

May 2015

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## **COMMISSION DECISIONS**



**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

May 27, 2015

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

v.

PARAMONT COAL COMPANY  
VIRGINIA LLC

Docket Nos. VA 2010-458  
VA 2010-369-R  
VA 2010-370-R

BEFORE: Cohen, Nakamura, and Althen, Commissioners<sup>1</sup>

**DECISION**

BY: Cohen, Nakamura and Althen, Commissioners

These proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). They involve Citation No. 8166774, which was issued to Paramount Coal Company Virginia LLC (“Paramont”) by the Department of Labor’s Mine Safety and Health Administration (“MSHA”), for a misaligned conveyor belt at Paramont’s Deep Mine No. 35. The citation alleged a “significant and substantial” (“S&S”)<sup>2</sup> violation of the safety standard in 30 C.F.R. § 75.1731(b), which requires conveyor belts to be properly aligned.<sup>3</sup>

The Administrative Law Judge found that the Secretary of Labor failed to prove that the violation of the cited standard was S&S. 35 FMSHRC 1118, 1158 (Apr. 2013) (ALJ). The Judge found that the Secretary failed to establish a confluence of factors which would have resulted in the ignition of a belt fire. The Secretary filed a petition for discretionary review of the Judge’s determination that the citation was not S&S, which we granted.

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

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

<sup>3</sup> 30 C.F.R. § 75.1731(b) states that “[c]onveyor belts must be properly aligned to prevent the moving belt from rubbing against the structure or components.”

For the reasons that follow, we vacate and remand the Judge’s decision that Citation No. 8166774 was not S&S.

## I.

### **Factual and Procedural Background**

#### **A. Factual Background**

On April 5, 2010, MSHA inspectors Bobby Hall and Lloyd Robinette arrived at Paramount’s Deep Mine No. 35, an underground coal mine in Virginia, to conduct a ventilation inspection. During the inspection, the inspectors viewed the area along the No. 3 belt between crosscuts 81 and 84. As discussed below, three citations were issued on that day, and all concerned the same general area. Citation Nos. 8166774 (at issue here) and 8166775 both involved equipment that rubbed against the belt — bottom roller hangers and wooden baffles respectively. Citation No. 8166773 involved accumulations of float coal dust in the area.<sup>4</sup> The main issue in the case is whether the wooden baffles that were the subject of Citation No. 8166775 should also have been considered as a potential cause of a belt fire when the Judge made his S&S determination regarding Citation No. 8166774.

At approximately 11:30 a.m., Inspector Hall issued Citation No. 8166774 for an S&S violation of section 75.1731(b). Hall alleged that the No. 3 belt was misaligned, resulting in the belt rubbing against 14 bottom roller hangers. He noted that the friction between the belt and the hangers resulted in at least two of the hangers being hot to the touch and that “the atmosphere in the area had a strong odor from rubbing belt.” Gov’t Ex. P-3. Hall added that “[f]loat dust was present in the area.” *Id.*

On the same day, Hall issued two related citations concerning the same general area between crosscuts 81 and 84 alongside the No. 3 belt. The first was Citation No. 8166773, which was also issued at approximately 11:30 a.m. for a violation of 30 C.F.R. § 75.400.<sup>5</sup> Hall alleged that float coal dust had accumulated along the No. 3 belt on the travelway and offside areas, and in the crosscuts. Hall added that “[f]loat coal dust and coal fines had accumulated between the two new constructed [baffles, referred to in Citation No. 8166775] along the No. 3 belt conveyor near stopping No. 82. No methane was detected.” Gov’t Ex. P-2.

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<sup>4</sup> While both parties filed petitions for discretionary review, only the Secretary’s petition, seeking review of the Judge’s finding that Citation No. 8166774 was not S&S, was granted. In regard to the two related citations, Citation No. 8166773 was litigated before the Judge below while Citation No. 8166775 was settled. 35 FMSHRC at 1166; *see* Docket No. VA 2010-408.

<sup>5</sup> 30 C.F.R. § 75.400 states that “[c]oal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on diesel-powered and electric equipment therein.”

The second related citation was Citation No. 8166775, which was issued at approximately 3:00 p.m. for a violation of 30 C.F.R. § 75.1731(c).<sup>6</sup> Hall alleged that the misaligned belt was rubbing against two wooden baffles between crosscuts 81 and 82.<sup>7</sup> The baffles consisted of wooden boards placed on the sides and across the top of the belt as a ventilation control. As stated in Citation No. 8166773, Hall alleged that float coal dust had accumulated between the baffles. Hall specified that “[t]he conveyor belt was not aligned properly and was rubbing the wood material and the atmosphere smelled of an odor of smoldering wood.” Gov’t Ex. P-12.

## **B. The Judge’s Decision**

In regard to whether Citation No. 8166774 was S&S, the Judge concluded that there was a violation — the misaligned belt rubbing against two hot hangers — that contributed to a discrete safety hazard of a belt ignition fire.<sup>8</sup> 35 FMSHRC at 1154-55. However, the Judge found that the Secretary failed to carry his burden of proof that the hazard was reasonably likely to result in reasonably serious injury. Therefore, the Judge found that the violation was not S&S. *Id.* at 1158.

The Judge focused on the friction between the hangers and the belt, and ignored the friction between the wooden baffles and the belt. The Judge stated that “[t]he Secretary’s reliance on the wooden baffle materials as . . . contributing to the . . . S&S finding is not well taken. The evidence establishes that those materials were removed . . . and the Secretary’s counsel confirmed that the baffles were ‘taken down immediately . . . which just left the belt rubbing, and they did not feel that itself was an imminent danger.’” *Id.* at 1155. As to the friction between the hangers and the belt, the Judge found “no credible evidence of any confluence of factors [which] could have come together to produce any ignition, combustion, fire, or other injury producing hazards described by the inspector.”<sup>9</sup> *Id.* at 1158. The Judge also found that the

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<sup>6</sup> 30 C.F.R. § 75.1731(c) states that “[m]aterials shall not be allowed in the belt conveyor entry where the material may contribute to a frictional heating hazard.”

<sup>7</sup> At trial, Paramount disputed the exact location of the wooden baffles on the No. 3 belt at the time in question. Tr. 133-34, 403-04. On remand, the Judge may wish to determine the exact location of these baffles when determining whether Citation No. 8166774 was S&S.

<sup>8</sup> Based on his credibility determination, the Judge found that only two of the bottom roller hangers were rubbing against the belt at the time of the inspection, with the remaining 12 bottom roller hangers indicating past rubbing by the belt. 35 FMSHRC at 1157-58.

<sup>9</sup> The Judge found that the following conditions existed:

- (1) the absence of any methane;
- (2) the absence of any float coal dust in suspension;
- (3) no exposed electrical wires;
- (4) no float coal dust turning or backed up in any of the belt rollers;
- (5) a fire resistant and retardant belt line; and
- (6) the absence of any rock dust or foot prints on the float coal dust accumulations that would indicate the presence of anyone in the area.

*Id.* at 1157.

hangers, at the time Hall observed them, were not sufficiently hot to start a belt ignition or fire and that Hall could not specify how hot the hangers must be in order to start a fire. *Id.* at 1157.

## II.

### Disposition

Under Commission case law, a violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *See Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984), the Commission set forth the following four-part test to evaluate whether a violation is properly designated as S&S:

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

(footnote omitted); *accord Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria). An evaluation of the reasonable likelihood of injury should be made assuming continued normal mining operations. *See U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985).

The first *Mathies* element is satisfied by the Judge's determination of a violation, a finding which has not been appealed. Regarding the second *Mathies* element, we conclude that the Judge correctly determined that the violation contributed to the hazard of a belt ignition fire.

As to the third *Mathies* element, the Commission has recognized that "[i]n addressing [whether a hazard is reasonably likely to result in an injury] . . . in cases involving violations which may contribute to the hazard of . . . explosions or ignitions, the likelihood of an injury resulting from the hazard depends on whether a 'confluence of factors' exists that could trigger an explosion or ignition." *McCoy Elkhorn Coal Corp.*, 36 FMSHRC 1987, 1992 (Aug. 2014). Such factors include any potential ignition sources, the presence of methane, float coal dust accumulations, loose coal or other ignitable substance, and the types of equipment operating in the area. *See Utah Power & Light Co., Mining Div.*, 12 FMSHRC 965, 970-71 (May 1990); *Texasgulf*, 10 FMSHRC 498, 501-03 (Apr. 1988).

In this case, the Judge erroneously failed to consider the frictional contact between the wooden baffles and the misaligned No. 3 belt as a factor that could contribute to a belt fire. 35 FMSHRC at 1155. He incorrectly reasoned that the Secretary could not rely on the smoldering

baffles as an ignition source (as evidence establishing the third and fourth prongs of the *Mathies* test) because the mine foreman had removed them (which he did in order to abate Citation No. 8166775).

The Commission has long held that an S&S determination must be made at the time the citation is issued “*without any assumptions as to abatement*” and in the context of “continued normal mining operations.” *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984) (emphasis added). Accordingly, in *Gatliff Coal Co.*, 14 FMSHRC 1982, 1985-86 (Dec. 1992), the Commission determined that the Judge misapplied the *Mathies* test by inferring that the violative condition would cease. Further, the “operative time frame for determining if a reasonable likelihood of injury exists includes both the time that a violative condition existed prior to the citation and the time that it would have existed if normal mining operations had continued.” *Rushton Mining Co.*, 11 FMSHRC 1432, 1435 (Aug. 1989).

We decline to assume that the operator would have noticed and removed the smoldering baffles in the absence of the inspector’s issuance of Citation No. 8166775. Accordingly, we conclude that there is no merit in the Judge’s reliance on the operator’s abatement of that baffles violation. The Judge should have considered the wooden baffles which were allegedly smoldering and near accumulations of coal dust (including float coal dust) in the confluence of factors analysis.<sup>10</sup>

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<sup>10</sup> The fact that the smoldering baffles were also the subject of a separate citation, Citation No. 8166775, is irrelevant to consideration of the baffles in the S&S analysis of Citation No. 8166774. Citation No. 8166775 is not duplicative of Citation No. 8166774 because they allege violations of separate standards, involving separate duties. Citation No. 8166775 was issued at approximately 3:00 p.m., three-and-a-half hours after the issuance of Citation No. 8166774. Inspector Hall testified that after issuing Citation Nos. 8166773 and 8166774, he went to the face to determine whether air was getting to the face. Tr. 154-55. After returning to the No. 3 belt between crosscuts 81 and 84, where the belt was misaligned, Inspector Hall observed that the belt was rubbing against the wooden baffles, causing friction, smoldering, smoke and an odor. Tr. 83-84, 155-57. Inspector Hall had not observed this condition earlier. Tr. 157. The fact that the severity of conditions resulting from the misaligned belt had increased over three-and-a-half hours does not militate against an S&S finding for Citation No. 8166774. Rather, it shows the effect of normal mining conditions on the development and worsening of the hazard.

On remand, the presiding Judge should consider whether a confluence of factors, including the wooden baffles, could have contributed to a fire. The Judge should also consider the Secretary's argument that the two hot hangers would eventually heat to a sufficient temperature to contribute as an ignition source.<sup>11</sup>

### III.

#### Conclusion

We vacate the Judge's finding that Citation No. 8166774 was not "significant and substantial" and remand the case to the Chief Administrative Law Judge<sup>12</sup> for further proceedings, including whether the violation was "significant and substantial" and what penalty assessment is appropriate.

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

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

/s/ William I. Althen  
William I. Althen, Commissioner

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<sup>11</sup> The Secretary also asserts that the Judge erred in his S&S finding for Citation No. 8166774 by improperly conflating the S&S and imminent danger analyses contrary to Commission precedent. *See Eastern Assoc. Coal Corp.*, 13 FMSHRC 178, 183 (Feb. 1991) ("the conditions created by [a S&S] violation need not necessarily be so impending as to constitute an imminent danger"). However, we find that the Judge included the phrase "imminent danger" as part of a quotation discussing the abatement of the baffles violation (Citation No. 8166775) and did not discuss any of the requirements for an "imminent danger." 35 FMSHRC at 1155. Therefore, we reject the Secretary's argument, which overlooks the context in which the Judge included the phrase "imminent danger."

<sup>12</sup> The Judge who originally decided this case has since retired.

# **COMMISSION ORDERS**



**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

May 4, 2015

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

v.

Docket No. YORK 2014-84  
A.C. No. 30-00006-338701

LAFARGE BUILDING MATERIALS,  
INC.

BEFORE: Jordan, Chairman; Young, Nakamura, and Althen, Commissioners<sup>1</sup>

**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 17, 2014, the Commission received from Lafarge Building Materials, Inc. (“Lafarge”) 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).

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<sup>1</sup> Commissioner Cohen has elected not to participate in this matter.

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on December 18, 2013, and became a final order of the Commission on January 17, 2014. Lafarge asserts that it failed to timely contest the proposed assessment because of vacations, the Christmas and New Year's holidays and extended travel by several key personnel. The operator asserts that it has since put in place procedures to streamline the process for handling MSHA penalty assessments. The Secretary does not oppose the request to reopen; however he notes that Lafarge mailed the contest form to the MSHA Payment Office in St. Louis, MO, which is the incorrect address for submitting contest forms. The Secretary urges the operator to take steps to ensure that future penalty contests are delivered to the proper address and timely contested within 30 days of receipt.

Having reviewed Lafarge'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/ Mary Lu Jordan  
Mary Lu Jordan, Chairman

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

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

/s/ William I. Althen  
William I. Althen, Commissioner

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

May 18, 2015

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

v.

RIVER VIEW COAL, LLC

Docket No. KENT 2014-674  
A.C. No. 15-19374-350794

BEFORE: Jordan, Chairman; Young, Nakamura, and Althen, Commissioners<sup>1</sup>

**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 July 28, 2014, the Commission received from River View Coal (“River View”) 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).

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<sup>1</sup> Commissioner Cohen has elected not to participate in this matter.

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on May 16, 2014, and became a final order of the Commission on June 16, 2014. River View asserts that it sent payment for several citations, along with the notice of contest form indicating which citations were to be contested. It further asserts that a mailing error caused the Secretary not to receive the notice of contest. The Secretary does not oppose the request to reopen. However, he notes that the MSHA payment processing office received a check dated June 11, 2014, and that there was nothing attached to the payment indicating the citations to which payment should be applied. The Secretary urges River View to take all steps necessary to ensure that proposed assessments are timely contested in the future.

Having reviewed River View'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/ Mary Lu Jordan  
Mary Lu Jordan, Chairman

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

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

/s/ William I. Althen  
William I. Althen, Commissioner

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

May 18, 2015

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

v.

U.S. SILICA COMPANY

Docket No. LAKE 2014-251-M  
A.C. No. 20-00608-336706

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners<sup>1</sup>

**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 26, 2014, the Commission received from U.S. Silica Company (“U.S. Silica”) 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).

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<sup>1</sup> Commissioner Althen was recused from this case. Commissioner Cohen has elected not to participate in this matter.

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on November 25, 2013, and became a final order of the Commission on December 26, 2013. U.S. Silica asserts that it timely contested the proposed assessment, but that, due to a clerical error, it incorrectly combined the Notice of Contest with a payment for a portion of the proposed penalties and sent the contest form along with the payment to the MSHA Payment Office in St. Louis, MO, instead of the Civil Penalty Compliance Office in Arlington, VA. The Secretary does not oppose the request to reopen, however he notes that there is no record of the St. Louis office ever receiving the Notice of Contest. The Secretary urges U.S. Silica to take steps to ensure that future penalty contests are timely filed and sent to the correct location at MSHA's Civil Penalty Compliance Office at 1100 Wilson Blvd., Arlington, VA 22209.

Having reviewed U.S. Silica'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/ Mary Lu Jordan  
Mary Lu Jordan, Chairman

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

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

/s/ William I. Althen  
William I. Althen, Commissioner

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

May 18, 2015

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

v.

BARNHILL CONTRACTING COMPANY

Docket No. SE 2014-402-M  
A.C. No. 31-02196-348242

BEFORE: Jordan, Chairman; Young, Nakamura, and Althen, Commissioners<sup>1</sup>

**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 July 14, 2014, the Commission received from Barnhill Contracting Company (“Barnhill”) 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).

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<sup>1</sup> Commissioner Cohen has elected not to participate in this matter.

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on April 21, 2014, and became a final order of the Commission on May 21, 2014. Barnhill asserts that, although it contested the citation, it was unfamiliar with Mine Act's requirement for operators to also contest MSHA's proposed assessments. As a result, Barnhill neglected to forward the proposed assessment to its counsel. Barnhill contends that its mistake was attributable to its inexperience in contesting citations, as this was the first citation that it has contested in the last seven years. The Secretary does not oppose the request to reopen. However, he urges the operator to take steps to ensure that future penalty contests are timely contested within 30 days of receipt.

Having reviewed Barnhill'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/ Mary Lu Jordan  
Mary Lu Jordan, Chairman

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

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

/s/ William I. Althen  
William I. Althen, Commissioner

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

May 18, 2015

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

v.

PETRO CHEMICAL INSULATION, INC.

Docket No. WEST 2014-169-M  
A.C. No. 04-00743-333178-V7D

BEFORE: Jordan, Chairman; Young, Nakamura, and Althen, Commissioners<sup>1</sup>

**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 23, 2013, the Commission received from Petro Chemical Insulation, Inc. (“Petro”) 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).

Records of the Department of Labor’s Mine Safety and Health Administration (“MSHA”) indicate that on October 1, 2013, Petro received a proposed penalty assessment from the Secretary. On October 31, 2013, the proposed assessment was deemed a final order of the Commission, when it appeared that the operator had not filed a Notice of Contest within 30 days.

Petro asserts that it submitted a letter requesting a conference on October 10, 2013, and made numerous attempts to follow up with MSHA on the case. Petro offers a UPS delivery report for the attempted delivery of the contest form. The Secretary does not oppose the request to reopen and notes that the contest was returned undelivered due to the Federal government shutdown that occurred from October 1 – 16, 2013.

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<sup>1</sup> Commissioner Cohen has elected not to participate in this matter.

Having reviewed Petro's request and the Secretary's response, we conclude that the proposed penalty assessment did not become a final order of the Commission because the operator timely contested the proposed assessment. 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/ Mary Lu Jordan  
Mary Lu Jordan, Chairman

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

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

/s/ William I. Althen  
William I. Althen, Commissioner

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

May 18, 2015

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

v.

U.S. SILVER - IDAHO, INC.

Docket No. WEST 2014-374  
A.C. No. 10-00082-335433

BEFORE: Jordan, Chairman; Young, Nakamura, and Althen, Commissioners<sup>1</sup>

**ORDER**

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On February 7, 2014, the Commission received from U.S. Silver - Idaho, Inc. (“U.S. Silver”) 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).

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<sup>1</sup> Commissioner Cohen has elected not to participate in this matter.

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on November 15, 2013, and became a final order of the Commission on December 16, 2013. U.S. Silver asserts that it timely contested the proposed assessment, but that due to a clerical error, it incorrectly combined the Notice of Contest with a payment for a portion of the proposed penalties and sent the contest form along with the payment to the MSHA Payment Office in St. Louis, MO, instead of the Civil Penalty Compliance Office in Arlington, VA. The Secretary does not oppose the request to reopen, however he urges U.S. Silver to take steps to ensure that future penalty contests are timely filed and sent to the correct location at MSHA's Civil Penalty Compliance Office at 1100 Wilson Blvd., Arlington, VA 22209.

Having reviewed U.S. Silver'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/ Mary Lu Jordan  
Mary Lu Jordan, Chairman

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

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

/s/ William I. Althen  
William I. Althen, Commissioner

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

May 18, 2015

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

v.

MONTANA ROCK & STONE, LLP

Docket No. WEST 2014-904-M  
A.C. No. 24-02604-349861

BEFORE: Jordan, Chairman; Young, Nakamura, and Althen, Commissioners<sup>1</sup>

**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 July 31, 2014, the Commission received from Montana Rock & Stone (“Montana Rock”) 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).

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<sup>1</sup> Commissioner Cohen has elected not to participate in this matter.

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on May 14, 2014, and became a final order of the Commission on June 13, 2014. Montana Rock asserts that it only received the contest form containing the citation numbers and their proposed penalties from MSHA, without receiving many of the citations themselves. Without being able to review many of the actual citations, Montana Rock argues that it had no basis upon which to decide which citations to contest. The operator offers a letter that it sent to MSHA on May 21, 2014, requesting the Secretary to send them the remaining citations. The Secretary does not oppose the request to reopen. However, he urges the operator to take steps to ensure that future penalty contests are timely contested within 30 days of receipt.

Having reviewed Montana Rock'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/ Mary Lu Jordan  
Mary Lu Jordan, Chairman

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

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

/s/ William I. Althen  
William I. Althen, Commissioner

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

May 18, 2015

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

v.

EASTERN ASSOCIATED COAL, LLC

Docket No. WEVA 2014-1950  
A.C. No. 46-09152-348595

BEFORE: Jordan, Chairman; Young, Nakamura, and Althen, Commissioners<sup>1</sup>

**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 July 28, 2014, the Commission received from Eastern Associated Coal (“Eastern Associated”) 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).

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<sup>1</sup> Commissioner Cohen has elected not to participate in this matter.

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on May 3, 2014, and became a final order of the Commission on June 2, 2014. Eastern Associated asserts that its failure to contest the proposed assessment was due to a personnel change at the office. The mine's safety manager, who reviews the mine's citations in order to determine which ones should be contested, was out on medical leave and a new safety manager was put in place in April 2014 to assume his responsibilities. According to the operator, the proposed assessment at issue was delivered during the transition. The Secretary does not oppose the request to reopen. However, he urges Eastern Associated to take all steps necessary to ensure that proposed assessments are timely contested in the future.

Having reviewed Eastern Associated'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/ Margaret A. Miller  
Mary Lu Jordan, Chairman

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

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

/s/ William I. Althen  
William I. Althen, Commissioner

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

May 18, 2015

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

v.

JUSTIN HERSHMAN,  
formerly employed by  
CONSOLIDATION COAL  
COMPANY

Docket No. WEVA 2014-1997  
A.C. No. 46-01433-336289 A

BEFORE: Jordan, Chairman; Young, Nakamura, and Althen, Commissioners<sup>1</sup>

**ORDER**

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On August 4, 2014, the Commission received from Justin Hershman (“Hershman”) a motion seeking to reopen a penalty assessment under section 110(c) of the Mine Act, 30 U.S.C. § 820(c), that had appeared to become a final order of the Commission.

Under the Commission’s Procedural Rules, an individual charged under section 110(c) has 30 days following receipt of the proposed penalty assessment within which to notify the Secretary of Labor that he or she wishes to contest the penalty. 29 C.F.R. § 2700.26. If the individual fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 29 C.F.R. § 2700.27.

Hershman asserts that it never received the proposed penalty assessment because the Secretary mailed it to the wrong address. The Secretary confirms this, and states that once MSHA re-mailed the proposed assessment to the correct address, it was timely contested by Hershman.

Having reviewed Hershman’s request and the Secretary’s response, we conclude that the proposed penalty assessment did not become a final order of the Commission because the operator never received the proposed assessment. This obviates any need to invoke Rule 60(b) of the Federal Rules of Civil Procedure in order to consider reopening a final order.

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<sup>1</sup> Commissioner Cohen has elected not to participate in this matter.

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/ Mary Lu Jordan  
Mary Lu Jordan, Chairman

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

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

/s/ William I. Althen  
William I. Althen, Commissioner

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

May 18, 2015

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

v.

DAVID VUKMANIC, formerly  
employed by CONSOLIDATION  
COAL COMPANY

Docket No. WEVA 2014-1998  
A.C. No. 46-01433-336288 A

BEFORE: Jordan, Chairman; Young, Nakamura, and Althen, Commissioners<sup>1</sup>

**ORDER**

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On August 4, 2014, the Commission received from David Vukmanic (“Vukmanic”) a motion seeking to reopen a penalty assessment under section 110(c) of the Mine Act, 30 U.S.C. § 820(c), that had appeared to become a final order of the Commission.

Under the Commission’s Procedural Rules, an individual charged under section 110(c) has 30 days following receipt of the proposed penalty assessment within which to notify the Secretary of Labor that he or she wishes to contest the penalty. 29 C.F.R. § 2700.26. If the individual fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 29 C.F.R. § 2700.27.

Vukmanic asserts that it never received the proposed penalty assessment because the Secretary mailed it to the wrong address. The Secretary confirms this, and states that once MSHA re-mailed the proposed assessment to the correct address, it was timely contested by Vukmanic.

Having reviewed Vukmanic’s request and the Secretary’s response, we conclude that the proposed penalty assessment did not become a final order of the Commission because the operator never received the proposed assessment. This obviates any need to invoke Rule 60(b) of the Federal Rules of Civil Procedure in order to consider reopening a final order.

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<sup>1</sup> Commissioner Cohen has elected not to participate in this matter.

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/ Mary Lu Jordan  
Mary Lu Jordan, Chairman

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

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

/s/ William I. Althen  
William I. Althen, Commissioner

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

May 18, 2015

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

v.

ARJ CONSTRUCTION COMPANY, INC.

Docket No. YORK 2014-83  
A.C. No. 18-00748-338452

BEFORE: Jordan, Chairman; Young, Nakamura, and Althen, Commissioners<sup>1</sup>

**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 17, 2014, the Commission received from ARJ Construction (“ARJ”) 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).

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<sup>1</sup> Commissioner Cohen has elected not to participate in this matter.

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on December 16, 2013, and became a final order of the Commission on January 15, 2014. ARJ asserts that it failed to timely contest the proposed assessment because ARJ's counsel inadvertently entered an incorrect deadline date of January 23, 2014, rather than January 15, 2014, into its scheduling system. ARJ further asserts that the error did not occur because of inadequate or unreliable office procedures, and that the office schedules hundreds of matters every month and has done so for years in a reliable manner. The Secretary does not oppose the request to reopen, however he urges the operator to take steps to ensure that future penalty contests are timely contested within 30 days of receipt.

Having reviewed ARJ'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/ Mary Lu Jordan  
Mary Lu Jordan, Chairman

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

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

/s/ William I. Althen  
William I. Althen, Commissioner

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

May 20, 2015

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

v.

HANSON AGGREGATES,  
SOUTHEAST, LLC

Docket No. SE 2014-190-M  
A.C. No. 31-00079-341111

BEFORE: Jordan, Chairman; Young, Nakamura, and Althen, Commissioners<sup>1</sup>

**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 26, 2014, the Commission received from Hanson Aggregates Southeast, LLC. (“Hanson”) 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).

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<sup>1</sup> Commissioner Cohen has elected not to participate in this matter.

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on January 15, 2014, and became a final order of the Commission on February 14, 2014. Hanson asserts that it failed to timely contest the proposed assessment due to unusual circumstances. Specifically, Hanson asserts that it had hired third party engineers to perform evaluations and submit reports regarding the citations in question. In addition, the mine had return visits from inspectors to monitor and evaluate the operator's progress in abating the violations. The Secretary does not oppose the request to reopen. However, he notes that his decision not to oppose is based solely on the fact that Hanson requested reopening 13 days after the assessment became a final order. The Secretary urges Hanson to adopt procedures to ensure that future penalty contests are timely filed.

Having reviewed Hanson'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/ Mary Lu Jordan  
Mary Lu Jordan, Chairman

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

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

/s/ William I. Althen  
William I. Althen, Commissioner

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

May 20, 2015

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

v.

BUZZI UNICEM USA

Docket No. SE 2014-391-M  
A.C. No. 40-00838-347215

BEFORE: Jordan, Chairman; Young, Nakamura, and Althen, Commissioners<sup>1</sup>

**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 July 3, 2014, the Commission received from Buzzi Unicem USA (“Buzzi”) 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).

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<sup>1</sup> Commissioner Cohen has elected not to participate in this matter.

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on April 11, 2014, and became a final order of the Commission on May 12, 2014. Buzzi asserts that it timely contested the proposed assessment, but that it mistakenly sent the Notice of Contest along with a payment for a portion of the proposed penalties to the MSHA Payment Office in St. Louis, MO, instead of the Civil Penalty Compliance Office in Arlington, VA. The Secretary does not oppose the request to reopen. However, he urges Buzzi to take steps to ensure that future penalty contests are timely filed and sent to the correct location.

Having reviewed Buzzi'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/ Mary Lu Jordan  
Mary Lu Jordan, Chairman

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

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

/s/ William I. Althen  
William I. Althen, Commissioner

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

May 20, 2015

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

v.

ARIZONA GENERAL ENGINEERING  
CONTRACTING, INC.

Docket No. WEST 2014-848-M  
A.C. No. 02-03143-348357

BEFORE: Jordan, Chairman; Young, Nakamura, and Althen, Commissioners<sup>1</sup>

**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 July 8, 2014, the Commission received from Arizona General Engineering Contracting, Inc. (“A.G.E.”) 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).

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<sup>1</sup> Commissioner Cohen has elected not to participate in this matter.

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") demonstrate that the proposed assessment was delivered on April 23, 2014, and became a final order of the Commission on May 23, 2014. A.G.E. asserts that its office manager misplaced the paperwork and that the operator subsequently noticed that it missed its deadline to contest the proposed assessment. The Secretary does not oppose the request to reopen. However, he urges A.G.E. to ensure that future penalty assessments are contested in a timely manner.

Having reviewed A.G.E.'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/ Mary Lu Jordan  
Mary Lu Jordan, Chairman

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

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

/s/ William I. Althen  
William I. Althen, Commissioner

# **ADMINISTRATIVE LAW JUDGE DECISIONS**



**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

May 1, 2015

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

CIVIL PENALTY PROCEEDING

Docket No. KENT 2013-960  
A.C. No. 15-17691-325489-02

v.

ALDEN RESOURCES, LLC,  
Respondent

Mine: #3

**DECISION AND ORDER**

Appearances: Ryan L. Pardue, Esq., Office of the Solicitor, Department of Labor,  
Denver, Colorado for Secretary of Labor

Billy R. Shelton, Esq., Jones, Walters, Turner, & Shelton, PLLC,  
Lexington, Kentucky for Alden Resources, LLC

Before: Judge McCarthy

**I. Statement of the Case**

These cases are before me upon a petition for assessment of civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d).<sup>1</sup> The parties stipulated to, inter alia, jurisdictional issues, interstate commerce, operator and authorized representative status, authenticity of exhibits, and that the proposed penalties will not affect Respondent’s ability to remain in business. Tr. I. 8, Jt. Ex. 1.

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<sup>1</sup> Prior to hearing, the parties agreed to settle six of the eleven citations at issue in Docket No. KENT 2013-960 and the single citation in Docket No. KENT-2013-959. I left the record open for receipt of the partial settlement as Joint Exhibit 2 (Jt. Ex. 2). On September 30, 2014, the undersigned issued Decision Approving Partial Settlement, Order to Modify, and Order to Pay a total civil penalty of \$1,740 for those settled citations. That Decision has now become final. Citation Nos. 8378378, 8378379, 8378383, 8378384, and 8407725 in Docket No. KENT 2013-960 were left for hearing.

An evidentiary hearing was held in London, Kentucky at which witnesses were sequestered. The parties presented testimony and documentary evidence and filed post-hearing briefs.<sup>2</sup>

The primary issues presented are whether the five contested 104(a) citations at issue were properly written with appropriate proposed assessments. After careful review of the record, I affirm, Citation No. 8378378, as written, and assess a \$1,026 civil penalty, as proposed, for the significant and substantial (S&S) violation of 30 C.F.R. § 75.310(a)(3) because the automatic fan signal on Fan No. 2 was de-energized and not working. I vacate Citation No. 8378379 alleging a violation of 30 C.F.R. 75.312(g)(1) because there was no record in the ventilation book that Fan No. 2 was examined on May 6 or 7, 2013. I modify amended Citation No. 8378383, alleging high negligence for a significant and substantial (S&S) violation of 30 C.F.R. § 75.380(d)(7)(vi) due to missing spheres and other components on the primary escapeway lifeline, to reduce the number of miners affected from 13 to 10. I assess a civil penalty of \$3405, as proposed. I modify Citation No. 8378384, alleging that Respondent violated 30 C.F.R. § 75.360(b)(1) because its examiners were failing to perform adequate examinations, to reduce the likelihood of injury or illness from “highly likely” to “reasonably likely, to reduce the injury or illness that could reasonably be expected to occur from “fatal” to “lost workdays or restricted duty,” and to reduce the number of miners affected from 13 to 10. I reduce the penalty from the \$25,163 proposed and assess a civil penalty of \$3,406. I affirm Citation No. 8407725, as written, and assess a \$425 civil penalty, as proposed, for the S&S violation of 30 C.F.R. 72.630(b) for failure to maintain the dry dust-collection system on the twin-head, roof-bolting machine in permissible and safe operating condition. I assess a total civil penalty of \$8,262 against Respondent for the five litigated citations.

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<sup>2</sup> Joint Exhibits (Jt. Exs.) 1- 6 were received into evidence. Petitioner Exhibits (P. Exs.) 1, 2, 5, 7-16, were received into evidence, but P. Ex. 15 (MSHA’s Certified Assessed Violation History) was received only for the 15 months prior to the citation at issue. Tr. 290-92. Respondent’s Exhibits (R. Exs.) 1-3 were received into evidence.

On the entire record, including my observation of the demeanor of the witnesses,<sup>3</sup> and after considering the post-hearing briefs, I make the following:

## **II. Findings of Fact**

### **A. Background**

Respondent operates Mine #3, a deep, underground, bituminous coal mine in Knox County, Kentucky. Coal is extracted through room-and-pillar mining below the water drainage level from the blue gem seam of coal, which is usually about 24-27 inches in height. Tr. I, 20. The pillar entries are no more than 20 feet wide and about 40 inches high. Tr. I, 20-21, 114.

The #3 intake entry and primary escapeway is a sloped road that serves as the main travelway for miners in and out of the mine. The road is rough, wet, and well-traveled by equipment and it extends from the portal to the loading point at crosscut #68, just outby the last open crosscut, where the lifeline begins. Tr. I, 109, 112-113, 121-22, 128; P. Ex. 10. The mine has several pumps for water control because a little bit of water can be a big problem for the small mine. Tr. II, 14. Miners can't walk and must crawl through the travelways, or use battery-powered vehicles. Tr. I, 113-14.

There are two ventilation fans. Tr. I, 21-22. Both fans are loud. Tr. I, 58. The No. 1 fan ventilates the active section of the mine where the miners are working and has the capacity to deliver 93,430 cubic feet per minute of air. Tr. I, 52-53. The No. 2 fan provides a maximum of 16,500 cubic feet per minute of fresh intake air from the surface to crosscut 32, where it splits off from the main intake to travel across the sealed entries, outby, and back out the mine. Tr. I, 25-26, 54-55. Respondent's underground mine manager, Fred Shannon, testified that the No. 2 fan does not assist the No. 1 fan in ventilating the face areas at the mine, and is used to pull air across the sealed areas on a separate split of air. Tr. II, 19-20. Although the air from the No. 2 fan does not sweep across the working face, the pressure between the two fans allows the No. 2 fan to pull air from the face entry out of the mine. Tr. I, 55-57. Therefore, if the No. 2 fan is de-energized and no longer providing return air across the sealed areas, it would allow the No. 1 fan to pull air up through and across the sealed areas and pull it onto the working sections. Tr. I, 27. Accordingly, when the No. 2 fan is not functioning, air from the sealed areas is pulled onto the working section and mixes with other air going up the entry. Tr. I, 55-56, 70-71.

On April 18, 2013, a rock fall at crosscut 25 blocked the #3 intake entry and primary escapeway. Tr. II, 12-14; R. Ex. 3, p. 2; P. Ex. 16 (map depicting rock fall). On April 19, 2013, Respondent requested a temporary revision to the MSHA-approved ventilation plan to cleanup

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<sup>3</sup> In resolving conflicts in testimony, I have taken into consideration the demeanor of the witnesses, their interests in this matter, the inherent probability of their testimony in light of other events, corroboration or lack of corroboration for testimony given, experience and credentials, and consistency, or lack thereof, within the testimony of witnesses and between the testimony of witnesses.

the rock fall. The extant ventilation plan required Respondent to have the Nos. 1 and 2 ventilation fans running at all times. Tr. II, 90. Respondent's proposed revision and action plan provided that Fan No. 2 would be temporarily idled during cleanup of the rock fall to allow the following: two common intakes on the No. 1 belt mains, relocation of the primary escapeway into the adjacent entry from break 26 to break 22, and examination of the entire intake air course prior to anyone else entering the area. Once the rock fall was cleaned, the escapeway and ventilation was to be returned to normal. On April 19, 2013, MSHA approved the ventilation plan revision, as requested. R. Ex. 3. Fan No. 2 was shut down during the cleanup period and no coal production occurred. Tr. II 84, 92, 95.

An automatic fan signal is a mechanical device that monitors ventilation force and provides an audible and visual warning signal if a fan slows or stops providing ventilation. Tr. I, 28-29. When air pressure from a fan is insufficient to keep the fan's paddle raised, the paddle falls and activates a visual and audio signal. *Id.* The triggered signal activates a buzzer and light to alert a responsible person on the surface that the fan has slowed or stopped. Tr. I, 29-30.

After the No. 2 fan was turned off on April 19, 2013, the disconnect for the fan signal was pulled so that the signal would not activate during the stoppage. Tr. II, 27. When production resumed on May 7, 2013 and the No. 2 fan was turned back on, no one re-engaged the disconnect to allow the automatic fan signal to start working again. Tr. II, 26-28.

#### **B. Citation Nos. 8378378**

On May 7, 2013, inspector Scott Mullis<sup>4</sup> issued Citation 8378378 alleging a Section 104(a) violation of 30 C.F.R. § 75.310(a)(3) because the automatic fan signal on the No. 2 fan was de-energized and not working. P. Ex. 7. Section 75.310(a)(3) mandates:

(a) Each mine fan shall be -- . . . (3) Equipped with an automatic device that gives a signal at the mine when the fan either slows or stops. A responsible person designated by the operator shall always be at a surface location at the mine where the signal can be seen or heard while anyone is underground. This person shall be provided with two-way communication with the working sections and work stations where persons are routinely assigned to work for the majority of a shift.

The responsible person at this mine is located in a metal-roofed, office building about 150 feet from Fan No. 2's automatic fan signal. Tr. I, 35, 58-59.

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<sup>4</sup> Mullis completed training at the Beckley Mine Academy and became a certified mine inspector in 2012. Tr. I, 16, 19, 44. Before that, Mullis worked in underground mines for 17 years as either a general laborer, face boss, or section boss. Tr. I, 17, 43. Mullis visited Mine #3 about five or six times before issuing four of the five litigated citations. Tr. I, 19-20.

At the time the citation issued, 12 men were working underground. Tr. I, 34. Inspector Mullis determined that the violation was significant and substantial (S&S) because an injury was reasonably likely to occur and result in lost workdays or restricted duty.<sup>5</sup> Further, Mullis determined that the operator's negligence was moderate, and 12 persons were affected. The Secretary proposed a penalty of \$1,026.

Respondent stipulated that it violated mandatory safety standard 30 C.F.R. § 75.310(a)(3), but contests the S&S designation and the appropriateness of the \$1,026 proposed penalty. Tr. 267; R. Br. 8, 10, 11. For the reasons set forth below, I affirm the citation, as written, and assess a \$1,026 civil penalty.

### **1. S&S, Moderate Negligence, and Civil Penalty Analysis**

The stipulated violation contributed to a discrete safety hazard or measure of danger to safety. Without a functional fan signal alerting the responsible person on the surface that Fan No. 2 had stopped, it is likely that miners underground would not know that air from Fan No. 2 had been reduced or stopped, and take timely corrective action to fix the fan or evacuate the mine within 15 minutes after fan stoppage. See 30 C.F.R. §75.313. The violation contributes to potential ventilation hazards underground, such as low oxygen or contaminated, toxic air emitted from the sealed areas ventilated by Fan No. 2. Tr. I, 63. Accordingly, the absence of a functional warning signal on Fan No. 2 contributed to a discrete safety hazard or measure of danger to safety.

Further, substantial evidence in the record establishes a reasonable likelihood that the ventilation hazards of low oxygen or contaminated, toxic air contributed to by the non-functioning automatic fan signal on Fan No. 2 would result in an injury during normal, continued mining operations. It is axiomatic that ventilation and atmospheric conditions in underground mining are dynamic, not static, and change quickly. Without a functional fan signal alerting the responsible person on the surface that Fan No. 2 had slowed or stopped, the person designated by the operator to be on the surface where the signal can be heard or seen would not be alerted to the change in ventilation in order to get word to the 12 miners working underground

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<sup>5</sup> An S&S violation is a violation “of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard.” 30 U.S.C. § 814(d) (2006). In order to establish the S&S nature of a violation, the Secretary must prove: “(1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard – that is, a measure of danger to safety – contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury will be of a reasonably serious nature.” *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984); *accord Buck Creek Coal Co., Inc.*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power Co., Inc.*, 861 F. 2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria). The Commission has held that “[t]he test under the third element is whether there is a reasonable likelihood that the hazard contributed to by the violation . . . will cause injury.” *Musser Engineering, Inc. and PBS Coals, Inc.*, 32 FMSHRC 1257, 1281 (Oct. 2010).

that the fan had slowed or stopped.<sup>6</sup> Those miners would likely be unaware of the dangers posed by the changing atmosphere and their potential exposure to low oxygen, or to harmful, toxic gases emitted from the sealed areas ventilated by Fan No. 2, which would impact the air quality of miners working inby.

Mullis testified that clean air from the No. 1 fan that was sweeping across the working area "could possibly be contaminated, because it would start pulling air back up the entry marked in green, up by those seals and pull it across the working face." Tr. I, 63. When asked on cross what would it pull, Mullis testified "[i]f you had a leaking seal, it could be methane. It could be low air, black damp, numerous different -- it could be explosive gases. It could be toxic gases." Tr. I, 63.<sup>7</sup> Mullis further testified on cross that "[t]here was an issue prior to that, their production going down, they had an issue with a seal, and it had a water issue and that was one of the purposes for this fan being in place. And I'm not sure that it [methane] was 3 percent, but I remember seeing something in the old records of the mine." Tr. I, 65-66.

The following colloquy on redirect examination of inspector Mullis bolsters my finding that the discrete ventilation hazards contributed to by the non-functioning automatic fan signal

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<sup>6</sup> Respondent argues that the sound of the fan going off is louder than the signal itself and therefore miners will know when Fan No. 2 slows or stops, even without a functioning automatic fan signal. Further, Respondent notes that the Secretary was hard pressed to offer instances when mine surface personnel would not be able to hear the fan shutting down, although both inspector Mullis and underground mine manager Shannon agreed that in the event of heavy rainfall striking the metal roof of the mine office building about 150 feet from the fan, the responsible person might not be able to hear the fan shutting down. R. Br. 11. I agree with the Secretary that it is highly speculative to assume that underground miners concentrating on their particular tasks, would hear or notice changes in the surface fan's functionality because that assumption is dependent on a variety of factors such as the miner's routine, the nature and location of the task, other work taking place at the mine, and personal protective or hearing equipment worn. P. Br. 13; Tr. I, 58. Further, other circumstances, including a thunderstorm, would prevent the designated person on the surface from hearing the fan shutdown without a functional automatic fan signal that could be both heard and seen. *Id.*; Tr. I, 59-60.

<sup>7</sup> Although miners are required to wear multi-gas detectors to monitor air quality and alert them to ventilation hazards (Tr. I, 63-64), oxygen-deficient air and toxic gases can have an immediate and serious impact on their safety and health before appropriate precautions and corrective actions can take place. Furthermore, the Commission interprets safety standards to take into consideration ordinary human carelessness and the vagaries of human conduct, including the fact that not all miners wear multi-gas detectors, as required. *See Thompson Bros. Coal Co.*, 6 FMSHRC 2094, 2097 (Sept. 1984); *cf.*, *Great Western Electric*, 5 FMSHRC 840, 842 (May 1983); *Lone Star Industries, Inc.*, 3 FMSHRC 2526, 2531 (November 1981).

made it reasonably likely that the 12 miners working underground would suffer injury under normal continued mining operations.

Q. Now, Mr. Shelton asked you about personal air-reading devices. Would one of those devices mitigate the hazard you were concerned about?

A. They should if they're calibrated and working properly.

Q. Why was the hazard you were concerned about then reasonably likely to result in injury?

A. Toxic gases more than explosive. The seam that they're working is not known to produce that much methane, but the gases themselves from the sealed area, the low oxygen levels and toxic, make them nauseated. And if there was enough of low oxygen, then, you know, it could be worse.

Q. Now, there was a lot of discussion about which fan has intake air towards the face. Does the #2 fan impact the working section at all?

A. It provides additional intake air going up the intake, yes. It provides more volume up that entry.

Q. Just so I understand, why is the #2 fan vital then for the ventilation system?

THE COURT: Well, vital is kind of a leading term. But it's out of the bag. Go ahead.

A. That fan, as its purpose is shown on this ventilation map, was it was being used to withdraw the air from those sealed areas, keeping it from going onto the working section.

Q. If the #2 fan was shut down, where would the hazards be located that you were worried about?

A. From -- it would draw air from across all those sealed entries shown on that ventilation map and would mix in with the other air going up the intake.

Q. Was the only hazard you were concerned about at the working face?

A. No. Anyone inby crosscut #32 where that air was mixed with the other air would be exposed.

Tr. 1, 70-71.

While Respondent argues that MSHA allowed miners to work underground during the rock fall cleanup when Fan No. 2 was shut down, no production was occurring at this time and an additional examination requirement was implemented under the revised ventilation plan for the entire air course, including the sealed areas, to ensure that ventilation was safe. Tr. 73-74; R. Ex. 3, p. 2. Such would not be the case if Fan No. 2 stopped or slowed unexpectedly. Thus, due to the discrete ventilation hazards contributed to by the deactivated warning signal on Fan No. 2, miners faced a reasonable likelihood of injury.

Without a functional warning signal, the 12 miners working underground would also face delays in leaving the mine within the 15- minute mandate established by MSHA if the fan stopped and could not be restarted, thereby heightening their risk of injury from exposure to ventilation hazards such as low oxygen, or harmful, noxious and/or toxic gases emitted and pulled from the sealed areas ventilated by Fan No. 2 toward the working face. Tr. I, 32-33.<sup>8</sup> Accordingly, during continuous underground mining operations, I find that it is reasonably likely that the hazards of low oxygen or contaminated, toxic air contributed by the non-functioning automatic fan signal on Fan No. 2 would result in an injury from miners' exposure to improper ventilation. Tr. I, 40.

Finally, with respect to the fourth *Mathies* factor, I credit Mullis' testimony that the exposure to improper ventilation would result in a reasonably serious injury. Mullis testified that black damp or low oxygen has been known to kill miners, but that lost workdays or restricted duty was the most likely injury from exposure to improper ventilation because the miners "would become nauseated before they knew what was going on with them and they would become ill from oxygen deprivation." Tr. I, 39-40, 70; P. Ex. 7.

Accordingly, having found that all four elements of the *Mathies* test are satisfied, the undersigned affirms the S&S and gravity designations for Citation No. 8378379.

On brief, and at the hearing, Respondent did not specifically challenge the moderate negligence designation for Citation No. 8378379, although Respondent's answer generally denies the gravity and negligence designations for all citations at issue.

When assessing penalties, section 110(i) of the Mine Act requires the Commission to consider, *inter alia*, whether the operator was negligent. 30 U.S.C. § 820(i). Each mandatory standard carries with it an accompanying duty of care to avoid violations of the standard. If a

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<sup>8</sup> If the fan has stopped, it must be restarted within 15 minutes. Otherwise, all electrically powered and mechanized equipment in each working section must be de-energized or shut off and all miners must be withdrawn from the mine. See 30 C.F.R. §75.313.

violation of the standard occurs, an operator's failure to meet the appropriate duty of care can lead to a finding of negligence. *A.H. Smith Stone Co.*, 5 FMSHRC 13 (1983).

For purposes of assessing a proposed penalty, the Secretary, by regulation, defines conduct that constitutes negligence under the Mine Act as follows:

Negligence is conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm. Under the Mine Act, an operator is held to a high standard of care. A mine operator is required to be on the alert for conditions and practices in the mine that affect the safety or health of miners and to take steps necessary to correct or prevent hazardous conditions or practices. The failure to exercise a high standard of care constitutes negligence. The negligence criterion assigns penalty points based on the degree to which the operator failed to exercise a high standard of care. When applying this criterion, MSHA considers mitigating circumstances which may include, but are not limited to, actions taken by the operator to prevent or correct hazardous conditions or practices. This criterion accounts for a maximum of 50 penalty points, based on conduct evaluated according to Table X.

30 C.F.R. § 100.3(d). Moderate negligence occurs when “[t]he operator knew of should have known of the violative condition or practice, but there are mitigating circumstances.” *Id.*

In designating Respondent's negligence as moderate, Mullis determined that there were mitigating circumstances because the signal was in place, but the switch had been installed inline with the signal and had been turned off and never turned back on when Fan No. 2 was restarted. Tr. I, 41-42. I agree with the Secretary that Respondent should have known that the automatic fan signal was off and was not turned back on when Fan 2 was restarted, and that Respondent should have had a system in place to ensure that the automatic fan signal was switched on each time Fan No. 2 was restarted. P. Br. 15. In these circumstances, I affirm the moderate negligence designation.

I have evaluated the Secretary's proposed penalty in light of my findings and the principles announced in my final *Big Ridge* decision. *Big Ridge Inc.*, 36 FMSHRC 1677, 1681-82 (July 19, 2014) (ALJ). I find that the penalty proposed by the Secretary of \$1,026 is consistent with the statutory criteria set forth in section 110(i) of the Mine Act. 30 U.S.C. 820(i). Accordingly, I assess a \$1,026 civil penalty against Respondent for Citation No. 8378378.

**C. Citation 8378379**

On May 7, 2013, after issuing Citation No. 8378378, Mullis also issued 104(a) Citation No. 8378379 during the first shift at 11:10 a.m. Citation No. 8378379 alleged a violation of 30 C.F.R. 75.312(g)(1) because there was no record in the ventilation record book that Fan No. 2 was examined on May 6 or 7, 2013. Tr. I, 76, 78; P. Ex. 9. Citation 8378379 further alleged that the violation was unlikely to cause a no-lost-workdays injury, that 12 persons were affected, and that the violation resulted from Respondent's high negligence. P. Ex. 9. The Secretary proposed a penalty of \$460. The citation was terminated after the results of the examination were recorded in the ventilation record book on May 7, 2013 at 11:20 a.m., before the end of the first shift. Tr. I, 90; P. Ex. 9.

30 C.F.R § 75.312 provides, in pertinent part:

Main mine fan examinations and records.

(a) To assure electrical and mechanical reliability of main mine fans, each main mine fan and its associated components, including devices for measuring or recording mine ventilation pressure, shall be examined for proper operation by a trained person designated by the operator. Examinations of main mine fans shall be made at least once each day that the fan operates, unless a fan monitoring system is used. No examination is required on any day when no one, including certified persons, goes underground, except that an examination shall be completed prior to anyone entering the mine.

..

(c) At least every 31 days, the automatic fan signal device for each main mine fan shall be tested by stopping the fan. Only persons necessary to evaluate the effect of the fan stoppage or restart, or to perform maintenance or repair work that cannot otherwise be made while the fan is operating, shall be permitted underground. Notwithstanding the requirement of §75.311(b)(3), underground power may remain energized during this test provided no one, including persons identified in §75.311(b)(1), is underground. If the fan is not restarted within 15 minutes, underground power shall be deenergized and no one shall enter any underground area of the mine until the fan is restarted and an examination of the mine is conducted as described in §75.360(b) through (e) and the mine has been determined to be safe. . .

(f) Certification. Persons making main mine fan examinations shall certify by initials and date at the fan or another location specified by the operator that the examinations were made. Each certification shall identify the main mine fan examined. . . .

(g) Recordkeeping. By the end of the shift on which the examination is made, persons making main mine fan examinations shall record all uncorrected defects that may affect the operation of the fan that are not corrected by the end of that shift. Records shall be maintained in a secure book that is not susceptible to alteration or electronically in a computer system so as to be secure and not susceptible to alteration.

When asked whether Fan No. 2 was operating on May 6, 2013, Mullis testified, “[e]vidently so” because “they worked the day before.” When asked how he knew that, Mullis testified, “They were on the property. They were preparing. Their records showed that they were working that day.” Tr. I, 77. Subsequently, on questioning from the undersigned, Mullis testified that he just assumed that the men were working underground on May 6, 2013. Tr. I, 91.

Mullis also determined that Fan No. 2 was operating on May 6, 2013 because there was no daily entry or indication on the manual chart monitoring system on the side of the fan housing that Fan No. 2 had been down. Mullis testified that Fan No. 2 would have been running on May 6, 2013 according to the graph. Tr. I, 81-82. This testimony begs the question of whether a daily entry was required because the fan was operating. Neither the Secretary nor Respondent produced the graph. As noted, a revision to the ventilation plan allowed for stoppage of Fan No. 2, but required that “ventilation and primary escapeway will be returned to the current plan (requiring Fan 1 and Fan 2 to run) as soon as the rockfall is cleaned.” R. Ex. 3; Tr. II, 89-90. On redirect, Mullis acknowledged that the fan stoppage plan permitted Fan No. 2 to be stopped on May 6, 2013. Tr. I, 106.

Additionally, Mullis testified that mine examiner, Dave Faulkner, told him that he had done an examination for May 6, 2013, but failed to record it. Tr. I, 83-84, 90-91. Faulkner did not testify. Mullis testified that if Faulkner did do the examination, he did a “poor one” because he did not find the fan signal inadequate. Tr. I, 86. Mullis cited the record-keeping standard in 75.312(g)(1) and not 75.312(a), i.e., the standard related to Respondent's failure to conduct a mine fan examination, because Mullis took Faulkner at his word that an examination had been completed, but just not recorded. Tr. I, 86, 104-05.

Mine manager Shannon credibly testified that the Fan No. 2 was not turned back on until May 7, 2013, after the rockfall cleanup was completed and the area re-supported on May 6, 2013. Tr. II, 94-95, 98. Shannon testified that pre-shift examiner Faulkner would not include the fact that Fan No. 2 was off in his pre-shift examination. Tr. II, 99.

Respondent argues that Mullis assumed that Fan No. 2 was in operation on May 6, 2013 because miners were working underground. R. Br. 12, citing Tr. I, 77. Respondent also argues, inter alia, that there was no need for an examination of the Fan No. 2 on May 6, 2013 because it was not running that day. R. Br. 12-13, citing Tr. I, 104, Tr. II, 36. Further, Respondent argues that there was no violation for the pre-citation failure to record a fan examination on May 7,

2013, because the results of that examination were recorded 10 minutes after the citation was issued at 11:20 a.m., and therefore prior to the end of the shift under § 75.312(g)(1). R. Br. 13.

## 1. Discussion and Analysis

§75.312(a) requires that all ventilation fans and associated component parts, including devices for measuring or recording mine ventilation pressure (i.e., an automatic fan signal), shall be examined for proper operation at least once each day that the fan operates. See Tr. I, 106-07.<sup>9</sup> §75.312(g) requires that “[b]y the end of the shift on which the examination is made, persons making main mine fan examinations shall record all uncorrected defects that may affect the operation of the fan that are not corrected by the end of that shift. . . .”

The Secretary failed to establish by a preponderance of evidence that Fan No. 2 was operating on May 6, 2013 such that a §75.312(a) examination was required or the deenergized fan signal needed to be recorded. Although miners were underground that day finishing the roof fall cleanup and re-support, the Secretary failed to establish that Fan No. 2 was operating. Mullis conceded that if Fan No. 2 was not operating, no examination was required. Tr. I, 104. Shannon credibly testified that Fan No. 2 was not turned back on until May 7, 2013, after the rockfall cleanup was completed and the area re-supported on May 6, 2013. Tr. 94-95, 98. Since no examination was required on May 6, 2013 under §75.312(a), the failure to record the non-functional automatic fan signal on Fan No. 2 by the end of the shift on May 6, 2013 was not a violation of §75.312(g). In addition, Fan No. 2 was not operating on May 6 so there was not yet any recordable event for a non-functioning fan signal.

An examination of the Fan No. 2 automatic signal was required on May 7, 2013 when Fan No. 2 was turned back on and production resumed on the first shift. By the end of that shift, the mine examiner was required to record all uncorrected defects that may affect the operation of the fan that had not been corrected by the end of that shift. The automatic fan signal violation in Citation 8378378 was terminated at 11:00 a.m. when the operator energized the automatic fan signal switch and it operated properly. P. Ex. 7. The alleged record-keeping violation described in Citation 8378379 was terminated on the first shift on May 7, 2013 at 11:20 a.m. when the examiner recorded his findings. P. Ex. 9. I find no record-keeping violation under §75.312(g) for May 7, 2013 because by the end of the shift on which the examination was made, there was no longer any uncorrected defect that affected the operation of Fan No. 2. Accordingly, I vacate Citation 8378378.

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<sup>9</sup> I reject Respondent’s argument that 30 C.F.R. § 75.312(c) only requires that the fan signal device to be examined every 31 days and not daily as required by 30 C.F.R. § 75.312(a) when the fans operate. R. Br. 12, citing Tr. I, 99. Rather, I agree with the Secretary that 30 C.F.R. § 75.312(c) requires that the fan signal device be tested every 31 days, not examined. Thus, the daily examination requirement in 30 C.F.R. § 75.312(a) is separate and distinct from the testing requirement in 30 C.F.R. § 75.312(c).

**D. Citation No. 8378383**

The body of Citation No. 8378383 focuses on missing spheres on the primary escapeway lifeline and tracks the language of § 75.380(d)(7)(vi) rather than § 75.380(d)(7)(vii), as alleged. The Secretary did not seek to amend the citation at hearing to reflect an alleged violation of § 75.380(d)(7)(vi). On post-hearing brief, however, the Secretary belatedly moved for conformance of the pleadings to the evidence adduced at trial. P. Br. 20-21.

Fed. R. Civ. Proc. 15(b), applicable under Commission Procedural Rule (1)(b), provides for conformance of pleadings to the evidence adduced at trial, and permits adjudication of issues that were actually litigated by the parties irrespective of pleading defects. Moreover, mere delay, regardless of length, does not bar a proposed amendment, absent prejudice. *See, e.g.*, 3 J. Moore, Moore's Federal Practice Par. 15.08[4] (2d ed. 1989).

The record indicates that Respondent understood the nature of the violation charged, i.e., that spheres were missing from the lifeline, and litigated the case on that basis. Tr. I, 279. At hearing, Respondent conceded that there was a violation of § 75.380 because of the missing spheres and limited its defense to issues concerning the gravity, negligence and S&S designations, the 13 miners allegedly affected, and the appropriateness of the \$3,405 proposed penalty. Tr. I, 118-19; 279. Thereafter, on post-hearing brief, Respondent conceded the S&S nature of the litigated violation and only challenged the high negligence designation, the allegation that all 13 miners underground were affected, and the appropriateness of the proposed penalty. R. Br. 16-18. In these circumstances, I find that Respondent suffered no prejudice because it fully understood the gravamen of the violation charged and knowingly litigated the citation on that basis. Accordingly, I grant the Secretary's belated request to amend Citation 8378383 to reflect an alleged violation of 30 C.F.R. § 75.380(d)(7)(vi). *See Faith Coal Co.*, 19 FMSHRC 1357, 1361-62 (Aug. 1997).

On or about May 22, 2013, Mullis issued section 104(a) Citation No. 8378383 alleging a violation of 30 C.F.R. 75.380(d)(7)(vii) because the lifeline located in the Mine's #3 Intake Entry, which serves as the primary escapeway and main travelway from the portal to the loading point at crosscut 68 (just outby the last open crosscut), did not have the required spheres to indicate the location where personnel doors were present. P. Ex. 10; Tr. I, 109, 112, 121-22. The spheres indicate intersections where personnel doors, about 30-square inches large, are installed in adjacent crosscuts. The personnel doors lead from the primary escapeway to a secondary escapeway in the adjacent entry about 60-80 feet away. Tr. I, 111, 129, 146. The citation was abated when Respondent installed the spheres to indicate the location of all existing personnel doors. P. Ex. 10.

Mullis testified that as he traveled underground towards the working section in a two-person vehicle, he noticed several locations along the main intake and primary escapeway where the required spheres were missing from the nearby lifeline, which was required to be readily accessible for the length of the entry. Tr. I, 109, 126, 129. The spheres used to identify the man doors are the only lifeline components without a branch line. Tr. II, 134. Mullis noticed that four spheres were missing from cross-cut 12 to 31, and that all required spheres were

missing between cross-cut 32 and 68. Tr. I, 114. Also, between cross-cut 32 and 68, Mullis noticed that there were no lifeline indicators for refuge alternative and SCSR locations, although Mullis' notes make no mention of these missing components. Tr. I, 115, 140-41. Mullis found no violations or hazards in the secondary escapeway located in an adjacent entry. Tr. I, 111-12.

Mullis was told by third-shift foreman, George Saylor, that the continuous miner trammed the entry to clean up the roof fall, and because of low clearance, the miner destroyed the old lifeline and the replacement lifeline did not have indicators on it. Rather, the indicators had to be manually installed. Tr. I, 122. While Mullis could not determine precisely when the lifeline was replaced, Mullis testified that foreman Saylor told Mullis that the portion of the lifeline from crosscut 32 to 68 was replaced "a couple of days" prior to Mullis' May 22, 2013 inspection. Tr. I, 179-180. Saylor did not testify, and no Respondent witness established when the lifeline was replaced. Although it is unclear precisely how long the lifeline was defective, it is apparent that the lifeline was damaged during cleanup of the rockfall, and the defective lifeline should have been noted in the pre-shift examination books once the mine resumed production on May 7, 2013. In these circumstances, I credit Mullis' testimony that since the rock fall was cleaned up and production resumed on May 7, 2013, at least nine days had been worked without any documentation in the pre-shift examination book that the required components were missing from the lifeline. Tr. I, 171-72; see also P. Ex. 13 ("The conditions cited in (cit. #8378383) has [sic] existed for 9 days, that was when the new lifeline was installed.").<sup>10</sup>

Mine manager Shannon testified that from cross-cut 12 thru 31, which was about 1150-1200 feet, MSHA required approximately four man doors or one man door every 300 feet. Respondent, however, actually had nine man doors in that area. This was so miners would not have to travel 300 feet to a man door, since the height in the No. 1 Main was very low. Tr. II, 43-44. The lifeline had spheres for five of those nine man doors, but not the other four. Tr. II, 45.

Between cross-cut 32 and 68, which was about 2160 feet, seven or eight man doors were required, but the mine actually had 11 man doors. Tr. II, 47, 53-54. The lifeline did not have any spheres for any of those 11 man doors, nor were there any indicators for SCSR caches or refuge alternatives. Tr. I, 114-115; P. Ex. 10. Mine manager Shannon testified, however, that in locations where spheres were missing, there were two types of signage: a reflector with "man door" written vertically on it, and a reflective sign with "man door" written horizontally with a directional arrow. Tr. II, 40. Mullis acknowledged that reflective signs identifying the location of the man doors were present at the mine, but they were not attached to the lifeline. Tr. I, 141-42.

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<sup>10</sup> Although Mullis' notes (P. Ex. 11, p. A-1) indicate that this condition has existed for at least six shifts, Mullis credibly explained on cross-examination regarding related Citation 8379384 (inadequate pre-shifts) that his notes for Citation 8379383 were made before he examined the pre-shift examination records for Citation 8379384. Tr. I, 171.

Mullis determined that the violation was S&S because it contributed to a hazard that was reasonably likely to cause a lost workday or restricted duty injury, that 13 miners were affected, and that the violation resulted from Respondent's high negligence. The Secretary proposed a penalty of \$3,405. P. Ex. 10. Mullis designated the violation as reasonably likely to result in a serious injury because in the event of a fire or heavy smoke hazard in the small confined area, miners would not be able to locate the man doors to travel from the primary escapeway to the secondary escapeway. Tr. I, 132-33.

Mullis determined that Respondent's negligence was high because no examiner had recognized the hazard during the previous nine shifts. Tr. I, 133-34. On cross examination, however, Mullis conceded that the amount of spheres that were missing compared to the amount of spheres that were present could have been considered a mitigating factor. Tr. I, 152. On further redirect, however, Mullis testified that he still considered the violation to result from Respondent's high negligence because miners needed access to all components of emergency equipment, and the citation could have been written as an unwarrantable failure because all of Respondent's examiners missed the defective lifeline components. Tr. I, 153-54. Regarding the number of persons affected, Mullis testified on cross examination that *some* of the 13 persons underground might choose to exit the mine in an emergency using the secondary escapeway, depending on their location at the time of the emergency. Tr. I, 148. As noted, Respondent concedes on brief that the violation was S&S, and only challenges the high negligence designation, the determination that 13 miners were affected, and the proposed penalty. R. Br. 16-18.

## **1. Discussion and Analysis**

I find that the S&S violation resulted from Respondent's high negligence because Respondent knew or should have known of the violation, and there are no mitigating circumstances. 30 C.F.R. § 100.3(d). Mullis' unrebutted testimony establishes that third-shift foreman Saylor told Mullis that the continuous miner used to clean up the roof fall destroyed the old lifeline and the replacement lifeline did not have the missing spheres or other indicators on it. Tr. I, 22. In fact, Respondent concedes that when the lifeline was replaced, several of the spheres were not re-attached to the lifeline. R. Br. 17. Mullis' testimony also established that these missing components were not identified or documented in the examination books during at least nine shifts prior to the May 22, 2013 issuance of the citation. Tr. I, 130. Any examiner agent or foreman entering or exiting the mine needed to use the travelway that had the defective lifeline. Tr. I, 133. Because of the primary travelway's low height and an agent's close proximity to the lifeline while traveling through the mine, foreman and examiners should have discovered the missing spheres after production resumed on May 7 and certainly before May 22, 2013.

Respondent argues that it raised numerous mitigating circumstances that should reduce its negligence to moderate. Specifically, Respondent argues that although the mine had nine man doors from cross-cut 12 thru 31, only four were required by law, and spheres were missing

on the lifeline for only four of the nine man doors. R. Br. 17.<sup>11</sup> Although Mullis conceded on cross examination that the amount of spheres that were missing compared to the amount of spheres that were present *could* be considered a mitigating factor (Tr. I, 152), in the circumstances of this case, I find no mitigation. Respondent's argument ignores the fact that all required spheres were missing between cross-cut 32 and 68 for a total of about 2160 feet, and this defect was not documented for nine shifts. Tr. I, 114; Tr. II, 53-54. In these circumstances, I agree with the Secretary that given the large number of spheres missing in an extensive area of the lifeline, *partial* compliance with the standard in a more limited area of the lifeline should not be considered a mitigating factor. P. Br. 26.

Respondent fails to argue on brief that the reflective signs that identified the location of the man doors, but were not attached to the lifeline, are a mitigating factor. *But see* Tr. I, 141-42, Tr. II, 40. I reject any such argument. I agree with the Secretary that visibility is likely to be reduced in an emergency situation, particularly in smoky conditions from a fire outby, and the spheres are meant to serve as a tactile guide to an alternative escape route when there is reduced or no visibility for miners. P. Br. 24. The reflective man door signs were typically hung away from the middle of the entry off to the side of the entry next to the crosscut. Tr. I, 142. Therefore, miners traveling the lifeline to escape in a low visibility emergency are unlikely to see such signs as they feel their way along the lifeline to find a sphere or spheres indicating the presence of man doors.

Respondent also fails to argue on brief that because the spheres have no branch lines to the man doors, miners are not likely to leave the security of the lifeline to find a door. *But see* Tr. I, 143-48. Any such argument ignores the fact that spheres are required for a purpose, i.e., to aid miners in desperate emergency situations where they have no choice but to leave the lifeline in order to escape through a man door to the secondary escapeway. In this regard, the following testimony from Mullis is persuasive.

THE COURT: So how likely is it in your view that a miner who left the lifeline in smoke, crawling through the 40 foot height, would become confused or disoriented or maybe bump into something and stumble and fall trying to get to the man door?

THE WITNESS: It could happen. They generally are taught that if you leave the lifeline for a man door, which the spheres are to indicate like if they -- like where the rock fall occurred, and say it cut their cable, their cable that brought their power underground, and caused a smoke. When they got to that rock fall, holding that line and got to that rock fall, they couldn't go any further. They

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<sup>11</sup> I note that the number of man doors is typically governed by the MSHA-approved ventilation plan and § 75.380(d)(7)(vi) provides that the continuous directional lifeline shall be equipped with one sphere securely attached to the lifeline at each intersection where personnel doors are installed in adjacent crosscuts.

would not be able to go anywhere. So that's what the spheres are for. They would come back to the next sphere and they would know that they could find a door to go through. They would turn loose of that line because they know what entry they're in. They would turn loose of the line and continue over into that crosscut. They're taught to feel their way to the bratti[ce], go across the bratti[ce] until you feel the door if you can't see it, go through it.

Tr. I ,147-48. Consequently, even without a branch line, spheres serve a vital and required purpose by signaling an alternative means of escape in an emergency through a man door into an adjacent escapeway when the lifeline in the primary escapeway is blocked outby.

In sum, I find no mitigating circumstance that would reduce Respondent's negligence from high to moderate. The violation remained undocumented for at least nine shifts and Respondent knew or should have known about it and failed to explain why foreman and examiners traveling the primary escapeway on a daily basis ignored the obviously defective lifeline for an extended period of time.

With regard to the number of miners affected by the violation, the Secretary argues that 13 miners worked on the section, and any emergency outby the section would require the entire crew to escape. P. Br. 14, citing Tr. I, 133. Both Mullis and Shannon testified, however, that *some* of the 13 miners underground might choose to exit the mine in an emergency using the secondary escapeway, depending on their location at the time of the emergency. Tr. I, 148; Tr. II, 50. The secondary escapeway is in the belt entry at the #3 mine. Tr. II, 49-50. Shannon testified that at any given time, there are two to four miners on that belt entry shoveling, cleaning or pumping water. Shannon opined that in an emergency requiring exit from the mine, those two to four miners would come out the belt entry unless something was preventing them from traveling that way. Tr. II, 50. Thus, out of the 13 miners underground, anywhere from 9-11 would likely be affected by the violation. Shannon, however, also conceded on cross examination that he would prefer to be in the intake air course rather than the secondary escapeway along the belt entry when trying to escape in the event of an emergency. Tr. II, 114. In these circumstances, it is reasonable to conclude that 10 miners would potentially be affected by the violation, i.e., the maximum number for penalty calculations purposes. See 30 C.F.R. § 100.3(e), Table XIII. Based on the foregoing, I modify Citation 8378383 to reduce the number of miners affected from 13 to 10.

I have evaluated the Secretary's proposed penalty in light of the principles announced in my final *Big Ridge* decision. *Big Ridge Inc.*, 36 FMSHRC 1677, 1681-82 (July 19, 2014) (ALJ). I find that the penalty proposed by the Secretary of \$3,405 is consistent with the statutory criteria set forth in section 110(i) of the Mine Act. 30 U.S.C. 820(i). Accordingly, I assess a \$3,405 civil penalty against Respondent for Citation No. 8378383.

**E. Citation No. 8378384**

On May 22, 2013, after issuing Citation No. 8378383 for the defective lifeline, Mullis issued 104(a) Citation No. 8378384 alleging that Respondent violated 30 C.F.R. § 75.360(b)(1) because its examiners were failing to perform adequate examinations that would identify the defective lifeline cited in Citation No. 8378383, a condition that existed for nine days. P. Ex. 13. Mullis determined that the violation was highly likely to cause a fatal injury, that 13 persons were affected, and that the violation resulted from Respondent's high negligence. The Secretary proposed a penalty of \$25,163. P. Ex. 13.

30 C.F.R. § 75.360(b)(1) requires that:

"[t]he person conducting the preshift examination shall examine for hazardous conditions and violations of the mandatory health or safety standards referenced in paragraph (b)(11) of this section, test for methane and oxygen deficiency, and determine if the air is moving in its proper direction at the follow locations:

(1) Roadways, travelways, and track haulageways where persons are scheduled, prior to the beginning of the preshift examination, to work or travel during the oncoming shift."

30 C.F.R. § 75.360(b)(1).

Mullis examined the pre-shift record book for the prior nine days and found no hazardous condition associated with the missing spheres on the defective lifeline noted in the pre-shift book. Tr. I, 162-163, 171. Although the pre-shift examinations had occurred, Mullis determined that they were inadequate because the examiner failed to notice the missing spheres on the lifeline. Tr. I, 164. Mullis explained, "They missed these. They missed [these] lifeline components. That's inadequate. And it was very - - you're only this far away from it . . . . As you're traveling that entry, its right in your face." Tr. I, 164-65.

Unlike the underlying defective lifeline Citation No. 8378383, which Mullis issued as "reasonably likely" and "lost workdays or restricted duty," Mullis issued this inadequate examination Citation No. 8378384 as "highly likely" and "fatal" because he was concerned that if all the examiners failed to recognize something as simple as the missing spheres on the lifeline, they could miss other hazards throughout the mine, such as inadequate support or ventilation. Tr. I, 166-69. Respondent points out, however, that Mullis only issued three citations on May 21 and 22, 2013, suggesting that Respondent was not missing a lot of things on its pre-shift examinations. R. Br. 19; Tr. I, 169. Respondent also emphasizes that as the pre-shift examiner travels through the mine, he is looking for a lot of things, including pump locations and existence of water, rib sloughage, floor conditions and other hazards, which could affect miners traveling in and out of the mine. Tr. II, 63-64.

Mine manager Shannon testified that Dave Faulkner, who had over 30 years of coal mine experience, was the outby examiner for the section. Shannon testified that he has traveled with Faulkner while Faulkner performed examinations, and that Faulkner is very thorough. Tr. II, 71-72.<sup>12</sup> Faulkner did not testify.

### **1. Respondent's Arguments**

Respondent argues that Citation 8378384 should be vacated because the pre-shift examination conducted on May 22, 2013 was adequate. R. Br. 20-21.<sup>13</sup> In an effort to show that the alleged violation was not obvious, Respondent relies on Shannon's testimony that the pre-shift examiner doesn't just lay on his back and stare at the lifeline on the roof about four inches from his head. Rather, the examiner may drive on his side and look off to the sides of the buggy, dodging pumps and other objects on the mine floor, and looking for signs of adverse roof, rib, and floor conditions. R. Br. 20; Tr. II, 66-68.

Respondent argues that if the pre-shift examiner conducts a thorough examination of the working areas, but does not see a potential hazard, a violation for an inadequate pre-shift is improper. Respondent emphasizes that even MSHA inspector Fuson, who wrote Citation No. 8407725 discussed below, testified that if the pre-shift examiner does not see a violation or hazard, it can't be reported on the pre-shift and no citation for an inadequate pre-shift should be issued. R. Br. 20, citing Tr. I, 261-63. Fuson testified as follows on re-cross examination:

Q. Well, Mr. Fuson, I'm a little bit confused now. You told me that there were hazardous conditions on equipment that you don't have to look at or write down on a pre-shift examination.

A. I didn't mean to say it that way, if that's the way you took it.

Q. Yeah, that's the way I took it. You tell me where I've made a mistake there.

A. Anytime you see a hazard anywhere, on anything, it has to be reported.

Q. What if you don't see it?

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<sup>12</sup> Shannon received pre-shift examination training from MSHA's Hazard, Kentucky field office. Although Shannon testified that this training never indicated that a pre-shift examiner should be looking for spheres on a lifeline, Shannon admitted that the training did mention that a lifeline should extend up to the dumping point of the section. Tr. II, 74-75.

<sup>13</sup> Respondent first argues that the violation did not exist for 9 days because Mullis' notes for Citation No. 8378383 indicate that the spheres had been missing from the lifeline for six shifts (two days). R. Br. 20. I have specifically rejected this argument at n.10, *supra*.

A. If you don't see it, you can't report it.

Q. Somebody comes in after you and says, hey, I found something but you didn't see it, is that an inadequate pre-shift?

A. No, but if there's multiple and multiple obvious conditions, then it would be considered.

Q. Well, the Judge asked you about a lifeline. What about one component on a lifeline, a sphere on a lifeline?

MR. PARDUE: Your Honor, this is -- well, I'll withdraw it.

BY MR. SHELTON:

Q. What about a missing sphere on a lifeline when you have a sign --

A. That's an inspector judgment I mean.

MR. SHELTON: That's all I have for him, your Honor.

Tr. I, 261-62. In sum, Respondent argues that the citation should be vacated because Respondent did conduct a pre-shift examination, and the lack of several spheres on the lifeline was not so obvious as to make the pre-shift examination inadequate. R. Br. 20-21.

Additionally, Respondent argues that the plain language of 30 C.F.R. 75.360 does not cover the hazardous condition cited, i.e., missing spheres on the lifeline, because this is not a hazardous condition referenced in paragraph (b)(11), and it is not a test for methane and oxygen deficiency, or a determination of whether air is moving in the proper direction at specifically identified locations. R. Br. 21.

Finally, Respondent argues that MSHA does not consistently enforce what hazards need to be covered by a pre-shift examination. Respondent relies on testimony from both inspectors Mullis and Fuson that some potential hazards need not be checked on a pre-shift examination. R. Br. 21. For example, Mullis testified on cross examination in response to a hypothetical that an energized cable with a gash and exposed copper on a working section would be a hazardous condition, but "I don't think that [pre-shift examiner is] required to check every inch of cable." Tr. I, 174. Fuson testified that issues with the dust parameters on a bolting machine pose a hazard to miners, but dust parameters do not have to be checked on a pre-shift exam, only during a pre-operational check of the equipment. Tr. I, 293-94, 317. Respondent concludes that a pre-shift examiner must report a noted hazard, but need not be counting spheres on the lifeline as he conducts his examination. R. Br. 21

## 2. Discussion and Analysis

30 C.F.R. § 75.360(b) requires that pre-shift examinations be conducted to identify hazardous conditions at certain locations, including roadways and travelways and other areas where persons will work or travel during the oncoming shift. The purpose of the examination requirement is to identify and document the hazardous condition in these areas where persons are expected to work and travel. The Commission has determined that pre-shift examinations are fundamental for assuring a safe work environment for miners working underground. *Enlow Fork Mining Co.*, 19 FMSHRC 5, 15 (Jan. 1997); *Buck Creek Coal Co.*, 17 FMSHRC 8, 15 (Jan. 1995). “The preshift examination is intended to prevent hazardous conditions from developing.” 19 FMSHRC at 15. The examiner must look for all conditions that present a hazard. *Id.* at 14. Conducting careful pre-shift examinations are critical because “[m]iners rely upon the preshift examiner to find and correct conditions that can be a hazard. When an examiner fails to do so, it creates in miners a false sense of working in a safe environment.” *Big Ridge, Inc.*, 33 FMSHRC 689, 713 (Mar. 2011) (ALJ).

Respondent argued on pre-trial motion for partial summary decision that it is only required to search for the specific hazardous conditions listed in subsection (b)(11) of the 30 C.F.R. § 75.360(b) because the "and" instead of a comma after "hazardous conditions" means that only hazardous conditions related to the standards in (b)(11) need to be identified. Tr. I, 271-22. I rejected this argument by Order dated May 13, 2014. *See Alden Resources, Inc.*, 36 FMSHRC 1486 (May 13, 2014) (ALJ) (Order Denying Respondent’s Motion for Summary Decision).<sup>14</sup>

Respondent does not renew its argument on post-hearing brief. There is good reason. Respondent’s argument is inconsistent with the clear and plain language of the standard, flouts its purpose to ensure a safe working environment, and ignores its legislative history. The standard plainly requires that "The person conducting the preshift examination shall examine for hazardous conditions and violations of the mandatory health or safety standards referenced in paragraph (b)(11) of this section, test for methane and oxygen deficiency, and determine if the air is moving in its proper direction . . ." As the Secretary points out, Respondent’s argument ignores the fact that the commas in the standard separate distinct things that Respondent is

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<sup>14</sup> I reject Respondent’s argument that a separate and distinct standard, 30 C.F.R. § 75.364(b)(5), requires a weekly examination of escapeways at least every seven days, and, therefore, since Respondent was not required to conduct a daily pre-shift examination of the escapeway, no violation of 30 C.F.R. § 75.360(b)(1) occurred. The issue here is whether an adequate pre-shift examination occurred in the No. 3 intake, which is the primary travelway and primary escapeway. The Commission has held that unless the text of the standard itself specifies a limitation, strict liability cannot be limited by extra-textual considerations, including requirements under other standards. *Wake Stone Co.*, 35 FMSHRC 825 (Apr. 2014). For the reasons explained herein, I find a violation of 30 C.F.R. § 75.360(b)(1) because the pre-shift examiner failed to identify an obvious hazardous condition, the defective lifeline, during numerous pre-shift examinations of the primary travelway in and out of the mine.

required to examine for during a pre-shift examination to comply with the standard. P. Br. 29. The clear language of the standard requires Respondent to examine for hazardous conditions and violations of the mandatory health or safety standards referenced in paragraph (b)(11) of the section. The "and" connects hazardous conditions and violations of the mandatory health or safety standards referenced in paragraph (b)(11) of the section because both need to be examined. The commas indicate that Respondent must also test for methane and oxygen deficiency, and determine if the air is moving in the proper direction.

The legislative history of the standard supports this plain meaning. 30 C.F.R. § 75.360(b) was amended on December 31, 2008. Before amendment, the standard only required that "[t]he 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" for roadways, travelways and track haulageways where miners are scheduled to work or travel during the oncoming shift. Thus, the standard always required pre-shift examiners to examine for hazardous conditions in a travelway. The amended standard added additional examination responsibilities regarding violations of specific standards in addition to hazardous conditions, consistent with Rules to Live By. The amended standard requires operators to conduct more thorough pre-shift examinations of underground coal mines to check for violations of the nine standards identified in MSHA's Rules to Live By initiatives, in addition to checking for general hazardous conditions. See 77 Fed. Reg. 20703-20705 (Apr. 6, 2012).

I conclude that the amended standard was intended to expand the examination requirements beyond hazardous conditions to include certain limited violations. Respondent's argument to the contrary fails to distinguish hazardous conditions from distinct violations of specific standards, particularly since not all violations are hazardous conditions. It would contravene the underlying safety purpose of the standard to limit the pre-shift examination responsibilities to hazardous conditions that are also violations of the Rules to Live By when the standard always required examination for hazardous conditions in certain areas such as travelways to ensure a safe working environment where miners were scheduled to work or travel.

In addition, Commission precedent treats hazardous conditions as a separate and distinct category of conditions that pre-shift examiners are required to identify. The term "hazard" denotes a measure of danger to safety or health." *Enlow Fork Mining Co.*, 19 FMSHRC 5, 14 (1997), citing *Cement Div., National Gypsum Co.*, 3 FMSHRC 822, 827 & n. 7 (April 1981). The Commission has described "hazard" as "a possible source of peril, danger, duress or difficulty," or "a condition that tends to create or increase the possibility of loss." *Id.* I find persuasive the reasoning of Judge Zielinski that "Section 75.360(b)(1) requires that persons conducting required preshift examinations "examine for hazardous conditions" in "[r]oadways, travelways and track haulageways where persons are scheduled . . ." *The American Coal Company*, 36 FMSHRC 1311, 1338 (May 2014)(ALJ).

The defective lifeline was clearly a hazardous condition in a travelway because it increased the likelihood that miners could not find their way out of the mine, particularly during a smoky or other low-visibility emergency. Tr. I, 143, 147-48. The violation was obvious because the replacement lifeline was bare and had no spheres indicating the existence of man

doors or any other lifeline indicators from crosscuts 32 to 68 (about 2160 feet), and Respondent knew that the replacement lifeline needed to have indicators manually installed before production resumed. Tr. I, 114-115, 122-23; Tr. II, 47, 53-54; P. Ex. 10. Further, I have credited Mullis's testimony that the violation existed throughout daily pre-shift examinations over the course of nine days. In these circumstances, and given the lifeline's vital importance, Respondent should have discovered the defective lifeline during its pre-shift examinations of the No. 3 intake entry, i.e., the primary travelway in and out of the mine. Accordingly, I find the violation.

I further find that Respondent's violation was S&S because reasonably likely to result in injuries to the 10 affected miners. Mullis testified that the failure to conduct adequate pre-shift examinations to document the defective lifeline resulted in the same discrete safety hazard as the underlying violation in Citation 8378383, which Respondent concedes was S&S, miners not being able to find their way out of the mine in the event of an emergency. Tr. I, 163. Therefore, the second *Mathies* element is satisfied.

Regarding the third and fourth *Mathies* elements, I remain unconvinced that the inadequate pre-shift exam was highly likely to cause serious injury as opposed to reasonably likely to result in serious injuries to the affected miners. Mullis increased the gravity for this citation based largely on speculation and assumption that was not supported by record evidence. See specifically Tr. I, 164-170, 173. In essence, Mullis testified, "if [the examiner's] missing something as big as this ball on this line that has reflectors on it, what else, you know, is he" missing. Tr. I, 164. Based on this testimony, the Secretary argues as follows:

Regarding the third *Mathies* element, the inadequate pre-shift exam was highly likely to cause fatal injuries to miners because, as Mullis explains, "[I]f he's (the examiner) missing something as big as this ball on this line that has reflectors on it, what else, you know, is he" missing. Tr. at 164. Thus, without proper examinations, miners would unknowingly come into contact with any number of hazardous conditions. Miners rely on an effective pre-shift examination as the initial and most effective tool to make sure that their environment is safe. If hazardous conditions are not being identified and corrected as miners start their shifts, they are being immediately and directly exposed to peril. Once Mullis discovered the inadequate pre-shift examination he determined that the thirteen miners underground were in greater danger than he previously designated related to the defective lifeline because no hazards were being identified as "there was no mention of anything found in those prior days." Tr. at 167. Mullis testified, "The hazard, if they're missing something as simple as this, what else are they missing . . ." Tr. at 166. Mullis was concerned with safety throughout the mine and, thus, push[ed] up his gravity designation. Tr. at 168. While other hazardous conditions were not cited, continuing mining operations suggest that if hazardous conditions

as obvious as the conditions cited in Citation 8378383 go unnoticed then the same would apply to other, less obvious hazardous conditions that are bound to develop. . . .

P. Br. 32.

The Secretary's arguments might be more persuasive had he put on evidence of several other hazardous conditions that were not being identified and corrected during pre-shift examinations after production resumed. But the Secretary's proof that other hazardous conditions were not being identified during pre-shift examinations after production resumed was flimsy and inadequate. Mullis merely opined that the inadequate examinations would cause any number of other safety hazards to go undetected and uncorrected. I have found an S&S violation of 30 C.F.R. § 75.310(a)(3) because someone forgot to switch the automatic fan signal for the No. 2 fan back on when production resumed on May 7, 2013. I have vacated the alleged non-S&S violation of 30 C.F.R. § 75.312(g)(1) because there was no record in the ventilation record book that Fan No. 2 was examined on May 6 or May 7, 2013. Below, I have affirmed Citation No. 8407725 finding an S&S violation of 30 C.F.R. 72.630(b) for failure to maintain the dry dust-collection system on the twin-head, roof-bolting machine in permissible and safe operating condition. But, as noted, that violation did not have to be recorded during a pre-shift exam, only during a pre-operational check of the equipment. Tr. I, 293-94, 317. In these circumstances, it was incumbent on the Secretary to rely on more than speculation to establish that the inadequate examinations would cause any number of other safety hazards to go undetected and uncorrected, and to show more than just the defective lifeline and failure to switch on the automatic signal on the No. 2 fan to heighten the gravity for Respondent's failure to do adequate pre-shift examinations under 30 C.F.R. § 75.360(b)(1). Accordingly, I find that the failure to conduct adequate pre-shift examinations was S&S, but I reduce the likelihood of injury or illness from "highly likely" to "reasonably likely, and reduce the injury or illness that could reasonably be expected to occur from "fatal" to "lost workdays or restricted duty."

I further find that Respondent's failure to perform an adequate pre-shift examination under 30 C.F.R. § 75.360(b)(1) was the result of high negligence because Respondent knew or should have known of the violation, and there are no mitigating circumstances. Mullis inspected the pre-shift examination book for the nine days prior to issuance of Citation No. 8378384 and no hazardous conditions were documented in the books, not even for the clearly defective lifeline that I have previously found resulted from high negligence. Respondent knew or should have known that the replacement lifeline needed manual installation of indicator components, which were not installed, and that the defective lifeline hazard, which was located in the primary travelway where examiners and foreman travel frequently, should be documented in the pre-shift examination book during the installation process. Respondent has proffered no mitigating circumstances, and raises none on brief. In these circumstances, I affirm the high negligence designation.

For the reasons set forth with regard to the underlying defective lifeline (Citation 8378383), it is reasonable to conclude that at least 10 of the 13 underground miners would potentially be affected by the failure to conduct an adequate pre-shift examination in the primary

travelway, i.e., the maximum number for penalty calculations purposes. See 30 C.F.R. § 100.3(e), Table XIII.

Based on the foregoing, I modify Citation 8378384 to reduce the likelihood of injury or illness from “highly likely” to “reasonably likely, to reduce the injury or illness that could reasonably be expected to occur from “fatal” to “lost workdays or restricted duty,” and to reduce the number of miners affected from 13 to 10.

I have evaluated the Secretary's proposed penalty in light of the principles announced in my recent *Big Ridge* decision. *Big Ridge Inc.*, 36 FMSHRC 1677, 1681-82 (July 19, 2014) (ALJ). Applying the statutory criteria set forth in section 110(i) of the Mine Act, and guided by the regular assessment criteria set forth in § 100.3 as applied to my findings above, I assess a \$3,406 civil penalty against Respondent for Citation No. 8378384.

#### **F. Citation No. 8407725**

On May 24, 2013, MSHA inspector Wendill Fuson<sup>15</sup> issued 104(a) Citation No. 8407725 alleging a violation of 30 C.F.R. 72.630(b) for failure to maintain the dry dust-collection system on its twin-head, roof-bolting machine in permissible and safe operating condition. P. Ex. 1; Tr. I, 189.<sup>16</sup> MSHA had previously set up a sampling program on this bolter, designated area 907, because of excessive respirable dust and quartz. Tr. I, 209-15. Accordingly, the roof bolting machine was on a reduced respirable dust standard of 1.0 instead of 2.0. Fuson could not point to any violations where the machine had exceeded the reduced standard, although it had a prior history of exceeding the prior standard on quartz. Tr. I, 241-42.

The dust collection system on the bolter consists of a box, hoses, and a pump motor that functions like a huge vacuum cleaner, with the filters and box used to catch dust exiting drill

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<sup>15</sup> Fuson has about 8 years of experience with MSHA as a health specialist. Tr. I, 187. Before joining MSHA, Fuson had been employed in the coal mining industry and had operated roof bolting machines for 10 to 12 years. Tr. I 182.

<sup>16</sup> 30 C.F.R. § 72.630(b) provides:

(b) *Dust collectors*. Dust collectors shall be maintained in permissible and operating condition. Dust Collectors approved under Part 33 -Dust Collectors for Use in Connection with Rock Drilling in Coal Mines of this title or under Bureau of Mines Schedule 25B are permissible dust collectors for the purpose of this section.

30 C.F.R. § 33.2(a) defines permissible:

(a) *Permissible*, as applied to a dust collector, means that it conforms to the requirements of this part, and that a certificate of approval to that effect has been issued.

holes as the bit penetrates the roof. Tr. I, 195. After testing, Fuson determined that the vacuum suction for each drill head was less than the minimum pressure requirement of twelve mercury inches. P. Ex. 1; Tr. I, 190, 196-199. The left head measured 11 inches of mercury (although the citation incorrectly stated 9 inches of mercury), and the right head measured 10 inches of mercury. Tr. II, 198. Fuson also determined that the suction hose coupling nipples for both drill heads were loose and leaking. One hose was broken, and an attempted repair of dust holes had been made with electrical tape. Fuson heard air seeping through its loose nipple. P. Ex. 1; Tr. I, 193, 196, 199-200. Further, the dust hoses connecting the drill heads to the dust boxes were not approved by MSHA. P. Ex. 1. Finally, Fuson observed drill dust piled on top of one of the dust boxes, which was used to seal leaks in the gaskets. Tr. I, 193-94, 196, 215. Although Fuson failed to mention the attempted repair of the broken hose or the dust piled on top of one of the dust boxes within the body of this citation, I credit his specific recollection that these conditions were present. P. Ex. 1; Tr. I, 193, 196.

Fuson testified that vibration from operation of the machine will place the respirable drill dust located on the box into the operator's breathable air. Tr. I, 215. Fuson subsequently testified, "[f]rom industry history of this district, I mean, anytime you've got drill dust in this district, there's a percentage of respirable dust present and always a danger if not protected against the miner breathing it that they will breathe in this." Tr. I, 252.

The citation alleged that the violation was reasonably likely to cause a permanently disabling injury, that 2 persons were affected, and that the violation resulted from Respondent's moderate negligence. MSHA proposed a penalty of \$425 for the alleged S&S violation. P. Ex. 1. When the citation was terminated by replacing parts on the machine, the vacuum pressure "drastically increased" over 50 percent. Tr. I, 224.

The citation was written at 7:10 a.m. P. Ex. 1. Fuson could not recall if any roof bolter operators were in the area. Tr. I, 202. The day shift was not present and a pre-operational examination of the bolter had not yet been conducted, although the bolter was not locked and tagged out. Tr. I, 207-09. The continuous miner had been cited an hour earlier for a dust parameter violation, although no coal production had taken place. Tr. I, 204.

Fuson determined that the conditions should have been repaired prior to operation of the machine and that the machine had already been operated with the cited conditions and was set up to operate again. Tr. I, 201, 206; P. Ex. 2. He testified, that "[t]he dust parameters -- the dust collection system of the machine has to be maintained at all times . . . Anytime there's a deficiency in the system, it should be shut down and repaired immediately." Tr. I, 208. Fuson also determined that the operator had "already used this machine with this many conditions." P. Ex. 2; Tr. I, 197. Fuson could not specifically remember whether he heard or saw the roof bolter actually bolting during his inspection, but in contemporaneous notes recorded during his inspection, he wrote roof bolter "has been bolting in 4 right, set up to bolt, ATRS is set, booms are ready. So the machine was sitting with the boom and support ready to drill." P. Ex. 2; Tr. I, 201, 204-05, 234-35. As noted, the bolter was not locked or tagged out. Tr. I, 209.

Fuson testified unconvincingly, "I wouldn't have wrote has been bolting down if I hadn't heard it or seen it." Tr. I, 201, 204-05. On cross examination, Fuson acknowledged that he did not have any independent recollection that the roof bolter had been operating that morning. He also acknowledged that his notes could reflect the fact that the third shift set the bolting machine in the 4 right entry so that the first shift could begin operation when they came underground. Tr. I, 228. Fuson did not know whether the third shift had actually conducted any roof bolting the evening before the citation was issued. Tr. I, 256. "No sir, we don't know if it was on third shift or first shift, but in my notes I've got in there they had been bolting." *Id.*

I find that Fuson did not see or hear the bolter on May 24 because the day-shift had not yet begun work. As Fuson acknowledged, "[t]he day shift hadn't come in yet when I went underground. Tr. I, 206. Rather, based on the following testimony, I find that Fuson reasonably inferred, based on his experience, that the conditions observed had developed while the roof bolter was being operated previously for at least a shift and had not been fixed, and the machine was already set up and about to be used again.

BY MR. PARDUE:

Q. For each of the conditions you cited, the vacuum suction, the couplings, and the hoses, could you tell how long those conditions had existed?

A. Well, from experience, hoses don't loosen on their own just sitting, so, you know, I'm safe -- it's safe to say that they had been bolting in that condition or it wouldn't be in that condition. They don't drive or move the machine around in the mines unless it's going from one place that needs bolted to the other. So without a doubt in my mind, they had been bolting with this condition.

Q. Can you say that about each of the conditions that's listed in the body of the citation?

A. Yes. Especially, you know, the tape, I mean, they know they had a busted hose or they wouldn't have taped it up.

Tr. I, 205-06. Although Fuson could not determine exactly how long the conditions had existed, he credibly testified that they were present for at least one shift.

Q. Based on your experience, how long were the -- the conditions cited, how long were they -- did they exist on this equipment?

A. I couldn't tell you how long. At least a shift, because it takes more than a shift for it to get -- the hoses to get that loose. If vacuum pressure drops like that, usually if you don't lose all of your vacuum -- them machines usually typically goes 15 to 20 mercury inches when you test them, and they generally gradually lose their suction. But with leaking hoses, you

know, with loose hoses on both sides, it would be easily determined it would be greater than a shift.

Tr. I, 223.

Third-shift foreman, Bryan Lewis, testified that pre-operational checks are conducted on roof bolting machines, which would include the vacuum suction on each side of the bolter. Tr. 292-94. Lewis testified that at the time that Fuson wrote the citation, the first-shift miners had not yet had time to conduct a pre-operational inspection or start bolting. Tr. I, 295, 302. Lewis opined that the bolting machine was in operation during the May 23rd second shift, a production shift. Further, Lewis did not recall any mention of any problems with the bolting machine at the start of the third shift. Tr. I, 298. He testified that a hole in a hose or the loosening of a clamp can occur at any time and cause the bolter to lose suction. Tr. I, 299. Lewis further testified that when the bolters are drilling top, they stand out by the drill pipe and dust box where the control levers are located, and any material that is on the dust box would be blowing in by. Tr. I, 300-01.

### **1. S&S, Moderate Negligence, and Civil Penalty Analysis**

I find that Respondent violated 30 C.F.R. § 72.630(b) by failing to maintain the dry dust collection system on its twin-head, roof-bolting machine. In fact, Respondent concedes the violation on brief (R. Br. 6), but argues that it was not significant and substantial (S&S) because not reasonably likely to lead to a permanently disabling injury. R. Br. 5. I find that Respondent's violation of 30 C.F.R. § 75.630(b) was S&S.

The first element of *Mathies* is satisfied by my finding of the violation 30 C.F.R. § 75.650(b), a mandatory safety standard.

The second *Mathies* element was satisfied because the cited conditions created a discrete safety hazard or measure of danger to safety, inhalation of excessive respirable dust that would contribute to the development of black lung disease.

The third *Mathies* element was also satisfied. Respondent argues, inter alia, that at the time the citation was written, the first shift miners did not have an opportunity to conduct a pre-operational check on the machine and that the machine would have been checked before being placed into operation at which time the decreased head suction would have been found and repaired prior to placing the machine into service. R. Br. 6; see also Tr. I, 232, 255. I reject this argument for two reasons. First, I have credited Fuson's reasonable inference based on the cited conditions that the bolter had already been used with the extant defects for at least a shift and thus two miners were exposed to the respirable hazard. Fuson reasonably determined that the conditions existed at least for one shift because "it takes more than a shift for it to get -- the hoses to get that loose . . . with loose hoses on both sides, it would be easily determined it would be greater than a shift." Tr. 223. Second, the Commission specifically rejected such argument in *Wake Stone Co.*, 36 FMSHRC 825, 828-29 (Apr. 2014), and reinforced the rule that equipment that is not locked and tagged out of operation and parked for repairs must be maintained in functional condition.

Having credited inspector Fuson's testimony that the conditions observed had developed while the roof bolter was being operated previously for at least a shift and had not been fixed, I conclude that two roof bolt operators on the twin-head machine were exposed to increased respirable dust due to improper dust collection. Tr. I, 218, 222. "Because of the lack of vacuum, hose leaking, dust on top of the box. That's about a guarantee these guys drilling in them conditions, they're going to be exposed to respirable dust." Tr. I, 218. The bolters operated within arm's reach of the drill steel bit on each side of the roof bolter, with controls outby the drill bit. Tr. I, 330-32. With regard to exposure, Fuson credibly testified, "You've got 3,000 feet of air at the bumper of the machine. The places that's been developed is 30 to 32-foot deep. By the time they're up in there, all you're going to have is a swirling motion, so anything - you know, you're not going to be ventilating the place. All your air is just swirling around in there . . ." Tr. I, 322. Fuson further credibly explained that "[t]he dust control suction collection box is to get the respirable dust away from them. If there's a breach in the system, the 3,000 feet of air at the bumper of the machine . . . So we depend on the dust collection system itself. And if there's any breach in air or dust, it's just going to swirl around in the place for them." Tr. I, 325-26. Fuson explained that "[a]nything that's spinning in the air is potential breathable atmosphere for those miners." Tr. 326.

I conclude that the two bolter operators on the prior production shift were exposed to increased respirable dust no matter where they were located on the machine. I credit Fuson's testimony that air swirls in the whole cut exposing the operators to respirable dust and silica. Tr. I, 218-219, 322, 325-26. I further conclude that bolters' exposure to respirable dust due to improper dust collection was reasonably likely to result in injury. In this regard, vibrations from the roof bolter would put fine respirable dust into the operators' breathable air. Tr. I, 215. The dust boxes were located on the booms of the machine about 8-10 feet from the operators, who move around the machine. Tr. I, 217. Further, Fuson credibly testified:

With low vacuum, -- you know, especially with a hose leaking, the machine's vacuum is not going to pull that dust out of the steel, and you'll have a lot of dust coming back out of the hole right in -- I mean, and the hole is within probably a couple feet from their -- two to three feet at most from their mouth, from breathing, at this height. This is a low seam coal, three to four foot high. So they're right there next to the drill head.

Tr. 218-19.

With respect to the fourth *Mathies* element, I find a reasonable likelihood that the violation will contribute to development of an illness of a reasonably serious nature, including black lung disease. It is beyond dispute that respirable coal mine dust can cause lung diseases such as coal workers pneumoconiosis (CWP), emphysema, silicosis, and bronchitis, collectively known as black lung. Black lung can lead to lung impairment, permanent disability, and even death. There is no cure. Judge Simonton recently recognized the connection between excessive exposure to respirable dust and serious respiratory illness in the roof bolter context when finding that "there is a reasonable likelihood that [this] over-exposure to respirable dust will result in

injury as respirable dust has been consistently linked to respiratory illnesses such as black lung and silicosis. Additionally, black lung and silicosis far exceed the definition of an injury of a reasonably serious nature, as they are irreversible illnesses that result in debilitating respiratory complications and even death.” *Webster County Coal*, 36 FMSHRC 382, 391 (Feb. 2014) (ALJ).

On this record, Fuson credibly testified that the roof and strata contained quartz content such that respirable dust exposure would lead to silicosis. Tr. I, 219-20. Fuson lost his father to silicosis and persuasively explained that “[o]nce complications of respirable dust do take affect (sic) on these miners, there's no cure to it and it is a horrible death.” Tr. I, 220. I conclude that the unabated exposure of the roof bolters to respirable dust by failing to maintain the dry dust collection system on the cited twin-head, roof-bolting machine during continuous normal mining operations was reasonably likely to contribute to the development of serious lung disease, including a permanently disabling respiratory illness. See *White Buck Coal*, 30 FMSHRC 535, 542 (June 2008) (ALJ); *Genwal Resources, Inc.*, 27 FMSHRC 580, 589 (Aug. 2005) (ALJ).

For the foregoing reasons, I conclude that the Secretary has established that this violation meets the four-element *Mathies* test for S&S violations. Accordingly, the S&S and associated gravity designations for Citation No. 8407725 are affirmed.

I further find that Respondent's failure to maintain the dry dust collection system on the roof bolter was the result of moderate negligence. As noted *supra*, moderate negligence occurs when an operator knew or should have known of the violation, but there are mitigating circumstances. Based on the numerous defective conditions and their apparent obvious nature, Respondent should have known about and corrected the conditions. The machine was not locked and tagged out and was set up for the oncoming first shift on May 24. Even Respondent's witness, former section foreman Lewis, confirmed that if a prior shift operates a piece of equipment, it has to be checked, and if anything is wrong, it should be fixed or shut down. Tr. I, 316. Fuson persuasively testified that the machine was run in its defective condition for at least one shift sometime prior to his discovery of the cited conditions. Tr. I, 206, 223. Respondent provided no mitigating circumstances about why the conditions existed other than to suggest that they could have happened at any time and would have been discovered and corrected. In these circumstances, I conclude that the moderate negligence designation is appropriate.

I have evaluated the Secretary's proposed penalty in light of the principles announced in my final *Big Ridge* decision. *Big Ridge Inc.*, 36 FMSHRC 1677, 1681-82 (July 19, 2014) (ALJ). I find that the penalty proposed by the Secretary of \$425 is consistent with my findings and the statutory criteria set forth in section 110(i) of the Mine Act. 30 U.S.C. 820(i). Accordingly, I assess a \$425 civil penalty against Respondent for Citation No. 8407725.

## V. Order

Wherefore, it is **ORDERED** that Citation No. 8378378 be **AFFIRMED**, as written.

It is **ORDERED** that Citation No. 8378379 be **VACATED**.

It is **ORDERED** that Citation No. 8378383 be **MODIFIED** to reduce the number of miners affected from 13 to 10.

It is **ORDERED** that Citation No. 8378384 be **MODIFIED** to reduce the likelihood of injury or illness from “highly likely” to “reasonably likely, to reduce the injury or illness that could reasonably be expected to occur from “fatal” to “lost workdays or restricted duty,” and to reduce the number of miners affected from 13 to 10.

It is further **ORDERED** that Citation No. 8407725 be **AFFIRMED**, as written.

To the extent Respondent has not already done so, within 40 days of the date of this decision, Respondent, Alden Resources, LLC, is **ORDERED TO PAY** a total civil penalty of \$8,262 for the five litigated citations that were not part of the final settlement referenced in footnote 1.<sup>17</sup>

/s/ Thomas P. McCarthy  
Thomas P. McCarthy  
Administrative Law Judge

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<sup>17</sup> Payment should be sent to: Mine Safety & Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
721 19<sup>TH</sup> ST. SUITE 443  
DENVER, CO 80202-2500  
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May 18, 2015

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

v.

A & G COAL CORPORATION,  
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. VA 2014-11  
A.C. No. 44-04534-332641

Mine: Prep Plant # 2

## DECISION

Appearances: Jennifer Pao, U.S. Department of Labor, Office of the Solicitor  
170 S. Independence Mall West, The Curtis Center, Suite 630 E  
Philadelphia, PA 19106-3306

Jim Bowman  
P.O. Box 99, Midway, WV 25878

Before: Judge Simonton

### I. INTRODUCTION

This case is before me on a civil penalty petition filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (MSHA), against A & G Coal Corporation, (Respondent), pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820. Prior to hearing the parties settled seven of the ten citations contained in this docket for a total monetary penalty of \$2,111.00. After consideration, the court denied the Secretary's motion for summary judgment on Citation Nos. 8202260 and 8202261. February 27, 2015 Order. The parties presented testimony and documentary evidence on the remaining three citations at a March 10, 2015 hearing in Pikeville, Kentucky.

At hearing, MSHA Inspector Wade Gardner testified for the Secretary. A & G Foremen Freddie Hamilton and Chris Bowman testified for the Respondent regarding site conditions at the time of the citations. A & G Safety Managers Benny Hensley and Patrick Graham also testified for the Respondent regarding previous enforcement protocols relevant to the cited standards. For the reasons that follow Citation Nos. 8202260 and 8202261 are affirmed as originally written and assessed, and Citation No. 8202263 is vacated. After considering the six statutory penalty criteria, I have assessed a total penalty of **\$4,517.00** for this docket, including the citations settled prior to hearing.

## II. FINDINGS OF FACT

### A. Citation No. 8202260

MSHA Inspector Wade Gardner issued Citation No. 8202260 for an alleged violation of 30 CFR §77.410(a)(1) on July 16, 2013. Gardner alleged within the citation that:

The Ford F250 pickup truck tag # 6H1-1261, with an obstructed rear view from a fuel tank and a tool box mounted on the fuel tank, was being used to haul parts, fuel oil, and miners. The truck was not provide(d) with an automatic warning device (back-up horn) which shall give an audible alarm when such equipment is placed in reverse. This truck is used on the entire mine and also on the refuse site, with miners being exposed to this hazard.

Jt. Ex. 1, 1.

Gardner designated Citation No. 8202260 as a moderate negligence violation that was reasonably likely to contribute to the occurrence of an injury resulting in lost workdays or restricted duty. Gardner also determined that the failure to maintain a back-up alarm on the work truck was significant and substantial. The Secretary has proposed a regularly assessed penalty of \$1,203.00 for Citation No. 8202260.

#### 1. Testimony

##### *a. The Secretary*

MSHA Inspector Wade Gardner testified for the Secretary. Gardner testified that he had inspected the Prep Plant No. 2 mine site regularly since the 1980s and described the mine site as a large set of raw coal stockpiles, coal processing facilities, belt lines, and refuse area strung out over several miles and separated in areas by a public highway. Tr. 32-33, 35. Gardner also stated that the mine site had a centralized mine office with a bathhouse and parts storage. Tr. 33-34. Gardner testified that the site foreman regularly transported workers to different areas of the mine site in a pickup truck. Tr. 35.

Gardner testified that shortly after he started his inspection of the Prep Plant No. 2 site, A & G Foreman Joe Johnson pulled into the mine office parking lot in an F-250 pickup truck with a toolbox on top of the bed mounted fuel tank. Tr. 38-39. Gardner stated that Johnson parked head in against the mine office in a manner that required him to back up to leave the parking lot. Tr. 41. Gardner additionally stated that employees regularly traveled the parking lot on foot as the lot was used as the employee parking lot and employees ate lunch at the mine office bathhouse. Tr. 41-42.

Gardner testified that the fuel tank and toolbox completely blocked the rear window and obscured the rear view. Tr. 45. Gardner testified that when he inspected the F-250 pickup truck

more closely, Johnson confirmed that the truck had never been equipped with a backup alarm during the several months it had been onsite. Tr. 39, 48. Gardner stated he designated the violation as significant and substantial because of the necessity to drive the F-250 in reverse at the mine office and his experience investigating injuries, including a fatality, where workers had been struck by trucks driving in reverse. Tr. 46. Gardner testified that he based the moderate negligence designation upon Johnson's own statement that he knew the F-250 did not have a backup alarm. Tr. 47-48.

### *b. The Respondent*

A & G Hauler Driver Chris Bowman testified that he had observed the F-250 truck at the refuse area of the mine and had driven the truck several times. Tr. 180. Bowman stated that the fuel tank and toolbox obstructed roughly 60 percent of the rearview window. Tr. 181. Bowman confirmed that the F-250 did not have a backup alarm but did have a front horn and strobe and back up lights. Bowman explained that the F-250 was primarily used to fuel the dozer and hauler truck at the refuse site and always parked parallel to the equipment so it could pull straight ahead without backing up. Tr. 182. On cross-examination, Bowman conceded that it was necessary to drive the F-250 in reverse to leave the mine office parking lot. Tr. 181.

A & G Safety Manager Patrick Graham stated the A & G foreman who drove the F-250 informed him that the fuel tank and toolbox did not block his rear view vision as the truck had wide-view side mirrors. Tr. 206. Graham also testified that many employees drove pickup trucks with similar obstructions and an accident had never occurred at an A & G mine site due to a truck operating in reverse. Tr. 207.

## **2. The Cited Standard**

30 CFR 77.410(a)(1) mandates:

Mobile equipment such as front-end loaders, forklifts, tractors, graders, and trucks, except pickup trucks with an unobstructed rear view, shall be equipped with a warning device that (1) Gives an audible alarm when the equipment is put in reverse...

30 CFR 77.410(a)(1).

## **3. Analysis**

### *a. The Violation*

The Secretary presented direct testimony from Inspector Gardner, largely corroborated by hauler driver Chris Bowman that the rear view of the F-250 pickup truck was obstructed by a bed mounted fuel tank and large toolbox. Tr. 38-39, 181. Gardner and Bowman both confirmed that the F-250 pickup truck did not have a backup alarm installed at the time of the July 16 inspection. Tr. 48, 181. The Respondent conceded the fact of the violation within their post-hearing brief. Resp. Br., 3. Accordingly, I find that the failure to install a backup alarm on a

pickup truck with a significantly obstructed rearview constituted a violation of 30 CFR 77.410(a)(1).

*b. Significant and Substantial*

A violation is Significant & Substantial (S&S), "if based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

In order to uphold a citation as S&S, the Commission has held that 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).

An S&S designation must be based upon the particular facts surrounding the violation and must be made in the context of continued normal mining operations. *Texasgulf, Inc.*, 10 FMSHRC 498, 500 (Apr. 1988); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984).

In this case, the Respondent violated a mandatory safety standard, 30 CFR 77.410(a)(1), by failing to install an audible back up alarm on a pickup truck with an obscured rear view. This violation exposed workers to the hazard of a 14,000 pound truck operating in reverse without an audible alarm that would alert workers of the approaching vehicle. Tr. 201. The F-250 truck was routinely parked head in at the mine office, and then backed out in an area where workers often traveled on foot. Tr. 46, 181. Accordingly, I find that there was a reasonable likelihood that the safety hazard created by the missing back up alarm would result in an injury to workers in the mine office parking lot. Given the relatively heavy weight of the F-250 truck and the Secretary's credible testimony that workers had been fatally injured by trucks operating in reverse, I find that the violation created the risk of at least a lost time injury to one worker. For all these reasons, I affirm the designation of Citation No. 8202260 as a Significant and Substantial violation.

*c. Negligence*

The Mine Act defines reckless disregard as conduct which exhibits the absence of the slightest degree of care, high negligence as actual or constructive knowledge of the violative condition without mitigating circumstances; moderate negligence as actual or constructive knowledge of the violative condition with mitigating circumstances; and low negligence as actual or constructive knowledge of the violative condition with considerable mitigating circumstances. 30 CFR § 100.3: Table X.

Inspector Gardner credibly testified that the A & G foreman driving the F-250 pickup at the time of the inspection acknowledged that he knew the truck did not have a backup alarm. Tr. 47-48. However, A & G Safety Manager Graham testified that the foreman did not believe that

his rear view was functionally impaired as the truck's large side view mirrors allowed him to see around the fuel tank and toolbox. Tr. 206. Nevertheless, the Respondent has conceded that the Secretary's designation of moderate negligence is appropriate for Citation No. 8202260. Resp. br., 5. Accordingly, Citation No. 8202260 is affirmed as a moderate negligence violation.

*d. Penalty*

It is well established that Commission administrative law judges have the authority to assess civil penalties de novo for violations of the Mine Act. *Sellersburg Stone Company*, 5 FMSHRC 287, 291 (March 1983). The Act requires that in assessing civil monetary penalties, the Commission ALJ shall consider the six statutory penalty criteria:

(1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator charged, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. 820(I).

These criteria are generally incorporated by the Secretary within a standardized penalty calculation that results in a pre-determined penalty amount based on assigned penalty points. 30 CFR 100.3: Table 1- Table XIV. The Secretary has proposed a regularly assessed penalty of \$1,203.00 for Citation No. 8202260 based upon the 30 CFR 100.3 penalty tables.

The Respondent is a large operator with a relatively high rate of total violations per inspection day but no previous violations of 30 CFR 77.410(a)1. The Respondent has conceded that it acted with moderate negligence. The Respondent has stipulated that the proposed penalty will not affect its ability to continue in business. I have found that the violation was reasonably likely to result in at least lost time injuries. The parties have stipulated that the Respondent acted promptly to replace the missing backup alarm.

After considering this evidence in light of the six statutory factors, I uphold the Secretary's proposed penalty and assess a penalty of \$1,203.00.

**B. Citation No. 8202261**

Gardner issued Citation No. 8202261 for an alleged violation of 30 CFR §77.1606(a) on July 16, 2013. Gardner alleged within the citation that:

A pre-operational inspection, was not being conducted on the Ford F250 pick-up truck tag # 6H1-126, provided with a fuel tank mounted in the truck bed. This truck is being used on all shifts and

no one has been conducting an inspection before the truck was put in service with a hazard condition....

Jt. Ex. 2, 1.

Gardner designated Citation No. 8202261 as a moderate negligence violation that was reasonably likely to contribute to the occurrence of an injury resulting in lost workdays or restricted duty. Gardner also determined that the failure to conduct a pre-operational inspection on the work truck was significant and substantial. The Secretary has proposed a regularly assessed penalty of \$1,203.00 for Citation No. 8202261.

## **1. Testimony**

### *a. The Secretary*

Inspector Gardner testified that when he requested the pre-op book for the F-250 truck, A & G Foreman Johnson stated that they did not have a pre-op log for the truck. Tr. 48. Gardner stated that he informed Johnson that A & G needed to perform a pre-operational check on the truck due to the fact that the truck hauled miners, fuel, and had a blocked rear window. Tr. 48-49. Gardner stated that 30 CFR 77.1706(a) regulated loading equipment such as loaders and haulage equipment ranging from heavy coal trucks to trucks hauling persons, parts, and fuel. Gardner testified that MSHA did not normally apply the standard to vehicles or trucks that were only used to transport the driver himself or personal employee vehicles not used by the operator onsite. Tr. 51-52.

Gardner stated that the failure to conduct a pre-op check on the F-250 specifically exposed workers to the hazards of the missing back-up alarm and struck by injuries. Tr. 53. Gardner confirmed during cross-examination that, to the best of his knowledge, MSHA had not issued any official guidance that mandated pre-operational inspections on pickup trucks. Tr. 85. However, Gardner stated that he was aware of inspections in other areas that had performed inspection on over a hundred pickup trucks as part of a regular inspection. Tr. 94.

### *b. The Respondent*

A & G Hauler Driver Chris Bowman testified that he had driven a pick-up truck on the mine site for years and had never been instructed by MSHA or the operator to conduct a pre-operational check. Tr. 183-84. A & G Safety Manager Patrick Graham also testified that MSHA had never directed him to conduct pre-operational checks on pick-up trucks in over 30 years of mining experience. Tr. 204-05. Graham additionally stated that the F-250 truck was under the weight limit that required DOT marking for bulk haulers. Tr. 208-09.

## 2. The Cited Standard

30 CFR 77.1606(a) mandates:

Mobile loading and haulage equipment shall be inspected by a competent person before such equipment is placed in operation. Equipment defects affecting safety shall be recorded and reported to the mine operator.

30 CFR 77.1606(a).

## 3. Analysis

### *a. The Violation*

The Respondent's witnesses have conceded that the operator did not perform a pre-operational inspection on the F-250 pickup truck, and have also conceded that the same F-250 truck was not provided with an audible back-up alarm as required by 30 CFR 77.410(a)(1). Tr. 48, 183-84; Resp. Br., 3. Thus, it is clear that the operator did not perform a pre-operational check on the F-250 pickup truck and that specific significant hazards were not recorded or corrected prior to the July 16th MSHA inspection. However, the Respondent argues that the truck did not carry enough fuel, tools, or persons to qualify as haulage equipment covered by 30 CFR 77.1606(a). Resp. Br. 15-16. The Respondent similarly argues that as MSHA failed to previously require inspections on pickup trucks at the Prep Plant mine site or publish specific guidance on pickup truck inspection, the Respondent was not provided adequate notice of the Secretary's interpretation of the regulation. Resp. Br., 13 *citing Ideal Cement Company*, 12 FMSHRC 2409, 2416 (November 1990).

The Respondent specifically objects to Inspector Gardner's statement at hearing that haulage equipment could be "anything hauling anything" as overbroad and absurd. Resp. Br., 14; Tr. 78. The Respondent asserts that as the truck was neither heavy enough or carrying enough fuel to require pre-operational inspections per Commercial Vehicle Safety Alliance (CVSA) regulations, MSHA should be barred from enforcing Citation No 8202261 in the absence of specific notice to operators regarding pickup truck inspection. Resp. Br., 15-16.

The Secretary argues that the Commission has previously adopted a broad definition of the term "hauling" that includes the transport of men or supplies in a separate standard. Sec'y Br., 17-18 *citing Cleveland Cliffs Iron Co. Inc.*, 3 FMSHRC 291, 292-93 (Feb 1981)(applying the Dictionary of Mining, Mineral and Related Terms definition of hauling to 30 CFR § 55.9-22). The Secretary also notes that a Commission ALJ has applied this same expansive definition of haulage equipment to enforce a citation issued for failure to keep the cab of a pickup truck free of extraneous materials. Sec'y Br., 18 *citing Mach Mining, LLC*, 2013 WL 8541001, \*7 (Aug. 2013)(ALJ Tureck)(finding that a pickup truck carrying two miners along with grease tanks and maintenance equipment was "haulage equipment").

After reviewing all evidence presented, I find that a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized that a preoperational inspection was necessary for the particular F-250 truck in question. The F-250 truck was equipped with a fuel tank with a capacity of at least one hundred gallons or 800 pounds of diesel fuel. Tr. 98. Haul Truck Driver Bowman testified that the F-250 was used to fuel the loader and haul truck at the refuse site on a regular basis. As such, the F-250 truck in question was relied upon to transport a significant amount of material (diesel fuel) and involved in a routine part of the mining process. Thus, I find that the F-250 truck fits the definition of haulage equipment previously advanced by the Commission and my fellow ALJs. *Cleveland Cliffs Iron Co. Inc.*, 3 FMSHRC 292-93; *Mach Mining, LLC*, 2013 WL 8541001, \*7.

The Respondent has previously conceded for Citation No. 8202260 that the fuel tank and large toolbox mounted on the bed of the truck blocked the rearview of the truck and required the installation of a back-up alarm. Resp. Br., 3. Accordingly, a reasonably prudent miner would have realized that it was, at a minimum, necessary to inspect the fuel tank and back-up alarm on the truck to ensure that the fuel tank was free of hazardous leaks and the back-up alarm functioned properly.

Although MSHA appears to have adopted CVSA standards as guidelines for some portions of equipment inspections, the Respondent did not introduce any evidence that MSHA had adopted those standards as binding substantive regulations. Indeed, in the absence of a formalized adoption of the CVSA standards, this court declines to constrain MSHA to standards developed for highway use, given the unique and varying hazards presented by differing mining environments.

Additionally, this court need not pass judgement on Inspector Gardner's statement that 30 CFR § 77.1606(a) extends to "anything hauling anything" or the regulation's application to pickup trucks in general. Tr. 78. The F-250 pick-up truck in question carried significant amounts of flammable material, a large toolbox, and hourly miners on a routine basis to locations several miles apart. Thus, Inspector Gardner acted appropriately in determining that this particular F-250 truck operated as haulage equipment and required a pre-operational inspection. For all these reasons, the Secretary has fulfilled their burden in demonstrating that the Respondent violated 30 CFR § 77.1606(a).

*b. Significant and Substantial*

The failure to conduct a preoperational inspection on the F-250 truck constituted a violation of mandatory safety standard 30 CFR § 77.1606(a). This violation contributed to the safety hazard of uncorrected equipment malfunctions including, but not limited to, fuel leaks and inoperable backup alarms. As the truck was operated routinely around both workers on foot and other operating heavy equipment, the hazards of a potential unrepaired fuel leak and missing backup alarm were reasonably likely to result in one miner suffering contamination, burn and struck by injuries of at least a lost time nature. For all these reasons, I affirm Citation No 8202261 as an S&S violation.

*c. Negligence*

As detailed above, A & G employees Bowman and Graham credibly testified that MSHA inspectors had never required pre-operational inspections for pickup trucks or distributed any guidance on the subject. Tr. 183-84; Tr. 203-04. I have found above that a reasonably prudent person should have determined that a preoperational inspection was needed for the F-250 truck on the basis of its large diesel fuel tank and blocked rearview alone. However, I find that the lack of previous enforcement at the Prep Plant site, the absence of official guidance on pickup truck inspection requirements, and the relatively recent arrival of the F-250 truck onsite represent a measure of mitigating circumstances. Therefore, I uphold the moderate negligence level assigned to Citation No 8202261.

*d. Penalty*

The Secretary has proposed a regularly assessed penalty of \$1,203.00. The Respondent is a large operator with a relatively high rate of total violations per inspection day but no previous violations of 30 CFR 77.1606(a). I have found that the Respondent acted with moderate negligence. The Respondent has stipulated that the proposed penalty will not affect its ability to continue in business. I have found that the violation was reasonably likely to result in at least lost time injuries. The parties have stipulated that the Respondent promptly conducted a pre-operational inspection once instructed to do by Inspector Gardner.

After considering this evidence in light of the six statutory factors I uphold the Secretary's proposed penalty and assess a penalty amount of \$1,203.00.

**C. Citation No. 8202263**

Gardner issued Citation No. 8202263 for an alleged violation of 30 CFR §77.205(a) on July 16, 2013. Gardner alleged within the citation that:

Stumbling hazards were observed in the bed of the Ford welding truck # WDT-13 where miners are required to work or travel to obtain tools or parts in the form of welding cables, electrical ext. cords, strips or metal, sledge hammer, 2 gallon jug, and other loose parts.

Jt. Ex. 3, 1.

Gardner designated Citation No. 8202263 as a moderate negligence violation that was reasonably likely to contribute to the occurrence of an injury resulting in lost workdays or restricted duty. Gardner also determined that the failure to eliminate tripping hazards in the bed of the welding truck was significant and substantial. The Secretary has proposed a regularly assessed penalty of \$5,080.00 for Citation No. 8202263.

## 1. Testimony

### *a. The Secretary*

Inspector Gardner testified that after inspecting the Ford F-250 truck he observed a separate Ford welding truck at the mine office parking lot and first inspected the truck's safety features. Tr. 56. Gardner stated that after performing those inspections, he observed seven oxygen/acetylene tanks lying horizontally in the bed and wrote a separate citation for improper tank storage. *Id.* Gardner also stated that there were welding cables, electrical parts, a sledge hammer, and other loose materials that blocked access to the air compressor mounted in the back of the pickup bed. Tr. 56-57. Gardner testified that these items presented a stumbling hazard to anyone who entered the bed to work, retrieve the cutting torches, or start the welding machine. Tr. 59, 66-68. Gardner testified in a non-specific manner regarding the configuration of the truck bed and features of the welding machine:

I'm assuming now, to the best of my recollection, it was like a 4x8. It could have been (a) 4x10. You know, I didn't measure it. I'm just going from remembering the truck a little bit. ...

Some welders - to the best of my knowledge that welder was sitting up on top of the bed, and you would have to crank it. It would be hard to crank it from the ground level because the switches on the welders are in the middle.

I had one of the welders myself that type, and the switch to crank it is in the middle. So you're standing on the ground and your bed is very high and the welder is on top of that, so it's above your arm reach.

Unless you've got a switch on it to where you can put it down here on the bed somewhere and crank it that way, if you have that system -- ....

Tr. 59-61.

Similarly, Gardner stated that he had not observed A & G employees use the welding truck or perform repair work, but stated that in his own work experience he had worked from the bed of a welding truck. Tr. 65-66, 70. Gardner testified that the stumbling hazards in the bed could lead a worker to suffer severe cuts, broken bones, or a serious head injury. Tr. 71, 74.

On cross-examination, Gardner conceded that he had stated during deposition that he "didn't know" whether there had been an air compressor in the bed of the Ford welding truck. Tr. 147. However, Gardner maintained that upon further consideration, he was confident that there had indeed been an air compressor in the bed of the welding truck at the time of the inspection. Tr. 147-148. When questioned by the court whether there were other alternate standards that may regulate the organization of the welding truck bed, Inspector Gardner stated that 30 CFR §

77.208(a), mandating orderly storage of materials within a workplace, did not apply to the bed of the pickup truck as that standard was typically applied to storerooms. Tr.173-175; 30 CFR § 77.208(a).

*b. The Respondent*

A & G Driver Chris Bowman testified regarding the setup and operation of the Ford welding truck. Bowman stated that the truck had toolboxes on the outside of the bed, a welding machine at the front of the bed, and a side compartment where the cutting torches were located. Tr.185. Bowman stated that he did not believe the Ford welding truck had a bed-mounted air compressor. *Id.* Bowman testified that he had never observed any miners working in the bed of the truck. Tr. 184. Bowman stated that the purpose of the cargo space in the truck bed was to haul parts and supplies and that workers could grab needed supplies from either the ground or the truck bumper. Tr. 186. Bowman also stated that the welder could be accessed directly from the ground. *Id.*

A & G Safety Manager Graham also testified that the Ford welding truck had tool cabinets that opened outwards and were accessed from the ground. Tr. 212. Graham stated that the interior cargo space of the truck was used solely to carry tools and supplies and it was not necessary to enter the bed of the truck. Tr. 213-214.

## **2. The Cited Standard**

30 CFR 77.205(a) mandates:

Safe means of access shall be provided and maintained to all working places.

30 CFR 77.205(a).

Commission ALJs have upheld violations issued for failure to maintain safe access to a pickup truck bed when the evidence presented indicated that workers did in fact enter the bed of a pickup truck under unsafe conditions. *Boart Longyear Company*, 34 FMSHRC 106, 120 (January 2014)(ALJ Barbour)(upholding citation issued under parallel surface metal/non-metal standard 30 CFR § 56.11001 when foreman testified that he failed to use a ladder and climbed from the open truck door to the top of an elevated truck bed with loose materials); *LaFarge Bldg. Materials*, 34 FMSHRC 3297, 3301(Dec. 2012) (ALJ Moran)( affirming an alleged violation of housekeeping standard 30 CFR § 56.20003 after crediting Inspector testimony that an air compressor mounted in the truck bed required daily servicing that could only be performed from within the bed of the truck).

However, a Commission ALJ has ruled that 30 CFR § 77.205(a) only regulates the means of *access* to a workplace and does not impose an obligation to maintain the conditions of the workplace itself. *Cloverlick Coal Company*, 36 FMSHRC 2145, 2160 (August 2014)(ALJ McCarthy)(holding that "The clear meaning of §77.205(a) only requires that the means of access to a workplace- be it a ladder, walkway, elevated platform, or other designated route-be free from

safety hazards. The standard does not impose, as the inspector suggests, a general duty on operators to maintain safe workplaces").

### 3. Analysis

I first note that the Secretary prosecuted this case as a violation of 30 CFR § 77.205(a) and declined, when prompted by the court, to consider whether other standards were more appropriate to the facts of the alleged violation. Tr. 173-75. As such, I must determine whether the Secretary has shown that the Respondent failed to maintain safe access to all necessary "working places" of the Ford welding truck. 30 CFR § 77.205(a). After considering all evidence presented, I hold that the Secretary has not demonstrated, by a preponderance of the evidence, that A & G workers entered, or would enter, the bed of the welding truck to either access material or perform repair work in the ordinary course of mining operations.<sup>1</sup>

Inspector Gardner did not observe any workers in the bed of the truck at the time of the inspection. Tr. 56. Gardner did not take any photos of the welding truck bed and offered vague and sometimes contradictory testimony regarding the setup of the welding machine. Tr. 60-61. Gardner did not record the presence of an air compressor within the text of Citation No. 8202263, stated at deposition he was not sure if there was an air compressor on the welding truck, and testified for the first time at hearing that he had decided after "giving it a lot of thought" that there had indeed been an air compressor in the bed of the welding truck. Tr. 147; Jt. Ex. 3, 1. Given these inconsistencies and A & G Haul Truck Driver Bowman's testimony that he did not recall an air compressor mounted in the bed, I have determined that the Secretary has not shown, by a preponderance of the evidence, that there was an air compressor in the bed of the welding truck. Tr. 185.

Furthermore, Gardner did not offer any testimony that he had ever observed workers climb into or work from the bed of a welding or repair truck at the Prep Plant site. Tr. 65-66. Instead, Inspector Gardner appears to have formed his conclusions about the use of the Ford welding truck from his personal work experience repairing farm equipment with his own welding machine. Tr. 61, 65. Gardner claimed that the welding machine on the Ford truck was similar to his own but he did not provide a specific description or model name to support that assertion. Tr. 61. Given that much of Inspector Gardner's testimony regarding the bed setup was reference to his own farm truck or how welding trucks are "usually" or "normally" set up, I have given Inspector Gardner's testimony little weight in evaluating whether it was necessary to enter the bed of this particular Ford welding truck to operate the welder or perform other work. Tr. 59-61; *Mid-Continent Resources*, 6 FMSHRC 1132, 1138. (May 1984)(holding that all inferences

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<sup>1</sup> In making this finding, it is not necessary for me to conclude that A & G workers have never and will never enter the bed of the Ford welding truck. The Secretary has alleged, and must prove by a preponderance of the evidence, that the oxygen/acetylene tanks and other loose materials described within Citation No. 8202263 blocked safe access to the "working places" of the welding truck. GX 3; 30 CFR 77.205(a). For the reasons detailed within, I have concluded that workers accessed and used the welding machine and toolboxes from the ground and that the tanks and loose materials did not impair safe access to the "working places" of the truck. Having made this determination, Citation No. 8202263 must be vacated and an academic inquiry into whether the truck bed is a work place or cargo space is unnecessary.

must be supported by a rational connection between the evidentiary facts and the ultimate fact inferred).

Additionally, A & G employees Bowman and Graham credibly testified that they were familiar with the Ford welding truck and that tools and the welding machine could be accessed and used without climbing into the bed of the truck. Tr. 186; 213-14. Both Bowman and Graham also stated that it was easy to unload the loose materials described in the citation from the bed by simply lowering the tailgate and removing stored materials from ground level. Tr. 186; 214-15. Having held that workers did not enter the bed of the welding truck, I have determined that the presence of oxygen/acetylene tanks and other loose materials in the bed of the truck did not impair necessary access to the welding machine, exterior mounted toolboxes, or cargo space of the truck bed. Therefore, Citation No. 8202263 is **VACATED**.

### III. SETTLEMENT

The Secretary has filed a motion to approve settlement of seven of the citations contained in this matter. Pursuant to 29 C.F.R. § 2700.1(b) and Fed. R. Civ. P. 12(f), I strike paragraphs three and four from the Secretary's Motion as immaterial and impertinent to the issues legitimately before the Commission.<sup>2</sup> The paragraphs incorrectly cite and interpret the case law and misrepresent the statute, regulations, and Congressional intent regarding settlements under the Mine Act.

Instead, I have considered the provided specific factual explanations for the agreed upon settlement per sections 110(i) and 110(k) of the Act. I acknowledge and accept the explanation for the agreed upon settlement contained in the parties' settlement motion and amendments. The originally assessed amount was \$3,227.00 and the proposed settlement is for \$2,111.00. The parties have agreed to bear their own legal fees associated with this matter, including costs which may be available under the Equal Access to Justice Act. The parties have moved to approve the proposed settlement as follows.

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<sup>2</sup> The Secretary's Motion for Decision and Order Approving Settlement reads in pertinent part:

3. In reaching this settlement, the Secretary has evaluated the value of the compromise, the likelihood of obtaining a still better settlement, the prospects of coming out better, or worse, after a full trial, and the resources that would need to be expended in the attempt. The Secretary has determined that the public interest and the effective enforcement and deterrent purposes of the Mine Act are best served by settling the citation as indicated above.

4. Consistent with the position the Secretary has taken before the Commission in *The American Coal Company*, LAKE 2011-13, the Secretary believes that the pleadings in this case and the above summary give the Commission an adequate basis for exercising its authority to review and approve the Secretary's settlement under Section 110(k) of the Mine Act, 30 U.S.C. § 820(k).

Citation No.	Originally Proposed Assessment	Settlement Amount	Modification
<b>VA 2014-11</b>			
8202262	\$1,203.00	\$600.00	Modify Chance of Injury or Illness from "Reasonably Likely" to "Unlikely"  Remove "Significant and Substantial" Designation
8202264	\$634.00	\$634.00	
8178266	\$127.00	\$127.00	
8202265	\$946.00	\$450.00	Modify Chance of Injury or Illness from "Reasonably Likely" to "Unlikely"  Remove "Significant and Substantial" Designation
8202269	\$117.00	\$100.00	Reduce Monetary Penalty
8202270	\$100.00	\$100.00	
8202271	\$100.00	\$100.00	
<b>Total</b>	<b>\$3,227.00</b>	<b>\$2,111.00</b>	

I have considered the representations and documentations submitted and I conclude that the proposed settlement is appropriate under the criteria set forth in section 110(i) of the Act. The motion to approve partial settlement is **GRANTED** and the citations contained in this docket are **MODIFIED** as set forth above.

#### IV. ORDER

As set forth within, Citation Nos. 8202260 and 8202261 are **AFFIRMED** as originally written and assessed with an individual penalty of \$1,203.00 each. Citation No. 8202263 is **VACATED**. Citation Nos. 8202262, 8202264, 8178266, 8202265, 82202269, 82202270, 8202271 are **MODIFIED** as set forth above for a partial settlement total of \$2,111.00.

Accordingly, A & G Coal Corporation is **ORDERED** to pay the Secretary of Labor the total sum of **\$4,517.00** within 30 days of this order.<sup>3</sup>

/s/ David P. Simonton  
David P. Simonton  
Administrative Law Judge

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James F. Bowman, A & G Coal Corporation, P.O. Box 99, Midway, WV 25878

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<sup>3</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  
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May 21, 2015

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

v.

WEST RIDGE RESOURCES,  
INCORPORATED,  
Respondent

CIVIL PENALTY PROCEEDING

Docket No. WEST 2013-232  
A.C. No. 42-02233-306321

Docket No. WEST 2013-722  
A.C. No. 42-02233-317947

Mine: West Ridge Mine

**DECISION**

Appearances: Sean J. Allen, Esq., U.S. Dept. of Labor, Office of the Solicitor, Denver, Colorado, for Petitioner;

Jason W. Hardin, Esq., and Artemis D. Vamianakis, Esq., Fabian & Clendenin, Salt Lake City, Utah, for Respondent.

Before: Judge Bulluck

These cases are before me upon Petitions for Assessment of Civil Penalty filed by the Secretary of Labor (“Secretary”) on behalf of his Mine Safety and Health Administration (“MSHA”), against West Ridge Resources, Incorporated (“West Ridge”), pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). The Secretary seeks a total civil penalty in the amount of \$82,642.00 for eleven alleged violations of his mandatory safety standards.<sup>1</sup>

A hearing was held in Salt Lake City, Utah. The issues before me are: (1) whether Respondent violated 30 C.F.R. §§ 75.362(a)(2) and 48.7; (2) whether the violations were significant and substantial; (3) whether the violations were a result of West Ridge’s reckless disregard; and (4) whether the violations were attributable to West Ridge’s unwarrantable failure to comply with the standard, where alleged. The parties’ Post-hearing Briefs are of record.

For the reasons set forth below, I **AFFIRM** one order, as issued, **VACATE** one order, assess a penalty against Respondent, and approve the parties’ Partial Settlement.

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<sup>1</sup> The parties reached a settlement on nine of the eleven contested citations and orders. The total civil penalty proposed for the two remaining orders is \$71,242.00.

## I. Stipulations

The parties stipulated as follows:

1. West Ridge is engaged in mining operations in the United States and these mining operations affect interstate commerce;
2. West Ridge is the owner and operator of the West Ridge Mine, Mine I.D. No. 42-02233;
3. West Ridge is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801;
4. The Administrative Law Judge has jurisdiction in this matter;
5. The orders at issue herein are properly served by a duly authorized representative of the Secretary upon an agent of West Ridge on the dates and places stated therein, and may be admitted into evidence for the purpose of establishing their issuance, but not for the truthfulness or relevance of any statements asserted therein, or for any other purpose other than establishing their issuance;
6. The exhibits offered by the parties are stipulated to be authentic, but no stipulation is made as to the relevance or truth of the matters asserted therein.

Tr. 6.

## II. Factual Background

West Ridge owns and operates the West Ridge Mine, an underground coal mine in Carbon County, Utah. On September 14, 2012, MSHA Inspector William Vetter, as part of a five-person inspection team, traveled to the mine to conduct a health impact inspection on the day shift. Tr. 12-13, 81. After arriving that morning, Vetter, MSHA Inspector James Martin, and company representative Val Udovich traveled to the 10 East working section. Tr. 15, 22, 118; Ex. P-3 at 5. Upon reaching the section, Vetter observed continuous miner operator Daniel Espino standing near a continuous miner that had been taken out of service due to a broken water hose. Tr. 16. Vetter then asked Espino whether he had taken certain air measurements, although the actual exchange between the parties is disputed. Tr. 17-19, 169-71, 193-94. After that conversation, section foreman Jeff Failor arrived on the scene, and also engaged in a conversation with Vetter about the scrubber air reading on the continuous miner.<sup>2</sup> Tr. 18-20, 205-08. Thereafter, Vetter issued an order to West Ridge for its failure to measure the scrubber velocity on the continuous miner as part of the on-shift examination, and another for its failure to train Espino on taking the scrubber velocity measurement. Tr. 23; Ex. P-3, P-8.

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<sup>2</sup> A scrubber is a high-velocity fan attached to a continuous miner which draws air from the front of the miner through a screen. The screen captures dust, and clean air is discharged. Tr. 36-37.

### III. Findings of Fact and Conclusions of Law

#### A. Order No. 8481679

##### 1. Fact of Violation

Vetter issued 104(d)(2) Order No. 8481679, alleging a “significant and substantial” violation of section 75.362(a)(2) that was “reasonably likely” to cause an injury that could reasonably be expected to be “permanently disabling,” and was caused by West Ridge’s “reckless disregard” and “unwarrantable failure” to comply with the standard.<sup>3</sup> The “Condition or Practice” is described as follows:

An inadequate on-shift examination was conducted in 10 east working section (MMU-004) in regard to compliance with the respirable dust control parameters specified in the approved ventilation plan. The person designated by the operator to conduct the examination completed a portion of the examination but failed to measure the scrubber velocity on continuous miner JM 5062, unit #11-07. A 30-foot cut had been made in the No. 1 bleeder entry working face without the examination being completed.

The section foreman was aware of the incomplete examination and reportedly instructed the miner operator to commence mining coal and the examination would be completed later. This is aggravated conduct constituting more than ordinary negligence.

The MMU-004 working section is on a reduced standard of 0.9 mg/m<sup>3</sup> and over the last 12 months there have been five respirable dust samples revealing over exposure. This violation is an unwarrantable failure to comply with a mandatory standard.

Ex. P-3. The Order was terminated after the scrubber velocity reading was taken.

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<sup>3</sup> 30 C.F.R. § 75.362(a)(2), “On-shift examination,” provides that “[a] person designated by the operator shall conduct an examination to assure compliance with the respirable dust control parameters specified in the mine ventilation plan. In those instances when a shift change is accomplished without an interruption in production on a section, the examination shall be made anytime within 1 hour of the shift change. In those instances when there is an interruption in production during the shift change, the examination shall be made before production begins on a section. Deficiencies in dust controls shall be corrected before production begins or resumes. The examination shall include air quantities and velocities, water pressures and flow rates, excessive leakage in the water delivery system, water spray numbers and orientations, section ventilation and control device placement, and any other dust suppression measures required by the ventilation plan. Measurements of the air velocity and quantity, water pressure and flow rates are not required if continuous monitoring of these controls is used and indicates that the dust controls are functioning properly.”

In order to establish a violation of one of his mandatory safety standards, the Secretary must prove that the violation occurred “by a preponderance of credible evidence.” *Keystone Coal Mining Corp.*, 17 FMSHRC 1819, 1838 (Nov. 1995) (citing *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989)).

The Secretary argues that West Ridge failed to take the scrubber velocity reading on the continuous miner as part of the on-shift examination, which was required to be conducted prior to commencement of mining on the shift. Sec’y Br. at 6-7.

In response, West Ridge contends that the scrubber velocity must have been checked, because all of the other dust parameter checks had been performed on the continuous miner, and mining would not have begun without the reading having been taken. Resp’t Br. at 5-7. It further argues that Espino did not understand that Vetter was asking him whether he had taken the scrubber reading; Espino’s unresponsive answer mistakenly led Vetter to believe that Espino had not taken the reading. Resp’t Br. at 3-4. The confusion continued, it argues, when Failor indicated that he had not received the scrubber reading and Vetter, once again, drew an erroneous conclusion, believing Failor’s statement to mean that he had instructed Espino to begin mining and had told him that he, Failor, would check the scrubber later. Resp’t Br. at 4-5. West Ridge also points out that it had not been cited for excess respirable dust in the two-year period preceding issuance of this Order. Resp’t Br. at 9-12.

Vetter had worked for MSHA for approximately 23 years, including 17 years as a regular inspector.<sup>4</sup> Tr. 8-11. He testified that when he came upon the out-of-service continuous miner, Espino informed him that the water hose had been damaged and was being fixed. Tr. 15-16. Espino continued that the crew had cut 30 feet of coal at the face, and had used the scrubber up until the hose ruptured. Tr. 17. Vetter then asked Espino for the scrubber reading and, receiving no response, asked about the hydrogen sulfide reading, which Espino offered.<sup>5</sup> Tr. 17-18. Vetter asked again about the scrubber reading and, according to Vetter, Espino lowered his voice and replied “I don’t know, I didn’t take it.” Tr. 18; Ex. P-3 at 4. Espino added that no one else had taken the reading because the section foreman had directed him to start mining, and had stated that he, the foreman, would take the reading later. Tr. 18-19. Espino then explained that the regular miner operator takes the reading, that he was just the miner helper filling in, and that he did not know how to take the scrubber reading. Tr. 19. According to Vetter, Failor then arrived on the scene and, in an apologetic tone, stated that he had, indeed, told Espino to start mining, and that he would check the scrubber later. Tr. 19-20; Ex. P-3 at 4. Failor allegedly also told Vetter that he had not taken the scrubber measurement because he had had other things to do on the section. Tr. 19-20; Ex. P-3 at 5. Vetter then informed Failor that the respirable dust parameters were required to be checked before cutting coal, and that he would be issuing a 104(d) order. Tr. 20-21.

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<sup>4</sup> At the time of the hearing, Vetter served as a health specialist. Tr. 11.

<sup>5</sup> Vetter explained that the scrubber velocity check is performed by inserting a Pitot tube into a scrubber duct port directed toward the air path, and the velocity pressure then registers on a Magnehelic gauge. Tr. 135-39.

Vetter explained that West Ridge's ventilation plan requires that the scrubber be used when cutting coal further than 20 feet, and that the reading be taken before the start of the shift. Tr. 25-30; Ex. P-4 at 3. According to Vetter, because West Ridge had not been actively mining on the section during the previous shift, section 75.362(a)(2) requires that the scrubber velocity check be performed before cutting coal. Tr. 32. He added that if West Ridge were to continue mining without checking the scrubber velocity, the continuous miner operator could become exposed to excess respirable dust and develop pneumoconiosis or silicosis. Tr. 39-42, 52-54. He opined that the danger of contracting respiratory disease was heightened because the section was on a reduced standard for quartz, and had had five reported dust overexposures prior to issuance of his Order.<sup>6</sup> Tr. 40-41, 47-51; Ex. P-6. On cross-examination, Vetter conceded that the overexposures were not in violation of section 70.101, because compliance is determined by comparing the average of five samples to the applicable dust standard. Tr. 91-92, 112-14.

Espino gave a different account of his conversation with Vetter. He testified that Vetter began the discussion by asking him for the velocity measurement which, Espino believed, referred to the air velocity at the face; he responded that he had to have 12,000 cfm in the face and 22,000 cfm in the last open crosscut to run the miner, but that that reading was usually taken by a foreman. Tr. 169-70. Vetter then allegedly replied, "that's not your face, what's your velocity?" Tr. 170. Espino stated that he believed Vetter to be referring to the air velocity in the last open crosscut but, after a minute or two of other conversation about which Espino did not elaborate, Vetter left him and began talking to Failor. Tr. 170-71. Espino testified that he had "no clue" that Vetter was referring to the scrubber velocity, because Vetter did not specifically use that term; he, Espino, refers to it as the "mag reading," or "mag velocity." Tr. 164-65, 171. According to Espino, when Vetter asked about the velocity, "[t]hat's when it all went bad, you know, and I didn't know if I was in trouble." Tr. 194.

Espino clearly remembered some events surrounding Vetter's inspection, but could not remember others. During direct examination, Espino testified to the position of the face, entries, last open crosscut, continuous miner, ventilation tubes, mine fan, and where he was stationed when he encountered Vetter; and he drew a corresponding diagram. Tr. 174-181; Ex. R-25. Espino also remembered checking the bits and sprays as part of his parameter checks. Tr. 182. However, he testified that he could not remember whether the mechanic or Failor took the scrubber reading, the mechanic's name, the total distance of the cut, or any conversation with Vetter before or after he was asked about the air velocity. Tr. 182, 184-85, 189-92. Initially, Espino testified that he could not remember whether Failor told him to begin mining and that he would check the scrubber velocity later; then he did an about-face and declared that Failor had not said that. Tr. 172-73. Espino admitted, however, that, as the miner operator, he was the person designated to conduct the on-shift examination. Tr. 190.

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<sup>6</sup> 30 C.F.R. § 70.101, "Respirable dust standard when quartz is present," provides that "[w]hen the respirable dust in the mine atmosphere of the active workings contains more than 5 percent quartz, the operator shall continuously maintain the average concentration of respirable dust in the mine atmosphere during each shift to which each miner in the active workings is exposed at or below a concentration of respirable dust . . . in terms of an equivalent concentration . . . computed by dividing the percent of quartz into the number 10."

Failor testified that he first encountered Vetter while coming down the Number 2 Entry toward the last open crosscut. Tr. 205-06. According to Failor, upon identifying himself as the section foreman, Vetter informed him that he would be issuing an order to West Ridge; then, as they walked toward the continuous miner, Vetter talked about the dangers of respirable dust exposure. Tr. 206. Initially, Failor testified that he could not recall any other conversation with Vetter but, when confronted with the statement in Vetter's notes, that he "indicated that he had other things to attend to before he could measure the scrubber air," Failor stated that he actually said "I had things to attend to; I hadn't received the scrubber reading yet." Tr. 206-08; Ex. P-3 at 5. Failor also denied directing Espino to begin mining before the scrubber reading was taken, but admitted that he never saw Espino or the mechanic, who he identified as Chris Walkingshaw, check the scrubber velocity. Tr. 208-09.

I fully credit the Secretary's version of events, based on Vetter's testimony and his contemporaneous notes, that Espino told Vetter that he did not take the reading, that Failor had directed Espino to start mining, and that Failor had told Espino that he would take the scrubber reading later. Consistent with this finding, the evidence supports a finding that Espino told Vetter that he did not know how to perform the scrubber check, especially in light of his admission that he was concerned about whether he was "in trouble." This statement was probably a knee-jerk reaction to the stressful probability of being cited since, as will be more fully discussed, it was not at all true. Failor's account of events is simply implausible based on the record, and I do not find credible his denial of having directed Espino to start mining without having performed the check. Notably, West Ridge only urges that performance of the check be inferred, rather than advancing an argument that it actually had been performed.

The purpose of requiring that parameter checks be performed on a continuous miner prior to commencement of mining, or within an hour of a shift change where no break in production has occurred, is made clear by the language of the standard - - so that deficiencies in dust suppression equipment can be detected and corrected prior to active mining or fairly early in a mining cycle - - a goal obviously intended to limit miners' overexposure to respirable dust. It is equally clear that Failor's conduct amounted to gambling with the health of his crew. I find as fact that the scrubber check was required prior to cutting coal on the shift, a contention advanced by the Secretary that is unchallenged. Therefore, because the operator failed to ensure that the on-shift examination of the continuous miner was completed by checking the scrubber velocity prior to commencement of mining, I find that West Ridge violated section 75.362(a)(2).

## **2. Significant and Substantial**

To prove that a violation is "significant and substantial" ("S&S") under *National Gypsum*, 3 FMSHRC 822 (Apr. 1981), the Secretary must establish the four criteria set forth by the Commission in *Mathies Coal Company*, 6 FMSHRC 1 (Jan. 1984). The Secretary bears the burden of proving: 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 injury; and 4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. *Mathies*, 6 FMSHRC 1, 3-4; *see also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133,135 (7th Cir. 1995); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021

(Dec. 1987) (approving *Mathies* criteria). Evaluation of the third criterion, the reasonable likelihood of injury, should be made in the context of “continued normal mining operations.” *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). Moreover, resolution of whether a violation is S&S must be based “on the particular facts surrounding that violation.” *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (Apr. 1998); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007, 2011-12 (Dec. 1987). The Secretary must prove that there is a reasonable likelihood that the hazard contributed to by the violation will cause an injury, not a reasonable likelihood that the violation, itself, will cause injury. *Musser Eng’g, Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010); *Peabody Midwest Mining, LLC*, 762 F.3d 611, 616 (7th Cir. 2014). The Commission and its judges have found violations for inadequate pre-shift and on-shift examinations to be S&S regardless of whether hazards were detected. *See Buck Creek Coal Co.*, 17 FMSHRC 8 (Jan. 1995); *ICG Knott County, LLC*, 33 FMSHRC 402, 411-12 (Feb. 2011) (ALJ); *ICG Hazard, LLC*, Unpub. Dec., slip op. at 17-20 (Oct. 2012) (ALJ) (finding that lack of an adequate on-shift examination of a continuous miner contributes to the hazard of miners failing to be on guard against exposure to respirable dust).

The fact of violation has been established. The second criterion of the *Mathies* test has been met, in that the inadequate on-shift examination, deficient in completion of parameter checks on the continuous miner, increased the odds of miners’ overexposure to hazardous concentrations of respirable dust. Inhalation of respirable dust would be reasonably likely to result in permanently disabling pneumoconiosis or silicosis. Therefore, I find that the violation was S&S.

### **3. Negligence and Unwarrantable Failure**

Unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec. 1987). Unwarrantable failure is characterized by such conduct as “reckless disregard,” “intentional misconduct,” “indifference,” or a “serious lack of reasonable care.” *Id.* at 2001-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); *see also Buck Creek Coal*, 52 F.3d at 136. The Commission has recognized the relevance of several factors in determining whether conduct is “aggravated” in the context of unwarrantable failure, such as the extensiveness of the violation, the length of time that the violation has existed, whether the violation posed a high degree of danger, whether the violation was obvious, the operator’s knowledge of the existence of the violation, the operator’s efforts in abating the violative condition, and whether the operator has been put on notice that greater efforts are necessary for compliance. *See Wolf Run Mining Co.*, 35 FMSHRC 3512, 3520 (Dec. 2013); *Consolidation Coal Co.*, 35 FMSHRC 2326, 2330 (Aug. 2013); *Manalapan Mining Co.*, 35 FMSHRC 289, 293 (Feb. 2013). Each case must be examined on its own facts to determine whether an actor’s conduct is aggravated, or whether mitigating circumstances exist. *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000). Although some factors may be irrelevant to a particular scenario, all relevant factors must be examined. *ICG Hazard, LLC*, 36 FMSHRC 2635, 2637-38 (Oct. 2014) (citing *IO Coal*, 31 FMSHRC 1346, 1351 (Dec. 2009)).

In arguing that West Ridge’s conduct was characterized by a reckless disregard of the standard that rose to the level of an unwarrantable failure to comply with its terms, the Secretary points out that the violation was extensive, since West Ridge had mined 30 feet of coal before

conducting the check, and highly dangerous, because miners were unaware of possible exposure to hazardous concentrations of respirable dust. Sec’y Br. at 13-14.

West Ridge counters that its negligence was mitigated by its check of the other parameters on the continuous miner, maintenance of adequate ventilation at the face and in the last open crosscut, and idling of the continuous miner after the water-line break. Resp’t Br. at 14-15. It also notes that the scrubber had been used on the shift during the morning cut and, when checked by Vetter, had a compliant velocity. Resp’t Br. at 15. Specifically addressing the unwarrantable failure allegation, West Ridge points out that the cut lasted only between 45 minutes and an hour and 15 minutes, that the condition was isolated to a single continuous miner on one shift, that West Ridge had no prior citations for violations of the standard, that it had trained Espino on the on-shift examination requirements, and that Failor believed that the scrubber velocity had been measured. Resp’t Br. at 15-18.

Failor’s instruction to Espino to begin mining prior to completion of the on-shift examination of the continuous miner, demonstrates his reckless disregard of the standard’s requirements and, as an agent of the operator, his negligence is imputable to West Ridge. *See Nelson Quarries, Inc.*, 31 FMSHRC 318, 329 (Mar. 2009). Furthermore, I find that West Ridge’s use of the scrubber during the shift’s 30 foot cut, prior to having taken the reading, aggravates, rather than mitigates, its negligence. The fact that the untimely scrubber reading turned out to be compliant by no means lessens the uncertain outcome of rolling the dice - - an impermissible gamble with the miners’ health and safety. Respecting the unwarrantable failure charge, the Commission has recently recognized that knowledge of an obvious violation clearly constitutes aggravated conduct in support of an unwarrantable failure determination. *Wolf Run*, 35 FMSHRC at 3521. Given that the section was subject to a reduced standard due to excess quartz, and had registered overexposures of respirable dust, the deliberateness of the operator’s failure to timely complete the scrubber check on the continuous miner was highly dangerous, and far outweighs other factors, such as extensiveness, efforts to abate, duration of violation, and notice of the need for greater compliance. Therefore, I find that the Secretary has met his burden of establishing that West Ridge displayed a reckless disregard of the standard, and aggravated conduct that constitutes unwarrantable failure.

## **B. Order No. 8481680**

### **1. Fact of Violation**

Vetter issued 104(g)(1) Order No. 8481680, alleging a “significant and substantial” violation of section 48.7 that was “reasonably likely” to cause an injury that could reasonably be expected to be “permanently disabling,” and was attributable to West Ridge’s “reckless disregard.”<sup>7</sup>

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<sup>7</sup> 30 C.F.R. § 48.7, “Training of miners assigned to a task in which they have had no previous experience; minimum courses of instruction,” provides that “[m]iners assigned to new work tasks . . . shall not perform new work tasks . . . until training . . . has been completed. This training shall not be required for miners who have been trained and who have demonstrated safe operating procedures for such new work tasks within 12 months preceding assignment. This

(continued...)

The “Condition or Practice” is described as follows:

Daniel Espino, continuous miner operator, was designated by the operator to conduct the on-shift examination to assure compliance with the respirable dust control parameters specified in the mine ventilation plan as required by 30 C.F.R. 75.362(a)(2). Mr. Espino indicated he was unfamiliar with the procedures for measuring the scrubber velocity on continuous miner JM 5062, unit 11-07 on working section 10 East, MMU-004. The scrubber velocity was not measured prior to a 30-foot cut being made. The section foreman was aware of the incomplete examination and instructed Mr. Espino to commence mining coal from the No. 1 working face. The Federal Mine Safety and Health Act of 1977 declares an untrained miner a hazard to himself and others.

Ex. P-8. The Order was terminated when Espino was trained.

The Secretary argues, based on Espino’s statement to Vetter that he did not know how to perform the scrubber check, that Espino was not trained to take the scrubber velocity reading on the continuous miner. Sec’y Br. at 19.

Here, again, West Ridge claims that Espino was confused by Vetter’s inquiry, leading to Vetter’s mistaken belief that Espino had not been trained to conduct the scrubber check. Resp’t Br. at 3, 22. It argues that, indeed, Espino had been trained to conduct the on-shift examination of the continuous miner, initially by foreman Tyler Norton in July of 2011; since becoming a regular continuous miner operator in April of 2012, Espino had been performing the parameter checks on his equipment. Resp’t Br. 22-23.

Vetter explained that the standard requires equipment operators to receive training before running unfamiliar equipment, and that Espino had told him that he did not know how to perform the scrubber check. Tr. 69-70; Ex. P-8 at 3, 5. In reviewing Espino’s July 27, 2011 training record, Vetter observed that while the record notes that Espino received training as a “miner operator/helper,” it does not indicate that Espino was trained as a designated person to conduct on-shift examinations of the continuous miner. Tr. 72-73; Ex. P-9 at 2.

Espino testified assertively that he knew how to take the scrubber velocity reading, and vehemently denied telling Vetter that he did not know how to do it. Tr. 167, 183. He explained that he had first received continuous miner training while serving on foreman Norton’s crew as a roof bolter, in preparation for substituting for the regular miner operator. Tr. 156-59. Referring to his training records, Espino testified that on July 27, 2011, Norton had trained him to change bits and serve as a miner helper and, five months before the inspection, he had become a full-time miner operator on foreman Bill Anderson’s crew. Tr. 159, 160-62; Ex. P-9 at 2. Espino stated that he had gotten into an argument with supervisor Scott Jones, who administered the training to

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<sup>7</sup> (...continued)

training shall also not be required for miners who have performed the new work tasks and who have demonstrated safe operating procedures for such new work tasks within 12 months preceding assignment . . . .”

abate the violation, because he thought that it was “dumb” that he be required to be trained in a task that he already knew how to perform. Tr. 172.

Tyler Norton testified that he had been a section foreman at West Ridge for almost five years, and that he had trained Espino to operate the continuous miner when his regular miner operator took a vacation. Tr. 213-14. Norton explained that he had begun task training Espino on July 27, teaching him how to conduct all parameter checks on the continuous miner. Tr. 215-219; Ex. P-9 at 2, R-18 at 1. He recalled that on that day he had taken the scrubber reading, and shown Espino how to take the measurement; he estimated that he had supervised Espino for approximately 85 percent of that day’s ten-hour shift. Tr. 220-22. Espino’s training continued on July 28, when Espino took the scrubber reading under Norton’s supervision, and did likewise on the following day. Tr. 222; Ex. R-18 at 2, 3. Failor also testified that Espino had been trained to perform the check, and that he had seen him take the reading. Tr. 204.

As has been discussed, the evidence establishes that sufficient conversation had transpired between Vetter and Espino for Espino to have understood Vetter’s inquiry about the scrubber velocity, and that Espino told Vetter that he did not know how to take the measurement. It is also clear, based on Espino’s training records and credible testimony of foremen Norton and Failor, that Espino had been task trained to take the scrubber reading and had, in fact, done so on previous occasions. A reasonable analysis of the facts leads to an obvious conclusion that Espino attempted to avoid the consequences of his incomplete on-shift examination of the continuous miner by misleading Vetter. Given the outcome of the lie, suffice it to say that lying to the inspector was a bad idea. Moreover, it is highly implausible that Espino would have served as a continuous miner operator for five months without knowing how to perform all essential dust control checks on the equipment that he operated; according to the record, the scrubber velocity check is not difficult to perform. Indeed, on the witness stand, Espino appeared insulted by the suggestion that he was somehow lacking in all aspects of operating his equipment. Therefore, while it was reasonable for Vetter to have concluded that Espino had not been task trained, the facts bear out the opposite conclusion, and I find that the Secretary has failed to prove a violation of section 48.7.

#### **IV. Penalty**

While the Secretary has proposed a civil penalty of \$52,500.00 for Order No. 8481679, the Judge must independently determine the appropriate assessment by proper consideration of the six penalty criteria set forth in section 110(i) of the Act, 30 U.S.C. § 820(i). *See Sellersburg Co.*, 5 FMSHRC 287, 291-92 (Mar. 1983), *aff’d* 736 F.2d 1147 (7th Cir. 1984).

West Ridge’s Assessed Violation History Report for the two-year period preceding the subject inspection indicates that 646 violations had become final orders of the Commission. None of these violations, however, was of section 75.362(a)(2) or section 70.101, the standard governing respirable dust when quartz is present. Ex. P-1. Therefore, I do not find West Ridge’s violations history to be an aggravating factor in assessing a penalty. I also find that West Ridge is a large operator, that the proposed penalty will not affect its ability to continue in business, and that it demonstrated good faith in achieving rapid compliance after notice of the violation. Ex. P-13 at 1. The remaining criteria involve consideration of the gravity of the violation, and West

Ridge's negligence in committing it. These factors have been discussed fully, and it has been established that this S&S violation of section 75.362(a)(2) was reasonably likely to cause permanently disabling injuries, and that West Ridge displayed a reckless disregard that constituted unwarrantable failure to comply with the standard.

Both parties' arguments concerning this specially assessed penalty focus on the overexposures of respirable dust detected on the cited section. Vetter testified that he made his recommendation for a special assessment based on the five reported dust overexposures, and that an increased penalty would serve as a deterrent. Tr. 68; Ex. P-6. The same justification is given in MSHA's Narrative Findings for a Special Assessment, and the Secretary incorporates this argument in his Brief, along with previous contentions concerning gravity and negligence. Ex. P-13 at 2; Sec'y Br. at 17. West Ridge asserts that it was in compliance with the applicable respirable dust standard and, accordingly, did not receive a single violation of section 70.101 in the two years prior to inspection. Resp't Br. at 9-12, 19-20. I find the Secretary's justification for specially assessing the proposed penalty for this Order somewhat overreaching, given that the average of the samples was in compliance with the applicable standard. The Secretary's Special Assessment Narrative reflects that under a regular assessment applying Part 100 penalty points, this violation would have been assessed at \$18,742.00. Ex. P-13 at 1. While I note that West Ridge had received no prior violations of this on-shift examination standard or the applicable dust standard, I also give consideration to the five overexposures. Therefore, having considered the six *Sellersburg* criteria, I find that a penalty of \$30,000.00 is appropriate.

## V. Approval of Settlement

The parties have filed a Motion to Approve Settlement and Order Payment respecting docket No. WEST 2013-232; and Citation No. 8461981 has been vacated. Pursuant to 29 C.F.R. § 2700.1(b) and Fed. R. Civ. P. 12(f), I strike paragraphs six and seven from the Secretary's motion as immaterial and impertinent to the issues legitimately before the Commission.<sup>8</sup> The

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<sup>8</sup> The Secretary's Motion to Approve Settlement and Order Payment reads in pertinent part:

6. In reaching this settlement, the Secretary has evaluated the value of the compromise, the likelihood of obtaining a still better settlement, the prospects of coming out better, or worse, after a full trial, and the resources that would need to be expended in the attempt. The Secretary has determined that the public interest and the effective enforcement and deterrent purposes of the Mine Act are best served by settling the citations as indicated above.

7. Consistent with the position the Secretary has taken before the Commission in *The American Coal Company*, LAKE 2011-13, the Secretary believes that the pleadings in this case and the above summary give the Commission an adequate basis for exercising its authority to review and approve the Secretary's settlement under Section 110(k) of the Mine Act. 30 U.S.C. § 820(k)

paragraphs incorrectly cite and interpret the case law, and misrepresent the statute, regulations, and Congressional intent regarding settlements under the Mine Act.

A reduction in penalty from \$11,400.00 to \$6,161.00 is proposed. The citations, initial assessments, and proposed settlement amounts are as follows:

<u>Citation No.</u>	<u>Initial Assessment</u>	<u>Proposed Settlement</u>
8462038	\$ 2,473.00	\$ 1,500.00
8462088	\$ 1,111.00	\$ 1,111.00
8459239	\$ 1,530.00	\$ 800.00
8459240	\$ 1,530.00	\$ 800.00
8462039	\$ 207.00	\$ 100.00
8461978	\$ 807.00	\$ 450.00
8482037	\$ 1,026.00	\$ 600.00
8461980	\$ 1,304.00	\$ 800.00
8461981	\$ 1,412.00	\$ 0.00
TOTAL:	\$11,400.00	\$ 6,161.00

I have considered the representations and documentation submitted in these matters under section 110(k) of the Act. Specifically, regarding Citation No. 8462038, the Secretary has credited Respondent's contention that the air velocity was sufficient at the beginning of the shift and, unknown to the operator, a Band-Aid became stuck in the fan, causing the drop in velocity. Regarding Citation Nos. 8469239 and 8469240, the Secretary has credited Respondent's contentions that it provided two layers of screen guarding over the fan blades, and that this guarding had been in place for previous inspections and not cited. Regarding Citation No. 8462039, the Secretary has credited Respondent's contention that the cited area was neither a working section nor a permanent oil storage location. Regarding Citation No. 8461978, the Secretary has credited Respondent's contentions that the ventilation map on the working section was accurate, and that the miners on the section would not be affected by the inaccurate mine manager's map. Regarding Citation No. 8482037, the Secretary has credited Respondent's contentions that the gap on the light switch housing on the scoop occurred after the last inspection, and that the inspecting electrician was not an agent of the operator. Regarding Citation No. 8461980, the Secretary has credited Respondent's contention that the operator ceased mining activity when its monitoring system reached 1.95 percent methane. Accordingly, I conclude that the proffered settlement is appropriate under section 110(i) of the Act.

**ORDER**

**WHEREFORE**, it is **ORDERED** that Order No. 8481680 is **VACATED**; that Citation Nos. 8462038, 8462088, 8462039 and 8461980 and Order No. 8481679 are **AFFIRMED**, as issued; that the Secretary **MODIFY** Citation No. 8461978 to reduce the level of gravity to “2 persons affected;” and Citation Nos. 8459239, 8459240 and 8482037 to reduce the degree of negligence to “low;” and that West Ridge Resources, Incorporated, **PAY** a civil penalty of \$36,161.00 within 30 days of the date of this Decision.<sup>9</sup>

/s/ Jacqueline R. Bulluck  
Jacqueline R. Bulluck  
Administrative Law Judge

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/ss

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<sup>9</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. Please include Docket numbers and A.C. numbers.

# 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

May 26, 2015

SECRETARY OF LABOR, MSHA, on  
Behalf of Charles Riordan,  
Complainant,

v.

KNOX CREEK COAL CORPORATION,  
Respondent,

DISCRIMINATION PROCEEDING

Docket No. VA 2014-343-D  
NORT CD 2014-03

Mine: Tiller Number 1  
Mine ID: 44-06804

## DECISION PENDING FINAL ORDER

Appearances: Wes Addington, Esq., Appalachian Citizens Law Center, Whitesburg, Kentucky, for Complainant  
Karen Barefield, Esq., U.S. Department of Labor, Office of the Solicitor, Arlington, Virginia, for the Secretary of Labor  
Stephen Hodges, Esq., Penn Stuart & Eskridge, Abingdon, Virginia, for the Respondent

Before: Judge Moran

### Introduction

This case is before the Court upon a Complaint of Discrimination under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2). For the reasons which follow, the Court finds that Complainant Charles Riordan engaged in protected activity, that subsequently he was terminated, and that his employment termination was motivated at least in part by that activity. Further, Respondent Knox Creek Coal did not prove that it was also motivated by the miner's unprotected activity and that it would have taken the adverse action for the unprotected activity alone. Accordingly, Mr. Riordan's discrimination claim is upheld.

The basics of a discrimination claim under the Mine Act are well-established and clear. In order to establish a prima facie violation of §105(c)(1) of the Mine Act, the Complainant must prove, by a preponderance of the evidence, that (1) he engaged in protected activity; (2) that he suffered an adverse action; and (3) that the adverse action taken against him by the mine operator was motivated in any part by that protected activity. In order to rebut a prima facie case, the operator must either show that no protected activity occurred or that the adverse action was in no part motivated by the miner's protected activity. *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (Oct. 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (Apr. 1981). If the operator cannot rebut

the miner's prima facie case in this manner, it nevertheless can defend affirmatively by proving that (1) it was also motivated by the miner's unprotected activity and (2) it would have taken the adverse action in any event for the unprotected activity alone. The operator bears the burden of proof in such an affirmative "mixed motive" defense. *Haro v. Magma Copper Co.*, 4 FMSHRC 1935 (Nov. 1982).<sup>1</sup>

### **Overview of the Court's Findings**

The details of the evidence, and the Court's findings regarding that evidence, follow but the essence of this case can be succinctly stated. Charles Riordan, a foreman at Knox Creek's Tiller Number 1 Mine, made numerous safety complaints, which were primarily, but not exclusively, directed at ventilation problems at the mine. There is no genuine dispute that the mine was having significant, continuing ventilation problems. This matter came to a head when Mr. Riordan participated in a conversation with mine president Ron Patrick at a company picnic, speaking with the president about the mine's continuing ventilation problems. Riordan's candor with the president did not sit well with his immediate supervisor, Mark Jackson, and he confronted him shortly after that event, telling Riordan that he had thrown him "under the bus" by his words to president Ron Patrick about the ventilation issues.

Knox Creek's defense is, at its core, a claim that Mr. Riordan was simply the unfortunate victim of the closing of sister mines and the consequent reduction in the number of its supervisory employees. Knox Creek asserted that it used a fair scoring system for deciding which employees would be retained, and that Mr. Riordan didn't make the cut. There are many holes with this claim and the Court finds that the system was not fairly applied and, of equal importance, it also finds that the witnesses offered up by the Respondent, Mr. Patrick, Mr. Jessee and Mr. Jackson were not credible in their testimony as to the scoring system nor as to their other claims about Mr. Riordan. In contrast, the Court finds that Mr. Riordan was a very credible and forthright witness.

### **Findings of Fact**

At the hearing, Complainant Charles Riordan was called as the first witness. Mr. Riordan has had about 32 years of employment in the mining industry. Over those years he has worked as an electrician, mine section foreman, and on occasion he would fill in as a mine superintendent.<sup>2</sup> When he first began work at Knox Creek's Tiller No. 1 Mine, in 2004, he was an electrician repairman on the section. In addition to being a section foreman, Riordan began conducting a mine foreman certification class in 2012. Riordan also conducted other miner training classes, such as newly employed experienced miner training. Tr. 33. He started the class so that employees could take the Virginia Mine Foreman, First Class Mine Foreman Test and become

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<sup>1</sup> Knox Creek has contended that, in light of a decision by the United States Supreme Court regarding discrimination claims under the Age Discrimination in Employment Act (ADEA), the Mine Safety and Health's Review Commission's burden shifting formula must now be discarded. That argument is addressed *infra*.

<sup>2</sup> Without contradiction, Mr. Riordan testified that he is a certified electrician and a certified mine foreman.

certified. Tr. 31. Riordan stated that, up until July 2013, part of his work was conducting newly employed experienced miner training, but the majority of his work involved outby examinations and filling-in on sections, as needed. Tr. 52. Those described work duties continued until he was dismissed. For the part of his job involving training, he conducted basic classroom discussions on air calculation readings, mine maps, and ventilation controls. Tr. 52. Presently there are foremen working at the Tiller No. 1 whom Riordan trained. Tr. 32.

## **The Complainant's Safety Complaints**

### **The Mine's Continuing Ventilation Problems**

Addressing the central basis of his complaint, Mr. Riordan testified that he began making verbal safety complaints about the mine's ventilation in late 2012 and that those ventilation conditions became progressively worse through the next year.<sup>3</sup> Regarding the ventilation problems, according to his testimony, those problems worsened to the point that the mine was

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<sup>3</sup> Mr. Riordan also had issues about miner bits and bit lugs on continuous miners. Tr. 36. The Court did not consider the continuous miner bits issue to be a significant part of this matter and the decision is not based on the subject. The brief discussion of this is included here only for the sake of completeness. There was testimony that a lot of bit lugs on the drum of the continuous miners were being broken due to the nature of the roof. Tr. 39. The problem associated with this was that the lugs were not being replaced as they were being broken off and that there was an inadequate supply of replacement bits and that this was a problem for all the sections. Tr. 40. Mining with broken bits creates an ignition hazard and, compounding that, this is a gassy mine, too, being on a 10 or 15 day "iSpot" for methane liberation. *Id.* The bit lugs issue was also discussed with his immediate supervisor, Mark Jackson. Tr. 40. Riordan couldn't be sure if he spoke with mine superintendent, Scott Jessee, about the lugs, but as best as he could recall, Jessee told him he would look into it. Tr. 41. Respondent's Counsel questioned Mr. Riordan about the issue of bit lugs on the continuous miner. Tr. 74. Riordan stated that bits which are broken off are required to be replaced, and an MSHA policy letter in the summer of 2013 spoke to that problem. Tr. 75. Riordan did not contend that the machines were operating when in a dangerous condition but rather that there was too much delay in obtaining replacement lugs. Riordan agreed that Anthony Melcher, a maintenance foreman, also complained about the lugs and that he was not let go from employment. Tr. 77. Riordan also identified Raymond Slate as another employee who complained about the lugs issue and that there were others who complained besides those two. *Id.* Mark Jackson was one of the individuals to whom the bit lug issue was addressed. *Id.* Further, Riordan made complaints about this to Jackson, and in so doing continued to be a safety thorn for him.

In the Court's view, Respondent's Counsel's questions had a twofold purpose: to show that no one was fired for complaining about the lugs and that the miner was not run when the lug issue was present, with the latter point intended to show that there was no hazard present. The Court believes that those questions miss the point that Riordan's safety-based complaint about the bit lugs was both legitimate and shared by others. The matter does tend to show that Knox Creek did not promptly address other safety concerns beyond ventilation. Having made those observations, this decision is not based on that subject.

not “able to comply with [its] ventilation plan and [this was] creating . . . problems . . . about methane accumulation and dust . . . [with Mr. Riordan noting that] all of these things work together or are a byproduct of inadequate ventilation.” Tr. 36-37. Elaborating about his assertion that things were becoming progressively worse after 2012, Riordan stated that as the mine was developed deeper, the ventilation demands became greater and therefore the ventilation had to be increased to meet those higher demands. Tr. 37. By insufficiently addressing these issues, the result was the ventilation became weaker at the face. *Id.*

Riordan stated that he spoke with Mark Jackson, the general mine foreman, about the inadequate face ventilation, but that the attempts to fix the problem were inadequate. For example, adjusting the air on one side of the section, so that it was in compliance with the ventilation plan, then adversely affected the other side of the section, so that it might not then be in compliance. Tr. 37-38. At this mine, described as a “super section,” there are two continuous miners operating, one on each side of the section. Employing two splits of air allows both continuous miners to operate at the same time. Tr. 53. Mr. Riordan’s point was that one side of the section or the other was continually not having adequate ventilation. This meant that the mine would have inadequate ventilation and mining would have to stop to address the problem of inadequate ventilation at the face. In Mr. Riordan’s words, addressing this ventilation issue with Mr. Jackson “was almost a daily conversation.” Tr. 39.

Mr. Riordan asserted that Mr. Jackson “usually had a smart aleck comment about everything” Riordan raised with him. Tr. 41-42. Riordan also raised his safety issues with Mike Wright, who was aware of the problems, and they discussed what needed to be done. It was Riordan’s belief that Wright would discuss the problems with Scott Jessee directly. Tr. 42. Jessee was not always available to discuss the issues with Riordan, and again Riordan stated that Jackson would essentially put him off, either by telling him that they were working on it or by making a smart aleck remark to him. *Id.*

Riordan also recalled another informative incident involving ventilation issues with Mr. Jackson, in addition to Jackson’s alleged remark<sup>4</sup> about being thrown under the bus by Riordan. It involved some ventilation problems with the No. 3 section and Riordan inquired of Jackson if air readings had been taken there. Tr. 55. Jackson, according to Riordan, responded that he was at that location all day the day before and that they had good air. *Id.* Riordan persisted and asked if *air readings* had been taken, to which Jackson reportedly told him he could tell if there was adequate air by simply slapping the dust off his jacket to determine if there was 2,000 cfm behind the curtain. *Id.* Riordan could not be specific about the date of that incident, but believed it occurred prior to the picnic. Tr. 56. Riordan retorted that he would advise the mine inspector that there was no need for an anemometer to measure the air, as he could simply slap the dust off his jacket for an air reading. *Id.* The Court finds that this event also occurred, per Mr. Riordan’s recounting of the exchange.

On cross-examination, Riordan agreed that in 2013 he sometimes worked as a section foreman and at other times as an outby foreman. Tr. 57. His ventilation issues, he agreed, primarily pertained to his work as a section foreman. *Id.* Near the time he was discharged, more

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<sup>4</sup> To be clear, the Court finds as a fact that Mr. Jackson did make the remark about being thrown under the bus by Riordan.

of his work then was doing outby work. *Id.* However, he went back and forth between those two duties, as assigned. Tr. 58. Riordan also agreed that both as an outby and a section foreman, he did on-shift and pre-shift exams. *Id.* Those exams can only be done by a licensed and certified state foreman. *Id.* Riordan acknowledged that he is required to report hazards and violations that do not meet the mine's ventilation plan. Tr. 58-59. Asked whether he is required to report ventilation readings that are not up to the plan, he replied that those may or may not be a violation and that they may or may not be a hazard. Tr. 59. Explaining further, he added that if there is no methane present or ignition source, then there is no hazard, though it may be a plan violation. Tr. 59. As to whether such violations are to be reported, Riordan advised, "Yes, now we are." *Id.*

Riordan affirmed that his complaints about ventilation were primarily made to Mark Jackson and that they were all verbal. Tr. 60. While he made some notes about air readings or conditions that he found on the section, he did not retain them. Tr. 60-61. Respondent's Counsel asked with disbelief about Riordan's assertion that he would not have kept the notes, but Mr. Riordan explained, credibly in the Court's view, that he did not expect to be involved with litigation down the road. Tr. 61. Riordan agreed that he probably did not record inadequate airflow readings during 2013, but maintained that he would note if a curtain was down and that if he found inadequate airflow, he would correct the problem. Tr. 63. Various measures were used to deal with such problems including reworking a curtain, regulating air on the returns, or regulating belt air. Tr. 64. Typically, fixing such problems would take much longer than five or ten minutes. *Id.*

In the Court's estimation, Respondent's Counsel, by his cross-examination of Mr. Riordan on these subjects, was trying to establish either that the Complainant was negligent in not recording ventilation problems in completing his on-shift or pre-shift exams, or that the problems were actually negligible, thereby undercutting the essence of his claim that he was discharged for making safety complaints. This line of questioning misses the central point, because it is undisputed that the Complainant did make safety complaints about the mine's ventilation to several management officials at the mine, including its chief officer. The real question is the legitimacy of the rating system as applied and whether it was manipulated in the case of the Complainant to obtain an adverse result because of Mark Jackson, who was the person identified as ignoring the ventilation issues and who therefore was very displeased with the Complainant making an issue over it to the mine president.

Mr. Riordan steadfastly, and quite credibly in the Court's estimation, maintained that there were no ventilation violations while he was present during production and that if one developed while they were producing, they would stop production and fix the issue before resuming. Tr. 66-67. As another example of Respondent's Counsel missing the key point, Riordan agreed that management did make attempts to correct the ventilation deficiencies during 2013. Tr. 67. In fact, Riordan acknowledged that the mine made "quite a number of changes" to change the ventilation. Tr. 67, 68-73. Indeed, that was not his issue, nor the issue before the Court. The issue is whether Riordan was discriminated against for making the safety complaints, which specifically came to rest on Mr. Jackson's doorstep, and about which Mr. Jackson took umbrage. While the discrimination was not so clumsily or inartfully done so as to leave

Jackson's fingerprints on some overt act, it is clear enough from the record testimony that, circumstantially, he was the force behind Mr. Riordan's discharge.

On a different topic, Riordan stated that he had knowledge of about 20 ventilation citations being issued during 2013 at the mine. Tr. 96. Many of them were in the area where Riordan was working, a fact he learned from MSHA's website, which lists all the citations it issued for the mine. Tr. 96-97. In fact, some of those citations were served upon Riordan when he was traveling with the MSHA inspector and also when he was a section foreman. Tr. 97.

Dave Smith, a special investigator for MSHA out of its Norton, Virginia, office, was also called as a witness. Tr. 103. He was the investigator assigned to Mr. Riordan's discrimination complaint. As part of his investigation into the complaint, Smith found between 20 to 30 ventilation violations in 2013 at this mine, Knox Creek's Tiller No. 1. Tr. 104. Those findings also serve to support Mr. Riordan's allegations that the mine had ventilation issues. Tr. 104; Gov't Ex. 2 (Knox Creek's ventilation violation history). All of the violations were Section 300 violations, although not all of those pertained to airflow. Tr. 109. While the Respondent made the contention during cross-examination that all of the airflow violations were abated within 30 minutes, the Court notes that it was Mr. Riordan's un rebutted testimony that fixing one area often created a new problem on the other side of the section. Tr. 34-35.

As noted above, there is no serious dispute that Knox Creek's Tiller No. 1 was having significant and chronic ventilation problems and the testimony of Respondent's own witnesses demonstrates this. In this regard, it is noted that mine president Ron Patrick did acknowledge there being ventilation issues at the mine in 2013 and that these issues were present *before* the picnic. However, Mr. Patrick described the issue as a small one: "The concern I had was one section had more volume of air than the other and never was we [sic] below the standard MSHA requirements or the State requirement, never were even close." Tr. 139. Patrick, doing little more than concurring with his attorney's descriptions,<sup>5</sup> agreed that he "would have liked to have had more air," but he stated that they had 65,000 but wanted 80,000 on the section. *Id.* The problem, according to Patrick, was being addressed, both under a short-term and a long-term plan. Tr. 140.

For such a small problem, that is, a problem which Mr. Patrick described as one that did not come even close to not meeting the federal or state requirements, the mine was doing quite a bit. His testimony reveals this to be the case:

The short-term plan we started on immediately. I had a spray machine brought from one of the other operations within DR [Dickenson-Russell Coal Company] to the Tiller coal mine.

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<sup>5</sup> On direct examination, Respondent's attorney habitually questioned his witnesses in a manner that required little more from them than to assent. Objections to the more-than-leading questions were infrequent and the Court did not intercede on its own, but that did not prevent the Court from discounting the ersatz testimony that was offered by the witnesses in their diminished role. Thus, apart from the Court's independent determinations that the credibility of many of the Respondent's witnesses was poor, the words that those witnesses did offer, essentially agreement with assertions by Respondent's counsel, carry less weight for that additional reason as well.

Scott [Jessee] and I had a discussion that we short term would start plastering the brattices to better seal them to eliminate any leakage that would get us more volume of air to that one what we called No. 2 Section.

The long-term plan was on the No. 2 Section [where] we had a super section. That was two [continuous] miners, two roof bolters, four shuttle cars.

Our plan then was to take that miner, half of that equipment, one miner, one roof bolter, two shuttle cars take that and half of the crew two miles outby, two miles from that section and start a new construction section that would improve the restrictions in the airways, and those restrictions were at the time when the coal mine -- the main line was developed, they hit adverse conditions, low to zero coal.

It also had about a 12-foot separation in the coal. In other words, the seam split. Part of it was up here, some of it down there and very adverse roof conditions.

To develop the main line through there whenever they drove that main line, they narrowed down the [entries] that they took through there, and I'm sure it was due to economics, and that forced a restriction through that area.

So long term we chose to take half of that section equipment down there in adverse conditions, poor roof, little to no coal and develop entries through there to relieve that restriction.

Tr. 140-41.

That process was, again as effectively answered through the question presented by Respondent's counsel, "already planned and under way before this picnic in 2013." Tr. 141. Patrick affirmed the description offered. *Id.* Also, Patrick, responding to the suggestion, affirmed that the mine built overcasts. *Id.* He described that as part of the "short term" solution, calling it "quick relief." *Id.* The mine "added an overcast along with plastering those brattices. That was a short-term fix, but the long-term fix was going to take six to eight months to develop those entries." Tr. 142. Patrick also agreed that during 2013 he regularly spoke with Mike Wright about the fact that one section was getting more air than the other and that he also spoke regularly with Mr. Jessee about the balancing of airflow. Tr. 160.

In sum, the Court makes two observations about this testimony. First, this was not quite the small problem that Patrick characterized it to be, not by a long shot. Second, the detail about it and all that they were planning to address the issue, makes it highly unlikely that Patrick would not be able to recall if the ventilation issue was discussed at the picnic. That, among other responses from Mr. Patrick, led the Court to conclude that his credibility was poor.

Scott Jessee is the superintendent at the Tiller No. 1 Mine, a position he has held for about a decade. Tr. 197. His boss is the aforementioned Ron Patrick. Tr. 198. His principal subordinate is Mark Jackson, who is the general mine foreman. *Id.* Mr. Riordan testified about his relationship with Jessee. While he had a good relationship with Jessee initially, around 2013

that cooled, as Jessee was less open with him than before. Tr. 33. Riordan had been evaluated by Jessee before 2013. Tr. 34. In 2013, in connection with bonuses earned for the prior year, Riordan received a very good evaluation and in that same year, Riordan never received any counseling (i.e., counseling reflecting that there was a problem with the job he was doing) about his performance as a foreman from Mr. Jessee. Tr. 35. Riordan affirmed that he discussed ventilation problems with Jessee. Tr. 53. When asked if the ventilation problems he raised with Jessee were addressed by him, Riordan advised they were not and Riordan was also sure that there were some ventilation issues raised with Mr. Jessee prior to August 2013. Tr. 53-54.

In his testimony, Mr. Jessee acknowledged that Mr. Riordan brought up the subject of safety issues with him. Jessee also admitted that Riordan did speak with him about problems with balancing air on the section and that this issue was raised with him during August and September 2013. Tr. 233. In that regard, Jessee also conceded that they “talked about ventilation. We talked about roof control, stuff like that.” Tr. 207. However, he did not consider those to be complaints, describing them instead as “just everyday issues [which were the same as those] discussed with other foremen.” *Id.* These topics, to which Jessee agreed, but which were not expressed in his own words, were in Respondent’s Counsel’s words, “a part of their job” to discuss anything that was going on underground. *Id.* Jessee, again playing the role of one who agreed with characterizations from Knox Creek’s Attorney, as opposed to testifying about subjects, affirmed that Riordan was no different than any of the other foremen. That is, Riordan didn’t complain or talk about such issues any more than any of the other foremen. Tr. 208. Jessee believed that he was doing a good job with the ventilation at the Tiller mine in 2013. Tr. 236.

Regarding the issue of the mine’s problem with ventilation, Respondent’s Counsel asked if the two super sections were first started in 2013. Jessee agreed and added that was in early 2013. Tr. 208. Benignly characterizing the problem, Counsel for Respondent asked if the super section “creat[ed] somewhat of a different pattern of airflows around the face. . . . [and that it was a different pattern] than what people had been used to.” *Id.* Jessee again agreed. Tr. 208. Jessee agreed that this is called “split air.” Tr. 209. However, once again in the posture of one who was a “witness who would agree” with assertions from the Respondent’s attorney, Jessee affirmed that there was adequate ventilation in all places in the mine and that the air at all times met the ventilation plan. *Id.* Continuing his role as an affirmer of questions, he then agreed that the ventilation issue required “more attention and maybe more work,” as Counsel put it, than before the super section was started. *Id.* Despite his rosy affirmations to the statements from his attorney, technically presented in the form of questions, Jessee next affirmed that the mine did get some “violations in 2013 concerning airflow,” but that they were all abated through simple means by tightening a curtain or a fly. *Id.* That line of questioning ended with the point that *it was the section foreman’s job* to tighten the curtain or fly. Tr. 209-10. Although this was obviously an attempt to suggest that it was up to Riordan to address the problem, it is, in the Court’s estimation, also misleading because it infers that Riordan was the source of the problem. However, the evidence was very clear that the ventilation problem was not a matter of any foreman’s lack of attention, and that it ran much deeper than that.

For a host of reasons, the Court did not find Mr. Jessee’s testimony to be credible overall. Jessee agreed that he has been the superintendent at the mine for 10 years. Tr. 242. Over those ten years he had not ever filled out another employee evaluation form. Tr. 243. Yet, Jessee

affirmed, incredibly in the Court's view, that he had no curiosity or questions about being faced with this evaluation form, his first in ten years. Tr. 244. Jessee also affirmed that Mr. Jackson told him that he had trouble getting Riordan to go underground and trouble getting him to start work. *Id.* Asked when these problems arose, Jessee stated it was "around March." *Id.* The Court then asked if such problems would not constitute an offense and that such individuals would be written up. Jessee responded that Jackson spoke with Riordan about it. *Id.* As to the number of times these issues were raised, Jessee informed that, for *both asserted problems*, the verbal discussion with Riordan over these matters happened *once*, not several times. Tr. 245. Surprised, the Court inquired whether Jackson thought it was important enough, based on one time, to bring it to Jessee's attention. Tr. 245. Jessee affirmed that such was the case, adding that "it must have been important to [Jackson] so he brought it to my attention." *Id.*

The Court then turned to Mr. Jessee's assertion that Riordan had a deficiency in terms of his ability to lead as a foreman, which Jessee repeated. Tr. 246. Asked for a concrete example of this, Jessee stated,

Okay. Say for instance when you go up there and you need to loop your curtain a little bit tighter to get your air up in the place and stuff like that, in your ability to lead as a foreman you have to tell your guys, hey, let's tighten this curtain up, so we can get air up there in the place.

Tr. 246-47. Jessee affirmed that he personally knew that Riordan failed to tell his employees to tighten up a curtain. Tr. 247. When asked if he was written up for that, Jessee advised that "[h]e was talked to." *Id.* Asked how many times Riordan failed to tighten up a curtain, Jessee stated, "Two, I'd say." *Id.* Inquiring further, Jessee stated that these two instances occurred "maybe four weeks apart" in 2013. Tr. 247-48. He could not recall the month this occurred. Tr. 248. Asked if the problem continued or stopped, Jessee stated that the problem did not continue. *Id.* Asked if that meant that Riordan's deficiency to lead as a foreman was no longer an issue, Jessee stated "Yes." *Id.* (emphasis added).

Another assertion of Jessee was Riordan's failure *to go above and beyond*. An example of this was asked to be provided by Jessee to the Court, who responded,

Say for instance we're cutting our first section move. Okay, you've cut it out. You squared your faces off, and you need to go ahead and start on your -- the next phase of it is moving your equipment or getting a stopping built down there, to go ahead and get your equipment moved. [Riordan] wouldn't go to the next step to go ahead and do that without some pushing like or saying, hey let's go ahead and get this done, next phase.

Tr. 249. The Court asked if Jessee remembered that Riordan failed to do that and Jessee affirmed he did so remember. *Id.* This event, Jessee stated, was around March 2013 when they had just cut out on the 3 Section and were getting ready for pillars. *Id.* Jessee stated that he personally observed this. *Id.* This occurred on one occasion. Tr. 250. To be sure about his testimony, the Court asked, "So your complaint about Mr. Riordan's inability *to go above and beyond* is limited to *one* occasion?" *Id.* (emphasis added). "Yes, sir," Jessee affirmed the Court's understanding.

*Id.* In response, the Court, which was astounded that Jessee's criticism was over an alleged *single event*, remarked, "Well, you have very high standards." Tr. 250.

Further, Jessee affirmed that he has never specifically stated that Riordan was his most unsafe foreman. Tr. 252. In attempting to show the alleged problem with getting Riordan to go underground, Jessee advised that in fact it occurred only once and, as to whether on that *one* occasion Jackson told him that the problem happened *more than one time*, Jessee did not aid Knox Creek's attorney, as he could only offer, despite being asked twice, that he did not recall. Tr. 253.

Complainant's Attorney, Mr. Addington, followed up on the issue of the statement that a verbal warning was made to Riordan. In that asserted instance, Jessee stated that Mark Jackson allegedly spoke to Riordan.<sup>6</sup> Tr. 254. However, when asked if verbal warnings are memorialized on paper, Jessee stated that "No, not all of them [are written down]." *Id.* Some verbal warnings, however, are written down. *Id.* Jessee was unaware that either of the claimed verbal warnings to Riordan were ever written down. Tr. 255.

Respondent also called Mark Jackson, who is currently the general mine foreman at Knox Creek. Tr. 276. At the time of Riordan's termination, Mr. Jackson was his immediate supervisor. *Id.* Jackson stated that in 2013 Riordan was a section foreman and worked outby, too. Tr. 277. As mentioned, near the end of his employment with Knox Creek, Riordan was doing more outby work. Tr. 278. Earlier in 2013, Riordan had been working on the section frequently and he and Riordan had discussions about ventilation in 2013. *Id.* In terms of those discussions, Jackson described it as "[j]ust every day concerns of balancing the air and stuff." *Id.* These were discussed, with Respondent's Counsel again providing the words through his questions, by asking if Jackson "discuss[ed] these things [with the other mine foremen] generally the same way that [he] discussed them with Mr. Riordan." Tr. 278-79. Jackson responded, "The same way." Tr. 279. Asked how many times Riordan discussed the ventilation balance issue in 2013, Jackson answered, "a couple of times." *Id.* Respondent's attorney then asked, "A couple being two?" *Id.* Jackson answered, "Yes." *Id.*

Finally, an objection was made to the leading questions. Tr. 280. Jackson then described the substance of the talk with others as "[j]ust where we went to split air the changes in the difference it makes, make sure we had our curtains hung and stuff like that." *Id.* The split air, Jackson said, made it so that the foremen "had to direct the air, and they ha[d] to hang their curtains better." *Id.* Jackson said the he was "replastering stoppings," too, in addressing ventilation in 2013. Tr. 281. Then, in response to whether a new section was then being developed, he answered, "Yes, we were also driving another set of mains up through there so we could help the mine breathe." *Id.* The mining conditions in those mains, he said, were "[v]ery bad." *Id.* The mains, he agreed, were driven only for the purpose of helping with the ventilation. *Id.* Then, upon further questioning, he answered that they built overcasts and that those also helped with ventilation. *Id.* Thus, in the Court's estimation, Jackson, though initially describing the ventilation as a minimal problem, then answered the questions in a way that showed that it

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<sup>6</sup> The transcript states that "Mark Jessee talked to him" but it is presumed by the Court that Mark Jackson was the intended reference and that Mr. Jessee either misspoke or the transcript incorrectly listed Jessee.

was a more significant issue. Everything they were doing, Jackson stated, was helping to get “more air to the section.” Tr. 282. Jackson maintained that during safety meetings, Riordan spoke up about safety issues the same as the others and that, when asked, “[d]id he even talk about ventilation at those meetings as far as [he could] *recall*,” Jackson answered, “*not that I remember*.” Tr. 282 (emphasis added).

Jackson could not say whether the number of times Riordan raised ventilation issues with him was two or three times, nor could he remember when those discussions occurred, nor even the season of the year. Tr. 302-03. Further, incredibly, and in contradiction to the substance of his own testimony, Jackson was of the view that there were *not* ventilation issues at the mine in 2013. Tr. 302.

Mr. Jackson denied that he ever made a statement that Riordan tried to throw him under the bus or any words to that effect. Tr. 285-86. He stated that he was Riordan’s direct supervisor for “[p]robably about four or five years.” Tr. 286. Overall, he characterized Complainant’s performance during that time as “Poor.” *Id.* Asked the basis for that characterization, Jackson answered,

He was -- when you go up on the section, he would not be up there with the men where they was mining. He would be outby down there at the feeder or around the shuttle cars. And I’d have to go up there, and the curtains wouldn’t be hung real good. They’d be hung but the ends wouldn’t be nailed up and stuff, and I’d go get him and talk to him about it and stuff.

*Id.* As for the alleged number of times Jackson had to raise the issues relating to hanging around the feeder and the curtains, during 2013, Jackson answered, “Two or three times, I think.” Tr. 287. Jackson asserted that over the years of Riordan working for him, things got worse, “[t]he longer he worked, the worse he got.” Tr. 287. Jackson also maintained that he had nothing to do with Riordan being terminated, nor did he score or rate him in any way. Tr. 288.

Jackson agreed that he spoke with Mr. Jessee a lot and that they discussed “[e]verything about the mines,” by which he meant “[j]ust the day in and day out running of it.” Tr. 289-90. He allowed that he discussed Riordan with Jessee “[o]n occasion.” Tr. 290. When asked how often he spoke with Jessee about Riordan in 2013, Jackson answered, “Probably a couple of times. Like I said, *I don’t exactly remember*.” *Id.* (emphasis added). As for the substance of those talks, Jackson stated, “When I’d go up on the section and find the curtains I would tell Jessee about it.” Tr. 290-91. As for any other discussions, Jackson replied, “That’s all I can remember.” Tr. 291. In the course of some 50 weeks in 2013, Jackson agreed that he would see Riordan three or four times per week and that, in sum, that amounted to seeing Riordan bossing hundreds of times. *Id.* Yet, even with the “couple of times,” among hundreds of opportunities that he claimed speaking about this issue with Riordan concerning curtains, he never issued Riordan either a verbal or a written warning. Tr. 292-93. Further, while Jackson admitted that Riordan did discuss ventilation with him, he did not view those discussions as complaints. Tr. 294. This occurred two or three times in 2013.

In terms of when Jackson told Jessee that Riordan was a poor employee, *he could not remember* when he said that, *nor could he recall* if was before August 2013. Tr. 295. The Court then became involved, asking if it Jackson's testimony that he told Jessee that Riordan was a poor employee one time only. *He could not remember* when that occurred. The Court then asked for a month and year, observing that, as it was one time, it must have stood out. Jackson answered, "*I can't remember* exactly the date on it." Tr. 296 (emphasis added). Jackson also *could not remember* whom he spoke with upon returning from a vacation on August 26, 2013, and that no one filled him in on what happened while he was gone. Tr. 297. His memory was better however on the subject of whether Riordan went inby pillars as he recalled seeing that occur. Tr. 297. That event happened on the first day Jackson returned to work. Tr. 298. In fact, Jackson was the one who brought Riordan outside after the alleged infraction occurred. Tr. 299.

Jackson agreed that he was present on the day Riordan was terminated, December 13, 2013, and he was sure that the two of them talked that morning. Tr. 300. However, Jackson asserted that he had *no idea* that Riordan was going to be fired that day. *Id.* Further, he asserted that no one told him that one of his foremen was going to be fired that day. *Id.* This assertion included the claim that Jessee did not tell him that one of the foremen would be fired. Tr. 301.

In terms of his issue with Riordan not being up on the section bossing his men, Jackson was asked to be more precise than describing this as something which occurred a "couple" of times. He then stated that it was on two occasions. Tr. 303. Jackson confirmed that he never wrote Riordan up for those alleged transgressions. *Id.* As for Riordan's record of training miners, Jackson stated that he *couldn't remember* that Riordan did that. Tr. 304.

The Court then asked some questions of Mr. Jackson. Jackson confirmed that while he spoke with Riordan about his work as a section foreman, he never gave him a verbal warning. Tr. 305. Instead, he just "talked to him." *Id.* He then stated that was probably the same as a verbal warning but that it was not written. *Id.* Jackson then agreed that, as part of his duties as the general mine foreman, it was part of his responsibility to note any serious failure on the part of one of his foremen and further agreed that he never made any such notation regarding failures by Riordan. *Id.* When the Court asked if the next logical step was a fair conclusion — that because Jackson didn't note anything, that none of the things that he brought to Riordan's attention were considered by him to be serious, because, as he admitted, he wrote down serious matters — Jackson would not agree, stating "[n]o, they was serious. I mean maybe I should have wrote it down." Tr. 306. Jackson then agreed that sometimes he writes down serious violations and sometimes he does not. *Id.* However, he conceded that it is company policy, that is, the company handbook provides that all verbal warnings are then to be noted in writing. Tr. 309.

As noted, the Court found Mr. Jackson's credibility to be seriously wanting.

## **The Mine Picnic**

As mentioned earlier, a mine picnic occurred during the summer of 2013 on August 22nd. Tr. 160. The picnic was a social event, and on this occasion it was prompted in part by the mine not having a lost time accident in the past year. Tr. 43. According to Mr. Riordan's testimony, Mr. Patrick would give a speech at these periodic social gatherings, but

communication was also an objective of those events. *Id.* During the summer of 2013 event, Mr. Patrick, asked in the presence of Mr. Riordan, Mr. Les Blankenship, and several others who had gathered in the lamp house, how things were going. *Id.* It was Mr. Blankenship who then first brought up the inadequate air on the section, and the others then joined in discussing that topic. *Id.* The participants made specific suggestions about how to address the problem. Riordan himself suggested that overcasts be constructed.<sup>7</sup> Tr. 44. The roof had been developed to have overcasts, but they had never been built. *Id.* Mr. Patrick, it can be said, had a positive response to the concerns expressed and stated that if overcasts needed to be built, that would happen. *Id.*

According to Mr. Riordan's credible testimony, it was his comments about the mine's ventilation problems to Mr. Patrick at the picnic that caused Mark Jackson to become upset with him. Tr. 45. As noted, Riordan was part of that conversation with Patrick along with Les Blankenship. Tr. 81. Riordan related that he offered specific steps to Patrick about how to deal with the ventilation problem. Tr. 83-84. Riordan agreed that Patrick did not balk at the suggestions, nor suggest that he would not consider them, Tr. 84, but to note that Patrick did not react poorly to his comments, again misses the point in this discrimination proceeding, that it was *Jackson* who resented Mr. Riordan's candor with the boss. Riordan reaffirmed that Jackson's hostile remark to him occurred either the day after the picnic or near to that time, when they came into contact with one another. Tr. 85.

Mine president Patrick did acknowledge ventilation issues at the mine in 2013 and that these issues were present *before* the picnic. Tr. 139. Given that, the Court considered it highly unusual that Mr. Patrick would not recall the discussion, which is central to this case, about the ventilation at the picnic. This was another factor in the Court's finding that Patrick was not credible.

Regarding that picnic event in August 2013, Patrick estimated that he arrived in the mid-afternoon. Tr. 137. He talked with attendees but *could not recall* if Mark Jackson was present for the event. *Id.* He *could not recall* if he spoke with Mr. Riordan at that event, although he admitted that he could have. Tr. 138. Further, as to whether Les Blankenship and Mr. Riordan spoke with him, Mr. Patrick could only offer: "They could have *but I do not recall that.*" Tr. 138 (emphasis added). The Court then offered, "So you don't deny it. You just don't remember whether there was a conversation." *Id.* Mr. Patrick responded, "No, sir, I do not deny it." Tr. 138. However, Mr. Patrick did recall, when his attorney asked, "So, Mr. Patrick, did you talk to Mr. Jessee about anything that happened there that day at that I'll call it a picnic?" *Id.* His answer was "No, sir." Tr. 139. In the Court's assessment, Mr. Patrick's memory seemed to be selectively good and poor. The Court considered that most of Patrick's responses were not credible. Of no surprise, when asked on direct if "Riordan's employment [was] terminated because of any safety complaint by him," he responded "[a]bsolutely not." Tr. 143.

The next work day following the picnic, Mr. Riordan immediately was faced with a change in attitude from Mr. Jackson towards him. As he was preparing to go underground that next day, Mark Jackson told him that he "had thrown him under the bus by discussing th[ose]

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<sup>7</sup> Mr. Riordan continued to make complaints about inadequate ventilation after the picnic incident. Tr. 48. These complaints were made to Mark Jackson, primarily, but were also discussed with Mike Wright on a regular basis. *Id.*

[ventilation] problems with Mr. Patrick.” Tr. 45. Again, as noted, the Court has found that Jackson made such a remark to Mr. Riordan. Riordan, reasonably in the Court’s view, took Jackson’s remark to mean that he, Jackson, was angry at Riordan for mentioning the ventilation issue with Mr. Patrick. Tr. 45. As Jackson was not present when the ventilation issue was discussed the previous day with Mr. Patrick at the picnic, Riordan could not know if Mr. Patrick spoke to Jackson about the matter, but clearly Jackson learned of Riordan’s words to Patrick. Tr. 45. Riordan’s relationship with Jackson, which was declining before the picnic incident, continued to go downhill after that event. Tr. 46.

As noted, in August 2013, Riordan received a written warning. *Id.* This occurred right after the 2013 picnic. *Id.* Scott Jessee came to the section where Riordan was working and believed that Riordan was in by the pillar line and therefore under unsupported roof. Tr. 47. Riordan did not agree, believing that he was actually in a bleeder entry, but the upshot was that Mr. Riordan “received three days off and a written warning.” *Id.* That warning was issued by Mark Jackson. Tr. 47-48. Much later in the testimony, replacing indefinite statements about the date of the company picnic, it was revealed that the picnic occurred on August 22, 2013, which was a Thursday. Tr. 262-63. It is undisputed that Mr. Jackson was on vacation, returning to work on Monday, August 26, 2013. *Id.* The Court cannot simply ignore the “coincidence” in time between Riordan’s critical remarks about the mine’s ventilation issues and his alleged infraction, occurring the first day Jackson was back on the job. Nor, it should be noted, did Respondent present *any* other such infractions as part of Mr. Riordan’s work history at the mine. The inference that this was the first reaction of displeasure over Mr. Riordan’s frankness about the mine’s ventilation problems cannot be ignored.

## **The Mine Employee Evaluation “System”**

### **Background – Prelude to the Layoffs**

As noted, Ronnie Patrick is the general manager for Dickenson-Russell Coal Company (“DR”) and the Knox Creek Coal Company. DR consists of three deep mines and two prep plants, one active and one inactive. Tr. 117-18. Knox Creek Coal, a subsidiary of Alpha Natural Resources, Inc., has one deep mine, Tiller No. 1, a prep plant, and a refuge area. Tr. 118. Knox Creek, DR, and Paramont<sup>8</sup> Coal are all subsidiaries of Alpha Natural Resources. Tr. 128-29, 174. In 2013 DR’s Roaring Fork and Laurel Mountain mines closed. Tr. 118-19. Remaining open were the Cherokee and Tiller mines. Forty employees at Roaring Fork and ninety-three at Laurel Mountain lost their jobs in connection with those closings. Tr. 121. Mr. Patrick asserted that with those mines’ closures, it was their goal to “see that the best of the foremen, in particular the best of those foremen were retained and held positions within the existing coal mines as much as practicable.” Tr. 122. Attempts were subsequently made to rehabilitate Patrick’s first remarks that the efforts to find employment for displaced workers applied to *both* closed mines. *See, e.g.*, Tr. 186. In that regard, the Respondent expended much energy trying to show that the efforts were focused on the first group to become unemployed, the approximately 40 employees at Roaring Fork, but not for the larger number of displaced employees, the 93 miners at Laurel Mountain. *See* Tr. 186-87, 331-32. About one-third of the displaced workers from both mines were given jobs within Alpha. Tr. 122.

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<sup>8</sup> The hearing transcript incorrectly spells Paramont as “Paramount” throughout.

Patrick stated that the first wave of layoffs was with Roaring Fork and the second was with Laurel Mountain. Tr. 190. Patrick agreed that the scoring system was in place at the time of the layoffs at Roaring Fork, and that the same scoring system was in place when the Laurel Mountain layoffs subsequently occurred. Tr. 190-91. The Court inquired if Patrick reached out to Paramount Coal twice. Tr. 191. Patrick stated that he recalled asking Paramount if there were any jobs for the Roaring Fork people, but when asked if he similarly reached out for the Laurel Mountain layoff, he stated, “*I don’t recall. I don’t recall* that as -- me specifically, no, sir, I did not.” *Id.* (emphasis added). This struck the Court as peculiar, as Patrick recalled the effort made with regard to the first layoff, but not for the more recent layoff. *See id.* Odder still, Patrick stated that 40 employees were affected by the Roaring Fork layoff, and then agreed that something on order of 93 employees were impacted by the Laurel Mountain layoff. Tr. 192. Summing up his testimony on this, the Court asked if it was correct that he remembered reaching out for the 40 employees but had no recollection about reaching out for the 93 at Laurel Mountain. Tr. 192-93. Patrick then answered, “I did not at Paramount [sic]. Whether HR did or not, I do not know.” Tr. 193.

### **The Evaluation System**

As framed by Respondent’s Counsel, Patrick agreed that there was “a system used to rank or rate the folks who were being -- losing the work at these two mines to try to determine who the better employees were.” Tr. 123. The evaluation “system” used a “standard form” and the four mine superintendents filled those forms out for the salaried employees. *Id.* All of those forms went into, again as described by Respondent’s attorney, “a central database” and the numbers were maintained by “HR [human resources] people.” Tr. 123-24. Christy Viers<sup>9</sup> did this

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<sup>9</sup> Ms. Christy Viers is the HR representative for the Knox Creek mine. Tr. 256. She learned of Mr. Riordan’s termination from Deidre Helbert, around December 12, 2012. Tr. 256-57. Ms. Helbert is the manager of human resources for Dickenson-Russell Coal. Tr. 325. Viers was present at the meeting when Riordan was terminated, and she had a packet of information that was presented to him at that time. Tr. 257-58. According to Viers, Riordan had questions about the severance package and other matters but, most pertinent, was Viers’ assertion that Riordan allegedly stated that “he knew this was coming to make room for other people.” Tr. 258.

Ms. Viers stated that she received the employee evaluation scores from Mr. Jessee around August 9th. Tr. 260. Viers was also shown an email she sent to Ms. Helbert and Mr. Jackson after Riordan was terminated. That email stated that Riordan was informed about his termination and other aspects, but the email also included the remark, as just noted, that “[Riordan’s] only other comment was he knew this was coming, to make room for other people.” Tr. 261; Resp’t Ex. 4. Viers stated that she had a role in the input of the evaluation scores that she received from Mr. Jessee, stating that she entered all of them into the spreadsheet that they had set up. Tr. 265. Also, she typed in any comments Jessee had. *Id.* After she entered the scores, she then printed it, saving a copy and filing it. *Id.* During her deposition, Viers affirmed that Jessee gave her *paper copies* of his evaluations *and that she still had those in her office.* Tr. 267 (emphasis added). However, at the hearing she stated that she was mistaken in her deposition and that Jessee did not give her handwritten copies. Tr. 271. Rather, he entered the information on the computer, printed a copy and then sent it over. Tr. 268. Revisiting Ms. Viers’ deposition, at the hearing Viers stated  
(continued...)

at Tiller, and Deidre Helbert did it at Dickenson-Russell. Tr. 124. The hierarchy for the underground mines consists of the section foreman, a maintenance foreman, a general mine foreman, and a superintendent. Tr. 125. As noted, Scott Jessee is the superintendent at Tiller, and

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<sup>9</sup> (...continued)

then that Jessee “was to do those evaluations and get them back to [her] to be entered in the computer.” Tr. 270 (reading from page 13 of Viers’ deposition). When asked at her deposition, “How did [Jessee] how did he get the -- how did he get you the information?”, Viers answered, “He printed the forms out and wrote in his answers and I -- and he sent them back to me in an envelope.” *Id.* Viers was then asked, “Okay. Did he handwrite them?”, to which Viers responded, “I think so, yeah, these printed copies are what comes out after I enter the information that he puts on the form.” *Id.* She then reaffirmed, that Jessee handwrote the information. Tr. 271. Therefore, Viers contradicted her earlier testimony, now maintaining that the evaluations were not handwritten. *Id.* In terms of assessing Ms. Viers’ credibility, the Court did not view this change in her testimony favorably.

Ms. Viers conceded that not only was Riordan’s job not eliminated, but that *additional* people came to Knox Creek, including Dale Slempe; his brother, Steve Slempe; and Shawn Greer. Tr. 272. Further, Knox Creek hired a fire boss. Tr. 273. In terms of hiring and firing, Viers stated that she did not think that anyone was fired in 2014 and she agreed that the workforce is now larger than it was in December 2013. Tr. 269.

Deidre Helbert, as stated, was the manager of human resources for Dickenson Russell Coal. Her testimony was of no impact to the findings by the Court, and is noted here only for the sake of completeness. It is the Court’s view that Ms. Helbert was called for damage control, because of testimony the day before from Ms. Viers which did not help the Respondent’s contentions. Helbert stated that Roaring Fork closed in October 2013 and Laurel Mountain closed on December 13, 2013. Tr. 327. She stated that Riordan’s loss of employment was in connection with the second closing, that of Laurel Mountain, not Roaring Fork. Tr. 331. When Roaring Fork closed, she stated there was an attempt to place people with another Alpha Company, called Paramount, and some people were placed as a result of those efforts. *Id.* Thus, Respondent’s Counsel, through this rehabilitative witness, was attempting to show that the only effort to find other jobs for displaced miners was with the mine closing that occurred first and that no similar efforts were made when Laurel Mountain closed. Tr. 332.

Ms. Helbert was also used to support the alleged basis for keeping Donald Duncan, but not Mr. Riordan, which rested upon the ground that Duncan was a mine rescue team member for Dickenson-Russell Coal. Tr. 334-35. Ms. Helbert agreed that she made no decisions about which employees stay and which leave and that she simply follows the orders of others. Tr. 336. Ms. Helbert conceded that during her deposition she had stated that, in terms of retention, *the evaluation score is the primary factor and dictates the outcome, unless there is a tie.* *Id.* She also conceded that Mr. Patrick gave her a list of employees who were considered to be high performers and that those people were identified by the people at Cherokee, Laurel Mountain, and Roaring Fork as the people the mine would like to see placed in any vacancies that might exist. Tr. 337. She also agreed that the superintendents at the mines would have identified the high performers, and that Mr. Patrick would have given her a compiled list of the high performers. *Id.*

he reported to Patrick. Tr. 125. Patrick did explain the process of job relocation as the decision making being made by himself and Mike Olsen, with Olsen being the superintendent at the Cherokee Mine. Tr. 126. Olsen is also the president of DR, and he reported to Patrick and to his, Patrick's, HR person, Ms. Helbert. *Id.* Patrick and Helbert met with Olsen and Jessee. *Id.* They had a list of all the openings for salaried people, and "then [they] took the rankings of the foremen and tried to match them up to where [they] had the highest ranking foremen continuing in employment." *Id.* Patrick stated that he "did not evaluate one person," nor did he affect the scoring in any way, by telling, for example, any superintendent to mark up or mark down any individual. Tr. 127. Patrick noted that Dickenson-Russell's operating budget restricts the number of employees it may have for its operations. Tr. 127-28. However, efforts were made to absorb as many employees as possible from the two mine closings. Tr. 128. Patrick was acquainted with Mr. Riordan, first coming to know him some two and half years ago when he, Patrick, was a general manager at Knox Creek. Tr. 129.

Patrick stated that, in total, six (6) section foremen were not able to get placed from the closings. Dale Slempp, also referred to as Ricky D. Slempp, replaced Mr. Riordan at the Tiller Mine. Tr. 130, 194. Slempp was hired by Patrick. He had known Slempp for 10 or 11 years. Patrick described Slempp as a "very strong section foreman" for whom, again agreeing with Respondent's Counsel's description, he had a personal high regard. Tr. 131. Slempp, Patrick stated, again agreeing with the words offered by Respondent's Counsel, "score[d] highly on this scoring system [Patrick] described." *Id.* Using his own words, Patrick stated that Slempp "took a step backwards, demotion from general mine foreman and shift foreman down to section foreman, but that's all I had for him." Tr. 131. When asked, "But at least he maintained employment?" by his attorney, Patrick responded, "That was our goal." Tr. 132.

Patrick also acknowledged that Donald Duncan was a section foreman who received a lower score than Mr. Riordan, yet he did not lose his employment. Tr. 135. Duncan's score was one (1) point lower than Riordan's. *Id.* For reference, Mr. Slempp's score was 61, Mr. Riordan scored 46, and Mr. Duncan had a 45. *Id.* According to Patrick, Duncan was retained because he was "a mine rescue member, and that [mine rescue] station was located at [DR's] office, which is mandated through State and Federal that the facility be within an hour of reporting times." *Id.* Therefore, Patrick stated that the mine rescue site had to stay in place, intact. *Id.* In contrast, Mr. Riordan has not been trained to be a mine rescue member and has never participated in such activity. Tr. 136. It was Patrick's position that if Duncan had not been retained, the mine rescue team would have been short of the required number of members and therefore he, in the words used by Respondent's counsel, was treated as a "special case," i.e., outside of the scoring system.<sup>10</sup> Tr. 137.

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<sup>10</sup> Counsel for the Secretary showed Mr. Patrick a spreadsheet produced by Knox Creek, apparently reflecting the scoring and notes for all the foremen that were evaluated. Tr. 150; *see* Gov't Ex. 3; Gov't Ex. 4 (also Bates Stamped by Respondent as KCCC8). When the Knox Creek scoring compilation was presented to Mr. Patrick and his attention was directed to the comments regarding the "areas for improvement," he stated that he had never seen those comments before. Tr. 155. Patrick maintained that he looked at the ranking and scoring only, not the comments. Tr. 156. Nevertheless, it was then pointed out to Mr. Patrick that, despite stating he had not seen the comments before, there were comments, some positive and some negative, but that, for Mr.

(continued...)

Patrick stated that he had no input into the evaluations that determined who was kept and who was not kept. He agreed that Mr. Riordan was *the only* management employee and foreman at the Tiller mine who was terminated in December 2013. Tr. 160. While Patrick conceded that *he had the discretion to retain a lower-scoring foreman*, he only did so in one instance, the Donald Duncan versus Charlie Riordan instance, with scores of 45 versus 46, respectively. Tr. 161. Further, Patrick agreed that the work force at Knox Creek was not actually reduced in 2013. Tr. 162. Instead, replacement employees came over to Knox Creek. *Id.* Patrick also knew that Riordan did foreman training at the Tiller mine and he admitted that, since Mr. Riordan's termination, they also hired more than one pre-shift or fire boss at Tiller mine too, agreeing that the mine needed to "hire additional folks."<sup>11</sup> Tr. 163. Further, during that time, in response to the question whether the Tiller Mine "hired a management position *off the street* during that time period," Patrick responded, "Could have, yes, sir." Tr. 163. (emphasis added). Beyond that, Patrick admitted that in 2014 at the Tiller mine it had management positions open there. These included more than one fire boss and possibly two section foreman positions in 2014. Tr. 163.

Mr. Riordan was fired on December 13, 2013. Tr. 48. As he was preparing to enter the mine that day, Mr. Jackson asked him to wait, and then he was told that he was to go to the office. Tr. 49. There, he met Christy Viers, who informed him that he was being dismissed or discharged. She informed him of this in the presence of Scott Jessee. *Id.* Mr. Riordan could not recall his specific comment upon learning of the news, but may have made some comment that maybe he should have known.<sup>12</sup> *Id.* Riordan stated that no other foremen were discharged that day and he was also unaware of any other foremen who were fired or terminated in December 2013. Tr. 50. However, he did know that one other salaried employee was fired from the mine,

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<sup>10</sup> (...continued)

Duncan, there was no reference to his mine rescue qualifications in the comments. Tr. 156. When asked if the document at least reflected the information that human resources had in order to make its decision about who would be retained and who would be let go, Mr. Patrick again stated that all he had reviewed was the final scores. *Id.* It was his position that he left it to the mine superintendents to identify the best employees, but without explanation for their conclusions. Tr. 158. The Court concludes that, for this and other reasons in the record, the scoring evaluation system was followed or ignored, as convenient for the Respondent. Patrick's own testimony supports this conclusion.

<sup>11</sup> Regarding new hires, Jessee's statement was that the employees that were added were people that were already there, hourly people that were moved up to salaried positions. Tr. 237. In sum, when asked how many more salary people were at Tiller in 2014 than at the time that Riordan was terminated in December 2013, Jessee stated, "around three." *Id.* The Court then inquired whether, when they promoted those people from the hourly jobs, they filled those hourly position openings that had been created. Tr. 238. Jessee affirmed those positions were in fact filled with new hires. *Id.*

<sup>12</sup> The Respondent later tried to make much of this, apparently attempting to demonstrate not just that Mr. Riordan made the remark, or something to that effect, but that Mr. Riordan knew his termination would be coming *and* that it was for legitimate reasons. *See* Knox Creek's Post-Trial Memorandum 31 ("Resp't Br.").

Tiller No. 1, as a result of the reduction in force. *Id.* Since those terminations, Riordan stated that he learned that the mine has added a number of other salaried people. *Id.*

Speaking to the scoring system, which was allegedly used in determining whether he was to be retained or let go, Riordan informed that he only learned of that during the course of the depositions made in connection with this litigation. Tr. 51. Riordan subsequently learned that a miner at Laurel Mountain mine was retained, despite having a lower score under the mine's scoring system. *Id.* It is not disputed that one employee, identified as "Employee No. 8," received a lower score than Riordan but did not lose his job. Tr. 54. Mr. Riordan's understanding was that the employee was a section foreman. *Id.* Riordan confirmed that it was his belief that he was discharged because of his safety complaints concerning the ventilation problems at the mine. Tr. 51. As noted, the Court agrees that Riordan's job loss particularly came about because of Mr. Jackson's animus towards Riordan for his remarks on that subject to mine president Ron Patrick and not because he was simply the "unfortunate" recipient of a lower evaluation score.

As yet another indication that the evaluation system was manipulated when needed to reach a desired outcome, Patrick himself agreed that the score reflected the total of all the categories, and that one of the categories was being a mine rescue team member, for which one point was assigned. In this regard, Patrick had one of his several attacks of "recall-itis"<sup>13</sup>: in this instance, his inability to recall a point already being awarded for being a mine rescue member. Tr. 167-68. When shown the employee evaluation form and that it allowed for one point for those on a mine rescue team, he then acknowledged, "that appears to be the case." Tr. 168.

The Court then asked some questions of Mr. Patrick, who informed that Mr. Jessee was the one who evaluated Mr. Riordan. Tr. 169. Jessee, he stated, was the only one who determined the number of points to be assigned for each category. *Id.* When asked about particulars of the form, Patrick stated that he didn't know if categories had point scales of 1 to 5, 1 to 10, or whatever. Tr. 170. He also did not know if there was any guidance on how to determine the number of points to be given for any category. *Id.* Patrick, even at the time of the hearing, did not know if there was any guidance for assigning points. Tr. 171. Beyond knowing that Jessee would put down a number for a given category, Patrick maintained that he knew nothing about how that number was derived. *Id.*

Illuminating to the issue of Mr. Riordan's claim of discrimination, as well as to Respondent's claim that the evaluation system was neutral and fair, when asked if there was any other employee, aside from Mr. Riordan, who had a lower score that was kept over a person with a higher score, Patrick stated that Riordan was the only instance. Tr. 172. Patrick stated that 133 were facing termination, but that not all of them were salaried people, and that only the salaried

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<sup>13</sup> "Recall-itis" is the Court's term for when a witness whom one would expect to be able to recall certain events or conversations cannot do so, while still being able to recall other events of no greater, or even lesser, significance. It usually takes the form of a witness saying, in some fashion, that he can't recall something, with the symptoms most often appearing when a question involves something the answer to which could be adverse to a party's position. At times, as in the Court's view of this case, the condition can spread like an epidemic to other witnesses. Having viewed the witnesses and the context in which the recall-itis symptoms arose, the Court has weighed these instances as part of its determinations about witnesses' credibility.

people were scored under the evaluation system. Tr. 173. Patrick agreed that he was concerned about *all* employees who were losing work and that he tried to reach out to other affiliates within the organization, one of which was Paramount. Tr. 174. Patrick stated that between salaried and employed people there were 35 to 40 people needing work and he agreed that he sent a list to Paramount with those peoples' names on the list. *Id.* Patrick stated that this would have been done by Deidre, with the Human Resources Department. Tr. 175. But the Court inquired further. Patrick agreed that there would have been a list of names for Paramount to consider for work. Tr. 176. Patrick agreed that he had to compile a list of names for this, but how this was accomplished or transmitted to HR, he could not recall. *Id.* Agreeing that there had to be a list of names compiled, he then stated that he did not create the list, but rather that HR did that. Tr. 177. Asked if Mr. Riordan's name was on that list, Patrick again with his recall-itis affliction, stated, "I don't recall." *Id.* The Court inquired further about Mr. Patrick's knowledge of Mr. Riordan being on such a list, as Patrick seemed to equivocate in his answer. Asked if he then recalled that Mr. Riordan's name was on some list of employees needing work, Patrick answered, "No, sir."<sup>14</sup> Tr. 178.

On the issue of points assigned for being on a mine rescue team, the Court expressed its understanding that the questions asked on that subject were intended to show that such membership on a mine rescue team *was already built into the scoring*. Tr. 180. Respondent's Counsel was attempting to show that "[r]egardless of whether there was *extra scoring* for mine rescue on the score," the mine could not operate without Mr. Duncan being employed. Tr. 182 (emphasis added). The idea, conceded by Respondent's Counsel, that there could be "extra scoring" demonstrates again the malleable nature of the evaluation system. *Id.* Respondent's Counsel's attempted point was that, even if Duncan's score was *10 points lower*, he had to be retained. *Id.* The Court then inquired if that made the point system "pointless" in that there were times when the mine would not apply its own point system. *Id.* Respondent's Counsel contended that Knox Creek had "*never said otherwise*." Tr. 183 (emphasis added). Thus, Knox Creek admitted that, depending on its needs, it could put aside its scoring system.

Mr. Jessee agreed that the scores given to Riordan in his evaluation were completely apart from his training activities and thus that he was scored on the basis of his skills and

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<sup>14</sup> Counsels for Riordan advised that they had not been provided with the list that Patrick stated had been created by HR. Tr. 177. The Court expressed that it would not have been burdensome for the Respondent to have provided the purported document sent to Paramount and that it would have helped Knox Creek's case "immensely" had Mr. Riordan's name appeared on it. Tr. 185. Respondent's Counsel, in the Court's estimation trying to thread the needle, then suggested that the list related to Roaring Fork job losses, and that Mr. Riordan only lost his job in connection with Laurel Mountain's closing. Tr. 186. However, the Court responded that Mr. Patrick's testimony suggested that the great effort to find employment applied to *all* displaced miners, and if Mr. Riordan's name was missing from the list, that would be troublesome. *Id.* At odds with Mr. Patrick's testimony, Counsel for Respondent asserted that the Respondent "did try to place what they perceived to be their better people." *Id.* Respondent's Counsel submitted that the testimony was only regarding reaching out to Paramount in connection with the earlier layoff at Roaring Fork and that Riordan lost his job in connection with the second layoff, at Laurel Mountain. Tr. 187. Obviously, Counsel's characterization of testimony is not a substitute for the testimony received.

performance as a foreman. Tr. 205. Yet, while mine rescue membership meant points would be awarded, and more if need be, safety training did not.

The Court has found Mr. Jessee's testimony, both at the hearing and in his deposition, to be incredible. In his September 19, 2014, deposition, Jessee stated he had *no idea*<sup>15</sup> whose decision it was to terminate Mr. Riordan, even though he admitted to being the mine's superintendent. Tr. 219. Jessee maintained that he was *never told* why he was to evaluate all of his employees. *Id.* In terms of entering the evaluations into the computer, he stated that no one from HR gave him any guidance about the purpose of the evaluations nor did he ask for any guidance about filling them out. Tr. 220. Jessee also maintained that in his discussions with Mr. Patrick, he never discussed the shutdown of Roaring Fork or Laurel Mountain and never discussed the possibility that any employees from those mines would be coming over to Knox Creek. *Id.* In fact, Jessee asserted that, even when Dale Slempp was at the mine, he had *no idea* that Slempp was coming. Tr. 221. The Court found all of this to be incredible. Jessee maintained that his realm was safety, cost, and productivity and, in effect, it was his testimony that in terms of personnel he did not consider anything beyond the bottom line of the budgeted number of employees, neither inquiring, nor knowing, about anything beyond that. Tr. 220-21. These assertions, especially when consider as a whole, run counter to common human behavior.

Jessee also stated that, *he could not recall* ever giving an evaluation of Mr. Riordan before 2013. Tr. 221. He disputed as inaccurate Mr. Riordan's claim that he, Jessee, had evaluated him prior to 2013. Tr. 222. However, when challenged if that meant that Mr. Riordan was being untruthful about that, Jessee reiterated that he was "saying *I don't recall.*" Tr. 222 (emphasis added). Asked how Alpha received the information that went into the performance evaluations which resulted in bonuses for all salaried employees, Jessee stated he had "*no idea.*" Tr. 223.

Jessee maintained that when he learned, around December 12, 2013, that Riordan would be terminated, he did not discuss that with Mark Jackson or with anyone else for that matter. Tr. 224. Further, Jessee stated that he had no plan for who would be taking over Riordan's shift and would wait until the next day to figure that out "on the fly." Tr. 225. Yet, Jessee acknowledged that he spoke frequently with Mark Jackson "about different issues of the mining from day-to-day." *Id.* As discussed, he admitted that he spoke with Jackson about Riordan, stating that he had such a discussion in "Mid Spring of 2013." *Id.* This conversation, Jessee stated, involved "some problems -- about getting [Riordan] -- when he worked on the outbys, getting him to go underground, start work and stuff like that." Tr. 226. Jessee admitted that the workforce at Knox Creek is now larger than it was on December 13, 2013, and that the mine has more salaried people there now than back then. *Id.* He estimated that there was one additional hire plus the transfers from Cherokee mine, which shut down in March 2014. Tr. 227.

Directed to the comments section of the employee evaluation form, Resp't Ex. 2, and particularly to the section addressing areas the employee needs to improve, Jessee read that it

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<sup>15</sup> "No idea-itis" is another condition closely related to "recall-itis." The conditions seem to occur together. As with the latter, which focuses on an ability to remember something, the former appears in situations where one would expect a witness to have some information about a line of inquiry, yet the witness responds that he has "no idea" about the matter.

stated “follow-up on jobs.” Tr. 228. In another area of the evaluation, it reflects Riordan “wants to work in the safety department.” *Id.* The same remark, that Riordan needs to follow-up on jobs, appears in Gov’t Ex. 3, which is the spreadsheet. Jessee agreed that in the section for improvements, only the one matter, the need to follow-up on jobs, was listed. Tr. 230. A discrepancy was noted, under the follow-up from field section, where the Secretary’s Exhibit 3 states: “Disciplinary measures regarding red zone areas had to be instructed and reinstructed on work projects, needed to be completed. It does not take initiative to identify mine concerns so that down time can be minimized as well as potential violations minimized.” Gov’t Ex. 3. Mr. Jessee stated that he did not give that information. Tr. 231. He had *no idea* who would have given that information nor how the additional information about discipline got on the spreadsheet evaluation for Mr. Riordan. Tr. 234. Continuing with the theme that Riordan’s motive was to get out of the mine and become a full time safety trainer, Jessee stated that Riordan had back issues and that it made it hard for him to get around. Tr. 207. However, Jessee conceded that the evaluation made no reference to any physical limitations for Riordan including back issues. Tr. 234. When asked if physical limitations would be important in evaluating one’s ability to perform a job, Jessee only allowed, “Yes, to a certain point I guess you could say.” *Id.* He then agreed that Riordan’s physical limitations were not important enough to include on the evaluation form, stating, “No, I guess not.” *Id.* Yet, Jessee admitted that he was the only person involved in the evaluation for Mr. Riordan. Tr. 232. Unsurprisingly, he had *no idea* where HR would have gotten that additional information which was added to Mr. Riordan’s evaluation. *Id.*

### **The “Running Right” Category**

There was a “Running Right” category on the employee evaluation form. Tr. 235. Mr. Riordan agreed that he has filled out “Running Right” cards. Tr. 93. The cards afford an anonymous method for commenting on mine operations. *Id.* They can involve compliments or criticisms. *Id.* He estimated that, over a period of many years, he had filled out probably hundreds of such cards. Tr. 94. Specifically, when asked about his using such cards in 2013, Riordan stated that he submitted on the order of one hundred Running Right cards in that year, and quite a few of them dealt with the ventilation issues. *Id.*

The typical practice was for the comments to be read during the safety meeting before each shift. Tr. 95. Again, consistent with the Court’s conclusion that he presented highly credible testimony, Mr. Riordan did not claim that the Running Right cards were connected with his loss of employment. In fact, the Court expressly noted on the record at the hearing of its evaluation of Mr. Riordan’s testimony as honest. Tr. 100-01.

In contrast, when asked about the Running Right category on that form, Jessee at first denied that they were all safety-related. Tr. 235. He was then shown his deposition and asked if his answer was “Yes,” that they were all safety-related. Tr. 236. When asked if that was his answer at his deposition, a serious moment arose as the Court had to intercede, instructing Jessee that he was “not to look at [his] attorney” before answering. *Id.* Jessee then stated, “No, but I did send in a change form on that.” *Id.* The Court then continued, advising that it was instructing Mr. Jessee that he was “to answer questions either [by] looking at [the Court] or [at] the person that’s asking the questions. You are not to look out at counsel[’s] table.” *Id.* Jessee then resumed his testimony agreeing that *was* his testimony at the time of the deposition. *Id.*

When asked if, in the Running Right category, among all the foremen Jessee evaluated, Riordan was rated the lowest, he ultimately agreed. Tr. 239. When asked why, with Riordan rated as the lowest foreman in the Running Right “safety evaluation topic,” he was the foreman used to train potential new foremen and new miner hires at the Tiller Mine, Jessee stated that they had no one else and he, Jessee, would have had to do the training. Tr. 240. As this was odd, Jessee then conceded that “[a]s a trainer . . . [he, Jessee,] didn’t have a problem with [Riordan] . . . with training and stuff . . . [the rating was not based on his training capabilities, it] was as a foreman.” Tr. 241. The problem, highlighted by Riordan’s Counsel Addington, was that while Riordan was rated as his least safe foreman,<sup>16</sup> Jessee was still fine with having him train new miners. *Id.* As Riordan’s Counsel noted for emphasis, Jessee was “perfectly comfortable having what [he] considered to be, based on [the] evaluation forms, the least safe foreman at [Jessee’s Tiller] mine, do all the training for new foremen classes, and also new hires at the Tiller mine.” Tr. 242. Jessee responded, “Yes.” *Id.* On re-direct, Respondent’s attorney asked if Running Right was limited to safety issues. Tr. 251. Jessee responded that it included operation improvements. *Id.*

## **Respondent’s Attempts to Undercut Mr. Riordan’s Discrimination Claim**

### **The Suggestion that Mr. Riordan Invented His Discrimination Claim**

This assertion arises from the contention that Mr. Riordan knew he would be terminated upon learning of the closing of the sister mines and for that reason concocted his discrimination claim. It is the Court’s view that this assertion is an attempt to use legerdemain to distract from the proper analysis of a complaint of discrimination. The issue before the Court is whether Riordan was discriminated against as a result of making safety complaints. The Court has found that to be the case. Mr. Riordan’s statement, roughly to the effect that he knew his termination would be occurring, does not alter that conclusion for several reasons. This is because his statement is not material to the test to be applied in a discrimination action. To begin with, one must not lose sight of the fact that Mr. Riordan’s statement, even adopting the version Respondent urges, did *not* include the reason for his termination. Respondent’s version, which the Court does not adopt as verbatim in any event, requires an inference as to what Riordan meant by some form of those words. Respondent’s interpretation of the meaning would require mind reading. Further, even if, for the sake of argument, Mr. Riordan had expressly added that his termination was due to the closing of the other mines, that would not change Respondent’s culpability if the record established, as it has, that his termination under the evaluation system was corrupt as applied to him, as Respondent was motivated by his safety complaints. In short, the claim of discrimination and its defense cannot be established based on what Mr. Riordan *may have thought* to be the reason for his termination on the day he was terminated, when the record shows that it stemmed from his safety complaints.

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<sup>16</sup> Respondent’s Counsel objected to the characterization that Knox Creek regarded Riordan as its least safe foreman. Tr. 241. The Court noted in that regard that Riordan received the lowest score for that category. Tr. 242.

### **The Claim that Mr. Riordan Was One of the Mine's Weaker Foremen**

The chief contention in its defense is Respondent's claim that Mr. Riordan would still be working were it not for the closing of the two sister mines. Apart from that, Respondent has, inaccurately and unfairly in the Court's view, effectively characterized Mr. Riordan's work performance as passable, while maintaining that he was still one of the weaker foremen it employed. Respondent has claimed that it was its evaluation system and Riordan's low score under that system that resulted in his dismissal.

However, through testimony during the hearing, the Respondent also attempted to insinuate that Riordan had other flaws and by implication that there were other reasons for his termination or that the flaws demonstrate the basis for his low score. Examples include Riordan's allegedly walking in by a pillar line; that supervisors had to keep after him to do his job; that he had a bad back,<sup>17</sup> suggesting that the condition both made him a weaker foreman and that the condition also prompted his desire to leave underground work for a less demanding position in the safety department; and that it's the foreman's job to make sure the ventilation is adequate, thereby implying that the ventilation problems Riordan complained about were due to his own shortcomings. While these many contentions were raised, Respondent did not directly make this part of its case. Instead, it maintained that, as poor a foreman as he was, at least according to Respondent's telling, he still would have been kept on at Knox Creek, but for the closing of the sister mines and his poor evaluation score. To be clear, the Court was not impressed at all with any of these claims about Mr. Riordan's other alleged deficiencies, but the larger point is that Respondent itself did not claim during its opening statement that Riordan's termination was due to anything other than his low score. Unfortunately, the low score defense, as discussed above, did not hold up either.

Mr. Jessee also agreed that the evaluation made no reference to any physical limitations for Riordan, including back issues. Tr. 234. However, when asked if physical limitations would be important in evaluating one's ability to perform a job, Jessee only allowed, "Yes, to a certain point I guess you could say." *Id.* He then agreed that Riordan's physical limitations were *not important enough* to include on the evaluation form, stating, "No, I guess not." *Id.* Accordingly, it is found that Mr. Riordan's undefined back problems do not shed light on this discrimination claim.

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<sup>17</sup> Mr. Riordan admitted that he has back problems and that he has had them for 15 years or longer. Tr. 91. He also agreed that "at times" it is difficult for him to do the physical parts of work in an underground coal mine. Tr. 92. Consistent with his forthright testimony, he admitted that he had been treated for his back issue for years and that he wanted to get a job as a safety trainer on a full-time basis. *Id.* To that end, he had numerous discussions with Mr. Jessee about his desire to perform safety training work on a full-time basis. Tr. 93. Riordan, to his credit, was very forthcoming in his entire testimony, including his testimony about his back. The Court concludes that Complainant's back was not a basis behind the filing of his discrimination claim. There is no credible evidence that Mr. Riordan's back issues prompted his claim nor that his back adversely affected his work performance at Knox Creek. There is, for example, no evidence of Complainant's loss of work time for such annoyances that he may have had regarding his back. In the Court's estimation of his credibility, that candor and honesty, worked in his favor when it came to evaluating his credibility on the critical issues in this matter.

Though Mr. Patrick was never a direct supervisor for Riordan, he claimed that Scott Jessee mentioned to him his impression of Riordan as a foreman. Patrick stated that “[o]n one occasion Mr. Jessee mentioned to [Patrick] that Mr. Riordan was one of his weaker section foremen.” Tr. 132. That this topic would even come up between the two seems quite odd. Further, Jessee never explained the basis for that view and apparently Patrick never inquired about the basis for the opinion either. *Id.* Patrick, upon the Court’s inquiry about the time of that comment, stated that he was “going to say that was probably 2012.” *Id.* Explaining further, Patrick offered that he had noticed that Mr. Riordan seemed to always be at the Knox Creek main office, instead of at the mine, and therefore asked “who this was and what his job duties were.” Tr. 133. Jessee’s response was that Riordan didn’t want to be a section foreman but wanted instead to work in the safety department. *Id.*

Adding to the Court’s skepticism about this story, when asked during his deposition about Jessee’s alleged remark that Riordan was one of his weaker foremen, Patrick stated that he had *no idea* and could not recall when Jessee made that comment, nor even how it was transmitted, by phone or in person. Tr. 145-46. Further, Mr. Patrick *could not recall* whether he initiated the remark about Mr. Riordan or if Jessee volunteered it. Tr. 146. As his deposition conflicted with this testimony at the hearing, the Court noted the obvious import of the line of questioning — that Mr. Patrick’s recollection seemed to be better at the hearing than earlier in time, during his deposition. Tr. 147. The Court expressly stated that Mr. Patrick’s improved recollection is not the way memories usually operate. Tr. 147-48. Mr. Patrick then stated that as far as his observing Riordan in the office in 2012, that “*was on one occasion.*” Tr. 148 (emphasis added). When the Court picked up on that remark, that he noticed Riordan “at the office on one occasion,” he then immediately recanted, stating, “No, I noticed Mr. Riordan being at the office several times, and that being in 2012.” *Id.* Suffice it to say, the Court did not place stock in this alleged occurrence between Patrick and Jessee regarding Mr. Riordan.

In subsequent cross-examination, revisiting the number of times Patrick had conversations with Mr. Jessee regarding Mr. Riordan, Patrick then responded that there were two entirely separate incidents and that they occurred in different time frames. The first was in connection with Patrick’s questions about Mr. Riordan’s “appearance daily at [the] mine office,” while the other time was in connection with the claim that Jessee told him that Riordan was one of the “lower performing section foremen.” Tr. 164. Patrick was then asked if Riordan was still training people at the time it was asserted that he was one of the weaker foremen. Tr. 165. Patrick, at the time of his deposition, had another bout of his “recall-itis.” *Id.* In contrast, at the hearing, Patrick stated that he didn’t think that Riordan was still doing training at the time he had the conversation with Mr. Jessee. *Id.*

In further cross-examination, regarding Patrick’s statement that he spoke with Jessee about Riordan one time, Patrick stated that the conversation involved the remark that Riordan was “a lesser performer as far as section foremen.” Tr. 166. When asked details about who initiated that conversation, Patrick stated that *he could not recall*, but he did recall that Jessee told him that Riordan really liked the safety department, that is, the training side of it, more than he enjoyed being a section foreman. Tr. 166-67.

Mr. Jessee was Riordan's superintendent for "[a]bout ten years." Tr. 202. Jessee stated that he goes underground "frequently" at the mine, elaborating that meant about three times per week. *Id.* While underground he checks on the status of the mine's operating areas and "over the years," as Respondent's Counsel put it, he had the opportunity to observe Mr. Riordan. *Id.* Jessee maintained that, in 2013, Riordan was "one of [his] weaker foremen." Tr. 203. He next agreed with Respondent's Counsel's words, that "he was at least good enough to keep his employment," if not for the layoffs at Respondent's other mines. Tr. 204. Again, not merely leading but effectively testifying for Jessee, Respondent's Counsel continued, "But compared to your other foremen, he was one of the weaker ones?" Jessee responded, "Yes," but when asked to elaborate about what was "weak about him," he responded, "Just his ability to lead as a foreman and actually the ability to go above and beyond what's required of him." *Id.* The utter emptiness of this claim has been discussed by the Court.

### **Mr. Riordan's Work as a Safety Trainer at the Mine**

Mr. Jessee agreed that Riordan wanted to be a safety professional, and if he had that job it would have relieved him of his duties as a foreman. Tr. 204. Further, he acknowledged that Riordan did some safety training at the mine in 2013, but that he was not the principal trainer. *Id.* The principal trainer was Ronnie Stevenson. *Id.* Jessee agreed that Riordan sometimes filled in and did various types of training and he agreed that he had an opportunity to observe Mr. Riordan's performance in doing that work. Tr. 205. When asked for his opinion of his performance in those tasks, Jessee described it as "fair." *Id.* Continually, Respondent's Counsel, through leading questions, suggested that Riordan's desire was to be out of the mine and performing training in place of that work. *See* Tr. 134, 204, 205, 226. The idea behind these questions was to suggest that Riordan's real motive was get out of mine work and that safety complaints were not his real agenda. Mr. Patrick acknowledged that Riordan did some training for the company, but that he was never a "regular" trainer. Tr. 134. Instead, he was the "second" for that work, filling in if the primary person was away. *Id.*

The Court was not impressed with Respondent's attempt to diminish Mr. Riordan's role as a safety trainer, whether labeled as the principal trainer or not. Further, Knox Creek can't have it both ways, simultaneously, grudgingly admitting that Mr. Riordan did safety training for its miners while claiming that it was difficult to get him to go underground or to be safety conscious, and that he was one of its poorer foremen, all while allowing him to do *any* safety training at all. Either he was really a poor foreman, and yet Knox Creek allowed him to safety train its employees, which does not speak well of Knox Creek's view of the importance of safety training, or the characterization painted by the mine about Mr. Riordan was untrue. The Court finds that the latter description applies.

### **Respondent's Post-hearing Brief**

The Court read and considered all points and contentions raised in Respondent's post-hearing brief. Resp't Br. 1-31. Although those arguments have been addressed through the findings of fact, one other matter is discussed here. The Respondent contends that, by virtue of a

Supreme Court decision in *Gross v. FBL Financial Services, Inc.*, an age discrimination matter,<sup>18</sup> the Mine Act's burden-shifting formula in its discrimination matters now must be discarded. Respondent first notes that under current law,

Commission decisions set out a shifting burden of proof in cases under Section 105(c). Under these decisions, the Secretary's initial burden is only to prove that the adverse action was motivated "in any part" by the protected activity. The burden then shifts to the operator to prove that the adverse action was motivated "in no part" by the protected activity or, alternatively, that the adverse action would have been taken solely for non-protected activities. *See, e.g., Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (Oct. 1980); *Driessen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324 (Apr. 1998).

Resp't Br. 14.

It is Respondent's contention that since the Supreme Court has invalidated the same burden-shifting scheme in Age Discrimination cases, the burden-shifting scheme under Mine Act cases must also be invalidated as it contains the same operative language. Resp't Br. 15. The Mine Act, it argues, is like the ADEA's discrimination provision and Title VII's retaliation provision in that it remedies discrimination which occurs "because of" the protected status or activity. *Id.* Respondent asserts that the Mine Act provides no remedy where the protected activity was simply "a motivating factor." *Id.* As Knox Creek sees it, the cited Supreme Court cases establish two important principles pertinent to this case:

First, the Secretary must prove as part of her case in chief that Riordan would not have been terminated "but for" the protected activity. It is not enough for him to prove the protected activity motivated the discharge "in any part." Second, the burden of proof on causation never shifts to Knox Creek, but remains with the Secretary from start to finish.

Resp't Br. 15-16.

Under the burden of proof required by *Gross v. FBL*, Knox Creek maintains that it is "the Secretary's burden to prove by the greater weight of the evidence that Riordan would not have

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<sup>18</sup> Respondent cites to *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009), stating that the Supreme Court held that burden-shifting does not apply under the Age Discrimination in Employment Act ("ADEA"), 28 U.S.C. § 621 et seq., "because, under the ADEA, the discrimination must be proven in the first instance to be 'because' of age. *Id.* at 176. The Supreme Court revisited the issue in *University of Texas Southwestern Medical Center v. Nassar*, 133 S. Ct. 2517, 2533 (2013), holding that even under Title VII, 'retaliation claims must be proved according to traditional principles of but-for causation . . . This requires proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer.' In *Burrage v. United States*, 134 S. Ct. 881, 888-89 (2014), the Supreme Court restated that – under federal statutes that use of the word 'because' in setting the causation standard – the burden is on the plaintiff to prove that the protected status was the 'but for' cause of the employer's adverse employment decision." Resp't Br. 15.

lost his job if he had not engaged in protected activities.” Resp’t Br. 16. The burden of going forward or of persuasion on all issues would “never shift to Knox Creek, but remain[] upon the Secretary throughout the trial.” *Id.*

Applying its view of the applicability of the Supreme Court ruling under a different statute, unrelated to mine safety law, to this case,<sup>19</sup> Knox Creek maintains that it showed a non-discriminatory reason for Riordan’s job termination — namely, a reduction in force and realignment which affected dozens of people besides Riordan and was driven by mine closures at sister mines. Riordan’s termination occurred on the very day of the closure of the Laurel Mountain mine, the event which caused it. Tr. at 327.

Per *Gross v. FBL*, it then was the Secretary’s burden to show that the reasons given by Knox Creek for Riordan’s termination were “pretextual,” meaning they had no basis in fact, the proffered reasons did not motivate the adverse action, or the reason given was insufficient to motivate the adverse action. It maintains that the realignment/layoff, involving dozens of employees at four mines, individual comparative evaluations, and efforts to place and retain the better employees, cannot be characterized as pretextual. No one would invent and implement such an involved, far-reaching decision-making protocol as a subterfuge to cover unlawfully motivated discrimination against a single employee among dozens who were affected by the process.

Knox Creek’s argument for why, upon providing its asserted business justification, it should prevail, is as follows:

The Commission and its judges have neither the statutory charter nor the specialized expertise to sit as a super grievance or arbitration board meting out industrial equity. Once it appears that a proffered business justification is not plainly incredible or implausible, a finding of pretext is inappropriate. *Chacon*, 3 FMSHRC at 2516. The Commission’s function is not to pass on the wisdom or fairness of Knox Creek’s asserted business justification, but rather only to determine whether it is credible and, if so, whether it would have motivated Knox Creek. *Secretary of Labor on behalf of Michael Price v. Jim Walter Resources, Inc.*, 12 FMSHRC 1521, 1534 (Aug. 1990).

The reduction and realignment of dozens of employees at the four affiliated mines is not “plainly incredible or implausible.” That the reduction and realignment occurred is clear and uncontested. The narrow statutory issue remaining is whether Knox Creek’s reason for Riordan’s termination – the reduction and realignment – was enough to have legitimately moved Knox Creek terminate Riordan’s employment. See *Chacon*, 3 FMSHRC at 2517. Undoubtedly it was. One hundred thirty three jobs were eliminated by the closure of two of the four mines in the group. There was nowhere to place all of them. Some jobs, including section foreman jobs, were eliminated. This is not a case of an employer claiming to have fired someone for an insubstantial offense, indicating the stated reason is

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<sup>19</sup> For the sake of argument only, Knox Creek assumes that the Secretary met its initial burden.

not the true reason. While the loss of Riordan's job was understandably a disappointment to him, it was one of dozens of changes to employment of more than 130 people resulting from the closure of half the mines in the group.

Determination of motivation in cases of this sort almost always involves inferences to be drawn from proven facts, but only inferences which are inherently reasonable and logically and rationally connected to evidentiary facts may be inferred. *Mid-Continent Res., Inc.*, 6 FMSHRC 1132, 1138 (May 1984); *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2153 (Nov. 1989). "Inferences must be based upon findings of fact followed by a logical and rational conclusion and may not be spun out of speculation or piled one on another to an inferred result that collapses the weight of its own insubstantial structure." *United Mine Workers of America on behalf of Mark A. Franks v. Emerald Coal Resources, LP*, 36 FMSHRC 2088, 2124 (Aug. 2014) (Althan, Commissioner, dissenting).

Resp't Br. 18-19.

The Court finds that Knox Creek's contention lacks merit for several reasons. First, the Supreme Court decision in the Age Discrimination Act case does not represent Mine Act law. The Mine Act has a long-established analysis for discrimination claims, and it is that current law which this Court follows here. While age discrimination is a worthy subject for relief, as reflected by Congress' recognition of that form of discrimination, it has neither the hazard-filled history, nor the deadly consequences, that are inextricably part of mining, as recognized by the federal government's role in enacting mine safety and health laws since the Federal Coal Mine Safety Act of 1952. Discrimination is an integral and essential part of the federal formula for the protection of the health and safety of persons working in the mining industry. Section 105(c) makes this plain, in providing in relevant part that "[n]o person shall discharge or in any manner discriminate against . . . because such miner . . . has filed or made a complaint under [the Mine Act] including a complaint *notifying the operator* . . . of an alleged danger or safety or health violation in a coal or other mine." 30 U.S.C. § 815(c).

As the Court also noted at the start of the hearing, in addressing the Respondent's Memorandum of Law in support of its contention, if it were to accede to the contention, it would seem to make it impossible for an alleged discriminatee to ever prevail because they would have to get inside the head of the mine operator. That would be impossible and therefore the task would be insurmountable. Tr. 5-6. The Court is not alone in this view. In the 5-4 decision of the Court in *Gross v. FBL*, Associate Justice Breyer, joined by Justices Souter and Ginsburg, said the following:

Justice BREYER, with whom Justice SOUTER and Justice GINSBURG join, dissenting.

I agree with Justice STEVENS that mixed-motive instructions are appropriate in the Age Discrimination in Employment Act context. And I join his opinion. The Court rejects this conclusion on the ground that the words "because of" require a

plaintiff to prove that age was the “but-for” cause of his employer’s adverse employment action. *Ante*, at 2350. But the majority does not explain why this is so. The words “because of” do not inherently require a showing of “but-for” causation, and I see no reason to read them to require such a showing.

It is one thing to require a typical tort plaintiff to show “but-for” causation. In that context, reasonably objective scientific or commonsense theories of physical causation make the concept of “but-for” causation comparatively easy to understand and relatively easy to apply. But it is an entirely different matter to determine a “but-for” relation when we consider, not physical forces, but the mind-related characterizations that constitute motive. Sometimes we speak of *determining* or *discovering* motives, but more often we *ascribe* motives, after an event, to an individual in light of the individual’s thoughts and other circumstances present at the time of decision. In a case where we characterize an employer’s actions as having been taken out of multiple motives, say, both because the employee was old and because he wore loud clothing, to apply “but-for” causation is to engage in a hypothetical inquiry about what would have happened if the employer’s thoughts and other circumstances had been different. The answer to this hypothetical inquiry will often be far from obvious, and, since the employee likely knows less than does the employer about what the employer was thinking at the time, the employer will often be in a stronger position than the employee to provide the answer.

All that a plaintiff can know for certain in such a context is that the forbidden motive did play a role in the employer’s decision. And the fact that a jury has found that age did play a role in the decision justifies the use of the word “because,” *i.e.*, the employer dismissed the employee because of his age (and other things). See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239–242, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989) (plurality opinion). I therefore would see nothing wrong in concluding that the plaintiff has established a violation of the statute.

But the law need not automatically assess liability in these circumstances. In *Price Waterhouse*, the plurality recognized an affirmative defense where the defendant could show that the employee would have been dismissed regardless. The law permits the employer this defense, not because the forbidden motive, age, had no role in the *actual* decision, but because the employer can show that he would have dismissed the employee anyway in the *hypothetical* circumstance in which his age-related motive was absent. And it makes sense that this would be an affirmative defense, rather than part of the showing of a violation, precisely because the defendant is in a better position than the plaintiff to establish how he would have acted in this hypothetical situation. See *id.*, at 242, 109 S.Ct. 1775; cf. *ante*, at 2356 (STEVENS, J., dissenting) (describing the Title VII framework). I can see nothing unfair or impractical about allocating the burdens of proof in this way.

The instruction that the District Court gave seems appropriate and lawful. It says, in pertinent part:

“Your verdict must be for plaintiff if all the following elements have been proved by the preponderance of the evidence:

.....

“[The] plaintiff’s age was a motivating factor in defendant’s decision to demote plaintiff.

“However, your verdict must be for defendant ... if it has been proved by the preponderance of the evidence that defendant would have demoted plaintiff regardless of his age.

.....

“As used in these instructions, plaintiff’s age was ‘a motivating factor,’ if plaintiff’s age played a part or a role in the defendant’s decision to demote plaintiff. However, plaintiff’s age need not have been the only reason for defendant’s decision to demote plaintiff.” App. 9–10.

For these reasons as well as for those set forth by Justice STEVENS, I respectfully dissent.

*Gross v. FBL*, 557 U.S. at 190-92.

Accordingly, for the foregoing reasons, Knox Creek’s contention that the Supreme Court’s decision in *Gross v. FBL* requires a new standard of proof for Mine Act discrimination cases is rejected.

### **Conclusion, Order, and Assessment of Civil Penalty**

As noted at the outset, Riordan’s termination was adverse action. It is undisputed that Charles Riordan was terminated by Knox Creek on December 13, 2013. There was a close proximity between Riordan’s protected activity and that adverse action.<sup>20</sup> Mr. Riordan was a long-employed and well-regarded employee until he continued to voice his safety concerns over the mine’s persistent ventilation problems. In good faith, thinking that an honest discussion of safety issues was encouraged, he spoke frankly to the mine president about that ventilation

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<sup>20</sup> As Riordan’s Counsel has noted, close proximity in time between a miner’s protected activity and an operator’s adverse action is itself evidence of a discriminatory motive, citing *Donovan on behalf of Anderson v. Stafford Construction Co.*, 732 F.2d 954, 960 (D.C. Cir. 1984); *Sec’y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (1981), *rev’d on other grounds sub nom. Donovan on behalf of Chacon v. Phelps Dodge Corp.*, 709 F.2d 86 (D.C. Cir. 1983).

problem. Aside from the Knox Creek's human resource witnesses, its other witnesses conceded that there were indeed continuous ventilation problems. One individual in particular, Mr. Jackson, took particular umbrage at Mr. Riordan's candid remarks about the problems and he told Riordan directly about his reaction on the first day following his return from vacation, stating that Riordan had thrown him under the bus. It was no coincidence that the same day, Mr. Riordan supposedly was found to be working under unsupported roof, the first time such an infraction had been leveled at him. Though the Respondent made other claims of Mr. Riordan's alleged shortcomings, they either did not actually occur, occurred once, or assuming generously that his failures did occur they were not written down, nor were any adverse actions taken, even when it was conceded that normally such alleged infractions would require action of some sort.

Then, too, it is completely contrary, and frankly unbelievable, that Riordan, as one of the mine's alleged "weaker foremen" would still be entrusted to conduct mine safety training. Further, in terms of the evaluation system, putting aside the lack of any detailed explanation of how points were assigned to the salaried people, putting aside Mr. Jessee's unbelievable testimony about his role in that process and the conflicts between his deposition and hearing testimony, the system itself, by the words of witnesses and counsel for the Respondent, was malleable. Scores were supposedly the determinative factor for determining who was retained and who was not, except when they were admittedly not decisive. Desired outcomes trumped scores when needed. Beyond that, there is the whole matter of Knox Creek adding employees after Mr. Riordan's discharge and the absence of any evidence that he was on a list of those eligible for the openings which subsequently arose. Beyond these reasons, regrettably, witnesses Patrick, Jessee, and Jackson were simply not credible.

Accordingly, for all of above, the Court finds that Knox Creek Coal unlawfully discriminated against the Complainant, Charles Riordan, for engaging in protected activity. The Court directs the Respondent to permanently reinstate the Complainant to his former position at Knox Creek together with any back pay which may be due and with all entitled benefits.<sup>21</sup>

In terms of the civil penalty, the Court has considered each of the statutory criteria and notes that the Secretary believes that a penalty of at least \$20,000.00 (twenty thousand dollars) should be assessed. The parties' stipulations and the record have spoken to some of the statutory criteria, but in arriving at the civil penalty, uppermost in the Court's evaluation are the lack of good faith, the gravity, and the negligence involved, each of which are deemed to have been significantly lacking on the Respondent's part and fully warrant the civil penalty of \$25,000.00 (twenty-five thousand dollars), which penalty amount is hereby imposed by this decision for the violation of section 105(c) of the Mine Act and which is to be paid within 30 days of this Order.

Within ten days of this Order, Knox Creek shall post this decision along with a visible notice on a bulletin board at the mine that is accessible to each and every employee, explaining that Knox Creek has been found to have discriminated against an employee, that such discrimination will be remedied, and that it will not reoccur in the future. The notice shall also

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<sup>21</sup> As is customary in these proceedings upon a finding of discrimination, the Court directs the parties to confer and to stipulate as to these terms and to report within 14 days of this decision whether an accord could be reached or whether it will be necessary to conduct an immediate hearing to take evidence on such issues as may be unresolved.

inform all employees of their rights in the event they believe they have been discriminated against. All references to the termination of Mr. Charles Riordan and the reasons asserted therein, are to be removed from his personnel file.

The Court retains jurisdiction of this matter until the specific remedies to which Charles Riordan is entitled are resolved and finalized. Accordingly, this decision will not become final until an Order granting any specific relief and awarding damages has been entered.

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

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
1331 PENNSYLVANIA AVENUE, N.W., SUITE 520N  
WASHINGTON, D.C. 20004

May 29, 2015

FRANK RODRIGUEZ,  
Complainant,

v.

LEHIGH SOUTHWEST CEMENT  
COMPANY,  
Respondent

CIVIL PENALTY PROCEEDING

Docket No. WEST 2013-301-DM  
WE MD 13-05

Mine ID 04-04075  
Lehigh Permanente Cement

**FINAL DECISION APPROVING SETTLEMENT**  
**ORDER OF DISMISSAL**

This case is before me pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977 (“Mine Act”), 30 U.S.C. § 815(c). Complainant Frank Rodriguez (“Complainant” or “Rodriguez”), filed a discrimination complaint against Lehigh Southwest Cement Company (“Respondent” or “Lehigh”) under section 105(c)(3) of the Mine Act, 30 U.S.C. § 815(c)(3). Chief Administrative Law Judge Robert J. Lesnick assigned this case to me, and I set the matter for hearing several times, including: October 22–23, 2013, February 25–26, 2014, and July 17–18, 2014. However, each time the hearing was continued because of the complicated procedural circumstances of this case and Complainant’s efforts to obtain representation. On January 13–14, 2015, I received testimony and evidence at a hearing in San Jose, California. Translation of Complainant’s testimony was time-consuming, and neither party completed its case-in-chief in the allotted two days. The litigants’ schedules precluded a supplemental hearing on January 15, 2015, and after discussing next steps in this case and the parties’ availability, I held a supplementary hearing in San Jose, California on April 14–15, 2015, to complete the hearing and take evidence on damages, if any.

During the hearing on April 15, the parties informed me that they wished an opportunity to complete a settlement agreement. (Tr. 648:2–7.) After the agreement was reduced to writing and signed by the parties, the parties submitted a settlement agreement entitled Confidential Settlement Agreement and General Release (“Confidential Settlement Agreement”) to me for my review. (Tr. 648:7–649:7.) In addition, the parties asked that the terms and conditions of the agreement remain strictly confidential. (Tr. 649:4–8.) In light of the parties’ request, I agreed to review the settlement agreement *in camera* and I issued an order from the bench placing the Confidential Settlement Agreement under seal in the official file.<sup>1</sup> (Tr. 649:8–10.)

Next, I issued an interim decision approving settlement from the bench. Having reviewed the parties’ settlement agreement, I approved its terms as they relate to Complainant’s claim under section 105(c)(3) of the Mine Act, and I found the agreement to be consistent with section

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<sup>1</sup> In a separate Order dated today, I also reduced to writing my April 15, 2015, bench order placing the Confidential Settlement Agreement under seal in the official file.

105(c) and the purposes of the Mine Act. *See* 30 C.F.R. §§ 815(c), 820(i). In addition to ordering the parties to comply with terms of the settlement agreement, I retained jurisdiction in the matter until the obligations outlined in the agreement had been satisfied. (Tr. 649:11–20.) Finally, I ordered counsel for the parties to report to my Law Clerk, Paul Veneziano, when all obligations had been satisfied. (Tr. 649:21–25.)

On May 13, 2015, counsel for Rodriguez informed Mr. Veneziano that the terms of the settlement agreement had been satisfied. On May 27, 2015, counsel for Lehigh confirmed that all obligations had been satisfied. Accordingly, final approval of the parties' settlement is hereby **GRANTED**.

WHEREFORE, the terms of the Confidential Settlement Agreement have been satisfied, this proceeding is hereby **DISMISSED** with prejudice.

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

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# **ADMINISTRATIVE LAW JUDGE ORDERS**



**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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May 4, 2015

SECRETARY OF LABOR  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA) ON  
BEHALF OF NICHOLAS DOVE,

Complainant,

v.

KENTUCKY FUEL CORP.,

Respondent

TEMPORARY REINSTATEMENT  
PROCEEDING

Docket No. KENT 2015-158-D  
MSHA Case No. PIKE-CD-2014-06

Mine: Beech Creek Surface  
Mine ID: 15-19475

**ORDER GRANTING JOINT  
MOTION TO TOLL TEMPORARY REINSTATEMENT**

This case is before me pursuant to an Application for Temporary Reinstatement brought under Section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §815(c), *et. seq.* (the “Mine Act.”). On January 26, 2015, I approved a settlement between the parties and ordered temporary economic reinstatement of Nicholas Dove. On March 9, 2015, the Respondent filed a Motion to Toll Temporary Reinstatement arguing that a reduction in force that occurred on February 9, 2015 warranted a tolling of the Temporary Reinstatement Order. In support of its assertions, the Respondent attached an Affidavit signed by mine manager, Kenny Lambert, Jr.. The Secretary opposed the Respondent’s Motion, and urged the Court to deny the Motion because there was “insufficient information concerning the total workforce in this case and because the information furnished to the court omits critical information about all the mining operations controlled by Respondent.” *Secy’s Opp. Mot.* ¶5. Furthermore, it stated that Respondent had ceased payments to the miner on February 9, 2015, in violation of this Court’s Order to Temporarily Economically Reinstatement Dove.

On March 16, 2015, the undersigned issued an Order Denying Respondent’s Motion to Toll Temporary Reinstatement. In that Order, the undersigned ordered the Respondent to provide information requested by the Secretary to show that tolling was warranted. Furthermore, the undersigned ordered the Respondent “to immediately pay Dove all outstanding payments due under the Temporary Reinstatement Order of January 26, 2015, and to continue such payment until this court orders otherwise.” *Ord. Denying Resp. ’s Mot.*, 2. Following this Order, a conference call was held with the parties, wherein the Respondent agreed to provide the Secretary additional information and the Secretary agreed to review the information expeditiously. It was agreed that once the Respondent provided sufficient information to show that tolling was warranted in this case, the parties would submit a joint motion to toll the Temporary Economic Reinstatement Order.

The Secretary and Respondent submitted a Joint Motion to Toll Economic Reinstatement Order on April 16, 2015. In this joint motion, the parties represented that additional information was supplied to the Secretary and, based on such information, the “Court’s Reinstatement Order should be tolled due to conditions unrelated to Dove’s alleged protected activity under the Mine Act.” The parties further requested this Court to toll the Reinstatement Order effective March 9, 2015, the date of Respondent’s initial opposed motion for tolling, which was denied. By email correspondence with the undersigned’s law clerk, the Respondent has represented that it has only paid Dove through March 9, 2015, in violation of the two previous orders of this court.

For the reasons that follow, the Joint Motion to Toll Economic Reinstatement Order is **GRANTED**, effective April 16, 2015.

“The Commission has recognized that the occurrence of certain events, such as a layoff for economic reasons, may toll an operator's reinstatement obligation.” *MSHA obo Robert Gatlin v. KenAmerican Resources, Inc.*, 31 FMSHRC 1050, 1054 (Oct. 2009). This “limited inquiry to determine whether the obligation to reinstate a miner may be tolled even when it has been established that the miner's discrimination complaint is not frivolous,” must be consistent with the “narrow scope of temporary reinstatement proceedings.” *MSHA obo Dustin Rodriguez v. C.R. Meyer & Sons Co.*, 2013 WL 2146640, \*3 (May, 2013). Accordingly,

[a]n operator generally must affirmatively prove that a layoff justifies tolling temporary reinstatement by a preponderance of the evidence. *Gatlin*, 31 FMSHRC at 1055. However, if the objectivity of the layoff as applied to the miner is called into question in the temporary reinstatement phase of the litigation, judges must apply the “not frivolously brought” standard contained in section 105(c)(2) of the Mine Act to the miner's claim.

*MSHA obo Russell Ratliff v. Cobra Natural Resources, LLC*, 2013 WL 865606, \*4 (Feb. 2013). “In other words, temporary reinstatement should be granted and not tolled unless the operator shows that the claim that the layoff arose at least in part from protected activity is frivolous.” *C.R. Meyer & Sons*, 2013 WL 2146640, \*3.

The Commission has categorized tolling as an affirmative defense, and held that the operator must make a showing by a preponderance of the evidence that no work was available for the miner. *KenAmerican Resources*, 31 FMSHRC at 1054-55; see also *Chadrick Casebolt*, 6 FMSHRC 485, 499 (Feb. 1984) (“if business conditions result in a reduction in the work force the right to back pay is tolled because a discriminatee is entitled to back pay only for the period during which he would have worked but for the unlawful discrimination.”)

In the instant case, the Secretary opposed the March 9, 2015 Motion to Toll and challenged the objectivity of the layoff. Therefore, under the “not frivolously brought” standard, the Respondent’s motion failed. After the Respondent provided additional information and evidence to the Secretary, the Secretary dropped its objections to the objectivity of the layoff, and indeed joined the Motion to Toll on April 16, 2015. Therefore, the standard of review is now preponderance of the evidence. Under this standard, the Respondent’s evidence that the Secretary has reviewed that it idled the Bevins Branch and Bent Mountain surface mines due a

loss of coal sales, resulting in a reduction-in-force of 72, is sufficient. *Joint Motion*, 1. The Respondent retained five supervisors and 11 heavy equipment operators at its three surface mines, but it retained no greasers (Dove's position at the mine). *Id.* at 2. Under these circumstances, Dove's temporary economic reinstatement should be tolled.

In the Joint Motion, the parties suggest that the Temporary Reinstatement Order be tolled effective March 9, 2015—the date of the first Motion to Toll. This request is denied, and instead the Temporary Reinstatement Order is tolled effective April 16, 2015—the date of the Joint Motion to Toll upon which this Order is based.

According to two previous orders, the Respondent was required to continue payments to Dove until such time as this Court ruled otherwise. Respondent unilaterally ceased payments on February 9, and only continued payment through March 9 (a date that Respondent again chose unilaterally without leave of the Court) after the denial of its first Motion to Toll and Order requiring the continuation of payment. In previous cases, the Commission has rebuked Respondents for unilaterally cutting off payments to a discriminatee on the date of a reduction-in-force rather than on the date of a modification, stating that “no operator is free to take the law into its own hands by deciding for itself what the law means and how it can best be applied.” *Sec. y of Labor obo Robert Gatlin v. KenAmerican Resources, Inc.*, 31 FMSHRC 1050, n. 2 (Oct. 2009). In *Gatlin*, the Commission made it clear what the proper course of action is for an operator that believes a change in conditions warranted tolling, stating “[r]ather than determining unilaterally that the workforce reduction justified terminating Mr. Gatlin's reinstatement, KenAmerican should have moved the Judge to modify the August 31 Order. *Id.*<sup>1</sup>

Here, the Respondent chose to wait a month after its reduction-in-force to file its first Motion to Toll, and then took another month after that Motion was denied to provide additional evidence to the Secretary. It cannot now claim that the temporary reinstatement should be tolled retroactively, when it was in control of the information and evidence and was the cause of the delay.<sup>2</sup> The Respondent provided sufficient evidence that tolling was warranted in its April 16, 2015 Joint Motion. Accordingly:

It is **ORDERED** that Dove's temporary economic reinstatement is **TOLLED**.

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<sup>1</sup> If Respondent had not violated the court's order and continued payment to the miner, that money would not be recoverable by the Respondent even if the February 9 reduction-in-force warranted tolling the temporary reinstatement. *Sec. y of Labor obo Dustin Rodriguez v. C.R. Meyer and Sons Co.*, 35 FMSHRC 811, 813-814 (Apr. 2013)(“[T]here is nothing in the Mine Act which contemplates that the miner would be expected to repay the amounts paid pursuant to the reinstatement order. Indeed, that would run counter to the intent of the provision, which is to provide immediate relief to a complaining miner while he or she waits for the case to be decided.”)

<sup>2</sup> Respondent's stated reason for idling the mine on February 9 was “the general softness of the Central Appalachian coal marke[t].” Presumably this decision was made prior to February 9, and it could have moved this Court prior to that date to toll the economic reinstatement.

The Respondent is **ORDERED** to pay Dove under the terms of the Temporary Economic Reinstatement Order through April 16, 2015.

It is Further **ORDERED** that the Respondent shall inform the Secretary, Dove, and this Court if Beech Creek, Bevins Branch, or Bent Mountain mines are brought back into production.

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

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/mzm

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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May 4, 2015

SEAN MILLER,  
Petitioner,

v.

SAVAGE SERVICES CORP.,  
Respondent.

DISCRIMINATION PROCEEDING

Docket No. WEST 2014-7-DM  
RM MD 2013-08

Mine: Freeport-McMoRan Morenci Mine  
Mine ID: 02-00024 A3858

## **ORDER ON RESPONDENT'S MOTION FOR SUMMARY DECISION**

Before: Judge Moran

Before the Court is Respondent Savage Services Corporation's ("Savage") Motion for Summary Decision ("Savage Motion").<sup>1</sup> The Complainant, Sean Miller, is not an attorney and is bringing this action *pro se* pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(3) ("Mine Act"), and 29 C.F.R. § 2700.40(b). For the reasons that follow, the Respondent's Motion is DENIED. The hearing in this matter remains as scheduled, to commence on May 12, 2015, at the Graham County Courthouse, 800 W. Main Street, Safford, Arizona.

### **Background**

On May 14, 2013, Sean Miller made a discrimination complaint with MSHA, which complaint was received on May 17th. Mr. Miller alleged that he was "Harrassed and Retaliated againsts (sic) for putting Commercial Vehicles Out of Service." The Complaint identified Isaiah Krass, assistant operations manager, and Richard Burkie,<sup>2</sup> another Savage supervisor, as the individuals who "harassed and retaliated against[] [him] for putting commercial vehicles out of service." MSHA Discrimination Report May 14, 2013. Thereafter, on August 22, 2013, MSHA advised Miller by letter that

[b]ased on a review of the information gathered during the investigation, MSHA does not believe that there is sufficient evidence to establish, by a preponderance of the evidence that a violation of Section 105(c) occurred [and] [f]or that reason, the Secretary of Labor will not file a discrimination case with the Federal Mine Safety and Health Review Commission ("Commission") in this matter.

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<sup>1</sup> The Order of Assignment lists the Respondent as "Savage Transport," as did a pre-assignment Order directing the Respondent to answer the Complaint. The Respondent is now correctly identified as Savage Services Corporation.

<sup>2</sup> This is a misspelling. The individual is Richard Bjerke.

The letter noted that Miller “continue[s] to have the right to file a discrimination case on [his] own behalf with the Commission.” Miller did just that, submitting a letter to Carolyn T. James (“Ms. James”), Mine Safety and Health Administration, 1100 Wilson Boulevard, Arlington, Virginia 22209-3939, on September 30, 2013, which letter was then forwarded to the Commission and date stamped as received on October 9, 2013. The letter to Ms. James identified two instances of protected activity: (1) Miller’s taking his truck out of service because of inoperable brakes, and (2) his refusal to drive an overweight vehicle and his further refusal to use a replacement truck which had not been cleared for service in place of the overweight vehicle.

At this point, it is necessary to note that Miller subsequently made a second discrimination complaint against Savage, which resulted in the Secretary filing a complaint against Savage, identified as Docket No. WEST 2014-404, and regarding which the Court issued its decision on April 30, 2015, finding that Savage unlawfully discriminated against Sean Miller. The second discrimination complaint was filed on or about October 21, 2013, and was based upon the claim that Miller was unlawfully discharged on or about September 3, 2013. The second complaint references Miller’s first complaint, alleging that around May 2, 2013, he was harassed and disciplined for taking vehicles out of service and it identifies May 2, 2013, as one of the incidents of Miller’s protected activity. The second complaint then related other alleged instances of protected activity occurring after the matter raised in the first complaint.

### **Summary Decision**

The Commission’s procedural rule governing summary decision, 29 C.F.R. § 2700.67, provides in relevant part:

(b) Grounds. 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.

...  
(d) Form of opposition. An opposition to a motion for summary decision shall include a memorandum of points and authorities specifying why the moving party is not entitled to summary decision and may be supported by affidavits or other verified documents. The opposition shall also include a separate concise statement of each genuine issue of material fact necessary to be litigated, supported by a reference to any accompanying affidavits or other verified documents. Material facts identified as not in issue by the moving party shall be deemed admitted for purposes of the motion unless controverted by the statement in opposition. If a party does not respond in opposition, summary decision, *if appropriate*, shall be entered in favor of the moving party.<sup>3</sup>

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<sup>3</sup> Following a conference call with the parties regarding Savage’s Motion for Summary Decision, the Court emailed Miller, copying Attorney Wolff. As noted below, that email summed up the Court’s discussion of the conference call. However, one aspect of the email from  
(continued...)

.....  
(f) Case not fully adjudicated on motion. If a motion for summary decision is denied in whole or in part, the Judge shall ascertain what material facts are controverted and shall issue an order directing further proceedings as appropriate.

29 C.F.R. § 2700.67 (emphasis added).

### **Savage's Motion for Summary Decision**

On April 3, 2015, Savage filed its motion for summary decision, alleging four bases in support:

[1] Mr. Miller's complaint was filed with MSHA outside of the 60-day statutory time limit imposed by Section 105(c) of the Mine Act without a justifiable excuse for that delay;

[2] No adverse action actionable under the Mine Act was taken against Mr. Miller as a result of his protected activity;

[3] The complaint now before the Commission alleges conduct that is outside the scope of the complaint Mr. Miller filed with MSHA and to that extent is outside the scope of the agency's investigation and is not properly raised in his Section 105(c)(3) complaint; and

[4] This matter has been superseded by Mr. Miller's termination-related proceeding in No. WEST 2014-404-DM.

Savage Motion at 5.

Because Miller is not an attorney and is acting *pro se*, the Court had a conference call with the parties to discuss Savage's Motion on April 9, 2015. During that call, the Court ruled on two of the bases advanced by Respondent. As to the first basis, that Mr. Miller's complaint was filed with MSHA outside of the 60-day statutory time limit imposed by Section 105(c) of the Mine Act without a justifiable excuse for that delay, the Court rules that Miller's lack of sophistication in legal matters excuses his delay. Beyond that finding, it is noted that Savage's objection relates to Miller's complaint that he was harassed on January 31, 2013, and did not file the complaint with MSHA until some six weeks after the 60 day time limit. However, neither MSHA nor Savage previously raised, or had an issue with, Miller's delayed filing. Savage

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<sup>3</sup> (...continued)

the Court misstated the standard for reviewing such motions in the statement that "such a [summary decision] motion asserts that there are no factual issues in dispute *and that the law favors the arguments of the party filing the motion* (Savage, in this case), so the Court may issue its decision without any hearing." In fact, the applicable provision provides: "If a party does not respond in opposition, summary decision, *if appropriate*, shall be entered in favor of the moving party." 29 C.F.R. § 2700.67(d) (emphasis added). Accordingly, it is within the Court's informed discretion to rule in favor of the moving party in such circumstances *or not*. Under the circumstances here, for the reasons expressed in this Order, the Court has determined that, despite the minimal response in opposition from Mr. Miller, it would not be appropriate to enter summary decision in favor of Savage against this *pro se* complainant.

concedes that the deadline is not jurisdictional. The Court finds that there was delay all around and that Savage should have objected when MSHA first notified Savage that it was investigating Miller's complaint.

The second basis ruled upon by the Court during the call pertains to Savage's objection that the complaint now before the Commission alleges conduct that is outside the scope of the complaint Mr. Miller filed with MSHA, and to that extent is outside the scope of the agency's investigation, and is therefore not properly raised in his section 105(c)(3) complaint. The Court disposed of that objection, but agrees with Savage that Mr. Miller's complaint can't now be expanded from the basis which prompted him to file it, namely the January 31, 2013, events, the harassment associated with those events, and any harm he may have experienced from that harassment.

Although, sequentially, it was the last of the four bases advanced by Savage, the Court turns to Respondent's claim that the matter has been superseded by Mr. Miller's termination-related proceeding in No. WEST 2014-404-DM. The first complaint was not superseded by the second complaint, although *some* factual aspects of the first complaint were addressed during the hearing held in June 2014. MSHA Special Investigator Funkhouser testified that four safety incidents were considered in this first complaint: a brake shoe issue; a brake line leak; a tire issue; and an overweight truck incident. Investigator Funkhouser recommended that MSHA go forward with that first complaint, but MSHA decided against that recommendation and Miller then proceeded on his own in this present section 105(c)(3) action. Funkhouser noted a difference between the first complaint and the second one: the adverse action in the first complaint was harassment, while the second complaint involved Miller's employment termination. Transcript of Hearing at 237-48, *Sec'y of Labor on behalf of Miller v. Savage Services Corp.*, WEST 2014-404-DM (Apr. 30, 2015) (ALJ) [hereinafter *Miller I*].

The last of the bases raised by the Respondent is that the complaint in this matter fails to assert that an "adverse action actionable under the Mine Act was taken against Mr. Miller as a result of his protected activity." More particularly, Savage maintains that "Mr. Miller was not suspended, discharged, disciplined, or even subjected to any undesirable change in his work assignments. . . . Harassment, standing alone, does not constitute an adverse action under the Mine Act." Savage Motion at 11. Savage continues, stating that "[e]ven assuming for the sake of argument that Mr. Krass questioned Mr. Miller about his sexuality, and even assuming further that Mr. [Krass] did so in a harassing manner, that by itself is not 'adverse' activity actionable under the Mine Act." *Id.* at 12.

Savage concludes its argument with the assertion that "because Mr. Miller suffered no adverse action, there is no redressable injury in this case." *Id.* at 13. Rhetorically, it then asks, "What relief could the Commission possibly offer to Mr. Miller when he was not suspended, discharged, disciplined, or subjected to undesirable work assignments? Nothing changed for Mr. Miller." *Id.*

The Court believes that adverse action can be established under allegations such as those contained in Miller's Complaint. The Commission has tacitly recognized harassment as a stand-alone form of adverse action since its 1982 decision in *Moses v. Whitley Development Corp.*, 4

FMSHRC 1475 (Aug. 1982), *aff'd*, 770 F.2d 168 (6th Cir. 1985), in which the Commission considered whether coercive interrogation and harassment may ever constitute a violation of section 105(c)(1). The Commission found that such actions do violate the Mine Act:

Section 105(c)(1) states that “no person shall discharge or in any manner discriminate against . . . or otherwise interfere with the exercise of the statutory rights of any miner.” (Emphasis added.) We have previously noted the high priority Congress placed upon the unencumbered exercise of rights granted miners under the Mine Act. *David Pasula v. Consolidation Coal Company*, 2 FMSHRC 2786, 2790 (October 1980), *rev'd on other grounds sub nom, Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981). As we concluded in *Pasula*, Congress viewed the free exercise of miners' rights as “essential to the achievement of safe and healthful mines.” 2 FMSHRC at 2790. Furthermore, 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.” S. Rep. 95-191, 95th Cong., 1st Sess. 36 (1977) [“S. Rep.”], reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 624 (1978) [“Legis. Hist.”].

We find that among the “more subtle forms of interference” are coercive interrogation and harassment over the exercise of protected rights. A natural result of such practices may be to instill in the minds of employees fear of reprisal or discrimination. Such actions may not only chill the exercise of protected rights by the directly affected miners, but may also cause other miners, who wish to avoid similar treatment, to refrain from asserting their rights. This result is at odds with the goal of encouraging miner participation in enforcement of the Mine Act. We therefore conclude that coercive interrogation *and harassment over the exercise of protected rights is prohibited by section 105(c)(1) of the Mine Act.*

*Moses*, 4 FMSHRC at 1478-79 (emphasis added). In that same decision, the Commission stated:

Under section 103(g)(1) of the Act, Moses had the right to request an inspection and to do so anonymously. The persistence with which the subject of his supposed reporting of the bulldozer accident was raised and the accusatory manner in which it was done could logically result in a fear of reprisal and a reluctance to exercise the right in the future. These conversations thus constituted prohibited interference under section 105(c)(1).

*Id.* at 1479.

Shortly after *Moses*, the Commission added that, “[i]n general, 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); *see also id.* at 1848 n.2 (“This case does not require us to develop a more detailed inventory of what is covered by the term adverse action. We recognize that discrimination may manifest itself in subtle or indirect forms of adverse action.”).

Quoting *Moses*, the Commission has stated that “[w]hether an operator’s question or comments concerning a miner’s exercise of a protected right constitute coercive interrogation or harassment proscribed by the Mine Act ‘must be determined by what is said and done, and by the circumstances surrounding the words and actions.’” *Sec’y of Labor on behalf of Gray v. N. Star Mining, Inc.*, 27 FMSHRC 1, 8 (Jan. 2005) (quoting *Moses*, 4 FMSHRC at 1479 n.8).

Based on the foregoing, the Court believes that harassment resulting from engaging in protected activity is cognizable under the Mine Act. The essence of the problem regarding Miller’s section 105(c)(3) claim is that the protected activity that spawned his first complaint was raised during the hearing on his second complaint but the harassment attendant to that was not. The matters were not consolidated and, as a practical matter they could not be, given that the Secretary opted not to proceed with Miller’s first complaint but did take up the second complaint.

### **Miller’s Response to Savage’s Motion for Summary Decision**

Pursuant to the Court’s conference call with the parties discussing Savage’s Motion for Summary Decision, the Court directed Mr. Miller to file a response to that motion. The response was minimal, as would be expected from a non-attorney complainant.<sup>4</sup> The Court acknowledges

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<sup>4</sup> The full text of Mr. Miller’s response provided:

As I am representing myself and I am not an attorney, consistent with the conference call, the Court does not expect me to supply a memorandum of points and authorities specifying why Savage is not entitled to summary decision. Although after the conference call on Wednesday I realized that I had commented on the wrong timeline of events. Now fully understanding the precise time frame of when the complaint was filed and to the fact of what the delay was.

#### **Claim #1**

It took me some time to see and recognize that there was a pattern being established as a result of my frequent Safety complaints. I felt that I was being singled out. On Record as Brian Hancock testified on pg. 354 lines 11- 22, states that I made 75 percent more complaints to the other drivers 25 percent.

#### **Claim #4**

I experienced sleeplessness, anxiety, weight gain, while trying to perform job duties. I did not understand, but now I see that there are no new facts to be presented to the court.

(continued...)

that Mr. Miller's response was minimal, but concludes that, in context, summary decision would not be appropriate.<sup>5</sup>

## Conclusion

For the foregoing reasons, the Court DENIES Respondent's Motion for Summary Decision. It is not as if Complainant Miller's allegations about harassment have been characterized by Savage as being made out of whole cloth. Savage, while not conceding each aspect of Miller's harassment contention, spoke to his claim at several points in its Motion. As it noted in that submission:

At a deposition taken in the termination-related case, No. WEST 2014-404-DM, Mr. Miller described "the crux of the discrimination" that took place in January 2013 as follows: "My supervisor – I felt my supervisor personally attacked me, asking – demanding if I was homosexual, if I batted for the other team, and so forth." Exhibit C, at 75:17-22; *see also* Exhibit D (written statement by Mr. Miller dated March 4, 2013, submitted as an internal company complaint to the acting manager of the Morenci operation complaining about Mr. Krass harassing him about his sexuality).

Savage Motion for Summary Decision at 3. Later, it quoted the following from Miller's deposition by Savage about the matter:

MILLER: I believe discrimination.

Q: Okay. Who?

MILLER: Isaiah Krass.

Q: Okay. When did that discrimination that you've complained about occur?

MILLER: On the 30th of January.

Q: Okay. And what was the – the crux of the discrimination, as you perceive it?

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<sup>4</sup> (...continued)

E-mail from Sean Miller, Complainant, to Daniel Wolff and Michael Small (Apr. 14, 2015, 11:45 EDT). With reference to Mr. Miller's last remark, that there are no new facts to be presented, this remark is disregarded. During the course of conference calls with the parties for this docket, which were recorded, Mr. Miller misunderstood other aspects of his complaint, but when the Court took the time to explain matters, he would then change his intention about continuing this litigation. In fact Mr. Miller's same email response here contradicts his remark that he has no new facts, as he states experiencing "sleeplessness, anxiety, weight gain, while trying to perform job duties," all of which would constitute *new facts*. This Order attempts to explain the facts about which Mr. Miller will testify in support of his claim of the harassment he experienced in connection with his safety complaint and with the ill-effects, if any, that he subsequently experienced both personally and in connection with interactions with fellow miners.

<sup>5</sup> The issue of a motion for a directed verdict at the conclusion of Mr. Miller's evidence is matter to be resolved at a later time.

MILLER: My supervisor – I felt my supervisor personally attacked me, asking – demanding if I was homosexual, if I batted for the other team, and so forth. . . . Exhibit C at 75:4-22; 78:4-16[.]

Savage Motion at 9-10.

Indeed, because of a written complaint to management that Mr. Miller submitted on or around March 4, 2013 (Exhibit D), Mr. Krass was issued a counseling statement of his own by the then acting Operations Manager, Richard Bjerke, instructing him not to repeat his behavior and warning him that if he acted in that manner again, it would be grounds for termination. *See* Exhibit I; Savage Motion at 10. Krass was issued a counseling statement on March 5, 2013, in connection with his improper conversations between him (as a supervisor) and an employee (Miller). Ex. C-7 at 3-4, *Miller I.*<sup>6</sup> Savage then concedes, “It is easy enough to understand how questioning a co-worker about his sexuality, regardless of motive, could create an uncomfortable work atmosphere, and for that reason it is easy to see why, from a company’s human resources perspective, such conduct should be discouraged, which is exactly why Savage Services issued Mr. Krass a counseling statement.” Savage Motion at 12 n.7.

Beyond these remarks, tantamount to admissions, there is also Miller’s handwritten statement, dated March 4, 2013, about the incident. Ex. C-9 at 12-13, *Miller I.* The Court, by this Order, makes that admitted exhibit part of this case.

As the Court observed on May 1, 2015, in response to an email from Savage’s Counsel:

[It] would note that when Mr. Miller filed his first discrimination complaint, the special investigator recommended that the case go forward and this came about without Mr. Miller having been demoted or fired or some other thing along those lines. The Commission too, in several cases, has recognized that harassment, by itself, can be the basis for [] discrimination. Apart from the Commission’s remarks about this, [the Court] acknowledge[s] that damages, though ascertainable, would be in uncharted waters because decisions so far have involved harassment plus some other action taken against an employee.

The hearing would be for Mr. Miller to have the opportunity to testify in detail about the circumstances surrounding and the nature of the harassment he alleges to have experienced and how that harmed him, financially and/or emotionally, if that is the case, and would also include, if alleged and so testified to under oath by Mr. Miller, any factor of intimidation making him reluctant to assert future safety or health concerns. Savage Services would then have the opportunity to rebut those claims, but bearing in mind that certain statements (effectively admissions) by Savage, could be construed as harassment towards Mr. Miller and, depending on Mr. Miller’s testimony, which harassment was linked with his safety complaint(s).

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<sup>6</sup> In Savage’s Post-Hearing Brief, in connection with Miller’s complaint about bad brakes on a truck, it notes that Krass was disciplined for his statements to Miller despite disagreeing with the allegations. Savage Br. 32, *Miller I.*

That said, as in any case, whether the Secretary is involved or, as in this case, not involved, there is nothing to prevent the parties from discussing between themselves a modest but fair settlement figure pertaining *only* to WEST 2014-7. For emphasis, [the Court] want[s] to remind the parties that any such settlement would be totally separate and apart from the damages associated with WEST 2014-404. The cases are separate and distinct. What happens in one does not impact the other. Note that if the matter does go to hearing and [the Court] find[s] that discrimination occurred, the Secretary would then be obligated to seek a civil penalty for such violation of section 105(c)(3).

Email from the Court to the parties (May 1, 2015, 12:59 EDT) (emphasis added).

Accordingly, at the hearing, Mr. Miller will have the opportunity to testify in detail both as to the nature of his safety complaint and the harassment which he has asserted was leveled at him by Savage's Mr. Krass. Further, Mr. Miller will have a full opportunity to express if that odious alleged harassment, directed at him by Krass, impacted and harmed him. Of course Savage will have the opportunity to establish, if it can, that the harassment had no impact upon Miller and otherwise to defend against the claim, with a goal, one would presume, of diminishing the claim that Miller was harmed by that harassment.

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

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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WASHINGTON, DC 20004

May 4, 2015

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

v.

SPARTAN MINING COMPANY, LLC,  
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. WEVA 2013-109  
A.C. No. 46-01544-285119-02

Docket No. WEVA 2012-1373  
A.C. No. 46-01544-290889-01

Docket No. WEVA 2012-1746  
A.C. No. 46-01544-298372

Mine: Road Fork #51

**ORDER**

Before: Judge Feldman

The captioned consolidated 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 five citations that are the subjects of the captioned civil penalty proceedings were all issued on February 1, 2012.<sup>1</sup> These citations were issued to the same mine foreman, in the same part of the mine, on the same day, and by the same inspectors. In the interest of judicial economy, and the Commission’s limited resources, these civil penalty matters were stayed on March 12, 2014, based on the parties’ representation that the Secretary had initiated an investigation to determine whether a personal liability case should be brought 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.

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<sup>1</sup> Citation Nos. 8120978, 8148651, 8148652, 8151811, and 8151812, are also the subjects of contest Docket Nos. WEVA 2012-720-R, WEVA 2012-721-R, WEVA 2012-722-R, WEVA 2012-723-R, and WEVA 2012-724-R. These contest proceedings were dismissed as moot on April 29, 2015, because they were superseded by the captioned civil penalty proceedings.

As noted by Judge Tureck:

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 ....” (Emphasis added.) 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 of § 105(a) should apply to penalty assessments brought under § 110(c).

*Sec’y v. Christopher Brinson, et al., employed by Kentucky-Tennessee Clay Co.*, 35 FMSHRC 1463, 1465 (May 2013) (ALJ) (citations omitted).

In *Sec’y of Labor v. Twentymile Coal Co.*, 411 F.3d 256, 261 (D.C. Cir. 2005), the court held that the “reasonable time” processing guidelines in section 105(a) of the Mine Act are intended to “spur the Secretary to action,” rather than to routinely confer rights on litigants that will limit the scope of the Secretary’s authority. However, the Secretary’s permissible procrastination is not without its limits. Significantly, even the Secretary has identified the parameters for satisfying the “reasonable time” provision contemplated by section 105(a). In this regard, 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, 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.

I MSHA, U.S. Dep’t of Labor, *Program Policy Manual*, § 110(c) (2012).

Thus, even the Secretary has acknowledged that completion of section 110(c) investigations must be timely accomplished. In these matters, more than enough time has elapsed in that the Secretary has had more than three years (approximately 38 months) since the February 2012 issuance of the subject citations to complete his relevant 110(c) investigation.

Accordingly, **IT IS ORDERED** that the Secretary, **within 90 days from the date of this Order**, initiate a relevant 110(c) proceeding, or, alternatively, advise the undersigned that, based on his investigation findings, the Secretary has declined to bring any relevant 110(c) actions.<sup>2</sup> At such time, the stay in the captioned civil penalty matters will be lifted and the civil penalty matters will be scheduled for hearing. The failure to provide the results of the relevant 110(c) investigation within 90 days from the date of this Order will result in the dismissal of the captioned civil penalty proceedings for failure to prosecute.

/s/ Jerold Feldman  
Jerold Feldman  
Administrative Law Judge

Distribution: (Regular and Certified Mail)

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/acp

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<sup>2</sup> The Secretary can provide notification of the status of the relevant 110(c) investigation to my law clerk, Avery Peechatka, at [apeechatka@fmshrc.gov](mailto:apeechatka@fmshrc.gov) or (202) 233-4010.

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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May 8, 2015

SECRETARY OF LABOR  
U.S. DEPARTMENT OF LABOR on  
behalf of FREDRICK ABRAMS,  
Complainant,

v.

CALIFORNIA ROCK CRUSHER CORP.,  
Respondent.

TEMPORARY REINSTATEMENT  
PROCEEDING

Docket No. WEST 2015-551-DM  
MSHA Case No. WE-MD-15-06

Mine: CEMEX-Paiute Pit Mine  
Mine ID: 26-00789

**ORDER TERMINATING TEMPORARY REINSTATEMENT**

Before: Judge Moran

Respondent California Rock Crusher Corporation (“California Rock”) has filed a motion seeking an order terminating Complainant miner Fredrick Abrams’ temporary economic reinstatement. For the reasons which follow, the Court terminates Fredrick Abrams’ temporary economic reinstatement, retroactively effective to the end of the business day on Friday, May 1, 2015.

Respondent’s Motion relates that California Rock provided and operated two articulating hauling trucks to move material at an open pit sand and gravel mine owned by CEMEX. It continues, stating that “[o]n Friday, April 24, 2015, CEMEX notified California Rock Crusher Corp. that effective the next Friday, May 1, 2015, at the end of the business day CEMEX was terminating Cal Crush’s services because CEMEX was then in a position to operate its own trucks with its own drivers.”

In support of its motion, California Rock’s Motion provides the following salient information<sup>1</sup>: that its business is located in Ripon, California; that it hired drivers from the Reno-Sparks, Nevada, area to work at CEMEX’s sand and gravel mine; that except for one employee, none of those drivers who were permanently laid off had ever worked for the Company in California in the past; that, except for that one driver, none of the other drivers, including Abrams, has a Class A license; that the only other drivers who work for California Rock are located in California and those drivers all have Class A licenses to operate over-the-road trucks; that Respondent did not transfer any employees from California to Nevada; that it does not have

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<sup>1</sup> The information, capsulized here without distortion by the Court, is essentially taken from the Motion, as amended by the subsequent email statement by Respondent’s Counsel dated May 6, 2015. Respondent contends that the amended statement, disclosing that one driver had worked for the Company in California and has a Class A license, supports its position, on the basis that as it did not offer another position to that driver who had worked for it in California and who has a Class A license, it certainly wouldn’t have offered Abrams another position.

any driver positions that are open; that the drivers who were on the CEMEX job on May 1, 2015, were permanently laid-off with no reasonable expectations of recall; that the Respondent will soon be transporting the two articulating hauling trucks to its headquarters in Ripon, California; that it does not have any work in Nevada, nor does it have any work scheduled in Nevada; that the two articulating hauling trucks at the CEMEX site are the only two that the Company owns; and that there currently isn't any work for those trucks and if the Company does not obtain work for those trucks they will be sold.

On the basis of its Motion, the supporting declaration, and exhibits to that declaration, California Rock Crusher Corp. requests that its motion to terminate the order approving settlement be granted on the basis that it has discharged its obligations under the settlement.

In its May 6, 2015, Response to the Motion, the Secretary advised that it “does not take a position on Respondents motion other than to note that Respondent must show by a preponderance of the evidence that work is not available for the complainant.” It adds that “if the Court finds that Respondent has met this burden the proper relief would be to toll the economic reinstatement pending the resolution of the underlying discrimination complaint rather than terminate the economic reinstatement entirely . . . [on the grounds that, per an email attachment to the Respondent’s motion from Anthony Beato of California Rock Crush,] Respondent is looking for work to employ the Articulating Hauling Trucks that complainant drove.” The Secretary contends that “[i]f such new projects are obtained then complainant would be entitled to reinstatement as a truck driver on those projects.”

### Discussion

As the Commission stated in *Gatlin v. KenAmerican Resources, Inc.*, 31 FMSHRC 1050, 1054 (Oct. 2009), “a temporary reinstatement order [does not] require[] a miner to be employed under any circumstance, regardless of changes that occur at the mine after issuance of the temporary reinstatement order.” Instead, it noted “that the occurrence of certain events, such as a layoff for economic reasons, may toll an operator’s reinstatement obligation or the time for which an operator is required to pay back pay to a discriminatee.” *Id.* (citing *Simpson v. Kenta Energy, Inc.*, 11 FMSHRC 1638, 1639 (Sept. 1989) (holding that back pay is due to a discriminatee from the date of the unlawful discharge until the time of reinstatement or “the occurrence of an event tolling the reinstatement obligation”); *Wiggins v. E. Assoc. Coal Corp.*, 7 FMSHRC 1766, 1772-73 (Nov. 1985) (concluding that back pay award ended upon date of layoff)).

It noted with approval the reasoning of a Commission Judge expressing that “if business conditions result in a reduction in the work force the right to back pay is tolled because a discriminatee is entitled to back pay only for the period during which he would have worked but for the unlawful discrimination.” *Casebolt v. Falcon Coal Co., Inc.*, 6 FMSHRC 485, 499 (Feb. 1984) (ALJ).

“Commission precedent recognizes that a change in circumstances may be relevant to tolling economic reinstatement in a temporary reinstatement proceeding.” *Gatlin*, 31 FMSHRC at 1054 (citing *Sec’y of Labor on behalf of Shepherd v. Sovereign Mining Co.*, 15 FMSHRC

2450 (Dec. 1993) (remanding to Judge to determine effect of operator's layoff on Judge's temporary reinstatement order)). The Commission then held that "the Judge erred in concluding that a miner must remain temporarily reinstated notwithstanding changing circumstances at the mine." *Id.*

The Commission has also recognized in remedial contexts that an operator has the burden of establishing "facts which would negative the existence of [back pay] liability to a given employee or which would mitigate that liability." *Simpson v. Kenta Energy, Inc.*, 11 FMSHRC 770, 779 (May 1989) (citations omitted). The Commission has stated that, "[s]pecifically, the burden of showing that work was not available for a discriminatee, whether through layoff, business contractions, or similar conditions, lies with the employer as an affirmative defense to reinstatement and backpay." *Id.* In such circumstances, the operator must make such a showing by a preponderance of the evidence. *Id.*

So too, in *Sec'y of Labor on behalf of Ratliff v. Cobra Natural Resources*, 35 FMSHRC 394, 396 (Feb. 2013), the Commission observed that it has "permitted a limited inquiry to determine whether the obligation to reinstate a miner may be tolled." It also "recognized that 'the occurrence of certain events, such as a layoff for economic reasons, may toll an operator's reinstatement obligation.'" *Id.* (quoting *Sec'y of Labor on behalf of Shemwell v. Armstrong Coal Co.*, 34 FMSHRC 996, 1000 (May 2012)). Thus, it agreed that a judge may consider whether a layoff tolls reinstatement obligations. Accordingly a judge should "consider evidence offered by an operator seeking to affirmatively show that reinstatement should be tolled because of a layoff due to business contractions or similar conditions. . . . An operator generally must affirmatively prove that a layoff justifies tolling temporary reinstatement by a preponderance of the evidence." *Id.* at 397 (citations omitted). In the circumstances of a layoff, "the operator must demonstrate that 'the layoff properly included' the miner who filed the complaint of discrimination." *Id.* (quoting *Gatlin*, 31 FMSHRC at 1055). If there are facts to support it, the Secretary in turn may "assert that the miner's inclusion in the layoff was, or might have been, related to protected activity engaged in by the miner."<sup>2</sup> *Id.*

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<sup>2</sup> Not applicable here is any claim that the objectivity of the layoff as applied to the miner should be evaluated as a potentially wrongful adverse action itself.

Upon consideration, the Respondent's Motion is GRANTED. The Secretary has taken no position on the Respondent's Motion, nor has it contested the facts presented in that Motion. Commission precedent clearly recognizes that the word "temporary" in temporary reinstatement encompasses situations which make continued employment or, as here, economic employment, subject to termination upon the occurrence of certain events, such as a layoff. Certainly, temporary reinstatement is not a ticket to continued nationwide employment. The undisputed facts here warrant not mere tolling but cessation of the temporary economic employment. California Rock is no longer doing business for CEMEX in the Reno-Sparks Nevada area and, given that state of affairs, its temporary employment obligations ended when that occurred at the end of the business day on Friday, May 1, 2015.

SO ORDERED.

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

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May 22, 2015

DANIEL B. LOWE,  
Complainant,  
  
v.  
  
VERIS GOLD USA, INC.,  
Respondent.

DISCRIMINATION PROCEEDING

Docket No. WEST 2014-614-DM  
WE-MD 14-04

Mine: Jerritt Canyon Mill  
Mine ID: 26-01621

**AMENDED<sup>1</sup> ORDER ON RESPONDENT’S MOTION TO DISMISS  
COMPLAINANT’S FIRST AMENDED COMPLAINT**

Before: Judge Moran

Before the Court is Respondent Veris Gold’s Motion to Dismiss First Amended Complaint. (“Motion”). The Motion contends that the First Amended Complaint “seeks to add a litany of new allegations.” Complainant filed an Answer to the Motion. Complainant’s original discrimination complaint, dated November 22, 2013, names seven (7) individuals,<sup>2</sup> together with their respective job titles, as responsible for the alleged discriminatory action. A narrative accompanied that complaint. That narrative speaks in broad terms, with Mr. Lowe alleging that he was “continuously discriminated in matters of safety and health as well as in matters of regulatory compliance [and that these] came in the form of constant threats of reprisal by members of senior management and/or corporate officers.” Complaint of Nov. 22, 2013, at 2.

At the outset of this Order it is important to note that even if the Amended Complaint were to be rejected in whole, the original complaint remains intact and unaffected. Put differently, this Order only determines if *additional* claims may be added to the original complaint. For the reasons discussed below, the Court partially grants and partially denies Respondent’s motion.

Citing *Hatfield v. Colquest Energy, Inc.*, 13 FMSHRC 544 (Apr. 1991), Respondent contends that Lowe’s First Amended Complaint “constitute[s] a theory of the case that MSHA

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<sup>1</sup> This amended order is being issued to correct the caption of the original order, which incorrectly listed the Secretary of Labor as the Petitioner in this matter rather than Mr. Lowe as the Complainant.

<sup>2</sup> The names listed in Mr. Lowe’s discrimination complaint are: Kiedock Kim, Mill Manager; Chris Jones, Assistant Mill Manager; Graham Dickson, Chief Operating Officer; William Hofer, General Manager; Francois Marlan, President/CEO/Director; Barry Goodfield, Director; and Dwayne Ward, Human Resources Manager.

had not previously investigated.” Motion at 4. In *Hatfield*, the Commission noted that the complaint filed by the *pro se* miner was

general in nature and alleges no specific protected activities. The present record contains no indication that the matters alleged in the amended complaint were part of the case reported to and investigated by MSHA. Nor is there evidence in the record that the Secretary’s determination that the Act had not been violated was based on matters contained in the amended complaint. *If the Secretary’s determination was based upon an investigation that did not include consideration of the matters contained in the amended complaint, the statutory prerequisites for a complaint pursuant to § 105(c)(3) have not been met.*”

*Hatfield*, 13 FMSHRC at 546 (emphasis added). The Commission went on to state that the “complainant should be afforded an opportunity to demonstrate that the protected activities alleged in the amended complaint were part of the matter that was investigated by the Secretary in connection with [the *pro se* complainant’s] initial discrimination complaint to MSHA.” *Id.* *Hatfield* remains the operative precedent.

Veris lists five allegations made by Lowe which it contends were not previously investigated by MSHA. These will be discussed in turn.

“A. Allegations that in March 2013, Randy Reichert, a corporate official whose employment was terminated by Veris on May 7, 2013, had a dispute with Lowe arising from another dispute between two industrial hygienists over sampling methods and mercury exposure calculation methods.” Motion at 3. These allegations appear in numbered paragraph 8 in Lowe’s First Amended Complaint. Lowe asserts that Reichert’s behavior in relation to this matter amounted to acts of discrimination related to safety and health.

Lowe asserts that there was no dispute between the hygienists and that it was merely a miscommunication,<sup>3</sup> but, more importantly, Lowe asserts that Mr. Randy Reichert wanted him to fire hygienist Garcia because of the miscommunication, but that he refused to fire the hygienist without first conducting a proper investigation into the matter. Answer at 2. Complainant’s Answer then goes into matters before a court in British Columbia involving Reichert’s termination from Veris Gold. Answer at 2-3.

The fundamental problem with Lowe’s Answer is that it does not address the central question for the Court, namely whether the Secretary’s determination was based upon an investigation which included consideration of the matter raised in paragraph 8. As Lowe makes no reference to this issue in his Answer, the Court must conclude that Complainant has failed to meet the statutory prerequisite to demonstrate that the protected activities alleged in the amended complaint were part of the matter that was investigated by the Secretary in connection with his initial discrimination complaint to MSHA. Therefore the Court sustains Veris’ motion regarding this amendment and dismisses item A.

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<sup>3</sup> Mr. Lowe’s Answer is lengthy but not useful to applying the test for evaluating amended complaints, per *Hatfield*.

“B. Allegations that Randy Reichert “went on a bizarre tirade” in May 2013 while Lowe was attempting to explain to him the particulars of an MSHA inspection.” Motion at 3. These allegations appear in numbered paragraph 9 in the First Amended Complaint. “Lowe believes that Mr. Reichert was terminated by Veris for violent outbursts at trade shows and other ‘incidents of inexplicable rage’ . . . [and] that the “tirade” by Mr. Reichert amounted to discrimination in relation to safety and health.” *Id.* The only connection with the original complaint, is a remark that complainant reported the incident to Bill Hofer, the mine’s general manager.

On its face, this allegation was not raised before MSHA in Complainant’s November 2013 complaint. Further, Complainant makes no response to Veris’ observation that Reichert’s name does not appear anywhere in the complaint. Although this is dispositive of item B, for the same reason given for item A, it is also noted that Veris, by Complainant’s admission, terminated Reichert’s employment shortly thereafter and that no adverse action was experienced by Lowe. In fact, Lowe, who threatened to quit after the Reichert incident was “talked into staying” as a Veris employee. Accordingly, because Lowe failed to meet the *Hatfield* test for item B, it is also dismissed from the First Amended Complaint.

C. This item involves allegations that, in late July, 2013, Veris general manager Joe Driscoll informed Complainant that his job title was going to be changed and that he would no longer be the designated company representative during MSHA inspections. These allegations appear in numbered paragraphs 10-12 in the First Amended Complaint. Complainant believes this was the onset of the decision to abolish the mine’s safety department. It includes allegations that there was an arrangement between an MSHA supervisor and Mr. Driscoll that if MSHA would “back off” at the mine, Lowe would be removed from contact with MSHA. Complainant then relates that he was thereafter demoted by Driscoll to the position of “Compliance Coordinator.” As Veris capsulizes this contention, “Lowe speculates that this may have borne a relationship to some type of covert arrangement between Driscoll and an MSHA inspector to remove Lowe from his position in order to obtain less stringent treatment by the agency. Lowe asserts that was an act of discrimination.” Motion at 3.

The problem with Lowe’s Answer for Item C is the same as for Items A and B. That Answer largely repeats the allegations made in the First Amended Complaint but it does not anywhere inform that those allegations were among those presented to MSHA when the original complaint was filed on November 22, 2013, and therefore it fails to satisfy the test in *Hatfield*. Mr. Driscoll’s name does not appear among the seven listed individuals in the original complaint filed with MSHA. Nor is this obstacle solved by Complainant’s additional remark in his Answer that

in his appeal letter to the Commission one Page #1, Paragraph #2, “For approximately six months leading up to my dismissal Veris Gold USA Inc. senior management interfered with my responsibilities and position as the Mine Safety and Regulatory Compliance Manager in matters of safety, health and regulatory compliance to include dismantling the Safety Department effectively demoting

me and my position.[<sup>7</sup>] The Complainant believes in fact these actions constitute discrimination under section 105 of the Mining Act.

Answer at 7.

Absent the Complainant producing dated documentation that he made these allegations to MSHA during the course of its investigation and well prior to MSHA's April 4, 2014, letter to Lowe, declining to file a discrimination complaint on his behalf, this allegation cannot be considered as part of the Complaint. Again, in circumstances where the Secretary's determination is based upon an investigation that did not include consideration of the matters contained in the amended complaint, the statutory prerequisites for a complaint pursuant to § 105(c)(3) are not met and such additional claims cannot be heard.

D. Lowe alleges that his termination on November 21, 2013, may have been in relation to "the two safety and health complaints" he made by email to Chief Operating Officer, Graham Dickson on November 19, 2013, and that it was on November 21, 2013, that Dwayne Ward informed the Complainant of his termination. Lowe asserts that no reason was given for the "official termination." The Complainant believes this was an act of discrimination. This allegation appears in numbered paragraph 14 in the First Amended Complaint. The problem with Veris' Motion to Dismiss for this item is that it elides the substance of this allegation. In his very broad complaint before MSHA, Lowe did name both Mr. Dickson and Mr. Ward among the persons responsible for the discriminatory action. Therefore, the investigation may be presumed to include all acts associated with that claim. In contrast to Veris' defense to Items A through C, it makes no claim in its Motion to Dismiss that those individuals were not referenced in the Complaint before MSHA. Accordingly, this part of the First Amended Complaint is allowed. Thus, dismissal is not warranted for this claim. Especially considering the substance of this allegation, Veris can hardly maintain that its inclusion would result in unfair prejudice to it.

E. The last item in Lowe's First Amended Complaint appears in numbered paragraph 8. There, Lowe seeks "an order assessing a \$20,000.00 civil penalty against the Respondent for the violations of Section 105 (c) of the Act [and] [f]or an order compelling the Secretary of Labor to investigate and to institute either civil or criminal proceedings or both against the Respondent for violations of §108 (b) and §110 of the mining Act of 1977."

Veris does not address this item and for good reason. Neither of these demands are within the Court's jurisdiction. If Lowe prevails on his section 105(c)(3) claim, only then will the Secretary be obligated to seek a civil penalty, but this is clearly premature at this point. Further, the Court does not have the authority to direct the Secretary to institute proceedings against the Respondent for violations of §108 (b) and §110 of the mining Act of 1977. Accordingly, this item from the Amended Complaint is dismissed.<sup>4</sup>

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<sup>4</sup> The Court has considered Veris' claims that the items in the First Amended Complaint are procedurally defective as they are outside of the 60 day time period. Those claims are rejected.

## Conclusion

As set forth above, other than Item D, the remaining items, A, B, C, and E, as listed in Complainant's First Amended Complaint, are DISMISSED. The original Complaint, however, stands, with Item D added to the original Complaint.

SO ORDERED.

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

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May 22, 2015

POCAHONTAS COAL COMPANY, INC.,  
Contestant,

v.

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

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

v.

POCAHONTAS COAL COMPANY, INC.,  
Respondent.

CONTEST PROCEEDING

Docket No. WEVA 2014-395-R  
Order No. 3576153; 12/19/13

Mine ID: 46-08878  
Mine: Affinity Mine

CIVIL PENALTY PROCEEDING

Docket No. WEVA 2014-1028  
A.C. No. 46-08878-350475

Mine: Affinity Mine

**ORDER GRANTING IN PART & DENYING IN PART  
THE SECRETARY’S MOTION FOR A PROTECTIVE ORDER**

Before: Judge Miller

These cases are before me as a result of a contest filed by Pocahontas Coal Company and a petition for assessment of a civil penalty filed by the Secretary pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977. These cases are part of a large number of dockets that are related to the notice of pattern of violations (“NPOV”) received by Pocahontas in October, 2013 and the subsequent 104(e) enforcement documents issued at the Affinity Mine. The parties have engaged in discovery in all of the dockets related to the NPOV, including written discovery and depositions. On two earlier occasions the parties brought discovery disputes before the Court, both of which primarily involved questions regarding the need for, and scope of, depositions. Pocahontas has determined that it needs further information about the decision to issue the NPOV at the mine and, as a result, served a notice to the Secretary for the deposition of a number of the Secretary’s attorneys. On April 13, 2015, the Secretary filed a Motion for Protective Order after receiving the notice and Pocahontas filed a Response in Opposition to the motion on April 16, 2015.

The Secretary represents that, after Pocahontas completed the deposition of Kevin Stricklin, Administrator for Coal Mine Safety & Health, it served a formal notice of deposition

upon the Secretary seeking to depose Heidi Strassler, Associate Solicitor for Mine Safety and Health, Jason Grover, Trial Counsel for the Mine Safety and Health Division of the Office of the Solicitor, Douglas N. White, Associate Regional Solicitor for the Arlington Regional Office of the Solicitor, and Robert S. Wilson, MSHA Counsel for the Arlington Regional Office of the Solicitor at an agreed upon date. The notice also requested each deponent to bring certain documents to aid in their testimony. The Secretary objected to providing any of the attorneys for deposition and filed this Motion for Protective Order.

After the motion was filed and all written responses were received, the parties participated in a conference call with the Court to discuss the issues and determine if a resolution could be reached regarding the motion. Following discussion and argument, it was determined that a resolution could not be reached, and that the Secretary could not provide a non-attorney to supply the information sought by Pocahontas. The information discussed during the conference call was transcribed and a copy provided to the parties. In issuing this order, I rely not only upon the motions filed, but also information learned during the conference call, as well as information in the case file, including two motions for summary decision and their attachments, a number of which are depositions. For reasons set forth below, I **GRANT** in part and **DENY** in part the Secretary's motion and allow discovery with restrictions.

## **I. BACKGROUND**

On October 24, 2013 MSHA issued Written Notice No. 7219153 (the "NPOV," or the "notice") in which it notified Pocahontas that an alleged pattern of violations existed at Pocahontas' Affinity Mine. Subsequently, MSHA issued multiple 104(e) orders to the mine, based upon the NPOV. In challenging the "e" orders, Pocahontas also challenges the validity of the NPOV. The depositions sought in this case primarily relate to the issuance of the notice.

Over the years the Secretary has promulgated several rules regarding the Mine Act's pattern of violations provision and, in March 2013, implemented the current rule. 30 C.F.R. § 104. The rule provides that, at least once each year, MSHA will review the compliance and accident, injury and illness records of mines to determine if any mines meet the pattern of violations criteria. The eight criteria to be addressed during the review are listed in the standard. MSHA initially performs a computer generated screening of its database using two sets of "screening criteria" that are related to the standard and are detailed on the MSHA website. These screening criteria, which address the number and types of violations at mines, speak to the first six of the eight criteria named in section 104.2. A mine must meet the screening criteria on MSHA's website in order to be considered for the issuance of a NPOV. Here, the screening was conducted in September 2013 and included information and data for nearly 14,000 mines for a review period from September 1, 2012 through August 31, 2013. As a result of the initial screening, three mines, including the Pocahontas Affinity Mine, were chosen for further review to determine if the criteria for a pattern of violations were met.

Once a mine meets the initial screening criteria, the district manager for the district in which the mine is located is notified that the mine has met the screening criteria. Subsequently, the district manager notifies the mine that it is being considered for a notice of pattern of violations. In this case, the Affinity Mine was notified of its potential for a NPOV by David

Mandeville, the District Manager for District 4. Mandeville met with the mine and, after the meeting, the mine provided a written response outlining why it should not be considered for a NPOV. Following the meeting, and after receipt of the letter from Pocahontas, Mandeville completed a mitigating circumstances form and submitted it to the MSHA POV review panel for a review of the mitigating circumstances.

The MSHA POV panel, in its review, is charged with addressing the final two criteria listed in the mandatory standard, which are, other information that demonstrates a serious safety or health management problem at the mine, and mitigating circumstances. 30 C.F.R. §§ 104.2 (7) and (8). Here, the panel, which was chaired by Jay Mattos, the Director of the Office of Assessments, Accountability, Special Enforcement and Investigation, conducted its review and generated a memo listing the panel's findings. The memo was sent to Kevin Stricklin, the Administrator for Coal Mine Safety and Health, and advised Stricklin that the panel recommended that Pocahontas be placed on a pattern of violations. Stricklin then determined that, given the initial screening and the subsequent findings of the POV panel, in his discretion, the mine should receive a NPOV. However, at some point prior to Stricklin's final decision, the body of the notice was drafted with two lists of citations and orders that make up the two alleged patterns of violations included in the NPOV. Stricklin next sent the NPOV, along with a cover letter, to the district office to present to the mine in order to notify the mine that it had been placed on a pattern of violations and, thereafter, inspections would be conducted as required by the Act's pattern of violations provision and the Secretary's regulations implementing the provision.

Based upon the Secretary's regulations and procedures identified on MSHA's website, as well as the record before me in this case, there are three distinct levels to determining whether a mine is subject to a NPOV. First, MSHA conducts a purely quantitative data review of all mines in the country. Second, the POV review panel conducts a review of the mitigating circumstances and other factors, and, based on that review, makes a recommendation to the appropriate MSHA Administrator. Third, and finally, the appropriate Administrator conducts a final review of the materials presented to him, determines if a pattern is shown, and ultimately decides if a pattern is demonstrated by the citations and orders detailed in the proposed notice.

I find that a mine operator may challenge the validity of a NPOV in at least two ways. First, an operator may challenge the NPOV by establishing that, at one or more of these three levels, the Secretary engaged in an abuse of discretion. Second, the operator may challenge whether the citations and orders identified in the NPOV properly describe a pattern of violations. The depositions sought here are primarily for the purpose of determining whether the agency abused its discretion when selecting the citations and orders listed in the body of the notice of pattern violations, and categorizing those citations and orders into groups which allegedly demonstrate two patterns of violations; one related to roof control and one related to emergency preparedness.

In this case, the mine operator propounded interrogatories to the Secretary, deposed Jay Mattos about the screening criteria and the POV panel, and deposed both the district manager, David Mandeville, and the assistant district manager, David Morris, about the mitigating factors, their involvement in the process, and the preparation and presentation of the POV letter to the

mine. Finally, the mine deposed Kevin Stricklin, the Administrator for Coal, regarding the entire POV process, including the selection of the 42 citations and orders named in the NPOV and the grouping of those enforcement documents into two patterns. Mattos, Mandeville and Morris each stated in their depositions that they were not involved in the final step of the process that included selecting and grouping the 42 enforcement actions. Stricklin conducted the ultimate review and decision to issue the NPOV, and he was involved in the selection of the 42 citations and orders only after the attorneys for the Solicitor's office chose which of the enforcement actions to include and in what categories. Stricklin, in his deposition, explained that a CLR and field office supervisor may have been involved in the selection and grouping of the enforcement actions listed in the NPOV but, primarily, the selection was made by attorneys in the Office of the Solicitor. During a conference call with the parties, the Secretary confirmed that the selection was made by attorneys from the Office of the Solicitor, and asserted that taking the deposition of the "point person" in the MSHA district office, who was either the CLR or the field office supervisor, would not yield any useful information about the selection of the 42 enforcement actions. The depositions sought by Pocahontas are aimed at discovering the facts surrounding the selection and grouping of the 42 enforcement actions listed in the NPOV. That selection and grouping was conducted not by an MSHA employee, but by an attorney for the Solicitor's office.

## **II. PARTIES' ARGUMENTS**

The Secretary, in his motion for protective order, argues that Pocahontas' proposed depositions exceed the scope of discovery and improperly seek to discover privileged information. The Commission's procedural rules limit discovery to relevant, non-privileged materials. Deposing opposing counsel is strongly disfavored and, here, the information sought regarding how the citations and orders listed in the NPOV were selected is not relevant to the validity of the NPOV. Rather, the validity of the NPOV depends solely on whether the violations listed in the notice establish a pattern of violations, and does not depend upon the process the agency went through to select those violations. Moreover, any of the desired information that could be obtained from the attorneys would necessarily inquire into the thought processes and opinions of those individuals and, accordingly, is protected by the deliberative process privilege. Further, the documents, memoranda and email that Pocahontas seeks to have the named individuals produce are tangible things that were prepared in anticipation of litigation by MSHA and the Office of the Solicitor, and are therefore protected under the work product rule. Finally, the Secretary argues that the attorney client privilege protects the communications between MSHA and the Office of the Solicitor regarding the review of facts and data when weighing whether to issue the NPOV, all of which was done in anticipation of this litigation.

Pocahontas, in its response in opposition, states that, during the deposition of Stricklin, it learned that attorneys from the Office of the Solicitor had factual knowledge as to why MSHA issued the NPOV and, as a result, it must be allowed to depose the attorneys named in the notice of deposition. There is no prohibition against deposing opposing counsel when that counsel has engaged in fact finding. Here, the information sought by Pocahontas from the attorneys, facts regarding what was utilized in the selection and grouping of the 42 enforcement actions in the NPOV, is relevant because it goes to the larger issue of the validity of the NPOV. Moreover, as made clear by the depositions of MSHA personnel, there are no other means to obtain this information other than to depose opposing counsel. The information sought is crucial to the case

given that it goes directly to the issue of the validity of the NPOV and the question of whether its issuance was arbitrary and capricious. Pocahontas argues that the information it seeks is purely factual, does not involve opinions, recommendations or deliberations between the Office of the Solicitor and its client, MSHA, and, as a result, is not protected by the deliberative process privilege. Additionally, even if the attorney work product rule protects the additional materials requested of the potential deponents, Pocahontas has a substantial need for those materials given that the attorneys are the only individuals who possess that factual knowledge. Further, the attorney client privilege does not protect the attorneys from deposition given that they have made themselves fact witnesses and the information sought by Pocahontas does not involve a protected communication between attorney and client. In the alternative, Pocahontas argues that the Secretary has waived both the work product rule and attorney client privilege through the previous disclosure of emails related to the NPOV and Stricklin's deposition testimony that individuals from the Solicitor's office have knowledge as to the 42 enforcement actions and the categories identified in the NPOV.

### **III. ANALYSIS**

I find that the factual information sought by Pocahontas is relevant to the case and falls within the proper scope of discovery in these proceedings. Pocahontas has raised the issue of whether the Secretary abused his discretion in issuing the NPOV to the Affinity Mine and a part of that analysis includes the procedure by which MSHA determined what citations and orders issued at the mine demonstrate a pattern. Therefore, the information sought is relevant to the issues raised by the mine. I find further that the privileges asserted by the Secretary do not protect the factual information sought by Pocahontas.

Commission Procedural Rule 56(b) states that “[p]arties may obtain discovery of any relevant, non-privileged matter that is admissible evidence or appears likely to lead to the discovery of admissible evidence.” 29 C.F.R. § 2700.56(b). A judge may “limit discovery to prevent undue delay or to protect a party or person from oppression or undue burden or expense.” *Id.* at 2700.56(c).

The Secretary argued in two previous discovery-related motions that the information Pocahontas sought to discover was not relevant and was privileged. In each of those instances I issued an order finding that while internal deliberations involving opinions, thoughts, conclusions and legal theories leading up to the decision to issue the NPOV were privileged, facts related to what information was considered in issuing the NPOV may be relevant, were discoverable, and were not privileged. The depositions were then limited to the facts known by each witness. The same is true in this instance.

As is evident from the response in opposition filed by Pocahontas, the mine seeks only factual information related to a very specific piece of the POV process. The Secretary has provided no evidence that suggests Pocahontas intends to ask questions related to the deliberation process. “The fact that objections may be raised to specific questions in a deposition does not provide a sufficient basis to bar the deposition[s] altogether.” *Rail Link, Inc.*, 20 FMSHRC 181, 182 (Jan. 1998) (ALJ). While I agree with the Secretary that internal deliberations leading up to the decision to issue the NPOV, including the weight given to the

different pattern criteria, and thoughts and opinions of the agency's employees are privileged, that protection does not extend to factual information considered by MSHA and the attorneys when selecting and grouping the 42 enforcement actions in the NPOV.

I have previously made clear that the issue of the validity of the NPOV is properly before the Court in these proceedings and the parties may obtain discovery of relevant, non-privileged material related to that issue. Moreover, I have noted that, as part of its contest to the validity of the NPOV, Pocahontas argues that the issuance of the NPOV was arbitrary and capricious and that MSHA did not follow its own rules. I have explained that in order for the Court to make a determination on this argument, it is necessary to know which facts MSHA considered when making its determination to issue the NPOV. Included in the determination to issue the notice to Pocahontas, is the factual information the Secretary considered regarding the selection and grouping of the 42 enforcement actions listed in the NPOV.

On April 1, 2015 Pocahontas, after taking the deposition of Kevin Stricklin, the MSHA Administrator for Coal, first learned that it was the attorneys in the Solicitor's office, not MSHA personnel, who selected the 42 enforcement actions to include in the NPOV. Stricklin also explained that the two groups of patterns contained in the notice were chosen by the attorneys. Subsequently, Pocahontas sought to have the Secretary supplement his answers to previous interrogatories and identify all individuals, including each attorney in the Office of the Solicitor, with knowledge as to why the mine received the NPOV. The Secretary rejected the request, stating that the information was not relevant or reasonably calculated to lead to the discovery of admissible evidence. Moreover, the Secretary asserted that the information provided by attorneys from the Office of the Solicitor would be protected by multiple privileges. Pocahontas then delivered notices of deposition to Heidi Strassler, Jason Grover, Robert Wilson and Douglas White, all attorneys in the Office of the Solicitor who have represented MSHA or otherwise been involved in this matter. During the course of a telephone conference, the Secretary agreed that it was the attorneys from the Solicitor's office who determined which citations formed a pattern and which should be included in the notice provided to the mine. However, the Secretary did not indicate which of the named attorneys, if any, were involved in those decisions.

The Secretary, citing *Hickman v. Taylor*, 329 U.S. 495, 516 (1947), argues that taking the deposition of an attorney is strongly disfavored. The Secretary argues that the rationale for keeping attorneys out of litigation is based on the recognition that allowing the deposition of counsel on relevant, non-privileged information can interrupt pending litigation. That disruption however, is more evident in cases where a party is represented by only one or even two attorneys who are deeply involved in preparing and litigating the case. Here, the Secretary is represented by several attorneys from the Solicitor's office and several more have been involved in the pattern of violations issues. Therefore, the risk of interruption or disruption caused by the deposition of only one of the Secretary's attorneys is minimal at best. Both parties acknowledge that the Eighth Circuit's decision in *Shelton v. American Motors Corp.*, 805 F.2d 1323 (8th Cir. 1986) is instructive as to when opposing counsel may be deposed. There the court determined that deposing an attorney should be limited to circumstances where the party seeking the deposition has shown that (1) no other means exists to obtain the information than to depose opposing counsel; (2) the information sought is relevant and non-privileged; and (3) the information is crucial to the preparation of the case. *Id.* at 1327.

Based on the Secretary's representations, the first and third elements of the *Shelton* test are easily met. In this case the Secretary was given the opportunity to provide an agency person who could attest to the facts surrounding the choice of the citations listed in the NPOV. However, the Secretary ultimately conceded that no one at MSHA could provide that information because it was the attorneys in the Office of the Solicitor who made the decision. As a result, given that counsel for the Secretary selected and grouped the enforcement actions included in the NPOV, there are no other means for Pocahontas to obtain the factual information surrounding the choice of the 42 enforcement actions listed in the NPOV. Moreover, and as discussed above, the information is crucial to Pocahontas' argument that the Secretary has abused his discretion and that the NPOV was invalidly issued. Accordingly, I find that the first and third elements have been met.

With regard to the second *Shelton* element, I find that certain information sought by Pocahontas regarding this discrete part of the NPOV process is both relevant and non-privileged. The Secretary, in addressing the second element of the *Shelton* test, argues first that the information sought by Pocahontas is irrelevant. I disagree and find that the information sought by Pocahontas regarding what was considered when selecting and grouping the citations and orders listed in the NPOV is relevant. Second, I find that the facts, including who, what, where and when, as they relate to the selection of the citations and orders to be included in the written notice, are not privileged information.

Mine operators have the right to understand the pattern of violations process as it applies to them. Given that an operator may challenge the issuance of a NPOV by showing that the Secretary, in issuing the NPOV to the operator, abused his discretion and acted in an arbitrary and capricious manner, factual information about what the Secretary considered when selecting and grouping the enforcement actions listed in the NPOV goes directly to the question of whether the Secretary abused his discretion. The mine operator is entitled to learn facts such as when the decision was made about the citations and orders that form the pattern, where the decision was made, who was involved, and what documents and information were before the decision-makers. Even if Stricklin made the final decision to accept the NPOV and the patterns described therein, as alleged by the Secretary, the mine is entitled to understand the process that was used to determine what information was provided to him and who was responsible to provide that information. Stricklin understood that the attorneys for the Secretary played a substantial role in selecting the enforcement actions to be listed and the Solicitor agreed that it was attorneys, not agency employees, who made the decision for the agency. MSHA had only a "point person" involved in the process, and in the opinion of the Solicitor deposing that person would yield little information as to the selection process. Therefore, the mine operator is correct that it has not had access to the facts underlying this particular step of the NPOV process.

The Secretary, in addressing the second element of the *Shelton* test, argues not only that the information is irrelevant but also that the information sought by Pocahontas is protected by the deliberative process privilege, work product rule, and attorney client privilege. However, as more clearly spelled out below, there are facts that can be disclosed without seeking information that is protected by these privileges. In addition, the Secretary waived his right to assert certain privileges when attorneys for the Solicitor's office operated beyond their role as advisors to the agency and instead took agency action on their own.

The Secretary first asserts that any information which could be obtained from the named attorneys about why certain enforcement actions were included in the NPOV would inquire into the thoughts, process and opinions of those individuals and is, therefore, protected from discovery by the deliberative process privilege.

The deliberative process privilege is intended to protect the “‘consultative functions’ of government by maintaining the confidentiality of ‘advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.’” *In Re: Contests of Respirable Dust Sample Alteration Citations*, 14 FMSHRC 987 (June 1992) (quoting *Jordan v. U.S. Dept. of Justice*, 591 F.2d 753, 772 (D.C. Cir. 1978)). In order to assert the privilege, the material sought must be “pre-decisional” and “deliberative.” *Id.* at 992. A communication is “pre-decisional” when it is made prior to the adoption of the agency policy or decision. *Id.* A communication is “deliberative” if it is actually “related to the process by which policies are formulated.” *Id.* However, purely factual material that does not expose the decision making process is not protected. *Id.* at 993 (citing *Exxon v. Doe*, 585 F. Supp. 690, 698 (D.C. 1983)). A court charged with determining whether to recognize the privilege must balance the public interest in protecting the information with the litigant’s need for that same information. See *Clinchfield Coal Co.*, 23 FMSHRC 347 (Mar. 2001) (ALJ) (Citing *United States v. Nixon*, 418 U.S. 683 (1974); 8 *Wright and Miller*, Federal Practice and Procedure § 2019 at 167-169 (1970)).

I find that factual information relied upon by the Secretary, his attorneys, and MSHA in selecting and grouping the 42 enforcement actions contained in the NPOV is not protected by the deliberative process privilege. Here, while the selection of the 42 citations prior to the final decision to issue the NPOV may be pre-decisional, the mine is not seeking the thought process or analysis of that decision. Instead, it seeks the facts relied upon in coming to the decision to include the enforcement documents. Undoubtedly much of the communication between the attorneys and MSHA included thoughts, process, and opinions of those individuals as to why they selected, and how they grouped, the 42 enforcement actions. However, in order to form those thoughts and opinions, and select and categorize the 42 enforcement actions, the attorneys had to rely on facts before them. Accordingly, while many of the communications between the Secretary and his counsel are protected by the deliberative process privilege, facts regarding what information the attorneys considered when selecting and grouping the 42 enforcement actions included in the NPOV are not protected by this privilege.

The Secretary next asserts that the work product rule protects against the disclosure of materials in the possession of the attorneys from the Office of the Solicitor related to why Pocahontas received the NPOV.

In *Asarco Inc.*, 12 FMSHRC 2548, 2557-2558 (Dec. 1990) the Commission explained that the work product privilege is a “qualified immunity against discovery.” A party may withhold otherwise discoverable materials if the materials are (1) documents and tangible things; (2) prepared in anticipation of litigation or for trial; (3) by or for another party or by or for that party’s representative. *Id.* at 2558; Fed R. Civ. P. 26(b)(3). However, even where litigation is contemplated, if the document was generated in the ordinary course of business, rather than for purposes of litigation, then the document is discoverable. *Asarco Inc.*, 12 FMSHRC 2548, 2558-

2559 (Dec. 1990). Moreover, the party seeking discovery of the materials may be able to overcome the protection if it can show a substantial need for the materials in order to prepare its case and is unable, without undue hardship, to obtain the substantial equivalent of those materials by other means. *Asarco Inc.*, at 2558.

I find that that the work product rule applies to some of the materials sought, but that, with limitations, other of those materials are discoverable. The notice of deposition requests the deponent to produce the “entire file, including but not limited to, any and all notes, documents, memoranda, e-mail correspondence, and any other correspondence . . . which relates in any manner to his knowledge as to why . . .” the mine received the NPOV notice. The request further seeks any document used to refresh memory. The request is very broad and seeks documents that go beyond the action of choosing the 42 citations and orders to list in the notice. Therefore, my order is limited to any fact contained in a document that relates to the selection of the citations and orders to include in the NPOV issued to Pocahontas along with facts related to the selection and inclusion of the two categories of pattern.

Pocahontas’ request for production of files, notes, documents, memoranda, emails, and other correspondence involves documents and tangible things and, therefore, step one of the test is met. The question of whether the documents were prepared in anticipation of litigation is a more difficult one. The Secretary argues that, because the attorneys were involved in the review of the 42 enforcement actions listed in the NPOV, litigation was clearly anticipated. However, Pocahontas argues that litigation could not have been contemplated because, at the time the 42 enforcement actions were selected and put into categories, no 104(e) order had been issued which would have allowed the mine to contest the validity of the underlying NPOV.

I reject the Secretary’s argument that simply because attorneys were involved the materials sought were prepared in anticipation of litigation. The involvement of attorneys cannot, by itself, support the conclusion that litigation was anticipated. Otherwise, the simple “involvement” of attorneys could be used to shield most any document or tangible thing from discovery. I also reject the argument of the mine that because no 104(e) orders had been issued, the documents could not have been generated in anticipation of litigation. Instead, I find that there may be documents included in the list that were in fact generated in anticipation of litigation, but others that were not. Here, the NPOV itself is not a pleading or charging document. Rather it is a notice generated in MSHA’s ordinary course of business. Undoubtedly, some of the documents sought by Pocahontas from the attorneys were generated in the ordinary course of business leading up to the decision to issue the NPOV, but the actual drafting of the NPOV was simply a notice, like any other notice drafted by MSHA. I cannot agree that by virtue of the fact that MSHA was drafting an enforcement document, it was done in anticipation of litigation. The same would be true for every citation, order, safeguard or other notice that MSHA is required to prepare. The Secretary’s decision to involve the attorneys, and ultimately have them make the decisions regarding what to include in an MSHA document under these particular circumstance, cannot now be used to shield facts from Pocahontas. As a result, I find that materials which include facts regarding the process of choosing what to list in the notice are not protected.

Even if the work product rule had applied to all materials, I find that Pocahontas has a substantial need for facts regarding what data and information were considered by MSHA and the attorneys when selecting and grouping the 42 enforcement actions. I agree with Pocahontas that if the attorneys in the Office of the Solicitor who selected and grouped the enforcement actions in the NPOV were the only individuals involved in that activity, then they may have made themselves fact witnesses to this matter. However, the Court is not willing to grant Pocahontas carte blanche to access all information in the materials sought, especially with regard to any thoughts and opinions concerning the issuance of the NPOV. As the Commission has stated, if the court finds that materials should be produced, it is incumbent upon the court to “protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.” *Asarco Inc.*, at 2558 (quoting Fed. R. Civ. P. 26(b)(3)). While the Court agrees that Pocahontas should have access to the materials sought, access should only extend to certain factual information regarding the selection and grouping of the enforcement actions.

With regard to Pocahontas’ argument that the Secretary has waived protection under the work product rule, I agree in part. To the extent that the Secretary has already disclosed certain materials, inadvertently or otherwise, those materials are no longer protected under the work product rule. However, with regard to materials which have not yet been turned over, and involve information beyond facts relied upon by the attorneys and MSHA in selecting and grouping the 42 enforcement actions, the Secretary has not waived work product or other protection.

Finally, the Secretary asserts in his motion that the information sought in the depositions is subject to the attorney client privilege. The attorney client privilege protects the confidential communications between attorneys and their clients. It is designed to “encourage full and frank communication between attorneys and their clients” and “recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer’s being fully informed by the client.” *Upjohn Co. v. U.S.*, 449 U.S. 383, 389 (1981). However, the privilege is not without its limits. As the Court in *Upjohn* explained, the privilege extends only to communications and does not protect disclosure of the underlying facts. *Id.* at 395-396.

First, there is some question whether there was any privileged advice given between attorney and client since the Solicitor apparently took over the process and made the decisions without discussing those decisions with a client. Next, it is fair to assume that the Office of the Solicitor was provided with some facts from its client, or otherwise sought out facts on its own, in order for its attorneys to select the 42 enforcement actions that it believes demonstrate a pattern of violations. Accordingly, I find that facts relied upon by the attorneys when selecting and grouping the 42 enforcement actions are not protected by the attorney client privilege. Obviously, as generally discussed above in the context of the other privileges, communications between MSHA and the attorneys for the Office of the Solicitor which involve internal thoughts, opinions, conclusions, and legal theories remain privileged and are not subject to discovery. While Pocahontas also argues that the Secretary has waived the attorney client privilege, I disagree. The privilege remains intact for communications which have not already been disclosed and involve thoughts, opinions, conclusions, legal theories, etc.

In addition to the arguments raised in the motion for protective order, the Secretary also argued during the telephone conference call with the parties that, here, the attorneys' decision to include certain citations and orders, as well as the groupings of those enforcement actions, in the NPOV is one of prosecutorial discretion. In making the argument the Secretary asserted that, just as a prosecutor has discretion regarding what to include in an indictment in a criminal matter, the attorneys for the Secretary have discretion when deciding which enforcement actions to include in the NPOV. I disagree. I find that the NPOV process is not akin to an indictment or the filing of a lawsuit. Rather, the NPOV is a notice from the agency that the mine has problems with its safety record and that MSHA has determined it is necessary to provide more scrutiny in order to help the operator become compliant and provide a safer workplace. While a NPOV may anticipate some litigation, it is not a pleading or other charging document. Even if it were, it must be based upon facts and those facts should be shared with the entity being put on notice. While I agree that the agency may seek advice from its attorneys in the Office of the Solicitor, here the actions of at least some attorneys went beyond advice and amounted to decision making regarding the contents of the NPOV. For that reason, and the reasons discussed above, the request for a protective order is **denied in part and granted in part**.

#### IV. ORDER

I am mindful of the disfavor with which courts order the deposition of opposing counsel. Accordingly, while the Secretary asserts that the deposition of the CLR and field office supervisor mentioned by Stricklin in his deposition will not yield information that is of use to Pocahontas, the Secretary is nevertheless **ORDERED** to produce for deposition, within the 14 days of the date of this order, the person from MSHA who was most closely involved in the selection and categorization of the 42 enforcement actions included in the NPOV. Pocahontas may question the witness about factual information that was relied upon when selecting and grouping the 42 enforcement actions in the NPOV, where the selection and grouping took place, when it took place, who was involved in the selection, and what facts, if any, were relied upon in making the selection. Internal thoughts, opinions, and conclusions remain protected and are not discoverable.

In the event Pocahontas is unable to learn the facts its needs from the deposition of the CLR or field office supervisor, Pocahontas is **ORDERED** to, within 7 days of the deposition, propound interrogatories to the Secretary for the sole purpose of discovering facts related to the selection of the citations and orders that were listed on the notice of pattern of violations issued to the mine. The mine may include a request for production, and any document that is subject of an objection shall be submitted to the Court within ten days of the date of the objection for an *in camera* review. All documents may be redacted so that they include only facts. The interrogatories will be answered within ten days by an attorney of the Secretary's choosing who has direct knowledge of the facts Pocahontas seeks to discover. The designated attorney for the Secretary is **ORDERED** to, within 10 days of service of the interrogatories, respond, in affidavit form, and include a description of their involvement in the selection of the enforcement documents for the NPOV. The same facts that were discoverable in the deposition remain discoverable in the interrogatories. The attorney who answers the interrogatories will, from that point forward, be a fact witness in this matter and will NOT be able to represent the Secretary for the remainder of this case or in any other case involving the subject NPOV. In the event

Pocahontas does not obtain the information it needs, it may file a motion within 10 days of the date of service of the Secretary's interrogatory response. If Pocahontas does not file such a motion, the parties are **ORDERED** to, within 20 days of the date of service of the Secretary's interrogatory response, supplement the record for the pending motions for summary decision with any new information learned from the depositions and interrogatories that is relevant to its arguments in this case.

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

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