

May 2017

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Jeffrey Pappas v. Calportland Company and Riverside Cement Company, Docket No. WEST 2016-264-DM (Judge Paez, March 31, 2017)

Secretary of Labor v. M-Class Mining, LLC, Docket No. LAKE 2012-519 (Judge Rae, April 7, 2017)

Review was denied in the following cases during the month of May 2017:

Daniel B. Lowe v. Veris Gold USA, Inc., et al. and Matthew A. Varady v. Veris Gold USA, Inc., et al., Docket Nos. WEST 2014-614 DM, et al (Judge Simonton, March 27, 2017)

Secretary of Labor v. Arnold Stone, Inc., Docket No. CENT 2016-540-M (Judge Miller, April 11, 2017)

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 11, 2017

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

v.

JOHN RICHARDS CONSTRUCTION

Docket Nos. WEST 2014-440-M
WEST 2015-101-M

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

DECISION

BY THE COMMISSION:

These cases arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act” or “Act”). The Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued a citation to John Richards Construction (“JRC”) for its refusal to permit an MSHA inspector entry to its mine in violation of section 103(a) of the Act, 30 U.S.C. § 813(a).¹ Another citation was issued pursuant to 30 U.S.C. § 814(a) after a different MSHA inspector determined that JRC’s fire extinguishers had not been timely inspected as required by 30 C.F.R. § 56.4201(a)(2).² At issue in these cases is whether the Commission Administrative Law Judge erred in granting the Secretary’s motions for summary decision.

For the reasons discussed below, we affirm the Judge’s decision regarding the refusal of entry violation. We also vacate the Judge’s grant of summary decision regarding the fire extinguisher citation and remand for further proceedings.

¹ 30 U.S.C. § 813(a) provides:

Authorized representatives of the Secretary . . . shall make frequent inspections and investigations in . . . mines each year for the purpose of . . . determining whether there is compliance with the mandatory health or safety standards. . . . In carrying out the requirements of this subsection, no advance notice of an inspection shall be provided to any person. . . . For the purpose of making any inspection or investigation under this chapter, the Secretary . . . shall have a right of entry to, upon, or through any coal or other mine.

² 30 C.F.R. § 56.4201(a)(2) states that : “Firefighting equipment shall be inspected . . . [a]t least once every twelve months. . . .”

I.

Summary Decision

Pursuant to Commission Rule 67(b), “[a] motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows: (1) [t]hat there is no genuine issue as to any material fact; and (2) [t]hat the moving party is entitled to summary decision as a matter of law.” 29 C.F.R. § 2700.67(b). Material facts are those that may affect the outcome of the case under the governing law. The mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986).

The Commission has long analogized summary decision to summary judgment under Rule 56 of the Federal Rules of Civil Procedure, Fed R. Civ. P. 56. *See, e.g., Kenamerican Res., Inc.*, 38 FMSHRC 1943, 1946 (Aug. 2016); *Energy West Mining Co.*, 16 FMSHRC 1414, 1419 (July 1994). As with summary judgment under Rule 56, appellate review of summary decisions is *de novo*, in that the reviewing court applies the same standard as the trial court. *See, e.g., Hanson Aggregates New York, Inc.*, 29 FMSHRC 4, 9 (Jan. 2007). When the Commission reviews a summary decision and determines that the record before the Judge contained disputed material facts, the proper course is to vacate the grant of summary decision and remand the matter for an evidentiary hearing. *See Energy West Mining Co.*, 17 FMSHRC 1313, 1316-19 (Aug. 1995); *Missouri Gravel Co.*, 3 FMSHRC 2470, 2473 (Nov. 1981).

II.

Discussion

A. Citation No. 8762607 - Refusal of Entry

1. Factual and Procedural Background

The Richards Pit is a sand and gravel mine in Seeley Lake, Montana, owned and operated by JRC, which is owned by John Richards. On Friday, July 19, 2013, at 11:40 a.m., MSHA Inspector Peter Crites arrived at the Richards Pit to conduct a regular inspection. Upon arrival, Crites proceeded to the office building in front of the mine, where he notified JRC office personnel, Cindy Llewellyn and Kim Myre, that he was there to conduct an inspection and asked to speak to Richards. Llewellyn told Crites that Richards was in Missoula, Montana, on business, and that she could not let Crites enter the mine. Crites asked if there was anyone else on-site who could accompany him on an inspection, and Llewellyn responded that she “thought Kerry the mechanic was out there,” but regardless, she could not let the inspector enter. S. Mot. for Sum. Dec., Ex. 1 at 2-3; Ex. 2 at 1; Exs. 9-10.

Llewellyn called Richards while Crites went outside to his vehicle to call his supervisor, Curtis Petty. Llewellyn then went out on the porch to let Crites know that Richards was on the phone, and that he had directed her to lock the gate to the vehicle entrance, which she then proceeded to do. Llewellyn also informed Crites that Richards had further instructed her and

Myre to prevent access by parking their vehicles in front of the gate.³ Crites spoke with Richards on the phone, and Richards told the inspector that “[he] could not enter the premises without [Richards] being there to accompany him.” Ex. 1 at 3; Ex. 2 at 2; Exs. 9-11; JRC’s Opp. to Mot. for Sum. Dec. at 1; JRC’s Mot. for Oral Arg. at 1; JRC Br. at 1. According to Crites, Richards “repeated this direction to not enter the mine site at least four (4) more times.” Ex. 1 at 3. JRC has not disputed this claim.

Crites subsequently spoke to Richards again on the phone. Richards informed Crites that he would be returning sometime between 4:00 and 4:30 p.m., and reiterated that Crites should not enter the property until his arrival. Shortly after 12:00 noon, Llewellyn and Myre got into their cars and drove away. As she was leaving, Llewellyn told Crites that she would return to the mine.

At 12:15 p.m., Crites called his supervisor again, who instructed him to issue the citation and wait until 4:00 p.m. for Richards to arrive. Crites then issued a citation for JRC’s refusal to allow MSHA to enter the mine in violation of section 103(a) of the Mine Act. On the face of the citation, Crites stated: “John Richards is well aware of this provision of the Mine Act, and has impeded past inspections.” Ex. 1-A at 2. He waited until 4:15 p.m., at which time Richards had not arrived and Llewellyn had not returned. He left the citation on the front porch of the office at 4:15 p.m. and drove away at 4:20 p.m.

JRC contested the proposed penalty of \$1,000. On June 10, 2015, the Secretary filed a Motion for Summary Decision asserting that there were no material facts in dispute. JRC opposed the motion and moved for oral argument on the Secretary’s motion.⁴

2. The Judge’s Decision

In an order issued on August 25, 2015, the Judge granted the Secretary’s motion for summary decision, finding that after looking at the record in the light most favorable to JRC, there was no genuine issue as to any material fact, and that oral argument was unnecessary to resolve the matter at issue. 37 FMSHRC 1813, 1814 (Aug. 2015) (ALJ). Specifically, the Judge disagreed with JRC’s assertion that it was disputed whether Llewellyn locked the gate, because based on written statements submitted by both Llewellyn and Myre, Llewellyn locked the gate following instructions from Richards. Ex. P-2 at 10-11. Additionally, Richards’ own written notes expressly stated that he instructed Llewellyn to lock the gate and block access. The Judge found that the employee’s act of locking the mine gate upon Richards’ orders denied Inspector Crites entry. She also determined that Crites was denied access to the mine by Richards when, according to JRC in its opposition to the Secretary’s motion, Richards stated that “I spoke to Mr. Crites on the telephone and stated that Inspector Crites could not enter the premises without me

³ There is no indication in the record regarding whether Llewellyn and Myre actually moved their vehicles to the gate.

⁴ JRC has been represented by the owner, Mr. Richards, who is not an attorney.

being there to accompany him.”⁵ 37 FMSHRC at 1815, 1817; Ex. P-2 at 9, 11; JRC’s Reply to Pet. Mot. for Sum. Dec. at 1.

The Judge dismissed JRC’s claim that Inspector Crites failed to follow proper procedures. She noted that while JRC quoted a number of requirements from MSHA’s program policy manual (“PPM”), it failed to specify which requirement the inspector failed to follow or how the alleged failure would affect the outcome of the case.

The Judge further determined that the facts in dispute were not material to the disposition of the case. Specifically, she noted that the validity of JRC’s allegation that Crites did not observe fresh gravel at the mine, contrary to the inspector’s assertion, would have no bearing on the Secretary’s right of entry under section 103(a). The Judge also concluded that resolution of whether Crites failed to give JRC personnel notice that it would be cited for refusing entry was unnecessary. She found that the Mine Act imposes no requirement that an inspector threaten or otherwise warn an operator of an impending citation in order to achieve compliance. The Judge concluded that based on the circumstances of the present case and JRC’s history of interference with MSHA’s authority to inspect its facility, a finding of high negligence and a penalty of \$1,000 were appropriate. 37 FMSHRC at 1815-16, 1820-1821.

JRC filed a petition for discretionary review with the Commission challenging the Judge’s order. We granted the petition.

3. Disposition

a. The Material Facts

The Supreme Court has recognized that section 103(a) of the Mine Act authorizes warrantless inspections by granting MSHA inspectors the right of entry to, upon, or through any mine, without advance notice, to determine if there is compliance with mandatory health and safety standards. If a mine operator refuses to allow section 103(a) inspection, the Secretary is authorized to institute a civil action to obtain injunctive or other appropriate relief. *Donovan v. Dewey*, 452 U.S. 594, 596-97 (1981); *see also U.S. Steel Corp.*, 6 FMSHRC 1423, 1430-31 (June 1984). Consistent with *Dewey*, the Commission has long held that a mine operator’s refusal to permit inspections is a violation of section 103(a). *Calvin Black Ent.*, 7 FMSHRC 1151, 1156

⁵ The Judge characterized Richard’s employees locking the mine gate as “indirect” denial of entry and held that Mr. Richards’ verbal order not to enter the mine was a “direct” denial. MSHA’s Program Policy Manual (“PPM”) provides that “[d]irect denials are those in which an operator or the operator’s agent informs an inspector that an inspection of the mine will not be permitted.” MSHA PPM, Vol. I, p. 11 (Oct. 2010). It further states that “[i]ndirect denials are those in which an operator or his agent does not directly refuse right of entry, but takes roundabout action to prevent inspection of the mine by interference, delays, or harassment. There must be a clear indication of intent and proof of indirectly denying entry. For example, access to the mine is blocked by a locked gate or other means of blockage. . . . [or] [w]ithdrawing mine personnel when the inspector arrives.” MSHA PPM, Vol. I, p. 12-13 (Oct. 2010). We do not find it necessary to draw the distinction between the types of unlawful denials in deciding this case.

(Aug. 1985); *Waukesha Lime & Stone Co., Inc.*, 3 FMSHRC 1702, 1703-04 (July 1981); *U.S. Steel*, 6 FMSHRC at 1430-31.

There is no dispute regarding whether MSHA has jurisdiction over the Richards Pit or whether Inspector Crites was there for a lawful purpose, i.e., to perform an inspection of the mine pursuant to the Mine Act.⁶ Therefore, the only remaining fact material to this case is whether MSHA Inspector Crites was denied entry to the Richards Pit on July 19, 2013.⁷ JRC argues that Inspector Crites was not refused entry by Llewellyn or Richards, and that Richards only requested that he be given the opportunity to accompany Crites on the inspection.

After reviewing the written statements of JRC personnel, as well as the statement and notes of Inspector Crites, we conclude that there is clear and unequivocal proof that Crites was denied entry to the Richards Pit in violation of the Act.

According to Llewellyn's written statement, she said that "I told [Crites] John was in town at meetings all day and that I couldn't let him in. He asked if anyone else was outside to show him around and I told him I thought Kerry the mechanic was out there but that again couldn't let him in. . . . I told him I would have to call John."⁸ Ex. 2 at 10. Richards also stated in his notes that "I told Pete I would be back at 4:30 or so and we could do inspection then." Ex. 2 at 11. In his reply to the Secretary's motion for summary decision, Richards admitted that "I spoke to Crites on the telephone and stated that Inspector Crites could not enter the premises without me being there to accompany him." JRC's Reply at 1.

⁶ JRC asserts that according to JRC's office staff, Crites indicated that he was at the mine because MSHA had received a complaint. This fact is immaterial because whether Crites was there to investigate an anonymous safety complaint or conduct a regular inspection. Both are authorized under the Act. *See* 30 U.S.C. §§ 813(a) and (g)(1).

⁷ JRC asserts that MSHA needed Richards' permission to cross private land to reach the mine site. Contrary to JRC's assertion, the Mine Act broadly defines "mine" to include private ways and roads appurtenant to the area of land from which minerals are extracted. 30 U.S.C. § 802(h)(1). This provision has been read to extend MSHA's jurisdiction to private roads leading to mine facilities. *See Sec'y of Labor v. Nat'l Cement Co. of Cal.*, 573 F.3d 788, 795 (D.C. Cir. 2009). Accordingly, MSHA's inspectors would not require permission to travel the private roadway providing access to the Richards Pit.

⁸ JRC improperly attempts to put forth a new account of the facts in an affidavit from its employee Cindy Llewellyn, executed nearly a month after issuance of the Judge's order granting the Secretary summary decision. *See* PDR, Ex. 1. In the affidavit, Llewellyn completely contradicts her previous written statement introduced before the Judge. Nonetheless, because the affidavit together with a photo of the mine's gate and entry (PDR, Exs. 1, 3) are new evidence introduced for the first time on appeal, and not entered before the Judge for consideration, they will not be considered by the Commission. 30 U.S.C. § 823(d)(2)(C) ("For the purpose of review by the Commission under paragraph (A) or (B) of this subsection, the record shall include: (i) all matters constituting the record upon which the decision of the administrative law judge was based . . . No other material shall be considered by the Commission upon review.").

JRC further insists that Crites was not physically barred entry because the gate was never actually locked and, in any eventuality, Crites could easily step over the gate to access the mine.⁹ Whether the gate was actually locked is not material to the disposition of this case. By expressly telling Crites that the gate would be locked and that he could not enter, JRC made clear that it would not permit Crites entry into the mine. Requiring more than such a clear expression of intent to show an inspector had been denied entry to a mine would risk forcing MSHA's inspectors into potentially dangerous confrontations with uncooperative operators. *See Calvin Black Ent.*, 7 FMSHRC at 1157 ("MSHA inspectors are not required to force entry or to subject themselves to possible confrontation or physical harm in order to inspect.").

Moreover, Richards' insistence that he accompany Crites on the inspection before he could enter the premises effectively amounts to a demand for prior notice of the inspector's visit. As correctly noted by the Judge, section 103(a) expressly requires that "no advance notice of an inspection shall be provided to any person." 30 U.S.C. § 813(a); 37 FMSHRC at 1818; *Calvin Black*, 7 FMSHRC at 1156. Delaying an MSHA inspection once it is known that an inspector has arrived can compromise the value of an inspection. Richards could have designated any one of the employees in the office that day or on the mine site to accompany Crites on the inspection, but he refused.

JRC refused to allow Crites entry into the Richards Pit and its agents prevented access to the mine. This violated MSHA's right of entry under section 103(a) of the Mine Act. The record before the Judge reveals no genuine issue of material fact in dispute and wholly supports her grant of the Secretary's motion for summary decision.

b. Degree of Negligence and the Penalty Amount

We also affirm the Judge's decision that JRC was highly negligent in its decision to refuse MSHA access to the mine, because the operator was well aware of MSHA's right to inspect, and yet acted intentionally in contravention of that right. The Commission has held "that an operator's intentional violation constitutes high negligence for penalty purposes." *Topper Coal Co., Inc.*, 20 FMSHRC 344, 350 (Apr. 1998) (quoting *Consolidation Coal Co.*, 14 FMSHRC 956, 969-70 (June 1992)).

⁹ The written statements of JRC's employees directly contradict JRC's assertion that the gate was never locked. Llewellyn states in her affidavit that "I told [Crites] per John [Richards] I was to go lock the gate at which time I did." Ex. 2 at 10. Kim Myre provides the same account, stating, "Cindy locked the gate per John's instructions." *Id.* at 9. These statements are further corroborated by the personal notes of Richards, who noted, "Cindy – instructed to lock gate and block access." Ex. 2 at 11; *see also* Ex. 2 at 1 ("John said to lock the gate as no one was working in the pit. . . . I went and closed the chain on the gate. Gate was only open for the ready mix driver.").

Finally, we affirm the Judge's penalty determination of \$1,000. In discussing each of the statutory penalty criteria,¹⁰ the Judge placed particular emphasis on JRC's history of similar behavior, which she found to be "particularly egregious." 37 FMSHRC at 1820. While JRC asserts that the proposed penalty would be devastating to the mine's continued operation, it proffered no evidence that would support its claim. *Id.* The Commission has held that "[i]n the absence of proof that the imposition of authorized penalties would adversely affect [an operator's] ability to continue in business, it is presumed that no such adverse [e]ffect would occur." *Sellersburg Co.*, 5 FMSHRC 287, 294 (Mar. 1983) (citing *Buffalo Mining Co.*, 2 IBMA 226, 247-48 (Sep. 1973)).

B. Citation No. 8762878 – Fire Extinguisher Inspection

1. Factual and Procedural Background

On July 29, 2014, MSHA Inspector David Small arrived at the Richards Pit to conduct a regular inspection. While there, Small examined the mine's fire extinguishers. JRC was unable to produce records demonstrating that the inspection had occurred. According to Small's inspection notes from that day, Richards told him that he was unaware that he needed to conduct yearly inspections, and asked Small for additional time to have the extinguishers examined. Small inferred from these facts that annual inspections had not been performed. Small issued Citation No. 8762878 for JRC's failure to conduct the annual inspection of its fire extinguishers, in violation of 30 C.F.R. § 56.4201(a)(2). Ex. P-1 at 1-2; Ex. P-4 at 1; S. Mot. for Sum. Dec. at 5; 37 FMSHRC 2490, 2491-92 (Oct. 2015). The citation states:

The yearly inspection of the fire extinguishers were [sic] not conducted at the mine site. At least once every 12 months checks shall be conducted to determine the condition of the extinguishing agent, mechanical parts, hose, nozzle, and vessel to determine that the extinguisher will function properly. Based on continued mining operations a person could be injured if a fire were to occur and a fire extinguisher did not function properly.

S. Mot. for Sum. Dec., Ex. 2 (emphasis added).

Approximately one week later, on August 6, 2014, JRC had Missoula Fire Equipment ("MFE") perform the annual inspection of the extinguishers. JRC later provided Small with the invoice from MFE as proof of examination, and the citation was abated. S. Exs. 3, 5. The Secretary subsequently filed a petition for civil penalty, which was assigned to the same Judge as the previous docket. In JRC's answer to the Secretary's petition, the operator did not provide a

¹⁰ In assessing civil monetary penalties, section 110(i) of the Act, 30 U.S.C. § 820(i), requires that the Commission 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.

reason for why it was unable to produce the inspection records at the time of the MSHA inspection. It stated: “Deny. Defendant has previously provided MSHA with reasons or Defendant is without knowledge to respond at this time.” JRC Ans. to Pen. Pet. at 1.¹¹

However, through subsequent submissions and conference calls with the Judge, Richards claimed that an inspection of the fire extinguishers had, in fact, been timely performed and that it was current at the time of Small’s inspection. JRC provided a copy of the alleged record of timely inspection, along with an affidavit from JRC employee Mark Smith, who allegedly performed the timely inspection.¹² JRC Br. Opp. Sum. Dec., Exs. R-1, R-2. During one of four conference calls with the Judge, Richards stated that he did not have the record of inspection available at the time of Small’s inspection. He did not know that it existed and needed to question the person who performs the fire extinguisher examinations. He then stated that he had part of the records at the time, but the other records were in a different file that he could not find. JRC PHR at 2; JRC Br. at 2; Exs. R-1, R-2; Aug. 14, 2015 Telec. Tr. 9-10; 37 FMSHRC at 2492.

The Secretary filed a motion for summary decision asserting that there were no material facts in dispute and that JRC was in violation of section 56.4201(a)(2) because it had failed to provide current annual inspection records for the fire extinguishers. JRC opposed the motion.

The Judge granted the Secretary’s motion for summary decision. She acknowledged the discrepancy between Richards’ alleged statements at the time of Small’s inspection and Richards’ later assertion of a timely inspection, but nonetheless found the dispute immaterial. The Judge determined that “its resolution does not affect ‘the outcome of the suit under governing law,’” and that the issue before her was “not whether the annual inspections had been performed, but whether, at the time of inspection, the operator was able to demonstrate to the inspector compliance with the standard by producing adequate documentation of timely inspections.” 37 FMSHRC at 2492, *quoting Anderson*, 411 U.S. at 248.

The Judge concluded that even when viewing the evidence in the light most favorable to the operator – that the extinguisher had been timely inspected, but the documentation was unavailable – the “standard is only enforceable if the operator demonstrates to the inspector, through records or tags, that the fire extinguishers have been properly inspected.” *Id.* at 2493-94. Consequently, she concluded that JRC was in violation of the standard upon finding that it was undisputed that JRC had failed to provide the inspector with proof of a timely inspection. *Id.* at 2494, 2496. The Judge did not consider the evidence produced by JRC allegedly proving that the annual inspection had been performed in accordance with the regulation. Aug. 14, 2015 Telec.

¹¹ By order dated May 20, 2015, granting a motion of the Secretary, the Judge designated Docket WEST 2015-101-M, involving Citation No. 8762878, for Simplified Proceedings under Commission Rule 101. 29 C.F.R. § 2700.101. Richards opposed the motion and requested the opportunity to take depositions.

¹² According to Mark Smith’s affidavit, he “performed the annual inspection of John Richards Construction fire extinguishers on July 1, 2014.” PDR, Ex. 1.

Tr. 9-12. JRC filed a petition for discretionary review appealing the Judge's decision, which we granted.¹³

2. Disposition

We conclude that summary decision here was inappropriate because a genuine issue of material fact remains.

Section 56.4201(a)(2) requires that "[f]irefighting equipment shall be inspected . . . [a]t least once every twelve months." This language unequivocally requires an annual inspection of fire extinguishers. In the instant case, however, there remains a factual dispute as to whether the operator performed the necessary annual inspection.

According to Inspector Small, on July 29, 2014, Richards told Small that he was unaware of the annual inspection requirement, and then he asked Small for additional time to have the extinguishers inspected. S. Mot. for Sum. Dec., Exs. 1, 4. The citation was terminated on August 13, 2014, after JRC produced a record showing that MFE performed the inspection on August 6.

However, in its April 2015 pre-hearing report, JRC asserted that the fire extinguishers in fact had been timely inspected. Later, during a conference call, JRC told the Judge that the inspection records were not produced because Richards had not known they existed and did not know where they were. JRC provided a copy of the alleged record of timely inspection, along with an affidavit from JRC employee Mark Smith, who allegedly performed the timely inspection.¹⁴ JRC Br. Opp. Sum. Dec., Exs. R-1, R-2. Nonetheless, the Judge found a violation of section 57.45201(a)(2) because the operator did not produce a record of an inspection at the time of the inspection.

We conclude that the Judge erred because the plain terms of the cited provision, section 57.45201(a), require a determination of whether an annual inspection was conducted. That section does not state a requirement for the immediate production of a record of the inspection. Consequently, in light of Richards' submission of evidence purporting to show compliance with the inspection requirement, a material fact is in dispute regarding whether JRC failed to conduct the annual inspection as alleged in the citation.

As noted, the Judge found JRC in violation of section 56.4201(a)(2) based on the operator's failure to provide proof of a timely inspection to Small at the time of the MSHA inspection. Although the failure to provide proof of a timely examination during an MSHA

¹³ JRC also appealed the Judge's decision regarding Citation No. 8762879, but the Commission did not grant review of that citation.

¹⁴ According to Mark Smith's affidavit, he "performed the annual inspection of John Richards Construction fire extinguishers on July 1, 2014." PDR, Ex. 1.

inspection suggests a violation of section 57.45201(b) of the regulations,¹⁵ provision of a certification record at the time of inspection is not an element of the violation charged here – that is, a failure to perform an inspection as required by section 56.4201(a)(2).

Section 57.45201(a)(2) mandates the performance of an annual inspection whereas section 57.45201(b) requires the creation of the proof of inspection – each requiring the resolution of a different factual question. Therefore, while an operator’s failure to produce a record of the certification required by subparagraph (b) provides sufficient grounds upon which to charge a violation of paragraph (a), it does not necessarily answer the ultimate factual question of whether JRC actually performed the section 56.4201(a)(2) inspection. *See LJ’s Corp.*, 14 FMSHRC 1278, 1280 (Aug. 1992) (“the absence of certification of inspection and testing of [a] mine rescue apparatus . . . is sufficient to establish a prima facie case of a violation.”).

Thus, an operator’s inability to provide proof of an inspection at the time of inspection, standing alone, is not dispositive of a violation of paragraph (a). Indeed, the Commission has held that “upon a showing by the Secretary that the operator’s records indicate the required certification was not made, the violation is established unless the operator can show that such inspection actually occurred within the relevant time period.” *Id.* at 1280,¹⁶ *citing Southern Ohio Coal Co.*, 14 FMSHRC 1, 13 (Jan. 1992); *Mid-Continent Res.*, 11 FMSHRC 505, 509 (April 1989). We reasoned that there may be instances where the operator may have performed the required inspection, but, for some reason, failed to make a record of it. Under these circumstances, the operator may present evidence that the required inspection was performed. *LJ’s Corp.*, 14 FMSHRC at 1280.

In the instant case, the Judge did not consider the alleged proof of inspection record and Smith affidavit presented by JRC on the ground that the evidence had not been produced at the time of the inspection. However, in accordance with the precedent established in *LJ’s Corp.*, JRC is allowed to rebut the Secretary’s prima facie case by providing credible evidence that the extinguisher was inspected in accordance with paragraph (a) requirements. On remand, the Judge must consider and weigh JRC’s rebuttal evidence against other evidence in the record.

Accordingly, we vacate the Judge’s grant of summary decision on this citation and remand to the Judge for further discovery and a full hearing on the merits. On remand, the Judge

¹⁵ 30 C.F.R. § 57.45201(b) requires:

At the completion of each inspection or test required by this standard, the person making the inspection or test shall certify that the inspection or test has been made and the date on which it was made. Certifications of hydrostatic testing shall be retained until the fire extinguisher is retested or permanently removed from service. Other certifications shall be retained for one year.

¹⁶ In *LJ’s Corp.*, a mine operator was cited for failure to test a rescue apparatus within the 30-day period prescribed by 30 C.F.R. § 49.6(b) when it could not produce records evidencing that the required tests had been done. 14 FMSHRC at 1278.

must make the necessary finding of fact and credibility determinations as stated in this decision.¹⁷

III.

Conclusion

For the reasons set forth above, the Judge's order granting the Secretary's motion for summary decision regarding Citation No. 8762607 is affirmed. We also vacate the Judge's grant of summary decision regarding Citation No. 8762878 and remand for further proceedings consistent with this decision.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

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

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

¹⁷ Due to the issues involved and our order of remand, simplified proceedings are hereby discontinued here and this case shall proceed under the Commission's conventional rules.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 31, 2017

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

v.

BUSSEN QUARRIES, INC.

Docket No. CENT 2015-385

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

DECISION

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act” or “Act”). The Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued a citation to Bussen Quarries, Inc., for allegedly violating the requirement of 30 C.F.R. § 56.15005 that “[s]afety belts and lines shall be worn when persons work where there is danger of falling.” A Commission Judge affirmed the citation in all respects. 37 FMSHRC 2786 (Dec. 2015) (ALJ). Bussen is appealing the Judge’s violation, significant and substantial (“S&S”),¹ and high negligence determinations.²

The Commissioners are evenly divided on whether to affirm the Judge’s decision in its entirety, or to reverse the finding of violation. The effect of the split decision is to allow the Judge’s decision to stand as if affirmed. *Pa. Elec. Co.*, 12 FMSHRC 1562, 1563-65 (Aug. 1990), *aff’d*, 969 F.2d 1501 (3d Cir. 1992).

¹ 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.”

² In its petition for discretionary review, which it adopted as its opening brief, Bussen requested that the Commission hear oral argument on its appeal. Commission Procedural Rule 77 specifies that any oral argument request is to be made by separate motion. 29 C.F.R. § 2700.77. The Commission nevertheless considered Bussen’s request. It decided, however, that oral argument would not be ordered.

I.

Factual and Procedural Background

The alleged violation took place on December 2, 2014, at Bussen's limestone mine in Missouri. Miners would routinely drill bore holes into what was known as the "State Ledge" highwall there, pump water out of the holes as necessary, and then use explosives in the holes to blast through the limestone and rock.

Bussen's practice was to drill blasting holes no closer than eight to nine feet from the highwall's edge. MSHA has developed a power point program for section 56.15005 defining a Fall Hazard Zone requiring a tie off as working within six feet of the crest. The operator's stated policy was that miners were to tie off when within seven feet.³ There is no dispute regarding the danger of the 70-foot dropoff from the edge of the highwall in question.

On December 2, a blasting crew of four individuals was atop the highwall. Prior to loading explosive shots into previously drilled holes, the crew expected to have to pump water out of least some of the holes. Accordingly, one of the members of the crew had driven a truck carrying a pump, mounted on a wheeled cart, to the site. David Becker, the lead blaster on the crew, unloaded the pump cart. Before much longer, however, another truck, carrying bags of blasting powder, arrived. Consequently, Becker moved the pump cart out of the way, repositioning it so that the other crew members could quickly unload the bags of powder.

Shortly thereafter, MSHA Inspector Gary Swan reached the top of the highwall. Swan observed that the pump cart was approximately four and one-half feet from the edge of the highwall, with the cart's curved handles pointed towards the edge. Swan approached Becker, who was checking for the presence of water in the holes, and told him that he wanted to discuss the placement of the pump. Upon hearing this, Becker reached for the pump, pulling it closer to the line of drill holes and spinning it so that the handles no longer faced the highwall. Tr. 19-22, 79; Gov't Ex. 1, at 3 (photo of pump after it was so moved, with annotation indicating its prior placement).

When Swan asked about fall protection, Becker told him that he had not worn it when moving the pump. Becker did say that fall protection was available in the truck that had brought the pump. Tr. 23. Swan determined that the location of the pump "could put a person using the cart approximately 2 to 3 feet from the edge of the highwall with their [sic] back to the edge. This practice exposes miners to a fall hazard." Gov't Ex. 1, at 1. Because fall protection had not been used, Swan issued Citation No. 8860004 for an alleged violation of section 56.15005. *Id.* The citation stated the condition was S&S and the result of high negligence on the part of the operator. *Id.* The Secretary proposed a civil penalty in the amount of \$6,300.

³ To tie off atop a highwall, Bussen miners would use a line attached to a "T" bar or spike dropped into a drill hole.

In her decision, the Judge refused to credit Becker's hearing testimony on a number of points. She instead agreed with the Secretary that the initial repositioning of the cart, with its handles pointing towards the highwall edge, indicated that at some point Becker likely was between the cart handles and the edge of the highwall, less than four and one-half feet away from it, without having been tied off.⁴ The Judge further found that Becker or other members of the crew "could" have used the pump where it was located near the edge of the highwall, and may have chosen to do so without wearing fall protection. Accordingly, she found that a violation of section 56.15005 had been established, given the danger of falling posed to miners by being so close to the edge of the highwall. 37 FMSHRC at 2788-89.

The Judge also affirmed the S&S allegation. She found that the violation of section 56.15005 contributed to a hazard, in that it presented the danger of a miner tripping and falling from the unmarked edge of the highwall while either using the pump or moving it to or from another location, all without the benefit of fall protection. The Judge concluded that there was a discrete hazard created by the violation and that the hazard was reasonably likely to result in an injury. She also concluded that the injury suffered in a 70-foot drop from the highwall would almost certainly be fatal. *Id.* at 2790-91.

The Judge additionally upheld the high negligence allegation, finding that the operator had been put on notice by MSHA of what is expected of it with regard to section 56.15005 and concluding that a violation of the standard was thus indicative of a significant lack of care. She further found that Becker had stated to Inspector Swan that he was in charge of the operation that morning and through his actions indicated that he was aware that the pump was too close to the highwall edge. The Judge also found it significant that despite the operator's policy on fall protection in the danger zone being even more stringent than MSHA's policy, and that a few months prior to the citation it had conducted a safety meeting with miners at which fall protection had been discussed, the pump had nevertheless been placed by Becker so obviously close to the edge. *Id.* at 2791-92.

On review, Bussen contends that the Judge's conclusions on the fact of violation, its S&S nature, and the operator's high negligence are not supported by substantial evidence.

⁴ Specifically, the Judge refused to credit Becker's testimony (1) that at no point was he within seven feet of the edge on the morning of the citation; (2) that he was the only one who would have used the pump that day; (3) that he would not have used it in the position four and one-half feet from the edge; and (4) that he would not have crossed the operator's seven-foot boundary beyond which fall protection was required, in order to retrieve the pump even if Inspector Swain had not been present. 37 FMSHRC at 2788-89.

II.

Separate Opinions

Commissioners Jordan and Cohen, writing in favor of affirming the Judge's decision as supported by substantial evidence with respect to each of the three issues:

A. Violation

We conclude that substantial evidence⁵ supports a finding of violation in this instance. We would affirm the Judge's conclusion that David Becker's positioning of the pump cart during the unloading of the powder truck placed him less than four and one-half feet from the highwall's edge without fall protection.

The Judge's conclusion that the standard was violated is based primarily upon her finding that "it seems most likely that Becker pushed the pump by its handles rather than carrying it or pushing or pulling it from the side opposite the handles," and thus the handles pointing towards the highwall edge indicate that he was between the pump cart and the highwall edge. 37 FMSHRC at 2789. The Commission has held that a violation may be proven through inferences drawn from indirect evidence so long as the inference is reasonable. *See, e.g., Jim Walter Res., Inc.*, 28 FMSHRC 983, 989 (Dec. 2006) (stating that inferences drawn from indirect evidence are reasonable when there is "a logical and rationale connection between the evidentiary facts and the ultimate fact inferred") (citation omitted). Here the Judge's inference is a commonsense view of how the cart in question had been placed in the position where Inspector Swan observed it, and is thus is a reasonable inference. Consequently, it was well within the Judge's purview as the trier of fact to conclude that, at some point, Becker had to have been within three to four feet of the edge of the highwall with his back to it.⁶ *See* 37 FMSHRC at 2791; *Donovan ex rel. Chacon v. Phelps Dodge Corp.*, 709 F.2d 86, 92 (D.C. Cir. 1983) (Commission may not substitute its conclusion regarding the facts from the record for that reasonably reached by the Judge).

⁵ When reviewing a Judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support [the Judge's] conclusion." *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

⁶ Our colleagues argue that the Judge's reference to the six-foot "fall hazard zone" provided in an MSHA PowerPoint presentation was error because the Judge considered this informal guidance as part of the mandatory legal standard. Slip op at 12. We disagree. Although the Judge referred to the informal guidance, her essential finding was that a miner's approach to within three or four feet of a 70-foot cliff created a "danger of falling," in violation of the standard. *See* 37 FMSHRC at 2788-91.

The Judge's decision is also supported by her comparative credibility findings. At the hearing, there was a significant difference in the testimony of Becker and Inspector Swan as to Becker's actions. Becker explained that, in order to initially move the pump cart away from the back of the powder truck, he grasped the pump cart's handles to spin the cart so that it was pointing in the opposite direction. He maintained that this action resulted in the handles pointing toward the highwall edge while he remained more than seven feet away from the edge. Tr. 74-76.

Becker further testified how he had retrieved the pump cart, with its handles pointing towards the highwall edge, without having to walk behind the handles, and thus be near the highwall edge with his back to it. He explained that he was able to grasp the pump and spin it back without moving closer to the edge. Tr. 76. Further, he stated that he did so in order to expressly demonstrate to the recently arrived Swan how the pump cart could be moved by a miner while standing more than seven feet away from the edge. Tr. 79-81.

Swan, however, told a different story. He testified that as soon as he started questioning Becker on why the pump was so close to the highwall edge, Becker quickly grabbed it and moved it to be near the drill holes, and thus more than seven feet away from the edge. Tr. 20-21. In Swan's view, if he had not been there, a miner would have retrieved the pump cart by placing himself between the handles and the highwall edge and thus be within the area in which fall protection was required to be used. Tr. 32-33.

Consequently, Swan also did not believe Becker's explanation of how he had originally positioned the pump cart. Instead, Swan was persuaded by the proximity of the cart and its handles pointing towards the highwall edge to conclude that a miner must have been less than six feet from the highwall edge to position the cart where he saw it, and thus working where there is a danger of falling in violation of section 56.15005, since fall protection had admittedly not been worn. Tr. 20, 22-24, 26, 27.

The operator points to Becker's testimony in urging that the Commission find that substantial evidence does not support the Judge's decision on the violation. However, the Judge refused to credit Becker's account with regard to how the pump cart came to be positioned four and one-half feet from the highwall's edge, and how it would have been retrieved had Swan's arrival not prompted Becker's quick method of retrieving it. She instead credited Inspector Swan with respect to a miner having to be close to the highwall edge to move the cart. 37 FMSHRC at 2788-89.

While Bussen argues that the Judge erred in these credibility findings, we see no compelling reason to disturb the Judge's credibility determinations. The Commission has recognized that a Judge's credibility determinations are entitled to great weight and may not be overturned lightly. *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992); *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2770 (Dec. 1981). Here, the Judge was required to choose between the competing explanations of Becker and Swan, after having had the

opportunity to hear the testimony of both and observe their demeanor as witnesses.⁷ *See, e.g., Sec’y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096, 1106-07 (D.C. Cir. 1998).

The Judge was also dissuaded from crediting Becker’s account by what he did upon Swan’s arrival. Rather than concluding that Becker had by his actions established that he could reposition the cart and remain more than seven feet away from the edge, the Judge inferred that those actions indicated that “Becker was aware that the pump was too close to the edge and quickly moved it before the inspector could do anything further.” 37 FMSHRC at 2791. This is a reasonable inference for the Judge to have drawn under the circumstances.

In summary, we conclude that substantial evidence supports the Judge’s determination that Bussen violated section 56.15005.⁸

B. S&S

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 (Jan. 1984), the Commission further explained:

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

⁷ The Judge also noted Swan’s extensive mining experience. Swan not only had been an inspector for seven years but, prior to that, had worked 30 years in the mining industry, primarily with surface mines, including in supervisory positions. 37 FMSHRC at 2787.

⁸ Although the citation alleges that the pump was being used from its position near the highwall edge (Gov’t Ex. 1, at 1), the Secretary failed to establish that was the case. Indeed, the evidence is largely to the contrary. In particular, the record seems clear that the pump had just been delivered to the highwall and had not even been fully assembled yet. Tr. 25, 42-43. Consequently, we view the Judge’s findings on the potential use of the pump to be no more than speculation. We note that the Secretary in his brief made no attempt to defend those findings, going as far as to characterize the issue as “irrelevant” on review. S. Br. at 10. Consequently, our conclusion that the citation should be affirmed is based solely on the placement of the pump cart in the position where Inspector Swan found it. Thus, our colleagues’ emphasis on what miners other than Becker might or might not have done, slip. op at 12-14, is not essential to our analysis of the violation given the Judge’s finding that Becker’s actions violated the standard.

and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

Id. at 3-4 (footnote omitted); accord *Buck Creek Coal, Inc. v. FMSHRC*, 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).

Given our conclusion that the Judge’s finding of violation is supported by substantial evidence with respect to Becker’s repositioning of the pump, and how he or any other miner would have retrieved it in the absence of inspector Swan, we limit our analysis under *Mathies* to those facts. Because that is sufficient to constitute a violation of section 56.15005, the first *Mathies* step is satisfied.

Since the issuance of the Judge’s decision and the submissions of the parties’ briefs, the Commission has further explained how the second and third steps of *Mathies* should be applied. *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2037-40 (Aug. 2016); *ICG Illinois, LLC*, 38 FMSHRC 2473, 2475-76 (Oct. 2016). In our view, the Judge’s analysis of the violation under *Mathies* steps two and three is consistent with our decisions in those recent cases.

Turning to the second step of the *Mathies* test, the inquiry here was whether the lack of fall protection was reasonably likely to lead to the danger of falling (the hazard expressed in section 56.15005).⁹ Clearly the 70-foot dropoff from the highwall here is a danger to which the tie-off requirement of section 56.15005 is directed.

MSHA has taken the position that, in highwall work areas, a danger arises when a miner takes a position six feet or less from the edge of the dropoff or unstable ground or footing. Gov’t Ex. 5, at 7 (copy of MSHA’s Safe Practices Near a Highwall Crest Powerpoint Presentation). MSHA has identified a number of reasons for how a miner could end up going over an edge when working within six feet of it, including slipping or tripping due to weather conditions, boreholes, or cracks in or clutter about the ground. In addition, in order to better help miners keep their bearings when close to the edge, MSHA suggests that there be visual warnings of the edge, or physical barriers to it. *Id.* at 6-14. Given that the violation here involved a miner getting to within steps of the edge of the highwall with his back to it, MSHA’s concerns are appropriately considered in this instance.

Our S&S inquiry considers the violative conditions as they existed prior to and at the time of the violation as well as how they would have existed had normal operations continued. *Mach Mining, LLC v. Sec’y of Labor*, 809 F.3d 1259, 1267 (D.C. Cir. 2016) (citations omitted).

⁹ In *ICG Illinois*, we stated separately that we “would hold that a violation sufficiently ‘contributes’ if it is at least somewhat likely to result in, or could result in, a safety hazard.” 38 FMSHRC at 2476 n.5. We do not find the qualitative difference between “reasonably likely” and “somewhat likely” to matter in this case, where a miner lacking fall protection was so close to a deadly dropoff.

In normal mining operations, there is always the potential for slipping and falling, and it was exacerbated in this instance by, as the Judge found, the presence of rock dust on the ground. 37 FMSHRC at 2791; Gov't Ex. 1, at 3-4 (photos of highwall edge area). In addition, she was correct to cite the lack of ground markings or other warnings of or barriers to the edge, which had been somewhat obscured by the rock dust.¹⁰ 37 FMSHRC at 2788, 2791; Gov't Ex. 1, at 3-4. Finally, the inspector testified as to the presence of the shavings piles that had resulted from the prior drilling of the bore holes, and over which a miner could stumble while working close to the edge. Tr. 25.

Hence, there existed a reasonable likelihood that Becker, or any other miner repositioning and then retrieving the pump cart within two to three feet of the edge of the highwall with his back to it, could slip, trip, stumble or inadvertently step over the unmarked edge — precisely what fall protection is designed to protect against. Regarding the third step of the *Mathies* test, it is reasonably likely that the hazard (a 70-foot fall) would result in injury. In addition, there is no dispute regarding the severity of the injuries that would result from a 70-foot plunge, so the fourth step was satisfied as well. Consequently, we would affirm in result the Judge's S&S determination.

C. Negligence

Bussen contends that the Judge erred in finding high negligence when the operator's fall protection policy was even more stringent than that of MSHA, and it had trained its miners to follow that policy. Citing *Excel Mining LLC*, 497 F.App'x 78, 79 (D.C. Cir. 2013), Bussen attempts to rely upon 30 C.F.R. Part 100, MSHA's regulations governing its proposal of civil penalties. Bussen maintains that, under 30 C.F.R. § 100.3(d), the existence of a single mitigating circumstance prevents a finding of high negligence in connection with a violation, even where the operator knew of the violation.

However, the D.C. Circuit has since held that the Commission, in assessing final civil penalties under the Act,¹¹ is not bound by Part 100, including the regulations defining "negligence" and setting forth MSHA's various degrees and descriptions of negligence. *Mach*

¹⁰ The operator argues that the lack of warning markers or barriers should not be taken into account, because the inspector did not cite it for a violation of 30 C.F.R. § 56.20011. That standard provides in pertinent part that "[a]reas where health or safety hazards exist that are not immediately obvious to employees shall be barricaded, or warning signs shall be posted at all approaches." A highwall edge, however, would seem to be immediately obvious from the vantage point of an individual "approaching" it. The measures noted to be lacking in this instance would instead serve as an additional reminder to miners busy at work in the area of the proximity of the dangerous edge just a few feet away.

¹¹ Negligence is one of the six statutory penalty criteria the Commission is to consider in assessing civil penalties pursuant to section 110(i) of the Act, 30 U.S.C. § 820(i).

Mining, 809 F.3d at 1263-64.¹² Instead of applying section 100.3(d), the Commission uses “a traditional negligence analysis.” *Id.* at 1264; *The American Coal Co.*, 39 FMSHRC 8, 14 (Jan. 2017). In determining the degree of negligence, the Judge should consider “what actions would have been taken under the same circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation.” *JWR Res., Inc.*, 36 FMSHRC 1972, 1975 (Aug. 2014). In addition, because Commission Judges are not bound by Part 100 when considering an operator’s negligence, they are not limited to a specific evaluation of potential mitigating circumstances. *Brody Mining, LLC*, 37 FMSHRC 1687, 1702-03 (Aug. 2015).

Although the Judge, in concluding that high negligence had been established here, referred to the Part 100 negligence definitions, her analysis of the record evidence regarding the operator’s negligence conforms with a “traditional negligence analysis,” because she “consider[ed] the totality of the circumstances holistically.” *Brody*, 37 FMSHRC at 1702. Based on Becker’s quick move to pull the pump away from the edge after Inspector Swan voiced concern about the situation, the Judge found that Becker was aware that the pump cart was positioned improperly in the danger zone. She further found that the edge of the highwall was an obvious danger to any persons in the area, and Becker therefore should have been alerted to the nearby danger. 37 FMSHRC at 2791-92. The Commission has held that high negligence can be found even when the violation is the result of a momentary error, when the error is by a supervisor or other agent of the operator and the violation is obvious. *See American Coal*, 39 FMSHRC at 14, 20, 22-23; *see also Topper Coal Co.*, 20 FMSHRC 344, 350 (Apr. 1998) (willful violation constitutes high negligence).

Bussen contends that, because Becker was a miner paid an hourly rate, any negligence on his part should not be attributed to Bussen. The Secretary responds that Becker’s status in the crew meant that he was acting as Bussen’s agent in this instance, and thus his negligence was attributable to it. *See generally Martin Marietta Aggregates*, 22 FMSHRC 633, 637 (May 2000) (citing cases).

The Judge concluded that Becker was “in charge” of the crew working atop the highwall that morning, and she considered that fact in her high negligence determination. 37 FMSHRC at 2787, 2791-92. While there is not a great deal of record evidence on this issue, it is undisputed that Swan asked Becker who was “in charge” and elicited a positive response from Becker. Becker informed Swan that he was the miner who was oldest and with the most experience in the crew (Tr. 19, 26), and he testified that his official title was “lead blaster.” Tr. 69. In contrast, the operator made no attempt to establish that another individual was supervising the crew that morning, and in its post-hearing brief did not even address the high negligence allegation, and

¹² Commissioner Cohen has explained why it is inappropriate for the Commission to apply the definitions contained in Table X of 30 C.F.R. § 100.3(d) in defining degrees of negligence. In particular, a finding of “high negligence” should not be precluded on the basis of a single mitigating circumstance. *Hidden Splendor Res., Inc.*, 36 FMSHRC 3099, 3105-09 (Dec. 2014) (Comm’r Cohen, concurring).

thus Becker's status in the crew. We agree with the Secretary that, for purposes of the rather unique circumstances of this case, Becker qualified as an agent of the operator for purposes of attributing his negligence to the operator in this instance.

In any event, we do not read the Judge's reliance on Becker's role relative to the remainder of the crew to be the entire basis for establishing that he was an agent of the operator in this instance. She also cited Becker's status as the lead blaster as illustrative in finding that, despite the operator's safety and discipline policies, it apparently had not succeeded in impressing upon its miners the importance of using fall protection when near a highwall's edge. *See* 37 FMSHRC at 2792.

Bussen contends that the Judge should have given its safety and discipline policies dispositive weight and reduced the level of negligence. However, it was not error for the Judge to decline to do so. Not only did Becker not adhere to the fall protection policy in this instance, but the evidence is that he was not disciplined by Bussen for failing to do so. Tr. 50, 83.

The operator also objects to the weight the Judge gave to the lack of warning markers or barriers at the highwall's edge in affirming the negligence as high in this instance. It contends that, in so doing, the Judge adopted requirements not imposed by section 56.15005. We disagree with this reading of the Judge's analysis. Her consideration of this evidence was more of a finding that such markers or barriers would have mitigated the operator's negligence in this instance, as those are measures MSHA recommends but does not require for highwall operations. Gov't Ex. 5, at 8. Their absence explains in part why the Judge was not persuaded to reduce the level of Bussen's negligence.

Accordingly, we conclude that the Judge's high negligence finding is supported by substantial evidence in this instance, and thus would affirm it.

D. Conclusion

For the foregoing reasons, we would affirm the Judge's decision that Bussen violated section 56.15005, that the violation was S&S, and that it resulted from high negligence.

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

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

Acting Chairman Althen and Commissioner Young, writing in favor of vacating the citation:

The Judge inferred a miner, Becker, placed himself in danger of falling. To do so, she disregarded Becker's sworn testimony explaining how he placed a moveable pump four and a half feet from the crest of the highwall, failed to contend with his physical demonstration to the inspector how this had been done, and then inferred — contrary to these facts of record — that the miner must have stood with his back to the highwall based merely on the direction of the pump's handles. Our task is to determine if that inference was reasonable in light of the totality of the evidence presented at the hearing and the analysis presented in the Judge's decision.

As set forth below, the Judge's inference that Becker placed himself in danger of falling, standing alone, is not supported by substantial evidence and therefore, is not reasonable. The miner's sworn testimony, his demonstration of his action, the evidence at the scene, and plain common sense contradict the Judge's inference. Moreover, the Judge further erred by basing the inference on the operator's failure, in the Judge's view, to comply with a host of non-mandatory safety suggestions made in informal MSHA presentations.

Discussion

A. The Judge failed to analyze the violation against the requirements of the standard.

We begin with the regulation the Secretary alleges Bussen violated. 30 C.F.R. § 56.15005 states: "Safety belts and lines shall be worn when persons work where there is danger of falling." In order to prove a violation of this standard, the Secretary must prove three elements: a person was (1) working (2) where there was a danger of falling (3) without wearing safety equipment. While the Judge below focused most of her opinion on possible actions and hazards that she speculated might arise in the future and on conditions that she believed to have been inadequate in light of informal guidance promulgated by the Secretary, the law imposes on the Secretary the burden of establishing each element of this violation, including the fact that a miner actually worked where there was a danger of falling. *See Cathedral Bluffs Shale Oil Co.*, 6 FMSHRC 1871, 1874-75 (Aug. 1984);¹ *cf. W.G. Yates & Sons Constr. Co., Inc. v. OSHRC*, 459 F.3d 604, 607 (5th Cir. 2006) (stating that all circuits considering the question agree that the

¹ The Court of Appeals for the D.C. Circuit reversed and remanded the Commission's decision vacating the citation in *Cathedral Bluffs. Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533 (D. C. Cir. 1986). However, the Court's decision was grounded on a holding that the enforcement guidelines at issue did not establish binding norms for determining when independent contractors could be cited. *Id.* at 537-39. Indeed, the Court found it "noteworthy that the Secretary took pain to exclude the enforcement guidelines from the final rule, and directed that they not be published with the rule in the Code of Federal Regulations." *Id.* at 539. In contrast, the elements at issue here appear in the text of a duly-promulgated, mandatory safety standard. The Commission's holding that the Secretary is required to prove all of the elements supporting a citation, and the logic supporting our holding that the Secretary failed to do so in *Cathedral Bluffs*, were undisturbed by the Court of Appeals.

Secretary has the burden of establishing each element of a violation under the Occupational Safety and Health Act).

When we examine the decision in its entirety, we see the Judge failed to measure the operator's conduct against the standard or to hold the Secretary accountable to his burden of proving a violation of its provisions. Instead, the Judge repeatedly relies on speculation and evaluates the operator's mine site actions against suggestions made in an MSHA informal PowerPoint to infer dangers of falling. 37 FMSHRC at 2788; *see also* Gov't Ex. 5, at 7.

The Judge accepted into evidence an MSHA PowerPoint presentation, "Fall Prevention on Highwalls." The presentation endorses the concept of a "Fall Hazard Zone" — that is, a space six feet or less from a stable crest or unstable ground. *See* Gov't Ex. 5, at 7. The operator in this case similarly recognizes the concept and had voluntarily established a seven-foot hazard zone from the edge of the highwall. 37 FMSHRC at 2788.

The concept of a six-foot "fall hazard zone" is certainly a beneficial suggestion. However, applying the six-foot "fall hazard zone" as if it were a mandatory standard upon which one may ground a strict liability violation is inconsistent with the actual regulation language promulgated by the Secretary and thus is impermissible. A violation of section 56.15005 is shown when the Secretary establishes each of the elements of the violation, i.e., whether the Secretary proved that in the specific circumstances of the citation it was more likely than not that a miner was working where there was a danger of falling and was not wearing a lifeline. The Secretary did not introduce any evidence for the proposition that every incursion within six feet of a crest creates a danger of falling.²

Nonetheless, the Judge repeatedly refers to the PowerPoint suggestions and opines that the failure to follow the suggestions put miners in danger of falling. The Judge draws a number of unreasonable and unsupported inferences.

The Judge below simplified the Secretary's burden of proof by dispensing with it: "I agree with the Secretary that the position of the pump together with the absence of any warnings near the edge created a danger of falling." 37 FMSHRC at 2788. Even were this statement true, it is wholly irrelevant to whether any miner actually was working where there was a danger of falling, an essential element of an alleged violation. The absence of warnings is not a violation and is not relevant if there were no miners working in an area where they would be in danger. There is no testimony from any witness that any miner worked near the edge of the highwall.

Essentially, the Judge finds that, because current mine practices did not follow all MSHA informal guidance, it was likely a miner might in the future be placed in a danger of falling area. In doing so, the Judge applies the principle of "continued normal mining operations" that makes

² As noted, the Secretary expressly stated the PowerPoint was not an official interpretation of the standard. Consequently, deference is not required or appropriate under either *Auer v. Robbins*, 519 U.S. 452 (1997), or *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

an existing violation S&S if based upon events likely to occur if the violation continued during such operations. However, there is no basis to cite inchoate circumstances not constituting a violation. If no miner is in danger of falling, MSHA cannot cite a violation of section 56.15005 based upon a belief that in the future a miner might come into a danger of falling without a lifeline. There simply is no basis in the Mine Act to cite an operator and assess a penalty for violations that have not yet occurred but that the inspector, Secretary, or Judge speculates may happen in the future. The Judge errs fundamentally in finding a violation based upon speculation that the operator “created a danger of falling.”³

The Judge also found that the routine and necessary placement of blasting boreholes created a danger of falling, stating that “[t]he bore holes had been drilled between eight and nine feet from the highwall edge, which itself would make it easy for a miner to come within six feet of the edge, given there was no demarcation line for reference.” 37 FMSHRC at 2788. There are two problems with this finding. First, the boreholes themselves at eight feet provided a line of demarcation. Miners would know that staying beyond them would keep them more than seven feet from the edge of the highwall.

The second problem is that the Judge relied on best-practices guidance to impose additional responsibilities on the operator, without citing any special hazards here. In fact, the photographs of the highwall show a fairly clean and level area near the edge. The Judge nonetheless faults Bussen for not providing signage or markings not required, even in the absence of a showing that such signage was necessary.

The Judge did discuss the miners working in the area. However, she never showed that any of them had at any point worked where they were in danger of falling. Her foundation is pure speculation. She noted that while Becker stated that he was the only one who worked with the pump, three other miners in the area “had every opportunity to use or move the pump.” *Id.* at 2788-89. The Judge “agree[d] with the inspector’s reasonable inferences that these other miners *could have* used or moved the pump from its location near the edge.” *Id.* at 2789 (emphasis added). This is complete speculation.

³ The Judge also relied upon page eight of the PowerPoint, which suggests using visual warnings and ground markings (signs, tape, cones, boulders, paint, or chalk) and physical barriers (berms, boulders, fencing, etc.) “to warn miners when they are approaching an edge.” *Id.* at 2788 (citing Gov’t Ex. 5, at 8). The Judge applied the Fall Hazard Zone and suggestions about visual warnings as if they were mandatory standards and faulted Bussen for failing to implement the visual warning suggestions, even though the PowerPoint expressly states that it does not identify MSHA standards. It states, “[T]his program **does not establish official MSHA policy** on all possible methods of compliance at every mining operation. Instead, this program provides suggestions and recommendations to the mining industry for educational purposes.” Sec’y’s Ex. 5, at 34 (emphasis added). Obviously, the Secretary — who cannot be held to the burden of establishing elements set forth in non-binding guidance, see *Brock v. Cathedral Bluffs*, 796 F.2d at 537-39 — likewise cannot establish by mere guidance a binding norm for determining violations. It was clear error for the Judge to implicitly hold otherwise here.

Further, the Judge again misread the standard to impose liability for the mere positioning of a piece of equipment. Her musings on the potential for such work might be relevant to an S&S analysis if miners had been shown to have worked in the area. But the evidence is devoid of any such evidence. Becker testified that he was the only miner to use the pump and no witness testified otherwise. The Judge simply speculated that other miners might go into the non-mandatory Fall Hazard Zone. Her inference that Becker had done so is groundless and her speculation that some other miner might do so in an imagined, hypothetical future is irrelevant to a violation of the standard.

The Judge further speculated that no one would have put on fall protection “to perform the simple task of moving the pump.”⁴ *Id.* at 2789. Not only is the Judge’s opinion speculative, but it also ignores the evidence, supported by the inspector’s testimony, that the pump could have been moved without coming within six feet of the crest of the highwall. Becker testified that he had done so. In fact, he demonstrated the action by easily and quickly moving the pump, while standing next to the inspector, Tr. 40-41, without exposing himself to a danger of falling. The evidence thus directly refutes the Judge’s supposition that a miner had to encounter a danger of falling to return the pump.

Accordingly, the Judge erred by effectively imposing requirements not specified in the regulation. In turn, using this view, she simply inferred, contrary to Becker’s testimony, that Becker put himself in danger of falling.

B. The Judge’s inference that Becker placed himself in danger of falling without wearing a lifeline is not supported by substantial evidence and is unreasonable.

Of course, credibility determinations are entitled to respect, and we generally defer to credibility determinations of ALJs. *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992). However, credibility determinations are not beyond review. The Eighth Circuit has long held that a contention grounded on speculation and unsupported by substantial evidence must fail as a matter of law. *Armour & Co. v. Harcrow*, 217 F. 224, 228 (8th Cir. 1914); *NLRB v. Monroe Auto Equip. Co.*, 368 F.2d 975, 980 (8th Cir. 1966); *J.E.K. Indus., Inc. v. Shoemaker*, 763 F.2d 348, 353 (8th Cir. 1985).

Thus, while our colleagues correctly note that we do not lightly overturn an ALJ’s credibility determinations, slip op. at 5, neither may such determinations be *made* lightly. An ALJ’s credibility determination must be supported by substantial evidence. *See Buckler v. Bowen*, 860 F.2d 308, 311 (8th Cir. 1988) (citing *Hardin v. Heckler*, 795 F.2d 674, 676 (8th Cir. 1986)) (“[An] ALJ may disbelieve a claimant’s allegations of pain, but credibility determinations must be supported by substantial evidence.”).

⁴ The Judge found that safety lines were on site at but chose to infer that the miners would have chosen to put themselves in danger of falling without putting on the lifelines. 37 FMSHRC at 2789. As with other findings, no evidence supports this speculation.

The Secretary's contention cannot rest on a mere scintilla — here, the position of the cart without any evidence other than Becker's testimony as to how it got in that position — as a basis for speculation. The Secretary's argument in this case would fail even on a motion for a directed verdict. At that stage, "[t]here must be a conflict in the substantial evidence and not merely speculation or conjecture. Plaintiff is not entitled to unreasonable inferences, 'or inferences at war with undisputed facts.'" *J.E.K. Indus.*, 763 F.2d at 353 (citations omitted) (quoting *Schneider v. Chrysler Motors*, 401 F.2d 549, 555 (8th Cir. 1968)).

Thus, "if a credibility determination is unreasonable, contradicts other findings of fact, or is 'based on an inadequate reason, or no reason at all,' [the court] will not uphold it." *NLRB v. McCullough Envtl. Servs., Inc.*, 5 F.3d 923, 928 (5th Cir. 1993) (quoting *NLRB v. Moore Bus. Forms, Inc.*, 574 F.2d 835, 843 (5th Cir. 1978)). The record must support a credibility determination. This means that "[w]hen the decision of an ALJ rests on a negative credibility evaluation, the ALJ must make findings on the record and must support those findings by pointing to substantial evidence on the record." *Ceguerra v. Sec'y of Health & Human Servs.*, 933 F.2d 735, 738 (9th Cir. 1991). This requirement follows from the "bedrock principle of administrative law" that "[a] reviewing court can evaluate an agency's decision only on the grounds articulated by the agency." *Id.*

Becker testified under oath that, to move a pump out of the way of a truck delivering explosives, he swung the pump from a location approximately seven feet from the edge of the highwall to a location approximately within four and a half feet of the edge of the highwall. Tr. 72. The pump handles faced toward the highwall. No witness contradicted Becker, and miners verified that a truck delivering explosives had arrived on the bench. Tr. 87, 94.

The Judge never accounts for and in fact disregards this evidentiary record. She appears to have based her wholly subjective view on a belief that Becker was not telling the truth. She never explains her rationale, beyond a specious assertion that it "seems most likely" that the cart in question was placed there in a manner at variance with Becker's sworn testimony and that it is "difficult to imagine" how it could have been placed as he testified. 37 FMSHRC at 2789.

There is no need for imagination. Becker provided a demonstration *proving* that the cart could be moved without coming anywhere near the crest of the highwall or in danger of falling. The most the Judge could have inferred was that Becker might have been slightly closer than six feet from the edge of the highwall briefly when he moved the cart out of the way. But, here, we have sworn, uncontradicted testimony that not even this happened.

Furthermore, Becker's sworn testimony is corroborated by other evidence in the record. When Swan, who had not seen Becker relocate the pump, approached, Becker took hold of the pump and swung it back to a location more than six feet from the edge of the highwall. Tr. 20, 41-42. In fact, the inspector's notes corroborate that Becker was able to retrieve the pump by swinging it around without approaching the highwall, Tr. 20, and that Becker told Swan that he had placed the pump in the same manner. Gov't Ex. 1, at 2 ("The miner that put the cart in place stated that he has fall gear in the truck but didn't feel he needed it. Stated that he swung the cart in place."); *see also* Tr. 35-36 (inspector confirming that his notes were accurate).

Becker's easy retrieval of the pump from a safe location demonstrates that he could move the pump just as he testified. There is no evidence contradicting that ability. There is no evidence to support a notion that by moving the pump toward the crest in the same manner that he retrieved it, the handles could not end up facing the highwall.

Further, the Judge does not deal with the common sense question of why a miner using the handles to move the pump out of the way would back the pump toward the highwall rather than push it toward the highwall. The pictures of the pump show the wheels are located at the back of the pump so that a person could move it forward or backward. Gov't Ex. 1, at 3-4. The Judge does not explain her finding that the miner backed toward the highwall and approached within two or three feet of the edge with his back to the highwall when if a miner were using the handles to roll the pump, it would make more sense to roll it toward the highwall. Indeed, with respect to anyone working around the pump, thereby coming closer to the highwall, the Inspector testified, "I'm not saying anybody would do that." Tr. 32. Similarly, under the Judge's theory, in retrieving the pump, the miner would have had to walk around the pump in order to push it away from the highwall. None of this makes more sense — that is, it can be more likely inferred that the miner moved the pump to its position and retrieved the pump from its position in exactly the manner he physically demonstrated and swore to in his testimony.

Not only did the Judge not consider this obvious impediment to her assumption that Becker pulled the pump toward the highwall, but she also did not consider her own finding that there were no recent footprints near the edge of the highwall. She noted that, "Swan noticed that there were *older* footprints near the edge of the highwall, but they were covered in rock dust and he could not tell how recently they had been made." 37 FMSHRC at 2787 (emphasis added).⁵ This raises a question: if Becker did walk too close to the edge in order to place the cart there with the handles facing toward the edge of the highwall shortly before the inspector arrived, how did he get there without creating fresh footprints in the dust that the Judge found to be on the bench? The weather was dry and the bench was flat. Tr. 53; Gov't Ex. 1, at 3-4. Although there was still evidence in the dust of someone walking at that location several days before (likely before firing the prior shot, Tr. 77-78), the Judge cites no evidence in the record of any foot traffic near the highwall after those prior footprints were made.

In sum, no witness, including the inspector, observed any miner in, or close to, a position where such miner was in danger of falling from the highwall. Indeed, Becker and Swan agree on one fact: neither of them saw any miner working where he would have been in danger of falling, as the standard requires.

This consistency in the record should have proven fatal to the Secretary's case. Yet despite the absence of any evidence of an incursion near the highwall and Becker's demonstrated retrieval of the pump from a safe distance, the Judge wholly discredited Becker's testimony. 37

⁵ Although the Judge discussed testimony throughout her decision, she cited the transcript precisely one time. 37 FMSHRC at 2791. It would be eminently helpful if the Judge would provide transcript citations when discussing testimony in future cases.

FMSHRC at 2788. The Judge did not comment upon Becker's demeanor, cited no impeachment, and relied on no evidence that contradicts his testimony. It is entirely improper, as a matter of law, for a Judge to disregard Becker's sworn and demonstrated testimony, implying that said testimony is untruthful, without citing anything more than a single, inconclusive fact and drawing an inference contradicted by every other fact in the record.⁶

Finally, the Judge's finding of high negligence encapsulates the defective findings and reasoning throughout her decisions. The Judge concludes, "The miners testified that they stayed seven feet back from the edge, but I am skeptical given the location of the holes, the location of the pump, and the fact that there were no warnings to remind workers to stay back." *Id.* at 2792. The boreholes were eight feet from the crest in a position *where they had to be for mining*. Thus, the Judge cites three factors that are not individually or collectively violative or negligent: (1) placement of the boreholes in places necessary for mining as evidence of high negligence regarding a fall standard, (2) placement of the pump although the placement was not a violation and the pump was easily retrieved without creating any danger of falling, and (3) failure to utilize the presence of non-mandatory signs even though boreholes were present.

The Judge's inference of a violation is thus unreasonable and refuted by the record. It rests entirely upon the Judge's articulated discontent with lawful mining practices and her disregard of the Secretary's burden of proof and the absence of any evidence that might support that burden.

⁶ Our colleagues suggest that the Judge made "comparative credibility findings" when she discredited Becker's testimony about what he did when he placed the pump on the highwall and instead adopted the inspector's testimony speculating what happened. Slip op. at 5. However, the Judge's resolution in the disputed testimony is likewise infected by error. As fully explained in the preceding discussion, the evidence corroborates Becker's explanation of the event and does not support the inspector's mere speculations of what he believed likely happened. Hence, the Judge's credibility findings are not supported by the evidence and must be overturned. *See Morgan v. Arch of Illinois*, 21 FMSHRC 1381, 1389-93 (Dec. 1999) (noting an exceptional circumstance warranting overturning a Judge's credibility finding is when such finding is contradicted by the record evidence); *Consolidation Coal Co.*, 11 FMSHRC 966 (June 1989) (stating that a Judge's credibility findings and resolutions will not be affirmed if there is no evidence or dubious evidence to support them).

Conclusion

While a judge's credibility determination is usually entitled to great weight, we cannot defer to a judge's unreasonable and unreasoned decision to disbelieve a witness without justification in the evidence. In turn, we cannot accept an inference based upon the unreasoned discrediting of a witness, without discussion of contradictory evidence, and without any basis in the evidence.

Because the Judge's inference that a miner worked in an area where he was in danger of falling without using fall protection is not supported by substantial evidence, we would reverse the Judge and vacate the citation.

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

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

COMMISSION ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 5, 2017

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

v.

PROSPERITY COAL, LLC

Docket No. SE 2016-187, et al.¹

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On April 5, 2016, the Commission received from Prosperity Coal, LLC (“Prosperity”) a motion seeking to reopen 19 penalty assessments that apparently have become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

¹ For the limited purpose of addressing these motions to reopen, we hereby consolidate docket numbers SE 2016-187, SE 2016-165, SE 2016-166, SE 2016-167, SE 2016-168, SE 2016-169, SE 2016-170, SE 2016-171, SE 2016-172, SE 2016-173, SE 2016-174, SE 2016-175, SE 2016-176, SE 2016-177, SE 2016-178, SE 2016-179, SE 2016-180, SE 2016-181, and SE 2016-182 involving similar procedural issues. 29 C.F.R. § 2700.12. For the sake of brevity, the relevant docket numbers and associated A.C. numbers have been listed in Exhibit 1, attached to this order.

good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessments were mailed to Prosperity between April 2, 2014 and December 30, 2015, but that all of the assessments were returned by the Post Office for various reasons (i.e., unclaimed, unable to forward, moved/left no address, etc.). In 18 of the 19 cases, delinquency notices were mailed to the operator and were also returned undelivered.

The record shows that the proposed assessments and delinquency notices were not all mailed to the same address. MSHA records indicate that mailings had gone to Prosperity's address of record only in Docket Nos. SE 2016-187, SE 2016-165, SE 2016-166, SE 2016-168 (delinquency letter only), SE 2016-180 and SE 2016-181. All of the other mailings were sent to either one of two mailing addresses in Tennessee. The Tennessee addresses used by MSHA were not provided by Prosperity, but rather, were unearthed during an internet search by the Wilkes-Barre Office of Assessments.

Prosperity asserts that it never received the proposed assessments and that, due to "hard economic times," the cases should be reopened so that it will be able to contest the large number of penalties at issue. Prosperity further alleges that the Secretary did not attempt to contact anyone at the company to inform it about the returned assessments.

The Secretary opposes the request to reopen and notes that the penalties were ultimately referred to the U.S. Department of Treasury for collection in 18 of the 19 cases. The Secretary argues that Prosperity cannot avoid its obligation to pay penalties under the Mine Act by failing to change its address of record or by not leaving a forwarding address with the post office. Furthermore, the Secretary notes that a majority of the cases at issue have been final orders for more than a year prior to the motion to reopen and that Prosperity has provided no justification for the lengthy delay.

MSHA must attempt to mail proposed penalties to the operator's correct address in order to constitute valid service. *See, e.g., Brahma Group, Inc.*, 31 FMSHRC 527 (May 2009). If the proposed penalty is sent to an incorrect address, the operator has not been notified pursuant to 30 U.S.C. § 815(a) and the 30-day contest deadline was not triggered. *Id.*

In Docket Nos. SE 2016-167, SE 2016-169, SE 2016 170, SE 2016-171, SE 2016-172, SE 2016-173, SE 2016-174, SE 2016-175, SE 2016-176, SE 2016-177, SE 2016-178, SE 2016-179, and SE 2016-182, the Secretary did not mail the proposed penalty or the delinquency letter to the operator's address of record. Pursuant to the Secretary's own internal procedures, MSHA's Office of Assessments should only try mailing to an alternative address after service was attempted to the address supplied by the operator, which in most cases is the address of record. *See* 30 C.F.R. § 100.8; MSHA, PROGRAM POLICY MANUAL, Vol. III, at 109 (June 2012). As Prosperity was not notified of the aforementioned proposed assessments, the penalties never became final orders of the Commission and the motion to reopen, as it pertains to these 13 cases, is moot.

In Docket Nos. SE 2016-187, SE 2016-165, SE 2016-166, SE 2016-168, SE 2016-180 and SE 2016-181, however, the record demonstrates that the Secretary did attempt service at Prosperity's address of record. During the relevant period, Prosperity filed six Legal ID Reports with MSHA. Between January 2014 and July 2015, Prosperity filed four reports listing its mailing address as 1340 South Laurel Road, London, Kentucky. In November 2015 and again in January of 2016, Prosperity listed its mailing address as 179 Pepperhill Drive, Suite 1, London, Kentucky.² The Secretary has represented that all mail sent to these addresses was returned undeliverable.

While the Commission has reopened cases where an operator has mistakenly failed to properly update its address of record, *see, e.g., Hoover Excavating, Inc.*, 35 FMSHRC 317 (Feb. 2013), the extent and effect of Prosperity's failure to provide MSHA with a mailing address is unprecedented. For nearly two years, Prosperity was issued citations during multiple MSHA inspections, but the company never received a single proposed assessment.³ The record contains no evidence that Prosperity took any proactive steps to inquire as to the status of the proposed assessments by contacting MSHA or simply checking the status of the penalties on MSHA's online database. Furthermore, Prosperity has not offered any explanation as to why mail sent to its address of record was returned undelivered. *See H & B Crushing, LLC*, 33 FMSHRC 2176 (Sept. 2011) (parties seeking reopening are encouraged to provide further pertinent information in response to the Secretary providing proof that the proposed assessments were mailed to the operator's address of record).

Moreover, Prosperity fails to explain when and how it learned of the delinquency as to the assessments at issue. In considering whether an operator has unreasonably delayed filing a motion to reopen penalty assessments, we find relevant the amount of time that has passed between an operator's receipt of a delinquency notice or other notification from MSHA and the operator's filing of its motion to reopen. *See, e.g., Left Fork Mining Co.*, 31 FMSHRC 8, 11 (Jan. 2009). As set forth in *Highland Mining Co.*, 31 FMSHRC 1313, 1317 (Nov. 2009), motions to reopen filed more than 30 days after receipt of delinquency information from MSHA should include an explanation for the delay in seeking reopening. The lack of such an explanation is grounds for the Commission to deny the motion.

In addition to the aforementioned rationale, reopening is presumptively barred for two of the proposed assessments by the express terms of Rule 60(b). We have consistently held that a Rule 60(b) motion shall be made within a reasonable time, and for reasons of mistake, inadvertence, or excusable neglect under subsections (1), (2), and (3) of the rule, not more than

² Operators have a duty to notify MSHA within 30 days of a change in its address of record. 30 C.F.R. § 41.12.

³ Prosperity timely contested at least one proposed assessment sent by MSHA prior to filing its motion to reopen. MSHA's records indicate that Assessment No. 000404392 was sent to Prosperity's Pepperhill Drive address and that the company's president, Timothy Webb, signed for the package on March 7, 2016. Prosperity has provided no explanation for why it received the proposed assessment in that instance but did not receive other mailings sent to its address of record.

one year after the judgment, order, or proceeding was entered or taken. In the case of Assessment Nos. 000357605 and 000355292 (Docket Nos. SE 2016-180 and SE 2016-181), Prosperity did not meet this one year time frame. *See J S Sand & Gravel, Inc.*, 26 FMSHRC 795, 796 (Oct. 2004).

Having reviewed Prosperity's request and the Secretary's response, we conclude that proper service was never effected for the proposed assessments that were not mailed to the operator's address of record and thus Prosperity's motion to reopen those assessments is moot. Accordingly, Docket Nos. SE 2016-167, SE 2016-169, SE 2016-170, SE 2016-171, SE 2016-172, SE 2016-173, SE 2016-174, SE 2016-175, SE 2016-176, SE 2016-177, SE 2016-178, SE 2016-179, and SE 2016-182 are 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.

However, we find that Prosperity has failed to establish good cause for reopening the proposed penalty assessments that the Secretary mailed to its address of record. Therefore, we deny its motion to reopen Docket Nos. SE 2016-187, SE 2016-165, SE 2016-166, SE 2016-168, SE 2016-180 and SE 2016-181.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

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

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

Exhibit 1

Operator	Docket Number	A.C. Number
Prosperity Coal, LLC	SE 2016-187	40-03177-400154
Prosperity Coal, LLC	SE 2016-165	40-03177-395720
Prosperity Coal, LLC	SE 2016-166	40-03177-393267
Prosperity Coal, LLC	SE 2016-167	40-03177-390499
Prosperity Coal, LLC	SE 2016-168	40-03177-385664
Prosperity Coal, LLC	SE 2016-169	40-03177-382736
Prosperity Coal, LLC	SE 2016-170	40-03177-380157
Prosperity Coal, LLC	SE 2016-171	40-03177-377830
Prosperity Coal, LLC	SE 2016-172	40-03177-375583
Prosperity Coal, LLC	SE 2016-173	40-03177-374168
Prosperity Coal, LLC	SE 2016-174	40-03177-373191
Prosperity Coal, LLC	SE 2016-175	40-03177-370978
Prosperity Coal, LLC	SE 2016-176	40-03177-368180
Prosperity Coal, LLC	SE 2016-177	40-03177-365843
Prosperity Coal, LLC	SE 2016-178	40-03177-363251
Prosperity Coal, LLC	SE 2016-179	40-03177-360240
Prosperity Coal, LLC	SE 2016-180	40-03177-357605
Prosperity Coal, LLC	SE 2016-181	40-03177-355292
Prosperity Coal, LLC	SE 2016-182	40-03177-346722

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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May 11, 2017

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

v.

CONTINENTAL CEMENT COMPANY,
LLC

Docket No. CENT 2016-458-M
A.C. No. 23-02434-409715

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On July 8, 2016 the Commission received from Continental Cement Company, LLC (“Continental Cement”) 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 another reason justifying relief. *See* 29 C.F.R. § 2700.1(b) (“the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure”); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Records of the Department of Labor’s Mine Safety and Health Administration (“MSHA”) indicate that the proposed assessment was delivered on May 14, 2016, and became a final order of the Commission on June 13, 2016.

Continental Cement asserts that its failure to timely file its contest to the proposed assessment was due to the unusually busy personal and work-related travel schedule of the mine's health and safety manager, who was charged with contesting the penalties at the mine. The operator states that upon receipt of the proposed assessment, it forwarded the assessment to the health and safety manager, who was on vacation. Upon returning from vacation, the health and safety manager's work schedule included two weeks of new miner safety training, an audit, and an MSHA inspection. Continental Cement discovered its default on its own and filed its motion 25 days after the order became final. The operator provides an affidavit from the health and safety manager that supports its claims.

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

Having reviewed Continental Cement's request and the Secretary's response, we conclude that the operator's failure to timely contest the two citations herein was the result of inadvertence and mistake on the part of a single individual. In the interest of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

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

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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May 11, 2017

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

v.

NYRSTAR GORDONSVILLE, LLC

Docket No. SE 2016-255-M
A.C. No. 40-00864-408129

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On June 17, 2016, the Commission received from Nyrstar Gordonsville, LLC (“Nyrstar”) 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 another reason justifying relief. *See* 29 C.F.R. § 2700.1(b) (“the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure”); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Records of the Department of Labor’s Mine Safety and Health Administration (“MSHA”) indicate that the proposed assessment was delivered on April 21, 2016, and became a final order of the Commission on May 23, 2016. Nyrstar asserts that it intended to contest the citations but mistakenly paid them instead. Nyrstar’s safety and health manager states that the

operator had been on alert to watch for and contest the two citations at issue here because the citations arose out of an incident involving the injury to a contractor at the mine.¹ The two Nyrstar employees tasked with reviewing MSHA assessments nevertheless failed to note the two citations at issue here because the proposed penalties were lower than expected. The operator further asserts that the mine's safety supervisor, who was the first employee to review MSHA's assessments, was transitioning to a new position with the company in a different part of the state. At the same time, Nyrstar's safety and health manager, who provides the second review of assessments, was preoccupied with an occupational health and safety audit and therefore failed to fully review the citations.

Nyrstar avers that it has amended its system of handling MSHA penalty assessments to include a third level of review. The Secretary does not oppose the request to reopen, but urges the operator to take steps to ensure that it understands all future documents sent by MSHA.

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

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

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

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

¹ Nyrstar challenged the citations in a conference with MSHA, and MSHA subsequently amended parts of the two citations.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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May 11, 2017

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

v.

PETE LIEN AND SONS, INC.

Docket No. WEST 2016-570-M
A.C. No. 05-03222-405208

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

ORDER

BY THE COMMISSION:

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

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

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

Records of the Department of Labor’s Mine Safety and Health Administration (“MSHA”) indicate that the proposed assessment was delivered on March 17, 2016, and became a final order of the Commission on April 18, 2016. MSHA records further indicate that a delinquency notice was sent to Pete Lien on June 1, 2016.

The operator asserts that it intended to contest two of the eight citations included in the proposed penalty assessment from MSHA and pay the remainder. The operator states that it inadvertently mailed the contest form, along with a check for the citations it did not wish to contest, to the MSHA payment office in St. Louis instead of to MSHA's Arlington office. Pete Lien states that it realized this mistake only upon receiving MSHA's delinquency notice. The Secretary does not oppose the request to reopen, but urges the operator to take steps to ensure that future penalty contests are timely filed.

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

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

/s/ Michael G. Young
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/s/ Robert F. Cohen, Jr.
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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May 17, 2017

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

v.

FERRAILOLO CONSTRUCTION

Docket No. YORK 2016-47-M
A.C. No. 17-00584-397754

Docket No. YORK 2016-108-M
A.C. No. 17-00584-397754

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

ORDER

BY THE COMMISSION:

These matters arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On July 6, 2016, the Commission received from Ferraiolo Construction (“Ferraiolo”) a motion seeking to reopen a penalty assessment proceeding and relieve it from the Default Order entered against it.

On December 1, 2015, the Mine Safety and Health Administration (“MSHA”) issued a proposed assessment to Ferraiolo at its address at 279 Main Street, Rockland, Maine. Ferraiolo timely contested the proposed assessment, listing the aforementioned address as its address of record. Nevertheless, when the Secretary subsequently filed his Petition for Assessment of Civil Penalty in Docket No. YORK 2016-47-M, his representative mailed the operator’s copy of the Petition to a different address, 28 Gordon Drive, Rockland, Maine.¹

Ferraiolo did not file an Answer to the Secretary’s Petition. Accordingly, on March 10, 2016, the Chief Administrative Law Judge issued an Order to Show Cause directing Ferraiolo to respond or else the docket would be dismissed. This order was also mailed to the 28 Gordon Drive address, and was returned undelivered by the Post Office 12 days later. By its terms, the Order to Show Cause was deemed a Default Order on April 11, 2016, when it appeared that the operator had not filed an answer within 30 days.

The Judge’s jurisdiction in this matter terminated when the default occurred. 29 C.F.R. § 2700.69(b). Since no petition for discretionary review was filed, the Judge’s order here has become a final order of the Commission. 30 U.S.C. § 823(d)(1).

¹ The Gordon Drive address apparently was Ferraiolo’s prior address.

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

Upon review of the record, we find that the Petition for Assessment of Civil Penalty and the Order to Show Cause were delivered to an incorrect address and that Ferraiolo never received them.² Ferraiolo also cites to correspondence with an MSHA Conference and Litigation Representative (“CLR”) in which the operator provided, at the request of the CLR, a written explanation as to why the penalty was contested. The following day, the CLR thanked Ferraiolo for the e-mail and stated that he would get back to the operator at a later date. Ferraiolo asserts that, based on these communications, it believed that it had done all that was required for purposes of contesting the penalty. The Commission has received no opposition from the Secretary regarding the vacating of the default order and the reopening of these proceedings.

² Based on the parties’ pleadings (which implied that the case involved a failure to timely contest MSHA’s proposed penalty), the Commission had construed the motion to reopen as arising from a failure to contest a proposed assessment under section 105(a) of the Act, despite the Chief Judge having issued the Order to Show Cause. As a result, the Commission assigned the motion to reopen to another docket, No. YORK 2016-108-M, despite having already assigned the substantive case to Docket No. YORK 2016-47-M upon the filing of the Secretary’s Petition. Because the subsequent case was docketed in error and is duplicative, we hereby dismiss Docket No. YORK 2016-108-M.

Having reviewed Ferraiolo's request, we hold that the operator has sufficiently demonstrated a basis for relief due to the fact that the Petition for Assessment of Civil Penalty and the Order to Show Cause were sent to the wrong address and because the operator was confused by the correspondence with the CLR. Therefore, in the interest of justice, we hereby reopen the proceeding and vacate the default order. Accordingly, this case is remanded to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

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

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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May 18, 2017

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

v.

SUSQUEHANNA COAL COMPANY

Docket No. PENN 2016-278
A.C. No. 36-08391-405897

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

ORDER

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

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On July 25, 2016, the Commission received from Susquehanna Coal Company (“Susquehanna”) a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on April 20, 2016, and became a final order of the Commission on May 20, 2016. Susquehanna asserts that the proposed assessment was sent to an office that is not located on mine property and is only occasionally occupied. The operator further asserts through an affidavit that while it has received MSHA documents at this address, it cannot recall receiving the assessment at issue. In addition, Susquehanna claims that it always intended to contest the penalties. Finally, the operator states that it is in the process of taking steps to change the address in the MSHA database to ensure that future documents will be delivered to the mine office that is occupied during normal business hours. The Secretary does not oppose the request to reopen, but urges the operator to take steps to ensure that future penalty contests are timely filed.

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

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

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

Commissioner Cohen, dissenting:

I disagree with my colleagues' decision because I believe that the record does not contain sufficient information to establish good cause to reopen this civil penalty proceeding.

In its motion to reopen, Susquehanna Coal Co. states, "the Proposed Assessment and Statement of Account was never received at the address noted on the Proposed Assessment." In an affidavit supporting the motion, Susquehanna's general manager at the mine further avers that the operator has received other MSHA documents at the office listed as its address of record, but the company does not recall receiving this penalty assessment. In response, the Secretary states that the proposed assessment was delivered by USPS Certified Mail on April 20, 2016. The Secretary did not provide a copy of the return receipt or any other means of verifying its mailing records.

The parties' two statements, taken at face value, appear to be irreconcilable. Because the operator's request for relief is based wholly upon its assertion that the penalty assessment was never delivered, I cannot agree to reopen this final civil penalty assessment on the conflicting record before us. I would remand the case to the Chief Administrative Law Judge for development of the record on the issue of whether Susquehanna Coal received the proposed assessment.

Accordingly, I dissent.

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

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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May 5, 2017

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

v.

M-CLASS MINING, LLC,
Respondent.

M-CLASS MINING, LLC,
Contestant,

v.

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

CIVIL PENALTY PROCEEDING

Docket No. LAKE 2015-587
A.C. No. 11-03189-384770

Mine: MC#1 Mine

CONTEST PROCEEDINGS

Docket No. LAKE 2015-285-R
Citation No. 7560565; 01/28/2015

Docket No. LAKE 2015-286-R
Citation No. 7560566; 01/28/2015

Mine: MC #1 Mine
Mine ID: 11-03189

DECISION AND ORDER

Appearances: Rachel L. Graeber, Esq. & Jason Patterson, Esq., Office of the Solicitor,
U.S. Department of Labor, Chicago, Illinois, for the Petitioner

Christopher D. Pence, Esq., Hardy Pence PLLC, Charleston, West
Virginia, for M-Class Mining, LLC

Before: Judge Rae

I. STATEMENT OF THE CASE

These cases are before me upon a petition for assessment of civil penalties and two notices of contest under section 105(d) of the Federal Mine Safety and Health Act of 1977, as amended, ("the Mine Act"), 30 U.S.C. § 815(d). Initially in dispute were two violations issued by the Secretary of Labor ("the Secretary") to mine operator M-Class Mining, LLC ("M-Class"): Citation Number 7560565 and Order Number 7560566.

A hearing was held in Mount Vernon, Illinois, at which time the parties notified me that they had agreed to settle Citation Number 7560565. I approved the settlement on the record. Tr.

6-8.¹ The parties presented testimony and documentary evidence on the remaining violation, Order Number 7560566, and later filed post-hearing briefs.

I have reviewed all of the evidence at length and have cited to the testimony, exhibits, and arguments I found critical to my analysis and ruling herein without including a detailed summary of the testimony given by each witness. Based on the entire record and my observations of the demeanor of the witnesses, I uphold Order Number 7560566 as written and assess a penalty of \$7,000.00 for the violation alleged therein, for the reasons discussed below.

II. STIPULATIONS

The parties have entered into the following stipulations:

1. M-Class is an “operator” as defined in Section 3(d) of the Mine Act, 30 U.S.C. § 802(d), at the coal mine at which the citation and order at issue in these proceedings were issued.
2. MC#1 Mine is operated by M-Class.
3. MC#1 Mine is subject to the jurisdiction of the Mine Act.
4. These proceedings are subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judges pursuant to sections 105 and 113 of the Mine Act, 30 U.S.C. §§ 815, 823.
5. The individual whose signature appears in Block 22 of the citation and order at issue in these proceedings was acting in his official capacity and as an authorized representative of the Secretary of Labor when the citation and order were issued.
6. A duly authorized representative of the Secretary served the subject citation and order and termination of the citation and order upon the agent of M-Class at the dates and place stated therein as required by the Mine Act, and the citation and order and terminations may be admitted into evidence to establish their issuance.
7. The total proposed penalties for the citation and order will not affect M-Class’ ability to continue in business.
8. The citation and order contained in Exhibit A attached to the Petition for Assessment of Penalty for these dockets are authentic copies of the citation and order at issue in these proceedings with all appropriate modifications and terminations, if any.
9. Exhibit S-8, the Assessed Violation History Report, is an accurate and authentic history of M-Class’ violation history.
10. The proposed penalty of \$5,000.00 is appropriate if Order Number 7560566 is affirmed in all aspects.
11. If the fact of the violation is affirmed, the inspector properly evaluated all aspects of Section 10 of the order.

Joint Exhibit 1; Tr. 8-9, 172-73.

¹ In this decision, the abbreviation “Tr.” refers to the transcript of the hearing. The Secretary’s exhibits admitted at hearing are numbered S-2, S-3, S-6, S-7, and S-8. *See* Tr. 94-96, 119, 130, 172. M-Class did not offer any exhibits.

III. FACTUAL BACKGROUND

This proceeding arises out of a November 20, 2014 incident in which miner Todd Davis was seriously injured while working at the MC #1 Mine, a large underground coal mine operated by M-Class in Franklin County, Illinois. Tr. 15, 237. Davis, who is a field service representative for equipment manufacturer Joy Global, was assigned as the life cycle manager for the mine's longwall shearer at the time of the accident. Tr. 51-53. He was at the longwall face at approximately 8:20 PM during the evening shift on November 20 when a hydraulic hose delivering a water and synthetic oil emulsion to a longwall shield at a pressure of 4,200 pounds per square inch (psi) ruptured and released a jet of fluid that struck Davis from below as he sat on or leaned back against a longwall base lift support to let other miners pass by. Tr. 53, 103, 114; Ex. S-3 at 3. The high-pressure fluid sliced through his pants and shot into his body, lacerating his rectum and causing immediate loss of bowel control and bleeding. Tr. 58, 63. "[T]he first thing I remember is [maintenance worker] John Lence coming up, asking if I was okay," Davis testified. "I told him, no, I felt like I had some kind of – my insides were hanging outside of my body is what I felt like. I needed to get out now." Tr. 53.

Lence helped Davis to a Kubota vehicle to transport him out of the mine and called ahead to the surface for an ambulance. Tr. 54-56, 68-69, 98, 115. Davis testified he was in shock and frantic to get out of the mine. Tr. 55-56. Blood had pooled in his seat on the ride and was running onto the floor by the time he and Lence reached the surface. Tr. 58, 115, 258. M-Class management official Gabe Wheeler and mine manager Mike Lily met them there. Tr. 57, 116, 182. Davis' coworkers wrapped him in a blanket and tried to keep him calm until the ambulance arrived to pick him up. Tr. 57-58, 70.

Davis was first taken to Franklin County Hospital, which is a small local hospital in Benton, Illinois. Tr. 15, 20, 61, 78, 84. He was joined there by his wife, Laura; his immediate and second-line supervisors from Joy Global; M-Class safety director Girolamo Intravaia; and M-Class general manager Travis Brown, who furnished the doctors with a copy of the material safety data sheet (MSDS)² for the hydraulic emulsion that had been injected into Davis' body. Tr. 66, 77-78, 183-86, 208, 210-12. After undergoing a CT scan, Davis was airlifted in a Life Flight helicopter to Barnes-Jewish Hospital in St. Louis, Missouri, where he was taken into emergency surgery. Tr. 61-65, 79-81, 84-85, 245. He remained hospitalized for seven days and returned for a number of subsequent surgeries to treat his internal injuries, which included a lacerated rectum, damaged colon, and burst bladder. Tr. 61, 66-67, 125, 233, 245, 257.

M-Class did not notify MSHA of Davis' accident the day it occurred. However, the next morning, the company's President of Underground Operations, Anthony Webb, placed a "courtesy call" to a supervisor at the local MSHA field office to inform him of the accident. Tr. 27, 215, 245-47. The MSHA supervisor, Dean Cripps, believed further investigation may be warranted based on past experiences in which he had received inaccurate accident information from M-Class. Tr. 29-30. Accordingly, after consulting with his district supervisor, Cripps issued

² An MSDS is an information sheet that describes the chemical composition of a material and any human health risks it poses. Tr. 221-22.

a section 103(j) order³ and initiated an accident investigation. Tr. 29-30; *see* Ex. S-2. He first phoned a Joy Global representative, who informed him that Davis had undergone surgery and was in a critical care unit at Barnes-Jewish Hospital with “some pretty serious injuries”; this indicated to Cripps that the accident was more serious than he had initially been led to believe. Tr. 30-31, 39, 152. He then traveled to the mine with MSHA Inspector Chad Lampley to interview witnesses and inspect the accident scene. Tr. 31, 90-91, 102; 250; *see* Ex. S-3. Cripps and Lampley did not issue any violations while at the mine because they wanted to interview Davis first. Tr. 126-27, 141. After giving him some time to recover from his injuries, Lampley interviewed him by phone on January 27, 2015. Tr. 127, 130.

The next day, January 28, 2015, Inspector Lampley issued the two enforcement actions that spurred this litigation. Tr. 130; *see* Ex. S-7. Citation Number 7560565 was issued under section 104(a) of the Mine Act and alleged that M-Class violated 30 C.F.R. § 75.1725(a) by operating the #7 longwall shield with a frayed hydraulic hose that ultimately ruptured, injuring Davis. M-Class has accepted this violation in settlement.⁴ The remaining enforcement action, Order Number 7560566, was issued under section 104(d)(2) of the Mine Act⁵ and alleges that M-Class violated 30 C.F.R. § 50.10(b) by failing to notify MSHA of the accident within 15 minutes of the time mine management knew or should have known that Davis had sustained injuries having a reasonable potential to cause death.

³ A j-order is a type of enforcement action issued after an accident that usually directs the mine operator to preserve the accident scene for investigative purposes and to cease work in the affected area until MSHA determines that no further hazard exists. Tr. 89-90, 255-56; *see* 30 U.S.C. § 813(j).

⁴ M-Class also accepted the Secretary’s gravity and negligence designations and agreed to pay a reduced penalty. The violation is designated “significant and substantial” (S&S), with the likelihood of injury marked “highly likely” and the expected injury “fatal” and affecting one person. The negligence is designated “moderate.” The Secretary originally proposed a “specially assessed” penalty of \$52,500.00 for the violation, but agreed to accept a settlement amount of \$15,750.00 (which is slightly more than the amount that would have been proposed under the Secretary’s “regular assessment” formula) on grounds that there are no extenuating circumstances to justify the special assessment other than the fact that a “Rules to Live By” standard was violated. Tr. 6-8; *see* 30 C.F.R. Part 100. I have considered the representations and documentation submitted by the parties with respect to Citation Number 7560565, and I conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Mine Act.

⁵ The issuance of an order under section 104(d)(2) denotes that the alleged violation was caused by the mine operator’s “unwarrantable failure” to comply with a mandatory health or safety standard and that the operator previously received other unwarrantable failure violations without an intervening clean inspection. *See* 30 U.S.C. § 814(d)(2); *Lodestar Energy, Inc.*, 25 FMSHRC 343, 345 (July 2003).

IV. LEGAL PRINCIPLES

A. Violation

A mine operator is strictly liable for Mine Act violations that occur at its mine. *Spartan Mining Co.*, 30 FMSHRC 699, 706 (Aug. 2008). The Secretary bears the burden of proving any alleged violation by a preponderance of the evidence. *In re: Contests of Respirable Dust Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995), *aff'd sub nom. Sec'y of Labor v. Keystone Coal Mining Corp.*, 153 F.3d 1096 (D.C. Cir. 1998).

B. Gravity

Gravity is generally expressed as the degree of seriousness of a violation. *Hubb Corp.*, 22 FMSHRC 606, 609 (May 2000); *Consolidation Coal Co.*, 18 FMSHRC 1541, 1549 (Sept. 1996). The Secretary assesses gravity in terms of the reasonable likelihood of injury, the severity of the expected injury, the number of persons affected, and whether the violation is S&S. The Commission has pointed out that the focus of the gravity inquiry “is not necessarily on the reasonable likelihood of serious injury, which is the focus of the S&S inquiry, but rather on the effect of the hazard if it occurs.” *Consolidation Coal*, 18 FMSHRC at 1550; *see also Harlan Cumberland Coal Co.*, 12 FMSHRC 134, 140-41 (Jan. 1990) (ALJ) (explaining that some violations are serious notwithstanding the likelihood of injury, such as a violation of an important safety standard, a violation demonstrating recidivism or defiance on the operator’s part, or a violation that could combine with other conditions to set the stage for disaster).

C. Negligence and Unwarrantable Failure

Negligence is conduct that falls below the standard of care established under the Mine Act. Under the Secretary’s regulations, an operator is held to a high standard of care and is required to be on the alert for conditions and practices that may cause injuries and to take necessary precautions to prevent or correct them. 30 C.F.R. § 10.0(d). The Secretary defines high negligence as having occurred in connection with a violation when “[t]he operator knew or should have known of the violative condition or practice, and there were no mitigating circumstances.” *Id.* § 100.3, Table X. The Commission generally assesses negligence by considering what actions a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the cited regulation would have taken under the circumstances. *Leeco, Inc.*, 38 FMSHRC 1634, 1637 (July 2016); *see also Brody Mining, LLC*, 37 FMSHRC 1687, 1701-03 (Aug. 2015) (explaining that Commission ALJs “may evaluate negligence from the starting point of a traditional negligence analysis” rather than adhering to the Secretary’s Part 100 definitions); *accord Mach Mining, LLC v. Sec’y of Labor*, 809 F.3d 1259, 1263-64 (D.C. Cir. 2016).

More serious consequences can be imposed under the Mine Act for violations that result from the operator’s unwarrantable failure to comply with mandatory health or safety standards. The unwarrantable failure terminology is taken from section 104(d) of the Mine Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. The Commission has determined that unwarrantable failure is aggravated conduct constituting more

than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001-04 (Dec. 1987). Unwarrantable failure is characterized by such conduct as “reckless disregard,” “intentional misconduct,” “indifference,” or a “serious lack of reasonable care.” *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 193-94 (Feb. 1991); *Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995).

Whether conduct is “aggravated” in the context of unwarrantable failure is determined by looking at all the facts and circumstances of each case to see if any aggravating factors or mitigating circumstances exist. These factors often include (1) the extent of the violative condition, (2) the length of time the violative condition existed, (3) whether the violation posed a high degree of danger, (4) whether the violation was obvious, (5) the operator’s knowledge of the existence of the violation, (6) the operator’s efforts in abating the violative condition, and (7) whether the operator had been placed on notice prior to the issuance of the violation that greater efforts were necessary for compliance. *See CAM Mining, LLC*, 38 FMSHRC 1903, 1909 (Aug. 2016); *Wolf Run Mining Co.*, 35 FMSHRC 3512, 3520 (Dec. 2013); *IO Coal Co.*, 31 FMSHRC 1346, 1350-57 (Dec. 2009). Because supervisors are held to a high standard of care, another important factor supporting an unwarrantable failure determination is the involvement of a supervisor in the violation. *Lopke Quarries, Inc.*, 23 FMSHRC 705, 711 (July 2001).

The factors listed above must be viewed in the context of the factual circumstances of a particular violation, and it is not necessary to find that all factors are relevant or deserving of equal weight in order to determine that the violation is unwarrantable. *Wolf Run*, 35 FMSHRC at 3520-21; *E. Assoc’d Coal Corp.*, 32 FMSHRC 1189, 1193 (Oct. 2010); *IO Coal*, 31 FMSHRC at 1351. However, all factors that are relevant should be considered. *San Juan Coal Co.*, 29 FMSHRC 125, 129 (Mar. 2007).

V. FINDINGS OF FACT AND ANALYSIS

A. Violation of 30 C.F.R. § 50.10(b)

Order Number 7560566 alleges:

The operator failed to immediately contact MSHA at once without delay and within 15 minutes once the operator knew or should have known that an accident occurred involving injury to a miner which had reasonable potential to cause death. An accident occurred at this mine on November 20th, 2014 involving a high pressure hydraulic hose. The actuation of hydraulic pressure to retract the base lift cylinder for the No. 7 shield at the Viking Portal longwall, MMU-005 caused the hose to rupture at the base lift. This allowed high pressure hydraulic fluid (4,200 psi) to strike the miner, resulting in internal injuries with reasonable potential to cause death. The operator engaged in aggravated conduct constituting more than ordinary negligence in that the operator, once aware of the injured

miner[']s condition, failed to call the MSHA hotline. This violation is an unwarrantable failure to comply with a mandatory standard.

Ex. S-6.

The standard alleged to have been violated is 30 C.F.R. § 50.10(b), which provides: “The operator shall immediately contact MSHA at once without delay and within 15 minutes at the toll-free number, 1-800-746-1553, once the operator knows or should know that an accident has occurred involving ... [a]n injury of an individual at the mine which has a reasonable potential to cause death.”⁶

The regulation necessarily accords the operator a reasonable opportunity for investigation before the 15-minute clock begins to run, but this opportunity must be exercised “in good faith without delay and in light of the regulation’s command of prompt, vigorous action” and is “tempered by the urgent need to notify MSHA *immediately*” once it is clear that a reportable accident has occurred. *Wolf Run Mining Co.*, 35 FMSHRC 3512, 3517 (Dec. 2013); *Consolidation Coal Co.*, 11 FMSHRC 1935, 1938 (Oct. 1989). Because the decision to notify MSHA must be made in the field in a matter of minutes after a serious accident, the Commission has stated it should not be based on “clinical or hypertechnical opinions as to a miner’s chance of survival.” *Cougar Coal Co.*, 25 FMSHRC 513, 521 (Sept. 2003). Rather, the operator should rely on readily available information such as the nature of the accident and any observable indicators of trauma, “resolv[ing] any reasonable doubt in favor of notification.” *Signal Peak Energy, LLC*, 37 FMSHRC 470, 476-77 (Mar. 2015).

In *Signal Peak*, the Commission held that MSHA should have been notified of a roof fall within 15 minutes when a miner was thrown fifty to eighty feet by the force of the falling material, had a visible protrusion on his back from the impact, and told those around him that he was in great pain and was having trouble moving and breathing, even though he had good respiration and circulation and no obvious signs of internal bleeding. *Id.* at 471, 474-77. “Clearly, [the victim] was severely injured and the fortunate fact that he did not die from the injuries does not detract from a finding that the readily observable nature of his injuries presented a reasonable potential to cause death,” the Commission stated. *Id.* at 476. “[A]

⁶ This regulation was promulgated under the authority of section 103(j) of the Mine Act. 30 U.S.C. § 813(j). The statute states in pertinent part: “In the event of any accident occurring in any coal or other mine, the operator shall notify the Secretary thereof and shall take appropriate measures to prevent the destruction of any evidence which would assist in investigating the cause or causes thereof. For purposes of the preceding sentence, the notification required shall be provided by the operator within 15 minutes of the time at which the operator realizes that the death of an individual at the mine, or an injury or entrapment of an individual at the mine which has a reasonable potential to cause death, has occurred.” *Id.* The second sentence, from which the 15-minute notification requirement derives, was added to the statute by the 2006 MINER Act as part of a Congressional push to improve mine emergency responses in the wake of several mine disasters. *Mine Improvement & New Emergency Response Act of 2006*, Pub. L. No. 109-236, sec. 5(a), § 103(j), 120 Stat. 493, 498 (June 15, 2006); see *Big Ridge, Inc.*, 37 FMSHRC 1860, 1866 (Sept. 2015) (discussing effect of amendment).

reasonable person would have concluded that [his] injuries posed a reasonable potential for death based on the available information.” *Id.* at 477.

The Secretary asserts that in this case, like in *Signal Peak*, a reasonable person familiar with the factual circumstances surrounding Davis’ accident would have recognized a potential for severe, life-threatening internal injuries. According to the Secretary, M-Class should have reported the accident at three separate points: first, when Davis was brought out of the mine; second, when General Manager Brown brought the MSDS for the hydraulic emulsion to Franklin County Hospital and expressed concern about Davis’ risk of infection; and third, when Davis was airlifted to Barnes-Jewish Hospital in St. Louis. Sec’y Br. 14-18.

M-Class’ witnesses concede that this was a serious accident, (Tr. 215-16, 238, 240), but M-Class nonetheless contends that the violation should be vacated because there was no point when mine management knew or should have known that Davis’ injuries had a reasonable potential to cause death. According to M-Class, the injuries were not readily apparent on the day of the accident and the company had no reason to suspect the extent of the “hidden injury” until management learned the next morning that Davis had undergone surgery, at which time he was no longer at risk of death. Resp. Br. 1-3, 11-14.

I reject M-Class’ contention that the injuries were not readily apparent. In this case, like in *Signal Peak*, a reasonable mine operator would have realized the accident was life-threatening and needed to be reported within 15 minutes on the basis of the information that was readily available to management, including the nature of the accident and numerous readily observable indicators that Davis had sustained serious internal injuries.

The nature of the accident was penetrating trauma to the rectum by high-pressure hydraulic fluid released from a ruptured hose. The fluid was pressurized at 4,200 psi. Tr. 33, 104-05. The Secretary’s two MSHA witnesses, Cripps and Lampley,⁷ described this as a “massive amount of pressure” that is three times what a power washer would exert and discussed past incidents where miners have suffered severe and even fatal injuries after being struck by fluid at similar pressures or by hoses or fixtures propelled by such fluid. Tr. 32-33, 43-44, 47-49, 106-09. Any reasonable person familiar with high-pressure hydraulic equipment, including anyone operating a longwall, would be expected to immediately realize that a struck-by accident involving a ruptured 4,200 psi hydraulic hose is very serious. *See* Tr. 48-49, 113, 219.

In this case, the 4,200 psi hydraulic fluid was injected into Davis’ body, increasing the likelihood the injuries would be life-threatening. It was readily apparent that a fluid injection injury had occurred, as Davis was bleeding, had a hole in the back of his pants at the point of impact, and said that the fluid had shot inside of him. Tr. 58, 114-15, 162; Ex. S-3 at 27. The fluid was an emulsion composed of 95% water and 5% synthetic oil. Tr. 32, 262. M-Class

⁷ Cripps is the electrical supervisor for MSHA District 8 and has more than twenty years of experience with the agency. He holds a Bachelor’s degree in electrical engineering technology and previously worked in the mining industry as an electrical engineer, underground maintenance foreman, and longwall foreman from 1983 until he was hired by MSHA in 1991. Tr. 25-26. Lampley is a regular coal mine inspector. He worked as a longwall mechanic in an underground coal mine from 2005 to 2007, when he was hired by MSHA. Tr. 86-89.

presented testimony purporting to establish that this was not a hazardous substance. Brown testified that synthetic emulsions are less harmful than petroleum-based emulsions and are advertised as posing no risk of death, and Webb went so far as to opine that this particular emulsion was perfectly safe and would pose no human health risks at all even if injected into the bloodstream or ingested. Tr. 208-09, 227-31, 260-61. M-Class did not identify the emulsion or provide a copy of the MSDS to corroborate this testimony, and neither of the MSHA witnesses were familiar with the claimed safety advantages of synthetic emulsions. Tr. 43, 159, 264-65. Regardless, I agree with the Secretary's witnesses that the risk of injury or infection is very high any time a fluid pierces a person's skin at 4,200 psi irrespective of the chemical composition of the fluid. Tr. 32, 121, 132-33. As Webb conceded, any open wound presents an infection risk, even if the penetrating material is pure water. Tr. 262-63. In addition, the fluid shot through Davis' work bibs in this case. The fabric could have carried numerous contaminants which would have been forced into his body, posing a serious risk of infection. Further, the precise manner the injection injury occurred was gruesome and posed a particularly high risk of internal harm. The hydraulic fluid did not just pierce Davis' skin, but impaled him through the rectum at an extremely high pressure. The nature of this accident alone would have led a reasonably prudent person to conclude there was a reasonable potential for death.

Moreover, there were other readily observable indications that Davis had sustained serious and potentially life-threatening internal injuries. Relying on the testimony of three management officials who did not examine Davis, did not witness the accident, and were not present when he was brought out of the mine, M-Class argues that the severity of the injuries was not immediately obvious because Davis was conscious, responsive, and mobile after the accident with stable vital signs and no overt signs of shock. Resp. Br. 12. This argument ignores key facts and trivializes the seriousness of the situation at the mine that day. After being struck by the hydraulic fluid, Davis had soiled himself and was bleeding profusely from the rectum. Tr. 58-60. He told Lence that the 4,200 psi hydraulic fluid had shot inside of him, that he was not okay and needed to get out of the mine immediately, and that he felt as if his intestines were hanging out and as if "there was something wrong inside." Tr. 53-54, 114-15, 145. It is true that he was "mobile" in the sense that he walked partway from the longwall to the Kubota on his own power, but this was more a reflection of his panicked desire to get to the surface than a sign of healthy vigor. Lence had initially helped him off the longwall face and walked with him some distance before running ahead to get the Kubota, not realizing Davis had the keys in his bibs. Tr. 54-55. Davis continued walking by himself until Lence returned because he "was very frantic" and wanted to get out of the mine. Tr. 55. By his own account, which I find entirely credible, he was in shock and extremely worried. Tr. 55-56. His coworkers wrapped him in a fire blanket when he finally reached the surface, presumably because he was shaking. Tr. 57-58, 70. He was still bleeding heavily to the extent that when he was loaded into the ambulance he left behind a pool of blood on the seat of the Kubota and running down the side. Tr. 58, 115, 258. All of these factors clearly indicated he had sustained serious internal injuries.

To summarize, although Davis was conscious and alert after the accident, he had been impaled in the rectum by a 4,200-psi hydraulic oil emulsion, had soiled himself and was bleeding profusely, was in shock, and said that he felt like his insides were hanging out. The wound was not, as Webb suggested, akin to an "overglorified paper cut," and I wholly reject M-Class' argument that the injuries "appeared superficial." Tr. 243; Resp. Br. 3. Any reasonable person

aware of the nature of the accident and Davis' symptoms and presentation would have recognized he was suffering from potentially life-threatening internal injuries.

Mine management was or should have been aware of both the nature of the accident and Davis' condition before he left the mine and should have called the MSHA hotline to provide notification of the accident within 15 minutes of the time he reached the surface. From the managers who were onsite that day to the supervisor of the entire mining complex, Webb, management personnel all the way up the chain of command were aware of the accident almost immediately after it happened and knew or could have easily learned of the circumstances surrounding it. Lence radioed warehouse personnel on the surface and notified them of the accident while he was transporting Davis out of the mine. Tr. 56-57, 69. He also called management official Gabe Wheeler. Ex. S-3 at 26. Wheeler and mine manager Mike Lily met Lence and Davis on the surface and were present when Davis was loaded into the ambulance to be taken to Franklin County Hospital. Tr. 57, 116, 182, 259. Meanwhile, warehouse personnel had called the mine's safety director, Intravaia, and general manager, Brown, to notify them of the accident, and Intravaia in turn had notified Webb. Tr. 181, 206, 241-42. Both Intravaia and Brown immediately began driving to the mine, and on the way, Intravaia spoke to Lily by phone to obtain more information and then called Brown, who called the warehouse and instructed that the MSDS for the synthetic oil emulsion be sent to the hospital. Tr. 182-83, 207-08. Although Intravaia and Brown did not arrive at the mine in time to see Davis, both proceeded to Franklin County Hospital. Tr. 183, 210. Brown was able to briefly speak to Davis, his wife, and his Joy Global boss, and both Brown and Intravaia remained at the hospital until Davis was loaded into a helicopter to be airlifted to Barnes-Jewish Hospital in St. Louis. Tr. 184-86, 210-13.

The point when mine management should have known of the need to report the accident within 15 minutes was when Wheeler and Lily met Davis on the surface after he was brought out of the mine. Davis said he discussed how he was feeling with Wheeler at that time. Tr. 57. "[T]here was blood on the ride, and I told him that I was really worried," Davis testified. Tr. 57. Wheeler and Lily, neither of whom testified at the hearing, would have seen that Davis was bleeding on himself and the Kubota, had a hole in his pants, had experienced a spontaneous bowel movement, and was in shock. They would have watched as he was wrapped in a blanket and loaded into the ambulance, and they would have been able to talk to Lence about the accident after the ambulance departed, since they did not travel to the hospital. In other words, they had every reason and opportunity to find out what had happened and recognize the seriousness of Davis' injuries. At this point, as members of mine management, they should have ensured the accident was promptly reported to MSHA. Webb stated they did not do so because "although it being a bad accident, severe, in their minds there was no life-threatening injuries" because Davis was walking and talking. Tr. 240. But Webb's later testimony suggested that the decision not to call the MSHA accident hotline was actually made by upper management officials who were not present and did not observe Davis' condition. "[W]e have a protocol that we follow. And if you err from that protocol, then it opens up for lower level managers to make decisions that they don't need to make," he stated. Tr. 263. The Commission has frowned on this sort of attitude. "[A]n operator may not designate one specific person, such as a safety manager, to place the immediate call to MSHA. Once a person with sufficient authority to call learns of an event injuring a miner, the clock begins to run," according to the Commission. *Signal Peak*, 37 FMSHRC at 476. I find that the foremen onsite should have realized that Davis had suffered

potentially life-threatening injuries, at which point the clock began to run for M-Class to notify MSHA of the accident within 15 minutes.

M-Class presented testimony from Intravaia, Brown, and Webb purporting to explain why mine management did not timely report the accident. However, I find that each of these men had the information necessary to realize the life-threatening nature of Davis' injuries and, as members of mine management, they should have ensured MSHA was notified of the accident promptly.

At the time of the accident, Intravaia was the mine's safety director, in which capacity he received notification of all accidents that occurred at the mine and was responsible for ensuring compliance with the Part 50 reporting requirements. Tr. 175-76, 180, 195. When he called mine manager Lily immediately after hearing of the accident, he learned that a hydraulic hose had ruptured and struck Davis and that Davis "might have a little laceration above either his lower back and then on one of his buttocks areas." Tr. 182-83, 188. Intravaia traveled to Franklin County Hospital and observed Davis in an examination room sitting upright on a gurney while talking on his cell phone. Tr. 184, 198. Intravaia made eye contact with Davis but did not talk to him or his wife. Tr. 185. "It seemed like there was no concern," he testified. Tr. 185. Davis was "conscious, alert, oriented times three, [and] was not complaining of anything." Tr. 195. No one told him that Davis had suffered internal injuries or was bleeding, Intravaia said. Tr. 197, 199. He had been a firefighter and emergency medical responder for twelve years before he began working for M-Class. Tr. 177-80. He asserted that after visiting the hospital, based on his knowledge and experience as an EMT, he did not believe Davis' injuries were an emergency or life-threatening. Tr. 189.

I do not credit this assertion. Intravaia leaned on his paramedic experience as proof of his qualifications to determine whether the injuries were life-threatening, but admittedly, he did not see the injuries, examine Davis, or even speak to Davis or his wife. Tr. 185, 192, 198-99. In fact, he spent much of his time on the witness stand attempting to disclaim any knowledge of Davis' condition or the extent of the injuries. He said he did not view the damage to Davis' rectum as a traumatic injury because "I'm not a doctor so I can't really assess that." Tr. 190. Asked how his firefighter training prepared him to handle internal injuries, he responded, "Internal injuries, nobody can inspect." Tr. 190. He testified that as long as an injured person is conscious and alert, he would not consider the person's injuries life-threatening because "I don't know what effects he has going on in the inside." Tr. 191. He admitted shock can be an indicator of internal injuries, but stated, "The only one who can diagnose shock would be a medical director or a physician." Tr. 202. Yet he conceded that as an EMT, if he observed signs of shock and knew that a patient had sustained blunt force trauma, he would treat the patient for suspected internal injuries, which can be life-threatening and should be reported to the hotline. Tr. 192, 201-03.

I find it implausible to believe that Intravaia had no suspicion of internal injuries after speaking to mine manager Lily and learning that Davis had been struck by an extremely high pressure hydraulic hose. Even if he was genuinely unaware of Davis' condition, the circumstances of the accident should have alerted him, in his vast experience as an EMT, to the need for further inquiry. *See Mainline Rock & Ballast, Inc. v. Sec'y of Labor*, 693 F.3d 1181, 1189 (10th Cir. 2012) (upholding violation of § 50.10 when "the obvious circumstances of the

accident would have triggered some minimal degree of inquiry in a reasonable person” but supervisor “chose to remain blind”). A mine operator has a duty to investigate accidents under § 50.10 to determine whether notification is required. Tr. 44-45, 163. And even though further investigation may not have revealed the precise character of Davis’ internal injuries, the Commission has indicated that a mine operator should not wait for a clinical or hypertechnical opinion regarding the nature of a miner’s injuries. Instead, the operator should err on the side of caution and provide prompt notification of any injury that may be life-threatening.

Moreover, Intravaia should have had no doubt that the accident needed to be reported once he knew that Davis had been airlifted to Barnes-Jewish Hospital in St. Louis via a Life Flight helicopter. According to Davis, he was transferred so he could be taken into surgery as quickly as possible, and indeed, he underwent emergency surgery shortly after his arrival at Barnes-Jewish. Tr. 63-65. Laura Davis also testified that the doctor at Franklin County Hospital knew from the moment her husband arrived that he would need to be sent somewhere else because “this was way above him [the doctor].” Tr. 80-81. However, Intravaia indicated he still did not realize Davis’ injuries were life-threatening at this point, but simply believed the patient was being transferred for further diagnostics. Tr. 185-88. I do not credit this testimony. If Intravaia truly still believed that Davis’ injuries consisted of superficial lacerations on the lower back and buttocks, it would be patently unreasonable to think the patient was being airlifted to St. Louis in a Life Flight helicopter simply so the cuts could be evaluated and stitched up by a different doctor. *See* Tr. 118, 168-69. The use of a helicopter indicated this was a more complicated and serious injury requiring urgent care.

Intravaia testified that he went to Franklin County Hospital that day “because I have a general concern for all our employees and anybody that’s on our facility. I care. And I also have a duty that I want to make sure myself and see what actually – what [Davis] looked like.” Tr. 193. And yet, if his testimony is to be believed, he asked no questions of the victim, his wife, or the medical staff and remained unaware of the mechanism and nature of the injury (a hydraulic injection injury causing penetrating trauma to the rectum) and the reason for Davis’ transfer to St. Louis (to have surgery for internal injuries). He simply showed up at Franklin County Hospital, saw that Davis was conscious and alert, and departed, satisfied that the accident was not serious enough to warrant reporting. If so, I would find Intravaia’s investigation of the accident to be woefully inadequate. But I find it more likely that Intravaia was aware the accident involved a hydraulic injection injury and a risk of life-threatening internal injuries and simply failed to report it to MSHA within 15 minutes, in violation of § 50.10.

Like Intravaia, General Manager Brown, who is the highest ranking official at the mine, receives notification of all accidents that occur onsite and is familiar with the 15-minute reporting requirement. Tr. 204-06, 214, 217. Brown testified that after being notified of the November 20, 2014 accident and traveling to Franklin County Hospital, where he spoke briefly with Davis and his wife, he did not believe Davis’ injuries had the potential to cause death. Tr. 211-15. Brown admitted that blunt force trauma and a suspicion of internal injuries would trigger a reporting obligation under § 50.10. Tr. 220-21. But he testified he did not suspect internal injuries, noting that Davis was conscious and “said he was doing okay.” Tr. 211, 215, 226. Although Brown was in charge of investigating the accident on M-Class’ behalf and determining whether it needed to be reported, he conceded he did not ask Davis about his injuries and said he

did not interview Lence or anyone else at the mine about the accident. Tr. 220-21, 223-25, 232. He stated he did not learn until the next day that the hydraulic fluid had penetrated Davis' body. Tr. 225-26.

I decline to credit Brown's testimony that he was unaware the hydraulic fluid had penetrated Davis' body. Shortly after learning of the accident, Brown called the mine and made sure the MSDS was submitted to the hospital. Tr. 207-08. This indicates mine management was aware a hydraulic injection injury had occurred, despite protestations by Brown and Webb that they simply wanted the doctors to know what type of fluid was involved in order to forestall any unnecessary treatment. Tr. 208-09, 223, 242, 260. In addition, Laura Davis testified that while she was at Franklin County Hospital, Brown "grabbed me and pulled me aside and said that based on the emulsion which is in the hose, and it was injected into Todd, that he was really concerned about how serious the emulsion could be for his body and thought that we should transfer him to St. Louis" rather than to a different hospital in Evansville. Tr. 79-80. Brown denied recommending one hospital over the other, but did not address whether he had discussed the hydraulic emulsion with Laura Davis. Tr. 211-12, 226-27. I credit her testimony that he did mention his concerns about the emulsion. This further supports a finding that Brown was aware Davis had suffered a serious hydraulic injection injury. Considering Brown's position, his knowledge of the 15-minute reporting requirement, and the information known to him on November 20 regarding the accident and Davis' condition, he should have ensured MSHA was notified promptly pursuant to § 50.10(b).

Webb, supervisor of the mining complex, was also aware of the Part 50 reporting requirements and had the authority to notify MSHA of the accident. Tr. 236-37, 244. After Davis was injured, he received enough information about the accident that he should have ensured it was reported. Intravaia had called him just after the accident and advised that a hydraulic hose had ruptured and struck Davis. Tr. 241-42. Webb was aware that Davis' skin had been pierced and that there was blood on the Kubota, and he later learned that Davis had been transferred from Franklin County Hospital to St. Louis by helicopter. Tr. 242-43, 258. He did not travel to the mine or hospital, so he had no firsthand knowledge of Davis' condition, but he apparently participated in making the decision not to notify MSHA. Management believed Davis' injuries were not life-threatening, he explained. Tr. 244, 253, 257-58. He further stated that "MSHA has a lot of things to do, and they don't have the resources to come out and investigate what I would call frivolous calls." Tr. 263. I find this to be a self-serving and disingenuous attempt to excuse mine management's many failings in this case, including failure to err on the side of caution in reporting the accident and failure to adequately investigate it. Webb asserted that management "did our due diligence when it came time to investigate," (Tr. 263), but if this were the case they should have recognized the life-threatening nature of the accident and notified MSHA immediately, for the reasons discussed above.

The morning after the accident, Webb sent a text message to a supervisor at Joy Global inquiring about Davis' condition. Tr. 244-45. The supervisor advised that Davis had undergone emergency surgery and had a lacerated rectum and damaged colon. Tr. 245. Webb said that was the point when he realized the injuries were more serious than he had previously thought, so he decided to call MSHA even though the time for immediate notification under § 50.10 had passed and Davis was no longer at risk of death. Tr. 238-39, 245-46. M-Class was "on shaky ground"

and “looked upon with some distrust from MSHA” at the time because it was on the cusp of a pattern of violations (POV).⁸ Tr. 174, 237-39. Thus, according to Webb, his call to MSHA represented a good faith effort to build a better rapport with the agency rather than a belated bid to avoid receiving a Part 50 violation. Tr. 238-39, 246. Webb also asserted that M-Class had no incentive not to report the accident in the first place; management simply had not realized the injuries posed a reasonable potential for death. Tr. 238, 254.

Citing Webb’s testimony, M-Class argues that even if its decision not to report the accident was a mistake, it acted in good faith. Resp. Br. 15. I reject this argument, for the following reasons.

First, as discussed above, multiple members of mine management had enough information about the accident to realize it was reportable. There was no plausible good faith reason not to report it right away.

On the other hand, M-Class had a motive not to notify MSHA immediately: avoiding a longwall shutdown. If the accident had been reported within 15 minutes, MSHA likely would have immediately issued a 103(j) order prohibiting alteration of the accident scene, and because the accident occurred on a longwall shield, this would have shut down coal production. Tr. 124, 171, 255-56. Indeed, after learning of the accident, Cripps issued a 103(j) order prohibiting M-Class from moving the longwall shield at the accident site, which prevented the longwall from being advanced and thereby halted production. Tr. 29, 91-93, 157-58. Inspector Lampley noted that while he and Cripps were at the mine conducting the investigation under the j-order, M-Class representatives asked several times if the investigation was finished yet so the j-order could be terminated and production could resume. Tr. 110. In addition, M-Class had already disconnected the ruptured hose from the longwall equipment and replaced it with a functional hose before the investigation. Tr. 97-98, 251. Had a 103(j) order issued immediately, the mine likely would have had to wait to make these repairs, further delaying production. Tr. 256.

In addition, M-Class failed to investigate the accident in good faith. Webb asserted that mine management “did our diligence when it come time to investigate the accident, and then we made a decision [not to notify MSHA] based off of that.” Tr. 263. But it is clear from the testimony of Intravaia and Brown, who – unlike Webb – were actually involved in investigating the accident, (Tr. 200, 232), that management’s investigative efforts prior to the issuance of the j-order were wholly inadequate. Although Intravaia and Brown were apparently in charge of the investigation, there is no evidence that either of them visited the mine the night of the accident. Neither of them ever interviewed Lence, the key eyewitness. Tr. 200, 224. Although they made an appearance at the hospital, Intravaia did not speak to anyone there and apparently learned nothing about the extent of Davis’ injuries. Brown spoke to Davis’ wife and boss from Joy Global, but indicated he learned nothing about Davis’ condition from either of them. Tr. 210-12. He said he spoke to Davis himself “for, maybe, less than five minutes” and asked only how he was doing, to which Davis responded “he was doing okay, and that was about it.” Tr. 211 He did not ask any more pointed questions which would indicate a bona fide investigation was being

⁸ A “pattern of violations” can trigger enhanced enforcement action against a mine under section 104(e) of the Mine Act. MSHA sends the mine operator a POV notice before placing it on a POV. 30 U.S.C. § 814(e).

made, such as where Davis' injuries were, what he was feeling, what the doctors were saying, and why they wanted to transfer him to a larger hospital. Tr. 224-26, 232. It appears that M-Class' management officials intentionally failed to investigate the accident and closed their eyes to the severity of Davis' injuries in hopes of later being able to disclaim knowledge of their extent. This indicates bad faith.

M-Class cites Webb's November 21 phone call to MSHA as evidence of good faith, but during the call, Webb misrepresented the nature and extent of Davis' injuries. Cripps did not take notes during the call because Webb termed it a "courtesy call" rather than a formal accident notification; for this reason, Cripps could not remember the exact substance of the conversation. Tr. 27-28, 45-46. But he did recall that when he spoke to a Joy Global representative later in the day, he was surprised to learn that Davis had undergone surgery for serious internal injuries and was in a critical care unit in the hospital in St. Louis. Tr. 30-31, 39. This was inconsistent with the information he had received from Webb. Tr. 31, 39. It was not until Cripps and Lampley traveled to the mine to investigate that they learned "the extent of the injuries and actually what happened, you know, about the high-pressure hose blowing and ... possibly ... hydraulic oil being actually injected into Mr. Davis." Tr. 31, 41-42. Webb, for his part, denied misleading Cripps and asserted he had recounted everything he knew at the time of the phone call, including that Davis had lacerated his rectum and undergone surgery. Tr. 246-50. However, I credit Cripps' testimony that if this information had been relayed to him during the call, he would have issued a 103(j) order immediately, requested more details, and asked why the accident had not been reported through the hotline. Tr. 35-38. Instead he initiated an investigation later in the day after talking to his supervisor. Mine management continued to downplay the seriousness of the accident even after MSHA begun investigating, with Intravaia still referring to the victim's injuries as "a one-inch cut on his backside" when he met with the investigators at the mine. Tr. 117-18, 161, 164-66. I find that mine management failed to provide MSHA with complete, trustworthy information about the accident, showing a lack of good faith.

For all the reasons discussed above, I find that M-Class violated § 50.10(b), and I reject the operator's suggestion that the violation should be dismissed as a good faith mistake.

B. Gravity

In Section 10 of the order (the section titled "Gravity"), Inspector Lampley designated the violation as non-S&S with no likelihood of causing injury and marked the expected injury as an injury causing "no lost workdays" and affecting zero miners. According to his field notes, he made these minimal gravity designations because this was a mere reporting violation that did not affect Davis' condition, the severity of his injuries, or the outcome of the accident. Ex. S-7 at 13-14. The parties have stipulated that Inspector Lampley properly evaluated all aspects of Section 10 of the order. Joint Ex. 1; Tr. 172-73.

Although I accept the parties' stipulation, I find that the gravity of this violation was extremely serious despite the inspector's minimal gravity designations. The regulation that was violated, § 50.10(b), derives from an express and relatively recent Congressional mandate added to section 103(j) of the Mine Act in 2006 with the intent of improving MSHA's ability to respond to mine emergencies promptly and effectively. *See supra* n.6. Prompt, accurate accident

reporting enables MSHA to swiftly mobilize an appropriate response, including securing the scene of the accident and investigating what caused it. *See Signal Peak*, 37 FMSHRC at 477; *Final Rule – Emergency Mine Evacuation*, 71 Fed. Reg. 71430, 71434-35 (Dec. 8, 2006). M-Class’ utter failure to comply with this mandate may not have directly endangered any particular miners, but still constituted a very serious violation in light of the importance of section 103(j) and the 15-minute notification requirement.

C. Negligence and Unwarrantable Failure

The Secretary contends that M-Class’ negligence in connection with this violation was high because Davis suffered severe injuries and members of mine management were present at the mine and hospital and aware of the injuries, yet no one called the hotline at any point, presumably because M-Class was trying avoid the issuance of a 103(j) order. Further, when M-Class finally did notify MSHA of the accident, the information provided by the company did not accurately reflect Davis’ condition. The Secretary also argues that this violation amounted to an unwarrantable failure to comply with § 50.10(b), citing factors including the length of time it existed, its obviousness, and the operator’s knowledge of it. Sec’y Br. 19-24.

M-Class counters that this violation did not involve high negligence and was not an unwarrantable failure because even if mine management made the wrong decision in failing to call the hotline, they acted in good faith – an argument I have already rejected. M-Class also asks to be credited for mitigating circumstances including the fact that Davis was quickly and efficiently transported out of the mine to the hospital. Resp. Br. 15-17.

Knowledge of Violation; Obviousness

Knowledge of a violation is established where the operator knew or reasonably should have known of the violation. *Coal River Mining, LLC*, 32 FMSHRC 82, 95 (Feb. 2010). The knowledge or negligence of an agent may be imputed to the operator. *Excel Mining, LLC*, 37 FMSHRC 459, 467-68 (Mar. 2015); *Martin Marietta Aggregates*, 22 FMSHRC 633 (May 2000).

In this case, for the reasons discussed at length above, I find that the nature of the November 20, 2014 accident and the type of injuries Davis sustained were obviously reportable under § 50.10(b). He was struck from below by a 4,200-psi hydraulic oil emulsion. He told Lence that the hydraulic fluid had shot into his body and that it felt like his intestines were hanging out. He had a hole in his pants and had soiled himself, was bleeding onto his clothing and the vehicle that transported him out of the mine, and was in shock. After being taken by ambulance to the local hospital and briefly evaluated, he was airlifted by Life Flight helicopter to a critical care unit in St. Louis where he was taken into surgery in short order. These factors made it obvious that he had suffered life-threatening internal injuries.

Mine management was aware of all the circumstances listed above. Two management officials, Wheeler and Lily, were present when Davis was brought out of the mine and would have been able to observe his condition and ask Lence what happened. Management officials Intravaia and Brown, both of whom are aware of the requirements of § 50.10 and are responsible for ensuring compliance with these requirements, were in contact with personnel at the mine

regarding the accident, traveled to Franklin County Hospital with Davis, and were present when he was airlifted to St. Louis. Webb was also notified of the accident and should have investigated it and ensured that it was reported. Given the nature of the accident and the blatant signs of trauma and internal injuries, mine management would have had to be blind or willfully ignorant not to realize that the accident was reportable under § 50.10(b). I find that this was a knowing violation on the part of mine management, including Wheeler, Lily, Intravaia, Brown, and Webb, whose knowledge is imputable to M-Class.

Notice of Need for Greater Compliance Efforts

An operator's history of past similar violations or other specific warnings from MSHA is relevant to the unwarrantable failure analysis to the extent the past violations and warnings placed the operator on notice that greater efforts were necessary for compliance with the cited safety standard.

Inspector Lampley testified that at the time this violation was written in January 2015, the mine had received six prior violations of § 50.10 since September 2013, including a 104(d)(2) order. Tr. 123, 153-55; Ex. S-7 at 17. This was one of the main factors influencing his finding of aggravated conduct. Tr. 135; Ex. S-7 at 17. I agree that the prior violations support a finding of aggravated conduct. Being cited for the same violative conduct six times in the preceding fifteen months and receiving an unwarrantable failure withdrawal order should have placed M-Class on notice of the need to make greater efforts to comply with the requirements of § 50.10.

In addition, as noted above, M-Class was on the cusp of being placed on a POV at the time this violation occurred, which is a symptom of poor overall compliance efforts. Given M-Class' admittedly "shaky" footing with MSHA, (Tr. 239), and the looming prospect that MSHA would take enhanced enforcement action against the company through the POV process, management should have been on notice of the need for greater compliance efforts all around and the need to be forthright with MSHA in all dealings in order to demonstrate good faith, which would include erring on the side of full, prompt disclosure of accidents under § 50.10.

Duration of Violation

Davis was injured at approximately 8:20 PM on November 20, 2014. Ex. S-3 at 3. When Lence brought him out of the mine shortly thereafter, the two foremen who met them on the surface should have assessed the situation and realized that the company needed to notify MSHA of the accident. The 15-minute clock began running at that point, but notification was not provided until the "courtesy call" was made the next morning. Webb made the call after arriving at the mine at his usual time, which was around 5:30 or 6:00 AM, and exchanging text messages with a Joy Global representative. Tr. 244-45. MSHA did not learn the full extent of Davis' injuries until Cripps and Lampley further investigated the accident later that day. I conclude that the violative condition lasted for more than one shift but less than a day.

Degree of Danger Posed by Violation

The Secretary contends that the operator's delay in reporting Davis' accident placed other miners at risk of being injured by defective hoses. Sec'y Br. 23-24. This argument conflicts with the parties' stipulation that there was no likelihood of injury. Tr. 172-73. There is no evidence there were any defective hoses on the longwall other than the one that ruptured, which was removed and replaced immediately after the accident because it was no longer functional (Tr. 251), nor is there evidence that any miners were endangered by the operator's delay in notifying MSHA of the accident. I find that this violation did not pose a direct danger to anyone. However, by their nature, reporting violations indirectly affect mine safety by hampering MSHA's ability to respond effectively to accidents.

Extensiveness; Abatement Efforts

The extensiveness of a violation is usually analyzed in terms of the physical dimensions of the affected area, the number of miners endangered, how many man-hours are required to abate it, or other similar factors. Anyone working on the longwall near the frayed hose could have been the victim of this accident. In addition, I find that this violation was extensive in other ways. Specifically, it involved five management officials and an extensive number of missed opportunities to comply with § 50.10. Wheeler, Lily, Intravaia, and Brown all were members of mine management who had the knowledge and opportunity to report the accident to MSHA on November 20 yet failed to do so. Webb did finally report the accident on November 21, but failed to call the hotline, instead choosing to call the local district office, and provided incomplete information about Davis' condition. When MSHA investigators conducted interviews at the mine later that day, mine management still seemed to be trying to downplay the seriousness of Davis' injury, referring to it as a "one-inch cut on his backside" even though by then the victim was in a critical care unit in St. Louis recovering from emergency surgery for multiple internal injuries. Tr. 117-18, 161, 164-66. In short, five management officials ignored multiple opportunities to ensure that MSHA received a prompt and accurate report of the accident, ultimately leaving the agency to ascertain the nature of the accident and extent of the injuries through its own investigation. This string of negligent conduct is extensive enough to undercut M-Class' assertion that mine management was acting in good faith.

For the same reasons, I also conclude that M-Class' abatement efforts undertaken prior to the issuance of the order were insufficient.

Conclusions

Based on the factors discussed above, particularly the obviousness of the violation, the fact that M-Class had a troubling history of prior similar violations placing it on notice of the need to make greater efforts to comply with § 50.10, and the knowledge and involvement of five members of mine management, I find that M-Class engaged in aggravated conduct constituting more than ordinary negligence. I reject M-Class' argument that its negligence was offset by its prompt and diligent efforts to investigate the accident and by the fact that Davis was quickly evacuated from the mine. The record does not support a finding that management made prompt and diligent investigative efforts. It is true that Davis was quickly and efficiently evacuated from

the mine. In fact, Inspector Lampley praised the evacuation effort at hearing, stating that “they did an excellent job of getting him out of there, and that’s great, and I hope they continue to do so.” Tr. 116. But the speedy evacuation, while laudable, is unrelated to the notification violation.

I find that this violation constituted an unwarrantable failure to comply with § 50.10(b), and it was appropriate for Inspector Lampley to issue the order under 104(d)(2). For the same reasons, I also find that M-Class’ negligence was high.

VI. PENALTY

The Commission has reiterated in *Mize Granite Quarries, Inc.*, 34 FMSHRC 1760, 1763-64 (Aug. 2012):

Section 110(i) of the Mine Act grants the Commission the authority to assess all civil penalties provided under the Act. 30 U.S.C. § 820(i). It further directs that the Commission, in determining penalty amounts, shall consider:

The operator’s history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator’s ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(i).

The Commission and its ALJs are not bound by the penalties proposed by the Secretary, nor are they governed by MSHA’s Part 100 regulations, although substantial deviations from the proposed penalties must be explained using the section 110(i) criteria. *See Am. Coal Co.*, 38 FMSHRC 1987, 1992-93 (Aug. 2016); *Sellersburg Stone Co.*, 5 FMSHRC 287, 293 (Mar. 1983). In addition to considering the 110(i) criteria, the judge must provide a sufficient factual basis upon which the Commission can perform its review function. *See Martin Co. Coal Corp.*, 28 FMSHRC 247, 266 (May 2006).

The Secretary asks me to assess a penalty of \$5,000.00 for this violation, which is the statutory minimum for violations of the 15-minute notification requirement. *See* 30 U.S.C. § 820(a)(2). The parties have stipulated that the proposed penalty is appropriate if the order is affirmed in all aspects. Joint Ex. 1.

The Secretary has submitted a violation history form showing that the MC #1 Mine received 1,130 violations from MSHA that became final during the two years preceding the issuance of this order. Ex. S-8. A number of these were Part 50 reporting violations, and Inspector Lampley testified M-Class’ recent violation history included six § 50.10 violations. Tr. 123; Ex. S-8.

The size of M-Class' business is large. The parties have stipulated that the proposed penalty will not affect its ability to remain in business. Joint Ex. 1.

My findings regarding gravity and negligence are discussed at length above in the body of my decision. In addition, I have discussed why I do not believe M-Class exhibited good faith in attempting to achieve rapid compliance after notification of the violation. Even after MSHA issued a 103(j) order and launched an accident investigation, M-Class left it to the MSHA investigators to discover what had actually happened and the extent of Davis' injuries on their own. *See* Tr. 31.

Considering the foregoing, it appears that the deterrent effect of the mandatory minimum penalty set forth in section 110(a)(1) is not sufficient. Prompt accident notification was important enough to Congress that it codified the 15-minute reporting requirement in section 103(j) and specified a minimum penalty. Yet M-Class, despite an alarming history of reporting violations, demonstrated a total indifference both to the statutory requirement and to Davis' condition, altering the scene of the accident and apparently purposefully failing to conduct a bona fide investigation in order to avoid a coal production shutdown and being placed back on POV watch. After considering the six statutory penalty criteria, I find that a penalty of \$7,000.00 is appropriate for this violation.

ORDER

M-Class is hereby **ORDERED** to pay a total penalty of \$22,750.00 for the two violations at issue in this docket within thirty (30) days of the date of this Decision and Order.⁹

/s/ Priscilla M. Rae
Priscilla M. Rae
Administrative Law Judge

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⁹ Payment should be sent to: Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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May 5, 2017

SECRETARY OF LABOR, MINE
SAFETY AND HEALTH
ADMINISTRATION (MSHA), on behalf of
JERRY RAMSEY,
Complainant,

v.

VULCAN CONSTRUCTION
MATERIALS,
Respondent.

DISCRIMINATION PROCEEDING

Docket No. SE 2016-0145-DM
MSHA Case No. SE-MD-16-06

Mine: Bristol Quarry
Mine ID: 40-02872

DECISION

Appearances: Thomas J. Motzny, Esq., 618 Church St., Suite 230, Nashville, Tennessee for the
Complainant

John B. Flood, Esq. and Lauren Marino, Esq., 1909 K St. NW, Washington, D.C.
for the Respondent

Before: Judge Moran

This case is before the Court upon a complaint of discrimination under Section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2) (“Mine Act” or “Act”). At issue is whether Complainant Jerry Ramsey (“Ramsey” or “Complainant”) was wrongfully terminated by the Respondent, Vulcan Construction Materials LLC (“Vulcan,” or “Respondent”) in retaliation for exercising his rights under the Act. For the reasons which follow, the Court finds that Ramsey was wrongfully terminated for exercising those rights and accordingly it orders appropriate relief, as set forth herein.

Findings of Facts

Summary

Complainant Jerry Ramsey filed the present discrimination complaint under the Mine Act on December 11, 2015.¹ The Complainant asserted that he was terminated on December 4, 2015 because his boss, Keith Austin, claimed that he, Ramsey, was using a cell phone on December 1, 2015 while operating his haul truck. Use of a cell phone while working is prohibited by Vulcan policy. Ramsey denied that he was using a cell phone that day.

A hearing in this matter was held on Tuesday, August 2 and Wednesday, August 3, 2016 in Rogersville, Tennessee, at which both parties presented evidence. Due to transcription problems, it was necessary to reconvene on December 8, 2016, in order to fill in audio gaps in the hearing record from the first day of the hearing. Those problems were adequately solved by the further testimony received on December 8th, as set forth in note 2, below.² In reaching its findings of fact and conclusions of law, the Court fully considered all testimony and documentary evidence, as well as the parties' post-hearing briefs.

At hearing, the Secretary sought to show that Ramsey was fired in retaliation for engaging in protected activities, including making safety complaints, making a discrimination complaint prior to the one that initiated this case, and for seeking to become a miners' representative. The Respondent alleged several forms of improper behavior on Ramsey's part yet, ultimately, they moved away from those allegations, arguing that Ramsey was actually fired

¹ As discussed herein, Complainant Ramsey filed an earlier discrimination complaint in September 2015. This decision addresses the Complainant's December 11, 2015 complaint, but the earlier filed complaint is not without probative value.

² Though scheduled, the court reporter did not appear for the first day of the hearing. The host courthouse then offered the use of its audio system to record the testimony. Both sides and the Court accepted that offer. Unfortunately, the recorded testimony had several "inaudible" portions, creating some gaps in the questions posed and witnesses' testimony. A court reporter did appear for the second day of the hearing and there were no transcription problems for that day. The host courthouse sent a second audio recording of the Day 1 testimony with fewer audio gaps and the court reporter created a second version of that day's testimony. However, because gaps still remained for the Day 1 testimony, the Court reconvened on December 8, 2016, giving counsel and the witnesses an opportunity to reconstruct missing questions and answers. The Court finds that, when the court reporter's second effort to create a transcript for Day 1 is combined with the December 8th testimony, there is a fully adequate record of the testimony for Day 1 and that neither side was disadvantaged. The testimony for Day 1, though it required reconvening to fill in gaps, represents a complete explication of the testimony for that day. In fact, with the benefit of hindsight, the December 8th testimony produced little useful and no dramatic or significant additional information and neither side points to or contends otherwise. Nevertheless, it is part of the record. *Accordingly, for the Day 1 testimony, **only** the second transcription effort, which was derived from the second audio recording copy from that day, and which consists of 219 pages should be considered, together with the December 8, 2016 testimony.*

for violating the company's policy forbidding, in most circumstances, the use of personal "electronic telecommunication devices" ("ETDs") while on the job. At least as applied in this case, in practical terms an ETD means a cell phone. Thus, whether the Complainant actually was using a cell phone on December 1, 2015 is the central issue in this case.

Ramsey contends that on his final day of work with Vulcan, he used an iPod to play music. Vulcan stipulated that an iPod cannot be used to "talk" with another as one can with a cell phone. Even assuming for the sake of argument that Ramsey was using a cell phone while on the job on December 1, 2015, it is interesting to note that both Austin and Bush conceded that such conduct on that date was not dangerous. Tr. 166, 207, 268. Although Vulcan introduced evidence which it believed showed that Ramsey was using an unauthorized cell phone that day, rather than an iPod, it presented no credible evidence that Ramsey actually used any such cell phone-type device to communicate with anyone in or outside the mine while he was on the job on December 1, 2015. With the basis for firing Ramsey not established, Vulcan's case collapsed. In contrast, the credible evidence shows that Ramsey made numerous safety complaints, that he invoked various rights under the Mine Act, and that Vulcan's response to those actions was to fire him.

Complainant's Evidence

Protected Activity

Jerry Ramsey worked for Vulcan Construction Materials as an equipment operator from 2013-2015, primarily driving a haul truck. His direct supervisor was Keith Austin. During the course of his employment, Ramsey made several safety complaints to Austin regarding issues such as a faulty parking brake on a truck, leaking calipers, a leaking belt, a truck bed slamming down,³ and an incident that occurred around the winter of 2014 when Ramsey's sweatshirt became ensnared in a moving machine while he was trying to clear blockage in a crusher.⁴ Tr. 33-39. Each of these safety complaints constituted protected activity.

Ramsey engaged in other types of protected activity as well. As described below, he was questioned repeatedly about a "lock and key" incident. In connection with that, Ramsey was suspended for three days, purportedly for failing to cooperate in an "investigation" of that matter. He then filed a 105(c) discrimination complaint, one of his protected activity rights under the Mine Act, because of that lock and key incident.

³ Austin preferred not to characterize Ramsey's issues about his haul truck as safety complaints but rather that Ramsey "stated what he had problems with it at times." Tr. 163. The Court finds that Austin's attempt to dress up Ramsey's issues with his haul truck as "problems," not safety complaints, was not credible.

⁴ Ramsey later clarified that the incident when he reported his sweatshirt becoming caught in a machine part occurred in 2014. Tr. 128. There is no dispute that this event occurred. Austin admitted that one of the things Ramsey complained about was almost being hit with a sway bar while he was cleaning out the jaw pressure. [sic] Tr. 162. It appears that the correct intended term is a jaw *crusher*. Tr. 36.

Later, in November 2015, Ramsey indicated to MSHA Inspector Mike LaRue that he was interested in becoming a miners' representative, and the two exchanged e-mails on the subject. Tr. 72-74. His interest in becoming a miners' representative was motivated because he was "tired of not being listened to" by Vulcan management. Tr. 72. An email from Ramsey to LaRue sent November 30, 2015 demonstrates his interest. Tr. 74; Gov. Ex. S 9. Although Ramsey sent paperwork to MSHA to apply as a miners' representative, the application was incomplete, as his submission was missing the mine's identification number. Tr. 74-75. Among other things, Ramsey inquired of MSHA if he would have to tell his foreman, Austin, about his application. Ex. S-9.

On the morning of December 1, 2015, Ramsey engaged in protected activity when he asked Austin for the mine's ID number so that he could submit his MSHA representative papers. Tr. 75-76. Austin did not respond to Ramsey's inquiry. Tr. 76.

Ramsey's job performance at Vulcan

For the year 2014, Vulcan gave Ramsey a "satisfactory" performance review. Tr. 31; Gov. Ex. S 6. Ramsey signed the review on March 2, 2015. The only suggestion for improvement that management noted was for him to show up slightly earlier for work, that is to say, *before* his shift began. There was no claim that Ramsey had been arriving late, nor was he being asked to clock in earlier. Tr. 31-32. Ramsey testified that he found the suggestion confusing, and did not understand why he was being asked to do this. *Id.* For his part, Austin admitted in his testimony that it was not a violation of company policy to show up when one's shift begins, that Ramsey is paid hourly, beginning when he clocks in, and that no one is required to show up before they clock in, nor to work off the clock. Tr. 156-57.

Events preceding Ramsey's firing

Several incidents involving Vulcan and Ramsey were raised during the hearing: a lock and key incident; a September 2015 cell call by Ramsey to his mother; and Ramsey's alleged use of a cell phone on December 1, 2015. Each is discussed in turn, but the most critical event for this decision pertains to December 1, 2015, because it was Ramsey's alleged behavior on that day that was the basis for Vulcan's decision to terminate his employment.

The July 2014 Lock and Key incident

The parties spent much time on this matter. While it did not form the basis for Vulcan's firing Ramsey, it is important to understand the event because it reveals Vulcan's attitude toward Ramsey and it is instructive in setting the stage for its decision to fire him. Though the record testimony about the incident made it appear complicated, it can be simply explained.

In July 2015, Ramsey was working in the mine's NCC building and, while performing tasks there, he admitted losing the key for a lock to a breaker on C12 in that building. Tr. 41-43. Ramsey failed to report the lost key to management. Although he offered explanations for the reporting lapse, that did not change the fact that he failed to report losing the key.

As it happened, about a month after losing the key, Sherrod and Austin, both part of Vulcan's management, came upon a mismatched lock and key. Thus, while there was a key found in a lock, it was the wrong key, and it would not open that lock. Sherrod and Austin learned that Ramsey had lost a key for a lock and they interviewed him about that, inquiring if the lock and key mismatch they discovered involved the key that Ramsey lost. Ramsey told them that the mismatched lock and key did not involve the lock for which he lost a key. This assertion by Ramsey was supported, because the mismatched lock and key did not have Ramsey's tag on it. Instead, the tag for the mismatched lock and key belonged to another employee.⁵ Tr. 41-46.

Having interviewed Ramsey about the mismatched lock and key and with Ramsey admitting that he had lost a key, but that it was unrelated to the lock and key mismatch, that should have been the end of the matter. However, about 30 minutes after the first interview, Sherrod and Austin interviewed Ramsey *a second time*, again about the same matter, asking the same questions of him and with Ramsey providing the same answers. Tr. 45-46. At the end of his work that day Ramsey, having clocked out, went to the mine office and asked Sherrod and Austin for the "miner's rights number and VP [Vulcan's vice president's telephone] number." Tr. 47. Ramsey explained that he asked for this information because he "was tired of being interviewed [and] didn't want to take the blame for somebody that wasn't [his] fault."⁶ Tr. 48.

Matters involving the mismatched lock and key did not end after the second interview of Ramsey. Instead Ramsey was interviewed *for a third time* on July 27, 2015. Upon review of the record, at the point of the third interview, the Court has concluded that calling the further questioning of Ramsey on the same issue an "interview" would be inaccurate and that interrogation and harassment are more accurate characterizations of Austin's and Sherrod's

⁵ The other employee was identified only as "Charlie" but, of greater importance, there is no evidence to contradict Ramsey's claim that he had nothing to do with the mismatched lock and key incident. Tr. 44-45. Thus, Ramsey's only failing was losing his key for the C12 breaker.

⁶ Following the office visit that day, Ramsey sent a text message to Austin, informing that the numbers he was given were not correct for either issue. Tr. 50-51. Ramsey's text to Austin, sent July 24 and 28, 2015, stated: "That was not the correct num for the miners right people nor was it the num for our vp. It's nothing against u but I won't put up with being talked down to as a liar [sic] and I know I may lose this battle but it might make it better for the next person and I'm good with that but I think it's a law u have to give me the correct num to the miners right .. The good things about iPhones it shows when a message has been sent and read. That's the reason I sent it as a text instead as a phone call." Gov. Ex. S 20. Austin disputed Ramsey's account and replied with his own text, stating "If you remember I didn't give you either of those numbers. I don't have the vp number and you said you had the miners number. The vp number came from the safety director. It wasn't that I didn't want you to have em but you said you had what you needed when you left." Gov. Ex. S 20. The Court would comment that, apart from the disputed accounts between Austin and Ramsey, the exchange shows that matters had heated up between the two.

behavior. Understandably and appropriately, in the Court's view, Ramsey, using his iPod,⁷ recorded the third interrogation. Tr. 52, 113. The recording was made part of the record evidence in this case. Sherrod played the major role in questioning Ramsey. Although he objected to Ramsey recording the third interrogation and advised in the recording that he knew the law and that such a recording couldn't be used in court, Ramsey, unintimidated, still recorded the questioning and the recording was made a part of the record, notwithstanding Sherrod's asserted knowledge of the law. Gov. Ex. S 8.

The Court heard the recording at the hearing and listened to it again, post-hearing, in deciding this case. The recording, as noted, was made on July 27th, as there were references in it to the second interview, the previous Friday. It would have to be said that, while there were a few moments when Ramsey lost his composure, overall he was polite and civil.⁸ As Sherrod continued to ask the same questions, now in the context of the third interview concerning the same lock and key matter, Ramsey, understandably exasperated, told them he had enough and did not want to continue the never-ending questioning. Revealing, in the Court's estimation, that Sherrod's design was to get under Ramsey's skin, he then remarked to Ramsey that he "could pinpoint some things right now that [he] kn[e]w about but [he was] keeping to himself." Ex. S-8. Ramsey, not cowed by the vague claim, invited him to make those things known. Sherrod did not back up his claims. As noted, while Ramsey did swear, in the Court's view, having heard the entire recording, and placing Ramsey's expressions in context, it is found that his swearing was out of exasperation.⁹ It should also be noted that, if the swearing was considered aggressive, the recording reveals that the aggression was bilateral – Sherrod had his finger in Ramsey's face, as Sherrod acknowledged on the recording, but he felt *that* was okay, as he told Ramsey that his "finger wasn't doing anything to [him]." Ex. S-8. The Court would agree, just as Ramsey's

⁷ As Austin later admitted in his testimony about the lock and key incident, just as he *believed* that Ramsey was using his cell phone on December 1, 2015, he also *believed* that Ramsey was using his cell phone when he recorded the third interview. Tr. 153. As Austin put it, "[t]hat's what I thought." *Id.* Both *beliefs* were erroneous – Ramsey was using his iPod to record the third interview.

⁸ Ramsey denied that he slammed open the door upon entering the mine office. Instead, he stated that Austin opened the door for him and that he, Ramsey, stood in the doorway the whole time. Tr. 113, 117. Ramsey admitted that he made some sarcastic and unprofessional remarks, including a few swear words to Sherrod, who was the chief interrogator about the lock and key matter. Tr. 111-13. Ramsey acknowledged that he was very frustrated and that he raised his voice, because he didn't appreciate that management kept questioning him about the same matter. The suspension letter Ramsey was given after that incident stated that he violated company policies regarding "complying in the company investigation" and for engaging in "abusive and harassing conduct." Tr. 108. Ramsey did not agree with these claims, but signed the suspension letter so that he could return to work. Tr. 112.

⁹ The Court will presume that the soft swears that Ramsey uttered were not new terms to the ears of Sherrod or Austin. In fact, Austin admitted that cursing is *not* a violation of company policy. Tr. 154.

occasional swears were not doing anything to Sherrod. Ramsey, worn from the harangue, expressed that he had told the truth and he couldn't keep providing the same answers. Sherrod agreed that this interview was the third time they had gone over the same matters, but showing his intention was not about honestly seeking Ramsey's answers, provocatively told Ramsey that his answers were a "fairy tale." Gov. Ex. S 8.

The Court concludes that the third investigation, this one lasting nearly 17 minutes, really was more in the nature of interrogation and harassment, that it was repetitive, totally disproportionate to the subject, excessively prolonged, and not designed to elicit new facts. It is of note that Sherrod did not testify in the proceeding before this Court.

Ramsey was suspended without pay for three days in connection with the event, ostensibly because he impeded the lock and key "investigation."¹⁰ Tr. 59. In any event, Ramsey was not disciplined for the lock and key incident, at least not for losing the key, but rather "[f]or not cooperating during the investigation." Tr. 56-57. After the third interview on the subject, Ramsey was sent home and was not allowed to return to work until serving the three-day suspension. Tr. 56. Ramsey was given a memo titled "Final Warning and Disciplinary Suspension" and dated July 30, 2015. Gov. Ex. S 4. It was issued by Keith Austin and it relates that it pertained to July 27-28. The memo asserts that Ramsey engaged in "abusive and harassing conduct" in violation of Vulcan's policy "regarding compliance and cooperation during a Company investigation." *Id.* As noted above, the memo focused upon Austin's and Sherrod's "investigation" into "a lockout/tagout situation" about which they interviewed Ramsey multiple times. The memo asserts that Ramsey gave silly, argumentative and disrespectful answers and that, as their investigation continued, Ramsey's "uncooperative nature escalated including the use of profanity toward [Sherrod]." *Id.* The memo then continued that Ramsey's comments "could be interpreted as threatening" and that the investigation stopped due to Ramsey's "erratic behavior." *Id.* Not finished, after receiving the disciplinary suspension letter, Ramsey was

¹⁰ There was an interesting epilogue, as it were, to the lock and key incident, as Ramsey eventually did find a lock on Vulcan's property. As he related the discovery, "We were doing work inside the plant and as we were downstairs -- everybody was getting their locks out-- I got - - just had to -- turned to look and it was a red lock with my tag on it." Tr. 61. Upon discovering the lock, Ramsey stated that he left it hanging for a few days until somebody could come from the office so he could show it to them. When that did not occur, Ramsey decided to take the lock to the office. Upon presenting the lock at the office, he asked if that changed anything, but it had no impact on the discipline that had been imposed on him. Tr. 62. The Court inquired of Ramsey what he thought finding the lock demonstrated from his side of the issue. Ramsey responded, "I lost a lock that was on a breaker, I lost the key to it, the only way to get that lock off would have been to cut it, and that lock [had] been cut, it was still hanging on there, I didn't cut it." Tr. 62. There was a tag on the cut lock, with Ramsey's name on it. Tr. 62. Ramsey left his lock on C12, yet the lock he was being questioned about was on breaker C8. Tr. 62-63. Vulcan never did an investigation into who cut the lock. Tr. 63, 154.

interviewed yet again by Sherrod, with that session, *now the fourth*, lasting about 40 minutes.¹¹ Tr. 58; Gov. Ex. S 4.

Thus, to be clear, Ramsey was never disciplined for violating Vulcan's lock and key policy, and the key that was found in the incorrect lock was not assigned to Ramsey. Tr. 45, 48. It is noteworthy that, despite the four grillings regarding the lock and key incident, aside from Ramsey's three-day suspension for allegedly failing to cooperate in the investigation, *no other* employee was ever disciplined for the incident. Tr. 153.

Austin's account of the July 24, 2015 incident, when Ramsey came to the mine office, presented a picture that Ramsey was riled up, wanted the miners' rights and vice president's numbers and that things were "pretty tense for a period of time." Tr. 175. Ramsey, he said, entered the office on his own but he could not recall if the door was open or closed before he entered. *Id.* Asserting that Ramsey cursed, Austin stated that neither he nor Sherrod cursed at Ramsey and that they were professional in their behavior towards him. Tr. 175-76. Austin also asserted that when Ramsey became aware that others were listening to the office meeting, via the mine office telephone, Ramsey's behavior calmed down. Tr. 178. Austin maintained that when Ramsey asked for the miners' rights number, he did not understand what Ramsey meant by that request. Tr. 178.

Following the lock and key incident and being subjected to the multiple interrogation sessions, Ramsey filed a 105(c) claim, naming Austin and Sherrod as the sources of discrimination against him. Tr. 63, 215. MSHA investigator Mike LaRue was assigned that first discrimination claim. During September 2015, while collecting evidence and investigating Ramsey's first 105(c) discrimination complaint against Vulcan, LaRue met with Ramsey. Tr. 214. During that investigation, although LaRue determined there was a *prima facie* case, worthy of further inquiry, MSHA did not file an action against Vulcan. Tr. 215.

Ramsey's September 2015 cell phone call to his mother

Ramsey was asked about a September 2015 incident when he called his mother from the mine using his cell phone. According to Ramsey, the mine called him on the truck's CB radio and told him there was a call from his mother, which was described as urgent. Ramsey then pulled off the side of the haul road and called his mother. Tr. 65. After Ramsey called his mother, Austin told him that cell phones were to remain in the employee's personal vehicle. Tr. 66. Ramsey stated no issue arose out of that incident. The next day there was a safety meeting held by Austin, informing miners they were to leave their phones in their personal vehicles, and

¹¹ Ramsey asserted that no one from "HR" (Human Resources) asked him for his side of the story about the incident. Tr. 57.

Ramsey stated that thereafter he followed the change to the rule.¹² Tr. 65-66. At least according to Ramsey's account, it would appear that, per that meeting, Vulcan clarified its cell phone policy so that, not only was *use* of a cell phone prohibited but *having* a cell phone in company vehicles was not allowed either. Gov. Ex. S 1 is Vulcan's policy regarding cell phones.¹³ Ramsey stated that, from Gov. Ex. S 2, he saw page 183 from the mine's handbook, posted in the breakroom. Tr. 69. Ramsey, referring to those exhibits, observed that neither speaks to the use of iPods. Tr. 71.

With Vulcan's policy prohibiting the use of "electronic telecommunication devices," ("ETDs") and after the clarification that cell phones were not even to be in mine vehicles, Ramsey began leaving his cell phone in his personal vehicle while on the job. Tr. 67; Ex. S-1.¹⁴ Ramsey testified that his understanding of the policy was that the term "electronic communication device" meant that he was not to use his cell phone. Tr. 92. In noting this incident, it is important to recall that Ramsey's September 2015 cell call to his mother was not the basis for firing him – Ramsey was fired for using his cell phone on December 1, 2015.

Austin's understanding of the event, which varied from Ramsey's account, was that Ramsey had been talking with his mother on his cell phone, that the connection was lost and that his mother then called the mine office asking that Ramsey *call her back*. Tr. 171. Ramsey was contacted on the haul truck's CB radio, told to call his mother and he then stopped hauling and called his mother using his cell phone. Austin then later spoke with Ramsey about the call, but

¹² Thus Ramsey admitted that in September 2015 he used his cell phone at the mine site without prior permission from his manager, when he called his mother about a family issue. Tr. 100-01. As noted above, Ramsey did not feel that he had violated company policy, because he had been informed at the safety meeting that employees should not be *operating* any equipment while using a phone, and when he made the call in September he was not operating any equipment. Tr. 101. He recalled that the day *after* the call to his mother, there was a meeting instructing employees to leave their phones in their personal vehicles. *Id.*

¹³ Ramsey also received a copy of Vulcan's employee handbook in October 2013, although he testified that he was not working on the day that there was a training session addressing changes that appeared in the handbook. Tr. 98-99, ref. Ex. R-183. When Ramsey was questioned further, he admitted that, according to the policy in the handbook, he should not have had his cell phone in a work area in September 2015, and that he would only have been allowed to carry it with the express permission of a supervisor, which he did not have. Tr. 103-04. However, Ramsey contended that he discussed a family situation — his father being ill — with an assistant manager he identified only as "Scooter," and suggested that if it was a problem to have his cell phone on him during work he could take the day off, but "Scooter" said it wasn't a problem. Tr. 104. Austin later warned Ramsey about the ETD device policy in October 2013. Tr. 103.

¹⁴ Ramsey testified that there was no mention of iPods or other kinds of MP3 players during this training. Tr. 67. This assertion was not contradicted by testimony from the Respondent's witnesses.

Austin challenged the truthfulness of Ramsey's account, asserting that Ramsey had called his mother first. Tr. 172. Austin stated that he told someone in safety about the event, but couldn't recall with whom he spoke. *Id.* He did not report the incident to HR. The incident occurred after Ramsey had filed his first 105(c) complaint, which named Austin as a person who discriminated against him. *Id.* Austin offered that no action was taken against Ramsey because his first 105(c) complaint was being investigated, so "it was decided to pass." Tr. 173.

MSHA inspector LaRue was aware of the incident in September 2015 when Ramsey used his cell phone to speak with his mother while at the mine, and was aware that the mine took no disciplinary action, ostensibly because of MSHA's ongoing 105(c) investigation of Ramsey's first discrimination complaint. Tr. 223-24. LaRue testified that Bill Duran, counsel to the Respondent, made the decision that there would be no discipline for that September cell phone incident. Tr. 227.

The Events of December 1, 2015

After Ramsey's December 1, 2015 protected activity, seeking information to enable his filing as a miners' representative, as described above, he then clocked in and went to work driving the mine's haul truck. He was using his iPod that day. Tr. 76. He used his iPod to listen to music when the truck's radio reception was poor. Tr. 76-77. Ramsey's iPod does not have cellular service, meaning one cannot use the device to make phone calls or send text messages. While that is sufficient to establish that this device cannot function as a cell phone, in addition, to Ramsey's knowledge, there is no Wi-Fi at the mine. Tr. 77, 88.¹⁵

Following Ramsey's request to Austin for the information he needed to file his miners' representative papers, he next saw Austin that morning standing above him on the high wall, looking down at him as he was operating his haul truck below. Tr. 77. Ramsey was alerted to Austin's surveillance from above, because he heard some rocks rolling down and wanted to see where that sound was coming from. *Id.* It was then that he observed Austin above him, close to edge of the high wall, only 3 or 4 feet away from its edge. Tr. 78. Austin watched Ramsey from above as he completed his haul truck cycle, which consisted of driving the truck to the loading point, loading, and then driving to the dumping location, a process involving a total of about 10 minutes per cycle. Tr. 79. Austin himself would later testify that he was about 50 feet away from Ramsey, when peering down on him as Ramsey was operating his haul truck. Tr. 137. The Court would comment that this whole situation bordered on weird behavior on Austin's part, surveilling his employee from atop the high wall. And of course it is noteworthy that this behavior occurred in the context of Ramsey having requested information that morning from Austin so that he could file an application with MSHA to become a miners' representative.

In any event, Ramsey next saw Austin when he, Ramsey, was pulling into the shop to use the restroom. Tr. 79. At that time Austin told Ramsey to give him his (i.e. Ramsey's) cell phone. Ramsey responded that he didn't have a cell phone. He told Austin he had an iPod. Tr. 79-80. Austin persisted, asserting that he saw Ramsey on his cell phone. Tr. 80. Ramsey responded,

¹⁵ These points are uncontested by the Respondent and Austin admitted that there is no Wi-Fi signal at the Bristol Quarry. Tr. 145.

“my cell phone is over in my truck, let’s go get it.” *Id.* Asked how many cell phones he has, Ramsey responded “one.” *Id.* Austin then telephoned someone, telling the person on the line that Ramsey refused to give him Ramsey’s cell phone. *Id.* Next, Austin used his work truck to take Ramsey to the mine office, where they waited for Mr. Bush to arrive. *Id.* When Bush arrived, Austin and Bush told Ramsey to hand over his cell phone. Again Ramsey told them his cell phone was in his pickup truck, repeating this “20, 30 times, and [I] offered them my keys so they could go by themselves to get it.” Tr. 81. Ramsey was then taken to his pickup truck by Austin and Bush and was advised that he was suspended until further notice. Tr. 82. Very oddly, neither Austin nor Bush used the clear opportunity to search the haul truck Ramsey was using, nor to search Ramsey’s pickup truck, though they were all at the pickup truck. *Id.* Ramsey then identified his cell phone records. Gov. Ex. S 10. Those records show that on December 1, 2015, Ramsey’s first call that day occurred at 9:47 a.m., which was at a time before he clocked in that day, and the next call was at 1:37 p.m. that afternoon, after he was suspended. Tr. 84-85.

Not surprisingly, Vulcan objected to the introduction of Ramsey’s cell phone records, but not because they challenged their authenticity or accuracy, but rather because it was “not evidence that was provided to Mr. Austin, Mr. Bush or others with the company at the point in time they’re making the decision [to terminate Ramsey].” Tr. 83. This was part of Vulcan’s unusual defense that, though the facts completely refuted Vulcan’s claim, it was Austin’s *belief* that Ramsey used his cell phone that day. *Id.* Though the records could not have been made available at the time that Austin claimed Ramsey was using his cell phone, nor when the decision was made to fire him, apparently Ramsey should have provided the unavailable information at the time the decision was made to fire him. And, of course, Vulcan felt no obligation to revisit its *beliefs* once the exculpatory phone records were later disclosed to it. Thus, though disabused of its ill-founded beliefs, Vulcan’s stance remained unchanged. In the Court’s view, there is only one rational reason to explain its intransigence — Vulcan was determined to rid itself of Ramsey because of his multiple invocations of his safety and health rights under the Mine Act.

When Vulcan next contacted Ramsey, he was asked to attend a meeting with Austin and a representative from Human Resources. Tr. 90. This occurred on December 4, 2015. Vulcan did not ask Ramsey to share his account of what had happened with the alleged cell phone use incident and his employment was terminated during that meeting. Tr. 91-92. Although Ramsey received his termination at that meeting, he testified that he did not understand why he was being fired at the time. *Id.*; Ex. S-7. Ramsey filed the instant discrimination complaint with MSHA shortly afterwards, and has not returned to work at Vulcan since his termination. This Court ordered Ramsey’s temporary economic reinstatement on February 11, 2016.¹⁶

Ramsey does not dispute the Respondent’s contention that he had *a device* in his hand while he was sitting in the haul truck on December 1, 2015, as he admits this is shown in the photos and video that Austin took. Tr. 120. The more important question is what that device was, as Vulcan’s policy was directed against the use of cell phones, not against devices which only play music. Indeed, as the Vulcan trucks were equipped with AM/FM radios, Vulcan could hardly object to other music-playing devices. Austin admitted that employees were allowed to

¹⁶ See Docket No. SE 2016-0107-DM.

listen to the radio in their trucks. Tr. 191. When Ramsey spoke with management that day, he told them that his iPod was in his lunch box in the haul truck. Tr. 125-26. He did not act to retrieve the iPod to show it to Bush or to management, although he admitted that he could have done that. Tr. 123-24. However, to place that decision in perspective, as was pointed out during Ramsey's testimony on re-direct, no one asked him to see his lunchbox. Tr. 127.

Testimony of Keith Austin

Keith Austin works for Vulcan as a plant manager and he was Ramsey's direct supervisor. Tr. 129-30. He testified that he gave Vulcan employees a talk on the mine's ETD policy, and that Ramsey signed a sheet acknowledging that he was present for the talk. Tr. 133. Important to understanding Vulcan's policies is Gov. Ex. S 1, dated September 1, 2006, which is titled "Midsouth Division Policy" and which lists the policy's topic of "Use of Cellular Phones" immediately below that heading. Tr. 131. Austin admitted that there is no company policy that specifically mentions iPods, and that he never told Ramsey or any other employee that iPods violate the company's policy on ETDs. Tr. 131. The policy lists a number of devices as examples of ETDs, but the list does not include iPods. Ex. S-2; *see also* Tr. 133-34. On September 28, 2015, Austin held a "Toolbox" meeting with six employees, including Ramsey, present. Austin reviewed the cell phone policy, which was that no one was to have cell phones during work hours. Gov. Ex. S 3.

Beginning in May 2015, Austin took notes concerning Ramsey. Tr. 156; Ex. S-5. He wrote the notes around the time that he observed certain events, such as Ramsey not returning phone calls while on leave covered by the Family Medical Leave Act (FMLA). Tr. 158-59. However, Austin did not know whether employees are required, under the FMLA, to check in with an employer while on such leave. Tr. 159. Although Austin testified that there were complaints from other employees concerning Ramsey, his notes do not reference any complaints about Ramsey using an ETD prior to his suspension. Tr. 160-61. Nor did Austin tell anybody, not even his own supervisor, about the claim that there were complaints from employees about Ramsey using his cell phone. Tr. 161.

Austin recalled Ramsey making safety complaints during his employment with Vulcan — these included a "near miss," following which Austin failed to fill out a "near miss" form. Tr. 162-63. The only potentially critical comment on Ramsey's performance review, prior to his termination, was that he did not show up *before* his shift was supposed to begin. Tr. 157. This was not a violation of company policy, because Ramsey is an hourly employee. *Id.*

Austin's testimony regarding the lock and key incident

Austin was present at all of the "interviews" management conducted with Ramsey about what was described as the "lock and key" incident, and he admitted that Ramsey did not change any of his answers between interviews. Tr. 146. Austin also admitted that Ramsey asked for the company's vice president's telephone number, stating that Ramsey asked for this "on, [interviews] two and three." Tr. 146. Although Austin is aware that MSHA enforces miners' rights, he claimed that he did not understand what Ramsey meant when he was asking for the "miners' rights number." Tr. 147. At the hearing, Austin claimed he did not recall whether he

had heard of miners' rights being referred to in any other context than MSHA enforcement — this contradicted his deposition testimony, in which he admitted that he had never heard of the term “miners’ rights in any other context than MSHA. Tr. 147-48.

According to Austin, HR employees Jones and Barrett made the decision to suspend Ramsey over the lock and key incident, yet Austin was involved in preparing the suspension letter.¹⁷ Tr. 148, Gov. Ex. S 4. Austin acknowledged that the suspension letter refers only to Ramsey’s alleged conduct on July 27, 2015. Tr. 151. While the alleged intemperate behavior by Ramsey occurred during the first two interviews, both of which occurred on July 24th, Austin admitted that the suspension letter, the letter which had Austin’s signature on it, did not mention the alleged agitated and violent behavior by Ramsey, while simultaneously claiming “it should have been in [the suspension letter].” Tr. 151. In the face of that claim, Austin admitted that Ramsey is not a “physically intimidating guy,” and Austin did not recall Ramsey ever acting violently towards anyone at work. Tr. 152. Further, Austin admitted that Ramsey never refused to answer any questions during any time he interviewed him about the lock and key incident. *Id.*

Austin’s testimony regarding the alleged December 1, 2015 cell phone use incident

As a manager, Austin has the power to decide when he should involve the corporate office in an issue. Tr. 135-36. On December 1, 2015 he decided to call Huffman, Vulcan’s Safety Director, because he believed Ramsey was using a cell phone while working, in violation of the mine’s ETD policy. *Id.* When Austin was watching Ramsey, ostensibly using a cell phone while operating his haul truck, he was about 50 feet away¹⁸ from Ramsey and looking down at an angle. Tr. 137, 183. Although Austin testified that he believed that what Ramsey was allegedly doing presented a safety hazard, he did not contact Ramsey on the CB radio or take any other action to stop the alleged dangerous activity.¹⁹ Tr. 139. Rather, Austin waited until Ramsey went

¹⁷ Austin testified that there was never a “conclusion” to the lock and key incident. Tr. 154. It was the lock and key incident interrogations which led to Ramsey filing his earlier discrimination complaint. Tr. 149. That earlier-filed complaint is not the subject of this matter. It is mentioned here for context and because it was brought up during the testimony in this case.

¹⁸ The Court takes note that looking at a device as small as a cell phone or an iPod from a distance of 50 feet is a significant distance. The Court takes judicial notice that, across their various generations, iPods are *not* larger than 5 inches by 2.5 inches. The smart phone video

Austin took only serves to confirm that one cannot tell the nature of the device Ramsey had on that day, December 1, 2015. Tr. 186. It is also noteworthy that in Austin’s ten years of working at Vulcan’s Bristol Quarry, this was the only time he ever took a video of a truck driver at that mine. Tr. 188.

¹⁹ Also of note, there is no allegation by Vulcan that Ramsey ever used any sort of device while the haul truck was in motion. Tr. 139. Vulcan’s evidence in support of their basis for the termination contained no reference to Ramsey endangering himself or others by driving while distracted.

on a bathroom break to stop him and then accused him of using a cell phone. Tr. 140. Austin admitted that Ramsey *immediately* told him that it wasn't a cell phone, but rather an iPod. *Id.*

Austin testified at the hearing that he believed Ramsey using an iPod "was a distraction and it was." Tr. 141. This contradicted his testimony at deposition, only two weeks earlier, at which time he stated that he had not formed an opinion on whether iPods violated company policy. Tr. 141-42. Importantly, Austin's evaluation of Ramsey's behavior was based solely on his belief that Ramsey was using a cell phone; iPod use was not part of his thoughts. In any event, Austin, disbelieving Ramsey's assertion that he was not using a cell phone, proceeded to contact HR. Tr. 143. Although company policy would have allowed Austin to look inside the haul truck Ramsey had been operating, both he and Danny Bush (manager for the Norton quarry) chose not to look inside. Tr. 143-44. This joint decision not to confirm Austin's suspicion was especially odd, as looking in the haul truck would have confirmed or refuted Austin's claim. Tr. 145. Austin also affirmed that he had *never* heard of anyone being disciplined for using an iPod. Tr. 145-46.

Despite the testimony, as recounted above, in Austin's opinion, there is no danger in a miner having a cell phone with them at work so long as they act responsibly.²⁰ Tr. 166. In fact, he acknowledged that there are situations where a cell phone might be needed in an emergency, such as if there is a problem with the truck's CB radio. Austin himself carries a cell phone when he is at the mine site, adding that it is the fastest way to reach him in an emergency. Tr. 167.

On cross examination,²¹ Austin claimed that his decision to take notes on Ramsey was not related to Ramsey's making safety complaints. Tr. 195. Furthermore, Austin testified that Ramsey admitted using his cell phone to speak with his mother during a family emergency *prior* to December 2015. Tr. 168. This matter has been discussed above. As Austin told the event, in September 2015 Ramsey's mother called the mine office and told the clerk that she had been talking with Ramsey on the phone and that the call then disconnected, and that she needed Ramsey to call her back. Tr. 171. Austin apparently heard about this conversation secondhand, through an unnamed clerk, who did not testify. *Id.* Austin recounted,

I told her just get him [Ramsey] on the radio, the shop, to call his mother and he stopped hauling and sat there for a few minutes... When I talked to him about it, he said that he... called her on the haul road... And I said that you were on it

²⁰ It is noted that it was not easy to get Austin to admit that cell phone use was not inherently dangerous. At the hearing he initially responded that there was danger with someone having a cell phone on the mine site. Tr. 166. Then, directed to his deposition only a few weeks earlier, he admitted that at that time he stated it *was not dangerous* "if they're responsible and use it the way they're supposed to." *Id.*

²¹ Technically, because Vulcan employee and manager Austin was first called by the Secretary of Labor, he was under "cross-examination" when questioned by Vulcan's attorney. Therefore, labels aside, the questioning by the Respondent was from a friendly, not adversarial, source.

before that because your mother had called and said that you had been on with her. He said okay.

Tr. 171.

Austin reported these events to Huffman or John Sherrod, or possibly both. Tr. 172. He gave Ramsey a verbal warning to use the office phone for situations like this in the future, but there was no formal discipline against Ramsey over this incident. Tr. 171-72. Although Austin felt there had been a violation of company policy, he believed there was no discipline imposed because “we were in the middle of an ongoing investigation at the time.” Tr. 173. That ongoing investigation involved Ramsey’s first discrimination complaint.

Returning to events prior to the alleged December 1st “cell phone incident,” Austin stated that he believed Ramsey had a cell phone because he had heard from other employees that Ramsey had been using a cell phone while on the job. *Id.* The two employees who complained to Austin about Ramsey were Glen Lunsford and Tom Leonard, both hourly employees. Austin asserted that the two employees complained *separately and on multiple occasions* about Ramsey’s alleged cell phone use. Tr. 169. However, Austin did not discipline Ramsey based on these complaints of cell phone use because “it wouldn’t have been fair. I didn’t see it — didn’t see it with my [own] eyes.” Tr. 170.²²

Austin testified that he did not recall Ramsey asking him for a mine ID number or saying anything about miners’ representatives when clocking in on December 1st and he could not recall if he saw Ramsey clocking in that day. Tr. 192.

As for the central event, and Austin’s claimed eyewitness observation of Ramsey’s using a cell phone, Austin stated that his conclusions were based upon his direct observations which were, in his view, also supported by the photos and video he took of Ramsey in the haul truck. Tr. 183, 190. Austin recounted that he saw Ramsey “scrolling up and he punched [the device] every now and then.” Tr. 183. However, Austin conceded that that one can also scroll on an MP3 player as well as a cell phone. Tr. 190. Austin claimed he could zoom in on the video he took on his phone, and that also informed his judgment. *Id.* In the Court’s estimation, it is notable that during Austin’s 10 years of working at the mine, this was the first instance when he ever recorded video of an employee. Tr. 188.

Austin told Ramsey during the December 1st interaction that, “if there was an iPod [] [he, Austin] wanted to see it.” Tr. 180. Austin is sure he made it clear that he wanted Ramsey to show him whatever he had been using in the haul truck. *Id.* At one point, Austin admitted,

²² There is certainly irony in Austin’s response, because his standard for taking action regarding cell phone use was *to see it with his own eyes*. Tr. 170. Yet, on December 1, 2015, Austin never actually saw Ramsey using a cell phone with his own eyes. He only *believed* he saw Ramsey using a cell phone, a view made some 50 feet away, and which view was never established by his smart phone video surveillance of Ramsey. That video only established that Ramsey had a device of some sort in his lap.

Ramsey told him that the device was in his lunchbox. *Id.* Austin also recalled that when he told Ramsey, per the instructions from Huffman, that he could return to work if he put the iPod in his personal truck, Ramsey kept saying, “my cellphone is in my pickup truck, you can go look at it.” Tr. 181.²³

Austin denied that the motivation for taking notes about Ramsey arose because of Ramsey’s previous safety complaints. Tr. 195. He also denied that he acted in any way to retaliate against Ramsey for asking for the MSHA phone number, for raising safety issues, or for filing an earlier 105(c) complaint. Tr. 179; 194-95. However, Austin admitted that Ramsey named him as the person who discriminated against him in that earlier complaint. Tr. 167.

On re-direct, Austin admitted that he conducted no investigation of the alleged safety complaints about Ramsey from other employees.²⁴ Tr. 200. Austin first began taking notes on Ramsey after he had been at Vulcan for over a year. Tr. 196. Curiously, while he took notes about Ramsey, he took no notes about the alleged complaints from other miners, nor did he discuss those complaints with Ramsey. Tr. 201. Austin said that even though there were complaints made about Ramsey habitually using his cell phone, he would not necessarily have been able to see such alleged frequent use. *Id.* Yet, he admitted that the one day he claimed to have seen Ramsey using his cell phone was the same day Ramsey asked for the mine ID number so that he could apply as a miners’ rep.²⁵ *Id.* While Austin denied he was “upset” about being named in Ramsey’s previous 105(c) complaint, he admitted he did not like the MSHA inspector showing up at the mine after the complaint. Tr. 196-97.

As noted earlier, while making his video-recording, allegedly showing Ramsey using his cell phone, Austin was standing above Ramsey, on an elevated area. He admitted this was a

²³ In the Court’s view, Ramsey was wise to reject the suggestion that he, Ramsey, go to his pickup truck, retrieve his cell phone and then show it to Austin. This is because, with Austin rejecting the invitation to go to Ramsey’s truck and see the cell phone himself, Vulcan could easily claim that Ramsey had the cell phone with him the whole time. Ramsey’s credible testimony and his cell phone call records each clearly establish that he was not using his cell phone while on the job on December 1, 2015.

²⁴ On re-direct examination, Austin again denied hearing anything about a mine ID or becoming a miners’ rep. Tr. 202. Austin also asserted that he has taken notes on other employees at Vulcan, and believed that there was nothing improper with that practice. *Id.* When the Court asked Austin to clarify the sources and frequency of the employee complaints about Ramsey using a cell phone, Austin stated that he heard complaints about Ramsey from two or three employees, and that these were made a couple of times from each person over the course of a few months. Tr. 203-04. Despite his characterization that those reports described “highly dangerous” activity, he admitted that he took no affirmative steps to investigate or stop this conduct. Tr. 205-06. Last, Austin admitted that the specific behavior shown in the video he recorded was not, in itself, dangerous. Tr. 207.

²⁵ While there was an attempt to repair Austin’s admission, his testimony was clear on the issue.

location where he does not usually go during the work day — in fact, Austin admitted he does not even go there on a weekly basis. Tr. 199. When the Secretary’s counsel asked, “the one day you did see [Ramsey using an electronic device] was the day Mr. Ramsey said he asked for the mine ID so he could fill out his miners’ rep papers; correct?” Austin acknowledged, “yes, it was that day.” Tr. 201.

There were multiple instances when Austin’s credibility was brought into question. For example, near the end of his testimony the Court asked about Austin’s claim that on numerous occasions employees had told Austin that Ramsey had been inattentive while driving his haul truck. Inquiring further about this claim, the Court asked over what period of time the alleged complaints had been made to him. Tr. 203. Austin responded that it had been “a few months” and that “two to three” employees had made the complaints to him about Ramsey’s inattentiveness. *Id.* Austin claimed that these complaints had been made “at least a couple of times per person.” Tr. 204. Having heard, according to Austin’s own count, a minimum of six such complaints, he formed an opinion that this was “highly dangerous” activity. Tr. 205. When the Court then inquired, “yet [the Court’s] understanding is that despite having a minimum of six different reports, you [Austin] took no affirmative action, no steps, didn't write anything up, didn't speak to highers up, didn't speak to Mr. Ramsey ... you took none of those steps, despite having multiple reports of his being inattentive, a highly dangerous activity?” Tr. 205. Austin admitted he did nothing in the wake of all those reports. Tr. 206.

After Vulcan completed calling its witnesses, Austin was recalled. After playing the video of Ramsey in his haul truck from December 1, 2015, Austin revisited the photos and video he took on that date. Tr. 431; R’s Ex. 52. Austin asserted that the images appeared more clearly on his phone than they did on the large screen display in the courtroom and that, with his phone, he could zoom in on the video of Ramsey. Tr. 431-38. Thus, Austin asserted that the image, on his cell phone screen of about three inches by four inches, was much clearer and sharper than the enlargement. Austin denied knowing that any miners regularly brought their cell phones onto the mine site before the safety training in October 2015. Tr. 429. Austin agreed with the Court’s perception that in every photos and video, one can see that the individual pictured has both hands near their lap or waist. Tr. 440-41.

On cross-examination, Austin stated that he was standing at least seven feet away from the edge of the highwall when he took the photo, and that his photos were not cropped in any way. Tr. 441-42. He agreed that the total distance for his video and photos from his location to Ramsey’s haul truck was about 55 feet. Tr. 442. Austin added that when he recorded video of Ramsey, he zoomed in as far as he could on his phone. Tr. 443.

Testimony of Mike LaRue

Mike LaRue is an MSHA safety and health inspector, who has also worked as a special investigator and a fatal accident investigator. Tr. 212. In addition to the MSHA training required to be a special investigator, LaRue’s credentials include an associate’s degree in occupational safety, job-related certifications, and 13 years of experience in underwater construction. Tr. 213.

LaRue met Ramsey around September 2015, while collecting evidence and investigating Ramsey's first 105(c) discrimination complaint²⁶ against Vulcan. Tr. 214. During that investigation, LaRue determined there was a prima facie case — that Ramsey was a miner, that he engaged in the protected activity of making safety complaints to his mine management, and that he incurred an adverse action, for which at least LaRue believed there was a nexus. Tr. 215. LaRue was aware of the incident in September 2015 when Ramsey used his cell phone to speak with his mother while at the mine, and was aware that the mine took no disciplinary action because of MSHA's ongoing 105(c) investigation. Tr. 223-24. LaRue testified that Bill Duran, counsel to the Respondent, made the decision that there would be no discipline for this incident. Tr. 227. To be clear, in no way does the Court infer that Ramsey's first complaint establishes or advances the present discrimination complaint. It does show, however, that there was a history of underlying events between Ramsey and Vulcan. The Court assured Vulcan that the mere lodging of Ramsey's first complaint could not be used by the Secretary to bootstrap the merits of the present complaint. Tr. 216.

A month or two after that, LaRue discussed the process of becoming a miners' rep with Ramsey via phone and e-mail, including topics such as elections, protected activities, and how to complete the required paperwork. Tr. 225-26. Ramsey asked LaRue if he had to inform Vulcan management that he was seeking to become a miners' representative, and LaRue told him he did, because election results would be posted at the mine. Tr. 226. LaRue testified that miners' reps are a relative rarity at Vulcan; it was his belief that out of roughly 20 Vulcan quarries throughout its Southeast district, only two quarries had miners' representatives.²⁷ Tr. 237.

LaRue also looked into Vulcan's cell phone policies and, to the best of his knowledge, at the time of Ramsey's discharge, Vulcan's policies on that subject are contained in Exhibits S-1 and S-2. Tr. 228; Ex. S-1; Ex. S-2. When LaRue reviewed the examples of ETDs listed in the company policy, he noted that all of the devices enable two people to speak to each other in real time. Tr. 232-33. However, LaRue found that an iPod cannot provide any kind of cell service without a Wi-Fi connection. *Id.*

On cross-examination, LaRue described how, after he began his investigation of the instant complaint, he asked Ramsey to bring in both his cell phone and his iPod. LaRue then photographed the two devices side by side. Tr. 239; Ex. S-12. The photographs were taken after LaRue had interviewed management, including Bush and Austin, about the alleged "cell phone incident" that led to Ramsey's termination. Consequently, LaRue did not show either Austin or Bush his photos of the devices, nor did LaRue elect to show any Vulcan management Ramsey's phone records. Tr. 241-49, 252.

²⁶ Ramsey's earlier 105(c) complaint also named Sherrod as a discriminator. Tr. 215.

²⁷ The Secretary presented some testimony through LaRue about cell phone use and miners' reps at other Vulcan properties. Tr. 233-238; Gov. Ex. S 8. The Court twice described this evidence as having "marginal" relevance, a description which remains accurate. The footnote appears because the Court stated that this information of marginal relevance would appear in a footnote in this decision. Tr. 238. This is that footnote.

When the Respondent asked LaRue if Mr. Duran had made a statement to him to the effect that, if there had been a prior written warning about cell phone use, the company would “at least . . . normally take disciplinary action,” LaRue responded, “I believe he referred something to that — yes.” Tr. 255.

Respondent’s Evidence

Testimony of Daniel Bush

Daniel Bush has worked for Vulcan for 23 years, and is a plant manager for the sites in Bristol, Tennessee and Norton, Virginia. Tr. 260. On December 1, Bush got a phone call from Huffman informing that Austin needed him to act as a witness at the Bristol quarry. *Id.* Bush then went to the mine and attended a meeting with both Austin and Ramsey present. Tr. 261-62. Austin told Bush that he had witnessed Ramsey using a cell phone in the haul truck, that Austin confronted Ramsey about that, and that Ramsey would not show the cell phone to Austin. Tr. 261. Bush stated that Ramsey “spoke up and said he [Ramsey] don't have – I don't have a phone, didn't have a phone in the haul truck, I had an iPod, and he [Ramsey] refused to show it.” Tr. 261. During this meeting, which lasted about an hour, Bush observed Ramsey being asked several times to produce “the device” he had used. Tr. 262. At one point, Bush was briefly alone in the room with Ramsey, and asked Ramsey why he wouldn’t just show Austin his phone, or iPod, or whatever he had. *Id.* Bush testified that Ramsey responded, “that’s not the point, you all should just trust me.” *Id.*

On cross-examination, Bush agreed that he conducted training “on a cellphone policy” that consisted of instructions “to keep your personal cellphone off the quarry property.” Tr. 266-67. As a supervisor, Bush granted miners permission to use cell phones in certain situations, such as if there was a family emergency. Tr. 267. Bush admitted that there is no more danger in using an iPod in a vehicle that is not moving than there is in using a radio. Tr. 267-68. On re-direct examination, Bush clarified that miners are supposed to get a manager’s permission before using a cell phone at work during a family emergency. Tr. 269.

Testimony of William Huffman

Mr. Huffman is the health and safety manager for Vulcan’s Central Division, and has held this position for nearly 30 years. Tr. 272. His responsibilities include investigating accidents, reviewing relevant policies and regulations, and overseeing other personnel who are responsible for workplace safety. Tr. 273. Another part of Huffman’s job is interacting with MSHA representatives. Tr. 274.

Although Huffman was not physically present at the Bristol quarry on a particular day in the summer of 2015, he did participate by being present on the telephone during a conference call with Austin and Sherrod that day. Tr. 275.

Through the telephone, Huffman heard Ramsey enter the office in what he described as a violent and threatening manner.²⁸

I heard an individual bust into the room, very violently, I heard a lot of commotion going on... I was in Chattanooga, Tennessee when it happened, and I had two people in the room that I had — it almost sounded like that the next thing we were going to hear was gunshots. I mean, that's how violent it was.

Id.

Huffman responded by introducing himself to Ramsey, and told him,

I had heard what had transpired, and at that point I asked him, he needed to leave because he was very — very upset and I could not see him. All I could do was hear the interaction of what was going on over the phone.

Tr. 276.

Huffman asserted that he also heard Ramsey cursing during the call. But, even by Huffman's version, Ramsey was not all about rambunctious behavior, as Huffman admitted that Ramsey requested the phone number of Vulcan's vice president. *Id.* In return, Huffman told Ramsey the number for Vulcan's Knoxville office, and "asked him to call Jeff May, the Vice President." *Id.*

However, Huffman did not recall if Ramsey made his other request concerning a number for miners' rights, and despite hearing quite clearly Ramsey's alleged contumacious behavior, he added that Ramsey "did not ask [for that information] *that [he] heard.*" Tr. 277 (emphasis added). The next day, he had a discussion with Barrett about his concern that "[Ramsey's] action and the way he came into the room, that he was upset, you know, we had people that were in harm's way, that we felt..." *Id.* Huffman asserted that he was concerned about safety, and not about the request for the vice president's phone number. Tr. 278.

Regarding the incident of December 1, 2105, Austin informed Huffman of what he believed he observed at the mine that morning, and sent Huffman the photo and video he recorded of Ramsey using a device in the haul truck. *Id.* Huffman then called the company's lawyer, Mr. Duran, and asked for his advice. Tr. 279. After conferring with the lawyer, Huffman instructed Austin to question Ramsey as to what he was using in his haul truck. Tr. 280. Austin called Huffman back and informed that Ramsey "was claiming that he was using an iPod." *Id.* He then instructed Austin "to get the iPod - - if there was an iPod, then tell [Ramsey] to put it in

²⁸ Huffman had met Ramsey before this call and it is fair to state that he had a poor opinion of him based on that prior interaction. If believed, Huffman stated that he met Ramsey around December 2014, when he was conducting annual refresher training and that Ramsey fell asleep during the class. Tr. 273-74. It is unnecessary, because of the lack of its importance, for the Court to determine if Ramsey was asleep in Huffman's class. Based on his testimony, recounting his *audio* participation of that summer of 2015 conference call, the Court considered Mr. Huffman to be an exaggerator.

his personal truck and go back to work.” *Id.* Austin did not follow through with Huffman’s instruction. Huffman maintained that Ramsey’s suspension was motivated by the events of December 1, and not the prior discrimination complaint. Huffman admitted that he was aware of the prior 105(c) complaint. Tr. 282.

On cross-examination, Huffman stated that prior to Ramsey’s suspension there had been no conversations among management about whether the use of an iPod was permitted under company policy. Tr. 284-85. He also agreed that even at the time of his testimony it was not yet settled whether iPods are currently prohibited at Vulcan’s mines.²⁹ *Id.*

Huffman admitted that the entire conference call he overheard concerning the lock and key incident, which call he found to be so threatening, lasted about *one minute*. Tr. 287. Though Huffman testified that he looked up the number to call the police in Bristol, Tennessee, despite his dramatic recounting, *he did not call the police about Ramsey*. Tr. 286. On cross-examination, Huffman agreed with the Secretary’s counsel that during his deposition he indicated Ramsey did, in fact, mention miner’s rights. Tr. 287. Further, while Huffman agreed during his hearing testimony that Ramsey *did* request the telephone number for Vulcan’s vice president during the conversation, this was at variance from his deposition two weeks earlier. He explained his contradictory testimony because he “was confused between the miners’ rep number and --during the deposition we talked a lot about different 800 numbers.” Tr. 286. Pressed, he then admitted that when deposed he claimed Ramsey did not ask for the number. Tr. 287. Continuing with the lock and key incident, Huffman admitted that it was never determined that the lock belonged to Ramsey. A window into where Huffman was coming from, when asked whether he agreed that it was never determined that Ramsey misled Vulcan, Huffman could only admit, “[n]ot conclusively, no.” Pressed about his indefinite response, Huffman then admitted, Vulcan “had no evidence that would say that it was his or it wasn’t his lock.” Tr. 288.

Regarding Ramsey’s suspension letter in connection with the lock and key investigation, Huffman admitted that he had input into the letter in that he was “not very happy” with what Austin and Sherrod “had to undergo” from Ramsey’s behavior. Tr. 289; Ex. S-4. However, Huffman also informed that “John Sherrod probably was the person that inputted the most, because he was on the scene.” It should be recalled that Sherrod, the one who put his finger in Ramsey’s face, was certainly *on the scene*, as he acted as the chief interrogator.

Although Huffman told Barrett that he was worried about gunshots and was ready to call the police, and that he would call the police if Ramsey returned to the mine that day, that information does not appear in the suspension letter. Tr. 290. Despite his great fears, Huffman stated that he did not participate in discussions about the discipline Ramsey would receive for any infraction related to the July 2015 event. *Id.*

On the topic of the December 1st video Austin sent to Huffman, at the hearing Huffman scuffled in his response, stating at first that he could hardly see anything from the video, but that was “when [he] couldn’t open it.” Tr. 293. He then offered that “when [he] finally viewed it at a

²⁹ Huffman also agreed that Exhibit S-2 is a “more abbreviated version of the policy contained in Exhibit S-1. Tr. 283.

larger version, [he] could see it looked and appeared to be a cellphone in his hand, and [he] could see, you know, how you scan through on a [sic] iPhone or whatever.” Tr. 292. Having viewed the video itself, the Court was amazed at Huffman’s capacity for discernment, inquiring “You saw all that on the video?” Tr. 293. Huffman affirmed he could indeed see all that. *Id.*

Huffman admitted that Austin had the authority to stop Ramsey from doing anything unsafe, and was in fact required to do so. Yet, he gave no such instruction to Austin to have Ramsey stop his alleged cell phone use. Tr. 294.

In Huffman’s opinion, using an iPod is similar to using a radio, which Vulcan does allow truck drivers to do. Tr. 295. However, Huffman was unwilling to take Ramsey at his word because, “*Austin believed he had a cellphone.*” *Id.* (emphasis added). Huffman admitted he does not know of anyone at Vulcan who has been disciplined for the use of an iPod, aside from Ramsey. Tr. 301. He also clarified that Ramsey was terminated for “use of an electronic device,” and *not* for refusing to show management his iPod. Tr. 297.

Regarding miners’ representatives, Huffman admitted that, to his knowledge, there is only one mine in Vulcan’s Central Division with a miners’ representative: the Green Rivers quarry in Kentucky. Tr. 298. Huffman admitted that, although Vulcan’s training may mention miners’ reps while covering miner rights and responsibilities, there is no specific training on how to become a miners’ representative. Tr. 299-300. Huffman himself does not encourage any miners to become a representative in that he doesn’t “go out and talk about [that].” Tr. 300. It was his testimony that he only learned that Ramsey was trying to become a miners’ rep after December 1, 2015. Tr. 297-98.

On re-direct examination, Huffman reiterated his lack of discriminatory intent and testified that Vulcan is very reluctant to search the personal belongings of a miner without permission, including a lunchbox, even if there were suspicion of a miner having weapons, drugs, or alcohol.³⁰ Tr. 305-06.

Huffman maintained that Ramsey was not disciplined for using an iPod. Tr. 301. It was Huffman’s view that Ramsey had the burden to prove his innocence, not that Vulcan had to prove he in fact had a cell phone that day. As he expressed it,

In my mind if you can't show what you say that you've got... the way that I saw that was *if you can't produce what you're saying you've got*, you're not willing to do that, then what we saw or what we felt at that time, was he was using an electronic device such as a cellphone while he was working.

Tr. 304 (emphasis added).

In response to the Court’s inquiry whether it’s “true that at any time any management person at that site could walk over to that truck and examine it and anything that's in it, because

³⁰ Huffman did not address the fact the Ramsey explicitly invited management to come with him to his pickup truck so that it could be established by Vulcan itself that his cell phone was in his personal truck.

it's Vulcan's truck; correct?," Huffman responded, "That is correct." Tr. 304-05. Huffman admitted that Vulcan never took the action it had the authority to take, agreeing that "even if Mr. Ramsey said I refuse to let you look in the truck, you could totally overrule that and look in that truck, from one end to the other; correct?" Huffman affirmed, "That is correct, Judge." Tr. 305.

The Court considered Huffman's testimony to be dubious.

Testimony of Edward Barrett

Mr. Barrett worked for Vulcan for over 19 years; but he had retired from its employment prior to the hearing in this matter. Tr. 310-11. Barrett has a secondary degree in industrial labor relations. Tr. 312. His career in human resources includes "36 years on the employer's side and eight years on the union side." Tr. 311. At the end of his career, Barrett was the vice president of Human Resources for Vulcan's Central Division. *Id.*

Barrett reviewed "some videos of Mr. Ramsey operating the vehicle that had been obtained by Mr. Austin ... Mr. Ramsey's record, his situation with prior discipline, and [with that information he] made a determination that the appropriate course of action under the circumstances was termination." Tr. 314. Barrett was then involved in drafting the notice of termination discussing these topics, which ultimately requires approval of a VP-GM level, senior manager. Tr. 315.

Barrett testified that he concluded Ramsey should be terminated because,

he had full knowledge of the policy, he had received that policy when he was employed, he was disciplined for that -- for a violation of the policy in October of '13. He was trained on the policy in the course of our open enrollment, refresher training in late October of 2013.

Tr. 316.

Barrett also stated that Ramsey would not have been fired if this had been his "first offence," but stated that his "prior record" justified the discharge. Tr. 319. The prior record referred to by Barrett was the instance where Ramsey, in Barrett's words,

basically lied to... Austin about possessing a cell phone on the premises... only after he was confronted with the fact that his mother had called the plant office saying [she] got cut off from [her] son [did] he admit to Keith [Austin] that he actually did have a cellphone in the [work]vehicle and he... was given a written warning.

Tr. 317; R's Ex. 13.

In Barrett's account, management chose to discharge Ramsey because, "basically it was a repeat situation." Tr. 320. Barrett admitted that he was not at the site personally for any of the events he recounted concerning Ramsey and that, apart from Austin's video, he conceded that "[a]nything [he] learned was what other people at Vulcan were telling [him]." Tr. 322.

Although Barrett testified that he believes it is safe to use haul truck radios while working because “they’re actually installed in the vehicle,” he stated that Vulcan’s policy bars the use of “any type of electronic device that would distract the employee.”³¹ Tr. 324-25. Barrett stated that the company handbook provides for a progressive system of discipline, yet it also states that Vulcan may terminate an employee for a first offense “depending on the severity of the infraction.” Tr. 334. Finally, Barrett denied that his decision to terminate Ramsey was motivated by his previous safety complaints, contending that he did not know about them at that time. Tr. 325-26. However, Barrett did admit that he was aware as of December 1, 2015, that Ramsey had filed a prior discrimination complaint. Tr. 325.

On cross examination, Barrett testified that the usual steps that Vulcan takes in disciplining an employee are: a verbal warning; a written warning; a suspension; and then termination. Tr. 339-40. He advised that Vulcan’s policy is that discipline only stays on an employee’s record for one year, so the October 2013 warning contained in Exhibit R-6 should no longer have been in Ramsey’s record by December 2015. Tr. 337. Yet, Barrett equivocated on the issue of whether the October 2013 warning played a role in the decision to terminate Ramsey, saying it was not used “directly,” but it did show “awareness of the policy.”³² Tr. 337-38.

Although Barrett could not “recall a specific case” where a Vulcan employee was given a final warning as a first disciplinary step, he asserted that among Vulcan’s 1200 employees and 60 facilities he was “sure” he could find an instance where that occurred. Tr. 341-42. However, assurances aside, no actual example was provided by Barrett. He also testified that Vulcan has a general rule known as the “day in court” rule, meaning that an employee will not be disciplined “without an opportunity to sit down and speak with someone” about their side of the story. Tr. 343. However, Barrett added that this was not a “written policy,” but rather only a “general rule.” Tr. 342. He further qualified that Vulcan’s “day in court” general rule does not necessarily mean that a miner would have the opportunity to tell their story to someone not directly involved in the incident. Tr. 343-44.

Barrett also made inconsistent statements on the issue of whether Ramsey was terminated in part due to “lack of cooperation” during the December 2015 cell phone incident. Barrett testified at hearing that the lack of cooperation was not “a direct factor,” yet he denied that the lack of cooperation was “not a significant factor at all.” Tr. 347. He then agreed that, during his deposition testimony, given only one week before the hearing, he stated, “[he] didn’t consider that [lack of cooperation] a significant factor. *Again, we focused on the what [sic] [Ramsey] had been doing when he was operating the truck.*” Tr. 348 (emphasis added).

The Court would comment that Barrett’s conclusion and recommendation were built on the premise that Ramsey was in fact using his personal cell phone while on the job on December

³¹ This is at odds with the Respondent’s stated position in this matter.

³² The Secretary contended that, since Ramsey was re-trained on the ETD policy in 2015, the 2013 warning was not relevant to showing his knowledge of the policy. Tr. 339.

1, 2015. The Court has found that Ramsey did not use his cell phone on the job that day. Working as he was from that defective premise, Barrett's testimony must be disregarded.

Testimony of Glen Lunsford and Tommy Leonard

Glen Lunsford has been working at Vulcan's Bristol plant for 42 years, with the last 15 to 20 years of that time as a haul truck driver. Tr. 364. Lunsford is an hourly worker with no managerial duties. Tr. 368. He testified of becoming concerned about Ramsey using a cell phone while driving his haul truck. That conclusion, that Ramsey was using a cell phone, was made because on occasion he saw Ramsey looking down at his lap while driving a haul truck. While Lunsford admitted that he "didn't have no idea what [Ramsey] was doing," that behavior, Ramsey looking down at his lap, made him suspicious that Ramsey was using a cell phone. Tr. 365. Lunsford later reaffirmed that he didn't know if Ramsey had a cell phone in his truck, only that Ramsey was doing something with his lap. Tr. 368, 375. According to Lunsford, Ramsey's looking down while driving his haul truck made him afraid for his safety and he told Austin of his fear.³³ Tr. 366.

Tommy Leonard has been working at the Bristol quarry for 40 years. He operates an excavator. Tr. 377. Like Lunsford, Leonard is also an hourly employee with no managerial duties. *Id.* Leonard stated that, while loading Ramsey's haul truck, he could see Ramsey was "playing with what [he, Leonard] thought was a phone." Tr. 378. It was his testimony that he could observe Ramsey's behavior through Ramsey's side view mirror. Tr. 379. Leonard, like Lunsford, reported his concerns to Austin. Tr. 380.

Leonard recounted the same information about the safety meeting, and recalled there being a few meetings in 2015 where management mentioned cell phones. Tr. 383-84. On the issue of actually seeing Ramsey possessing or using a cell phone, Leonard admitted that he never saw Ramsey holding a cell phone up to his ear, as if to talk with someone. Tr. 387.

In an obvious attempt to diminish that Ramsey had raised safety issues to Vulcan's management, Leonard stated that "everybody" at the quarry would bring up safety complaints. Tr. 385. However, Leonard's claim contradicted his own deposition testimony on this issue. At his deposition, Leonard said that Ramsey was the only person he knew who made safety complaints to management. Tr. 385-86. With his contradictory claims exposed, Leonard then responded that he had misunderstood the question during his deposition. On re-direct examination, Leonard claimed that he may have heard other people talking about Ramsey using a cell phone in the haul truck. Tr. 389. On re-cross examination, Leonard admitted that he knew

³³ Interestingly, Lunsford, speaking to his awareness of Vulcan having a policy against using cell phones, stated he "didn't really know it was a policy until later." Tr. 368. It was only when Austin held a safety meeting one morning *in the fall of 2015* telling the employees not to have their cell phones in the mine vehicles, that he stopped bringing his cell phone in his haul truck. Tr. 371-72. Ironically, Lunsford admitted that he has used his cell phone at work, "[w]hen [his] wife called [him]." *Id.* That use, in the Court's estimation, is hard to distinguish from Ramsey's call with his mother.

Ramsey had made safety complaints and talked to other miners about safety, but did not recall any details about these complaints. Tr. 390.

Thus, both Lunsford and Leonard stated that they confronted Ramsey and told him to stop using his phone while working before he got caught by management.³⁴ Neither could recall what, if anything, Ramsey said in response to the concerns they allegedly raised to him. Tr. 369; 382. The Court did not consider either Lunsford or Leonard to be especially credible.

Testimony of Benjamin Cate

Mr. Cate is an area manager for Vulcan, and supervises the managers of 12 plants, including the Bristol quarry. Tr. 392-93. He has held this position since 2010, and has worked for Vulcan for 31 years. *Id.* Although Cate met Ramsey briefly during a meeting at the Bristol quarry, he was not at the plant on December 1, 2015. *Id.* Cate heard secondhand about the “phone incident” that day, watched the video that Austin recorded, and personally believed that Ramsey had a cell phone based on how Ramsey “was holding his hand and looking at it.” Tr. 396. Cate told Barrett that he thought Ramsey should be terminated. Tr. 397. He denied, as each of Vulcan’s witnesses who spoke to the subject dutifully denied, that the decision to terminate was motivated by Ramsey’s previous safety or discrimination complaints. *Id.*

On cross-examination, Cate admitted that he played no role in preparing Exhibit S-7, the termination letter, and stated that he never prepares disciplinary documents. Tr. 398. Cate also agreed that he said he did *not* make a *recommendation* about the discipline that Ramsey should receive. Tr. 399. On re-direct examination, Cate offered an interesting perspective about his participation, as he perceived a nuanced difference between telling Barrett what he believed should be done and making a recommendation. Tr. 399-400. As Cate, an apparent wordsmith, explained to Vulcan’s attorney, the Secretary’s attorney asked if he made a *recommendation* about the discipline for Ramsey, whereas he only gave his *opinion* on the subject. Tr. 399. The reader can glean the Court’s estimation of the value of Cate’s testimony.

³⁴ This struck the Court as an oddity, which diminishes their credibility, and not simply because the witnesses’ testimony paralleled one another. Consider this: we have two witnesses who were *ostensibly concerned about Ramsey getting caught by management* while using his cell phone and yet they are the ones who *reported to management, informing Austin about the alleged conduct*.

Other Testimony

Several other witnesses testified for the Respondent about the practices that Vulcan employs regarding authorizations to use cell phones at other quarries in Cleveland, Tennessee and Athens-Sweetwater, Tennessee.³⁵ Tr. 401-11.

Testimony of Amy Reese

Ms. Reese is Vulcan's Human Resources supervisor, and has been with the company for 28 years. She has 15 years of experience with the Human Resources team, and has been a supervisor for about a year and a half. Tr. 413. Reese conducted presentations on the Respondent's new employee handbook, which addressed ETDs. Tr. 414-15; Ex. S-2. Because this was a new policy, she included two slides about the policy in her presentation. Tr. 415. Reese testified that Ramsey was present at the Bristol quarry training on October 29, 2013, which she knows in part because HR asked employees to sign sheets acknowledging receipt of the handbook. Tr. 415-18. Ex. R 50, and 51. On cross examination, Reese clarified that Vulcan's policy on cell phones appeared in a policy memo, and was only included in the employee handbook in October 2013. Tr. 423. The Court would comment that this testimony added nothing to the central issues in this matter.

Testimony of Russell Scott Powers

Mr. Russell Scott Powers was also called as a witness for the Respondent — he is the foreman at the Bristol quarry, and has worked for Vulcan for 18 years. Tr. 425-26. Austin is Powers' direct supervisor, and Powers knows Ramsey. *Id.* Powers, though acknowledging awareness that Ramsey had some family medical issues, affirmed that it would be fair to say that he did not remember giving Ramsey approval to carry his cell phone in his, (i.e. Ramsey's), haul

³⁵ Except perhaps to point out that Vulcan's policy on cell phone usage is not uniform across its many operations, the value of testimony from Vulcan witness Steve Vickery was elusive. Vickery is the plant manager for a Vulcan plant in Cleveland, Tennessee. Apparently called to speak to his practice for cell phone use at his mine site, Vickery stated that he has authorized that certain people could have their cell phones as long as they use them in a safe practice and that it is his understanding that Vulcan's policy permits such use. Tr. 403. Upon cross-examination, Vickery stated that 7 people are authorized to use cell phones at his Vulcan plant, all of them being hourly employees. Tr. 404. The only restriction placed on cell phones is that they are not to be used while they are "operating." *Id.* Equally elusive was the testimony Vulcan offered from "lead man" Allen Stewart, an hourly employee, who accompanied Inspector LaRue during an inspection of the Athens-Sweetwater quarry in July 2015. Tr. 406. At one point, while a third party was waiting for a phone call, Stewart made a statement to LaRue that "everyone knows we ain't supposed to have these phones and stuff... but sometimes it's the best means of communication that we got." Tr. 407. By Stewart's account, LaRue then told him to stop talking about that. *Id.* Stewart knew of two employees at his quarry who have special authorization from his boss, Mr. Jason Perry, to carry cell phones. *Id.* Martin Jason Perry was next up for Vulcan's witnesses. Perry is the plant manager for another Vulcan plant, this one in Athens-Sweetwater. Offering testimony even more attenuated than that of Vickery or Stewart, Perry stated that cell phones may be used for potential family emergencies. Tr. 411.

truck. Tr. 427. Powers also stated that employees with family emergencies are supposed to use the office phone to take calls. Tr. 428.

Mine Act Discrimination Claims

This discrimination complaint was brought under section 105(c)(2) of the Mine Act, alleging a violation of section 105(c)(1), which states, in relevant part:

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner [or] representative of miners . . . because such miner [or] representative of miners . . . has filed or made a complaint under or related to this chapter, including a complaint notifying the operator or the operator's agent at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine.

30 U.S.C. § 815(c).

As the Commission stated in *Jaxun v. Asarco*, “[t]he Mine Act, the Administrative Procedure Act (‘APA’), and the Commission’s Procedural Rules permit a Complainant to proceed with an action under section 105(c)(3) of the Mine Act without representation.” *Jaxun v. Asarco, LLC*, 20 FMSHRC 616, 620 (Aug. 2007).

The legal framework for assessing discrimination claims brought under the Act is well-established and clear. A complainant may establish a prima facie case by showing “(1) that he engaged in protected activity, and (2) that he thereafter suffered adverse employment action that was motivated in any part by that protected activity.” *Pendley v. FMSHRC*, 601 F.3d 416, 423 (6th Cir. 2010). The complainant bears the ultimate burden of proving these elements by a preponderance of the evidence. *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).

Protected activity often takes the form of complaints made to the operator or its agent of an “alleged danger or safety or health violation. 30 USC § 815(c)(1). Often, the Court will be called upon to consider indirect evidence of a discriminatory motivation for the adverse action. The Commission has stated that “[d]irect evidence of motivation is rarely encountered; more typically, the only available evidence is indirect.” *Sec’y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981), *rev’d on other grounds*, 709 F.2d 86 (D.C. Cir. 1983). Where direct evidence of motivation is unavailable, the Commission has identified several indicia of discriminatory intent, including, but not limited to: “(1) knowledge of the protected activity; (2) hostility towards the protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the complainant.” *Turner v. Nat’l Cement Co. of Cal.*, 33 FMSHRC 1059, 1066 (May 2011) (citing *Chacon*, 3 FMSHRC at 2510). When considering indirect evidence, the Court may draw reasonable inferences from the facts. *Id.*

An adverse action is any “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). An adverse action must be material, meaning that the harm is significant rather than trivial. In determining whether adverse action has occurred, the Commission applies the test articulated in *Burlington North v. White. Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006); *see also Sec’y of Labor on behalf of Pendley v. Highland Mining Co.*, 34 FMSHRC 1919, 1931 (Aug. 2012).

If a complainant establishes the required elements, the burden shifts to the operator to rebut the prima facie case by showing “either that no protected activity occurred or that the adverse action was in no part motivated by protected activity.” *Driessen v. Nev. Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998).

An operator who cannot rebut the prima facie case may still raise an affirmative “mixed motive” defense by proving that the adverse action was motivated only in part by protected activity, and it “would have taken the adverse action for the unprotected activity alone. *Haro v. Magma Copper Co.*, 4 FMSHRC 1935 (Nov. 1982). The operator must prove this defense by a preponderance of the evidence. *Id.*, *see also Pasula*, 2 FMSHRC at 2799-800. When evaluating an affirmative defense, the Court follows the two-step analysis outlined by the Commission in *Chacon v. Phelps Dodge. Sec’y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508 (Nov. 1981). The first step of the *Chacon* analysis directs the Court to determine whether “the justification is so weak, so implausible, or so out of line with normal practice that it was a mere pretext seized upon to cloak discriminatory motive.” 3 FMSHRC at 2516. If the Court finds that the justification is *not* pretextual, it then moves to the second step, which is a “*limited examination*” of the justification’s substantiality, and assesses the narrow question of “whether the reason was enough to have legitimately moved that operator” to engage in the adverse action.” *Id.* at 2516-17.

Discussion

As noted, the Court fully considered the parties post-hearing briefs. A few comments about those submissions are made here, followed by the Court’s further discussion of this case.

The Court agrees with the Secretary’s remarks summarizing Ramsey’s invocations of protected activity to include his safety complaints, all made to Austin, as fully discussed above. The lock and key incident is also important because it reveals that Vulcan, acting through Austin and Sherrod, had an animus toward the safety-active Ramsey. There is no reasonable explanation to justify Vulcan’s many interrogations of Ramsey regarding the lock and key incident. Austin and Sherrod effectively goaded Ramsey through the use of the multiple questioning sessions, asking repeatedly about the same issues. Sherrod, in particular, so shocked that Ramsey, having had enough, would swear as a means of venting because of the repetitive harangues, was hardly a model of professionalism. As has been noted, he characterized Ramsey’s answers as a “fairytale” and aggressively put his finger in Ramsey’s face. Even after serving his three-day suspension, a suspension which the Court considered to be unwarranted, Ramsey was interrogated again. It is noteworthy that Ramsey was never disciplined on the basis of any

violation of the mine's lock out/tag policy, nor was any employee, except Ramsey, disciplined in connection with that matter.

Following the issuance of the Final Warning and Disciplinary Suspension, Ramsey stood up to the unwarranted suspension by having the courage to file a 105(c) complaint against Vulcan. In the Court's estimation, that protected activity, filing a discrimination complaint, made Ramsey more of a marked man, as did Ramsey's making it known to Vulcan that he would be applying to MSHA to become a miners' representative. It was no happenstance that, on the same day Ramsey reiterated that intention, by seeking the mine's identification number so that his miners' application could be completed and submitted, Austin elected to surveil Ramsey from atop a high wall, peering down some 50 feet below and recording what he believed was Ramsey using a cell phone in his haul truck.

Thus, the Court concludes that the Secretary well met its burden, under the preponderance standard, having established both that Ramsey engaged in protected activity, and that Vulcan's adverse action was motivated by that activity. Vulcan had knowledge of Ramsey's protected activity, displayed hostility towards it, and the adverse action occurred close in time to that protected activity.³⁶

The Secretary, addressing the December 1, 2015 event, contends that there was no unprotected activity that could justify Ramsey's firing. The ostensible unprotected activity put forward by Vulcan was use of a personal cell phone in violation of its electronic communications policy. As noted, the Court finds that the evidence does not support, at all, that Ramsey was in fact using his cell phone while on the job on December 1, 2015. It is clear that Ramsey was using an iPod on that date. Ramsey's cellphone records support that he was not using his cell phone on

³⁶ The Secretary asserts that Vulcan disciplined Ramsey in a "disparate manner" by issuing a final warning and suspension with regard to the missing key incident, which essentially provided that any kind of transgression on Ramsey's part in the next year, including any form of "problem performance" would cause him to be fired. Ex. S 4. The Secretary's point is that Vulcan simply discarded its "progressive discipline policy" for Ramsey. Sec. Br. at 16-17. Although Vulcan asserted that it can go outside of the progressive discipline steps for serious violations, the Secretary provided a litany of workplace failures for which only written warnings were issued even though, on their face, those failures were more serious. Perhaps the most glaring example of a disciplinary process that seems to operate on a chaotic whim is that involving an employee who was "given a non-disciplinary warning for bringing a firearm to work in direct violation of a Vulcan written policy. Ex. S-18 at RESP 0120." *Id.* at 18. In fact, Barrett, Vulcan's former vice president "for human resources, could not think of any case involving another employee who was given a final warning as the first step in the disciplinary process." *Id.* at 18, citing Tr. at 341-42. Apart from these observations, the Court is of the view that Vulcan's actions on December 1, 2015 are themselves more than sufficient to establish its discriminatory behavior toward Ramsey.

that date during his time on the job. Vulcan's policy does not prohibit the use of iPods. Neither Vulcan's Division Policy nor its Handbook prohibits the use of an MP3 player,³⁷ such as an iPod.

Regarding Vulcan's post-hearing briefs, Vulcan begins with the claim that Ramsey's claim should fail because he "failed to demonstrate that there was a causal link between his protected activity and the termination of his employment which is sufficiently close in time to justify an inference of discrimination on the part of Vulcan's personnel." R's Br. at 1. This is hardly worth comment – Ramsey's protected activities were cumulative and, certainly with regard to his initial complaint of discrimination, and his effort to file as a miners' representative, those actions were, undeniably, sufficiently close in time to draw the inference. In fact, speaking just to the morning of December 1, 2015, Ramsey's protected activity seeking the information to file his miners' representative application was contemporaneous with the day he was, for all practical purposes, fired. Vulcan, for good reason, rapidly moved to its alternative stance that, even if there is a link, the evidence shows Ramsey's firing was in no part motivated by any protected activity. *Id.* To the contrary, the evidence shows that, as Vulcan never established that Ramsey was using his cell phone while on the job operating his haul truck on December 1, 2015, Ramsey's firing can only be explained as being motivated by his protected activity.

In what the Court finds to be a peculiar stance, Vulcan asserts that in determining whether or not the Complainant actually possessed a cellular phone while in the haul truck in question on December 1, 2015, the analysis of this case should not be driven by hindsight, which necessarily includes information to which Vulcan was not privy when its supervisors, in real time, had to address the repeated, obstinate refusals by the Complainant to comply with the reasonable request of Mr. Austin to show him the electronic device that he had used in the haul truck.

Id. at 1-2.

In the Court's estimation, another way to express Ramsey's "obstinate refusals" is that Ramsey refused to prove his innocence. While Vulcan had full authority to search Ramsey's haul truck and had been invited repeatedly by Ramsey to search his pickup truck, Vulcan refused to exercise those available options. The Court has already expressed that Ramsey wisely did not take the bait to produce the device. Failing that strategy, with no proof that Ramsey was using a cell phone that day, Vulcan would have the case turn on whether its personnel *believed* that Ramsey was using a cell phone while in the mine's haul truck. *Id.* at 2.

Apart from their central contention — Vulcan's *belief* that Ramsey was using his cell phone on December 1, 2015 — Vulcan refers to an event more than two years earlier, in October 2013, when it issued Ramsey a written reprimand for talking on a cell phone while at work. R's Br. at 4. They use this relatively ancient event to bootstrap the claim that it was a violation to have or use a cell phone in his haul truck, and that Ramsey knew of the policy, although even

³⁷ The Secretary makes the point that, if an iPod was prohibited, it would have made no sense for Vulcan to interrogate Ramsey so many times, as he told them he was using an iPod. The record is teeming with references that Vulcan's policy applied to cell phones alone.

Vulcan admits that only “partially” supports its claim that Ramsey violated the policy on December 1, 2015. This argument confuses whether Ramsey *knew* of the cell phone ban policy *with whether he actually violated the policy on that December 2015 date*. In fact, Ramsey never contended that he didn’t know of, nor that he didn’t understand, the policy regarding cell phone use at the mine. Therefore, such points on the part of Vulcan are non-issues here. Again, the evidence is that Vulcan never established that Ramsey was using his cell phone in his haul truck that day, and no amount pointing to other issues changes that.

Vulcan’s brief then turns to the “lock out –tag out” incident. Although the Court has discussed this at some length already, a few points are worth revisiting. Vulcan’s issue with this incident, in which Ramsey admits that he lost a key to a lock, is that “[d]uring the second interview, management officials concluded that Complainant was uncooperative, gave silly and disrespectful answers to questions, and used profanity and made comments which they felt were threatening in nature.” R’s Br. at 5. Vulcan then contends that “[a]fter these interviews, Complainant burst into Mr. Austin’s office and demanded the telephone number for the Vice President of Vulcan and the ‘miners’ rights’ telephone number while Mr. Sherrod and Mr. Austin were on a conference call with Mr. Huffman.” *Id.* at 5-6. For proof of their claim of Ramsey’s outrageous behavior, Vulcan points to the testimony of Mr. Huffman. It needs to be pointed out that Mr. Huffman was not even present in Austin’s office when the alleged behavior occurred. He was only on the phone. A poor prognosticator, Huffman dramatically testified that he “feared that the next sound he heard would be gun shots.” *Id.* at 6. Suffice it to say, there were no gun shots fired, nor was there even a gun present. At any rate, the upshot of the lock and key tale was that Ramsey “received a Final Warning and Disciplinary Suspension for his ‘abusive and harassing conduct’ and for failing to abide by Vulcan’s policy regarding compliance and cooperation with a company investigation.” *Id.* The tape (or more accurately the recording) of claimed abusive and harassing conduct tells the tale, so to speak, and it does not establish such conduct. Noteworthy also is that it was Ramsey who recorded the session, not Vulcan.

While the Court appreciates the role of full-throated advocacy, and respects the effort Respondent’s Counsel put forth in that regard, that does not mean that hollow arguments should be presented. One such example is Vulcan’s assertion that the “Complainant was warned about his pattern of tardiness.” *Id.* at 7. By that claim, Vulcan’s idea of tardiness is not just to show up for work on time but rather to be at work before the day begins. Of course, Vulcan does not point to such a requirement in its work policy, nor did it advise that employees are paid for starting work early. Vulcan also points to the September 11, 2105 cell phone incident in which Ramsey used his cell phone to contact his mother. *Id.*; Ex. S-5. The point of this incident is difficult to fathom, as Vulcan did not use the event as part of its justification for firing Ramsey. If, for the sake of argument, it demonstrates an instance of Ramsey violating the cell phone policy at that time, it does not excuse Vulcan’s failure to show that Ramsey used his cell phone on December 1, 2015.

Arriving in its brief at the event which prompted Vulcan to terminate the Complainant, Ramsey’s, alleged, conduct of using a cell phone on December 1, 2015, while he was operating a mine haul truck, the problem with Vulcan’s theory is that it presents the same deficiency noted

earlier — Vulcan’s claim of Ramsey’s cell phone use was never credibly established, though *in theory* it was completely within their ability to irrefutably make their case. Clearly, Vulcan wanted to avoid finding out that Austin was wrong. Thus, it is not surprising that Vulcan declined Ramsey’s invitation, permitting them to establish that their claim was valid. It is undeniable that Vulcan had full authority to inspect the haul truck, and Ramsey encouraged them to search his personal pickup truck by affording them permission to conduct such a search. Respondent effectively concedes it has no proof that Ramsey was using his cell phone on that date, acknowledging that Austin “believed that handheld electronic device to be a cell phone.” R’s Br. at 8. As Vulcan expresses it,

the critical issue is whether Vulcan’s personnel *believed* that Complainant had violated Vulcan’s policy at the time in question when Keith Austin and other management personnel concluded that Mr. Ramsey used a cell phone while in the haul truck in violation of Company policy. The credible evidence demonstrates that Mr. Austin and other management officials *sincerely held this belief* at the time in question based upon what they knew at the time.

Id. at 13-14 (emphasis added).

Vulcan expresses this unusual position, that Vulcan *believed* Ramsey was using a cell phone in the mine’s haul truck, as a “fully plausible” conclusion. *Id.* at 15. Again, mere belief is not enough, particularly where, if Vulcan really believed its claim, such proof, in theory, was readily at hand.

To remove any doubt that Vulcan’s position is that belief, not proof, can carry the day, Vulcan, acknowledging that the Court might conclude that “the device that Mr. Ramsey had in the haul truck on December 1, 2015, was in fact an ipod and not a cell phone,” submits that issue

is not the material issue for decision in this case; rather, the critical issue is whether Vulcan’s personnel actually believed that Complainant had a cell phone in the haul truck on the day in question. So long as such belief was sincerely held and was plausible, it is **not** material whether it was shown to be correct as a factual matter through the hearing process.

Id. at 16 (emphasis in original).

Vulcan’s position would have its belief overtake the facts. In taking that stance, Vulcan asserts that for the Commission to “substitute its own justification for disciplining the miner,” amounts to imposing its own business judgment over the operator’s actions.” R’s Br. at 17. This is nothing more than an attempt at legerdemain, because it tries to divert attention from the Court’s determinations as to what the evidence established, *and what it did not establish*, as augmented by its credibility determinations.

Even Vulcan’s citation to *Cumberland River Coal Co.* and its quoting from that Court’s observation that “ ‘[i]n examining the mine operator's justification for terminating a miner, the court must examine ‘whether the reasons are plausible, whether they actually motivated the operator's actions, and whether they would have led the operator to act even if the miner had not

engaged in protected activity,” draws the incorrect conclusion from that decision, because it claims that the Commission “is limited to a ‘restrained’ examination of the mine operator's justification and may not insert its own justification.” *Id.* at 17, citing *Cumberland River Coal Co.*, 712 F.3d 311 (6th Cir. 2013). However, the mine’s justification must be sound and supported by facts, not beliefs, sincere or invented.

In Vulcan’s Response Brief it notes that the Court determined at the hearing that the Secretary can’t build its case on the predicate events regarding the lock and key incident. Response at 1, citing Tr. 217. That remains true: the Secretary had to prove that Vulcan’s firing of Ramsey was based on his protected activity and that a nexus was established between them. The Secretary met those burdens. However, the Court would note that doesn’t mean that those earlier events are to be ignored entirely, as they provide informative context for the event which Vulcan used to fire Ramsey. Therefore, the Court does not agree with Vulcan’s claim that Ramsey did not engage in protected activity in July 2015, when he asked for the telephone number for the vice president of Vulcan, and for the telephone number for the “miners’ rights.” *Id.* at 2. Certainly, as to the latter request, it was protected and the Court rejects Vulcan’s claim that Ramsey’s request for that information was “because he was ‘just tired of being interviewed.’” *Id.* at 3.

Although Vulcan has urged that the Court put aside the lock and key incident, it cannot resist assailing Ramsey’s earlier filed mine act discrimination complaint of August 2015. That first-filed complaint was precipitated by the lock and key incident, but in the context of his second discrimination complaint, the matter at issue here, Vulcan asserts it has refuted any “inference of a causal link between the two events.” Response at 7. It theorizes that if Vulcan wanted to retaliate against Ramsey for filing his first discrimination complaint, it could have acted against him for the September 2015 cell phone incident involving the circumstances of a call between Ramsey and his mother. Vulcan asserts that its forbearance over the September 2015 event, coupled with the “approximately two more months beyond [the September] incident, weakens any possible inference of a discriminatory motive.” *Id.* at 7-8. The Court does not share Vulcan’s characterization of those events. To the contrary, weak or strong, Vulcan would have had an aversion to disciplining Ramsey in September, coming on the heels of his first discrimination filing. By December however, it may have concluded that a sufficient interval had passed to inoculate it against the appearance of retaliating against Ramsey for his August discrimination complaint.

Implicitly recognizing the weakness of its argument, Vulcan asserts that its decision to fire Ramsey was in no part motivated by his earlier discrimination filing and returns again to its claim that Vulcan managers’ believed that Ramsey was using his cell phone on December 1st. Vulcan states that Ramsey’s only protected activity on that date was his request for the mine’s identification number. To deal with that, Vulcan claims that Austin “testified unequivocally” that Ramsey did not ask for the mine’s identification number and that Ramsey made no mention of becoming a miners’ representative that morning. *Id.* at 3-4.

Contrary to Vulcan’s assertion, Austin’s claims and Vulcan’s characterization that Austin testified “unequivocally” about the issue, do not settle the matter, as the competing versions of

what was said that day are matters of credibility determinations for the Court. In that regard, the Court finds that Ramsey's account was the only credible version. The Court, closely observing both witnesses when they testified, had no ambivalence about this determination – it was Ramsey who was credible, not Austin.³⁸

Conclusion

As discussed above, Ramsey clearly engaged in multiple instances of protected activity. These instances, which also had a cumulative effect, were close in time to the adverse action of Ramsey's firing on December 1, 2015 and one such instance was on the same morning as the date he was effectively fired.

Ramsey's complaint of discrimination, filed on December 11, 2015, asserted that on December 1, 2015, while Ramsey was working his shift at Vulcan, his boss, Keith Austin, sent him home, claiming that he had seen Ramsey on his cell phone. Official Record, Temporary Reinstatement Proceeding for Ramsey, Exhibit B. Following an investigation, MSHA special investigator Michael LaRue declared that on December 1, 2015, Ramsey sought information from Austin so that he could apply to become a miners' representative. Austin did not supply the information and later that same morning Austin accused Ramsey of using his cell phone while driving the mine's haul truck.

Haul truck drivers, like Ramsey, were allowed to play the radio installed in their trucks and to talk on the trucks' CB radios too. Thus, while the Court has found that Ramsey did not use his cell phone while in the mine's haul truck on December 1, 2015, it is still instructive that drivers were allowed to listen to music on the truck radio while performing their jobs. Further, use of the Vulcan-installed CB radio in its vehicles provided a virtual, though limited range, truck telephone.

Ramsey was suspended that day and fired three days later. Vulcan's "Notice of Disciplinary Termination," signed by Austin alone, asserts that "[o]n the morning of December 1st, I personally observed you repeatedly using an electronic communications device while operating a haul truck at the Bristol quarry. When confronted, you told me that you were not using a cell phone, but were using an iPod." Gov. Ex. S-7. Briefly, but without distortion, the letter from Austin goes on to state that Ramsey refused to show Austin the device and it asserts that in October 2013 and on September 11, 2015, Ramsey had other incidents about cell phone use while on the job. Austin's letter then relates that on September 28, 2015, that is to say, *after* the September 11th incident, Vulcan reminded the entire crew about its policy prohibiting the use of phones on the job.

In Austin's letter and recurrently during the hearing and in its post-hearing briefs, as discussed previously, Vulcan repeatedly tried to blur what devices were prohibited while working under the vague term of "electronic communication devices." Austin's letter of termination continued that theme of obfuscation but, as a whole, any rational reading of that

³⁸ The remainder of Vulcan's Response brief is a regurgitation of arguments it advanced in its initial brief and therefore will not be repeated.

letter boils down to a policy prohibiting *cell phone* use. For example, Austin's letter alleges that Ramsey "continued to deny cell phone use" and he reveals that electronic communication devices means cell phones as the specific examples he cites are "cellular phones, Blackberries, Palm Pilots, Treos, iPhones, iPads," each of which are cell phones. Gov. Ex. S-7. Notably, an iPod is not included as a prohibited device in Austin's letter.

It is also true that Vulcan generally, and Austin particularly in his termination letter to Ramsey, after making it clear that the policy was about *cell phone* use, tried to leave wiggle room for themselves by employing the phrase that the policy also prohibited "other electronic devices on the job." Ex. S 7. The Court does not accept these stratagems.

Austin's letter of termination to Ramsey works under a fundamental and essential premise — that Ramsey *was using a cell phone* while operating a mine haul truck on December 1, 2015. From that premise, Austin's letter then moves to his determination of the "appropriate level of discipline to apply," citing a July 30, 2015 incident for "inappropriate and disruptive conduct" toward Austin and one of Vulcan's Safety Representatives. Ex. S-7-2. That July 2015 incident was invoked by Austin as the sole springboard to justify Ramsey's termination. By Vulcan's own statement, the action to fire against Ramsey came about because of his alleged cell phone use on December 1, 2015. Distinct from the alleged cell phone use violation, the *discipline* for the alleged violation relied essentially on the July 30th incident, alleging bad conduct. It is noted that, as with its attempt to vaguely infer that electronic communication devices covered more than cell phones, Vulcan tried to roll into the mix that Ramsey's "prior record of performance, conduct and discipline" were also considered, but the only specific item identified was the July 30, 2015 incident.

Thus, in a nutshell, Ramsey was fired on Vulcan's claim that he was using his cell phone while on the job on December 1, 2015. There were two stories presented on the issue of whether Ramsey was using a cell phone on that day while operating the mine's haul truck – Ramsey's testimony and Austin's. As between the two, the only credible testimony was Ramsey's. Vulcan never established that Ramsey was, in fact, using his cell phone. Instead, the credible evidence is that Ramsey was using a music player, his iPod, which does not function as a cell phone. Having failed to establish that Ramsey was using a cell phone, Vulcan's case collapses.

Further, the Court rejects Vulcan's stance that it was up to Ramsey to establish his innocence. While Vulcan claimed that *Ramsey* could simply go to his personal vehicle, a pickup truck, and bring the phone to them, as has been noted this ignores that Vulcan certainly had the authority to search the haul truck Ramsey was using, and it avoids Ramsey's unconditioned and multiple offers for Vulcan to search his pickup truck.

The Court's determinations are based on the record evidence and the Court's credibility determinations. With that in mind, the evidence establishes that Ramsey stood out, within the small group of hourly employees at the Bristol quarry because of his willingness to bring safety issues to the attention of his supervisor. When Ramsey felt he was being singled out unfairly during a lock and key investigation, he filed a discrimination complaint preceding the one at issue today, thereby raising his visibility as a miner who actively exercised rights protected under the Act. Ramsey engaged in protected activity when he complained about his sweatshirt

becoming ensnared in a moving machine part and by his inquiry to Vulcan management about the information he needed to apply as a miners' rep.

The Court finds that Austin was not receptive to addressing safety issues that Ramsey raised. For example, he failed to fill out a near miss form after Ramsey reported one to him. Tr. 162-63. Austin began to consider Ramsey as a problem for the mine, as evidenced by the fact that he began taking notes on his conduct in May 2015. At that point Ramsey had been working at Vulcan for over a year. Austin's close scrutiny, tied in time as it was to Ramsey's assertions of safety issues and miners' rights, supports the Court's conclusion that management saw Ramsey as "troublesome" due to his exercise of protected activities. As the Secretary has noted, the Commission has held that hostility towards a miner who exercises his or her right to make safety complaints is a circumstantial indicator of discriminatory intent. Sec. Br. at 13, citing *Jungers v. U.S. Borax*, 15 FMSHRC 300, 308 (Feb. 1993).³⁹

Considering all of the evidence, including, as mentioned above, the Court's credibility assessments and in particular the Court's evaluation of the believability of Ramsey as compared to Austin, the Court finds that Ramsey was, by far, the more credible witness. This conclusion was reassessed and reaffirmed by the Court when it had the opportunity to hear and observe the testimony of Austin and Ramsey again, when the hearing reconvened in Charlotte for the purpose of trying to fill in gaps in the transcript of the original, first, day of the hearing. The point is that the Court determined that its original credibility determinations were correct, and that Ramsey was more credible than Austin. Accordingly, the Court finds that Ramsey was truthful in his testimony that he was not using a cell phone on December 1, 2015 and that Austin's cell phone video capture of Ramsey while in his truck at that time utterly failed to show otherwise. Upon those findings and for the other reasons articulated in this decision, the Court finds that Ramsey did not violate the Respondent's ETD policy. Vulcan, therefore, had no legitimate basis to fire Jerry Ramsey.

Order

Wherefore, finding that the Secretary established that Jerry Ramsey engaged in protected activity, that Vulcan took adverse action for that activity and that Vulcan failed to establish any viable defense, the Court **ORDERS** the Respondent to reinstate Jerry Ramsey to his former position at the Bristol Quarry and to restore all benefits⁴⁰ due, so that he is fully returned to his position as if he had never been terminated. Further, Vulcan is ordered to expunge all references to the termination of the Complainant, and the asserted reasons therewith, from his personnel file.

³⁹ "Circumstantial indicia of discriminatory intent by a mine operator against a complaining miner include the following: knowledge by the operator of the miner's protected activities; hostility towards the miner because of his protected activity; coincidence in time between the protected activity and the adverse action complained of; and disparate treatment of the complaining miner by the operator." *Id.* (internal citations omitted).

⁴⁰ Such restoration will include, for example, the period of compensation between Ramsey's unlawful discharge and the date of economic reinstatement of February 11, 2016.

Within ten (10) days of the issuance of this Decision, the Respondent **SHALL** post this decision on a bulletin board at the mine that is visible to every employee, along with a visible and clear notice explaining that: the Respondent has been found liable for discrimination against an employee; that such discrimination shall be remedied; and that it will not reoccur in future. The notice shall also inform all employees of their rights in the event that they experience workplace discrimination.

Pursuant to Procedural Rule 44(b), a copy of this decision will be sent to the office of the applicable Regional Solicitor so that the Secretary may take the actions required by the rule. 29 C.F.R. § 2700.44(b).

The Parties are hereby also **ORDERED to confer** within 21 days of the issuance of this Decision for the purpose of reaching an agreement on the specific actions and monetary amounts that will constitute the complete relief to be ordered in this matter. If an agreement is reached, the parties shall submit it within 30 days of the issuance of this Decision.

If an agreement cannot be reached, the parties are **FURTHER ORDERED** to submit to this Court, within 30 days of the issuance of this Decision, their respective positions concerning the issues on which they cannot agree, along with supporting arguments, case citations, and references to the record. For areas involving monetary relief on which the parties disagree, they shall submit specific proposed dollar amounts for each category of relief. In the rare event that there are factual disputes requiring an evidentiary hearing, the parties shall submit a joint hearing request and identify those issues.

The Court retains jurisdiction of this matter until a final Decision is issued, disposing of all specific remedies to which the Complainant is entitled. Accordingly, this Decision shall not become final until an Order has been entered granting any specific relief and awarding any monetary damages which are appropriate.

SO ORDERED.

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

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May 9, 2017

MICHAEL WILSON,
JUSTIN GREENWELL &
BRANDON SHEMWELL,
Complainants,

v.

ARMSTRONG COAL COMPANY, INC.,
Respondent.

DISCRIMINATION /
INTERFERENCE PROCEEDING

Docket No. KENT 2015-673-D
MADI-CD 2015-18

Mine: Parkway Mine
Mine ID: 15-19358

BRANDON SHEMWELL,
Complainant,

v.

ARMSTRONG COAL COMPANY, INC.,
Respondent.

DISCRIMINATION /
INTERFERENCE PROCEEDING

Docket No. KENT 2016-96-D
MADI-CD 2015-14

Mine: Parkway Mine
Mine ID: 15-19358

JUSTIN GREENWELL,
Complainant,

v.

ARMSTRONG COAL COMPANY, INC.,
Respondent.

DISCRIMINATION/
INTERFERENCE PROCEEDING

Docket No. KENT 2016-108-D
MADI-CD 2015-15

Mine: Parkway Mine
Mine ID: 15-19358

DECISION

Appearances: Tony Oppedard, Esq., Lexington, KY, & Wes Addington, Esq.,
Appalachian Citizens' Law Center, Whitesburg, KY, Representing the
Complainants

Marco Rajkovich, Esq., Rajkovich, Williams, Kilpatrick & True,
Lexington, KY, Representing the Respondent

Before: Judge Lewis

These cases are before me upon complaints of discrimination and interference brought by Michael Wilson, Justin Greenwell, and Brandon Shemwell (“Complainants”), pursuant to § 105(c) of the Federal Mine Safety and Health Act of 1977 (“Mine Act”), 30 U.S.C. § 815(c).

STIPULATIONS

- A. Armstrong is subject to the Federal Mine Safety & Health Act of 1977.
- B. Armstrong mines and produces coal at the Parkway Mine that enters into and has an effect upon interstate commerce within the meaning of the Federal Mine Safety & Health Act of 1977.
- C. Armstrong is subject to the jurisdiction of the Federal Mine Safety & Health Review Commission and the Administrative Law Judge has the authority to hear this case and issue a decision.

Resp. Amended Prehearing Report, 4; Tr. 18-19.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The findings of fact are based on the record as a whole and my careful observation of the witnesses during their testimony. In resolving any conflicts in the testimony, I have taken into consideration the interests of the witnesses, or lack thereof, and consistencies, or inconsistencies, in each witness’s testimony and between the testimonies of the witnesses. In evaluating the testimony of each witness, I have also relied on his or her demeanor. Any failure to provide detail as to each witness’s testimony is not to be deemed a failure on my part to have fully considered it. The fact that some evidence is not discussed does not indicate that it was not considered. *See Craig v. Apfel*, 212 F.3d 433, 436 (8th Cir. 2000)(administrative law judge is not required to discuss all evidence and failure to cite specific evidence does not mean it was not considered).

I. Summary of Testimony

A. Brandon Heath Shemwell

The Complainant, Brandon Heath Shemwell, appeared and testified at hearing. Tr. 45. He had worked at Parkway Mine since April 2009 in various positions, including roof bolt operator, “Ram” car operator, scoop operator, and bolter. Tr. 46. Shemwell had worked in the coal industry for 11 years, and was designated as a miners’ representative on February 28, 2014. Tr. 45, 47. He had become a miners’ representative because he had become concerned about safety issues at Parkway Mine, including his fear that Respondent had been cheating in its dust sampling procedures. Tr. 48.

After he had become a miners’ representative, Shemwell noticed a change in attitude toward him by both management and coworkers. Tr. 48. Some of the men shunned him. Tr. 48.

During the 14 months prior to June 11, 2015, Shemwell had frequently accompanied MSHA inspectors—"pretty much every time [he] was asked." Tr. 50. During MSHA inspections, Shemwell would note safety issues that the MSHA inspector may not have noticed. Tr. 50-51. On one occasion, he had pointed out rub rails that had gone off a car, which led the MSHA inspector to order the car shut down. Tr. 51-52.

Management would become upset at Shemwell's pointing out of safety violations to MSHA inspectors. Tr. 52. A superintendent, Danny Thorpe, "cuss[ed] and rave[d]" at him. Tr. 52. The safety managers, Steven DeMoss and John T. Scott, had also become upset at Shemwell for pointing out safety violations. Tr. 52-53.

On June 11, 2015, the date at issue, Shemwell had been asked by DeMoss if he wanted to travel with the federal inspector. Tr. 54. Shemwell was instructed to call Danny Presley in order to arrange a ride with the inspector on a four-man buggy. Tr. 55-57. Shemwell usually accompanied the inspectors the entire time they were on mine property, including the time that MSHA inspectors would write up any citations. Tr. 58.

Shemwell contacted mine employees with a "mine site phone," which was like a cell phone and was issued to each miner who had his own extension number. Tr. 59. On June 11, 2015, after being told by DeMoss to contact Presley for a ride, Shemwell phoned Presley 12 times without success. Tr. 60. Presley neither answered the phone nor called Shemwell to determine whether Shemwell needed a ride to participate in the MSHA inspection. Tr. 61. Shemwell did not have the authority to order someone to give him a ride. Tr. 61.

Shemwell was finally contacted by John T. Scott who asked him to speak on the phone with the MSHA inspector, Alan Frederick. Tr. 62. Shemwell was informed by Frederick that the MSHA inspection had been completed and was asked if he had any questions. Tr. 62. Due to being so upset over not having been provided a ride, Shemwell did not ask any questions. Tr. 62.

Shemwell testified that if after this incident Respondent had again failed to provide transportation to him for an MSHA inspection, he would not have continued acting as a miners' representative. Tr. 63.

Shemwell testified that Complainants Justin Greenwell and Michael Wilson had reported to him that John T. Scott had stated that MSHA inspectors could not issue citations in situations where the safety violation was first discovered by the miners' representative. Tr. 64. Such a position would essentially prevent the miners' representative from fulfilling his duty to protect miners from potential safety hazards. Tr. 65. Further, if MSHA would not issue citations in such situations, there would be no assurance that the company would abate unsafe conditions in a timely fashion. Tr. 65. Shemwell mentioned the missing rub rails violation as a case in point. Only after Shemwell had pointed out the unsafe condition to an MSHA inspector, and only after Armstrong was cited, did Respondent finally abate the condition. Tr. 65-66.

Shemwell believed that Respondent had failed to timely notify him of and provide him with a ride to the MSHA inspection on June 11, 2015, because they had been irritated with him

for having fulfilled his miners' representative duties and because they were annoyed with Justin Greenwell for having pointed out safety problems a few days earlier. Tr. 67-69.

On cross examination Shemwell agreed that the rub rail problem had been in his and Greenwell's units. Tr. 73. Although DeMoss had not liked it when Shemwell pointed out safety violations to MSHA inspectors, he had never "laid hands" on Shemwell. Tr. 73. DeMoss's changed attitude toward Shemwell did not cause him to give up being a miners' representative, but did make him "hesitant" and had bothered him. Tr. 73. Shemwell, however, agreed with his prior deposition testimony that he did not care about DeMoss's attitude and could deal with it. Tr. 74. Neither of Respondent's employees, Thorpe and Scott, had directed anger toward Shemwell personally. Tr. 74. Shemwell was not prevented from doing his job as miners' representative despite Armstrong's unhappiness over his pointing out of safety problems. Tr. 75.

During the "normal course of action" the company would call Shemwell on his mine cell phone to notify him of an MSHA inspection or call his boss to arrange a ride for him. Tr. 78. When Inspector Frederick had informed Shemwell that the MSHA inspection had been completed, Frederick told him that he did not know what had happened regarding the failure to contact Shemwell. Tr. 78-79.

Shemwell agreed that he had expressed no concerns to Frederick during their conversation, and neither did he question Respondent nor MSHA on the date at issue. Tr. 79.

According to company cell phone records, Shemwell had been able to contact Justin Greenwell's number on June 11, 2015. Tr. 79-80; See also JX-1.

Although Scott's reported statements made him hesitant, Shemwell continued in his miners' representative duties. Tr. 82.

B. Justin Neil Greenwell

The Complainant Justin Neil Greenwell also appeared and testified at hearing. Tr. 85.

Greenwell had worked for approximately four years for Respondent before quitting his employment a year previously. Tr. 86. He had worked nine years total in the coal industry. Tr. 86. Complainant had initially worked as an underground roof bolt operator for Respondent, later being moved above ground as a loader operator. Tr. 86. After discovering he had black lung disease, Greenwell had exercised his Part 90 right to work in a less dusty environment.¹ Tr. 87.

Greenwell had become a designated miners' representative on February 28, 2014, after becoming concerned about various safety issues at Parkway mine, including the tampering with of a dust pump. Tr. 87.

¹ On cross examination, Greenwell indicated that he had undergone a drug test two days before he had quit work. Tr. 113-115. He further confirmed that he had convictions for assault, possession of marijuana, and public intoxication. Tr. 114. He further confirmed that he had been involved in an incident at work, shortly before his resignation, in which he had backed into a guy-wire, cutting all power to the mine. Tr. 116-117.

Between February 28, 2014, and June 11, 2015, Greenwell frequently traveled with MSHA inspectors. Tr. 89. Greenwell would watch and observe the MSHA inspection and be on the look-out for unsafe conditions. Tr. 89, 92. Miners would also approach him to relay their concerns about safety issues to the MSHA inspector. Tr. 90.

Greenwell also noticed the rub rail problem and asked an MSHA inspector, who was uncertain as to safety implications to enquire into such, which ultimately lead to an MSHA citation. Tr. 92.

Greenwell also noted a change in management's attitude toward him after he had become a miners' representative: they had become "angry" at him. Tr. 92. An example of the hostile attitude of management was the action of a second shift foreman, Jeff Wilkins, toward Greenwell. The foreman demanded that Greenwell stay by the MSHA inspector's side—even after the inspector had finished his inspection and had told Greenwell that he could leave. Wilkins had gone so far as to order Greenwell to accompany the MSHA inspector to the bathroom and shower. Tr. 93-94. Greenwell felt Respondent was attempting to discourage him from accompanying MSHA inspectors on their inspections. Tr. 94.

Mine management would advise Greenwell that it wasn't his job to point out safety problems. Tr. 95.

Greenwell was also told that it imposed a "hardship" when he left his job duties to accompany MSHA inspectors. Tr. 96. One section foreman, Billy Harold, called Greenwell a "slow walker," advising Greenwell to think about what was more important—his job or his miners' representative duties. Tr. 96-97. On another occasion, Greenwell had reported management's failure to hold a required fire drill leading to a citation. Tr. 98. When the drill was eventually held, Complainant was singled out during the training. Tr. 98.

On June 11, 2015, Greenwell had been asked by Steve DeMoss if he'd like to accompany an MSHA inspector. Despite agreeing to such, Greenwell never received a call. Tr. 99. Only later in his shift did he happen to notice MSHA inspector, Jerry Walker, going into the bathhouse. Upon learning that Walker had already completed his inspection, Greenwell asked why he hadn't been called. Walker indicated that "they didn't have a ride" for Shemwell and that a company representative had accompanied the inspector rather than Greenwell. Tr. 101-102.

Greenwell had pointed out roof safety issues to an inspector on June 10, 2015, and he felt that this report motivated management's decision to not contact him on June 11, 2015. Tr. 103-104.

Greenwell had also pointed out a malfunctioning methane monitor to an MSHA inspector, which he also felt motivated management's decision to not contact him. Tr. 105-106.

On July 8, 2015, Greenwell was traveling with an MSHA inspector, Charles Ramsey, along with Complainant miners' representative, Michael Wilson. Greenwell had noted some loose roof bolts, which he had pointed out to Inspector Ramsey. Tr. 108-110. Greenwell also pointed out to the inspector a piece of machinery that was leaking oil. Tr. 110. Greenwell heard

John T. Scott express management's position to Ramsey that an MSHA inspector could not issue a citation if a miners' representative had first pointed out the safety violation. Tr. 111.

Such a position, in Greenwell's mind, would defeat the purpose of traveling with MSHA personnel during inspections because it would mean that no violation would be abated if first seen by the miners' representative. Tr. 112. Greenwell had sometimes not traveled with MSHA inspectors because of this. Tr. 112-113. In fact he eventually quit because he was tired of all the hostility directed toward him as a miners' representative. Tr. 113.

Greenwell agreed that neither DeMoss nor Scott had ever directly spoken to him in a hostile manner. Tr. 119. DeMoss had no problem with Greenwell traveling with an MSHA inspector on June 11, 2015. Tr. 119. Greenwell had sometimes declined to participate in MSHA inspections. Tr. 120. Nobody from Armstrong had ever told Greenwell on June 10, 2015, that there was no room for him to travel with MSHA inspectors. Tr. 121. Greenwell did not attempt to call management regarding such. Tr. 122-123.

Complainant again asserted that he never knew that Jeremy Walker was underground until he saw the inspector at the bathhouse. Tr. 120. Steve DeMoss had told him that the inspector had only wanted one person to travel with him. Tr. 127.

C. Michael Steve Wilson

Complainant, Michael Steve Wilson, appeared and testified. Wilson, whose nickname was "Flip," had worked in the mines for 40 ½ years, 37 of which as a continuous miner operator. Tr. 128. Wilson had become a miners' representative at Parkway mine in February 2014 and had retired from Armstrong in April 2015. Tr. 129. Complainant had started working for Respondent in 2009 and had become a miners' representative "to make it better for the young guys."² Tr. 130. Prior to becoming a miners' representative, Wilson had gotten along well with management. Tr. 131. However after Wilson became a representative, he felt that management had "turned on" him, treating him like "a piece of shit." Tr. 131.

Wilson filed for Part 90 after he had become a miners' representative. Tr. 132. He began to operate an above ground hand loader, leaving his underground continuous miner position. Tr. 132. Wilson testified that various members of management had become hostile toward him, including Danny Thorpe, John T. Scott, Steve DeMoss, Jeff Wilkinson, Danny Presley, and Keith Casebeer. Tr. 133. Wilson testified Respondent's employees engaged in various acts of vandalism toward him, including writing "die rat" on his locker and super-gluing his lock. Tr. 134.

After his retirement in April 2015, Wilson continued working as an unpaid miners' representative, traveling 25-30 miles each way from his residence to Parkway mine. Tr. 134-135, 149. As a non-employee miners' representative, Wilson still regularly traveled with MSHA. Tr. 135. During MSHA inspections, Wilson would point out possible safety violations. Tr. 136.

² On cross examination Wilson conceded that he himself had violated various safety regulations. Tr. 141-142. However, he asserted that he had taken "deep cuts" in the past at management's urging. Tr. 146-148. Wilson further admitted that he had been convicted of five counts of assault and receiving stolen property in the distant past. Tr. 142.

On July 8, 2015, Wilson traveled with MSHA Inspector Charles Ramsey, Justin Greenwell, and John T. Scott. Tr. 137. Complainant(s) noticed some loose roof bolts (“pins”), which they pointed out to the MSHA inspector. Tr. 137-138. John T. Scott objected to any citations being issued on the basis that federal inspectors could not issue citations in situations where the violation was first discovered by a miners’ representative. Tr. 138-139.

Wilson had not stopped traveling with MSHA inspectors despite management’s changed attitude. Tr. 144.

D. Steven James DeMoss

Steven James DeMoss appeared and testified at hearing on behalf of Respondent.

DeMoss was safety manager at Parkway mine in June 2015. Tr. 151. He had worked in the mining industry since 2002, first working as a halster on a bolter and then pinner. Tr. 153. He began working at Parkway mine in approximately 2009, working as a bolt man, pin man, ram car operator, belt examiner, and face boss. Tr. 154. Toward the end of 2013 he became a safety analyst for Respondent.

In June 2015 Armstrong used a miners’ representative log to keep track of the MSHA inspections that each miners’ representatives had accompanied and which miners’ representative was next in line. Tr. 156. A record was kept of the miner’s names, whether they had traveled, or whether they had declined to accompany the MSHA inspector.³ Tr. 157. Prior to June 17, 2015, Justin Greenwell had declined to travel four times. Tr. 160.

When an MSHA inspector arrived at Parkway mine, DeMoss would normally ask the inspector if he wanted a miners’ representative to travel with him, or the inspector himself would request such. Tr. 102. DeMoss would then check to see which miners’ representative was next in rotation and ask that person if he wished to participate in the MSHA inspection. Tr. 162. If that miners’ representative declined, then DeMoss would continue through the list until someone indicated their willingness to go. Tr. 162. The MSHA inspector could also indicate his preference as to miners’ representative whom he wished to accompany him. Tr. 163.

On June 11, 2015, DeMoss noticed that the MSHA vehicle was in the mine parking lot. Tr. 164. He asked the miners’ representatives if they wanted to participate in the MSHA inspection. Both Shemwell and Greenwell wanted to exercise their rights to travel. Tr. 165. DeMoss indicated that both would travel. Tr. 166. After pre-calibrating spotters (gas detectors), DeMoss saw District 10 Assistant District Manager, Brian Dodson, and District 10 Field Supervisor, Alan Frederick, arrive. Tr. 166.

DeMoss was asked if there was a miners’ representative available and he indicated Shemwell would be participating. Tr. 166. Neither Dodson nor Frederick informed DeMoss where they wanted to go in the mine. Tr. 167.

³ “Travel” meant that the miners’ representative exercised his right and requested to travel with MSHA.

DeMoss testified that he told Dodson and Frederick that he would call Danny Presley to pick Shemwell up. Tr. 167. However either Frederick or Dodson stated to DeMoss that they wanted him to call Shemwell directly and to have Shemwell call Presley to pick him up. Tr. 167.

DeMoss agreed to follow their directives; however, he had never previously notified miners' representatives this way, and no MSHA inspector had ever made such a request in the past. Tr. 167.

DeMoss believed that he may have told Frederick or Dodson that this was not the normal way he contacted miners' representatives regarding MSHA inspections, but didn't question their instructions, believing they were concerned about "pre-notification." Tr. 167.

DeMoss then attempted to call Shemwell several times on the mine phone. Tr. 168. DeMoss testified "there was not a one hundred percent signal everywhere in the mines." Tr. 168. A miner might be tracked but not be able to talk or text on the phone. Tr. 168.

Referring to his call log, DeMoss stated he had first called Shemwell at 9:57 a.m. on June 11, 2015. Tr. 169-170; R-5. Despite 12 calls, DeMoss was unable to reach Shemwell. Tr. 171. At 10:10 AM Shemwell had successfully phoned DeMoss at which time DeMoss, pursuant to MSHA directives, instructed Shemwell to contact Danny Presley to get him a ride. Tr. 172. Presley would have been "at the rehab place" where reception would have been poor.⁴ Tr. 172.

DeMoss himself did not accompany the MSHA inspectors; rather John T. Scott did. Tr. 173. DeMoss estimated that the group, Dodson, Frederick, and Scott, had been underground for two to three hours. Tr. 175. DeMoss "figured" that Shemwell had gotten a hold of Presley and assumed Shemwell had gotten a ride. Tr. 175.

DeMoss observed Scott, Frederick, Dodson, and Jeremy Walker emerging from the mine. Tr. 176. He asked Scott the whereabouts of Shemwell but Scott did not know. Tr. 176. DeMoss later learned that Shemwell had been unable to get a hold of Presley. Tr. 177.

DeMoss could not recall whether Walker had mentioned anything about a miners' representative not being present nor did he remember Frederick or Dodson saying anything about such (at the end of their inspection). Tr. 177.

DeMoss denied that Armstrong had ever attempted to block miners' representatives from obtaining rides. Tr. 177

Regarding the July 8, 2015, incident at issue, DeMoss recalled that MSHA inspector Ramsey, as well as Greenwell, Wilson, and Respondent's safety supervisor, Scott, had gone on an underground inspection. Tr. 178.

After the group had returned from the inspection, DeMoss recalled a discussion regarding miners' representatives finding violations before the MSHA inspector noticed the violations. Tr. 181. He testified that in such instances, "the negligence and gravity wouldn't be as high as if the

⁴ The "rehab place" was the area where there had been a roof cave-in. Tr. 174.

inspector actually found it.” Tr. 181. DeMoss testified that John Scott had gotten this information from either MSHA inspector, Jeremy Walker, or Alan Frederick. Tr. 182.

On cross examination DeMoss admitted to some inconsistencies in the miners’ representative log. Tr. 182-187; 191-192; R-1. DeMoss agreed that beginning at 6:00 AM on June 11, 2015, with MSHA’s arrival at the mine, a miners’ representative had the right to travel with him. Tr. 189. He further agreed that MSHA Inspector Walker had been underground for several hours without a miners’ representative. Tr. 190. On June 11, 2015, Alan Frederick and Brian Dodson were traveling together as MSHA inspectors. Though Brandon Shemwell had been designated as the next miners’ representative to travel at 6:45 AM, and despite him having been asked by MSHA at 8:45 AM who would be the designated miners’ representative, DeMoss first attempted to call Shemwell at 9:57 AM. Tr. 193.

DeMoss, in explaining the failure to timely contact Shemwell, asserted: “I’m going to do what the Assistant District Manager and the Field Supervisor tells me to do.” Tr. 194.

DeMoss agreed that Shemwell did not have the authority to order other miners to give him a ride to where MSHA inspectors might be and was totally dependent upon management to provide transportations. Tr. 195.

DeMoss further agreed that MSHA could not order management to travel with them during an inspection. Tr. 197. Nor could management be ordered to provide MSHA with transportation. Tr. 197. Neither could management order an employee to give a miners’ representative a ride to an inspection. Tr. 198.

Normally, DeMoss sent Danny Presley or someone else from the safety department to pick up a miners’ representative. Tr. 198. DeMoss conceded that neither Frederick nor Dodson actually stated that they were worried about “pre-notification.” Tr. 199.

On June 11, 2015, the chain of command at the mine was the following: (1) Danny Thorpe, Superintendent; (2) Chad Paldwin, Mine Manager; (3) DeMoss, Safety Manger; (4) John Scott, Safety Analyst. There was a tracking device outside at the Parkway mine which could track any miner within 200 feet of where they were. Tr. 201. On June 11, 2015, Presley was the day shift foreman and would have been in the rehab area of the belt line where phone reception would have been poor. Tr. 202. DeMoss indicated that it was “illegal” for a miner to power off his phone while he was in the mine. Tr. 205.

In order to assure that Shemwell had been able to travel with the inspectors he did one thing: he called Shemwell and told Shemwell that he’d need to arrange his own ride. Tr. 206.

DeMoss speculated that, although Shemwell could not get through to Presley, Scott was able to do so because Presley may have been standing in a better reception area. Tr. 207.

DeMoss had no explanation why Shemwell had been unable to contact Presley in 12 phone call attempts but he, in the middle of the calls, was able to do so. Tr. 209.

DeMoss agreed that Respondent did not have the right to tell a miners' representative that he could not travel with an inspector because only a two man ride was available to transport a MSHA inspector and company's representative. Tr. 211.

DeMoss himself was not present during the July 8, 2015, meeting between the MSHA inspectors, Safety Analyst Scott, and Complainants Greenwell and Wilson. Tr. 209-210.

After his recollection was refreshed by means of a prior deposition, DeMoss recounted that John T. Scott had told MSHA Inspector Ramsey that Ramsey's supervisor, MSHA's Field Office Supervisor, Alan Frederick, had stated that citations were not to be issued for any violations found by miners' representatives and only for violations that an inspector had found himself. Tr. 212. Frederick told DeMoss that if a miners' representative finds a violation but the MSHA inspector does not see it, a citation cannot be issued on the miner's word alone: the inspector would need to "actually visually see" the citation.⁵ Tr. 213.

DeMoss testified that Scott's position that MSHA cannot issue a citation if a miners' representative sees the violation first was "crazy." Tr. 214. However, such a scenario might affect negligence and gravity. Tr. 214.

DeMoss made no attempt on July 8, 2015, or thereafter to talk to Frederick or anyone else at MSHA regarding its policy for issuing citations when a miners' representative first sees the violation. Tr. 215.

On June 11, 2015, if he had called a foreman underground to alert him of MSHA arrival, DeMoss agreed this would be advance notice. Tr. 219. Had he called underground, DeMoss feared that MSHA might have perceived such as "prenotification." Tr. 220. Although telling Shemwell to call Presley to arrange transportation might also be giving advance notice of a MSHA inspection, DeMoss did what MSHA instructed him to do. Tr. 223.

E. John T. Scott

At hearing John T. Scott appeared and testified on behalf of Respondent.⁶ Tr. 224. In June 2015 Scott was employed by Respondent at Parkway mine as a safety supervisor. Tr. 226. DeMoss was his boss at the time. Tr. 226. He had received training as a police officer, had a Class A mine foreman paper through the state of Kentucky, was a certified mine emergency technician, and held a Kentucky Mine Inspector certification. Tr. 227-228. He had worked in the mines as a general laborer, roof bolter operator, car operator, equipment face operator, scoop operator, and mine foreman. Tr. 228-229.

⁵ This testimony, as discussed *infra*, conflates and confuses two different issues: violations based solely upon hearsay miners' representative reports versus violations based upon initial miners' representatives' observations subsequently confirmed by MSHA inspectors.

⁶ Scott indicated that his actual middle name was Ellis but that as an adolescent he was nicknamed "Trouble," which stuck. Tr. 225.

Scott began working at Armstrong in 2009 until being terminated on June 24, 2015. Tr. 230. It was his understanding that miners' representatives' job was to represent miners as to health and safety issues, with their job duties including accompanying MSHA inspectors. Tr. 230. Scott indicated that in June 2015, a rotational list was utilized at Armstrong to determine what miner would travel with MSHA. Tr. 231. Scott stated that it was ultimately up to MSHA to decide which miners' representative would travel with them. Tr. 232. Various MSHA inspectors—Charlie Jones, Josh Orr, Jeremy Walker, Alan Frederick, Charles Ramsey, and another unnamed individual—had so advised him. Tr. 232. As Scott understood it, miners' representatives had to stay with the inspector. MSHA Inspector Richie Breen had so advised him. Tr. 234.

On June 11, 2015, there had been a rock fall on the belt line and Scott had accompanied MSHA Assistant District Manager Alan Frederick and Brian Dodson underground to examine the fall area. Tr. 236. Scott later learned that Inspector Jeremy Walker was also underground but did not know this earlier in the day because he “was not supposed to know” where Walker was at. Tr. 237.

Scott heard DeMoss inform Frederick and Dodson that Shemwell was the designated miners' representative and that he would call Shemwell and send somebody after him. DeMoss, however, was instructed to call Shemwell, tell him MSHA was at the mine, and that Shemwell should call somebody for transportation. Tr. 238. DeMoss explained that normally Respondent would go and get the miners' representative but was told: “you're not doing it that way...you tell him to have somebody come and get him.” Tr. 238. Dodson told DeMoss that he didn't want anyone to know that MSHA was there. Tr. 238. Scott heard DeMoss call Shemwell informing him of the MSHA inspection and Shemwell's need to contact Presley for a ride but did not hear Shemwell's side of the conversations. Tr. 239.

Scott, Frederick, and Dodson proceeded to the rock fall area where the inspector, Jeremy Walker, and a mine examiner rode up. Tr. 240. Frederick instructed Walker to get off his ride and to accompany the group to the belt line. Tr. 240. Scott drove a four seat ride with Walker, Frederick, and Dodson. Tr. 241. Frederick asked Scott about Shemwell's location. Tr. 241. Using his cell phone Scott reached Shemwell on his first attempt, telling Shemwell that Frederick wished to speak to him. Tr. 242. Scott heard Frederick tell Shemwell that the MSHA inspection had been completed, that there had been a mix-up on their end, and that he was sorry but they were leaving. Tr. 242. Scott questioned Frederick as to Shemwell's reaction and was told everything was fine. Tr. 243.

Scott denied that he had ever attempted to block miners' representatives' rides. Tr. 244.

As to the incident on July 8, 2015, Scott was with Complainants, Wilson and Greenwell, and MSHA Inspector Ramsey when Wilson pointed out something wrong with the door switch. Tr. 246. MSHA Inspector Ramsey thereupon issued a citation, which lead to Respondent repairing the door. Tr. 246-247. Subsequently Wilson pointed out a high cable in front of a door, which resulted in another citation. Tr. 247. Later, Ramsey informed Scott that he was also citing Respondent for a roof bolt safety violation, which prompted Scott to enquire who first discovered the violation. Tr. 248.

It was Scott's belief that if he or another miner first discovered a safety violation, this was a mitigating circumstance that would affect the gravity because "that shows we're looking." Tr. 248. Scott asserted, "that's part of the law," which had always been told him by all Federal inspectors. Tr. 248. If a violation is first identified by a miner or management and is flagged and corrected, "it's not that serious and lessens the gravity." Tr. 248.

Scott further asserted that he had in the past been instructed by Alan Frederick and Jeremy Walker that if a miners' representative first noticed a safety problem, this should not be a violation. Tr. 249-250.

Scott conceded that (when Ramsey had cited him for a roof bolt violation) he argued in the presence of Greenwell and Wilson that a citation should not be issued because a miners' representative first pointed out the violation. Tr. 250. Citing Frederick's past opinion, Scott further argued that, if Ramsey still followed through with a citation, the gravity should be lower. Tr. 250.

Scott admitted that Greenwell had become upset over his remarks, stating, "a violation is a violation." Tr. 250. Scott reasoned that miners' representatives are not inspectors: "Their job is for the health and safety of the men." Tr. 250.

A few days after the incident Scott met Wilson at a "Burger Queen" where Wilson advised him that he was filing a complaint which wasn't against Scott, but "against Federal" for their faulty advice. Tr. 250-251. Greenwell subsequently saw Scott at the mine where he told him substantially the same thing that the complaint was against MSHA. Tr. 252.

On cross examination Scott was questioned regarding the discrimination complaint filed against Respondent regarding the July 8, 2015, incident at issue. Tr. 254-255.

Scott admitted that the Complainants' discrimination complaint's pleadings were accurate in that he had tried to talk MSHA Inspector Ramsey out of issuing a citation for safety violations first pointed out by miners' representatives, arguing that citations could only be filed in instances where the MSHA inspector was the first individual to discover the violation. Tr. 254-255, Exhibit E. Scott again testified he was relying upon information given to him by MSHA Inspector Alan Frederick. Tr. 255-256.

Scott conceded that the inspectors *had also* seen the violations at issue but only *after* they had been *first* pointed out by miners' representatives. Tr. 250. Scott agreed that Wilson was only doing his job in pointing out the safety violations: "If you see something wrong, for God's sake tell somebody." Tr. 251, 256-257.

Scott further conceded that he did *not* mention a lowering of gravity or negligence to Ramsey on July 8, 2015, but only that Ramsey shouldn't issue a citation at all because miners' representatives first pointed out the violation. Tr. 257.

As to the June 8, 2015, incident at issue, Scott had not actually heard Dodson voice concerns about "prenotification" to DeMoss. Tr. 259. Although he was a safety assistant, Scott

made no efforts to locate Shemwell when Shemwell did not appear at the rock fall inspection site. Tr. 261. Nor did he raise the matter with any other supervisors at the scene. Tr. 262. Scott could not cite any statutory provision or rule barring Respondent from sending somebody to pick up a miners' representative. Tr. 264-265. Scott further agreed that MSHA did not have the authority to order a particular miners' representative or management official to accompany it during an inspection. Tr. 265. He also agreed that a miners' representative was totally dependent upon the company to provide him with a ride to travel with federal inspectors. Tr. 266.

Scott further agreed that management could have looked at their tracking system on the surface of Parkway mine to determine where Shemwell was on June 5, 2015—as long as the system was up and functioning. Tr. 267.

F. Danny Presley

At hearing Danny Presley appeared and testified on behalf of Armstrong. Tr. 271.

Presley worked for Armstrong in June 2015 but was now off work due to a back injury. Tr. 272. Presley could not recall any conversations with Shemwell on June 11, 2015. Tr. 275. Presley testified that he was on pain medication and had memory problems. Tr. 275.

II. **Contentions of the Parties**

The Complainants argue that Shemwell's miners' representative rights were interfered with when the Respondent did not notify Shemwell of the June 11, 2015, inspection, did not offer Shemwell transportation to meet a separate inspection party on that date, and told Shemwell that he had to arrange his own transportation. The Complainants further argue that Greenwell's miners' representative rights were interfered with when the Respondent did not notify Greenwell of the June 11, 2015, inspection and failed to provide him transportation so that he could accompany the inspector. Furthermore, the Complainants argue that Safety Supervisor Scott generally interfered with miners' representative rights due to his statements on July 8, 2015, in the presence of miners' representatives that MSHA inspectors could not issue citations for violations found by miners' representatives.

The Respondent argues that this Court should apply the interference test developed by ALJ Barbour in *Secretary on behalf of Pepin v. Empire Iron Mining*, 38 FMSHRC 1435 (June 2016), rather than the interference test endorsed by two Commissioners in *UMWA on behalf of Franks & Hoy v. Emerald Coal Resources*, 36 FMSHRC 2088 (Aug. 2014), and applied subsequently by several ALJs. However, the Respondent argues that under either of the tests, it should prevail.

The Respondent argues that it acted properly and did not interfere with any miners' representative's rights. With respect to the events of June 11, 2015, Respondent argues that it was within the discretion of the MSHA inspector to decide who, if anyone, would accompany the inspector. They argue that MSHA Assistant Manager Dotson and Field Supervisor Frederick rejected the practice of calling the mine foreman to pick up Shemwell as the miners' representative. Instead, they directed DeMoss to call Shemwell and for Shemwell to call the

mine foreman for a ride. The MSHA personnel indicated that the usual procedure for calling the miners' representative and offering a ride would constitute unlawful pre-notification. Respondent argues that the evidence shows that the Respondent did not engage in interference against Shemwell or Greenwell.

With respect to the statements made by Safety Supervisor Scott, the Respondent argues that Shemwell was not present for the statements, and therefore should not be permitted to bring a claim. Further, Respondent argues that the First Amendment and Due Process counsel against a finding of interference.

III. Character Evidence and Evidence of Past Crimes

At hearing the Respondent questioned the Complainants' veracity due to their past criminal convictions. Tr. 115, 142. Justin Greenwell had reportedly been convicted of first degree assault, possession of marijuana, and public intoxication. Tr. 114. Michael Wilson had been convicted of five assaults and receiving stolen goods. Tr. 142.

This Court recognizes that the Federal Rules of Evidence allow, under certain circumstances, for the admission of evidence regarding a witness' character, including evidence of past crimes. (See *inter alia* Rules 404, 405, 608, 609). However, this Court found such evidence to be of little or no probative value in resolving the material factual questions in the case *sub judice*. Indeed, the most critical factual question of what Scott uttered in the presence of Complainants, Greenwell and Wilson, on July 8, 2015, was resolved by Scott in his hearing admissions. As such, there was no need to make any credibility determinations as to what Complainants allegedly heard and as to what Scott actually said.

Traditionally, in most jurisdictions, felonies, without regard to the nature of the particular offense, and *crimen falsi*, crime(s) involving falsity, without regard to the grade of the offense, were admissible to attack a witness' character for truthfulness. (see also commentary to Rule 609 of Federal Rules of Evidence).

On their face, Greenwell's convictions do not appear to fall within either category nor do Wilson's assault convictions. Moreover, this Court observes that history is replete with examples of individuals who, though pugnacious and alcoholic, were men of great character—Ulysses S. Grant, Audie Murphy, and Winston Churchill being only a few of many examples.⁷

As to Mr. Wilson's conviction for receiving stolen goods, such appears to have been in the distant past. Rule 609(b) essentially provides that any conviction taking place more than 10 years previous should only be admitted if its probative value outweighs its prejudicial effect. This Court found little probative value as to this evidence of past crimes—especially in view of Scott's admissions and Wilson's obvious passion to be an advocate for miners' safety in his miners' representative capacity.

⁷ Indeed, during 40 years in the practice of law, this Court has encountered more than a few lawyers and judges who, though bellicose and tippling, were men of recognized honesty and truthfulness.

Under the total circumstances—regardless of Respondent’s evidence of Greenwell’s and Wilson’s character—this court found that both Complainants reasonably viewed Scott’s interactions with and comments to the MSHA inspector as tending to interfere with their protected rights under § 105(c). None of the character evidence or past crime evidence presented by Respondent persuaded this Court that the Complainants were being less than honest in their testimony as how their willingness to exercise their rights as miners’ representatives was chilled.

At hearing Respondent’s witnesses sometimes appeared to conflate and confuse two distinct issues: whether a MSHA inspector can issue a citation solely based upon the alleged observation of a safety violation by a miners’ representative that is not seen by the inspector versus whether a MSHA inspector can issue a citation if the violation is *first* pointed out by the miners’ representative and *then* only confirmed by the inspector. Tr. 250, 254-55; Ex-E.

There is no need to address the former issue as in the case *sub judice* the safety violations were also subsequently seen by the MSHA inspector. (see inter alia: Tr. 256.)⁸ As to the latter issue, there is no question that Scott’s asserted position would violate § 103(g).

IV. Credibility Assessment

A. Steven James DeMoss

This Court found this witness only partially credible.⁹ At times DeMoss seemed purposely obtuse during cross-examination. The efforts he exerted in attempting to contact Shemwell and ensuring that Shemwell participated in the June 11, 2015, MSHA inspection suggested, in the best light, a benign indifference to Shemwell’s § 103(g) rights. Likewise, his expressed fears of being cited for “prenotification” were not altogether convincing. Further, his unquestioning embrace of Scott’s position on the lowering of gravity and negligence in cases where miners’ representatives first find safety violations was also disconcerting.

B. Brandon Heath Shemwell

This Court fully credited Shemwell’s testimony that he wanted to exercise his § 103(g) right to travel with a MSHA inspector on June 5, 2015, that he made honest attempts to participate in the inspection, and that he was genuinely upset over being thwarted at such. Shemwell’s testimony was essentially uncontradicted by Respondent as to the critical elements of his interference claim. This case turned not on Shemwell’s testimony as upon respondent’s

⁸ Moreover, this Court observes that there is abundant Commission case law holding that the fact of violation may be based upon (reliable) hearsay alone. *Secretary Of Labor Mine Safety And Health Administration v. Productos De Agregados De Gurabo*, 37 FMSHRC 2441, 2451-53 (Oct. 28, 2015)(ALJ).

⁹ At hearing DeMoss’ private counsel indicated that there might be reason for DeMoss to invoke his fifth amendment privilege if questioned regarding an alleged dust pump tampering incident at subject mine that had a collateral connection to the within controversy. This Court, of course, took no adverse inference from such in assessing DeMoss’ testimony. See Tr. 71-72.

claimed justification for its failure to contact and provide him with transportation to the MSHA inspection.

C. Justin Neil Greenwell

Justin Greenwell gave consistent testimony regarding the July 8, 2015, incident at issue. As noted within, Greenwell's recollections of Scott's remarks regarding MSHA inspectors being barred from issuing citations where violations were first pointed out by miners' representatives were essentially confirmed by Scott at hearing.

Whether Greenwell ultimately left his employment for other non-discriminatory grounds is not ultimately dispositive of his within interference claim in that this Court fully credited Greenwell's testimony that Scott's remarks on July 8, 2015, chilled his desire to exercise his § 103(g) rights. This Court found Greenwell to be also quite sincere in his expressed desire to protect miners' health and safety in his position as miners' representative.

D. Michael Wilson

Michael Wilson was quite credible in his descriptions of Scott's fundamental misapprehension of § 103(g)'s statutory intent—that miners themselves should play an integral role in the enforcement of mine safety and health standards by alerting others to hazards. Indeed, Scott was Wilson's best corroborating witness.

Whatever the character flaws imputed to Wilson by Respondent—this Court nonetheless found Wilson to be an individual sincerely devoted to his duties as a miners' representative and honestly committed to miners' health and safety. That Wilson was willing to continue in his role in an unpaid capacity post-retirement is persuasive evidence of such.

Given the total circumstances it was abundantly clear to this Court that Wilson in good faith reasonably viewed Scott's remarks as tending to interfere with Wilson's protected § 103(g) rights.

E. John T. Scott

This Court found Respondent's witness, John T. Scott, to be a credible and honest individual. A former police officer, Scott readily admitted that he had argued with MSHA Inspector Ramsey—in the presence of Complainants Greenwell and Wilson—that MSHA inspectors could not issue citations for safety violations that were first pointed out by miners' representatives. Indeed, Scott's forthright admissions, as a matter of fact and law, substantially established Wilson's and Greenwell's interference claims arising out of July 8, 2015, incident at issue.

Scott's testimony essentially corroborated much of Complainants' hearing testimony. (See *inter alia* Scott's acknowledgement that his remarks regarding the issuance of citations had generally upset Greenwell.)

While finding Scott to be a quite believable witness, this Court nonetheless found much of Scott's testimony to be troubling. Given Scott's years of coal mine experience and his position of safety supervisor this Court was shocked at Scott's fundamental lack of understanding regarding § 105(g) protections. That Scott in good faith believed that mine operators were to be given a carte blanche waiver of responsibility as to safety violations first pointed out by miners' representatives is profoundly disturbing.

This Court wonders if Scott, as a former police officer, would so blithely embrace a proposition that criminal wrong-doers could not be charged for crimes whose existence was first pointed out by their defense counsel to the police.

Because of the Secretary's discovery refusals discussed herein, this Court is unable to determine what was actually said by MSHA personnel to Scott and/or whether Scott misinterpreted or misunderstood any of such remarks. However, even assuming that Frederick provided misinformation to Scott, Scott's failure to have reasonably questioned such patently erroneous advice affecting miners' health and safety is baffling and saddening.

V. The Test for Interference

The test for interference under Section 105(c) is not well-settled, and each party argues that this Court should apply a different test. Section 105(c) states:

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

30 U.S.C. 815(c)(1).

The Act prohibits both discrimination because of protected activity and interference with the exercise of statutory rights. Most cases before the Commission are of the former, and follow the *Pasula-Robinette* framework, wherein the Claimant presents a *prima facie* case by showing that he or she engaged in protected activity, that there was an adverse action, and that the adverse action was motivated in any part by that activity. See *Turner v. Nat 7 Cement Co. of*

California, 33 FMSHRC 1059, 1064 (May 2011); *Sec'y of Labor on behalf of Pasula v. Consol Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds* 663 F.2d 1211 (3d Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981).

However, the Act's text and legislative history make clear that the Act protects miners 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 benefits or threats of reprisals." S. Rep. 95-191, 95th Cong., 1st Sess. 36 (1977), 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). Interference cases have been relatively rare at the Commission, with an increased frequency of such cases in the past few years, so a majority of Commissioners have never explicitly laid out a test for interference.

In *United Mine Workers of America obo Mark A. Franks and Ronald M. Hoy v. Emerald Coal Resources, LP*, 36 FMSHRC 2088 (Aug. 2014), two Commissioners endorsed a test suggested by the Secretary. According to this test, an interference violation occurs if:

- 1) A person's action can be reasonably viewed, from the perspective of members of the protected class and under the totality of the circumstances, as tending to interfere with the exercise of protected rights, and
- 2) The person fails to justify the action with a legitimate and substantial reason whose importance outweighs the harm caused to the exercise of protected rights.

Id. at 2108. This test has been applied by several ALJs in a variety of interference cases. *See e.g. Lawrence Pendley v. Highland Mining Co. & James Creighton*, 37 FMSHRC 301 (Feb 12, 2015)(ALJ Andrews); *Scott D. McGlothlin v. Dominion Coal Corp.*, 37 FMSHRC 1256 (June 11, 2015) (ALJ Feldman); *Sec'y of Labor obo Greathouse et al. v. Ohio County Coal*, 37 FMSHRC 2892 (Dec. 30, 2015) (ALJ Miller).

However, in *Sec. of Labor on behalf of Mindy S. Pepin v. Empire Iron Mining Partnership*, 38 FMSHRC 1435 (June 6, 2016), ALJ Barbour cast doubt on the *Franks* test. Judge Barbour held that the Secretary's interpretation of Section 105(c) was unreasonable and not entitled to *Chevron* deference because it "entirely reads out the word 'because' and all subsequent language" from the provision.¹⁰ *Id.* at 1449. Judge Barbour held that the word "because" required that the Complainant prove that the Respondent's interference with the

¹⁰ The pertinent language of Section 105(c)(1) states: "No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner...because such miner... has filed or made a complaint under or related to this Act..." 30 U.S.C. 815(c)(1)(emphasis added).

exercise of miners' statutory rights was motivated by the exercise of protected rights. *Id.* at 1453-54. While acknowledging that the Commission has traditionally based its interpretation of interference on the NLRB's interpretation of similar language, which does not require a showing of intent, and that courts have held that the word "because" in Title VII disparate impact cases does not require a showing of intent, the judge held that a plain reading of the Act required such. *Id.* at 1450-51, n. 11. Accordingly, he created the following test, which places intent front and center: In order to prove an allegation of illegal interference under section 105(c)(1), the Secretary must show that "(1) the Respondent's actions can be reasonably viewed, from the perspective of members of the protected class and under the totality of the circumstances, as tending to interfere with the exercise of protected rights, and that (2) such actions were motivated by the exercise of protected rights." *Id.* at 1453-54.

Following *Pepin*, the Commission had the opportunity to determine the appropriate interference test in *Sec. of Labor on behalf of Thomas McGary and Ron Bowersox and UMWA v. The Marshall County Coal Co., McElroy Coal Co., Murray American Energy, Inc. and Murray Energy Corp.*, 38 FMSHRC 2006 (Aug. 26, 2016) (hereinafter referred to as "*McGary*")¹¹. The Secretary in *McGary* argued that the Commission should apply the test from *Franks*, whereas the Respondent argued before the Commission that because there was no interference test endorsed by a majority of Commissioners, it should only apply its previous precedential decisions in *Sec'y on behalf of Gray v. North Star Mining, Inc.*, 27 FMSHRC 1 (Jan. 2005), and *Moses v. Whitley Dev. Corp.*, 4 FMSHRC 1475 (Aug. 1982).

Commissioners Young, Nakamura, and Althen held that the "*Franks* two-step test is consonant with the Commission's decisions in *Gray* and *Moses* and thus it was not error for the Judge to apply it in this instance." 38 FMSHRC at 2012. The Commission further stated:

The language of the first prong of the *Franks* interference opinion test is entirely consistent with *Moses* and *Gray*. In *Moses*, the Commission concluded that the operator's conduct constituted interference because it would "chill the exercise" of miners' protected rights. 4 FMSHRC at 1478-79. Consequently in *Gray*, the Commission analyzed "whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of [protected] rights." 27 FMSHRC at 9 (citation omitted).

The second prong of the *Franks* interference opinion two-step test is similarly grounded in Commission precedent. In *Moses*, the Commissioner recognized that an operator may have legitimate and substantial reason for its conduct in question. *See* 4 FMSHRC at 1479 n.8 ("This is not to say that an operator may never question or comment upon a miner's exercise of a protected right. Such question or comment may be innocuous or even necessary to address a safety or health problem").

Id. In a footnote, Commissioners Young and Althen clarified that they "do not find it necessary

¹¹ In *McGary*, the Respondents did not challenge the application of the *Franks* interference test before the ALJ, which complicated the procedural posture of the issue before the Commission. *McGary*, 38 FMSHRC at n. 11, n. 22.

to settle upon a final, specific test of interference in this case.” *Id.* at n. 11. They noted that the question of which test should apply to interference cases has never been fully briefed before the Commission, and therefore it would be inappropriate for the Commission to settle on one test over another. *Id.* Commissioner Nakamura noted that he believed that the *Franks* test was the appropriate test for interference cases. *Id.* Citing Supreme Court precedent in *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507 (2015), *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and *Smith v. City of Jackson, Miss.*, 544 U.S. 228 (2005), he observed, “that the Supreme Court has often recognized that statutes prohibiting discrimination “because of” congressionally designated criteria need not include a motive element.” *Id.*

Commissioners Jordan and Cohen wrote a separate decision, concurring in part and dissenting in part. In pertinent part, they agreed with the Judge’s application of the *Franks* test. *Id.* at 2028-2030. Commissioner Jordan noted in a footnote that she joins Commissioner Nakamura in his endorsement of the *Franks* test. Commissioner Cohen noted that he would apply the *Franks* test in the *McGary* case, but explained that “absent briefing from the Secretary, the regulated community and miners, however, Commissioner Cohen does not believe it prudent to settle upon a specific test for interference under the section 105(c) of the Mine Act at this time.”¹² *Id.* at n. 22.

Accordingly, *McGary* clarifies that whereas there is no settled test for interference cases, the *Franks* test is an appropriate test, and not contrary to the Act or Commission precedent. The undersigned will apply the *Franks* test for these reasons, and because the *Pepin* test would appear to lead to absurd results under too many circumstances.

Unfortunately, Section 105(c) is not the model of legislative precision.¹³ Section 105(c)(1)—a 203-word run-on sentence—is no exception. This is perhaps due to the fact that the

¹² Commissioner Cohen did not describe a circumstance in which an interference case would warrant a different test.

¹³ For example, Section 105(c)(2), which describes the procedures for Temporary Reinstatement, states that the Secretary shall commence an investigation of a complaint “within 15 days of the Secretary’s receipt of the complaint, and if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, *shall* order the immediate reinstatement of the miner pending final order on the complaint.” 30 U.S.C. 815(c)(2)(emphasis added). Read plainly, this clause, with its use of the word “shall,” would seem to deny the Commission ALJs of any discretion in granting or denying a Temporary Reinstatement application, and would make a hearing wholly unnecessary. However the Commission has not interpreted the clear words of the statute in this manner, and has instead detailed procedures for a Temporary Reinstatement hearing, 29 C.F.R. 45, and Commission ALJs have denied applications by the Secretary for Temporary Reinstatement. *See e.g. Sec’y of Labor obo Lawrence D. Hagene v. Prairie State Generating Co., LLC*, 38 FMSHRC 290 (Feb. 22, 2016) (ALJ); *Sec’y of Labor obo Levi Bussanich v. Centralia Mining Co.*, 22 FMSHRC 107 (Jan. 27, 2000)(ALJ), *aff’d by the Commission*, 22 FMSHRC 153 (Feb. 22, 2000); *Sec’y of Labor obo Daniel R. Brusca v. Twentymile Coal Co.*, 30 FMSHRC 552 (June 25, 2008)(ALJ).

history of mining legislation follows quickly on the heels of the history of mining disasters. The 1969 Coal Act was passed soon after the 1968 Farmington Mine disaster.¹⁴ Public Law 91-173 (Dec. 30, 1969). Similarly, the 1977 Mine Act was passed soon after the 1976 Scotia Mine disaster and the 1977 Porter Tunnel Mine disaster.¹⁵ One should of course give effect to every word in a statute, but one should not interpret words so narrowly such that they lead to absurd results that are contrary to the purpose of the law.

Though the *Pepin* test's strict reading of the word "because" in the Act to require the Complainant to show that the Respondent was "motivated by the exercise of protected rights," has some appeal, it would lead to results that are contrary to the Act's and the provision's purpose. According to the *Pepin* test, an agent of the operator would be legally permitted to interfere with a miner's statutory rights because he doesn't like the miner, because there was a lack of resources, because he was ignorant of the miner's statutory rights, or a host of other reasons that are not motivated by the exercise of protected rights.

Additionally, because the *Pepin* test requires that "such actions were motivated by the exercise of protected rights," it would only find interference as a reaction to miner's conduct, and not in instances where the operator preemptively interfered with miners' rights. Such an example of preemptive inference can be found in the *McGary* case, where the mine CEO held mandatory "Awareness Meetings" wherein miners got the impression that all safety complaints should first be reported to mine management, in contravention to their statutory rights to make anonymous complaints to MSHA. *McGary*, 38 FMSHRC at 2015-16. In the *McGary* case, the CEO's conduct was perhaps in response to previous complaints, but what about an instance where a mine operator opens a mine and includes such information in the initial training? If the Complainant cannot show that the operator's motivations were because of the exercise of protected rights—and how could he if the mine just opened—should that conduct be permissible?

This requirement is in conflict with the first prong of both the *Franks* test employed in *McGary*, as well as the first prong of the *Pepin* test, which asks if the Respondent's actions can

¹⁴ Indeed, the first two sentences of the Purpose of the Coal Act in the House Report state:

During the early hours of November 20, 1968, an explosion rocked Consolidation Coal Co.'s No. 9 mine near Farmington, W. Va. When the mine was sealed several days later, it became the tomb for 78 miners working that tragic midnight shift who could not have escape and for whom no rescue operation could succeed.

H. Rept. 91-563, 91st Congress, 1st Session, October 1969.

¹⁵ The Introduction of the Senate Report accompanying the bill provides a long list of mine disasters, ending with Scotia and Porter Tunnel (Tower City). S. Rep. 95-191, 95th Cong., 1st Session (1977), 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 (1978).

be reasonably viewed “as tending to interfere with the exercise of protected rights.” *McGary*, 38 FMSHRC at 2011; *Pepin*, 28 FMSHRC at 1453-54. The phrase “tending to interfere” indicates that the employer’s conduct is inclined to interfere with future miner conduct. However, the second prong in *Pepin* requires a predicate exercise of protected rights that the conduct be in reaction to. If a mine operator is interfering with a miner’s statutory rights, why should the Complainant who is in a worse position to make a showing of the operator’s motivations be required to show why the operator is acting in such a manner? Instead, the operator should be required to show why the interference with a miner’s statutory rights was due to “a legitimate and substantial reason whose importance outweighs the harm cause to the exercise of protected rights,” as required by the *Franks* test. If it cannot, then the conduct should be prohibited under Section 105(c).

VI. Respondent’s Conduct Tended to Interfere with the Exercise of Miners’ Rights in Docket Nos. KENT 2016-96-D and KENT 2016-108-D, However There was a Legitimate and Substantial Reason Present in Docket No. KENT 2016-96-D

In Docket Nos. KENT 2016-96-D and KENT 2016-108-D, Complainants Shemwell and Greenwell allege that Respondent’s failure to notify them of the June 11, 2015, MSHA inspections and failure to provide Shemwell transportation to accompany the inspector constituted interference. Shemwell and Greenwell were designated as miners’ representatives on February 28, 2014. Tr. 45, 47, 87. Both Shemwell and Greenwell testified that mine management treated them worse once they started serving as miners’ representatives. Tr. 48-49, 93-95. The Respondent does not deny that neither Shemwell nor Greenwell were notified about the inspection or provided transportation, but states that the failure to notify Shemwell was due to the MSHA inspector’s specific orders regarding notification.

The relevant facts of these cases are that on June 11, 2015, inspector Walker arrived at the mine at 6:00 am. Tr. 187. DeMoss was unaware if Walker had asked for a miners’ representative or if one was available when he arrived, but he later learned that an Armstrong examiner had been accompanying Walker. Tr. 190, 221.

At 6:45 am DeMoss asked Shemwell and then Greenwell if they wanted to walk around with the MSHA inspector should one be there on that day, to which they both responded yes. Tr. 54, 99, 165. DeMoss did not tell them that there was already an inspector at the mine, and they did not know that there was an inspection already proceeding. Tr. 100, 126, 190-91. Based on Inspector Walker’s notes, it is likely that he did not go underground until approximately 6:45 am, when DeMoss was meeting with the miners’ representatives. EX. R-2.

Later in the morning, between 8:30 am and 9:00 am, MSHA District 10 Assistant Manager Brian Dotson and Field Supervisor Allen Frederick arrived at the mine for inspection. Tr. 166. DeMoss told them that he would call Presley to pick up Shemwell so he could accompany the inspectors. Tr. 167, 238. MSHA personnel told DeMoss not to do so, and instead instructed DeMoss to call Shemwell, and have Shemwell call Presley for transportation. Tr. 238, 259. Though not specifically told the reason behind this directive, DeMoss testified that he believed it was due to MSHA’s concern with pre-notification of the inspector’s presence.¹⁶ Tr.

¹⁶ Advance notice of an inspection is prohibited by Section 103(a) of the Act.

167, 238-39. Over the following 13 minutes, DeMoss tried to call Shemwell 12 times, but was unable to reach him. Tr. 170-71. When Shemwell called back, DeMoss explained that Shemwell had to contact Presley for a ride. Tr. 56-60, 172.

Shemwell thereafter attempted to call Presley 12 times between 10:12 am and 11:21 am to arrange a ride, but he could not reach him. Tr. 58-61. Shemwell called Greenwell and asked if there were any rides available to transport him to the inspection party, but Greenwell could not locate any. Tr. 121-122. Later that morning, Shemwell spoke with Scott, and Scott told him that the inspection had concluded and asked Shemwell if he had any questions. Tr. 62-63. Shemwell responded that he did not. Tr. 62-63.

Later, when Greenwell enquired with Inspector Walker and DeMoss why he was not informed about the inspection and offered transportation, they both indicated that there was no room on the ride. Tr. 101-102, 120, 126. Greenwell testified that had DeMoss informed him that there was an ongoing inspection during the 6:45 am meeting, he would have traveled with the inspector. Tr. 102. He further testified that if the company continued to fail to inform him of inspections and offer him transportation, he would not continue to exercise his rights as a miners' representative. Tr. 113.

According to the Mine Act, miners' representatives "shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine...for the purpose of aiding such inspection and to participate in pre- or post-inspection conferences held at the mine." 30 U.S.C. §813(f). Such opportunity must mean that miners' representatives are provided notification, as well as the time and resources necessary to facilitate the walkaround. Miners' representatives are dependent upon mine management for appropriate notification of inspection. Furthermore, the record clearly shows that miners' representatives like Shemwell or Greenwell have no authority to order anyone to provide a ride, and are instead dependent on mine management. Tr. 61, 195-196. I find that a failure to notify a miners' representative or provide him with adequate transportation would tend to interfere with the exercise of the miners' representative's statutory rights of accompanying the MSHA inspector.

However Shemwell's case (Docket No. KENT 2016-96-D) contains evidence that MSHA representatives ordered the Respondent to notify Shemwell in the manner it did, which further led to the lack of transportation. Tr. 167, 238-239, 259. Although the undersigned agrees with Complainant that the Respondent could have, and perhaps should have, engaged in further efforts in ensuring that Shemwell was notified and provided transportation, the MSHA inspector's orders complicate this matter.¹⁷ If a federal inspector orders mine personnel to use a specific means of notification and arrangement for transportation, even if inefficient or problematic, there is a legitimate and substantial justification for complying.

In Greenwell's case (Docket No. KENT 2016-108-D), no such justification exists. Respondent made no efforts in informing Greenwell of Inspector Walker's presence, or trying to

¹⁷ MSHA repeatedly refused to make personnel available for deposition.

find him transportation. In this instance, they simply shirked their duties. Accordingly, I find that the conduct contained in KENT 2016-108-D constituted unlawful interference.

VII. Respondent Interfered With the Exercise of Miners' Rights in Docket No. KENT 2015-673-D

The circumstances surrounding Docket No. KENT 2015-673-D involve statements made on July 8, 2015, by Armstrong safety director, John T. Scott, to MSHA inspector, Charles Ramsey, in the presence of miners' representatives Wilson and Greenwell. During the July 8 inspection, Greenwell pointed out some loose roof bolts, a piece of machinery that was leaking oil, and a problem with a door switch to the MSHA inspector. Tr. 108-110, 137, 246-47. This led to the inspector issuing three citations. Tr. 247-48. Scott challenged the citations, and told the MSHA inspector that citations could not issue if a miners' representative had first pointed out the safety violation.¹⁸ Tr. 111, 138-39. I find that such comments made in the presence of miners' representatives would tend to interfere with the exercise of miners' rights, and there is no legitimate and substantial justification.

Wilson, Greenwell, and Shemwell each testified that if the Respondent continued to argue to MSHA that if a miners' representative points out a violation to an inspector a citation cannot issue, or if MSHA did not issue citations for those violations, they would not continue to exercise their walkaround rights. Tr. 66, 81, 112, 138-139. Indeed, miners' representatives serve in this important capacity to make the mines safer. Any reasonable miners' representative would reason that if his presence lessened MSHA's ability to issue citations, he would likely rethink his role, and would perhaps conclude that it would be safer if no miners' representative walked around with the inspector.

Scott testified that he was told by MSHA inspector Frederick or Walker of the rule that MSHA cannot issue a citation if a miners' representative first discovers the violation. Tr. 182. Though a mine operator has a right to challenge any citation or defend its conduct to the inspector, the comments made in the instant case were unreasonable and should not have been made in the presence of miners' representatives. However, there are several problems with Scott's conduct. Even if Scott was indeed informed on a previous occasion by MSHA personnel that a citation cannot issue if a miners' representative first discovers the violation—or he misunderstood their statements to mean such—as safety director he should have found the notion unreasonable and suspicious. The Mine Act is a strict liability statute, meaning that the circumstances surrounding discovery would not impact the fact of violation. Furthermore, if such were the case, then miners' representatives would be dissuaded from speaking up, and simply hope silently that the MSHA inspector noticed the violations. Indeed, mine safety manager DeMoss called Scott's position "crazy." Tr. 214.

¹⁸ I find Wilson and Greenwell's account of Scott's statement challenging the citation more credible than Scott's testimony that he was challenging the gravity and negligence. Tr. 250. In addition to Wilson and Greenwell providing more credible testimony, Scott's testimony was inconsistent. After testifying that he was only referring to gravity and negligence, he admitted that the Complainants' discrimination complaint's pleadings were accurate in that he had tried to talk inspector Ramsey out of issuing the citation because miners' representatives first discovered the violations. Tr. 254-55; Ex-E.

If Scott somehow believed this unreasonable notion, he should have discussed the matter with MSHA either prior to, or after, the inspection, while out of the presence of the miners' representatives. Any reasonable person would recognize that raising the argument in the presence of the miners' representative would have the unintended, or intended, consequences of dissuading miners' representatives from reporting violations to MSHA inspectors. Respondent raises a freedom of speech argument, stating that one should not suffer liability under the Mine Act for clarifying one's rights under the Act. However, the Respondent's arguments are misplaced, and the cases it cites in support are inapposite. The issue in the instant case is not solely what was said, but that it was said in the presence of the miners' representatives. The First Amendment often requires a balancing of the right to free speech with other rights. *See eg. NLRB v. Gissel Packaging Co.*, 395 U.S. 575 (1969) (Supreme Court found interference under NLRA based on threats of plant closure made by employer to employees to dissuade unionization). If the Respondent's argument was followed, then much of the Act's discrimination protections (as well as many other regulatory provisions) would be hollowed of all meaning.

The Respondent certainly had the right to clarify its understanding of MSHA's citation protocol. However, in doing so in the presence of the miners' representatives, its comments tended to interfere with the representatives' rights. Furthermore, there is no significant justification for why the comments were made in their presence. As such, I find that Scott's comments made in the presence of miners' representatives constituted interference under Section 105(c) of the Mine Act.

ORDER

Based on the above, the Court finds that Respondent violated Section 105(c) in Docket Nos. KENT 2016-108-D and KENT 2015-673-D by unlawfully interfering with miners' protected activities. The Court finds no interference in Docket No. KENT 2016-96-D.

It is hereby **ORDERED** that Armstrong Coal cease and desist from interfering with the rights of miners' representatives.

It is **FURTHER ORDERED** that Armstrong Coal's management personnel undergo comprehensive specialized training by MSHA personnel in the statutory rights of representatives under Section 105(c) of the Act.

It is **FURTHER ORDERED** that Armstrong Coal post this decision at the Parkway Mine in a conspicuous unobstructed place where notices to employees are customarily posted, for a period of 60 days.

It is **FURTHER ORDERED** that Respondent pay Complainants' reasonable attorney fees and costs.

Pursuant to Commission Rule 44(b), 29 C.F.R. §2700.44(b), a copy of this decision will be sent to the office of the Regional Solicitor having responsibility for the area in which the Highland 9 Mine is located so that the Secretary may take the actions required by the rule.¹⁹

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

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¹⁹ It should be noted that any significant penalty based upon the negligence or gravity of Respondent's conduct will be closely scrutinized by the undersigned in light of MSHA's refusal to make available information necessary to this case.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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May 9, 2017

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

v.

TEICHERT AGGREGATES,
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. WEST 2017-0028
A.C. No. 04-02792-419417

Mine: Vernalis Plant

DECISION AND ORDER

Appearances: Randy L. Cardwell, Mine Safety and Health Administration, U.S. Department of Labor, Vacaville, California, for Petitioner;

Luis A. Garcia, Office of the Solicitor, U.S. Department of Labor, Los Angeles, California, for Petitioner;

Alberto Ramirez, *pro se*, Sacramento, California, for Respondent.

Before: Judge Miller

This case is before me upon a petition for assessment of civil penalty filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d) (“the Act”). This docket involves one citation issued pursuant to Section 104(a) of the Act with an originally proposed penalty of \$114.00. The parties presented testimony and evidence regarding the citation at a hearing held in Sacramento, California, on April 12, 2017. The Secretary provided a memorandum of law regarding this single guarding violation prior to the hearing.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Vernalis Plant is a surface sand and gravel mine located in San Joaquin County, California. The parties have stipulated that Teichert Aggregates is an “operator” as defined in Section 3(d) of the Mine Act, 30 U.S.C. § 803(d), and that the mine is subject to the provisions of the Mine Act and the jurisdiction of the Commission. *Jt. Stips.* ¶¶ 2-6.

Citation No. 8873581 was issued for violation of 30 C.F.R. § 56.14107(a) for an inadequate guard on a head pulley. The Secretary alleges that the violation was unlikely to cause injury, that if an injury did occur it would be permanently disabling, that the violation was not significant and substantial, and that it was the result of low negligence. The Secretary proposed

a penalty of \$114.00 based on his penalty criteria. Based upon the parties' stipulations, my review of the entire record, my observation of the demeanor of the witnesses, and consideration of the parties' legal arguments, I find that the Secretary has proven that a violation occurred as alleged.

A. MSHA's Inspection

Inspector William Edminister has been a mine inspector for nine years, and has a total of 16 years mining experience. He is familiar with the Vernalis sand and gravel operation and familiarized himself with the mine file prior to conducting an inspection there. The mine employs approximately 40 to 50 miners, with production primarily on the day shift. Edminister travelled to the mine on August 1, 2016, to conduct a regular inspection beginning in the late afternoon. During the course of his inspection, he observed the 2 CNV 25 tripper conveyor. The tripper conveyor is an overland conveyor that moves finished product from one location to another, where it is dumped onto a stock pile. The end of the conveyor, where this citation was issued, is on a trolley and can be moved to change the location of dumping. Edminister and the others in the inspection party walked the length of the conveyor on the designated walkway, up the slope to the discharge point at the top. At the end of the conveyor walkway, the inspector climbed a ladder about seven or eight feet up to the work platform. From that platform, Edminister observed a second work platform higher up where the head pulley was located. The platform with the pulley was surrounded by a handrail. The Respondent's Exhibit 3-14 shows an aerial view of the conveyor and work platform with the pulley. Edminister did not enter the work platform, but observed that a miner could enter it by climbing over or through the handrails. Other than the handrails, the head pulley was not guarded on either side. The unguarded area was 26 inches wide and 40 inches above the work platform. The aerial photograph shows a shovel on the work platform that miners use to dislodge material in the discharge chute, bringing them very close to the unguarded portion of the pulley.

The Secretary's Exhibits 3 and 4 are photographs that show the unguarded pulley as observed by the inspector. The inspector explained that there were exposed moving machine parts at the drive shaft area where the head pulley passes over the drum. The primary purpose of the work platform, which was added after the conveyor was purchased, is to service the head pulley. The bearings must be changed periodically, and miners must occasionally access the platform to unclog the discharge point. Some maintenance on the pulley can be completed by visual inspection, and lubrication is done with a remote grease line. However, if the grease line fails or material builds up at the chute, a miner must enter the area and will be exposed to the moving parts.

Edminister testified that the moving parts as he observed them could pull a miner into the area, possibly causing a fatal injury. He was told that the pulley had been unguarded for quite a while, but he was not certain exactly how long. He understood that the mine had a lock-out/tag-out policy for anyone accessing the area and that the area was not accessed often. Due to the limited exposure, he designated the citation as non-S&S and unlikely to cause injury. He chose also to designate the negligence as low because mine management believed that the handrail around the work platform was sufficient to protect miners from the pulley.

The mine operator called three witnesses, all of whom were present for at least part of this inspection. Chris Walters, the assistant hot plant operator, has worked at the plant for 13 years. He has not worked on the cited platform but testified that the miners are trained not to enter the area unless they have de-energized and locked out the belt. He also explained that the miners know not to go past the handrails on the platform, and that the only time a miner would come close to the pulley would be to do work on it. He explained that miners occasionally enter the area to change the direction of the discharge chute, but that they de-energize the equipment first. The moving parts are not accessible, in his view, when miners are following the safety procedure. Mark Muniain, the plant repairmen, agreed that the area is accessed only for maintenance, which is infrequent. He testified that it was possible for a miner to go through or over the rails and access the cited area, but that this would be against the mine's safety procedures.

Michael Goss has been a superintendent for Teichert for 14 years and has worked at the Vernalis location slightly more than a year. He was called at home when Edminister arrived to conduct an inspection, and he returned to the mine to accompany the inspector. He was present for the inspection of the conveyor area and the work platform. He explained that the unguarded pulley had been unguarded during the year he was at the plant, and he believed that the work platform had been added eight or ten years earlier when the bearings on the pulley had to be changed. He believes additional guarding was not necessary because the area with moving machine parts was completely enclosed by a handrail with a mid-rail. In his view, if someone were to trip and fall as they entered the work platform, the handrail would prevent contact with the unguarded area.

B. The Violation

Based on his observations, Edminister issued Citation No. 8873581 for an unguarded head pulley. The Secretary alleges a violation of 30 C.F.R. § 56.14107, which provides that

(a) Moving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and takeup pulleys, flywheels, couplings, shafts, fan blades, and similar moving parts that can cause injury.

(b) Guards shall not be required where the exposed moving parts are at least seven feet away from walking or working surfaces.

The parties agree that a work platform on the 2 CNV 25 tripper conveyor provided access to the head pulley, and that there were moving machine parts inside the pulley which had the potential to cause injury. The parts were exposed to someone standing on the work platform. The issue is whether the machine parts were "guarded" under the meaning of the standard. The Secretary argues that the exposed parts of the head pulley violated § 56.14107. However, Teichert argues that the handrails surrounding the pulley were sufficient guarding to satisfy the standard. In the Secretary's view, the handrails did not constitute a guard because they were too easily defeated.

A plurality of the Commission has found that § 56.14107 is ambiguous because "its language is broad and does not specify the extent of guarding required or explain how moving

parts should be guarded.” *Alan Lee Good*, 23 FMSHRC 995, 1004 (Sept. 2001) (Jordan and Beatty, Comm’rs). In cases involving an ambiguous regulatory provision, Commission judges must defer to the Secretary’s interpretation of his own regulation “as long as it is reasonable.” *Small Mine Dev.*, 37 FMSHRC 1892, 1894 (Sept. 2015) (quoting *Tenet HealthSystems Healthcorp. v. Thompson*, 254 F.3d 238, 248 (D.C. Cir. 2001)); *see also Auer v. Robins*, 519 U.S. 452, 461 (1997) (holding that an agency’s interpretation of its own regulation is “controlling unless plainly erroneous or inconsistent with the regulation”).

The purpose of MSHA’s guarding standards is to “prevent, to the greatest extent possible, accidents in the use of [mechanical] equipment.” *See Arch of Ky., Inc.*, 13 FMSHRC 753, 756 (May 1991) (quoting 38 Fed. Reg. 4976, 4977 (Feb. 1973)) (interpreting a different guarding standard). Here, several witnesses testified that it was possible for a miner to climb over or through the handrail to reach the work platform near the pulley. If he did so, he would be exposed to the moving machine parts. The additional guard required by the inspector would prevent such a person from coming into contact with the moving parts. The additional guard did not impede the functioning of the pulley and would be crucial in the event of someone entering the work platform without de-energizing the pulley. Thus, I find that the handrail alone would not prevent an accident involving the pulley “to the greatest extent possible.” Therefore, the Secretary’s interpretation requiring a guard on the specific moving parts is a reasonable interpretation of the regulation.

Teichert also argues that additional guarding was not necessary because the mine has a lock-out/tag-out policy which would require that the pulley be de-energized before anyone performed maintenance on it. However, the Commission has found that guarding standards should be interpreted to account for “all relevant exposure and injury variables” including “the vagaries of human contact.” *Thompson Bros. Coal Co.*, 6 FMSHRC 2094, 2097 (Sept. 1984). Consistent with this, Commission judges have interpreted guarding standards to require that guarding be adequate to prevent injury in the event that an employee carelessly disregards a lock-out/tag-out policy. *See, e.g., Climax Molybdenum Co.*, 38 FMSHRC 2453, 2460 (Sept. 2016) (ALJ); *Dix River Stone Inc.*, 29 FMSHRC 186, 203 (Mar. 2007) (ALJ); *Calco Inc.*, 15 FMSHRC 480, 484 (Mar. 1993) (ALJ). Here, I credit the miners’ testimony that Teichert had a lock-out/tag-out policy that was consistently followed. Nevertheless, the pulley guarding needed to account for the unlikely event of a miner entering the area without following the policy. The guarding observed by the inspector would not have been adequate to prevent injury in that occasion. Accordingly, I find that the Secretary has proven a violation of the standard.

C. Fair Notice

While I find that the Secretary’s interpretation of the standard is reasonable, Teichert is entitled to due process protections prior to enforcement of that interpretation. *Hecla Ltd.*, 38 FMSHRC 2117, 2125 (Aug. 2016). Due process requires that laws “give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.” *Id.* (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972)). In the context of regulatory interpretation, a court must not allow deference to an agency’s interpretation to “validat[e] the application of a regulation that fails to give fair warning of the

conduct it prohibits or requires.” *Id.* (quoting *Suburban Air Freight, Inc. v. Trans. Sec. Admin.*, 716 F.3d 679, 683-84 (D.C. Cir. 2013)). This is known as the “fair notice doctrine.” *Id.*

The Commission evaluates fair notice using the reasonably prudent person standard. *Hecla*, 38 FMSHRC at 2125. Under that test, application of a standard to a set of facts is consistent with fair notice if “a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard.” *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990). In applying the reasonably prudent person standard, the Commission has taken into account a wide variety of factors, including the text of the regulation, its placement in the overall regulatory scheme, explicit definitions in the regulations or the Act, the regulatory history, the consistency of the agency’s enforcement, and whether MSHA has published notices informing the regulated community of its interpretation. *See Hecla*, 38 FMSHRC at 2125-26; *Wolf Run Mining Co.*, 32 FMSHRC 1669, 1682 (Dec. 2010); *Island Creek Coal Co.*, 20 FMSHRC 14, 24-25 (Jan. 1998); *Morton Int’l, Inc.*, 18 FMSHRC 533, 539 (Apr. 1996); *Ideal Cement Co.*, 12 FMSHRC at 2416. Also relevant is the testimony of the inspector and the operator’s employees as to whether they believed the cited condition to be a violation. *Island Creek*, 20 FMSHRC at 24-25. Finally, the Commission has looked to evidence of accepted safety practices in the industry. *See BHP Minerals Int’l Inc.*, 18 FMSHRC 1342, 1345 (Aug. 1996); *Ideal Cement*, 12 FMSHRC at 2416.

In this case, the mine operator has not provided sufficient facts to establish a fair notice defense. There was some testimony that the work platform without a guard had been in place for eight to ten years, but another witness said the platform had only been in place for a year or two. Further, there was no indication that the practice of leaving that pulley unguarded was an accepted safety practice in the industry or that it had been viewed by a previous inspector. Instead, the Secretary has shown that MSHA has published many notices regarding this type of guard, and provided power point presentations and training materials. The Secretary introduced a portion of MSHA’s Program Policy Manual, which is sent to mine operators. Sec’y Ex. 7. The manual states that “the use of chains to rail off walkways and travelways near moving machine parts ... is not in compliance with” § 57.14107. *Id.* The Secretary also introduced a PowerPoint presentation that is available to mine operators on the MSHA website. Sec’y Ex. 9. The PowerPoint presentation includes a photograph of a pulley on a work platform with a handrail and indicates that the guarding is insufficient. *Id.* at 24. At the Vernalis plant, miners could easily crawl over or through the handrails to the work platform to dislodge rock or to work on the conveyor. In fact, Respondent’s Exhibit 3-14, an aerial photograph of the conveyor and the pulley cited, shows a shovel laying on the work platform, presumably to dislodge rock that may be caught in or around the pulley area. A reasonable miner would have been aware that a guard was needed in this situation, particularly in view of the information in the PowerPoint and Program Policy Manual from MSHA. When the mine added the work platform, it should have been aware that the moving pulley needed a guard.

The MSHA inspector designated the citation as low negligence and non S&S. He indicated that he designated the violation as low negligence for several reasons. First some of the mine personnel believed that the handrail was sufficient to protect against inadvertent contact with the moving pulley. Next the work platform had probably been in place during past inspections without the guard. Likewise, the inspector believed the gravity was not serious,

given the limited use of the work platform and the mine's training and lock-out/tag-out policies. Therefore, in addition to the low negligence, Edminister designated the violation as not significant and substantial. I agree that the mine operator's arguments do not negate the violation, but instead indicate that the violation was properly designated as low negligence and was non-S&S.

II. PENALTY

The principles governing the authority of Commission Administrative Law Judges to assess civil penalties de novo for violations of the Mine Act are well established. Section 110(i) of the Mine Act delegates to the Commission and its judges "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(i). The duty of proposing penalties is delegated to the Secretary. 30 U.S.C. §§ 815(a), 820(a). The Secretary calculates penalties using the penalty regulations set forth in 30 C.F.R. § 100.3 or following the guidelines for special assessments in 30 C.F.R. § 100.5. When an operator notifies the Secretary that it intends to challenge a penalty, the Secretary then petitions the Commission to assess the penalty. 29 C.F.R. § 2700.28. Commission judges are not bound by the Secretary's penalty regulations or his special assessments. *Am. Coal Co.*, 38 FMSHRC 1987, 1990 (Aug. 2016). Rather, the Act requires that in assessing civil monetary penalties, the judge must consider six statutory penalty criteria: the operator's history of violations, its size, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and whether the violation was abated in good faith. 30 U.S.C. § 820(i). In keeping with this statutory requirement, the Commission has held that judges must make findings of fact on the statutory penalty criteria. *Sellersburg Stone Co.*, 5 FMSHRC 287, 292 (Mar. 1983), *aff'd*, 736 F.2d 1147, 1152 (7th Cir. 1984). Once these findings have been made, a judge's penalty assessment for a particular violation is an exercise of discretion "bounded by proper consideration of the statutory criteria and the deterrent purposes underlying the Act's penalty scheme." *Id.* at 294; *see also Cantera Green*, 22 FMSHRC 616, 620 (May 2000). The Commission requires that its judges explain any substantial divergence from the penalty proposed by the Secretary. *Am. Coal*, 38 FMSHRC at 1990. However, the judge's assessment must be de novo based upon her review of the record, and the Secretary's proposal should not be used as a starting point or baseline. *Id.*

The Secretary has proposed a penalty of \$114.00 for this violation. The history of violations introduced by the Secretary shows that the mine regularly complies with the standards and abated this violation in good faith. The mine operator is a large one, and has not raised the issue of the ability to pay. The negligence is low and the violation is not significant and substantial. Based upon my review of the six penalty criteria, I assess the penalty of \$114.00 as proposed by the Secretary.

III. ORDER

Respondent is hereby **ORDERED** to pay the Secretary of Labor the sum of \$114.00 within 30 days of the date of this decision.

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

Distribution: (U.S. First Class Certified Mail)

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May 11, 2017

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

v.

FREEPORT-MCMORAN SIERRITA,
INC.,
Respondent

CIVIL PENALTY PROCEEDINGS

Docket No. WEST 2015-0873-M
A.C. No. 02-00144-385291

Docket No. WEST 2016-0414-M
A.C. No. 02-00144-404052

Docket No. WEST 2016-0691-M
A.C. No. 02-00144-415949

Docket No. WEST 2017-0002-M
A.C. No. 02-00144-418450

Sierrita Mine

DECISION

Appearances: Timothy Turner, Office of the Solicitor, U.S. Department of Labor,
Denver, Colorado, for the Secretary;
Kristin R.B. White, Esq., Jackson Kelly PLLC, Denver, Colorado, for
Freeport-McMoRan Sierrita, Inc., for Respondent.

Before: Judge Manning

These cases are before me upon petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”), against Freeport-McMoRan Sierrita, Inc., (“Freeport”) pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the “Mine Act”). Freeport operates the Sierrita Mine (“Sierrita”), a surface copper mine in Pima County, Arizona.

These dockets involve thirteen section 104(a) citations issued by the Secretary to Freeport. Prior to hearing the parties settled four of the thirteen citations. On April 18, 2017 the Secretary filed a Motion to Approve Partial Settlement and Order Payment. The motion is addressed at the end of this decision. The parties presented testimony and documentary evidence on the nine remaining section 104(a) citations at a hearing held in Tucson, Arizona and filed post-hearing briefs.

I. DISCUSSION WITH FINDINGS OF FACT & CONCLUSIONS OF LAW

WEST 2015-0873

Citation No. 8929292

Citation No. 8929292 alleges a violation of section 56.14100(b) of the Secretary's safety standards and asserts that the emergency steering system on a haul truck was not being maintained in a functional condition, which in turn exposed the driver to collision/rollover hazards that could result in a fatal accident. The citation states that the truck travels along elevated, winding roadways where both small and large mobile equipment travel. The citation further alleges that a steering test was conducted three times and the wheels could not be turned. Section 56.14100(b) requires that "[d]efects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons." 30 C.F.R. § 56.14100(b).

Inspector Enrique Vidal¹ determined that an injury was reasonably likely to be sustained and, if an injury occurred, it could reasonably be expected to be fatal. He determined that the condition was significant and substantial ("S&S"), that one person was affected, and that Freeport's negligence was moderate. The Secretary proposed a penalty of \$4,329.00 for this alleged violation.

Summary of the Evidence

On April 15, 2015 Inspector Vidal conducted an inspection of a haul truck at the Sierrita Mine. As part of the inspection he asked the driver to test the truck's emergency steering system. Tr. 43.

The emergency steering system is designed to provide the driver with backup steering power in the event the engine goes out and truck loses power. Tr. 43-44. The system is composed of accumulators that hold pressurized nitrogen that can be activated in the event of an engine failure to provide the driver with steering power for a limited period of time during which the driver can steer the truck into a berm or out of the way. Tr. 43-44, 46.

Vidal explained that testing the emergency steering system requires two persons. Tr. 45. Here, Vidal had the driver test the system by pulling the truck onto a flat area, chocking the back wheels, and then having a man on the ground turn off the engine² to simulate an engine failure so the driver could test the emergency steering from inside the cab. Tr. 44, 69. Vidal was not aware of how the truck's service manual recommended testing the system. Tr. 69.

¹ Inspector Vidal has been with MSHA for 18 years and performs approximately 30 inspections a year. Tr. 9. He is a certified accident investigator, trained as a mechanic and, prior to MSHA, worked 29 years in the mining industry, primarily as a heavy equipment mechanic. Tr. 10-11.

² The haul trucks are equipped with an engine shut off mechanism at ground level.

Vidal testified that, during the test, when the driver of the truck turned the steering wheel, the truck wheels only turned a few inches. Tr. 45, 67-68. At some point the driver told Vidal that he did not know how to do the test and that the drivers are not allowed to conduct the tests. Tr. 45, 74. As a result, Vidal allowed a mechanic to conduct another test. Tr. 45, 75. The system was ultimately tested three times, and in each case it failed to work properly. Tr. 43, 45.

Vidal understood that the emergency steering systems on the haul trucks were tested by mine personnel every 500 hours as part of preventative maintenance (“PM”). Tr. 47. In his opinion, while there is no requirement to conduct a steering test daily, he believed that the testing method used by Freeport was not enough because the drivers of the truck, who are told not to test the system, would not have knowledge whether the system was operational. Tr. 47-48, 75. Vidal observed no issues with the engine that day and the truck’s monitoring systems were not alerting to any problems. Tr. 69.

Based on his observations, Vidal issued Citation No. 8929292 which alleged that Freeport had failed to correct the unsafe condition presented by the non-functional emergency steering system in a timely manner. Tr. 43. The hazard, according to Vidal, was that a haul truck driver going down a ramp would not have emergency steering if the engine went out. Tr. 44. Vidal testified that the truck travels near edges of benches and around other smaller vehicles, and the lack of emergency steering would create a hazard that could cause a collision or rollover. Tr. 48-51. It was unclear how long the steering had been defective and Vidal observed no problems with the truck’s engine and, although he stated he had seen engines go out, he could not provide specific instances. Tr. 49-50.

Ramon Figueroa³, a technical coordinator in the mine’s maintenance department, testified that he was present when the inspector conducted the tests on the haul truck’s emergency steering system. Tr. 88-89, 130, 143, 152.

Figueroa explained the procedure for checking the emergency steering system in much the same way that the inspector did, but stated that the wheels do not need to be turned all the way each direction but only need to be turned until movement is observed, and then turned back the other direction. Tr. 131-132, 158. In support of this statement, he pointed to the truck’s maintenance manual, which states that testing involves visually confirming that the “front wheels turn left as the steering wheel is turned left[,]” and vice versa. Tr. 136-136, 159; RX-4 No. 7. According to Figueroa, the inspector’s method of having the wheels turned all the way to the right and then all the way back to the left is not the correct method to test the emergency steering. Tr. 134. The mine checks the system during the PM conducted on the truck every 500 hours of operation, which usually works out to every three to four weeks. Tr. 132. The manual for the truck recommends testing every 500 hours. Tr. 133.

³ Figueroa has worked at this mine since 1974, with short stints elsewhere during layoffs. Tr. 87-88. He has worked as a helper, mechanic, and lead supervisor. Tr. 88. As a member of the mine maintenance department he is responsible for care of multiple pieces of equipment, including haul trucks. Tr. 89.

Figueroa explained that, given the procedure required to test the emergency steering system, the system check should not be done by the drivers and should, instead, be completed by the maintenance department. Tr. 130-131. The only way a driver can do the test is to park at the ready line in the pit where there is not much room and a person on the ground could get hit and crushed by a wheel when it turns. Tr. 132-133, 163.

Figueroa testified that, at the time of the inspection, the truck's monitoring system detected no issues and no alarms were sounding. Tr. 130, 139. According to Figueroa, during the first test the wheels turned all the way to the right, but did not come back. Tr. 138-139, 156. On the second test the wheels moved a little bit, but not as much as during the first test. Tr. 156.

Figueroa opined that the condition was created because, when the wheels were turned all the way to the right, one of the system's three accumulators was drained. Tr. 152-153, 158. The low accumulator would have been discovered when the truck was brought in for PM. Tr. 139-167. He stated that the emergency steering system was functioning and the condition was not a hazard or safety defect because there was still plenty of pressure in the two other accumulators and the tires moved as required by the truck's manual. Tr. 139-140, 158, 166-167. On cross-examination Figueroa conceded that when the other trucks at the mine were tested that day the wheels turned all the way to the left and right. Tr. 160. He further agreed that if a truck in this condition had just received PM the defect could be there for a few weeks without being corrected. Tr. 162.

Figueroa explained that, in order for the secondary steering system to be needed, an engine or steering pump would have to fail. Tr. 141. This happens on average maybe one to two times a year and the truck's message center will notify the driver to pull over and shut down immediately. Tr. 141, 155, 162.

Fact of Violation

I find that the Secretary failed to meet his burden of proof and that the citation should be vacated. The cited standard requires that defects on equipment that affect safety shall be corrected in a timely manner. In order to satisfy the standard the Secretary must show that there was a defect that affected safety, and that the defect was not corrected in a timely manner. Here, while the cited condition was a defect that affected safety, the Secretary failed to establish that the defect was not corrected in a timely manner.

The emergency steering system's inability to provide power sufficient to turn the wheel more than, at most, a few inches is a defect that affects safety. The purpose of the system is to provide steering power for the haul truck in the event the engine goes out and the primary steering system loses power. Without this system, the driver of the haul truck would not have full steering control of the truck in the event the engine went out. Drivers are aware of the system and undoubtedly would rely on it if the engine went. Notably, while losing an engine is not a frequent occurrence at this mine, it does happen on average one to two times a year. Had this truck's engine gone out, the driver would have had limited control over the direction of travel. While this limited control may be sufficient in many instances, the limitation nevertheless affects safety given that the driver would not have the same level of control that a fully functional

system would provide. I credit Vidal's testimony that the truck travels on hills and benches, and operates in the area of other smaller equipment. Given the limited control, and the areas in which this truck operated, both the driver's safety and the safety of others in the area were impacted. According, I find that this defect affected safety.

Freeport argues that there was no defect affecting safety because the truck passed the emergency steering test as described in the truck's service manual. Freeport Br. 3. This argument lacks merit. While the service manual may have outlined a method for testing the emergency steering system, the manual is silent as to how far the wheels must turn during the test. Although the parties dispute how much the wheels turned during the three tests, there is no dispute that, when tested, the wheels on this truck did not turn all the way in each direction like the other trucks tested that day did.

The Secretary failed to establish that the defect was not corrected in a timely manner. In *Lopke Quarries, Inc.*, 23 FMSHRC 705, 715 (July 2001), the Commission stated that "[w]hether the operator failed to correct the defect in a timely manner depends entirely on when the defect occurred and when the operator knew or should have known of its existence." Here, the Secretary did not introduce credible evidence establishing when the defective condition developed.⁴ Nevertheless, the Secretary argues that the court should find that the condition was not corrected in a timely manner because the mine did not require its drivers to conduct a pre-shift check of the system and Freeport only checks the system every 500 hours of operation as part of its PM program. Sec'y Br. 8. Consequently, the Secretary argues, "it was possible the defect could sit dormant for up to four weeks before the operator found out [the defective condition] existed." *Id.* I find this argument unavailing.

The Secretary argues that the mine *should* check the system during every pre-shift examination and *should* have known of the condition's existence. I disagree. There is no requirement that the emergency braking system be checked as part of a pre-shift examination. The truck's service manual recommends testing only every 500 hours, which is exactly what Freeport did. Further, I credit Figueroa's testimony that having mechanics in the maintenance department test the system, as opposed drivers on the ready line where there is not much room, is the safer method.

I find that Freeport's reliance on the manual in determining when and where to test the system was reasonable. The Secretary has failed to meet his burden of proof. Citation No. 8929292 is **VACATED**.

Citation Nos. 8929293, 8929294 and 8929295

Three of the citations in this docket allege essentially identical violations of section 56.14101(a)(3) of the Secretary's safety standards, which requires that "[a]ll braking systems installed on the equipment shall be maintained in functional condition." 30 C.F.R. §

⁴ Commission Judges have vacated citations under similar circumstances. *Northern Aggregate, Inc.*, 37 FMSHRC 562, 594 (Mar. 2015) (ALJ); *Nelson Quarries, Inc.*, 36 FMSHRC 3143 (Feb. 2014) (ALJ)

56.14101(a)(3). MSHA inspector Enrique Vidal issued each of the citations. I address the citations together.

Citation No. 8929293 alleges that the left front brake assembly of a haul truck was leaking brake oil, which affected the truck's braking effectiveness in the event of an emergency and exposed the driver to collision and rollover hazards which could result in a fatal accident. The citation further alleges that the truck travels elevated, winding roadways where all types of mobile equipment travel.

Citation Nos. 8929294 and 8929295 allege essentially the same thing, with the only difference being that those citations involve a right front brake assembly and left rear brake assembly respectively.

In each of the three citations Inspector Vidal determined that an injury was unlikely to be sustained, but that if an injury occurred, it could reasonably be expected to be fatal. He determined that the conditions were not S&S, that one person was affected, and that Freeport's negligence was moderate. The Secretary has proposed a penalty of \$585.00 for each of these alleged violations.

Summary of the Evidence

On April 21, 2015 Inspector Vidal was at the mine to conduct a mandatory inspection. Tr. 13. While inspecting the equipment in the pit he observed what he believed were violative conditions on three different haul trucks.

Vidal testified that the brake assemblies on the three subject haul trucks have two types of oil, one of which is gear oil and is used on the spindle and large bearings, and another of which is brake oil and used for the brake assembly. Tr. 22. The two types of oil are easy to differentiate by their "thickness, tackiness." Tr. 22. While gear oil is roughly 50 to 60 weight and very thick, brake oil is approximately 30 weight and much thinner and clearer. Tr. 22-23. Vidal testified that the purpose of brake oil in the brake system is to make the brake function by compressing the springs. Tr. 20-21. The brake oil is added to the brake assembly via an oil tank on the exterior of the truck. Tr. 21. The wheel bearings with gear oil are next to the brake assemblies. Tr. 23. According to Vidal, mine personnel check all fluids every shift, including the brake oil, and top off the oil tanks if there is any leakage. Tr. 24, 73.

Vidal testified that section 56.14101(a)(3) requires the service brakes to work and that a brake test is not required in the field when a leak is observed since he already knows that something is wrong with the system. Tr. 72-74. The only time testing is required is when there is a question whether the brakes are operational. Tr. 74. However, on cross-examination he agreed that a leak may not necessarily affect functionality. Tr. 61-62. Moreover, he acknowledged that the technology for brakes had changed quite a bit since he was a mechanic. Tr. 61.

Vidal observed and photographed brake oil leaking from one of the brake assemblies on each of the three trucks. Tr. 19, 32-33, 37; GX-9 p. 1, GX-3 P-1, GX-6 p.1. He was adamant that the leaks were brake oil, as opposed to gear oil. Tr. 23-24. Based on his observations, Vidal

issued Citation Nos. 8329293, 8929294, and 8929295 to Freeport for alleged violations of section 56.14101(a)(3) because the break assemblies were leaking and, therefore, were not being maintained. Tr. 18-19, 32, 38-39. In each instance Vidal believed that an injury was unlikely to be sustained, but that if an injury occurred it would be fatal given that the trucks operate all day, in all types of weather, on elevated haul roads and a collision or rollover could occur. Tr. 27-29, 35-36, 39.

On cross-examination Vidal agreed that he did not test the functionality of the brakes on the three cited trucks, was not aware of any issues with the functionality of the brakes, and no tests were done to determine where the leaking oil was coming from. Tr. 63-667. In writing the citations he relied only on his visual observation of the leaking assemblies. Tr. 63-66. Further, he agreed that the trucks' monitoring systems did not indicate any problems with the brakes and he was not sure if the overstroke pins had been engaged. Tr. 63-67. Moreover, he conceded that it was unlikely overstrokes would ever be triggered since the oil tanks were topped off every shift. Tr. 73.

Ramon Figueroa was present during the inspection of each of the three trucks and testified that the three citations involved the same issue, i.e., leaking brake assemblies. Tr. 91-92, 106. While he agreed that there was an oil leak, he disagreed that the leak was at the service brake on each of the three trucks. Tr. 92. He explained that, while the model numbers of the three trucks were not identical, the brake assemblies were designed the same. Tr. 93-94. Each brake assembly consisted of three different systems: the service brake component which includes a brake piston that applies the service brake, a cooling package that runs through the brake itself, and a parking brake release piston. Tr. 94. Each of these systems runs on its own independent circuit of brake oil. Tr. 103, 119, 163. The cooling system runs on brake oil at low pressure and high volume and provides a heat exchange to the assembly, but is not part of the actual service braking system. Tr. 94, 145-146.

Figueroa described the brake assembly in detail through the use of schematic drawings. Tr. 96-99, 122-; RX-3. Relying on those drawings, as well as the work orders that were submitted on the trucks, he explained that the leaks were not from the service brake lines, but rather from the Duo-Cone seals that separate the brake assemblies from the wheel groups.⁵ Tr. 95, 99-100, 102-103, 145. The Duo-Cone seals are what hold in the cooling system brake oil. Tr. 124, 144, 146. Had the leaks been from the service brake circuits, the overstroke switches would

⁵ Figueroa explained that the brake system uses hydraulic oil as brake oil. Tr. 97. While the terms used by the parties differ from witness to witness, it is clear they were talking about the same thing. For clarification's sake I refer to the fluid as brake oil throughout this decision. The brake oil, which is used by the brake assemblies, is a lighter, 10 weight brake oil, while the gear oil used by the wheel groups is a thick and sticky 60 weight oil. Tr. 95, 99-100, 145.

have been thrown and an alarm would have been triggered.⁶ Tr. 106. Here, there were no over-strokes and the trucks' monitoring systems had not triggered an alarm or warning from an overstroke, or indicated any other problems with the brakes. Tr. 89-90, 106-107. The service brakes were in perfect condition. Tr. 164. Figueroa knew the leaks were not from the parking brake circuits because hydraulic pressure is what enables the parking brakes to release and, had there been a drop in pressure, the brakes would have dragged. In addition, there were no temperature issues with the parking brakes. Tr. 107.

Figueroa explained that these types of leaks are caused when dirt gets behind the O-rings, or in the face of the Duo-Cone seals, and those parts start to wear out. Tr. 102. While the Duo-Cone seals were not in perfect condition, they were functional. Tr. 164. Because these leaks involved brake oil from the cooling circuits and not from the service brake circuits they did not affect the functionality of the service brakes and there were no safety hazards. Tr. 103-104. These trucks have 300 gallon brake oil tanks that service each of the three circuits and are checked by the driver each day. Tr. 104, 148. The driver will report these types of leaks and the trucks will be serviced during the next opening in the department's PM schedule. Tr. 104-105. In the event a problem is detected with the braking systems, miners are trained to pull over, set the parking brake and call maintenance. Tr. 120.

Figueroa testified that the inspector did not test the brakes that day and none of the drivers reported weak brakes, brake noise or brake chatter. Tr. 108-109. When the brakes were taken apart in order to fix them, the mechanics found everything was functional and the only issue was the leaking Duo-Cone seals. Tr. 109.

Fact of Violation

I find that the Secretary failed to meet his burden and that each of the three citations should be vacated. The cited standard requires that braking systems on equipment be maintained in functional condition. Consequently, in order for the Secretary to establish a violation he must show that the braking systems were not maintained in a functional condition.

The Secretary argues, and I agree, that the cited standard's use of the term "braking systems" encompasses the entire brake assembly. Sec'y Br. 4. Here, the brake assemblies included three different components which utilized brake oil: the service brake, the parking brake, and the brake cooling components. Each of these components had its own independent brake oil circuit which was served by the same brake oil reservoir.

⁶ Figueroa explained that the service brake includes a large air chamber that actuates a piston which converts air pressure to hydraulic pressure to operate the service brake. Tr. 108, 126. The hydraulic pressure is between 675 and 750 psi and, if there is a leak, the pressure is going to go all the way down and push the oil out and cause the overstroke switch to be thrown, and in turn cause an alarm to sound in the cab, after which the truck would be taken out of service. Tr. 108, 124, 127. The overstroke switch is bolted to the air system and is triggered when there is a leak in the hydraulic circuit of the service brake that allows the air piston to go too far. Tr. 127.

I credit Figueroa's testimony that, in each case, the source of the leaking brake oil was the Duo-Cone seals where oil was leaking from the cooling circuits. Figueroa credibly testified as to why a leak at the Duo-Cone seal could only be from the cooling circuit and not from either the parking brake or service brake components. Specifically, he explained that, had the leaks been from the parking brake circuits a drop in pressure would have caused the parking brakes to drag since pressure is what enables the parking brakes to disengage. No signs of dragging, such as temperature issues, were present. Further, he explained that, had a leak been present in the service brake circuits the brake overstroke switches would have been triggered and an alarm would have sounded, yet there were no overstrokes and the trucks' monitoring systems reflected such. Notably, the inspector did not conduct any testing to determine the sources of the leaks. Given that the sources of the leaking oil were the cooling circuits, the next question that must be asked is whether those leaks affected the functionality of the braking systems.

I find that the Secretary failed to meet his burden of proof to establish that the braking systems were not being maintained in a functional condition. At no point during his testimony did Vidal address the brake assemblies' cooling components and the Secretary presented no evidence on the impact a leak in the cooling system would have on the functionality of the brake systems. In fact, when asked on direct examination what was the purpose of the oil in the brake systems, Vidal responded that it was "used to compress the springs[.]" Tr. 20-21. No testimony, from either party, indicates that springs were involved in either the cooling or service brake systems. Moreover, although there is no dispute that leaks did exist on each of the cited brake assemblies, the presence of a leak, by itself, does not establish that a brake system is not being maintained in a functional condition. Vidal confirmed as much on cross-examination when he agreed that a leak on a part may not necessarily affect functionality. Tr. 61-62. Moreover, as conceded by Vidal, the braking systems of haul trucks are significantly more sophisticated and complex than they were when he was a mechanic.

While the Secretary takes issue with the Freeport's practice of filling the brake oil reservoir each shift, and argues that doing so only amounts to a "Band-Aid masking the defect[.]" the issue here is not whether the Duo-Cones had a "defect," but rather whether the braking systems were maintained in a "functional" condition. Sec'y Br. 5. Here, I find no credible evidence that these leaks affected the functionality of the braking systems. Freeport's practice of refilling the reservoirs each shift, while not optimal in the Secretary's opinion, enabled the braking systems to function as designed. The leak would have been repaired during the next PM. Under different circumstances a leak may in fact evidence an operator's failure to maintain a brake system in a functional condition but, under the facts of this case, the Secretary has failed to meet his burden of establishing that any of the three components utilizing the brake oil was not functioning as intended. Accordingly, Citation Nos. 8929293, 8929294 and 8929295 are **VACATED**.

WEST 2016-0414

Citation No. 8934664

Citation No. 8934664 alleges a violation of section 56.20003(a) of the Secretary's safety standards and asserts that, due to a holding tank overflowing, the base of the stairway in the

sump floor area was obstructed by an accumulation of material made up of slurry and water that created a slip, trip and fall hazard that could result in a lost time injury. Section 56.20003(a) requires that “[a]t all mining operations . . . [w]orkplaces, passageways, storerooms, and service rooms shall be kept clean and orderly[.]” 30 C.F.R. § 56.20003(a).

Inspector Enrique Vidal determined that an injury was unlikely to be sustained, but that if an injury occurred, it could reasonably be expected to result in lost workdays or restricted duty. He determined that the condition was not S&S, that one person was affected, and that Freeport’s negligence was moderate. The Secretary has proposed a penalty of \$243.00 for this alleged violation.

Summary of the Evidence

On January 7, 2016 Inspector Vidal was traveling in the area of the mine’s molybdenum plant when he observed an accumulation of material on a stairway and on the floor at the bottom of the stairway. Tr. 55, 78; GX-16 p. 1. Vidal testified that the stairway was the dedicated access point to an area where miners worked “24/7.” Tr. 55-56, 58. After having his memory refreshed he acknowledged that the area was the secondary containment area. Tr. 71-72. Vidal learned that the accumulation of material, which consisted of a “slurry of concentrated water mixture[.]” some of which was dry, had come from a tank that had overflowed due to a “burp” in the system. Tr. 55-56. A burp occurs when material does not flow through the system as designed, which in turn plugs up the system and causes a spill. Tr. 55. Vidal was not sure how long the material had been present, or how often the tank overflowed. Tr. 56. There was a sump in the area that could be used to clear the spillage, but it was not working. Tr. 56-57. While Vidal initially testified that workers were in the area, on cross-examination he acknowledged that the workers were actually 50 feet away from the area and he did not see any persons in the sump/secondary containment area. Tr. 58, 72.

Based on his observations, Vidal issued Citation No. 8934664 to Freeport for failing to keep the cited work area clean. Tr. 54. He determined that Freeport exhibited moderate negligence because any miner could have identified this problem and documented it, reported it, and barricaded it. Tr. 59. Vidal acknowledged that the area was barricaded. Tr. 59. While no mitigating circumstances were presented by the mine at the time, Vidal noted that a supervisor was not in the area and, as a result, he did not believe there was high negligence. Tr. 59.

David Scott Robinson⁷, who is currently a health and safety specialist for Freeport, was escorting the inspector when the cited condition was discovered. Tr. 81-82. Robinson explained that, prior to the citation being written, the mine had experienced issues with the leach process and the plant had been stopped. Tr. 78. When the process was stopped all of the harder and heavier material that had been flowing through the plant settled in the pipes and vessels. Tr. 78. That morning the plant was restarted and a backflow occurred, which in turn caused material to overflow. Tr. 78. This occurs roughly six times a year. Tr. 82, 85.

⁷ Robinson has been a health and safety specialist at the mine for four years, and prior to that worked in the security department. Tr. 76-77.

Robinson explained that the overflow material fell into the secondary containment area, which is below the leach process and designed specifically for the purpose of holding material in the event of an overflow. Tr. 78-80; GX-16 p. 1. The area has a three foot tall wall surrounding it in order to hold material and is equipped with a sump that is only run when there is spill and material needs to be sucked up and put back into the system. Tr. 79-80, 83. Robinson explained that the dry material on the stairs would be removed with squeegees and hoses and eventually sucked back up through the sump and put into the system. Tr. 83, 85. On the day in question miners were cleaning the area and pushing material toward the sumps. Tr. 80. Employees would only be in the area in order to turn on the sumps and use the squeegees and hoses to push material to the sump. Tr. 79-81, 86.

Fact of Violation

I find that the citation should be vacated. The cited standard, as relevant to this case, requires that workplaces and passageways shall be kept clean and orderly. The secondary containment area and staircase were clearly a workplace and passageway. I credit Robinson's testimony that those areas are only entered in the event of a spill for the sole purpose of cleaning the area, which ultimately is what the standard is intended to encourage. In *Nelson Quarries*, I vacated a citation where the Secretary issued a housekeeping citation for material covering a walkway to a screen. *Nelson Quarries, Inc.*, 30 FMSHRC 254 (Apr. 2008) (ALJ). There, in vacating the citation I stated that there was no evidence that miners walked or worked in the area without first cleaning it. Here, cleaning is the *only* work conducted in the cited area.

The purpose of section 56.20003(a) is to encourage mine operators to keep workplaces clean and orderly. When the specific purposes of an area is to contain material which, by its very nature, is not clean and orderly, a mine operator should not be held liable under this standard for allowing that area to become dirty and unordered. Holding otherwise would be illogical and such an interpretation would lead to the absurd result that mine operators would be in violation of the standard while in the process of cleaning or preparing to clean, which is the activity the standard seeks to encourage. See *Consolidation Coal Co.*, 15 FMSHRC 1555 (Aug. 1993) (Rejecting interpretation of a standard which would defeat the intention of the standard). I credit Robinson's testimony that on the day in question the mine was actively engaged in addressing issues related to the spill, which had just developed that morning. Accordingly, Citation No. 8934664 is **VACATED**.⁸

WEST 2016-0691

This docket includes two citations that involve many of the same facts and circumstances. Accordingly, I address the citations together where appropriate.

⁸ The transcript of the hearing includes testimony from the inspector indicating that the cited area was barricaded. Tr. 59. The Secretary, in his brief, disputes this testimony and states that the area was not barricaded. Sec'y Br. 10. The Secretary offers no cite in support of the statement. In reaching my decision to vacate this citation I have not relied upon the testimony offered by the inspector on this issue.

Citation No. 9302025 alleges a violation of section 56.16009 of the Secretary's safety standards and asserts that two persons were not clear of a load, i.e., a 700 pound steel pipe spacer, while it was suspended at roughly head height. The persons were steadying the load with their hands while standing on top of a roughly two foot wide cement divider with a drop-off of approximately four feet on each side. This exposed them to being struck should the load fall while persons were next to it. Section 56.16009 requires that "[p]ersons shall stay clear of suspended loads." 30 C.F.R. § 56.16009.

Inspector Robert Jacobs⁹ determined that an injury was reasonably likely to be sustained and, if an injury occurred, it could reasonably be expected to result in lost workdays or restricted duty. He determined that the condition was S&S, that one person was affected, and that Freeport's negligence was moderate. The Secretary has proposed a penalty of \$783.00 for this alleged violation.

Citation No. 9302026 alleges a violation of section 56.11001 of the Secretary's safety standards and asserts that a person was not clear of a load, i.e., a 700 pound steel pipe spacer, while it was suspended approximately 15 feet above the individual. The individual had a fall harness on which was attached to a retractable lanyard that crossed under the load to its anchor point approximately eight feet away. If the load had fallen it would have struck the lanyard and pulled the person into contact with the load. Section 56.11001 requires that "[s]afe means of access shall be provided and maintained to all working places." 30 C.F.R. § 56.11001.

Inspector Robert Jacobs determined that an injury was reasonably likely to be sustained and, if an injury occurred, it could reasonably be expected to be fatal. He determined that the condition was S&S, that one person was affected, and that Freeport's negligence was moderate. The Secretary has proposed a penalty of \$2,598.00 for this alleged violation.

Summary of the Evidence

On May 12, 2016 Jacobs observed a 700 pound, three foot diameter pipe spacer being lowered by a boom truck into a steel structure where miners were waiting. Tr. 178-179, 203. The boom operator was approximately 30 to 40 feet away from where the miners were and could not see the load in the structure. Tr. 180-181. The opening of the structure through which the spacer was being lowered was approximately ten feet by ten feet. Tr. 180. Miners inside the structure were standing on top of cement walls, approximately four to five foot tall, that ran parallel to each other and created a trough. Tr. 180, 250. One of the miners standing on the wall inside the structure was observed guiding the spacer into place with his hands while it was being lowered. Tr. 180-181. As Jacobs approached the scene, the miner pulled his hands back from the load, which was at approximately shoulder height at the time. Tr. 181. Jacobs observed no taglines on the load, nor were mine personnel using any other tools to maneuver the spacer while it was suspended. Tr. 181.

⁹ Jacobs has been with MSHA for over eight years and has been trained on crane safety. Tr. 177-176. Prior to working for MSHA, Jacobs worked nine years at a remote mine where he was in charge of compliance. Tr. 176-177. The remoteness of that mine required that deliveries be made by helicopter via suspended loads. Tr. 176. As a result, Jacobs is familiar with the regulations for suspended loads. Tr. 194

Jacobs, when questioned about photos of the miners lowering the spacer into place, agreed that the photos depicted the area in question, but stated that he did not take the photos and the photos did not reflect the conditions as he observed them that day. Tr. 181-182; GX-20. He explained that, while the photos show a tagline connected to the load and miners using the tagline as well as push-pull sticks, taglines were not connected, nor were miners using push-pull sticks when he observed the scene. Tr. 182-183, 201-202.

Jacobs was concerned that the miner touching the spacer was at risk if the load were to shift or drop, as the load could contact the miner or cause him to fall from the narrow cement wall he was standing on. Tr. 182, 211. A miner who lost his balance, given the narrow wall, would not be able to readjust his center of balance and, in turn, would fall. Tr. 211. Further, if the load were to fall while the miner was guiding it with his hands, Jacobs stated the miner's natural reaction would be to grab the load, which would cause the miner to fall with the load. Tr. 204. A miner not touching the load is at less of a risk of falling with the load. Tr. 204. Jacobs opined that the miners should have put taglines on the load prior to suspending it and used those taglines to maneuver the load. Tr. 183.

Based on his observations, Jacobs issued Citation No. 9302025 because the miner with his hands on the spacer was not clear of the load, as is required by the cited standard. Tr. 178-179. He explained that, in addition to staying out from underneath the load, the standard requires people to stay out of areas where the load could swing or shift if the rigging failed so that if the load were to drop they would not be struck. Tr. 179, 197, 202. While Jacobs had never seen a boom shift with a suspended load, he believed it could occur if the operator misread a signal from one of the miners relaying information to the operator. Tr. 184, 205. On cross-examination Jacobs acknowledged that he did not observe any problems with the rigging or boom, or the training of the boom operator, and explained that, in order for changes to be made to the rigging, a load must be put down. Tr. 196, 205-206. Counsel for Freeport questioned Inspector Jacobs regarding the applicability of an MSHA Program Policy Letter ("PPL"), RX-7. Jacobs testified that the PPL was not clear and disagreed with Freeport's counsel that the PPL allowed miners to approach and touch a suspended load to attach and detach equipment to/from the load. Tr. 197-199.

Shortly after Jacobs observed the miner with his hands on the load he went to look for a supervisor. Tr. 207. During that time, and while the load was being lifted back out of the structure and still above the opening, one of the miners in the structure moved such that his retractable lanyard, which was providing fall protection, crossed the open area below the suspended load. Tr. 187. Jacobs explained that, had the load fallen, it would have most likely come in contact with the lanyard and pulled the person into the load. Tr. 187-188. The men inside the structure were working in an area approximately 12 to 14 feet wide and were standing on top of a concrete wall approximately 10 to 12 inches wide, roughly 4 to 5 feet above the bottom of the trough. Tr. 187-188. The miner at issue had clamped his lanyard onto a beam and crossed over to another side of the opening, roughly 6 to 8 feet from his anchor. Tr. 188-189.

Jacobs explained that this fall protection system, as used here, would not prevent a fall because lanyards, which function like a seatbelt, have to be at near vertical from the anchor point in order to work, and will not catch until a certain degree from vertical, e.g., 30 degrees, is

reached during a fall. Tr. 188-190. Here, while the lanyard would likely catch if the miner fell backwards, if a miner fell forwards, being 8 feet away from the anchor point would result in a miner falling while the lanyard retracted and until that degree from vertical was made, and then swinging the miner into the opposing cement wall once the lanyard did catch. Tr. 188-189. Jacobs noted that the lanyard was beneath the load for only approximately five seconds. Tr. 189.

Based on his observations, Jacobs issued Citation No. 9302026 because the working area in the structure was not safe, as evidenced by the walls the miners were standing on, their lanyard clamping locations, and because a miner's retractable lanyard was exposed under the suspended load. Tr. 186-187, 206. In order to satisfy the standard the operator could have provided beam clamps for the lanyards closer to their working positions. Tr. 190. Jacobs designated the citation as S&S and determined that a fatal injury was reasonably likely to occur because, if the load fell, nothing would have prevented serious injury since the load would have contacted the lanyard and, because the miner's harness attachment point was between his shoulder blades, pulled the miner into the load headfirst. Tr. 191. Jacobs attributed the violation to moderate negligence because there was no supervisor present, which he found to be a mitigating circumstance. Tr. 192.

Mario Rivera¹⁰, a diagnostic mechanic at the time the subject citations were issued, testified that on the day in question the mine was using a boom truck to lower a sweep and spacer into the structure.^{11 12} Tr. 215. Given the dimensions of the opening in the structure the spacer had to be lowered in a vertical position. Tr. 222.

After lowering the sweep into the trough at the bottom of the structure the miners began to lower the spacer into the structure. Tr. 218-219, 221. Rivera testified that a 10 foot tagline was attached to the spacer when it was being lowered and stated that the mine never suspends a load without a tagline. Tr. 226, 236-237, 246. Rivera, who was inside the structure and standing on one of the walls of the trough, reached out when the load was at about chest/belly height and touched the load with his hands to turn the load to connect a "come-along" to an eye-bolt on the

¹⁰ Rivera is currently the mill supervisor and has worked at the mine since 2014. Tr. 214. He has received training on suspended loads, operating cranes, and rigging through the National Crane Operators, as well as on-site training at the mine. Tr. 216.

¹¹ Rivera referred to the spacer as a "spool." For clarification's sake, I refer to the object as a spacer throughout this decision. The sweep and spacer are essentially pipe conduits for slurry. Tr. 218-219.

¹² Rivera's testimony relied heavily on describing what was occurring in the photos, GX-20, which were not taken at the time the citations were issued. Tr. 247. At points during Rivera's testimony on direct examination, counsel for Freeport would ask what was occurring in the photos and would then ask about what occurred the first time the spacer was lowered. This resulted in confusing testimony as to what time period Rivera was discussing.

spacer, which would then be used to pull the spacer into place on top of the sweep.¹³ Tr. 221, 223-225, 227-228, 238, 246. He did not use the tagline to turn the load because it was on the opposite side of the spacer when the load was lowered to him. Tr. 237. Rivera opined that, had the spacer come loose it would have fallen straight down and he was not worried about it falling. Tr. 240. At that point the inspector arrived and had the miners lift the spacer out of structure. Tr. 227, 229. Rivera was not sure if the inspector saw the tagline. Tr. 246. Mine personnel then conducted a safety meeting where they checked the rigging and found a way to re-rig the load and lower it into place.¹⁴ Tr. 226, 229.

Rivera testified that at no point did his retractable lanyard go under the suspended load, and he never saw the retractable lanyard worn by the other miner in the area go under the load. Tr. 231, 242. Had he seen that occur he would have immediately stopped the job. Tr. 242. Rivera explained that the retractable lanyard systems he and the other miner in the area were wearing would have engaged immediately if one of them fell since the shock absorbers had been removed. Tr. 241-242. On cross-examination Rivera stated that while the lanyard would have prevented him from falling to the ground, it would not have prevented him from swinging. Tr. 252.

Citation No. 9302025

Fact of Violation

I find that the citation should be vacated. The cited standard requires that miners “stay clear” of suspended loads. There is no dispute that the spacer was a suspended load. For reasons set forth below, I find that the Secretary has failed to meet his burden to establish that Freeport failed to comply with the Secretary’s interpretation of the cited standard.

The Secretary’s regulations do not define what “stay clear of” means in the context of section 56.16009. In *Dawes Rigging & Crane Rental*, the Commission explained that “stay[ing] clear . . . requires more than simply staying out from directly underneath a suspended load[,] . . . and [w]hether a person is clear of a suspended load must be determined by considering the particular facts surrounding the violation.” 36 FMSHRC 3075, 3078 (Dec. 2014) (citing *Anaconda Co.*, 3 FMSHRC 299, 301 (Feb. 1981)).

While the standard requires miners to stay clear of suspended loads, the Secretary, in Program Policy Letter No. P17-IV-01, has crafted an exception which allows miners, under

¹³ A “come-along” is “a small portable winch usually consisting of a cable attached to a hand-operated ratchet.” Merriam-Webster.com, <https://www.merriam-webster.com/dictionary/come-along> (last visited April 24, 2017). Rivera noted that the mine had initially tried to use push-pull sticks as part of the job but, given the small area the miners were working in and the length of the sticks, stopped using them. Tr. 234-235, 247.

¹⁴ Rivera explained that the miners were ultimately able to get the spacer into place by attaching a chain fall to lower the spacer into a horizontal position after it was on the ground and then attaching a “come-along” to an eyebolt on the spacer which was then used to move the spacer horizontally into place. Tr. 227, 234, 236, 249.

certain circumstances, to attach and detach equipment to suspended loads. RX-7. The PPL, the subject of which is “Suspended Loads (30 C.F.R. §§ 56/57.16009),” states that “[i]f the only activity at issue involves miners (including riggers) working near load-attaching equipment in order to attach and detach this equipment from the object or materials being hoisted, and if MSHA determines that miners are not exposed to a foreseeable risk of being struck by load attaching equipment, MSHA does not intend to cite under §§ 56/57.16009.”¹⁵ RX-7 p. 2.

The Secretary, in his brief, concedes that the standard “does not unequivocally . . . forbid the use of hands to position a load[.]” Sec’y Br. 14. However, he argues that “‘a reasonably prudent person familiar with the mining industry and the protective purposes of the standard’ would certainly not expect to be in compliance with the standard when miners are present within the arc of the load, directly under the load, or in the area that would be affected should the load fall.” Sec’y Br. 14 (citing *CCC Group, Inc.*, 34 FMSHRC 1192, 1198 (May 2012) (ALJ)). I disagree when considering the facts presented here.

At hearing the inspector testified that the PPL was not clear on whether the exception for allowing attaching or detaching of equipment applied to “suspended loads.” Tr. 198-199. While the PPL could have been better crafted, I find that it clearly applies to the attaching or detaching of equipment to suspended loads. Otherwise, the PPL would serve no purpose, since there is no need to stay clear of unsuspended loads that would require an exception under this standard.

I credit Rivera’s testimony that he approached and touched the load for the sole purpose of attaching the “come-along” to an eye-bolt on the spacer, which would then be used to pull the spacer into place on top of the sweep. The PPL defines “load attaching equipment” as being equipment “such as, the load blocks, ropes, slings, shackles, and any other ancillary attachment.” While a “come-along” is not explicitly listed, I find that it fits within the category of “other ancillary equipment.”

Neither the Secretary nor the Commission is bound by the policy statements included in PPLs. However, this PPL provides a reasonable interpretation of the cited standard. That interpretation allows for miners to contact suspended loads for the purpose of attaching and detaching equipment. As relevant to this matter, it allowed for the miner to contact the load for the purpose of attaching the come-along. Mine operators should not be held liable for violations of mandatory standards where their actions fit squarely within interpretations published by the Secretary. I find that the Secretary has failed to meet his burden and that the citation should be **VACATED**.¹⁶

¹⁵ While the PPL became effective on February 6, 2017, I find it can be used to interpret the safety standard. This PPM was issued to clarify the standard rather than to change its meaning.

¹⁶ While not critical to my decision, I agree with Rivera that the load was suspended above an opening and, had the load fallen, it would have fallen straight down into that opening and not struck miners standing on the walls around the opening, which is ultimately the concern of the cited standard. *See CCC Group, Inc.*, 34 FMSHRC 1192, 1198 (May 2012) (ALJ) (stating that the “cited standard is aimed at preventing a miner from being struck by a suspended load.”).

Citation No. 9302026

Fact of Violation

I find that the Secretary has established a violation of the cited standard. The cited standard requires that safe means of access be provided and maintained to all working places. There is no dispute that miners were in the area to install the sweep and spacer. As a result, the area was a working place. I find that safe access was not provided in the area because of the passage of the lanyard under the suspended load and the position of the miner's lanyard anchor.

I credit Jacob's testimony that a miner was positioned such that his lanyard extended under the suspended load. I further credit his testimony that if the lanyard were struck by the suspended load the miner would have been pulled into the opening and potentially into the load. Allowing a miner's lanyard to pass under a suspended load does not constitute safe access.

Freeport argues that the inspector did not observe the actual condition and, instead, only speculated that the lanyard passed under the suspended load. Freeport Br. 15. I do not believe that accurately reflects the testimony. I find that, while Jacob's testimony appears to indicate he did not see the miner move from one position to the other, he did see the lanyard positioned under the suspended load. Rivera testified that his lanyard did not move under the suspended load and he did not observe the lanyard of the other miner in the area pass beneath the load. However, Jacobs testified that the condition existed for only "[f]ive seconds or so. Not very long." Tr. 189-190. Given the short duration that the lanyard was under the suspended load, I find it likely Rivera simply did not see the condition.

I also find that safe access was not provided because of the position of the anchor points for the retractable lanyard worn by at least one miner. Freeport disputes that miners who fell from their locations on the wall would have struck the bottom of the trough. Freeport Br. 16. However, Rivera did not dispute that the lanyard would not prevent a miner from swinging if he fell. I credit Jacobs' testimony that, given the location of the miner's anchor point approximately eight feet away, a miner who fell into the opening would have swung and struck a concrete wall, which is unsafe. *See Rock N Road Quarry*, 36 FMSHRC 1278 (May 2014) (ALJ). The Secretary has proven that safe access was not provided.

Gravity & S&S

An S&S violation is a violation "of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard." 30 U.S.C. § 814(d). 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). An experienced MSHA inspector's opinion that a

violation is S&S is entitled to substantial weight. *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-79 (Dec. 1998).

The Commission has explained that the focus of the *Mathies* analysis “centers on the interplay between the second and third steps.” *ICG Illinois*, 38 FMSHRC 2473, 2475 (Oct. 2016) (citing *Newtown Energy Inc.*, 38 FMSHRC 2033 (Aug. 2016)). The second step requires the judge to adequately define the “particular hazard to which the violation allegedly contributes[.]” and then determine whether “there exists a reasonable likelihood of the occurrence of the hazard against which the mandatory safety standard is directed.” *Id.* at 2475-2476. This determination must be made “based on the particular facts surrounding the violation[.]” *Id.* The third step then requires the judge to assume the existence of a hazard and assess whether the hazard “was reasonably likely to result in serious injury.” *Newtown* at 2038; *ICG Illinois* at 2476.

The “reasonably likely” provision does not require the Secretary to prove that an injury was “more probable than not.” *U.S. Steel Mining Co.*, 18 FMSHRC 862, 865 (June 1996). In addition, the “Secretary need not prove a reasonable likelihood that the violation itself will cause injury” but, rather, that the hazard *contributed to* by the violation is reasonably likely to cause an injury. *Musser Engineering, Inc. and PBS Coals Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010)(emphasis added); *Cumberland Coal Res.*, 33 FMSHRC 2357, 2365 (Oct. 2011).

I find that the Secretary established that the violation was S&S and that the gravity was serious. I have already found that Freeport violated the standard. Here, the hazard to which the violation allegedly contributes is two-fold. First, the location of one miner’s lanyard under the suspended load exposed the miner to having his lanyard hit by a falling suspended load, which in turn would cause the miner to be pulled into the opening and potentially striking the load. The Secretary presented no evidence that this was anything but an isolated occurrence. I credit Rivera’s testimony that, had he seen a lanyard positioned under the suspended load, he would have stopped the job. Moreover, Jacobs testified that he saw no problems with the rigging, boom, or the training of the boom operator. Accordingly, I find that this particular hazard was unlikely to occur. However, that is not the end of the analysis.

Second, the location of the miner’s lanyard anchor as relative to the miner’s position exposed the miner to falling and swinging into a concrete wall. I credit Jacob’s testimony that miners who lost their balance would not be able to regain it while standing on the narrow walls and, in turn, would fall. The only protection from falling was the retractable lanyard system. Here, while the lanyard may have prevented a miner from striking the ground, it would not have prevented a miner from swinging into the concrete wall. A miner falling from an elevated surface and swinging into a concrete wall is likely to sustain an injury of a reasonably serious nature.

Negligence

The Commission has determined that “[e]ach mandatory standard . . . carries with it an accompanying duty of care to avoid violations of the standard, and an operator’s failure to satisfy the appropriate duty can lead to a finding of negligence if a violation of the standard occurred.” *A.H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983) (citations omitted). The Commission analyzes negligence by considering what actions would have been taken under the same or

similar circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the safety standard. *Brody Mining LLC*, 37 FMSHRC 1687, 1702 (Aug. 2015).

I find that Freeport was moderately negligent. Inspector Jacobs determined Freeport was moderately negligent and that the lack of a supervisor in the area at the time was a mitigating circumstance. I agree. Freeport had conducted a job hazard analysis and was using pre-established anchor points for the lanyards. While the location of those anchor points may not have been appropriate, Freeport had taken steps in an effort to provide a safe working place. I find that moderate negligence is appropriate. I assess a penalty of \$2,600.00 for this violation.

WEST 2017-0002

This docket includes two citations that involve many of the same facts and circumstances. Accordingly, I address the citations together where appropriate.

Citation No. 8833133 alleges a violation of section 56.16007(a) of the Secretary's safety standards and asserts, in pertinent part, that a miner did not use a tagline while steadying a suspended load by hand as it was placed in the bed of a truck, thereby exposing persons to the hazard of a fall or shifting of the load, which would have caused blunt force permanently disabling injuries. The citation further alleges that, while a tagline was present at some point, it fell off the load. Section 56.16007(a) requires that "[t]aglines shall be attached to loads that may require steadying or guidance while suspended." 30 C.F.R. § 56.16007(a).

Inspector Sidney Garay¹⁷ determined that an injury was reasonably likely to be sustained and, if an injury occurred, it could reasonably be expected to be permanently disabling. He determined that the violation was S&S, that one person was affected, and that Freeport's negligence was moderate. The Secretary has proposed a penalty of \$918.00 for this alleged violation.

Citation No. 8833134 alleges a violation of section 56.16009 of the Secretary's safety standards and asserts, in pertinent part, that a miner did not use a tagline while steadying a suspended load by hand as it was placed in the bed of a truck. As a result, the miner was not clear of the load, which exposed him and other persons working nearby to the hazard of a fall or shifting of the suspended load. Section 56.16009 requires that "[p]ersons shall stay clear of suspended loads." 30 C.F.R. § 56.16009.

Inspector Garay determined that an injury was reasonably likely to be sustained and, if an injury occurred, it could reasonably be expected to be permanently disabling. He determined that

¹⁷ Inspector Garay has been with MSHA for 15 years and currently supervises the Mesa Arizona South field office. Tr. 255. In addition to performing approximately 24 mine inspections a year he is responsible for reviewing the performance of his inspectors, interacting with the mining community, making field visits to operators, and providing information to industry groups. Tr. 256. He has worked as an accident investigator and received training, both while with MSHA and prior to his employment with MSHA, regarding safe crane operation and suspended loads. Tr. 256-257, 281. He currently holds no certifications with respect to cranes. Tr. 258, 282.

the violation was S&S, that one person was affected, and that Freeport's negligence was moderate. The Secretary has proposed a penalty of \$918.00 for this alleged violation.

Summary of the Evidence

On July 5, 2016 Freeport personnel were using a boom truck to lift materials up to and down from an elevated surface on a large shovel.¹⁸ The materials¹⁹ were being loaded onto a pallet which was rigged with a nylon sling that could be lifted by the boom. Tr. 324.

Inspector Garay was at the mine to conduct a spot inspection for an issue unrelated to this matter. Tr. 260, 282-283. While traveling in a vehicle with one of the mine's representatives from the health and safety department, Garay observed a miner in the bed of the boom truck. Tr. 261-262, 282. The miner was approximately four feet off the ground and not using fall protection. Tr. 263. According to Garay, the miner was under a load suspended from the boom, had his arms extended with hands elevated above his head and was touching the suspended load. Tr. 261-262, 268, 285-286. Garay initially observed the miner's hands holding both the side and bottom of the load. Tr. 285. As the load was lowered the miner's hands moved from holding the bottom and side of the load, to palming the load. Tr. 303. Garay recalled that the suspended load did not have a tagline on it and the miner's palms were out as he touched the load and guided it into place on the bed of the boom truck. Tr. 270, 285, 298. Garay was approximately 100 to 200 feet away from the miner when he first observed the condition. Tr. 267, 287. By the time Garay and the mine representative arrived at the boom truck, the load was already in the bed of the truck. Tr. 261, 287.

According to Garay, the miner in the back of the boom truck said that a tagline had fallen off of the load at some point and the miner did not think it was needed. Tr. 262, 297. Garay found a tagline laying on the ground next to the boom truck. Tr. 262.

Garay issued two citations based on his observations. First, he issued Citation No. 8833133 because, although a tagline had initially been attached to the suspended load, it was no longer on the load. Tr. 262. Garay designated the citation as S&S and determined that a permanently disabling injury was reasonably likely to be sustained because the miner was standing underneath the suspended load, with his hands extended above his head steadying the load. Tr. 265. Based on his experience the load could shift or fall, or the boom operator could accidentally hit a button triggering the load to jerk, which could cause the load to strike the miner and/or make the miner fall off of the truck and cause permanently disabling injuries such as a fracture or blunt force injuries. Tr. 265-266. He conceded that it was not windy that day and that the miner was only maneuvering the load by hand for a moment, but could have used a tagline to do the job. Tr. 265, 270. Garay attributed the violation to moderate negligence given that there

¹⁸ The boom truck was equipped with a crane attached to the frame of the truck. Tr. 263. The crane, or boom, can be operated by a person standing on either side of the truck. Tr. 263. The truck bed was approximately 8 to 10 feet wide, and 20 to 24 feet long. Tr. 263.

¹⁹ While Garay testified that the pallet was loaded with multiple boxes that were not broken down, Tr. 264, 286, Freeport's witnesses testified that the boxes were broken down and stacked on the pallet. This dispute of fact does not affect my analysis. The boxes were empty.

was no supervision of the job by agents of Freeport, which he believed was a mitigating circumstance. Tr. 266.

Garay explained that he issued the second citation, Citation No. 8833134 because the miner was not clear of the suspended load since he was touching it with his hands as the load was above his head. Tr. 267. According to Garay, in order to comply with the standard, a miner should never touch a suspended load. Tr. 268, 291. He explained that there is not enough time to react when a load falls free and he has seen miners who touch loads as they are being brought to the ground have their hands crushed. Tr. 268-269.²⁰ Garay designated the citation as S&S and determined that a permanently disabling injury was reasonably likely to be sustained for essentially the same reasons set forth in the first citation, i.e., the miner was not clear of the load and could be struck by the load if it shifted or fell. Tr. 270-272. He noted that the mine had failed to use the tools designed to prevent a miner from being next to a suspended load, e.g., taglines and push-pull sticks, despite the fact that a tagline had been present at one point. Tr. 271. Garay attributed the violation to moderate negligence given that there was no supervision of the job by agents of Freeport, which he believed was a mitigating circumstance. Tr. 272.

Luis Bernal²¹, who was a health and safety specialist for Freeport at the time in question, testified that he was the mine representative traveling with the inspector that day. Tr. 305-306. Bernal stated that, while traveling in a truck with the inspector, he could see the suspended load at approximately “mid-cab high, mid-shovel height” from about 300 to 400 yards away. Tr. 309-310. At that point no one was guiding the load and he could not tell if there was a tagline on it. Tr. 310-311. He first saw the miner touching the suspended load when the pallet was about waist high. Tr. 308, 315. He could not tell if the miner’s hands were fully extended or close to his body. Tr. 317. When Bernal and Garay arrived at the miner’s location, Garay asked where the tagline was and the miner said it was on the ground and he had taken it off the load. Tr. 313.

Bernal explained that although miners are taught to never get under a suspended load, miners may touch a suspended load and miners typically do so to position a load when it is at the lowest point. Tr. 311-312. In all his time as a health and safety specialist, he never saw someone stand under a suspended load. Tr. 312. Here it appears that the miner was touching the load to position it on the truck bed. Tr. 308-309. Bernal testified that if he had seen someone under a load with their hands above their head guiding the load down it would have been his responsibility to stop the job and he would have had a conversation with the miner and their supervisor. Tr. 311. While the mine tries to utilize taglines and push-pull sticks when they have the opportunity, there are situations when that is not possible. Tr. 312. On cross-examination, Bernal conceded that it would not have been difficult to use push-pull sticks or taglines to maneuver or adjust this particular load. Tr. 315-316

²⁰ Counsel for Freeport questioned Inspector Garay regarding the applicability of the MSHA PPL, RX-7, discussed above in the context of the suspended spool. As mentioned above, the PPL applies to attaching or detaching equipment.

²¹ Bernal has been with Freeport for over five years. Tr. 305. He is currently a conveying supervisor, but was a health and safety specialist prior to that. Tr. 305.

Arthur Laguna²², a diagnostic mechanic at the mine, testified that he was the miner in the bed of the boom truck at the time in question. Tr. 322. Laguna stated that he was not standing in the swing radius of the load while it was coming down. Tr. 326-327. While the load had a tagline on the “bottom end of the pallet”²³ as it was being lowered, he removed the tagline because it was in an awkward position for final placement, and threw it on the ground so that the load would not set on top of the tagline when the load was placed. Tr. 327-329. Laguna acknowledged that, in the alternative, the tagline could have been tied to the side of the pallet in a position where it would have been useful to him. Tr. 339. He explained that the pallet holding the material, which was approximately four feet by four feet, was about knee high when it reached him, and he gave directions to the boom operator so that the load was not above him. Tr. 324-325, 329, 334, 337. Laguna stated that he would never position himself under a suspended load since the load could fall. Tr. 329-330.

Laguna explained that, while the bed of the truck was loaded with other materials that had already been lowered down, he had left a clear path to walk and enough room to set the pallet in place. Tr. 325, 327-328. To do so, once the load reached a certain point, he had to touch it to maneuver it into a position for final placement on the truck. Tr. 325, 339. Laguna believes that he used only his palms to place the load and that his feet were clear of the load. Tr. 325-326, 333. He acknowledged it was possible that if the boom operator shifted the boom he would be knocked off the truck. Tr. 337-338. He agreed that he had used the same method for final placement of other materials that had been lowered from the shovel via the boom truck. Tr. 338-339.

Laguna acknowledged that could have done the job safely with a push-pull stick and that the sticks are designed to help with suspended loads. Tr. 329, 336-337. Nevertheless, on redirect he stated that, based on his experience, the sticks create a hazard because if the load shifts the stick could push him. Tr. 340.

Laguna testified that the inspector arrived after he placed the load and disconnected it. Tr. 331. He informed the inspector that the load had a tagline he had taken off and that the mine allows persons to touch suspended loads in order to place them. Tr. 331-332. If he had thought anything about the job was unsafe he could have stopped the process, but he thought he was clear of the load at all times. Tr. 329-330. On cross-examination, when asked if he could have moved the load after it was set down, he responded that he could not have done so because there was not much room for him to work given that there was only about a two feet by six feet area for him to stand. Tr. 335-336. Moreover, he acknowledged that, while he left an exit way in case the load unexpectedly shifted, exiting could mean jumping off of the truck. Tr. 340-341.

²² Laguna has been at Sierrita for six years and previously worked at other Freeport mines. Tr. 319. As a diagnostic mechanic he is responsible for maintaining equipment. Tr. 320. He has been in the mining industry for 28 years. Tr. 319. He has had training on suspended loads, and handling and working with suspended loads is a regular part of his job. Tr. 320-321.

²³ Laguna’s testimony that the tagline was at the “bottom end of the pallet” is somewhat ambiguous. On one hand it could mean that the tagline was attached to underside of the pallet, or it could be interpreted to mean the tagline was attached near the bottom of the pallet on the end.

Citation No. 8833133

Fact of Violation

I find that the Secretary has established a violation of the cited standard. The cited standard requires that suspended loads have taglines when the loads may require steadying or guidance. There is no dispute that the Laguna had to guide the suspended load into its final placement. Laguna testified that he removed the tagline before guiding the load into its final placement. Accordingly, a tagline was not attached to the load while it was being guided, as is required under the standard.

Gravity & S&S

I find that the Secretary has not established that the violation was S&S. I have already found that Freeport violated the standard when a tagline was not attached to the load while it was being guided. Here, the hazard to which the violation allegedly contributes to is a miner being unable to safely steady or guide a load due to the lack of a tagline. A tagline would not have been of much use in this instance because Laguna could not pull the pallet into position with the tagline. A stick or other device would have been more useful.

The Secretary failed to establish that there existed a reasonable likelihood that, under the facts of this case, a miner would be unable to safely steady or guide this load due to the lack of a tagline. For the same reasons discussed below in the context of the “staying clear” citation, I find that it was unlikely Laguna would be struck by the suspended load. In addition, I credit Laguna’s testimony that the location of the tagline on the load when it was attached was such that it could not be used to place the load into position on the truck. As a result, the lack of tagline did not affect the likelihood of the occurrence of the hazard. Moreover, and consistent with my below findings on the “staying clear” citation, an injury was unlikely to occur as a result of this condition. As a result the violation was not S&S. I find that the gravity was not serious.

Negligence

I find that Freeport was moderately negligent. Inspector Garay determined Freeport was moderately negligent and that the lack of a supervisor in the area at the time was a mitigating circumstance. While Laguna testified that he knowingly removed the tagline before using his hands to position the load in the bed of the truck, which could potentially weigh in favor of a higher negligence designation, I defer to Inspector Garay’s determination. I assess a penalty of \$300.00 for this violation.

Citation No. 8833134

Fact of Violation

I find that the Secretary has proven a violation of the cited standard. There is no dispute that the miner was touching the load and guiding it into place.²⁴ The Secretary, in his brief, concedes that the standard “does not unequivocally . . . forbid the use of hands to position a load[.]” Sec’y Br. 14. In determining whether a person is “clear” of a suspended load the court must consider the “particular facts surrounding the violation.” *Dawes Rigging*, 36 FMSHRC at 3078. Here, the miner was operating in a small area and testified that “exiting” the area if the load shifted would likely require him to jump off the truck. I hold that although the safety standard does not forbid a miner from touching a suspended load or standing close to a suspended load in all circumstances, the particular facts of the situation are critical. In this instance, Laguna was working in a very small area on the back of a truck, with a four foot drop off to the ground, directing a suspended load into place. Given the confined space in which he was working, it was critical that Laguna remain away from the load until it was just above the bed of the truck. I find that he was not “clear” of the load. The Secretary has established a violation.²⁵

Gravity & S&S

I find that the Secretary has not established that the violation was S&S. I have already found that Freeport violated the standard when the miner touched the suspended load in order to guide it into place. Here, the hazard to which the violation allegedly contributes to is a miner being struck by a suspended load.

The Secretary failed to establish that there existed a reasonable likelihood that, under the facts of this case, Laguna was likely to be struck by this suspended load. Conflicting testimony was offered by each of the three witnesses who described the events of that day. Inspector Garay testified that he observed the miner with his hands above his head reaching up and touching the load. He made this observation from a moving vehicle approximately 100 to 200 feet away.

²⁴ Freeport, in a footnote, cites the decision of a judge with the Occupational Safety and Health Review Commission (“OSHRC”) for the proposition touching a suspended load for final placement may be necessary. Freeport Br. 18. OSHRC ALJ decisions are not binding on this court and that decision was not “examined and adopted by OSHRC or a reviewing court.” *H. Bittle & Son, Inc.*, 38 FMSHRC 2446, 2451 n. 7 (Sept. 2016) (ALJ). Accordingly, I decline to consider that decision in reaching my finding in this matter.

²⁵ Freeport argues that Citation No. 8833133 and Citation No. 8833134 are duplicative because they do not impose separate and distinct duties on the operator. Freeport Br. 19-20. I disagree. Section 56.16007(a), at issue in Citation No. 8833133, requires that taglines be attached to loads if the loads will require steadying or guidance, while Section 56.16009, at issue in the present citation, requires that miners stay clear of loads. These are clearly different duties, as evidenced by the fact that Freeport could have complied with section 56.16007(a) had the miner not removed tagline, while at the same time being in violation of 56.16009 by touching the suspended load while it was too high above the truck-bed.

Bernal testified that he first saw the suspended load being lowered from 300 to 400 yards away while in the vehicle with the inspector and that the miner in the bed of the boom truck did not touch the load until the pallet was at about waist height. Laguna testified that he would never position himself under a suspended load and that the pallet was at approximately knee height when he first touched it. Moreover, he stated that his feet were clear of the load and that he only touched the load with his palms out.

For purposes of determining whether the violation was S&S, I will assume that Laguna first touched the load with his palms out while it was at about eye level or slightly higher. The hazard that the safety standard is designed to prevent in this instance is the risk that Laguna would be hit by the suspended load and knocked off the truck. Given the particular facts presented, as discussed above, I find that it was not reasonably likely that Laguna would be struck by the load. It was not windy that day, the boom operator was in the final process of lowering the load, and Laguna was steadying the load and helping to move it into place as it was lowered. Although it was possible that the load of empty boxes could shift, it was not reasonably likely. “[A] vague observation that suspended loads move in unpredictable ways” is insufficient to establish an S&S violation. *Dawes Rigging*, 36 FMSHRC at 3078. Of course, if I assume that the load shifted and moved out of position or if I assume that the boom operator accidentally bumped the wrong lever, the load could strike Laguna. However, such events were unlikely. If he were to be struck, he would likely suffer a lost work-days type of injury.

The Secretary failed to establish that an injury was reasonably likely to be sustained. The S&S designation is not appropriate, but the violation was serious.

Negligence

I find that Freeport was moderately negligent. Inspector Garay determined Freeport was moderately negligent and that the lack of a supervisor in the area at the time was a mitigating circumstance. I affirm Inspector Garay’s negligence determination. I assess a penalty of \$500.00 for this violation.

II. SETTLED CITATIONS

The Secretary filed a Motion to Approve Settlement of the other citations in the above captioned docket. The proposed settlement is set forth in the table below:

Citation/Order	Proposed Penalty	Settlement Amount	Other Modifications to Citation/Order
Docket No. WEST 2016-0414			
8934448	\$138.00	\$138.00	None
8934275	\$108.00	\$108.00	None
8934269	\$138.00	\$138.00	Modify from Moderate Negligence to Low Negligence
Docket Totals:	\$384.00	\$384.00	

Docket No. WEST 2015-0873			
8929291	\$392.00	\$392.00	Modify from Moderate Negligence to Low Negligence
Docket Totals:	\$392.00	\$392.00	
Overall Totals:	\$776.00	\$776.00	

I have considered the representations and documentation submitted in this case, and I conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act. The Secretary's Motion for Approval of Settlement is **GRANTED**.

III. APPROPRIATE CIVIL PENALTY

Section 110(i) of the Mine Act sets forth the criteria to be considered in determining an appropriate civil penalty. 30 U.S.C. § 820(i). The parties have stipulated that Freeport is a large operator and the penalties will not affect its ability to remain in business. The citations which were not vacated were issued in May and July of 2016. Freeport had approximately 68 violations in the fifteen months preceding the issuance of these citations, roughly 17 of which were S&S. The gravity and negligence are discussed above. The citations were timely abated. Based on the penalty criteria I assess a total penalty of \$3,400.00 for the citations addressed at hearing.

III. ORDER

For the reasons set forth above, Citation Nos. 8929292, 8929293, 8929294, 8929295, 8934664, and 9302025 are **VACATED**. Citation No. 9302026 is **AFFIRMED** as issued. Citation Nos. 8833133 and 8833134 are **MODIFIED** as set forth above. Freeport-McMoRan Sierrita, Inc., is **ORDERED TO PAY** the Secretary of Labor the sum of \$4,176.00.00 for both the settled citations and those addressed at hearing within 40 days of the date of this decision.

/s/ Richard W. Manning
Richard W. Manning
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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May 23, 2017

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

v.

WEBSTER COUNTY COAL, LLC,
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. KENT 2016-233
A.C. No. 15-02132-401970

Mine: Dotiki Mine

DECISION

Appearances: Schean G. Belton, Office of the Solicitor, U.S. Department of Labor
618 Church Street, Suite 230, Nashville, TN 37219

Tyler H. Fields, Webster County Coal, LLC
1146 Monarch Street, Lexington, KY 40513

Before: Judge Simonton

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 Webster County Coal, LLC (“WCC” or “Respondent”), pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. This docket involves Citation No. 9045176, issued on October 1, 2015 for a specially assessed penalty of \$65,000. The citation was designated Significant and Substantial (S&S), reasonably likely to result in a fatal injury, and the result of Webster County Coal’s moderate negligence.¹ The parties presented testimony and documentary evidence at a hearing held on February 28-29, 2017 in Madisonville, Kentucky.

At hearing, Inspector Ray Cartwright and Inspector Jeremy Walker testified for the Secretary. WCC Miners Shane Armstrong, Brandon Beach, and Patrick Scott were also called by the Secretary and testified. Mine Foreman Merle Carter, Mine Manager Gary Thweatt and Safety Director Chris Gunn testified for Webster County Coal. I have reviewed the evidence and testimony at length, and for the reasons that follow I **AFFIRM** the underlying violation and S&S designation as alleged and increase WCC’s negligence from moderate to high. However, I find

¹ At hearing, the Secretary moved to modify the citation to allege high negligence. See Secretary’s Post-Hearing Brief (Sec’y Br.) at 10; Tr. 104-05.

that the Secretary failed to establish that the violation merited a special assessment. I assess a civil monetary penalty of **\$20,000**.

I. FINDINGS OF FACT AND SUMMARY OF TESTIMONY

The Dotiki Mine is an underground bituminous coal mine located in Clay, Kentucky, and operated by Webster County Coal, LLC. On September 28, 2015, contract miner Aaron Rickard was replacing suction hoses on his side of a roof bolter when a large rock fell onto him and struck him on the back and hip. Tr. 157-58. Rickard sustained serious injuries, including a displaced hip, lacerated spleen, torn urethra, three broken vertebrae, and internal bleeding. Tr. 297. Miner Shane Armstrong, Rickard's pin buddy, witnessed the rock fall on Rickard before he could suggest backing up the roof bolter. Tr. 158. Armstrong believed that Rickard was dead until he saw him move his head. Tr. 171-72. Unable to move the rock off of Rickard by himself, Armstrong used a five-foot pry bar to lift the rock and allow Rickard to crawl out from under it. Tr. 159. He then left Rickard to get help. Tr. 160.

Armstrong located Mine Foreman Merle Carter and informed him of the incident.² When Carter arrived at the scene, he found Rickard kneeling under the ATRS of the roof bolter. Tr. 220. Carter saw the large rock on the roof bolter and assumed that the rock fell and struck Rickard, though he did not know exactly where the rock made contact. Tr. 235. Carter did not discuss the specifics of the accident with Rickard or Armstrong, and was apparently unaware that Armstrong pried Rickard loose prior to getting help. Tr. 225. Rickard remained conscious and complained of pain to his back and stomach. Tr. 224. Carter moved Rickard to protect him from other potential falls and performed a brief physical examination. Tr. 221-22. He tested Rickard's alertness, squeezed his fingertips to check capillary refill, and began feeling around for signs of physical damage. Tr. 222. Carter noticed that Rickard had an obvious hip injury, but he could not tell whether it was a deformity or swelling. Tr. 222-23. Because Rickard was talking, exhibited no breathing issues, and presented stable vital signs, capillary refill, and skin color, Carter did not believe that the injuries were serious. Tr. 222, 224. He was aware of the requirement to call MSHA under § 50.10(b), but did not believe it was necessary in this instance. Tr. 233.

Nonetheless, Carter decided to radio for Rickard to be evacuated from the mine and transported by Life Flight, a type of air evacuation, to Deaconess Hospital in Evansville, Indiana. Tr. 223-24. Carter testified that he chose to arrange Life Flight to ensure that Rickard reached the hospital quickly and avoided additional pain associated with ground travel from the mine. Tr. 223. He quickly moved Rickard on to a stretcher and into an ambulance to evacuate the mine. Tr. 227.

Miners Brandon Beach and Patrick Scott rode with Rickard and Carter in the ambulance to the mine surface. Beach testified that he was instructed to keep conversation with Rickard and note any changes to his condition. Tr. 180. He recalled that Rickard was awake and conscious throughout the 15 to 20 minute ride to the mine surface. Tr. 180. Though he has no medical or

² Carter was the Rotating Mine Foreman at the time of Rickard's accident. Tr. 218. He has worked at Dotiki for approximately 27 years and has been a certified EMT for approximately 22 years. *Id.*

EMT training, Beach could tell that Rickard's hip was damaged, and noted that Rickard kept placing his hand on his backside to indicate where he was in pain. Tr. 179-80. He did not believe the injury to be life threatening. Tr. 179, 182. Beach saw the rock that struck Rickard and estimated that the rock was about the size of a table, but could not testify to its thickness. Tr. 178.

Patrick Scott performed a secondary examination of Rickard during the ambulance ride.³ Scott immediately noticed that Rickard's left foot was turned outward, an indication of a hip or pelvic injury, but testified that he could not determine the precise injury. Tr. 189. Scott checked Rickard's vitals and examined for signs of internal bleeding and potential shock. Tr. 189. He noted that Rickard's heart rate was elevated, but that his blood pressure and oxygen levels appeared normal. Tr. 191-92. Scott was unsure whether Rickard's elevated heart rate was the result of the high amount of pain or a sign of internal injuries. Tr. 191-92. Scott examined Rickard's abdomen to check for internal bleeding. Tr. 193. While Scott stated that Rickard did not exhibit obvious signs of internal bleeding, he testified that he could not definitively rule out the possibility. *Id.* Though he knew that pelvic injuries had the potential to be life-threatening, Scott considered Rickard to be in stable condition. Tr. 191, 194.

Scott next treated Rickard for potential shock despite no outward signs of the condition. Tr. 192. Rickard remained fully conscious throughout his preliminary treatment and evacuation, possessed normal skin coloring, and exhibited no sudden changes in condition. *Id.* He placed Rickard on oxygen and covered him with a blanket while Beach and Carter continued talking to him. Tr. 205. Upon finishing his examination, Scott determined that Rickard's vitals were stable and that the injury was serious but not life-threatening. Tr. 211, 223-24, 228. The time from the injury to reaching the surface appeared to be about 30 to 40 minutes. Tr. 227-28. Rickard was flown to Deaconess Hospital in Evansville, Indiana, the closest trauma center to the Dotiki Mine. Tr. 272. He would later be transferred to Nashville, Tennessee for additional surgery. Tr. 99.

Dotiki's management learned about the injury shortly after Rickard was transported to Deaconess Hospital. General Manager Gary Thweatt was not present at the mine at the time of the accident but received reports of the accident at home. He testified that he was informed that Rickard sustained a hip injury and his vitals were stable. Tr. 280.⁴ Thweatt traveled to Deaconess Hospital on the night of the accident to provide support to Rickard's family. Tr. 270. He testified that he learned that Rickard required surgery and was stable, but did not glean additional details pertaining to Rickard's specific injuries. Tr. 277-78. Thweatt did not overhear any information relating to the severity of his injuries, and did not get the impression that Rickard's condition was life threatening. Tr. 283. Furthermore, Thweatt believed that Rickard was not in a life-threatening situation because he was in the hospital and had already undergone initial surgery.

³ Scott has been a miner for eight years and an EMT for over ten years. Tr. 185. He has responded to between 20 and 25 calls while working for Webster County Coal. Tr. 196-97.

⁴ Thweatt has been the General Manager at Dotiki since 2012, and has been a certified EMT and EMT instructor since 1997. Tr. 259-61. He has also served as Assistant General Manager, Safety Director, and Assistant Safety Director since beginning work at Dotiki in 2003. *Id.*

Tr. 327-28. He remained at the hospital until around midnight when Deputy Safety Director Jake Quisenberry arrived. Tr. 281.

Chris Gunn, Safety Director at Dotiki, learned of the accident on the morning of September 29, 2015 when he awoke to missed calls and text messages from Gary Thweatt and Jake Quisenberry.⁵ Tr. 334. Gunn was aware that Rickard had undergone surgery for internal injuries but testified that he never believed the injury had the reasonable potential to cause death. Tr. 384, 387. Gunn testified about his internal investigation into the accident. Tr. 353-54. He also testified to his role in Inspector Cartwright's Part 50 Audit. Tr. 353-54. The Part 50 Audit was conducted after an unrelated fatality at the Dotiki Mine, and was completed after the instant citation was issued and specially assessed.⁶ Specifically, Gunn testified that many of the citations issued pertained to a miscommunication with a contractor nurse, who mistakenly believed that injuries treated with dermabond were not reportable under the Mine Act. Tr. 347-49.

WCC did not inform MSHA of the accident at any point on the day of the injury. MSHA Inspector Jeremy Walker discovered the accident on September 29 by word of mouth.⁷ He began looking on various social media sites to verify the occurrence and discovered that Rickard's girlfriend had posted a brief description and updates relating to the accident on Facebook. Tr. 63-64; Ex. 4. Walker informed his supervisor, who called Dotiki and confirmed the accident. Tr. 65. On September 30, Inspector Walker visited Dotiki to conduct an accident investigation. *Id.* He interviewed the miners that were present at the time of the accident. Tr. 71. Walker found that Dotiki had already removed the rock from the accident scene and had continued mining in the area. Tr. 122.

On October 1, 2017, Inspector Walker issued Citation No. 9045176 alleging a violation of 30 C.F.R. § 50.10(b) for failing to contact MSHA within 15 minutes after discovering that Rickard's injuries had the reasonable potential to cause death. Ex. 7. Walker designated the citation as a Significant and Substantial (S&S) violation that was reasonably likely to result in fatal injuries and the result of Webster County Coal's moderate negligence. Tr. 103-104. At hearing, Walker testified to increase WCC's negligence from moderate to high because he later learned that Gary Thweatt visited the hospital and thus believed that WCC had additional

⁵ Chris Gunn has worked at Dotiki Mine for 20 years and is a certified Mine Emergency Technician. Tr. 331-32. He has been Safety Director at Dotiki since 2011. Tr. 332.

⁶ Prior to the hearing, WCC filed a motion in limine to exclude the citations because they were irrelevant to the issue now before the court. On February 8, 2017, this court held that the Secretary may admit evidence and testimony relating to the Audit limited to the citations that were accepted and pertained to events that occurred prior to the September 28, 2015 accident at issue in this case. *See Order Denying Respondent's Motion in Limine to Exclude the Secretary's Evidence and Testimony Related to the Part 50 Audit of the Dotiki Mine.*

⁷ Inspector Jeremy Walker worked at Dotiki Mine from 2002 to 2011. Tr. 59. Walker has been a certified EMT since 1999. Tr. 60. He also used to be an EMT instructor and a member of the federal mine rescue team. Tr. 62. He has been a mine inspector for MSHA since 2011, and an accident investigator since 2013. Tr. 61-62.

opportunities to contact MSHA but continually failed to do so. Tr. 104-05. WCC abated the citation when it notified MSHA of the accident on October 5, 2017. Ex. 7.

II. PARTY ARGUMENTS

The Secretary argues that the Respondent violated section 50.10(b) because WCC failed to contact MSHA within 15 minutes of learning that Rickard's injuries had the reasonable potential to cause death. Secretary's Post-Hearing Brief (Sec'y Br.) at 3. The Secretary asserts that Carter and Scott should have notified MSHA because they examined Rickard, immediately noticed the serious injury to his hip, and treated him for potential shock. Sec'y Br. at 6. Furthermore, the Secretary alleges that WCC's decision to call in air evacuation indicated that mine management knew that Rickard sustained serious injuries, and nonetheless chose not to call MSHA within the requisite 15 minutes. *Id.* at 6-7.

The Secretary contends that the violation was S&S because it deprived MSHA of the opportunity to fully investigate the cause of the accident, thus exposing miners to potential uncorrected hazardous conditions. Sec'y Br. at 10. At hearing, the Secretary argued to modify the citation's negligence designation from moderate to high because WCC repeatedly failed to notify MSHA even after receiving additional information that spoke to the severity of Rickard's injuries. *Id.* at 11-12. The Secretary believes that WCC failed to report the accident to MSHA following Carter's initial assessment, again when he decided to radio for Life Flight after learning the rock landed on Rickard, and yet again when Gary Thweatt discovered that Rickard would need additional surgeries. *Id.* at 13. Finally, the Secretary asserts that the violation warrants a special assessment due to WCC's admitted history of underreporting accidents at the Dotiki Mine. *Id.* at 14.

The Respondent argues that the citation should be vacated because Rickard's injury did not have the reasonable potential to be fatal. Respondent's Post-Hearing Brief (Resp. Br.) at 9. While WCC concedes that it did not notify MSHA within 15 minutes after assessing the injury, it contends that Rickard's injuries did not constitute an "accident" as defined by the Act because the injury did not have the reasonable potential to cause death. *Id.* at 10. Specifically, WCC contends that its miners were certified EMTs that properly evaluated Rickard and reasonably determined him to be stable given the facts readily available at the time of the injury. *Id.* at 13-16. WCC asserts that the fact that Rickard was transported via air and was hospitalized do not automatically trigger the reporting standard, and that the mechanism of injury and Rickard's actual condition did not carry a reasonable potential to cause death. *Id.* at 19.

Even if WCC is found to have violated section 50.10(b), WCC argues that the injury was neither S&S nor the result of high negligence. Resp. Br. at 9. WCC contests the gravity of the violation because the failure to immediately report the injury did not contribute to the existence of the hazard of the falling rock that caused the injury at issue. *Id.* at 24. Furthermore, WCC claims that preservation of the accident scene provided little value in preventing similar injuries because the rock fell in an area with an unsupported top in by the t-bar, and only struck Rickard because he was replacing suction hoses on the side of the roof bolter. *Id.* WCC argues that its negligence should be modified to low because Carter and Scott made a reasonable and thoughtful decision regarding the reporting requirement and provided exemplary medical care to Rickard

while he remained underground. *Id.* at 25. Finally, WCC argues that the Secretary failed to provide adequate support for a special assessment because Inspector Walker did not consider the results of the Part 50 Audit in recommending the special assessment, and because the Part 50 Audit revealed a history of underreporting occupational injuries under § 50.20, and thus was not considered in or relevant to the assessment process. *Id.* at 28-29.

III. ANALYSIS

A. The Violation

The cited standard provides:

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

(b) An injury of an individual at the mine which has a *reasonable potential* to cause death.

30 CFR § 50.10(b) (emphasis added).

Section 50.10(b) requires operators to make a prompt determination of whether an accident has occurred. *Consolidation Coal Co.*, 11 FMSHRC 1935, 1938 (Oct. 1989). The provision allows the operator a reasonable opportunity to investigate the accident before the 15-minute clock begins to run, but the opportunity must be exercised in good faith and tempered with the need to immediately notify MSHA once it is clear that a reportable accident has occurred. *Wolf Run Mining Co.*, 35 FMSHRC 3512, 3517 (Dec. 2013). The Commission has held that “the decision to call MSHA cannot be made upon the basis of clinical or hypertechnical opinions as to a miner’s chance of survival. The decision to call MSHA must be made in a matter of minutes...” *Cougar Coal Co.*, 25 FMSHRC 513, 632 (Sept. 2003). Thus, readily available information such as the nature of the accident, which entails the hazard itself and observable indicators of injury or trauma, is highly relevant in determining whether an injury is reportable. *Signal Peak Energy, LLC*, 37 FMSHRC 470, 476 (Mar. 2015). The operator, in making the determination whether to notify MSHA under 30 C.F.R. § 50.10, must resolve any reasonable doubt in favor of notification. *Id.* at 477.

WCC’s decision not to notify MSHA of the accident was unreasonable given the readily available information concerning the cause and observable indicators of Rickard’s injuries. A reasonable miner would have recognized that the accident had the reasonable potential to cause death and immediately reported it to MSHA within the requisite 15 minutes.

The nature of Rickard’s accident was a crushing-type injury to the pelvic area caused by a large rock that fell from the roof of the mine. By all accounts, the rock that struck Rickard was approximately twelve inches thick and large enough to cause serious injury or death. Tr. 158, 221, 234. The rock fell from between eight and ten feet, the standard height of the roofs throughout the Dotiki Mine. Tr. 86. Armstrong testified that the rock landed and came to rest on

Rickard. Tr. 159. He was unable to lift the rock on his own. Tr. 172. He had to use a five-foot pry bar to move the rock sufficiently to allow Rickard to crawl out from under it. *Id.* The contact was so severe that Armstrong believed that Rickard was dead until he saw Rickard move his head. *Id.* at 171.

It was readily apparent that a crushing-type injury may have occurred. Even those WCC miners with no medical experience immediately noticed that Rickard's hip was damaged. Carter and Scott, both certified EMTs, testified that they were unable to identify the exact type of hip injury, raising doubts about the possibility of severe internal injuries.⁸ Tr. 222-23. The cause and extent of the injury was readily apparent, and Carter and Scott acknowledged that a hip injury was potentially life-threatening. Tr. 193-94, 234. Carter testified that the size of the rock posed a risk of a serious crushing injury if it came to rest on Rickard. Tr. 234. Rickard was complaining of back and stomach pains, indicating that the damage extended beyond his visible hip injury. Tr. 224. Upon learning this information, a reasonable miner would have realized that the accident had the reasonable potential to cause death and thus known to notify MSHA as required under § 50.10(b).

I find that WCC violated section 50.10(b) when Carter opted not to notify MSHA within 15 minutes after his initial assessment of Rickard's injuries. Carter was Rotating Foreman, and therefore responsible for the entire mine at the time of the accident, and possessed the authority to notify MSHA of the accident. Tr. 228-29. He was aware of the Part 50 reporting requirements and had notified MSHA under the standard in the past. Tr. 232-33, 237-38. He was the first member of management to arrive at the scene and the first certified EMT to examine Rickard. The scene was undisturbed, and both Rickard and Armstrong were available to answer any questions regarding the cause or details of the accident. Given Carter's authority and experience and the nature of the accident, I find that a similarly situated reasonable miner would have assessed Rickard's injuries and the scene of the accident and determined that Rickard had likely sustained serious and reportable internal injuries.

WCC asserts that Carter's preliminary assessment of Rickard indicated that he was stable and that its decision not to notify MSHA was therefore reasonable. I disagree. Section 50.10(b) requires merely that the injury has the *reasonable potential* to cause death, not that the injury is actually life-threatening. *See Red River Coal Co.*, 39 FMSHRC 368, 393 (interpreting the Commission's decision in *Signal Peak*, 37 FMSHRC 470, 474 (Mar. 2015) to apply a common sense approach to what constitutes a "reasonable potential to cause death."). The provision therefore requires a reasonable possibility that an injury may be fatal to trigger the requirement. With this in mind, I find that the fact that Rickard was conscious, alert, and that his initial vitals were stable do not overcome two important factors that should have prompted the Respondent to report the accident.

⁸ Section 50.10(b) does not require operators to wait to determine the exact injury that occurs after an accident. *See Cougar Coal Co.*, 25 FMSHRC at 632. However, the fact that Carter and Scott noted an obvious hip injury but could not determine whether the injury was a swelling, deformity, or a displacement or the like indicated a reasonable doubt regarding the severity and implications of the injury.

First, the readily observable nature of Rickard's injuries and his own comments indicated the potential existence of serious internal injuries. Carter observed the size of the rock and immediately noted damage to Rickard's hip and pelvic area, in close proximity to vital organs. Although Rickard remained conscious and responsive, he complained about back and stomach pains, neither directly related to his hip. Tr. 222-24. These comments should have indicated the reasonable likelihood of undetectable internal injuries, and indeed, Rickard sustained severe internal injuries that went undetected until he arrived at the hospital. At the very least, the readily apparent information at the accident scene should have prompted WCC to resolve its doubts in favor of notification. *See Signal Peak Energy, LLC*, 37 FMSHRC at 477.

Second, the discrepancy over whether or not Carter was aware that the rock fell on top of Rickard indicates that his assessment of the nature of the injury was incomplete and therefore unreasonable. When Carter arrived at the scene, the rock was no longer on top of Rickard, and Carter apparently assumed that the rock merely struck him and did not land on him. Tr. 234-35. He did not recall asking Armstrong how the rock struck Rickard. Tr. 235. Armstrong however, credibly testified that Carter asked him if he moved the rock off of Rickard when he arrived at the scene. Tr. 161. Carter stated that had he known that the rock fell on Rickard, he would have reported the injury to MSHA for fear of a life-threatening crushing injury. Tr. 234.

It is undisputed that the rock landed on top of Rickard and had to be pried off of him. Regardless of whether Carter knew that the rock rested on Rickard or simply failed to ascertain that fact, it is clear that the information was readily available and would have impacted his decision to call MSHA. At the very least, Carter should have assumed that a crushing-type injury was a distinct possibility, and asked either Rickard or Armstrong to specify precisely what happened or assumed that a crushing type injury occurred. To fail to determine the available details of the accident while performing a medical examination is inherently unreasonable.

Inspector Walker testified that Carter also should have notified MSHA after his decision to radio for Life Flight. Tr. 397-98. He believed that Carter's decision to call for air evacuation indicated that his assessment of the accident had increased from stable to critical. Tr. 398. While I find Inspector Walker's testimony to be credible on the whole, I do not credit this assumption. Walker admitted that Carter never explicitly told him that he made the call to Life Flight because his assessment of the accident had changed. Tr. 411. Walker testified that this was merely an assumption based on Carter's actions. *Id.* I credit Carter's testimony that he radioed for Life Flight to ensure that Rickard reached the hospital as quickly and comfortably as possible, not because he believed the accident was life-threatening. Tr. 223.

Additionally, I do not find that the use of Life Flight automatically triggers the reporting requirement. Life Flight is intended for serious injuries, but it is also the best way to ensure rapid and comfortable transportation for injured miners, regardless of whether their life is at stake. Section 50.10(b) does not specify the conditions required for an injury to carry the "reasonable potential to cause death," and to read use of Life Flight into that definition may deter operators from employing what is a safe and effective method of emergency transportation.

Next, Inspector Walker alleged that WCC should have notified MSHA once Patrick Scott began treating Rickard for potential shock. Tr. 100. Walker testified that an EMT would not

normally treat a patient for shock unless the patient exhibited signs of shock. Tr. 136. I decline to find that the decision to treat an injured miner for potential shock automatically triggers the reporting standard in § 50.10(b). Although the onset of shock has a reasonable potential to cause death, merely treating for the possibility of shock does not elevate the severity of the injury in itself. Scott testified that Rickard did not exhibit symptoms of shock during his examination, but he administered treatment for potential shock, such as providing a blanket and oxygen, to ensure Rickard's comfort, and would do the same for any injury for which shock remained a distinct possibility. Tr. 192. He noted Rickard's injury could have been life-threatening and that while he checked Rickard for symptoms of internal bleeding he could not definitively rule out the possibility. Tr. 193. I credit Scott's testimony that Rickard did not exhibit any outward signs of shock and that his decision to treat for potential shock was to err on the side of caution and also to keep Rickard as comfortable as possible during his evacuation to the mine surface. Tr. 211. Though WCC should have already notified MSHA after Carter's assessment, Scott's decision to treat for shock does not in itself suggest that WCC knew Rickard's injury had the potential to cause death.

Even assuming that WCC's initial assessment of Rickard's injury was reasonable, I find that WCC knew or should have known that Rickard's condition merited contacting MSHA when Gary Thweatt learned of Rickard's need for surgery and internal injuries the night of and the day after the accident.⁹ Tr. 259-61. On the night of the accident, Dotiki contacted Thweatt and told him that Rickard sustained a hip injury, that his vital signs were stable, and that Rickard was being flown to the nearest trauma center in Evansville. Tr. 272. Thweatt traveled to Deaconess Hospital and introduced himself to Rickard's family, but testified that they had no additional information regarding his condition at that time. Tr. 275. Thweatt overheard the doctor inform the family that Rickard would need additional surgery and was stable, but did not learn any specific details at that time. Tr. 279.

Thweatt testified that he learned more about the details of Rickard's accident and injuries the following day. He knew that the rock was large enough to kill or seriously injure a miner, and learned that the rock fell and pinned Rickard against the ATRS. Tr. 301. He also learned of Rickard's lacerated urethra and that Rickard needed multiple surgeries. Tr. 298-300. I find Thweatt's testimony on these points to be inconsistent. Thweatt testified that he knew of the lacerated urethra the day after the accident, but walked back that testimony to state that he was unsure that he ever got all of the details concerning Rickard's condition. Tr. 298-300. It is unlikely that Thweatt, the General Manager of Dotiki Mine, was only informed of some of Rickard's serious injuries but remained in the dark about others. I find it probable that if Thweatt knew about the lacerated urethra, he likely knew or should have known of Rickard's other serious internal injuries and made the decision to notify MSHA.

⁹ I wish to emphasize that I do not find WCC or Mr. Thweatt's decision to travel to a hospital in support of an injured miner as evidence of knowledge that an injury has the potential to cause death. I commend and encourage providing miners and their families support during difficult times. However, information learned in this context can and should inform an operator's decision to notify MSHA if it leads mine management to believe that an injury has the reasonable likelihood to be fatal.

Nevertheless, Thweatt did not notify MSHA after learning this additional information because Rickard was already in the hospital having surgery. Tr. 298. In fact, WCC did not notify MSHA as required under the standard until after Inspector Walker issued the citation on October 1, three days after Rickard's accident. Tr. 303. I find it unlikely and unreasonable that, after commencing an investigation and learning more about Rickard's injuries, Thweatt was not aware that his condition merited notifying MSHA. Thweatt clearly explained his understanding of the accident, what he remembered of the details of Rickard's injuries, and his knowledge that Rickard was airlifted to Nashville for multiple surgeries. Tr. 319.

WCC argues that Thweatt did not learn of the severity of Rickard's injuries until after he had undergone surgery, and thus the injuries were repaired and no longer posed a reasonable potential for death. Resp. Br. at 21. While this may be true, the fact remains that WCC did not call MSHA until well after the disputed citation was issued. Thweatt learned of the extent and specifics of the accident by September 30 and still did not report the accident to MSHA as required by the standard. I find it unreasonable that neither Carter nor Thweatt, in their capacities as EMTs and authority figures at the mine, took it upon themselves to fully understand the accident or to err on the side of caution and notify MSHA of the accident based on what they understood about Rickard's condition. Even after receiving significant detail regarding the incident and talking with MSHA the following day, WCC still failed to fulfill their obligation under § 50.10(b) until October 5, well after the citation was issued on October 1. Tr. 305-06; Ex. 7.

WCC cites ALJ Manning's decision in *Newmont USA Limited*, 32 FMSHRC 391 (Apr. 2010) (ALJ) to argue that the citation should be vacated. In *Newmont USA Limited*, MSHA alleged a violation of section 50.10(b) when an employee sustained a fractured leg from being run over by a haul truck. *Id.* at 934. The Secretary alleged that the fractured femur had a reasonable potential to cause death because of risks inherent with hospitalizations and complications in surgery. *Id.* ALJ Manning found that Newmont was entitled to summary decision and vacated the citation because the risk of death from surgery or hospitalization was too remote from the leg injury itself and that the regulation did not require mine operators to report every injury that required off-site emergency care. *Id.* at 396.

I find the present facts distinguishable from those in *Newmont*. The nature of Rickard's injury was significantly more serious than the miner's broken leg in *Newmont*. A crushing injury to the pelvic area carries a high risk of internal injury and damage to vital organs. This risk is inherently more likely to cause death than a broken leg. Furthermore, in *Newmont*, at no time did the EMT believe that the miner suffered an injury with the reasonable potential to cause death. *Id.* at 396. Here, both Carter and Scott admitted that injuries on or near the pelvic area could result in such injuries, and only changed their minds after checking Rickard's vital signs and without considering the possibility that a crushing injury had occurred. Tr. 194, 234. As noted by the Respondent, their decision not to notify MSHA was carefully and cautiously considered, thus indicating some uncertainty to whether Rickard's injury had the potential to be fatal. Resp. Br. at 25. Carter and Scott's examinations, while instructive, did not alleviate doubt that Rickard was bleeding internally or had severe internal injuries. Rickard's hip injury was immediately noticeable, and the size of the rock, the height from which it fell, and the fact that it had to be pried off of Rickard all indicate an injury with the potential to cause death.

For the reasons discussed above, I find that WCC violated § 50.10(b) when Carter opted not to call MSHA within 15 minutes of examining the scene of the accident and Rickard's sustained injuries and when Thweatt learned of Rickard's specific injuries the day after the accident.

B. Significant and Substantial (S&S)

A violation is significant and 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).

The Commission has held that the second element of the *Mathies* test addresses the extent to which a violation contributes to a particular hazard. *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2037 (Aug. 2016). Analysis under the second step should thus include the identification of the hazard created by the violation and a determination of the likelihood of the occurrence of the hazard that the cited standard is intended to prevent. *Id.* at 2038. At the third step, the Secretary must prove there was 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. *West Ridge Resources, Inc.*, 37 FMSHRC 1061, 1067 (May 2015) (ALJ), citing *Musser Eng'g, Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010). Evaluation of the four factors is made assuming continued normal mining operations. *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984).

As an initial matter, the Commission has held that violations of section 50.10 are mandatory standards to which S&S designations are applicable. *See Red River Coal Co., Inc.*, 39 FMSHRC 368, 392 (Feb. 2017) (ALJ) (citing *Signal Peak Energy, LLC*, 37 FMSHRC 470, 479 (Mar. 2015)). Thus, the first prong of the *Mathies* test is satisfied.

The specific hazard posed by section 50.10(b) is the preclusion of MSHA's ability to investigate the cause of Rickard's accident. The Commission has held that in cases where rescue efforts are not concerned, Section 50.10 is intended to facilitate MSHA's ability to investigate and remedy the cause of an accident. *See Signal Peak*, 37 FMSHRC at 480. Thus, failure to report a potentially fatal accident creates a discrete safety hazard because it precludes MSHA's investigatory role in determining and remedying the cause of the accident. *Id.* Here, Rickard's injury posed two concerns: the stability of the roof of the Dotiki Mine and whether Rickard's decision to repair the suction hose prior to backing up the roof bolter was an isolated occurrence. WCC failed to notify MSHA of the accident, removed the rock that injured Rickard, and continued to mine in the accident area shortly thereafter. Tr. 122. WCC thus prevented MSHA from investigating Dotiki's roof conditions and roof bolting procedures and determining whether

Rickard's accident was an isolated occurrence or part of a widespread problem that put miners at risk and merited additional remedy.

The preclusion of MSHA's investigatory role is reasonably likely to expose miners to uncorrected hazardous conditions or behaviors. The failure to report the injury prevented MSHA from investigating and remedying potentially adverse roof conditions in the mine and ensuring that Dotiki's miners were following proper safety procedures while operating machinery. WCC contends that the hazard was unlikely to result in an injury because the rock fell from an area of unsupported top, and only struck Rickard because he was repairing suction hoses by the roof bolter's t-bar. Resp. Br. at 24. The record indicates, however, that miners were already taking shorter cuts due to adverse roof conditions in Dotiki, and that WCC continued to mine in the same area shortly after Rickard was evacuated from the mine. Tr. 83-84, 122. Furthermore, Thweatt testified that Rickard's decision to try to repair the suction on the roof bolter without backing up was not typical, suggesting that proper safety procedures may not have been followed. *See* Tr. 301-02. Thus, the hazard of precluding MSHA's investigatory ability was reasonably likely to result in an injury in the context of continuous mining operations because it prevented implementation of additional safety measures and exposed miners to uncorrected hazards.

Finally, exposure to dangerous roof conditions is reasonably likely to result in a serious injury similar to Rickard's. Rock falls of roughly the same size and from the same height as the one that impacted Rickard are likely to result in serious crushing injuries. Accordingly, I affirm the Secretary's S&S designation.

C. Negligence

Inspector Walker initially designated the violation as the result of WCC's moderate negligence, but moved to modify the citation to high negligence at hearing. Sec'y Br. at 10; Tr. 104-05. The Secretary argues that the violation was the result of WCC's high negligence because it failed to report the accident to MSHA on multiple occasions, namely after Carter's decision not to contact MSHA following his initial assessment and decision to radio for Life Flight, after Carter learned that the rock fell on to Rickard and posed a potential crushing injury, and after Thweatt visited the hospital and learned that Rickard's injuries required surgery. Sec'y Br. at 12-13; Tr. 403-04, 411-12, 420-22.

WCC argues that it exhibited low negligence because it provided exemplary medical care to Rickard and its decision not to immediately report the injury was a conscious and reasonable one made with thoughtful consideration. Resp. Br. at 25.

I find that WCC was highly negligent in its repeated failure to notify MSHA of the accident. Under the Mine Act, operators are held to a high standard of care, and "must be on the alert for conditions and practices in the mine that affect the safety or health of miners and to take steps necessary to correct or prevent hazardous conditions or practices." 30 C.F.R. § 100.3(d). High negligence occurs when the operator "knew or should have known of the violative condition and there are no mitigating circumstances." 30 CFR § 100.3: Table X. Moderate

negligence occurs when the operator “knew or should have known of a violative condition or practice, but there are mitigating circumstances.” *Id.*

The Commission has held that the operator, in making the determination whether to notify MSHA under 30 C.F.R. § 50.10, must err on the side of caution and resolve any reasonable doubt in favor of notification. *Signal Peak Energy, LLC*, 37 FMSHRC 470, 477 (Mar. 2015). Carter and Scott testified that injuries to the hip area could be potentially fatal and that while Rickard’s vital signs were stable, they could not precisely identify the injury to his hip or foreclose on the possibility of serious internal injuries. Tr. 194, 235. Yet inexplicably, WCC opted not to notify MSHA in spite of these doubts. As discussed in detail above, Carter was clearly aware of the reporting requirement and should have known, given the readily available evidence, that Rickard’s injury had the potential to cause death. Carter did not properly assess the scene of the accident and the mechanism of the injury, which in combination indicated that Rickard sustained a potential crushing injury to his pelvic region. Carter should have known that Rickard was pinned under the rock, and should have notified MSHA immediately once he learned that the rock landed on Rickard and pinned him to the ATRS. Carter testified that such knowledge would have led him to contact MSHA for fear of a serious crushing injury, and yet upon learning that information, he still did not contact MSHA. Tr. 235.

Furthermore, Thweatt’s decision not to contact MSHA after being notified that Rickard had to undergo additional surgeries and was eventually air lifted to Nashville exacerbates WCC’s negligence. It is at this point that WCC certainly learned of Rickard’s serious internal injuries. The details of Rickard’s serious injuries conflicted with WCC’s initial assessment of Rickard and should have prompted an immediate call to MSHA. However, WCC again failed to report the accident for a number of days and until Inspector Walker issued his citation on October 1, at which point MSHA was unable to conduct any investigation of the accident scene.

I acknowledge that WCC’s rapid and thorough response to Rickard’s injury was commendable but its efforts in this regard do not mitigate its negligence. Throughout the treatment of Rickard there remained a reasonable doubt as to the severity of Rickard’s injuries and there is no dispute that mine management was aware of the reporting requirement. Mine management continued to assume that Rickard’s stable vitals foreclosed the need for notification despite learning additional details regarding his injuries. I thus find that WCC was highly negligent in its repeated failure to contact MSHA under section 50.10(b), even after learning that Rickard had severe internal injuries and required extensive surgery.

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. If the conditions of the violation so warrant, the Secretary may waive the regular assessment under § 100.3(a) and specially assess a penalty. 30 C.F.R. § 100.5(a). The special assessment must also be based upon the six criteria outlined above, and all findings must be in narrative form. 30 C.F.R. § 100.5(b).

I find that the Secretary failed to establish that the violation merited the proposed special assessment. The Secretary primarily argues that WCC demonstrated a “pattern of conduct” in failing to report or underreporting violations that would only be deterred by upholding the specially assessed penalty. *See* Sec’y Br. at 14-15. The Secretary offered a Part 50 Audit conducted after an unrelated fatality occurred at the Dotiki Mine in early 2016. Tr. 17-18; Ex. 10. For the following reasons, I find the audit to be of minimal evidentiary value and do not believe that it justifies the proposed special assessment.

First, the audit alleges numerous § 50.20 violations for failing to report occupational injuries or illnesses but does not allege any § 50.10 violations. *See* Ex. 10. Section 50.10 is triggered under vastly different circumstances and permits the operator much less time to comply with the requirement. *See* 30 C.F.R. § 50.10 (requiring the operator to call MSHA’s hotline within 15 minutes); § 50.20(a) (requiring the operator to mail the completed injury forms within 10 working days). Evidence of WCC’s failures to report occupational illnesses or injuries does not prove or support the assertion that WCC likewise consistently failed to report injuries with the reasonable potential to cause death.

Additionally, neither MSHA nor Inspector Walker considered the Part 50 Audit when recommending and proposing the special assessment. Tr. 426-28. MSHA initiated the Part 50 Audit well after the issuance of the instant citation, and the Secretary had already issued the proposed special assessment when the audit was completed. Tr. 17-18, 26-27. Inspector Walker testified that he based his recommendation for special assessment on the facts of the citation and that the Part 50 Audit offered played no part in his decision. Tr. 425-26. In fact, he was not involved in the audit procedure at all. *Id.* Yet the Secretary submitted the Part 50 Audit as evidence for the special assessment without addressing why either its post hoc citations or Inspector Walker’s findings merited a special assessment in this case. *See* Sec’y Br. at 14-15. I therefore do not find the Part 50 Audit to support the proposed special assessment and assign WCC’s violation history minimal weight.

Inspector Walker testified that he recommended the special assessment in light of the mechanism of Rickard’s injury and because Carter, as an EMT and Rotating Foreman, should have known that the situation required immediate notification to MSHA after radioing Life Flight. Tr. 430-31; 439. As discussed above, WCC violated the standard after Carter’s initial

assessment, but that his decision to radio Life Flight should not factor into the violation. I agree that Life Flight is intended for critical situations, but I credit Carter's testimony that his decision to do so was to provide Rickard with the quickest and most comfortable access to the nearest hospital. I decline to penalize WCC for using Life Flight and do not wish to deter the practice when operators determine that it is warranted.

I also decline to find that Carter and Thweatt's EMT certification justifies the special assessment. *See* Tr. 430. EMT certification is undoubtedly useful in assessing injuries and administering treatment in mine accidents. However, it does not raise the standard of care under section 50.10(b). The Commission has held that clinical or hypertechnical opinions are not required to merit notifying MSHA under the standard. *See Cougar Coal Co.*, 25 FMSHRC 513, 521 (Sept. 2003). While EMTs may be able to provide a more specific injury diagnosis than the average miner, their responsibility under section 50.10 remains the same; they must quickly assess whether the injury is severe enough to reasonably conclude there is a potential for the injured miner to die and notify MSHA if that is the case. Holding EMTs to a higher standard would frustrate the immediate notification requirement by encouraging more time-consuming technical examinations of injured miners before making the decision to notify MSHA. *See generally* 25 FMSHRC at 521. While Carter and Thweatt should have been able to determine that Rickard's injuries had a reasonable potential to cause death, their EMT certification is not an aggravating factor that justifies the special assessment. In light of these findings, I vacate the Secretary's proposed special assessment.

Turning now to my independent assessment, I nonetheless hold that the violation is serious and deserves a significant penalty. Based on the following review of the statutory penalty criteria, I assess a penalty of \$20,000.

I have already noted that WCC does not have an extensive violation history of § 50.10. Ex. 10. WCC is a large operator and there is no indication that the penalty will have an impact on its ability to continue in business. Neither party raised WCC's size or ability to pay as an issue during the hearing or in post-hearing briefs.

I have discussed my findings regarding gravity in the preceding sections. WCC's failure to notify MSHA of Rickard's injury was S&S and reasonably likely to result in a fatal accident. A violation of § 50.10 precludes MSHA's investigatory abilities and forecloses the possible discovery and remedy of widespread issues in the mine. *Signal Peak Energy*, 37 FMSHRC 470, 480 (Mar. 2015). Here, MSHA was precluded from investigating the existence of unstable or adverse roof conditions in Dotiki Mine and whether proper safety procedures were followed when making equipment repairs or adjustments. Both of these potential issues pose serious threats to miners' safety. Given the severity of Rickard's injuries, any additional injuries caused by WCC's violation of section 50.10 were likely to be serious if not fatal.

WCC's violation was the result of high negligence with no mitigating factors. Carter and Thweatt, both high-ranking members of Dotiki's management, independently failed to notify MSHA of Rickard's accident on multiple occasions. Carter should have notified MSHA after his initial assessment of Rickard which revealed that he may have sustained a crushing injury and certainly when he discovered that the rock fell on to Rickard and had to be pried off of him. *See*

Tr. 161, 234-35. Thweatt should have notified MSHA when he learned that Rickard needed surgery on the night he visited his family at the hospital and again when he subsequently learned of Rickard's internal injuries and of his transfer to Nashville for additional surgeries. *See* Tr. 298-300, 319. Upon learning this information, WCC did not notify MSHA even days after the accident. Tr. 298, 305-06. The failure of one member of Dotiki's mine management, let alone two, to notify MSHA in light of the information progressively gathered during and subsequent to the accident, is inexplicable. Thweatt and Carter's continual failure to notify MSHA demonstrate high negligence and a disregard for the importance and purpose of section 50.10(b).

I do not find that WCC demonstrated good faith in abating the citation. Inspector Walker issued the citation on October 1, 2015, over three days after the accident. Ex. 7. WCC had not called to notify MSHA at that time, and WCC did not terminate the citation until October 5, four days after MSHA issued the citation. *See* Ex. 7; Tr. 305-06. WCC offered no justification or explanation for waiting so long to terminate the citation. I do not consider a four day delay in abatement to be a good faith effort when all that was necessary to abate the citation was to place a brief phone call to MSHA.

The notification requirement of section 50.10 is an important standard that promotes MSHA's role in investigating and remedying the causes of serious accidents. *See Signal Peak Energy*, 37 FMSHRC 470, 480 (Mar. 2015). Any injury that creates a reasonable doubt as to whether it has potential to cause death should trigger the operator's decision to notify MSHA, as compliance with the standard is neither difficult nor time consuming. Given the gravity and negligence of this particular accident and WCC's failure to quickly terminate the citation, I find the Congressionally-prescribed minimum penalty to be an insufficient deterrent for this violation. Considering the above mentioned criteria, I assess a penalty of \$20,000.

IV. ORDER

The Respondent, Webster County Coal, LLC, is **ORDERED** to pay the Secretary of Labor the sum of **\$20,000.00** within 30 days of this order.¹⁰

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

¹⁰ Payment should be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, P. O. BOX 790390, ST. LOUIS, MO 63179-0390

Distribution: (U.S. First Class Mail)

Schean G. Belton, Office of the Solicitor, U.S. Department of Labor, 618 Church Street, Suite 230, Nashville, TN 37219

Tyler H. Fields, Webster County Coal, LLC, 1146 Monarch Street, Lexington, KY 40513

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
721 19TH STREET, SUITE 443
DENVER, CO 80202-2536
303-844-3577 FAX 303-844-5268

May 23, 2017

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

v.

MAGORIAN MINE SERVICES,
Respondent

CIVIL PENALTY PROCEEDINGS

Docket No. WEST 2016-270-M
A.C. No. 26-01597-401772 1ZZ

Docket No. WEST 2016-445-M
A.C. No. 26-01597-406304 1ZZ

Pinson Mine

DECISION

Appearances: Rose Darling, Esq. and Mark A. Pilotin, Esq., Office of the Solicitor, U.S. Department of Labor, San Francisco, California, for the Secretary;
Robert D. Peterson, Esq., Robert D. Peterson Law Corporation, Rocklin, California, for Magorian Mine Services.

Before: Judge Manning

These cases are before me upon two petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”), against Magorian Mine Services (“MMS”) pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the “Mine Act”). The parties presented testimony and documentary evidence at a hearing held in Sacramento, California, and filed post-hearing briefs. One section 104(d)(1) citation, one section 104(d)(1) order, and two section 104(d)(2) orders were adjudicated at the hearing. MMS was an independent contractor performing development work at the Pinson Mine, an underground gold mine in Humboldt County, Nevada. At all pertinent times, the mine’s operator was Atna Resources, Inc. For reasons set forth below, I **AFFIRM** Citation No. 8876362 and Order No. 8876391, **VACATE** Order No. 8876363, and **MODIFY** Order No. 8876392.

I. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

Citation No. 8876362, WEST 2016-270-M; and Order No. 8876363, WEST 2016-445-M.

Citation No. 8876362, issued under section 104(d)(1) of the Mine Act on November 2, 2015, alleges a violation of section 57.3360 of the Secretary’s safety standards and asserts that there was insufficient ground support in the 4644 intersection. GX-1. In relevant part, the safety standard provides that ground support “shall be used where ground conditions, or mining experience in similar ground conditions in the mine, indicate that it is necessary.” 30 C.F.R. § 57.3360. The standard further provides that “[w]hen ground support is necessary, the support

system, shall be designed, installed, and maintained to control the ground in places where persons work or travel in performing their assigned tasks.” *Id.* The citation alleges that ground support had not been installed and “the drift was accessed constantly by foot and open cab equipment.”

Order No. 8876363, issued under section 104(d)(1) of the Mine Act on November 2, 2015, alleges a violation of section 57.3200 of the Secretary’s safety standards and asserts that loose ground was found in the 4644 intersection. GX-4. The citation states that loose ground was “located in the back and was scaled down and measured 2 feet by 2 feet by 2 inches . . . and fell directly into the travelway[.]”¹ The “condition was a direct result of not installing ground support.” In relevant part, the safety standard provides that “[g]round conditions that create a hazard to persons shall be taken down or supported before other work or travel is permitted in the affected area.” 30 C.F.R. § 57.3200.

Inspector Patrick L. Barney² issued the citation and order. He determined that, in both the citation and order, an injury was highly likely to be sustained and, if an injury occurred, it could reasonably be expected to be fatal. Moreover, he concluded that the conditions were significant and substantial (“S&S”), and that ten people were affected by the conditions set forth in the citation and one person was affected by the conditions set forth in the order. The inspector determined that MMS’s negligence was high in both the citation and order. In the body of the citation and the order, the inspector stated that MMS’s owner engaged in aggravated conduct because “he knew of the condition and allowed miners to work and travel in the area.” The Secretary proposed a penalty of \$6,996.00 for the violation alleged in the citation using his regular assessment formula, 30 C.F.R. § 100.3, and proposed a penalty of \$9,100.00 for the violation alleged in the order under his special assessment regulation, 30 C.F.R. § 100.5.

Summary of the Evidence

Small Mine Development (“SMD”) operated the Pinson Mine on behalf of Atna Resources. Tr. 25. SMD contracted with MMS to perform specified work, including the development of tunnels and drifts.

On or about October 27, 2015 Inspector Barney traveled to the mine after MSHA received a hazard complaint concerning ground conditions. Tr. 20. Subsequently, MSHA received a second complaint with additional information, which prompted Barney to revisit the mine. After meeting with officials from Atna Resources and SMD, Barney started his underground inspection. He traveled to the 4644 access and entered the subject T-shaped intersection. Tr. 26. In that area, he observed that the ground consisted of “sand, gravel, shale, [and] clay[.]” *Id.* He did not see any rock bolts or other ground support in the intersection.

¹ The “loose ground” at issue in these cases all relate to conditions in the roof, often referred to as the “back,” of the cited intersection

² Inspector Barney has been an inspector with MSHA since February 2011 and inspected many underground gold mines during that time. Tr. 15. He started working as miner in 1988 and held many jobs up to and including supervisory positions in underground Nevada gold mines. Tr. 16.

Barney testified that it was his understanding that MMS constructed the intersection. Tr. 27. The inspector was concerned, in part, because there had been a ground fall in mid-October about 100 or more feet away. Tr. 28. Moreover, “several” ground falls had occurred at the mine during the summer of 2015. Tr. 29. He considered the ground at the mine to be “very unstable.” Tr. 28.

Atna Resources adopted a ground support plan in late October 2015 in response to a fall of ground. Tr. 31; GX-2 pp. 3-5. This plan included the mine’s minimum standard for ground support and noted that “[p]oor ground conditions require more than the minimum” standards. GX-2 p. 3. The plan specifies that rock bolts should be on four or six foot centers depending on the circumstances. Tr. 32-33. It also contains requirements for wire mesh-type matting to “prevent small rock from falling from the back of the heading” Tr. 33-34; GX-2 pp. 4-5.

Barney issued Citation No. 8876362 because there was no ground support in the intersection. Tr. 35. He could see wire and a two-inch layer of shotcrete. Tr. 35. There were some bolts on either side of the intersection along one rib, but not on the other rib and not in the center of the intersection. Tr. 36; GX-1 p. 14. The plan discussed above required more roof support than was present and additional layers of shotcrete. GX-2 p. 5. Kent Hanson, a superintendent with SMD, was able to easily scale down pieces of rock from the back in the intersection. Tr. 38, GX-1 pp. 4-5. The inspector testified that Hanson “touched the rock [with a scaling bar] and it came down.” Tr. 39. Footprints in the area indicated that people walked through the intersection. Tr. 40. SMD abated the cited condition by attaching hog wire to the back using rock bolts with bearing plates. Tr. 42; GX-1 pp. 11-12.

Barney testified that, in his opinion, attaching a coat of shotcrete along with some rebar was not adequate ground support for the cited area. Tr. 43. He previously worked at other underground gold mines within the same area in Nevada and, based on his experience, he has observed falls of ground “beyond anchorage” due to the nature of the rock. *Id.* Ground support in the area did not meet the minimum specifications of the mine’s ground support plan. He estimated that at least 10 people were exposed to this hazard and that the condition “existed for 95 days, which was 190 shifts.” Tr. 44.

Barney designated the violation as S&S because loose rock was easy to bar down, there was a lot of foot traffic and open cab traffic in the area, and the condition had existed for over 190 shifts. Tr. 45. The discrete hazard was an “unplanned fall of ground.” Tr. 46. An injury was highly likely because the “drift had been advanced 228 feet beyond that intersection . . . and the intersection wasn’t supported.” Tr. 47. The loose ground that Hanson took down was two feet by two feet by two inches thick. Rock falling from that height could “easily be fatal.” *Id.*

Barney determined that the violation was the result of MMS’s high negligence because Don Magorian, the owner of MMS, admitted that he knew of the condition. Magorian “knew that the intersection was non-supported, that they had mined 228 feet beyond that intersection and that he never bothered to tell anybody that it was not supported.” Tr. 48. The inspector stated that he recorded Magorian’s statement contemporaneously in his notes. GX-1 p. 19. Barney also testified that Magorian went on to say that he did not tell Atna Resources or SMD about the condition because the shotcrete, mesh and rebar were better engineered than any bolt. Tr. 49.

Barney further determined that the violation was the result of MMS's unwarrantable failure to comply with the safety standard because management knew that the conditions violated that safety standard and people were not kept out of the intersection. Tr. 50. The inspector relied, in large part, on Magorian's statements during the telephone conference when making this determination. *Id.* The inspector testified that Magorian "knew that the intersection was not supported and allowed his miners, SMD miners and Atna Resources people to travel beyond that intersection while he mined another 228 feet beyond that intersection prior to leaving the mine site." *Id.*

Inspector Barney issued Order No. 8876363 one minute after issuing the citation discussed above and based it on the presence of loose rock that was present at the time of his inspection. He determined that the conditions he observed violated the safety standard because the loose ground created a hazard to persons. Tr. 53. Miners walked under the loose ground when they mined 228 feet beyond the intersection. *Id.*

An injury was highly likely because when the rock was scaled down by Hanson "it actually came down at first contact with the scaling bar, didn't require any prying, and there were multiple pieces of loose that fell in by that location[.]" *Id.* Getting hit by a 50 pound rock could result in a fatal injury. The inspector determined that MMS's negligence was high because of the statements made by Magorian, as discussed with respect to Citation No. 8876362 above. Tr. 54-55. The inspector also determined that the violation was the result of MMS's unwarrantable failure to comply with the safety standard because Magorian knew that the cited conditions had existed for a length of time and "he allowed and/or instructed his people to travel underneath that area and travel under those conditions." Tr. 55.

Barney admitted that Magorian ceased working in this area of the mine on October 2, 2015 and that the mine's ground support plan was not adopted until October 19. Tr. 61, 66. He also acknowledged that SMD scaled down the back once every shift. Tr. 69.

The Secretary also called James G. Vadnal as an expert witness with respect to this citation and order.³ He testified that he is familiar with the geology of the mine even though he has never visited the mine. Tr. 76, 86. He has investigated the geology of the Leeville and Midas Mines, both of which are underground gold mines close to the Pinson Mine. Tr. 74. He also "read quite a bit" about the geology of the Pinson Mine. Tr. 76. He said that the rock at the mine is composed of gravel, shale, boulders, and sand. Tr. 79. There were faults in the general area. Tr. 79-80.

Vadnal testified that the conditions described in Citation No. 8876362 created a violation of section 57.3360. Tr. 81. At an intersection, there is a larger area of the back exposed with the result that "all intersections need some sort of permanent support." *Id.* The intersection in

³ Mr. Vadnal has worked for the roof control division of MSHA's technical support group since January 2007. Tr. 71, GX-7. He has investigated many accidents resulting from falls of ground. He was an inspector with MSHA's metal/non-metal division starting in November 2004. Prior to working for MSHA, he worked as a mining engineer in the mining industry. He has a Bachelor of Science degree in geology and a Master of Science with an emphasis in mining. Tr. 73; GX-7. He was accepted as an expert witness at the hearing. Tr. 77.

question should have been supported by roof bolts, shotcrete and welded wire mesh. *Id.* After reviewing the photos taken by Inspector Barney, Vadnal concluded that the ground support installed by MMS was “not adequate in that large chunks of loose fell with very little effort.” Tr. 81-82. The photos show that the roof was loose in several areas. Tr. 83. Although rebar had been used to attach mesh to the back, “rebar does not constitute ground control.” Tr. 84. Photos introduced into evidence show that someone had scaled down back and installed roof bolts to abate the citation. Tr. 85; GX-1 pp. 11-12. Based on his knowledge of the rock structure at the Pinson Mine, Vadnal testified the back in the intersection should have been supported as soon as it was cut. Tr. 85-86. Vadnal believes that it is unlikely that the ground conditions in the intersection changed between early October 2015 and November 2, 2015. Tr. 87-88.

Don Magorian⁴ testified that he is the owner of MMS. Tr. 89. MMS had an agreement with SMD “to come in and cut and support ground that had been difficult to – or had proved difficult to impossible to do with normal mining methods.” Tr. 90. MMS believed that MSHA approved the use of its alternative mining method. Tr. 91. MMS was asked to drive “some tunnels around” cave-ins that had occurred in the area. Tr. 92. The idea was to use shotcrete and wire support after “cutting the ground and maintaining a nearly perfect shape so that we could keep the shotcrete in compression and provide an extremely strong liner.” *Id.* He stated that concrete has “ten times the strength under compression than it does under tension.” Tr. 93. Shotcrete in compression is structural and contains poly fibers. He testified that his employees are very experienced in doing this type of work and that MMS has been doing it for 18 years in other tunneling construction.

Magorian testified that MMS and SMD worked “hand-in-hand” and it was SMD’s responsibility to install roof bolts where needed. Tr. 95, 97. MMS’s responsibility was to “cut the tunnel, spray shotcrete and put wire in[.]” Tr. 95. MMS was unable to cut the tunnel in the intersection at issue because there was a block of solid limestone that MMS could not remove with its cutters. Tr. 94. As a result, SMD blasted the area and then MMS trimmed it to shape. Tr. 97, 109-111. Prior to MMS cutting the 4644 intersection, SMD bolted the ground up to the intersection. After trimming the intersection, MMS applied shotcrete that adhered to the ribs and back. Magorian did not observe any cracks in the shotcrete in that area. Tr. 109. Eventually MMS left the area to work in another area of the mine more suitable to its methods. Tr. 98.

MMS was told that its work at the mine was over after SMD drilled into water at the face of the tunnel at the “4644 Range Front Drive.” Tr. 100. The nearby fault had not yet been reached but on or about September 28, 2015 all operations in that area were stopped. The area where SMD hit water was about 200 feet beyond the intersection. *Id.* MMS withdrew from the area on September 28 and then, on or about October 12, MMS was told to remove all of its equipment from the mine and that its services would no longer be required. Tr. 101. The area was barricaded due to hazardous conditions created by the presence of the water.

Magorian disagreed with the testimony of Vadnal that the conditions in the back would have remained the same between early October and November 2. Tr. 103. He believes that the ground was under high stress and in several areas it was “moving all over the place while we

⁴ Mr. Magorian has a Bachelor of Science in mining engineering and has worked in underground mines for about 40 years. Tr. 91.

were digging it.” *Id.* The tunnel liner was being pushed around in the area beyond the intersection, which Magorian called the “AP Zone.”

Magorian testified that he would have no knowledge whether anyone entered the intersection after MMS left the mine in early October. Tr. 106. The last time he was personally in the intersection was on September 27 and “the crown was in very good shape.” Tr. 112-13. In fact, he was told that the area was to be barricaded and only accessed by qualified people and that it would be bolted before anyone entered the area again. Tr. 106, 113-114. The mine owner wanted to see if the area stabilized over time so that it could continue mining. Tr. 107.

Magorian also testified that Inspector Barney, during a conversation, questioned the competence of MMS to be performing the tunneling work because the company builds wine cellars.⁵ Tr. 108. Magorian said that MSHA inspected the work of MMS in August 2015 when it was mining through softer ground conditions. Although he was not present at the time, he understood that the MSHA inspector “liked the work we were doing” using the same techniques that were in place while working in the subject intersection. Tr. 108. Magorian said that he works hard to ensure the safety of MMS’s employees and that it has not had a reportable injury in 28 years. Tr. 109.

MMS also called David W. Halverson⁶ as a witness. He was the underground superintendent for Atna Resources at the Pinson Mine from February 2, 2015 until October 14, 2015, when he was laid off. Tr. 117. He advised MMS on October 2, 2015 that its services were no longer needed at the mine because there was “no place for [it] to work” once the area in which it was working became flooded with water. Tr. 118. “We had to shut everything down, and a lot of damage occurred, because of that water[.]” *Id.*

Halverson testified that two ground support plans had been submitted to MSHA. One was the standard “drill, and blast, [and] ground support plan.” Tr. 121. A separate plan was submitted for MMS’s work. Halverson was underground about four days a week and he observed MMS following its ground support plan; MMS was “very meticulous” in its work.

On rebuttal, Vadnal testified that shotcrete sprayed in compression can act as structural support. Tr. 123. Specifically, “[i]f the ground had some stability to it to begin with, the multiple layers of shotcrete and welded wire mesh would support the ground.” *Id.* However, the two-inch layer of shotcrete sprayed at the 4644 intersection would not provide support. Vadnal characterized the shotcrete applied as a “flash coat to keep the air from affecting the rock.” *Id.* He further testified that, as far as he is aware, all underground gold mines in Nevada use roof bolts to support the back.

⁵ Magorian testified that building caves in California used for the storage of wine constitutes about 80% of MMS’s business. Tr. 114. Since 2000, MMS has completed only three tunnel related projects at underground mines. *Id.*

⁶ Halverson has a Bachelor of Science in geological engineering and he has worked in the mining industry since 1982. Tr. 120.

Fact of Violation

I find that the Secretary has proven a violation. The cited standard requires that ground support be used where ground conditions, or mining experience in similar conditions, indicate that support is necessary. Further, when support is necessary it must be designed, installed, and maintained to control the ground in places where persons work or travel. Here, I find that the conditions present in the intersection necessitated ground support and that the limited support provided by MMS did not control the ground.⁷

I credit the testimony of Barney and Vadnal that the back in this particular intersection, which consisted of sand, gravel, shale, clay and boulders, was not solid and that the ground in this area of Nevada is “notoriously unstable.” Their conclusions are supported by the multiple falls of ground which had already occurred in the area, as well as Magorian’s own testimony that the ground in the area was “moving all over the place while we were digging it.” Tr. 103. Vadnal, who was offered and accepted as an expert, explained that, given the larger area of back exposed in intersections, all intersections in this type of ground require some sort of permanent support. He stated that permanent support should have been installed as soon as the intersection was cut. While MMS did put up a two inch coat of shotcrete and welded wire mesh held by rebar in the intersection,⁸ I credit Vadnal’s expert opinion that this support would not have controlled this ground and, instead, would only have kept the air from affecting the rock. Magorian’s method of roof support may well work in many mine environments, but it was not sufficient in the intersection at issue. Moreover, and as explained immediately below, miners clearly traveled in the inadequately supported area. Accordingly, I find that a violation existed.⁹

While Respondent argues that the Secretary failed to present evidence of an employee actually being exposed to the condition, I disagree. MMS Br. 2. The Secretary introduced a map into evidence which depicts the layout of the area in question along with annotations that show

⁷ The Secretary attempts to establish that MMS violated the standard because it failed to comply with the Pinson Ground Support plan, dated October 19, 2015. Sec’y Br. 6. However, and as noted by the Secretary, it is unclear if this or any other plan was in place at the time MMS was in the mine. Accordingly, I have not relied on the plan in reaching my findings.

⁸ I decline to credit the testimony of Magorian that the ground was adequately supported by the two inch shotcrete coat, wire mesh and rebar in the 4644 intersection. The majority of MMS’s business is derived from building caves for California wine businesses. Since 2000 MMS has only worked on three tunnel projects at an underground mine.

⁹ While Magorian offered testimony that SMD was responsible for all bolting, clearly that was not the case, as evidenced by his statement that MMS did at times install bolts when needed. Tr. 105. At a minimum, MMS should have advised SMD that ground support was required in the intersection before the work proceeded further.

that MMS and SMD worked those areas.¹⁰ GX-3B. Respondent did not dispute the annotations on the map. Barney indicated on the map where the subject intersection was located. The map clearly shows that MMS, as well as SMD, worked on areas inby the intersection and that personnel would have had to pass through that intersection in order to travel to those inby areas. Accordingly, MMS personnel were exposed.

Respondent also argues that the Secretary has the burden of proving that the violation occurred on the date noted in Section I, Block 1 of the citation form. I disagree. Section I, Block 1 indicates the date the citation was issued, not the date of the actual violation. The Commission has explained that an inspector need not actually observe a violation at the time of its occurrence in order to conclude that a violation did in fact occur. *See Emerald Mines Corp.*, 9 FMSHRC 1590 (Sept. 1987), *aff'd*, *Emerald Mines Co. v. FMSHRC*, 863 F.2d 51, 59 (D.C. Cir. 1988); *see also Nacco Mining Co.*, 9 FMSHRC 1541 (Sept. 1987). It is not necessary for the Secretary to prove that a violation existed on the date he issued the citation. Rather, he need only prove that a violation occurred. I find that the Secretary established that MMS violated the standard.

Gravity and S&S

An S&S violation is a violation “of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard.” 30 U.S.C. § 814(d). 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). An experienced MSHA inspector’s opinion that a violation is S&S is entitled to substantial weight. *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-79 (Dec. 1998).

The Commission has explained that the focus of the *Mathies* analysis “centers on the interplay between the second and third steps.” *ICG Illinois*, 38 FMSHRC 2473, 2475 (Oct. 2016) (citing *Newtown Energy Inc.*, 38 FMSHRC 2033 (Aug. 2016)). The second step requires the judge to adequately define the “particular hazard to which the violation allegedly contributes[.]” and then determine whether “there exists a reasonable likelihood of the occurrence of the hazard against which the mandatory safety standard is directed.” *Id.* at 2475-2476. This determination must be made “based on the particular facts surrounding the violation[.]” *Id.* The third step then requires the judge to assume the existence of a hazard and assess whether the hazard “was reasonably likely to result in serious injury.” *Newtown* at 2038; *ICG Illinois* at 2476.

The “reasonably likely” provision does not require the Secretary to prove that an injury was “more probable than not.” *U.S. Steel Mining Co.*, 18 FMSHRC 862, 865 (June 1996). In addition, the “Secretary need not prove a reasonable likelihood that the violation itself will cause injury” but, rather, that the hazard *contributed to* by the violation is reasonably likely to cause an

¹⁰ Barney testified that he obtained map from the Atna personnel and asked them to outline and highlight the areas of the mine that MMS had worked in. Tr. 29.

injury. *Musser Engineering, Inc. and PBS Coals Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010)(emphasis added); *Cumberland Coal Res.*, 33 FMSHRC 2357, 2365 (Oct. 2011).

I find that the violation was S&S. MMS violated the standard. The hazard to which the violation allegedly contributes is a person being struck by ground that was either unsupported or inadequately supported. I find that this hazard was reasonably likely to occur given the inadequate ground support provided, the unstable ground, and the frequency with which miners passed through the area. I addressed the instability of the ground and inadequate support in my findings above. It is critical to note that persons were exposed to the condition for an extended period of time. MMS, SMD and Atna personnel continued to travel under the inadequately supported roof between the time the intersection was completed and early October, a period of several months. Given the instability of the rock in the area, I find it likely that a fall of ground would occur and that such a fall was reasonably likely to strike and injure a miner. A large rock falling and striking a miner could easily cause a fatal injury. The violation was S&S and serious.

Negligence and Unwarrantable Failure

I find that the violation was a result of Respondent's high negligence and unwarrantable failure to comply with the cited standard. The Commission has recognized that "[e]ach mandatory standard . . . carries with it an accompanying duty of care to avoid violations of the standard, and an operator's failure to meet the appropriate duty can lead to a finding of negligence if a violation of that standard occurs." *A.H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983). In determining whether an operator has met its duty of care, the Commission considers "what actions would have been taken under the same circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation." *Jim Walter Res. Inc.*, 36 FMSHRC 1972, 1975 (Aug. 2014) (footnote omitted).

Respondent was highly negligent in failing to install adequate roof support. I credit Barney's testimony that Magorian knew the intersection only had a two inch flash coat of shotcrete and was not adequately supported. Tr. 48-49. Barney's testimony was based on his inspections notes that he recorded contemporaneously while speaking with Magorian. GX-1 pp. 18-19. Given the unstable ground in this area, a reasonably prudent person familiar with the mining industry would know that the intersection could not be properly supported by a two inch flash coat of shotcrete. Allowing that condition to continue to exist for an extended period of time, during which the likelihood of a hazard developing continued to increase, demonstrates high negligence.

The unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id.* at 2001. Unwarrantable failure is characterized by conduct described as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2002-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); *see also Buck Creek Coal, Inc.*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test). The Commission has explained that whether a citation is an "unwarrantable failure" is a question that

should be evaluated based on the facts and circumstances in each case, and in light of each of the following factors: (1) the length of time that the violation has existed; (2) the extent of the violative condition; (3) whether the operator has been placed on notice that greater efforts were necessary for compliance; (4) the operator's efforts in abating the violative condition; (5) whether the violation was obvious; (6) whether the condition posed a high degree of danger; and (7) the operator's knowledge of the existence of the violation. *See Consolidation Coal Co.*, 22 FMSHRC 340 (Mar. 2000); *IO Coal Co.*, 31 FMSHRC 1346 (Dec. 2009). All of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether mitigating circumstances exist. *Consol*, 22 FMSHRC at 353.

I find that the violation was obvious, extensive, existed for an extended period of time, posed a high degree of danger, and, despite being known to MMS, no steps had been taken to abate the condition prior to the issuance of the citation. Magorian knew that the only support provided in the area was the two inch flash coat of shotcrete with welded wire mesh held by rebar. As discussed above, this did not amount to adequate support. The lack of proper permanent support was plainly obvious. Nevertheless, the condition existed for an extended period of time from roughly late July until the day the citation was issued in early November. While the condition was limited to a single intersection, it was extensive given the number of people from MMS, SMD and Atna that passed through that area and were exposed to the condition over the extended period of time. *Dawes Rigging & Crane Rental*, 36 FMSHRC 3075, 3079-3080 (Dec. 2014) (citing *Watkins Eng'rs & Constructors*, 24 FMSHRC 669, 681 (July 2002)). For the same reasons set forth in my S&S finding, I find that the condition presented a high degree of danger. No credible evidence was introduced as to Respondent's efforts to abate the condition prior to the issuance of the citation. While the Secretary presented no evidence that Respondent was on notice that greater efforts were necessary for compliance, I find that, on balance, my findings on the other factors establish that Respondent engaged in aggravated conduct and unwarrantably failed to comply with the cited standard.

I find that a penalty of \$10,000 is appropriate for this citation. I am not bound by the Secretary's proposed penalty of \$6,996. I assess this \$10,000 penalty because the cited condition created a severe and obvious hazard and because MMS was highly negligent.

Order No. 8876363

Fact of Violation

I find that the Secretary has failed to prove a violation. The cited standard requires that ground conditions that create a hazard to persons be taken down or supported before work or travel is permitted. Unlike the previous citation issued for failure to provide ground support when ground conditions or mining experience indicate that support is necessary, the cited standard here requires the Secretary to prove that a hazard existed. Here, I find that the Secretary failed to establish that a specific hazard existed during the time when MMS had some level of control over the area. *See Ames Construction, Inc.*, 33 FMSHRC 1607 (July 2011); *Sec'y of Labor v. National Cement Co. of Cal., Inc.*, 573 F.3d 788 (D.C. Cir. 2009).

The Secretary, in his brief, primarily argues that a hazard existed because Hanson was able to easily scale down a 50 pound piece of loose during his inspection. Inspector Barney's inspection of the cited area occurred approximately one month after MMS left the mine. The language in the order relies exclusively on the presence of specific pieces of loose rock. There is no proof that those pieces of loose rock were present when MMS was working in the mine. I cannot speculate that the ground scaled down in the inspector's presence existed at the time MMS was still working in the mine. In fact, Barney acknowledged that SMD scaled down loose "on a regular basis each and every shift[.]" Tr. 69. Assuming that to be the case, I find it unlikely that this loose, which was so easily scaled down, had existed since MMS was in the mine roughly a month prior.

We simply do not know what conditions existed when MMS left the mine. I cannot credit Vidal's testimony that ground conditions would not have changed between early October and November 2. The evidence shows that ground conditions in the area were not static but were under high stress. I find that the Secretary failed to meet his burden of proving that loose ground was present during the time period MMS was working in that area of the mine.¹¹ *Cf. Master Aggregates TOA Baja Corp.*, 28 FMSHRC 835, 839-840 (Sept. 2016) (ALJ) (Vacating a citation issued under section 56.3200 where the Secretary presented no probative direct evidence of hazardous conditions that existed prior to a fatal fall of ground). Order No. 8876363 is **VACATED**.

Order No. 8876391, WEST 2016-445-M; and Order No. 8876392, WEST 2016-445-M.

Order No. 8876391, issued under section 104(d)(2) of the Mine Act on December 1, 2015, alleges a violation of section 57.15005 of the Secretary's safety standards and asserts that a miner was not wearing fall protection while on top of a load of ventilation pipe that was stacked on the bed of a truck. GX-5. In relevant part, the safety standard provides that "[s]afety belts and lines shall be worn when persons work where there is a danger of falling[.]" 30 C.F.R. § 57.15005.

Order No. 8876392, issued under section 104(d)(2) of the Mine Act on December 1, 2015, alleges a violation of section 57.11001 of the Secretary's safety standards and asserts that no safe means of access was provided for a miner working on top of a load of ventilation pipe. GX-6. The order further alleges that the top of the load measured nine feet above the ground. In relevant part, the safety standard provides that a "[s]afe means of access shall be provided and maintained to all working places." 30 C.F.R. § 57.11001.

¹¹ It is important to distinguish this finding that the Secretary failed to establish that a hazard was present, from my S&S finding in the previous citation that there was a particular hazard to which the violation allegedly contributed. The S&S analysis requires that the Secretary establish only that the occurrence of a hazard was reasonably likely and that the violation contributed to that hazard. Here the standard itself requires that a hazard be present. The Secretary did not establish that the loose rock in question was present at the time MMS was working in the mine or that any loose rock was present prior to the end of September. Inspector Barney agreed that SMD regularly scaled down the back in the intersection.

Inspector Barney determined that, with respect to both orders, an injury was highly likely to be sustained and, if an injury occurred, it could reasonably be expected to be fatal. He determined that both violations were S&S, and that one person was affected by the conditions set forth in each order. The inspector determined that MMS's negligence was high in both orders. In the orders, the inspector stated that MMS's supervisor engaged in aggravated conduct because (1) he knew that there was no fall protection available and allowed the miner to stand on top of the load, and (2) he knew that there was no safe access and allowed the miner to climb over the cab of the truck. The Secretary proposed a penalty of \$10,700 for each order under his special assessment regulation, 30 C.F.R. § 100.5.

Summary of the Evidence

Inspector Barney testified that as he was driving on mine property, he saw a truck loaded with ventilation pipe at the surface lay-down area. An individual, Jim Morse, was standing on top of the pipes. He pulled over to see if the individual was wearing any fall protection. Tr. 132. When Barney did not see a supervisor around, he asked Morse to safely climb down from the top of the load and issued Imminent Danger Order No. 8876390.¹² Tr. 132, 141. The distance between the top of the load to the ground was nine feet, as measured by the inspector. Tr. 133. The truck was not equipped with guard rails. It was a cold day and Inspector Barney observed a "thin skin" of ice on the pipes. There is no dispute that Morse was not wearing fall protection. Tr. 127-28; GX-9 p. 3. Inspector Barney considered Morse to be a miner because he worked at a mine. Tr. 146-47.

The inspector determined that the violation was S&S because there was a "very real possibility of a slip and fall." Tr. 133. A fall was "highly likely" because ice was present on the pipes, the miner was nine feet above the ground, and the pipes were being loaded onto the truck from behind with a forklift. *Id.* The inspector testified that a fall from that height "could easily be fatal." Tr. 134.

The inspector testified that Becker told him that he did not have any fall protection available and that he was "more worried about getting the load ready for the highway than he was about fall protection[.]" Tr. 134-35, GX-5 p. 2. As a consequence, Inspector Barney determined that MMS's negligence was high. He also designed the violation was an unwarrantable failure because Becker, who was a supervisor, admitted that he instructed the miner to go up on the load and did not tell him to use fall protection. Tr. 135). The condition was abated by getting a full body harness from Atna Resource's warehouse.

Inspector Barney issued Order No. 8876392 a few minutes after he issued the previous order. The inspector testified that when he ordered Morse to come down from the top of the load, he observed him crawling off the front of the load, down the windshield and then down the hood and across the front bumper of the truck. Tr. 137, 150. Inspector Barney determined that the violation was S&S because, taking into consideration the icy conditions, "it was highly likely that an injury would occur." *Id.* Morse could have slipped and fallen while climbing down.

¹² The imminent danger order is not before me and a search of the Commission's electronic case management system (eCMS) indicates that MMS did not contest the order.

Inspector Barney determined that MMS's negligence was high and that the violation was the result of its unwarrantable failure to comply with the safety standard because Becker told him that there was a ladder about 50 feet away from the truck that could have been used to get on and off the load on the truck. Tr. 138-39; GX-6 at 2.

Kevin Becker testified that he had just finished placing a pipe on the bed of the truck with a backhoe forklift when Inspector Barney arrived. Tr. 153. He heard the inspector order Morse down from the truck "in a safe manner." *Id.* The inspector spoke in an authoritative manner and he clearly wanted Morse to immediately get off the truck. He added the words "in a safe manner" a few seconds after he told Morse to get down. Tr. 154. Becker went to get a ladder to help Morse get down but by the time he got back, Morse was already off the truck. Tr. 155.

Jim Morse testified that he was an employee of MMS at the time the two orders were issued. Tr. 157. He recalled that Inspector Barney yelled "get off that truck" as soon as he drove up. *Id.* Morse immediately got down. He stated that he got down by stepping on the headboard and then using steel rails on the back of the headboard to step down between the cab and the headboard. Tr. 158. He said that there was "no way I'd go over the hood and the roof of my brand-new baby truck." *Id.*

Morse testified that he was employed by MMS to drive a Class 1 commercial vehicle "to the job site to remove supplies from that job site." Tr. 159. That has been his primary job while working for MMS.

Order No. 8876391

Fact of Violation

I find that the Secretary established a violation of the cited standard.¹³ Section 57.15005 requires that safety belts and lines be worn when persons work where there is a danger of falling. There is no dispute that Morse¹⁴ was not wearing fall protection. I credit Barney's testimony that there was a danger of Morse falling nine feet from his position on top of pipes in the bed of a truck with no guard rails. Because there was a danger of falling and no fall protection was being used, I find that a violation existed.

¹³ Respondent, in discovery responses, conceded that it violated the cited standard. GX-9 p. 3.

¹⁴ Despite conceding that a violation occurred, Respondent nevertheless argues that Morse was not a "miner" because he was only a truck driver. MMS Br. 7-9. In making this argument Respondent incorrectly relies on the Part 46 definitions of "miner" and "mine site" which applies only to training standards. 30 C.F.R. pt. 46. The Mine Act defines a "miner" as "any individual working in a coal or other mine." 30 U.S.C. § 802(g). Morse, an employee of MMS, was tasked with driving a truck "to the job site." In this case, the Pinson Mine lay-down area was the job site. Tr. 131. Because Morse was working at the Pinson Mine, he was a "miner" under the Act.

Gravity and S&S

I find that the Secretary established that the violation was S&S. MMS violated the standard. Here, the hazard to which the violation allegedly contributes is a miner falling from height without fall protection. Working nine feet off the ground on an uneven surface without fall protection or railings was dangerous. The presence of ice on that uneven surface exacerbated the likelihood of a fall. Given the presence of ice on the pipes and the lack of anything to protect Morse from falling from his standing position on top of the uneven surfaces of the pipes, I find that the hazard was, at the very least, reasonably likely to occur. Barney testified that a fall under those conditions could easily result in a fatality. I agree and find that a serious injury was reasonably likely to be sustained in the event of a fall from that height. Commission judges have held that serious injuries can be sustained from falls of less than nine feet. *E.g., Small Mine Development*, 33 FMSHRC 1477 (June 2011) (ALJ), *Molton Co., LP*, 31 FMSHRC 427 (Mar. 2009) (ALJ). The violation was S&S and serious..

Negligence and Unwarrantable Failure

I find that, the violation was a result of Respondent's high negligence and unwarrantable failure to comply with the standard. I credit Barney's testimony that Becker, a supervisor, instructed Morse to go up on the pipes and that he knew no fall protection was present. I further credit Barney's testimony that Becker said that he was more concerned with getting the load ready for travel than providing fall protection. I note that Respondent did not dispute Barney's testimony on these issues despite offering Becker as a witness. Given the obvious hazard presented by working at height without fall protection, and the lack of mitigating circumstances, I find that both Morse and Becker were highly negligent. Because Becker was a supervisor directing Morse's work, I find that he was an agent of MMS and that his negligence is imputable to MMS.¹⁵

As discussed above, the condition was obvious, presented a high degree of danger, and Becker, a supervisor, clearly had knowledge of it given that he was directing Morse's work and was aware that MMS had no fall protection equipment. Moreover, no evidence was presented that steps were being taken to abate the condition prior to the issuance of the order. In *Newtown Energy, Inc.*, the Commission stated that supervisors are "held to a higher standard of care than a rank and file miner, and as such, evidence of a supervisor's involvement in the creation of a violative condition is an aggravating factor that should be considered in conjunction with the traditional unwarrantable failure factors." 38 FMSHRC 2033, 2044 (Aug. 2016). Becker's involvement as the supervisor who directed Morse to get on top of the pipes while knowing that there was no fall protection is a substantial aggravating factor. Becker not only instructed Morse to get on top of the pipes, thereby creating the violation, he also was present the entire time since he was the individual driving the forklift that was placing the pipes in the bed of the truck.

¹⁵ The Commission has held that "the negligence of an operator's 'agent' is imputable to the operator for penalty assessment and unwarrantable failure purposes." *Nelson Quarries, Inc.*, 31 FMSHRC 318, 328 (Mar. 2009). The Mine Act defines an "agent" as "any person charged with responsibility for the operation of all or part of a coal or other mine or the supervision of miners in a coal or other mine[.]" 30 U.S.C. § 802(e).

While it is unclear how long the condition existed and no evidence was introduced to establish that MMS was on notice that it needed to do more to comply with the cited standard, I find that Becker's conduct, as a supervisor, when considered with the other aggravating factors, amounted to a serious lack of reasonable care and that he unwarrantably failed to comply with the standard. Accordingly, I affirm the unwarrantable failure designation.

Order No. 8876391 was originally issued under section 104(d)(2), with Order No. 8876363 serving as the underlying 104(d)(1) order. Because I have vacated Order No. 8876363, Order No. 8876391 is modified to a 104(d)(1) order. The Secretary proposed a civil penalty under his special assessment regulation, 30 C.F.R. § 100.5. Based on my above findings, I assess a penalty of \$10,000 for this order because the hazard created by the violation was immediate and obvious and MMS was highly negligent.

Order No. 8876392

Fact of Violation

I find that the Secretary established a violation of the cited standard. The cited standard requires that safe means of access be provided and maintained to all working places. The parties offered conflicting testimony as to how Morse traveled from his position on top of the pipes to the ground. While Barney testified that he observed Morse climb off the front of the load, down the windshield, and then over the hood and across the front bumper of the truck, Morse testified that he stepped on the headboard and then used steel rails on the back of the headboard to go down between the cab and the headboard. I need not resolve this conflict. I find that, in either case, safe access was not provided or maintained. Clearly, climbing over the cab of the truck and down the windshield and hood is not safe access. A miner could easily slip or fall from those surfaces. If Morse climbed down the way he described, he did not do so in a safe manner. The abatement photo for the fall protection violation shows the area that Morse avers he used to climb down, i.e., the area between the cab and the headboard. GX-5 p. 4. This area clearly was not intended to be used as an access route and a reasonably prudent person familiar with the mining industry and the protective purpose of the standard would not expect to be in compliance by allowing a miner to climb up or down via this route.¹⁶ *Ideal Cement Co.*, 12 FMSHRC 2409, 2415 (Nov. 1990). The record does not establish how Morse gained access to the top of the truck bed when Becker started loading the pipes. I find that the Secretary has proven that safe access was not provided or maintained.

¹⁶ Respondent argues that the cited standard does not apply to the present situation because (1) Morse was not a miner, and (2) he was not "accessing" the area when he climbed down but, rather, was "egressing" the area. I find these arguments to be without merit. First, for the reasons set forth above in relation to the fall protection violation, I find that Morse was a "miner" under the Act. Second, whether Morse was traveling onto the bed of the truck or traveling down from on top of the load is immaterial. The area on top of the pipes was a working place and safe access, for Morse or any other person, needed to be provided and maintained.

Gravity and S&S

I find that the Secretary established that the violation was S&S. MMS violated the standard. Here, the hazard to which the violation allegedly contributes is a miner being unable to safely travel from on top of the load to ground level or vice versa. As discussed above, Morse was already standing on uneven, ice covered pipes. Neither of the respective routes described by Barney or Morse from his location on top of the load could reasonably be considered a safe option for travel. In both instances Morse would be taking a route not intended for a person to travel, which in turn would put him in a position where he was reasonably likely to fall. As with the above citation, a serious injury was reasonably likely to be sustained in the event of a fall. The violation was S&S and serious.

Negligence and Unwarrantable Failure

I find that the violation was the result of MMS's moderate negligence. Becker testified that, when the inspector ordered Morse off of the pipes, he went to go get a ladder to help Morse get down. Tr. 155. Based on that testimony it is reasonable to infer that Becker knew a ladder was needed to safely descend from the elevated working place. Morse climbed down from the truck upon the inspector's orders without waiting for Becker to get a ladder because he believed that the inspector wanted him to get down immediately. But for the inspector's command, Morse could have sat upon one of the pipes and waited for Becker to get the ladder. As stated above, there is no evidence as to how Morse got up on the bed of the truck. It is entirely possible that the truck bed was empty when he did so. Based on the above, I find that the negligence of MMS was moderate. Although Becker was in the area when the violation occurred he was taking steps to get Morse down in a safe manner by getting the ladder. The abatement photo shows a ladder tied to the truck. GX-6 at 5.

For the same reason, the Secretary did not establish that the violation was the result of aggravated conduct. Becker was taking steps to abate the hazard. Although the condition presented a high degree of danger, there is no evidence that MMS was on notice that it needed to do more to comply with the cited safety standard. Whether this was a frequent occurrence at the mine is not known. The unwarrantable failure designation is removed and this 104(d)(2) order is modified to a 104(a) citation.

I assess a penalty of \$3,000 for this violation taking into consideration the six penalty criteria. I have reduced the penalty from that proposed by the Secretary because the violation was not the result of MMS's aggravated conduct and to account for the reduction in negligence.

II. APPROPRIATE CIVIL PENALTY

Section 110(i) of the Mine Act sets forth the criteria to be considered in determining an appropriate civil penalty. 30 U.S.C. § 820(i). According to MSHA's website MMS worked fewer than 5,000 hours in 2015, which correlates with a small-sized contractor. 30 C.F.R. § 100.3 Table V. The parties have stipulated that the penalties will not affect MMS's ability to remain in business. In addition to the uncontested imminent danger order discussed above, MMS was

issued only one non-S&S citation in the 15 months preceding the issuance of these citations and orders. The gravity and negligence are discussed above. The citations were timely abated. Based on the penalty criteria I assess a total penalty of \$23,000.

III. ORDER

For the reasons set forth above, Citation No. 8876362 and 8876391 are **AFFIRMED** as issued, Order No. 8876363 is **VACATED**, and Order No. and 8876392 is **MODIFIED** as set forth above. Magorian Mine Services is **ORDERED TO PAY** the Secretary of Labor the sum of \$23,000.00 within 40 days of the date of this decision.

/s/ Richard W. Manning
Richard W. Manning
Administrative Law Judge

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May 25, 2017

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

BUNDY AUGER MINING, INC.,
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. WEVA 2015-1036
A.C. No. 46-09415-391343

Mine: Lost Flats Highwall Miner

DECISION DENYING SETTLEMENT MOTION

Before: Judge Moran

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”) and is before the Court upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977. The Secretary has filed a Motion for Decision and Order Approving Settlement (“Secretary’s Motion,” or “Motion”). The originally assessed amount was \$6,300.00, and the proposed settlement is for \$4,410.00. Upon review, as explained below, the Court concludes that the proffered settlement does not meet the criteria set forth in section 110(i) of the Act, because the Secretary has not provided sufficient facts to justify its sought-after penalty reduction. Accordingly, the Motion is **DENIED** and this case will be set for hearing.

Involved are 2 (two) specially assessed alleged violations of the Mine Act. One is a section 104(d)(1) citation, No. 9082933, and the other is a section 104(d)(1) order, No. 9082935. While the proposed penalty amounts differ, \$2,900 in the case of No. 9082933, with a settlement figure of \$2,030, and \$3,400 in the case of 9082935, with a settlement figure of \$2,380, both reductions amount to the ubiquitous 30% penalty reduction that has appeared in other cases. *See The American Coal Company et al.*, 38 FMSHRC 1972, 1981 (2016).

Understanding the deficiency in the Motion begins with an appreciation of the standards alleged to have been violated. The section 104(d)(1) citation, No. 9082933, involves 30 C.F.R. § 77.1004(b), titled “Ground control; inspection and maintenance; general,” which provides at subsection (b) that “Overhanging highwalls and banks shall be taken down and other unsafe ground conditions shall be corrected promptly, or the area shall be posted.”¹ 30 C.F.R. § 77.1104(b).

¹ Subsection (a) of 30 C.F.R. § 77.1004 provides “Highwalls, banks, benches, and terrain sloping into the working areas shall be examined after every rain, freeze, or thaw before men work in such areas . . .” and it ties into the other standard cited in this matter by referencing that “such examination shall be made and recorded in accordance with § 77.1713.” 30 C.F.R. § 77.1004(a).

The (d)(1) citation states,

The operator failed to take down, correct or post an unsafe ground conditions [sic] located along the measured [sic] the measured 60 to >80 vertical spoil low-wall for a horizontal distance of approximately 231 feet in the active Pit #0001. Oversteepend [sic] spoil slopes and loose rocks/soil measuring several inches in diameter were observed laying on the pit floor 3 to 4 feet from the unprotected low-wall toe area and in the middle of the active haul road to the active pit end. Large rocks 2 to 4 feet in diameter were observed on top of the > 60 foot spoil pile. The approximately 20 foot wide pit access and haul road traveled along the unprotected toe of the low-wall/spoil pile toe and immediately behind the Highwall Miner (SHM #06). Fallen loose rocks approximately 3 to 4 inches in diameter were observed laying along the toe of the oversteepened [sic] spoil pile. An excavator and loader was [sic] observed loading coal below the unprotected low-wall and oversteepened [sic] spoil slope. Loader tire tracks were observed from 1 to 5 feet from areas of the low-wall /spoil pile. 1 Excavator, 3 loaders, 1 pick-up, multiple coal dump trucks and the 3 person Highwall Miner crew were observed actively traveling to and from the pit. Continued mining will require the miners to continue pit and highwall development to remove at least two more highwall miner holes. Measurements were taken with the Laser Technology Impulse electronic measuring device (EDM). The mine operator's haul trucks, loader, and highwall miner crew have traveled the area at least day shifts for the last seven months and would continue pit work for at least a [sic] 2 or 3 shifts of mining. Miner's, [sic] including agents of the operator, have traveled the area at least 2 dayshifts since the condition was recorded, but not corrected, in the daily onshift examination dates March 31, 2015 to April 2, 2015. The mine operator allowed and directed miners to work and travel with a [sic] unsafe condition not corrected or posted in the active pit. The mine operator has engaged in aggravated conduct constituting more than ordinary negligence. This violation is an unwarrantable failure to comply with a mandatory standard.

Citation No. 9082933.

As noted, this matter was specially assessed. That special assessment stated,

the vertical spoil low-wall and over-steepened slopes in active Pit #001 created hazards and were not corrected nor barricaded off before work or travel was permitted in the area. The gravity of the violation was considered serious. Over-steepened slopes and *loose rocks were laying on the pit floor near the unprotected low wall and in the middle of the haul road to the active pit*. Large rocks were on top of the *60-foot spoil pile*. This condition could have contributed to the cause of a serious injury or fatality, from the fall-of -materials, to the equipment operators that worked at the active pit. The violation resulted from the operator's high degree of negligence. *The over-steepened slopes and unprotected low-wall area conditions were extensive and had existed for an extended period of time. The operator was aware of the conditions – they had just been cited, for the same*

conditions, earlier during the week. No efforts were made to correct the obvious hazards and miners were allowed to continue normal mining operations.

Narrative Findings for a Special Assessment at 1 (emphasis added).

Thus, the section 104(d)(1) citation, No. 9082933, which appears to be both detailed and well documented, alleges, at its heart, patently unsafe ground conditions involving a significant distance over a tall spoil wall. It is also troublesome that the Motion touts that the settlement involves “Penalty reduction[s] *only*,” as if the reduction in the penalty amount sought is not a major concern. Motion at 1-2 (emphasis added).

Congress expressed otherwise, noting that penalties *are* important. As the D.C. Circuit found upon a review of the Mine Act’s legislative history, “Congress was intent on assuring that the civil penalties provide an effective deterrent against all offenders, and particularly against offenders with records of past violations.” *Coal Employment Project v. Dole*, 889 F.2d 1127, 1133 (D.C. Cir. 1989). The Supreme Court also found that civil penalties serve an important role in deterring future violations: “the deterrence provided by monetary sanctions is essential to [the] objective [of obtaining compliance with health and safety standards.]” *Nat’l Independent Coal Operators’ Ass’n.*, 423 U.S. 388, 401 (1976). The Commission likewise found that

the Act’s legislative history, and numerous Commission and federal cases identify deterrence as a central tenet of the Mine Act and its penalty provisions. This leads to the inexorable conclusion that, in approving or rejecting a proposed settlement, a Commission Judge may take into account the deterrent effect of the penalty. Our decision in *Ambrosia* acknowledged the importance of the deterrent effect of penalties, citing to the pertinent legislative history and to the statement in *Consolidation Coal* recognizing the importance of civil penalties as deterrence. While acknowledging that “deterring future violations is an important purpose of civil penalties,” we held in that case that deterrence could not be used as a separate component to adjust a penalty amount after the statutory criteria have been considered. To the extent that the case suggests that a Judge may not explicitly consider deterrence in the analysis of the six statutory factors and the overall penalty, we overrule it, as it is not consistent with the principles set forth above. Moreover, it forces our Judges to perform the unenviable - and perhaps impossible - task of attempting to distinguish between the supposedly permissible goal of achieving deterrence via a penalty based on the six statutory penalty criteria, and the supposedly impermissible utilization of the concept as a factor separate from the six criteria set forth in section 110(i). Our Judges should not be asked to perform such analytical hair-splitting. Simply put, we refuse to require our Judges to apply blinders when reviewing settlement proposals, and to ignore the central and most obvious purpose of civil penalties — to ensure operator compliance with safety measures - when deciding whether such penalties are appropriate. Deterrence is a principle basic to and underlying the entire statutory

scheme of imposing civil penalties. Thus, deterrence can and should infuse the Judge's consideration of whether or not to approve a settlement.

Black Beauty Coal Co., 34 FMSHRC 1856, (Aug. 2012) (internal citations omitted).

The entire text of the 57 words offered as “justification” for the 30% reduction regarding the (d)(1) Citation, No. 9082933 states,

Respondent presented evidence that it relied upon the representations of the owner Operator that it was only required to set the miner back 20 feet in order to be in compliance with the ground control plan. In consideration of this evidence and the risks inherent in proceeding to trial, the Secretary agreed to the reduction in penalty.

Motion at 3.

Upon subtracting the 21 words of boilerplate offered by the Secretary, “In consideration of this evidence and the risks inherent in proceeding to trial, the Secretary agreed to the reduction in penalty,” which add nothing to explain the 30% reduction, one is actually left with 32 words. Reduced to its core, the proffered mitigation from the operator, advanced by the Secretary of Labor, is that “*the Respondent relied upon the representations of the owner Operator that it was only required to set the miner back 20 feet in order to be in compliance with the ground control plan.*” *Id.* (emphasis added).

Of course the standard speaks not at all in such terms. It deals only with unsafe ground conditions, requiring that they “shall be corrected promptly, or the area shall be posted.” 30 C.F.R. § 77.1004(b). The standard makes no mention of ground control plans. Further, the Motion offers nothing to explain how the claim that Bundy Auger Mining was allegedly told by the “owner Operator,” that “it was only required to set the miner back 20 feet in order to be in compliance with the ground control plan,” applies to the requirements of the standard. Motion at 3.

The Motion is deficient in other ways too, as there is no explanation of the relationship between Bundy Auger and the unnamed “owner Operator,” nor how that relationship would absolve Bundy from compliance with the standard or reduce the amount of its penalty liability. Further, the asserted relevance of the claim that, if the miner was set back 20 feet, the mine would be in compliance with the ground control plan vis-à-vis the standard, is not explained. The absence of such an explanation does not strike the Court as a mystery, because the standard plainly speaks in terms of the prompt correction of unsafe *ground conditions*.

For T\the section 104(d)(1) order, No. 9082935, involved is 30 C.F.R. § 77.1713(a), titled, “Daily inspection of surface coal mine; certified person; reports of inspection.”

The standard provides at subsection (a) that

At least once during each working shift, or more often if necessary for safety, each active working area and each active surface installation shall be examined by a certified person designated by the operator to conduct such examinations for hazardous conditions and any hazardous conditions noted during such examinations shall be reported to the operator and shall be corrected by the operator.²

30 C.F.R for § 77.1713(a).

Order No. 9082935 alleges,

The operator failed to conduct an adequate on-shift examination to identify hazardous conditions in the active working area at the Taylor Highwall Mine, Pit #001, see Citations # 9082933 and #9082934, that were issued for failure to correct or post an unsafe ground condition. The hazardous conditions existed at least two shifts when examinations were to occur and was [sic] not adequately reported or corrected in examinations recorded for March 31 to April 2, 2015. At least five miners (1 loader operator, 1 excavator operator and 3 person highwall miner crew) were observed working and traveling approximately 1 to 5 feet from the toe of the oversteepened [sic] and unstable low wall/spoil. The hazardous conditions were obvious, extensive and easily identifiable to a person trained to recognize hazards with highwalls and spoil banks. The mine operator has engaged in aggravated conduct constituting more than ordinary negligence. This violation is an unwarrantable failure to comply with a mandatory standard. The operator immediately removed miners from the active pit and highwall area. Standard 77.1713(a) was cited 1 time in two years at mine 4609415 (1 to the operator, 0 to a contractor).

Section 104(d)(1) Order No. 9082935.

² Although the importance of subsection (a) is plain, subsections (c) and (d) underscore this by providing at (c) that “After each examination conducted in accordance with the provisions of paragraph (a) of this section, each certified person who conducted all or any part of the examination required shall enter with ink or indelible pencil in a book approved by the Secretary the date and a report of the condition of the mine or any area of the mine which he has inspected together with a report of the nature and location of any hazardous condition found to be present at the mine. The book in which such entries are made shall be kept in an area at the mine designated by the operator to minimize the danger of destruction by fire or other hazard,” and at (d) that “All examination reports recorded in accordance with the provisions of paragraph (c) of this section shall include a report of the action taken to abate hazardous conditions and shall be signed or countersigned each day by at least one of the following persons: (1) The surface mine foreman; (2) The assistant superintendent of the mine; (3) The superintendent of the mine; (4) The person designated by the operator as responsible for health and safety at the mine; or, (5) An equivalent mine official.” 30 C.F.R. §77.1713 (c) and (d). Subsection (b), not invoked here, addresses only imminent dangers.

The Special Assessment for this Order notes that the cited standard is one of the “Rules to Live By,” and, as such, the standard has been identified as among those “that most commonly contribute to fatalities in the mining industry.” For such standards, about which the mining industry has been made aware, MSHA expects mine operators to have “heightened awareness” of the hazards associated with them. The Special Assessment continues, in line with the inspector’s assertions in his Order, that the conditions were “obvious, extensive and easily identified to a trained examiner.” Special Assessment at 2. Further, that Special Assessment asserts that members of management had been in the work areas *and that such management failed to exercise “the slightest degree of care for miner safety.”* *Id.* (emphasis added).

For this matter, 69 words were presented by the Secretary of Labor to justify the settlement. Removing, the same rubric as for the other matter, the 21 words of boilerplate from the Secretary regarding “consideration of this evidence and the risks inherent in proceeding to trial...” 48 words remain.³ Those words advise, “Respondent presented evidence that the required examinations had been conducted by its agents and that Respondent reasonably believed it was in compliance with the ground control plan and safety procedures because it had set the miner back 20 feet from the highwall as instructed by the owner operator.” Motion at 3-4. Translated fairly, 17 words remain to justify the 30% reduction and they constitute the same mitigating reason that was presented for Citation No. 9082933, to wit: the Respondent “reasonably believed” it was in compliance with the ground control plan and safety procedures because “it had set the miner back 20 feet from the highwall as instructed by the owner operator.” *Id.*

Thus, the Secretary merely parrots the Respondent’s same claim that was offered up for the other matter – someone else, the unidentified owner operator, allegedly told Bundy Auger that, if the miner was set back 20 feet from the highwall, the working shift examination requirement for hazardous conditions for each active working area would be met.

This defense is inadequate because it sidesteps the requirements of the cited standard, and implies that the unidentified ground control plan can supersede those requirements. Plain and simple, the standard, as noted above, requires that,

[a]t least once during each working shift, *or more often if necessary for safety*, each active working area and each active surface installation shall be examined by a certified person . . . for hazardous conditions and any hazardous conditions

³ The Court wishes to make it plain that it is not engaging in bean counting. The purpose of noting the few words offered is twofold. First, brief as the justifications are, a large number of the few words are still empty, devoid of any meritorious explanation for the proposed reduction. Second, when examining the few words that seem to provide some justification, even those words are empty. This is true for both of the distilled words offered as justification for these (d)(1) matters.

noted during such examinations shall be reported to the operator and shall be corrected by the operator.

30 C.F.R. § 77.1713(a).

As discussed above with regard to Citation No. 9082933, the standard at issue in Order No. 9082935 (30 C.F.R. § 77.1713(a)) also makes no mention of ground control *plans*.

Conclusion

The “justifications” for both of these matters – the (d)(1) citation, No. 9082933, and the (d)(1) order, No. 9082935 – suggest that the blame rests to some degree upon the “owner Operator.” However, the Motion does not identify that owner Operator, nor does it inform how long Bundy Auger Mining has been operating the mine, the “Lost Flats Highwall Miner.” Further, the Motion fails to explain how the claimed representations from the “owner Operator” insulate or excuse Bundy from compliance with the cited standards. Beyond that, neither standard allows exceptions for compliance with promptly correcting or posting unsafe ground conditions and the duty to have a certified person examine for hazardous conditions at least once during each working shift and to report any such hazards found to the operator and to have such hazards corrected by the operator. Importantly, neither of the cited standards infers that how far the miner is set back is the test or a factor for compliance – instead, hazardous conditions are the trigger.

Thus, neither of the cited standards allows for, or makes an exception to, compliance with their requirements. The parties have utterly failed to explain how shifting the blame to the “owner Operator” justifies the 30% penalty reduction. Yet, in stating that the Respondent relied upon representations of the owner Operator, the Secretary seems to be suggesting in his “Rationale” that the Respondent had no duty to do more than to rely upon such claimed representations, or at least that pointing to another entity justifies the 1/3rd reduction. This is in the face of the inspector’s statement that the cited conditions existed since they were recorded on March 31, some 3 days before the citation and order were issued. Therefore, the inspector asserted that the conditions were known and the Court again notes that the cited standard speaks in terms of the presence of hazardous conditions – unsafe ground – not how far a miner is to be set back.

The motion does not inform if the Respondent’s contention was brought to the attention of the issuing inspector for his reaction. The Court has commented previously that settlement motions should advise whether the assertions advanced by a respondent were brought to the attention of the issuing inspector, as such individual is MSHA’s only eyewitness to the alleged violations.

With submissions such as this, it is not surprising that Congress wisely determined that the Secretary could not have unbridled authority for settlements and that it included section 110(k) in the 1977 Mine Act for that reason. The legislative history for the origin of the provision and Congress’ intention for the provision’s inclusion have already been repeatedly cited by the Commission.

Accordingly, for the reasons stated, the Secretary's Motion for Decision and Order Approving Settlement is DENIED. This matter is now to be set for a prompt hearing. The parties are directed to participate in a conference call with the Court on **Thursday, June 1, 2017 at noon EDT**. The call-in number will be separately provided to the parties.

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

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ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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May 2, 2017

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

THE AMERICAN COAL COMPANY,

CIVIL PENALTY PROCEEDING

Docket No. LAKE 2011-0013
A.C. No. 11-02752-232235

Mine: New Era Mine

ORDER DENYING SETTLEMENT MOTION

Before: Judge Moran

This case is before the Court upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act” or “Act”). The Secretary has filed a “new” motion to approve settlement, but it is new only in the sense of its filing date. The Secretary continues to resist complying with the Commission’s requirements for settlements. Accordingly, for the reasons which follow, the Secretary’s motion is **DENIED** and the parties are **ORDERED** to participate in a conference call with the Court on **Friday May 5, 2017 at 12:00 p.m. EDT** for the purpose of setting a hearing date for this docket, which shall be held promptly.¹

This matter now has a very long history. Over four years ago the Secretary embarked on its goal of emasculating section 110(k) of the Mine Act. The Court in its Decision Denying Settlement Motion, issued February 11, 2013, noted that:

[t]he Motion seeks an across-the-board reduction of 30 (thirty) percent for each of the 32 citations involved. That, in itself, is a red flag. The idea that every one of 32 citations could warrant a 30% reduction demonstrates, by that fact alone, that the reductions were more in the nature of yard sale, rather than any individualized review meriting, by some impossibly small odds, that each just happened to have earned such an implausibly uniform reduction.

The American Coal Co., 35 FMSHRC 515, 515 (Feb. 2013) (ALJ) (emphasis omitted).

In denying the motion, the Court observed that:

[t]he *entirety* of the justification provided: ‘After further review of the evidence, the Secretary has determined that a reduced penalty is appropriate in light of the parties’ interest in settling this matter amicably without further litigation. In

¹ The call-in number will be provided in a separate email to the parties.

recognition of the nature of the citations at issue, and the uncertainties of litigation, the parties wish to settle the matter with a 30% reduction in the total assessed penalty with no changes in gravity or negligence for any of the citations at issue.’ If this were a satisfactory justification, then every case would warrant a 30% reduction to avoid the ‘uncertainties of litigation.’

35 FMSHRC at 515-16.

So began the Secretary’s effort to overlook the plain meaning of Section 110(k). As will be set forth below, the Secretary’s latest motion, too clever by half, is nothing more than its latest gambit, displaying the same, tired, recalcitrant behavior, all with the obvious purpose of continuing to avoid complying with section 110(k) of the Mine Act.

Before examining the Secretary’s latest ploy, it is worth revisiting that there is nothing particularly difficult, nor onerous, required for the Secretary to comply with the Commission’s long-standing requirements for section 110(k) and the *Secretary has himself* repeatedly demonstrated that to be the case. In numerous other cases, examples of which were provided to the Secretary by the Court *from his own submissions* to the Commission, the Court reminded the Secretary how this is done in the appendix to its May 13, 2014 Order Denying Motion for Approval of Settlement Upon Secretary’s Motion for Reconsideration. *The American Coal Co.*, 36 FMSHRC 1489, 1503-1522 (May 2014) (ALJ). Because the Secretary seems to have forgotten how this is done, two examples from the appendix to the Court’s May 13, 2014 Order are repeated here. These examples are from the *Secretary’s submission* for approval of a settlement in another case, *Sec. v. Brooks Run Mining*, Docket No. WEVA 2010-468:

Citation No. 8089450 was issued to the Respondent on October 20, 2009 and alleged a violation of 30 C.F.R. § 75.517 and 104(a) of the Act, 30 U.S.C. § 814(a). The Secretary determined that the violation was reasonably likely to cause an injury; that an injury from the cited condition could reasonably be expected to result in lost workdays or restricted duty; that the violation was significant and substantial; that one person was affected; and that the operator’s conduct in the violation demonstrated a moderate degree of negligence. The Secretary assessed a penalty of \$499.00. The Respondent contends that the likelihood of injury and level of negligence alleged are excessive, and states that at hearing it would present evidence that the individual leads of the allegedly damaged cable were insulated, that there was no damage to the inner power or ground conductors and that the condition had existed for only a short time and would have been discovered during the next examination. In light of the contested evidence, the Secretary has agreed to modify the likelihood from “reasonably likely” to unlikely,” to modify the citation from “significant and substantial” to not significant and substantial,” to modify the negligence from “moderate” to “low,” and to reduce the penalty to \$275.00.

Citation No. 8089451 was issued to the Respondent on October 22, 2009 and alleged a violation of 30 C.F.R. § 75.220(a)(1) and 104(a) of the Act, 30 U.S.C. § 814(a). The Secretary determined that the violation was reasonably likely to cause

an injury; that an injury from the cited condition could reasonably be expected to result in lost workdays or restricted duty; that the violation was significant and substantial; that two persons were affected; and that the operator's conduct in the violation demonstrated a moderate degree of negligence. The Secretary assessed a penalty of \$540.00. The Respondent contends that the likelihood of injury alleged is excessive, and states that at hearing it would present evidence that the roof in the cited entry was too high for the automated temporary roof support system to effectively control the roof, the roof conditions were good and the top was solid, stable and secure and that any roof sloughage was addressed by the installation of "pizza pans" and 6-foot torque tension bolts. The parties agree that this citation will remain as issued with no modifications, but in light of the contested evidence, the Secretary has agreed to reduce the penalty to \$475.00.

Unpublished Order dated Nov. 4, 2013; *see* 36 FMSHRC at 1519-20.

The reader should take note that the justification for the penalty reductions in those two citations provided a factual basis to support them.

More recent settlement motions before this Court demonstrate that, when the Secretary drops his mulish stance, he is quite able to provide the kind of facts the Commission needs in order to meet its statutory obligations under section 110(k).

For example, in *Sec. v. Triad Underground Mining LLC*, LAKE 2017-0007, ("*Triad*"), the Secretary filed his Motion to Approve Settlement before the Court on January 26, 2017. That case involved a single citation, No. 9036792, for which a penalty reduction of 24 percent, from \$3,300 to \$2,500, was sought.

In support of his Motion, despite some grammatical errors, the Secretary presented facts in dispute, stating:

The Respondent has communicated plausible arguments as to why the gravity and/or negligence findings for this violation should be reduced. The Respondent would present evidence at hearing that, among other things, the examiner did not observe any hazards during his previous examination [sic] therefore no hazards were recorded in the Record Book. The accumulations referenced in the citation had occurred after the previous examination due to a coal spill. The hazard referenced in the inspection notes, accumulations of coal at the take up, had just occurred due to a spill and had not existed for two shifts [sic] therefore management could not have known. The Respondent contends that the negligence should be evaluated at "Moderate or Low" based on the mitigating circumstances provided. The Respondent contends that it is not reasonably likely that the accumulations of coal would [] result in a Lost Workdays injury. Also the Respondent provided evidence that this mine is in "Non-Producing Status", has no production crew and none of the belts are currently in operation, and when verified through reviewing the Uniform Mine File of record at MSHA, this mine was placed in "Non-Producing Status" on 09/06/2016. The Respondent further

argues that management was not aware of the condition and would have promptly corrected the condition as soon as management was made aware of the condition. The Respondent asserts that there was not a “Confluence of Factors”, no ignition source identified, along this belt that would cause and/or contribute to a belt fire. Also, the Respondent would argue that there was normally only one miner working and/or traveling within the cited area and would request the number of persons affected be modified from “2” to “1”. However, the respondent agrees to pay a reduced penalty and there will be no change to the violation as issued. The Secretary acknowledges that any or all of respondent’s arguments regarding gravity or negligence may be persuasive at a hearing on the merits and has agreed, based on evidence presented, to reduce the proposed penalty *in consideration of the six statutory criteria in Section 110(i) of the Federal Mine Safety and Health Act of 1977 as amended by the MINER Act of 2006 (the Act)*.

Motion at 4-5 (emphasis added).

The Court calls attention to four observations from the Secretary’s Motion in *Triad*. First, the Motion demonstrates that the Secretary is not confused; he knows full well what needs to be provided to the Commission when inclined to respect the command of section 110(k). Second, the Secretary recognizes that *facts* which are in dispute need to be identified. Third, it is neither difficult nor burdensome to gather such facts to explain the basis for the reduced penalty. Fourth, the Secretary recognizes that such disputed facts must be tied to the six statutory criteria in Section 110(i), a requirement the Commission has made plain.² As the Commission stated less than a year ago:

The requirements to provide *factual support in the settlement proposal* and for the Judge’s decision approving settlement to be supported by the record have been largely unchanged since the inception of the Commission’s procedural rules in 1979. ... The Commission has recognized that standards for such factual support may be found in section 110(i).

The American Coal Company, 38 FMSHRC 1972, 1981 (Aug. 2016) (“*American Coal*”) (emphasis added).

Now, with a zombie-like persistence, the Secretary refuses yet again to comply with the Commission’s explicit direction, a direction the Secretary implicitly accepted by its recent decision to file, on March 16, 2017, his *Motion to Withdraw* its Petition with the Court of Appeals for the District of Columbia. Motion at 1 (emphasis added).

² While the Secretary asserted in *American Coal* that it is inappropriate for a judge to consider section 110(i) factors when considering whether to approve a proposed penalty settlement, the Commission directly stated, “We disagree.” *The American Coal Company*, 38 FMSHRC 1972, 1981 (Aug. 2016). For instance, in *Black Beauty*, the Commission held that it was not error for the Judge to request factual support relating to the six criteria set forth in section 110(i) for her consideration of the penalties agreed to by the parties. *Black Beauty Coal Company*, 34 FMSHRC 1856, 1864 (Aug. 2012).

As with the Secretary's original, insufficient, justification in February 2013 for its 30% across-the-board reduction, its new offering, while dressed-up, is just as empty as its original formulation because it again provides *no facts* to support the reduction sought. In the Court's original rejection of the Secretary's Motion, issued in February 2013, it noted the "impossibly small odds," that each of the 32 citations warranted a 30% penalty reduction. 35 FMSHRC at 515. As set forth below, the Secretary now offers a host of non-factual excuses, untethered to any specific citation. Further, there is no information associating any of the citations to the statutorily identified penalty factors. While wordier, the Secretary sets forth its new justification and again, against all odds, miraculously arrives at the same conclusion it served up four years ago — a 30% across-the-board reduction. The translation of all this is, effectively, "*we were right all along.*"

Here then, is the Secretary's latest offering:

Counsel for the Secretary reviewed the entire case, including all 32 citations, the inspectors' notes, the views of officials in the district office, and American Coal's position statement, as well as privileged information that would be improper or imprudent to share with the court and opposing counsel concerning the evidence developed in this case. Counsel concluded that there is substantial risk that the court could reduce the degree of negligence or gravity with respect to 14 of the 32 citations. One additional citation runs the risk of vacatur because of a legal dispute between the operator and the Secretary regarding the applicability of the standard to the cited condition. The Secretary does not consider this case to be a well-chosen vehicle by which to litigate that legal dispute... If, after trial, the Secretary were to receive adverse decisions with respect to each of the citations that counsel believes to entail such risks- a worst-case outcome the Secretary does not believe would occur but is obligated to consider-the resulting penalty based on the Part 100 penalty tables would reflect an approximately 50% reduction from the penalties originally proposed by the Secretary. Accordingly, the Secretary has concluded that an across-the-board 30% reduction reflects an appropriate compromise. In deciding that such a compromise is appropriate, the Secretary has not given weight to the costs of going to trial as compared to the possible monetary results that would flow from securing a higher penalty total. He has, however, considered the fact that he is maximizing his prosecutorial impact in settling this case on appropriate terms and in litigating other cases in which settlement is not appropriate. The Secretary believes that maximizing his prosecutorial impact in such a manner serves a valid enforcement purpose. ... The Secretary considers the fact that the proposed settlement preserves all of the citations as written to be a significant advantage of the compromise. This fact will assist the Secretary in future enforcement efforts against this operator by ensuring that the paper record reflects the Secretary's views regarding the gravity and negligence of the operator's conduct. As the Commission is aware, such determinations can affect the proposed or assessed penalty in future proceedings, can affect whether future citations are classified as unwarrantable failures within the meaning of Section 104(d) of the Act, and can bear on how the citations are counted for purposes of determining whether the operator has demonstrated a

pattern of violations within the meaning of Section 104(e) of the Act. ... Indeed, even if the Secretary were to substantially prevail at trial, and to obtain a monetary recovery similar to or even exceeding the amount of the settlement, it would not necessarily be a better outcome from the enforcement perspective than the settlement, in which all the citations are admitted and can constitute a basis for future enforcement actions. A resolution of this matter in which all violations are admitted is of significant value to the Secretary and advances the purposes of the Act. ... Based on the course of negotiations and counsel's experience, the Secretary does not believe that the mine operator would have agreed not to contest all of the violations without a reduction in the monetary amount of the penalty. Based on the calculations above of litigation risk, a 30 percent reduction is reasonable from the Secretary's perspective in exchange for a guarantee that none of the violations will be set aside or modified. ... Because the violations are all being admitted, an across-the-board reduction in penalties is reasonable. The value of an admitted violation from a future enforcement perspective does not depend on the size of the penalty so much as it does on the nature of the violation, including the alleged levels of negligence and gravity. There was no reason for the parties to negotiate different or variable reductions for each individual citation; doing so would have required sensitive discussions of the strengths and weaknesses of the Secretary's case, and given that American Coal has agreed to accept each citation as written, reallocation of the penalty amount on a citation-by-citation basis would undermine the Secretary's ability to effectively and efficiently enforce the Act.

Secretary's March 30, 2017 Motion at 2-4.

The Secretary confuses logorrhea with providing factual support. They are not the same. The long-winded statement is easily translatable — the Secretary's position has not changed; he continues to assert that settlements are within the Secretary's unreviewable discretion. The essential problem with the Secretary's latest motion is that it does not provide a penalty-factor related explanation to support the uniform 30% reduction for each citation.

Importantly, in the larger picture, if this formulation were to be accepted by the Court, apart from the failure to meet 110(k)'s language, *every case* the Secretary submitted for settlement hereafter could adopt essentially the same language presented here. In that way, though it failed to prevail before this Court, and then failed *again* before the Commission and, effectively, failed for a *third time*, after he decided to *withdraw* his appeal before the United States Court of Appeals for the District of Columbia of those prior denials, this non-factually based language in his present motion, if accepted, would enable the Secretary to achieve his original goal of unfettered, unreviewable settlement offerings before the Commission.

Nor can the non-factually based language be viewed as a one-off event. That the Secretary would now take this dressed-up formulation of non-compliance for future cases is not

speculation. In other recent settlements the Secretary has been providing similar, uninformative, language, to wit:

In reaching this settlement, the Secretary has evaluated the value of the compromise, the likelihood of obtaining a better settlement, and the prospects of coming out better or worse after a trial. In deciding that such a compromise is appropriate, the Secretary has not given weight to the costs of going to trial as compared to the possible monetary results that would flow from securing a higher penalty total. He has, however, considered the fact that he is maximizing his prosecutorial impact in settling this case on appropriate terms and in litigating other cases in which settlement is not appropriate. The Secretary believes that maximizing his prosecutorial impact in such a manner serves a valid enforcement purpose. Even if the Secretary were to substantially prevail at trial, and to obtain a monetary judgment similar to or even exceeding the amount of the settlement, it would not necessarily be a better outcome from the enforcement perspective than the settlement, in which all alleged violations are resolved and violations that are accepted can be used as a basis for future enforcement actions. A resolution of this matter in which all violations are resolved is of significant value to the Secretary and advances the purposes of the Act.

See, e.g., the settlement motions filed by the Secretary in *Omega Highwall*, VA 2016-0008 (April 26, 2017), *Edgar Minerals*, SE 2017-0029 (April 27, 2017), and *Greenbrier*, WEVA 2017-0091 (April 26, 2017), each of which contain this verbiage.

Meeting the requirement of Section 110(k) requires that civil penalties are to be assessed upon the Commission considering:

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

30 U.S.C. 820(i); *American Coal* at 1977.

The Commission, in its August 25, 2016 decision in this case, left no room for the apparent confusion or obstinate stance that the Secretary has renewed here.

³ Included here for the sake of completeness, the remainder of section 110(i) then speaks to the distinct subject of the Secretary's *proposing* civil penalties by providing: "In proposing civil penalties under this chapter, the Secretary may rely upon a summary review of the information available to him and shall not be required to make findings of fact concerning the above factors."

As the Commission stated:

[t]he legislative history of section 110(k) describes the Congressional rationale behind the provision in great detail. The Senate Report states that the ‘compromising of the amounts of penalties actually paid’ had reduced ‘the effectiveness of the civil penalty as an enforcement tool.’ S. Rep. No. 95-181, at 44 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 632 (1978) (“Legis. Hist.”). The Committee explained that in investigating the penalty collection system under the Federal Coal Mine Safety and Health Act of 1969, it learned ‘that to a great extent the compromising of assessed penalties [did] not come under public scrutiny,’ and that ‘[n]egotiations between operators and Conference Officers of MESA [MSHA’s predecessor] are not on the record.’ *Id.* It noted that even after a petition for civil penalty had been filed, ‘settlement efforts between the operator and Solicitor [were] not on the record, and a settlement need not be approved by the Administrative Law Judge.’ *Id.*

In fashioning a solution to this problem, Congress emphasized the need for transparency in the penalty process, stating that ‘the purpose of civil penalties, [that is,] convincing operators to comply with the Act’s requirements, is best served when the process by which these penalties are assessed and collected is carried out in public,’ where miners, Congress, and other interested parties ‘can fully observe the process.’ *Id.* at 633. ‘To remedy this situation,’ section 110(k) ‘provides that a penalty once proposed and contested before the Commission may not be compromised except with the approval of the Commission’ and that a ‘penalty assessment which has become the final order of the Commission may not be compromised except with the approval of the Court.’ *Id.*

Congress explained that ‘[b]y imposing [the] requirements” of section 110(k), it “intend[ed] to assure that the *abuses involved in the unwarranted lowering of penalties as a result of off-the-record negotiations are avoided.*” *Id.* (emphasis added). Congress expressed its ‘inten[t] that the Commission and the Courts will assure the public interest is adequately protected before any reduction in penalties.’ *Id.*

American Coal at 1975-76.

Anticipating the type of empty settlement the Secretary has presented yet again in this case, the Commission set forth its standard for reviewing proposed settlements of contested penalties. The Commission’s standard, based upon the language of section 110(k) and the legislative history for that section, is designed ““in order to ensure that penalties serve as an effective enforcement tool, prevent abuse, and preserve the public interest.’ . . . The Commission’s consideration of proffered settlements has worked well for more than 35 years. *Id.* at 1976 (quoting *Black Beauty*, 34 FMSHRC at 1862).

Thus, the Commission summarized that it:

must have information sufficient to carry out this responsibility. Consequently, through its procedural rules, the Commission has required parties to submit *facts* supporting a penalty amount agreed to in settlement. In particular, Commission Procedural Rule 31 requires that a motion to approve penalty settlement must include for each violation the penalty proposed by the Secretary, the amount of the penalty agreed to in settlement, and *facts* in support of the penalty agreed to by the parties. 29 C.F.R. § 2700.31(b)(1). Rule 31 also requires that “[a]ny order by the Judge approving settlement shall set forth the reasons for approval and shall be supported by the record.” 29 C.F.R. § 2700.31(g). The requirements to provide *factual support* in the settlement proposal and for the Judge’s decision approving settlement to be supported by the record have been largely unchanged since the inception of the Commission’s procedural rules in 1979. See 44 Fed. Reg. 38,226, 38,230 (June 29, 1979).

Id. at 1981 (emphasis added).

Conclusion

Now, more than four years later, the Secretary continues to refuse to provide any facts to support the proposed settlement of 32 reduced penalties. The game is over. Given that Counsel for the Secretary has represented in its current motion that it has, “reviewed the *entire* case, including *all* 32 citations, the inspectors' notes, the views of officials in the district office, and American Coal's position statement, as well as privileged information that would be improper or imprudent to share with the court and opposing counsel concerning the evidence developed in this case,”⁴ there can be no need for the delay resulting from depositions, nor is there any other impediment to proceeding immediately to hearing in this matter.

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

⁴ See, Sec’s Motion at 2 (emphasis added).

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May 18, 2017

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

v.

SUNBELT RENTALS, INC.,
Respondent

CIVIL PENALTY PROCEEDING

Docket No. VA 2013-0291
A.C. No. 44-00068-316647

Mine: Roanoke Cement Company

ORDER DENYING SUMMARY DECISION

Before: Judge McCarthy

This remanded case is before me upon a Petition for Assessment of a Civil Penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d) (“the Mine Act” or “the Act”). This matter is set for hearing on May 23-24, 2017 in Roanoke, Virginia. Currently pending before the Court are Respondent’s Amended Motion for Summary Decision, the Secretary’s Motion to Correct the Record in Partial Response to the Respondent’s Motion for Summary Decision, and the Secretary’s Response to [Respondent’s] Motion for Summary Decision Stating Contested Facts.

I. Statement of the Case

This matter arises out of a non-fatal fall of materials accident that occurred in operator Roanoke Cement Company’s (“Roanoke Cement”) pre-heat tower on January 8, 2013. Roanoke Cement hired LVR, Inc. (“LVR”) to conduct annual maintenance on the tower. LVR hired Sunbelt Rentals, Inc. (“Sunbelt”) to erect scaffolding inside the tower so that LVR could perform the maintenance. On January 8, 2013, as Sunbelt was erecting scaffolding at the sixth level inside the tower, Sunbelt’s employee Brian Tyler was struck by unidentified material that fell from above and knocked him unconscious. MSHA inspector David Nichols subsequently issued citations to Roanoke Cement, LVR, and Sunbelt for violations of 30 C.F.R. § 56.18002(a).¹

Citation No. 8723677 was issued to Sunbelt and assigned to Docket No. VA 2013-0291. Citation No. 8723676 was issued to LVR and was assigned to Docket No. VA 2013-0275.

¹Section 56.18002(a) provides that

A competent person designated by the operator shall examine each working place at least once each shift for conditions which may adversely affect safety or health. The operator shall promptly initiate appropriate action to correct such conditions.

Citation No. 8723675 was issued to Roanoke Cement and assigned to Docket No. VA 2013-0276. All three dockets were set for hearing on October 21, 2013. Prior to the hearing, the Secretary filed a Motion for Partial Summary Decision, and all three Respondents filed Cross-Motions for Summary Decision. The Secretary's motion requested findings that (1) the failure to perform a workplace examination "adequate" to discover latent defects is a violation of section 56.18002(a), and (2) the mine operator and its contractors have a duty to either perform an adequate workplace examination or ensure that one is performed. *Sunbelt Rentals, Inc., et al.*, 35 FMSHRC 3208, 3209 (Sept. 2013) (ALJ). I found that no genuine issues of material fact remained, and granted the Respondents' Cross-Motions for Summary Decision on the grounds that section 56.18002(a) contained no adequacy requirements and Sunbelt's shift examination of the pre-heat tower therefore satisfied the requirements of section 56.18002(a). *Id.* at 3216. I found in the alternative that "the Respondents did not have fair notice of the Secretary's interpretation that the cited regulation included an adequacy requirement." *Id.* at 3215.

The Secretary appealed, and the Commission granted the Secretary's Petition for Discretionary Review.² The Commission determined that section 56.18002(a) contains an adequacy requirement, vacated my summary decision, and remanded all three dockets to me for to determine whether "the workplace examination conducted by [Sunbelt] met the requirements of the standard." *Sunbelt Rentals, Inc., et al.*, 38 FMSHRC 1619 (July 2016).³

II. Legal Principles and Analysis

Commission Rule 67 sets forth the guidelines for granting summary decision. A motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows (1) that there is no genuine issue as to any material fact; and (2) that the moving party is entitled to summary decision as a matter of law. 29 C.F.R. § 2700.67(b). A motion shall be accompanied by a memorandum of points and authorities and a statement of material facts specifying each material fact as to which the party contends there is no genuine issue, and supported by reference to accompanying affidavits or other verified documents. 29 C.F.R. § 2700.67(c). An opposition shall include a memorandum of points and authorities 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 supported by reference to any accompanying affidavits or other verified documents. Material facts identified as not in issue by the moving party shall be deemed admitted unless controverted by the statement in opposition. If a party does not respond in opposition, summary decision, if appropriate, shall be entered for the moving party. 29 C.F.R. § 2700.67(d).

² Despite my alternative basis for dismissal on the absence of fair notice grounds, I note that the Secretary advanced his current interpretation of section 56.18002(a)'s adequacy requirement for the first time in oral argument on appeal before the Commission. Tr. for Oral Argument at 34-36. In my view, this was inappropriate and the issue is preserved for judicial review.

³ Docket No. VA 2013-0275 was disposed in my Decision Approving Settlement on November 30, 2016. Docket No. VA 2013-0276 was disposed in my Decision Approving Settlement on January 5, 2017.

Applying these rules, the Commission has long recognized that summary decision is an extraordinary procedure analogous to Rule 56 of the Federal Rules of Civil Procedure, under which “the Supreme Court has indicated that summary judgment is authorized only ‘upon proper showings of the lack of a genuine, triable issue of material fact.’” *Energy West Mining Co.*, 16 FMSHRC 1414, 1419 (July 1994) (quoting *Missouri Gravel Co.*, 3 FMSHRC 2470, 2471 (Nov. 1981) and *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986)); see also *Lakeview Rock Prods., Inc.*, 33 FMSHRC 2985, 2987-88 (Dec. 2011) (reiterating the Commission's summary decision rules). In reviewing a record on summary decision, a judge must evaluate the evidence in the light most favorable to the party opposing the motion. *Hanson Aggregates New York, Inc.*, 29 FMSHRC 4, 9 (Jan. 2007); see also *Poller v. Columbia Broadcasting Sys., Inc.*, 368 U.S. 464, 473 (1962); *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)).

Respondent's initial Motion for Summary Decision alleged that the Secretary failed to respond to Respondent's Third Set of Interrogatories, Second Set of Requests for Admission, and Second Set of Requests for Production, which Respondent served on the Secretary's solicitor on January 25, 2017. In response to Respondent's motion, the Secretary filed his Motion to Correct the Record and included copies of his timely responses to Respondent's discovery requests. Resp't's Mot. for Summ. Decision, at 2-3; Sec'y's Mot. to Correct, at 1. Respondent then filed an Amended Motion for Summary Decision, arguing that the Secretary's discovery responses show that no genuine issues of material fact remain. Resp't's Amended Mot. for Summ. Decision, at 1. The Secretary also filed a Response to [Respondent's] Amended Motion for Summary Decision, Stating Contested Facts on April 14, 2017. On April 14, the Respondent filed a final Response to [the] Secretary's Motion to Correct the Record in Partial Response to the Motion for Summary Decision.

As demonstrated by the parties' competing motions, and in light of the fact that the Commission had decided that despite my alternative basis for dismissal on fair notice grounds, it is permissible for the Secretary to advance his new interpretation of section 56.18002(a) for the first time during oral argument on his Petition for Discretionary Review, I find that genuine issues of material fact still remain regarding the adequacy of Sunbelt's January 8, 2013 workplace examination and whether the seventh level of the preheat tower constituted a “working place” within the meaning of section 56.18002(a).

III. Order

WHEREFORE, Respondent's Amended Motion for Summary Decision is **DENIED**. I reserve judgment on the Secretary's Motion to Correct the Record until hearing, at which time the Secretary may proffer his discovery responses for entry into the record. This docket will proceed to hearing as scheduled on May 23-24, 2015 in Roanoke, Virginia.

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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May 19, 2017

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

THE AMERICAN COAL COMPANY,

CIVIL PENALTY PROCEEDING

Docket No. LAKE 2011-0013
A.C. No. 11-02752-232235

Mine: New Era Mine

ORDER DENYING SECRETARY'S MOTION TO CERTIFY MAY 2, 2017 ORDER FOR INTERLOCUTORY REVIEW

Before: Judge Moran

Though hard to believe, the Secretary of Labor and his present counsel, whether motivated through deafness or defiance, is back, filing another motion for interlocutory review, but asking, essentially, the same questions.¹ The Commission has already answered those questions. For the reader who may be confused, this is not a new case. It is the *same case*, now more than four years old, with the Secretary presently making another run, through the same vehicle as before — interlocutory review — at not complying with this Court's decision and the Commission's affirmance of that decision, all with the purpose of emasculating the Commission's Congressionally-delegated statutory responsibility under section 110(k) of the Mine Act. The United Mine Workers of America, Intervenors in this case, have also weighed in on the Secretary's Motion, voicing strong opposition to it ("UMWA Response in Opposition"). For the reasons which follow, the Secretary's Amended Motion to Certify May 2, 2017 Order for Interlocutory Review ("Motion") is **DENIED**. **The hearing in this matter remains as scheduled, to commence on Monday, June 19, 2017.**

When this Court rejected the Secretary's latest gambit, in its May 2, 2017 Order Denying Settlement Motion ("Order"), as set forth below in Appendix I, it went to some lengths to expose the emptiness of the Secretary's present settlement. In this Motion the Secretary now, yet again, seeks the Commission's repeated review and by that step to unnecessarily draw upon the Commission's resources regarding a subject about which the Commission has already, patiently and definitively, expressed its view.

¹ The Secretary filed his motion on May 8, 2017. Two days later, on May 10, 2017, he filed a "Supplemental Motion" for interlocutory review, recasting its questions. The Supplemental Motion changes nothing, both forms of the motion are rejected.

Following the Court's Order, a conference call was held for the purpose of setting this matter for a hearing.² A few observations about that conference call are revealing. It was the *Respondent's* counsel who inquired whether *it* could provide the facts to support the motion, and asked for guidance from the Court as to the type of facts that would pass muster. The Court advised the parties that both the Court and the Commission have already made plain the information required for settlement motions. Curiously, the Secretary was entirely silent on that issue, with not a word offered that he too would like to supply facts in support of the motion. The Secretary's silence during the call clearly displayed that he has no intention of providing facts to the Commission. Both the Court's May 2, 2017 Order, and its many other prior Orders where settlements have been accepted, and on occasion denied, provide clear guidance to anyone who is genuinely interested in compliance.

There were other problems revealed with the one-sided interest in offering an adequate basis in support of a settlement. Counsel for the Respondent did not seem to appreciate that a one-size-fits-all 30% reduction is not likely to be satisfactory, because each violation is fact-specific.³ That is why the Commission repeatedly told the Secretary in its August 25, 2016 Decision that *facts* must be provided. Therefore, even if plausible facts were presented and the Secretary admitted that those facts presented genuine disputes, it would be highly questionable if, through some magic, each citation ended up with an odds-defying 30% reduction. Compounding that problem, if the percentage reduction would be the same for each of the 32 citations, is the fact that at least 5 (five) of the citations were specially assessed.

While the Court appreciates the cooperative spirit advanced by the Respondent, there is a second problem that the Court has encountered in some settlements and needs to be mentioned. These have occurred on occasion where a cooperative *Respondent* has provided asserted facts in support of a given reduction but the Secretary made *no comment whatsoever*. As with the proverb "one hand won't clap," a settlement must express from the Secretary that the Respondent's assertions present *legitimate* questions of fact which can only be resolved through the hearing process. Under such circumstances, *legitimate* disputes of fact are usually sufficient to support a given proposed reduction.⁴

² As announced during the call, that conference call was recorded by the Court.

³ Nor is this matter a "global settlement," where different considerations may come into play.

⁴ In those instances when the Court has rejected settlements because only one side, the mine operator, has offered facts in dispute and the Secretary has remained mute, in addition to requiring the Secretary's voice on the facts advanced by the operator, the Court has suggested, in the spirit of seeking legitimate settlements, that the Secretary at least announce to the Court that it has apprised the issuing inspector of the facts asserted by the Respondent, as the inspector is the only government eyewitness to the issued citation or order. Note that this requires no disclosure of privileged *information*, nor the substance of such communications between the Secretary's attorney and the issuing inspector, but only confirms that, acting in good faith, the Secretary has disclosed the operator's version of the attendant facts to the inspector. Though this would seem obvious as part of due diligence, the Secretary has rarely cooperated with the Court's request for such assurance.

A review of the Secretary's Motion

Having set the stage, so to speak, of the background for this matter, here is the Court's annotated version of the Secretary's latest motion. The quoted portions in the following annotated version all are from the Secretary's March 30, 2017 Motion at 2-4. A non-annotated version appears in Appendix II of this Order. Language taken from the Motion is in quotations, with bold text and italics added, as deemed appropriate, by the Court. The Court's annotations follow each quoted portion from the Secretary's Motion and they are in *italics*.

Counsel for the Secretary reviewed the entire case, including all 32 citations, the inspectors' notes, the views of officials in the district office, and American Coal's position statement, as well as privileged information that would be improper or imprudent to share with the court and opposing counsel concerning the evidence developed in this case.

The Court would note that most of this would be standard protocol in any case — reviewing each citation and the inspector's notes and the position of the Respondent would seem to be minimalist activity. It is unclear what role "the views of officials in the district office" would have and the Court is told neither who those individuals were, the nature of their views, nor any basis for concluding that a 30% reduction would be appropriate for each of the 32 citations. The Secretary then announces that information, identified as "privileged," about the evidence developed in the case would be improper or imprudent to disclose.

"Counsel concluded that there is substantial risk that the court could reduce the degree of negligence or gravity with respect to 14 of the 32 citations."

Based upon "information," about which the Commission is completely kept in the dark, the Secretary then announces that he concludes that there is "substantial risk" that the court "could" reduce the degree of negligence or gravity with respect to 14 of the 32 citations. How that speculation evolves into a 30% across the board reduction is left for the Commission to somehow divine.

"One additional citation runs the risk of vacatur because of a legal dispute between the operator and the Secretary regarding the applicability of the standard to the cited condition. The Secretary does not consider this case to be a well-chosen vehicle by which to litigate that legal dispute."

The Secretary, while not identifying which citation runs the claimed risk of vacatur, apparently feels that, like each of the other 32 citations, such a risk qualifies this citation for a 30% reduction. That the Secretary suggests this citation may not be the best case to test the citation's applicability is odd, because in more than a few cases before this Court, the Secretary has routinely exercised his option to vacate a given citation. As with all of the foregoing, no facts are presented by the Secretary.

"If, after trial, the Secretary were to receive adverse decisions with respect to each of the citations that counsel believes to entail such risks- a worst-case outcome *the Secretary does not believe would occur* but is obligated to consider- the resulting penalty based on the Part 100 penalty tables would reflect an

approximately 50% reduction from the penalties originally proposed by the Secretary. Accordingly, the Secretary has concluded that an across-the-board 30% reduction reflects an appropriate compromise.”

Here, the Secretary truly brings out his crystal ball, advising that, while he does not believe that his fears would occur, if they did occur, he predicts that he would suffer a 50% reduction in the penalties. On the basis of the fears he does not himself believe in, he then asserts that a 30% reduction makes sense. As with all of the foregoing, no facts are presented by the Secretary.

In deciding that such a compromise is appropriate, **the Secretary has** not given weight to the costs of going to trial as compared to the possible monetary results that would flow from securing a higher penalty total. He has, however, **considered the fact that he is maximizing his prosecutorial impact in settling this case on appropriate terms and in litigating other cases in which settlement is not appropriate.**

This part of the Motion is the Secretary’s most overt return to its stance of four years ago; translated it plainly means that the determination of a settled penalty amount is completely within its sole discretion. How that fits within section 110(k) is, as before, ignored by the Secretary.

“The Secretary believes that maximizing his prosecutorial impact in such a manner serves a valid enforcement purpose.”

As with the justification presented, next above, this is an encore assertion of the Secretary’s claim that he has the sole power over settlement terms; the role of the Commission is to genuflect to the Secretary. The Secretary’s interpretation effectively revokes Congress’ inclusion of section 110(k) in the Mine Act.

The Secretary considers the fact that the proposed settlement preserves all of the citations as written to be a significant advantage of the compromise. This fact will assist the Secretary in future enforcement efforts against this operator by ensuring that the paper record reflects **the Secretary’s views regarding the gravity and negligence of the operator’s conduct.**

*If this basis were to be accepted, the Commission would be required to accept any settlement with such terms. The Secretary’s position would also negate the express language of section 110(k), which addresses “Compromise, mitigation, and settlement of penalty,” and provides, in relevant part, that “[no] proposed **penalty** which has been contested before the Commission under section 815(a) of this title shall be compromised, mitigated, or settled except with the approval of the Commission.” 30 U.S.C. § 820(k) (emphasis added). The further remark that the Secretary will somehow be assisted “in future enforcement efforts against this operator by ensuring that the paper record reflects the Secretary’s views regarding the gravity and*

negligence of the operator's conduct," can only be described as pure blather.⁵ The Secretary's "views regarding the gravity and negligence of the operator's conduct" do not go beyond these particular citations – they are not translatable to future citations as the nature of those criteria are determined vis-à-vis those matters. In short, there is no carry over.

As the Commission is aware, such determinations can affect the proposed or assessed penalty in future proceedings, can affect whether future citations are classified as unwarrantable failures within the meaning of Section 104(d) of the Act, and can bear on how the citations are counted for purposes of determining whether the operator has demonstrated a pattern of violations within the meaning of Section 104(e) of the Act.

There is no representation that, among the 32 citations, a section 104(d) chain has been triggered, nor is there any assertion that a pattern of violations is in the offing. Further, such speculations do not excuse the Secretary from complying with section 110(k) as those provisions are not entwined, but operate independently of one another.

Indeed, even if the Secretary were to substantially prevail at trial, and to obtain a monetary recovery similar to or even exceeding the amount of the settlement, **it would not necessarily be a better outcome from the enforcement perspective than the settlement, in which all the citations are admitted** and can constitute a basis for future enforcement actions. A resolution of this matter in which all violations are admitted is of significant value to the Secretary and advances the purposes of the Act... Based on the course of negotiations and counsel's experience, the Secretary does not believe that the mine operator would have agreed not to contest all of the violations without a reduction in the monetary amount of the penalty.

As noted before, if the Secretary's expression was deemed sufficient here, then in future cases, the Commission could not logically assert any section 110(k) considerations where all violations were admitted. Such a result would effectively neuter the Commission's review authority under section 110(k). Beyond ignoring the plain language of that section, the Commission could not reasonably object to a higher percentage reduction. Accordingly, if the Secretary's position were adopted, a 40 or 50 percent reduction, or more, would also fit within the Secretary's authority.

"Based on the calculations above of litigation risk, a 30 percent reduction is reasonable from the Secretary's perspective in exchange for a guarantee that none of the violations will be set aside or modified.... **Because the violations are all being admitted, an across-the-board reduction in penalties is reasonable.**"

By this reasoning, all dockets for which all violations are admitted, could form the justification for a 30% reduction. But that is not all. As just mentioned, applying the same

⁵ "Blather" is defined as talking long-windedly without making very much sense. As expressed by Merriam-Webster it is "voluble nonsensical or inconsequential talk or writing." "Blather," Merriam-Webster Online Dictionary (May 11, 2017), <http://www.merriam-webster.com/dictionary/blather>.

reasoning, if the principle were to be accepted, it could be applied to justify any other across-the-board percentage figure that the Secretary tossed out.

The value of an admitted violation from a future enforcement perspective does not depend on the size of the penalty so much as it does on the nature of the violation, including the alleged levels of negligence and gravity. **There was no reason for the parties to negotiate different or variable reductions for each individual citation; doing so would have required sensitive discussions of the strengths and weaknesses of the Secretary's case, and given that American Coal has agreed to accept each citation as written, reallocation of the penalty amount on a citation-by-citation basis would undermine the Secretary's ability to effectively and efficiently enforce the Act.**

This statement simply underscores the transparent nature of the Secretary position — it is for the Secretary alone to reach settlements and facts in support of such matters need not be disclosed to the Commission. Clearly, under the Secretary's interpretation, section 110(k) would be an empty provision.

In summary, under the Secretary's, now tedious, view, it is entirely within his prerogative to decide terms of settlement. It is not an understatement to say that the Commission would have *no role* under this approach *except to submissively accept the terms presented by the Secretary.*

For its part, the United Mine Workers of America, in its Response in Opposition, has asserted that, as the question has already been considered and decided, the matter should not be certified for interlocutory review since a redundant review cannot materially advance the final disposition of the proceeding. UMW Response in Opposition at 1. Noting that in its August 25, 2016 decision “the Commission held . . . in this case that ‘Commission Procedural Rule 31 requires that a motion to approve penalty settlement must include **for each violation** the penalty proposed by the Secretary, the amount of the penalty agreed to in settlement, and facts in support of the penalty agreed to by the parties,’” the UMW maintains that the law of the case applies. *Id.* at 2 (citing *The American Coal Company et al.*, 38 FMSHRC 1972, 1981 (2016) (applying 29 C.F.R. § 2700.31(b)(1)) (emphasis in original). The Court agrees.

Thus, we have the quite peculiar situation where the Respondent mine operator and the United Mine Workers of America want to support the Commission's clear decisions regarding the required information for settlements, while the Secretary of Labor, whom one would expect to be in the vanguard on this issue, instead seeks to avoid the plain words of section 110(k) yet again.

Analysis of the Secretary's Motion to Certify this Court's May 2, 2017 Order for Interlocutory Review

The Secretary's Motion for Interlocutory Review⁶ seeks certification of the following questions:

1. Whether the Commission erred in rejecting the Secretary's interpretation of the term "approval" in Section 110(k) of the Mine Act (30 U.S.C. § 820(k)), and instead adopting a standard of review that fails to recognize that the Secretary is exercising his statutory enforcement discretion when he proposes a settlement agreement?
2. Whether the Commission erred in adopting a standard of review that presumptively disfavors across-the-board settlements of multiple penalties.

Motion at 1.

These questions may be addressed summarily. The Commission has already definitively answered the first question in its August 25, 2016 decision. The Commission did not adopt a standard of review that *presumptively* disfavored across-the-board settlements. Instead, it held that *in this case* no facts supported the across-the-board 30 % reduction. As mentioned in footnote 6, the Secretary's Supplemental Motion does not change the Court's reaction.

The Secretary's Motion, after asserting that the matter involves a controlling question of law, defines a "controlling" question as one which if reversed on interlocutory appeal "might save time for the [trial] court, and time and expense for the litigants." Motion at 2 (internal citation omitted). Given the more than four year history challenging the same issue — the authority of the Commission in approving settlements and the Commission's decision on that issue — the save time and expense argument is hollow. The Secretary also asserts that "there can be no doubt that immediate review of the questions presented could 'materially advance the final disposition of the proceeding' because a decision in the Secretary's favor would avoid litigation and adjudication on the merits by resolving the matter with an approved settlement." Motion at 3. The opposite of that assertion is true — the matter has already been litigated and decided before the Commission and the hearing date is imminent, commencing on June 19th.

⁶ As mentioned at the outset, two days after filing its Motion for Interlocutory Review, the Secretary filed a second "Supplemental Motion." The essence of the Supplemental Motion was to reframe the questions, but the result is the same — the Secretary simply does not want to comply with the Commission's decisions on settlements and section 110(k). The Secretary's additional questions are, "Whether the ALJ failed to adequately consider whether the additional facts provided by the Secretary on remand in support of the settlement motion satisfy the legal standard established by the Commission for evaluating proposed settlement agreements under Section 110(k) and whether the additional facts provided by the Secretary on remand in support of the settlement motion satisfy the legal standard established by the Commission for evaluating proposed settlement agreements under Section 110(k)." Supplemental Motion at 1.

Conclusion

The Commission has spoken clearly about settlements and section 110(k). When the Commission stated that settlements require “facts,” as was evident to nearly everyone, they meant facts *about the alleged violations*. In contrast, the Secretary’s notion of *facts* encompasses his assertions expressing why he doesn’t want or need to provide facts about the violations. In the Court’s view, by taking that tactic, the Secretary has basically fabricated issues for interlocutory review in its unceasing effort to circumvent the Commission’s responsibilities under section 110(k). Accordingly, pursuant to 29 C.F.R. § 2700.76(a)(1)(i), titled “Interlocutory review,” the Court **DENIES** the Secretary’s Motion for Interlocutory Review because the questions of law raised in the Motion have been decided by the Commission and further immediate review will not materially advance the final disposition of the proceeding.

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

Appendix I

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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May 2, 2017

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

THE AMERICAN COAL COMPANY,

CIVIL PENALTY PROCEEDING

Docket No. LAKE 2011-0013
A.C. No. 11-02752-232235

Mine: New Era Mine

ORDER DENYING SETTLEMENT MOTION

Before: Judge Moran

This case is before the Court upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act” or “Act”). The Secretary has filed a “new” motion to approve settlement, but it is new only in the sense of its filing date. The Secretary continues to resist complying with the Commission’s requirements for settlements. Accordingly, for the reasons which follow, the Secretary’s motion is **DENIED** and the parties are **ORDERED** to participate in a conference call with the Court on **Friday May 5, 2017 at 12:00 p.m. EDT** for the purpose of setting a hearing date for this docket, which shall be held promptly.⁷

This matter now has a very long history. Over four years ago the Secretary embarked on its goal of emasculating section 110(k) of the Mine Act. The Court in its Decision Denying Settlement Motion, issued February 11, 2013, noted that:

[t]he Motion seeks an across-the-board reduction of 30 (thirty) percent for each of the 32 citations involved. That, in itself, is a red flag. The idea that every one of 32 citations could warrant a 30% reduction demonstrates, by that fact alone, that the reductions were more in the nature of yard sale, rather than any individualized review meriting, by some impossibly small odds, that each just happened to have earned such an implausibly uniform reduction.

The American Coal Co., 35 FMSHRC 515, 515 (Feb. 2013) (ALJ) (emphasis omitted).

⁷ The call-in number will be provided in a separate email to the parties.

In denying the motion, the Court observed that:

[t]he *entirety* of the justification provided: ‘After further review of the evidence, the Secretary has determined that a reduced penalty is appropriate in light of the parties’ interest in settling this matter amicably without further litigation. In recognition of the nature of the citations at issue, and the uncertainties of litigation, the parties wish to settle the matter with a 30% reduction in the total assessed penalty with no changes in gravity or negligence for any of the citations at issue.’ If this were a satisfactory justification, then every case would warrant a 30% reduction to avoid the ‘uncertainties of litigation.’

35 FMSHRC at 515-16.

So began the Secretary’s effort to overlook the plain meaning of Section 110(k). As will be set forth below, the Secretary’s latest motion, too clever by half, is nothing more than its latest gambit, displaying the same, tired, recalcitrant behavior, all with the obvious purpose of continuing to avoid complying with section 110(k) of the Mine Act.

Before examining the Secretary’s latest ploy, it is worth revisiting that there is nothing particularly difficult, or onerous, required for the Secretary to comply with the Commission’s long-standing requirements for section 110(k) and the *Secretary has himself* repeatedly demonstrated that to be the case. In numerous other cases, examples of which were provided to the Secretary by the Court *from his own submissions* to the Commission, the Court reminded the Secretary how this is done in the appendix to its May 13, 2014 Order Denying Motion for Approval of Settlement Upon Secretary’s Motion for Reconsideration. *The American Coal Co.*, 36 FMSHRC 1489, 1503-1522 (May 2014) (ALJ). Because the Secretary seems to have forgotten how this is done, two examples from the appendix to the Court’s May 13, 2014 Order are repeated here. These examples are from the *Secretary’s submission* for approval of a settlement in another case, *Sec. v. Brooks Run Mining*, Docket No. WEVA 2010-468:

Citation No. 8089450 was issued to the Respondent on October 20, 2009 and alleged a violation of 30 C.F.R. § 75.517 and 104(a) of the Act, 30 U.S.C. § 814(a). The Secretary determined that the violation was reasonably likely to cause an injury; that an injury from the cited condition could reasonably be expected to result in lost workdays or restricted duty; that the violation was significant and substantial; that one person was affected; and that the operator’s conduct in the violation demonstrated a moderate degree of negligence. The Secretary assessed a penalty of \$499.00. The Respondent contends that the likelihood of injury and level of negligence alleged are excessive, and states that at hearing it would present evidence that the individual leads of the allegedly damaged cable were insulated, that there was no damage to the inner power or ground conductors and that the condition had existed for only a short time and would have been discovered during the next examination. In light of the contested evidence, the Secretary has agreed to modify the likelihood from “reasonably likely” to unlikely,” to modify the citation from “significant and substantial” to not

significant and substantial,” to modify the negligence from “moderate” to “low,” and to reduce the penalty to \$275.00.

Citation No. 8089451 was issued to the Respondent on October 22, 2009 and alleged a violation of 30 C.F.R. § 75.220(a)(1) and 104(a) of the Act, 30 U.S.C. § 814(a). The Secretary determined that the violation was reasonably likely to cause an injury; that an injury from the cited condition could reasonably be expected to result in lost workdays or restricted duty; that the violation was significant and substantial; that two persons were affected; and that the operator’s conduct in the violation demonstrated a moderate degree of negligence. The Secretary assessed a penalty of \$540.00. The Respondent contends that the likelihood of injury alleged is excessive, and states that at hearing it would present evidence that the roof in the cited entry was too high for the automated temporary roof support system to effectively control the roof, the roof conditions were good and the top was solid, stable and secure and that any roof sloughage was addressed by the installation of “pizza pans” and 6-foot torque tension bolts. The parties agree that this citation will remain as issued with no modifications, but in light of the contested evidence, the Secretary has agreed to reduce the penalty to \$475.00.

Unpublished Order dated Nov. 4, 2013; *see* 36 FMSHRC at 1519-20.

The reader should take note that the justification for the penalty reductions in those two citations provided a factual basis to support them.

More recent settlement motions before this Court demonstrate that, when the Secretary drops his mulish stance, he is quite able to provide the kind of facts the Commission needs in order to meet its statutory obligations under section 110(k).

For example, in *Sec. v. Triad Underground Mining LLC*, LAKE 2017-0007, (“*Triad*”), the Secretary filed his Motion to Approve Settlement before the Court on January 26, 2017. That case involved a single citation, No. 9036792, for which a penalty reduction of 24 percent, from \$3,300 to \$2,500, was sought.

In support of his Motion, despite some grammatical errors, the Secretary presented facts in dispute, stating:

The Respondent has communicated plausible arguments as to why the gravity and/or negligence findings for this violation should be reduced. The Respondent would present evidence at hearing that, among other things, the examiner did not observe any hazards during his previous examination [sic] therefore no hazards were recorded in the Record Book. The accumulations referenced in the citation had occurred after the previous examination due to a coal spill. The hazard referenced in the inspection notes, accumulations of coal at the take up, had just occurred due to a spill and had not existed for two shifts [sic] therefore management could not have known. The Respondent contends that the negligence should be evaluated at “Moderate or Low” based on the mitigating circumstances

provided. The Respondent contends that it is not reasonably likely that the accumulations of coal would [] result in a Lost Workdays injury. Also the Respondent provided evidence that this mine is in “Non-Producing Status”, has no production crew and none of the belts are currently in operation, and when verified through reviewing the Uniform Mine File of record at MSHA, this mine was placed in “Non-Producing Status” on 09/06/2016. The Respondent further argues that management was not aware of the condition and would have promptly corrected the condition as soon as management was made aware of the condition. The Respondent asserts that there was not a “Confluence of Factors”, no ignition source identified, along this belt that would cause and/or contribute to a belt fire. Also, the Respondent would argue that there was normally only one miner working and/or traveling within the cited area and would request the number of persons affected be modified from “2” to “1”. However, the respondent agrees to pay a reduced penalty and there will be no change to the violation as issued. The Secretary acknowledges that any or all of respondent’s arguments regarding gravity or negligence may be persuasive at a hearing on the merits and has agreed, based on evidence presented, to reduce the proposed penalty *in consideration of the six statutory criteria in Section 110(i) of the Federal Mine Safety and Health Act of 1977 as amended by the MINER Act of 2006 (the Act)*.

Motion at 4-5 (emphasis added).

The Court calls attention to four observations from the Secretary’s Motion in *Triad*. First, the Motion demonstrates that the Secretary is not confused; he knows full well what needs to be provided to the Commission when inclined to respect the command of section 110(k). Second, the Secretary recognizes that *facts* which are in dispute need to be identified. Third, it is neither difficult nor burdensome to gather such facts to explain the basis for the reduced penalty. Fourth, the Secretary recognizes that such disputed facts must be tied to the six statutory criteria in Section 110(i), a requirement the Commission has made plain.⁸ As the Commission stated less than a year ago:

The requirements to provide *factual support in the settlement proposal* and for the Judge’s decision approving settlement to be supported by the record have been largely unchanged since the inception of the Commission’s procedural rules in

⁸ While the Secretary asserted in *American Coal* that it is inappropriate for a judge to consider section 110(i) factors when considering whether to approve a proposed penalty settlement, the Commission directly stated, “We disagree.” *The American Coal Company*, 38 FMSHRC 1972, 1981 (Aug. 2016). For instance, in *Black Beauty*, the Commission held that it was not error for the Judge to request factual support relating to the six criteria set forth in section 110(i) for her consideration of the penalties agreed to by the parties. *Black Beauty Coal Company*, 34 FMSHRC 1856, 1864 (Aug. 2012).

1979... The Commission has recognized that standards for such factual support may be found in section 110(i).

The American Coal Company, 38 FMSHRC 1972, 1981 (Aug. 2016) (“*American Coal*”) (emphasis added).

Now, with a zombie-like persistence, the Secretary refuses yet again to comply with the Commission’s explicit direction, a direction the Secretary implicitly accepted by its recent decision to file, on March 16, 2017, his *Motion to Withdraw* its Petition with the Court of Appeals for the District of Columbia. Motion at 1 (emphasis added).

As with the Secretary’s original, insufficient, justification in February 2013 for its 30% across-the-board reduction, its new offering, while dressed-up, is just as empty as its original formulation because it again provides *no facts* to support the reduction sought. In the Court’s original rejection of the Secretary’s Motion, issued in February 2013, it noted the “impossibly small odds,” that each of the 32 citations warranted a 30% penalty reduction. 35 FMSHRC at 515. As set forth below, the Secretary now offers a host of non-factual excuses, untethered to any specific citation. Further, there is no information associating any of the citations to the statutorily identified penalty factors. While wordier, the Secretary sets forth its new justification and again, against all odds, miraculously arrives at the same conclusion it served up four years ago — a 30% across-the-board reduction. The translation of all this is, effectively, “*we were right all along.*”

Here then, is the Secretary’s latest offering:

Counsel for the Secretary reviewed the entire case, including all 32 citations, the inspectors' notes, the views of officials in the district office, and American Coal's position statement, as well as privileged information that would be improper or imprudent to share with the court and opposing counsel concerning the evidence developed in this case. Counsel concluded that there is substantial risk that the court could reduce the degree of negligence or gravity with respect to 14 of the 32 citations. One additional citation runs the risk of vacatur because of a legal dispute between the operator and the Secretary regarding the applicability of the standard to the cited condition. The Secretary does not consider this case to be a well-chosen vehicle by which to litigate that legal dispute... If, after trial, the Secretary were to receive adverse decisions with respect to each of the citations that counsel believes to entail such risks- a worst-case outcome the Secretary does not believe would occur but is obligated to consider-the resulting penalty based on the Part 100 penalty tables would reflect an approximately 50% reduction from the penalties originally proposed by the Secretary. Accordingly, the Secretary has concluded that an across-the-board 30% reduction reflects an appropriate compromise. In deciding that such a compromise is appropriate, the Secretary has not given weight to the costs of going to trial as compared to the possible monetary results that would flow from securing a higher penalty total. He has, however, considered the fact that he is maximizing his prosecutorial impact in settling this case on appropriate terms and in litigating other cases in which

settlement is not appropriate. The Secretary believes that maximizing his prosecutorial impact in such a manner serves a valid enforcement purpose. ... The Secretary considers the fact that the proposed settlement preserves all of the citations as written to be a significant advantage of the compromise. This fact will assist the Secretary in future enforcement efforts against this operator by ensuring that the paper record reflects the Secretary's views regarding the gravity and negligence of the operator's conduct. As the Commission is aware, such determinations can affect the proposed or assessed penalty in future proceedings, can affect whether future citations are classified as unwarrantable failures within the meaning of Section 104(d) of the Act, and can bear on how the citations are counted for purposes of determining whether the operator has demonstrated a pattern of violations within the meaning of Section 104(e) of the Act. ... Indeed, even if the Secretary were to substantially prevail at trial, and to obtain a monetary recovery similar to or even exceeding the amount of the settlement, it would not necessarily be a better outcome from the enforcement perspective than the settlement, in which all the citations are admitted and can constitute a basis for future enforcement actions. A resolution of this matter in which all violations are admitted is of significant value to the Secretary and advances the purposes of the Act. ... Based on the course of negotiations and counsel's experience, the Secretary does not believe that the mine operator would have agreed not to contest all of the violations without a reduction in the monetary amount of the penalty. Based on the calculations above of litigation risk, a 30 percent reduction is reasonable from the Secretary's perspective in exchange for a guarantee that none of the violations will be set aside or modified. ... Because the violations are all being admitted, an across-the-board reduction in penalties is reasonable. The value of an admitted violation from a future enforcement perspective does not depend on the size of the penalty so much as it does on the nature of the violation, including the alleged levels of negligence and gravity. There was no reason for the parties to negotiate different or variable reductions for each individual citation; doing so would have required sensitive discussions of the strengths and weaknesses of the Secretary's case, and given that American Coal has agreed to accept each citation as written, reallocation of the penalty amount on a citation-by-citation basis would undermine the Secretary's ability to effectively and efficiently enforce the Act.

Secretary's March 30, 2017 Motion at 2-4.

The Secretary confuses logorrhea with providing factual support. They are not the same. The long-winded statement is easily translatable — the Secretary's position has not changed; he continues to assert that settlements are within the Secretary's unreviewable discretion. The essential problem with the Secretary's latest motion is that it does not provide a penalty-factor related explanation to support the uniform 30% reduction for each citation.

Importantly, in the larger picture, if this formulation were to be accepted by the Court, apart from the failure to meet 110(k)'s language, *every case* the Secretary

submitted for settlement hereafter could adopt essentially the same language presented here. In that way, though it failed to prevail before this Court, and then failed *again* before the Commission and, effectively, failed for a *third time*, after he decided to *withdraw* his appeal before the United States Court of Appeals for the District of Columbia of those prior denials, this non-factually based language in his present motion, if accepted, would enable the Secretary to achieve his original goal of unfettered, unreviewable settlement offerings before the Commission.

Nor can the non-factually based language be viewed as a one-off event. That the Secretary would now take this dressed-up formulation of non-compliance for future cases is not speculation. In other recent settlements the Secretary has been providing similar, uninformative, language, to wit:

In reaching this settlement, the Secretary has evaluated the value of the compromise, the likelihood of obtaining a better settlement, and the prospects of coming out better or worse after a trial. In deciding that such a compromise is appropriate, the Secretary has not given weight to the costs of going to trial as compared to the possible monetary results that would flow from securing a higher penalty total. He has, however, considered the fact that he is maximizing his prosecutorial impact in settling this case on appropriate terms and in litigating other cases in which settlement is not appropriate. The Secretary believes that maximizing his prosecutorial impact in such a manner serves a valid enforcement purpose. Even if the Secretary were to substantially prevail at trial, and to obtain a monetary judgment similar to or even exceeding the amount of the settlement, it would not necessarily be a better outcome from the enforcement perspective than the settlement, in which all alleged violations are resolved and violations that are accepted can be used as a basis for future enforcement actions. A resolution of this matter in which all violations are resolved is of significant value to the Secretary and advances the purposes of the Act.

See, e.g., the settlement motions filed by the Secretary in *Omega Highway*, VA 2016-0008 (April 26, 2017), *Edgar Minerals*, SE 2017-0029 (April 27, 2017), and *Greenbrier*, WEVA 2017-0091 (April 26, 2017), each of which contain this verbiage.

Meeting the requirement of Section 110(k) requires that civil penalties are to be assessed upon the Commission considering:

the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity

of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.⁹

30 U.S.C. 820(i); *American Coal* at 1977.

The Commission, in its August 25, 2016 decision in this case, left no room for the apparent confusion or obstinate stance that the Secretary has renewed here.

As the Commission stated:

[t]he legislative history of section 110(k) describes the Congressional rationale behind the provision in great detail. The Senate Report states that the ‘compromising of the amounts of penalties actually paid’ had reduced ‘the effectiveness of the civil penalty as an enforcement tool.’ S. Rep. No. 95-181, at 44 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 632 (1978) (“Legis. Hist.”). The Committee explained that in investigating the penalty collection system under the Federal Coal Mine Safety and Health Act of 1969, it learned ‘that to a great extent the compromising of assessed penalties [did] not come under public scrutiny,’ and that ‘[n]egotiations between operators and Conference Officers of MESA [MSHA’s predecessor] are not on the record.’ *Id.* It noted that even after a petition for civil penalty had been filed, ‘settlement efforts between the operator and Solicitor [were] not on the record, and a settlement need not be approved by the Administrative Law Judge.’ *Id.*

In fashioning a solution to this problem, Congress emphasized the need for transparency in the penalty process, stating that ‘the purpose of civil penalties, [that is,] convincing operators to comply with the Act’s requirements, is best served when the process by which these penalties are assessed and collected is carried out in public,’ where miners, Congress, and other interested parties ‘can fully observe the process.’ *Id.* at 633. ‘To remedy this situation,’ section 110(k) ‘provides that a penalty once proposed and contested before the Commission may not be compromised except with the approval of the Commission’ and that a ‘penalty assessment which has become the final order of the Commission may not be compromised except with the approval of the Court.’ *Id.*

Congress explained that ‘[b]y imposing [the] requirements” of section 110(k), it “intend[ed] to assure that the *abuses involved in the unwarranted lowering of penalties as a result of off-the-record negotiations are avoided.*” *Id.* (emphasis added). Congress expressed its ‘inten[t] that the Commission and the Courts will

⁹ Included here for the sake of completeness, the remainder of section 110(i) then speaks to the distinct subject of the Secretary’s *proposing* civil penalties by providing: “In proposing civil penalties under this chapter, the Secretary may rely upon a summary review of the information available to him and shall not be required to make findings of fact concerning the above factors.”

assure the public interest is adequately protected before any reduction in penalties.’ *Id.*

American Coal at 1975-76.

Anticipating the type of empty settlement the Secretary has presented yet again in this case, the Commission set forth its standard for reviewing proposed settlements of contested penalties. The Commission’s standard, based upon the language of section 110(k) and the legislative history for that section, is designed “in order to ensure that penalties serve as an effective enforcement tool, prevent abuse, and preserve the public interest.’ . . . The Commission’s consideration of proffered settlements has worked well for more than 35 years. *Id.* at 1976 (quoting *Black Beauty*, 34 FMSHRC at 1862).

Thus, the Commission summarized that it:

must have information sufficient to carry out this responsibility. Consequently, through its procedural rules, the Commission has required parties to submit *facts* supporting a penalty amount agreed to in settlement. In particular, Commission Procedural Rule 31 requires that a motion to approve penalty settlement must include for each violation the penalty proposed by the Secretary, the amount of the penalty agreed to in settlement, and *facts* in support of the penalty agreed to by the parties. 29 C.F.R. § 2700.31(b)(1). Rule 31 also requires that “[a]ny order by the Judge approving settlement shall set forth the reasons for approval and shall be supported by the record.” 29 C.F.R. § 2700.31(g). The requirements to provide *factual support* in the settlement proposal and for the Judge’s decision approving settlement to be supported by the record have been largely unchanged since the inception of the Commission’s procedural rules in 1979. See 44 Fed. Reg. 38,226, 38,230 (June 29, 1979).

Id. at 1981 (emphasis added).

Conclusion

Now, more than four years later, the Secretary continues to refuse to provide any facts to support the proposed settlement of 32 reduced penalties. The game is over. Given that Counsel for the Secretary has represented in its current motion that it has, “reviewed the *entire* case, including *all* 32 citations, the inspectors' notes, the views of officials in the district office, and American Coal's position statement, as well as privileged information that would be improper or imprudent to share with the court and opposing counsel concerning the evidence developed in this case,”¹⁰ there can be no need for the delay resulting from depositions, nor is there any other impediment to proceeding immediately to hearing in this matter.

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

¹⁰ See, Sec's Motion at 2 (emphasis added).

Appendix II

Counsel for the Secretary reviewed the entire case, including all 32 citations, the inspectors' notes, the views of officials in the district office, and American Coal's position statement, as well as privileged information that would be improper or imprudent to share with the court and opposing counsel concerning the evidence developed in this case. Counsel concluded that there is substantial risk that the court could reduce the degree of negligence or gravity with respect to 14 of the 32 citations. One additional citation runs the risk of vacatur because of a legal dispute between the operator and the Secretary regarding the applicability of the standard to the cited condition. The Secretary does not consider this case to be a well-chosen vehicle by which to litigate that legal dispute... If, after trial, the Secretary were to receive adverse decisions with respect to each of the citations that counsel believes to entail such risks- a worst-case outcome the Secretary does not believe would occur but is obligated to consider-the resulting penalty based on the Part 100 penalty tables would reflect an approximately 50% reduction from the penalties originally proposed by the Secretary. Accordingly, the Secretary has concluded that an across-the-board 30% reduction reflects an appropriate compromise. In deciding that such a compromise is appropriate, the Secretary has not given weight to the costs of going to trial as compared to the possible monetary results that would flow from securing a higher penalty total. He has, however, considered the fact that he is maximizing his prosecutorial impact in settling this case on appropriate terms and in litigating other cases in which settlement is not appropriate. The Secretary believes that maximizing his prosecutorial impact in such a manner serves a valid enforcement purpose. ... The Secretary considers the fact that the proposed settlement preserves all of the citations as written to be a significant advantage of the compromise. This fact will assist the Secretary in future enforcement efforts against this operator by ensuring that the paper record reflects the Secretary's views regarding the gravity and negligence of the operator's conduct. As the Commission is aware, such determinations can affect the proposed or assessed penalty in future proceedings, can affect whether future citations are classified as unwarrantable failures within the meaning of Section 104(d) of the Act, and can bear on how the citations are counted for purposes of determining whether the operator has demonstrated a pattern of violations within the meaning of Section 104(e) of the Act. ... Indeed, even if the Secretary were to substantially prevail at trial, and to obtain a monetary recovery similar to or even exceeding the amount of the settlement, it would not necessarily be a better outcome from the enforcement perspective than the settlement, in which all the citations are admitted and can constitute a basis for future enforcement actions. A resolution of this matter in which all violations are admitted is of significant value to the Secretary and advances the purposes of the Act. ... Based on the course of negotiations and counsel's experience, the Secretary does not believe that the mine operator would have agreed not to contest all of the violations without a reduction in the monetary amount of the penalty. Based on the calculations above of litigation risk, a 30 percent reduction is reasonable from the Secretary's perspective in exchange for a guarantee that none of the violations will be set aside or modified. ... Because the violations are all being admitted, an across-the-board reduction in penalties is reasonable. The value of an admitted violation from a future enforcement perspective does not depend on the size of the penalty so much as it does on the nature of the violation,

including the alleged levels of negligence and gravity. There was no reason for the parties to negotiate different or variable reductions for each individual citation; doing so would have required sensitive discussions of the strengths and weaknesses of the Secretary's case, and given that American Coal has agreed to accept each citation as written, reallocation of the penalty amount on a citation-by-citation basis would undermine the Secretary's ability to effectively and efficiently enforce the Act.

Secretary's March 30, 2017 Motion at 2-4.

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