

**May and June 2018**

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Secretary of Labor v. Sunbelt Rentals, Inc., Docket No. VA 2013-291 (Judge McCarthy, April 27, 2018)

**No case was denied during the months of May and June 2018.**

## **COMMISSION DECISIONS**



# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 2, 2018

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

v.

ALCOA WORLD ALUMINA, LLC

Docket Nos. CENT 2015-128  
CENT 2015-365  
CENT 2015-401

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

## DECISION

BY THE COMMISSION:

These proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). The dockets involve an accident that occurred at a mine operated by Alcoa World Alumina, LLC. While employees of a contractor were attempting to clean a pipe that was blocked by a rock-like substance (“scale”), caustic liquid began to spew from the pipe and burned one of the contractor’s employees. Steven Alvarado, an employee of Alcoa, was in the area watching the contractor’s employees at the time of the accident.

The Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued a citation and two orders to Alcoa in connection with this accident. Citation No. 8778037 asserts that the operator, by failing to ensure that a pipe was empty, failed to block hazardous movement of liquid in the pipe.<sup>1</sup> Order Nos. 8778038 and 8778039 assert that the operator failed to ensure that all contractors were wearing proper personal protective equipment and that all contractors had safe access to the piping system. MSHA designated all three charged violations as significant and substantial (“S&S”).<sup>2</sup> MSHA also designated the alleged violations as resulting from the operator’s high negligence and unwarrantable failure to comply with mandatory safety

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<sup>1</sup> This citation, initially issued as an order, was subsequently modified by MSHA to a citation. Citation No. 8778037-02.

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

standards.<sup>3</sup> MSHA claimed that Alcoa's employee Alvarado supervised the contractors and was an agent of Alcoa during the accident and alleged violations.

Alcoa did not dispute the existence of the three violations, or that they were S&S, but did argue that the violations were not the result of high negligence and unwarrantable failure. After a hearing on the merits, a Commission Administrative Law Judge determined that Alvarado was not an agent of Alcoa because he did not supervise the contractors during the accident. Therefore, the Judge did not impute Alvarado's conduct to Alcoa when assessing the operator's negligence and determining whether there was an unwarrantable failure. 39 FMSHRC 128, 147 (Jan. 2017) (ALJ). He ruled that none of the violations was the result of the operator's unwarrantable failure, reduced the negligence determination for each violation, and significantly lowered the penalties.

The Secretary petitioned the Commission to review the Judge's decision. On appeal, the Secretary contends that the Judge erred in finding that Alvarado was not Alcoa's agent. The Secretary also argues, in the alternative, that if Alvarado was not an agent, Alcoa's failure to designate someone to supervise the contractors itself constituted high negligence and unwarrantable failure.

We conclude that substantial evidence supports the Judge's determination that Alvarado was not an agent of the operator in connection with the accident. We further conclude that the Secretary did not properly raise his alternative argument. Therefore, we affirm the Judge's findings as to negligence and unwarrantable failure for the citation and orders.

## I.

### **Factual Background**

Alcoa operates an alumina plant in Texas. Alumina is used to produce aluminum metal. Alcoa's facility extracts alumina from bauxite. As part of this process, pipes in the press building transport liquid bauxite to presses.<sup>4</sup> While the liquid bauxite travels through the pipes, it cools and hardens. The hardening of the bauxite can result in scale, a rock-like substance, building up within the pipes. To clean scale, the operator removes pipes from the production process, drains liquid from within the pipes, locks and tags out the piping system, and treats the pipes with a caustic solution (referred to simply as "caustic"). 39 FMSHRC at 139-40.

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<sup>3</sup> The unwarrantable failure terminology is taken from section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), which establishes more severe sanctions for any violation that is caused by "an unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards."

<sup>4</sup> Presses are long tube-shaped devices with a series of screens that capture and filter solid materials like sand and mud from the slurry. 39 FMSHRC at 140 n.11.



During caustic cleaning, two metal plates—a blind plate and a Dutchman plate—are placed at opposite ends of a T-pipe. The T-pipe is then connected to two risers.<sup>5</sup> The blind, a round metal plate, is placed in the T-pipe to stop the flow of caustic into the riser which remains in production. The Dutchman, a metal plate with a hole, is placed in the T-pipe to allow caustic to flow into the riser designated for cleaning. Once the first pipe has been cleaned, the caustic is transferred to the second pipe through a blind swap, a process by which the blind plate swaps positions in the T-pipe with the Dutchman. Before performing a blind swap, the pipes at issue must be empty, the T-pipe connecting them must be removed, and the piping system must be locked and tagged out. After the blind swap is complete, the second pipe is then cleaned with the caustic. *Id.* at 141.

Alcoa periodically uses a contractor, Turner Industries, for certain tasks. On the morning of September 3, 2014, three contractor employees of Turner—Rusty Morales, Dominic Cano, and Leo Gaytan—arrived at the mine to perform a blind swap, *i.e.*, a transfer of caustic, between Riser 27, which had just been cleaned, and Riser 25. Upon arriving, the contractors met with Jeff McCaskill, an Alcoa supervisor, and discussed the hazards presented by the task. Employees of Alcoa, including McCaskill, drained, locked, and tagged out the piping system because contractors were not authorized to lock out/tag out pipes. McCaskill also told Alcoa employee Steven Alvarado “to keep an eye” on the contractors while they performed the blind swap.<sup>6</sup> McCaskill then left the mine around lunchtime. Tr. 130, 309; 39 FMSHRC at 142-43, 145.

Following McCaskill’s departure, Morales, Cano, and Gaytan went to the press building. Alvarado reviewed the isolation points for the piping system with Morales prior to the blind swap. The contractors then removed the relevant T-pipe and blind only to discover that a chunk of scale was blocking the opening to Riser 25. Cano and Gaytan began to jackhammer the scale to remove it from the pipe.<sup>7</sup> While jackhammering, Gaytan used a stand. Cano, however, did not use the stand but knelt directly on the piping system. At some point, the jackhammer broke through and created a hole in the scale. Alvarado, who was standing nearby, noticed liquid spewing from this hole and shouted to Cano and Gaytan to stop jackhammering. At this moment, Morales, who was not wearing proper personal protective equipment, was struck in the back by the leaking liquid and severely burned. Alvarado immediately pulled Morales into a chemical safety shower to rinse off the liquid. Tr. 384-85; 39 FMSHRC at 143-44.

After investigating the accident, MSHA issued the citation and orders to Alcoa. MSHA designated all three violations as S&S. MSHA also designated these violations as resulting from Alcoa’s high negligence and unwarrantable failure, in part because MSHA asserted Alvarado was an agent of Alcoa and therefore imputed his conduct to the operator.

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<sup>5</sup> The pipes that connect to presses are referred to as risers. 39 FMSHRC at 140.

<sup>6</sup> Although Alvarado had served as a Temporary Acting Supervisor (“TAS”) in the past, McCaskill did not designate Alvarado as an acting supervisor on the day of these events. 39 FMSHRC at 145.

<sup>7</sup> Alvarado had previously reminded Gaytan to remove scale from the pipe. Tr. 384.

Citation No. 8778037 was issued because liquid in a pipe was not blocked against hazardous motion resulting in accidental burning of a contractor. MSHA alleged that Alcoa violated 30 C.F.R. § 56.14105, which requires that “[r]epairs or maintenance of machinery or equipment shall be performed only after the power is off, and the machinery or equipment blocked against hazardous motion.” The citation stated that “Alcoa’s management engaged in aggravated conduct constituting more than ordinary negligence in that they did not verify that the [piping] system was completely blocked against hazardous movement of liquor.” Citation No. 8778037.

Order No. 8778038 was issued for a failure to require Morales to use proper personal protective equipment (“PPE”) and for Alvarado’s failure to wear proper PPE. MSHA alleged that Alcoa violated 30 C.F.R. § 56.15006, which requires that “[s]pecial protective equipment and special protective clothing shall be provided, maintained . . . and used whenever hazards of process or environment, chemical hazards, radiological hazards, or mechanical irritants are encountered in a manner capable of causing injury or impairment.” The order stated that “Alcoa’s management engaged in aggravated conduct constituting more than ordinary negligence in that [an] agent was present during the work and observed the [contractor’s] supervisor not wearing the proper equipment. The . . . agent failed to wear the required PPE as well.” Order No. 8778038.

Order No. 8778039 was issued for the operator’s failure to ensure that Cano, who kneeled on the piping system while jackhammering, had safe access to Riser 25. MSHA alleged that Alcoa violated 30 C.F.R. § 56.11001, which requires that “[s]afe means of access shall be provided and maintained to all working places.” The order stated:

A miner gained access to the scaled up line by climbing on top of the [pipe] . . . . This . . . expose[d] the miner to falling from the pipe to the concrete floor as well as a sudden release of hot liquor from the scaled up line . . . . Alcoa’s management engaged in aggravated conduct constituting more than ordinary negligence in that the . . . agent observed the practice and failed to act.

Order No. 8778039.

## II.

### **The Judge’s Decision**

The Judge noted that under the Mine Act, the conduct of an agent of the operator, but not of a rank-and-file miner, can be imputed to the operator. The Judge recognized that Alvarado was neither designated nor paid as a Temporary Acting Supervisor, despite having been so designated in the past. The Judge also recognized that when considering agency, the Commission has historically focused on the miner’s function rather than his job title. After considering the evidence, the Judge determined that Alvarado was not an agent, and did not impute Alvarado’s conduct to Alcoa for purposes of negligence and unwarrantable failure. 39 FMSHRC at 135, 145-47.

First, the Judge considered whether McCaskill delegated supervisory authority when he instructed Alvarado to “keep an eye” on the contractors. The Judge credited Inspector Brett Barrick’s testimony that it is normal for a supervisor to instruct rank-and-file employees to “keep an eye” on contractors. The Judge also credited Alvarado’s testimony that instead of serving as an agent, he was merely present in the area because he had a task to complete (cleaning Riser 25 with caustic) following the blind swap. Therefore, the Judge found that McCaskill’s instruction did not delegate supervisory authority. Tr. 337-40, 403; 39 FMSHRC at 145.

Second, the Judge considered whether Alvarado’s tag-out authority indicated supervisory authority. The Judge recognized that Alvarado, in contrast to the contractors, possessed authority to tag out certain equipment. However, the Judge determined that the Secretary failed to show that Alvarado’s tag-out authority (“Level 2” tag-out authority) differed from that of other rank-and-file miners employed by the operator. Therefore, the Judge concluded that Alvarado’s tag-out authority did not indicate supervisory authority. 39 FMSHRC at 145-46.

Third, the Judge considered the testimony of the Turner employees regarding Alvarado’s status. Morales testified that he perceived Alvarado to be a supervisor and that McCaskill had designated Alvarado as the supervisor for the blind swap. However, the Judge noted that Morales had filed a lawsuit against Alcoa and Alvarado as a result of injuries Morales suffered from the accident. Therefore, the Judge determined that Morales would have an incentive to blame Alvarado for his injuries by testifying that Alvarado had supervisory responsibility. The Judge also noted that Morales’ testimony was contradicted by the testimony of other witnesses. For these reasons, the Judge discredited Morales’ testimony regarding Alvarado’s supervisory status. *Id.* at 146.

In addition, the Judge discredited Gaytan’s testimony that he perceived Alvarado to be “in charge” of the contractors. The Judge found that Gaytan perceived Alvarado to be a supervisor merely because Alvarado had reminded Gaytan to remove scale from the piping system. The Judge dismissed Gaytan’s testimony because Gaytan was already aware of this assignment prior to Alvarado’s instruction. *Id.* at 147.

Gaytan also testified that Alcoa would normally assign one of its employees to supervise the blind swap. However, the Judge noted testimony to the contrary by Dwayne Maly, the training superintendent of Alcoa, who testified that Alcoa normally would not assign an employee to supervise this task. While the Judge did not explicitly discredit Gaytan’s testimony regarding Alcoa’s normal practice, the Judge ultimately concluded that Alvarado was not an agent. *Id.* at 145-47.

Because the Judge concluded that Alvarado was not acting as an agent of Alcoa during the time in question, he did not impute Alvarado’s conduct to Alcoa for purposes of the operator’s negligence and unwarrantable failure. The Judge further disagreed with the MSHA inspector that the violations were a result of the operator’s high negligence and unwarrantable failure. The Judge found that the operator exhibited low negligence for Citation No. 8778037 and

Order No. 8778038, and moderate negligence for Order No. 8778039, and that none of the violations resulted from the operator's unwarrantable failure.<sup>8</sup> *Id.* at 147, 163-64.

### III.

#### Disposition

#### **A. Substantial evidence supports the conclusion that Alvarado was not an agent of the operator in connection with the relevant violations.**

##### 1. Citation No. 8778037

The citation alleges that the operator failed to ensure that Riser 25 was properly drained and empty. MSHA designated the citation as resulting from high negligence and an unwarrantable failure. In making these assertions, the Secretary seeks to impute Alvarado's conduct to the operator, arguing that Alvarado, a rank-and-file employee, supervised contractors from Turner on September 3, 2014. However, the citation, which by its terms only involves conduct by Alcoa's employees in draining the pipe and tagging out the piping system, does not encompass any conduct by the contractors.<sup>9</sup>

Furthermore, there is no evidence that any of the employees from Turner, who lacked tagging authority, assisted the operator's employees in draining and tagging out the piping system, and thus the issue of Alvarado's alleged supervisory role during the subsequent blind swap is not relevant. Accordingly, there is no basis for the Secretary's imputation of Alvarado's actions to the operator based on the allegation that he supervised the contractors.<sup>10</sup>

At trial, the Secretary argued that the operator was highly negligent because it failed to use special 3x2 drains or flush verification (flushing pipe with water) when draining Riser 25. While the Judge found that the operator was negligent in failing to use special 3x2 drains and flush verification for Riser 25, he concluded that such failures reflected low rather than high negligence because flush verification would not have prevented the accident, and the operator reasonably believed that flush verification was unnecessary. 39 FMSHRC at 151-52. The Secretary has not challenged these findings on appeal. Therefore, we cannot consider them here.

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<sup>8</sup> At the end of his decision, the Judge reduced the total penalty for these three violations from \$69,831 to \$6,224, partially due to his negligence and unwarrantable failure findings. 39 FMSHRC at 162-63.

<sup>9</sup> The record indicates that three employees of Alcoa—McCaskill, Alvarado, and Rudy Pena—were involved in isolating the piping system at issue and draining the pipes. Tr. 412, 414-18.

<sup>10</sup> The Judge found that although Gaytan mentioned a leak from the line when Alvarado was nearby, “[i]t was not established that Alvarado knew that the system was not properly verified.” 39 FMSHRC at 154. The Secretary has not challenged that finding, and so even if Alvarado were an agent, he had no knowledge to impute to the operator.

## 2. Order Nos. 8778038 and 8778039

Order No. 8778038 was issued because a contractor, Morales, failed to wear proper personal protective equipment. Order No. 8778039 was issued because a Turner employee, Cano, unsafely knelt on a pipe while jackhammering scale. Each order alleges that Alcoa engaged in aggravated conduct because an agent (Alvarado) observed the violative conduct but failed to take action. MSHA designated both orders as resulting from the operator's high negligence and unwarrantable failure, in part because MSHA imputed Alvarado's conduct to Alcoa. However, the Judge determined that Alvarado was not an agent of the operator. This finding is supported by substantial evidence.<sup>11</sup>

Section 3(e) of the Mine Act defines an "agent" as "any person charged with responsibility for the operation of all or part of a . . . mine or the supervision of the miners in a . . . mine." 30 U.S.C. § 802(e). In determining whether a miner was an agent of the operator, the Commission has focused on the miner's function rather than his job title. *REB Enterprises Inc.*, 20 FMSHRC 203, 211 (Mar. 1998). A Judge must make a factual determination when assessing whether the miner's function reflected supervisory responsibility. *Martin Marietta Aggregates*, 22 FMSHRC 633, 639 (May 2000).

The Secretary argues that the Judge ignored certain evidence that Alvarado supervised the Turner employees and thus acted as an agent for Alcoa. In particular, the Secretary claims that the Judge ignored McCaskill's instruction that Alvarado "keep an eye" on the contractors, and Gaytan's testimony that Alvarado observed and instructed the contractors.

We conclude that the Judge did consider these circumstances when determining Alvarado's supervisory status. 39 FMSHRC at 145-47. The Judge found that McCaskill's instruction did not delegate supervisory authority to Alvarado. Specifically, the Judge credited Alvarado's testimony that he was in the vicinity of the contractors not to supervise them but simply because he needed to insert caustic into Riser 25 after the blind swap had been completed. Tr. 403, 459; 39 FMSHRC at 145. We find no reason to set aside the Judge's decision to credit Alvarado's explanation for why he was near the contractors.

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<sup>11</sup> 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)). Substantial evidence has been found to be more than a scintilla, but less than a preponderance of the evidence. *Dynamic Energy, Inc.*, 32 FMSHRC 1168, 1173 (Sept. 2010) (citing *Richardson v. Perales*, 402 U.S. 389, 401 (1971)). The Commission has recognized that the "possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Id.* (quoting *Sec'y on behalf of Wamsley v. Mutual Mining, Inc.*, 80 F.3d 110, 113 (4th Cir. 1996)).

The Judge explained why he discredited the contradictory testimony of the Turner employees.<sup>12</sup> Morales testified that Alvarado supervised the contractors following McCaskill's departure from the mine. The Judge discredited his testimony because the Judge found that Morales, who had filed a lawsuit against Alvarado as a result of the accident, had an incentive to place supervisory responsibility on Alvarado. Gaytan testified that Alcoa's normal practice was to assign one of its employees to supervise the blind swap. However, the Judge implicitly credited the contradictory testimony of Maly, Alcoa's training supervisor, that Alcoa normally does not assign one of its employees to supervise a blind swap, but trusts the contractors to complete the assigned task. We find no reason to set aside the Judge's credibility determinations.<sup>13</sup> Tr. 164; 39 FMSHRC at 146-47.

The Judge further recognized that the Secretary had failed to show that Alvarado's tag-out authority differed from that of other rank-and-file miners. 39 FMSHRC at 145-46. The substantial evidence standard is met where the record is not "wholly barren of evidence" to sustain the Judge's finding. *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). We conclude that the record supports his finding that Alvarado's authority was no different than that of any other rank-and-file miner.

Therefore, we conclude that the Judge's determination that Alvarado was not an agent of Alcoa during the accident on September 3, 2014, is supported by substantial evidence.

**B. The Secretary failed to properly raise his alternative argument that Alcoa's failure to assign a supervisor to oversee the blind swap itself constituted high negligence and unwarrantable failure.**

On appeal, the Secretary argues that even if Alvarado were not an agent, the operator's failure to assign a supervisor for these violations itself indicated high negligence and unwarrantable failure. Therefore, the Secretary maintains, even if Alvarado were not an agent, we must remand the Judge's negligence and unwarrantable failure findings.

Although the Commission liberally provides leave to amend citations and orders, *Cyprus Empire Corp.*, 12 FMSHRC 911, 916 (May 1990), the Secretary never availed himself of the opportunity to add this alternative theory of negligence to the pleadings. Similarly, counsel for the Secretary did not present the theory at the hearing.

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<sup>12</sup> When evaluating evidence, we have stated that "credibility determinations reside in the province of the administrative law judge's discretion, are subject to review only for abuse of that discretion, and cannot be overturned lightly." *Dynamic*, 32 FMSHRC at 1174.

<sup>13</sup> In addition, Gaytan testified that he perceived Alvarado to be a supervisor because Alvarado instructed him to remove scale from a pipe. The Judge discounted this testimony, finding that Gaytan was aware that he needed to remove scale prior to Alvarado's instruction. In essence, the Judge implied that Alvarado's reminder to Gaytan to complete a preexisting assignment did not indicate that Alvarado exercised supervisory authority. 39 FMSHRC at 147. Under the deferential standard governing the review of credibility determinations, *see supra* note 12, we do not disturb this finding.

Because the Secretary failed to present the alternative theory of negligence at trial, the operator lacked sufficient notice of the charges to mount a defense against them. Due to the Secretary's failure, we decline to consider this alternative theory at this stage of the proceeding. See *Black Beauty Coal Co.*, 37 FMSHRC 687, 693-95 (Apr. 2015); *Oak Grove Res., LLC*, 33 FMSHRC 2657, 2664 (Nov. 2011); *Beech Fork Processing, Inc.*, 14 FMSHRC 1316, 1321 (Aug. 1992).

#### IV.

#### Conclusion

In the absence of this alternative argument, we are limited to considering only the agency argument made by the Secretary below. Upon reviewing the evidence in the record, we conclude that substantial evidence supports the Judge's determination that Alvarado was not an agent of the operator in connection with the accident on September 3, 2014. Therefore, we affirm the Judge's findings that Citation No. 8778037 and Order No. 8778038 involved low negligence while Order No. 8778039 involved moderate negligence. We also affirm his determination that none of the violations were a result of Alcoa's unwarrantable failure to comply with safety standards.

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

/s/ Mary Lu Jordan  
Mary Lu Jordan, Commissioner

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

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

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

May 10, 2018

JEFFREY PAPPAS

v.

CALPORTLAND COMPANY and  
RIVERSIDE CEMENT COMPANY

Docket No. WEST 2016-264-DM

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

**DECISION**

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” or “Act”). It concerns a complaint of discrimination filed by the Secretary of Labor on behalf of miner Jeffrey Pappas. The complaint alleged that Riverside Cement Company (“Riverside”) and CalPortland Company (“CalPortland”) discriminated against Pappas in violation of section 105(c) of the Mine Act.<sup>1</sup>

Respondent companies contested the allegations, and the matter proceeded to a hearing before a Commission Administrative Law Judge. Following the hearing, the Judge issued a written decision dismissing the complaint of discrimination and concluding that no discrimination occurred. 39 FMSHRC 718 (Mar. 2017) (ALJ). Thereafter, Pappas filed a petition for discretionary review *pro se*, which we granted. The Secretary did not file a petition on Pappas’ behalf and did not otherwise participate in the case on appeal.

After reviewing the record and considering the issues raised in the petition, we affirm the decision of the Judge.

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<sup>1</sup> Section 105(c)(1), 30 U.S.C. § 815(c)(1), provides:

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



## I.

### **Factual and Procedural Background**

The Oro Grande Cement Plant is a surface quarry and cement manufacturing facility located in California that was operated by Riverside until October 2015. *Id.* at 721. Pappas worked at the Oro Grande Plant for approximately 16 years.

On October 1, 2015, CalPortland took over the Oro Grande Plant from Riverside, completing an asset purchase agreement. Pappas had applied to continue working at the mine with CalPortland, but he was not offered a position. Pappas lost his job upon the transfer of assets. The Secretary's complaint alleged that Pappas was not selected to be hired by CalPortland due to the unlawful discriminatory actions of Riverside and CalPortland.

#### **A. Pappas' prior discrimination claim and reinstatement**

In April 2014, Pappas had been discharged from his position with Riverside purportedly for disobeying the instruction of management to discontinue use of his personal truck on mine property. Thereafter, Pappas filed a complaint of discrimination with the Mine Safety and Health Administration ("MSHA") alleging that his discharge was actually in retaliation for his recent safety complaints. The parties subsequently reached an agreement to settle that complaint. Pappas was reinstated to the mine in January 2015.

The 2014 discrimination case concerned safety complaints Pappas made in December 2013 regarding a train operated in proximity to miners that Pappas had feared would hit him and other miners working with him. After a safety review, requested by Pappas, Riverside's safety director determined that all work was performed consistent with company policy and MSHA regulations. Pappas addressed the incident at the next monthly safety meeting. He accused his immediate supervisor of falsely representing to the safety director that he had failed to bring the issue to the supervisor's attention, and of brushing off the concerns Pappas expressed earlier. Pappas testified that David Salzborn, the plant manager, was visibly angered by these public remarks.

A few weeks later, Pappas spoke with an MSHA inspector at the mine on a regular inspection and communicated his safety concerns. After an investigation, the inspector issued citations to Riverside concerning the operation of the train.

Shortly thereafter, Riverside management instructed Pappas not to use his truck on mine property. Pappas continued to use his truck on mine property despite this instruction. On April 4, 2014, he was discharged for alleged "gross insubordination." Pappas filed a discrimination complaint with MSHA alleging his termination was actually in retaliation for his protected activities.

After an investigation, MSHA filed a discrimination complaint on Pappas' behalf. Thereafter, Riverside settled the case by agreeing to reinstate Pappas to his former position,

expunge all records related to his discharge, and to pay a civil penalty. Pappas returned to work on January 5, 2015.

### **B. Events after Pappas' reinstatement**

Pappas testified that he faced harassment from his co-workers after his reinstatement. In early February 2015, Pappas met with Jamie Ambrose, Riverside's human resources manager, to inform her of the perceived harassment. In response, Ambrose sent instructions to Pappas' supervisor to monitor the work environment and to report issues to human resources. Pappas decided to eat lunch by himself to reduce his contact with co-workers.

On April 30, 2015, Pappas was assigned to fix a broken dust door along with Stacey Portis. Portis, however, failed to arrive at the job site during the shift. As a result, Pappas was unable to complete the task and became upset. At the end of the day, Pappas confronted Portis in the breakroom. The two engaged in a heated exchange that lasted several minutes. Pappas cursed Portis, using obscenities and referring to him as "lazy," gathered his things, slammed his locker, and left the plant.

The next day, Portis filed a complaint with Riverside, stating that Pappas had verbally assaulted him. After Riverside's investigation, management suspended Pappas for five days, required him to undergo a psychological evaluation, and disqualified him from returning as a dust collector.

On June 22, 2015, Pappas returned to work. The United Steelworkers Union filed grievances concerning the discipline imposed upon him.

On June 30, 2015, CalPortland signed the asset purchase agreement with Riverside, which included an agreement to purchase and take possession of the physical assets at the Oro Grande Plant at a later date. Gov. Ex. 2.

On August 27, 2015, Riverside management met with union officials to resolve pending grievances. Riverside and the Union settled the Pappas grievance by Riverside paying Pappas for two days of the original five day suspension. At the conclusion of the meeting, Ron Espinosa, the union's international representative, called Pappas to join the group. In front of all those in attendance, Espinosa instructed Pappas to change his behavior at work going forward.

### **C. The decision not to rehire Pappas**

On September 1, 2015, Ambrose accepted CalPortland's offer to be its human resources manager at the plant. On September 3, Ambrose met with Steve Antonoff, CalPortland's vice-president of human resources. Together they went through a list of current Riverside employees. For each employee, Ambrose recommended either hiring that employee or not hiring that employee, or she stated that she was "unsure."<sup>2</sup> Ambrose stated that she was unsure about

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<sup>2</sup> CalPortland used this process in lieu of reviewing Riverside's employment files.

Pappas. Antonoff highlighted every name that did not get a positive recommendation on a spreadsheet, making no distinction between a “no” and an “unsure.”

In mid-September, CalPortland informed all Riverside miners that they would need to apply for a position with CalPortland if they wished to continue to be employed at the mine. Miners, including Pappas, filled out applications and sat for brief interviews.

Rich Walters, CalPortland’s plant manager (replacing Salzborn), and Betsy Lamb, a CalPortland vice-president, were responsible for staffing the mine. Salzborn informed Walters that there were two problem employees at the plant — one of whom was Pappas. Salzborn informed him that Pappas had been disciplined for violating work rules and insubordinate behavior.

Walters delegated the job of selecting employees to Lamb. She was provided with the interviewers’ notes, the applications, and Ambrose’s recommendations. On September 25, Lamb presented her list of recommended hires of hourly employees to Walters, who agreed to it completely. In total, CalPortland hired 125 employees, about 100 of which were hourly miners. CalPortland did not offer jobs to 15 applicants from Riverside, including Pappas. Lamb testified that Pappas’ application demonstrated no progression in employment or salary and the answers he gave during his interview did not reflect the type of answers CalPortland sought.

On February 11, 2016, the Secretary filed a discrimination complaint with the Commission on behalf of Pappas.<sup>3</sup> The complaint alleged that CalPortland discriminated against Pappas when he was identified as someone who should not be retained and who was in fact not hired by CalPortland. The Secretary later amended the complaint to add Riverside as a respondent.

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<sup>3</sup> The Secretary also filed an application for temporary reinstatement pursuant to section 105(c)(2). A Commission Judge determined that the complaint was not frivolously brought and granted Pappas temporary reinstatement. *Sec’y of Labor on behalf of Pappas v. CalPortland Co.*, 38 FMSHRC 53 (Jan. 2016) (ALJ). The Commission affirmed. *Sec’y of Labor on behalf of Pappas v. CalPortland Co.*, 38 FMSHRC 137 (Feb. 2016).

The D.C. Circuit reversed the Commission, vacated the Judge’s order, and determined that Pappas, as an applicant for employment, was not eligible for temporary reinstatement. *CalPortland Co. v. FMSHRC*, 839 F.3d 1153 (D.C. Cir. 2016) (concluding that Pappas was not a miner at CalPortland, but instead was an applicant for employment and accordingly was not eligible for the temporary reinstatement remedy).

## II.

### The Judge's Decision

#### A. Riverside

The Judge first considered whether the Secretary had established the elements of a prima facie case of discrimination against Riverside.

##### 1. Prima Facie Case

A complainant establishes a prima facie case under section 105(c) by presenting evidence sufficient to support a conclusion that the individual engaged in protected activity; that there was an adverse action; and that the adverse action complained of was motivated in any part by that activity. *See Turner v. Nat'l Cement Co. of California*, 33 FMSHRC 1059, 1064-67 (May 2011); *Sec'y on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds* 663 F.2d 1211 (3d Cir. 1981); *Sec'y on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981).

The Judge found that Pappas engaged in activities protected by the Mine Act, including filing a discrimination complaint with MSHA and complaining to Riverside management that he faced harassment from co-workers following his reinstatement to the mine.<sup>4</sup> 39 FMSHRC at 739. The Judge also found that the negative employment references from Ambrose and Salzborn were adverse actions.<sup>5</sup> *Id.* at 740.

The Judge next considered whether the Secretary demonstrated a relationship between the protected activities and the adverse actions.<sup>6</sup> He concluded that Salzborn exhibited animus toward Pappas' protected activities. The Judge relied on Pappas' testimony that Salzborn was angered by Pappas' public accusations regarding management's response to the train incident. *Id.* at 749; Tr. 75-76. He also relied on Salzborn's statements to Walters, which referred to the circumstances surrounding Pappas' prior discharge in "deliberate disregard" of the settlement

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<sup>4</sup> Both Ambrose and Salzborn knew of Pappas' prior protected activities: Salzborn was the plant manager who terminated Pappas in 2014, and Pappas complained to Ambrose about harassment following his reinstatement. *Id.* at 741.

<sup>5</sup> An adverse action is "an act of commission or omission by the operator subjecting the affected miner to discipline or a detriment in his employment relationship." *Sec'y of Labor on behalf of Jenkins v. Hecla-Day Mines Corp.*, 6 FMSHRC 1842, 1847-48 (Aug. 1984).

<sup>6</sup> In evaluating whether a causal relationship between Pappas' protected activity and Riverside's action existed, the Judge considered the four *Chacon* factors: (1) knowledge of the protected activity; (2) hostility or animus toward the protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the complainant. 39 FMSHRC at 741 (citing *Sec'y of Labor on behalf of Chacon*, 3 FMSHRC 2508, 2510 (Nov. 1981)).

agreement. 39 FMSHRC at 749-50. Furthermore, the Judge found that Salzborn's declaration that Pappas was one of two "problematic" employees was somewhat illustrative of disparate treatment. *Id.* at 753. The Judge also found a coincidence in time between the protected activity and Riverside's adverse actions. *Id.* at 751. The Judge concluded that the Secretary established the necessary elements of a prima facie case based on Salzborn's conduct.

However, the Judge found that the Secretary failed to substantiate allegations that Ambrose manifested hostility toward Pappas. The Secretary had alleged that Ambrose failed to adequately investigate Pappas' reports of harassment and that this was indicative of hostility toward his protected activity.<sup>7</sup> The Judge disagreed. He concluded that Ambrose responded to Pappas' concerns: She took steps to see that Pappas' direct supervisor would monitor the situation and notify human resources if the problems persisted. The Judge noted that Ambrose did not hear back from Pappas, his managers, or his co-workers after their February meeting. The Judge also found it persuasive that Pappas described Ambrose's demeanor toward him as "polite" and "professional." Importantly, the Judge specifically credited Ambrose's testimony that her decision not to recommend that CalPortland hire Pappas was based on his disciplinary issues and not protected activity. *Id.* at 754. Accordingly, the Judge found neither indications of discriminatory animus from Ambrose's conduct nor a motivational nexus between the negative reference by Ambrose and Pappas' prior protected activity. *Id.* at 743.

In sum, the Judge found that the Secretary established a prima facie case against Riverside only on the basis of Salzborn's conduct, holding that his "warning to CalPortland [about Pappas] was in part motivated by discriminatory intent." *Id.* at 756.

## 2. Affirmative Defense

The Judge next considered whether Riverside established an affirmative defense. An operator may defend affirmatively against a prima facie case by proving that it was also motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. *See Robinette*, 3 FMSHRC at 817-18; *Pasula*, 2 FMSHRC at 2799-800; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642-43 (4th Cir. 1987) (applying *Pasula-Robinette* test).

Riverside asserted that Salzborn and Ambrose would have provided the negative references based on Pappas' unprotected activity alone — his recent suspension for a violation of the hostile work place rule was fresh in their minds when they provided their opinions.

The Judge found the defense to be based in fact; Salzborn and Ambrose had attended the third step grievance meeting regarding Pappas' suspension shortly before providing their negative references. *Id.* at 756. The Judge credited Salzborn's testimony, finding that Pappas' issues were recent, recurrent, and unprecedented in provoking a union representative to summon Pappas, a union-represented miner, to a grievance meeting and then directly instructing him to

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<sup>7</sup> The Judge noted that what Pappas perceived to be harassment was not clearly related to his protected activity, and instead may have been reasonably interpreted by others to be "banter" due to the topics at issue and prior relationships of the parties. *Id.* at 744.

improve his behavior in the presence of management representatives. *Id.* at 757. The Judge found that Riverside successfully established an affirmative defense and held that “[w]hile Riverside may have been motivated in part by discriminatory animus, I find that the operator would have given the same negative references as a result of Pappas’ unprotected activity alone.” *Id.* at 758.

Therefore, the Judge concluded that the Secretary failed to demonstrate that Riverside unlawfully discriminated against Pappas in violation of the Mine Act.

## **B. CalPortland**

The Judge found that CalPortland’s failure to hire Pappas was an adverse action. However, he concluded that the Secretary failed to prove that its decision was motivated by Pappas’ protected activity. The Judge also concluded that, although Ambrose was acting as an agent for CalPortland when she provided the negative employment reference, she did not demonstrate any animus toward Pappas’ protected activity.

The Judge further found that the Secretary failed to demonstrate that any other CalPortland agent had knowledge of, and animus towards, Pappas’ protected activity or that Pappas was treated any differently than similarly situated employees. *Id.* at 762.

The Judge found that the Secretary did not establish a prima facie case of discrimination against CalPortland. He found further that even if a prima facie case had been established, CalPortland had proven an affirmative defense. The Judge credited Lamb’s testimony that Pappas provided poor answers to interview questions and that his work history contained “red flags” such as a failure to progress, indicating possible performance issues. *Id.* at 767.

## **III.**

### **Disposition**

#### **A. The claims against Riverside**

Pappas argues that the Judge erred in crediting the testimony of Ambrose and Salzborn in support of the Judge’s conclusion that Riverside was not liable for discrimination.<sup>8</sup>

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<sup>8</sup> On review, CalPortland argues that Pappas’ *pro se* petition for discretionary review failed to comply with the statutory requirements set forth at 30 U.S.C. § 823(d)(2)(A). Our practice has been to liberally construe the filings of *pro se* litigants. *See Rostovsky Coal Co.*, 21 FMSHRC 1071 (Oct. 1999); *see also Original Sixteen to One Mine, Inc.*, 23 FMSHRC 1217 (Nov. 2001). We find that Pappas sufficiently identifies and supports assignments of error in his petition; Pappas challenges the Judge’s credibility determinations and cites evidence in the record in support of his allegations. Accordingly, we review these issues.

## 1. Ambrose's testimony

Pappas alleges that the Judge erred in crediting Ambrose's testimony because it was (1) inconsistent with statements she made to the MSHA investigator and (2) inconsistent with Antonoff's testimony.

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). Accordingly, the Commission reviews a Judge's credibility determinations under an abuse of discretion standard. *See Jim Walter Res., Inc.*, 37 FMSHRC 1868, 1871 (Sept. 2015).

We conclude that Pappas has not met the burden of showing that the Judge erred in concluding that Ambrose's testimony was credible. The discrepancies between Ambrose's hearing testimony and other record evidence were considered and reconciled by the Judge. 39 FMSHRC at 753-54.

Ambrose testified that she provided CalPortland with a negative employment reference for Pappas because he had recently been suspended for engaging in threatening and intimidating behavior. *Id.* at 755-56. In crediting Ambrose's testimony, the Judge considered that it departed from her initial statements to the MSHA investigator: Ambrose originally stated that she had no involvement in CalPortland's hiring process and did not speak with CalPortland management about Riverside hourly employees. Gov. Ex. 17 (November 6, 2015, interview). However, in a subsequent MSHA interview, she acknowledged that she had in fact provided employment references for Riverside hourly employees to CalPortland. Gov. Ex. 18 (November 17, 2015). Ambrose clarified that she initially provided different information to the MSHA investigator because she had misunderstood what the investigator was asking. She understood him to have asked if she provided employee files or details regarding job performance, which she maintained she did not. Gov. Ex. 18; Tr. 715.

The Judge reasonably exercised his discretion when he credited Ambrose's hearing testimony and her explanation for the apparent conflict. The Judge noted that while Ambrose's prior statements were at times inconsistent, her rationale for providing a negative reference for Pappas did not change, and her testimony at the hearing was "reasonable, detailed, and consistent." *Id.* at 754.

Pappas also asserts that the Judge erred in crediting Ambrose's testimony because it differed at times from the testimony of Steve Antonoff (CalPortland's Vice-President for Human Resources). He points out that Antonoff testified that Ambrose sometimes explained why she had provided a negative reference for a particular employee (in contrast with Ambrose's insistence that she had not). Tr. 832-33. However, with respect to Ambrose's recommendation of Pappas, Antonoff testified that Ambrose provided no additional information to explain her negative reference. Tr. 821. Therefore, Ambrose's testimony and Antonoff's testimony were consistent with respect to the negative reference she provided for Pappas. *See* Tr. 690. We find that the Judge did not abuse his discretion in crediting Ambrose's account.

For these reasons, we conclude that the Judge did not err in crediting Ambrose's hearing testimony. Because the Judge found that Ambrose was not motivated by Pappas' protected activity when she provided the negative employment reference, he found that the Secretary and Pappas failed to establish that Ambrose's conduct was part of the prima facie case of discrimination. We decline to disturb this ruling.

## 2. Salzborn's testimony

The Judge next considered whether Riverside established an affirmative defense for the prima facie case of discrimination concerning Salzborn's negative reference of Pappas. 39 FMSHRC at 756. Riverside asserted that Salzborn, the plant manager, would have provided the same reference even if Pappas had not engaged in protected activities.<sup>9</sup> *Id.* The Secretary countered that Riverside's proffered rationale was mere pretext.

The Judge credited Riverside's explanation; he found that Salzborn would have given a negative reference for Pappas based on his unprotected activity alone. The Judge concluded that Riverside's proffered reasons were "plausible and had a basis in fact." 39 FMSHRC at 757 (citing *Turner*, 33 FMSHRC at 1073) ("A plaintiff may establish that an employer's explanation is not credible by demonstrating 'either (1) that the proffered reasons had no basis *in fact*, (2) that the proffered reasons did not actually motivate [the adverse action], or (3) that they were *insufficient* to motivate [the adverse action].'" (emphasis included).

Salzborn testified that he provided the negative employment reference based on Pappas' history of discipline for behavioral problems. Tr. 633. The most recent disciplinary issue was still fresh in his mind due to the recent settlement of Pappas' related grievance and the unusual step Espinosa (the Union's International Representative) took in directly addressing Pappas about his behavior in front of attendees at the grievance meeting. Tr. 633, 646-47. In addition, Salzborn recalled Pappas' 2010 suspension and removal from the shipping department, which he testified was the result of Pappas' behavior toward staff and customer truck drivers. Tr. 633. Furthermore, Salzborn recalled that a department manager had complained that Pappas was "causing problems" when he traveled off his assigned job site to other areas of the mine in his truck. Tr. 634-35. As a result, Salzborn had ordered him to cease use of his truck on mine property. Salzborn testified that despite this warning, Pappas continued using his truck. Tr. 637-39. *See supra* at 2.

Pappas argues that the Judge erred in crediting Salzborn's testimony, arguing essentially that Salzborn's testimony was unreliable because he was motivated, in part, by animus against Pappas' prior engagement in protected activities.

The Judge found that although Salzborn harbored some animosity toward Pappas' prior engagement in protected activity, Salzborn would have provided Pappas with a negative

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<sup>9</sup> Salzborn retired from Riverside at the end of 2014, and then returned as interim plant manager in 2015 to assist in the transfer of assets to CalPortland.



employment reference to CalPortland even if Pappas had not engaged in protected activities.<sup>10</sup> The Judge was persuaded to believe Salzborn because his asserted rationale — Pappas’ history of discipline — was corroborated by the record.

We conclude that the Judge acted within his discretion in crediting Salzborn’s testimony. We do not find reason in the type of inconsistencies in the record or Salzborn’s testimony to disturb the Judge’s findings. As a result, we affirm the Judge.

## **B. The claims against CalPortland**

The Judge found that the Secretary failed to establish a prima facie case for discrimination against CalPortland. Although the Judge found Ambrose was a “de facto agent of CalPortland” at the time she provided the negative references, 39 FMSHRC at 761, he further found that she was not motivated by discriminatory animus. We have previously explained that this finding was within the Judge’s discretion. *See supra* at 9-11. We affirm the finding as it relates to CalPortland’s liability.

We also affirm the Judge’s holding that CalPortland was not liable for Salzborn’s conduct. The Secretary did not claim that Salzborn was an agent of CalPortland. Moreover, the Judge explicitly ruled that he was not an agent of CalPortland whose knowledge and animus could be imputed to that operator. 39 FMSHRC at 760-62. Pappas has not sought review of this finding. Thus, it was neither contended nor demonstrated that Salzborn was an agent of CalPortland.

For these reasons, we affirm the Judge’s finding that the Secretary failed to successfully establish a prima facie case of discrimination against CalPortland. In the absence of a prima facie case of discrimination, Pappas does not have a valid claim against CalPortland.

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<sup>10</sup> The Commission has recognized that, because the Judge “has an opportunity to hear the testimony and view the witnesses[,] he [or she] is ordinarily in the best position to make a credibility determination.” *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1878 (Nov. 1995) (quoting *Ona Corp. v. NLRB*, 729 F.2d 713, 719 (11th Cir. 1984)), *aff’d sub nom. Sec’y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998).

### III.

#### **Conclusion**

We conclude that although Pappas did identify some inconsistencies in witness testimony, the Judge's decision demonstrates that he considered those inconsistencies and reconciled witness testimony against the record evidence. Accordingly, the Judge acted within his discretion as the finder of fact to make credibility determinations. The Judge's decision is hereby affirmed.

/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, concurring in result,

I agree with the conclusions of my colleagues, but write separately to address what I consider to be error in the Judge's analysis of Riverside Cement Company's affirmative defense.<sup>1</sup> I believe that the Judge's finding that Oro Grande plant manager David Salzborn, individually, would have supplied a negative reference based on Jeffrey Pappas's unprotected activity alone is not supported by substantial evidence. Nevertheless, the issue before the Commission is whether Riverside (not Salzborn or Ambrose individually) established an affirmative defense. As explained below, I conclude that substantial evidence supports the Judge's ultimate conclusion that Riverside established an affirmative defense. Thus, the Judge's error in finding that Salzborn would have given a negative reference based on unprotected activity alone is not outcome determinative.

### **A. The Prima Facie Case**

I begin my analysis by reviewing the Judge's findings regarding Pappas's prima facie case of discrimination against Riverside.<sup>2</sup> Here, the Judge relied on the discriminatory animus exhibited by Salzborn in providing a negative job reference to CalPortland's incoming plant manager Rich Walters. As the Judge noted, Salzborn described Pappas as a "problematic employee" and identified several disciplinary incidents involving Pappas including his alleged "gross insubordination" for use of a company truck on mine property. This incident had led to Pappas's termination in 2014, his first section 105(c) complaint to MSHA, and the settlement in which Pappas was reinstated and his personnel record was expunged of all records relating to discipline for use of the truck. 39 FMSHRC at 724, 740.

In finding animus on the part of Salzborn, the Judge relied on Salzborn's expression of anger directed at Pappas at a safety meeting following an incident with the train at the mine's

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<sup>1</sup> I agree with my colleagues' conclusion that the Judge did not err in his findings that the Secretary and Pappas failed to establish a prima facie case with regard to alleged discrimination by other Riverside employees including Jamie Ambrose, Riverside's human resources manager, and by CalPortland Company.

<sup>2</sup> Like the Judge and my colleagues, I apply the Commission's analytic framework for discrimination cases arising under section 105(c) of the Mine Act, 30 U.S.C. § 815(c), set forth in *Sec'y on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds* 663 F.2d 1211 (3d Cir. 1981) and *Sec'y on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981). Under the *Pasula-Robinette* test, it is first determined whether the complainant miner has made out a prima facie case of discrimination by showing that he engaged in protected activity, and that there was adverse action motivated in any part by the protected activity. If the complainant makes out a prima facie case, the operator may raise an affirmative defense by establishing that it was also motivated by the miner's unprotected activity, and would have taken the adverse action based on the unprotected activity alone.

pack house. *Id.* at 723-24, 749.<sup>3</sup> In addition, the Judge found that Salzborn's mention to Walters of Pappas's discipline for use of the company truck represented animus, in that Salzborn disregarded Riverside's agreement to expunge all reference to the events that led to Pappas' prior termination. As the Judge stated, "Salzborn's deliberate disregard of a Commission order and settlement resolving Pappas's section 105(c) claim is an expression of animus toward Pappas's section 105(c) rights that should not be tolerated." *Id.* at 750.

The Judge also relied on Salzborn's disparate treatment of Pappas as demonstrative of animus. Salzborn had identified only one hourly employee to Walters as a problem – Pappas. Yet, Jamie Ambrose testified that there were at least three other hourly employees with "multiple or recent disciplinary issues" and numerous others with related problems who she had identified to CalPortland. *Id.* at 753. These disciplinary issues were significant enough for Ambrose to provide those employees with negative references, as she did with Pappas. Furthermore, while Salzborn testified that Pappas's disciplinary problems were at the forefront of his mind as he had recently attended Pappas's grievance meeting, Salzborn had also contemporaneously attended grievance meetings involving other miners with disciplinary issues. *Id.* at 753 n.32. He did not give negative recommendations about those other miners.

Although the Judge found that Salzborn exhibited animus based on his anger at the safety meeting, the Judge did not mention an even greater basis for Salzborn's animus towards Pappas. A few weeks after the train incident, Pappas approached an MSHA inspector at the mine, and reported the incident. After speaking with Pappas, the inspector began an investigation of the train incident, which resulted in the issuance of citations to Riverside, the temporary closure of the shipping facility, and the mandatory installation of an additional lock on the rail tracks. *Id.* at 724. Shortly after receiving these citations, Salzborn restricted Pappas' ability to use the company truck. When Salzborn discovered that Pappas used the truck again, he terminated Pappas for "gross insubordination." *Id.*; Tr. 648. In settling the resulting section 105(c) discrimination complaint, Riverside was required to pay a \$5,000 penalty in addition to reinstating Pappas with back pay and expunging his personnel file of related records.

The clear implication of the settlement was that Salzborn's firing of Pappas for "gross insubordination" was a pretext for unlawful discrimination. The acceptance of the settlement by Riverside amounted to a rebuke of Salzborn's management of the plant. The evidence certainly supports the Judge's conclusion that Salzborn's statement to Walters about Pappas was in part motivated by animus against his protected activity.

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<sup>3</sup> In December 2013, Pappas was working with two other miners replacing filters on the chutes which loaded rail cars at the mine's pack house. There were three tracks at that location, and the crew was working on manlifts elevated above two of the tracks. A train of cars emerged, backing up on the one track which fed the three tracks, heading for the location where the crew was. There was no lock on that track, and no miner stationed as a lookout at the back of the train, and thus no way to notify the locomotive operator to stop because there were other miners working on the tracks. Pappas's crew were not able to move out of the train's way, but fortunately the train ended up coming down the third track and stopping, so no one was injured. Pappas felt that his life and the lives of his co-workers had been endangered by the moving train. 39 FMSHRC at 723.

## **B. The Affirmative Defense – Salzborn**

In evaluating whether Riverside established an affirmative defense, the Judge expressly found that Salzborn would have provided Pappas with a negative reference based on Pappas' unprotected activities alone. 39 FMSHRC at 758. Salzborn testified about three disciplinary incidents that formed the basis of his negative reference – the most recent incident involving Pappas's dispute with Stacy Portis, a prior 2010 suspension, and the aforementioned truck incident. Tr. 638-39.

It is the Commission's task to review the Judge's finding to determine if it supported by substantial evidence. 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). In reviewing the whole record, we must consider anything in the record that "fairly detracts" from the weight of the evidence. *Midwest Material Co.*, 19 FMSHRC 30, 34 n.5 (Jan. 1997) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)).

I find that the Judge erred in failing to consider that Salzborn's asserted rationale for the negative reference included, in part, events that Riverside was ordered to expunge from Pappas' disciplinary history. 39 FMSHRC at 756-57. One cannot rely on an event that the Commission had previously ordered to be expunged from a miner's disciplinary history in a subsequent case to establish that the miner had a history of disciplinary issues.

The Judge further erred when he failed to consider his previous finding that Salzborn had disparately treated Pappas, *see id.*, when he analyzed Riverside's affirmative defense. Specifically, in the context of the affirmative defense the Judge held that there was "very little evidence of disparate treatment" and "the Secretary's case lacked detailed comparisons between employees who were and were not recommended." *Id.* at 757. However, as noted, the Judge had already found disparate treatment of Pappas on the part of Salzborn. Ambrose provided negative references for multiple employees with disciplinary issues, but Salzborn singled out Pappas. It was Riverside's burden to establish an affirmative defense, not the Secretary's. *See Pasula*, 2 FMSHRC at 2799; *Robinette*, 3 FMSHRC at 817-18. Accordingly, the fact that the Secretary did not provide a detailed comparison of employees who were and were not recommended is irrelevant.

For these reasons I find that evidence in the record as well as the Judge's own findings detract from his conclusion that Salzborn would have given a negative recommendation about Pappas based on unprotected activity alone.

## **C. The Affirmative Defense – Riverside**

However, whether Salzborn would have given a negative recommendation based on Pappas' unprotected activity alone is not determinative. The question is whether *Riverside* would have provided a negative recommendation to CalPortland about Pappas based on his unprotected activity alone. Accordingly, the negative reference supplied by Ambrose is also relevant to the establishment of an affirmative defense. To analyze this issue, we can look at the relative weight of the statements of Salzborn and Ambrose.

CalPortland had established a system for the evaluation and hiring of Riverside's hourly employees. Betsy Lamb, CalPortland's vice president of organizational planning and development, made recommendations to Walters based on the job applications and interviews, with additional input provided by Steve Antonoff's summary of Ambrose's recommendations. Walters accepted all of Lamb's recommendations. Lamb testified that she did not recommend Pappas because his application did not demonstrate that he was progressing as an employee, and because she believed that he answered the interview questions poorly. 39 FMSHRC at 731-32.

Although Ambrose's recommendation about Pappas had some significance to Lamb's decision, there is insufficient evidence in the record to demonstrate any effect by Salzborn's statement. Salzborn's negative reference was made to Walters, who was not called as a witness. The only evidence from Walters is the MSHA investigator's interview summary, Gov. Ex. 22, and the investigator's hearsay testimony. According to the investigator, Walters said that he did not personally make any decisions about hourly employees; he left that up to Lamb. Walters acknowledged talking with Salzborn, and that Salzborn had told him that Pappas was not a good employee. Although Salzborn's statement made Pappas a "No", Pappas was already on the "No" list compiled by Human Resources. *Id.* Thus, since Walters followed all of Lamb's recommendations for the hiring of hourly employees, and since Lamb did not recommend that Pappas be hired, Salzborn's negative reference was ultimately inconsequential.

Accordingly, I believe that the relative weight of the recommendations by Salzborn and Ambrose support the Judge's conclusion that Riverside established an affirmative defense. Riverside's negative reference of Pappas would have been made based on unprotected activity alone.

Hence, I concur with the majority that the Judge's decision should be affirmed in result.

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

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

June 27, 2018

SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA),  
on behalf of ERIC GREATHOUSE  
and UNITED MINE WORKERS OF  
AMERICA INTERNATIONAL UNION

v.

MONONGALIA COUNTY COAL  
COMPANY, CONSOLIDATION COAL  
COMPANY, MURRAY AMERICAN  
ENERGY, INC., and MURRAY ENERGY  
CORPORATION<sup>1</sup>

Docket No. WEVA 2015-904-D

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

**DECISION**

In these proceedings, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act” or “Act”), the Administrative Law Judge found that the operators of six mines owned and operated by Murray Energy Corporation (“the Operators”) violated section 105(c) of the Mine Act, 30 U.S.C. § 815(c), by interfering with miners’ protected rights. 38 FMSHRC 941 (May 2016) (ALJ). Section 105(c)(1) provides:

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this chapter because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this chapter, 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 811 of this title or because such miner, representative of miners or applicant

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<sup>1</sup> Additional captions in these cases are listed in Appendix A to this order.

for employment has instituted or caused to be instituted any proceeding under or related to this chapter or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this chapter.

30 U.S.C. § 815(c)(1).

The cases arise from the Operators' implementation of bonus plans at their respective mines. The Operators and the United Mine Workers of America ("UMWA" or "the Union") filed cross petitions for review of the Judge's decision, which the Commission granted. We briefly respond to the Union's petition and then turn to the Operators' claim.

### **The UMWA's Request for a Make-Whole Remedy**

UMWA seeks a make-whole remedy for miners who did not receive bonuses under the plans' provisions. We deny that request. The Union did not present evidence regarding miners who suffered lost bonuses. As the Secretary's brief in response to UMWA's opening brief pointed out, proof of such relief would require a remand and re-opening the record to present additional evidence of each instance of denied bonus and proof of the lost payment amount, beyond the scope of issues raised in the initial hearing before the Judge. The Union had the opportunity to submit this issue for consideration by the Judge, but it did not. Accordingly, we find that the Union waived this argument, and the Commission declines to consider it on appeal.

### **The Operators' Challenge to the Decision of the Judge Below**

Regarding the Operators' claim, the parties stake their positions on clear and sharply contrasting views of section 105(c). The Secretary and the UMWA contend that an action interferes with the exercise of protected rights if the action tends to interfere with the exercise of protected rights and is not justified by a legitimate and substantial reason whose importance outweighs harm caused to the exercise of protected rights. They assert motivation or causation is not an element of such a violation. The Operators, on the other hand, contend that the Judge erred in the application of section 105(c). They contend that section 105(c) contains a necessary element of motive or causation. Thus, they argue that the complaining party must demonstrate that an operator's action arose because of the exercise of protected activity. The Judge adopted the position asserted by the Secretary and the UMWA.

The Commissioners are divided evenly regarding the correct analytical framework to apply and whether the Operators violated section 105(c).

Commissioners Jordan and Cohen would find that the language of section 105(c) is ambiguous and would defer to the Secretary's reasonable interpretation. They would apply the *Franks* test, *infra* slip op. at 8, and conclude that substantial evidence supports the Judge's determination that the Operators violated section 105(c) by implementing bonus plans which interfered with miners' protected rights under the Mine Act.



Acting Chairman Althen and Commissioner Young would find that the language of section 105(c) is plain and requires proof of motivation related to protected activity to establish a claim of interference and would conclude that the Secretary has failed to prove motivation in this case. Thus, they would reverse the Judge's finding of interference in violation of section 105(c).

The effect of the split decision is to allow the Judge's conclusions on the violations and penalty assessments to stand as if affirmed. *Pennsylvania Electric Co.*, 12 FMSHRC 1562, 1563-65 (Aug. 1990), *aff'd*, 969 F.2d 1501 (3d Cir. 1992).

## I.

### **Background and Proceedings Below**

#### **A. Background**

In 2014, the Operators decided to implement bonus plans at each of the six mines. The bonus plans provided that miners would earn additional pay if they met specified production goals. In October or November 2014, the Operators held a meeting at each of the mines with the UMWA representatives to present the bonus plans. During these meetings, the UMWA representatives argued that the bonus plans would have a negative effect on mine safety and miners' willingness to exercise their rights. Tr. 33-34, 146-47, 149, 208-09, 282, 288.

The Operators made minor changes to their initial proposals that somewhat narrowed plan provisions that disqualify entire crews from earning bonuses if an injury occurred during a shift. However, miners continued to raise safety concerns during subsequent meetings with management. Jt. Ex. 1A, Stip. 28; Jt. Ex. 14-19; Tr. 36-37, 151. At three mines, miners voted on whether to approve the bonus plans, and two of the three rejected the plans. Jt. Ex. 1A, Stips. 35, 47; Tr. 37, 210-11. The Operators nonetheless implemented the bonus plans at all six mines between January 15 and 19, 2015.

Arbitration decisions under the collective bargaining agreement between the Operators and the UMWA have since led to the discontinuation of the bonus plans at the Marion County Mine in July 2015, at the Powhatan No. 6 Mine in September 2015, and at the Harrison County Mine in December 2015. 38 FMSHRC at 946. The plans remained in effect at the other three mines until the Judge's decision in this case in May 2016. *Id.*

The plans at the six mines were generally identical. Miners in a production crew qualified for bonuses that increased by steps according to how far the working face advanced during a shift. To qualify for the bonus, miners had to be "physically present the entire shift." 38 FMSHRC at 943; Jt. Exs. 20-25. Miners working outby the face were eligible to receive 10% of the bonuses achieved by production crews. Miners from production crews who accompanied MSHA inspectors during inspections were only eligible for the 10% outby bonus.

Certain events would disqualify section crews for a shift, a day, or even a week. All production crews on a section would lose their bonus eligibility for a full day if an MSHA

inspector issued a significant and substantial (“S&S”)<sup>2</sup> citation for a condition in by the tailpiece. Similarly, all the miners on a section could be deemed ineligible to receive a bonus for a full week if the section received a withdrawal order under sections 104(b) or 104(d) of the Mine Act. The entire crew would be ineligible for one shift if any crew member suffered a lost-time accident during that shift. And at five mines, any “major deviation” from “[s]ection production and safety standards” would disqualify a production crew.<sup>3</sup> 38 FMSHRC 943; Jt. Exs. 20-25.

As set forth above, the parties assert starkly contrasting views of the proper interpretation of section 105(c). As one would expect, each side presented evidence supporting its legal position.

The Secretary and Union presented six Union officials and/or local safety committee members. Each testified in detail about the terms of the bonus plans, explaining how certain activity by miners would render them ineligible for a bonus. They also testified to the chilling effects of the plans upon the exercise of protected rights, describing numerous instances in which miners were deterred from engaging in safety related activity in order to avoid negatively impacting a bonus. The testimony of interference ranged from miners raising fewer safety issues and neglecting non-production safety tasks, such as rock dusting, to fewer reports of injuries and antipathy towards miners’ representatives’ assertion of safety rights. The witnesses also explained why the legitimate business purposes intended to be served by the bonus plan did not offset the interference.

At oral argument, the Secretary stated that his case did not depend upon a showing of retaliatory motivation. Accordingly, the Secretary did not present evidence going to a causal connection between the implementation of the bonus plan and prior protected activity.

The Operators, on the other hand, staked their case on their view of the law. They presented just one witness – John Forrelli, Senior Vice President of Murray Energy Corporation. He testified that the purpose of the bonus plans was to improve both production and safety and that the Operators did not implement the plans because of any protected activity. Thus, they claimed protected activity did not motivate adoption of the plans. Under their view of section 105(c), an absence of evidence showing that the plans were implemented because of the exercise of protected rights defeats a section 105(c) claim.

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

<sup>3</sup> The discontinued plan at the Harrison County Mine did not include the “major deviation” provision. Jt. Ex. 24.

## **B. The Judge's Decision**

On May 2, 2016, the Judge issued a decision and order finding that the Operators had interfered with miners' rights at each of the mines. The Judge began her analysis by concluding that the proper test for analyzing section 105(c)(1) interference claims is the two-step framework adopted by two Commissioners in *UMWA on behalf of Franks and Hoy v. Emerald Coal Resources, LP*, 36 FMSHRC 2088, 2108 (Aug. 2014) (sep. op. of Chairman Jordan and Comm'r Nakamura) (hereinafter cited as "*Franks*"). 38 FMSHRC at 946-48. The Judge rejected the Operators' reliance on *Sec'y of Labor on behalf of Feagins v. Decker Coal Co.*, 23 FMSHRC 47 (Jan. 2001) (ALJ), a 15-year-old ALJ decision, concluding that it was out of line with the Commission's current case law on interference. *Id.* at 948-49.

The Judge then turned to the first step of the *Franks* test, which asks whether a reasonable miner would view the operator's actions as tending to interfere with miners' protected rights. The Judge found that (1) "[t]estimony at hearing indicated that the effect of the bonuses is to create pressure on miners to maximize short-term production at the expense of safety," and that this effect was compounded by peer pressure, *id.* at 950; (2) miners were "reluctant to report safety issues to management or MSHA under the bonus plans because making the report and undergoing an inspection take away from production time," *id.* at 950-51; (3) "[t]here is no question that some miners are discouraged from serving as walk-around representatives because they would miss out on the chance to get a larger bonus," *id.* at 952; and (4) the injury disqualification "impermissibl[y] burden[s]" miners' right to report injuries because an injured miner "must choose between exercising his right to report the injury and getting a bonus," *id.*

Having adopted the *Franks* test, the Judge then turned to the second step of this test, which requires identifying and weighing any legitimate and substantial business justification proffered by the operator for actions it takes that interfere with protected rights. The Judge recognized that the Operators purported to have promulgated the bonus plans to increase safety and production. The Judge stated that an operator "certainly has a right to implement programs to assure that miners are producing at the best rate possible," but found that the Operators had not shown that the bonus plans promoted safety or increased production. *Id.* at 954. "In contrast, the harm to miners' rights is evident." *Id.* at 955. Thus, the Judge found that "[t]he uncertain benefits that [the Operators] put forth do not outweigh these harms." *Id.*

The Judge therefore ordered that the bonus plans be rescinded at the three mines where they remained in place, required the posting of a remedial notice, and assessed a civil penalty of \$25,000 per mine – \$5,000 more per mine than the Secretary's proposal. *Id.* at 955-56.

The Operators filed a timely petition for review. The UMWA also filed a timely petition for review, arguing that the Judge should have ordered additional remedies. The Commission granted both petitions.

## II.

### Disposition

The Operators contend that the Judge erred by applying the wrong test for analyzing a claim of interference. They argue that the *Franks* test fails to adhere to the plain language of section 105(c), which requires a finding of motive or intent. They set forth the following three-part test as an alternative framework for analyzing interference claims: (1) the exercise of statutory rights by a miner; (2) any adverse action taken must be directed against the miner who engaged in the exercise of statutory rights; and (3) the operator must take some affirmative adverse action against a miner in response to the exercise of statutory rights. PDR at 12. The Operators point to the Judge's decision in *Secretary of Labor on behalf of Pepin v. Empire Iron Mining Partnership*, 38 FMSHRC 1435 (June 2016) (ALJ) (hereinafter cited as "*Pepin*"), as support for its interpretation of section 105(c) and the application of its interference test in lieu of the Secretary's *Franks* test.<sup>4</sup>

The Secretary asserts that the Judge correctly applied the *Franks* test as supported by the Mine Act's text, its legislative history, and Commission precedent. Both the UMWA, an intervenor in these proceedings, and the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial & Service Workers International Union ("USW"), which filed an amicus brief on appeal, support the Secretary's position that the Judge correctly applied the *Franks* test in concluding that the Operators' bonus plans violate section 105(c) by interfering with miners' protected rights.

A majority of Commissioners has not endorsed the *Franks* test, under which evidence of motivation or causation is relevant only to proof of a legitimate business justification defense. Commissioners Jordan and Cohen agree that the applicable test is *Franks* and conclude that substantial evidence supports the Judge's finding of a violation. Acting Chairman Althen and Commissioner Young conclude that the plain language of the Mine Act requires proof that the action was taken "because of" the exercise of protected rights. They would find, therefore, that the Judge failed to apply the proper test. The effect of the split vote is to affirm the Judge's decision below. The separate opinions of the Commissioners follow.

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<sup>4</sup> The Secretary claims that the Operators have waived this argument because they did not present it to the Judge below. We disagree. This argument is intrinsically intertwined with the Operators' challenge of the claim of interference. Although the Operators challenged the application of *Franks* below, they did not present their alternative test for the Judge to consider. Op. Post-Hrg. Br. at 7-9 & n.4. However, they did cite Commission precedent concerning the issue. Since their test essentially mirrors the Commission's *Pasula-Robinette* test applicable to discrimination claims, their argument on appeal is sufficiently related. See *Freeman United Coal Mining Co.*, 6 FMSHRC 1577, 1580 (July 1984) (finding that operator's broad statements addressing the issue of the interpretation of the regulation at issue "afforded the administrative law judge an opportunity to pass" upon the question). Moreover, *Pepin* was not issued until after the Judge issued her decision in this case. Thus, we may appropriately consider the Operators' arguments.

### III.

#### **Separate Opinions of the Commissioners**

Commissioners Jordan and Cohen, in favor of affirming the Judge:

As more fully explained in our decision, we reject the interpretation of the Operators and our colleagues that section 105(c) has a plain meaning, because both interpretations would lead to absurd results. Hence, we find the language ambiguous and would defer to the Secretary's reasonable interpretation. We thus would apply the *Franks* test and would conclude that substantial evidence supports the Judge's determination that the Operators violated section 105(c) by implementing bonus plans which interfered with miners' protected rights under the Mine Act. We also conclude that the Judge did not abuse her discretion in making her evidentiary rulings below.

#### **I. Proof of Retaliatory Motive is Not Required in an Interference Claim Under the Mine Act.**

This case concerns the scope of section 105(c) of the Federal Mine Safety and Health Act of 1977 ("Mine Act" or "Act"). That particular statutory provision prohibits persons from discharging, or in any manner discriminating against, or otherwise interfering with the statutory rights of any miner "because of the exercise by such miner . . . of any statutory right afforded by this Act."<sup>1</sup> 30 U.S.C. § 815(c)(1). The case before us presents the issue of whether, in order to

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<sup>1</sup> Section 105(c)(1), 30 U.S.C. § 815(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, representative of miners or applicant for employment in any coal or other mine subject to this chapter 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 811 of this title 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 chapter or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this chapter.

constitute a violation of section 105(c), it is sufficient to demonstrate that an operator's policy interferes with the exercise of miners' rights, and that such interference is unjustified, or whether one must also prove that the challenged policy was implemented with a retaliatory motive, in other words directly "because of" a miner's exercise of a statutory right.

As described below, we believe that the correct test is the test previously articulated by two Commissioners in *Franks & Hoy*, 36 FMSHRC at 2108 (sep. op. of Chairman Jordan and Comm'r Nakamura), and proposed by the Secretary herein (S. Resp. Br. at 13-15), providing that a section 105(c) violation of interference 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.

In attempting to answer the question of the correct test for interference, we turn to the language of the statute, and our first inquiry is "whether Congress has directly spoken to the precise question at issue." *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984); *Thunder Basin Coal Co.*, 18 FMSHRC 582, 584 (Apr. 1996). If a statute is clear and unambiguous, effect must be given to its language. *See Chevron*, 467 U.S. at 842-43; *accord Local Union 1261, UMWA*, 917 F.2d 42, 44 (D.C. Cir. 1990). In ascertaining the meaning of the statute, courts utilize traditional tools of construction, including an examination of the "particular statutory language at issue, as well as the language and design of the statute as a whole," to determine whether Congress had an intention on the specific question at issue ("*Chevron I*" analysis). *Local Union 1261, UMWA v. FMSHRC*, 917 F.2d at 44; *Coal Employment Project v. Dole*, 889 F.2d 1127, 1131 (D.C. Cir. 1989). If an interpretation of statutory language which apparently is clear and unambiguous leads to absurd results, then the language should be found to be ambiguous. *American Water Works Assoc. v. EPA*, 40 F.3d 1266, 1271 (D.C. Cir. 1994); *see also United States v. Ryan*, 284 U.S. 167, 175 (1931) ("A literal application of a statute which would lead to absurd consequences is to be avoided whenever a reasonable application can be given which is consistent with the legislative purpose."). If a statute is ambiguous or silent on a point in question, deference is accorded to the interpretation of the agency charged with administering the provision in question, provided that the interpretation is reasonable (*Chevron II* analysis). *See Chevron*, 467 U.S. at 843-44; *Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 460 (D.C. Cir. 1994).

Section 105(c) mandates that persons not take certain actions "because of" a miner's<sup>2</sup> exercise of statutory rights. Included in the list of prohibited actions is the directive not to

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<sup>2</sup> Section 105(c) speaks of the protected class as including "miner[s], representative[s] of miners, or applicant[s] for employment in any coal or other mine subject to this Act." 30 U.S.C. § 815(c)(1). For simplicity of expression, in this opinion we shall simply use the word "miner," understanding that it refers to the entire protected class.

“otherwise interfere with the exercise of [miners’] statutory rights.” 30 U.S.C. § 815(c)(1). In general, a claim that a person has interfered with another’s ability to do something would cause us to consider whether, or how, that person’s actions made it more difficult for another person to carry out the activity in question. The focus of the inquiry is on the effect of the challenged action, not necessarily on the motive behind the action.

The respondent operators, Murray Energy Corporation, et al. (“the Operators”) and our colleagues assert that the plain language of section 105(c) requires any employer action challenged as violating that provision be shown to have been taken “because of” the exercise of protected rights. They focus on the meaning of the term “because” to derive an alleged plain meaning in section 105(c). However, “[t]he plainness or ambiguity of statutory language is determined [not only] by reference to the language itself, [but as well by] the specific context in which that language is used, and the broader context of the statute as a whole.” *The American Coal Co.*, 796 F.3d 18, 25 (D.C. Cir. 2015) (affirming the Commission, the Court held that the term “fire” in section 3(k) of the Mine Act is ambiguous and the Secretary’s interpretation of the term to include smoldering, smoking combustion without visible flames was reasonable) (citing *Yates v. United States*, 135 S.Ct 1074, 1081 (2015)).<sup>3</sup>

Here too, we must interpret the terms used in section 105(c) in context with both the Mine Act’s goals and the actual experiences of miners. Congress recognized that interference with miners’ rights can be subtle and will take uncommon forms. *See* S. Rep. No. 95-181 at 36, discussed *infra*. To permit subtle interference through a narrow construction of the term “because of” in section 105(c) would be inconsistent with this Congressional recognition.

Specifically, the Operators argue that the statutory test requires three elements to establish a claim of interference: (1) the actual exercise of statutory rights by a miner *prior to* the alleged act of interference by the employer, (2) that the alleged act of interference be directed against the miner who previously exercised statutory rights, and (3) that the employer be shown to have committed the alleged act of interference *in response to* the miner’s exercise of statutory rights. PDR at 12. Thus, in the operators’ view, a literal reading of the statutory language requires that prior conduct of a miner be the catalyst for the employer action under review, and to do otherwise would read the “because of” language out of the Act.<sup>4</sup>

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<sup>3</sup> In *American Coal Company*, the Commission had considered the legislative history and context in which the Mine Act was written as part of its analysis. 35 FMSHRC 380, 383-84 (Feb. 2013). The Commission determined that because the legislative history of the Mine Act contained reference to “smoldering” fires that resulted in mass suffocation fatalities, Congress could not have plainly used the term “fire” to mean or exclusively require the presence of a flame.

<sup>4</sup> Our colleagues take a somewhat different view. *See infra* slip op. at 18-20.

**A. The Language of Section 105(c) has No Plain Meaning Because a Literal Reading Would Lead to Absurd Results.**

We conclude that the language of section 105(c), insofar as it pertains to interference claims, does not have a plain meaning. The relevant language states: “No person shall . . . otherwise interfere with the exercise of the statutory rights of any miner . . . because of the exercise by such miner . . . of any statutory right afforded by this Act.” 30 U.S.C. § 815(c)(1). As the Operators contend, a literal reading of the words “because of the exercise by such miner . . . of any statutory right afforded by this Act” necessarily refers to an exercise of a statutory right which has already taken place. But such a reading leads to absurd results.

Imagine a situation where a mine is newly opened with a new workforce and the mine owner creates a bonus plan which provides that if a miner contacts MSHA to complain about an unsafe condition, an action protected under section 103(g) of the Act,<sup>6</sup> the miner will lose his bonus. Clearly, this is interference within the meaning of section 105(c). But it does not involve any prior act by any miner, and so, under the Operators’ literal reading, it would not be an illegal act under section 105(c).<sup>7</sup>

Because a literal reading of the statute leads to absurd results, the interference provision of section 105(c) must be seen as lacking a plain meaning. A case in point is *American Water Works Assoc. v. EPA, supra*. This case involved a challenge by the Natural Resources Defense Council (“NRDC”) to the EPA’s interpretation of the language “not economically or technologically feasible” in the Safe Drinking Water Act, 42 U.S.C. § 300f(1)(C)(ii). The dispute centered on an EPA regulation for the control of lead in public water systems, specifically whether EPA was required to set a numeric maximum contaminant level (“MCL”), which was required by the statute unless it was “not economically or technologically feasible,” or whether it could establish a treatment technique to control lead. In support of its position that the EPA was required to set a specific MCL for lead, the NRDC argued that the plain meaning of the word “feasible” was “physically capable of being done at reasonable cost.” In response, the EPA did not dispute that it was “feasible” to monitor lead under the definition proposed by the NRDC, but contended that use of an MCL standard could lead to requiring public water systems to undertake aggressive corrosion control techniques which would increase the levels of other contaminants.

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<sup>6</sup> Section 103(g) provides: “Whenever . . . a miner . . . has reasonable grounds to believe that a violation of this Act or a mandatory health or safety standard exists, or an imminent danger exists, such miner . . . shall have a right to obtain an immediate inspection by giving notice to the Secretary . . . of such violation or danger.” 30 U.S.C. § 813(g).

<sup>7</sup> This hypothetical was posed to counsel for the Operators during the oral argument in this case. The initial response of the Operators’ counsel was that the plan would constitute interference with statutory rights under section 105(c). Oral Arg. Tr. 11-13. But on further reflection, after being reminded that the test he proposed required prior protected activity by a miner, counsel agreed that the bonus plan would not constitute illegal interference because of the absence of a predicate act by a miner. Oral Arg. Tr. 14-17.



Hence, EPA interpreted “feasible” broadly to mean “capable of being accomplished in a manner consistent with the Act.” 40 F.3d at 1270-71.

In siding with the EPA, the Court stated:

We agree with the EPA that the meaning of ‘feasible’ is not as plain as the NRDC suggests. Although we generally assume that the Congress intends the words it uses to have their ordinary meaning, . . . case law is replete with examples of statutes the ordinary meaning of which is not necessarily what the Congress intended. . . . Indeed, where a literal reading of a statutory term would lead to absurd results, the term simply ‘has no plain meaning . . . and is the proper subject of construction by the [agency] and the courts.’ . . . If the meaning of ‘feasible’ suggested by the NRDC is indeed its plain meaning, then this is such a case; for it could lead to a result squarely at odds with the purpose of the Safe Drinking Water Act.

*Id.* at 1271 (citations omitted). The Court then went on to defer to the agency’s interpretation of the statute, finding, pursuant to the *Chevron* doctrine, that it was a reasonable one.

Likewise, we conclude that the literal reading of the interference provision of section 105(c) asserted by the Operators leads to absurd results. As illustrated by the example of a new mine with a bonus plan which discourages complaints to MSHA described above, it leads “to a result squarely at odds with the purpose” of the Mine Act.

The Commission has adhered to the principle that when interpreting the Mine Act and safety standards, constructions that lead to absurd results must be avoided. *See, e.g., Central Sand and Gravel Co.*, 23 FMSHRC 250, 254 (Mar. 2001). Notably, the Commission has been guided by this precept in considering the scope of protection afforded by section 105(c). For example, the statute prohibits the “discharge . . . 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). The literal application of the provision advocated by the Operators would cover only retaliatory actions taken against the particular person who made a safety complaint. This is because the statute prohibits the discharge of a miner “because *such* miner . . . has . . . made a complaint under or related to this Act . . . or because of the exercise by *such* miner . . . of any statutory right afforded by this Act.” *Id.* (emphasis added). If an employer fired a miner believing that the miner filed a safety complaint, but a different miner had made the complaint, would the fired miner have a claim under section 105(c)? A literal approach, seeking to give effect to every word, would require the Commission to answer in the negative.

In *Moses v. Whitley Dev. Corp.*, 4 FMSHRC 1475 (Aug. 1982), *aff’d*, 770 F.2d 168 (6th Cir. 1985), the Commission confronted this very question. Moses was fired, and the Judge below found that the discharge occurred “because the operator thought the complainant had engaged in protected activity, even though he had not.” 4 FMSHRC at 1480. We acknowledged that “a literal interpretation . . . might require the actual or attempted exercise of a right before the

protection of section 105 comes into play,” but we nevertheless found a violation. Emphasizing the *effect* of the employer’s action on the willingness of miners to exercise their rights, we pointed out that:

Miners would be less likely to exercise their rights if no remedy existed for discriminatory action based on an operator’s mistaken belief that a miner had exercised a protected right . . . .  
[E]mployees could reasonably fear that they might be treated adversely on the basis of suspicion alone, and thus would seek to avoid even the appearance of asserting their rights.

*Id.*

More recently, in *Sec’y obo Gray v. North Star Mining, Inc.*, 27 FMSHRC 1 (Jan. 2005), a case involving an alleged threat against a miner, we stated:

[I]nterference . . . does not turn on the employer’s motive or on whether the coercion succeeded or failed. The test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights . . . .

*Id.* at 9 (quoting *Am. Freightways Co.*, 124 NLRB 146, 147 (1959)).

The case involved conversations between an assistant mine superintendent, Jim Brummett, and Mark Gray, who had been called to testify before a grand jury about smoking, ventilation and roof support violations at the mine (although ultimately he was not called as a witness). *Id.* at 2. When Gray told Brummett that he did not want hard feelings between them, Brummett replied, “No, they ain’t no hard feelings, unless you put the screws to me, then I’ll kill you,” and then laughed. *Id.* at 3. The next day, Brummett sought assurances from Gray that a second miner had not testified against him. *Id.* Brummett told Gray that “if anyone had laid the screws to him that he would whip their ass.” *Id.* The Judge dismissed Gray’s discrimination complaint, finding that Brummett’s statement to Gray was just an “exaggerated expression, commonly used between friends” and that his statement to Gray on the following day was directed at the second miner, and not at Gray. *Id.* at 5.

The Commission found that the Judge had erred in denying Gray’s interference claim based on the absence of intent or motive. The Commission said, “We conclude that the judge examined Brummett’s statements too narrowly by considering largely, if not exclusively, Brummett’s intent or motive in making the statements. . . . rather than considering only Brummett’s intent, the judge should have analyzed the totality of circumstances surrounding

Brummett's statements to determine whether they were coercive and violative of section 105(c) of the Mine Act." *Id.* at 10.<sup>8</sup>

The Commission's approach in *Moses* and *Gray* is consistent with cases that considered the scope of the analogous anti-discrimination provision in the Federal Coal Mine Health and Safety Act of 1969, the predecessor to the current statute. In *Phillips v. IBMA*, 500 F.2d 772 (D.C. Cir. 1974), the D.C. Circuit considered whether a miner came under the protection of section 110(b) of that Act when he complained to his foreman, and then subsequently refused to work because of the dusty conditions in the mine.<sup>9</sup> The dissenting judge applied the literal language of the Coal Act, which afforded protection to miners who notified the Secretary or his authorized representative of an unsafe condition, and concluded that "the phrase 'the Secretary or his authorized representative' on its face plainly does not mean a foreman or the mine employees serving on a safety committee." *Id.* at 785. The *Phillips* majority, however, after considering the

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<sup>8</sup> Our colleagues would require proof of motivation in a claim of interference. They contend that their approach is consistent with *Gray* because the threats in *Gray* "were clearly motivated by protected activity. . . . The issue of whether motivation was required for interference was not before the Commission." Slip op. at 47-48. However, our colleagues ignore the fact that in *Gray* the Commission vacated an ALJ decision where the Judge had specifically found that Brummett's statements to Gray "amounted to no more than an exaggerated expression, commonly used between friends who expect loyalty from one another," and that "no threat occurred." 27 FMSHRC at 5, quoting 25 FMSHRC at 215, 217. Thus, our colleagues' contention that Brummett issued "threats" which were "motivated by protected activity" is inconsistent with the Judge's findings based on credibility determinations after a hearing. In reversing the Judge, the Commission did not challenge her findings regarding the motivation behind Brummett's statements to Gray. Rather, the Commission found the motivation relied on by the Judge to be irrelevant. It was the nature of Brummett's statements, and their potentially coercive effect on Gray, which was essential to the Commission's decision. 27 FMSHRC at 10. Hence, our colleagues are incorrect in stating that the issue of motivation in an interference claim was not before the Commission in *Gray*. Their interpretation of the interference provision in section 105(c) is inconsistent with *Gray*.

<sup>9</sup> Section 110(b)(1) of the Coal Act stated:

No person shall discharge or in any other way discriminate against or cause to be discharged or discriminated against any miner or any authorized representative of miners by reason of the fact that such miner or representative (A) has notified the Secretary or his authorized representative of any alleged violation or danger, (B) has filed, instituted, or caused to be filed or instituted any proceeding under this Act, or (C) has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this Act.

30 U.S.C. § 820(b)(1) (1976).

procedures in place at the mine and the practical effect of applying the literal language of the provision, concluded that such an interpretation “would nullify not only the protection against discharge but also the fundamental purpose of the Act to compel safety in the mines.” *Id.* at 781 (footnote omitted).<sup>10</sup> The *Phillips* Court analogized section 110(b)’s protection to the protection afforded under the corresponding anti-discrimination provision of the National Labor Relations Act which, the *Phillips* Court noted, had been construed broadly so as to apply to the discharge of an employee for giving a sworn written statement to a NLRB field examiner who was investigating an unfair labor charge. Such protection was necessary, the Supreme Court had determined, in order “to prevent the Board’s *channels of information from being dried up* by employer intimidation of prospective complainants and witnesses.” *Id.* at 782 (emphasis added) (citing *NLRB v. Scrivener dba AA Electric Co.*, 405 U.S. 117, 122 (1972)).<sup>11</sup>

The concern that safety-related channels of information were being dried up prompted the Secretary’s filing in this case. Here, however, the reluctance of the miners to assert their rights is attributed not so much to employer intimidation as it is to the inducements contained in the employer’s bonus plan. As set forth in more detail, *infra* slip op. at 22-24, certain aspects of the plan can cause a miner who chooses to exercise his or her right to accompany an inspector to risk losing a portion of a bonus payment. Likewise, under the plan, a miner who points out a condition that is hazardous, or which violates a safety standard, can be, at least indirectly, the cause of a forfeiture of all or part of the bonus. Reporting an injury can result in the entire crew losing their bonus. Miners who insist that certain time-consuming but necessary safety-related chores (like rock dusting) be carried out incur the ire of fellow employees, who fear that the activity will lessen the likelihood of a bonus. Putting aside for a moment the issue of whether the Secretary has adequately proven these potentially deterrent effects of the bonus plan, the question remains whether the Secretary must also show that the plan was implemented “because of” the miners’ exercise of protected activity.

In interpreting other, similarly-worded, statutes, the Supreme Court has found the phrase “because of” not to have the alleged plain meaning of motivation advocated by the Operators or our colleagues. The Court has recognized that statutes prohibiting discrimination “because of” congressionally designated criteria need not include a motive element. In *Texas Department of*

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<sup>10</sup> The holding of the *Phillips* Court, that the coverage of the anti-discrimination provisions of the Coal Act begins when a miner notifies mine officials or the safety committee of possible safety violations, and that no formal complaint to the Secretary of Labor is required, was reaffirmed in *Munsey v. Morton*, 507 F.2d 1202, 1208-9 (D.C. Cir. 1974).

<sup>11</sup> Four years later, in *Baker v. IBMA*, 595 F.2d 746 (D.C. Cir. 1978), the Court rejected the view that section 110(b)’s protection from discrimination was only afforded to miners who had the intent to contact federal officials at the time they made safety complaints to a mine foreman. The Court noted the comment by the sponsoring Senator, Edward Kennedy, that “(T)he rationale for this amendment is clear. For safety’s sake we want to encourage the reporting of suspected violations of health and safety regulations.” 595 F.2d at 749-50 (citation omitted). Thus, the Court focused on the safety-enhancing purpose of the statute’s anti-discrimination language rather than on the express language of the statute.

*Housing & Community Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2518 (2015), the Court considered whether a method of distributing low income housing tax credits violated the Fair Housing Act. That statute made it unlawful *inter alia* to “refuse to sell or rent after the making of a bona fide offer . . . or otherwise make unavailable or deny, a dwelling to any person *because of* race, color, religion, sex, familial status, or national origin.” *Id.* at 2518 (quoting 42 U.S.C. § 3604(a)) (emphasis added). Although a purpose underlying the Fair Housing Act was to reduce racially segregated housing, the housing tax credit program under review actually wound up reinforcing it, albeit without evidence of a discriminatory intent. The Housing Department denied liability, claiming that “[a]n action is not taken ‘because of race’ unless race is a reason for the action.” 135 S. Ct. at 2519.

The Court rejected the argument that “because of” must include a motivational argument. Focusing on the phrase “or otherwise make unavailable,” it noted the similar language in both Title VII and the Age Discrimination in Employment Act (“ADEA”), 29 U.S.C. § 621, and concluded:

In these three statutes the operative text looks to results. The relevant statutory phrases, moreover, play an identical role in the structure common to all three statutes: Located at the end of lengthy sentences that begin with prohibitions on disparate treatment, they serve as catchall phrases *looking to consequences, not intent*. And all three statutes use the word ‘otherwise’ to introduce the results-oriented phrase. “Otherwise” means “in a different way or manner,” thus signaling a shift in emphasis from an actor’s intent to the consequences of his actions. Webster’s Third New International Dictionary 1598 (1971).

135 S. Ct. at 2519 (emphasis added). Thus, the Court held that the inclusion of the phrase “because of” in an anti-discrimination statute does not imply the need to show discriminatory motive.<sup>12</sup>

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<sup>12</sup> Our colleagues argue that *Inclusive Communities* is irrelevant to the issues here because it involved a claim of disparate impact, an area of law they suggest is unique unto itself. But the Court’s reasoning and conclusions were not so narrowly drawn. The above-quoted passage shows that the language and structure of the anti-discrimination provisions reviewed by the Court were critical to its conclusion that the effects or consequences of employer conduct may support a claim of discrimination without regard to the employer’s intent. Similar language and structure support the same reading and conclusion for section 105(c) of the Mine Act.

Moreover a focus on the effects of employer conduct is not limited to cases involving disparate impact claims and, in fact, is consistent with Commission precedent interpreting section 105(c), as reflected in *Moses* and *Gray*. The importance the Commission has placed on the effects of operator conduct is also reflected in its use of section 8(a)(1) of the National Labor (continued...)

**B. The Mine Act's Legislative History Demonstrates that Interference Could Occur Without a Showing of Motive on the Part of the Operator.**

The directive that no person shall “otherwise interfere with the exercise of the statutory rights of any miner” was included when the 1969 Coal Act was amended to become the Federal Mine Safety and Health Act of 1977. The Senate drafters explained that the wording of section 106(c)(1) (the section which became section 105(c) in the final bill) was “broader than the counterpoint language in section 110 of the Coal Act” and the listing of protected rights was “intended to be illustrative and not exclusive.” S. Rep. No. 95-181, at 36 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Healthy Act of 1977*, at 624 (1978). The Committee specified that this section should “be construed expansively to assure that miners will not be inhibited in any way in exercising any rights afforded by the legislation” and indicated its intention “to insure the continuing vitality of the various judicial interpretations of section 110 of the Coal Act which are consistent with the broad protections of the bill’s provisions. *See, e.g., Phillips v. IBMA*, 500 F.2d 772; *Munsey v. Morton*, 507 F.2d 1202.” S. Rep. No. 95-181, at 36, *reprinted in Legis. Hist.* at 624.

The legislative history of the discrimination provision in the 1977 Mine Act establishes that Congress had contemplated the type of operator conduct present in this case, and that Congress intended to prohibit it without a showing of operator motive. The Senate Report demonstrates that Congress’ intent was to protect miners from “not only the common forms of discrimination, such as discharge, suspension, demotion . . . but *also against the more subtle*

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<sup>12</sup> (...continued)

Relations Act as an aid in interpreting section 105(c). *See Gray*, 27 FMSHC at 9-10. Section 8(a)(1) focuses on the effects of employer misconduct and does not contain a motivational requirement.

Given the Supreme Court’s reasoning in *Inclusive Communities*, our colleagues’ reliance on *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009) (“*Gross*”) and *University of Texas Southwestern Medical Center v. Nassar*, 133 S. Ct. 2517 (2013) (“*Nassar*”), to argue that the phrase “because of” has a plain meaning which requires proof of motive in all case, is misplaced.

*Gross* involved a claim of disparate treatment under the ADEA which requires proof of wrongful motivation. Nothing in *Gross* suggests that the Court was rejecting prior interpretations of the ADEA, as described in *Inclusive Communities*, allowing claims challenging the discriminatory effect or impact of employer conduct without proof of discriminatory motive.

Similarly, *Nassar* involved a claim under Title VII’s anti-retaliation provision set forth at 42 U.S.C. § 2000e-3(a). That provision does not contain language similar to “otherwise adversely affects” in the anti-discrimination provisions of Title VII (42 U.S.C. § 2000e-2(a)(2)) and the ADEA (29 U.S.C. § 623(a)(2)), “otherwise make unavailable or deny” in the FHA (42 U.S.C. § 3604(a)), or “otherwise interferes” in section 105(c) of the Mine Act (30 U.S.C. § 815(c)(1)). It is limited to claims of retaliatory treatment of employees, which require proof of motive.

*forms of interference, such as promises of benefit* or threats of reprisal.” S. Rep. No. 95-181, at 36 (emphasis added). This language directly addresses the Operators’ bonus plans at issue here. “Promises of benefit” inherently affects *future* protected activity rather than being made *in reaction* to prior protected activity. Thus the Operators’ argument that section 105(c) only forbids adverse action or interference “because . . . such miner” previously participated in protected activity directly contravenes the legislative history of the Mine Act.<sup>13</sup>

In light of this legislative history, we conclude it inappropriate to limit the scope of section 105(c)’s protection from interference in the manner proposed by the Operators. We decline to adopt their narrow construction, based on the literal terminology of the statute and focused on an employer’s motivation when implementing the policy, rather than on the effects of the policy on miners’ willingness to exercise their rights. The decisions endorsed by the Senate drafters rejected such an interpretation. Those decisions declined to elevate the statutory text at the expense of the underlying remedial purpose of the law, and we find it difficult to believe the drafters would consider motivation to be such a necessary element that its absence would be the basis for an interpretation of 105(c) that undermines its very purpose: to encourage the reporting of suspected violations of health and safety regulations.

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<sup>13</sup> Our colleagues’ assertion, slip op. at 37-38, that the legislative history of section 105(c) supports their position rings hollow. They rely heavily on the drafters’ statement that their goal was the protection of miners from interference with their rights in the form of “threats of reprisal,” and then argue that “[f]or there to be a threat of reprisal there must be an action that triggers the threat – that is, there must be a *cause* for the reprisal.” *Id.* at 37. Our colleagues ignore the fact that in the same sentence of the legislative history containing the phrase “threats of reprisal,” the drafters expressed their concern about interference in the form of “promises of benefit.” S. Rep. No. 95-181, at 36. A promise of benefit which has the *effect* of interference with the exercise of protected rights need not have been *motivated* by the exercise of those rights.

Our colleagues also claim textual significance in the fact that in converting the 1969 Coal Act’s section 110(b) into the 1977 Mine Act’s section 105(c), Congress changed the language “by reason of the fact” to “because” and re-structured the section so that instead of phrases beginning “(A),” “(B),” and “(C),” each subject to the “by reason of the fact” language, the section now contains separate clauses prefaced by “or” and including the “because” or “because of” language. We fail to discern an effectual difference between “by reason of the fact” and “because.” What is much more significant in the evolution of this section is that in 1977 Congress added the language “or otherwise interfere with the exercise of . . . statutory rights,” a provision which did not exist in the 1969 Coal Act. In explanation of the new interference language, the legislative history spoke of going beyond “the common forms of discrimination” so as to include “the more subtle forms of interference, such as promises of benefit . . .” S. Rep. No. 95-181, at 36.

Indeed, the test proposed by the Operators leads to absurd results because the Congressional intent to include “the more subtle forms of interference” is essentially precluded.<sup>14</sup> Congress intended to include “threats of reprisal” within the ambit of illegal interference, but such threats cannot be reached under the Operators’ test unless there has been a predicate act of miners exercising protected rights which gave rise to the threat of reprisal. Moreover, the “promises of benefit” contemplated by Congress virtually cannot be reached at all.<sup>15</sup> The test proposed by the Operators’ is essentially backward-looking. It requires that there be a pre-existing exercise of statutory rights by a miner which triggers the alleged act of interference by the operator. However, the Mine Act’s prohibition of unlawful interference, as described in the legislative history, is forward-looking. The interference which Congress sought to prevent is the promise of *future* benefit or the threat of reprisal for a *future* assertion of statutory rights by a miner.

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<sup>14</sup> *Digital Realty Trust, Inc. v. Somers*, 138 S.Ct. 767 (2018), relied on by our colleagues, does not refute this. In that case, the Supreme Court ruled that a private sector employee who did not report any securities-law violations to the Securities and Exchange Commission was not a “whistleblower,” even though he had reported his concerns to senior management. The Court’s adherence to the plain language of the statutory definition of “whistleblower,” which states that a “whistleblower” is a person who provides information relating to a violation of securities laws to the Secretary, was driven in large part by its view that the purpose of the statute was to encourage prompt reporting of violations to the SEC (which the plaintiff had not done). By contrast, a literal reading of section 105 of the Mine Act (resulting in the institution of a motivation requirement in interference cases) does nothing to further the objectives of the anti-discrimination provisions in the Act. To the contrary, it makes it more difficult for miners to prevail in interference lawsuits.

Although, in *Digital Realty Trust*, the Court applied a plain meaning analysis to the language of a discrimination statute, its rationale was based specifically on the statute’s purpose and on alternative mechanisms that could protect employees. The Court opinion is not the first – nor the last – to base an interpretation on the plain meaning of statutory text. Importantly, however, in rejecting the specific “absurd results” analysis of the lower court and the parties, the Supreme Court relied on case-specific rationales, and did not call into question the use of the absurd results doctrine in other cases.

<sup>15</sup> The Operators’ express concern is that under the *Franks* test (as embodied in the Judge’s Decision), “any bonus plan that provides an element of production is *per se* unlawful.” Oral Arg. Tr. 30. We reject this suggestion. But what is clear is that under the Operators’ proposed test, the “promises of benefit” provided in a bonus plan based on production can never be found unlawful under section 105(c) without smoking gun evidence that the plan’s intent was to subvert statutory rights.



**C. Demanding Proof of an Operator’s Motivation Would Permit Some Policies Intruding Upon the Mine Act’s Protections Against Interference to Go Uncorrected.**

The test proposed by the Operators would have the effect of reading the “interference” language of section 105(c) out of the Mine Act. The statutory language provides, “No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, . . . .” Thus, “interference” is distinct from “discrimination.” In *Sec’y on behalf of Pendley v. Highland Mining Co.*, the Commission held that “discrimination” includes all retaliatory “adverse actions” that are “harmful to the point that they could well dissuade a reasonable worker” from engaging in protected activity. 34 FMSHRC 1919, 1932 (Aug. 2012) (quoting *Burlington N. & Santa Fe Railway v. White*, 548 U.S. 53, 57 (2006)). Given that the dissuading of workers from engaging in protected activity is the essence of “interference,” *Pendley* establishes that “interference” which is in retaliation for protected activity – i.e., the test proposed by the Operators – is covered by section 105(c)’s provision against “discrimination.” As noted above, Congress added the “interference” language to the 1969 Coal Act in creating the Mine Act in 1977 and intended the interference provision to broaden the coverage of the anti-discrimination provision. However, if the test proposed by the Operators is adopted by the Commission, it would render the “interference” language a nullity.

Our colleagues’ approach is somewhat different from that of the Operators. They reject the literal interpretation of section 105(c) advanced by the Operators and argue that they can divine a plain meaning of the section separate from its literal meaning, slip op. at 34 n.6, 35, 46, 49-50, although, as the Operators point out, the literal meaning of the statutory language is clear.<sup>16</sup> Like the Operators, our colleagues assert that there must be a causal nexus between alleged acts of interference and protected activity in order to come within the ambit of the

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<sup>16</sup> Our colleagues rely on *Meredith v. FMSHRC*, 177 F.3d 1042, 1054 (D.C. Cir. 1999), where the Court held that MSHA employees are not “persons” who can be named as respondents in discrimination claims under section 105(c) of the Mine Act. Interestingly, the Court found a textual analysis of the word “person” to be insufficient to determine a plain meaning of the statute. Rather, the Court looked to the statutory scheme as a whole. *Id.* at 1054-56. Our colleagues, however, rely primarily on a textual analysis. Our colleagues also rely on the Commission decision in *Nally & Hamilton Enterprises, Inc.*, 33 FMSHRC 1759 (Aug. 2011), where the Commission interpreted the word “maintain” as used in 30 C.F.R. § 77.410(c). In finding a plain meaning for the word, the Commission did not reject the literal meaning of the word as inconsistent with the plain meaning, but rather, rejected the operator’s attempt to inject nuances and requirements into the plain meaning which simply were not present. *Id.* at 1763.

statutory prohibition. However, unlike the Operators, they assert that the required protected activity can include activity that is yet to occur.<sup>17</sup>

We can envision situations where actions by mine operators may constitute actionable interference under section 105(c) absent motivation to inhibit miners' protected activity. An obvious example is the fact pattern described in *Gray*, where the Commission found interference although the Judge accepted Brummett's testimony that he was only joking with Gray and that no threat occurred. 27 FMSHRC at 5.

At least one Commission Judge has described how demanding proof of motivation as a requirement in interference cases would permit operators to interfere with statutory rights for reasons that would not be actionable. Commission Judge John Kent Lewis noted, "[a]ccording to the *Pepin* test,<sup>18</sup> 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 statutory rights." *Wilson v. Armstrong Coal Co.*, 39 FMSHRC 1072, 1092 (May 2017) (ALJ), review granted June 15, 2017. Thus, the interpretation of section 105(c) advanced by our colleagues, like the interpretation by the Operators, would lead to absurd results: in some circumstances, policies intruding upon the Mine Act's broad protections would escape corrective action under section 105(c).

Moreover, we note that both the Operators and our colleagues assert that their respective interpretations of section 105(c) represent the "plain meaning" of the statutory language. The obvious conflict between these allegedly "plain" meanings suggest that section 105(c) actually is ambiguous, and not subject to resolution under *Chevron I* analysis. See *American Coal Co.*, 796 F.3d at 24-25.

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<sup>17</sup> Our colleagues submit that interference claims are analytically indistinguishable from discrimination claims characterized by firing, suspension, adverse change in job duties or other such direct adverse action, and so should be analyzed under the traditional formula created in *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (Oct. 1980) and *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (Apr. 1981), and widely known as the *Pasula-Robinette* test. Slip op. at 46, 50. However, in *Gray*, the Commission noted that "[t]he Commission's approach to the analysis of operator statements [of alleged coercive interrogation or harassment constituting interference with protected rights] stands in contrast to its analysis of discrimination against miners who have exercised their rights under the Mine Act. . . . This latter analysis is generally referred to as the *Pasula-Robinette* test." 27 FMSHRC at 8-9 n.6. Thus, the Commission has indeed recognized a difference between interference claims and the more typical discrimination claims arising under section 105(c).

<sup>18</sup> Judge Lewis was discussing Judge David Barbour's decision in *Secretary obo Pepin v. Empire Iron Mining Partnership*, 38 FMSHRC 1435, 1453-54 (June 2016) (ALJ), a decision whose thesis that in a claim of unlawful interference under section 105(c) the Secretary has the threshold burden of proving the operator's unlawful motivation is echoed by our colleagues' opinion in this case.

#### **D. Deference to the Secretary's Interpretation is Warranted.**

Given our conclusion that the alleged “plain meaning” interpretations by the Operators and our colleagues lead to absurd results, and thus that section 105(c) is ambiguous as to whether proof of motivation is required in an interference claim, we next consider whether it is appropriate to defer to the Secretary’s interpretation of the statutory language pursuant to *Chevron II* analysis.

As noted above, the Secretary submits that an action constitutes interference in violation of section 105(c)(1) 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.

S. Br. at 13-17 (quoting *Franks & Hoy*, 36 FMSHRC at 2108 (sep. op of Chairman Jordan and Comm’r Nakamura). The Secretary thus interprets the Mine Act so as to allow a miner to prevail on an interference claim, without requiring proof of the operator’s motivation to interfere with the miners’ statutory rights. This two-part test was articulated and adopted by two Commissioners in *Franks & Hoy*, 36 FMSHRC at 2108 (sep. op of Chairman Jordan and Comm’r Nakamura). This analytic framework has been dubbed “the *Franks* test.”

Commissioners recently concluded that it was not error for a Judge to apply the *Franks* test. *Sec’y of Labor on behalf of McGary v. Marshall Cty. Coal Co.*, 38 FMSHRC 2006 (Aug. 2016). In that case, the operator instituted a policy, announced at company-wide meetings, requiring miners to report safety hazards to management first, thereby circumventing miners’ rights to report hazards under section 103(g) of the Act.<sup>19</sup> 38 FMSHRC at 2012 n.11, 2028 n.22.<sup>20</sup> All five commissioners concluded that the *Franks* test was consonant with *Moses* and *Gray* and thus it was not incorrect for the Judge to use it in the *McGary* case. *Id.* at 2012.

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<sup>19</sup> As previously noted, *supra* slip op. at 10 n.5, That statutory provision affords miners the right to make anonymous complaints to the Secretary. 30 U.S.C. § 813(g).

<sup>20</sup> A number of Commission Judges have also applied *Franks* to interference claims. See *UMWA ex rel. Franks v. Emerald Coal Res.*, 38 FMSHRC 799 (Apr. 2016); *McGary v. Marshall County Coal Co.*, 37 FMSHRC 2597, 2603-04 (Nov. 2015); *McGlothlin v. Dominion Coal Corp.*, 37 FMSHRC 1256, 1264-65 (June 2015); *Pendley v. Highland Mining Co.*, 37 FMSHRC 301, 309-11 (Feb. 2015). One Commission Judge has rejected the *Franks* test. *Sec’y obo Pepin v. Empire Iron Mining Partnership, supra.*

In a recent interference case under the Mine Act, the D.C. Circuit also employed the *Franks* test, noting that the administrative law judge had applied it and that neither party challenged its use. *Wilson v. FMSHRC*, 863 F.3d 876 (D.C. Cir. 2017). In ruling on the miner’s interference claim, the Court emphasized that the *Franks* test calls for an objective evaluation of how a reasonable miners’ representative would view the alleged discriminator’s conduct, and not whether the individual accused of interference had a subjective intention to interfere with the statutory rights of the miners’ representative. *Id.* at 881-82. Specifically, the Court stated, “as the Commission has instructed, whether ‘interference’ occurred does not turn ‘on the [respondent’s] motive . . . .’” *Id.* at 881 (citing *Gray*, 27 FMSHRC at 9).

In sum, we reject the literal interpretation of section 105(c) that would unduly restrict the reach of the Mine Act’s protection from interference. We would have the Commission adopt the *Franks* test, deferring to the Secretary’s reasonable interpretation of the statutory language, an interpretation that is consistent with Commission precedent, federal case law, and the legislative history of the Mine Act and, importantly, one in keeping with Congressional intent to encourage miners to play an active role in maintaining safe and healthful conditions in the mines.<sup>21</sup>

## **II. Substantial Evidence Supports the Judge’s Finding that the Bonus Plans Interfered with the Miners’ Protected Rights.**

### **A. A Reasonable Miner Would be Deterred from Exercising His or Her Rights as a Result of the Bonus Plans.**

Concluding that the bonus plans discouraged miners from making safety complaints, reporting injuries, and serving as walk-around representatives, the Judge explained:

While the bonus amounts are not extraordinarily large, the amounts for production crewmembers are large enough to matter to most miners. The witnesses at the hearing also emphasized the intensity of the peer pressure fostered by the plans. The bonus plans make it so that a miner must decide whether it is worth taking money out of his own pocket and those of his entire section every time he considers reporting an unsafe condition or an injury. This impact on a miner’s decision to exercise his rights constitutes a coercive pressure analogous to the interrogation and harassment discussed by the Commission in *Moses* and *Gray*.

38 FMSHRC at 953 (citations omitted).

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<sup>21</sup> Indeed, section 2(e) of the Mine Act states that mine operators, with the assistance of miners, have the primary responsibility to prevent the existence of unsafe and unhealthful conditions and practices in mines. 30 U.S.C. § 801(e).

Ample evidence<sup>22</sup> supports the Judge's conclusion regarding the negative impact the plans had on the miners' exercise of rights, evidence the operator did not attempt to counter.

Miner Timothy McCoy, employed at the Marshall County Mine, testified that miners on his production crew did not report hazards to MSHA because they did not want to risk their bonuses. He described an incident in which roof bolts were not properly spaced over a power center, and being told by a miner that "[i]f I report this, we are going to have MSHA here tomorrow investigating it and tomorrow's bonus was out." Tr. 141.<sup>23</sup>

Testimony indicated that internal safety complaints also decreased after the bonus plans took effect. Ann Martin, the former mine safety committee chairman at the Harrison County Mine, described how "[d]uring my inspections on the section, I found it interesting that before the plan was implemented, the guys were just waiting to talk to you, converse with you, you know, per the plan itself, that changed because those guys were doing nothing more than setting on their equipment and mining coal." *Id.* at 158.

After shutting down a section because of ventilation issues, Martin was told by a miner "you just knocked us out of our Bonus Plan." *Id.* at 165. Upon being asked by another committeeman whether he would prefer to have the money rather than assure safe mining conditions, the miner's response was "yes." *Id.* Under the plan, foremen receive double the bonus their crews earn. *Id.* at 308. There was testimony that some foremen instructed miners that they "absolutely cannot shut down the belt." *Id.* at 58-60.

Miners who were injured but not incapacitated were tempted to "rough it out" so as to not lose the bonus for leaving the mine face. *Id.* at 54. Levi Allen, who had served as the local union president at the Marshall County Mine, described a specific incident in which an employee injured his shoulder while working but did not report the injury: "His exact words to me was he didn't want to screw everybody," Allen testified. *Id.* at 226. Allen explained that he rarely received calls before the plan about miners who left a shift without reporting an injury, but after the plans went into effect, the frequency of such calls tripled. *Id.* at 229.

Under the plan, bonus amounts were tied to one's presence on a working section. A production miner who left the section to accompany a federal inspector earned 10% of the bonus his or her section earned if the section met its production quota. After the bonus plans were implemented, safety committees had difficulty identifying miners willing to accompany inspectors. *Id.* at 47, 72-73, 152, 155, 166. Ann Martin testified: "I approached a young man who normally would jump at the chance to travel with the inspector and earn that experience, and his

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<sup>22</sup> In his case-in-chief, the Secretary presented evidence from four miners to describe the effects of the bonus plans. The Secretary attempted to call additional miner witnesses, but the Judge excluded their testimony, finding that it would be cumulative. 38 FMSHRC at 944, n.1.

<sup>23</sup> McCoy heard of other crews not filing section 103(g) complaints in similar situations. Tr. 114-15. At mines where the bonus plans were discontinued, section 103(g) reporting rebounded. *Id.* at 166.

exact words to me were, ‘No, Ann, I don’t want to go today. We are set up for production bonus, so I want to go to the section.’” *Id.* at 152. Timothy McCoy testified that his coworkers on the production crew discouraged him from serving as a walk-around representative because a less experienced miner would be sent to replace him, and this would reduce the crew’s ability to achieve a bonus. *Id.* at 113-14.

There was also abundant testimony describing safety issues that were being neglected while the bonus plans were in effect. Specifically, miners did not adequately rock dust, *id.* at 49, 52, 106, 119, 153, 217, failed to properly bolt the roof, *id.* at 105-6, 119, 153, worked in poorly ventilated and high methane conditions, *id.* at 49, 51-2, 106, 108, 118-19, failed to clean up accumulations, *id.* at 49, failed to maintain and inspect equipment, *id.*, and failed to change belt rollers, *id.* at 51.

The Judge found that “the effect of the bonuses is to create pressure on miners to maximize short-term production at the expense of safety,” such that “each worker feels pressure to work as fast as possible so as not to take away from potential bonuses for the other workers,” because “safety-related tasks take additional time, and miners are therefore reluctant to do them under the [plan] because they are less likely to achieve the production goals.” 38 FMSHRC at 950.

We conclude that the Judge’s finding that the first prong of the *Franks* test was satisfied is supported by substantial evidence. We turn now to the operators’ justification of the plan.

**B. The Operators’ Justification for the Policy Does Not Outweigh the Resulting Interference with Miners’ Rights.**

Applying the second step of *Franks*, under which an operator may defend against an otherwise valid interference claim if it offers a “legitimate and substantial reason whose importance outweighs the harm caused to the exercise of protected rights,” the Judge identified the Operators’ proffered reason as improving production and safety at its mines. 38 FMSHRC at 954 (quoting *Franks*, 36 FMSHRC at 2108, 2116).

The opinion of Chairman Jordan and Commissioner Nakamura in *Franks* noted that where the employer established a justification under step two, the operator’s actions must be “narrowly tailored” to promote that justification as part of the balancing of the operator’s interests with the protected rights of miners. 36 FMSHRC at 2118 n.14 (citing *Guardsmark, LLC v. NLRB*, 475 F.3d 369, 376-376 (D.C. Cir. 2007)). Even if the operator’s actions are narrowly tailored, it is still necessary to balance the degree of interference with protected rights against the importance of the asserted business justification. *Franks*, 36 FMSHRC at 2108.

The Operators failed to present any evidence addressing this step of the *Franks* test. The Operators asserted that the purpose of the bonus plans was to enhance both safety and production at the attendant mines. However, they made no assessments as to the impact of the plans on safety before implementation, and were unable to discern the impact on either safety or

production after the plans were implemented.<sup>24</sup> Finding that the Operators had failed to establish a legitimate and substantial reason for the plans which outweighed the impact on miners' protected rights, the Judge cited the same concerns. She concluded that "the harm to miners' rights is evident," while the Operators are "unable to show that the [plan has] actually been effective at improving or maintaining safety" and "unable to establish that the [plan] actually resulted in increased production." 38 FMSHRC at 954.

Given the totality of the circumstances, demonstrating the imbalance between the bonus plans' unsubstantiated benefits and the clear evidence of their chilling effect on the exercise of rights, we conclude that substantial evidence supports the Judge's conclusion that the Operators' bonus plans interfered with miners' protected rights in violation of section 105(c).

### **III. The Operators' Objections to the Judge's Evidentiary Rulings are not Meritorious**

#### **A. Admission of Hearsay Testimony**

The Operators argue that the Judge erred in admitting and relying on hearsay testimony of miners' representatives. Their testimony described how the bonus plans negatively affected miners' willingness to exercise their protected rights (such as the right to report injuries to management, to report safety hazards to management and MSHA, and to exercise their walkaround rights). Our inquiry centers on whether this testimony was reliable, and whether its admission was unfair to the Operators.

We review the Judge's ruling under an abuse of discretion standard. *Shamokin Filler Co. Inc.*, 34 FMSHRC 1897, 1907 (Aug. 2012), *aff'd*, *Shamokin Filler Co. Inc. v. FMSHRC*, 772 F.3d 330 (3d Cir. 2014), *cert. denied*, 135 S. Ct. 1549 (2015) (mem.); *Dynamic Energy, Inc.*, 32 FMSHRC 1168, 1174 (Sept. 2010) (holding that a judge's credibility determinations are reviewed under an abuse of discretion standard). Abuse of discretion may be found when there is no evidence to support the decision or if the decision is based on an improper understanding of the law. *Pero v. Cyprus Mining Corp.*, 22 FMSHRC 1361, 1366 (Dec. 2000).

Commission Rule 63(a) explicitly permits hearsay evidence "that is not unduly repetitious or cumulative." Comm'n Proc. Rule 63(a), 29 C.F.R. § 2700.63(a). *See also Mid-Continent Res., Inc.*, 6 FMSHRC 1132, 1135 (May 1984) (holding that hearsay evidence is admissible so long as it is material and relevant). In *Mid-Continent Resources*, the Commission emphasized that "properly admitted hearsay testimony, and reasonable inferences drawn from it,

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<sup>24</sup> As the Judge noted, 38 FMSHRC at 954, Murray Energy Senior Vice President John Forelli, who had designed the bonus plans, testified that two statistical analyses he had commissioned failed to reach a conclusion as to whether the bonus plans had improved production, and that his review of daily and quarterly safety reports did not show an impact on safety. Tr. 293-301. Significantly, however, as the Secretary notes, the combined non-fatal injury rate at the six mines went up by 18% during 2015, the year the bonus plans were put in place. S. Br. at 10, n.3.

may constitute substantial evidence upholding a judge's decision if the hearsay testimony is surrounded by adequate indicia of probativeness and trustworthiness." *Id.* at 1135-36. In that case, the Commission rejected the operator's argument that the Judge had erred in relying on the testimony of two MSHA inspectors about what they were told by a foreman.

In *Mid-Continent*, the Commission set forth a number of factors used to measure the probative value of hearsay evidence. Applying the relevant factors to the case at hand, we conclude that the Judge's finding of interference clearly rested on reliable evidence.

First, the statements of the miners' representatives were undisputed. *See Mid-Continent Res.*, 6 FMSHRC at 1137. The operators produced no contradictory evidence, never calling any witnesses who testified that their protected rights were not impacted by the bonus plan. The fact that the operators did not refute the evidence in any way significantly weakens their argument that the evidence was not reliable.

Second, the hearsay testimony was consistent. *Id.* at 1136-37. All of the miners' representatives testified about incidents involving miners who chose to forego protected activity due to the bonus plan. Tr. 47, 54-55, 72, 107-08, 112, 114-15, 141, 152, 155-58, 167, 213, 226-229. *See Mid-Continent Res.*, 6 FMSHRC at 1136-37 ("If there is more than one reported [hearsay] statement, we inquire whether the statements are consistent . . . . And we examine the content of any contradictory or corroboration evidence.").

As in *Mid-Continent*, the out-of-court statements in this matter "rest[ed] on personal knowledge gained from firsthand experience." *Id.* at 1136. The miners' representatives testified to the thoughts and motivations of miners reacting to the bonus plan, as it was related to them. Clearly, these miners had personal knowledge of their own responses to the bonus plan.

A final factor suggested by the Commission in *Mid-Continent* is whether the out-of-court declarant had an interest in the outcome of the case (and thus a reason to lie). *Id.* at 1136. Here, the record indicates that the miners felt that they benefited economically from the bonus plan, so they would have had no motivation to dissemble in order to shore up an interference claim challenging the plans.<sup>25</sup>

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<sup>25</sup> In fact, in this case, miner witnesses had motivation not to come forward. Witnesses risked retaliation, not only from the Operators, but also from their bonus-seeking fellow miners. We agree with the Secretary that "[t]he very nature of an interference violation is that it deters or intimidates miners from coming forward to share their concerns with MSHA, management, and the Commission. To fault the Secretary for proffering obviously relevant testimony via representatives of miners, as he did here, would undermine the structure and purpose of the Mine Act, which specifically envisions representatives acting as advocates for miners." S. Resp. Br. to R. PDR at 42. These considerations are precisely *why* the Commission's rules permit hearsay testimony.



As the above discussion indicates, there is nothing that tempts us to call into question the reliability of the undisputed testimony admitted by the Judge.<sup>26</sup> Moreover, the use of relevant information from the miners' representatives permitted the Judge to avoid a hearing that would have otherwise been replete with repetitious or cumulative testimony.<sup>27</sup> It was well within her discretion to make this choice.

Furthermore, as the Judge noted, much of the hearsay testimony to which the operators objected went to the state of mind of the miners (regarding the effect of the bonus plan). This would be admissible evidence under Federal Rule of Evidence 803(3), which states that out-of-court declarations are admissible to demonstrate "the declarant's then-existing state of mind (such as motive, intent, or plan)." Thus, for example, testimony by a safety committeewoman that a miner told her he didn't want to travel with an inspector because he wanted to go to the section demonstrates the miner's state of mind at the time he spoke. Tr. 152, 155, 167. This would be admissible under Federal Rule of Evidence 803(3).

Finally, in *Knight Hawk Coal, LLC*, 38 FMSHRC 2361 (Sept. 2016), the Commission rejected the contention of the operator that the Judge in that case had improperly relied on vague and speculative hearsay statements of miners who had been interviewed by MSHA accident investigators. We noted that the operator did not call the rank-and-file miners interviewed by MSHA as witnesses at the hearing to rebut MSHA's assertions. We held that the Judge did not err in admitting and relying on the testimony of the MSHA investigator concerning what he was told by the miners during the investigation, because the statements by the miners were "clearly material and relevant." 38 FMSHRC at 2366, n.13.<sup>28</sup>

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<sup>26</sup> To the extent that the Operators identify instances of double hearsay, we agree that a Judge must be particularly attentive and scrutinize such testimony for its probative value. However, under the circumstances, given the overwhelming reliable evidence of numerous examples of miners coerced into not exercising their protected rights in order to achieve a bonus under the plans, any error by the Judge in crediting and relying on such double hearsay is harmless.

<sup>27</sup> Courts routinely use representative testimony to establish violations of the Fair Labor Standards Act on behalf of similarly situated employees who do not testify, when employers fail to maintain proper wage and hour records. *See, e.g., Garcia v. Tyson Foods, Inc.*, 770 F.3d 1300, 1307 (10th Cir. 2014); *Reich v. S. New England Telecomm. Corp.*, 121 F.3d 58, 67 (2d Cir. 1997); *Martin v. Selker Bros., Inc.*, 949 F.2d 1286, 1297-98 (3d Cir. 1991).

<sup>28</sup> The Operators do not contend that the testimony of the miners' representatives was not relevant. They would be hard pressed to do so, given that the testimony addressed such issues as instances in which the bonus plan deterred miners from reporting hazards and injuries, refusing unsafe work, and serving as walkarounds. *See, e.g.,* Tr. 112, 152, 226.

The decision to admit evidence rests primarily in the province of the Judge.<sup>29</sup> Our analysis above confirms that the evidence in question was reliable and relevant, and that the Judge did not abuse her discretion in admitting it. We thus decline to take the extraordinary step of overturning the Judge's evidentiary ruling.

### **B. Cross-Examination**

The Operators contend that the Judge committed procedural errors in not allowing them to cross-examine the Secretary's witness on prior inconsistent statements made in response to discovery requests. This argument is also without merit. As discussed in further detail below, the Judge imposed limits on cross-examination only after the Operators had successfully established potential inconsistencies in testimony and the Judge had taken notice of them. Tr. 69-72, 91-92, 167-70, 248-49. Since the Operators had already raised the issue of allegedly inconsistent testimony, any additional cross-examination would have had limited probative value. *See Shamokin Filler Co.*, 772 F.3d at 339 (holding the judge did not err in excluding evidence of limited probative value when the presentation of that evidence would unnecessarily delay the hearing). The Judge merely re-directed the Operators' counsel to focus his examination substantively, rather than to spend time proving the inconsistency.

Rule 63(b) requires that a party be permitted "to conduct such cross-examination as may be *required* for a full and true disclosure of the facts." Comm'n Proc. Rule 63(b), 29 C.F.R. § 2700.63(b) (emphasis added). A Judge's limitations on cross-examination are reviewed for abuse of discretion. *See Connolly-Pacific Co.*, 36 FMSHRC 1549, 1555-56 (June 2014) (holding that the Judge did not err in enforcing time limits on some cross-examination).

The Operators first argue that the Judge twice limited their ability to impeach the Secretary's witnesses with allegedly prior inconsistent statements from their depositions. Counsel for the Operators attempted to impeach the witnesses by asking why they had mentioned a certain anecdote at trial but not in their depositions.<sup>30</sup>

The Operators additionally complain that they were not permitted to question two of the Secretary's witnesses about having testified to anecdotes that were not mentioned in the initial interrogatories exchanged by the parties during discovery. *See* R. PDR at 23-25 (citing Tr. 91-92, 248-49). However, the Secretary and the UMWA had objected to the interrogatories as being overly broad, unduly vague, and burdensome. Hence, these interrogatory responses were not inconsistent with the subsequent testimony. Moreover, at the hearing, the Judge appears to have been willing to assume that the anecdotes in question were not mentioned in the interrogatories, but the Judge found that this did not undermine the witnesses' credibility because they testified to the anecdotes at their depositions. *See* Tr. 91-92, 248-49.

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<sup>29</sup> The Operators cite no case in which the Commission had found a Judge's reliance on hearsay evidence to be an abuse of discretion.

<sup>30</sup> One of the two witnesses explained that she did not mention the incident at the deposition because the Operators' counsel had objected to the fact that the witness would not disclose the identity of the miners who allegedly were involved. Tr. 168-69.

In short, we reject these baseless objections by the Operators, and conclude that the Judge did not abuse her discretion.<sup>31</sup>

### **Conclusion**

For the foregoing reasons, we would affirm the Judge's decision.

/s/ Mary Lu Jordan  
Mary Lu Jordan, Commissioner

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

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<sup>31</sup> We reject the Operators' argument that the Judge erred by considering the evidence collectively as applying to each mine. In conjunction with streamlining this trial, the Judge limited the Secretary's presentation of redundant witnesses by prohibiting the Secretary from presenting a witness from each individual mine. The evidence reflected that the bonus plans at the mines were nearly identical. One individual drafted a single plan and met with each mine in implementing them. The only differences with the plans at Ohio County Mine and Powhatan No. 6 Mine were minimal – allowing a representative of the mine safety committee to conduct one additional inspection each month and permitting safety committee participation in determining whether injuries affecting bonuses were properly documented. This did not affect the application and analysis of the interference claims. Hence, the testimony of the Secretary's witnesses was applicable to all of the Operators' miners and the Judge did not abuse her discretion.

Acting Chairman Althen and Commissioner Young, in favor of reversing:

In 2011, the D.C. Circuit Court of Appeals, quoting liberally from a Commission dissent, noted that the plain language in section 105 was “a marvel of Congressional clarity” and “struggle[d] to see how Congress could have intended any other reading of the phrase” at issue in another provision of section 105. *Performance Coal Co. v. FMSHRC*, 642 F.3d 234, 238-39 (D.C. Cir. 2011). “Indeed, it is hard to imagine a clearer expression of congressional language.” *Id.* at 239.

Indeed. Once again, it is hard to imagine how Congress could have more clearly required the prohibited actions in section 105(c) be improperly motivated in order to be actionable, than by pointedly including “because” or “because of” *four times* as a threshold requirement for a violation. As explained below, we would apply the plain language of the Mine Act’s anti-interference provision and vacate the decision below.<sup>1</sup>

## DISCUSSION

### I. **Plain Statutory Language, Reinforced by Legislative History, Clearly Requires that Interference be Motivated in Some Way by Rights Protected Under the Act**

#### A. **The Plain Language of Section 105(c)(1) Requires Proof that Protected Activity Motivated the Operators’ Action.**

The fundamental problem with the Secretary’s argument is that he is not interpreting statutory language at all. He is impermissibly attempting to revise the statute by excising “because” from the text for interference claims alone.

The Secretary’s effort “runs afoul of the ‘cardinal principle’ of interpretation that courts ‘must give effect, if possible, to every clause and word of a statute.’” *Loughrin v. United States*, 134 S. Ct. 2384, 2389 (2014) (quoting *Williams v. Taylor*, 529 U.S. 362, 404 (2000) (citation omitted)). Section 105(c) identifies five actions – among them, interference – that may not be taken “because” of one or more of four specifically identified reasons. As relevant, section 105(c)(1) provides:

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner . . .

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<sup>1</sup> During oral argument, the Secretary conceded that he did not present evidence or argument that there was a motivational nexus between the Operators’ implementation of the bonus plan and any prior or anticipated exercise of protected rights by miners. Oral Arg. Tr. 77-78. Therefore, there is no basis to find the Operators implemented the plans because of prior or anticipated protected activity, and accordingly, no reason to remand the case for reconsideration under the proper standard.

[1] **because such miner** . . . has filed or made a complaint under or related to this chapter, . . . or [2] **because such miner** . . . is the subject of medical evaluations and potential transfer under a standard published pursuant to section 811 of this title or [3] **because such miner** . . . has instituted or caused to be instituted any proceeding under or related to this chapter or has testified or is about to testify in any such proceeding, or [4] **because of the exercise by such miner** . . . on behalf of himself or others of any statutory right afforded by this chapter.

30 U.S.C. § 815(c)(1) (emphasis added). In the present action, despite not presenting any evidence of the motivation for the bonus plans, the Secretary alleges that the Operators “interfere[d] with the exercise of the statutory rights of any miner . . . because of the exercise by such miner . . . of any statutory rights afforded by this chapter.”

Where the meaning of a statute is plain, we must apply the statute as written, looking first to the ordinary meaning of the words. *Schindler Elevator Corp. v. United States ex rel. Kirk*, 563 U.S. 401, 407 (2011); see also *Engine Mfrs. Ass’n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 253 (2004) (“Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.” (quoting *Park ‘N Fly, Inc. v. Dollar Park and Fly, Inc.*, 469 U.S. 189, 194 (1985))); *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995) (“When terms used in a statute are undefined, we give them their ordinary meaning.” (citing *FDIC v. Meyer*, 510 U.S. 471, 476 (1994))). If the words are clear, we may not make any further inquiry. *Schindler Elevator Corp.*, 563 U.S. at 412 (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997)). Here, Congress repeatedly used the same term throughout section 105(c)(1) as a prerequisite for connecting a prohibited action to a miner’s protected activity. That term is “because.”

The motivation requirement of “because” is repeated *four times* – once for each class of protected conduct – in Section 105(c)(1), which is a single sentence. The Supreme Court has recently, and unanimously, instructed that the “presumption that a given term is used to mean the same thing throughout a statute” is “at its most vigorous when a term is repeated within a given sentence.” *Mississippi ex rel Hood v AU Optronics Corp*, 571 U.S. 161, 134 S. Ct. 736, 743 (2014), citing *Brown v. Gardner*, 513 U.S. 115, 118 (1994). Therefore, “because” – repeated four times in the single sentence that comprises the entirety of Section 105(c)(1) – has one meaning, and that meaning clearly relates squarely to motivation.<sup>2</sup>

Absent a statutory definition, the ordinary meaning of a term, as provided in dictionaries, determines the plain meaning to the statute. See *Sebelius v. Cloer*, 569 U.S. 369, 376

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<sup>2</sup> “Because” is one of the 100 most-commonly-used words and most clearly understood words in the English language, as it is the natural beginning of any response to the question, “Why?” Our colleagues, though, maintain that the reasons “why” an operator has taken an action they deem to be interference are immaterial, despite the pointed inclusion of “because” four times in the text of section 105(c). There is an inherent irony in their incuriosity.

(2013)(“[u]nless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning.”); *Martin County Coal Corp.*, 28 FMSHRC 2487, 267 (May 2006). Here, there is no doubt concerning the ordinary meaning. Dictionaries uniformly define “because” as “for the reason that.” See Webster’s Third New International Dictionary 194 (1993) (“for the reason that: on account of the cause that”); American Heritage Dictionary of the English Language 159 (2009) (“for the reason that; since”); Random House Dictionary of the English Language 184 (1987) (“for the reason that; due to the fact that”).

Interpreting “because” as meaning “for the reason that” is particularly appropriate with respect to an anti-discrimination provision like section 105(c). The Supreme Court has repeatedly adopted such a definition of the term when asked to interpret federal anti-discrimination statutes. In *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009), the Court construed the term “because of” in the following provision: “[i]t shall be unlawful for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual’s age.” *Id.* at 176 (alteration in original) (quoting 29 U.S.C. § 623(a)(1) (Age Discrimination in Employment Act (ADEA))). In rejecting the idea that the ADEA authorizes a mixed-motive age-discrimination claim and holding that the term “because of” means that age must have been the “but-for” cause of the employer’s action, the Court explained:

The words “because of” mean “by reason of: on account of.”  
1 Webster’s Third New International Dictionary 194 (1966); see also 1 Oxford English Dictionary 746 (1933) (defining “because of” to mean “By reason of, on account of” (italics in original)); The Random House Dictionary of the English Language 132 (1966) (defining “because” to mean “by reason; on account”). Thus, the ordinary meaning of the ADEA’s requirement that an employer took adverse action “because of” age is that age was the “reason” that the employer decided to act. See *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610, 113 S.Ct. 1701, 123 L.Ed.2d 338 (1993) (explaining that the claim “cannot succeed unless the employee’s protected trait actually played a role in [the employer’s decisionmaking] process and had a determinative influence on the outcome. . . .”

557 U.S. at 176-77 (emphasis added).

The Supreme Court reaffirmed the *Gross* definition of “because” in *University of Texas Southwestern Medical Center v. Nassar*, 133 S. Ct. 2517 (2013):

Concentrating first and foremost on the meaning of the phrase “*because of* . . . age,” the Court in *Gross* explained that the ordinary meaning of “because of” is “by reason of” or “on account of.” *Id.*, at 176, 129 S.Ct. 2343 (citing 1 Webster’s Third New International Dictionary 194 (1966); 1 Oxford English

Dictionary 746 (1933); The Random House Dictionary of the English Language 132 (1966); emphasis in original). Thus, the “requirement that an employer took adverse action ‘because of’ age [meant] that age was the ‘reason’ that the employer decided to act,” or, in other words, that “age was the ‘but-for’ cause of the employer’s adverse decision.” 557 U.S., at 176, 129 S.Ct. 2343. See also *Safeco Ins. Co. of America v. Burr*, 551 U.S. 47, 63–64, and n.14, 127 S. Ct. 2201, 167 L. Ed. 2d 1045 (2007) (noting that “because of” means “based on” and that “‘based on’ indicates a but-for causal relationship”); *Holmes v. Securities Investor Protection Corporation*, 503 U.S. 258, 265-266, 112 S.Ct. 1311, 117 L.Ed.2d 532 (1992) (equating “by reason of” with “‘but for’ cause”).

133 S. Ct. at 2527 (emphasis and alteration in original).<sup>3</sup>

Thus, “because of” is the same as “by reason of” or “on account of.” Congress’ repeated use of that term in section 105(c)(1) demonstrates an intention to prohibit interfering actions when taken “by reason of” or “on account of” the specifically-identified types of protected activity.<sup>4</sup> Substituting the definition for the word “because” makes this inescapably clear: “No person shall . . . interfere with the exercise of the statutory rights of any miner . . . [by reason of or on account of] . . . the exercise by such miner . . . on behalf of himself or others of any statutory right afforded by this chapter.”

Indeed, from its very outset, the Commission recognized the meaning of “because” and required a motivational nexus between protected activity and violations of section 105(c). In *Secretary of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct.

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<sup>3</sup> Notably, in *Nassar*, the Court also stated,

When the law grants persons the right to compensation for injury from wrongful conduct, there must be some demonstrated connection, some link, between the injury sustained and the wrong alleged. The requisite relation between prohibited conduct and compensable injury is governed by the principles of causation, a subject most often arising in elaborating the law of torts.

133 S. Ct. at 2522.

<sup>4</sup> The Secretary asserts that Congress’ use of the term “because of” is ambiguous. S. Resp. Br. at 26. The foundational premise of this assertion, that section 105 is complex, is patently absurd. Section 105(c)(1) is hardly complex. It is a single (admittedly long) sentence comprising, in its entirety, barely 200 words. Reducing the sentence to its salient features reveals a quite simple structure: No person shall *a* or *b* or *c* or *d* or *e* because *w*, because *x*, because *y*, or because of *z*.

1980), *rev'd on other grounds*, 663 F.2d 1211 (3d Cir. 1981), the Commission held that “the complainant has established a prima facie case of a violation of section 105(c)(1) if a preponderance of the evidence proves (1) that he engaged in a protected activity, and (2) that the adverse action was motivated in any part by the protected activity.”

*Pasula* and its progeny are not limited to any one of the four subgroups of unlawful conduct under section 105(c), but apply, broadly, to any “violation of section 105(c)(1).” *Id.* For all violations of section 105(c), protected activity must motivate at least in part the adverse action. The Commission has repeatedly affirmed the *Pasula* test identifying indicia necessary to “establish a nexus between the protected activity and the alleged discrimination” – most recently in the case of *Sec’y of Labor on behalf of Kevin Shafer*, 40 FMSHRC 39 (Feb. 2018).

Essentially, the Secretary argues that the same word – “because” – has different meanings in the very same instance of its use depending on which type of case he has decided to bring.<sup>5</sup> The Secretary’s repeated attempts to rewrite unambiguous legislative terms must try the patience of the circuit courts that have reminded the Commission and the Secretary again and again that they may not exalt their policy desires over the words of Congress. *CalPortland Co. v. FMSHRC*, 839 F.3d 1153, 1161 (D.C. Cir. 2016) (rejecting Secretary’s attempt to interpret section 105(c) to extend its reach as contrary to plain meaning of provision); *Performance Coal Co.*, 642 F.3d at 239 (“[T]he language Congress selected [is] plain, clear, and simple and we refuse to muddy it by finding ambiguity where none exists.”); *Vulcan Constr. Materials, L.P. v. FMSHRC*, 700 F.3d at 309 (section 105(c) case); *see also N. Fork Coal Corp. v. FMSHRC*, 691 F.3d 735, 743-44 (6th Cir. 2012) (rejecting Secretarial attempt to extend reach of section 105(c) as entirely unpersuasive).<sup>6</sup>

Our colleagues’ failure even to attempt to reconcile the plain language of the statute, by citing the straw man of the Operators’ hyper-literal argument, has been held to be improper upon

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<sup>5</sup> Neither the Secretary nor our colleagues can adequately explain how, in a statute, the same instance of the same word can hold within it two incompatible meanings at the same time. There is no basis in law for this proposition. One wonders if they could turn to literature for support: “Do I contradict myself? Very well then I contradict myself, (I am large, I contain multitudes.)” Walt Whitman, *Song of Myself* 51 (1892). Or perhaps they should look to quantum physics and liken section 105(c)(1) to Schrödinger’s cat – the statute exists in a state of quantum superposition, where “because” means both “because” and nothing at the same time, until the Secretary brings a case and the word’s meaning is revealed.

<sup>6</sup> As discussed further *infra*, we do not agree with and do not accept the Operators’ argument that, because protected activity must motivate at least in part the Operators’ action, an action taken to restrain possible future protected activity cannot violate section 105(c). An action motivated by a desire to foil anticipated protected activity is as fully within the scope of section 105(c) as if the protected activity had occurred. In this case, the Secretary conceded that he did not introduce any evidence of motivation. Therefore, we do not deal with a case involving a claim of an attempt to forestall anticipated protected activities.



judicial review. We agree that the Operators’ “literal” interpretation is incorrect.<sup>7</sup> But, as instructed by the D.C. Circuit, in a case *interpreting the very same provision*, “plain meaning and literal meaning are not equivalents.” *Meredith v. FMSHRC*, 177 F.3d 1042, 1054 (D.C. Cir. 1999) (citing *Bell Atlantic Tel. Cos. v. FCC*, 131 F.3d 1044, 1045 (D.C. Cir. 1997)). In that case, the UMWA argued that, by its literal language, the term “person” included MSHA officials, thus allowing suits against MSHA officials for discrimination under section 105(c)(1) of the Act. *Id.* at 1052. The D.C. Circuit disagreed with that literal interpretation and found that “the text and structure of the Mine Act, as well as the legislative history, inexorably lead to a single conclusion. The Mine Act’s anti-discrimination provision does not apply to MSHA employees for actions taken under color of their authority.” *Id.* at 1053. Notably, although the court found that the literal reading of the statute was incorrect, the court did not then consider the statute to be ambiguous. The court considered Congress’s intent to be clear and resolved the issue under the first prong of *Chevron*. *Id.* at 1053 n.9. Accordingly, the court vacated the Commission’s decision, which had incorrectly defined “persons.” *Id.* at 1044.

Similarly, in *Nally & Hamilton Enterprises, Inc.*, 33 FMSHRC 1759 (Aug. 2011), the Commission rejected an operator’s literal reading of a standard to apply the standard’s ordinary meaning. The operator argued that “maintain,” as a verb, required a willful failure to act in order to be held liable for a violation. The Commission found that “its literal meaning is less complicated than what is suggested by the operator.” *Id.* at 1763. Instead, the Commission applied “the ordinary meaning of ‘maintain’ and conclude[d] that the term is not ambiguous.” *Id.* Even though the Commission reversed the judge’s determination that there was no violation and rejected the operator’s literal interpretation, the Commission nevertheless found “the standard’s language plain and unambiguous,” and “[did] not reach the Secretary’s deference argument.” *Id.* at 1764. Contrary to our colleagues’ argument, rejecting a “literal” interpretation is not some sort of *deus ex machina* they can call upon to find ambiguity where there is none.

Finally, in addition to the commanding bulwark of cases we have cited to show the resolute refusal of appellate courts to exceed the limits of judicial authority to interpret statutes, we note the Supreme Court has recently provided an emphatic admonishment of a failure to do so. In *Digital Realty Trust, Inc. v. Somers*, 138 S. Ct. 767 (2018), the Court reversed –

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<sup>7</sup> Our colleagues’ charge that the Act does not require “retaliatory motivation” and their indignation over the Operators’ artificially narrow reading of section 105(c) is no exception. *See slip op.* at 10-11. We find that the requisite motivation for an operator’s improper interference may be because of the operator’s fear of the prospective exercise of protected rights or the operator’s belief that a miner or group of miners has engaged in protected activity, regardless of whether any protected activity actually occurred. This is consistent with the Commission’s holdings in *Moses* and *Gray*.

unanimously – a Ninth Circuit holding that application of statutory language as written could not have been what Congress intended.<sup>8</sup>

*Somers*, like the case at bar, construed statutory language designed to protect those who exercise protected rights, especially including the right to bring private wrongs to the attention of supervisors or authorities.<sup>9</sup> In a decision by Justice Ginsburg, the Court unanimously reversed the Circuit Court, finding, “[c]ourts are not at liberty to dispense with the condition – tell the SEC – Congress imposed.” *Id.* at 777.

In the present case, the Secretary has not presented any evidence of any motivation to interfere with protected rights. Indeed, the Secretary has not even presented evidence that the miners *in this case* would suffer any harm from the application of the plain language requiring proof of a nexus between the Operators’ conduct and rights protected under the Act. It would be astonishing for a court to endorse such a misreading of the plain words of the statute in this context, where there has been no attempt to show that construing the statute as written would be contrary to the purposes of the Act.

In attempting to overcome the exquisite clarity of section 105(c) our colleagues gamely assert that the plain language of section 105(c) leads to absurd results and/or is ambiguous. Slip op. at 10-11. These arguments only emphasize the weakness of their position. With respect to their absurdity argument, it is difficult to conceive of a more absurd result than construing section 105(c) – which four times expressly requires a motivational component for a violation – nonetheless *not* to require motivation and to permit imposition of monetary penalties upon operators for actions not motivated in any way by protected activities. In turn, there is nothing ambiguous about the word “because” or about the requirement that the interference occur “because” of protected activity.

As read by our colleagues, section 105(c) as a practical matter could prohibit virtually any form of incentive plan for miners. Congress certainly did not intend to abolish for the coal industry incentive programs used throughout American businesses without any recognition of that effect. In a given case, indeed even in this case, the Secretary might well be able to present evidence that the current or future exercise of protected activities motivated, at least in part, the introduction of an incentive program. In such case, the program would be unlawful. However,

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<sup>8</sup> The reversed courts cited to the “absurd results doctrine” to avoid the result required by the plain language of the statute. The District Court and the Ninth Circuit, in succession, adopted the Second Circuit’s finding that applying the statute as written “would make little practical sense and undercut congressional intent. The Supreme Court unanimously held that courts must apply the plain language of the statute.

<sup>9</sup> It is perhaps obvious beyond need of mention, but *Somers* is a whistleblower case arising in the context of a statute written to provide protections to persons based on their *conduct*, rather than personal characteristics, and is thus much more like Section 105(c)(1) than the status-based protections giving rise to disparate-impact claims. *See* Part II, *infra* (discussing inapplicability of disparate-impact case law).

without any such evidence there is no basis to find the Operators introduced the plan “because” of protected activity. The Secretary made no effort to introduce such evidence in this case.

**B. The Legislative History of Section 105(c)(1) Supports the Plain Language’s Imperative for a Motivational Nexus.**

Because the language of the law plainly excludes the Secretary’s distortion, it is unnecessary to resort to legislative history. However, for purposes of a complete analysis, we note that the revisions made to section 105(c) of the Mine Act from its antecedent strengthened the requirement that actionable misconduct must be motivated by protected activity, and that the history shows that Congress clearly intended that improper actions be proscribed because of their relationship to protected activity.

Section 105(c)(1) is similar in purpose to its predecessor, section 110(b)(1) of the Coal Act, which used terms synonymous with those employed in the Mine Act. The earlier provision stated:

No person shall discharge or in any other way discriminate against or cause to be discharged or discriminated against any miner or any authorized representative of miners by reason of the fact that such miner or representative (A) has notified the Secretary or his authorized representative of any alleged violation or danger, (B) has filed, instituted, or caused to be filed or instituted any proceeding under this Act, or (C) has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this Act.

83 Stat. 758-59. The changes made to the Coal Act’s protections in Section 110(b) in drafting Section 110(c) of the Mine Act reinforced the requirement for motivation – literally. The Act’s structure was changed to ensure “because” or “because of” was appended to each class of protected activity, making clear that improper motivation is essential to a finding of violation.

This change to emphasize by repetition the integral nature of the motivational requirement forecloses any misreading here. In essence, in the Mine Act, Congress repeated and amplified the requirement that the Secretary prove that an operator acted “because of” some prohibited reason. The motivational nexus set forth in the Mine Act flows logically from the antecedent Coal Act.

The Secretary intones the intents and purposes of the Mine Act, but its legislative history contains not a shred of authority for applying any type of disparate-impact analysis, or for discarding Congress’ plain and direct articulation of violative interference. Indeed, the legislative history demonstrates the overarching relevance of the exercise of miners’ rights under the Act, stating as a goal the protection of miners against forms of interference with those rights, such as “threats of reprisal.” S. Rep. No. 95-181, at 36, *reprinted in Legis. Hist.* at 624. For there to be a threat of reprisal there must be an action that triggers the threat – that is, there must be a *cause* for the reprisal.

In fact, the legislative history of the Mine Act – with its references to threats as illustrative of “interference” – establishes that disparate-impact liability has no place in interpreting the interference clause of section 105(c)(1). The addition of the phrase “or otherwise interfere” simply recognizes that other forms of employer retaliation, such as threats, may *also* – or “otherwise” – constitute wrongful action when motivated by protected activity.<sup>10</sup>

The legislative history of the two statutes confirms this congressional intent. In proposing an amendment to the Coal Act that became section 110(b)(1) – the precursor to section 110(c) – Senator Edward Kennedy explained that it “would make it unlawful for any person to discharge or otherwise discriminate against a miner *for bringing suspected violations of this act to the attention of the authorities.*” 115 Cong. Rec. 27948 (Oct. 1, 1969), *reprinted in* S. Subcomm. on Labor, S. Comm. on Labor and Pub. Welfare, 94th Cong., 1st Sess., *Legislative History of the Federal Coal Mine Health and Safety Act of 1969 Part I*, at 666 (1975) (emphasis added). He further explained that his amendment gave miners “the same safeguards that we give to other employees *who raise possible violations of the law.*” *Id.* at 667-68 (emphasis added).

The available history of section 110(b)(1) of the Coal Act clearly supports the plain language’s protection against operator conduct motivated by a desire to retaliate for a miner’s assertion of his/her safety rights. Thus, a motivational nexus was the required for a successful claim under section 110(b)(1).

Regarding interference with protected rights under the Mine Act, at no point did Congress even hint at an intention to eliminate or qualify the motivation required by the Coal Act. On the contrary, the Committee on Human Resources explained, “if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer *as a result* of their participation.” It further stated that “[w]henver protected activity is in any manner *a contributing factor* to the retaliatory conduct, a finding of discrimination should be made.” S. Rep. No. 95-181, at 35, 36, *reprinted in Legis. Hist.* at 623, 624 (emphases added).

Section 105(c)(1) provides protection against discrimination, discharge, and interference because of protected activity. It achieves those protections through direct and/or circumstantial evidence permitting reasonable inferences drawn from all the evidence presented in a case. To erase “because,” and thus the necessary motivational nexus, from section 105(c)(1) is entirely contrary to the language and legislative history of the Mine Act and the Coal Act.

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<sup>10</sup> MSHA itself has recognized that the Mine Act does not reach mistreatment based on the types of characteristics that have supported disparate-impact analysis. MSHA’s *A Guide to Miners’ Rights and Responsibilities Under the Federal Mine Safety and Health Act of 1977*, at 7 (Rev. 2017), states, “Discrimination on the basis of race, sex, age, religion, handicap, union activity, or any other non-mining status, is not covered by Section 105(c) of the Act.” Rather, the prohibited actions are those taken for the reasons enumerated in the statute; if some other reason motivates an action, the Mine Act provides no recourse.

## **II. There's No Evidence or Rational Analysis to Support the Secretary's Application of Incongruous Legal Doctrine and Statutes Not Germane Here.**

Unable to argue persuasively the definition of “because” in the context of the wording of the Mine Act or in an analysis of legislative history, the Secretary turns to a wholly different and completely irrelevant category of cases in an effort to obscure the clear wording of the Mine Act. The Secretary relies on *Texas Department of Housing Community Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507 (2015), to support an argument that section 105(c)(1) should be read to embrace a “disparate impact” analysis. There is no foundation anywhere in the law for this discordant cherry-picking of out-of-context language from an exotic, context-sensitive legal doctrine.

### **A. Disparate-Impact Case Law is Not Applicable in This Case.**

Disparate-impact cases use statistical evidence to show that members of a protected class defined by identifiable and usually immutable characteristics, have been disproportionately disadvantaged compared to members outside the class by policies that are facially-neutral. “[C]laims that stress ‘disparate impact’ [by contrast] involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another . . .” *Smith v. City of Jackson*, 544 U.S. 228, 239 (2005) (quoting *Teamsters v. U.S.*, 431 U.S. 324, 335-336 n.15 (1977)).<sup>11</sup>

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<sup>11</sup> In *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977), the Supreme Court explained the difference between “disparate treatment” and “disparate impact”:

“Disparate treatment” such as is alleged in the present case is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment. . . . Claims of disparate treatment may be distinguished from claims that stress “disparate impact.” The latter involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity.

Obviously, section 105(c) does not deal with separate or “disparate” groups. *All* miners are entitled to exercise protected rights without discrimination or interference because of their exercise of such rights. With the Secretary’s resort to a theory of disparate-impact liability for interference cases, it appears that the Secretary has entirely failed to heed the Supreme Court’s admonition, set forth in the context of interpreting discrimination provisions, to “be careful not to apply rules applicable under one statute to a different statute without careful and critical examination.” *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 393 (2008).

There is a total absence of *any* of these facts in the record of this case:

- There is no group of persons that Congress has chosen to protect on the basis that the group is subject to prejudice or discrimination based on characteristics.
- There are no distinguishing personal characteristics one might use to establish a disparity based on protected-group membership.
- There is no comparator class of persons against whom a disparate impact theory may be evaluated, and thus no showing that consequences of an action fall more harshly on one group than another.
- There are no statistics – indeed, no objective evidence of any sort – showing a disparity.

Because none of the predicate facts exist in this case, there is, of course, no showing of a disparate impact – which is an irresolvable problem for a disparate-impact case. In fact, there is not even really a theory here: just a slogan or a catchphrase. It matters not at all to our colleagues, who unquestioningly accept the Secretary’s radical reliance on an extraordinary legal remedy, despite a total absence of the evidence used to prove that theory in its proper context.

Even properly-applied disparate-impact cases are rare. While the Secretary states – incorrectly – that *Inclusive Communities* “says nothing about applying only in exceptional circumstances,” S. Resp. Br. at 25, the Supreme Court majority not only specifically acknowledged that “the underlying dispute in this case involves a novel theory of liability,” but cited a historical review showing that such cases do, in fact, appear to be “exceptional.” *Inclusive Communities*, 135 S. Ct. at 2522 (citing Seicshnaydre, *Is Disparate Impact Having Any Impact? An Appellate Analysis of Forty Years of Disparate Impact Claims Under the Fair Housing Act*, 63 Am. U. L. Rev. 357, 360-63 (2013)) (“noting the rarity of *this type of claim*” (emphasis added)). The Secretary is thus either unaware of the exotic foundation of his own theory, or he has chosen to ignore what the Court said about it in *Inclusive Communities*.

The foregoing caveat would apply even to a true disparate-impact case, reflecting a justified caution in the Court’s consideration of the scope of disparate-impact doctrine, even in a case with the requisite evidentiary support and a common foundation in civil rights law. Here, though, the Secretary produced none of the evidence required to support the theory *he himself has chosen to argue before us*, and which is spelled out as a prerequisite for the type of theory he espouses *in the very authority he has chosen to cite*. Simultaneously, he disclaims that authority’s own acknowledgment that the approach it endorsed is highly unusual. The Secretary does all this in order to favor his policy preferences over the clear words of Congress.

**B. *Inclusive Communities* Cannot Serve as a Template for Interpretation of Section 105(c).**

*Inclusive Communities* is predicated entirely on the principle that cases of racial discrimination in housing may be based on the disparate impact that facially-neutral policies may have on racial or ethnic minorities.<sup>12</sup> The Secretary did not cite to *Inclusive Communities* before the Judge below, nor did the Secretary introduce any evidence pertaining to, or make any argument concerning the applicability of, disparate-impact analysis to the facts in this case. Thus, there are no distinct classes against whom any statistical or other objective analysis may be applied in order to infer an improper basis for the circumstances in which the law has found them.

As *Inclusive Communities* and other disparate-impact cases have made clear, a showing of discriminatory effect requires a sophisticated and thorough exposition grounded on record evidence. “A plaintiff who fails to allege facts at the pleading stage or produce statistical evidence demonstrating a *causal connection* cannot make out a prima facie case of disparate impact.” *Inclusive Communities*, 135 S. Ct. at 2523. None was provided below. Thus, the

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<sup>12</sup> The historical background of racial discrimination in housing and its persistent effects demonstrate why disparate-impact analysis was necessary to determine causation. Both before and after the Fair Housing Act, the federal government actively supported racial segregation for decades. See Federal Housing Administration, Underwriting Manual, pt. 2, ¶ 228 (Apr. 1936), <https://catalog.hathitrust.org/Record/002137289> (last visited June 26, 2018). Outlining a policy known as “redlining,” the Federal Housing Administration expressly approved of segregation and racial covenants to prevent minorities from purchasing homes and urged federal evaluators to “investigate areas surrounding the location to determine whether or not incompatible racial and social groups are present, to the end that an intelligent prediction may be made regarding the possibility or probability of the location being invaded by such groups.” *Id.* ¶ 233. For an saddeningly long period, government, including in the provision of mortgage assistance and public housing assistance, entrenched institutional racism and furthered segregation. See, e.g., *Gautreaux v. Romney*, 448 F.2d 731, 739, 740 (7th Cir. 1971) (“It also is not seriously disputed on appeal that the Secretary exercised the above described powers in a manner which perpetuated a racially discriminatory housing system in Chicago, and that the Secretary and other HUD officials were aware of that fact.”) (granting summary judgment for plaintiffs for violations of the Fifth Amendment and the Civil Rights Act of 1964); *Young v. Pierce*, 628 F. Supp. 1037, 1053 (E.D. Tex. 1985) (“The actions complained of here are not in any sense facially neutral: HUD supports those authorities it knows to discriminate.”). It is against this background of government-assisted and government-subsidized racism that the Supreme Court adopted a disparate-impact theory of discrimination in *Inclusive Communities* – a far different historical context than that presented in this case. To be analogous, one would be required to show that the federal government, after passage of the Mine Act, had mine regulators working to suppress protected activity by miners. There is not a scintilla of evidence suggesting support for a parallel in the Mine Act experience to the government’s suppression of fundamental civil rights in the exercise of official state housing policy.

Secretary seeks to introduce before the Commission an entirely new argument upon which the Judge below was not given an opportunity to pass, and for which there is no substantial evidentiary support. This is impermissible as a matter of law. 30 U.S.C. §§ 823(d)(2)(A)(iii), (d)(2)(B).<sup>13</sup>

There also are critical distinctions between *Inclusive Communities*, decided by a majority of the Supreme Court, and *Smith v. City of Jackson* (an earlier disparate-impact case), which was a plurality decision. The Court found in *Inclusive Communities* that Congress had effectively ratified the application of disparate-impact analysis to the FHA by amending the FHA's anti-discrimination provisions in 1988 without addressing the "unanimous" body of circuit court opinion holding that its application was appropriate. *Inclusive Communities*, 135 S.Ct. at 2519-22. "Indeed, the inference of disparate-impact liability is even stronger here than it was in *Smith*. As originally enacted, the ADEA included the RFOA provision, *see* § 4(f)(1), 81 Stat. 603, whereas here Congress added the relevant exemptions in the 1988 amendments against the backdrop of the uniform view of the Courts of Appeals that the FHA imposed disparate-impact liability." *Id.* at 2521.

The Mine Act, of course, reveals no such historical context, no unanimous body of circuit court opinions, and no statutory revisions that are relevant to the consideration here. Further, Justice Kennedy, who authored the majority opinion in *Inclusive Communities*, was not part of the plurality that extended *Griggs*' disparate-impact holding beyond race discrimination cases in *Smith*.

In addition to noting the "significant differences between the ADEA and Title VII of the Civil Rights Act of 1964 [that] counsel[ed] against transposing to the former our construction of the latter" in *Griggs*,<sup>14</sup> Justices O'Connor, Kennedy, and Thomas expressly disclaimed in *Smith* the linguistic contortion the Secretary has thrust before us. *Smith*, 544 U.S. at 2118. Criticizing the plurality's parsing of the language of the ADEA, such that in successive paragraphs, the term "because of" would have different meanings, Justice O'Connor noted that the language at issue in Section 4(a)(1) of the ADEA was clear:

That provision requires discriminatory intent, for to take an action against an individual "*because of* such individual's age" is to do so "by reason of" or "on account of" her age. See Webster's Third New International Dictionary 194 (1961); see also *Teamsters v.*

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<sup>13</sup> We note the flaw of the Secretary's objection to the Operators' challenge to the ALJ's misconstruction of the law. It is our duty to interpret the law *de novo*, so, in any proper review, the Judge's error in applying the wrong legal standard must be uprooted.

<sup>14</sup> Justice Kennedy deemed this significant in *Smith*, which at least involved another disparate-impact claim. In nearly four decades of Mine Act jurisprudence before the Commission and the Appellate Courts, there has never been any suggestion of even a remote association between such claims, grounded on a statistical showing of disparity between groups, and interference claims under the Mine Act.



*United States*, 431 U.S. 324, 335-336, n. 15, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977) (“Disparate treatment’ . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others *because of* their [protected characteristic]. Proof of discriminatory motive is critical” (emphasis added)).

*Smith*, 544 U.S. at 249 (emphasis in original). Thus, the author of *Inclusive Communities* read “because of” precisely as we do, and even if there were any plausible basis for applying disparate-impact analysis to interference cases as a threshold matter (there is not), employing the doctrine here would require a radical leap over a fortified barricade of legal authority and practical and evidentiary barriers. If the Court was hesitant to expand the scope of disparate-impact liability to analogous anti-discrimination statutes, it surely would never approve of its application to a case with no elements in common and no evidence of any disparity.

A more thoughtful review in place of the Secretary’s specious analysis of Supreme Court precedent makes abundantly clear that *Inclusive Communities* is wholly irrelevant to the case before us.<sup>15</sup> Section 105(c)(1) is different in kind from Title VII and the Fair Housing Act. The Mine Act’s prohibition against interference is not aimed at facially-neutral employer policies affecting miners because of their membership in a protected group. In characterizing Section 105(c) as an “anti-discrimination law,” somehow similar to Title VII, the FHA or the ADEA, the Secretary disregards the fact that he suggests an interpretation that he would apply only to *interference* claims, and not to discrimination claims – for which he acknowledges motivation is required.<sup>16</sup> *Cf.* S. Resp. Br. at 18.

Finally, the Secretary argues that the use of the word “otherwise” in section 105(c)(1) indicates an intent to apply a disparate-impact analysis, as in *Inclusive Communities*. That argument makes no sense, linguistically, logically, or legally. All of the actions prohibited by section 105(c) (discrimination, discharge, etc.) are forms of “interference” with protected rights. Use of the term “otherwise” simply extends the Act’s prohibitions to include employer conduct, such as threats of reprisals, that does not rise to the level of a direct and adverse employment action, and represent nothing more than Congressional recognition that interference may be found – and proved – in operator actions beyond those expressly enumerated, *when those actions are taken “because of” the exercise of protected rights.*

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<sup>15</sup> We must note, again, that *Inclusive Communities* repeatedly and emphatically makes clear that it is entirely grounded in disparate-impact theory, and a citation to the points in the case supporting this limiting principle would read simply “*passim.*” A full reading of *Inclusive Communities* abundantly demonstrates: it is a case decided to address a particular problem using particular evidentiary methods not applicable here and requiring evidence that has not been produced in this case.

<sup>16</sup> This non-sequitur flows from the fact that the Mine Act is, of course, nothing like statutes which seek to protect group members from discrimination *because of their membership in a group*, even in its “anti-discrimination” provisions.

The Secretary's argument disregards the fact that *Inclusive Communities* itself, like the disparate-impact cases upon which it relies, continues to require that plaintiffs prove causation, i.e., that the harm they have suffered is "as a result of" or "because of" their race. His citation to a single word yanked out of context cannot serve to erase statutory language – especially where the Secretary acknowledges that his position would require "because" to be interpreted differently in successive clauses of the same sentence. While we feel duty-bound to respond to all of the Secretary's arguments, in fact the question is settled at the initial consideration of the statute's plain meaning. The Court's "inquiry ceases [in a statutory construction case] 'if the statutory language is unambiguous and the statutory scheme is coherent and consistent.'" *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002). The Secretary's argument would reduce Section 105(c)(1) to incoherence and inconsistency – the exact opposite of the clear command of the law.

Disparate-impact liability has been relied upon in rare circumstances, e.g., when it has been "necessary to achieve Title VII's ostensible goal of eliminating the cumulative effects of historical racial discrimination." *Smith*, 544 U.S. at 262 (O'Connor, J., joined by Kennedy and Thomas, JJ., concurring in the judgment). Finding no such necessity, the O'Connor opinion Justices declined to extend *Griggs* beyond the remediation of "historical racial discrimination" – the same evil targeted by the Fair Housing Act and addressed in *Inclusive Communities*.

The Secretary has not made a showing that the expansion of a doctrine from cases of racial discrimination is not merely permissible and convenient but *necessary* to achieve the purposes of the Act.<sup>17</sup> There was no evidence adduced in this case showing that any miner would be prejudiced unfairly or the Act's protections neutered by a requirement to show that the Operators' actions were motivated by protected activity. In sum, there is no authority for applying *Inclusive Communities* even if there were evidence showing how miners interfered with might theoretically have been disparately impacted by the Operators' bonus plan, and there is no evidence showing that it would be necessary – or even proper – to apply a disparate-impact analysis in contravention of the statute's plain language.

### **III. The Secretary has Misstated Section 8(a)(1) of the National Labor Relations Act, Which is Materially Dissimilar to Section 105(c) and Must Be Read As Adverse to the Secretary's Position**

The Secretary urges that Commission precedent compels us to rely on the National Labor Relations Act ("NLRA") as persuasive authority. The Commission does use NLRA case law to assist its interpretations. *See Gray*, 27 FMSHRC at 9-10. We are not compelled to follow NLRA case law. More importantly, here, an honest reading of the relevant provision of the NLRA torpedoed the Secretary's argument amidst.

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<sup>17</sup> Neither the Commission nor the Courts have decided the issue before us in this case. *Griggs* was decided in 1971, before the Mine Act was signed and forty-five years before we heard this case on review. If disparate impact were essential to the protection of miners' rights, one imagines we would have heard of the need before now.

Section 8(a)(1) of the NLRA provides: “It shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title.” 29 U.S.C. § 158(a)(1).

Unlike section 105(c)(1), section 8(a)(1) does not include any motivational requirement – that is, there is no “because” in it. Actions that “interfere” or rise to the level of “coercion” are likely to be similar in both contexts, but the Mine Act contains the explicit requirement that interference must be occur “because of” protected activity – section 8(a)(1) of the NLRA contains no such requirement.

Thus, the NLRA case law is irrelevant due to the omission of “because” from section 8(a)(1), which is material and presumptively intentional. The Court has stated that it has “often noted that when ‘Congress includes particular language in one section of a statute but omits it in another’ – let alone in the very next provision – this Court ‘presume [s]’ that Congress intended a difference in meaning.” *Loughrin*, 134 S. Ct. at 2390 (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)).<sup>18</sup>

The Secretary further failed to note that, in 8(a), Congress did require motivation, but only in subsection (a)(4), which makes it an unfair labor practice “to discharge or otherwise discriminate against an employee *because* he has filed charges or given testimony under this subchapter.” 29 U.S.C. § 158(a)(4) (emphasis added).

Of course, the NLRA is an entirely separate statute. There is no congruence between the respective provisions of the Mine Act and the NLRA because the latter does not include “because” – a crucial term with fatal significance here. The Secretary’s misstatement of the law is thus readily exposed, and the NLRA’s interference provision has no relevance here.

#### **IV. There Is No Basis for Our Colleagues’ Reliance Upon an “Absurd Results” Theory and No Grounds for Re-Writing The Statute to Avoid Them.**

The real danger represented by the misreading of the Mine Act is demonstrated by the fact that it is unnecessary to any purpose save bureaucratic expedience. A decade after *Griggs* – and 35 years before we heard this case — the Commission addressed, and resolved, the same concerns our colleagues and the Secretary have raised. See *Pasula*, 2 FMSHRC at 2795-2801; *Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981). Our colleagues’ claim that absurd results will necessarily flow from a consistent, harmonious reading of the provisions of section 105(c)(1). Their claim is demonstrably false.

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<sup>18</sup> The Secretary’s argument elides the fact that the Commission has never equated the two provisions, which are not, in fact, similar in their requirements. We have not held that actions need not be motivated by protected activity, because in the entire history of the Act, every case considered by the Commission has presented facts showing motivation, and it is apparent from circumstance that the law was clearly understood as meaning what it plainly says.

The historical record, in fact, suggests that the contrary is true. The Commission as a whole has never varied from the need to show motivation in the more than 30 years since adopting the *Pasula-Robinette* framework. Here, our colleagues pursue the abstraction the Secretary has thrown them to suggest easing his duty under the law: The obligation to prove violations by substantial evidence, including *all* of the elements Congress has provided.<sup>19</sup>

*Pasula-Robinette* has long provided a framework and clear authority for deriving improper motivation from circumstantial evidence. Without doubt, evidence of motivation may be drawn from circumstantial evidence. Rather than attempting to demonstrate an improper motive, the Secretary seeks to avoid the necessity for proof by eliminating an element of the violation.<sup>20</sup>

We do not accept the Operators' argument, relied upon by the majority for its assertion of absurdity, that a specific occurrence of protected activity necessarily must precede an operator action motivated by a desire to thwart or prevent protected activity. *See supra* slip op. at 34 n.6. Commission case law related to operator efforts to deter protected activity remains fully applicable.

Following *Pasula* and *Robinette*, *Moses v. Whitley Development Corp.*, 4 FMSHRC 1475 (Aug. 1982), raised the issue of whether a miner was discharged because the operator suspected he had engaged in protected activity. The Commission highlighted the motivation requirement: "Section 105(c) prohibits discharge, discrimination, or interference 'because' of 'a miner's exercise of any statutory right afforded by [the] Act.'" *Id.* at 1480. The Commission then found that, if a suspicion of protected activity motivated the discharge, such discharge would violate section 105(c) *even if the suspicion turned out to be incorrect*. Thus, the Commission's reading of the law is both protective of miners' rights and faithful to its intent.

In *Gray v. North Star Mining*, 27 FMSHRC 1 (Jan. 2005), we similarly found interference, overturning a Judge's conclusion that a threat he found not to have been sincere did

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<sup>19</sup> Legal reasoning unrelated to facts of record such as that employed here is not only devoid of useful content, it is arguably foreclosed to us. The Supreme Court has stated that "[i]t has long been settled that a federal court has no authority 'to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.'" *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992) (quoting *Mills v. Green*, 159 U.S. 651, 653 (1895)). The Commission, as an adjudicative body, is likely equally constrained by the Supreme Court's admonition, and the Commission since its inception has repeatedly expressed that we need not reach issues unnecessary to the disposition of cases. *See, e.g., Ross v. Monterey Coal Co.*, 3 FMSHRC 1171, 1173 n.6 (May 1981); *Kaiser Steel Corp.*, 1 FMSHRC 343, 345 n.6 (May 1979).

<sup>20</sup> The Secretary, quite unlike the Court in *Griggs*, has not demonstrated a change in the law that justifies unsettling our interpretation of "because of" in discrimination cases or decades of settled law governing our use of inferences to resolve questions of motivation. He has simply seized upon *Inclusive Communities* as an instrument of interest and convenience.

not constitute interference. We held that, in determining whether an actor's statements are coercive under the Mine Act, Judges must consider the totality of the circumstances. *Id.* at 10.

The Secretary argues that *Gray*'s holding is substantially broader and that "[t]he only reasonable way to read *Gray* is as adopting the NLRA interference test and rejecting the notion that the interferer's intent matters." S. Resp. Br. 19. The Secretary misreads the *Gray* decision by ignoring the case's factual context, where the motivation was apparent.<sup>21</sup> The Commission in *Gray* did not confront the issue in the present case — whether an employer's allegedly interfering actions must be motivated by protected activity in order to constitute a violation of section 105(c)(1). Rather, *Gray* was concerned with policing the line between allowable comments and questions about protected activity and impermissible coercive interrogations and harassment about protected activity.

In *Gray*, a co-worker asked Gray about whether he had testified against him before a grand jury in a case related to unsafe mining activities. 27 FMSHRC at 3. Such testimony is protected activity under the Mine Act. 30 U.S.C. § 815(c)(1). The miner said that there would not be any hard feelings "unless you put the screw to me, then I'll kill you." 27 FMSHRC at 3. Later, the same miner asked Gray about another miner's testimony, stating that "if anyone had laid the screws to him that he would whip their ass." *Id.* The Judge found that such comments did not constitute threats because the co-worker did not actually intend to kill or hurt Gray or the other miner. *Sec'y of Labor on behalf of Gray v. N. Star Mining, Inc.*, 25 FMSHRC 198, 215-16 (Apr. 2003) (ALJ).

In that case, whether or not the threats were genuine, they were clearly motivated by protected activity (testimony related to unsafe mining activities). Protected activity was at the core of the case. The issue of whether motivation was required for interference was not before the Commission. Rather, the Commission found that the Judge applied the wrong legal standard in determining whether such comments rose to the level of coercion. The Judge had framed the question in the case as whether "[the miner] meant the literal meaning of the words, 'I'll kill you,' or whether he was speaking figuratively, as in, 'I'll *really* be upset with you.'" 27 FMSHRC at 10.

The Commission found that the Judge focused too narrowly on the goal of the statements — that is, "largely, if not exclusively, [the miner's] intent or motive in making the statements." *Id.* The Commission found that the occurrence of a violation did not turn upon the literal truth of the murder threat. Instead, the miner's "statements could be coercive, even if he did not mean to literally kill or cause physical harm to Gray or other miners who testified against him." *Id.* "[T]he judge should have considered the effect of [the miner's] statements in this broader context and what other meanings could be reasonably inferred from them, *rather than limiting her consideration to their literal meaning and what [the miner] intended.*" *Id.* (emphasis added).

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<sup>21</sup> As previously noted, Section III, *supra*, the Secretary also disassembles the statutory language of the NLRA, which was not in issue in *Gray* and which, read fairly, undercuts his argument.

Therefore, in *Gray*, the Commission’s decision is consistent with a requirement that the employer’s action have a motivational nexus with protected activity. As the Commission stated in *Moses*, “the ‘more subtle forms of interference’ are coercive interrogation and harassment **over the exercise of protected rights.**” 4 FMSHRC at 1478 (emphasis added). Here, the Secretary has not sought to demonstrate that the challenged plan was motivated in any way by considerations of protected activity, preferring instead to attempt a sweeping change in the interpretation of clear language, solely to make it easier for him to prove interference as a general matter wholly unrelated to the circumstances of this case.

Obviously, this would open the door for almost unlimited interference claims. A miner presumably could establish a prima facie case of interference by testifying that a supervisor’s chastisement for slow work led him to believe he should not adequately rock dust his assigned area. Of course, this would be a direct result of construing the statutory term “because” – repeated for emphasis and certainty in each provision of 105(c)(1) – to mean one thing in a discrimination case while construing it to mean literally nothing in an interference case.

Finally, we must point to the *coup de grace* foreclosing the Secretary’s position. While the Secretary has disparaged the decision of an administrative law judge in *Pepin*, and while our colleagues fret that miners would not be able to pursue interference claims if required to show motivation, the Judge in *Pepin* found evidence of motivation and held the operator liable for interference with the miner’s rights in that case. In that way, *Pepin* is indistinguishable from every interference case decided by the Commission.<sup>22</sup>

There has been no showing of absurd results flowing from a faithful reading of the statute. Unanimous authority, including recent Supreme Court cases, makes clear that such cases against the plain meaning of a statute are hard to make, even with compelling facts and even with Circuit Court support. It is an impossible proposition here.

#### V. **The Secretary’s Interpretation Is Not Entitled to Deference.**

Given the clarity of the language of section 105(c), the Secretary’s claimed entitlement to *Chevron* deference hardly requires a response.<sup>23</sup> See *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984) (“If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”).

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<sup>22</sup> Even in *Franks and Hoy*, evidence of motivation was sufficient to convince two Commissioners that the miners in that case had been discriminated against. See *Franks and Hoy*, (Opinion of Commissioners Young and Cohen).

<sup>23</sup> It bears noting that Justice Kennedy joined Justices O’Connor and Thomas in refusing to extend deference to the EEOC in *Smith*. See 544 U.S. at 263-65.

The deference question is never reached here because it fails necessarily under step one of *Chevron*. See Section I.A., *supra*. Even if we were to consider deference, though, analysis under *Chevron* is foreclosed as a matter of law in this case.

Since the turn of the century, the Supreme Court has repeatedly addressed and reshaped the scope of *Chevron* deference. See *Christensen v. Harris County*, 529 U.S. 576, 586-87 (2000); *United States v. Mead Corp.*, 533 U.S. 218 (2001). In *Gonzalez v. Oregon*, 546 U.S. 243, 255-56 (2006), the Court confirmed that even if statutory language is ambiguous, “[d]eference in accordance with *Chevron*, however, is warranted *only* ‘when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.’” *Id.* at 255-56 (emphasis added) (quoting *Mead*, 533 U.S. at 226-27). Here, there can be no such claim.

The Secretary’s interpretation in this case does not germinate from any rule carrying the force of law, a prerequisite for *Chevron* deference under *Gonzalez*, *Christensen*, and *Mead*. Rather, the Secretary announced this interpretation in briefs and litigating positions before the Commission, which are not legally binding on the opposing party, the regulated industry, or the government itself. As a plurality of circuit courts have held specifically in Mine Act cases, the Secretary’s litigating positions do not warrant *Chevron* deference. See *Knox Creek Coal Corp. v. Sec’y of Labor*, 811 F.3d 148, 158-60 (4th Cir. 2016); *North Fork Coal Corp. v. FMSHRC*, 691 F.3d 735, 742 (6th Cir. 2012); *Vulcan Const. Materials L.P. v. FMSHRC*, 700 F.3d 297, 315-16 (7th Cir. 2012). *But see Sec’y of Labor v. Twentymile Coal Co.*, 411 F.3d 256, 261 (D.C. Cir. 2005) (disregarding *Mead*’s holding to afford *Chevron* deference to the Secretary’s litigating position); *Pattison Sand Co., LLC v. FMSHRC*, 688 F.3d 507, 512 (8th Cir. 2012) (agreeing with the D.C. Circuit’s approach).

Rather than contend with the commonsense, plain meaning of the Mine Act, our colleagues argue not with our interpretation but rather with the Operators’ hyper-literal and incorrect interpretation that, if motivation is required, section 105(c) could not apply until after protected activity occurs.

Knowing that construction cannot stand review, our colleagues’ willingly embrace it in an effort to support their effort to read “because” out of the statute. The Operators and our colleagues erroneously conflate “literal meaning” and “plain meaning” and boldly declare that “[b]ecause a literal reading of the statute leads to absurd results, the interference provision of section 105(c) *must* be seen as lacking a plain meaning.” Slip op. at 10 (emphasis added). The D.C. Circuit and the Commission, though, have previously rejected this reasoning. See *Meredith*, 177 F.3d at 1054; *Nally and Hamilton*, 33 FMSHRC at 1763-64.

Of course, we do not accept the notion that section 105(c) does not protect miners from operator activity motivated by a desire to interfere with protected activity that has not yet occurred. Section 105(c) applies fully if the Secretary or claimant demonstrates that an operator’s action was motivated by a desire to prevent protected activity from occurring in the first place. Slip op. at 31-38. For example, a general pre-hiring announcement or policy that any miner who files a section 103(g) complaint will be fired would violate section 105(c) because it is because of a right to engage in protected activity.

As we said at the outset, the Secretary did not introduce evidence or argue, let alone prove, that the bonus plans were motivated by the prospect of protected activity. Our colleagues, naturally, have made no effort at all to reconcile the plain language with the circumstances in this case because no evidence permitting such analysis was introduced, and because the circumstances fall squarely within the *Pasula-Robinette* formula we have unfailingly applied to cases arising under Section 105(c)(1).

As a final point, this case does not involve mining activities with respect to which MSHA may claim any special expertise or experience. The issue does not turn on a policy interpretation of a safety standard in the Mine Act or promulgated by MSHA. Here, we reach a legal decision on the meaning of legal requirements of the Mine Act, not mining practices prescribed in the Act. The Secretary has not taken any formal action to formulate and announce a coherent policy on discrimination and interference; instead, he attempts to prevail in a particular case by claiming deference without any recognition or consideration of the broad scope of the principle that would result.

MSHA has not demonstrated that it has considered the effect that eliminating motive from an interference claim might have on literally thousands of daily events in which management communicates a mining technique, mining practice, or mine directive to miners. The Secretary has not allowed any public comment or participation regarding an attempt to expand the scope of section 105(c). Indeed, notwithstanding the use of “because” repeatedly after the prohibitions against discrimination and interference and the Secretary’s agreement that motivation is a prerequisite for discrimination, the Secretary asserts the illogical and, frankly, absurd position that the word “because” requires motivation when applied to discrimination cases but does not require motivation when applied to interference cases.<sup>24</sup>

Congress designated the Commission as the adjudicatory agency for Mine Act disputes. There is no reason for the Commission to defer to a litigation position on a purely legal matter on which the Secretary has not demonstrated any formal, thoughtful, or fully informed consideration, analysis, or reasoning. The Secretary’s position has neither the attributes required for *Chevron* deference nor persuasiveness were we to apply the standard of *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

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<sup>24</sup> This point is especially relevant where, as here, the Secretary attempts an unprincipled and significant legislative revision that effectively reads congressional language out of the statute.



## CONCLUSION

A principal goal of the Mine Act is to foster cooperation between management and workers on safety matters and increase worker participation in achieving safe working conditions. It does not advance the interests served by the Act to disconnect a miner's allegation of interference with protected rights from any exercise of protected rights. Further, the course urged by our colleagues would do real violence to basic principles of statutory construction and Commission precedents and would ratify an effort by the Secretary to arrogate to him legislative power reserved to Congress by the Constitution. We would reverse the Judge and dismiss this case for a lack of substantial evidence on an essential element of the violation.

/s/ William I. Althen

William I. Althen, Acting Chairman

/s/ Michael G. Young

Michael G. Young, Commissioner

Appendix A

SECRETARY OF LABOR, MSHA,  
on behalf of RICKY BAKER  
and UNITED MINE WORKERS OF  
AMERICA INTERNATIONAL UNION

v.

OHIO COUNTY COAL CO.,  
CONSOLIDATION COAL CO.,  
MURRAY AMERICAN ENERGY, INC.,  
and MURRAY ENERGY CORPORATION

SECRETARY OF LABOR, MSHA,  
on behalf of LEVI ALLEN  
and UNITED MINE WORKERS OF  
AMERICA INTERNATIONAL UNION

v.

THE MARSHALL COUNTY COAL CO.,  
McELROY COAL COMPANY,  
MURRAY AMERICAN ENERGY, INC.,  
and MURRAY ENERGY CORPORATION

SECRETARY OF LABOR, MSHA,  
on behalf of MICHAEL PAYTON  
and UNITED MINE WORKERS OF  
AMERICA INTERNATIONAL UNION

v.

MARION COUNTY COAL CO.,  
CONSOLIDATION COAL CO.,  
MURRAY AMERICAN ENERGY, INC.,  
and MURRAY ENERGY CORPORATION

Docket Nos.: WEVA 2015-905-D  
WEVA 2015-906-D  
WEVA 2015-907-D  
WEVA 2015-908-D  
LAKE 2015-616-D

SECRETARY OF LABOR, MSHA,  
on behalf of ANN MARTIN  
and UNITED MINE WORKERS OF  
AMERICA INTERNATIONAL UNION

v.

HARRISON COUNTY COAL CO.,  
CONSOLIDATION COAL CO.,  
MURRAY AMERICAN ENERGY, INC.,  
and MURRAY ENERGY CORPORATION

SECRETARY OF LABOR, MSHA,  
on behalf of MARK RICHEY  
and UNITED MINE WORKERS OF  
AMERICA INTERNATIONAL UNION

v.

THE OHIO VALLEY COAL CO.,  
and MURRAY ENERGY CORPORATION



# **COMMISSION ORDERS**



**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

May 4, 2018

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

v.

SAN JUAN COAL CO.

Docket No. CENT 2017-325  
A.C. No. 29-02170-426933

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 May 12 2017, the Commission received from San Juan Coal Co. (“San Juan”) 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), 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).

San Juan asserts that it received the Secretary’s proposed penalty assessment on or about January 4, 2017. It further asserts that it inadvertently sent the contest form to MSHA’s St. Louis office with a check for uncontested citations instead of to the Arlington office. San Juan’s check for partial payment of the assessment was dated January 17, 2017.

The operator claims that the safety manager at San Juan reviewed the assessment and selected four citations that the company intended to challenge. San Juan claims the safety manager then forwarded this information to the accounts payable department. The operator asserts that the Secretary received the payment for the citations it did not intend to contest. However, the operator asserts that as a result of a clerical error the contest was mailed with the check. The operator alleges that it only learned of the problem when it received a delinquency notice on or around April 17, 2017.<sup>1</sup> Upon learning of the mistake, the operator changed its contest procedures so that safety personnel will now handle all correspondence related to the contest of proposed penalties at the mine. San Juan has not filed any other motions to reopen with the Commission in the last two years. 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 San Juan's request and the Secretary's response, we find that the operator inadvertently sent its notice of contest to the wrong address. The operator changed its office procedures to prevent the mistake from happening again. 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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<sup>1</sup> The delinquency notice was dated April 4, 2017. The Secretary does not challenge the operator's assertion that it was received on April 17, 2017.



Distribution:

Jere C. Overdyke III, Esq.  
Holland & Hart LLP  
P.O. Box 68  
Jackson, WY 83001

Ali Beydoun, Esq.  
Office of the Solicitor  
U.S. Department of Labor  
201 12th St. South, Suite 401  
Arlington, VA 22202-5450

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

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

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 4, 2018

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

v.

CASTILLO READY MIX, INC.

Docket No. CENT 2018-27-M  
A.C. No. 29-02237-444887

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

## ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On October 31, 2017, the Commission received from Castillo Ready Mix, Inc. (“Castillo”) a motion seeking to reopen a penalty assessment that had appeared to become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

On August 3, 2017, the Secretary issued a proposed penalty assessment to Castillo. Castillo asserts that the operator always intended to contest Citation No. 9355405 but that the person tasked with handling the paperwork was ill at the time of the citation and subsequently passed away.<sup>1</sup> The operator believed that the paperwork had been misplaced and had not been timely contested. However, documents submitted by the Secretary show that the assessment in this matter was listed as delivered by the U.S. Postal service on October 17, 2017, and also listed as “unclaimed.” Further, MSHA’s records indicate that a contest for the assessment of Citation No. 9355405 was mailed on October 27, 2017 and received by MSHA on October 31, 2017. That penalty contest was docketed as CENT 2018-30-M

Having reviewed Castillo’s request and the Secretary’s response, we conclude that the proposed penalty assessment did not become a final order of the Commission because the operator timely contested the proposed assessment. Section 105(a) states that if an operator “fails to notify the Secretary that he intends to contest the . . . proposed assessment of penalty . . . the citation and the proposed assessment of penalty shall be deemed a final order of the Commission.” 30 U.S.C. § 815(a). Here, Castillo notified the Secretary of the contest. This obviates any need to invoke Rule 60(b). Because Castillo timely contested the proposed penalty

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<sup>1</sup> The operator filed medical reports, a birth certificate, and other private documents with its request to reopen to substantiate this claim. The Commission has placed copies of these personal records under seal. We ask that the Secretary destroy any copies of those records that he received from the Castillo.

and the Secretary filed the necessary civil proceeding before the Commission, the operator's motion to reopen is moot. Accordingly, this case is remanded to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

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

/s/ Mary Lu Jordan  
Mary Lu Jordan, Commissioner

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

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

Distribution:

Paula Castillo  
Castillo Ready Mix, Inc.  
116 Padilla Rd.  
Belen, NM 87002

Ali Beydoun, Esq.  
Office of the Solicitor  
U.S. Department of Labor  
201 12th St. South, Suite 401  
Arlington, VA 22202-5450

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

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

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 4, 2018

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

v.

JAY FULKROAD & SONS, INC.

Docket No. PENN 2018-33-M  
A.C. No. 36-05666-437268

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

## ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On October 16, 2017, the Commission received from Jay Fulkroad & Sons, Inc. (“Jay Fulkroad”) 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), 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).

Jay Fulkroad asserts that it contested the initial citation, but was unaware that it needed to contest the proposed penalty as well.<sup>1</sup> Records of the Secretary of Labor’s Mine Safety and

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<sup>1</sup> The contest is docketed as PENN 2017-159-M and is currently pending before a Commission ALJ.

Health Administration (“MSHA”) indicate that the proposed assessment was mailed on May 3, 2017. The operator subsequently made a partial payment for the assessment on May 27, 2017. MSHA delivered a delinquency notice to the operator on August 28, 2017. Jay Fulkroad sent a letter to the Commission the next day, seeking an explanation. The Secretary notes, “[a]lthough the operator did not immediately file a motion to reopen, it did promptly take action in response to the delinquency notice.” Jay Fulkroad has not filed any other motions to reopen with the Commission in the last two years. 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 Jay Fulkroad’s request and the Secretary’s response, we find that mistakenly failed to contest the penalty after contesting the underlying citations. In the interest of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission’s Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

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

/s/ Mary Lu Jordan  
Mary Lu Jordan, Commissioner

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

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

Distribution:

Gerald Fulkroad, Sr.  
President  
Jay Fulkroad & Sons, Inc.  
2736 Free Spring Church Rd.  
McAlistersville, PA 17049

Ali Beydoun, Esq.  
Office of the Solicitor  
U.S. Department of Labor  
201 12th St. South, Suite 401  
Arlington, VA 22202-5450

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

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

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

May 4, 2018

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

v.

WESCO

Docket No. WEST 2016-321  
A.C. No. 48-01353-403777

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

**ORDER**

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On February 7, 2017, the Commission received from WESCO a motion seeking to reopen a penalty assessment proceeding and relieve it from the Default Order entered against it.

On May, 23, 2016, the Chief Administrative Law Judge issued an Order to Show Cause in response to WESCO’s failure to answer the Secretary of Labor’s April 14, 2016 Petition for Assessment of Civil Penalty. By its terms, the Order to Show Cause was deemed a Default Order on June 23, 2016, when it appeared that the operator had not filed an answer within 30 days.

WESCO filed a contest to MSHA’s proposed assessment and asserts that it always intended to continue to contest the single citation at issue. However, during the week of February 22, 2016, the operator moved offices to a new address. While the operator contends that it properly filed a change of address notification with MSHA, it claims that it never received any of the paperwork related to this citation after contesting the proposed assessment.<sup>1</sup> The operator asserts that it learned that the citation became final when it began to receive collection notices. WESCO has not filed any other motions to reopen with the Commission in the last two years. The Secretary does not oppose the request to reopen and does not challenge any of the assertions made by the operator.

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

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<sup>1</sup> We note that the Order to Show Cause issued by Chief Judge Lesnick lists the operator’s previous address on the distribution list.



30 U.S.C. § 823(d)(1). Consequently, the Judge's order here has become a final decision of the Commission.

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).

Having reviewed WESCO's request and the Secretary's response, we find that the operator inadvertently failed to respond to the Show Cause Order because the document was sent to its old address. In the interest of justice, we hereby reopen the proceeding and vacate the Default Order. Accordingly, this case is remanded to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

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

/s/ Mary Lu Jordan  
Mary Lu Jordan, Commissioner

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

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

Distribution:

Tim Wright  
HSE Manager  
WESCO  
3135 S. Richmond St.  
Salt Lake City, UT 84106-3053

Ali Beydoun, Esq.  
Office of the Solicitor  
U.S. Department of Labor  
201 12th St. South, Suite 401  
Arlington, VA 22202-5450

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

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

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 4, 2018

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

v.

HOLROYD CO., INC.

Docket No. WEST 2017-492-M  
A.C. No. 45-00637-423672

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 13, 2017, the Commission received from Holroyd Co., Inc. (“Holroyd”) 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), an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

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

Records of the Department of Labor’s Mine Safety and Health Administration (“MSHA”) indicate that the proposed assessment was delivered on November 10, 2016, and became a final order of the Commission on December 10, 2016. Holroyd asserts that it inadvertently sent the contest form to MSHA’s St. Louis office with a check for uncontested citations instead of to the Arlington office.

The operator asserts that the contest was mailed on November 16, 2016. The Secretary mailed a delinquency notice on January 25, 2016, having not received the contest. However, the operator claims it only learned of the delinquency in mid-to-late February. Holroyd asserts that it then attempted to contact MSHA to dispute the debt. Holroyd asserts it repeatedly reached out to MSHA, and left phone and email messages with MSHA's representative on February 28, 2017. The operator claims that MSHA's representative did not return the phone call until March 29, 2017. At that time, Holroyd asserts that MSHA representative stated that MSHA had received the notice of contest that he would "take care of this" and that a backlog of cases was causing delays.<sup>1</sup> Holroyd claims it believed that the matter was then being resolved.

Holroyd claims that on May 5, 2017 it received a notice from the U.S. Department of the Treasury showing that it owed money to MSHA. The operator asserts it was surprised by this notice, believing that MSHA was resolving the matter. The operator alleges that on May 15, 2017, the MSHA representative e-mailed Holroyd and stated that the contest had been filed late. The operator claims it was confused because of the discrepancy between this e-mail and the March 29, 2017 conversation with MSHA and that it decided to obtain counsel. Holroyd claims that through counsel it learned, for the first time, on May 30, 2017, that it had sent the contest to the wrong address. The operator then filed its motion to reopen on June 13, 2017. Holroyd has not filed any other motions to reopen with the Commission in the last two years. 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.

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<sup>1</sup> In his Response, the Secretary of Labor agrees that a telephone conversation occurred in March 2017, but disagrees with the operator's characterization of the conversation. The Secretary provides no specifics regarding his disagreement, instead stating it is unnecessary to resolve the discrepancy because the Secretary does not oppose reopening.

Having reviewed Holroyd's request and the Secretary's response, we find that the operator inadvertently sent its notice of contest to the wrong address. The operator then diligently pursued the matter until it learned the source of its mistake and then promptly rectified it. In the interest of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

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

/s/ Mary Lu Jordan  
Mary Lu Jordan, Commissioner

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

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

Distribution:

Selena C. Smith, Esq.  
Davis Grimm Payne & Marra  
701 Fifth Ave., Suite 4040  
Seattle, WA 98104

Ali Beydoun, Esq.  
Office of the Solicitor  
U.S. Department of Labor  
201 12th St. South, Suite 401  
Arlington, VA 22202-5450

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

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

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

May 4, 2018

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

v.

GRANITE CONSTRUCTION  
COMPANY,

Docket No. WEST 2017-637-M  
A.C. No. 04-05683-436870

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 August 22, 2017, the Commission received from Granite Construction Company (“Granite”) 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), 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 May 9, 2017, and became a final order of the Commission on June 8, 2017. Granite asserts that on June 1, 2017 it timely mailed the penalty contest form to MSHA. However, the operator claims that administrative

personnel inadvertently sent the form to MSHA's previous mailing address. The operator produced USPS tracking information showing that a parcel had been sent, but to the wrong address. The operator asserts that it learned of its mistake when its counsel searched for the petition and realized the penalty was sent to the wrong address. MSHA sent a delinquency notice on August 18, 2017, and Granite filed its motion to reopen four days later. Granite has not filed any other motions to reopen with the Commission in the last two years and responded quickly upon discovering its mistake. 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 Granite's request and the Secretary's response, we find that the operator inadvertently mailed its contest form to MSHA's previous address. In the interest of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

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

/s/ Mary Lu Jordan  
Mary Lu Jordan, Commissioner

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

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



Distribution:

Laura E. Beverage, Esq.  
Jackson Kelly, PLLC  
1099 18<sup>th</sup> St., Suite 2150  
Denver, CO 80202

Ali Beydoun, Esq.  
Office of the Solicitor  
U.S. Department of Labor  
201 12th St. South, Suite 401  
Arlington, VA 22202-5450

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

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

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 4, 2018

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

v.

MOUNTAIN CEMENT COMPANY,

Docket No. WEST 2017-638-M  
A.C. No. 48-00007-433214

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 August 22, 2016, the Commission received from Mountain Cement Company (“Mountain 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), 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 March 10, 2017, and became a final order of the Commission on April 10, 2017. Mountain Cement asserts that it inadvertently sent the contest form to MSHA’s St. Louis office with a check for an uncontested citation instead of to the Arlington office. Upon learning of its mistake, Mountain Cement asserts that it

contacted counsel in order to seek reopening. 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.

In its request to reopen, Mountain Cement includes an affidavit from its safety director stating that it learned that the citation had become final when it received a delinquency notice on May 30, 2017. The Secretary states that the delinquency notice was issued on May 24, 2017. Mountain Cement did not file its request to reopen until August 22, 2017, 90 days after the delinquency notice was sent and 84 days after it was received. Settled commission case law requires an operator to file a motion to reopen within 30 days following receipt of a delinquency notice. If the operator fails to do so, it must provide a satisfactory explanation for the delay. *See Concrete Mobility, LLC*, 37 FMSHRC 1709, 1710 (Aug. 2015); *Lone Mountain Processing, Inc.*, 33 FMSHRC 2373 (Oct. 2011); *Highland Mining*, 31 FMSHRC 1313, 1317 (Nov. 2009). Here, the operator has given reasons for its initial failure to timely contest the orders at issue. However, it has not provided any explanation for its failure to request reopening within 30 days of learning of its delinquency. Accordingly, we deny Mountain Cement's motion.

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

/s/ Mary Lu Jordan  
Mary Lu Jordan, Commissioner

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

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

Distribution:

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

Ali Beydoun, Esq.  
Office of the Solicitor  
U.S. Department of Labor  
201 12th St. South, Suite 401  
Arlington, VA 22202-5450

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

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

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 4, 2018

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

v.

GREAT NORTHWEST, INC.

Docket No. WEST 2017-671-M  
A.C. No. 50-01684-441334

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

## ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On September 12, 2017, the Commission received from Great Northwest, Inc. (“Great Northwest”) 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), 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 June 19, 2017, and became a final order of the Commission on July 19, 2017. Great Northwest asserts that it inadvertently sent the contest form to MSHA’s St. Louis office with a check for uncontested citations, instead of to

the Arlington office. The Secretary asserts that MSHA received payment for the uncontested citations, and that a delinquency notice was sent on September 5, 2017. Upon learning of its mistake, Great Northwest contends that it immediately filed a request to reopen. Great Northwest has not filed any other motions to reopen with the Commission in the last two years. 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 Great Northwest's request and the Secretary's response, we find that the operator inadvertently sent its notice of contest to the wrong address. In the interest of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

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

/s/ Mary Lu Jordan  
Mary Lu Jordan, Commissioner

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

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

Distribution:

Anton K. Johansen  
Vice President  
Great Northwest, Inc.  
P.O. Box 74646  
Fairbanks, AK 99707

Ali Beydoun, Esq.  
Office of the Solicitor  
U.S. Department of Labor  
201 12th St. South, Suite 401  
Arlington, VA 22202-5450

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

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

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 4, 2018

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

v.

AMERICAN ROCK SALT COMPANY,  
LLC

Docket No. YORK 2018-5-M  
A.C. No. 30-03255-435700

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

## ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On October 17, 2017, the Commission received from American Rock Salt Company, LLC (“American”) 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), 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 12, 2017, and became a final order of the Commission on May 12, 2017. American asserts that it timely filed a notice of contest regarding the proposed civil penalty of \$7,000 for Order No. 9310579, and at the same time sent MSHA a check for \$884 for the remaining penalties in the proposed assessment at



issue. The operator only learned that there was a problem with the contest when it received a delinquency letter dated June 28, 2017. American asserts that on July 7, 2017, it wrote a letter to the MSHA compliance office protesting that it had filed the notice of contest and suggesting that it had received the delinquency letter in error. The operator asserts that it received no response from the compliance office by October 11, 2017. American claims it contacted the compliance office on that day and learned that it was required to file a request to reopen. The request was filed six days later on October 17, 2017.<sup>1</sup> American has not filed any other motions to reopen with the Commission in the last two years.

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. The Secretary does not dispute American's assertion that it filed a timely notice of contest, and confirms that MSHA received a check for \$884 for penalties contained in the proposed assessment.

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<sup>1</sup> While American's request to reopen was filed more than 30 days after the delinquency notice, we note that the operator had contacted the MSHA compliance office immediately upon receiving the delinquency letter and diligently pursued this matter until the mistake was discovered.

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

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

/s/ Mary Lu Jordan  
Mary Lu Jordan, Commissioner

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

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

Distribution:

Thomas A. DeSimon, Esq.  
Harris Beach, PLLC  
99 Garnsey Rd.  
Pittsford, NY 14534

Ali Beydoun, Esq.  
Office of the Solicitor  
U.S. Department of Labor  
201 12th St. South, Suite 401  
Arlington, VA 22202-5450

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

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

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

May 24, 2018

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

v.

V-TECH SAND, LLC

Docket No. CENT 2016-293-M  
A.C. No. 03-02013-368839

Docket No. CENT 2016-294-M  
A.C. No. 03-02013-371413

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

**ORDER**

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 12, 2016, the Commission received from V-Tech Sand, LLC (“V-Tech”) two motions seeking to reopen two penalty assessments.<sup>1</sup>

The Commissioners are evenly divided on the disposition of this matter. Acting Chairman Althen and Commissioner Young would hold that there is no final order and therefore the operator’s motions are unnecessary. They would permit the operator to contest the penalties before the Judge. Commissioners Jordan and Cohen would hold that the proposed penalties did become final orders pursuant to section 105(a) of the Mine Act, and that the motions to reopen were untimely filed. They would deny the motions.

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<sup>1</sup> For the limited purpose of addressing these motions to reopen, we hereby consolidate docket numbers CENT 2016-293-M and CENT 2016-294-M involving similar procedural issues. 29 C.F.R. § 2700.12.

Because the Commission is evenly divided, there is not a majority voting to grant the motions to reopen. The Secretary has administratively determined that final orders have been issued. The Commission's order here leaves that determination undisturbed. *See Pa. Elec. Co.*, 12 FMSHRC 1562, 1563-65 (Aug. 1990), *aff'd on other grounds*, 969 F.2d 1501 (3d Cir. 1992) (providing that the effect of a split Commission decision is to leave standing disposition from which appeal has been sought).

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

/s/ Mary Lu Jordan  
Mary Lu Jordan, Commissioner

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

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

Distribution:

Wray Valentine  
V-Tech Sand, LLC  
48 Teresa St.  
Batesville, AR 72503

Troy Pigg  
V-Tech Sand, LLC  
P.O. Box 2836  
Batesville, AR 72503

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

Chief Administrative Law Judge Robert J. Lesnick  
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1331 Pennsylvania Ave. N.W., Suite 520N  
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Mine Safety and Health Administration  
U.S. Department of Labor  
201 12th St. South, Suite 500  
Arlington, VA 22202-5450

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 15, 2018

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

v.

THE AMERICAN COAL COMPANY

Docket No. LAKE 2009-35

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

## ORDER

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”), and is presently before the Commission a second time on review. After briefing had begun, the Secretary of Labor filed a motion to settle the case pursuant to a proposed settlement agreement he had reached with the operator, The American Coal Company (“AmCoal”). In an order dated March 5, 2018, two Commissioners voted to grant the motion and two voted to deny, which thereby denied the motion in effect. 40 FMSHRC \_\_\_ (Mar. 2018).

AmCoal petitioned the Commission for reconsideration and requested that the motion for settlement be granted. In an order dated March 27, 2018, two Commissioners voted to grant the petition and two voted to deny, again thereby denying the motion for settlement in effect. AmCoal thereupon petitioned the United States Court of Appeals for the District of Columbia Circuit to review the Commission’s two split decisions. *American Coal Co. v. FMSHRC*, No. 18-1090 (docketed Apr. 2, 2018).

AmCoal subsequently requested that the court hold that proceeding in abeyance while the parties further pursued settlement before the Commission. By order dated May 15, 2018, the court held the case in abeyance. On May 18, 2018, the Secretary and AmCoal filed an Amended Joint Motion to Approve Settlement Agreement with the Commission.

Upon consideration of the amended motion, the settlement agreement is approved. The basis for Acting Chairman Althen's and Commissioner Young's approval is set forth in their opinion in favor of approving the original settlement motion. Slip op. at 3-7. Commissioners Jordan and Cohen now join in granting the motion for settlement.<sup>1</sup>

/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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<sup>1</sup> The Amended Joint Motion to Approve Settlement Agreement provides substantive explanations supporting the Secretary's decision to compromise the issues of one violation at issue in this matter by deleting the flagrant designation, reducing the level of gravity, and substantially reducing the assessed penalty. In addition, the Secretary has set forth reasons why it would not be in the public interest to litigate certain legal issues in the context of this case. Moreover, the amended motion explains that the operator's mines have closed since the citations issued, reducing the deterrent value of a penalty. Commissioners Jordan and Cohen note that these justifications were absent in the initial settlement motion. Upon review of the amended motion, Commissioners Jordan and Cohen agree to grant the motion and approve the settlement.



**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

June 28, 2018

SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA), on behalf  
of THOMAS McGARY and RON  
BOWERSOX

and

UNITED MINE WORKERS OF  
AMERICA INTERNATIONAL UNION,  
Intervenor

v.

THE MARSHALL COUNTY COAL CO.,  
McELROY COAL CO., MURRAY  
AMERICAN ENERGY, INC., and  
MURRAY ENERGY CORPORATION<sup>1</sup>

Docket No. WEVA 2015-583-D

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

**ORDER**

BY THE COMMISSION:

Respondents in this matter have petitioned the United States Court of Appeals for the District of Columbia Circuit to review the two decisions the Commission issued in the case. D.C. Cir. No. 18-1098 (docketed Apr. 12, 2018); *see* 38 FMSHRC 2006 (Aug. 2016); 40 FMSHRC 261 (Mar. 2018).<sup>2</sup> On April 13, 2018, Respondents moved the Commission for a stay while the two decisions are on appeal.

In their motion, Respondents state that the Secretary of Labor, without taking a position on the Respondents' arguments for a stay, does not oppose the motion. The other party to the case, the United Mine Workers of America International Union ("UMWA"), has not replied to the motion for stay.

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<sup>1</sup> Additional captions are listed in Appendix A to this order.

<sup>2</sup> Respondents are five underground coal mines in West Virginia and associated corporate entities, including the owner and operator of the five mines, Murray Energy Corporation. 38 FMSHRC at 2006; 40 FMSHRC at 261 n.2.

Two Commissioners would grant the motion and stay the effect of the Commission's decisions, while two Commissioners would deny the motion. Respondents' stay request is thus, in effect, denied.

The opinions of Commissioners for and against granting a stay in this instance are set forth below.

Acting Chairman Althen and Commissioner Young, in favor of granting the stay:

In this case, the Commission ordered Respondents to rescind a policy requiring miners to give notice to management of their complaints made pursuant to section 103(g) of the Mine Act,<sup>1</sup> not to enforce that policy, to post a Notice for one year of the rescission/non-enforcement of the policy, to pay civil penalties, and for Robert E. Murray, the Chief Executive Officer of Murray Energy Corporation, to read a prescribed statement to the miners.

The record demonstrates that the Respondents posted the required Notice rescinding the announced policy and informing miners of their rights. By now, a year from the posting has expired and the Respondents have, or could have, permissibly removed the notice.<sup>2</sup>

Nearly two years have passed since the Commission's initial decision. Neither the Secretary nor the UMWA has complained of a violation or any failure to comply with the Judge's order regarding the Respondent's section 103(g) policy. Therefore, Respondents apparently have complied with the requirements that they not interfere with miners' rights to file section 103(g) complaints.

The Secretary and MSHA, the federal agency responsible for prosecuting violations and enforcing orders, do not oppose the stay and have not otherwise expressed any concern that a stay will injure the public interest. Consequently, the federal enforcement agency that protects the public interest and miners' rights implicitly accepts a stay.

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<sup>1</sup> Section 103(g)(1) provides that, if a miner or miner representative has reasonable grounds to believe that a violation of the Act or a mandatory standard exists, the miner or representative has a right to obtain an immediate inspection by the Department of Labor's Mine Safety and Health Administration ("MSHA"). It further provides that the name of the person requesting an inspection shall not be revealed. 30 U.S.C. § 813(g)(1).

<sup>2</sup> In Respondents' second petition for discretionary review, Respondents sought review of the assessed penalty and of the requirement that CEO Murray personally read a statement to the miners.

The UMWA, the official representative of the miners, does not oppose the stay and has not otherwise expressed a concern that issuance of a stay will injure any safety rights of miners or the public interest.<sup>3</sup> Consequently, the UMWA implicitly accepts a stay.

These positions of the concerned parties tip the scales decisively in favor of granting the stay and should be dispositive. No one in the world opposes the stay except our colleagues.

Application of the classic stay factors confirms that the Commission should grant the stay. The factors are (1) a showing that the stay is in or does not adversely affect the public interest; (2) no adverse effect on other interested parties; (3) irreparable harm if the stay is not granted; and (4) likelihood of prevailing on the merits of the appeal. *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958).

## **1. Public interest**

In light of the absence of any opposition, we must conclude Respondents have complied with the substantive requirements of the Judge's order to avoid interfering with miners' rights to file section 103(g) complaints. There is no indication that Respondents have interfered with, or attempted to interfere with, miners' statutory rights subsequent to entry of the order. The remaining elements of the order are the payment of a penalty and a personal admission of unlawful activity by CEO Murray.

The Secretary, as guardian of the public interest, does not oppose the stay or assert that a grant of the stay would adversely affect the public interest. The statutory defender of the public interest, therefore, sees no threat to that interest from a stay. The UMWA has not opposed the settlement or suggested any public interest in immediate full compliance.

## **2. Effect upon other private parties**

The UMWA, a zealous defender of miners' rights, has not taken any action to oppose the stay. It has not asserted a need for an immediate personal reading of a notice after two years of quiescent compliance by Respondents with the Commission's order and no claimed infringement of miners' section 103(g) rights. Nor has any individual miner named in this action objected to the stay.<sup>4</sup> Further, the Secretary, charged with the statutory duty to protect miners' rights, has not asserted a need or basis for an immediate personal reading. Consequently, there is no support for a finding that the stay would harm the rights of an affected party or the public interest.

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<sup>3</sup> The lack of opposition to the stay brings up an important question at the outset: if the other parties to the case — the Secretary and the UMWA — do not oppose the stay, does that mean that they have no intention of seeking to immediately enforce the remedial aspects of the Judge's decision that remain to be satisfied by the Respondents? We think the answer to that question is clearly "yes." Without such enforcement, particularly by the Secretary, those remedies effectively are stayed despite the motion not garnering majority support.

<sup>4</sup> MSHA filed each of the cases on behalf of UMWA International Safety Representative Ron Bowersox and another individual. Each of these individuals is a local UMWA representative at his or her respective mine. 40 FMSHRC at 262 n.4.

### **3. Irreparable Injury**

Regarding the element of irreparable harm, the remedy imposed is extraordinary. It mandates a personal action and involves a legal question of first impression before the Commission. The mandated reading would require CEO Murray to read a notice stating that he personally instituted an unlawful policy in awareness meetings with the UMWA miners. The first few sentences of the mandatory statement are:

The Federal Mine Safety and Health Review Commission has found that the Murray Energy Corporation and its West Virginia subsidiaries have violated the Federal Mine Safety and Health Act and has ordered me to read and abide by this notice. In an awareness meeting between April and July 2014, I outlined a policy requiring that any safety complaint made to MSHA also be made to management. That policy is rescinded.

40 FMSHRC at 272.

The statement, therefore, constitutes a compelled admission by CEO Murray that he personally implemented a policy that violated the Mine Act, and he is rescinding it. Obviously, such a personal admission of unlawful conduct related to worker health and safety far surpasses a simple affirmation of safety principles. Once CEO Murray makes the statement, if Respondents prevail on appeal, there will be no effective way to fully counteract any damage to reputation caused by the original statement. This is the very definition of irreparable injury.

### **4. Likelihood of Success**

In light of the compelling reasons for granting a stay based upon the above-discussed factors, the only possible ground for denying the stay would be an overweening certainty that the circuit court will uphold the Commission's decision in its entirety. However, there are multiple reasons for Commission cautiousness.

The Commission did not address the merits of Respondents' argument regarding the remedy of personally reading a statement. We found that Respondents did not preserve that issue. If the Court disagrees with our procedural ruling, the Respondents presented a substantial question that cuts heavily in favor of a stay. *See Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843-44 (D.C. Cir. 1977). Compelling an individual to personally read a notice to his employees that he violated the law regarding their health and safety most certainly is a bell that cannot be unrung if it is later determined that his actions were lawful. This is particularly true when the compelled reading involves invaluable First Amendment rights. Undoubtedly, given the importance of First Amendment rights and the particularly punitive nature of a compelled reading, the circuit court will carefully review Respondents' claim that they did properly raise the issue before the Commission.

Success in the appeal of the violation would negate any duty to read the statement. Here, the principal argument presented by Respondents before the circuit court is that the Judge

utilized an incorrect standard for determining interference claims. The Administrative Law Judge applied the so-called “*Franks/Hoy* test” for violations of section 105(c). 38 FMSHRC at 2011; see *UMWA on behalf of Franks v. Emerald Coal Res., LP*, 36 FMSHRC 2088, 2108 (Aug. 2014) (sep. op. of Chairman Jordan and Comm’r Nakamura).

The *Franks/Hoy* test would eliminate the need for any motivational nexus between protected activity and adverse action despite a quadruple-explicit mandate in the Mine Act that the adverse action must occur “because of” protected activity.<sup>5</sup> Two Commissioners proposed the test in the *Franks/Hoy* case. A majority of the Commission has never accepted the test, which is not a Commission standard.<sup>6</sup>

Most importantly, in a decision issued yesterday, June 27, 2018, the current four members of the Commission split evenly on the adoption of the *Franks/Hoy* test in a case testing the plain meaning of section 105(c). *Sec’y of Labor on behalf of Greathouse v. Monongalia Cty. Coal Co.*, Docket No. WEVA 2015-904-D. The case involved the introduction of bonus plans. The Secretary did not introduce any evidence that protected activity motivated in any way the introduction of the plans. Therefore, the *Greathouse* case provides an ideal test of the requirements of section 105(c) with less possibility of one set of unusual facts unduly influencing a legal standard applicable to a limitless array of other circumstances. Two Commissioners rejected the *Franks/Hoy* test in favor of applying the plain language of the Mine Act and consistently accepted meaning of section 105(c). An agency’s refusal to accept the plain meaning of statutory language is a well-recognized and frequent reason for court reversals of agency

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<sup>5</sup> As relevant, section 105(c)(1) of the Mine Act provides,

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner . . . [1] *because* such miner . . . has filed or made a complaint under or related to this chapter, including a complaint notifying the operator or the operator’s agent, 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 [2] *because* such miner . . . is the subject of medical evaluations and potential transfer under a standard published pursuant to section 811 of this title or [3] *because* such miner . . . has instituted or caused to be instituted any proceeding under or related to this chapter or has testified or is about to testify in any such proceeding, or [4] *because* of the exercise by such miner . . . on behalf of himself or others of any statutory right afforded by this chapter.

30 U.S.C. § 815(c) (emphases added).

<sup>6</sup> The United States Court of Appeals for the District of Columbia Circuit specifically noted the Commission’s refusal to adopt the *Franks/Hoy* test in *Wilson v. FMSHRC*, 863 F.3d 876, 879 (D.C. Cir. 2017), stating “[t]he Commission has not settled upon a test for interference.”

interpretations in recent years. *See* 2A Norman J. Singer, Sutherland Statutory Construction § 46:1 (7th ed. 2014).

If the circuit court in this case rejects the *Franks/Hoy* test, the court would then have to decide whether the other three Commissioners appropriately affirmed the violation on the ground that the evidence would show a motivational nexus although the Judge found interference based on the *Franks/Hoy* test. *See* 38 FMSHRC at 2012 n.11, 2028 n.22. This is a purely legal question, and the circuit court is the appropriate forum for its resolution.

### **Conclusion**

The enforcement agency and the miners' legal representative do not oppose a stay and do not assert any harm to the public interest from a stay. No party has suggested any harm to the rights of miners from a stay; and, a personal admission of unlawful conduct clearly is an irreparable hardship to an individual. We cannot dismiss the possibility of circuit court disagreement with our decision. A personal reading by CEO Murray would reduce the appeal to an argument over the penalty amount thereby depriving Respondents of any opportunity to challenge the impact/effect of the extraordinary personal reading obligation.

The stay should be granted.

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

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

Commissioners Jordan and Cohen, in favor of denying the stay:

We would deny the motion to stay the Judge's remedial order because, in our view, the operators have not met the criteria they are required to satisfy before a stay request is granted.

In *Secretary of Labor ex rel. Price and Vacha v. Jim Walter Resources, Inc.*, 9 FMSHRC 1312 (Aug. 1987), the Commission held that a party seeking a stay must satisfy the factors set forth in *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958). Those factors include: (1) likelihood of prevailing on the merits of the appeal; (2) irreparable harm if the stay is not granted; (3) no adverse effect on other interested parties; and (4) a showing that the stay is in the public interest. The Court emphasized that a stay constitutes "extraordinary relief." 259 F.2d at 925. The burden is on the movant to provide "sufficient substantiation" of the requirements for the stay. *Stillwater Mining Co.*, 18 FMSHRC 1756, 1757 (Oct. 1996).

The operators' attempt to convince us to stay the Judge's order fails at the first prong of this test, as their claims are not likely to succeed before the Circuit Court. They are appealing our finding that they interfered with the complainants' rights under section 105(c) of the Mine Act, 30 U.S.C. § 815(c), and our affirmance of the Judge's remedial order requiring CEO Robert Murray to read a statement.

On the first issue all five Commissioners concluded that CEO Murray's PowerPoint presentation to miners constituted interference with miners' rights to make anonymous safety complaints to MSHA under section 103(g) of the Mine Act, 30 U.S.C. § 813(g).<sup>1</sup> 38 FMSHRC 2006, 2018 (Aug. 2016). Although the Secretary's use of the test for interference contained in *UMWA on behalf of Franks v. Emerald Coal Resources, L.P.*, 36 FMSHRC 2088, 2108 (Aug. 2014) (sep. op. of Chairman Jordan and Comm'r Nakamura) may be an issue presented for review by the D.C. Circuit, our colleagues do not explain why the operator is likely to succeed in persuading the Court to rule in its favor and reject this test. We note that the D.C. Circuit readily utilized this standard in a recent interference case in which neither party challenged it. *Wilson v. FMSHRC*, 863 F.3d 876, 882-83 (D.C. Cir. 2017).

Moreover, when the Commission issued its first decision in this case, our colleagues concluded that it was unnecessary to even consider the issue of the proper test for interference because of their conclusion that "the filing of complaints under section 103(g) clearly motivated the offending portions of the Respondent's presentations. . . . either of [the] competing tests would arrive at the same result." 38 FMSHRC at 2012 n.11. Similarly, we stated in our separate opinion that the Administrative Law Judge was correct in considering CEO Murray's filing of a federal suit against witnesses in this matter to be a bad-faith attempt to intimidate those witnesses. Thus, even if the Court were to rule that animus is a necessary prerequisite for finding interference, the four present Commissioners have concluded it existed. Therefore, CEO Murray is unlikely to succeed on the merits.

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<sup>1</sup> CEO Murray made PowerPoint presentations to each shift of miners at each of the five mines involved in this case where he informed miners that they must report to mine management any safety complaint made to MSHA. 38 FMSHRC at 2008.

As to the second issue, the Respondents repeatedly failed to raise the issue when the case was in litigation before the Commission. Accordingly, all four Commissioners held that “[i]n light of [the operators’] multiple failures to make plain to the Judge any objection to CEO Murray being required to personally read a statement as part of the remedy, we affirm in result the Judge’s decision on remand.” 40 FMSHRC 261, 268 (Mar. 2018).

Accordingly, the Respondents have not demonstrated a likelihood of success based on the merits of their arguments on appeal.

Our vote to deny is also based on the fact that nearly two-and-half years have passed since the Judge’s November 2015 order requiring that CEO Murray read a statement to the miners to correct the previous violative PowerPoint presentation he had made. Now that the matter is pending in the court of appeals, it would conceivably take at least another year or more before this case is resolved. Under these circumstances, if a stay is granted but the operator ultimately loses its appeal, there could be a delay of over three years between the time the Judge initially ordered this remedy and compliance with the Judge’s order. We thus disagree with the operators’ contention that a stay would be in the public interest.

Finally, we would be remiss if we failed to comment on the operators’ assertion that CEO Murray will suffer irreparable harm if he is compelled to read the statement drafted by the Judge. As a threshold matter, we have taken into account that the Judge’s order permits CEO Murray to read the statement through a video conference instead of traveling to each mine and reading the statement in person (as he did with the violative PowerPoint presentation). 38 FMSHRC 2695, 2700-01 (Oct. 2016) (ALJ). Thus, CEO Murray would not have to experience direct contact with miners in reading his statement.



In addition, although we understand the objection to “compelled speech,” we cannot identify the harm suffered by a manager who is ordered by a Judge to tell his employees that, in the words of the statement drafted by the Judge, “You have every right to make a complaint to MSHA without notifying any person at the mine,” and “You have a right, under section 103(g) of the Mine Act, to make those reports anonymously and confidentially,” and “All miners have a right to make a complaint to MSHA and all miners are protected from retaliation or adverse action for making a Section 103(g) complaint.” Id. at 2699-2700. Yes, CEO Murray would only be reinforcing these bedrock principles of the Mine Act because the Judge ordered him to do so. Yet we fail to see how this rises to the level of “irreparable harm.” Nor do we find CEO Murray’s reading of the statement drafted by the Judge to be a “punitive” remedy, as alleged by our colleagues. We suspect that the drafters of the Mine Act would agree.

For the foregoing reasons, we would deny the operators’ motion for a stay pending appeal.

/s/ Mary Lu Jordan  
Mary Lu Jordan, Commissioner

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

## Appendix A

SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA) on behalf  
of RICK BAKER and RON  
BOWERSOX

and

UNITED MINE WORKERS OF  
AMERICA INTERNATIONAL UNION,  
Intervenor

v.

OHIO COUNTY COAL CO.,  
CONSOLIDATION COAL COMPANY,  
MURRAY AMERICAN ENERGY, INC.,  
and MURRAY ENERGY CORPORATION

SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA) on behalf  
of ANN MARTIN and RON  
BOWERSOX

and

UNITED MINE WORKERS OF  
AMERICA INTERNATIONAL UNION,  
Intervenor

v.

HARRISON COUNTY COAL CO.,  
CONSOLIDATION COAL COMPANY,  
MURRAY AMERICAN ENERGY, INC.,  
and MURRAY ENERGY CORPORATION

Docket Nos. WEVA 2015-584-D  
WEVA 2015-585-D  
WEVA 2015-586-D  
WEVA 2015-587-D

SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA) on behalf  
of RAYMOND COPELAND and RON  
BOWERSOX

and

UNITED MINE WORKERS OF  
AMERICA INTERNATIONAL UNION,  
Intervenor

v.

MONONGALIA COUNTY COAL CO.,  
CONSOLIDATION COAL COMPANY,  
MURRAY AMERICAN ENERGY, INC.,  
and MURRAY ENERGY CORPORATION

SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA) on behalf  
of MICHAEL PAYTON and RON  
BOWERSOX

and

UNITED MINE WORKERS OF  
AMERICA INTERNATIONAL UNION,  
Intervenor

v.

MARION COUNTY COAL CO.,  
CONSOLIDATION COAL COMPANY,  
MURRAY AMERICAN ENERGY, INC.,  
and MURRAY ENERGY CORPORATION



# **ADMINISTRATIVE LAW JUDGE DECISIONS**



# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
721 19<sup>th</sup> St. Suite 443  
Denver, CO 80202-2500  
TELEPHONE: 303-844-5266 / FAX: 303-844-5268

May 3, 2018

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

v.

NALC, LLC,  
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. LAKE 2018-0020  
A.C. No. 12-02409-448333

Mine: 243 Quarry

## DECISION

Appearances: Dan Venier, Conference & Litigation Representative, and Suzanne Dunne, Esq., Office of the Solicitor, U.S. Department of Labor, MSHA, Chicago, Illinois, for Petitioner

Dana Boyd and Sonja Cowles, NALC, LLC, Cloverdale, Indiana, for Respondent

Before: Judge Simonton

## I. INTRODUCTION

This Simplified Proceedings docket is before me on a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration, pursuant to the Federal Mine Safety and Health Act of 1977 (“Mine Act”), 30 U.S.C. §801.<sup>1</sup> This case involves two section 104(a) citations issued to NALC, LLC (“NALC” or “Respondent”), on July 24, 2017.

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<sup>1</sup> In this decision, the transcript, the Secretary’s exhibits, and Respondent’s exhibits are abbreviated as “Tr.,” “Ex. S-#,” and “Ex. R-#,” respectively.

A hearing was held on March 15, 2018, in Indianapolis, Indiana. MSHA Inspector Jeffery L. Cook testified for the Secretary. Dana Boyd presented the case and testified for NALC.<sup>2</sup> At hearing, the parties agreed to the following stipulations of fact included in their prehearing statements:

1. NALC, LLC is engaged in mining operations in the United States, and its mining operations affect interstate commerce.
2. NALC, LLC is the operator of the 243 Quarry, MSHA I.D. No. 12-02409.
3. NALC, LLC is an “operator” as defined in Section 3(d) of the Federal Mine Safety and Health Act of 1977, as amended (Mine Act), 30 U.S.C. § 803(d).
4. NALC, LLC is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et. seq.*
5. The Administrative Law Judge has jurisdiction in this matter.
6. The subject citations and orders were properly served by a duly authorized representative of the Secretary upon an agent of NALC, LLC on the dates and places stated therein, and may be admitted into evidence for the purpose of establishing their issuance.
7. The exhibits to be offered by NALC, LLC and the Secretary are stipulated to be authentic but no stipulation is made as to their relevance or the truth of the matters asserted therein.
8. The assessed penalties, if affirmed, will not impair NALC, LLC’s ability to remain in business.<sup>3</sup>

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<sup>2</sup> NALC did not present any formal witnesses at hearing. The court swore in Mr. Boyd as Respondent’s pro se representative in order to ensure that he would be under oath should his presentation of the case include personal testimony. *See* Tr. 7–8. The court allowed Dan Venier, the representative for MSHA, to cross-examine Mr. Boyd when appropriate. Tr. 8.

<sup>3</sup> At hearing, Respondent expressed its concern that, while the Secretary’s proposed penalties would not impair its ability to remain in business, potential future issues may arise from a finding of liability. Tr. 9. Specifically, Respondent noted that if it were to accept liability for Citation No. 8954275, the excessive history criteria in potential future assessments may impact its operations due to its widespread use of the particular model of scalping screen at issue. *See* Tr. 9–11. At hearing, the court accepted the stipulation as written and noted that its language was applicable only to the proposed penalty amounts and not to findings of negligence or gravity. Tr. 10–11.



9. Mine Safety and Health Administration (MSHA) Inspector Jeffery L. Cook was acting in his official capacity as an authorized representative of the Secretary of Labor when aforesaid citations were issued.

*See* Tr. 8–12; Secretary’s Prehearing Report at 2. At hearing, the Secretary argued that the citations should be upheld as written. NALC contested the fact of violation and the Secretary’s S&S and negligence designations for both citations. The parties agreed to make closing arguments at the hearing in lieu of submitting post-hearing briefs. Based upon the parties’ stipulations and my review of the witness testimony and of the entire record, I make the following findings.

## II. LEGAL PRINCIPLES

### A. Establishing a Violation

The Commission has long held that, “In an enforcement action before the Commission, the Secretary bears the burden of proving any alleged violation.” *Jim Walter Res., Inc.*, 9 FMSHRC 903, 907 (May 1987); *Wyoming Fuel Co.*, 14 FMSHRC 1282, 1294 (Aug. 1992). The Commission has described the Secretary’s burden as:

The burden of showing something by a “preponderance of the evidence,” the most common standard in the civil law, simply requires the trier of fact “to believe that the existence of a fact is more probable than its nonexistence.”

*RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000); *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989).

The Secretary may establish a violation by inference in certain situations. *Garden Creek Pocahontas Co.*, 11 FMSRC at 2153. Any such inference, however, must be inherently reasonable, and there must be a rational connection between the evidentiary facts and the ultimate fact inferred. *Mid-Continent Res.*, 6 FMSHRC 1132, 1138 (May 1984).

If the Secretary has established facts supporting the citation, the burden shifts to the Respondent to rebut the Secretary’s prima facie case. *Construction Materials*, 23 FMSHRC 321, 327 (March 2001) (ALJ).

### B. Significant and Substantial

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).

### C. Negligence

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

The Commission and its judges are not bound to apply the part 100 regulations that govern MSHA’s determinations addressing the proposal of civil penalties. *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2048 (Aug. 2016), citing *Brody Mining, LLC*, 37 FMSHRC 1687, 1701–03 (Aug. 2015). The Commission instead employs a traditional negligence analysis, assessing negligence based on whether an operator failed to meet the requisite standard of care. *Brody*, 37 FMSHRC at 1702. In doing so the Commission considers what actions a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation, would have taken under the same circumstances. *Id.* Commission judges are thus not limited to an evaluation of mitigating circumstances but may instead consider the totality of the circumstances holistically.” *Id.*; see also *Mach Mining*, 809 F.3d 1259, 1264 (D.C. Cir. 2016).

## 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).

## III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

NALC operates the 243 Quarry, a surface limestone operation located in Putnam County, Indiana. On July 24, 2017, MSHA Inspector Jeffery L. Cook visited the 243 Quarry to perform a routine inspection.<sup>4</sup> He was accompanied by NALC lead man Chad Dunham ("Dunham"). Cook issued the two section 104(a) citations at issue in this case. Citation No. 8954273 as modified alleges a violation of 30 C.F.R. § 56.20003(a) for the failure to keep the stairway leading to the north screen deck clean and orderly. Citation No. 8954275 alleges a violation of 30 C.F.R. § 56.14110 for the failure to provide adequate side shields or similar devices on the scalping screen to prevent a fall of material hazard.

### A. Citation No. 8954273

Inspector Cook began his inspection prior to the start of mine operations on the morning of July 24, 2018. Approximately one hour into the inspection, Cook approached the stairway to the north screen deck. Though NALC had performed some maintenance in the general area, Cook observed loose material covering the bottom two steps of the stairway. Tr. 20–21, 28–30. The material's top layer was granular and unconsolidated with a slick, clay-like substance underneath. Tr. 25. Cook also observed three footprints in the loose material. Tr. 22. He determined that one footprint faced toward the stairway while the other two faced away, indicating that at least one individual walked through the material on the way up and on the way down the stairway. Tr. 45; Exs. S–5, S–6. Cook believed that the material posed a slip and fall hazard to miners walking up or down the stairs. Tr. 20.

Later that day, Mine Foreman Dwayne Foster told Cook that he "told those guys when they go up there and clean that around the screen deck, they're supposed to clean that up before

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<sup>4</sup> Inspector Cook has served as an MSHA Inspector for approximately 2 and one half years. Tr. 17. He worked in the mining industry for 11 years as a mechanic, driller, shooter, and electrician. *Id.* He has an associate's degree in engineering. *Id.*

they go up there.” Tr. 25. Inspector Cook assumed that Foster’s statement referred to the cited loose material covering the bottom steps. *Id.* He issued Citation No. 8954273, which alleged:

Safe access was not maintained to the ladder for the walkway up to the North screen. There was loose and hard material covering above the second step that measured 29 inches long. The condition exposes miners to lost work day/restricted duty type hazards. There were foot prints in the material and miners are in the area daily. This condition had not been reported on the last area exam.

Ex. S-1.

The Secretary subsequently modified the citation to allege a violation of 30 C.F.R. § 56.20003(a), alleging that NALC failed to keep the stairway clean and orderly. Ex. S-4. Inspector Cook designated the citation S&S, reasonably likely to result in lost workdays or restricted duty, and the result of Respondent’s moderate negligence. NALC terminated the citation by clearing the material from the stairway. Ex. S-3. The Secretary assessed a penalty of \$116.00.

NALC challenges the fact of violation and the Secretary’s S&S and negligence designations. NALC argues that its miners were not exposed to the material and that they would have cleared the stairway before using it. Tr. 33-34. NALC also contends that the negligence designation should be reduced to low because it performed some maintenance in the area and the condition existed for a brief period of time. Tr. 33-34, 39-40.

## 1. The Violation

30 C.F.R. § 56.20003(a) requires that “[w]orkplaces, passageways, storerooms, and service rooms shall be kept clean and orderly” at all mining operations. The Secretary must establish that (1) the cited area is a “workplace,” “passageway,” “storeroom,” or “service room,” and (2) the area is not being kept clean and orderly. *See Tim M. Ball, employed by Mountain Materials, Inc.*, 38 FMSHRC 1799, 1808 (July 2016) (ALJ); *Ames Construction*, 37 FMSHRC 536, 540 (Mar. 2015) (ALJ).

The stairway was undisputedly a passageway leading to the north screen deck. Miners worked in the area and used the stairway regularly to access the screen. Tr. 26. The photographs clearly show that the stairway was not kept clean and orderly. Exs. S-5, S-6, S-7. The bottom two steps of the stairway were covered in loose material to the extent that a miner would be unable to climb the stairway without stepping through the material. Exs. S-5, S-7. Three footprints are visible in the loose material and appear to be facing both toward and away from the stairway, indicating that one or more individuals walked through the material on the way up and down the steps. Exs. S-5, S-6.

NALC contends that no miners were exposed to the condition because the mine was closed from the end of the last shift on Saturday until the Monday morning inspection, and that miners would have cleaned up the material before using the stairway. Tr. 27-30, 34. Though NALC did not state as much at hearing, I interpret this argument to challenge the fact of

violation in that the mine's maintenance procedures would have cleared the buildup before miners traveled through the area. In support of this argument, NALC asserts that the footprints in the Secretary's photographs cannot be proven to belong to a miner. Tr. 31. Boyd testified at hearing that the footprints could reasonably belong to a trespasser. *Id.* He noted that trespassing and theft are recurrent problems at the mine due to a neighboring gun range and correctional facility. *Id.*

I find that the footprints can be reasonably inferred to have belonged to a miner. I credit Cook's testimony that Foreman Foster reportedly instructed the miners to clean up the material before using the stairway. Tr. 25. Foster's comments were not disputed at hearing and credibly suggest that he was aware of the buildup and that the miners ignored his instructions and used the stairway without first clearing the steps. *See* Tr. 35. NALC performed maintenance in the area surrounding the stairway at the end of the previous shift, and it is reasonable to infer that a miner walked up the stairs to perform maintenance on the screen deck itself without stopping to clean the steps first.

While I do not doubt Boyd's assertion that trespassing is an issue at the 243 Quarry, NALC provided no additional information to support its claim that it was a trespasser who left the footprints over the weekend prior to the inspection. Cook testified that he normally asks the operator about instances of theft during his inspection, and that no NALC employee notified him of any trespassing or theft issues on the property. Tr. 46. Absent any verifiable evidence regarding trespassing in this particular area of the mine, I find that the footprints likely belonged to a miner and NALC therefore failed to keep the stairway clean and orderly.

Accordingly, I affirm the violation of § 56.20003(a).

## **2. Significant & Substantial**

Inspector Cook designated the citation as S&S and reasonably likely to result in lost workdays or restricted duty. I have already determined that NALC violated section 56.20003(a), thereby satisfying the first element of the *Mathies* test for an S&S violation.

To prove the second *Mathies* element, the Secretary must demonstrate the reasonable likelihood of the occurrence of the hazard that section 56.20003(a) is designed to prevent. *Newtown Energy, Inc.*, 38 FMSHRC at 2037. Section 56.20003(a) requires that all workplaces, passageways, storerooms, and service rooms shall be kept clean and orderly. 30 C.F.R. § 56.20003(a). The purpose of section 56.20003(a) is to prevent the hazard of miners slipping, falling, or tripping on loose materials in areas where they work or travel. NALC contends that the violation was not likely to contribute to a hazard because miners would have cleared the material before using the stairs. Tr. 33–35. As determined above, however, at least one miner stepped through the material to access the stairway. The material was loose and slick, and covered the bottom two steps of the stairway. Tr. 25; Exs. S–6, S–7. NALC's failure to keep the steps clean therefore contributed to the reasonable likelihood of a trip, slip, or fall hazard. The Secretary has proven the second element of the *Mathies* test.

To prove the third *Mathies* element, the Secretary must show that the hazard was reasonably likely to result in an injury. *Newtown*, 38 FMSHRC at 2038. Here, the built up material was both loose and slick and therefore conducive to slips or falls. The buildup covered two entire steps and miners would have to walk through the material in order to climb the stairway. Tr. 25–26; Exs. S–6, S–7. Assuming the hazard has been realized, if a miner were to slip or trip on the material, they could fall backwards from a height of the steps to the ground or stumble forward and make contact with the stairway itself. Given the consistency and location of the material on the steps, the Secretary has shown that the slip and fall hazard was reasonably likely to result in injury.

Finally, to prove the fourth *Mathies* element the Secretary must show that the injury resulting from the hazard was reasonably likely to be serious. *Newtown*, 38 FMSHRC at 2038. Inspector Cook testified that slips and falls from stairway steps can result in serious injuries such as a ligament or muscle strain or possibly a broken bone that could result in lost workdays or restricted duty. Tr. 26. I credit Cook’s assessment and conclude that the resulting injury would reasonably likely be serious.

I affirm the Secretary’s S&S designation for this violation, and for the same reasons I affirm the gravity designation of reasonably likely to result in lost work days or restricted duty.

### **3. Negligence**

The Secretary attributes the violation to NALC’s moderate negligence. The Secretary contends that the condition was in plain view and miners should have seen the buildup and known to clean the steps. Tr. 26. NALC contends that it performed general maintenance in the area using a skid steer. Tr. 41–42. It posits that the material may have been back dragged by the skid steer during previous maintenance efforts or blown from the conveyor on to the steps. *See* Tr. 41–43. Respondent also contends that it was not aware of the condition over the weekend while the mine was closed and that the miners intended to clear the material before resuming mining operations that day. Tr. 34, 36–37.

Respondent clearly performed general maintenance in the area at the end of the previous shift on Saturday. Exs. S–5, S–7. However, the photographs suggest that the skid steer created the condition. The wind could not have blown that much material on to the steps without disturbing the footprints present in the buildup. *See* Exs. S–5, S–6. Furthermore, the defined edges of material surrounding the stairway indicate that the steer likely pushed the material onto the steps. *See* Exs. S–5, S–6, S–7. The condition was obvious, and NALC offered no credible explanation for why it cleaned the area near the stairway during Saturday’s shift but failed to notice or clear the stairway. Tr. 30; Ex. S–7. As discussed above, the footprints indicate that at least one miner walked through the material without cleaning it up.

The condition was not extensive, however, and I credit NALC’s assertion that it intended to clear the material that morning. Foreman Foster’s comments to Cook imply that management instructed the miners to clean up the material and that they had not yet done so. Tr. 25, 34–35. Cook agreed that he did not see any miners beginning active work in the area when he inspected the area, suggesting they may not yet have had the opportunity to clear the steps. Tr. 33. Based

upon NALC's maintenance efforts in the area, management's intent to clean the steps, and the brief time that miners were exposed to the condition, I modify the Secretary's negligence designation from moderate to low.

#### **4. Penalty**

The Secretary proposed a penalty of \$116.00. NALC's history of previous violations is minimal, and the parties stipulated that the Secretary's proposed penalty amount is consistent with the violation and would not affect NALC's ability to remain in business. *See* Ex. S-17; Jt. Stip. 8. As discussed in detail above, I affirmed the Secretary's S&S and gravity determinations and reduced the operator's negligence from moderate to low. NALC promptly took steps to terminate the citation and clear the stairs. Ex. S-8. Accordingly, I assess a reduced penalty of \$75.00.

#### **B. Citation No. 8954275**

Inspector Cook next inspected NALC's scalping screen deck. Cook and Dunham approached the screen from the electrical room to the right and ascended the stairway to inspect the screen while it ran. Tr. 51, 63-64. As they were observing the deck, the screen ejected a large rock. Tr. 51. The rock missed striking Dunham by about six inches, hit the hand rail midway up the stairway, and broke into two pieces before falling 30 feet to the ground below. Tr. 51; Ex. S-9. The rock measured 9 inches by 16 inches by 8 inches and landed approximately 14 feet from the side of the screen deck. *Id.* Cook issued Citation No. 8954275, which alleged:

The side shields on the scalping screen were not extended far enough to prevent a fall of material hazard. A rock was observed falling from the screen deck striking the handrail falling to the ground during the inspection. The rock measured 9 inches x 16 inches x 8 inches. Employees working in and around the area were exposed to the possible injury from rocks falling approximately (30) thirty feet. Employees work in this area on a daily basis.

Ex. S-9. Inspector Cook designated the citation S&S, reasonably likely to be permanently disabling, and the result of NALC's moderate negligence. The Secretary later modified the negligence designation to low. Ex. S-12. NALC terminated the citation by adding an additional 18 inches of guarding to the screen's side shields. Ex. S-16. The Secretary assessed a penalty of \$116.00.

NALC challenges the fact of violation and the Secretary's S&S and negligence designations. NALC contends that no miners were exposed to rocks falling from the screen because the plant's various safety measures prevented miners from approaching the screen while it was running. Tr. 61-62. NALC also contends that it took various steps to mitigate any potential hazard generated by the screen. Tr. 59-61.

## 1. The Violation

30 C.F.R. § 56.14110 provides that “[i]n areas where flying or falling materials generated from the operation of screens, crushers, or conveyors present a hazard, guards, shields, or other devices that provide protection against such flying or falling materials shall be provided to protect persons.” Any installed guard or shield must provide actual protection against the danger of falling rocks. *See Northern Aggregate Inc.*, 37 FMSHRC 562, 579 (Mar. 2015) (ALJ) (affirming violation where signs on the crusher warning of ejecting rocks were not readily observable or obvious enough to keep employees out of the area).

The screen at issue presented a hazard of flying or falling materials. NALC does not dispute that the screen ejected a large rock during the inspection. Tr. 55. The rock was large and posed a hazard to Cook and Dunham, and would have posed to a hazard to any miner working or traveling within 14 feet of the screen. Tr. 51–52.

NALC did not provide actual protection against the falling material hazard posed by the screen. While Respondent installed additional guards on the scalping screen prior to the inspection, the guards did not prevent the ejection or protect Cook or Dunham from the falling rock. There is no evidence of barriers or barricades that would ensure miners maintained a safe distance from screen, and Cook testified that neither Dunham nor any other miner notified him of the plant’s policy that miners should not approach the screen while in operation. Tr. 71.

NALC provided evidence of signage warning of the hazard posed by the screen. *See* Tr. 57; Ex. R–F. However, the signage was not prominent enough to warn individuals of the danger from all directions. *See* Ex. R–F. The photographs show that the sign was posted on the side of the stairway’s top platform, and one could walk up the steps to the screen deck without seeing it at all. *Id.* Furthermore, NALC provided no further evidence of signage on other sides of the screen. I therefore find that NALC did not provide actual protection from the hazard of falling rocks as required by the standard. Accordingly, I affirm the violation of section 56.14110.

## 2. Significant and Substantial

Inspector Cook designated the violation S&S because the rock fell and nearly struck Dunham, which could have resulted in serious injuries. I have already found that NALC violated section 56.14110, thereby satisfying the first element of the *Mathies* test.

In regards to the second *Mathies* element, the Secretary must demonstrate the reasonable likelihood of the occurrence of the hazard that section 56.14110 is designed to prevent. Section 56.14110 requires that operators install guards, shields, or other devices in order to protect miners from flying or falling material hazards generated by operating screens, crushers, or conveyors. 30 C.F.R. §56.14110. The express language of the standard anticipates the discrete safety hazard of falling or flying materials contacting miners. *See Ash Grove Cement Co.*, 38 FMSHRC 2151, 2169 (Aug. 2016) (ALJ).

NALC contends that the violation did not contribute to the hazard because the plant’s safety measures limit miners’ exposure to falling material generated by the screen. Tr. 61–62. In



addition to the installation of side guards and signs, NALC argues that its miners are trained to only approach the scalping screen to perform maintenance work and that all maintenance work is done when the plant is shut down. Tr. 58, 62. Any miners in the area would be operating equipment while the screen was running. Tr. 62. NALC thus argues that if it weren't for the inspection, no miner would have been in the area and the violation would not have contributed to the hazard. Tr. 78–79.

I have already held that NALC's signage and initial guarding installation did not provide actual protection against flying or falling rocks. Since NALC did not provide evidence of barricades or any other measures that prevent rocks flying or falling from the screen, NALC essentially posits that the violation did not contribute to the hazard because its miners would exercise caution near the screen. I am constrained from considering this argument in my S&S analysis.<sup>5</sup> The Commission has held that whether miners would exercise caution is not relevant in determining whether a violation is S&S. *See Newtown*, 38 FMSHRC at 2044 (citations omitted) (Holding that mitigation by caution should not be considered in S&S analysis because the hazard will continue to exist regardless of whether caution is exercised).

The facts surrounding the inspection clearly indicate that NALC's failure to protect against flying or falling rocks contributed to the reasonable likelihood that a rock would strike a miner. Inspector Cook personally observed the rock eject over the screen's side guarding and come within six inches of striking Dunham. Tr. 54–55. NALC did not dispute this testimony. Tr. 55. The Secretary has met his burden of proof for the second *Mathies* element.

Regarding the third *Mathies* element, the Secretary argues that hazard of rock falling from a screen and striking a miner was reasonably likely to result in injury because Dunham would have been hurt if the ejected rock had struck him. Tr. 77. Assuming that the hazard has been realized, I find that a rock falling and striking a miner would be reasonably likely to result in an injury. Cook credibly testified that the rock would have injured Dunham had it made contact. Tr. 52. The rock was quite large and was ejected with enough force to break on the stairway and land 14 feet from the screen deck. Tr. 52; Ex. S–15. In the context of continued normal mining operations, if a rock of a comparable or even smaller size struck a miner on the deck, the steps, or the ground 30 feet below, it would almost certainly cause an injury. Tr. 52; Exs. S–9, S–15. The large rock also landed nearly 14 feet away from the screen, indicating that even miners attempting to maintain some distance from the screen could be struck and injured. Tr. 51. Given the size of the rock that was ejected from the screen and the height from which the rock fell, I find that the hazard would be reasonably likely to result in an injury. The Secretary has therefore met the minimum threshold for proving the third element of the *Mathies* test.

Regarding the fourth *Mathies* element, the Secretary must show that the injury resulting from the hazard is reasonably likely to be serious. The rock measured 9 inches by 16 inches by 8

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<sup>5</sup> Even if I were to consider NALC's safety measures, it is undisputed that the measures were not followed during the inspection. Cook and Dunham approached the screen on foot and while it was running, in contravention of two of NALC's safety policies. Tr. 55–56. Cook testified that neither Dunham nor any other miner informed him that miners were trained to only approach the screen when the plant was shut down. Tr. 71.

inches and fell from a height of about 30 feet. Ex. S-9. Cook credibly testified that the rock would have seriously injured Dunham, who was standing relatively close to the screen at the time it was ejected. Tr. 52. If a rock of comparable size ejected and struck a miner on the stairway or on the ground, the injury could be even worse. *Id.* I find that any injury resulting from the hazard would undoubtedly result in permanently disabling injuries at the very least.

For the reasons above, I affirm the Secretary's S&S and gravity determinations.

### 3. Negligence

Inspector Cook originally designated NALC's negligence as moderate. Ex. S-9. The Secretary later modified the negligence designation to low at conference.<sup>6</sup> Tr. 68; Ex. S-11. NALC contends that it went above and beyond the normal practice to protect its miners from dangers posed by the scalping screen. Tr. 61.

I find that NALC was not negligent in light of the facts surrounding this violation. As discussed above, NALC took a number of steps to ensure that its miners were not at risk of injury from rocks that may eject from the screen. NALC installed an additional 32 inches of guarding to the screen's sides at the request of its miners and posted a sign on the steps of the screen warning passerby of the danger of falling rocks. Tr. 68-69; Exs. R-A, R-C. Although Cook testified that NALC's decision to add the additional guarding demonstrates that NALC knew that the screen posed a danger, the Secretary failed to question the respondent on the frequency at which the screen ejected rocks or regarding any prior occurrences that may have induced NALC to do so. *See* Tr. 69-70. Absent this evidence, I credit NALC's assertion that it added the guards at the behest of its miners and decline to further penalize NALC for installing additional guarding, even if it proved insufficient.

NALC also trained its miners not to approach the general area while the scalping screen was operating. Tr. 58-61. Boyd testified that miners only approached the screen for maintenance purposes when the plant was shut down. Tr. 58. If miners did approach the screen while it was running, they did so in equipment that provided additional protection. Tr. 62. While NALC's employees did not adhere to the plant's safety policies during the inspection itself, I credit Boyd's testimony that Dunham was intimidated by Inspector Cook and the MSHA inspection process, and thus did not object to Cook's request to observe the running screen. Tr. 63-64. Cook testified he had no reason to dispute this testimony or to disbelieve that NALC generally enforced its safety policies, and the Secretary provided no evidence to the contrary. Tr. 71.

All of these factors indicate that NALC took significant steps to ensure that miners were both aware of and protected from any dangers that the scalping screen might pose while in operation. I therefore find that NALC's actions were commensurate with that of a reasonably prudent miner. Accordingly, I modify the Secretary's negligence designation from low to none.

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<sup>6</sup> Inspector Cook was not present at the informal conference and was unable to testify as to why the Secretary opted to modify the negligence designation from moderate to low. Tr. 69.

#### 4. Penalty

The Secretary proposed a penalty of \$116.00. NALC's history of previous violations is quite low, and the parties stipulated above that the Secretary's proposed penalty amount is consistent with the violation and would not affect NALC's ability to remain in business. *See* Ex. S-17; Jt. Stip. 8. I found that the violation was S&S and reasonably likely to result in a permanently disabling injury. I reduced NALC's negligence from low to none. NALC took immediate steps to terminate the citation by adding 18 inches of guarding to the sides of the screen. Accordingly, I assess a penalty of \$50.00.

#### IV. ORDER

The Respondent, NALC, LLC, is hereby **ORDERED** to pay the Secretary of Labor the total sum of **\$125.00** within 30 days of this order.<sup>7</sup>

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

Distribution: (U.S. First Class Mail)

Dan L. Venier, Conference & Litigation Representative, U.S. Department of Labor, MSHA, 515 West 1<sup>st</sup> Street, #333, Duluth, MN 55802

Dana Boyd, NALC, LLC, 8090 South State Road 243, Cloverdale, IN 46120

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<sup>7</sup> Payment should be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, P. O. BOX 790390, ST. LOUIS, MO 63179-0390

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
721 19<sup>TH</sup> STREET, SUITE 443  
DENVER, CO 80202-2536  
303-844-3577

May 3, 2018

PEABODY TWENTYMILE MINING,  
LLC,

Contestant,

v.

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

Respondent

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

Petitioner

v.

PEABODY TWENTYMILE MINING,  
LLC,

Respondent

CONTEST PROCEEDINGS

Docket No. WEST 2017-0247-R  
Order No. 9025723;02/19/2017

Docket No. WEST 2017-0248-R  
Citation No. 9025724;02/19/2017

Foidel Creek Mine  
Mine ID 05-03836

CIVIL PENALTY PROCEEDING

Docket No. WEST 2017-0553  
A.C. No. 05-03836-439555

Foidel Creek Mine

## DECISION

Appearances: Kristi Henes, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado for Petitioner;  
Christopher G. Peterson, Esq., and Benjamin J. Ross, Esq., Jackson Kelly PLLC, Denver, Colorado for Respondent.

Before: Judge Manning

These cases are before me upon notices of contest filed by Peabody Twentymile Mining, LLC (“Twentymile”) and a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”), against Twentymile 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 Steamboat Springs, Colorado, and filed post-hearing briefs. A section 104(d)(1) citation and a section 107(a) order were adjudicated at the hearing.

Twentymile operates the Foidel Creek Mine, an underground coal mine in Routt County, Colorado.

The citation and order were issued on February 19, 2017 by MSHA Inspector Rufus Taylor during a regular inspection of the mine. Inspector Taylor was accompanied by his supervisor Inspector Richard Eddy and by Twentymile's Safety Compliance Officer Jordan Gustafson. For reasons set forth below, I modify the citation to a section 104(a) citation and I vacate the imminent danger order. Although I have not included a detailed summary of all evidence or each argument raised, I have fully considered all the evidence and arguments.

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

### **A. Background**

Inspector Taylor testified that he arrived at the mine at about 7:20 a.m. on Sunday, February 19, 2017, and began his inspection. Tr. 15-18. While inspecting a bolter at about 1:00 p.m., the inspectors heard what Taylor described as a scream and then a second scream. Tr. 18-21. At that point, both inspectors turned and observed what they described as a miner bent over the trough of a feeder, approximately 100 feet away. *Id.* Taylor was concerned that the miner may have fallen into the feeder. Tr. 21. When they went over to investigate, they saw that the miner, David Lomas, was standing on the off-walkway side of the feeder, the feeder conveyor was operating, and a shuttle car was dumping material into the feeder. Tr. 25, 31. Inspector Taylor issued a verbal imminent danger order requiring Gustafson to remove the miner from the off-walkway side. Tr. 22-23. The inspectors subsequently learned that what the inspectors thought were screams were actually whoops of joy, as described below. Tr. 191.

For as long as anyone can remember and for at least the last 30 years, Twentymile has used a method colloquially known as “fishing” to remove roof bolts, wood, and other extraneous material from feeders. Tr. 135, 137-138. Fishing is more often used when an area of the mine is being rehabilitated rather than when coal is being produced. Tr. 135-136. If the floor needs to be graded, for example, Twentymile uses a continuous miner to grade the floor to remove material that has heaved. Tr. 133, 178-179. The resulting material is loaded into shuttle cars and slowly dumped into feeders that slowly load it onto conveyor belts to remove the material from the mine. Tr. 135. This material is mostly rock and mud but also may contain roof bolts and other extraneous metal parts that can damage conveyor belts. Tr. 136. Pieces of wood may also be present. Tr. 285. The feeder is equipped with a pick breaker that can crush most of the material before it dumps on the belt but, to protect the belts, Twentymile uses fishing to remove as many metal pieces from the feeder as possible.<sup>1</sup> Tr. 136. Metal and/or wood are capable of jamming the pick breaker. Tr. 136-137, 166.

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<sup>1</sup> The feeder unit consists of a hopper, conveyor and pick breaker. Material is slowly dumped into the hopper located on the inby end of the feeder unit. The material is moved along the feeder by a chain conveyor from the hopper to the pick breaker at the outby end of the feeder. Material is then dumped onto a conveyor belt and sent out of the mine. Throughout this decision the phrase “feeder conveyor” refers to this chain conveyor on the feeder.

Twentymile developed a written procedure for miners to follow when fishing. RX-7. In order to fish material from the feeder, a miner takes a D-Ring, bends it into the shape of a hook and attaches it to a piece of drill steel using electrical tape. Tr. 208, 211. The drill steel is typically about five feet long. Tr. 219. The feeder is set to its lowest speed. Tr. 259. The feeder in this case moved 1.42 feet per second. RX-18; Tr. 54, 277. The miner engaged in fishing positions himself so he can see the shuttle car as it approaches. Tr. 138. He signals the shuttle car operator to approach the feeder and to begin slowly dumping the material into the feeder. Tr. 138. He also signals the operator to stop dumping when the feeder is full or when he sees metal or wood in the material. Tr. 138-139. The fishing miner then uses his hook to remove the object. If the object the miner tries to hook weighs more than about 10-15 pounds, the D-Ring will separate from the drill steel because it is only attached with tape. Tr. 219-220. A railing surrounds parts of the feeder. Tr. 73, 84. The miner who is fishing can shut off power to the feeder conveyor and the pick breaker by using an e-stop button on the side of the feeder or an e-stop cord that stretches across the feeder. Tr. 255-57. He can also lock-out and tag-out the feeder if he sees a large object that needs to be removed or he can simply let it go through the pick breaker and onto the belt. Tr. 202-204. Pat Sollars, the general manager of Peabody's Colorado operations, as well as Michael Zimmerman, the mine's compliance manager, both testified that no miner has ever been injured while fishing material out of a feeder. Tr. 137, 285.

Davis Lomas, the miner who was fishing on the day of the inspection, is not a mechanic and does not perform maintenance at the mine. Tr. 180. He made a whooping sound at the time of the inspection because he had been fishing for several 12 hour shifts and he found something that he needed to hook. He testified that he "jokingly yelled [to another miner] woo hoo! Yea! I got something." Tr. 191. I credit this testimony.

### **B. Citation No. 9025724 – Fact of Violation**

Inspector Taylor issued Citation No. 9025724 under section 104(d)(1) later that day. The citation states, in part,

Repairs or maintenance shall not be performed on machinery until the power is off and the machinery is blocked against motion, except where machinery motion is necessary to make adjustments. When examined by this inspector the operator is failing to remove power to company No. 237 feeder to block against motion on the 9 east longwall[.] There is miner with a piece of Roof Bolter steel with a metal hook attached to the end removing wood and metal from the moving feeder conveyor. The miner is on the off walkway side of the feeder within approximately 41 inches of the moving conveyor chain. In the event of the miner falling into the moving conveyor chain the miner will be pulled into pick breaker causing the miner to be fatality injured. This is obvious to the most casual observer. The operator engaged in aggravated conduct constituting in more than ordinary negligence in that after further review and

interviewing the miner it is determined that the miner was instructed to perform these functions.

The inspector charged a violation of section 75.1725(c) which provides that “[r]epairs or maintenance shall not be performed on machinery until the power is off and the machinery is blocked against motion, except where machinery motion is necessary to make adjustments.” 20 C.F.R. § 75.1725(c).

There is no dispute that Lomas was not performing repairs and no adjustments were being made. Further, there is no dispute that the feeder conveyor and pick breaker were not locked out at the time.<sup>2</sup> The singular issue is whether Lomas’s action of fishing constituted “maintenance” under the standard. I find that it did.

The Secretary argues that Lomas’s act of fishing metal and wood out of the feeder amounted to preventive maintenance because it kept the feeder’s pick breaker and the attached belt in good repair. Sec’y Br. 9. Roof bolts, if not fished out, could damage the pick breaker and/or become wrapped around the pick breaker, which would require removal via a torch. Similarly, metal objects could damage the belts and wood could jam the pick breaker. Sec’y Br. 8-9.

Twentymile asserts that it did not violate section 75.1725(c) because the miner was not performing repairs or maintenance on the feeder. A feeder can operate without fishing. Fishing does not correct a malfunction of the feeder, nor does it affect the feeder or pick breaker in any manner. Twentymile Br. 7. Wood and metal do not stop the feeder from operating. Although, a roof bolt may get stuck in the pick breaker, it cannot jam the breaker, and bolts are often too heavy to remove via fishing. If a feeder stalls or an impediment must be removed from the pick breaker, miners lock out and tag out the equipment. Twentymile Br. 7-8.

The Commission, relying on the ordinary meaning of the word, has defined “maintenance” as “the labor of keeping something (as buildings or equipment) in a state of repair or efficiency: care, upkeep ...” and “[p]roper care, repair, and keeping in good order.” *Walker Stone Co.*, 19 FMSHRC 48, 51 (Jan. 1997) *aff’d*, 156 F.3d 1076 (10<sup>th</sup> Cir. 1998) (quoting *Webster’s Third New International Dictionary, Unabridged* 1362 (1986) and *A Dictionary of Mining, Mineral, and Related Terms* 675 (1968)). In *Walker Stone* the Commission found that the breakup and removal of rocks clogging a crusher amounted to maintenance. *Id.* at 51. The

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<sup>2</sup> Following the submission of briefs the Secretary submitted a letter that was essentially a reply brief in which he argued that Lomas’s testimony that he deactivated the feeder and pick breaker should not be seriously considered due to the presence of more reliable evidence, including testimony from Twentymile witnesses, that the feeder conveyor was running and the chain was in motion when the inspection party arrived. Sec’y Reply 1. Twentymile filed a response to the Secretary’s reply arguing that Lomas was in the best position to know what the feeder was doing when he was fishing and that the feeder likely restarted after Lomas fished. Twentymile Response 1. Although the parties dispute whether the feeder and pick breaker were moving the entire time Lomas was fishing, it is clear that the equipment was not locked out, i.e., blocked against motion. In addition, the feeder was operating when the loader was dumping material into the hopper while Lomas was looking to see if anything needed to be removed.

Commission, in reaching its decision, focused on the purpose of the work being done, which was to restore the crusher to a functioning condition, and reasoned that the purpose clearly fit within the “broad phrase ‘repairs or maintenance of machinery or equipment[.]’” *Id.* Further, “[t]he removal of rock was necessary to . . . ‘keep [the crusher] in a state of repair or efficiency.’”

The purpose of fishing was to remove metal and wood objects that could affect equipment and/or the product shipped to customers.<sup>3</sup> The primary concern with metal objects, especially roof bolts, was that they could seriously damage the belt used to remove this material from the mine. However, Sollars acknowledged that metal, along with wooden objects such as cribs, could jam the pick breaker. Tr. 136-137, 166. Sollars also testified roof bolts that are not fished out could wrap around the pick breaker and “would stay there and you’d go in later and cut them out” with a torch while the equipment was locked out.<sup>4</sup> Tr. 136, 166-167.

The Secretary specifically categorized Lomas’s activity as “preventive” maintenance. While the term “preventive” is not included in the cited standard, I find that the term “maintenance” may include actions of a “preventive” nature. “Preventive maintenance” involves a “system that enables breakdowns to be anticipated and arrangements made to perform necessary overhauls and replacements in good time.” Am. Geological Institute, *Dictionary of Mining, Mineral, and Related Terms* 426 (2d ed. 1997). Essentially, it is anticipatory maintenance designed to address potential problems before they come to fruition. In that way, it fits squarely within the type of “care,” “upkeep,” and “keeping in good order” contemplated by the Commission’s definition of “maintenance” in *Walker Stone*.

I find that Lomas was engaged in preventive maintenance. A jammed pick breaker is not a functioning pick breaker. Lomas, by removing metal and wood objects from the feeder prior to those objects reaching the pick breaker, was keeping the feeder and pick breaker in a functioning condition by preventing a possible jam. Further, even if roof bolts wrapped around the pick breaker did not affect its performance while operating, they certainly affected its efficiency in the form of future downtime because at some point those bolts would need to be removed. Removal of the bolts wrapped around the pick breaker required a miner to deenergize the equipment and block it against motion before cutting the bolts out with a torch. Removing the bolts via fishing prior to the bolts reaching the pick breaker prevented a shutdown and kept the pick breaker in a state of efficiency. Further, there is no dispute that removing metal objects prevented possible

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<sup>3</sup> Zimmerman testified that wood fed through the pick breaker and dumped onto the belts would not be separated from coal in the mine’s wash plant, since both wood and coal float, and could potentially be sent to Twentymile’s customers. Tr. 285.

<sup>4</sup> Although Twentymile, in its brief, attempted to qualify Sollars’s testimony by citing Owens testimony that roof bolts were too heavy to remove via fishing, it is quite clear that nothing prevented miners from attempting to remove bolts via fishing. Twentymile Br. 7. Owens himself testified that he had attempted to do just that, but that the tape holding the hook to the drill steel failed and the hook was pulled off. Tr. 220.



damage to the belt.<sup>5</sup> I find that the purposes of fishing fit within the “broad phrase ‘repairs or maintenance of machinery or equipment[.]’” *Walker Stone* at 51; *see also Sec’y of Labor v. Ohio Valley Coal Co.*, 359 F.3d 531 (D.C. Cir. 2004) (broadly interpreting the standard’s “repairs or maintenance” language to include not just actual physical work by the miner, but also a miner’s assessment of a piece of equipment in order to identify an apparent problem if the miner doing the assessment is in a location where their safety might be threatened by running machinery.)

Twentymile also argues that the Secretary is attempting to stretch the definition of maintenance so as to require that a mine operator lock-out and tag-out all section equipment when maintenance is required anywhere on the section. Twentymile Br. 8-9. While the Secretary alluded to this at hearing, he did not expressly mention it in his brief. Nevertheless, I reject the idea that in order to comply with the standard all equipment on the active section must be deenergized. Rather, consistent with the D.C. Circuit’s finding in *Ohio Valley Coal Co.*, it would seem that only that equipment posing a potential safety threat to a miner in the location where they are conducting the maintenance needs to be deenergized and blocked against motion.

Because Lomas was engaged in maintenance on the feeder while it was operating, I find that the Secretary established a violation of the cited standard.

### **1. Fair Notice of the Requirements of Section 75.1725(c).**

Twentymile argues that the court should vacate the subject citation because it lacked fair notice of the requirements of section 75.1725(c). Twentymile Br. 11. A reasonably prudent person would not have fair warning of the standard’s requirement because this mine has used fishing to remove metal and wood for thirty years and MSHA has never suggested it violated a mandatory standard. Many people, including numerous mine managers and apparently one current MSHA inspector have fished materials out of the feeder while it was operating in the belief that such activity was safe and did not violate a safety standard. Twentymile Br. 11. Indeed, Twentymile had in place a standard work procedure spelling out how fishing should be performed in a safe manner. RX-7 pp. 4-5.

The Secretary argues that Twentymile was on notice that fishing violated the mandatory standard. Notice is only inadequate where a reasonably prudent mine operator would not have understood that a specific condition was in violation of the standard. Sec’y Br. 9. The definition of “maintenance” in *Walker Stone* has been established law for two decades and any reasonable operator would know that working on materials being conveyed into a feeder without deenergizing and blocking the equipment against motion was a violation of the cited standard. Sec’y Br. 10. Twentymile had actual notice of the hazards associated with miners working near

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<sup>5</sup> Twentymile argues that because the conveyor belt and feeder are distinct pieces of equipment, maintenance can be conducted on each piece of equipment without blocking the other. Specifically, it argues that because fishing is aimed at protecting the belt, the act of fishing does not constitute maintenance of the feeder and, in turn, does not require the feeder to be locked out and tagged out. Twentymile Br. 10. However, the belt and feeder are linked because the feeder would never be operated without the presence of the belt to remove the material from the mine.

the belt and this was the first time MSHA inspectors had ever observed the practice of fishing during an inspection. Sec’y Br. 10.

The Secretary must provide fair notice of the requirements of a broadly written safety standard. The language of section 75.1725(c) is “simple and brief in order to be broadly adaptable to myriad circumstances.” *Kerr-McGee Corp.*, 3 FMSHRC 2496, 2497 (Nov. 1981); *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2130 (Dec, 1982). Such broadly written standards must afford notice of what is required or proscribed. *U.S. Steel Corp.*, 5 FMSHRC 3, 4 (Jan. 1983). In “order to afford adequate notice and pass constitutional muster, a mandatory safety standard cannot be ‘so incomplete, vague, indefinite, or uncertain that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application’” *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990)(citation omitted). A standard must “give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.” *Lanham Coal Co.*, 13 FMSHRC 1341, 1343 (September 1991).

When faced with a challenge that a safety standard failed to provide adequate notice of prohibited or required conduct, the Commission has applied an objective standard, i.e., the reasonably prudent person test. The Commission summarized this test as “whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard.” *Id.* (citations omitted). To put it another way, a safety standard cannot be construed to mean what the Secretary intended but did not adequately express. “The Secretary as enforcer of the Act has the responsibility to state with ascertainable certainty what is meant by the standards he has promulgated.” *Diamond Roofing Co. v. OSHRC*, 528 F.2d 645, 649 (5th Cir. 1976).

In *Alan Lee Good d/b/a Good Construction*, 23 FMSHRC 995 (Sept. 2001), Commissioner Jordan and former Commissioner Beatty stated the following:

In applying the reasonably prudent person standard to a notice question, the Commission has taken into account a wide variety of factors, including the text of a regulation, its placement in the overall enforcement scheme, its regulatory history, the consistency of the agency's enforcement, and whether MSHA has published notices informing the regulated community with “ascertainable certainty” of its interpretation of the standard in question. Also relevant is the testimony of the inspector and the operator's employees as to whether certain practices affected safety. Finally, we have looked to accepted safety standards in the field, considerations unique to the mining industry, and the circumstances at the operator's mine.

23 FMSHRC at 1005 (citations and footnote omitted). Although the Commission split as to whether the operator in that case had been provided with fair notice, the Commission did not disagree as to how the notice issue should be analyzed in future cases.

The text of 75.1725, which is contained in “Subpart R- Miscellaneous,” is instructive because it illustrates that the Secretary intended to include preventive maintenance within the scope of subsection (c). Subsection (d) of the safety standard states that “[m]achinery shall not be lubricated manually while in motion, unless equipped with extended fittings or cups.” Lubrication is clearly a type of preventive maintenance because an operator will want to keep machinery lubricated even when it is working perfectly to ensure that it continues to operate as designed. If the Secretary did not consider preventive maintenance to be “maintenance” as that term is used in the safety standard, subsection (d) would not be as necessary.<sup>6</sup> This provision provides notice to mine operators that the Secretary intends that preventive maintenance is included in the coverage of the safety standard.

The Secretary did not provide, and the court has been unable to find through its own research, any MSHA documents that provide guidance on how to interpret the standard in the context of the facts of this case. MSHA’s Program Policy Manual, for example, does not address any issues related to the interpretation of 75.1725(c) as relevant here. *See* V MSHA, U.S. Dep’t of Labor, *Program Policy Manual*, Part 75, at 156-59 (2018).

Fishing has been conducted at the mine for a long time, perhaps 30 years or longer. It is important to note however that, until Longwall Panel 9 was developed, fishing was not a frequent occurrence. Prior to the development of this panel, fishing occurred once or twice a year. Because of floor heaving problems in Panel 9, however, fishing was being conducted monthly for a period of 8-16 days each month. Tr. 52, 133, 162, 164, 224-225, 243-244. Consequently, it is not surprising that MSHA inspectors had never observed anyone fishing at the mine until the subject inspection. Field Office Supervisor Eddy indicated that he asked the inspectors at the Craig, Colorado, office whether they had ever observed fishing at the mine. He testified that each inspector told him that they had not.<sup>7</sup> Tr. 128. I credit the Secretary’s evidence that no MSHA inspector had previously observed fishing while inspecting the mine.

Twentymile correctly argues that MSHA does not always prohibit miners from working around moving pieces of equipment. For example, Inspector Taylor admitted that miners are allowed to shovel coal accumulations onto belts that are moving at a high rate of speed. Tr. 96-97, 99-100. Twentymile believes that working around a fast-moving belt poses a greater safety

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<sup>6</sup> The regulatory history of section 75.1725(c) is scant, at best. The proposed rule prohibited lubrication of operating machinery “where a hazard exists” unless equipped with extended fittings or cups. 37 Fed. Reg. 11777, 11779 (June 14, 1972). The final rule was changed to reflect the fact that machinery is often self-lubricating. 38 Fed. Reg. 4974, 4975 (Feb. 23, 1973). There was no discussion of subsection (c) in the regulatory history.

<sup>7</sup> I recognize that Inspector Eddy’s testimony is hearsay, but it is consistent with the testimony of Twentymile’s witnesses that the mine did not start engaging in fishing on a frequent basis until floor heave problems developed in Longwall Panel 9. Twentymile presented hearsay evidence that another MSHA inspector, who once worked at the Foidel Creek Mine, called Sollars to tell him that he had fished while working at the mine and he did not believe that it created a hazard. RX-6; Tr. 127, 183. Twentymile attempted to call this inspector as a witness but, by order dated January 24, 2018, I quashed the subpoena. 40 FMSHRC 242.

hazard than fishing around a slow moving feeder. Consequently, it argues that the Secretary is not sending a consistent message about prohibited conduct around moving machinery.

I agree that there is some inconsistency but, as the inspector stated, the area around the head and tail pulleys of conveyor belts are regulated. *See* 30 C.F.R. § 75.1722. Head and tail pulleys are more analogous to the subject feeder and they must be tightly guarded.

I hold that a reasonably prudent person familiar with the mining industry and the protective purposes of section 75.1725 would have recognized that the act of fishing at the feeder is a type of preventive maintenance that is covered by the requirements of section 75.1725(c).

## **2. Significant and Substantial.**

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).

The Secretary maintains that “[g]iven the proximity of Lomas to the moving feeder conveyor, the uneven trench in which he was standing, the pile of material collected around him, the monorail hanging from the roof, and the generally cramped location from which Loma was fishing, the violation contributed to the discrete hazard of falling into the feeder and being pulled

through the pick breaker.” Sec’y Br. 11. Twentymile was aware of the hazards of working around the feeder because it would lock and tag out the feeder when miners cleaned or shoveled around it. Tr. 260. Fishing was usually assigned to less experienced miners and was becoming a more regular function which increased the likelihood of an accident. Any injury would be of a reasonably serious nature and could be fatal.

Twentymile argues that the evidence demonstrates that the hazard of a miner falling or being pulled into the feeder while fishing was highly unlikely. Miners have been performing this task for 30 years without incident. The fishing miner usually stops the feeder conveyor when he finds an object that needs to be removed. If he does not stop the feeder, the conveyor moves at a slow rate of speed, about 1.42 feet per second, and the hook would separate from the drill steel if it snagged on something. Twentymile argues that at that slow speed, material would travel along the feeder conveyor for about 24 seconds before reaching the pick breaker. Twentymile Br. 14. Lomas testified that at all times he stood at a distance from the pick breaker and he cleaned the area around him to remove tripping hazards. Tr. 183, 186, 190. He deactivated the feeder when necessary as he removed objects with the drill steel. Tr. 186. The conveyor chain was 35-41 inches from the edge of the feeder closest to Lomas and 19 inches from the top of the feeder, making it unlikely that the fishing rod would snag on anything. Twentymile Br. 14; Tr. 87, 289; RX-20. In addition there were emergency stop switches and a stop cord in the area.

I find that the Secretary did not establish that the violation was S&S. I determined that Twentymile violated section 75.1725(c), above.

The next issue is whether there was a discrete safety hazard. To resolve this issue a judge must first determine the nature of the hazard. A hazard is the “prospective danger the cited safety standard is intended to prevent.” *Newtown Energy*, 38 FMSHRC at 2038. Section 1725(c) is designed to prevent miners from being injured by becoming entangled in moving machinery while repairs or maintenance are being conducted. The hazard in this case was the risk of a miner being pulled into the feeder or falling into the feeder while in the process of fishing as the feeder conveyor was moving. Next, the judge must determine whether the violation sufficiently contributed to this hazard. That is, was there a “reasonable likelihood of the occurrence of the hazard against which the mandatory safety standard is directed.” *Id.*

I find that it was unlikely that the hazard that the safety standard is designed to prevent will ever occur assuming continued mining operations. It was highly unlikely that David Lomas or any other fishing miner would be pulled into or fall into the moving feeder. First, Lomas testified that if he sees a piece of metal as it is being slowly dumped into the feeder by the loader operator, he stops the feeder conveyor and uses his fishing stick to grab it and move it to the side. Tr. 185-86. Second, the type of fishing stick that he and other miners use has the hook attached to the drill steel with tape. Thus, even if the feeder is moving and the hook gets entangled in something, the hook will come off and the miner will not be pulled in. The hook easily separates from the drill steel. Tr. 186-87, 211, 259. The feeder conveyor is always run at the lowest speed possible so even if the miner kept holding the pole for a second or more after it snagged, he would not be pulled for any significant distance and he would not be pulled so hard that there would be a chance that he would be pulled onto the feeder conveyor. RX-7, p. 5; Tr. 259-60.

Third, the dimensions of the feeder would make it very difficult for anyone to be pulled into the feeder conveyor or fall into it. The deck plate for the hopper of the feeder was about 34 inches above the ground level where Lomas was standing. Tr. 274-75; RX-10. It is 35 inches from the top edge of this deck plate close to the fishing miner to the other side of the flat surface of the deck plate close to the feeder conveyor. *Id.* The feeder conveyor is 19 inches below the top of the deck plate. Tr. 288-29; RX 19, 20. Thus, the distance from the ground where a miner would be standing to the feeder conveyor would be 34 inches up to the edge of the deck plate, 35 inches across to the other side of the deck plate, and then 19 inches down to the feeder conveyor. I credit these measurements that were taken by Twentymile soon after the inspection party arrived. It would take a lot of force to pull a miner into the feeder conveyor and the tape on the fishing pole would give way if the miner kept grasping the pole. It would also be next to impossible to fall into the conveyor. The likelihood of falling into the feeder conveyor from where Lomas was standing would be about the same as the chance of standing on one side of a typical office desk and falling over to the other side of the desk while leaning over the desk; it is possible but very unlikely.

As a consequence, I find that the Secretary did not establish that there was a discrete safety hazard, the second step of the *Mathies* S&S test. The hazard contributed to by violation was not reasonably likely to cause an injury.<sup>8</sup> The inspector's S&S determination is vacated.

### 3. Gravity

The gravity penalty criterion under section 110(i) of the Mine Act, 30 U.S.C. § 820(i), "is often viewed in terms of the seriousness of the violation." *Consolidation Coal Co.*, 18 FMSHRC 1541, 1549 (Sept. 1996) (citing *Sellersburg Stone Co.*, 5 FMSHRC 287, 294-95 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984); *Youghioghney & Ohio Coal Co.*, 9 FMSHRC 673, 681 (Apr. 1987)). The gravity analysis focuses on factors such as the likelihood of injury, the severity of an injury if it occurs, and the number of miners potentially affected.

I find that the gravity of this violation was not very serious. It was unlikely that Lomas or anyone else who fished from the cited location would be injured for the reasons discussed above. A serious injury was possible but improbable. If an injury did occur, it was likely to be minor. For example, if Lomas tripped while fishing, he could suffer sprains or bruises. It is highly unlikely that he would fall into the feeder. I find the gravity to be low.

### 4. Negligence

The Secretary argues that Twentymile unwarrantably failed to comply with the cited standard because the "fishing process presented a high degree of danger to miners, was open and obvious, and in the aggregate, existed for significant periods of time." Sec'y Br. 14-15.

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<sup>8</sup> If I assume that the Secretary established that there was a discrete safety hazard, that is that the violation sufficiently contributed to the hazard that the safety standard was intended to prevent, I would be required to assume such occurrence and determine whether the occurrence of that hazard would reasonably be likely to result in an injury. *Newtown*, 38 FMSHRC 2038. An injury would be reasonably likely in such instance which could range between sprains and bruises to serious or fatal injuries.

Moreover, the act of fishing “was known to and sanctioned by” management as evidenced by the fact that it had been made into a standard work procedure. Sec’y Br. 13-15. Because Owens was Lomas’s supervisor, his knowledge that Lomas engaged in fishing must be imputed to Twentymile for purposes of finding that it was highly negligent and that it engaged in aggravated conduct. Sec’y Br. 13-16.

Twentymile argues that the unwarrantable failure and high negligence designations are inappropriate because its conduct was not aggravated. Twentymile Br. 14. There was little to no degree of danger associated with the act of fishing. Moreover, Twentymile genuinely believed that it was in compliance with the safety standard. *Id.* Fishing was an “established, regulated practice” at the mine, was not an obvious violation, and MSHA had never put the mine on notice that greater efforts were necessary to comply with the cited standard. Twentymile Br. 16.

Section 110(i) of the Mine Act includes "negligence" as one of the six criteria the Commission is required to consider in assessing a penalty. The term is not defined in the Act, but over 30 years ago the Commission recognized that: "[e]ach mandatory standard ...carries with it an accompanying duty of care to avoid violations of the standard, and an operator's failure to meet the appropriate duty can lead to a finding of negligence if a violation of the standard occurs." *A. H. Smith Stone Company*, 5 FMSHRC 13, 15 (Jan. 1983).

Commission Judges are not bound by the Secretary’s definitions in 30 C.F.R Part 100 when considering an operator's negligence. *Brody Mining, LLC*, 37 FMSHRC 1687, 1702 (Aug. 2015); *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2048 (Aug. 2016). Rather, a Judge "may consider the totality of the circumstances holistically." *Id.* The Commission has established that its judges may "evaluate negligence from the starting point of a traditional negligence analysis rather than based upon the Part 100 definitions. Under such an analysis, an operator is negligent if it fails to meet the requisite standard of care - a standard of care that is high under the Mine Act." *Brody Mining* 37 FMSHRC at 1702. This evaluation 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 Resources*, 36 FMSHRC 1972, 1975 (Aug. 2014). The Commission has stated the real gravamen of high negligence is that it "suggests an aggravated lack of care that is more than ordinary negligence." *Newtown*, at 2049 (*citing Topper Coal Co.*, 20 FMSHRC 344, 350 (Apr. 1998)).

I find that the violation was a result of low negligence and that Twentymile did not unwarrantably fail to comply with the mandatory standard.<sup>9</sup> Much of the Secretary’s argument in support of the high negligence and unwarrantable failure designations is based upon the fact that

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<sup>9</sup> The Commission has held that “[t]he statutory language of section 104(d)(1) expressly makes a significant and substantial finding a prerequisite for the issuance of a section 104(d)(1) citation.” *Youghiogheny & Ohio Coal Co.*, 10 FMSHRC 603, 608 (May 1998). Given that I have found that the violation was not S&S, Citation No. 9025724, by operation of law, is modified from a 104(d)(1) citation to a 104(a) citation and the unwarrantable failure designation is vacated. My finding that Twentymile’s negligence was low is also inconsistent with an unwarrantable failure finding.

Twentymile sanctioned the practice of fishing and its managers routinely assigned miners that task. Sec’y Br. 13-16. I agree that Twentymile sanctioned the act of fishing and had knowledge that miners, including Lomas, engaged in fishing. However, I find that Twentymile permitted the act of fishing based on “an objectively reasonable and good faith belief that the cited conduct was in compliance with applicable law.”<sup>10</sup> *Oak Grove Res., LLC*, 38 FMSHRC 1273, 1279 (June 2016).

The evidence establishes that Twentymile reasonably believed that the act of fishing was not dangerous and did not constitute “maintenance” as contemplated by the cited standard. As discussed above in the S&S analysis, as well as in the imminent danger order analysis below, I find that a significant hazard did not exist. Twentymile personnel, including members of management and apparently at least one current MSHA inspector, had engaged in the act of fishing for decades without incident. Twentymile clearly believed that it was not engaging in violative conduct. I find that this belief, albeit an incorrect one, was objectively reasonable under the facts of this case. Given that the violation did not create a serious safety hazard and that Twentymile had a reasonable good faith belief that this practice did not violate a safety standard, I find that Twentymile’s negligence was low.<sup>11</sup>

### **C. Imminent Danger Order No. 9025723**

Inspector Taylor also issued Order No. 9025723, a section 107(a) order that alleges that Lomas’s act of fishing, as described above, created an imminent danger. 30 U.S.C. § 817(a).

The Secretary argues that the imminent danger order was validly issued when the inspector observed a miner fishing in an energized conveyor using a piece of drill steel with a hook attached. Sec’y Br. 4. Inspector Taylor, in response to screams, believed that a miner had been caught and pulled into the moving feeder conveyor. Sec’y Br. 6. Although the miner was actually unharmed, in other situations miners have been pulled into moving conveyors and suffered fatal injuries. Sec’y Br. 6 (citing GX-8, a collection of fatalgrams involving miners pulled into pick breakers). Here, the miner was standing in a 13 inch wide trench with uneven ground, removing pieces of wood and metal of various sizes and weights from the feeder. Sec’y Br. 6-7. Although the miner testified that he could easily let go of the pole if it became caught, the natural human reflex is to grab tighter when an item is being pulled from one’s grasp. While the inspector did not review fatalgrams at the time of issuance, he was generally familiar with the

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<sup>10</sup> Consideration of an operator’s objectively reasonable and good faith belief that the cited conduct was in compliance with applicable law is appropriate in the analysis of unwarrantable failure and the degree of negligence. *Lehigh Anthracite Coal, LLC et al.*, 40 FMSHRC \_\_\_, slip op. at 9, No. PENN 2014-109 (April 10, 2018).

<sup>11</sup> Earlier in this decision, I determined that that a reasonably prudent person familiar with the mining industry and the protective purposes of section 75.1725 would have recognized that the act of fishing at the feeder is a type of preventive maintenance that is covered by the requirements of section 75.1725(c). That determination is not inconsistent with my finding here that Twentymile had a reasonable good faith belief that it was in compliance with MSHA safety standards. I am holding that Twentymile *was negligent* in permitting the violation but the degree of its negligence should be lowered given the circumstances discussed above.



many deaths that have resulted from these types of situations and had personally experienced a close call with a conveyor belt. Sec’y Br. 7.

Twentymile argues that the inspector abused his discretion because there was no imminent danger. The inspector based his order on the incorrect belief that a miner was in danger when the inspector heard shouting. Twentymile Br. 18. The two inspectors present were excited and yelling before they reached the feeder or Lomas, who had finished fishing and was never in the feeder. Twentymile Br. 19. Standing next to the feeder is not dangerous and no regulations prevent it. Twentymile Br. 19. The inspector’s investigation was not reasonable given that he took no photographs, did not investigate the floor conditions, did not know Lomas’s location, and took incorrect measurements. Twentymile Br. 19-20. The inspector’s statement at hearing that “anytime you’re around moving machine parts it is an imminent danger” is not a proper basis for an imminent danger order and ignores the fact that miners must stand next to a feeder to access its controls. Twentymile Br. 19.

Section 107(a) of the Act states that if an inspector “finds that an imminent danger exists, [the inspector] shall ... issue an order requiring the operator of such mine to cause all persons ... to be withdrawn from” the subject area until the inspector “determines that such imminent danger and the conditions or practices which caused such imminent danger no longer exist.” 30 U.S.C. § 817(a). Section 3(j) of the Act defines an “imminent danger” as a condition “which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated.” 30 U.S.C. § 802(j); *See also Wyoming Fuel Co.*, 14 FMSHRC 1282, 1291 (Aug 1992). While the danger justifying the issuance of the order need not be immediate, an inspector must find that the hazardous condition or practice “has a reasonable potential to cause death or serious injury within a short period of time.” *Cumberland Coal Resources, LP*, 28 FMSHRC 545, 555 (Aug. 2006)(citation omitted).

In reviewing a 107(a) imminent danger order, the judge must determine if the inspector, who must make a quick decision at the time of issuance, “abuse[d] his discretion[.]” *Utah, Power & Light Co.*, 13 FMSHRC 1617, 1622-23 (Oct. 1991). In order to establish an imminent danger order the Secretary must prove “by a preponderance of the evidence that the inspector reasonably concluded, based on information that was known or reasonably available to him at the time the order was issued, that an imminent danger existed.” *Knife River Constr.*, 38 FMSHRC 1289, 1291 (June 2016) (citing *Island Creek Coal Co.*, 15 FMSHRC 339, 346 (Mar. 1993)). “[A] Judge is not required to accept an inspector's subjective perception that an imminent danger existed but, rather, must evaluate whether it was *objectively reasonable* for the inspector to conclude that an imminent danger existed.” *Id* (emphasis added). “[I]n making such a determination, a judge ‘should make factual findings as to whether the inspector made a reasonable investigation of the facts, under the circumstances, and whether the facts known to him, or reasonably available to him, supported issuance of the imminent danger order.’” *Island Creek Coal Co.*, 15 FMSHRC 339, 346 (Mar. 1993) (citing *Wyoming Fuel Co.*, 14 FMSHRC 1282, 1292 (Aug. 1992)).

I find that the imminent danger order was invalidly issued. Inspector Taylor issued the verbal imminent danger order while he and others were walking towards, but before the group arrived at, the feeder. *See* Sec’y Br. 3 (citing Tr. 22-23). The only information available to Inspectors Taylor and Eddy was that they had heard someone “scream” and it appeared to them

that a miner was in the feeder. Upon further review, Inspector Taylor discovered that Lomas had shouted in joy, not screamed, and that his shouts were unrelated to any danger. Lomas had been standing next to the feeder but was never in the feeder. The information Inspectors Taylor and Eddy relied upon to issue the verbal imminent danger order was inaccurate.

Moreover, the information that the inspectors subsequently gathered does not support the issuance of the imminent danger order, for the reasons discussed above. The deck of the feeder was about 34 inches above the ground. Tr. 33, 83, 86, 275. The feeder's metal deck was about 35 inches wide, which separated the area where Lomas was standing from the feeder conveyor. Tr. 83, 86, 275. The conveyor was moving a slow speed of about 1.42 feet per second. Tr. 54, 136, 198, 260, 277. E-stop buttons/cords were present on both sides of the feeder, with the closest being about two feet from where Lomas was standing. Tr. 198. In addition, a third e-stop was strung across the feeder conveyor in front of the pick breaker. Tr. 76, 255-257. Finally, the hook at the end of Lomas's pole was only secured with tape and Owens credibly testified that the tape would fail and the hook would come off if heavier items were snagged. Tr. 220. Given the distance Lomas was from the conveyor, the low speed of the conveyor, the fact that the hook would be pulled off when subjected to even limited stress, and the presence of multiple methods to stop the conveyor in the event of an emergency, I find that the Secretary did not establish that the conditions at the feeder had a reasonable potential to cause death or serious injury within a short period of time. An imminent danger was not present.<sup>12</sup>

For these reasons, Imminent Danger Order No. 9025723 is **VACATED**.

## 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). Twentymile had a history of 280 violations during the 15 months preceding the issuance of the subject citations, 31 of which were S&S. GX-1. Twentymile is a large operator and its parent company is also a very large operator. The parties were unable to stipulate as to good faith abatement. The Secretary stated that there is confusion as to whether Twentymile is still using some type of fishing to remove extraneous material and, if it is being used, where it is taking place. Sec'y Br. 20-21. Nevertheless, Inspector Taylor terminated the citation when Twentymile removed Lomas from the feeder. Tr. 69. Thus, Twentymile immediately abated the conditions that caused Inspector Taylor to issue the citation.

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<sup>12</sup> Although Taylor testified that the feeder conveyor was running when the inspection party arrived at the feeder, it is unclear whether the conveyor was running at the time Lomas actually fished material out. Tr. 25. Lomas testified that he always pulls the e-stop cord to stop the conveyor before removing anything from the feeder with the fishing pole. Tr. 96, 201. As discussed above, it is clear that the feeder conveyor was moving as material is dumped into the feeder's hopper. For purposes of this decision I assume that Lomas did not always stop the conveyor when he removed objects from the feeder conveyor while fishing.

The proposed penalty will not have an adverse effect upon Twentymile's ability to continue in business.<sup>13</sup>

### III. ORDER

For the reasons set forth above, Citation No. 9025724 is **MODIFIED** to a non-significant and substantial section 104(a) citation with low gravity and negligence. Order No. 9025723 is **VACATED**. Based on the penalty criteria, I assess a total civil penalty of \$5,000.00 for the violation. Peabody Twentymile Mining, LLC is **ORDERED TO PAY** the Secretary of Labor the sum of \$5,000.00 within 40 days of the date of this decision.<sup>14</sup> Docket Nos. WEST 2017-247-R and WEST 2017-248-R are **DISMISSED**.

/s/ Richard W. Manning  
Richard W. Manning  
Administrative Law Judge

Distribution:

Christopher G. Peterson, Esq. and Benjamin J. Ross, Esq. Jackson Kelly PLLC, 1099 18th Street, Suite 2150, Denver, CO 80202 (Certified Mail)

Kristi Henes, Esq., Office of the Solicitor, U.S. Department of Labor, 1244 Speer Blvd., Suite 515, Denver, CO 80204 (Certified Mail)

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<sup>13</sup> The Secretary specially assessed the proposed penalty. 30 C.F.R. § 100.5. MSHA's Special Assessment Narrative Form indicates that the proposed penalty would have been \$25,445 had it not been specially assessed. The Commission is not bound by the Secretary's special assessment procedure or the assessment formula used in 30 C.F.R. Part 100. I find that a penalty of \$5,000 is appropriate in this case taking into consideration the penalty criteria set forth in section 110 the Mine Act. Although I determined that the violation was not serious and Twentymile's negligence was low, Peabody Twentymile Mining LLC and Peabody Energy, Inc. are large operators, so a further reduction of the penalty is not warranted.

<sup>14</sup> Payment should be sent to the Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
721 19TH STREET, SUITE 443  
DENVER, CO 80202-2500  
TELEPHONE: 303-844-5266 / FAX: 303-844-5268

May 31, 2018

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

v.

ROCK PRODUCTS, INC.,  
Respondent.

CIVIL PENALTY PROCEEDINGS

Docket No. CENT 2017-0397  
A.C. No. 29-02323-441046

Docket No. CENT 2017-0432  
A.C. No. 29-02323-443333

Docket No. CENT 2017-0433  
A.C. No. 29-02323-443333

Mine: Crusher #10

**DECISION AND ORDER**

Appearances: Felix R. Marquez, U.S. Department of Labor, Office of the Solicitor,  
Dallas, Texas, for Petitioner;

Charles W. Newcom, Sherman & Howard LLC, Denver, Colorado, for  
Respondent.

Before: Judge Miller

These cases are before me upon petitions for assessment of civil penalties 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”). These dockets involve fourteen citations issued pursuant to Sections 104(a) and 104(d)(1) of the Act with originally proposed penalties totaling \$30,934.00. Respondent withdrew its contest of Citations No. 8968775 and 8968780 at hearing. The parties presented testimony and evidence regarding the remaining citations at a hearing held in Albuquerque, New Mexico, on March 7, 2018. Based upon the parties’ stipulations, my review of the entire record, my observation of the demeanors of the witnesses, and consideration of the parties’ legal arguments, I make the following findings and order.

Crusher No. 10 is a sand and gravel mine located in Valencia County, New Mexico, and operated by Rock Products, Inc. The parties have stipulated that Rock Products is an “operator” as defined in Section 3(d) of the Mine Act, 30 U.S.C. § 803(d), and is subject to the jurisdiction of the Commission. Jt. Stips. ¶¶ 2, 3, 4.

On May 2, 2017, MSHA Inspector John Lewis visited the mine to conduct a regular inspection. Inspector Lewis has been a mine inspector for two years and four months, and prior to that time worked in the mining industry. He has a bachelor’s degree in business and is a certified MSHA trainer. He conducted three inspections of Crusher No. 10 that are discussed

here. The first began on May 2, 2017, as a regular inspection. The second was a hazard complaint investigation beginning on May 9, 2017. The third began on May 11, 2018, after a reported accident at the mine.

Lewis arrived at Crusher No. 10 on May 2, 2017, to conduct a regular inspection. He met with Rob Martinez, the safety manager for Crusher No. 10 as well as several other mines owned by the same company, and Mason Holman, the supervisor of Crusher No. 10 as well as Rock Products Crusher No. 6. Martinez and Holman both testified on behalf of the mine along with several other witnesses. Several of the violations were marked as high negligence, and a number were assessed as significant and substantial violations.

## I. APPLICABLE PRINCIPLES OF LAW

### A. Establishing a Violation

To prevail on a penalty petition, the Secretary bears the burden of proving an alleged violation by a preponderance of evidence. *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000), *aff'd*, 272 F.3d 590 (D.C. Cir. 2001); *Jim Walter Res., Inc.*, 9 FMSHRC 903, 907 (May 1987). The Secretary may establish a violation by inference in certain situations, but only if the inference is “inherently reasonable” and there is “a rational connection between the evidentiary facts and the ultimate fact inferred.” *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152-53 (Nov. 1989); *see also Eagle Energy Inc.*, 23 FMSRHC 1107, 1118 (Oct. 2001).

### B. Negligence

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 the standard occurs.” *A.H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983). In determining whether an operator met its duty of care, the judge must 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.” *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2047 (Aug. 2016); *Brody Mining, LLC*, 37 FMSHRC 1687, 1702 (Aug. 2015); *U.S. Steel Corp.*, 6 FMSHRC 1908, 1910 (Aug. 1984). While the Secretary’s Part 100 regulations evaluate negligence based on the presence of mitigating factors, Commission judges are not limited to that analysis. *Brody*, 37 FMSHRC at 1702-03. Rather, Commission judges consider “the totality of the circumstances holistically.” *Id.* at 1702. The Commission has recognized that “the gravamen of high negligence is that it ‘suggests an aggravated lack of care that is more than ordinary negligence.’” *Id.* at 1703 (quoting *Topper Coal Co.*, 20 FMSHRC 344, 350 (Apr. 1998)).

The Mine Act places primary responsibility for maintaining safe and healthful working conditions in mines on operators, and they are thus expected to set an example for miners working under their direction. *Newtown*, 38 FMSHRC at 2047; *Wilmot Mining Co.*, 9 FMSHRC 684, 688 (Apr. 1987); *see also* 30 U.S.C. § 801(e). “Such responsibility not only affirms management’s commitment to safety but also, because of the authority of the manager, discourages other personnel from exercising less than reasonable care.” *Wilmot*, 9 FMSHRC at

688. When a violation is committed by a non-supervisory employee, the conduct of the rank-and-file miner is not imputable to the operator for negligence purposes. *Ky. Fuel Corp.*, 40 FMSHRC 28, 31 (Feb. 2018). In such circumstances, Commission judges must analyze “whether the operator has taken reasonable steps to prevent the rank-and-file miner’s violative conduct.” *Id.*; see also *Knight Hawk Coal, LLC*, 38 FMSHRC 2361, 2369 (Sept. 2016). Relevant considerations include “the foreseeability of the miner’s conduct, the risks involved, and the operator’s supervising, training, and disciplining of its employees to prevent violations of the standard [at] issue.” *A.H. Smith Stone Co.*, 5 FMSHRC 13, 15-16 (Jan. 1983).

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); *Whayne Supply Co.*, 19 FMSHRC 447, 450 (Mar. 1997); *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991). The Mine Act defines an “agent” as “any person charged with responsibility for the operation of all or a part of a coal or other mine or the supervision of the miners in a coal or other mine.” 30 U.S.C. § 802(e). In analyzing whether an employee is an agent of an operator, the Commission has considered factors including “the ability of the employee to direct the workforce, whether the employee holds himself out as a person with supervisory responsibilities and is so regarded by other miners, and whether the actions of the employee in directing the workforce have an impact on health and safety at the mine.” *Nelson Quarries*, 31 FMSHRC at 328.

### C. Significant and Substantial

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

In *Mathies Coal Co.*, the Commission established the standard for determining whether a violation is S&S:

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

6 FMSHRC 1, 3-4 (Jan. 1984).

The second element of the *Mathies* test addresses the likelihood of the occurrence of the hazard the cited standard is designed to prevent. *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2036

n.8 (Aug. 2016). The Commission has explained that “hazard” refers to the prospective danger the cited safety standard is intended to prevent. *Id.* at 2038. For example, *Newtown* involved a violation of a standard requiring that equipment be locked out and tagged out while electrical work is being performed. *Id.* The Commission determined that the hazard was a miner working on energized equipment. *Id.* The likelihood of the hazard occurring must be evaluated with respect to “the particular facts surrounding the violation.” *Id.*; see also *McCoy Elkhorn Coal Corp.*, 36 FMSHRC 1987, 1991-92 (Aug. 2014); *Mathies*, 6 FMSHRC at 4. At the third step, the judge must assess whether the hazard, if it occurred, would be reasonably likely to result in injury. *Newtown*, 38 FMSHRC at 2037. The existence of the hazard is assumed at this step. *Id.*; *Knox Creek Coal Corp. v. Sec’y of Labor*, 811 F.3d 148, 161-62 (4th Cir. 2016). As with the likelihood of occurrence of the hazard, the likelihood of injury should be evaluated with respect to specific conditions in the mine. *Newtown*, 38 FMSHRC at 2038. Finally, the Commission has found that the S&S determination should be made assuming “continued normal mining operations.” *McCoy*, 36 FMSHRC at 1990-91.

## II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

### Citation No. 8968761.

As he entered the property to begin his inspection, Inspector Lewis observed a front-end loader idling unattended. The parking brake on the loader was set, but Lewis checked each of the wheels and found that they were not chocked. Lewis observed that the loader was parked on a grade and the transmission was in neutral. There was no foot traffic in the area. Lewis waited until the operator returned to the area and asked him to get into the loader and release the parking brake. The machine rolled a few feet. Lewis noted that the operator had left the bucket of the machine down, but the machine still rolled when tested. When asked, the operator of the loader informed Lewis that he did not have any wheel chocks.

Lewis issued a citation for a violation of 30 C.F.R. § 56.14207, which requires that “Mobile equipment shall not be left unattended unless the controls are placed in the park position and the parking brake, if provided, is set. When parked on a grade, the wheels or tracks of mobile equipment shall be either chocked or turned into a bank.”

Respondent argues that there was no grade where the loader was parked. Martinez, the company safety director, testified that the grade in the area was minimal. The photograph of the violation introduced by the Secretary does not show an obvious grade. Ex. 6-1. On cross-examination, Lewis admitted that while he had estimated a seven percent grade, a similar seven percent grade on a road known to him was steeper than the one in the photograph. Nevertheless, I credit the inspector’s testimony that there was a grade which caused the loader to roll. The loader was in neutral and the wheels were not chocked or turned into the bank. Therefore, I find that the Secretary has proven a violation.

Lewis found the negligence to be high because he believed that management was aware of the standard and that miners should be aware of it through training. Respondent argues that there were mitigating factors because the bucket was down, which prevented the loader from rolling far, and the loader was not parked in a hazardous area.

The Commission addressed the negligence of a similar violation in *Kentucky Fuel Corp.*, 40 FMSHRC 28 (Feb. 2018). That case involved an injury to a mechanic who was working on a vehicle. The mine was cited for a failure to block machinery against motion when conducting repairs, and the judge found that the violation resulted from high negligence. The Commission affirmed the judge's finding because the operator had failed to provide wheel chocks for use at the mine. *Id.* at 39. The Commission found that the failure to provide the materials necessary for compliance with the standard was a particularly significant breach of the operator's duty of care because it meant that a miner could not comply with the safety standard. *Id.* at 40. Thus, the operator's actions displayed the aggravated lack of care required for high negligence. *Id.* at 41.

In this case, the Secretary has demonstrated an "aggravated lack of care that is more than ordinary negligence" on the part of the mine operator. *Brody*, 37 FMSHRC at 1703. The operator of the loader was a rank-and-file miner who is required to be trained before he operates heavy equipment. He left the loader in neutral instead of in gear and he failed to turn the wheels and chock them. Although it is not clear whether chocks were available somewhere on the mine property, the loader operator admitted that he had no chocks to use. At the same time, I do not agree that the bucket being left down was a significant mitigating factor, given that it did not prevent the loader from rolling. I find that the violation resulted from high negligence.

The Secretary alleges that the violation was unlikely to result in injury, but that if an injury did occur, it would likely be fatal. The loader is a large piece of equipment that could cause fatal injury in the event of an accident. An accident was unlikely to occur, however, because there was no foot traffic in the area, the grade was minimal, and the parking brake was set. I affirm the finding that the violation was not S&S. I assess the \$1,770.00 penalty as proposed.

Citation No. 8968762.

Lewis also observed that the bottom step on the same front-end loader was slightly bent. Exhibits 6-1 and 6-2 are photographs of the loader showing that the bottom step is bent several inches to one side. The step provided access to the loader cab. Lewis believed the bent step created a slip, trip, and fall hazard for a person entering or exiting the cab. He understood that the condition had existed for some time. He noted that the loader would have been used every shift and that the loader operator would have to fill out a pre-operational report before each use. Lewis cited the mine for a violation of 30 C.F.R. § 56.14100(b), which provides that "Defects 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." Martinez testified that he did not believe the step affected safety because a person could still get a three-point stand with hands and feet on the step and hand rails. On this point, I credit the inspector's testimony that the bent step made it easier for a person to misstep and fall, creating a slip, trip, and fall hazard.<sup>1</sup>

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<sup>1</sup> The inspector determined that this citation and Citation No. 8968771 were unlikely to cause injury. Respondent argues that, based on this determination, neither defect "affected safety" within the meaning of the standard, and so both citations must be vacated. I am not persuaded by this argument, because whether a defect "affects safety" is a separate question from  
(continued...)



The Commission has explained that whether a defect was corrected “in a timely manner depends entirely on when the defect occurred and when the operator knew or should have known of its existence.” *Lopke Quarries, Inc.*, 23 FMSHRC 705, 715 (July 2001). Thus, to prove that a defect was not corrected in a timely manner, the Secretary must present evidence to show when the defect occurred and when the operator knew or should have known about it. *See Martin Marietta Materials, Inc.*, 36 FMSHRC 411, 412 (Feb. 2014) (ALJ) (vacating citation for timely correction of a defect where Secretary presented no evidence to show when the operator knew or should have known of the defect); *Giant Cement Co.*, 13 FMSHRC 286, 287 (Feb. 1991) (ALJ) (vacating citation for timely correction of a defect on a loader because there was no evidence that the defect existed when the loader was last operated, and an inspection would not be expected until it was operated again); *cf. Northshore Mining Co.*, 38 FMSHRC 753, 792 (Apr. 2016) (ALJ) (finding a violation occurred where there was evidence that management had known of the defect for a week prior to inspection); *Campbell Cty. Highway Dep’t*, 36 FMSHRC 2579, 2582 (Sept. 2014) (ALJ) (finding a violation where a leak of hydraulic fluid had been noted in examination records prior to inspection). Given that the loader was examined and used every day, the operator should have known of and corrected the defect. The Secretary has proven a violation.

Lewis marked the violation as non-S&S and unlikely to cause injury because the step was not severely damaged. He stated that while the loader operator would use the step several times each shift, the operator would probably only sustain an injury if he was not paying attention. Lewis believed that an injury that did occur would most likely result in lost workdays or restricted duty. Martinez noted that someone entering the loader could grab onto the hand rails to avoid a fall, making injury unlikely. I affirm the Secretary’s gravity determination.

The Secretary alleges that the violation was the result of high negligence. Lewis stated that the operator should have been aware of the violation because the loader is examined every day before it is operated. He also stated that, given what he observed, the step had been in that condition for some time. The Secretary did not introduce examination reports from the loader. Because there is no evidence that the step was noted on the examination reports, or that management believed it was a hazard that needed to be repaired, I find that there is insufficient evidence in the record to demonstrate an aggravated lack of care on the part of the operator. I find that the violation was the result of moderate negligence. I assess a penalty of \$500.00.

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<sup>1</sup> (...continued)

whether it is likely to cause injury. *See, e.g., Apex Quarry, LLC*, 36 FMSHRC 211, 221 (Jan. 2014) (ALJ) (affirming two violations of 30 C.F.R. § 56.14100(b) and finding that both were unlikely to cause injury).

Citation No. 8968771.

Lewis next inspected the Caterpillar 988F front-end loader and observed that the main access steps to this loader were also damaged. The loader was being operated at the time of the inspection. The bottom step had been modified using a chain so that it was at a height of 30 inches. Lewis stated that a normal step height would be around 18 to 24 inches. Exhibit 6-4 shows the modified step. Lewis believed that having the step at an increased height created a slip, trip, and fall hazard for someone entering or exiting the loader cab. Martinez stated at hearing that the loader operator had modified the step because he was tall and wanted a bigger step. However, when asked, Martinez could not recall who the operator was or how tall he was. Lewis stated that the modification was the result of a repair when the original step had been damaged. The inspector cited the mine for a second violation of 30 C.F.R. § 56.14100(b), timely correction of a defect affecting safety. Given that the alleged defect was the result of an intentional modification to the step during a repair and the loader was examined regularly, the mine operator should have known of the defect. I credit the inspector's testimony that the tall step created a hazard and find that the Secretary has proven a violation.

Lewis indicated in the citation that the violation was unlikely to cause injury, and that if an injury did occur, it would most likely result in lost workdays or restricted duty. The violation was marked as non-S&S. At hearing, Lewis suggested that the violation could actually cause permanently disabling injury because of the significant fall distance. He stated that a person could break a leg or severely twist an ankle from that distance. The Secretary alleged an injury severity of lost workdays or restricted duty in his brief. Sec'y Br. at 21. I find that injury was unlikely, and that if an injury did occur, it would most likely be of the severity to cause lost workdays or restricted duty.

The Secretary alleges that the violation was the result of high negligence. Lewis stated that the defect was obvious and the loader operator would have done a pre-operational check on the equipment. I find that in this instance, because the step had intentionally been modified to this unsafe height, the high negligence assessment is appropriate. I assess a penalty of \$533.00 as proposed.

Citation No. 8968772.

The following day, Lewis inspected the laydown conveyor located in the middle of the plant at Crusher No. 10. He observed that the tail pulley on the conveyor was exposed underneath. Exhibit 6-6 shows the exposed area, which was 30 inches above the ground. Lewis explained that miners work near the tail pulley to shovel material that spills off the conveyor. He believed the exposed tail pulley created a hazard because there was ample room for someone's hand to become entangled in the conveyor and pulley.

Lewis cited the mine for a violation of 30 C.F.R. § 56.14107(a), which provides that "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." To prove a violation of § 56.14107(a), the Secretary must show that there was an unguarded moving machine part that "can cause injury." The

Commission has interpreted a similar guarding standard to require proof of “a reasonable possibility of contact and injury.” *Thompson Bros. Coal Co., Inc.*, 6 FMSHRC 2094, 2096 (Sept. 1984); *see also Nelson Quarries, Inc.*, 36 FMSRHC 3143, 3146 (Feb. 2014) (ALJ) (interpreting § 56.14107(a) to require proof of reasonable possibility of injury). The analysis of a reasonable possibility of injury should account for “contact stemming from inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness.” *Thompson Bros.*, 6 FMSHRC at 2097. Relevant considerations include “all relevant exposure and injury variables, e.g., accessibility of the machine parts, work areas, ingress and egress, work duties, and as noted, the vagaries of human conduct.” *Id.*

The parties disagree as to whether there was a reasonable possibility of a person contacting the moving parts. The uncovered area was only 30 inches above the ground, and Lewis acknowledged that if a person walking by fell into the metal, he would be protected by the guarding that was already present. Lewis also did not believe that a person would have a reason to intentionally crawl under the conveyor. However, he stated that miners kneel down to shovel material out from under the conveyor, which puts them in close proximity to the exposed tail pulley.<sup>2</sup> He noted that miners would be in the area to clean on every shift. Martinez believed that a person would need to get on his hands and knees to access the pulley. He noted that there was an overhang of three or four inches around the conveyor, and thus he believed it would be difficult to hit the belt with a shovel. He believed the guard already present would protect someone who fell. I credit the testimony of the inspector regarding the exposure and work duties in the area, and I find that there was a reasonable possibility of injury. The Secretary has proven a violation.

The Secretary alleges that the violation was reasonably likely to result in a permanently disabling injury and was S&S. The Secretary has proven a violation, satisfying the first element of the *Mathies* test for S&S. The violation involves the hazard of a miner contacting the conveyor or tail pulley. I find that the hazard was reasonably likely to occur, given that miners worked in the area daily and their work duty of shoveling material from under the conveyor brought them in close proximity to the moving parts. The second *Mathies* element is satisfied. I credit Lewis’s testimony that a person who contacted the pulley or conveyor could become entangled and would likely receive a permanently disabling injury. The third and fourth elements of *Mathies* are also shown, and I find that the violation is S&S.

The Secretary alleges that the violation involved high negligence on the part of the operator. I find that a moderate negligence designation is more appropriate. A reasonably prudent operator would have provided a guard in this location given the risk of serious injury. Nevertheless, the missing guard was not particularly obvious, and the Secretary has produced no other evidence to indicate that the negligence was more than moderate. Based upon the change in the negligence finding, I assess a penalty of \$2,000.00.

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<sup>2</sup> Respondent notes that the inspector agreed on cross-examination that “somebody wouldn’t be kneeling down to get underneath this car.” Tr. at 147; Resp. Br. at 4. I interpret that statement to mean that Lewis did not believe that a miner would intentionally climb under the conveyor. However, he did believe miners would kneel in close proximity to the conveyor in order to shovel under it. Tr. at 52.

Citation No. 8968773.

As part of his regular inspection, Lewis requested that the parking brake on a Caterpillar 980G front-end loader be tested. Lewis asked Mason Holman, a supervisor at the mine, to fill the loader bucket with dirt and back up onto a ramp. He then had Holman set the parking brake to test it. Lewis observed that when the service brake was released, the parking brake did not hold. The machine rolled down the grade with the parking brake set for a few feet. Lewis spoke with the operator of the loader, who told him he had noted the defective parking brake on his pre-operational report for the past two days. The loader was in use at the time of the inspection. Lewis cited the mine for a violation of 30 C.F.R. § 56.14101(a)(2), which provides that “If equipped on self-propelled mobile equipment, parking brakes shall be capable of holding the equipment with its typical load on the maximum grade it travels.”

Respondent argues that the brake did in fact hold. Holman, the witness for Respondent, testified that while the loader rolled a foot or so during the test, it was only enough for the parking brake to lock in and then hold. However, the fact that the equipment operator had noted a problem with the brake in his pre-operational report supports Lewis’s assessment that the brake was not functioning properly. Based upon my observation of both witnesses and their testimony as a whole, I found the inspector to be a more credible witness than Holman. I credit the inspector’s testimony and find that the Secretary has proven a violation of the standard.

The Secretary alleges that the violation was the result of high negligence. Because the equipment operator noted the defective brake on his pre-operational report the previous day, management was or should have been aware of the problem. There was no evidence that management took any action to investigate or correct the problem. This constitutes an aggravated lack of care, and I find that the high negligence designation is appropriate.

The Secretary alleges that the violation was unlikely to cause injury, and that if an injury did occur, it would likely be fatal. The violation was marked as non-S&S. Lewis explained that the loader is a large piece of equipment that could cause a fatality if it struck someone. However, he believed that an accident was unlikely to occur because there was no one else working in the area and the service brakes on the loader were still functional. I affirm the gravity determination as issued and assess the proposed penalty of \$1,770.00.

Citation No. 8968774.

Inspector Lewis also observed that in the cab of the Caterpillar 980G front-end loader, there were accumulations of oil and oily rags on the floor near the pedals. He observed a puddle of oil on the floorboard near the accelerator and brake pedals. Exhibit 6-10 is a photograph of oily rags on the floorboard of the loader cab and shows that a piece of cardboard had been taped to the brake pedal to make it less slippery. The loader operator told Lewis that the oil was from a leak in the steering column and that there was oil dripping onto the pedal and onto the floorboard. The operator of the equipment stated that he had been reporting the leak on his pre-operational reports since March 16, 2017, approximately six weeks prior to the inspection. Lewis reviewed the pre-operational reports and confirmed that the leak had been mentioned beginning in March 2017. Lewis believed the oil created a hazard because the operator’s foot could slip off

the pedals, causing him to lose control of the loader. The loader could then hit another piece of equipment or a person on foot in the area.

Lewis cited the mine for a violation of 30 C.F.R. § 56.14103(c)(1), which requires that “The operator’s stations of self-propelled mobile equipment shall [b]e free of materials that could create a hazard to persons by impairing the safe operation of the equipment.” The Secretary alleges that the oil and rags created the danger that the operator’s foot could slip and he could lose control of the loader. Respondent argues that the rag and oil in the operator compartment did not create a hazard. Martinez stated that the rags were there to wipe dust from the windshield. However, the testimony of Lewis and the photograph of the rags and cardboard show that there was a leak that created a slippery surface near the brake pedal. This is a clear hazard and the Secretary has proven a violation. I affirm the Secretary’s high negligence designation, given that the condition had been noted in the pre-operational reports for six weeks and no repairs had been made.

I also find that the violation was S&S. The Secretary has proven a violation of a mandatory safety standard. The hazard addressed by the standard is that of the equipment operator losing control of the loader. I find that the hazard was reasonably likely to occur because the oil on and around the brake pedal could cause the operator’s foot to slip. If the operator lost control of the loader, the loader could easily hit a person on foot or another piece of equipment. While there was no one else working around the loader at the time of the inspection, the condition had existed for some time, and there was nothing to prevent the use of the loader around other equipment or miners. An accident involving a person on foot would be fatal, and a collision with another piece of equipment would likely cause serious injury.

I assess the proposed penalty of \$8,768.00.

Citation No. 8968776.

Lewis returned to the mine on May 9, 2017, to investigate a hazard complaint regarding safety defects on a skid steer loader. The skid steer was parked in the middle of the site at the adjacent Crusher No. 6. It was in front of a parts trailer and next to the diesel fuel storage in an area where other mobile equipment was available for use. Lewis was told that the skid steer was out of service because of a bad tire, but he observed that it did not have a tag and the key was still in the ignition. He was told it had been moved to that location from Crusher No. 10 with the defects, but he did not know whether it had been towed. He stated that because of the bad tire, the skid steer could not be used, but Lewis did not know how long it had been in that condition. The machine would normally be used on a daily basis to clean up material or haul material around the conveyors and the crusher. Lewis believed it had been moved to Crusher No. 6 so that it could be used for cleaning. In order to test the functions on the skid steer, Lewis asked the operator to get in, but told him he did not need to move the equipment. He had the operator test the horn and backup alarm on the skid steer without moving it and found that both were inoperable. He cited the mine for a violation of 30 C.F.R. § 56.14132(a).

Mason Holman, the plant supervisor, was present for the inspection. He testified at hearing that the skid steer was locked out and inoperable at the time. He stated that the hub on

the wheel had come off and the wheel bearing had gone out. The wheel had been repaired at least once but shortly thereafter developed that same problem. Holman believed that the skid steer had been parked where it was for about a month prior to the inspection. After the inspection, the skid steer was never put back into service, but rather was taken to the mine shop and used for parts. In response to a leading question from counsel for Respondent, Holman agreed that in addition to being locked out, the skid steer was also tagged out at the time of the inspection. Respondent introduced Exhibit H-1, a photograph of a lock and tag on the key of the skid steer. The tag reads "Out of Service. Do Not Use." It is signed by Holman but does not list any specific problem with the loader, and the date on the tag is illegible. In response to further leading questions, Holman stated that the lock and tag had been on the skid steer for a month prior to the inspection. He explained that at the time of the inspection, he informed Lewis that the skid steer was locked out, but Lewis asked him to get in and test it anyway. He moved the skid steer back about a foot so that Lewis could inspect it. Holman stated that he never removed the lock and tag during the inspection. When questioned by the court, however, he said he had locked the loader out but did not recall whether he had put a tag on it. He then stated that he believed he had put a tag on, but hadn't filled it out correctly. On redirect, he said he believed he had tags on the loader and had locked it out a month before. In response to further questions from counsel for the Secretary, Holman then said that he believed there was another tag that had just his name and the date on it, but he did not know what had happened to it.

Ralph Martinez, the safety officer, was also present during the inspection. He stated that all miners are trained in the company's lockout/tagout procedures, which were introduced as Exhibit D. He stated that when a piece of equipment is taken out of service, a lock is put on it, and whoever takes it out of service has the key and has to be the one to take the lock off. Before a piece of equipment is put back into service, an examination is done by the person who did the repairs. Martinez usually receives pre-operational reports from the foreman for equipment, but he had not received reports for the skid steer and was not aware of the defects on it. Martinez claims that on the day of the inspection, he informed Lewis that the skid steer was locked out. Martinez took the photo of the lock and tag introduced as Exhibit H-1, and testified that the tag was present before the inspection. He stated that he did not bring the tag to the attention of Lewis during the inspection because he believed Lewis would raise the penalty for the citation if he argued with him. He also stated that the wheel on the skid steer was so badly damaged that it could not have been put back into service. Exhibits H-2, H-3, and H-4 are photographs taken by Martinez showing the wheels of the skid steer and the tire tracks to show how far the machine moved during the inspection. The skid steer appears to have moved less than a foot.

There is opposing testimony regarding whether a tag was present on the skid steer prior to the inspection. Inspector Lewis testified that when he observed the skid steer, the key was in the ignition, and there was no tag to warn miners of defects affecting safety. On the other hand, Martinez testified that the tag shown in Exhibit H-1 was on the skid steer at the time of the inspection. He did not explain how the tag he photographed was different from the tag used to terminate the citation. Martinez's explanation for why he did not bring the tag to the attention of the inspector seemed disingenuous. While Martinez has many years' experience in the industry, he appeared confused in some of his answers. For example, when asked, he said that the photographs of the skid steer introduced by Respondent as exhibits were the only photographs he took during the inspection. His attorney later indicated that in fact Martinez took many

photographs during the course of the inspection. Martinez answered some questions well, although his answers seemed rehearsed. When he was asked other questions, he seemed confused but determined to say what would be most beneficial. I did not find him to be a credible witness and so discount his testimony as to the citations he discussed.

Holman also testified on direct examination that he believed the tag shown in Exhibit H-1 was on the skid steer prior to the inspection. Upon further questioning, however, it became clear that he was unsure. While I think Holman was sincere in most of his testimony, he contradicted himself regarding the tag and was not certain when it was placed on the machine. Holman was nervous and uncomfortable, especially when asked about things he could not remember clearly. The inspector, on the other hand, was alert, candid, and thoughtful in his responses. He sometimes referred to his notes when unable to recall, but took the time to review and respond. He was obviously more comfortable testifying than the other witnesses, and was also comfortable in his understanding of the citations and why they were issued. He had no reason to be untruthful, and I find him to be a credible witness. I thus find that while the skid steer was not in use at the time of the inspection, it was not tagged out, nor was it in a location where it would not be available for use.

The relevant standard provides that “Manually-operated horns or other audible warning devices provided on self-propelled mobile equipment as a safety feature shall be maintained in functional condition.” 30 C.F.R. § 56.14132(a). The Commission has interpreted this standard to require that “horns or other audible warning devices must function at all times unless the equipment has been taken out of service for repair.” *Wake Stone Corp.*, 36 FMSHRC 825, 827 (Apr. 2014). The Commission noted in *Wake Stone* that the standard “does not contain language limiting its application to equipment only ‘to be used during a shift’ or to equipment that has or has not been ‘placed in operation.’” *Id.* at 828. Similarly, in *Alan Lee Good*, 23 FMSHRC 995, 997 (2001), the Commission held that a standard requiring that braking systems installed on equipment “shall be maintained in functional condition” was applicable “[a]s long as the cited equipment is not tagged out of operation and parked for repairs ... whether or not the equipment is to be used during the shift.”

The issue in this case is whether the skid steer had been taken out of service. I find that it had not. MSHA regulations provide two methods for taking a piece of equipment out of service:

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

30 C.F.R. § 56.14100(c) (emphasis added). In this case, the skid steer was parked in an area of the mine where mobile equipment was available for use. There was no tag marking it as defective. While a lock may have been present, the key was in the ignition, and Holman stated that he started the loader without removing the lock. Further, while Inspector Lewis testified that “Because of the tire, it couldn’t be used,” the skid steer was able to move a minimal distance

during the inspection. *See* Tr. at 64, 195; Ex. H-3. I therefore find that the skid steer had not been taken out of service.

The skid steer was “wheeled... equipment capable of moving or being moved” and thus constituted “mobile equipment” under the Secretary’s definitions. *See* 30 C.F.R. § 56.2. I credit the inspector’s testimony that the horn and backup alarm were not functional and find that the Secretary has proven a violation.

The Secretary alleges that the violation was the result of high negligence. The inspector based his negligence determination on the fact that the skid steer had been moved from another location in the mine with the defective tire. However, he did not know whether it had been towed. The mine’s witnesses stated that they were unaware of the defective horn and backup alarm, and there was no mention of a pre-operational report that detailed the malfunctioning backup alarm or horn. Because there was no evidence that the skid steer was operated with the defective horn and backup alarm or that management had knowledge of them, I find that the negligence is more appropriately designated as moderate.

The Secretary alleges that the violation was reasonably likely to cause a permanently disabling injury and was S&S. The Secretary has proven a violation of a mandatory standard. The defective backup alarm and horn presented the hazard that a person or piece of equipment could be struck without warning by the skid steer when it was backing up. However, given the particular facts surrounding the violation, I find that the hazard was unlikely to occur. *See Newtown Energy, Inc.*, 38 FMSHRC 2033, 2036 n.8 (Aug. 2016); *McCoy Elkhorn Coal Corp.*, 36 FMSHRC 1987, 1991-92 (Aug. 2014). It was unclear from the testimony whether the defective tire would have been obvious to a miner and prevented him from using the machine. It was also unclear whether anyone was working in the area and might be exposed to the machine backing up. The inspector stated that the skid steer “couldn’t be used,” suggesting it could not have moved far, and it appears that the skid steer may not have been used for several weeks. Additionally, Martinez stated that the loader would have been inspected before it was put back into service after repairs on the tire were completed. Thus, the backup alarm would most likely have been noted as defective when the tire was repaired. *See Knox Creek Coal Corp.*, 36 FMSHRC 1128, 1138-39 (May 2014) (finding that a violation was not S&S when the equipment was under repair for a different defect because company policy required inspection after repair and the cited defect would have been found and corrected before the equipment was returned to service). I find that it was unlikely that a miner would have attempted to use the skid steer before the alarm and horn were repaired, and thus it was unlikely that the machine would have struck someone while backing up.

Given that I have lowered the gravity assessment, I do not assess the proposed penalty of \$3,939.00, but instead assess a penalty of \$2,000.00.

*Citation No. 8968777.*

During his inspection of the skid steer loader, Lewis also observed oil accumulated in the engine compartment. The oil was settled on top of the engine and the engine compartment. Lewis believed the oil presented a fire hazard. Because the engine compartment was right behind



the back seat, a person operating the skid steer could get burned if there was a fire. Lewis believed injury was unlikely, however, because it would be easy for the miner to get out of the cab. Martinez and Holman both told the inspector that they did not know how long the oil had been present. Lewis observed dust, dirt, and mud on the bottom of the compartment, which indicated to him that the oil had been present for several days. Martinez stated that he had not received a report for this loader, and if he had he would have taken it out of service.

Lewis cited the mine for a violation of 30 C.F.R. § 56.4102, which provides that “Flammable or combustible liquid spillage or leakage shall be removed in a timely manner or controlled to prevent a fire hazard.” The Secretary defines “flammable liquid” as “a liquid that has a flash point below 100 °F (37.8 °C), a vapor pressure not exceeding 40 pounds per square inch (absolute) at 100 °F (37.8 °C), and is known as a Class I liquid.” 30 C.F.R. § 56.2. A “combustible liquid” is defined as a liquid “having a flash point at or above 100 °F (37.8 °C).” 30 C.F.R. § 56.2. Thus, almost any liquid is covered except water. *Lehigh Sw. Cement Co.*, 33 FMSHRC 340, 353 (Feb. 2011) (ALJ). Lewis did not discuss the flash point of oil, but stated that it was a fire hazard. Respondent did not dispute the flammability or combustibility of the oil. *See Resp. Br.* at 6-7.

Here, Lewis believed the oil had been present for several days based on the dust and dirt in the compartment. Martinez admitted that had he observed the oil, he would have taken the equipment out of service. The oil was on the engine and easily observed by anyone. The Secretary has proven a violation.<sup>3</sup>

The Secretary alleges that the violation was the result of high negligence. Lewis based his negligence determination on the absence of mitigating circumstances. I find that a moderate negligence designation is more appropriate, given that the loader had not been operated for some time, and thus a pre-operational exam would not have been conducted recently. Although the oil was obvious, overall the violation did not rise to the level of high negligence.

The Secretary alleges that the violation was unlikely to cause injury, and that if an injury did occur, it would likely result in lost workdays or restricted duty. The violation was marked as non-S&S. I agree that injury was unlikely to occur because the loader had not been used for some time and would likely be examined before it was used again. If a fire did occur, injury including minor burns would be likely and would result in lost workdays.

The Secretary proposed a penalty of \$533.00, but given the change in the negligence assessment, I assess a penalty of \$400.00

*Citation No. 8968778.*

In addition to the above defects, Lewis observed that the safety bar on the Caterpillar 326 skid steer loader was not functioning properly. The safety bar typically has gas shocks that hold it in place while the machine is operating. On this loader, the gas shocks had been removed, so the bar was not held firmly up or down. When functioning properly, the bar is intended to hold

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<sup>3</sup> As explained above, I reject the argument that the skid steer could not be inspected because it was “unavailable for use.” *See Resp. Br.* at 2.

the operator in the seat while the loader is moving, and to stay raised when the operator is entering or exiting the cab. If the bar is lifted, it disables the machine. The cab of the skid steer with the safety bar down is shown in Exhibit 6-16. Lewis believed the defective safety bar presented a hazard because if the machine were to roll over, the operator would not be secure in his seat and could even be hit by the safety bar. Additionally, the safety bar could fall and hit the operator while he was entering the machine. Lewis did not believe that a fatality would result, because the operator would also be wearing a seatbelt. Lewis did not know when the shocks had been removed, and when asked, Martinez said that he did not know. Lewis said that in his experience, the shocks lose pressure over time and have to be replaced.

Lewis cited the mine for a violation of 30 C.F.R. § 56.14100(b), which provides that “Defects 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.” The Commission has made clear that whether a defect was corrected “in a timely manner depends entirely on when the defect occurred and when the operator knew or should have known of its existence.” *Lopke Quarries*, 23 FMSHRC at 715 (vacating citation when there was no evidence in the record indicating when the cited device became defective). Thus, in order to sustain his burden of proof for a violation of 30 C.F.R. § 56.14100(b), the Secretary must present evidence demonstrating when the alleged defect arose and when the operator knew or should have known of its existence. In this case, Lewis stated that he did not know when the safety bar became defective. However, Lewis also testified that the gas shocks holding the safety bar in place had been removed. I infer based on this fact that the operator was aware of the defect. The skid steer should have been tagged out of service for repairs at that point, which it was not. I find that the Secretary has proven a violation.

The Secretary alleges that the violation was S&S. The Secretary has proven a violation of a mandatory standard. The standard is intended to prevent the hazard of a person operating equipment with a safety defect. Here, however, it was unlikely that anyone would operate the skid steer with the broken safety bar. The inspector stated that the skid steer “couldn’t be used,” and no one had used it in approximately a month. The machine likely would have been inspected before it was used again, giving the operator an opportunity to correct the defect. I find that the violation was not S&S.

The Secretary alleges that the violation was the result of high negligence. The inspector did not explain the basis for his high negligence determination at hearing, other than to say that the shocks had been removed, yet the equipment was not tagged out or in a position where it would be repaired. Given that the shocks had been removed, it is reasonable to infer that a person with authority at the mine knew of the violation. I thus find that a high negligence determination is appropriate.

The Secretary has proposed a penalty of \$2,640.00, but given that the gravity of the violation has been reduced, I find that a penalty of \$1,800.00 is appropriate.

Citation No. 8968779.

Continuing with the items listed on the hazard complaint, Lewis inspected a Caterpillar 988 front-end loader. He observed that the left front tire had a large gash in the tread that exposed the inner rubber tire. The loader was not functional or capable of being operated. However, it was not tagged out. It was located behind the stockpile near Crusher No. 10. The damaged tire had been noted on a pre-operational report indicating that it had been left inside the machine. Lewis examined the pre-operational reports in the mine office and saw that the condition had been reported from March 20 through April 8. At the time of the inspection, Lewis asked Martinez if the loader was in service, and Martinez said that it was not. Martinez told Lewis that the loader had been parked because it had a bad transmission. Lewis asked Martinez if he had a tag, and Martinez said he didn't know. Lewis did not observe a tag on the loader or whether a key was in the ignition. Holman also testified at hearing that the transmission on the loader was out and inoperable. He did not recall whether there was a tag. Lewis did not start or try to move the loader or otherwise confirm that the transmission was bad. On cross examination, Lewis agreed that if the transmission was in fact not working, the loader could not have been moved to do any mining work. On redirect examination, he clarified that it would depend on what type of problem there was with the transmission. Martinez testified at hearing that there was no defect in the tire, but rather the gash observed by the inspector was part of a repair to the tire. Martinez stated that the loader was not locked out, but was parked where loaders were kept for parts and not in an area where equipment was available for use.

Lewis cited the mine for a violation of 30 C.F.R. § 56.14100(b), which provides that "Defects 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." Respondent argues that there was no violation because the loader was inoperable and not available for use. I am not persuaded by this argument, because the condition was noted on pre-operational reports for several weeks, indicating that the loader had been used with the defective tire before it became inoperable. However, I find that the Secretary has failed to demonstrate that the gash in the tire was a defect that affected safety as specified in the standard. *See Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990) (directing the judge to consider evidence as to whether a reasonably prudent person familiar with mining would recognize that the removal of a certain equipment part affected safety). The inspector stated that the gash left the inner tire exposed, but did not explain the consequence of the defect. He instead stated that the tire was unlikely to cause injury because there was no exposure. Therefore, the citation is vacated.

Citation No. 8968781.

During the course of the hazard complaint inspection on May 9, Lewis also observed that the switches for conveyor No. 12 and feeder conveyor No. 7 did not function when pushed. The condition had been part of the hazard complaint. The switches were located in the control panel. Lewis asked the control room operator to start all of the conveyors as he would when he starts the plant. Conveyor No. 12 and feeder conveyor No. 7 did not start. Lewis believed the switches created a hazard of electrical shock. However, he noted that the main power was locked out when he arrived, which meant that there was no power to those breakers either. The control room operator only energized the power at Lewis's request so that he could test the switches. The

individual breakers were not locked and tagged. Lewis stated that when he arrived for the inspection, Martinez was already aware of the condition and was waiting for an electrician to arrive to repair the switches.

Nate Stein was working as a laborer running the control panel at the time of the inspection. He stated that at the time of the inspection, the system was locked down while they were waiting on parts for the breaker. When Lewis arrived, he informed Stein that he needed to see the plant running. Stein told Lewis that they had electrical problems with the breakers and they were locked out. Lewis told him not to fire up the ones that were broken, but asked him to get everything else running. Stein stated that he took the lock off the main power breaker and proceeded to fire everything up. Stein's lock on the main breaker is shown in Exhibit J. The daily log-in sheets introduced by Respondent as Exhibit K show that the mine was waiting on the breaker parts on May 8, 2018, the day before the inspection. The plant restarted on May 9 around 5:30 p.m. after an electrician came out to check everything.

William Garrett, who worked on the electrical boxes at the crusher on May 9, testified at hearing that there was a problem with the conveyors starting and stopping on May 4, 2017. Someone at the mine tested the circuit breakers in boxes 7 and 12 and determined that they were bad. Garrett ordered parts and replaced the breakers on May 9. He testified that the system was locked out for four days until the parts arrived. Nate Stein had locked out the main power supply, and Garrett himself had also locked out box 7 and box 12 when he pulled the breakers out. While there would have been no power to any of the control panels with the main power disconnected, Garrett explained that it was still necessary to lock out the boxes because the breakers had been removed.

Lewis cited the mine for a violation of 30 C.F.R. § 56.12002, which provides that "Electric equipment and circuits shall be provided with switches or other controls. Such switches or controls shall be of approved design and construction and shall be properly installed." While the parties agree that the cited switches were not functioning, the operator was aware of the condition and had shut down the system and locked out the main power supply until the switches could be repaired.

The testimony of the witnesses for both the Secretary and the operator clearly established that the operator was aware of the defective switches prior to the inspection and repairs were already underway. While there was some dispute as to whether the individual breakers were locked out, the main power supply was locked out and there was no power to the defective switches. The Secretary did not present any evidence related to the elements of the standard cited and has not cited any decision in which a citation was upheld under similar circumstances. I find that in shutting down and locking out the affected area and initiating repairs, the operator complied with the requirements of the standard. The citation is vacated.

*Citation No. 8968787.*

Inspector Lewis returned to Crusher No. 10 again on May 11, 2018, to investigate a reported accident. He learned that the mine foreman, Chris Lucero, had received an injury to his finger while investigating an issue with the conveyor. The conveyor had stopped and Lucero, as

foreman, was responsible for directing repairs if any problems arose at the plant. Three other people were in the area at the time, including Nate Stein and Lance Richards. Lucero removed the guard to the 3/8" drive pulley and belt to see if there was a problem, then asked the control room operator, Stein, to start the conveyor. When Stein started the conveyor, Lucero had his finger on the drive pulley, and it was injured, resulting in the need for 40 stitches to his left middle finger. Stein was not in Lucero's line of sight when Stein started the conveyor, but the conveyor was equipped with an alarm, which the control room operator would have activated before starting the conveyor in order to warn people in the area. While there was testimony that the area was noisy and the alarm difficult to hear, a citation was not issued for the alarm. Lewis had inspected the alarm during the hazard complaint inspection two days earlier and found that it functioned.

Testimony from the mine's witnesses was largely consistent with Lewis's account of the incident. Nate Stein was present when Lucero injured his finger. He testified that he and Lucero were in the control room when an employee came running in and said that one of the belts had stopped. Lucero shut everything down and they walked out to the belt that had stopped. Lucero jumped onto a frame above the belt to look at it. He removed one of the guards and then asked Stein to try turning the power on because it looked like there was nothing wrong with it. Stein walked to the control room, sounded the alarm, and turned the power on. A few seconds later, another employee came running in to say that Lucero had badly cut his finger. Stein stated that, in his opinion, it was necessary to test the belt with the guard removed before it was locked out.

Martinez, the safety manager, was also on site in a different area of the mine when the injury to Lucero occurred. Stein came to tell him what had happened, and after reviewing what had happened, Martinez gave Lucero and Stein a written warning about lockout/tagout procedures. After the injury, Lucero did not return to work.

Inspector Lewis believed that the conveyor should have been locked out and tagged out before the guard was removed. If it was necessary to start the conveyor to troubleshoot, Lucero should have stood farther from the moving parts. Lewis cited the mine for a violation of 30 C.F.R. § 56.14105, which provides that "Repairs or maintenance of machinery or equipment shall be performed only after the power is off, and the machinery or equipment blocked against hazardous motion. Machinery or equipment motion or activation is permitted to the extent that adjustments or testing cannot be performed without motion or activation, *provided that persons are effectively protected from hazardous motion.*" (Emphasis added). In this instance, Lewis stressed that the primary concern was that Lucero was not far enough back from the moving belt as he was troubleshooting, and therefore was not protected from hazardous motion. Lewis believed it was reasonably likely that a more serious injury could have occurred, including an amputation if Lucero became entangled in the pulley and drive belt.

Respondent argues that the citation should be vacated because the standard allows for "machinery motion or activation" in situations where troubleshooting is being done. Resp. Br. at 9. Respondent notes that the conveyor was locked out once the problem was identified. However, the standard permits machinery activation only "provided that persons are effectively protected from hazardous motion." 30 C.F.R. § 56.14105; *see also Empire Iron Mining P'ship*, 29 FMSHRC 999, 1007 (Dec. 2007) (finding that warnings, training, and location of moving

parts did not provide adequate protection where a miner was killed by moving parts during repairs). It is clear that miners were not “effectively protected,” given that Lucero was in close proximity to the moving machine parts and was injured. I find that the Secretary has proven a violation.

The Secretary alleges that the violation was the result of high negligence. Lewis stated that once the guard was removed, the exposed parts were an obvious hazard. He noted that Lucero was a foreman and was aware that Stein was about to start the belt. Lucero should have known to step back at that point. As a foreman, Lucero was an agent of the operator, and his negligence is attributed to the operator. In view of Lucero’s status as a foreman and the obviousness of the hazard, I find that the high negligence designation is appropriate.

The inspector also designated the citation as an unwarrantable failure to comply with the standard. The “unwarrantable failure” terminology is taken from Section 104(d) of the Act, 30 U.S.C. § 814(d). The Commission has explained that unwarrantable failure is “aggravated conduct constituting more than ordinary negligence. [It] is characterized by conduct described as ‘reckless disregard,’ ‘intentional misconduct,’ ‘indifference,’ or a ‘serious lack of reasonable care.’” *Consol. Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2007) (citing *Emery Mining Corp.*, 9 FMSHRC 1997, 2001-04 (Dec. 1987)) (citations omitted). In determining whether a violation is an unwarrantable failure, the Commission has instructed its judges to consider all of the relevant facts and circumstances in the case and determine whether there are any aggravating or mitigating factors. *Id.* Aggravating factors to be considered include

the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts were necessary for compliance, the operator’s efforts in abating the violative condition, whether the violation was obvious or posed a high degree of danger, and the operator’s knowledge of the existence of the violation.

*IO Coal Co.*, 31 FMSHRC 1346, 1352 (Dec. 2009); *see also Consol.*, 22 FMSHRC at 353. 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 Commission has long recognized that mine foremen are agents of the mine operator. *See, e.g., Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1463-64 (Aug. 1982). Based upon the following analysis of the factors enumerated by the Commission, I find that the Secretary has proven an unwarrantable failure in this case.

Duration. In *IO Coal Co.*, the Commission emphasized that the duration of time that the violative condition existed is a “necessary element” of the unwarrantable failure analysis. 31 FMSHRC at 1352. However, the brief duration of a violative condition is not a mitigating factor. *Knight Hawk Coal, LLC*, 38 FMSHRC 2361, 2371 (Sept. 2016). In *Midwest Material Co.*, the Commission noted that the brief duration of a violation does not weigh against a finding of unwarrantable failure when the violation is highly dangerous and obvious. 19 FMSHRC 30, 36 (Jan. 1997) (finding that a brief, highly dangerous violation resulting in a fatality was “readily distinguishable from other types of violations . . . where the degree of danger and the operator’s

responsibility for learning of and addressing the hazard may increase gradually over time”). In that case, the Commission noted that the condition existed for a short time only because it led to an accident causing a fatality. *Id.* Here, the violation existed for a short period of time while Lucero was troubleshooting the stopped conveyor. The conveyor was locked out after Lucero’s injury occurred. However, the brief duration was enough time for injury to occur, and the condition might have persisted longer had it not resulted immediately in injury.

Extensiveness. The extent factor is intended to “account for the magnitude or scope of the violation” in the unwarrantable failure analysis. *Dawes Rigging & Crane Rental*, 36 FMSHRC 3075, 3079 (Dec. 2014). Facts relevant to the extent of the condition include the size of the affected area and the number of persons affected. *Id.* at 3079-80. In *Dawes*, the Commission found that where one miner endangered himself by walking under a suspended load for a period of seconds, the violation was not extensive. *Id.* at 3080. Here, Lucero was the only miner affected. Richards testified that he was within arm’s length of Lucero when the conveyor was turned on, but no one except Lucero was close enough to be injured by the moving parts. Extensiveness, therefore, does not weigh in favor of the unwarrantable finding.

Notice. A mine operator may be put on notice that it has a recurring safety problem in need of correction where there is a history of similar violations. *Black Beauty Coal Co. v. FMSHRC*, 703 F.3d 553, 561 (D.C. Cir. 2012); *IO Coal*, 31 FMSHRC at 1353; *Peabody Coal Co.*, 14 FMSHRC 1258, 1264 (Aug. 1992). Prior violations may be relevant even though they did not involve the same regulation or occur in the same area of the mine within a continuing time frame. *IO Coal*, 31 FMSHRC at 1354; *San Juan Coal Co.*, 29 FMSHRC 125, 131 (Mar. 2007); *Peabody*, 14 FMSHRC at 1263. It is not required that the past violations were the result of unwarrantable failure. *IO Coal*, 31 FMSHRC at 1354; *Consolidation Coal Co.*, 23 FMSHRC 588, 595 (June 2001). Past discussions with MSHA can also serve to place the operator on notice that greater efforts were necessary to assure compliance with the safety standard. *Consolidation Coal Co.* 35 FMSHRC 2326, 2342 (Aug. 2013) (citing cases). The Secretary notes that the mine received a citation for an unguarded tail pulley less than two weeks earlier, Citation No. 8968772 discussed above. However, that citation involved a permanent guard and appeared to be an isolated problem. I do not find that the single guarding citation put the mine on notice of a problem with guarding in general at the mine. The real issue here was keeping away from a hazard when engaged in troubleshooting and repair. There is no evidence that the mine had been placed on notice in that regard, and hence, notice was not a substantial aggravating factor in this case.

Abatement. Abatement efforts prior to or at the time of the inspection may support a finding that the violation was not unwarrantable. *Utah Power & Light Co.*, 11 FMSHRC 1926, 1933-34 (Oct. 1989). Conversely, where the operator has notice of a condition, such as through previous violations or conversations with an inspector, a failure to remedy the problem weighs in favor of an unwarrantable failure finding. *Consol.*, 35 FMSHRC at 2343; *Enlow Fork Mining Co.*, 19 FMSHRC 5, 17 (Jan. 1997). Abatement efforts relevant to the unwarrantable failure analysis are those made prior to the issuance of the citation or order. *Consol.*, 35 FMSHRC at 2342; *IO Coal*, 31 FMSHRC at 1356. Respondent introduced refresher training records for Lucero showing that he received training on guarding and prevention of accidents in January 2017. Nevertheless, it is clear that Lucero, who was a management employee, made no effort to

abate the violation by moving away from the machine or asking other employees to stand clear. Therefore, abatement is not a mitigating factor in this case.

Degree of danger. A high degree of danger posed by a violation can be an aggravating factor that supports an unwarrantable failure finding. *IO Coal*, 31 FMSHRC at 1355-56. In some cases, the degree of danger may be “so severe that, by itself, it warrants a finding of unwarrantable failure.” *Manalapan Mining Co.*, 35 FMSHRC 289, 294 (Feb. 2013). The degree of danger was high in this instance. Lucero received a moderately serious injury, and the potential existed for a more serious injury if he had become entangled in the belt. I find that this factor weighs in favor of the unwarrantable finding.

Knowledge/Obviousness. The obviousness of the violative condition is an important factor in the unwarrantable failure analysis. *IO Coal*, 31 FMSHRC at 1356. An operator’s knowledge of the existence of a violation may be established not only by demonstrating actual knowledge, but also by showing that the operator “reasonably should have known of the violative condition.” *IO Coal Co.*, 31 FMSHRC 1346, 1356-1357 (Dec. 2009); *see also Drummond Co.*, 13 FMSHRC 1362, 1367-68 (Sept. 1991); *E. Associated Coal Corp.*, 13 FMSHRC 178, 187 (Feb. 1991); *Emery Mining Corp.*, 9 FMSHRC 1997, 2002-04 (Dec. 1987). Here, Lewis stated that the moving machine parts were obvious when the guard was removed. As a foreman, Lucero should have known how to troubleshoot without putting himself and others in danger, and certainly he should have known not to put his hand into an area with a moving belt. His knowledge is imputed to the operator.

The degree of danger and the obvious nature of the violation are the primary bases to support a finding of unwarrantable failure. In addition, there was no effort to abate. It is true that the mine had not been placed on notice, and the duration factor does not significantly weigh in either direction. The Commission addressed a similar case involving a dangerous and obvious violation by a supervisor in *Capitol Cement Corp.*, 21 FMSHRC 883 (Aug. 1999), *aff’d*, 229 F.3d 1141 (4th Cir. 2000). In that case, a shift supervisor was injured when he attempted to perform maintenance on a crane without wearing a safety belt or deenergizing the rail that provided electrical power to the crane. The supervisor contacted the energized rail and received severe burns to his forearm. Another miner was forced to run along a craneway and down a stairway to a circuit breaker to deenergize the crane. *Id.* at 884. The Commission upheld the judge’s unwarrantable failure finding, citing the obviousness and high degree of danger of the violation. *Id.* at 892. The Commission also noted that supervisors are subject to a high standard of care under the Act, and that they are “entrusted with augmented safety responsibility and ... obligated to act as [] role model[s]” for their subordinates. *Id.* at 893. The Commission found that the supervisor’s failure to meet that high standard of care, especially in the presence of a subordinate, supported the unwarrantable failure finding. *Id.*

Respondent argues that an unwarrantable failure finding is inappropriate in this case because Lucero was merely thoughtless and inattentive. Resp. Br. at 9. While Lucero’s injury was certainly the result of carelessness, that carelessness is measured against the high standard of care demanded of a supervisor. Lucero had an obligation to follow safety procedures and exercise care to ensure the safety of himself and other miners, which included protecting them from moving machine parts during maintenance. His failure to do so in the presence of



subordinates was an aggravated breach of his duty of care. I find that the violation is properly designated as an unwarrantable failure.

The Secretary also alleges that the violation was S&S. The Secretary has proven a violation of a mandatory safety standard, satisfying the first *Mathies* element. The violation involved the hazard that a miner could become entangled in moving machine parts. Given Lucero's proximity to the conveyor when it was activated, the hazard was likely to occur. The hazard caused Lucero to receive a reasonably serious injury to his finger, satisfying the third and fourth elements. I assess the proposed penalty of \$4,377.00.

### III. 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 history of assessed violations at Crusher No. 10 has been admitted into evidence and shows 27 violations that became final orders in the 15-month period prior to the inspection. Ex. 1. Four involve equipment hazards, and eight involve problems with guarding. The parties agree that the citations at issue were abated in good faith. The mine has not raised the defense of ability to pay. The negligence and gravity have been discussed above with respect to each citation. The penalties are assessed as follows:

<b>Citation No.</b>	<b>Originally Proposed Assessment</b>	<b>Assessed Amount</b>	<b>Modification</b>
<b>Docket No. CENT 2017-0397</b>			
8968772	\$3,939.00	\$2,000.00	Modify negligence from high to moderate.
8968774	\$8,768.00	\$8,768.00	None.
8968775	\$533.00	\$533.00	None.
8968776	\$3,939.00	\$2,000.00	Modify negligence from high to moderate. Modify likelihood of injury from reasonably likely to unlikely. Remove S&S designation.
8968777	\$533.00	\$400.00	Modify negligence from high to moderate.
8968780	\$533.00	\$533.00	None.
8968781	\$533.00	\$0.00	Vacate.
<b>TOTAL</b>	<b>\$18,778.00</b>	<b>\$14,234.00</b>	
<b>Docket No. CENT 2017-0432</b>			
8968787	\$4,377.00	\$4,377.00	None.
<b>TOTAL</b>	<b>\$4,377.00</b>	<b>\$4,377.00</b>	
<b>Docket No. CENT 2017-0433</b>			
8968761	\$1,770.00	\$1,770.00	None.
8968762	\$533.00	\$500.00	Modify negligence from high to moderate.
8968771	\$533.00	\$533.00	None.
8968773	\$1,770.00	\$1,770.00	None.
8968778	\$2,640.00	\$1,800.00	Modify likelihood of injury from reasonably likely to unlikely. Remove S&S designation.
8968779	\$533.00	\$0.00	Vacate.
<b>TOTAL</b>	<b>\$7,779.00</b>	<b>\$6,373.00</b>	

#### **IV. ORDER**

Respondent is hereby **ORDERED** to pay the Secretary of Labor the sum of \$24,984.00 within 30 days of the date of this decision.

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

Distribution: (U.S. First Class Mail)

Felix Marquez, U.S. Department of Labor, Office of the Solicitor, 525 S. Griffin Street, Suite 501, Dallas, TX 75202

Charles W. Newcom, Sherman & Howard LLC, 633 17th Street, Suite 3000, Denver, CO 80202

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
721 19<sup>TH</sup> ST. SUITE 443  
DENVER, CO 80202-2500  
TELEPHONE: 303-844-5266 / FAX: 303-844-5268

June 13, 2018

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

v.

JAMESTOWN QUARRIES,  
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. SE 2017-252  
A.C. No. 40-03297-441925

Mine: Rocky Ridge Custom Crushing LLC

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

v.

ROCKY RIDGE CUSTOM CRUSHING  
LLC,  
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. SE 2017-253  
A.C. No. 40-03297-442550

Mine: Rocky Ridge Custom Crushing LLC

## DECISION

Appearances: Mary Sue Taylor, Esq., U.S. Department of Labor, Office of the Solicitor,  
Nashville, Tennessee, for Petitioner

Howard Upchurch, Esq., Pikeville, Tennessee, for Respondent

Before: Judge Simonton

### I. INTRODUCTION

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 Jamestown Quarries and Rocky Ridge Custom Crushing, LLC, pursuant to the Federal Mine Safety and Health Act of 1977 (“Mine Act”), 30 U.S.C. §801.<sup>1</sup> The petitions allege three citations against Jamestown Quarries and one citation against Rocky Ridge Custom Crushing.

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<sup>1</sup> In this decision, the transcript, the Secretary’s exhibits, and Respondent’s exhibits are abbreviated as “Tr.,” “Ex. G-#,” and “Ex. R-#,” respectively.

The Respondents share common ownership, are located in close proximity, and stipulated that if the court were to find that MSHA has jurisdiction over the Rocky Ridge Custom Processing Shop, the Jamestown Quarries Garage, or both, then the associated citations were properly issued and valid. Resp. Br. at 2; Tr. 8-9. For these reasons, the dockets were consolidated for a hearing on the jurisdictional issue.

The parties presented testimony and documentary evidence at a hearing held in Crossville, Tennessee on February 22, 2018. MSHA Inspector John Myers, Jr. testified for the Secretary. Site Foreman Gabe Clayborn and co-owner Patrick Garrison testified for Jamestown and Rocky Ridge (“Hereinafter Respondents”). The parties submitted post-hearing briefs, which have been fully considered.

## II. FINDINGS OF FACT

The Rocky Ridge Stone Quarry (“Quarry”) is located in Cumberland County, Tennessee. The Quarry mines and produces dimensional stone, or sandstone, for resale in interstate commerce. Tr. 16. Adjacent to the Quarry is a three-building complex that includes an office trailer, the Jamestown Quarries Garage (“Garage”), and the Rocky Ridge Custom Processing Shop (“Shop”). Tr. 113-14. All three operations conduct their administrative operations out of the office trailer. Tr. 111. There is no dispute as to MSHA’s jurisdiction over the common office space or the Quarry itself. Tr. 23-24.

The Quarry is entered by going down a road that passes next to the three-building complex. Tr. 139-40. Along this road, a gated fence separates the three-building complex from the Quarry and two warning signs are posted to the gate. Exs. G-14, 15; Tr. 45, 142. The first sign warns of blasting danger in the Quarry and directs individuals to register at the office trailer, receive the necessary site-specific hazard awareness training, or be accompanied by an experienced miner when entering the premises. Ex. G-15. The second sign prohibits through traffic and lists general traffic rules for the Quarry site. Ex. G-14.

The Jamestown Quarries Garage is located directly behind the office trailer and is connected to the Shop by a common breezeway. Ex. G-2. The Garage is leased to Jamestown Quarries by Rocky Ridge Stone Company, although both companies are commonly owned by Patrick Garrison and Johnny Presley as Bedrock Partnership Holdings. Tr. 102, 173. The Garage serves as a storage, repair, and maintenance building, in which Jamestown’s mechanics work on equipment that is used in the course of the owners’ business ventures. Tr. 114-15; 174. The Jamestown Quarry itself is located approximately 52 miles north of the Garage and is shut down. Tr. 178-79.

The parties dispute whether any Rocky Ridge equipment is serviced inside the Garage. The Respondents maintain that the Garage is not large enough to hold or service other equipment related to the Rocky Ridge Quarry. Tr. 114-15; 162. However, Foreman Gabe Clayborn would not unequivocally state that quarry equipment has never been serviced in the garage itself. Tr. 149-50. Inspector Myers testified that he had no doubts that Quarry equipment was maintained in the Garage because it was located so close to the Quarry. Tr. 89. He noted that the Garage also stored an inoperative rock breaker. Tr. 116. The rock breaker has been stored there for

approximately two years to protect it from adverse weather. *Id.* Respondents testified that it would be unable to use the breaker even if it was operable because it would be too difficult to transport material from the Quarry to the Garage. Tr. 116-17.

The parties do not dispute that the Garage's mechanics work on Quarry equipment in general, however. The Garage has a MSHA Contractor Identification number so that its employees may be on the Rocky Ridge Quarry site for five or more consecutive days. Tr. 172-73. Clayborn testified that Jamestown registered for a contractor ID number so that the Garage's mechanics may travel to the quarry to maintain, repair, or weld any equipment that might require service. Tr. 173-75. The mechanics use a service truck stocked with all of the tools and supplies necessary to perform these functions at the Rocky Ridge Quarry, as well as other nearby quarries. Tr. 176, 179. The truck is stored in the Garage. *Id.*

The Rocky Ridge Custom Processing Shop ("Shop") is adjacent to the office trailer and Garage to the south. Ex. G-2; Tr. 117. The Shop consists of two sections, separated by a partition stretching approximately three quarters the length of the building. Tr. 125-26. The first, larger section has a gabled roof and was constructed in 2012. Tr. 122. The entry way to the gabled portion contains a sign that reads "Rocky Ridge Stone Co. Polishing & Finishing Shop." Ex G-6; Tr. 41, 129. The gabled section contains two large rock breakers that Respondent uses to break, cut, and size rock. Tr. 124, 126. The second section has a flat roof and was constructed in 2014. Tr. 126. This section contains a saw and polisher used for additional sizing and finishing. Tr. 40-41, 126-27.

Rocky Ridge excavates the rock from the Quarry, breaks the rock, and brings some of the rock into the Shop for additional cutting, sizing and finishing per customer orders. Tr. 131-32. Respondents also break and size rock outside of the Shop, and they do not polish or finish all of the rock that is excavated from the Quarry. Tr. 157. Rocky Ridge also removes some of the rock from the building to be palletized outside of the building. *Id.* A significant amount of cut stone is palletized outside of the Shop. Ex. G-8; Tr. 133-34.

In 2016, MSHA sent the Respondents a letter informing them that it had conducted an analysis and determined that it had jurisdiction over the buildings pursuant to the Mine Act and the 1979 MSHA-OSHA Interagency Agreement. Ex. R-5; Tr. 28-29, 169. Respondents received the letter but interpreted its language to exclude the Shop and Garage from MSHA jurisdiction based on certain terms within the Interagency Agreement. Ex. R-5; Tr. 167-69. While the Respondents believed that OSHA had jurisdiction over the buildings, they acknowledged at hearing that OSHA has never asserted jurisdiction over, nor inspected any area of the property. Tr. 154-55, 172.

The interpretational differences came to a head in early May 2017 when MSHA inspector John Myers, Jr.<sup>2</sup> inspected the Rocky Ridge Stone Quarry.<sup>3</sup> Myers held two safety meetings; the first took place in the Garage in front of approximately 15 employees, and the second took place in the quarry yard in front of five employees. Tr. 20. Myers inspected the surface and the common office building, but did not inspect the Garage or the Shop because management told him that they were not part of the Quarry. *Id.* When Myers returned to the MSHA office, his supervisor told him that MSHA had jurisdiction over the two buildings and instructed him to return to the site to complete the inspection. Tr. 29. Myers conducted the second inspection on May 8-9, 2017. Tr. 29. Mine management initially refused Myers entry to the buildings but eventually allowed him to inspect the areas over their objections. Tr. 29-30.

Myers issued three citations to Jamestown Quarries for violations within the Garage. Citation No. 8901448 alleged a violation of 30 C.F.R. § 56.4430(a)(1) for the operator's failure to properly store a propane tank and several spray cans containing flammable materials. Ex. G-16. Citation No. 8901449 alleged a violation of 30 C.F.R. § 56.14100(a) for the operator's failure to adequately maintain a load lifting strap. *Id.* Citation No. 8901452 alleges a violation of 30 C.F.R. § 56.12008 for the failure to properly bush a 120-VAC control box. *Id.* Myers issued Citation No. 8901451 to Rocky Ridge Custom Crushing LLC alleging a second violation of § 56.12008, this time in the Shop, for the operator's failure to substantially bush a stone saw's 120-VAC control box. Ex. G-17.

The Respondents allege that MSHA does not have jurisdiction over either building. They argue that the Garage performs no work for the Quarry, and that the Shop is explicitly exempted from MSHA jurisdiction per the MSHA-OSHA Interagency Agreement. Respondents' Post-Hearing Brief ("Resp. Br.") at 8-9. The Secretary disagrees, arguing that the proximity of the Shop and Garage to the Rocky Ridge Quarry and the work being done in each building is related to milling and within MSHA's jurisdiction. Secretary's Post-Hearing Brief ("Sec'y Br.") at 8-9.

The parties stipulated, for the purposes of this case, that if MSHA retains jurisdiction over the Garage and the Shop, the four citations that comprise the two dockets were properly issued and valid. Tr. 8-9. Based on the parties' briefs and my review of the witness testimony and the entire record, I find that MSHA's jurisdiction over both buildings is proper and accordingly affirm all four associated citations.

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<sup>2</sup> Inspector Myers has been an MSHA inspector for over 11 years, and began inspecting metal/nonmetal mines in 2015. Tr. 13. He has over 20 years of mining experience. Tr. 14. Myers completed training at the Mine Safety and Health Academy in Beaver, West Virginia, underwent mine rescue training and instructor training, and has taught mine safety and foreman classes. *Id.* He is a certified underground mine foreman in Kentucky, and was previously certified as a surface and underground foreman in Virginia prior to letting the certification lapse. *Id.*

<sup>3</sup> Inspector Myers could not recall the exact dates of the first inspection, but noted that it took place approximately a week prior to the May 8-9, 2017 inspection at issue. Tr. 17.

### III. CONCLUSIONS OF LAW

#### A. The Mine Act

The Mine Act provides that “[e]ach coal or other mine . . . and each operator of such mine . . . shall be subject to the provisions of this Act.” 30 U.S.C. § 803.

The Act defines a “coal or other mine” as

(A) an area of land from which minerals are extracted in nonliquid form . . . (B) private ways and roads appurtenant to such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property... including impoundments, retention dams, and tailings ponds, on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form, . . . or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals, and includes custom coal preparation facilities. In making a determination of what constitutes mineral milling for the purposes of this Act, the Secretary shall give due consideration to the convenience of administration resulting from the delegation to one Assistant Secretary of all authority with respect to the health and safety of miners employed at one physical establishment.

30 U.S.C. § 802(h)(1).

The legislative history of the Act indicates that the intention of Congress was that “what is considered to be a mine and to be regulated under this Act be given the broadest possibl[e] interpretation.” S. Rep. No. 95-181, at 14 (1977). Congress was clear in its intent that if any uncertainty existed to whether a facility or site should come under MSHA jurisdiction, those doubts shall be resolved in favor of inclusion of a facility within the coverage of the Act. *Watkins Engineers & Constructors*, 24 FMSHRC 669, 675-76 (July 2002).

Section 3(h)(1)(C) defines a “mine” to include “structures” and “facilities” used in “milling” or “the work of...preparing coal or other minerals.” *Id.* The section also expressly grants the Secretary the authority to determine what constitutes “mineral mining” under the Act. 30 U.S.C. § 802(h)(1); *see also Watkins*, 24 FMSHRC at 673 (citations omitted). Accordingly, the language of Section 3(h)(1) “gives the Secretary discretion, within reason, to determine what constitutes mineral milling, and thus indicates that his determination is to be reviewed with deference by both the Commission and the courts.” *Donovan v. Carolina Stalite Co.*, 734 F.2d 1547, 1552 (D.C. Cir. 1984). The Act does not require that the structures or facilities be owned by a firm that also engages in the extraction of minerals from the ground or that they be located on property such extraction occurs. *Id.* at 1552. However, the Court of Appeals for the Sixth Circuit recently held that MSHA’s jurisdiction extends to such structures and facilities only “if



they are in or adjacent to—in essence part of—a working mine. *Maxxim Rebuild Co., LLC v. FMSHRC*, 848 F.3d 737, 740 (6th Cir. 2017).

## **B. The MSHA-OSHA Interagency Agreement**

To provide further clarification on the language of section 3(h)(1)(C) the Secretary defined “milling” in the 1979 MSHA-OSHA Interagency Agreement (“Interagency Agreement”) as “the separation of one or more valuable desired constituents of the crude [crust of the earth] from the undesirable contaminants with which it is associated.” 44 Fed. Reg. 22, 827 (Apr. 17, 1979), *amended by* 48 Fed Reg. 7, 521 (Feb 22, 1983). Appendix A of Agreement specifies that MSHA’s authority over milling processes include “crushing, grinding, pulverizing, sizing, concentrating, washing, drying, roasting, pelletizing, sintering, evaporating, calcining, kiln treatment, sawing and cutting stone, heat expansion, retorting (mercury), leaching, and briquetting.” *Id.* Only one of these activities must be conducted in order for MSHA to assert jurisdiction over the facility or property. *Jermyn Supply Co., LLC*, 39 FMSHRC 1472, 1484 (July 2017) (citations omitted).

Relevant to this case, section 6(a) of the Agreement identifies that MSHA jurisdiction over milling operations includes “stone cutting and stone sawing operations on mine property where such operations do not occur in a stone polishing or finishing plant.” 44 Fed. Reg. at 22,828. Appendix A further defines “Custom Stone Finishing” to commence at the point “when milling, as defined, is completed, and the stone is polished, engraved, or otherwise processed to obtain a finished product and includes sawing and cutting when associated with polishing and finishing. *Id.* at 22,830.

However, the Agreement acknowledges that “there will remain areas of uncertainty regarding the application of the Mine Act, especially in operations near the termination of the milling cycle and the beginning of the manufacturing cycle.” *Id.* Section B(4) provides that “Under section 3(h)(1) of the Mine Act, the scope of the term milling may be expanded to apply to mineral product manufacturing processes where these processes are related, technologically or geographically, to milling.” 44 Fed. Reg. at 22, 828. In resolving these areas of uncertainty, the Secretary should consider the processes conducted at the facility, the relation of all processes at the facility to each other, the number of individuals employed in each process, and the expertise and enforcement capability of each agency with respect to the safety and health hazards associated with all processes conducted at the facility. *Id.*

The Agreement thus defers to the language of section 3(h)(1) instructing the Secretary to “give due consideration to the convenience of administration resulting from the delegation...with respect to the health and safety of miners employed at one physical establishment.” *Id.* The Secretary’s interpretation of the term is therefore entitled to deference so long as it is reasonable. *See Watkins Engineers & Constructors*, 24 FMSHRC at 673 (holding that Congress explicitly left a gap in section 3(h)(1) of the Mine Act delegating to the Secretary the authority to interpret what constitutes “milling,” and therefore that interpretation is entitled to *Chevron* deference so long as it is reasonable).

#### IV. DISPOSITION

There is no dispute that the Rocky Ridge Stone Quarry adjacent to the Garage and Shop engages in “milling” as defined by the Interagency Agreement, and is thus subject to MSHA’s jurisdiction. Rather, The Respondents contest whether that jurisdiction extends to the Garage and Shop, respectively.

The Respondent contends that MSHA does not have jurisdiction over the Jamestown Quarries Garage because it does not engage in milling on behalf of the Rocky Ridge Quarry, nor does it service or maintain equipment related to the Quarry. Resp. Br. at 5. The Respondent argues that the Garage lacks sufficient connection to the Rocky Ridge Quarry because they are located on different properties and are not owned by the same entity. *Id.* The Respondent argues that MSHA does not have jurisdiction over the Rocky Ridge Shop because the shop constitutes a “polishing or finishing plant” under the Interagency Agreement and is therefore subject to OSHA jurisdiction. *Id.* at 8.

The Secretary counters that the Jamestown Garage Quarry falls under MSHA’s jurisdiction because it is located adjacent to the Rocky Ridge Quarry and does in fact provide repair and maintenance services for the Quarry. Resp. Br. at 9. The Secretary argues that the Rocky Ridge Processing Shop falls under MSHA’s jurisdiction because it located adjacent to the Quarry and does not qualify as a “finishing plant” as defined under the Interagency Agreement. The Secretary maintains that the presence of a single polisher among other equipment used to break, cut, and size rock classifies the building as performing “milling” as defined by the Agreement. *Id.* at 8-9.

Because the jurisdictional issues differ as to each facility, the court will address them in turn.

##### A. The Jamestown Quarries Garage

The Jamestown Quarries Garage is primarily used for storage, repairs, and maintenance work for Garrison’s and Presley’s various other businesses. It does not conduct “milling” as defined in the Interagency Agreement, and so the issue is whether the Garage constitutes a “structure” or “facilit[y] used in “milling” or “the work of...preparing coal or other minerals.” 30 U.S.C. 802(h)(1)(C).

As an initial matter, I reject the Respondent’s contentions that MSHA’s jurisdiction is improper because the Jamestown Garage and Rocky Ridge Quarry are owned by separate entities and located on different property. Resp. Br. at 9. The Act “does not require that [the] structures or facilities be owned by a firm that also engages in the extraction of minerals from the ground or that they be located on property such extraction occurs.” *See Donovan v. Carolina Stalite Co.*, 734 F.2d 1547, 1552 (D.C. Cir. 1984). Even if that were not the case, the Respondents’ alleged ownership distinction is illusory. While Rocky Ridge Stone Company leased the Garage to Jamestown Quarries, both of those entities, including the Quarry, are owned by Bedrock Partnership Ownings. Tr. 102. Likewise, the Garage and the Quarry are adjacent to one another and connected by ownership and by the access road to the Quarry.

I thus turn to whether the Jamestown Quarries Garage's relationship with the Rocky Ridge Quarry subjects it to MSHA's jurisdiction. In determining whether the Secretary properly exercised jurisdiction over the Garage, the court must examine the location where the cited conduct occurred and the nature of the conduct itself. *Maxxim Rebuild Co., LLC v. FMSHRC*, 848 F.3d 737, 740 (6<sup>th</sup> Cir. 2017) (holding that the jurisdiction of MSHA extends only to those facilities and equipment adjacent to or essentially part of a working mine); *see also Calmat Co. of Arizona*, 27 FMSHRC 617, 621 (Sept. 2005).

Inspector Myers issued three citations to Jamestown Quarries pertaining to the improper storage and maintenance of equipment stored or operated in the Garage. Ex. G-16. In order to be subject to MSHA jurisdiction, the Garage must have a geographical and functional relationship with a working mine. The U.S. Court of Appeals for the Sixth Circuit's recent decision in *Maxxim Rebuild Company, LLC* emphasized the importance of the disputed building's location relative to a working mine site in jurisdictional analysis under the Mine Act. *Maxxim*, 848 F.3d at 740. In that case, the Court found that MSHA did not have jurisdiction over a shop that made and repaired mining equipment because it was not located near or part of a working mine. *Id.* at 744. The Court held that even though the shop made and repaired equipment to be used in mining, the Act's definitions extended only to things that one would see in or around a working mine and not to equipment wherever it may be found or made. *Id.* at 742.

Here, the Jamestown Quarries Garage's geographic proximity to and services rendered for the Quarry distinguishes it from the Maxxim Rebuild shop and suggests that MSHA's jurisdiction is proper. Unlike the shop in *Maxxim Rebuild*, the Garage is located adjacent to the fully operational Rocky Ridge Quarry and nearby a few other working quarries. Ex. G-2; Tr. 89, 179. Miners use the same road to access the Garage and the Quarry. Tr. 139-40.

Furthermore, the Garage performs services related to the work of preparing minerals at the Rocky Ridge Stone Quarry. First, Jamestown's mechanics have a consistent presence at the Quarry. *See United Energy Services, Inc.*, 35 F.3d 971, 975-76 (4<sup>th</sup> Cir. 1994) (holding that a company that maintained a co-generation power plant was subject to MSHA jurisdiction because its employees worked on the mine property daily in connection with mine equipment). The mechanics work in the Garage and travel out to the Quarry to repair or maintain equipment. Tr. 173-75. The Garage has an MSHA Contractor ID Number so that its mechanics are permitted to perform the repair and maintenance work at the quarry for over five consecutive days as required under the Mine Act. Tr. 173-74. The employees also gathered at the garage when Inspector Myers gave a safety talk during the first inspection. Tr. 20.

Respondents contend that the Garage only services equipment unrelated to the Quarry. Resp. Br. at 3. However, Clayborn hedged this assertion at hearing, stating that "Rocky Ridge may have been serviced at some point in that building at some point in time." Tr. 150. Inspector Myers also testified that he had no doubt that the Garage serviced quarry equipment because of the locational proximity of the sites. Tr. 89.

Even if the Jamestown employees did not service Quarry equipment in the Garage, they certainly stored Quarry equipment in it. Aside from the inoperable rock breaker, the Garage houses a service truck that is used to perform repairs and maintenance at the quarry site,

including welding. Tr. 176. The truck purportedly contains all of the equipment needed to service equipment at the Quarry, and is stored in the garage. Tr. 176-77. That same truck may service other adjacent mines as well. Tr. 179. These facts indicate that the Garage is not only adjacent to the active Quarry but performs services to assist in the Quarry's milling processes. The Garage is therefore a facility used in the preparation of minerals as defined by the Act.

Accordingly, I find that MSHA has jurisdiction over the Jamestown Quarry Garage and its contents.

## **B. The Rocky Ridge Custom Processing Shop**

Unlike the Garage, there is no dispute that processes labeled as "milling" under the Interagency Agreement take place in the Rocky Ridge Custom Processing Shop. The Shop is located adjacent to the Rocky Ridge Stone Quarry and breaks, cuts, saws, sizes, and polishes and finishes rock that is extracted from the Quarry. The citation at issue pertains to the saw, and the Secretary normally need only show that one of the activities listed under the Agreement's definition of "milling" takes place in a facility to assert jurisdiction over it. *See Jermyn Supply Co., LLC*, 39 FMSHRC 1472, 1484 (July 2017). However, the Interagency Agreement carves out an exception to MSHA's jurisdiction when cutting and sawing stone takes place in a "stone polishing or finishing plant." 44 Fed. Reg. at 22, 828. Unfortunately, the Interagency Agreement does not define that term, and so the dispositive issue is whether the Secretary's determination that the Shop is not a "stone polishing & finishing plant" is a reasonable one. I find that it is.

Respondents contend that the sign on the door reading "Rocky Ridge Stone Co. Polishing & Finishing Shop" and the polishing machine are sufficient proof that the Shop is a "stone polishing or finishing plant" subject to OSHA's jurisdiction. Resp. Br. at 8-9. These factors support the Respondents' position, but the sign and the polisher are not the only two objects in the Shop that must be considered. The mere fact that one portion of the Shop could be subject to OSHA jurisdiction does not necessarily defeat the reasonableness of the Secretary's determination to the contrary. *Cf. Cranesville Agg. Co. Inc.*, 878 F.3d 25, 35 (2nd Cir. 2017).

The makeup and function of the rest of the Shop suggests that the equipment in the entire building as a whole is not exclusively dedicated to the finishing process. The Shop contains two rock breakers and a saw used to cut and size the rock. Tr. 122-24. Rocky Ridge does not process all of the rock extracted from the Quarry inside of the Shop, nor does it finish or polish all of the rock that is broken in the Shop. Tr. 131-32, 156. While Rocky Ridge undoubtedly finishes and polishes rock in the Shop, this activity accounts for only a portion of the Shop's work, and there is no indication as to how much polishing and finishing takes place in the Shop in proportion to how much sawing and cutting takes place.

Respondents point to the Interagency Agreement's definition of "custom stone finishing" as clearly including the Shop. *See* Resp. Br. at 8-9; 44 Fed. Reg. at 22, 828. Yet the Agreement does not lay out any specific guidelines as to when stone cutting and sawing ends and polishing or finishing begins, nor to how much finishing and polishing activity and equipment is necessary to constitute a "polishing and finishing plant." What the Agreement does do is

explicitly lend the Secretary discretion in these circumstances. The Agreement explicitly accounts for areas of uncertainty “in operations near the termination of the milling cycle and the beginning of the manufacturing cycle” and gives the Secretary the discretion to expand its definition of milling to include such activities when geographically or technologically related to milling. *See* 44 Fed. Reg. at 22, 828; *see also* *U.S. Quarries Slate Products, Inc.*, 24 FMSHRC 124, 129 (Jan. 2002) (ALJ) (deferring to the Secretary’s assertion of MSHA’s jurisdiction over mine-adjacent buildings holding finishing equipment).

This is clearly one of those circumstances, and where either MSHA or OSHA jurisdiction may apply, Commission judges and courts will defer to the Secretary’s reasonable determination considering the convenience of administration of his agencies. *See Cranesville Agg. Co., Inc.*, 878 F.3d 25, 35 (2nd Cir. 2017) (“Because the Secretary has the authority to distinguish between mining and non-mining activities for the purposes of enforcement, when the Secretary reasonably applies a functional analysis, the Secretary’s determination as to which act governs is entitled to substantial deference”); *Carolina Stalite Co.*, F.2d 1547 (D.C. Cir. 1984) (In situations where an entity is deemed to be subject to either MSHA or OSHA regulations, the Secretary merely engages in an act of “adjusting the administrative burdens between [his] various agencies”).

Here, the Secretary’s decision to assert MSHA’s jurisdiction over the Shop is reasonable. While stone finishing and polishing occurs in the Shop, the breaking, cutting, and sizing processes that take place within the Shop are technologically and geographically related to the milling process. *See U.S. Quarried Slate*, 24 FMSHRC at 129. MSHA asserted jurisdiction over the Shop in a 2016 letter to the Respondents and already exercises jurisdiction over the remainder of the Rocky Ridge property. OSHA has never asserted jurisdiction over or inspected the Shop or any other part of the property. Tr. 154-55, 167-68, 172. His determination therefore aptly considered convenience of administration in declining to partition jurisdiction over a single facility between multiple agencies.<sup>4</sup>

Accordingly, I find that MSHA has jurisdiction over the Rocky Ridge Custom Crushing Shop.

## V. 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

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<sup>4</sup> The Commission has previously noted that adherence to strict geographical analysis in determining jurisdiction could theoretically “permit an operator at a facility, where there is both OSHA and MSHA-regulated work, to escape enforcement of one agency’s regulations by moving the work to an area of the facility considered to be geographically outside of that agency’s jurisdiction.” *See Calmat Co. of Arizona*, 27 FMSHRC 617, 621 (Sept. 2005). As in the *Calmat* case, there is absolutely no allegation that such conduct has occurred here. Nonetheless, the court is mindful that strictly requiring the Secretary to divide a single building between MSHA and OSHA jurisdiction would increase the potential for such behavior.

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).

As noted above, the parties stipulated to the validity of the four citations if the Court affirmed MSHA's jurisdiction over the Shop and the Garage. Resp. Br. at 2; Tr. 8-9. Accordingly, the proposed penalties of \$116.00 for each of the four citations are appropriate under section 110(i) of the Mine Act and are hereby **AFFIRMED**.

## VI. ORDER

The three citations in docket SE 2017-252 are **AFFIRMED**, and Jamestown Quarries, is **ORDERED TO PAY** a civil penalty of **\$348.00** within 30 days of the date of this order.<sup>5</sup>

The single citation in docket SE 2017-253 is **AFFIRMED**, and Rocky Ridge Custom Crushing, LLC, is **ORDERED TO PAY** a civil penalty of **\$116.00** within 30 days of the date of this order.

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

Distribution: (U.S. First Class Mail)

Mary Sue Taylor, Attorney, U.S. Department of Labor, Office of the Solicitor, 618 Church Street, Suite 230, Nashville, TN 37219

Howard Upchurch, Attorney for Jamestown Quarries, Law Office of Howard L. Upchurch, P.O. Box 381, Pikeville, TN 37367

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<sup>5</sup> Payment should be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, P. O. BOX 790390, ST. LOUIS, MO 63179-0390

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
1331 PENNSYLVANIA AVE., N.W., SUITE 520N  
WASHINGTON, DC 20004-1710  
TELEPHONE: 202-434-9933 / FAX: 202-434-9949

June 13, 2018

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

v.

ORIGINAL SIXTEEN TO ONE  
MINE, INC.,  
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. WEST 2017-0119  
A.C. No. 04-01299-423919

Sixteen to One Mine

**DECISION AND ORDER<sup>1</sup>**

Appearances: Isabella M. Finneman, Esq., Office of the Solicitor, U.S. Department of Labor, San Francisco, CA 94103, for Petitioner<sup>2</sup>

Mr. Michael Miller, President, Original Sixteen to One Mine, Inc., Alleghany, California, for Respondent

Before: Judge Moran

This docket is before the Court upon a petition for assessment of civil penalties under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). Two citations are in issue. A hearing was held in Nevada City, California commencing on August 9, 2017. For the reasons which follow, the Court finds that both the alleged violation of 30 C.F.R. § 57.4131(a), a matter involving a claim that more than a one day's supply of combustible materials was stored within 100 feet of a mine opening, and the alleged a violation of 30 C.F.R. § 57.11051(a), involving a claim that an escape route was not maintained in safe, travelable condition, were established.

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<sup>1</sup> Originally, Docket No. WEST 2017-0173 was heard with WEST 2017-0119. Subsequently, the Secretary moved to dismiss all citations within Docket No. WEST 2017-0173. The Court issued its Dismissal Order for that docket on January 11, 2018.

<sup>2</sup> Ms. Laura Ilardi Pearson, Esq. appeared at the hearing for the Secretary. Subsequent to the hearing, Attorney Pearson left the Solicitor's Office for other employment. Attorney Isabella M. Finneman submitted the post-hearing briefs for this docket.

## **Violations at Issue**

### **Introduction**

At issue in Docket No. WEST 2017-0119 are two 104(a) citations, with a total proposed penalty of \$392.00.

#### **Citation No. 8879804:**

Citation No. 8879804 alleged a violation of 30 C.F.R. § 57.4131(a). That standard, titled “Surface fan installations and mine openings,” provides: “(a) On the surface, no more than one day's supply of combustible materials shall be stored within 100 feet of mine openings or within 100 feet of fan installations used for underground ventilation.”

The condition or practice identified in the 104(a) citation alleged:

Combustible materials were being stored within 100 feet of the entrance to Portal 2 located at the zero level at the mine. There was a pile of cut wooden 2 by 4s located about 15 feet to the right of the entrance of Portal 2. A pile of timbers were also located to the right of the portal entrance about 5 feet from the wooden 2 by 4s. Observed on the left side of the entrance of Portal 2 were two piles of combustible materials consisting of timbers of various sizes. Both piles were estimated to be less than 20 feet from the entrance of the mine. This condition creates a hazard of smoke inhalation into the mine in the event of a fire. A miner was working about 75 feet inside the mine at Portal 2. Standard 57.4131a was cited 3 times in two years at mine 0401299 (3 to the operator, 0 to a contractor).

GX 2.

The inspector assessed the gravity as unlikely, the injury or illness that could reasonably be expected to be lost workdays or restricted duty, not significant and substantial (“non-S&S”), with one person affected. The Secretary proposed a civil penalty of \$157.00.

#### **Citation No. 8879805:**

Citation No. 8879805 alleged a violation of 30 C.F.R. § 57.11051(a). That standard, titled, “Escape routes” provides: “Escape routes shall be - (a) Inspected at regular intervals and maintained in safe, travelable condition.”

The condition or practice identified in the 104(a) citation alleged:

The designated secondary escape way located in 21 tunnel of the mine was not being maintained in a safe, travelable condition. There was an area in the escape way that had a buildup of silt and mud. The buildup was estimated to be about 20 feet long, and extended out about 53 inches from the wall of the tunnel. The buildup was about 3 feet high at its highest point located against the wall of the



tunnel and about 6 inches high at its lowest point which was located in the travel way. This condition impedes miners trying to escape through this route during the event of an emergency, hampers the safe evacuation of injured miners being assisted out, and has the potential of causing an injury to the miner. Standard 57.11051a was cited 2 times in two years at mine 0401299, to the operator.

GX 5.

The inspector assessed the gravity as reasonably likely, the injury or illness that could reasonably be expected to be lost workdays or restricted duty, significant and substantial (“S&S”), with one person affected.

As a subsequent action, the inspector modified the negligence alleged from high to moderate, based on mitigating information presented by the operator. *Id.* The operator also “removed a good portion of the buildup of silt and mud out of the travel way, thus terminating the citation.” *Id.* The Secretary proposed a civil penalty of \$235.00.

### **Findings of Fact**

MSHA Inspector Julie Hooker, the issuing inspector, testified regarding the citations in this docket. Tr. 29. Inspector Hooker became an authorized inspector in October 2015. Tr. 30. The inspector has no prior mining experience. Tr. 32. On September 21, 2016, she inspected the Respondent’s mine. Tr. 35. She was there in response to an EO4 anonymous hazard complaint. With her at that time was her field office supervisor, Troy Van Wey, who also testified about the citations. The hazard complaint alleged that the secondary escapeway was not safe. Tr. 36. A second issue involved a miner working at “the zero level,” which term refers to where the upper shop and the number one and two portal locations, each of which are on the surface. Tr. 37.

### **Citation No. 8879804**

Inspector Hooker identified Citation Number 8879804, which she issued for “combustible materials being stored within a hundred feet of the entrance to Portal Number 2, citing 30 C.F.R. §57.4131a.” Tr. 38. She stated that the standard requires “that not more than one day's use of [combustible] material can be stored within a hundred feet of the mine opening.” Tr. 38-39. She observed “a couple piles, to the left and to the right of the opening, and they were within the -- they were less than a hundred feet. There was timbers [sic] that the miner had been taking out, and there was new wood that he was installing. From what I understand, it had been there -- he had been working there in that area for about two and a half weeks ...” Tr. 39. The miner referred to by the inspector was working inside the portal at that time. *Id.* The inspector took photos of the material she observed. Tr. 39-40. In the photos, the Inspector identified old timber that had been removed from the mine, and new wood as well; two-by-fours. Tr. 40. A miner told her that the entry she observed was Portal Number 2, an entry into the mine where that miner was currently working. Tr. 41. The miner informed Hooker that he had been working at that location for two and a half weeks and that the wood had been placed there the previous Friday, with the following Tuesday being the day she was performing her inspection. *Id.* In determining that there was more than a one day supply of materials, she informed that she asked

a miner how long the material had been there and how long he had been working there. The miner's response was that he had been working there for "about two and a half weeks." *Id.*

Continuing to speak to Citation Number 8879804, GX 2, the Inspector stated that in her evaluation, she marked the citation, under gravity, as unlikely, the injury or illness reasonably expected as lost workdays or restricted duty, not S&S, and with one person affected. However, she marked the negligence as "high." In connection with those designations, the Inspector acknowledged that she saw no ignition sources, that is, nothing that could ignite the wood. Tr. 41-42. As for the lost workdays or restricted duty designation, it was based on her observing one miner working, but there was not a lot of wind that day. Therefore, she believed that, in the worst case, there would probably be some *mild* smoke inhalation. Tr. 42. The distance from the portal to the timbers was determined by the Inspector and her supervisor using a tape measure. *Id.* The timber furthest from the opening was 20 feet. Tr. 43. High negligence was marked because the mine had been cited for this condition "before in the same area." Tr. 43-44. Other photos were taken of the cited condition. These reflected some new lumber as well as lumber that had been removed from the mine. GX 4; Tr. 44-45.

Upon cross-examination, the Inspector stated that she became an AR in October 2105. Tr. 48. Asked for the basis for her conclusion that old timbers were being stored, the inspector stated that a miner informed they had been there since last Friday. Tr. 55. She did not know the hours for the work crew at the mine. *Id.* Asked the basis for concluding that the mine was storing the wood, and not, as the Respondent would later assert, that it was in transit, the Inspector stated that a miner told her the old wood came from inside the opening and the new wood was for laying track. Tr. 55. She again stated that she saw no signs of ignition sources and for that reason marked the citation as unlikely. Tr. 56. The Inspector defined combustible as "anything that can be ignited." *Id.* She admitted to no experience being "involved in an operation where people are repairing or renovating track, mine rail." Tr. 57.

In terms of marking the violation as high negligence, the Inspector was asked how her review of the mine's prior citations for storing combustible material impacted her decision to mark the violation as high negligence. Tr. 58. The Inspector stated that she had done a "thorough review" of those prior citations and that the review included pictures of those prior violations. Tr. 59. However she conceded that the scene she viewed for this citation did not resemble those prior violations. *Id.* The Inspector did not know if the air at the number 2 portal was exhausting or intaking. Tr. 61. She conceded such information could make a difference in assessing who could be harmed.

The Inspector was also asked if, from her background or training, she could distinguish between storing something and having it in transit. She responded that storage occurs if something is at a location for more than one day, while transit is using the material within that one day. Tr. 63. She was then asked about distinguishing supplies from waste and she answered that supplies are things one is going to use, while waste covers things that will not be used. Tr. 63-64.

On redirect, the Inspector stated that, for purposes of the standard she cited, the direction of air flow to the portal does not matter. Tr. 64. Except for some cinder blocks she observed, the

remainder of the material was combustible and it was more than a one day's supply. Tr. 64-65. Her conclusion about the material being present for more than one day was based upon the miner who told her it had been there since the previous Friday and, as she was there on a Tuesday, four days had elapsed. Tr. 65.

Respondent's Mr. Miller then testified about this citation. Tr. 90. He stated that the "respondent has extensive policies and procedures for handling storage material, material in transit as well as the use and maintenance and repair of second exits. They are extensive, they're written, they're in our policy manual." *Id.* Respondent asserted that Inspector Hooker "did not have the background and actual practical experience to really understand what she was inspecting." Tr. 91. Part of the Respondent's position is that when MSHA comes to a mine, "they should honor and respect the specifics of this particular mine or operation that they are inspecting[,adding] [t]hat's also pretty clear in the language and intent of congress, site specific." Tr. 92.

Much of Mr. Miller's testimony was essentially an objection to the manner in which MSHA inspects. All of his contentions were reviewed, but not every comment deserves a response where the Court finds that such comments are not relevant to the citations in issue. Those issues are whether the standard was established as having been violated and, if so, the appropriate penalty upon consideration of the statutory factors.

Mr. Miller stated that the zero level has two adits. It was the first adit that was questionable and which was sealed according to prior inspectors. The mine was at that time rehabilitating the number two adit. Thus, he asserted that, in the process of rehabilitating the number two adit the inspectors viewed "a work in progress where they were taking, repairing track. They had their supply of track ties right there where they brought them out. They put them there where they come outside close to the portal. I would have stipulated that it was 20 feet." Tr. 94-95. Thus, he contended that the only place those "track ties could be would be right at the outside stored there so they can walk out and get the track ties and put them in when they're installing the rail." Tr. 95.

As for the rotten lumber, he asserted they could not be considered "in storage." Rather, "it was a waste pile that is hauled off as needed. It could be every day, it could be every week. It doesn't meet the language of that standard. It's not supplies as clearly Ms. Hooker stated. It wasn't supplies. It's waste." *Id.* Thus, he contended they were not stored. He expressed that the idea of the standard "is to eliminate long-term storage of the materials that could have the potential to ignite and then lead to an intake of air into the mine." As this citation was issued in September, the air is blowing out of the mine and therefore there was no possibility of any injury to the miner who was working there at that time. Tr. 95-96. Regarding the claim that the material had been there for four days, Miller contended that the small mine is only open from Tuesday

through Fridays. Therefore, the waste pile was there at 5 p.m. on that Friday and the small number of two-by-fours were there when the miner returned to work on Tuesday.<sup>3</sup> Tr. 96.

On cross-examination, Miller confirmed that waste from the mine could be hauled off every day or every week or just as needed, stating “[t]hat’s our policy and procedure.” Tr. 104. He agreed that the waste cited in Citation No. 8879804 was wood, describing it as “very, very old timber” that was being removed during the rehabbing process and that it was combustible. Tr. 105-109.

### **Citation No. 8879805**

The other matter in issue, Citation No. 8879805, was issued by the same inspector on September 21, 2016. This was issued for an alleged violation of the designated secondary escapeway<sup>4</sup> not being in a safe, travelable condition. This conclusion was based upon finding a “huge buildup of silt and mud that blocked passageway.” Tr. 66; GX 5; and GX 7 (photos). Referring to the photos, the Inspector stated they show a buildup of mud and silt along the sides of the escapeway. Tr. 67. That mud and silt was muddy and “sticky in certain parts” and she opined that one could not walk on it without getting stuck. *Id.* The depth of the material ranged from “probably six inches” near the water to “about three feet high” at its highest level. *Id.* The depths were determined by using a tape measure. Mr. Van Wey assisted her in taking the measurements. *Id.* Thus, the Inspector confirmed that she saw some portions of the escapeway with water and mud up to three feet in depth. Tr. 68. Asked if this covered the entire bottom surface of the escapeway, the Inspector answered by referring to one location to the right on a photo that had the most buildup, stating that they measured that “to be about 52 inches from the side of the tunnel there to where you see there the water. It was about 52 inches wide.” Tr. 68.

The Court asked if “in the secondary escapeway, were there areas where one could walk away from the water and be in some small amount of water and still traverse.” The Inspector answered, “[n]ot in that area that [she] took a picture.” Tr. 69. Asked how extensive this condition was, that is, “[h]ow far did this water extend where you had an issue with its depth and the mud,” the Inspector responded, “I believe it ran through the course of the whole escapeway,

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<sup>3</sup> Miller was perturbed that, to abate the citation, he “had to go and take those track ties and put them back over in the shop and just get them, you know, a hundred feet away.” Tr. 97. He continued, “[t]here was a pile of cut wood in two-by-fours. Those are track ties. We can sometimes lay ten feet, we can sometimes lay hundred feet of rail. Depends on the circumstances of what we’re doing at that time. We put track ties every three or four feet. We put track ties where we have a joint -- where the two tracks meet with fishplates. We have situations where we will put them closer together. We have situations where maybe we can extend them out. So a miner is going to have a supply that he thinks he can get through that day, and that varies. There is no standard like eight ties or ten. There was no storage of supplies, there was no long-term storage.” Tr. 98. Thus, it was Miller’s contention that the inspector’s lack of any practical experience led to this issue.

<sup>4</sup> The escapeway was identified as the secondary escapeway by the miner who accompanied the inspector that day. Tr. 74.

but we did not travel past that area.” She therefore conceded that she would have no way of knowing how far the condition existed, stating, “[c]orrect, Not at that time, no.” Tr. 69. She then admitted that her “at that time” remark actually meant she did not later learn more about the extent of the condition. She therefore admitted that it was perhaps possible that the water she observed only continued for a few feet. Tr. 70. However, the Inspector stated that she didn’t proceed further because she considered it to be unsafe. *Id.*

The second photograph she took in connection with this citation was described as “looking at the pipes that we saw laying in the water, and there's also the buildup there that you can see that comes close to those pipes.” Tr. 70-71. When the Court inquired about the Inspector’s location when she took photo three of four and whether that photo was taken from the same location as photo two of four, the Inspector stated she was not sure and did not know. Tr. 71. Then asked about photo four of four and the location where that was taken, the Inspector expressed that it was more “two of four,” by which she meant both photos two and four of the four photos were taken from the same location. Tr. 71-72. Continuing, for photos two and three of the four, the Inspector stated that the pipe in those photos is normally there and that it is located in escapeway’s walking area. Tr. 72. This also caused her concern because the pipe created a tripping hazard along with the water and the mud. Tr. 73. However, upon questioning by the Court, the Inspector stated that she would not have issued the citation based solely upon the pipe’s presence. It was the combination of those factors, she explained, with the pipe contributing to the unsafe condition of the escapeway. *Id.*

The Inspector marked the citation as “reasonably likely” because the miner told her that he travelled that on a weekly basis. Tr. 74. Although she agreed that the condition had been that way for more than a week, she did not offer the basis for that opinion. *Id.* In marking the injury as “lost workdays or restricted duty as the type of injury or illness that could occur,” she based that upon her view that “if they had to use that and running out of there in a hurried condition,” then “they would probably get stuck in the mud,” and therefore sustain a muscle strain or a twisted ankle producing lost workdays or restricted duty. Tr. 75. Regarding negligence, the Inspector, after initialing marking it as high, modified it to moderate. *Id.* This change came about because the miner told her they were working other projects, doing various things to try to improve safety in the mine overall. Tr. 76.

On cross-examination, Mr. Miller asked the Inspector to explain her reference to “emergencies.” The Inspector responded that she meant a fire or some blockage in the mine that required miners to exit the mine via the secondary escapeway. The Inspector arrived at the secondary escapeway through the mine’s main entrance. Tr. 80. There, she met Reed Miller who informed that they were working exclusively at the 800 level. At that point she asked him to identify the secondary escapeway for their use and was told it was the secondary tunnel. The Inspector then advised that the escapeway would have to be inspected, as a hazard complaint had been made. Tr. 81. Thus, her purpose, per the standard was to see if it was maintained in a safe and travelable condition. *Id.*

When the Respondent suggested that if the Inspector had examined the records, it would have revealed that there have been monthly inspections, each recorded by date and time and the person who conducted the inspection, he asked if that would have changed the Inspector’s view

of the citation. The Inspector responded it would not have changed her conclusion. Tr. 82. Referencing that she was a new inspector, and had no underground mining experience, she was asked for her opinion as to how long the mud she observed had been there. She responded that it was present for more than a month. *Id.* She could not be more precise about how long the mud had been present. Tr. 83. The Court then inquired about the issue, asking if the Inspector in preparation for her inspection and reviewing the mine's prior violation history, found other citations that had been issued for not maintaining a secondary escapeway at this location. She answered, "yes." Tr. 84. In fact it was also in the 21 Tunnel. Tr. 85.

Miller then testified about the second citation, Citation No. 8879805. He began by asserting that the 21 Tunnel "is an issue for many inexperienced ... inspectors. This isn't the first time someone has made a similar mistake of saying that you cannot travel and it's impeded and with [the issuing inspector's] pure speculations about how it could be hazardous to the health and safety of a miner. It is inspected by MSHA rules once a month, and it has been ever since I've been involved in mining." Tr. 110-111. He then reviewed the history of the tunnel, adding that in the past it had "ten times as much mill way sand in that tunnel, ten times or maybe fifty times as much, it still passed inspection." Tr. 111. Miller asserted that this issue had arisen before and that those prior citations for that assertion were subsequently vacated. Tr. 112. Miller contended that it is inspected each month and while there may be a little slough in it, it doesn't impede travel. *Id.* Miller also contested the Inspector's claim that there was three feet of water and asserted that the pipe did not create a hazard. Tr. 114. Thus, while he did not challenge the standard itself, he did assert that it has been incorrectly interpreted by some inspectors and her claim that the passageway was blocked. Tr. 114-115. Last, he stated that this is an escapeway, not a travelway, with the latter being more restrictive. Tr. 117.

On cross-examination, Miller disagreed with the Inspector's claim that there was three feet of buildup in the walkway, where one travels, though he agreed there was buildup on the sides, adding that such buildup had been there for at least 20 years. Tr. 117. He also agreed there was water in the walkway, informing that it is the natural drain tunnel level, as it's "the lowest adit that comes out of the mine." Tr. 118. However, he maintained that water would never impede anyone from getting out of the mine. *Id.* As to the water depth there, Miller stated it was never over his 12 inch boots. *Id.* In this instance, he maintained that the boots he had on at that time just above his ankles. Tr. 119. As for the boots the Inspector wore that day, Miller agreed he did not see the Inspector that day. Tr. 120. Regarding the claim that there was mud in the walkway, Miller disputed that, asserting that it was mill tailings. Tr. 123. Miller added that the pipe referenced in the Inspector's testimony sits on the floor of the cited tunnel and that it is not suspended or floating at that location. Tr. 124.

Troy Van Wey then testified about these two citations, Citation Nos. 8879804 and 8879805. Van Wey is a field office supervisor for MSHA's Vacaville, California office, a position he has held since February 2015. Tr. 127. Van Wey has significant mining experience as an MSHA inspector and as a miner in private industry. He has inspected the Respondent's mine about a dozen times. Tr. 130. He participated in Inspector Hooker's inspection of the Respondent's mine on September 21, 2016. Tr. 131. Regarding Citation No. 8879804, Van Wey stated that he saw the condition cited in that and that he agreed with Hooker's evaluation of it, including the gravity and negligence assessments. Tr. 132.

Van Wey was then asked for his definition of combustible material, which he stated is “[s]omething that will burn.” Tr. 132. He then described the cited materials as “[m]ostly old timbers that they're using for support, I'm assuming, and then new timbers, new various sizes, two-by-fours, I believe, four-by-fours, maybe some two-by-eights if I remember correctly.” Tr. 132.

Directed then to Citation No. 8879805, GX 5, Van Wey confirmed that he was present when Inspector Hooker found that condition as well. Tr. 133. As with the other citation, he agreed with all of Hooker’s evaluations in this citation too. Asked if he felt the condition was unsafe, he responded, “Yes. It was perceived as maybe a slip/trip-type hazard.” *Id.* Specifically, he stated “there was a bunch of fine material that had sloughed off one of the ribs and into the walkway.” Tr. 133-134. He also did not attempt to walk through it, as he believed it to be unsafe. Tr. 134. Asked to estimate how long the condition had existed, he responded, “there's a lot of variables. It would depend upon the time of year. There's water that was running through the escapeway. There's fine material, so for the water to carry those fines, and it was buildup, again a guesstimate, maybe about three feet high at its highest point along the rib and sloped into the walkway. I would say months for it to get to that stage.” *Id.* Thus, his estimate was in line with that of Hooker’s. In terms of the water depth, Van Wey estimated it as “around ankle deep.” *Id.* Referring to the photos associated with this citation, GX 7, he described it as showing “material that's sloughing off from the right rib as I'm looking at it, it slopes off into the walkway, the middle section that is the water that was running down the middle. There's also a pipe running through the middle of that as well.” Tr. 135. Asked if one could traverse this safely, he answered, “[n]ot without the hazard of slipping, tripping or falling.” *Id.* As the pipe was in the walkway, he also considered it to be a hazard. *Id.*

On cross-examination, Van Wey was asked about the cited standard and its provision that escape routes are to be “inspected at regular intervals and maintain safe, travelable conditions.” To comply, the Inspector stated, the mine would need to inspect the escapeway on a regular basis to see if it’s safe and travelable. Tr. 138. There is no paperwork requirement to document this however. *Id.* He admitted that Hooker was a “fairly new inspector” and felt it was appropriate for him to join her for the inspection, which arose from a hazard complaint. Tr. 139.

The Court noted that the abatement of the two citations is recorded on the same documents. Tr. 141. Van Wey stated that the same escapeway had been cited in the past. Tr. 143. As for the issue of Hooker’s lack of mining experience, Van Wey defended his inspector, stating that all inspectors receive a “tremendous amount of training before they're given their authorized representative card.” Tr. 144- 145.

## **Discussion**

### **Citation No. 8879804**

Regarding Citation No. 8879804, and the claim that the Respondent violated 30 C.F.R. § 57.4131(a), it is the Secretary’s contention that the Respondent violated the cited standard because used and new timbers were stored within 100 feet of a mine opening. Secretary’s Post-Hearing Brief (“Sec’s Br.”) at 4.

The applicable provision from the cited standard, section 57.4131(a), titled “Surface fan installations and mine openings,” provides: “(a) On the surface, no more than one day’s supply of combustible materials shall be stored within 100 feet of mine openings or within 100 feet of fan installations used for underground ventilation.”<sup>5</sup>

The Secretary asserts that “[t]he old timbers and new 2 by 4’s fall within the definition of combustible materials. These combustible materials had been left within 100 feet of Portal No. 2 for more than one day. The miner was exposed to the hazard while entering and exiting the Mine through Portal No. 2 on the day of the inspection. Therefore, a violation of 30 CFR 57.4131(a) has been established.”<sup>6</sup> *Id.* at 5.

Speaking to the Respondent’s defense, that it was not *storing* the timbers at the cited location, but was “transporting” them at the time that the citation was issued, the Secretary acknowledges that the final rule for the cited standard expressed that it does not prohibit the *actual transit* of combustible materials into the mine. *Id.* (citing 50 Fed. Reg. 4022-01, 4025 (Jan. 29, 1985)). However, the Secretary contends that the evidence demonstrated that the Respondent allowed timbers to be stockpiled by Portal No. 2 and that it was not cited for transit of timbers. *Id.*

The Secretary also notes the Respondent’s contention that it didn’t have more than a one day’s supply of timbers at the cited portal location. While acknowledging the Respondent’s argument that the phrase “more than one day” must mean more than 24 hours while the mine is in operation, the Secretary responds that he is not aware “of any provision in Section 57.4131(a) or the Secretary’s interpretive guidance that requires the Secretary to show that the Mine was in continuous operation in order to establish that the cited condition existed for more than one day.” *Id.* Even if that were accepted, the Secretary asserts that the “Respondent did not address the stored timbers when the Mine resumed operation on the morning of the inspection.” *Id.* It is the Secretary’s position that the “Respondent could have, at a minimum, begun the process of moving the timbers further away from Portal No. 2 at the beginning of the shift prior to Inspector Hooker’s arrival. Instead, Respondent continued the work of removing more timbers from the Mine.” *Id.* at 6.

As to the Inspector’s gravity and negligence evaluation for this citation, the Secretary acknowledges that the issuing Inspector determined that it was unlikely that the condition cited

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<sup>5</sup> Because the Respondent raised a separate section for this standard, section 57.4131(b), the text of that provision is noted. It provides: “(b) the one-day supply shall be kept at least 25 feet away from any mine opening except during transit into the mine.” However, the Court concludes that this subsection is not useful in resolving the cited provision.

<sup>6</sup> The Secretary notes that “‘Combustible material’ is defined in 30 CFR § 57.2 as “...a material that, in the form in which it is used and under the conditions anticipated, will ignite, burn, support combustion or release flammable vapors when subjected to fire or heat [] [and that] Section 57.2 also states: ‘Wood, paper, rubber, and plastics are examples of combustible materials.’ Secretary’s Post-Hearing brief (“Sec’s Br.”) at 4. There is no genuine dispute about the materials’ combustibility.



would result in an injury or illness to a miner, as there were no ignition sources near the timbers and it was unlikely for a fire to occur at the two timber stacks. *Id.* Further, in terms of the expected injury should the timbers ignite and burn, such “flames would not be fanned and the exposed miner would suffer from, at most, mild smoke inhalation,” and, at most, result in lost workdays or restricted duty. *Id.*

However, the Secretary asserts that the Inspector correctly determined that the Respondent was highly negligent because the Respondent had been cited for violating this standard in the past.<sup>7</sup> *Id.* at 7. Citing 30 C.F.R. § 100.3(d), a “high negligence” designation is apt, the Secretary contends, where an operator “knows or should have known of the violative condition or practice, and there are no mitigating circumstances which explain the operator’s conduct in minimizing or eliminating a hazardous condition.” *Id.* Apart from its past violations of the standard theory to support the Secretary’s high negligence claim, the Secretary also claims that “Miller admitted during his testimony that he knew that his miner(s) placed the timbers near to the portal and that the timbers are not always hauled away every day [by his testimony that] [t]hey put [the timbers] there where they come outside close to the portal [and that he admitted] [t]he rotten timber ... was a waste pile that is hauled off as needed. It could be every day, it could be every week.” *Id.* at 8 (citing Tr. 95:3-4 and 95:12-15). Given these considerations, the Secretary “requests that a penalty of not less than \$157 be assessed for Citation No. 8879804.” *Id.*

Respondent’s Post-Hearing Brief (“R’s Br.”) challenges the Inspector’s assertion that the wood had been within 100 feet of the portal for multiple days, as she included the weekend in her calculation that the wood was present for four days. R’s Br. at 4. Respondent contends that the Inspector’s total absence of mining experience contributed to her inaccurate evaluation. Also, she did not know if the air at the portal was exhausting or intaking. *Id.* at 6.

### **The Court’s Determinations regarding Citation No. 8879804**

The Court finds that the Secretary established the violation in this instance. The chief reason for this conclusion is that the Mine Act is a remedial statute and therefore must be construed liberally. As the Commission has observed,

The Federal Mine Safety and Health Act of 1977 is a remedial statute, the ‘primary objective [of which] is to assure the maximum safety and health of

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<sup>7</sup> The Secretary is correct in asserting that the operator had been cited for violating this standard in the past. He notes, “[i]n May 2011, and again in May 2014, the Secretary cited Respondent for storing timbers near a mine portal in violation of Section 57.4131(a). The ALJ decisions affirming these citations can be found at *Secretary of Labor v. Original Sixteen to One Mine, Inc.*, 36 FMSHRC 2224, 2235 (Bulluck, ALJ) (August 20, 2014) (affirming citation issued in May 2011 for “more than a day’s supply” of timbers stored 30 to 90 feet from the mine portal), and *Secretary of Labor v. Original Sixteen to One Mine, Inc.*, 38 FMSHRC 1019, 1043 (Moran, ALJ) (May 3, 2016) (affirming citation issued in May 2014 for timbers stored for more than one day at a location that the parties stipulated was less than 25 feet from the mine portal).” *Id.* at 7.

miners.” U.S. Senate, Committee on Human Resources, Subcommittee on Labor, Legislative History of the Federal Mine Safety and Health Act of 1977, 95th Cong., 2d Sess. at 634 (1978). ... In interpreting remedial safety and health legislation, ‘[i]t is so obvious as to be beyond dispute that ... narrow or limited construction is to be eschewed ... [L]iberal construction in light of the prime purpose of the legislation is to be employed.’ St. Mary's Sewer Pipe Co. v. Director, U.S. Bureau of Mines, 262 F.2d 378, 381 (3rd Cir. 1959); Phillips v. Interior Board of Mine Operations Appeals, 500 F.2d 772, 782 (D.C. Cir. 1974), cert. denied, 420 U.S. 938.” (1975).

*UMWA v. Consolidation Coal Co.* 1 FMSHRC 1300, 1302 (Sept. 1979).

This Court has noted,

In enacting the Federal Mine Safety and Health Act of 1977, Congress intended to ensure safe working conditions for miners. The Commission and Courts of Appeal have construed the application of the Mine Act liberally. One Circuit Court held that ‘[s]ince the Act in question is a remedial and safety statute, with its primary concern being the preservation of human life, it is the type of enactment as to which a narrow or limited construction is to be eschewed.’ The Commission, too, has held in multiple cases that the Mine Act, as a remedial statute, must be interpreted broadly to further the Act's remedial goals. Thus, close cases of interpretation of safety standards are to be resolved in favor of furthering the goals of the Mine Act.

*Lavarge Building Materials*, 34 FMSHRC 3297, 3300-3301 (Dec. 2012) (ALJ).

Although a violation is found, there are problems with the Secretary’s position that, in the Court’s estimation, bear upon the determination of the penalty, at least for this instance. The reasons for this determination are severalfold. First, the standard itself plainly addresses a one day’s *supply* of combustible materials, requiring that no more than that amount may be stored within 100 feet of mine openings. The term “supply,” as a noun, is defined as “an amount or quantity of something that is available to use.”<sup>8</sup> Therefore, facially, it does not encompass waste material. The standard could have been easily written to expressly prohibit all types of combustible materials located within 100 feet of mine openings, but that is not within the literal scope of the provision.

Further, fairly construed, the standard does not require that the one day’s supply must be used up each day. Such language also could have been included within the standard’s proscription but, as written, the standard allows the one day’s supply to be stored indefinitely

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<sup>8</sup> <https://www.macmillandictionary.com/us/dictionary/american/supply>.

within 100 feet of a mine opening.<sup>9</sup> Accordingly, at least as promulgated, the plain objective of the standard is to allow a one day's supply of combustible materials within 100 feet of a mine opening, but not more than that amount. The one day's supply limit is therefore a compromise between allowing some combustible material but not more than that day's supply, so that any combustion would be limited to storage of that amount.

The question then becomes whether the Secretary established that there was more than a one day's supply of combustible material within 100 feet of the mine opening. In this regard, neither Inspector Hooker, nor field office supervisor Van Wey, drew any distinction between supply materials and waste materials; their focus was entirely upon the combustibility of the material, not its nature. The Inspector identified combustible material but did not distinguish between combustible new materials (i.e. supply materials) and old timber. The latter, as has been explained, is not addressed by the standard. Although Hooker opined about how long the material had been at that location, the Court has determined that the standard contains no requirement that the one day supply of material be used up each day.<sup>10</sup> As such there was no testimony that the *supply* materials themselves amounted to more than a one day's supply, nor was there any rationale to explain how it was determined that such supply material was more than a day's worth. Instead, implicitly, the inspectors wrote into the standard words that do not appear in it, to wit: that the supply materials must be used up each day.

Despite this, an examination of the rulemaking for this standard reveals a more expansive intent of coverage. The proposed rule, which revised a previous version of the standard, stated "The proposed standard would apply only to surface areas of underground mines. *It would restrict accumulation of combustible materials*, but not prohibit their presence in transit or when used, in the construction of mine installations. In addition, it would retain the existing provision prohibiting dry vegetation within 25 feet of mine openings." 48 Fed. Reg. 45336, 45338 (Oct. 4, 1983) (emphasis added).

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<sup>9</sup> Were it not for the remedial nature of the Mine Act, this construction of the standard's terms has a logical appeal. Consider this scenario: At the start of a day, a mine operator has a one day's supply of combustible materials which is within 100 feet of a mine opening. That material remains there during the entire day until the last hour of work, when it is brought into the mine for use the following day. During the time the material remained within 100 feet of the opening, it would potentially be subject to combustion, but the standard does not prohibit its presence during those hours nor does it require any anti-combustion steps to be employed while it remains at that mine opening location.

<sup>10</sup> Because the Court has determined that the one day's supply need not be used up each day, the issue of the number of days the material was there is not of consequence. However, even if one were to conclude that such material must be used each day, the number of days this material was stored is fairly subject to debate. This is because there was un rebutted testimony that the mine did not operate on Friday or the weekend, reducing the number of days to one.

The Final Rule also reveals that the emphasis addressed storage of combustible materials,

Section 57.4131 Surface fan installations and mine openings. This standard revises § 57.4-42 and applies to surface fan installations and mine openings at underground mines. *It restricts storage of combustible materials in these areas* and prohibits dry vegetation within 25 feet of mine openings. In response to commenters, the final rule clarifies that the standard addresses fan installations used for underground ventilation. In addition, the final rule clarifies that the standard does not prohibit the actual transit of combustible materials into the mine. Some commenters stated that the standard should exempt materials used in construction of mine installations. The standard addresses the storage of combustible materials and does not prohibit their use in construction.

50 Fed. Reg. 4022, 4025 (Jan. 29, 1985) (emphasis added).

Accordingly, on the basis of the foregoing, the citation is **AFFIRMED**.<sup>11</sup>

#### **Penalty Determination for Citation No. 8879804**

The section 104(a) citation was marked as unlikely for gravity, non-significant and substantial, with lost workdays or restricted workdays expected, and with one person affected. The negligence was marked as “high.” The mine’s violation history is part of the record and was considered by the Court. GX 1. The Secretary’s post-hearing briefs did not refer to penalty factors other than the mine’s violation history, negligence, and indirectly, gravity, through the Inspector’s significant and substantial designation. The Respondent’s mine is small. Good faith in attempting to achieve rapid compliance was ascribed to the operator. Per Exhibit A, the number of repeat violations for this standard is listed as two and there was no cognizable claim that these two proposed penalties, if assessed, would have an effect on the operator’s ability to continue in business.

Given the facial ambiguity of the words employed in the standard, the Court concludes that the Respondent’s contentions cannot be dismissed as meritless. Therefore, the negligence is determined to be low. Considering each of the statutory factors the Court concludes that a civil penalty of \$75.00 (seventy-five dollars) is appropriate to impose.

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<sup>11</sup> No doubt, in reaction to this decision, when MSHA next inspects the Respondent’s mine, it will be attentive to this decision. Given that, the Court hopes that the Respondent will avoid future litigation by taking the simple prophylactic step of ensuring that its supply material and, for that matter, any combustible material, be located more than 100 feet from any mine opening.

## Citation No. 8879805

Regarding Citation No. 8879805, and the claim that the Respondent violated 30 C.F.R. § 57.11051(a), it is the Secretary's contention that the Respondent violated the standard by failing to maintain the designated secondary escapeway in a safe, travelable condition. Sec's Br. at 8. The applicable section from the cited standard provides: "Escape routes shall be - (a) Inspected at regular intervals and maintained in safe, travelable condition." 30 C.F.R. § 57.11051(a).

As with the other cited standard, this matter also arose in the wake of a hazard complaint. The Secretary maintains that Inspector Hooker's testimony establishes a violation of the cited standard. *Id.* at 9. The Secretary contends that Inspector Hooker believed in good faith that the muddy and wet conditions extended through the course of this entire secondary escapeway. *Id.* at 9 (citing Tr. 69:14-18). The Secretary also asserts that, per her evaluation of the gravity and negligence for this section 104(a) citation, it was reasonably likely that a miner traveling through the cited 21 Tunnel in a mine emergency would get stuck in the muddy conditions and that the expected injuries would be lost workdays or restricted duty. *Id.* at 10. The Secretary advises that determination was based on two considerations: the accompanying miner's statement that he travelled the 21 Tunnel on a weekly basis and the Inspector's good faith belief that the wet and muddy conditions had existed for more than a week. *Id.* The Inspector also expressed that "if a miner got stuck in the mud while hurrying through the 21 Tunnel in the event of a mine emergency, the miner would sustain injuries resulting in lost workdays/restricted duty." *Id.* This conclusion was based on "her knowledge, training and experience that a miner would sustain muscle strain or twisted ankle if he/she became stuck in the muddy conditions." *Id.*

The Inspector's negligence evaluation was initially deemed "high," but she reduced it to "moderate negligence" upon the exposed miner stating that the Respondent was working to improve safety at the mine. The Secretary also notes that field office supervisor Troy Van Wey testified that "Respondent had been cited numerous times prior to this inspection for a violation of the same standard (Section 57.11051(a)) due to conditions in the 21 Tunnel that made it impassable." *Id.* at 10-11.

The Secretary concludes that at least moderate negligence was involved and that, when considered with the significant and substantial characterization, the penalty assessed should at least be \$235.00. *Id.* at 11.

Respondent's Post-Hearing Brief contends that Inspector Hooker's complete lack of any mining experience contributed to her erroneous conclusions about this citation. Respondent claims that the 21 Tunnel passed inspection for a number of years and it was until recently that MSHA started having issues with it. Respondent also challenged the Inspector's claim that there was up to three feet of water in that escapeway, asserting that he has never experienced water going over his boots and the Inspector's boots were only six inches deep, which he opined were inadequate boots to be wearing. R's Br. at 14. Respondent also contended that the two inspectors had differing views of the water depth. *Id.*

## **Discussion**

### **Citation No. 8879805**

The Court also finds that standard 30 C.F.R. § 57.11051(a) was established as violated. The Court notes that the requirement to inspect at regular intervals was not part of the alleged violation. Instead, it was the claim that the escape route was not being “maintained in safe, travelable condition.” The testimony and the photographs, per GX 7, show some water in the escapeway, but apart from the Inspector’s testimony, the photos themselves do not show a “huge buildup of silt and mud that blocked passageway.” Even the Inspector was restrained in her description, stating that the mud and silt was muddy and sticky in certain parts. Further, when asked if the water and mud covered the entire bottom surface of the escapeway, Van Wey’s response was that there was one location that had most of the buildup which was measured to be about 52 inches from the side of the tunnel. A more fundamental problem was, when asked if the condition ran the course of the whole escapeway, neither inspector could answer about the extent of the problem. This was because neither inspector traveled past the area they observed. In fact, Hooker admitted that the water she observed may only have continued for a few feet. The presence of the pipe is a non-issue, because the inspectors were not claiming that was part of the violation. Thus, the issue was about mud and water only, with the testimony placing emphasis on the mud. As noted, the water, according to Van Wey was only “around ankle deep.” Tr. 134. Even the mud, Van Wey disclosed, sloughed off the right rib into the walkway with water running down the middle section of it.

### **The Court’s Determinations regarding Citation No. 8879805**

Based on the credible testimony of the inspectors, the Court finds that the violation was established. However, the Secretary’s proof of the extent of the condition was quite limited. Accepting that the mud and water observed diminished safe and travelable conditions, the evidence does not support a conclusion that this existed over a significant length of the escape route. The burden of proof, including the extent of a violative condition is on the Secretary<sup>12</sup> and, as Hooker admitted, the condition may have extended only a few feet. Neither she nor Van Wey knew the extent of the problem, electing not to travel beyond the point they encountered the conditions.

### **Penalty Determination for Citation No. 8879805**

The section 104(a) citation was marked as reasonably likely for gravity, and as significant and substantial, with lost workdays or restricted workdays expected and with one person affected. The negligence, first marked as “high” was later modified by the Inspector to “moderate.” As noted above, the mine’s violation history is part of the record and was considered by the Court. Ex. GX 1. The Secretary’s post-hearing briefs did not refer to penalty

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<sup>12</sup> The Secretary is required to prove all elements of the alleged violations by a preponderance of the evidence, which requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence. *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000) (internal citations omitted).

factors other than the mine's violation history, negligence, and indirectly, gravity, through the Inspector's significant and substantial designation. The Respondent's mine is small, good faith in attempting to achieve rapid compliance was ascribed to the operator. Per Exhibit A, the number of repeat violations for this standard is listed as zero<sup>13</sup> and there was no cognizable claim that these two proposed penalties, if assessed, would have an effect on the operator's ability to continue in business.

Although it is difficult to assess the gravity, given the limited evidence of the extent of the condition presented by the Secretary and taking into account Mr. Miller's testimony on the issue, the Court finds that the reasonable likelihood, and significant and substantial evaluation were established,<sup>14</sup> but in the context of a resulting lost workdays or restricted duty injury.

As for the moderate negligence designation, the Court notes that "[n]egligence is not defined in the Mine Act. The Commission has found that '[e]ach mandatory standard thus 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) ... [and] [i]n determining whether an operator meets its duty of care under the cited standard, the Commission considers what actions would have been taken under the same or similar circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation." *Sims Crane*, 39 FMSHRC 116, 118 (Jan. 2017) (ALJ McCarthy).

Further, it is a given that "Commission judges are not required to apply the level-of-negligence definitions in Part 100 penalty regulations and may evaluate negligence from the starting point of a traditional negligence analysis rather than from the Part 100 definitions. ... Thus, in making a negligence determination, a Commission judge is not limited to an evaluation of allegedly mitigating circumstances, but may consider the totality of the circumstances *holistically*." *Id.* (emphasis added).

The Court applies the holistic approach. Given the state of the evidence regarding the limited established extent of the condition, the Court finds that the level of negligence is fairly established as low.

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<sup>13</sup> Although the citation asserts that this standard was cited two times in the past two years and noting that inspector Van Wey asserted that the escapeway had been cited in the past, this is insufficient to establish as part of the violation history for this citation, given Exhibit A.

<sup>14</sup> The violation, as noted, was established. The discrete hazard is the risk of injury to a miner because the presence of the mud and water diminished safe and travelable conditions, whether during a regular inspection of the escape route, or during the need to use that escapeway in an emergency. The Inspector's testimony, which the Court accepts as credible, supports the conclusion that there is a reasonable likelihood that the violation will result in the hazard, that the hazard contributed to would result in an injury and, with the expected injury being lost workdays or restricted duty, such an injury is of a reasonably serious nature. *Newton Energy*, 38 FMSHRC 2033, 2036-39 (Aug. 2016).

Upon consideration of all of the penalty factors, the Court finds that a civil penalty of \$68.00 (sixty-eight dollars) is the appropriate assessment.<sup>15</sup>

### **ORDER**

For the reasons set forth above, Citation No. 8879804, which alleged a violation of 30 C.F.R. § 57.4131(a) is **AFFIRMED** and a civil penalty of \$75.00 is imposed.

For the reasons set forth above, Citation No. 8879805, which alleged a violation of 30 C.F.R. § 57.11051(a) is **AFFIRMED**, and a civil penalty of \$68.00 is imposed.

**A total civil penalty of \$143.00 is hereby imposed upon Respondent**, Original Sixteen to One Mine, Inc., for this violation. Payment is to be made to the Mine Safety and Health Administration within 40 days of the date of this Decision. Upon timely receipt of payment, the captioned civil penalty matters are **DISMISSED**.

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

#### Distribution:

Isabella M. Finneman, Esq., Office of the Solicitor, 90 Seventh Street, Suite 3-700,  
San Francisco, CA 94103

Michael Miller, President, Original Sixteen To One Mine, Inc., P. O. Box 909,  
Alleghany, CA 95910

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<sup>15</sup> As noted for the citation alleging combustible material storage, it is to be expected that if subsequent violations of this standard are alleged, the Secretary will likely overcome the evidentiary deficiencies identified in this decision and therefore the Court urges Mr. Miller to be vigilant in maintaining safe and travelable conditions in the mine's escape routes.



# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
721 19<sup>TH</sup> ST. SUITE 443  
DENVER, CO 80202-2500  
TELEPHONE: 303-844-5266 / FAX: 303-844-5268

June 28, 2018

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

v.

PEABODY MIDWEST MINING, LLC,  
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. LAKE 2017-450  
A.C. No. 12-02295-447106

Mine: Francisco Underground Pit

## DECISION

Appearances: Edward V. Hartman, U.S. Department of Labor, Office of the Solicitor  
230 S. Dearborn Street, Room 844, Chicago, Illinois 60604

Arthur Wolfson, Jackson Kelly PLLC, Three Gateway Center, Suite 1500,  
401 Liberty Avenue, Pittsburgh, Pennsylvania 15222

Before: Judge Simonton

### I. INTRODUCTION

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration, against Peabody Midwest Mining, LLC, (“Peabody” or “Respondent”), pursuant to the Federal Mine Safety and Health Act of 1977 (“Mine Act”), 30 U.S.C. §801.<sup>1</sup> At issue is one citation alleging that Peabody violated its Emergency Response Plan when it positioned a refuge chamber in the direct line of sight of a working face. Ex. S–2.

The parties presented testimony and documentary evidence at a hearing held in Henderson, Kentucky on March 28, 2018. MSHA Inspector Bryan Wilson testified for the Secretary. Peabody Director of Safety and Compliance Chad Barras and section foremen Mark Bedwell and Zeke Wilson testified for Respondent. After fully considering the testimony and evidence presented at hearing and the parties’ post-hearing briefs, I affirm the citation as written and assess a penalty of **\$50,000.00**.

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<sup>1</sup> In this decision, the joint stipulations, transcript, the Secretary’s exhibits, and Respondent’s exhibits are abbreviated as “Jt. Stip.,” “Tr.,” “Ex. S–#,” and “Ex. R–#,” respectively.

## II. STIPULATIONS OF FACT

The parties jointly filed the following stipulations of fact in their prehearing reports:

1. Peabody Midwest Mining, LLC, is an “operator” as defined in Section 3(d) of the Federal Mine Safety and Health Act of 1977, as amended (Mine Act), 30 U.S.C. § 803(d), at the coal mine at which the citation at issue in these proceedings was issued.
2. The Francisco Underground Pit mine is operated by Respondent in this case, Peabody Midwest Mining, LLC.
3. The Francisco Underground Pit mine is subject to the jurisdiction of the Mine Act.
4. At all relevant times, the products of the Francisco Underground Pit mine entered commerce or products affect commerce, within the meaning of the Mine Act, 30 U.S.C. §§ 802(b) and 803.
5. 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 and 823.
6. Section 316(b) of The Mine Act, 30 U.S.C. § 876(b) is a mandatory health or safety standard as that term is defined in Section 3(l) of the Mine Act, 30 U.S.C. § 802(l).
7. Payment by Respondent of the proposed penalty of \$44,546.00 will not affect Respondent’s ability to remain in business.
8. The individual whose signature appears in Block 22 of the citation at issue in these proceedings was acting in his official capacity and as an authorized representative of the Secretary of Labor when the citation was issued.
9. A duly authorized representative of the Secretary served the subject citation and any termination thereof upon the agent of the Respondent at the date and place stated therein, as required by the Mine Act, and the citation and termination may be admitted into evidence to establish its issuance.
10. The citation contained in Exhibit A attached to the Petition for Assessment of Penalty for this docket is an authentic copy of the citation at issue in this proceeding with all appropriate modifications and terminations, if any.
11. The subject refuge chamber was moved to entry no. 6 at the end of the day shift on July 18, 2017.
12. The exhibits listed in each party’s List of Witnesses and Exhibits are true and accurate copies of the originals.

### III. FINDINGS OF FACT AND SUMMARY OF TESTIMONY

Peabody Midwest Mining, LLC, owns and operates the Francisco Underground Pit, a bituminous coal mine located in Gibson County, Indiana. Peabody runs three working sections at the mine, identified as Units 1, 2, and 3. Tr. 95. Each working section is divided into an A-Crew, B-Crew, and C-Crew, and each crew occupies one of the three daily shifts; the day shift (7:00am to 3:00pm), the afternoon shift (3:00pm to 11:00pm), and the midnight shift (11:00pm to 7:00am). Tr. 95-96. Each working section produces coal on two of the three shifts and is idle for the third shift. Tr. 96-97. The idle shift crew is charged with setting up the section for production. Tr. 97.

In compliance with Section 2 of the MINER Act, Peabody implemented an Emergency Response Plan (“ERP”) designed to “provide for the evacuation of individuals endangered by an emergency” or “provide for the maintenance of individuals trapped underground in the event that miners are not able to evacuate the mine.” See 30 U.S.C. § 876(b)(2)(B). In order to prepare for the latter scenario, Peabody’s ERP includes requirements for the positioning and maintenance of two Refuge Chambers (“Chamber” or “Alternative”)<sup>2</sup> at each working section. Ex. S–2; Tr. 43, 81, 99. Specifically, the ERP provides:

Refuge chambers will not be placed in direct line of sight of the working face. Where feasible, refuge chambers will not be placed in areas directly across from, nor closer than 500 feet radially from belt drives, take-ups, transfer points, air compressors, explosive magazines, seals, entrances to abandoned areas, fuel, oil, or other flammable or combustible material storage.

Ex. S–2. Peabody Director of Safety and Compliance Chad Barras (“Barras”) helped write Peabody’s ERP and testified to its development and implementation.<sup>3</sup> Barras explained that the line of sight provision is designed to protect the refuge chambers from damage or destruction in the event of an ignition or explosion at the working face. Tr. 84-85. The chambers represent the last resort in the event of an emergency, and at all times Peabody’s preferred emergency response is total evacuation of the mine. Tr. 86.

In addition to the ERP’s requirements, the idle shift crew must also maintain the refuge chambers within 1,000 feet of the working face to comply with 30 C.F.R. § 75.1506(c)(1). Tr.

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<sup>2</sup> A Refuge Chamber is an enclosed structure designed to provide 96 hours of oxygen for miners to barricade in an emergency scenario where evacuation is not possible. Tr. 28. The chamber at issue measures about 10-12 feet wide and can hold as many as 20 miners, and contains various tools and supplies to assist in survival. Tr. 28, 31.

<sup>3</sup> Chad Barras is the Director of Safety and Compliance for Peabody Energy, the parent company of Peabody Midwest Mining. Tr. 74. He has worked for Peabody since 2004, and currently oversees safety operations at all Peabody mines in the Americas. *Id.* His responsibilities include conducting safety training and accident investigations, risk management, and compliance and litigation. Tr. 74, 91. Prior to working at Peabody, Barras was a ventilation engineer at MSHA. Tr. 75.

99-100. As a working section advances, the idle crew section foreman will review the unit map and determine when and to where the chambers should be moved. Tr. 100-01. The section foreman will then plot the chambers' new locations on the performance map. Tr. 37. All of the section foremen use the performance map to plot the chambers, sumps, and bolted and unbolted cuts, list needed supplies, and sign their visits to the area. *Id.*

During the week prior to the inspection at issue, Mark Bedwell II ("Bedwell"), section foreman for the Unit 1 A-Crew, determined that the refuge chambers soon needed to be moved. Tr. 94-97, 104-05. Normally, two miners can move the chambers in 30 to 45 minutes. Tr. 99-100. At that time, however, Unit 1 experienced an influx of water and mud that hindered the mine's ability to move the chambers to a location that complied with the ERP and the relevant Mine Act provisions. Tr. 102. Bedwell's crew worked to pump out the water and spread loads of bulk ash to try and solidify the ground to aid in moving the chambers. Ex. R-B; Tr. 106.

Mine conditions did not improve, however, and on July 18, 2017, Bedwell felt compelled to move the chambers. Tr. 114-15. Bedwell was able to place the first refuge chamber into crosscut #27 but did not believe that he could transport the second one into the 26 or 28 crosscuts due to the muddy conditions. Tr. 113-14. Instead, he placed the second chamber in the travelway approximately two feet off the rib and directly in the line of sight of the working face to comply with section 76.1506(c)(1) and to ensure that the chambers remained in consecutive order.<sup>4</sup> Ex. R-A; Tr. 31-31, 113-14, 155-56. Bedwell plotted the chamber locations on the performance map and planned to leave the chamber in the travelway for another couple of days until the belt and power center needed to be moved again. Tr. 149-50. Bedwell testified that at the time he was not aware that positioning the refuge chamber in the direct line of sight of the working face violated Peabody's ERP and would not have placed the chamber there had he known. Tr. 102, 148. He also testified, however, that at least one member of upper management knew that he placed the chamber in the travelway. Tr. 159.

On July 19, 2017, MSHA Inspector Bryan Wilson<sup>5</sup> ("Inspector Wilson") conducted a standard quarterly inspection at the Francisco Underground Pit. Tr. 24. He was accompanied by Peabody Safety Department employee Randy Hammond. *Id.* Since the second shift was running at the time of the inspection, Inspector Wilson wanted to walk the beltline and its intake to inspect the area while it was running coal. *Id.* The two walked past the unit power center at Entry #6 when Inspector Wilson noticed the refuge chamber positioned in the travelway. Tr. 27-28.

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<sup>4</sup> While unclear if required by the ERP, the mine's standard practice is to place the refuge chambers in consecutive crosscuts so that miners would be able to locate them easily in an emergency situation. Tr. 153, 155-56.

<sup>5</sup> Bryan Wilson has been an MSHA inspector for over five years. Tr. 18. He previously worked as a coal miner for Sunrise Coal, LLC for five years, spending three years as an equipment operator and laborer, one year as an examiner, and one year as an examiner and fill-in foreman. *Id.* Wilson completed training at the Mine Safety and Health Academy, and has taken accident training and journeyman training. Tr. 19. He inspects approximately four mines per year. *Id.*

Inspector Wilson immediately recognized that the chamber's position violated the mine's Emergency Response Plan. Tr. 28-29. Wilson believed that the mine could have placed the chamber in crosscut #28, which already contained a high voltage tub and a slinger duster and showed no obvious irregularities or adverse conditions unfit for holding the chamber. Tr. 33.

When Inspector Wilson asked Hammond why the refuge alternative was located in the travelway and not in the crosscut, Hammond could not provide a satisfactory answer. Hammond first responded that the ERP required placement out of the line of sight of the working face only when feasible given the mine conditions. Tr. 29-30. Wilson knew this to be an incorrect reading of the ERP. *Id.* When Wilson pressed Hammond a second time, Hammond replied "I got nothing for you." Tr. 34.

Inspector Wilson informed Hammond that he intended to issue a section 104(d)(1) citation, and Hammond subsequently shut down the section and retrieved a foreman. *Id.* Inspector Wilson and Hammond met foreman Zeke Wilson in entry #4. Tr. 35. When informed of the violation, Inspector Wilson testified that Foreman Wilson was "shocked, surprised. His eyes were – were big. He appeared that he couldn't believe it." *Id.*

Inspector Wilson gave the mine one hour and 15 minutes to abate the citation and move the refuge chamber into crosscut #28. *Id.* During the abatement period, Inspector Wilson returned to the spool area where he located the section's performance map. Tr. 37. The map showed the refuge alternative plotted in direct line of sight of the face. *Id.* Upon further review of the map and other records, Wilson determined that the chamber had been in the travelway for at least 24 hours. Tr. 48.

Neither party disputes that Peabody utilized ten miners and the entire 75-minute abatement period to reposition the refuge chamber into crosscut #28. Tr. 172. However, the parties disagree as to the extent of the undesirable conditions in the mine at the time of the inspection. According to the Respondent, the abatement required significant additional steps to cope with the conditions. The miners had to jerk and pull the chamber due to the mud and water and feared that the chamber would drag against the rib because the scoop was sliding in the mud. Tr. 169-70. Eventually, the miners attached a strap from the bucket of the scoop to the front of a coal hauler to pull the chamber into the crosscut. *Id.* The miners removed the voltage tub and slinger from the crosscut, centered the chamber, installed roof jacks, and reconnected the communication and life lines. Tr. 40. Inspector Wilson disagreed and testified that he did not observe severely adverse conditions or any notable difficulty repositioning the refuge chamber in the crosscut. Tr. 40-41. Wilson did not observe any of the common issues that he associated with the moving process, including scoops spinning out, ruts in the ground, or the need for timbers or additional scoops. *Id.*

Inspector Wilson issued Citation No. 9105403 alleging a violation of 30 U.S.C. § 876(b). The citation states:

The mine's Approved Emergency Response Plan is not being complied with on active #1 united. The Approved Emergency Response Plan states on page 9, first paragraph, that refuge chambers will not be placed in direct line of sight of

working face. Refuge Chamber serial #452089-04-13 was located between crosscut #27 and #28, entry #6, MMU-011, approximately 480 feet outby the working face in direct line of sight. Unit #1 was running and coal was being extracted from the face and sent to the surface by belt conveyor. The operator engaged in aggravated conduct constituting more than ordinary negligence. This violation is an unwarrantable failure to comply with a mandatory standard.

Ex. S-1. He designated the citation S&S, reasonably likely to be fatal, and the result of Peabody's high negligence and unwarrantable failure to comply with the Mine Act. *Id.* The Secretary proposed a civil penalty of \$44,546.00. *Id.*

#### **IV. DISPOSITION**

The Secretary argues that the Respondent violated Section 316(b) by failing to follow its Emergency Response Plan. Secretary's Post-Hearing Brief ("Sec'y Br.") at 9. The Secretary contends that the violation was S&S because an explosion or ignition was reasonably likely to damage or destroy a chamber located in the line of sight of the working face, thereby rendering it unusable and exposing miners to serious injuries. *Id.* at 11-12. The Secretary also argues that the high negligence and unwarrantable failure determinations are proper because multiple mine employees knew or should have known that the position of the refuge chamber violated the ERP, the condition existed for three shifts and would have existed longer but for the citation, and the condition posed a significant danger to miner safety. *Id.* at 8, 13, 15-16. As such, the Secretary requests that the court uphold citation as written and affirm the regularly-assessed penalty of \$44,546.00. *Id.* at 22-23.

Peabody contests the S&S, negligence, unwarrantable failure, and penalty designations. Respondent's Post-Hearing Brief ("Resp. Br.") at 10. Respondent argues that the Secretary's S&S designation is improper because the particular facts and circumstances surrounding the violation do not support the reasonable likelihood that miners would be unable to seek refuge in the event of an explosion. *Id.* at 21-22. Peabody contends that the Secretary's high negligence designation is not appropriate because Foreman Bedwell took considerable measures to improve the condition of crosscut #28 prior to the inspection and made a good faith mistake as to the ERP's refuge chamber requirements. *Id.* at 11-12. The Respondent further contends that the unwarrantable failure designation is improper because Peabody was not placed on notice that greater efforts were necessary to comply with the ERP provision, the cited condition was not extensive, did not exist for more than 24 hours, and did not pose a high degree of danger. *Id.* at 14-18. As a result, the Respondent contends that the Secretary's assessed penalty is excessive. *Id.* at 24-25.

##### **A. Citation No. 9105403**

The parties do not dispute the material facts surrounding the violation. Section 316(b) requires every underground coal mine to develop a written plan to provide for the evacuation of all individuals in an emergency and provide for the maintenance of miners trapped underground where evacuation is not possible. 30 U.S.C. § 876(b)(2). Peabody's Emergency Response Plan

explicitly states that “[r]efuge chambers will not be placed in direct line of sight of the working face.” Ex. S-2.

Here, the refuge chamber was placed in the travelway toward the beltline in the #6 entry in the direct line of sight of the working face. Ex. R-A; Tr. 27-29. Peabody’s witnesses admitted at hearing that the refuge chamber’s placement was in contravention of the mine’s ERP. Tr. 92, 148, 177.

Accordingly, the fact of violation is affirmed.

## **B. Significant & Substantial**

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).

I have already found that Peabody Midwest violated section 316(b), a mandatory safety standard, when it placed the refuge chamber in the direct line of sight of the working face in contravention of its ERP. The first *Mathies* element is therefore satisfied.

I next turn to whether the violation was reasonably likely to contribute to the hazard contemplated by the standard. As an initial matter, the Commission has recognized that emergency standards “are different from other mine safety standards” because they are “intended to apply meaningfully only when an emergency actually occurs. *IGC Illinois, LLC*, 38 FMSHRC 2473, 2476 (Oct. 2016) *citing Cumberland Coal Res., LP*, 33 FMSHRC 2357, 2367 (Oct. 2011), *aff’d* 717 F.3d 1020 (D.C. Cir. 2013). Thus, when determining whether a violation of an emergency standard is S&S, the violation should be considered in the context of the emergency

contemplated by the standard and the court should assume the existence of the emergency when defining the hazard. *Id.*

Section 316(b) requires mines to develop a plan to facilitate prompt emergency evacuation or, when evacuation is impossible, ensure survival underground until rescue is possible. The line of sight provision in Peabody's ERP is intended to protect refuge chambers from damage or destruction in the event of a large fire or explosion at the working face. Ex. S-2; Tr. 84-85. The Commission has found that standards pertaining to refuge chambers are "intended to apply in the context of an emergency so severe as to make an evacuation impossible, survival outside of the refuge unlikely, and travel extremely difficult in the face of the smoke, debris, and possible injury." *ICG Illinois, LLC*, 38 FMSHRC at 2477 (finding that a mine's failure to position the refuge chamber within 1,000 feet of the nearest working face was S&S). Thus, the contemplated discrete safety hazard is that in an emergency situation where evacuation is impossible, miners would be unable to follow the ERP and access or utilize a refuge chamber.

Assuming an emergency in which evacuation is impossible, I find that Peabody's failure to comply with its ERP was reasonably likely to contribute to the discrete safety hazard of miners being unable to use the refuge chamber. Inspector Wilson and Safety Director Barras both testified that the ERP prohibits positioning the refuge chamber in the direct line of sight of the working face because an explosion traveling outby could damage or destroy the chamber. Tr. 29-30, 84-85. The Francisco Underground Pit is a five-seam coal mine that liberates one million cubic feet of methane daily, and any ignition would likely be significant. Tr. 90. The refuge chamber was located in the direct line of sight and within 480 feet outby the working face. Ex S-1. It is therefore reasonably likely that a chamber placed in the line of sight of the working face would be subject to destruction or damage beyond use in the event of an explosion or ignition.

Peabody contends that the violation is unlikely to contribute to the hazard because the mine would have to simultaneously experience (1) a buildup of methane and float dust, (2) cutting in entry #6, (3) and an explosion with sufficient force to disrupt the refuge chamber. Resp. Br. at 22. Furthermore, Peabody argues that more than 20 miners were only present at the face during a hot-seat change<sup>6</sup> and that work is not performed during those changes. *Id.* at 23. Thus, Peabody argues that an ignition in which the use of both chambers would be necessary is unlikely. *Id.*

Respondent's argument fails to properly assume the emergency contemplated by the standard. Consideration of whether the mine's conditions are likely to cause an explosion at the face is irrelevant because an explosion or ignition event must be assumed in the context of the standard. *Cumberland Coal Res., LP*, 33 FMSHRC 2357, 2368 (Oct. 2011); *See Warrior Investments Co., Inc.*, 38 FMSHRC 651, 657 (Apr. 2016) (ALJ) (holding that a mine's low methane levels and the lack of fire, ignition, or explosion history are not relevant where the court must presume the type of an emergency where a beacon reader on the chamber becomes relevant). In this case, the court must presume the occurrence of a fire or ignition significant

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<sup>6</sup> A "hot seat change" occurs when the miners on a given shift stay at the working section until the oncoming crew actually reaches the unit. Tr. 82-83.



enough to prevent miners from evacuating the mine and rendering the chambers necessary for refuge or survival.

Peabody's claim that both chambers would only be necessary if an ignition occurred during a hot-seat change and that no work is performed during those changes is not supported by the ERP's language or the record. The number of refuge chambers required in a given area is dictated by the number of employees that may work in the area, and the ERP explicitly requires two refuge chambers with the capacity to hold 20 miners apiece. Tr. 81-82. Barras testified that both chambers are necessary because more than 20 miners can be present at the working face on a given shift, not only during hot-seat changes. *Id.* Barras also noted that work does not necessarily stop during those changes. *Id.* Even assuming that hot-seat changes were the only time in which more than 20 miners could be at the working face, the refuge chamber was positioned in the cited location for 24 hours and would have been there for another two days if not for the citation. Tr. 48, 150. Assuming continuing mining operations, the chamber would have been in the direct line of sight of the face for up to three days, over which nine hot-seat changes could take place. Tr. 53, 150. The Secretary has satisfied the second *Mathies* element.

In the context of an ignition or explosion rendering evacuation impossible, the hazard of miners being unable to effectively use a refuge chamber is reasonably likely to result in fatal injuries. "Since refuge chambers are meant to ensure survival during an emergency which has created inhospitable conditions, then common sense dictates that an inability to reach the refuge chamber threatens miners' survival." *ICG Illinois*, 38 FMSHRC at 2481. The same logic applies when miners are unable to utilize a damaged or destroyed refuge chamber. In such dire circumstances miners would be reasonably likely to sustain serious if not fatal injuries. Aside from the miners' exposure to the triggering event that damaged the chamber, the potential dangers posed by the compromised chamber could include the inability to communicate with the surface, the lack of necessary equipment to perform first aid or other life-saving procedures, and the lack of oxygen to survive in a heavy smoke-filled environment. Tr. 43-46. All of these possibilities are reasonably likely to result in severe or fatal injuries. The third and fourth elements of *Mathies* are therefore met.

Accordingly, I find that the violation was S&S.

### **C. Negligence and Unwarrantable Failure**

Inspector Wilson designated the citation as high negligence and an unwarrantable failure. The Commission has recognized the close relationship between a finding of high negligence and a finding of unwarrantable failure. *See Dominion Coal Corp.*, 35 FMSHRC 1652, 1663 (June 2013) (ALJ), *citing San Juan Coal Co.*, 29 FMSHRC 125, 139 (Mar. 2007).

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). The Mine Act defines reckless disregard as conduct which exhibits the absence of the slightest degree of care, high negligence as actual or constructive knowledge of the violative condition without mitigating circumstances; moderate negligence as actual or constructive knowledge of

the violative condition with mitigating circumstances; and low negligence as actual or constructive knowledge of the violative condition with considerable mitigating circumstances. 30 CFR § 100.3: Table X.

The Commission and its judges are not bound to apply the part 100 regulations that govern MSHA's determinations addressing the proposal of civil penalties. *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2048 (Aug. 2016), *citing Brody Mining, LLC*, 37 FMSHRC 1687, 1701-03 (Aug. 2015). The Commission instead employs a traditional negligence analysis, assessing negligence based on whether an operator failed to meet the requisite standard of care. *Brody*, 37 FMSHRC at 1702. In doing so the Commission considers what actions a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation, would have taken under the same circumstances. *Id.* Commission judges are thus not limited to an evaluation of mitigating circumstances but may instead consider the totality of the circumstances holistically." *Id.*; *see also Mach Mining*, 809 F.3d 1259, 1264 (D.C. Cir. 2016).

More serious consequences can be imposed for violations that result from the operator's unwarrantable failure to comply with mandatory health or safety standards under section 104(d) of the Mine Act. Section 104(d)(1) states:

If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health standard...and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such findings in any citation given to the operator under this Act.

Unwarrantable failure is defined as aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (Dec. 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "willful intent", "indifference," or the "serious lack of reasonable care." *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 193-94 (February 1991).

The Commission considers the following factors when determining the validity of 104(d)(1) and 104(d)(2) orders: (1) the length of time that the violation has existed and the extent of the violative condition, (2) whether the operator has been placed on notice that greater efforts were necessary for compliance, (3) the operator's efforts in abating the violative condition, (4) whether the violation was obvious or posed a high degree of danger and (5) the operator's knowledge of the existence of the violation. *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000). 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. *IO Coal Co.*, 31 FMSHRC 1346, 1351 (Dec. 2009).

### 1. Operator's Knowledge of the Violation

An operator's knowledge of a violation is an important factor in unwarrantable failure analysis and is a requirement for a finding of high negligence under 30 C.F.R. § 100.3. *Maryan Mining, LLC*, 37 FMSHRC 1715, 1723 (Aug. 2015) (ALJ). Where an agent of an operator has knowledge or should have known of a safety violation, such knowledge should be attributed to the operator. *Martin Marietta Aggregates*, 22 FMSHRC 633, 637 (May 2000). The knowledge or negligence of an agent may be imputed to the operator. *Id.*

I find that the operator had knowledge of the violation. Mark Bedwell was Section Foreman of the A-Crew on Unit 1 and in charge of moving and plotting the chambers' positions on the performance map. Tr. 102, 138, 148. He admitted at hearing that he was unaware of the ERP's line of sight requirement. Tr. 128. While I credit Bedwell's testimony that he would not have placed the chamber there had he known it was in violation of the ERP, this assertion does not excuse his lack of familiarity with the ERP, a document crucial to ensuring the safety of Peabody's miners. Tr. 148. The record shows that Bedwell was familiar with other mine policies and Mine Act requirements as to the chambers' positioning, and as a section foreman should have known to avoid placing the chamber in the line of sight of the working face. Tr. 149, 151, 155-56. As an agent of Peabody, his negligence is imputed to the operator.

Even assuming, as Respondent contends, that Bedwell acted in good faith, other members of Peabody mine management knew or should have known that the refuge chamber was positioned in violation of the ERP. The refuge chamber sat in the direct line of sight of the working face for 24 hours and was subject to three pre-shift examinations by section foremen, none of whom took any steps to move the chamber or to notify Bedwell to do so. Ex. S-2, S-4; Tr. 48-51. Most concerning, Bedwell provided undisputed testimony that mine manager Mike Butler, a member of upper management, knew that the refuge chamber was positioned in the travelway but took no action and provided no direction or assistance to ensure compliance. Tr. 159-60. Peabody therefore knew or should have known of the violation.

### 2. Duration of the Violation

The refuge chamber existed in the direct line of sight of the working face for 24 hours. Tr. 48. The area was subject to three pre-shift examinations by different section foremen during that time and was plotted on the performance map. Ex. S-4; Tr. 48-53. Furthermore, Foreman Bedwell testified that if it weren't for the citation, the chamber would have remained in the same spot for at least a couple more days. Tr. 150.

### 3. Extent of the Violation

The violation was extensive. The refuge chamber was large and could hold as many as 20 miners for up to 96 hours in an emergency situation. Tr. 28, 31. It constituted half of the refuge chambers required by the mine's ERP in the area. The refuge chamber's position would impact the entire crew at the working section in an emergency situation and could affect two crews during a hot-seat change. Tr. 82-83. Should the chamber be damaged or destroyed during an

emergency, multiple miners could be subjected to serious or fatal injuries because they could not access or utilize the chamber.

More importantly, I find that the violation was extensive due to the widespread failure of multiple members of mine management to recognize or address the situation. *See M-Class Mining, LLC*, 39 FMSHRC 1013, 1030 (May 2017) (ALJ) (finding a violation extensive where five members of mine management had the knowledge and multiple opportunities to comply with a standard but failed to do so). As discussed above, these employees were aware of the chamber's position and should have known that it violated the ERP. Tr. 48-51, 104, 159-60. Nonetheless, the chamber remained in the violative position for 24 hours, and if not for the citation it would have remained there for another couple of days. Tr. 150.

This combination of ignorance and knowing inaction on the part of management suggests that the operator was either highly negligent in training its section foremen on the ERP, highly negligent in executing the ERP, or both. Foreman Bedwell's unfamiliarity suggests a lack of or deficiency in training on effective preparation and execution of the ERP. Bedwell testified that he had read the ERP but did not remember the cited provision, and had never been trained on the ERP. Tr. 128-29, 148. Barras also failed to recall instituting any training on the ERP. Tr. 91.

Yet the record shows that only Bedwell was unaware of the terms, and makes no indication as to why the other members of management failed to act. At best, those individuals were also inadequately trained and did not recognize the violative condition. At worst, those other members were aware of the violative condition and did nothing. Particularly concerning is Bedwell's acknowledgment that Mine Manager Mike Butler was aware of the chamber's position and took no action to provide direction to Bedwell or any other section foreman. Tr. 159-60.

In all, four members of mine management failed to act on multiple occasions despite knowing that the refuge chamber was placed in the direct line of sight of the working face. Whether due to deficient training or willful inaction, Peabody's negligent conduct was extensive.

#### 4. Obviousness of the Hazard and Degree of Danger

The hazard was obvious. The language of the ERP is clear that refuge chambers cannot be placed within the direct line of sight of the working face. Ex. S-2. Any miner familiar with the ERP would have immediately recognized the violative condition. Not only was the chamber clearly visible to all of the miners that worked in Unit 1, but it was plotted on the performance map available to management. Tr. 37, 149-50. Inspector Wilson testified as to multiple Peabody employees and management members being surprised or in shock when finding out that the chamber was positioned in the travelway in direct line of sight of the working face. Tr. 35, 138-42.

As discussed in relation to the S&S finding, the chamber's placement posed a high degree of danger to miners at the working section. Barras and Wilson testified that in an emergency the refuge chamber is the last resort for miners to seek immediate protection and survive until rescue is possible. Tr. 46, 86. The mine's placement of the refuge chamber exposed

it to damage or destruction in the event of an ignition at the face. An irreparably damaged or destroyed refuge chamber has no safety value in an emergency situation. The chamber's placement was therefore highly dangerous.

#### 5. Abatement Efforts

Abatement efforts relevant to the unwarrantable failure analysis are those made prior to the issuance of the citation or order. *Consolidation Coal Co.*, 35 FMSHRC 2326, 2342-43 (Aug. 2013); *New Warwick Mining Co.*, 18 FMSHRC 1568, 1574 (Sept. 1996).

Here, Peabody knew or should have known of the violation but did not move the chamber out of the line of sight of the working face until Inspector Wilson issued the 104(d)(1) citation. Ex. S-4; Tr. 159-60. If not for the citation the chamber would have remained in the violative condition for at least another two days. Tr. 150.

I reject Peabody's contention that Bedwell's efforts to improve conditions in the working section using pumps and ash constitute a mitigating circumstance. Resp. Br. at 11. Although I credit the testimony of the Respondent's witnesses that wet and muddy conditions existed at the mine, those same conditions existed the next day when Peabody successfully moved the refuge chamber into crosscut #28 to abate the citation. Tr. 33, 114, 167. Although it took longer than usual to move the chamber into the crosscut during abatement, Peabody was still able to do so in a relatively short period of time, and part of the delay was due to the need to remove the equipment already placed in the crosscut. Tr. 35, 40, 114, 167. Respondent could have properly positioned the chamber in the crosscut prior to the inspection if it wished to dedicate the time and manpower to ensure compliance with the ERP, but did not do so until cited. Abatement is therefore not a mitigating factor in this case.

#### 6. Notice to the Operator that Greater Efforts Were Necessary for Compliance

The notice factor of the unwarrantable failure analysis pertains to previous citations, directives, and communications prior to the violation at issue that notify the operator of hazardous conditions or practices. *Consolidation Coal Co.*, 22 FMSHRC 2326, 2342 (Aug. 2013); *IO Coal Co.*, 31 FMSHRC 1346, 1353-55 (Dec. 2009).

Here, there is no evidence Peabody was placed on notice of the need for greater compliance in the past.

#### 7. Conclusion

Based on the foregoing, especially the operator's knowledge of the violation, mine management's extensive negligence in training its employees to understand and execute the ERP, and the violation's obviousness and high degree of danger, I find that Peabody engaged in aggravated conduct constituting more than ordinary negligence. Though Peabody was not placed on notice of the need for greater compliance, the placement of the chamber was a clear violation of the ERP, a crucial document to miners' safety and well-being in the mine. While the violation only existed for 24 hours, it would have existed for at least another 48 hours if not for the citation

and was either missed or ignored by multiple agents of the operator. In essence, Peabody failed to take a thorough and cautious approach to implementing its ERP and did not offer any credible mitigating factors.

Accordingly, I find that the violation constituted an unwarrantable failure, and for the same reasons find that Peabody's negligence was high.

## V. 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).

The Secretary proposed a regularly assessed penalty of \$44,546.00. Peabody had one previous violation of section 316(b) over the past two years and was not assessed additional points for violation history. *See* Sec'y Br. at 22. The parties stipulated that payment of the proposed penalty of \$44,546.00 will not affect Respondent's ability to remain in business. *Jt. Stip. # 7*. Peabody immediately dedicated ten miners and over an hour of time to abate the condition following the issuance of the citation. *Tr. 62-63, 150, 172*. However, Peabody also admitted that if not for the citation the refuge chamber would have likely remained in the direct line of sight of the working face for another couple of days. *Tr. 150*.

I discussed my gravity and negligence findings in greater detail above. Peabody violated the standard and the violation was S&S and reasonably likely to be fatal. I affirmed the Secretary's high negligence and unwarrantable failure designations because at least four members of mine management including the mine manager knew or should have known of the violation and failed to act. Of particular concern is upper management's knowledge of the violation, and its failure to act or to properly train its section foremen on the ERP's terms and their importance.

In light of the above, the court believes that the proposed penalty is not sufficient given the context and severity of the violation. Section 316(b) is intended to maximize miners' chances of survival in the face of an emergency, and the refuge chambers represent the miners' last resort in such circumstances. Yet Peabody showed little regard for the chamber's vulnerable position and its importance to effectively executing the ERP if the need arose. Despite being able to move the chamber with slightly more time and manpower than usually required, Peabody elected not to

act and would have left the chamber in the direct line of sight of the working face for even longer. These decisions put miners' lives at risk. After considering the penalty criteria, I assess a penalty of **\$50,000.00**.

## VI. ORDER

Respondent is hereby **ORDERED** to pay the Secretary of Labor the total sum of **\$50,000.00** within 30 days of this order.<sup>7</sup>

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

Distribution: (U.S. First Class Mail)

Edward V. Hartman, Esq., U.S. Department of Labor, Office of the Solicitor, 230 South Dearborn Street, Suite 844, Chicago, Illinois 60604

Arthur Wolfson, Esq., Jackson Kelly PLLC, Three Gateway Center, Suite 1500, 401 Liberty Avenue, Pittsburgh, PA 15222

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<sup>7</sup> Payment should be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, P. O. BOX 790390, ST. LOUIS, MO 63179-0390

# FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
1331 PENNSYLVANIA AVE., NW, SUITE 520N  
WASHINGTON, DC 20004-1710  
Telephone: (202) 434-9950 FAX: (202) 434-9954

June 29, 2018

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

v.

OIL-DRI PRODUCTION COMPANY,  
Respondent.

CIVIL PENALTY PROCEEDINGS

Docket No. SE 2015-0285  
A.C. No. 22-00035-380097

Docket No. SE 2015-0418  
A.C. No. 22-00035-387993

Mine: Ripley Mine and Mill

## **DECISION AND ORDER**

Appearances: Daniel T. Brechbuhl, U.S. Department of Labor, Office of the Solicitor, Denver, CO, for the Petitioner;

Douglas A. Graham, Oil-Dri Corporation of America, Chicago, IL, for the Respondent.

Before: Judge L. Zane Gill

These proceedings under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994), involve 14 citations issued by Inspectors Michael LaRue and John Howerton during their MSHA E01 inspections in March and June 2015, at the Ripley Mine and Mill near Ripley, Tippah County, Mississippi. SE 2015-0285 comprises 11 citations written by Inspector LaRue on March 18, 23, and 24, 2015: Citation Nos. 8820563, 8820564, 8820565, 8820567, 8820568, 8820569, 8820571, 8820573, 8820574, 8820575, and 8820576. SE 2015-0418 comprises the remaining three citations issued by Inspector Howerton on June 22 and 23, 2015: Citation Nos. 8818317, 8818319, and 8818320. The Ripley mine processes clay material. The trial was held in Memphis, Tennessee, on March 8 and 9, 2016.

### **I. PROCEDURAL HISTORY**

Of the 14 citations issued by Inspectors LaRue and Howerton, 12 were presented for decision. Citation No. 8818317 (Howerton), involving a dispute over fire extinguisher inspection records, was vacated during the hearing on motion by Respondent. (Tr.164:16-19) In addition, Respondent agreed to accept and pay a penalty of \$100.00 for Citation No. 8820576 (LaRue), involving a missing accident report. (Tr.18:18-19:7)



The 12 remaining citations were grouped for presentation and discussion into a collection of seven housekeeping violations,<sup>1</sup> two dust truck violations,<sup>2</sup> and three stand-alone violations: the first alleging that an over-the-road driver tarped his load without fall protection (Citation No. 8818320); the second alleging inadequate lighting in the verge storage tank area (Citation No. 8820571); and, the third alleging that a pre-use inspection of a work area had not been done (Citation No. 8820575).

The housekeeping citations allege violations of 30 C.F.R. § 56.20003(a). Citation No. 8820571 (inadequate lighting) alleges a violation of 30 C.F.R. § 56.17001. The first dust truck citation, No. 8820573, alleges a violation of 30 C.F.R. § 56.14100(c), and the second, No. 8820574, alleges a violation of 30 C.F.R. § 56.14101(a)(3). The examination of working places citation, No. 8820575, alleges a violation of 30 C.F.R. § 56.18002(a). Finally, the fall protection citation, No. 8818320, alleges a violation of 30 C.F.R. § 56.15005.

## II. STIPULATIONS

The parties read the following stipulations into the record:

1. Oil-Dri Production Company (“ODPC”) was at all times relevant to these proceedings engaged in mining activities at the Ripley Mine and Mill in or near Ripley, Mississippi.
2. ODPC’s mining operations affect interstate commerce.
3. ODPC is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (The “Mine Act” or “Act”).
4. ODPC is an “operator” as that word is defined in section 3(d) of the Mine Act, 30 U.S.C. § 803(d), at the Ripley Mine and Mill (Federal Mine I.D. No. 22-00035) where the contested citations in these proceedings were issued.
5. The Administrative Law Judge has jurisdiction over these proceedings pursuant to section 105 of the Act.
6. On or about March 18, 2015, through June 23, 2015, Mine Safety and Health Administration (“MSHA”) Inspectors Michael LaRue and John Howerton were acting as duly authorized representatives of the United States Secretary of Labor, assigned to MSHA, and were acting in their official capacity when conducting the inspection and issuing the citations from dockets SE 2015-0285 and 0418, at issue in these proceedings.

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<sup>1</sup> Inspector Howerton wrote one housekeeping violation, Citation No. 8818319, and Inspector LaRue wrote the other six: Citation Nos. 8820563, 8820564, 8820565, 8820567, 8820568, and 8820569.

<sup>2</sup> Citation Nos. 8820573 and 8820574.

7. The citations at issue in these proceedings were properly served upon ODPC as required by the Act and were properly contested by ODPC.
8. The citations at issue in these proceedings may be admitted into evidence by stipulation for the purpose of establishing their issuance. Materials published on MSHA's website or otherwise published by MSHA may also be admitted into evidence by stipulation for the purpose of establishing their issuance and availability. The truthfulness or relevancy of any statements asserted therein is not stipulated to by the parties.
9. ODPC demonstrated good faith in abating the violations.
10. Without ODPC admitting the propriety or reasonableness of the penalties proposed herein, the penalties proposed by the Secretary in this case will not affect the ability of ODPC to continue in business.

### **III. DECISION SUMMARY**

#### **A. Docket No. SE 2015-0418**

##### **1. Citation No. 8818317 – Fire Extinguisher Annual Inspection**

Respondent did not violate 30 C.F.R. § 56.4201(a)(2). The citation is vacated.

##### **2. Citation No. 8818319 – Old Clay Shed**

Respondent violated 30 C.F.R. § 56.20003(a) by failing to keep the old clay shed clean and orderly. The disarray described in the violation narrative created a slip–trip–fall hazard to miners. The violation was unlikely to result in a lost-workday or restricted-duty injury for one person. The violation was the result of moderate negligence. The assessed penalty is \$100.00.

##### **3. Citation No. 8818320 – Flat Bed Truck (#456)**

Respondent violated 30 C.F.R. § 56.15005 when an over-the-road truck driver failed to use safety belts and lines where there was a fall danger. The irregular surface on the top of the truck bed created a slip–trip–fall hazard to the driver. The violation was reasonably likely to result in a permanently disabling injury for one person. The violation was significant and substantial (“S&S”). The violation was the result of no negligence. The assessed penalty is \$130.00.

#### **B. Docket No. SE 2015-0285**

##### **1. Citation No. 8820563 – New Agg Discharge Cooler**

Respondent violated 30 C.F.R. § 56.20003(a) by failing to keep the new Agg discharge cooler clean and orderly. The material accumulation described in the violation narrative created a slip–trip–fall hazard to miners. The violation was reasonably likely to result in a lost-workdays or restricted-duty type injury for one person. The violation was S&S. The violation was the result of moderate negligence. The assessed penalty is \$634.00.

## **2. Citation No. 8820564 – RVM Discharge End Platform**

Respondent violated 30 C.F.R. § 56.20003(a) by failing to keep the RVM discharge end platform clean and orderly. Accumulated material, tools, and spray cans in the work area created a slip–trip–fall hazard to miners. The violation was unlikely to result in a lost-workdays or restricted-duty injury for one person. The violation was the result of moderate negligence. The assessed penalty is \$127.00.

## **3. Citation No. 8820565 – Ground Level of the Old Agg Scrubber**

Respondent violated 30 C.F.R. § 56.20003(a) by failing to keep the ground level of the old agg scrubber clean and orderly. An accumulation of material on the ground level of the old agg scrubber created a slip–trip–fall hazard to miners. The violation was reasonably likely to result in a lost-workdays-or-restricted-duty-type injury for one person. The violation was S&S. The violation was the result of moderate negligence. The assessed penalty is \$634.00.

## **4. Citation No. 8820567 – Third Floor of the Mill Building**

Respondent violated 30 C.F.R. § 56.20003(a) by failing to keep the third floor of the mill building clean and orderly. Deep material accumulation and a chair in a passageway on the third floor of the mill building created a slip–trip–fall hazard to miners. The violation was unlikely to result in a lost-workdays or restricted-duty injury to one miner. The violation was the result of moderate negligence. The assessed penalty is \$127.00.

## **5. Citation No. 8820568 – Walkway Around the 4 & 5 Pre-Grind Mills**

Respondent violated 30 C.F.R. § 56.20003(a) by failing to keep the walkway around the 4 & 5 pre-grind mills clean and orderly. Deep accumulations covering floor irregularities on the walkway around the 4 & 5 pre-grind mills created a slip–trip–fall hazard to miners. The violation was reasonably likely to result in a lost-workdays or restricted-duty injury to one miner. The violation was S&S. The violation was the result of high negligence. The assessed penalty is \$2,107.00.

## **6. Citation No. 8820569 – Ground Level of the Mill Building**

Respondent violated 30 C.F.R. § 56.20003(a) by failing to keep the ground level of the mill building clean and orderly. Significant material accumulations created a slip–trip–fall hazard to miners. The violation was reasonably likely to result in a lost-workdays or restricted-duty injury to one miner. The violation was S&S. The violation was the result of high negligence. The assessed penalty is \$2,107.00.

## **7. Citation No. 8820573 – Dust Truck Tagging**

Respondent violated 30 C.F.R. § 56.14100(c) by failing to remove a Ford L9000 dust truck from service after defects affecting safety were observed during a pre-operational examination. Significant clay dust on the truck’s windshield created a visibility hazard. The violation was reasonably likely to result in a fatal injury to one miner. The violation was S&S. The violation was the result of moderate negligence. The assessed penalty is \$1,944.00.

#### **8. Citation No. 8820574 – Dust Truck Air Brakes**

Respondent violated 30 C.F.R. § 56.14101(a)(3) by failing to maintain functional air brakes on the Ford L9000 dust truck. The leak in the air brakes created a loss-of-control hazard. The violation was reasonably likely to result in a fatal injury to one miner. The violation was S&S. The violation was the result of moderate negligence. The assessed penalty is \$1,944.00.

#### **9. Citation No. 8820571 – Illumination of Verge Storage Tank Area**

Respondent violated 30 C.F.R. § 56.17001 by failing to provide sufficient lighting around the verge storage tanks. Deep mud accumulations and low visibility created a slip–trip–fall hazard. The violation was reasonably likely to result in a lost-workdays or restricted-duty injury to one miner. The violation was S&S. The violation was the result of moderate negligence. The assessed penalty is \$585.00.

#### **10. Citation No. 8820575 – Working Place Examination of Verge Storage Tank Area**

Respondent violated 30 C.F.R. § 56.18002(a) by failing to inspect and conduct a pre-shift working place examination of the verge storage tank area. Deep mud accumulations under and around the verge storage tanks created a slip–trip–fall hazard. The violation was reasonably likely to result in a lost-workdays or restricted-duty injury to one miner. The violation was S&S. This violation was the result of high negligence. The assessed penalty is \$1,944.00.

#### **11. Citation No. 8820576 – MSHA Injury Report Form 7000-1**

Respondent withdrew contest of the penalty at hearing. The assessed penalty is \$100.00.

### **IV. GENERAL LEGAL PRINCIPLES**

#### **A. Burden of Proof**

The Secretary bears the burden of proving all elements of a citation by a preponderance of the credible evidence. *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995), *aff'd sub nom. Sec'y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998); *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989); *Jim Walter Res., Inc.*, 30 FMSHRC 872, 878 (Aug. 2008) (ALJ) (“The Secretary’s burden is to prove the violations and related allegations, e.g., gravity and negligence, by a preponderance of the evidence.”); *see also Jim Walter Res., Inc.*, 36 FMSHRC 1972, 1976-77 (Aug. 2014) (holding that to prove his imputed negligence is proper, the Secretary must describe the specific action an operator did not take to meet the requisite standard of care). In general, this preponderance standard “means proof that something is more likely so than not so.” *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC at 1838.

## B. Negligence

The Mine Act creates a strict liability enforcement model,<sup>3</sup> and, as a result, negligence is not an essential part of the calculus to determine an operator's liability. When an MSHA inspector observes conditions that create mine hazards or otherwise fall short of the Act's requirements, a citation is required, irrespective of fault. Negligence, however, is central to the assessment of civil penalties<sup>4</sup> and to the evaluation of unwarrantable failure and flagrant violations.<sup>5</sup>

Negligence is considered in light of the action that would have been taken under the same circumstances by a "reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purposes of the regulation." *Brody Mining LLC*, 37 FMSHRC 1687, 1702 (Aug. 2015). An operator is negligent if it should have known that its actions (or failure to act) would cause a violation. *Id.* at 1704. Considerations regarding negligence include "the foreseeability of the miner's conduct, the risks involved, and the operator's supervising, training, and disciplining of its employees to prevent violations of the standard in issue." *A. H. Smith Stone Co.*, 5 FMSHRC at 15.

The operator may be charged with varying degrees or levels of negligence, which becomes an important consideration during the penalty assessment. The Commission has described that ordinary negligence may be characterized by "inadvertent," "thoughtless," or "inattentive" conduct. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec. 1987). A finding of high negligence, however, "suggests an aggravated lack of care that is more than ordinary negligence." *Topper Coal Co.*, 20 FMSHRC 344, 350 (Apr. 1998); *E. Assoc. Coal Corp.*, 13

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<sup>3</sup> "If [. . .] the Secretary or his authorized representative believes that an operator of a coal or other mine subject to this chapter has violated this chapter [. . .], he shall [. . .] issue a citation to the operator." 30 U.S.C. § 814(a). This court has held that "[t]he Mine Act is a strict liability statute, and an operator is liable for a violation of a mandatory safety standard regardless of its level of fault." *Brody Mining, LLC*, 33 FMSHRC 1329, 1335 (May 2011) (ALJ) (citing *Spartan Mining Co.*, 30 FMSHRC 699, 706 (Aug. 2008); *Asarco, Inc.*, 8 FMSHRC 1632, 1634-36 (Nov. 1986), *aff'd*, 868 F.2d 1195 (10th Cir. 1989)); *see also A.H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983) (holding that each mandatory standard has an accompanying duty of care to avoid violations of the standard, and an operator's failure to meet that duty can lead to a finding of negligence if a violation occurs).

<sup>4</sup> Section 110(i) of the Mine Act requires that in assessing penalties, one criterion that must be taken into account is "whether the operator was negligent." 30 U.S.C. § 820(i); *see also Asarco*, 8 FMSHRC at 1636, *aff'd*, 868 F.2d 1195 (10th Cir. 1989) ("[T]he operator's fault or lack thereof, rather than being a determinant of liability, is a factor to be considered in assessing a civil penalty.").

<sup>5</sup> Although the same or similar factual circumstances may be included in the Commission's consideration of an operator's misconduct with regard to an unwarrantable failure finding and the Commission's evaluation of an operator's negligence for purposes of assessing a civil penalty, the concepts are distinct and subject to separate analysis. *See Black Diamond Coal Mining Co.*, 7 FMSHRC 1117, 1122 (Aug. 1985).

FMSHRC 178, 187 (Feb. 1991). In particular, the Commission has held that an operator's intentional violation constitutes high negligence for penalty purposes. *Consolidation Coal Co.*, 14 FMSHRC 956, 969-70 (June 1992). Also, actual knowledge of violative conditions and the failure to act in light of that knowledge amount to high negligence. *Deshetty, employed by Island Creek Coal Co.*, 16 FMSHRC 1046, 1053 (May 1994). Moreover, mine management is held to a higher standard of care because they are tasked with the safety of their miners and must also set an example for miners under their direction. *Midwest Material Co.*, 19 FMSHRC 30, 35 (Jan. 1997); *Wilmot Mining Co.*, 9 FMSHRC 684, 688 (Apr. 1987).<sup>6</sup>

Negligence is defined in Part 100 as “conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm.” 30 C.F.R. § 100.3(d).<sup>7</sup> MSHA’s Part 100 also takes into account mitigation, stating that “MSHA considers mitigating circumstances which may include, but are not limited to, actions taken by the operator to prevent or correct hazardous conditions or practices.” *Id.* Accordingly, reckless negligence is present if “[t]he operator displayed conduct which exhibits the absence of the slightest degree of care.” *Id.* High negligence is when “[t]he operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances.” *Id.* Moderate negligence is properly attributed to the operator if “[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances.” *Id.* Low negligence is appropriate when “[t]he operator knew or should have known of the violative condition or practice, but there are considerable mitigating circumstances.” *Id.* No negligence is appropriate if “[t]he operator exercised diligence and could not have known of the violative condition or practice.” *Id.* MSHA’s definitions of negligence and corresponding degrees in part 100 are not binding on Commission judges but are helpful in evaluating culpability. *Brody Mining*, 37 FMSHRC at 1701-03 (holding that Commission judges are not bound to apply MSHA’s negligence definitions in 30 C.F.R. Part 100).

Mitigation becomes an important consideration when analyzing the level of negligence attributable to the operator. Essentially, mitigation is something the operator does affirmatively, with knowledge of the potential hazard being mitigated, that tends to reduce the likelihood of an injury to a miner. This includes actions taken by the operator to prevent or correct hazardous conditions. While mitigation is an important consideration, an ALJ is not constrained to an evaluation of “mitigating” circumstances but is charged to consider the “totality of the circumstances holistically.” *Mach Mining, LLC v. Sec’y of Labor*, 809 F.3d 1259, 1264 (D.C. Cir. 2016) (citing *Brody Mining*, 37 FMSHRC at 1702).

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<sup>6</sup> There is an exception to this principle that applies in limited circumstances. The Commission has held that where an operator takes reasonable steps to prevent accidents and the “erring supervisor unforeseeably exposes only himself to risk,” a finding of no negligence will be upheld, but if an operator was blameworthy in respect to hiring, training, safety procedures or the accident itself, there may be a negligence finding. *NACCO Mining Co.*, 3 FMSHRC 848, 850-51 (Apr. 1981). Notably, the Commission has never applied the *NACCO* exception to preclude a finding of unwarrantable failure or to mitigate the civil penalty assessment for an unwarrantable failure violation.

<sup>7</sup> “A mine operator is required [. . .] to take steps necessary to correct or prevent hazardous conditions or practices.” 30 C.F.R. § 100.3(d).

### C. Gravity

The gravity penalty criterion under section 110(i) of the Mine Act, 30 U.S.C. § 820(i), is most often viewed in terms of the seriousness of the violation. *Sellersburg Stone Co.*, 5 FMSHRC 287, 294 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984). The seriousness of a violation can be evaluated by comparing the violated standard and the operator's conduct with respect to that standard in the context of the Mine Act's purpose of limiting violations and protecting the safety and health of miners. *See Harlan Cumberland Coal Co.*, 12 FMSHRC 134, 140 (Jan. 1990) (ALJ). The Commission has recognized that the determination of the likelihood of injury should be made assuming continued normal mining operations without abatement of the violation. *See U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985).

However, the gravity of a violation and its S&S nature are not the same. The Commission has pointed out that the "focus of the seriousness of the violation is not necessarily on the reasonable likelihood of serious injury, which is the focus of the S&S inquiry, but rather on the effect of the hazard if it occurs." *Consolidation Coal Co.*, 18 FMSHRC 1541, 1550 (Sept. 1996). The gravity analysis can include the likelihood of an injury but should focus more on the potential severity of an injury and the number of miners potentially injured. The analysis should not equate gravity, which is an element that must be assessed in every citation or order, with "significant and substantial," which is only relevant in the context of enhanced enforcement under Section 104(d). *See Quinland Coals, Inc.*, 9 FMSHRC 1614, 1622 n.11 (Sept. 1987).

### D. Significant and Substantial

A violation is S&S "if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). To establish an S&S 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 in question will be of a reasonably serious nature." *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); *see also Buck Creek Coal, Inc. v. Fed. Mine Safety & Health Admin.*, 52 F.3d 133, 135-36 (7th Cir. 1995) (affirming ALJ's application of the *Mathies* criteria); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103-04 (5th Cir. 1988) (approving the *Mathies* criteria).

The Commission has recently explained that in analyzing the second *Mathies* element, Commission Judges must determine "whether, based upon the particular facts surrounding the violation, there exists a reasonable likelihood of the occurrence of the hazard against which the mandatory safety standard is directed." *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2038 (Aug. 2016). In evaluating the third *Mathies* element, the Commission assumes the hazard identified in the second *Mathies* element has been realized and determines whether that hazard is reasonably likely to cause injury. *Id.* at 2045 (citing *Knox Creek Coal Corp. v. Sec'y of Labor*, 811 F.3d 148, 161-62 (4th Cir. 2016); *Peabody Midwest Mining, LLC*, 762 F.3d 611, 616 (7th Cir. 2014); *Buck Creek Coal*, 52 F.3d at 135).

The Commission has further found that “the absence of an injury-producing event when a cited practice has occurred does not preclude a determination of S&S.” *Musser Eng’g, Inc.*, 32 FMSHRC 1257, 1281 (Oct. 2010) (citing *Elk Run Coal Co.*, 27 FMSHRC 899, 906 (Dec. 2005); *Blue Bayou Sand & Gravel, Inc.*, 18 FMSHRC 853, 857 (June 1996)). The Commission has also specified that evaluation of the reasonable likelihood of injury should be made assuming continued normal mining operations. *U.S. Steel Mining*, 7 FMSHRC at 1130 (quoting *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984)). Finally, it is well settled that redundant safety measures are not to be considered in determining whether a violation is S&S. *Knox Creek Coal*, 811 F.3d at 162; *Cumberland Coal Res., LP*, 717 F.3d 1020, 1029 (D.C. Cir. 2013); *Buck Creek Coal*, 52 F.3d at 136; *Brody Mining*, 37 FMSHRC at 1691; *Cumberland Coal Res., LP*, 33 FMSHRC 2357, 2369 (Oct. 2011).

## **E. Penalty**

A mine operator is subject to a civil penalty for a violation of a standard promulgated by MSHA at its mine. 30 U.S.C. § 820. The purpose of imposing penalties is to provide a “strong incentive for compliance with the mandatory health and safety standards.” *Nat’l Indep. Coal Operators’ Ass’n v. Kleppe*, 423 U.S. 388, 401 (1976).

Congress’ purpose in enacting the penalty component of the Act was to create deterrence, stating, “[t]o be successful in the objective of including [sic] effective and meaningful compliance, a penalty should be of an amount which is sufficient to make it more economical for an operator to comply with the Act’s requirements than it is to pay the penalties assessed and continue to operate while not in compliance.” S. Rep. No. 95-181, at 90 (1977).

Part 100 establishes two types of proposed penalties: (1) regular formula assessments and (2) special assessments. The Secretary is seeking regular formula assessments for all of the citations in these two dockets. Regular formula assessments are governed by 30 C.F.R. § 100.3. Pursuant to this section, the Secretary assigns a point value for each of the six criteria based on the designations associated with the particular violation. The points are then added together and the penalty is proposed based on the point total according to the point table contained in section 100.3. When this procedure for assessment is used, the operator is provided an “Exhibit A,” which lists the points for each criterion and shows how the proposed penalty was calculated.

The principles governing the authority of Commission administrative law judges to assess civil penalties de novo for violations of the Mine Act are well established. Section 110(i) of the Mine Act delegates to the Commission and its judges the “authority to assess all civil penalties provided in [the] Act.” 30 U.S.C. § 820(i). The Act delegates the duty of proposing penalties to the Secretary. 30 U.S.C. §§ 815(a), 820(a). Thus, when an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess said penalty. 29 C.F.R. § 2700.28.

Under section 110(i) of the Mine Act, the Commission is to consider the following when assessing a civil penalty: (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 in abatement of the violative condition. 30 U.S.C. § 820(i). Thus, the Commission alone is responsible for assessing final penalties. *See Sellersburg*



*Stone Co.*, 736 F.2d at 1151-52 (“[N]either the ALJ nor the Commission is bound by the Secretary’s proposed penalties [. . .] we find no basis upon which to conclude that [MSHA’s Part 100 penalty regulations] also govern the Commission.”); *see also Am. Coal Co.*, 35 FMSHRC 1774, 1819 (June 2013) (ALJ).

The Commission has repeatedly held that substantial deviations from the Secretary’s proposed assessments must be adequately explained using the section 110(i) criteria. *E.g.*, *Hubb Corp.*, 22 FMSHRC 606, 612 (May 2000); *Cantera Green*, 22 FMSHRC 616, 620-21 (May 2000) (citations omitted); *Sellersburg Stone Co.*, 5 FMSHRC at 293. A judge need not make exhaustive findings but must provide an adequate explanation of how the findings contributed to his or her penalty assessments. *Cantera Green*, 22 FMSHRC at 621.

#### **F. Regulatory Interpretation and Fair Notice<sup>8</sup>**

Where the language of a regulatory provision is clear, the provision must be enforced as written unless the regulator clearly intended the words to have a different meaning or enforcement would produce absurd results. *Hecla Ltd.*, 38 FMSHRC 2117, 2122 (Aug. 2016); *Austin Powder Co.*, 29 FMSHRC 909, 913 (Nov. 2007); *see Pfizer Inc. v. Heckler*, 735 F.2d 1502, 1509 (D.C. Cir. 1984) (“Under settled principles of statutory and rule construction, a court may defer to administrative interpretations of a statute or regulation only when the plain meaning of the rule itself is doubtful or ambiguous.”).

To the extent a regulation is silent or ambiguous on a particular point, the Commission follows the doctrine of deference established in *Bowles v. Seminole Rock and Sand Company*, 325 U.S. 410 (1945), and reaffirmed in *Auer v. Robbins*, 519 U.S. 452 (1997). *See, e.g., Hecla*, 38 FMSHRC at 2122; *Tilden Mining Co.*, 36 FMSHRC 1965, 1967 (Aug. 2014), *aff’d*, 832 F.3d 317 (D.C. Cir. 2016). Under this doctrine, the promulgating agency’s interpretation of the regulation is entitled to full deference (referred to as *Auer* deference) unless the interpretation is unreasonable, plainly erroneous, or inconsistent with the regulation, or there is reason to suspect it does not reflect the agency’s fair and considered judgment on the matter. *See, e.g., Drilling & Blasting Sys., Inc.*, 38 FMSHRC 190, 194-97 (Feb. 2016) (declining to defer to plainly erroneous interpretation); *Hecla*, 38 FMSHRC at 2122-25 (deferring to reasonable interpretation); *Tilden Mining*, 36 FMSHRC at 1967-68 (same); *Twentymile Coal Co.*, 36 FMSHRC 2009, 2012-13 (Aug. 2014) (declining to defer to unreasonable interpretation).

If there is reason to suspect that an agency’s interpretation does not reflect its fair and considered judgment, the interpretation is not entitled to full *Auer* deference but is still entitled to a measure of deference proportional to the “thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade.” *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 159 (2012) (citing *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001) and *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

In evaluating the merits of a proposed regulatory interpretation, the Commission has considered factors such as whether the interpretation is consistent with the language and ordinary

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<sup>8</sup> Much of this section is “borrowed” nearly intact from Judge McCarthy’s excellent summary in *Cemex Southeast, LLC*, 38 FMSHRC 2806, 2814-16 (Nov. 2016) (ALJ).

usage of the cited standard, whether it harmonizes with the purpose and structure of the regulations, and whether it furthers the policy goals of the Mine Act, particularly the Act's safety-promoting purposes. *See, e.g., Hecla*, 38 FMSHRC at 2122-25 (analyzing the language of the regulation, the regulation's specific purpose, and the general policy goals of the Mine Act, particularly the goal of promoting safety); *Natty & Hamilton Enters.*, 38 FMSHRC 1644, 1648-51 (July 2016) (adopting an interpretation that was consistent with the language of the regulation, as determined by reliance on dictionary definitions and prior case law that harmonized with the regulatory scheme and furthered the goals of the Mine Act); *Twentymile*, 36 FMSHRC at 2012-13 (rejecting an interpretation that was not suggested by the language of the standard or its regulatory history and that did not advance mine safety); *Wolf Run Mining Co.*, 32 FMSHRC 1669, 1681-82, 1685-86 (Dec. 2010) (analyzing one ambiguous term with reference to the broader regulatory context, including analogous regulations, and adhering to another ambiguous term's customary technical usage, as demonstrated by a mining dictionary and the testimony of knowledgeable witnesses); *Daanen & Janssen, Inc.*, 20 FMSHRC 189, 193-94 (Mar. 1998) (analyzing regulatory language with reference to ordinary dictionary meanings, the Mine Act's safety-promoting goals, the PPM, the Secretary's past application of the regulation, and the regulatory structure); *Island Creek Coal Co.*, 20 FMSHRC 14, 19-24 (Jan. 1998) (evaluating the ordinary meaning of the regulatory language, "contextual indications," including the meaning of similar language in other regulations, and the Mine Act's purposes).

Even if an agency's interpretation of a regulation is reasonable, fundamental due process considerations preclude adoption of that interpretation without fair notice. *See Hecla*, 38 FMSHRC at 2125; *Am. Coal Co.*, 38 FMSHRC 2062, 2075 (Aug. 2016); *Energy W. Mining Co.*, 17 FMSHRC 1313, 1317-18 (Aug. 1995). In Mine Act proceedings, this means that before the Secretary can penalize a mine operator for a violation of a safety standard, the operator must be placed on notice of what conduct the standard forbids or requires such that it has an opportunity to act accordingly. *See Hecla*, 38 FMSHRC at 2125 ("To comport with due process, laws must 'give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.'") (citing *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972)); *Energy W.*, 17 FMSHRC at 1318 (same); *Mathies Coal Co.*, 5 FMSHRC 300, 303 (Mar. 1983) ("[E]ven a broad standard cannot be applied in a manner that fails to inform a reasonably prudent person that the condition or conduct at issue was prohibited by the standard.").

To resolve issues of notice, the Commission applies an objective standard, the "reasonably prudent person" test. *Hecla*, 38 FMSHRC at 2125; *Sunbelt Rentals, Inc.*, 38 FMSHRC 1619, 1627 (July 2016); *Energy W.*, 17 FMSHRC at 1318. The test is "whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard." *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990). In determining whether a party had adequate notice of regulatory requirements, a wide variety of factors may be relevant to the inquiry, including the text of the regulation, its placement in the overall regulatory scheme, its regulatory history and purpose, the consistency of the agency's enforcement, whether MSHA has published notices informing the regulated community with ascertainable certainty of its interpretation, and whether the operator would have been aware of the requirement of the standard because of past case precedent. *See Sunbelt Rentals*, 38 FMSHRC at 1627; *Wolf Run Mining*, 32 FMSHRC at 1682; *Lodestar Energy, Inc.*, 24 FMSHRC 689, 694-95 (July 2002); *Island Creek Coal*, 20 FMSHRC at 25.

## V. OTHER PRELIMINARY CONSIDERATIONS

### A. The Housekeeping Violations

#### 1. The Meaning of “At All Mining Operations”

The Respondent makes an umbrella argument directed at all housekeeping citations issued in these two dockets: “The language ‘at all mining operations’ has substantive meaning, and restricts application of the standard to areas of the mine where actual ‘mining operations’ take place.” (Resp’t Br. 43)

Respondent argues that prior Courts have failed to appreciate the significant limitation that the clause “At all mining operations” creates in the housekeeping standard, 30 C.F.R. § 56.20003(a). (*Id.*) Respondent argues that, consistent with earlier regulation covering housekeeping, the clause actually limits MSHA to citing this standard “in” and “around” the pit where mining occurs. (*Id.*) As all of the citations in these dockets occurred outside of “mining operations,” by Respondent’s definition, they all must be vacated. (*Id.*)

Respondent attempts to misdirect by claiming to raise an issue of first impression and by kludging together an argument based on an apparent language change in a section of the Congressional Record. The language change, which is unexplained in the Congressional Record, seems to shift the focus of the housekeeping standard from areas “in and around the mine and plants” to only “in and around the mine.” Another way Respondent expresses it is that the change in the language signifies an intended change in the focus of the standard, one that excludes any areas not considered engaged in a “mining” activity as opposed to milling or anything arguably not “mining.” (*Id.* at 43-44)

I reject this argument. First, the case cited in support of the change simply does not say what Respondent claims it says. Respondent cites to *Madison Granite Company*, 1 FMSHRC 1906 (Nov. 1979) (ALJ), as “recognizing that the phrase ‘in and around the mine’ restricted coverage to the mine itself and did not cover a crusher, which was not in the mine pit itself.” (Resp’t Br. 44) In *Madison Granite*, the inspector issued a citation after observing a crusher operator not wearing his hard hat in the crusher area. 1 FMSHRC at 1911. The cited standard was 30 C.F.R. § 55.15-2, which read, “[a]ll persons shall wear suitable hard hats when in or around a mine or plant where falling objects may create a hazard.” *Id.* The ALJ in that case vacated the citation after concluding that MSHA had not shown by a preponderance of the evidence that “the employee was in an area where falling objects may create a hazard.” *Id.* at 1912. Nowhere in that decision did the Judge state or imply what Respondent claims: that the crusher was not “in and around the mine.” Respondent’s interpretation of this case is either misdirection or an error in research and drafting.

Second, the changed language seems more likely to be an attempt to conform the new statement of the standard to the interpretation given to the term “mining” as stated in the definitional section of the Act and which is used routinely in determining MSHA’s jurisdictional reach. In other words, the change in language reflects an understanding that “mining” is defined in the Act to include ancillary functions, such as milling. Contrary to Respondent’s argument, it is meant to clear up any interpretation that would limit the standard to only “mining” areas. What is intended is clarification that the focus of the standard is on functions and not areas. Any

function that is covered by the definition of “mining” in the Act is covered by the housekeeping standard. It is an error to focus on physical areas and to argue that because a violation is found in an area that is not considered a place where the act of mining is done, e.g., a plant or other workplace, it is not covered by the housekeeping standard. The proper interpretation is to look to whether the violation occurred as part of an activity that falls within the Act’s definition of “mining.” Inasmuch as the functions performed at the Respondent’s Ripley facility fall under a proper interpretation of “mining,” a housekeeping violation occurring during the performance of such a “mining” function is covered, irrespective of the area where it is carried out.

## **2. The March 18, 2015 Housekeeping Violations are Not Duplicative**

Prior to the hearing, Respondent filed a motion for summary decision asking the court to rule that the six housekeeping citations in SE 2015-0285 were duplicative and should be subsumed under a single violation.<sup>9</sup> The motion was denied on February 22, 2016.

At and after the hearing, Respondent again argued that the six housekeeping citations in SE 2015-0285 should be collapsed into a single citation because they were written by Inspector LaRue in a two-hour period during his inspection on March 18, 2015, in an area loosely referred to as the “mill plant area.” (Resp’t Br. 45) Respondent contended that the cited areas were not distinct enough to warrant separate violations, and that the inspector could not increase the negligence level of later-cited violations of the standard based on his decision to write multiple citations. (*Id.* at 45-47) I reject Respondent’s multiple violation argument again.

In its briefing, Respondent identified only two distinct areas at the Ripley mine site: the “mill plant area” and the “pit area.” (*Id.* at 38, *citing* Tr.346:4-6) It argued that the entire area covered by LaRue’s housekeeping citations should be taken as a single location because it was the work area of a single miner per shift (*Id.*, *citing* Tr.398:15-23; 399:7-10) and was covered by a single workplace inspection. (*Id.*, *citing* Tr.402:7-9) In essence, Respondent argued that because it considered the mill plant area a discrete work area, LaRue should have known and recognized this operational characteristic and limited his housekeeping enforcement accordingly. In the context of this case, this view is too opportunistic and arbitrary to be convincing. How LaRue approached this enforcement is more relevant than Respondent’s operational definition.

Inspector LaRue testified that the source of the clay accumulations described in his housekeeping violations was from significant equipment leakage (Tr.236:5-16), and he did not believe he had the authority to “force [ODPC] to [. . .] plug [the] holes.” (Tr.257:4-6) Instead, he cited the plant for housekeeping violations. He issued separate citations because the violating areas were either geographically separate, e.g., part of a different building, or were in the vicinity of a separate piece of equipment, although in the same building. (Tr.228:22-229:16) He also understood that MSHA’s directives only justified combining separate violations into a single citation when they were associated with a single piece of machinery. (Tr.229:9-11)

According to Inspector LaRue, the six housekeeping citations he wrote were in separate locations. (Tr.260:6-262:1) Citation Nos. 8820563 and 8820564 (Exhibits S–2 and S–3) describe conditions in separate buildings (Tr.212:2-12), and Citation Nos. 8820564 and 8820565 describe conditions in areas about 150–200 feet apart. (Tr.218:7-11) LaRue was not able to see the other

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<sup>9</sup> Citation Nos. 8820563, 8820564, 8820565, 8820567, 8820568, and 8820569.

cited areas from the location of Citation No. 8820567 (Tr.228:22-229:11) or Citation No. 8820568. (Tr.241:21-242:11) Citation No. 8820569 was at the ground floor level underneath the mill buildings. (Tr.248:8-10) He opted against writing all the housekeeping violations as one citation because, to him, they happened in different areas of the plant. (Tr.261:2-262:1)<sup>10</sup>

The authority Respondent relies on to support its argument that LaRue's housekeeping citations should be compressed into a single event is inapposite. That case, *Western Fuels-Utah, Inc.*, 19 FMSHRC 994 (June 1997), applies to a single violating condition that could have been cited under more than one standard. The Commission stated:

[O]ur determination that the two citations are duplicative is not based on our premise that every violation of 15(d) is also a violation of 14(a). Our inquiry does not stop there. Rather, we ask whether MSHA is citing the operator on the basis of more than one specific act or omission. Had MSHA put on evidence of additional deficiencies that violated the general regulation, instead of relying on the identical evidence (lack of sufficient reservoirs) used to support the violation of the specific standard, we would not have found them duplicative.

*Id.* at 1004 n.12.

*Western Fuels* does not apply to the facts of this case. Here, instead of there being two citations under different standards for the same violating condition, there are multiple citations under the same standard for different violating conditions. Moreover, there is differing evidence relating to the location and nature of the accumulated material instead of identical evidence supporting more than one citation.

*Port Costa Materials, Inc.*, 16 FMSHRC 1516 (July 1994) (ALJ), also cited by Respondent in support of its single citation argument, pays respect to the guidance regarding multiple violations found in Section 104(a) of the Mine Act:

[W]here there are multiple violations of the same standard which are observed in the course of an inspection and which are all related to the same piece of equipment or to the same area of the mine, such multiple violations should be treated as one violation, and one citation should be issued.

*Id.* at 1518 (emphasis added).

The judge in *Port Costa* found value in the citation "grouping" done by the Secretary, which he considered a valid exercise of prosecutorial discretion. *Id.* at 1519. His focus in

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<sup>10</sup> The remaining housekeeping violation, Citation No. 8818319 (SE 2015-0418), was written by Inspector Howerton on June 22, 2015, during an E01 regular inspection of the Ripley Mine. Howerton observed pallets of equipment and maintenance debris covering the floor of the Old Clay Shed. (Tr.55:12-24; Ex. S-17) Respondent does not contend that this citation should be grouped with the others.

resolving the grouping issue was whether multiple violations could be abated by a single remediation. *Id.* at 1520. Aside from being only advisory for this court, this is merely an ad hoc means of referencing the need to pay attention to the provision in Section 110(a) of the Mine Act that “[e]ach occurrence of a violation of a mandatory health or safety standard may constitute a separate offense.” 30 U.S.C. § 820(a); *see also Tazco, Inc.*, 3 FMSHRC 1895, 1897 (Aug. 1981); *Spurlock Mining Co.*, 16 FMSHRC 697, 699 (Apr. 1994). It does not require nor convince me to adopt a “single abatement” test.

The single abatement approach suffers from the same conceptual confusion as Respondent’s contention here. Respondent argues that because it defined the work area at the Ripley facility as a single location—despite its size, its layout, and the fact that it housed multiple milling functions—any number or nature of violations found in that arbitrarily designated area should be considered a single event. It is an extension of this notion to consider the abatement of any number of separate violations in an arbitrarily-defined area as a single event since it occurs in a “single location.” This approach may fit certain fact patterns, but it is not a principled way to approach the issue. It is too facile to be of more than occasional use. When the facts of a case lend themselves to the “single abatement” approach, it appears to be useful. But, when, as in this case, the single abatement approach depends on the operator’s self-serving definition of what constitutes a working area, it is of little analytical use. Whether multiple violations can be abated in a single pass can be a factor to consider but is not dispositive.

MSHA’s obligation to write a separate citation or order for each distinct violating condition found during an inspection originates from 30 U.S.C. § 820 (a)(1): “Each occurrence of a violation of a mandatory health or safety standard may constitute a separate offence.” The use of the word “may” allows for some discretion on the part of the issuing inspector, as was discussed in *Port Costa* above. However, *Port Costa* is not enough to convince me that abatement efforts are the best criterion on which to base a decision whether a group of citations should be deemed duplicative. Additional guidance comes from MSHA’s Program Policy Manual (“PPM”), which deals with an inspector’s discretion and provides guidance as to when related violations may be combined into a single citation. Abatement is but one factor, in addition to those illustrated in the PPM, that an MSHA inspector can use to guide him- or herself in issuing grouped or individual citations. Ultimately, the decision whether to issue individual citations for multiple violations of the same standard is within the ambit of the inspector’s discretion. As for situations whose fact scenarios deviate from those illustrated in the PPM, the inspector’s discretion carries much weight.

Making the operator’s definition of what constitutes a separate “area” of a mine the decisive factor in determining whether an individual or grouped citation should be issued, as Respondent urges, shifts too much weight to the operator’s side of things and away from the Mine Act’s mandate that the Secretary’s designated inspectors must make that call. As a result, the authority cited in support of Respondent’s single-location/single-event argument is not persuasive.

As before, I reject Respondent’s contention that LaRue’s housekeeping citations are duplicative. There is sufficient difference in the location of each violation and in the impact of

the material accumulations on discrete equipment, work areas, walkways, and facilities to support LaRue's decision to cite each discrete condition as a separate violation.

## **B. Universal Penalty Adjustment**

Inspector LaRue referenced Respondent's previous housekeeping violations on March 18, 2015, as one of the reasons he ascribed "high negligence" to Citation Nos. 8820568 and 8820569. (Tr.243:21-244:10; 255:12-13) Respondent argues that this resulted in an impermissible "pyramiding" of penalties. (Resp't Br. 47) Respondent incorrectly conflates "repeat" assessments and enhancement of negligence for Citation Nos. 8820568 and 8820569 in its argument when it accused LaRue of using the prior citations from the same inspection "to enhance the 'repeat' assessment." (*Id.*) Exhibit A of the petition for the assessment of civil penalty for Docket No. SE 2015-0285 shows that no penalty points were given for repeat assessments ("RPID") for Citation Nos. 8820563, 8820564, 8820565, 8820567, 8820568, and 8820569. Additionally, although LaRue mentioned the housekeeping violations he cited earlier in the day, as discussed fully in the sections below, they were just one of a confluence of factors he used to justify the increase of negligence from moderate to high for Citation Nos. 8820568 and 8820569. (Tr.243:21-245:9; 255:10-257:12)

While I do not find any problems with Inspector LaRue's negligence determinations or the RPID score, I do note that the Violations Per Inspection Day ("VPID") calculation on March 18, 2015, was noticeably and significantly high, which may have factored into Respondent's claim that penalties for the housekeeping violations were "pyramided."

The VPID is calculated by first dividing the number of violations that have been paid, finally adjudicated, or have become final orders during the Violation History Period<sup>11</sup> by the number of inspection days.<sup>12</sup> Once that number is calculated, it is applied to Table VI of 30 C.F.R. § 100.3(c)(1) and converted into a penalty point scale ranging from 0 to 25.

Here, the VPID on March 18, 2015, was 2.14, resulting in a maximum 25 points. *See History of Previous Violations; Violations Per Inspection Day (VPID); Repeat Violations Per Inspection Day (RPID) for Oil Dri Production Company Mine ID 2200035*, MSHA (last visited Oct. 2, 2017), <https://arlweb.msha.gov/drs/ASP/MineInspectionDay.asp> [hereinafter *Oil Dri VPID Scores*]. This score differed significantly from the VPID of either of the days immediately surrounding it: The VPID on March 17 was 1.43 (14 points); the VPID on March 19 was 1.67 (16 points). *Id.* This is not an immaterial consideration. With a VPID of 25 points, the six housekeeping citations issued on March 18, 2015, resulted in a proposed penalty of \$12,772.00, after good faith discounts. By contrast, applying the VPID score on March 17, 2015, only a day earlier, would have amounted to penalties totaling \$5,292.00, after good faith discounts.

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<sup>11</sup> The "Violation History Period" covers the preceding 15 months. 30 C.F.R. § 100.3(c).

<sup>12</sup> "Inspection Days" are calculated by dividing the total MSHA on-site inspection hours for Authorized Representatives of the Secretary for certain types of inspection activities by five. *History of Previous Violations: Violations Per Inspection Day (VPID); Repeat Violations Per Inspection Day (RPID)*, MSHA (last visited Oct. 2, 2017), <https://arlweb.msha.gov/drs/ASP/MineAction.asp>. Any remainder amount increases the number of inspection days by one. *Id.*

The reason for this discrepancy has to do with the timing of a series of five final orders<sup>13</sup> that were added to the violation history table on March 17, 2015, the day immediately preceding the March 18th inspection. *Mine Citations, Orders, and Safeguards for Mine ID: 2200035*, MSHA (last visited Oct. 2, 2017), <https://arlweb.msha.gov/drs/ASP/MineAction.asp>. Although all five of the newly added orders were issued ten months earlier in May 2014 and terminated in May/June 2014, the fact that they became final for history calculation purposes on March 17, 2015, affected the March 18th VPID calculations. *Id.* They caused the VPID ratio numerator to increase from 10 to 15 violations. Had Inspector LaRue conducted the very same inspection one day earlier, on March 17, the VPID would have been 1.43 (14 points). Instead, because the inspection took place on March 18, the VPID changed, due to circumstances outside the control of the mine operator, and resulted in a 141% increase in the penalty.

The following day, March 19, 2015, the VPID dropped to 16 points. *See Oil Dri VPID Scores*. This happened because Inspector LaRue's March 18, 2015, inspection, although only one day earlier in real time, accounted for two inspection days under the formula. As such, although the numerator for the VPID calculation on March 19 was the same as that on March 18 (i.e., 15 violations), the denominator (i.e., nine inspection days) was larger, resulting in a lower VPID score of 1.67.

These conditions created a “perfect storm” scenario for a short-lived spike in the VPID on March 18, 2015. While the MSHA formula for calculating the VPID is generally fair and equitable, the process cannot be deemed fair in the rare instance where the mere order of operations or the random timing of an investigation—issues completely outside the control of the mine operator—yields vastly different results.

For these reasons, I find that the VPID algorithm on March 18, 2015, resulted in an unpredictable and unfair outcome. Accordingly, I hold that a lower VPID of 15 penalty points—a figure between March 17th's 14 points and March 19th's 16 points—is more appropriate and shall be applied to the six housekeeping citations issued on March 18, 2015.

## VI. THE CITATIONS

### A. **Citation No. 8818319 – Old Clay Shed**

#### **Docket No. SE 2015-0418**

Exhibit S–17 (Tr.50:25-51:23)

The Secretary alleges that Respondent violated 30 C.F.R. § 56.20003(a) by failing to keep the ground floor at the Old Clay Shed clean and orderly. The standard requires that all mining operation workplaces, passageways, storerooms, and service rooms be kept clean and orderly.

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<sup>13</sup> Citation Nos. 8810931, 8810927, 8810929, 8810934, and 8810928.



## 1. Violation

Inspector Howerton issued housekeeping Citation No. 8818319 during his June 22, 2015 E01 inspection. (Ex. S-17) He documented pallets of maintenance and production equipment and debris covering the floor of the old clay shed, which was being used for maintenance storage at the time. (Tr.54:8-15; Ex. S-17) He concluded that floor obstructions blocked access to shelves used to store parts and created a slip-trip-fall hazard for anyone using the area.<sup>14</sup> (Tr.56:3-6) The supporting photos taken by Howerton at the time of the inspection (Ex. S-17, at 4-6) show the extent of the disarray in the building and support his assessment that there were hazards. This is particularly salient in comparison with the post-abatement photo, which shows the area in an obviously cleaned and orderly condition. (Ex. S-17, at 7; Tr.62:1-20)

Respondent offered the following explanation why the old clay shed area was in such disarray and why it should not be considered a working area: (1) The materials located in this area were obtained from a closed plant in Florida and were being kept in this area until it could be decided what was worth salvaging (Resp't Br. 42, *citing* Tr.60:18-19; 171:14-172:2); (2) the decision could not be made because the maintenance supervisor position was unfilled (*Id.*, *citing* Tr.61:14-25); (3) the only "storeroom" operated at the Ripley mine and mill was overseen by Delaney and was not in this area (*Id.*, *citing* Tr.170:19-171:7); (4) if this area were ever accessed, a miner must use a forklift (*Id.*, *citing* Tr.174:18-175:8); and, (5) before someone actually worked in the area to sort through the salvaged materials, they would conduct a safety inspection and "make the scene safe before they would start working." (*Id.* at 42-43, *citing* Tr.176:1-13)

The old clay shed is a large building (Tr.100:1-22; 169:19-25; Ex. R-1), which Respondent approximates at 16,000 square feet. (Resp't Br. 42) Exhibit S-17, page 5 shows storage racks approximately 80 to 100 feet long where maintenance items were stored. Howerton considered this area a working area because of the need to go there to obtain items used in normal milling operations. (Tr.53:12-54:3) Howerton also considered it a storeroom because there were stored maintenance items there. (Tr.54:8-15)

According to Howerton, miners had to walk over (Tr.56:7-13) or drive a forklift around pallets to access the dry goods, super sacks,<sup>15</sup> and maintenance items stored in the shed. (Tr.53:20-25; 54:19-56:16; 59:1-16; Ex. S-17, at 4-6) Howerton concluded that miners could not get to the racks without walking on and over items strewn on the floor (Tr.55:16-24), which subjected them to a slip-trip-fall hazard. (Tr.55:25-56:6; 59:24-60:15)

I find Howerton's rationale for considering this area a working area and storeroom more convincing than the Respondent's explanation why it was not. I conclude that the old clay shed was a working area and storeroom, and the disarray described in the violation narrative and shown in the photos in Exhibit S-17 constitutes a violation of 30 C.F.R. § 56.20003(a).

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<sup>14</sup> Howerton noted that this area was a "limited use area" that was "only used to store spare parts." (Ex. S-17, at 3) However, he concluded that it was used regularly as a workplace and a storage area. (Tr.53:12-54:3)

<sup>15</sup> A "super sack" is a large capacity plastic bulk storage bag. *Flexible Intermediate Bulk Container*, WIKIPEDIA (last visited Oct. 3, 2017), [https://en.wikipedia.org/wiki/Flexible\\_intermediate\\_bulk\\_container](https://en.wikipedia.org/wiki/Flexible_intermediate_bulk_container).

## **2. Gravity**

Howerton designated the gravity of this violation as “unlikely” because miners accessed the area infrequently. (Tr.60:16-25; Ex. S-17, at 1, 3) Howerton did not see anybody working in this area at the time. (Tr.60:21-25; 100:6-7) He believed that the most likely injury would be an ankle or limb sprain injury, which would involve lost workdays or restricted duty (Tr.61:1-5), and that only one person would be involved. (Tr.61:6-13) I concur and conclude that an injury was unlikely to occur, could reasonably be expected to result in lost workdays or restricted duty, and was limited to only one person.

## **3. Negligence**

Howerton rated the negligence at “moderate” because only maintenance personnel went into the building and the mine was operating one maintenance supervisor short at the time. (Tr.61:14-21) If the staffing level had been at the normal count, Howerton would have assessed the negligence at “high” since the condition was obvious. (Tr.61:21-25) I concur and conclude that “moderate” is the appropriate negligence designation for this violation.

## **4. Penalty**

The Secretary proposed a penalty of \$100.00 for this violation. I have reviewed and confirmed the data in Exhibit A to the Secretary’s Petition for Assessment of Civil Penalty showing the number of production hours for the mine and the mine controller, the number of prior violations per inspection days, the number of repeat violations, the number of persons affected, the negligence points, the likelihood points, and the good faith point reductions. Based on my gravity and negligence findings, and considering but not relying on the point calculation in 30 C.F.R. § 100.3, the Secretary’s proposed penalty of \$100.00 is supported and reasonable. I assess a penalty in that amount.

### **B. Citation No. 8818320 – Flatbed Truck (#456)**

#### **Docket No. SE 2015-0418**

Exhibit S-18 (Tr.62:21-63:16)

The Secretary alleges that Respondent violated 30 C.F.R. § 56.15005 when a contract driver failed to use safety belts and lines while attempting to tarp his flatbed truck where there was a danger of falling. The standard requires that safety belts and lines be worn when persons work where there is a danger of falling.

### **1. Violation**

On June 23, 2015, Inspector Howerton observed a contract driver of a flatbed truck standing on his loaded trailer without fall protection. (Tr.64:1-65:5) Howerton testified that the driver was standing on an irregular surface and could have slipped while attempting to pull a tarp over the load. (Tr.70:22-25) Howerton estimated that, had he slipped, the driver would have fallen over ten feet to the ground from the position he was standing in. (Tr.71:9-16) Gibens was with Howerton at this time and also observed the contract driver. (Tr.63:22-64:5) Upon seeing

the driver standing on the loaded truck without fall protection, Gibens immediately ran towards the driver and told him to get down off of the truck. (Tr.64:6-7) Howerton testified that Gibens rushed over to the truck driver to request that he get down from the truck “quicker than [Howerton] did.” (Tr.64:13-14) During an interview with the driver of the truck, it was confirmed that he was not an ODPC employee and did not work at the mine. (Tr.65:6-23; 65:21-23) Howerton confirmed through plant records that the driver had been given appropriate site-specific training, as well as express instructions about how he could safely tarp his truck using company-provided fall protection. (Tr.85:16-21; 120:21-24) This was corroborated by the driver himself upon questioning by Gibens. (Tr.65:14; 182:9-20) Written material provided to the truck driver stated that the plant expressly prohibited tarping without use of such fall protection. (Ex. R-3, at 2) Additionally, the available fall protection gear was operational and clearly visible to truckers entering or exiting the facility. (Tr.72:5-14; 123:19-124:24; 125:2-10)

Respondent does not dispute Howerton’s account that the flatbed truck driver was standing on his loaded trailer without tie-off protection. It states in its brief that there are no significant credibility determinations required as Howerton and Gibens both testified consistently concerning the key aspects of the event in question. (Resp’t Br. 23) Instead, Respondent argues that the citation should be vacated because the safety belts and lines standard cited does not apply here. (*Id.*) First, Respondent argues the truck driver was not a “miner,” citing to the definition of “miner” found in 30 C.F.R. § 46.2(g)(2), which explicitly excludes commercial over-the-road truck drivers. (Resp’t Br. 28) Respondent also cites to the 2012 and 2014 Safety Belts and Lines Program Policy Letters (“PPL”), which both state that the purpose is to “enhance consistency and protection of miners” and that the provisions are in place “to protect miners from fall hazards.” (*Id.* at 29-31, *citing* Exs. R-19, 20) (emphasis in original) Respondent argues that such language “exclude[s] coverage of the Standard to non-miners and those doing tasks outside of normal mining activities.” (Resp’t Br. 31) (emphasis in original) While examining the PPL at hearing, Howerton maintained that section 56.15005 deals with any personnel that come onto mining property, which includes anybody working on the mine site. (Tr.109:3-15) The Secretary did not brief any of these issues.

I am unpersuaded by Respondent’s arguments. First, Respondent attempts to misdirect by citing to the definition of a “miner” used in section 46, which sets forth training and retraining requirements of miners and other persons at shell dredging, sand, gravel, surface stone, surface clay, colloidal phosphate, and surface limestone mines. 30 C.F.R. § 46.1. Here, however, the cited standard was under part 56 subpart N – Personal Protection. 30 C.F.R. § 56.15005. Part 56’s purpose and scope section states in part, “[t]he purpose of these standards is the protection of life, the promotion of health and safety, and the prevention of accidents.” 30 C.F.R. § 56.1. There is no indication that the part 56 standards only concern the protection of miners’ lives or miners’ health and safety. Likewise, the definition section in part 56 does not define “miner,” nor does it contain any exclusion for commercial over-the-road truck drivers similar to that cited by Respondent. *See* 30 C.F.R. § 56.2.

Second, the Commission has long held that enforcement guidelines, such as PPM or PPL, are not binding on the Secretary or the Commission. *See Warrior Coal, LLC*, 38 FMSHRC 913, 921 (May 2016) (“we note that it is well established that policy manuals are not officially promulgated and do not prescribe rules of law that are binding on the Commission or its Judges.”); *D.H. Blattner & Sons, Inc.*, 18 FMSHRC 1580, 1586 (Sept. 1996) (“As the judge

correctly pointed out, the Enforcement Guidelines and the PPM are not binding on the Secretary or the Commission.”); *King Knob Coal Co.*, 3 FMSHRC 1417, 1420 (June 1981), *citing Old Ben Coal Co.*, 2 FMSHRC 2806, 2809 (Oct. 1980) (“[T]he Manual’s ‘instructions are not officially promulgated and do not prescribe rules of law binding upon [this Commission].’”) Where there is a discrepancy between a regulation and an interpretative document, the “express language of a statute or regulation ‘unquestionably controls’ over material like a field manual.” *King Knob Coal Co.*, 3 FMSHRC at 1420, *citing H.B. Zachry Co. v. OSHRC*, 638 F.2d 812, 817 (5th Cir. 1981). While it is true that these PPLs use the word “miners,” the plain language of the regulation states that “persons,” not “miners,” are to wear safety belts and lines when they work where there is a danger of falling. In addition to the part 56 purpose and scope section discussed above, I note that the other sections of subpart N also explicitly refer to “persons.” For example, section 56.15002 states that “[a]ll persons shall wear suitable hard hats [. . .].” 30 C.F.R. § 56.15002 (emphasis added). Section 56.15003 states that “[a]ll persons shall wear suitable protective footwear [. . .].” 30 C.F.R. § 56.15003 (emphasis added). Section 56.15004 states that “[a]ll persons shall wear safety glasses, goggles, or face shields or other suitable protective devices [. . .].” 30 C.F.R. § 56.15004 (emphasis added). In fact, the word “miner” does not appear anywhere in subpart N. *See* 30 C.F.R. §§ 56.15001-15020. As there is no dispute that the contract driver is a “person,” this ends this line of inquiry.

Respondent alternatively argues that the citation should be vacated because MSHA’s policy failed to provide fair notice that it was required to provide safety belts and harnesses for non-employees. (Resp’t Br. 32-33) Here, the plain language of the regulation is clear: Safety belts and lines shall be worn when persons work where there is danger of falling. 30 C.F.R. § 56.15005. Accordingly, I determine that the operator was provided with adequate notice of its requirements. *See Austin Powder Co.*, 29 FMSHRC at 919 (operator had adequate notice of the regulation because the meaning of the regulation was clear based on its plain language); *Jim Walter Res., Inc.*, 28 FMSHRC 983, 988 n.6 (Dec. 2006) (“Because we conclude that the meaning of the standard is clear from the regulation’s plain language, it follows that the standard provided the operator with adequate notice of its requirements.”).

Additionally, ODPC’s contention that it did not have fair notice that the safety belts and lines regulation applied to over-the-road truckers is at odds with the available evidence. As ODPC described in its brief, it had created an “extensive program to prevent falls at the mine by non-employees such as the over-the-road trucker.” (Resp’t Br. 24) This included site specific training on fall protection for each new trucker who arrived at the plant (*Id.*, *citing* Tr.183:24-187:3), written instructions provided to each trucker (*Id.*, *citing* Ex. R-3), a large sign that drivers drove by upon entering the plant, which included tarping restrictions (*Id.* at 24-25), and a tarping station with all of the necessary fall protection materials, instructions, and another sign reinforcing the tarping protection requirements. (*Id.* at 25, *citing* Ex. R-4; Tr.72:5-73:8; 122:4-14; 123:19-124:12) It is incongruous to think that ODPC went through such exacting safety standards to ensure that visiting truck drivers were safe from falling only to now argue that it did not have notice that the safety standard actually applied to these very drivers.

I conclude that the contract driver standing on the loaded trailer of his flatbed truck without fall protection constituted a violation of 30 C.F.R. § 56.15005.

## 2. Gravity and S&S

Howerton designated the gravity of this violation as “Reasonably Likely” because the driver was attempting to pull a tarp over the load while standing on bags of Oil-Dri product, which created an irregular surface. (Tr.70:19-71:1) He believed that this could reasonably result in a slip if the driver lost his balance. (Tr.70:25-71:4) Howerton believed that, in the event of a slip, the driver could face an approximate ten-foot fall from the top of the truck (Tr.71:18-25; Ex. S-18, at 2-3), which could reasonably be expected to result in a permanently disabling injury. (Tr.71:9-16) Such a fall and subsequent injury would affect one person, in this case the contract driver. (Tr.72:3-4) I concur that the injury was reasonably likely to occur, could reasonably be expected to result in a permanently disabling injury, and was limited to only one person.

I have found an underlying violation of 30 C.F.R. § 56.15005. The driver was not wearing proper fall protection. This contributed to a slip–trip–fall hazard, which I find was reasonably likely to occur given the irregular surface he was standing on. Assuming the occurrence of the hazard, I find a ten-foot fall from the top of the truck would reasonably likely result in an injury. The injury would be of a reasonably serious nature, likely resulting in a permanently disabling injury. Accordingly, I conclude this violation was S&S.

## 3. Negligence

The Secretary alleges that ODPC exhibited low negligence. In his brief, the Secretary states that “the evidence established that Respondent knew or should have known of the cited condition because the contract driver had just loaded and climbed on top of the truck’s load.” (Sec’y Br. 56) The sole justification for low negligence cited by the Secretary is a transcript page, which contains a large quote from Howerton:

But [the driver] was not in that area. [The driver] was in the area where they’re loading other trucks and putting it on. And normally I think the procedure is to, you know, to drive around to the area where you’re going out the gate around the plant or however they get around to that—that area. But [the driver] wasn’t in that area. He was right up close to where they were getting loaded. They were, you know, company guys loading trucks with forklifts and stuff in the area and a couple of maintenance guys over in the corner when we saw it.

(Tr.72:14-25)

However, the Secretary fails to explain exactly how Respondent could have better prevented this incident in his brief. The Secretary does not deny that Respondent had precautions in place. ODPC’s precautions included the following: (1) site specific training on fall protection requirements for new truckers (Tr.183:24-187:3); (2) written instructions given to each trucker (Ex. R-3); (3) a tie-off poster (Tr.72:11); and, (4) a tarping station with the necessary fall protection materials, instructions on how to use the fall protection materials, and another sign referring to the fall protection requirements located next to the area where all trucks are weighed upon arrival and departure from the plant. (Ex. R-4; Tr.72:5-25; 122:4-14; 123:19-124:12) Notably, Howerton testified that he did not see any defects in the harness or cable systems

(Tr.125:5-7), he did not see any problems with the location of the tarping area (Tr.125:8-10), and even went as far as to say that ODPC did a “fairly good job” on their site specific training. (Tr.125:13-17) Further, Howerton testified that Gibens ran to stop the driver before he did (Tr.125:18-22) and did exactly what he was expected to do in that situation. (Tr.126:14-17)

While the Secretary’s brief is conclusory and lacking specifics, I note that Howerton provided three reasons at hearing why he thought ODPC was negligent. First, Howerton testified that the driver was not proficient at English, suggesting that ODPC’s safeguards were insufficient in this case. (Tr.65:12-14; 127:12-15) Second, on cross examination, Howerton stated, “[i]t was also brought to my attention that you have the area around the other side of the building where [the truck driver] should have been told to go [. . .] this is the reason I made [the negligence] low.” (Tr.122:9-14) Finally, Howerton justified the low negligence designation because it was a “fairly busy area” with “other trucks in the area” and “[s]omebody should have said something to [the truck driver] before he even got up there.” (Tr.127:19-24) For the reasons outlined below, I am not convinced that ODPC exhibited any negligence.

First, the mere fact that the driver’s proficiency in English was questionable does not establish whether the truck driver was unaware of the rules or understood the rules but simply chose to disregard them. Further, Gibens testified that the truck driver was able to respond to his questions and was subsequently retrained (Tr.182:12-20), which suggests the driver was at least minimally proficient in English. Given all of the safeguards that were in place at the time, including what appear to be visual instructions (Ex. R-4), I am unconvinced that ODPC would have enough cause to believe that more needed to be done to ensure that this particular driver understood the safety belt rules.

Second, the fact that the truck driver was about to tarp his truck in the wrong area is not automatically attributable to ODPC’s negligence. Again, in full consideration of the record before me, there is simply no way to determine whether the truck driver failed to follow the rules because ODPC was negligent, because the driver did not understand, or because the driver disregarded the rules.

Finally, I am not convinced by Howerton’s contention that workers in the area could have acted to prevent the driver from standing on his truck. Howerton stated that “company guys” were loading trucks with forklifts in the area (Tr.72:22-25), but he also testified that there was nobody in the immediate area helping the driver. (Tr.126:19-127:2) (emphasis added) Even if I assume that ODPC workers were generally in the area and close enough to see, the Secretary has failed to establish that the driver at issue was standing on his truck long enough for a non-negligent worker to notice. At the time Howerton and Gibens spotted the driver standing on top of the truck, the tarp was still folded up in front of the vehicle (Ex. S-18, at 3; Tr.84:1-3) and the driver had not lifted the tarp up or started to unfurl it. (Tr.128:2-14) A viewing of the credible evidence, particularly the photo taken at the time of the citation, leads me to conclude that the driver had just climbed up on his trailer when Howerton and Gibens spotted him. ODPC would be negligent if workers had seen or had an opportunity to see the driver standing on his truck without the appropriate safety belts and lines and done nothing. That does not appear to be the case here.

Even though attempting to tarp a truck bed while standing on an uneven surface without fall protection certainly was a display of negligent and risky behavior on the part of the driver, the Secretary failed to sufficiently establish that Respondent could have done more to prevent the violation from occurring. The burden is on the Secretary to prove by a preponderance of the evidence all of the claims he brings. He has failed to do so here. For these reasons, I determine that Respondent exhibited no negligence in this instance.

#### **4. Penalty**

I have reviewed and confirmed the data in Exhibit A to the Secretary's Petition for Assessment of Civil Penalty showing the number of production hours for the mine and the mine controller, the number of prior violations per inspection days, the number of repeat violations, the number of persons affected, the negligence points, the likelihood points, and the good faith point reductions. Based on my gravity and negligence findings, and considering but not relying on the point calculation in 30 C.F.R. § 100.3, the Secretary's proposed penalty of \$285.00 is decreased to \$130.00. I assess a penalty in that amount.

#### **C. Citation No. 8820563 – New Agg Discharge Cooler**

##### **Docket No. SE 2015-0285**

Exhibit S-2 (Tr.194:20-195:9)

The Secretary alleges that Respondent violated 30 C.F.R. § 56.20003(a) by failing to keep the ground floor at the "new agg" discharge cooler clean and orderly. The standard requires that all mining operation workplaces, passageways, storerooms, and service rooms be kept clean and orderly.

#### **1. Violation**

During a regular E01 inspection of the Ripley facility on March 18, 2015, Inspector LaRue observed accumulated material on the ground floor at the new agg discharge cooler. (Tr.194:7-10; 197:21-22; Ex. S-2) LaRue observed footprints where miners had used the area as a walkway to get from one point to another and determined that this area was a passageway, subject to the housekeeping standard. (Tr.204:15-205:11) LaRue could not recall the type of work performed in this area. (Tr.205:4-6) The accumulated material was about six inches deep and covered an area of about 12 feet by 20 feet. (Tr.198:9-20) LaRue observed that the material was damp and retained distinct footprints. (Tr.198:14-16) He concluded from the large amount of material, that the accumulation had existed for more than one shift. (Tr.200:18-201:2)

The citation was terminated the same day. (Tr.207:3-5) Respondent removed the accumulated material with a skid loader and shovels. (Tr.207:7-12) The before and after photos (Ex. S-2, at 4-5) show the extent of the material accumulation (with footprints) before clean-up and the tidy condition of the area after the abatement cleanup.

LaRue testified that he considered the cited condition to be an S&S violation. (Tr.206:2-9) Specifically, LaRue determined that the area was covered by wet, slippery material, which concealed the underlying uneven floor surface with anchor bolts and cement pillars at the base of

the columns. (Tr.202:6-15; 204:5-11; Ex. S-2, at 5) Footprints in the accumulated material indicated that miners had transited the area, creating an inference that serious injuries were reasonably likely to occur had the condition been allowed to continue. (Tr.204:15-19). Inspector LaRue concluded that a miner could fall and catch a knee or hand on a bolt, or simply trip and fall (a foot-level fall) and suffer a twisted ankle or knee, or possibly tear an ACL, which would result in lost workdays or restricted duty. (Tr.205:21-206:1) LaRue determined that one person would be exposed to the cited condition because only one person would likely be hurt before the condition was identified and corrected. (Tr.206:10-16)

LaRue classified the negligence level as moderate because, even though the violation was obvious and extensive, there had only been one housekeeping violation prior to this inspection and the operator did not offer any mitigating evidence or argument to justify a lower negligence classification. (Tr.206:17-207:2; 208:15-16) The Secretary proposed a penalty of \$1,412.00. (Ex. S-1)

The Respondent countered that although LaRue claimed the clay was near a ladder (Tr.199:21-23), the picture of the location (Resp't Br. 40, *citing* Ex. S-2, at 4-5) shows that the ladder could be accessed without walking through the accumulated material. Respondent argues the picture shows there is a drive-thru roadway nearby, which eliminates any need to access this area as a passageway. (*Id.*, *citing* Ex. S-2, at 4) Additionally, Respondent argues the picture shows angled steel supports in the top, right corner, which deter anyone from walking through this area. (*Id.*, *citing* Ex. S-2, at 5)

I cannot agree with the Respondent's characterization of what the photos show. The mere presence of numerous footprints, apparent in the photo at Exhibit S-2, page 4, undercuts the argument that the area need not be transited on foot at all or that no one would walk through the area because of the steel support beams in the way. I find that the material accumulation created a hazardous violation of the cited standard. I credit the evidence presented by the Secretary substantially more than that from the Respondent because it accords more closely with the evidence as a whole.

Based on the above, I find the accumulation of material described above constituted a violation of 30 C.F.R. § 56.20003(a).

## **2. Gravity and S&S**

The elements of gravity at the level of reasonable likelihood are satisfied. The accumulated material created a slip-trip-fall hazard. The accumulations were extensive, deep, and damp in some places. Additional trip hazards were concealed by the accumulations. As discussed above, the accumulations were located on a passageway. At least one miner was subjected to this hazard as shown by the footprints in the material. I conclude that this violation created a hazard that was reasonably likely to result in an injury, which could reasonably be expected to result in lost workdays or restricted duty for one miner.

I have found an underlying violation of 30 C.F.R. § 56.20003(a), a mandatory safety standard. The accumulation of material, its extent, location, and slippery state contributed to a slip-trip-fall hazard. (Tr.204:5-11) It was reasonably likely that this hazard would occur given the extensiveness of the accumulations, the uneven flooring, and the existence of concealed



anchor bolts and cement pillars at the base of the columns. Assuming the occurrence of the foot-level fall hazard, I find it would reasonably likely result in a joint injury of the type LaRue outlined in his testimony. (Tr.204:9-11) The injury would be of a reasonably serious nature, likely resulting in lost workdays or restricted duty. Accordingly, I conclude this violation was S&S.

### **3. Negligence**

The violation was the result of moderate negligence. The violating condition was extensive, 12 by 20 feet and some six inches deep (Tr.198:9-20; Ex. S-2, at 3), and obvious, as evidenced by the existence of multiple footprints in the material. The condition had existed at least one shift before being cited and was in an area where a pre-work examination had been performed. (Tr.200:18-201:2; 208:9-13) Given the obviousness and extensiveness of the accumulations, Respondent's management either knew or should have known it existed and should have taken remedial measures on their own. However, ODPC only had one housekeeping violation prior to this inspection. In consideration of the totality of circumstances, I conclude that ODPC exhibited only moderate negligence.

### **4. Penalty**

I have reviewed and confirmed the data in Exhibit A to the Secretary's Petition for Assessment of Civil Penalty showing the number of production hours for the mine and the mine controller, the number of prior violations per inspection days, the number of repeat violations, the number of persons affected, the negligence points, the likelihood points, and the good faith point reductions. Based on my gravity and negligence findings, and considering but not relying on the point calculation in 30 C.F.R. § 100.3, as adjusted to account for the VPID distortion discussed above, the Secretary's proposed penalty of \$1,412.00 is decreased to \$634.00. I impose a penalty in that amount.

#### **D. Citation No. 8820564 – RVM Discharge End Platform**

##### **Docket No. SE 2015-0285**

Exhibit S-3 (Tr.208:20-209:16)

The Secretary alleges that Respondent violated 30 C.F.R. § 56.20003(a) by failing to keep the RVM discharge end platform clean and orderly. (Ex. S-3; Tr.210:4-12) The standard requires that all mining operation workplaces, passageways, storerooms, and service rooms be kept clean and orderly.

#### **1. Violation**

During the mine inspection on March 18, 2015, LaRue climbed up a ladder onto the RVM discharge end platform and observed accumulated material, two cans of spray foam, and some tools, situated so as to partially block the way onto the platform. (Tr.210:16-23; 218:18-23; Ex. S-3) He entered this area from a separate building where the "new agg" discharge cooler discussed in Citation No. 8820563 was located. (Tr.210:7-9; 212:6-22) LaRue determined that

the area was a working place because the tools, other items, and the footprints in the material indicated to him that miners had been working in the area. (Tr.210:24-211:14; Ex. S-3, at 4)

The citation was terminated on March 19, 2015, after Respondent removed the material and other items. (Tr.216:19-217:3) Exhibit S-3, pages 4 and 5 show the significant difference between the clean and orderly condition in the termination photo and the violating condition photo. (Tr.428:17-429:1) Inspector LaRue determined the following: (1) The cited condition created a slip-trip-fall hazard (Tr.214:24-25); (2) the hazard was unlikely to occur because a person would have to climb up the ladder to reach the violating area, there was a clear walkway around the material, and a miner would most likely have three points of contact after climbing to the platform (Tr.214:18-215:11); (3) assuming the foot-level-fall hazard, a possible joint or muscle injury would follow, which would result in at least lost workdays or restricted duty (Tr.215:12-14); and, (4) an injury would likely affect only one person. (Tr.215:17-20) LaRue found moderate negligence, citing the fact that the condition was not obvious from ground level as a mitigating circumstance. (Tr.214:8-10; 215:22-25) However, the footprints in the material in conjunction with the tools and spray cans showed that people had been there, supporting the conclusion that it was a working area. (Tr.215:25-216:6) The Secretary proposed a penalty of \$285.00. (Ex. S-1)

I find the accumulation of material, tools, and spray cans described above constituted a violation of 30 C.F.R. § 56.20003(a).

## **2. Gravity**

Inspector LaRue determined that the cited condition created a slip-trip-fall hazard. (Tr.214:24-25) He determined, however, that the foot-level fall hazard was unlikely to occur because a person would have to climb up the ladder to reach the violating area, there was a clear walkway around the material, and a miner would most likely have three points of contact after climbing to the platform. (Tr.214:18-215:11; Ex. S-3, at 4) Additionally, LaRue's notes mention the area at issue was only accessed for maintenance as needed. (Ex. S-3, at 3) Respondent adds that an injury would be unlikely because access is blocked by a bolted panel directly across from the ladder, the spray cans and tools were left by the panel to open and reseal it, and the tools and materials are not directly at the top of the access ladder. (Resp't Br. 40, *citing* Ex. S-3, at 4) I agree with LaRue and Respondent that the hazard was unlikely to result in injury. If a foot-level fall were to occur, however, it would likely result in a joint or muscle injury, which could reasonably be expected to result in at least lost workdays or restricted duty. (Tr.215:13-14) The injury would likely only affect one person. (Tr.215:17-20)

## **3. Negligence**

LaRue found moderate negligence, citing the extensive amount of trash and material on the floor and the fact that there was evidence that workers were up in the area after the spill. (Tr.215:22-216:6; Ex. S-3, at 3) LaRue noted the fact that the condition was not obvious from ground level as a mitigating circumstance. (Tr.214:8-10; 215:22-25)

I consider as evidence of mitigation the counter points raised. Considering the totality of the circumstances, I concur with LaRue that ODPC exhibited moderate negligence here.

#### **4. Penalty**

I have reviewed and confirmed the data in Exhibit A to the Secretary's Petition for Assessment of Civil Penalty showing the number of production hours for the mine and the mine controller, the number of prior violations per inspection days, the number of repeat violations, the number of persons affected, the negligence points, the likelihood points, and the good faith point reductions. Based on my gravity and negligence findings, and considering but not relying on the point calculation in 30 C.F.R. § 100.3, as adjusted to account for the VPID distortion discussed above, the Secretary's proposed penalty of \$285.00 is decreased to \$127.00. I impose a penalty in that amount.

#### **E. Citation No. 8820565 – Ground Level of the Old Agg Scrubber**

##### **Docket No. SE 2015-0285**

Exhibit S-4 (Tr.217:14-21)

The Secretary alleges that Respondent violated 30 C.F.R. § 56.20003(a) by failing to keep the ground level of the old agg scrubber area clean and orderly. (Ex. S-4) The standard requires that all mining operation workplaces, passageways, storerooms, and service rooms be kept clean and orderly.

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

During the E01 inspection on March 18, 2015, Inspector LaRue observed accumulated material on the ground level of the old agg scrubber (Tr.219:7-9), an area adjacent to the RVM discharge area, covered by the previous citation, Citation No. 8820564 (Ex. S-3), but approximately 150-200 feet away. (Tr.217:24-218:11) The area was part of a separate structure. (Tr.218:10-11)

LaRue testified that on approach the accumulated material was obvious and extensive in size. (Tr.221:2-9) At first glance he did not recognize a hazard, but when he put the toe of his boot into the material, he found it was "extremely slick." (Tr.219:6-9) He noted in his field notes that the facility's site hazard awareness sheet recognized that the material could be slippery when wet. (Ex. S-4, at 3; Tr.197:3-14; 222:16-23; 433:11-434:2) He also noted footprint tracks and drag marks as though someone had dragged something through the material. (Tr.219:15-220:7; Ex. S-4, at 4-5)<sup>16</sup> He concluded that miners had passed through the area to get from one point to another. (Tr.220:12-13) He understood that miners used the area as a passageway to access a drain valve for an adjacent containment. (Tr.220:8-22) He could not say how long the condition had existed by looking at the area or from talking to Superintendent Gibens who accompanied him on the inspection (Tr.220:23-221:1), but he believed that management was aware of this condition and considered it a recurring problem. (Tr.222:10-223:17)

The citation was terminated on March 19, 2015, after Respondent removed the material. (Tr.225:4-18; Ex. S-4, at 2) Inspector LaRue noted the difference between the condition in the

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<sup>16</sup> LaRue testified about seeing two sets of footprint tracks at one point (Tr.219:15-24), but only a single set of tracks at another. (Tr.224:20) This apparent contradiction does not change my analysis.

violation photo and the orderly condition in the termination photo. (Tr.225:8-12; Ex. S-4, at 4-6) LaRue determined that the cited condition created a safety hazard that was reasonably likely to result in serious injury involving lost workdays or restricted duty and that it potentially affected one person. (Ex. S-4, at 1) LaRue testified that the accumulation of wet, slippery mud on the uneven ground created a slip-trip-fall hazard. (Tr.223:20-25; Ex. S-4, at 3) LaRue determined that an injury was reasonably likely to occur based on miner exposure to the slippery surface, evidenced by footprints in the material. (Tr.223:18-224:1; Ex. S-4, at 5) LaRue testified that the lost workdays or restricted duty designation was appropriate because a miner could fall and catch a knee or hand on a bolt or simply trip and fall at foot-level, suffering a twisted ankle or knee joint, or perhaps a torn ACL. (Tr.224:4-5) LaRue determined that one person was affected by the cited condition because only one person would likely be hurt before the condition was identified and corrected. (Tr.224:13-16) LaRue concluded that this violation was S&S. (Tr.224:8-10) LaRue found moderate negligence due to factors he considered mitigating, e.g., the material was not very thick, he could not tell how long it had been on the ground, and there was no history of similar violations. (Tr.224:17-225:3) The proposed penalty for this violation is \$1,412.00. (Ex. S-1)

Respondent argues that the citation should be vacated based on the following: (1) The area where this condition was found is less than 200 feet from the prior citation (Resp't Br. 41, *citing* Tr.218:7-11); (2) LaRue did not see any miners working in the area; he merely saw footprints that showed someone had been there at some prior time (*Id.*, *citing* Tr.219:15-24 and Ex. S-4); (3) LaRue said he determined the material was slick by dipping his boot tip in it, but he did not testify that access to the area occurred while the material was wet (*Id.*, *citing* Tr.221:22-25); and, (4) the slickness of the material was contradicted by Gibens, who testified that the product would not be slick unless it was a very thin layer, which this was not. (*Id.*, *citing* Tr.433:11-434:14)

I have already determined that this citation will not be vacated on the basis that it cited a condition in an area that Respondent believes should be considered part of another area. In full view of Respondent's contentions, I find that the material was slippery as tested by LaRue and recognized to be so by Respondent in its site awareness documentation. I find that the accumulation of material described above constituted a slip-trip-fall hazard to miners and violated 30 C.F.R. § 56.20003(a).

## **2. Gravity and S&S**

LaRue determined that the hazard underlying this violation was reasonably likely to result in injury to a single miner that would involve lost workdays or restricted duty. I concur in his assessment. I am aware that Respondent contests the slickness of the material, but on balance I am convinced by the weight of the evidence that the accumulated material was slick and reasonably likely to cause a miner traversing it to slip and fall and incur an injury to his joints. I conclude that LaRue's gravity determination of "reasonably likely" to result in lost workdays or restricted duty for a single miner is appropriate.

I have found an underlying violation of 30 C.F.R. § 56.20003(a), a mandatory safety standard. The material accumulation, its extent, location, and slippery state contributed to a slip-trip-fall hazard. (Tr.223:20-224:1) It was reasonably likely that this hazard would occur given

the fact that miners traversed the area. Assuming the occurrence of the foot-level-fall hazard, I find that it would reasonably likely result in a foot-level fall causing a joint injury of the type LaRue outlined in his testimony. (Tr.224:2-5) The injury would be of a reasonably serious nature, possibly resulting in lost workdays or restricted duty. I conclude this violation was S&S.

### **3. Negligence**

Management is deemed to have been aware of this violation. The accumulation was conspicuous and large. (Tr.221:4-9) According to statements attributed to Gibens and Larry Gurley, the second shift supervisor, management was not able to maintain consistent housekeeping compliance due to a staff shortage. (Tr.397:13-17; 443:5-7; 476:2-15) LaRue based his “moderate” negligence allegation on what he considered to be mitigating circumstances, including the following: (1) The accumulated material was not very thick; (2) there was only one set of footprints in the material (*see supra* text accompanying note 16); he could not tell how long the material had been in place; (3) Gibens had claimed another point of mitigation which LaRue could not recall, but took into consideration; and, (4) there were relatively few housekeeping violations in Respondent’s violation history. (Tr.224:18-225:3) I concur with the inspector’s evaluation of negligence and find that this violation involved moderate negligence.

### **4. Penalty**

I have reviewed and confirmed the data in Exhibit A to the Secretary’s Petition for Assessment of Civil Penalty showing the number of production hours for the mine and the mine controller, the number of prior violations per inspection days, the number of repeat violations, the number of persons affected, the negligence points, the likelihood points, and the good faith point reductions. Based on my gravity and negligence findings, and considering but not relying on the point calculation in 30 C.F.R. § 100.3, as adjusted to account for the VPID distortion discussed above, the Secretary’s proposed penalty of \$1,412.00 is decreased to \$634.00. I impose a penalty in that amount.

## **F. Citation No. 8820567 – Third Floor of the Mill Building**

### **Docket No. SE 2015-0285**

Exhibit S–5 (Tr.227:5-7)

The Secretary alleges that Respondent violated 30 C.F.R. § 56.20003(a) by failing to keep the third floor of the mill building clean and orderly. (Tr.227:24-228:2; Ex. S–5) The standard requires that all mining operation workplaces, passageways, storerooms, and service rooms be kept clean and orderly.

### **1. Violation**

During his E01 inspection on March 18, 2015, Inspector LaRue observed material on the third floor walkway of the mill building. (Tr.228:5-15; Ex. S–5) Gibens accompanied LaRue on this portion of the inspection. (Tr.228:9-10; 435:9-12) Inspector LaRue entered the mill building from the old agg scrubber, a separate building, as discussed in relation to Citation No. 8820564.

(Tr.228:5-8) On the third floor of the mill building, near the screen room, he saw deep accumulated material on the floor with footprints and a chair in the middle. (Tr.228:10-21) It appeared to him that the chair had been placed there so a person could take a break. (Tr.228:13-15; 231:21-232:1) The material ranged from three to six inches deep. (Tr.228:19-21; Ex. S-5, at 3) LaRue considered this an obvious and extensive slip-trip-fall hazard. (Tr.229:25-230:11; Ex. S-5, at 3-5) He testified about the difference between the violation photos and those showing the area after it was cleaned. (Tr.234:4-9; Ex. S-5, at 4-7) The citation was terminated on March 19, 2015, when Respondent removed the material. (Tr.234:13-17; Ex. S-5, at 2)

LaRue appropriately characterized the area in question as a workplace and passageway. According to LaRue, Gibens had indicated to him at the time that Respondent stored screens used in support of the mining operation in this area and miners traveled this area to get from one point to another and to gather the screens. (Tr.232:2-14) I find that the combination of the deep material accumulation and a chair in the passageway created a slip-trip-fall hazard. This condition was a violation of 30 C.F.R. § 56.20003(a).

## **2. Gravity**

LaRue determined that the cited condition created a slip-trip-fall hazard that was unlikely to result in injury. (Tr.232:15-233:2)<sup>17</sup> He felt that an injury resulting from this hazard would probably involve a muscle or joint injury (Tr.233:3-6), would likely result in at least lost workdays or restricted duty (Tr.233:3-6), and would affect one person because only one person would be hurt before the condition was identified and corrected. (Tr.233:7-9) The inspector testified that even though miners were exposed to this hazard, as shown by the footprints, an injury was unlikely because of how infrequently anyone went into the area—one person every eight to ten weeks (Tr.228:20-21; 232:18-20)—and because the material was light silt. (Tr.232:20-21) LaRue did not consider this violation S&S.

I concur with LaRue's gravity determination. This violation was unlikely to result in a lost-workdays or restricted-duty injury to a miner.

## **3. Negligence**

LaRue felt this violation resulted from "moderate" negligence. Once a person climbed to the area in question, the accumulations were very obvious and covered an extensive area. (Tr.233:11-12; Ex. S-5, at 3) He factored in the mitigating effect of the out-of-the-way location of the accumulations to reach moderate negligence. (Tr.233:12-16) I concur.

## **4. Penalty**

I have reviewed and confirmed the data in Exhibit A to the Secretary's Petition for Assessment of Civil Penalty showing the number of production hours for the mine and the mine controller, the number of prior violations per inspection days, the number of repeat violations, the number of persons affected, the negligence points, the likelihood points, and the good faith point reductions. Based on my gravity and negligence findings, and considering but not relying

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<sup>17</sup> LaRue mentioned in his field notes that this was a low visibility area because his glasses fogged while he was there. (Ex. S-5, at 3) He did not mention this in his testimony.

on the point calculation in 30 C.F.R. § 100.3, as adjusted to account for the VPID distortion discussed above, the Secretary's proposed penalty of \$285.00 is decreased to \$127.00. I impose a penalty in that amount.

**G. Citation No. 8820568 – Walkway Around the 4 & 5 Pre-Grind Mills**

**Docket No. SE 2015-0285**

Exhibit S–6 (Tr.236:20-237:2)

The Secretary alleges that Respondent violated 30 C.F.R. § 56.20003(a) by failing to keep the walkway around the 4 & 5 pre-grind mills clean and orderly. (Ex. S–6; Tr.237:4-6) The standard requires that all mining operation workplaces, passageways, storerooms, and service rooms be kept clean and orderly.

**1. Violation**

During his inspection of the mine on March 18, 2015, Inspector LaRue observed material with footprints on the walkway around the 4 & 5 pre-grind mills. (Tr.237:8-20; Ex. S–6) Gibens accompanied Inspector LaRue on this portion of the inspection. (Tr.237:24-25; 244:14-17) The pre-grind mills area is separate from the mill building discussed in Citation No. 8820567. (Tr.242:3-15) This area is close to the control room—the nerve center of the mine—where mine management spends significant time. (Tr.238:21-240:4) LaRue observed a sizeable buildup of material with heavy foot traffic, as evidenced by the multiple footprints. (Tr.237:15-20; Ex. S–6, at 4-5) The accumulated material covered and hid angle iron motor floor supports and floor plate height differences, both of which created a trip hazard. (Tr.238:11-20; Ex. S–6, at 4-6)

LaRue considered this area both a passageway and a working place because miners not only used it to come and go to check motors, instrumentation, or a heat lamp nearby, but also conducted inspections, maintenance, and other types of work in the area. (Tr.241:4-18)

The citation was terminated on March 19, 2015, after the accumulations were removed. (Tr.246:3-9; Ex. S–6, at 2) Inspector LaRue testified to the difference between the pre- and post-abatement photos showing the extent of the violating condition. (Tr.245:13-25; Ex. S–6, at 4-6) The photos also show the depth of the accumulated material. The material was deep enough to nearly cover a set of handrails about forty-two inches in height. (Tr.240:16-20; Ex. S–6, at 4)

The Respondent argues that LaRue did not see anyone working in the area, and the “walkway” was not used to access the nearby control room. (Resp't Br. 42, *citing* Ex. S–6)

I find that the deep accumulations covering floor irregularities created a trip hazard as alleged by Inspector LaRue. This was a violation of 30 C.F.R. § 56.20003(a).

**2. Gravity and S&S**

LaRue determined that the cited condition created a safety hazard that was reasonably likely to result in serious injury because of the significant buildup of silt material concealing uneven ground with trip hazards. (Tr.238:10-20; 239:16-19; 240:13-20; 242:18-22) The miners

who left the footprints were exposed to the hazard. (Tr.242:20-22) LaRue confirmed that a trip or fall could result in a twisted ankle, twisted knee joint, or a torn ACL and result in lost workdays or restricted duty. (Tr.243:9-11) LaRue also determined that one person would be affected by the violation because he believed the condition would be identified and corrected before anyone else was injured. (Tr.243:17-20) I concur with LaRue that this violation was reasonably likely to result in a lost-workday or restricted-duty injury to one miner.

I have found an underlying violation of 30 C.F.R. § 56.20003(a), a mandatory safety standard. The extent and location of the material accumulation greatly contributed to a slip–trip–fall hazard. (Tr.238:10-20; 239:16-19; 240:13-20; 242:18-22; Ex. S–6, at 4-5) It was reasonably likely that this hazard would occur given the number of personnel exposed to the area and the size of the material accumulation. Assuming the occurrence of a foot-level-fall hazard, I find that it would reasonably likely result in a joint injury of the type LaRue outlined in his testimony. (Tr.243:9-11) The injury would be of a reasonably serious nature, likely resulting in lost workdays or restricted duty. I conclude this violation was S&S.

### **3. Negligence**

Inspector LaRue rated the negligence for this violation as “high” because mine management was aware of and had multiple opportunities to correct this hazard considering its proximity to the control room, how it grew in size over multiple shifts, and its obvious nature. (Tr.238:23-239:19; 240:5-9; 244:5-6; 440:7-10) Inspector LaRue testified that the extensiveness of the accumulation suggested a “callous attitude” by Respondent. (Tr.245:23-25)

Respondent contends that the “high” negligence designation was based on the frequency of housekeeping citations, which, except for a single prior event, reflected only the other housekeeping citations written during this inspection. (Resp’t Br. 42, *citing* Tr.243:21-244:10) I note there is partial support in the record that Inspector LaRue considered the previous housekeeping citations in issuing the high negligence designation for Citation No. 8820568. For example, in his notes under the justification section for his high negligence determination, Inspector LaRue wrote, “repeated violations of same regulation.” (Ex. S–6, at 3) Inspector LaRue also testified that his frustration level was increasing by the time he issued Citation No. 8820567, having previously issued four housekeeping citations earlier that day. (Tr.233:20-234:4) Nevertheless, I find there is sufficient justification, notably the obviousness given the extensiveness of the material accumulations and proximity to the control room, to warrant a high negligence determination for Citation No. 8820568 without reference to any other housekeeping violations.

### **4. Penalty**

I have reviewed and confirmed the data in Exhibit A to the Secretary’s Petition for Assessment of Civil Penalty showing the number of production hours for the mine and the mine controller, the number of prior violations per inspection days, the number of repeat violations, the number of persons affected, the negligence points, the likelihood points, and the good faith point reductions. Based on my gravity and negligence findings, and considering but not relying on the point calculation in 30 C.F.R. § 100.3, as adjusted to account for the VPID distortion



discussed above, the Secretary's proposed penalty of \$4,689.00 is decreased to \$2,107.00. I impose a penalty in that amount.

## **H. Citation No. 8820569 – Ground Level of the Mill Building**

### **Docket No. SE 2015-0285**

Exhibit S-7 (Tr.247:10-19)

The Secretary alleges that Respondent violated 30 C.F.R. § 56.20003(a) by failing to keep the ground level of the mill building clean and orderly. (Ex. S-7) The standard requires that all mining operation workplaces, passageways, storerooms, and service rooms be kept clean and orderly.

#### **1. Violation**

During his inspection on March 18, 2015, Inspector LaRue observed material with footprints on the ground floor level of the mill building. (Tr.248:8-10; 249:4-5; Ex. S-7) Gibens accompanied LaRue on this portion of the Inspection. (See Tr.452:22-455:14) This area was on the ground level underneath the mill building, separate from the pre-grind milling area discussed in Citation No. 8820568. (Tr.248:3-10)

As he was approaching the mine prior to starting the inspection, LaRue observed a dust cloud emanating from this area of the milling facility. (Tr.250:23-251:3) When he entered the mill building, he noted that the material completely covered the concrete floor.<sup>18</sup> (Tr.252:4-7) The buildup area was so large that LaRue could not capture it in a single photo; rather, three photos were required to show the extent of material accumulation in the area. (Tr.248:18-24) It was deep enough—12 to 18 inches—to create a trip hazard. (Tr.252:23-25; 258:1-15; Ex. S-7, at 4) The area in question was on the ground floor of the main milling portion of the mine; miners would often be in and around it. (Tr.252:10-20) It was very close to the break room, thus obvious in LaRue's opinion. (Tr.253:3-10) LaRue was certain the material had built up over more than one shift; he suspected it had been forming for days, weeks, or possibly months. (Tr.253:13-23) From this, he concluded that mine management had numerous opportunities to find and correct this hazard given how close it was to the break room, its large size, and its obvious nature, but they made no apparent effort to address the condition. (Tr.253:3-254:2)

LaRue considered the cited area a passageway—miners used it to get from one point to another, including the nearby break room and other areas of the main mill building. (Tr.249:6-8; 252:12-20) Although there was a ladder in the area, which typically denotes an access point to another work platform or workplace, LaRue found it to be inconsequential, and he did not give it much weight. (Tr.250:13-15)

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<sup>18</sup> LaRue's handwritten notes on MSHA Form 4000-49E state, "[r]aw mill ground floor [. . .] housekeeping not maintained on approx 50% of the ground floor." (Ex. S-7, at 4) At hearing, however, he testified that "it was a hundred percent coverage. When I say a hundred percent coverage, at no point in that field of view could I see the concrete underneath it." (Tr.252:5-7) I have reviewed the photographic evidence and conclude that this discrepancy—whether there was fifty percent or one hundred percent coverage—does not affect my ultimate analysis.

The citation was terminated on March 23, 2015, when Respondent removed the material. (Tr.259:21-22; Ex. S-7, at 3) LaRue testified that he had to extend the termination period multiple times because of the extensiveness of the material accumulation. (Tr.259:3-22) The pre- and post-abatement photos show the extent of the violation and corroborate LaRue's testimony. (Tr.256:19-257:3; Ex. S-7, at 5-8)

LaRue determined that the cited condition contributed to a safety hazard that was reasonably likely to result in injury resulting in lost workdays or restricted duty for one person. (Ex. S-7, at 1) LaRue determined that ODPC exhibited high negligence. (*Id.*) The Secretary recommended a penalty of \$4,689.00. (Ex. S-1)

Respondent pointed out that LaRue did not identify any miners working in the area during the inspection (Resp't Br. 42, *citing* Tr.252:13-14), and that he rated the negligence element as "high" due to the multiple violations of housekeeping cited during this inspection. (*Id.*, *citing* Ex. S-7, at 4) Larue's evidence of the nature and extent of the material accumulation is uncontested. (Tr.453:1-10, 20-23; 454:3-7)

I find that the accumulation was as described above by LaRue, it created a slip-trip-fall hazard, and it constituted a violation of 30 C.F.R. § 56.20003(a).

## **2. Gravity and S&S**

LaRue determined that the cited condition contributed to a safety hazard that was reasonably likely to result in injury for the following reasons: (1) deep footprints indicated that miners had walked through the material (Tr.252:12-14; 254:21-22); (2) the 12- to 18-inch accumulated material would stop a miner's normal forward motion, causing them to fall (Tr.258:1-12); and, (3) the material was extensive, covering uneven ground and concealing trip hazards. (Tr.254:20-21; 258:9-15; Ex. S-7, at 4) LaRue determined that any injury resulting from this hazard was reasonably likely to result in lost workdays or restricted duty because miners could fall and catch a knee or hand on a bolt or simply trip and fall at foot level, suffering a twisted ankle, twisted knee joint, or a torn ACL. (Tr.205:21-206:1; 255:1; Ex. S-7, at 4) LaRue determined that only one person would be affected because he assumed the condition would be identified and corrected before anyone else was injured. (Tr.255:6-9)

On cross-examination, Gibens agreed there was extensive material coverage on the ground, footprints were observed throughout the spilled material, and the material was 12 to 18 inches deep. (Tr.453:1-7, 20-23)

I find that the Secretary has proved that the hazard created by the cited conditions was reasonably likely to cause an injury to at least one miner, and that the resulting injury would most likely be serious enough in nature to lead to lost workdays or restricted duty.

I have found an underlying violation of 30 C.F.R. § 56.20003(a), a mandatory safety standard. The material accumulation's extent, depth, and location contributed to a slip-trip-fall hazard. It was reasonably likely that this hazard would occur because miners were walking through the extensive and thick material accumulation, as evidenced by numerous footprints. Assuming the occurrence of the foot-level fall hazard, it would reasonably likely result in a joint injury of the type LaRue outlined in his testimony. Such an injury would be of a reasonably

serious nature, possibly resulting in lost workdays or restricted duty. I conclude this violation was S&S.

### **3. Negligence**

The entire floor area on the ground level of the mill building was covered by 12 to 18 inches of accumulated material. (Tr.252:2-25; *see* Ex. S-7, at 4-7) There was no vantage point from which LaRue could see any of the floor through or around the material. (Tr.252:5-7) This area was in the main milling portion of the mine, frequented by miners. (Tr.252:17-20) The proximity to the break room and the presence of traffic footprints support LaRue's conclusion that the condition was obvious and had been ignored long enough for material to accumulate to this depth. (Tr.253:1-254:17)

On cross-examination, Gibens stated that he disagreed with LaRue's notes that the area is accessed daily by plant personnel. (Tr.453:11-13) Gibens agreed, however, that 50% of the ground floor was covered by the accumulated material, there were footprints throughout the spilled material, the material was 12 to 18 inches deep, and the condition was very obvious. (Tr.453:1-23) Gibens also disagreed with LaRue's notes that the company made no effort to correct or mitigate the hazard. (Tr.453:17-19) Gibens stated that the company made efforts to clean this specific area as they had more manpower and time. (Tr.454:13-455:1) In stating that the company was making efforts to correct the situation, Gibens admitted that the company knew about this problematic area for quite a while. (Tr.455:4-9)

As it did with Citation No. 8820568, Respondent contends that the "high" negligence designation was impermissibly based on the frequency of housekeeping citations written during this inspection. (Resp't Br. 42, 47) I again note that there is partial support in the record that Inspector LaRue factored the previous housekeeping citations that day in issuing the high negligence designation for Citation No. 8820569. For example, in his notes under the justification section for his high negligence determination, Inspector LaRue wrote, "multiple violations for housekeeping this inspection." (Ex. S-7, at 4) Nevertheless, the exhibit picture is indeed worth a thousand words. Upon viewing the photographic evidence, I find there is sufficient justification—notably the obviousness and extensiveness of the material accumulations, which required three photographs to capture its panoramic enormity—to justify a high negligence determination for Citation No. 8820569 without reference to any other housekeeping violations. What is more alarming to me is that Gibens admitted that the company knew about the problematic area for "quite a while" (Tr.455:4-6) but did not take preventative steps to limit access to the area. (Tr.254:4-10; 455:10-14) Viewing the totality of the circumstances, I agree with the Secretary and conclude that ODPC exhibited high negligence in this instance.

### **4. Penalty**

I have reviewed and confirmed the data in Exhibit A to the Secretary's Petition for Assessment of Civil Penalty showing the number of production hours for the mine and the mine controller, the number of prior violations per inspection days, the number of repeat violations, the number of persons affected, the negligence points, the likelihood points, and the good faith point reductions. Based on my gravity and negligence findings, and considering the point calculation in 30 C.F.R. § 100.3, as adjusted to account for the VPID distortion discussed above,

the Secretary's proposed penalty of \$4,689.00 is decreased to \$2,107.00. I impose a penalty in that amount.

**I. Citation No. 8820573 – Dust Truck Tagging**

**Docket No. SE 2015-0285**

Exhibit S-10 (Tr.277:14-279:20)

The Secretary alleges that Respondent violated 30 C.F.R. § 56.14100(c) by failing to remove the Ford L9000 dust truck from service after safety defects were observed during pre-operational examinations. The standard requires that “[w]hen defects make continued operation hazardous to persons, the defective items including self-propelled mobile equipment shall be taken out of service and placed in a designated area posted for that purpose, or a tag or other effective methods of marking the defective items shall be used to prohibit further use until the defects are corrected.” 30 C.F.R. § 56.14100(c).

**1. Violation**

During the inspection on March 24, 2015, Inspector LaRue cited Respondent for failing to remove the Ford L9000 dust truck from service after safety defects (dirty windshield and inoperable wipers) were observed during pre-operational examinations. (Ex. S-10) Gibens accompanied Inspector LaRue on this portion of the inspection. (Tr.455:21-24)

During the previous night's inspection on March 23, 2015, LaRue saw the Ford L9000 dust truck when he issued the inadequate lighting violation citation, No. 8820571, in the verge storage tank area. (Tr.282:4-22; *see* discussion *infra* Section VI. K.) He made a video recording, which shows the dust truck parked up at the top of the ramp near the mine entrance. (Tr.282:23-283:9; Ex. S-9, at 1:30; *see also* Ex. R-1)

During the morning inspection on March 24, 2015, LaRue noticed the dust truck had been moved from its previous place on the ramp. (Tr.282:5-14) LaRue found the truck parked under the dust chute<sup>19</sup> in front of the verge storage tank area next to the main building. (Tr.279:22-25) At the hearing, I estimated, based on my observation of the video recording and the mine map, that the distance the dust truck traveled was 100 yards or less.<sup>20</sup> (Tr.328:8-11; Exs. S-9, R-1) LaRue responded that the estimate was a fair assessment. (Tr.328:12-13)

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<sup>19</sup> Gibens explained at hearing that the Ford L9000 dust truck is backed under the dust chute whenever ODPC changes products. (Tr.403:4-5) The clay wastes in the tanks are flushed out into the dust truck to ensure there is no cross-product contamination. (Tr.403:5-8) However, because the dock is also used for the loading of bulk trucks, the Ford L9000 is normally pulled out from the loading dock and positioned up the ramp. (Tr.403:17-404:6)

<sup>20</sup> Upon closer review of Exhibit S-9 in relation to Exhibit R-1, it appears that I misspoke at hearing. Although I said “100 yards,” which Inspector LaRue agreed with, given Inspector LaRue's walking speed in the video, the truck appears to be closer to 100 “feet” away from the dust chute. This correction does not materially alter any part of my analysis.

LaRue noticed a significant<sup>21</sup> amount of clay dust on the windshield, which was observable even from a distance. (Tr.289:13-20; Ex. S-10, at 3-5) LaRue interviewed Teddy Hall, a kiln operator, who explained that he had driven the truck to the dust chute at about 7:30 a.m. (Tr.282:10-12; 286:6-8; 314:22-315:5; 406:23-407:1; Ex. S-10, at 2) Hall said that he tried unsuccessfully to run the wipers to clear the dust off the windshield before moving it into the position shown in the photographs on pages 3, 4, and 5 of Exhibit S-10. (Tr.282:12-14; *see* Ex. S-10, at 3-5) Other miners were operating a Bobcat in the verge storage tank area directly behind the dust chute as Hall backed the truck into place. (Tr.287:11-18)

Two days earlier, on March 22, 2015, a pre-operational examination was conducted for the dust truck (Ex. S-10, at 7), which identified the truck's lights, the truck's windshield wipers, and "obvious damage or leaks" as problems. (*Id.*) The following notes were written in the description section: (1) "head light [sic] busted"; (2) "windshield wipers don't work"; and, (3) the truck was to be "tagged out after dark." (Tr.285:10-16; Ex. S-10, at 7) The pre-operational examination appears to have been signed by Teddy Hall. (Ex. S-10, at 7)

Instead of removing the truck from service, Respondent placed a tag on the steering wheel, which stated, "DANGER—DO NOT OPERATE." (Tr.285:20; Ex. S-10, at 6) The tag did not specify, however, why the truck should not be operated. (Tr.285:7-9; 287:1-9; Ex. S-10, at 6) Hall confirmed that he was aware of the tag on the steering wheel but had driven the truck nonetheless. (Tr.286:3-9)

LaRue concluded that the truck had been operated, i.e., moved to the dust chute location (Tr.282:4-22), with the windshield so dirty from accumulated dust as to obscure driver visibility (Tr.280:6; 289:15-20; Ex. S-10, at 4-5), without the headlights being repaired (Tr.285:11-16), and contrary to the admonition on the tag not to operate the truck. (Tr.285:5-287:9; Ex. S-10, at 6-7) LaRue testified that the company explained to him that dust and material commonly impedes normal operation of the wipers. (Tr.281:10-12) Often times, the dust gets into the windshield wiper motor itself. (Tr.281:12-13) Typically, ODPC remedies this by either blowing it out with air or washing it down with water. (Tr.281:13-15; 404:13-14; 405:7-13; *see also* Resp't Br. 9) In this instance, however, ODPC tried the normal method to no avail (Tr.281:6-16); instead, according to LaRue, they had to "get in there and actually work on it" before the wipers were functional again. (Tr.281:16-18)

The first clause of section 56.14100(c) states, "[w]hen defects make continued operation hazardous to persons, the defective items including self-propelled mobile equipment shall be taken out of service and placed in a designated area posted for that purpose [. . .]." 30 C.F.R. § 56.14100(c) (emphasis added). Here, Respondent did not take the truck out of service.

The second clause of the standard provides an alternative: "[A] tag or other effective method of marking the defective items shall be used to prohibit further use until the defects are corrected." *Id.* (emphasis added). Two issues are raised by this: (1) Was there a defect?; and, if so, (2) did Respondent properly tag or mark the defect to prevent further use until the defect was corrected?

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<sup>21</sup> LaRue noted that 90% of the windshield was covered by clay dust. (Ex. S-10, at 2) Gibens agreed with this assessment at hearing. (Tr.456:22-24)

Respondent argues in its brief that “neither the headlight nor the wipers were defects that made continuous operation of the truck hazardous.” (Resp’t Br. 12) Respondent did not consider the windshield wipers defective because, in its view, the wiper motor was never broken—it was just unable to overcome the friction created by the clay material without water. (Resp’t Br. 9 n.2) According to Gibens, even a brand new wiper motor could not wipe away the clay dust without having the windshield first sprayed with water. (Tr.405:14-19) Gibens also testified that the windshield on the day of this citation was cleaned by simply adding water and turning on the wipers. (Tr.407:9-12)

LaRue considered the windshield wiper problem sufficient in itself to justify tagging the truck out of service. (See Tr.285:13-16; 288:10-18) I agree. From the moment the pre-operation examination noted “wipers don’t work” on March 22, 2015, until they were actually working properly again on March 24, 2015, the wipers were, for all relevant purposes, “defective.” During this window of time, both Hall and LaRue had attempted to get the wipers to work to no avail (Tr.282:12-14; 374:23-25), and, critically, Hall had operated the truck. (Tr.282:10-12; 290:1-3) Moreover, Gibens’ recollection of how the wipers were fixed was contradicted by LaRue’s testimony that the normal method of washing the windshield with water was ineffective that day. (Tr.281:12-16) According to LaRue, they had to “get in there and actually work on it to get it going again.” (Tr.281:16-18) I credit LaRue’s recollection that more effort than normal was required to get the wipers functioning. Accordingly, I find the wipers on the truck were defective.

Irrespective of the condition of the windshield wipers, it is important to note that the dirty windshield itself can be considered a defect, as its existence made continued operation of the truck hazardous to miners. (Tr.280:15-20) LaRue testified that the obscured visibility on the windshield was a defect in this particular scenario. (Tr.280:2-6) Indeed, LaRue responded on cross-examination that as long as the windshield was clean before the truck was operated, even if it was cleaned with a squeegee, he would not have cited it. (Tr.375:11-14) The fact that the truck was operated with a dirty windshield remains uncontested. Accordingly, I find the dirty windshield itself to be a defect.

Next, Respondent argues that affixing the tag to the steering wheel and noting the issues elsewhere was a sufficient response to the truck’s defects (Resp’t Br. 13), and, in any event, the tag on the steering wheel was conditional: It was only intended to address the broken headlight and only applied after dark. (Tr.408:3-9; Resp’t Br. 9) Respondent did not tag the truck out for the windshield wipers or the dirty windshield because, as discussed above, it did not think they were defective.

In order for a miner to be adequately informed about the limited conditions under which the truck could or could not be driven given the cryptic notation on the tag itself—“Do Not Operate”—he or she would have to refer to the examination records to get a fuller view of the limitations. This is not an effective means of dealing with equipment defects as serious as these.

Respondent was aware of the intent of the regulation and its duty to appropriately tag this truck out of service, as evidenced by the tag found on the steering wheel. However, Respondent’s failure to effectively remove the truck from service shows that it did not take its duty to conduct an effective pre-operational examination seriously. Respondent tried to create an

appearance of compliance by noting the defects in its examination records and hanging a tag on the steering wheel, but it failed to actually take the truck out of service, clearly because it wanted to defer correcting the problems while it continued to make the truck available to use for this dust collection function. This half measure would allow Respondent to operate the truck indefinitely, leaving the defects unaddressed. This is not the intent of the regulation. Indeed, the insufficiency of Respondent's actions is evident given that the truck was driven despite having the "Do Not Operate" tag affixed to the steering wheel and a significant amount of clay dust plastered onto its windshield.

This is not to say there is anything per se improper about a conditional tag. Indeed, LaRue testified that he would not have had a problem with the conditional tag if it were properly marked—clearly demarcating that the truck was not to be used from dusk till dawn due to a broken headlight—and if the broken headlight was the only defect on the truck. (Tr.287:25-288:18) The error here was Respondent's failure to appropriately recognize the hazard presented by the dirty windshield and remove the dust truck from service until the defect could be remedied. This constitutes a violation of the standard.

The Secretary has proved by preponderant evidence the existence of a defect that made continued operation of the truck hazardous to miners and the Respondent's failure to take the machine out of service. *Cemex De P.R.*, 36 FMSHRC 1386, 1417 (May 2014) (ALJ) (citing *Dix River Stone, Inc.*, 32 FMSHRC 1779, 1784 (Nov. 2010) (ALJ)). Accordingly, I conclude Respondent violated 30 C.F.R. § 56.14100(c).

## 2. Gravity and S&S

I agree with Inspector LaRue that this violation was reasonably likely to result in injury to a miner. The dust truck was operated in the defective condition in an area where other miners were working, including those who were operating the Bobcat outside the verge storage tank area. (Tr.287:11-18) The dirty windshield compromised Hall's ability to see optimally either to the front or back. (See Ex. S-10, at 3-5)<sup>22</sup> In this case, Hall backed the truck from where it had been on the ramp the night before into its position under the dust chute (Tr.282:10-12; 286:6-8; 314:22-315:5; 406:23-407:3; Ex. S-10, at 2), a distance of approximately 100 feet. (Tr.328:8-14; see *supra* text accompanying note 20)

Respondent argues that an injury would be unlikely because the truck had a dirty front windshield, which did not affect its ability to safely reverse under the dust chute (Resp't Br. 12), and, in any event, its windshield would have been cleaned before moving forward. (*Id.* at 13) I do not find this argument compelling for two reasons.

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<sup>22</sup> Although LaRue did not specifically cite the Respondent for the rearview mirrors being obscured by the same dust found on the windshield, he recalled they were dirty. (Tr.376:5) I infer from several tangential references to the mirrors made by the parties as they discussed that Hall had to look through the windshield or used the mirrors instead, and the fact that the Respondent indicated that its practice was to use a water hose to clean off the windshield and the mirrors before the truck was moved, that the mirrors were equally as dirty as the windshield. (Tr.375:15-376:4; 404:11-14; 406:9-15)

First, Respondent's argument that the truck only traveled in reverse while it had a dirty front windshield requires that I draw the inference that the extensive accumulation of clay dust on the windshield occurred while the dust truck was on the ramp. While that is certainly possible, given how much dust was already on the windshield when Hall backed the truck down the ramp (Tr.282:15-22), I find it is more reasonable to infer that much of the buildup of clay dust on the windshield occurred while the dust truck was under the dust chute at some point prior to being parked on the ramp on March 23, 2015.<sup>23</sup> Indeed, Respondent echoes my sentiments that the dust chute, not the ramp, was the likely cause of the dusty windshield: "Nor is it surprising that a truck literally gathering dust in a loading dock would quickly develop a dusty windshield." (Resp't Br. 13) If that is the case, somebody necessarily drove the dust truck forward from the dust chute with an obscured, dusty windshield before parking it on the ramp on or before March 23, 2015. Although only a short distance of 100 feet, it was in close to proximity to foot traffic from the nearby verge storage tank area, the main building, and the parking lot. (Tr.279:24-280:1; 290:7-18; *see also* Exs. S-9 & S-10; Ex. R-1)

Second, the dust truck was operated with a significant amount of clay dust obscuring the windshield so there is no guarantee miners would have actually cleaned the windshield before operating the truck again. (*See* Tr.282:5-20; 289:25-290:3) Although Teddy Hall was not the normal operator of the truck (Tr.407:1-3), the fact that he was unaware of how to clean the windshield and was also the employee apparently in charge of conducting the pre-operation examination on March 22, 2015 (*see* Ex. S-10, at 7), leaves open the distinct possibility that the dust truck would be operated again before having its windshield cleaned. The truck's normal path took it from the dust chute through the mine's plant area where there was often foot traffic because of the proximity to a parking lot, the administration building, and the break room in the administration building. (Tr.289:21-290:18; 319:17-320:1) Gibens agreed that the dust truck was operated around foot traffic at the loading point and is normally driven to the other side of the plant to dump. (Tr.457:13-16) If the windshield were not cleaned prior to a dump run, miners on foot would have reasonably likely been exposed to danger.

LaRue concluded that if a miner were struck by the truck as it moved on the work site, the injury could reasonably be expected to be fatal. (Tr.290:25-291:4) Again, I agree. Another citation, No. 8820574, addresses the issue of the condition of the brakes on this truck. *See* discussion *infra* Section VI. J. Without deciding for the moment whether the Secretary has proved that the dust truck brakes were defective, I find that even if the dust truck's brakes were operating optimally, any contact between the dust truck and a miner on foot or even on a piece of equipment smaller than the dust truck carries a high likelihood of fatal injury. I agree with LaRue that even if the truck were being driven no more than five to ten miles per hour, an impact with a pedestrian could cause death. (Tr.291:2-4; 320:2-15) I also agree that any injury arising from this violation would affect only one miner. (Tr.291:10-14)

I have found an underlying violation of 30 C.F.R. § 56.14100(c), a mandatory safety standard. The operator's failure to properly remove the Ford L9000 dust truck from service after

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<sup>23</sup> I suppose there is a non-zero possibility of a third alternative: The truck could have developed the significant coat of dust on its windshield at some other location at the mine and reversed all the way back to the top of the ramp. This seems not only highly unlikely but would also constitute incredibly reckless behavior.



defects affecting safety were observed contributed to a discrete safety hazard that the driver would be unable to see while driving. Based on the extensiveness of the clay dust on the windshield, as evidenced by the photos and testimony at hearing, I find the hazard was reasonably likely to occur.

Assuming the occurrence of the hazard that the driver would have limited visibility, I find it reasonably likely that an injury of a serious nature, possibly resulting in death, would occur because the dust truck was operated near areas with heavy foot traffic and working miners. Accordingly, I conclude this violation was S&S.

### **3. Negligence**

LaRue designated the negligence for this violation as “moderate.” (Tr.291:15-292:13) The March 22, 2015 pre-operation examination and “Do Not Operate” tag affixed to the truck’s steering wheel demonstrate that ODPC’s management was fully aware of the defects on this dust truck. (Tr.285:5-24; Ex. S–10, at 7) Further, any reasonably prudent person familiar with the mining industry, the facts of this case, and the protective purpose of 30 C.F.R. § 56.14100I would have followed the clear directive of the regulation and taken the truck out of service rather than attempt to excuse the half measure of a “conditional” tag out for only one of the truck’s defects as Respondent did here. LaRue gave an unconvincing explanation of why he considered the negligence in this situation to be no more than “moderate.” He listed many of the things that would support a finding of “high” negligence (Tr.289:13-20; 291:16; 292:1-8), but he ultimately concluded that the negligence rating should be reduced to “moderate” because the violating condition had not lasted more than four hours before he cited it. (Tr.291:15-24) I am not in full agreement with this evaluation, but I will not alter his official negligence rating of “moderate.”

### **4. Penalty**

I have reviewed and confirmed the data in Exhibit A to the Secretary’s Petition for Assessment of Civil Penalty showing the number of production hours for the mine and the mine controller, the number of prior violations per inspection days, the number of repeat violations, the number of persons affected, the negligence points, the likelihood points, and the good faith point reductions. Based on my gravity and negligence findings, and considering but not relying on the point calculation in 30 C.F.R. § 100.3, the Secretary’s proposed penalty of \$1,944.00 is appropriate. I impose a penalty in that amount.<sup>24</sup>

#### **J. Citation No. 8820574 – Dust Truck Air Brakes**

##### **Docket No. SE 2015-0285**

Exhibits S–11 and S–14 (Tr.312:22-313:11) and Exhibit R–21 (Tr.315:18-316:12)

The Secretary argues that Respondent violated 30 C.F.R. § 56.14101(a)(3) by failing to properly maintain all braking systems on the Ford L9000 dust truck. The standard applies to self-

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<sup>24</sup> There is no need to adjust this penalty for the VPID distortion identified in relation to the housekeeping violations. The VPID calculation for this violation does not have the same defect.

propelled mobile equipment and requires that all such equipment have a service brake system capable of stopping and holding the equipment with its typical load on the maximum grade it travels. The pertinent section of the regulation simply requires that all mobile equipment braking systems be maintained in functional condition.

## 1. Violation

LaRue issued Citation No. 8820574 on March 24, 2015, alleging that Respondent failed to properly maintain the air pressure on the service brakes of the Ford L9000 dust truck, which allegedly affected the operator's ability to stop the vehicle when activated. (Tr.317:8-13; Ex. S-11) This is the same dust truck mentioned in Citation No. 8820573. (Tr.312:10-15) Gibens accompanied Inspector LaRue on this portion of the inspection. (Tr.455:21-24)

LaRue opted to do a thorough inspection of the dust truck after dealing with the obstructed windshield and ODPC's failure to properly take the truck out of service. (Tr.313:18-22) LaRue wanted to test the truck's air brake system,<sup>25</sup> but the truck could not be moved to perform for the test prescribed in the regulation because it was tagged out. (Tr.372:13-14; see 30 C.F.R. § 56.14101(b)) Accordingly, LaRue deemed it appropriate to use an alternative test method—a "stomp" test<sup>26</sup>—under the authority of 30 C.F.R. § 56.14101(b)(5), which allows an inspector to rely on "other available evidence to determine whether the service brake system meets the performance requirement of this standard." (Tr.313:21-314:2; 371:2-372:21)

LaRue enlisted the truck's driver to assist in performing the brake test. The driver started the engine and allowed air pressure to build up. (Tr.313:20-22) LaRue testified that he preferred to run the test with the engine on to simulate a more natural condition with the air compressor pumping air into the system. (Tr.318:17-25) The driver then stomped on and held the service brake pedal while LaRue checked for pressure drop-off on the pressure gauge on the truck's dashboard. (Tr.313:23-314:8; 409:8-10) LaRue testified that from his experience, he expected

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<sup>25</sup> Air brakes use compressed air and are comprised of three different braking components: the service brake, the parking brake, and the emergency brake. (Ex. R-21, at 5-1) An air compressor adds air into the system by pumping air into air storage tanks. (*Id.*) The air compressor governor instructs the air compressor to pump more air into the system if the tank pressure falls to the "cut-in" pressure level (around 100 psi) and to stop pumping if the tank pressure rises to the "cut-out" pressure level (around 125 psi). (*Id.*) The service brake system "applies and releases the brakes when you use the brake pedal during normal driving." (*Id.*) The "foundation brakes" include the brake chamber, the pushrod, the slack adjuster, camshaft, s-cam, brake shoes, and drum brakes. (*Id.* at 5-2) When a driver presses down on the service brake, i.e., the brake pedal, compressed air is forced into the service brake side of the brake chamber. (*Id.*) This air pressure initiates a sequential chain reaction—involving the pushrod, slack adjuster, camshaft, s-cam, brake shoes, and brake drum—which causes the vehicle to stop. (*Id.*) When the brake pedal is released, the compressed air is exhausted out of the system, thereby reducing the air pressure in the tanks. (*Id.*) This lost air pressure is restored by the air compressor. (*Id.*) Pressing and releasing the pedal unnecessarily can let air out faster than the compressor can replace it. (*Id.*) The service brake component is the primary concern in this citation.

<sup>26</sup> With the "stomp" test, the driver holds his foot on the brake pedal while watching the pressure gauge to see if the pressure drops faster than is permissible. (Tr.409:6-10)

any system checked in this manner to have an initial pressure drop of between 10 and 15 psi from the normal operating value of 110 to 120 psi. (Tr.314:1-4; *see also* Ex. R–21, at 5-7 (noting expected normal pressure drops during testing)) LaRue waited until after the initial 10 to 15 psi pressure drop to start his measurement. (Tr.314:5-6) LaRue testified that, to his knowledge, a drop in pressure of six psi within a 60 second period would qualify as a failure. (Tr.319:1-5) He observed the air pressure drop nearly 30 psi—from 90 psi to near 60 psi—in less than a minute (Tr.314:6-8), but stopped the test before discovering whether the truck’s air pressure alarm would sound. (Tr.410:11-16) Additionally, LaRue also heard an audible air leak while standing in the doorway of the operator’s cab. (Tr.314:9-11; Ex. S–11, at 2) From this, he concluded that a component of the brake system was not functioning properly in violation of the regulation. (Tr.314:15-17; 368:13-21) The citation was terminated by replacing the defective brake chamber. (Tr.321:20-322:2)

This truck had a manufacturer-installed air pressure alarm system, which, according to LaRue, was calibrated to activate if air pressure dropped below 60 psi. (Tr.317:21-318:2) According to the Mississippi Professional Driver’s Manual for Commercial Driver Licenses, there is a possibility that an air pressure warning signal might not work, causing a pressure drop without the operator knowing it. (Tr.316:14-25; Ex. R–21, at 5-6) At this point, whether the alarm system sounds or not, “uncontrolled actuation” of the air brakes occurs. (Tr.317:7-20) If this occurs, the air brakes become less effective, but it is still possible to drive the truck long enough to stop it safely. (Tr.316:23-317:13; 322:10-23; 369:19-21; 411:14-19; Ex. R–21, at 5-3) As pressure continues to drop below the trigger point, typically 20 to 30 psi, the emergency spring brake system is designed to “pop out” and engage, which stops the truck.<sup>27</sup> (Tr.318:3-6; *see* Ex. R–21, at 5-3)

As a preliminary matter, I conclude LaRue’s stomp test was an acceptable methodology of “determin[ing] whether the service brake system meets the performance requirement of the standard” given that a “Do Not Operate” tag was affixed to the steering wheel. *See* 30 C.F.R. § 56.14101(b)(5) (stating other available evidence may be used by an inspector if the equipment is not capable of traveling at least 10 miles an hour). The test produced reliable, relevant data and detected a significant air leak in a component of the brake system, which required replacement to restore the brakes to full function.

Section 56.14101(a)(3) requires that “all braking systems [. . .] shall be maintained in functional condition.” The Commission established a definition of “functional condition” in *Nally & Hamilton Enterprises, Inc.*, noting that “functional” means “capable of performing; operative.” 33 FMSHRC 1759, 1763 (Aug. 2011) (citing *The American Heritage Dictionary of the English Language* 711 (4th ed. 2009)); *see also* *Wake Stone Corp.*, 36 FMSHRC 825, 827 (Apr. 2014) (using the *Nally & Hamilton Enterprises, Inc.* definition of “functional” for section 56.14132(a)). Applied directly to section 56.14101(a)(3), an ALJ colleague stated, “[t]he adjective ‘functional’ connotes something being able to perform its regular function, that is, it [connotes] something being able to work as intended (see *Webster’s Third New International*

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<sup>27</sup> Air brakes actually use air pressure to release the vehicle’s parking brake (i.e., the mechanical spring brake), allowing the vehicle to move. (Ex. R–21, at 5-3) If there is an air pressure failure, the failsafe condition is for the spring brakes to engage and stop the truck. (Tr.367:24-369:9; Ex. R–21, at 5-3)

*Dictionary* 921 (1986) (*Webster's*).” *Daanen & Janssen, Inc.*, 18 FMSHRC 1796, 1807 (Oct. 1996) (ALJ).

Respondent argues there was an insufficient basis for LaRue to conclude the truck’s brakes were not maintained in “functional condition” and that LaRue’s conclusion was arbitrary and incorrect. (Resp’t Br. 10-11) I am unpersuaded. In *Grace Pacific Corporation*, a case cited to by both parties, a water truck at an aggregate mine had an air leak in its brake system that dropped system pressure by 28 psi when tested for one minute with the engine off.<sup>28</sup> 35 FMSHRC 3722, 3723 (Dec. 2013) (ALJ). The judge agreed with the Secretary and concluded that a psi “lower than the acceptable level, leaving the brakes ineffective” to be indicative that brakes were not maintained in “functional condition” and, therefore, in violation of section 56.14101(a)(3). *Id.* at 3724. Here, the drop in air pressure in one minute, 30 psi, was even greater than that in *Grace Pacific Corporation*. Furthermore, the brake test in this case was conducted with the engine on, allowing the air compressor to add more air into the system. (Tr.318:17-25) Had LaRue opted to test the air brakes with the engine off like in *Grace Pacific Corporation*, the air pressure could have dropped even more.

Respondent next cites to various failsafe and alarm systems on the truck that would alert the driver that the air pressure in the brakes was too low and argues that the integrated system was functional. (Resp’t Br. 6-7, 11) Had LaRue determined that the defect did not rise to the level of rendering the brakes non-functional and therefore not a violation of the regulation, he would have had to ignore the intent of the regulation and the Commission’s precedent on this point. In *Secretary of Labor v. Daanen & Janssen, Inc.*, the Commission was faced with the question of how to interpret the language of 30 C.F.R. § 56.14101(a)(3) given “at least two plausible and divergent interpretations.” 20 FMSHRC 189, 192 (Mar. 1998). The Secretary argued that “the plain language of the standard mandates a finding of violation when a component of the braking system is not maintained in functional condition, regardless of whether the braking system is capable of stopping and holding the vehicle.” *Id.* at 192. The Commission found the Secretary’s interpretation reasonable for four reasons.

First, because the term “system” entails an “interrelationship of component parts, it follows that for the system to be considered functional, each of its component parts must be functional.” *Id.* at 193 (emphasis added).

Second, the Secretary’s interpretation was preventative and sought to cure equipment defects before serious accidents occurred, in line with the Mine Act’s goal of protecting the safety of miners. *Id.*

Third, the Secretary’s interpretation was consistently applied through the implementation of the PPM. Notably, the PPM provided, “[s]tandard [56].14101(a)(3) should be cited if a component or portion of any braking system on the equipment is not maintained in functional

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<sup>28</sup> Although the *Grace Pacific* decision did not specify whether the brakes were tested with the engine running or not, Citation No. 8691005 reads, “[t]he water truck brake system had an air leak that dropped system pressure about 28 psi when tested for one minute with the engine not running.” Government Ex. 1, at 1, 35 FMSHRC 3722 (Dec. 2013) (ALJ) (Docket No. WEST 2013-0162) (emphasis added).

condition even though the braking system is in compliance with (1) and (2) above.” *Id.* at 194 (citations omitted).

Fourth and finally, the Secretary’s interpretation gave meaning to all subsections of the standard. *Id.* Under the Secretary’s interpretation, subsection (a)(1) is a performance standard, while subsection (a)(3) is a maintenance standard. *Id.* (emphasis added).

The Commission’s ruling in *Daanen & Janssen* makes it clear that subsection (a)(3) is different than subsections (a)(1) and (a)(2) and that a braking system may violate (a)(3) even though it passes the performance tests in (a)(1) and (a)(2). Thus, I conclude that the air leak that LaRue’s stomp test detected in one of the dust truck’s pressure canisters rendered the truck’s braking system non-functional and constituted a violation of 30 C.F.R. § 56.14101(a)(3).

## 2. Gravity and S&S

The Secretary argues that it is reasonably likely that an injury would occur, that the injury could reasonably be expected to be fatal, and that one miner would be affected. The Secretary also alleges this citation was S&S. The Secretary describes two possible situations that could result in injury to a miner: (1) an increase in the truck’s stopping distance; or (2) the emergency spring brake activating. (Sec’y Br. 44-45, *citing* Ex. R–21, at 5-6, 5-9) In the event that the emergency spring brake were activated, the Secretary depicts a worst-case scenario where “such a loss of air pressure is going to result in the driver losing full control of the vehicle.” (*Id.* at 45) (emphasis added) Additionally, the Secretary argues the condition would not have been found or corrected before an accident occurred. (*Id.*, *citing* Tr.319) Finally, the Secretary alleges the dust truck was regularly used to haul dust and operated around foot traffic with poor visibility, which would have contributed to serious injuries had normal practices been continued. (*Id.*)

Respondent does not dispute there was a leak in the right front rear brake chamber or that the air pressure dropped from 90 psi to 60 psi during LaRue’s test; rather, Respondent argues that an injury would be unlikely because the truck had only been backed up a short distance to the loading dock, the truck traveled at a low rate of speed, and there was no evidence of foot traffic in the area when the truck was moved. (Resp’t Br. 11, *citing* Tr.459:15-18) Respondent also argues injury would be unlikely because the brake system had an integral, dual-level failsafe mechanism: (1) a low-pressure alarm that would alert the driver, giving the him or her sufficient time to bring the truck to a controlled stop; and (2) the automatic emergency spring brake to lock the truck down. (Resp’t Br. 7, 11-12).

On this point, I find serious inadequacies with both the Respondent and Secretary’s briefs and the arguments in them. The Respondent focuses nearly exclusively on the facts at the time of the citation and relies heavily on redundant safety measures, both contrary to Commission precedent. The Commission has long held that an evaluation of the likelihood of injury should be made “in terms of continued normal mining operations,” not just the snapshot at the moment of the citation. *U.S. Steel Mining*, 7 FMSHRC at 1130. The Circuit Courts and Commission have also held that redundant safety measures are irrelevant to all elements of the S&S analysis, including the likelihood of an injury. *Cumberland Coal*, 717 F.3d at 1029; *Knox Creek Coal*, 811 F.3d at 162; *Buck Creek Coal*, 52 F.3d at 136; *ICG Ill., LLC*, 38 FMSHRC 2473, 2481 (Oct. 2016); *Brody Mining*, 37 FMSHRC at 1691; *Cumberland Coal*, 33 FMSHRC at 2369.

The Secretary's brief, on the other hand, reaches conclusions with only a trivial consideration of the context and particular facts in this case. Both of the injury-producing scenarios the Secretary describes—an increase in the stopping distance or the emergency spring brake activating—require the air pressure in the system to drop below 60 psi. In contemplating the likelihood of injury here, it is important to consider that the brakes were “double chambered,” which means the air leak only occurred when the driver put his foot on the brake pedal. (Tr.409:18-20; 411:12-13) It is also imperative to acknowledge the role the air compressor and governor play in regulating and restoring air pressure. Indeed, the reason that Inspector LaRue ran the “stomp” test with the dust truck engine on, despite the Mississippi Professional Driver's Manual instruction to “turn off the engine” (Ex. R-21, at 5-7), was that it simulates “more of a natural condition” because “[t]he compressor is constantly building [air pressure] up.” (Tr.318:21-23) The Secretary did not mention either of these points in his brief.

The Secretary also failed to discuss with any specificity how the truck's speed, distance traveled, and frequency of use affect the likelihood of injury. At hearing, Gibens testified the maximum on-site speed allowed was 15 miles per hour (Tr.412:5-6), but the average speed driven was estimated at 10 to 12 miles per hour. (Tr.412:10) Additionally, Gibens testified that, depending on the season, the truck was driven as much as two times per day and as infrequently as once a week or less. (Tr.403:12-14) On days when the truck was operated, it was driven less than 500 yards a day. (Tr.411:18) The Secretary did not discuss any of these factors but simply concluded, “[t]he vehicle was used regularly [. . .].” (Sec'y Br. 45)

The Secretary also failed to discuss factors that would bolster his argument. For example, the Secretary did not discuss the terrain of the Ripley Mine and Mill, a consideration that is often relevant in brake citation cases, despite discussion of it in the record. *See, e.g., Grace Pacific*, 35 FMSHRC at 3724 (mentioning the water truck operated on a grade of five to 10 percent); *Freeport McMoran Morenci, Inc.*, 35 FMSHRC 172 (Jan. 2013) (ALJ) (finding an accident was likely given the truck had non-functional brakes and traveled at 35 miles per hour on dirt and gravel haul roads with 10 percent grade and a continuum of hills); *Dix River Stone Inc.*, 29 FMSHRC 186, 197 (Mar. 2007) (ALJ) (stating “the road's grades must be kept in mind” where the haul truck was parked on a slope with a grade range of four to six percent but would travel in areas with a 10 percent grade and several turns, including a sweeping, long U-turn); *Tide Creek Rock Inc.*, 24 FMSHRC 201, 211 (Feb. 2002) (ALJ) (stating that even if a front-end loader with non-functioning brakes only traveled down a hill one percent of the time, it establishes the seriousness of violation). Although LaRue did not measure the grade since it did not seem relevant to him at the time (Tr.325:23-24; 326:2-5), a noticeable slope leading out from the dust chute is clearly visible in the video. (Ex. S-9, at 1:25) Gibens confirmed at hearing that the truck traveled uphill and around the plant from the dust chute to the dump area. (Tr.413:6-12)

Nor did the Secretary discuss in any detail how the load would affect the truck's ability to brake; instead, the Secretary's brief merely states the vehicle was used “to haul dust.” (Sec'y Br. 45) Other judges have factored the effect a heavy load has on the ability of a vehicle to brake, especially when traveling on a grade. *See, e.g., Knife River Constr.*, 36 FMSHRC 2176, 2178-79 (Aug. 2014) (ALJ) (concluding that a truck with partially defective brakes “carrying a heavy load upon a steep grade” could reasonably likely cause a serious injury to miners); *Freeport McMoran Morenci*, 35 FMSHRC at 175 (discussing possibility of “brake fade” when trucks operate on a grade, particularly when carrying a heavy load); *Nelson Quarries, Inc.*, 30

FMSHRC 254, 283-84 (Apr. 2008) (ALJ) (finding S&S where truck with defective parking brake traveled over grades of up to twelve percent and often traveled with a load of rocks). Here, the citation indicates the truck was used to remove residual material during switchovers, and LaRue's notes state that the truck was "observed full." (Ex. S-11, at 1-2)

Lastly, the Secretary thrice notes the truck was "operated around foot traffic" (Sec'y Br. 40, 45-46), but he leaves out important details, which provide context and substance. LaRue testified at hearing that he was told by management that the dust truck was driven from the dust chute near the verge storage tank area, through the plant by the parking lot, down a road between the main administration building and the break room building, and ultimately dumped the dust on the other side of the plant. (Tr.319:17-25) The dust truck's path brought it in close proximity to both foot and equipment traffic. (Tr.319:25-320:1) Gibens on cross examination agreed that the dust truck was operated around foot traffic at the loading point and was normally driven to the other side of the plant. (Tr.457:13-16; 459:2-4)

This is a close call. Taking the facts and arguments as outlined in the Secretary's brief, I would be inclined to believe that "uncontrolled actuation," i.e., air pressure of 60 psi or lower, was unlikely to occur and, accordingly, an injury would be unlikely. However, upon consideration of the entirety of the record before me—notably the fact that the truck carried a heavy load, traveled uphill from the dust chute to the dump point on the opposite side of the mine, and traveled in close proximity to foot traffic—I can understand how a driver of the dust truck could step on his brake pedal frequently enough to reduce air pressure in the system to dangerous levels. Assuming continued normal operation without abatement of the air leak, I find it reasonably likely that an injury would occur. My conclusion is strengthened by the fact that the front windshield of the truck was covered by a significant amount of clay dust, obscuring visibility for the truck driver. *See* discussion *supra* Section VI. I. 1.

With regard to the Secretary's contention that an injury could reasonably be expected to be fatal for one miner, I concur for the same reasons discussed above in Citation No. 8820573. *See* discussion *supra* Section VI. I. 2.

I have found an underlying violation of 30 C.F.R. § 56.14101(a)(3), a mandatory safety standard. The leak in the air brake system on the Ford L9000 contributed to a discrete safety hazard that the driver would lose control of the vehicle. For the reasons stated above, particularly because the truck traveled while carrying a heavy load uphill, I find it reasonably likely the air pressure in the system would drop to levels where the hazard would occur. Assuming the occurrence of the hazard, I conclude it is reasonably likely an injury would follow, especially given that the truck was operated in close proximity to foot and equipment traffic. Because of the size of the Ford L9000 dust truck, I find the injury would be of a reasonably serious nature, possibly resulting in a fatality. Accordingly, I conclude this violation was S&S.

### **3. Negligence**

The Secretary maintains that this violation arose from moderate negligence. LaRue testified the air leak was audible even with the engine running. (Tr.314:10-11; Ex. S-11, at 2) He also testified the leak was extensive: dropping 30 psi in 60 seconds. (Tr.314:6-8; Ex. S-11, at 2) However, he testified that he could not show that Respondent had knowledge of the brake defect

or that it had reason or occasion to have such knowledge. (Tr.321:8-17) Additionally, LaRue could not show exactly how long the leak existed. (Tr.321:10-16; Ex. S-11, at 2) For him, this mitigated the negligence designation to the moderate level.

Respondent argues that moderate negligence is not appropriate because the brake deficiency was not previously known. (Resp't Br. 6, 9) In support of Respondent's argument, I note there is no indication in the record before me that the failsafe low-air-pressure alarm system had ever sounded, and, as LaRue confirmed, the air pressure level had not yet dropped low enough to trigger the alarm during his stomp test. Additionally, the pre-operation examination for the dust truck from March 22, 2015, did not mark "Brakes" or "Parking Brake" as being problematic, despite noting other problems with the truck. (Ex. S-10, at 7) Nevertheless, considering the totality of the circumstances and for the reasons stated below, I find sufficient support in the record to establish that the citation was the result of moderate negligence.

First, the citation notes that standard 56.14101(a)(3) was previously cited two times in two years at the mine. (Ex. S-11, at 1) Previous repeated violations and warnings from MSHA should place an operator on "heightened alert" that more is needed to rectify the problem. *IO Coal Co.*, 31 FMSHRC 1346, 1356 (Dec. 2009), citing *New Warwick Mining Co.*, 18 FMSHRC 1568, 1574 (Sept. 1996). However, both of these previous citations were issued to a contractor, thus reducing any actual notice given to ODPC.

Next, although the checkboxes for "Brakes" and "Parking Brake" were not marked as problematic, I note that "Obvious Damage or Leaks" was marked on the dust truck's pre-operation examination. (Ex. S-10, at 7) Curiously, neither party discussed this at the hearing nor was it covered in the briefs. It is not clear from the limited reference—a single photo taken by LaRue of the pre-operation examination—whether Hall was referencing the damaged headlight, the leak in the air brake, or something else. Accordingly, this fact neither helps nor hinders a finding of negligence.

The most convincing factors in support of a moderate negligence determination are the extent and obviousness of the leak. Gibens agreed with LaRue that the air pressure bled down from 90 psi to 60 psi in one minute with the engine running. (Tr.458:21-459:1) Gibens also testified they measured the drop in air pressure while watching the air gauge on the truck's dashboard. (Tr.409:8-9) Given how quickly air left the system while pressing the brake pedal, a reasonably prudent driver would have recognized that something was wrong had he or she checked the air gauge while driving.

LaRue's testimony also indicates the leak should have been obvious. LaRue testified that he was standing in the doorway of the operator's cab while the driver was conducting the stomp test. (Tr.313:21-314:10) From that position, LaRue could hear the audible leaking of the air. (Tr.314:10-11; Ex. S-11, at 2) With no direct refutation by Gibens at hearing, Respondent attempts to undermine LaRue's testimony in its reply brief:

[T]he Secretary outrageously claims that an air leak in the right rear brake chamber could be heard from the left doorway of the cab. Sec'y Br. at 44 (citing Tr. 313). There is simply no testimony on page 313 about hearing an air leak. Even if such testimony existed, it is questionable whether any weight should be given to



this testimony given that LaRue did not record this key finding in his field notes (S. 14, at 14), and it requires this Court to believe that someone standing outside the front left side of a running truck would be able to hear a leak on the opposite side of the truck. Sec’y Br. at 46 (stating that the citation was terminated by replacing the right rear brake chamber). S. 11, at 1.

(Resp’t Reply Br. 20) (emphasis in original)

I find multiple errors with Respondent’s argument. First, Respondent is correct that there is no testimony regarding an audible air leak on page 313 of the transcript; however, had Respondent checked the next page, it would have seen that LaRue testified that he could “hear the audible leaking of air.” (Tr.314:10-11) Second, contrary to Respondent’s claim, LaRue did record this key finding in his notes. In the negligence section of his Citation/Order Documentation worksheet (MSHA Form 4000-49E) under “Justification,” LaRue wrote, “Audible air leak.” (Ex. S-11, at 2) Finally, although Respondent frames the broken chamber as the “right rear brake chamber,” the record states the leak came from the “right rear, front brake chamber” (Ex. S-11, at 1) and “right front rear brake chamber.” (Tr.321:20-322:2) Respondent’s choice to remove the word “front” comes across as a semantic attempt to distance LaRue from the leaking brake chamber. In any event, I am convinced that LaRue could hear an air leak over the roar of the engine, especially given how extensive the leak was. Accordingly, I credit LaRue’s testimony that the air leak was audible from the driver’s position with the engine running.

Viewing the totality of the circumstances, especially given the leak was audible and extensive, I conclude the respondent exhibited moderate negligence.

#### **4. Penalty**

I have reviewed and confirmed the data in Exhibit A to the Secretary’s Petition for Assessment of Civil Penalty showing the number of production hours for the mine and the mine controller, the number of prior violations per inspection days, the number of repeat violations, the number of persons affected, the negligence points, the likelihood points, and the good faith point reductions. Based on my gravity and negligence findings, and considering but not relying on the point calculation in 30 C.F.R. § 100.3, the Secretary’s proposed penalty of \$1,944.00 is appropriate. I impose a penalty in that amount.<sup>29</sup>

#### **K. Citation No. 8820571 – Illumination of Verge Storage Tank Area**

##### **Docket No. SE 2015-0285**

Exhibits S-8 and S-9 (Tr.301:24-302:7)

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<sup>29</sup> There is no need to adjust this penalty for the VPID distortion identified in relation to the housekeeping violations. The VPID calculation for this violation does not have the same defect.

The Secretary alleges that Respondent violated 30 C.F.R. § 56.17001 by failing to provide sufficient lighting around the verge storage tanks.<sup>30</sup> (Tr.301:1-5; Exs. S-8, S-9) The standard states, “[i]llumination sufficient to provide safe working conditions shall be provided in and on all surface structures, paths, walkways, stairways, switch panels, loading and dumping sites, and work areas.” 30 C.F.R. § 56.17001.

## 1. Violation

Inspector LaRue issued Citation No. 8820571 on March 23, 2015, alleging that three lights were not working at and around the verge storage tanks. (Ex. S-8, at 1) Specifically, the Tank 10 light was out, the Tank 9 light shone up but would not shine down,<sup>31</sup> and the light on the south side of the verge building was out. (*Id.*) Exhibit S-9 is a video LaRue made of the area after dark, showing the conditions described in the citation and in his testimony. (Tr.301:6-17) The Secretary argues that the scenes captured in the video accurately show (1) the relative lack of illumination in the area; (2) the accumulated material on the floor with miner footprints; and, (3) the general location, dimensions, and arrangement of structures relevant to LaRue’s determination that what he saw and filmed created a slip-trip-fall hazard, which was compounded by the lack of adequate lighting. (Sec’y Br. 34-36; Tr.301:14-17; Ex. S-9)

LaRue testified about the layout of the area and the condition of the floor. (Tr.303:3-304:12) The floor surface was part concrete, part plate steel. (Tr.300:3-12) It was ramped up in places and down in others. (Tr.303:10-11) The floor was covered by wet material showing footprints from traffic through the area. (Tr.303:3-7) LaRue testified that miners periodically transited the area to perform maintenance and to access the Main Control Center (“MCC”).<sup>32</sup> (Tr.303:18-24)

LaRue determined the verge storage tank area was a working area because maintenance work was done there on a periodic but regular basis. (Tr.309:25-310:14) He also determined that the area included surface structures, a path, and a walkway. (Tr.309:4-16) No measures had been taken to restrict access to the area to daytime only. (Tr.305:12-14; 310:2-4) Under normal and continuing mining conditions, miners could travel through or work in that area day or night, without restriction, to get parts, use the elevator, or to access the MCC room. (Tr.309:23-310:14)

By interviewing Respondent’s management and hourly employees, LaRue determined that of the five employees in the verge storage tank area at the time of the citation, two supervisors and one hourly employee did not have flashlights as a back-up measure; the other two (hourly employees) did. (Tr.304:21-305:11)

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<sup>30</sup> For a discussion about the “verge” product, see discussion *infra* Section VI. L. 1.

<sup>31</sup> While the written citation states, “tank 9 light would not shine down only up,” I note that the video evidence only shows a non-lit light in Tank 9. (Ex. S-9, at 3:20) While observing Tank 9 in the video, Inspector LaRue commented, “[t]his light was not working. The electrician is currently working on it.” (*Id.* at 3:20-3:23) During the filming, no further comment was made regarding the specific defect with the light in Tank 9.

<sup>32</sup> The MCC is the main electrical control room, which houses breakers and control switches for various parts of the plant. (Tr.267:4-6; 303:18-22; 362:25-363:7)

Based on his familiarity with an earlier and, in his opinion, similar fatality case in Georgia and his knowledge about safe and acceptable light levels in similar work installations, LaRue concluded there was insufficient illumination in the verge tank area to provide safe working conditions. (Tr.308:8-309:3) He did not have or use a light measuring meter to back up his assessment (Tr.364:13-18); however, he was generally aware that a light intensity level of 30 lumens was accepted as a safe illumination level for manufacturing and warehouse facilities. (Tr.308:18-20) LaRue testified that from his experience dealing with issues of adequate illumination, he had a sense of when the illumination level was below 30 lumens. (Tr.308:11-17) He believed that the light level in the verge storage tank area was below 30 lumens in the cited area. (Tr.308:18-22)

The following summarizes my impressions when viewing the video, Exhibit S-9. Starting at 2:21, the video shows how dark the stairway is that leads down to the verge loadout area. The stairway is an access way for the MCC. LaRue uses his flashlight to point out features in the area; the lighting is so poor that nothing would be visible without the flashlight. The distance in linear feet that is in the dark is not very great—it appears to be less than 20 feet. (Ex. S-9, at 2:59) Tanks 7 and 8 have sufficient lighting to navigate safely. (*Id.* at 3:00) Exiting Tank 8, there is a slick walkway and accumulated mud. (*Id.* at 3:09) The lighting is too dark to see any detail. LaRue uses his flashlight again in this area to show the floor and the accumulations. (*Id.* at 3:12) The entire distance from Tank 8 to Tank 9 is in darkness. (*Id.* at 3:16) LaRue shows a non-functioning ceiling light in Tank 9 with his flashlight. (*Id.* at 3:22) The area under Tank 10 is too dark to see without a flashlight. (*Id.* at 3:30) Multiple footprints are visible. The area leading to Tank 10 is too dark to transit safely. A light is burned out in Tank 10. (*Id.* at 3:35) With the exception of Tanks 7 and 8, the entire area shown in the video is too dark to walk through safely without a flashlight. It appears to be a maze of passageways comprising tens of yards of distance. Without the flashlight, it would not be possible to see any detail on the floor. (*Id.* at 3:45) Outside the tank area, looking away from the verge tanks, it is too dark to see the floor safely. (*Id.* at 4:00) LaRue points out another non-functioning light in the distance. (*Id.* at 4:04) There is another green light off to the right side, but it does not provide enough light to make it safe to walk in the area where he is taking the video.

Respondent asserts there was sufficient lighting in the verge area based on Gurley's testimony. (Resp't Br. 35, *citing* Tr.471:18-19; 473:9-18; 474:9-14) Though Respondent concedes that the light in Tank 10 was out and another light in Tank 9 was directed up and away from the floor area (*Id.*), Gurley testified that the MCC's internal lights were working (Tr.471:20-24), there was enough light for him to see where the steps were in the staircase going down to the verge area (Tr.471:15-19), and there was more than enough lighting to provide sufficient illumination outside the verge tanks. (Tr.473:12-18; 474:9-14; 475:2-4) Respondent attempts to discredit Inspector LaRue's lumen assessment by arguing "[t]he subjective opinion of an MSHA inspector is insufficient to establish a violation." (Resp't Br. 37, *citing* *Lehigh Sw. Cement Co.*, 33 FMSHRC 340, 342 (Feb. 2011) (ALJ) (vacating illumination citation where inspector failed to use a light meter)). Contrary to Respondent's argument, an experienced inspector can give opinion estimates of a technical nature based on his experience. *See, e.g., Centre Crown Mining, LLC*, 33 FMSHRC 428, 435 (Feb. 2011) (ALJ) (where the court credited an Inspector's expert opinion that the volume of air flow fell below the required minimum based on his unmeasured observation). It is important to note here that *Lehigh Southwest*, which Respondent has cited to, does not stand for the proposition that an MSHA inspector must use a

light meter to determine the sufficiency of light in a room. The judge held in that case that “one must take into consideration the work being performed in the cited area” to determine “whether the illumination was sufficient to ‘provide safe working conditions.’” *Lehigh Sw. Cement Co.*, 33 FMSHRC at 343. There, the cited area functioned primarily as a breakroom for miners rather than as a traditional working area. *Id.* Additionally, based on the photographic evidence and testimony, the judge found that natural light entered the room from a doorway and windows and there was ambient light from a television in the room. *Id.* The judge concluded after looking at the photographs that the room was “not so dark that it presented a significant hazard to miners, especially considering the purpose of the room.” *Id.*

I have viewed the video evidence and, especially considering the purpose of the area, hold that LaRue’s unmeasured assessment of light levels is admissible and convincing. Furthermore, after viewing the video, I conclude there was insufficient lighting to provide safe working conditions everywhere in the verge area at night except at Tank 7 and Tank 8. My conclusion is bolstered by the fact that but for the flashlight Inspector LaRue used to light his path in the video, it would have been nearly impossible to see.

Respondent next contends that, even if the area was too dark to provide safe working conditions, supplemental lighting was easily available, whether in the form of portable lights, flashlights, or personal cellphones. (Resp’t Br. 35-36). I am not persuaded. Although the record indicates that portable, temporary lights were obtained and used in the verge area to terminate the citation (Tr.310:18-21; 365:23-366:14; Ex. S-8, at 2), nothing in the record suggests they would have been used in the area but for LaRue’s citation. Respondent’s assertion that flashlights would be used by miners in the area at night is also unsupported by the record: Only two of five night-shift employees questioned by LaRue were carrying flashlights. (Tr.305:7-11; Ex. S-8, at 4) Notably, two of the three employees who did not have flashlights were supervisors. (Tr.305:10; Ex. S-8, at 4) Finally, Respondent’s suggestion that workers could use personal cellphones to illuminate the area (Resp’t Br. 36, *citing* Tr.365:13-15) is similarly unconvincing. While cellphone usage is now ubiquitous, I note the standard’s language instructs that illumination sufficient to provide safe working conditions “shall be provided.” Presumably, the operator, not the individual miner, shall do the providing. I hesitate to believe that the drafters of the regulation intended for operators to pass this significant responsibility to its workers.

Respondent also claims that the verge storage tank area is not a work area because verge storage and loading are not usually done during evening hours. (Resp’t Br. 34) Additionally, Respondent states the area is rarely accessed and the only reason to access the area is for greasing of a bulk loading bucket conveyor for the verge product that ran through the area. (*Id.*, *citing* Tr.303:13-21; 418:18-419:16) Respondent argues this work was done by a contractor during daytime hours, when natural light provided sufficient illumination in all areas. (*Id.*, *citing* Tr.363:17-19; 470:4-19)<sup>33</sup>

Key to the resolution of this issue is the nature and location of the MCC. Previous Commission decisions require that analysis of a sufficient lighting controversy focuses on the

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<sup>33</sup> However, the record shows that although the maintenance work was done by contractors, the bulk loading of the verge product was done by regular plant employees. (Tr.419:6-9)

specific facts of the case. It is significant whether work is actually or likely done at night in a given area, and whether there are alternatives or work-arounds that would give miners the option to work and move about without accessing the contested area. For example, in *Capitol Aggregates, Inc.*, 3 FMSHRC 1388 (June 1981) (cited by Respondent), the Commission's ruling focused on whether there was an available alternative to miners that would allow them to perform a needed function without having to transit a poorly lit area. The Commission held that the existence of a work-around possibility undercut the inspector's determination that the work place in question was not safely lit. *Id.* at 1390. Miners could, but did not have to, access the cited area to do essential functions at night. *Id.*

Here, there is little doubt that the MCC is an area where "work" is or may be performed any time the plant is in operation.<sup>34</sup> Although the Respondent downplayed the significance of the total-plant switching and monitoring functions done from the MCC (Tr.471:25-472:5), there is no evidence to support nor argument proffered that access to the MCC through the verge area was not essential to the safe operation and control of the entire plant facility. (See Tr.267:1-6) The MCC contains alarms and read-outs for material depths and production speed which, in LaRue's opinion, would need to be checked frequently. (Tr.239:7-13) It is beyond peradventure that any time the plant operates, it is essential that the switching circuits in the MCC must be accessible because of the crucial need to be able to use them to perform lock-out/tag-out and reset overloads. (Tr.303:18-22; 309:19-20; 472:2-3)

The MCC was the only place where essential plant operations could be done, e.g., switching off electrical equipment for safety purposes. (Tr.267:3-6; 303:18-24; 309:17-20; 471:25-472:5) If it were necessary to switch off equipment at night, the only place to do it was at the MCC. (Tr.310:7-11) The MCC could only be accessed through the verge storage tank area (Tr.471:20-22; Ex. S-9, at 1:14, 2:46), where Inspector LaRue determined the lighting was insufficient and the floor conditions created a slip-trip-fall hazard.<sup>35</sup> The evidence also confirms that personnel working in the verge storage tank area accessed the MCC area as needed. (Tr.362:25-363:7) In addition to the contract personnel who performed periodic maintenance there, regular employees who loaded bulk verge also transited the verge storage tank area as needed. (Tr.269:18-270:4; 418:18-419:9) Notably, contrary to Respondent's assertion that nobody worked in the area at night, Gurley testified that the maintenance person who worked in the verge area worked the second shift, 5:00 p.m. to 1:00 a.m., a period during which it would be dark for at least half of the time. (Tr.470:15-471:4)

In this case, the existence of substantial material accumulations and the footprints in them suggests that either there was no workable means of avoiding the cited area, or, as a matter of practice, miners chose to and were allowed to move through the area. This, combined with the presence of the MCC in the area, makes it convincingly likely that such traffic occurred at night when the lighting was such as seen in the video. (Ex. S-9) Admittedly, based on the record before me, there is no way to determine with certainty that the footprints visible in the

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<sup>34</sup> The plant was operating twenty-four hours a day, seven days a week at the time of this citation. (Tr.464:19-21)

<sup>35</sup> LaRue testified that he did not see anyone going into or out of the MCC during his inspection. (Tr.362:21-24)

accumulated material were made at night. Nevertheless, even assuming that all of the foot traffic that made the prints occurred during daylight hours, there is sufficient evidence that people could transit or access the verge storage tank area at night—whether to merely go from one point to another, to do maintenance work, or to access the MCC room—to establish that the passageways and work areas in the vicinity of the verge tanks at night were not sufficiently lit or cordoned off to make it safe for a person to move through or work in the area.

Based on the above, I find there was insufficient illumination provided to provide safe working conditions in the cited area at night. This constituted a violation of 30 C.F.R. § 56.17001.

## **2. Gravity and S&S**

Inspector LaRue determined that an injury was reasonably likely to occur. (Tr.306:4-18; Ex. S-8, at 1, 4) I concur. Despite Respondent’s arguments to the contrary, I find it reasonably likely that personnel would transit the cited area at night given the essential nature of the functions controlled by the adjacently located MCC. Additionally, Gurley testified that the maintenance person who worked in the verge area worked the second shift, between 5:00 p.m. and 1:00 a.m. (Tr.470:15-471:4) I also note that no barricades or other means of preventing access and exposure at night were in place at the time the citation was issued. (Tr.305:12-21) The area was dark and had wet, slippery mud on uneven ground with tripping hazards, which would have likely contributed to an injury had normal practices been continued. (Tr.306:4-20; Ex. S-9, at 2:38-3:12) I also concur with LaRue’s conclusion that the resulting injury—a muscle or joint injury—could reasonably be expected to result in lost workdays or restricted duty for one person. (Tr.306:18-307:14; Ex. S-8, at 1, 4)

I have found an underlying violation of 30 C.F.R. § 56.17001, a mandatory safety standard. The lack of adequate lighting in the verge tank area created a discrete safety hazard that a miner could slip, trip, or fall as a result of the poor lighting. It is reasonably likely that personnel would transit the area at night given the location of the MCC and the essential nature of the functions it controlled. It is also reasonably likely that the poor lighting conditions would result in a slip, trip, or fall hazard, especially given the obscured and uneven floor surface and the accumulation of verge material on the floor. Assuming the occurrence of the hazard, it is reasonably likely that an injury would result. The injury would be of a reasonably serious nature, possibly a muscle or joint injury resulting in lost workdays or restricted duty. I conclude this violation was S&S.

## **3. Negligence**

Inspector LaRue evaluated the negligence for this violation as “moderate” because the darkened area was obvious, observable from multiple points, and the number of non-functioning lights was extensive. (Tr.307:23-308:3; Ex. S-8, at 1, 4) Although LaRue did not note any mitigating circumstances, he nonetheless felt the citation did not warrant a high negligence designation. (Tr.307:17-22) In his brief, the Secretary argues that the Court should consider high negligence and at least affirm the moderate negligence designation. (Sec’y Br. 38)

The numerous footprints in the accumulated material on the work area floor are evidence that Respondent’s management had reason to be aware of actual or potential foot traffic through

this area. Notably, the essential plant-wide functions controlled from the MCC made it likely that personnel would transit the area at all times, including nighttime hours. Additionally, the violation was extensive: three lights were not functioning. The fact that remedial action was required should have been obvious, especially when juxtaposing the lighting in Tanks 7 and 8 and the darkness in Tanks 9 and 10. (See Ex. S-9, at 2:55-3:40) I note that the Secretary did not establish how long the violation lasted. LaRue's field notes state "unknown existence." (Ex. S-8, at 4) Considering the totality of the circumstances, I agree with Inspector LaRue and conclude that this violation was the result of moderate negligence.

#### **4. Penalty**

I have reviewed and confirmed the data in Exhibit A to the Secretary's Petition for Assessment of Civil Penalty showing the number of production hours for the mine and the mine controller, the number of prior violations per inspection days, the number of repeat violations, the number of persons affected, the negligence points, the likelihood points, and the good faith point reductions. Based on my gravity and negligence findings, and considering but not relying on the point calculation in 30 C.F.R. § 100.3, I find the Secretary's proposed penalty of \$585.00 is appropriate. I impose a penalty in that amount.<sup>36</sup>

#### **L. Citation No. 8820575 – Working Place Examination of Verge Storage Tank Area**

##### **Docket No. SE 2015-0285**

Exhibits S-12 and S-9 (Tr.276:3-9; 301:24-302:7)

The Secretary alleges that Respondent violated 30 C.F.R. § 56.18002(a) by failing to designate a competent person to examine the verge storage tank area for safety or health hazards. (Tr.264:22-265:5; Ex. S-12) The standard requires that a "competent person designated by the operator [ ] examine each working place at least once each shift before miners begin work in that place, for conditions that may adversely affect safety or health." 30 C.F.R. § 56.18002(a).

#### **1. Violation**

Inspector LaRue issued Citation No. 8820575 on March 24, 2015. He was accompanied by Gibens during this portion of his inspection. (Tr.459:22-25)

The verge storage tanks<sup>37</sup> are used to store "verge," a "finished good" produced by the plant. (Tr.418:17) The product is a refined granule made from clay fines that is extruded and spherionized to be perfectly round. (Tr.416:14-417:21) After the product is made, it is stored in bulk at the verge tanks until it is loaded on trucks and in railcars for shipment. (Tr.417:22-418:4) The tanks are essentially large bins made of solid material. (Tr.473:4-8) The tanks are not used in the making of this product, only its post-production storage. (Tr.418:5-7)

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<sup>36</sup> There is no need to adjust this penalty for the VPID distortion identified in relation to the housekeeping violations. The VPID calculation for this violation does not have the same defect.

<sup>37</sup> For a visual image of the verge storage tank area, see Exhibit S-9 starting at 2:50.

While observing the verge storage tank area the night before on March 23, 2015, LaRue noted almost one hundred percent coverage of footprints in wet mud/clay. (Tr.266:23-267:15; 268:3-12; *see* Ex. S-9, at 2:50) After questioning management and rank-and-file personnel, LaRue realized that no workplace examination occurred in the area over the past year because nobody was able to produce records of the examination and nobody claimed that such records existed. (Tr.267:16-22; 269:3-4; 273:7-9) The various groups—verge personnel, maintenance personnel, and bagging personnel—each deflected the responsibility when asked. (Tr.269:5-270:4)

The next morning on March 24, 2015, LaRue continued to attempt to determine who was responsible for conducting workplace examinations in the verge storage tank area. (Tr.270:14-16) LaRue met with Mr. Cox, Superintendent Gibens, and Billy Albertson, a supervisor. (Tr.270:23-271:10; Ex. S-12, at 2) None of these individuals disputed that the verge storage tank area was a working place, which indicated to LaRue that they understood the regulation the same way he did. (Tr.361:4-9) LaRue recalls that Cox of the production department was eventually deemed to be responsible for the area. (Tr.270:16-18) Cox thought the verge department was in charge of conducting workplace examinations in the area. (Tr.270:23-25) After the citation was terminated, management decided that the verge department would be responsible for working place examinations in the area going forward. (Tr.275:18-23; Ex. S-12)

Inspector LaRue testified that he thought Citation No. 8820575 was appropriate because people were working in and traveling through the verge storage tank area, justifying its being classified as a working place. (Tr.272:10-15) Albertson told LaRue that maintenance contractors were assigned to do lubrication work on the elevator and equipment in the verge area at least once a week. (Tr.271:8-21; 356:20-357:4) In addition to these independent contractors (Tr.469:19-470:8), Gibens testified that plant employees would occasionally go in for the purpose of “loading the bulk.” (Tr.419:6-9) Although Gibens was specifically responsible for the processing department (Tr.181:8-10), he estimated that fifty to sixty percent of verge business involved bulk bags, which did not require the storage tanks. (Tr.417:24-418:2) Gibens testified he agreed with LaRue’s notes that Respondent failed to ensure examinations were being done in violation of section 56.18002(a). (Tr.461:5-8) Additionally, he agreed with the statement that the verge group thought that maintenance was doing the inspection and vice versa. (Tr.460:23-461:4)

Respondent argues that this citation should be vacated for the following reasons: (1) 30 C.F.R. § 56.18002(a) limits the requirement to perform workplace exams to “mining or milling” areas, and the verge area was neither (Resp’t Br. 14); (2) the verge storage tank area is a post-production storage location merely waiting for bulk shipment off premises and, therefore, not a “working place” (*Id.*); (3) it had in place an SOP that determined, in reference to MSHA’s then-relevant PPL, the verge area was not covered by the regulation (*Id.* at 15-16); (4) the maintenance workers who worked in the verge storage tank area were non-miner contractors (*Id.* at 17); (5) only maintenance and repair activities took place there, and these activities are not covered by the requirement (*Id.* at 20); and, (6) even if the verge storage tank area were a working place, ODPAC did not have fair notice. (*Id.* at 19-20) I shall address each of these arguments below.



### (a) The Verge Storage Tank Area is in the “Mining or Milling” Process

First, the regulation can only apply if the verge tank area is determined to be part of a mine. The Mine Act at 30 U.S.C. § 803 states, “Each coal or other mine [. . .] shall be subject to provisions of this [Act].” At 30 U.S.C. § 802(h)(1)(C), Congress defined the term “other mine” as “lands, [. . .] structures, facilities, equipment, machines, tools, or other property [. . .] used in, or to be used in, the milling of [. . .] minerals, or the work of preparing [. . .] minerals [. . .].” (emphasis added). For this purpose and paraphrasing somewhat, the area must be a location where milling or preparing of minerals is done, or comprise structures, facilities, or equipment used in the work of preparing or milling minerals.

Second, the preparation and storage of the verge product must come under the definition of milling. Milling operations are covered by Section 3(h)(1) of the Mine Act, but not defined there. The definition is found in the MSHA–OSHA Interagency Agreement<sup>38</sup> in Appendix A:

Milling is the art of treating the crude crust of the earth to produce therefrom the primary consumer derivatives. The essential operation in all such processes is separation of one or more valuable desired constituents of the crude from the undesired contaminants with which it is associated.

*MSHA–OSHA IA*, 44 Fed. Reg. at 22,829. The types of milling processes over which MSHA has jurisdiction under the Interagency Agreement include crushing, grinding, pulverizing, sizing, concentrating, washing, drying, roasting, pelletizing, sintering, evaporating, calcining, kiln treatment, sawing and cutting stone, heat expansion, retorting (mercury), leaching, and briquetting. *Id.*

These authorities provide some contour to the definition of “milling,” but it is still ambiguous. Section 802(h)(1) of the Mine Act provides helpful guidance in this situation. 30 U.S.C. § 802(h)(1). In making a “determination of what constitutes mineral milling [. . .], the Secretary shall give due consideration to the convenience of administration resulting from the delegation to one Assistant Secretary of all authority with respect to health and safety of miners employed at one physical establishment.” *Id.* The legislative history of the Mine Act reveals a congressional intent to interpret what is considered to be a mine broadly and resolve jurisdictional doubts in favor of coverage under the Mine Act. S. Rep. No. 95-181, at 14 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., 95th Cong., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 602 (1978); *see Dicapertl Minerals Corp.*, 28 FMSHRC 720, 726 (July 2006) (ALJ).

Further analysis is required to determine whether the Secretary’s interpretation of “milling” deserves deference. If it does, it takes us one step closer to interpreting whether the

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<sup>38</sup> The Interagency Agreement is an agreement entered into between MSHA and OSHA to “delineate certain areas of authority, set forth factors regarding determinations relating to convenience of administration, provide a procedure for determining general jurisdictional questions, and provide for coordination between MSHA and OSHA in all areas of mutual interest.” MSHA & OSHA, Interagency Agreement, 44 Fed. Reg. 22,827 (Apr. 17, 1979), *amended by* 48 Fed. Reg. 7,521 (Feb. 22, 1983) [hereinafter *MSHA–OSHA IA*].

verge storage tank area should be considered a “working place” for enforcement purposes. Deference is accorded to “an agency’s interpretation of the statute it is charged with administering when that interpretation is reasonable.” *Energy W. Mining Co. v. FMSHRC*, 40 F.3d 457, 460 (D.C. Cir. 1994) (citing *Chevron, U.S.A., Inc. v. Nat. Res. Defense Council, Inc.*, 467 U.S. 837, 844 (1984)); *see also Sec’y of Labor v. Cranesville Aggregate Co.*, 878 F.3d 25 (2d. Cir. 2017) (noting that Secretary’s reasonable determination regarding which conditions are to be regulated by MSHA and which by OSHA is entitled to “substantial deference”). The agency’s interpretation of the statute is entitled to affirmance “as long as that interpretation is one of the permissible interpretations the agency could have selected.” *Watkins Eng’rs & Constructors*, 24 FMSHRC 669, 673 (July 2002) (citations omitted). When an agency “fills in a space” in a statute it is charged with administering, its interpretation is given *Chevron* deference. *Id.*

LaRue concluded that the verge tanks were being used in a milling process when he cited the plant for a violation. (Tr.360:3-5) His point of reference was the then-relevant PPL. (Ex. R–18)<sup>39</sup> LaRue conceded that he had no idea why the area was called “verge” or what was in the tanks. (Tr.265:14-22) But at the hearing, he explained that, to his understanding, the verge area was the final part of the milling process. (Tr.360:19-20)

Jurisdictional cases provide a starting point for my analysis. The decision in *Donoho Clay Company*, 3 FMSHRC 2381 (Oct. 1981) (ALJ), departed significantly from what had seemed to be a core characteristic of a milling operation under the Interagency Agreement, i.e., separating more valuable constituents of the crude material. As such, *Donoho* provides guidance as to whether verge storage can constitute “milling.” The production of Meltzona, a product made at a similar point in the preparation cycle and very similar in composition to verge pellets, was determined to be a milling operation. Meltzona was made from a naturally occurring refractory clay that required principally milling processes to produce a marketable product, very similar to the verge product in this case. The issue in *Donoho* was whether the operator’s plant was a milling operation, and therefore part of a “mine” under section 3(h)(1) of the Act and subject to MSHA’s jurisdiction, or whether it was a refining operation, and therefore subject to OSHA’s jurisdiction under the MSHA–OSHA Interagency Agreement.

*Donoho*’s mixing and blending of clay with other products was not seen strictly as an “essential operation,” a defining characteristic of a milling process as mentioned in the Interagency Agreement. It did not increase the purity of the clay—but simply changed its nature and level of refractoriness. Similarly, Respondent’s production of verge from waste clay fines, which had already been refined to produce other clay products, did not increase the purity of the clay but simply formed it into a size and shape that was necessary for its use in various products or processes.

The *Donoho* decision focused more on the continuity of process and less on the apparent arbitrariness such a narrow “essential operation” analysis would impose. The “essential

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<sup>39</sup> MSHA’s PPL in place at the time of the inspection states that “working places” must be inspected. (Ex. R–18) It uses the definition of “working place” found at 30 C.F.R. § 56.2: “any place in or about a mine where work is being performed.” This is broad enough on its face to encompass milling activities, but there is no specific reference to milling.

operation” test was distinguished as contrary to the language in the Act’s legislative history that encouraged MSHA to assert jurisdictional authority over facilities and processes where convenience and ease of enforcement were served.

It is not apparent from the *Donoho* decision whether the Meltzona product was ultimately packaged or kept in bulk for shipment to customers, but it is clear that the process of making the products, Meltzona in *Donoho* and verge here, can be considered a milling operation, and therefore part of a “mine” under section 3(h)(1) of the Act and subject to MSHA’s jurisdiction. The processing of the two products is identical for analytical purposes. I conclude that the production of verge is a milling operation and is covered by the Mine Act.

The next step is to determine whether storage of the verge product is also covered under the Mine Act as a milling activity. The Interagency Agreement expands the scope of what can be considered a milling process “to apply to mineral product manufacturing processes where those processes are related, technologically or geographically, to milling.” *MSHA–OSHA IA*, 44 Fed. Reg. at 22,828. The Secretary has also recognized that “[n]otwithstanding the clarification of authority provided by Appendix A, there will remain areas of uncertainty regarding the application of the Mine Act, especially in operations near the termination of the milling cycle and beginning of the manufacturing cycle.” *Id.*<sup>40</sup>

In *Austin Powder Company*, 37 FMSHRC 1337, 1355 (June 2015) (ALJ), a broad reading of the Act supported the inclusion of a storage area under MSHA’s jurisdiction. The storage facility contained explosives used both at the subject quarry and at other sites. It was within one-tenth of a mile of the rest of the mine, and was geographically close enough to the area where minerals were actually extracted to be included in the definition of a mine.

Respondent’s production of verge spheres from waste clay material that has been “milled” is in the grey area between milling and manufacturing. Nonetheless, the Mine Act and related documents provide sufficient clarity about what to do in this situation. The technical difference between milling and manufacturing does not stand in the way of ease of application, particularly where, as here (and in *Austin Powder*), the storage is done in the same physical area where the milling is done. The argument that storage is not part of milling is inconsequential in light of the Act’s preference for unified MSHA coverage of processes related to mining and milling activities. See *VenBlack, Inc.*, 7 FMSHRC 520, 534 (Apr. 1985) (ALJ). I conclude that verge storage is sufficiently related to milling to satisfy the Mine Act’s preference for unitary MSHA coverage.

### **(b) The Verge Storage Tank Area Conforms to the Definition of a “Working Place”**

Per the authorities cited above, MSHA’s interpretation of what constitutes a “working place” is entitled to full deference unless the interpretation is unreasonable, plainly erroneous, or inconsistent with the regulation, or there is reason to suspect it does not reflect the agency’s fair

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<sup>40</sup> The Commission has also observed that “‘milling’ and ‘preparation’ can be perceived as words used, in a loose sense, interchangeably to describe the entire process of treating mined minerals for market.” *Kerneos, Inc.*, 37 FMSHRC 719, 721 (Apr. 2015) (ALJ) (internal citations omitted).

and considered judgment on the matter. *See* discussion *supra* Section IV. F. The working place examination standard was “drafted in general terms in order to be broadly adaptable to the varying circumstances of a mine” and, therefore, is appropriate for application of the reasonably prudent person standard. *Sunbelt Rentals, Inc.*, 38 FMSHRC 1619, 1627 (July 2016) (quoting *FMC Wyo. Corp.*, 11 FMSHRC 1622, 1629 (Sept. 1989)).

Respondent reiterated the position in its briefs that the verge storage tank area is a “storage tank,” (Resp’t Br. 14, 16, 18-19; Resp’t Reply Br. 21, 23-24), or “storage area,” (Resp’t Reply Br. 23), but not a “working place.” Within the definition section for surface metal and nonmetal mines, the verge storage tanks only appear to fit into five possible categories: (1) storage facility; (2) storage tank; (3) magazine; (4) travelway; or, (5) working place. I will consider each in turn.

A storage facility is defined as “the entire class of structures used to store explosive materials. A ‘storage facility’ used to store blasting agents corresponds to a BATF Type 4 or 5 storage facility.” 30 C.F.R. § 56.2. A storage tank is defined as “a container exceeding 60 gallons in capacity used for the storage of flammable or combustible liquids.” *Id.* A magazine is defined as “a facility for the storage of explosives, blasting agents, or detonators.” *Id.* As mentioned previously, verge is a spheronized “finished good” made from extruded clay fines. (Tr.416:14-417:21) It is not a blasting agent. It is not a liquid. It is not an explosive. Therefore, the verge storage tank area conforms to none of these storage-based definitions.

Similarly, the verge storage tank area does not meet the criteria to be categorized as a “travelway.” A travelway is defined in the regulation as a “passage, walk or way regularly used and designated for persons to go from one place to another.” 30 C.F.R. § 56.2 (emphasis added). While the existence of numerous footprints in wet mud suggests that the area was frequented, there is no indication in the record that the area was designated for persons “to go from one place to another.” Thus, the verge storage tank area is not properly characterized as a travelway.

A working place is defined as “any place in or about a mine where work is being performed.” *Id.* Independent contractors performed maintenance duties and Respondent’s plant employees loaded bulk product at the verge storage tank area. (Tr.419:6-9; 469:19-470:8) Here, given the options listed above, the verge storage tank area is best described by the “working place” definition. Accordingly, I conclude that the Secretary’s interpretation of “working place,” as applied by Inspector LaRue when he issued this citation, is reasonable and entitled to deference. The verge storage tank area was appropriately considered a “working place.”

### **(c) Respondent’s SOP is not Dispositive in Determining Whether the Verge Area is a “Working Place”**

The Respondent published and followed an internal workplace examination SOP for the Ripley plant. (Ex. R-2; Tr.399:16-400:21) Respondent argues that under the SOP, all areas where miners worked “in the mining and milling processes” were required to be inspected each shift. (Resp’t Br. 15-16, *citing* Ex. R-2) Respondent additionally states in its brief that ODPC policy specifically referenced the MSHA PPL on workplace inspections in effect at the time this citation was issued. (*Id.* at 16, *citing* Tr.400:4-13) Respondent argues it derived an interpretation of what constituted a mining or milling process from the PPL and determined, based on that

definition, that verge storage was excluded, which relieved it of any obligation to perform pre-use examinations in that part of its operation. (*Id.* at 16, 23)

The Respondent's SOP does not change the focus of this analysis.<sup>41</sup> Its identification of areas that were subject to working place examinations is not binding and is less reasonable than the Secretary's, particularly inasmuch as it is clearly self-serving, at least under these facts. Defining the verge storage tank area so as to exclude it from the working place examination requirement relieves the Respondent of the expense and administrative bother of having to staff and execute this function and is further afield from the "reasonable miner" test customarily applied to these disputes than is the Secretary's conclusion that the verge storage tank area was a working place.

#### **(d) The Independent Contractors who did Weekly Maintenance Work were Miners Subject to the Mine Act**

Respondent emphasizes that only contracted maintenance workers worked in the verge storage tank area. (Resp't Br. 15, 17; Resp't Reply Br. 23) Respondent refers to the contracted maintenance workers as "non-miners." (Resp't Br. 20) However, the fact that the maintenance workers at the verge storage tanks were independent contractors does not negate their status as miners. Section 3(g) of the Mine Act states that a "miner" is "any individual working in a coal or other mine." 30 U.S.C. § 802(g) (emphasis added). *See also Nat'l Indus. Sand Assoc. v. Marshall*, 601 F.2d 689, 704 (3d Cir. 1979) ("As its standard, the statute looks to whether one works in a mine, not whether one is an employee or nonemployee or whether one is involved in extraction or nonextraction operations."); *Cyprus Empire Corp.*, 15 FMSHRC 10, 14 (Jan. 1993) ("In the Mine Act, [. . .] Congress chose to define miners as individuals who work in a mine, rather than as employees of an operator.") While there are exceptions for contracted workers who perform maintenance work in other areas of the regulations,<sup>42</sup> no similar exception to the definition of "miner" exists for Part 56. Since the verge storage tanks are an extension of the milling facilities as discussed above, and since the contracted maintenance workers worked there, it follows that the maintenance workers are miners under the Mine Act.

In any event, the operative word in the definition of a "working place" is the word "work." I note that the definition of a "working place" does not include a requirement that the work is performed by a "miner." 30 C.F.R. § 56.2. Similarly, the PPL in effect at the time of the citation explains that the phrase "working place" applies to those locations at a mine site "where persons work in the mining or milling processes." (Ex. R-18) The contracted maintenance workers undoubtedly fit this description.

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<sup>41</sup> Based on a thorough review of Respondent's Workplace Examinations SOP, Exhibit R-2, I am doubtful of Respondent's sincerity that it relied on the 2014 PPL in believing the verge storage tank area was not a working place. A full discussion can be found below. *See* discussion *infra* Section VI. L. 3.

<sup>42</sup> For example, Part 46 makes an exception to the definition of "miner," stating that maintenance or service workers who do not work at a mine site for a frequent or extended period are not "miners" for the purposes of the mandatory training/retraining requirements. 30 C.F.R. § 46.2(g)(2).

**(e) The Definition of “Working Place” used at the Time of the Citation was Broad Enough to Include Areas Where Maintenance Work was Performed**

Respondent next argues the verge storage tank area is not a “working place” because the area was only accessed weekly for routine greasing by contractors (Resp’t Br. 15, *citing* Tr.356:20-25) and maintenance activities do not constitute “work.”<sup>43</sup> (Resp’t Br. 14, 17, 20) As authority to bolster its claim, Respondent cites to MSHA’s evolving policy regarding the enforcement of section 56.18002(a), as outlined in MSHA’s PPLs. *See* (Ex. R–17 (Program Policy Letter No. P15-IV-01, “Examination of Working Places” (effective date July 22, 2015))); (Ex. R–18 (Program Policy Letter No. P14-IV-01, “Examination of Working Places” (effective date March 25, 2014))); MSHA, Final Policy on Examination of Working Places, 61 Fed. Reg. 42,787 (Aug. 19, 1996) [hereinafter *1996 PPL*]; MSHA, Examination of Working Places, 60 Fed. Reg. 9,987 (Feb. 22, 1995) [hereinafter *1995 Proposal*].

In 1995, MSHA issued a public notice for a change in the definition of a “working place.” Respondent highlights the following sentence in the proposed draft definition: “The working place for an individual assigned to perform maintenance or repair duties, for example, is the area where the individual performs the maintenance or repair work.” *1995 Proposal*, 60 Fed. Reg. at 9,988. Respondent notes that the 1996 PPL deleted the references to maintenance and repair work from the 1995 proposed draft language. (Resp’t Br. 20) Respondent argues that based on this omission, which was carried forward to the 2014 PPL that was in effect at the time of the citation, it is appropriate to assume that maintenance and repair activities were not intended to be included as “work” for purposes of section 56.18002(a). (*Id.*) Respondent also notes that MSHA updated its working place inspection PPL, effective July 22, 2015, to specifically include areas where work is performed on an infrequent basis, such as areas accessed primarily during periods of maintenance or clean-up. (*Id.* at 21; *see* Ex. R–17, at 2) Respondent argues that the explicit addition of “maintenance” work in the 2015 PPL further evidences that the scope of “working place” did not include maintenance work at the time Citation No. 8820575 was issued on March 24, 2015. (*Id.*) I disagree.

First, Respondent’s contention that the 1995 draft language reference to maintenance and repair duties delineates the scope of what constitutes “work” misreads the purpose of the sentence. The 1995 draft language stated, “[t]he working place for an individual assigned to perform maintenance or repair duties, for example, is the area where the individual performs the maintenance or repair work.” *1995 Proposal*, 60 Fed. Reg. at 9,988 (emphasis added). The following sentence in the draft language clarifies this focus by stating, “[f]or an operator to be in compliance, that area would need to be examined by a competent individual for hazardous

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<sup>43</sup> Respondent is careful in its briefs to frame the tasks that were done in the verge area as maintenance and cleanup “activities” and not “work.” (Resp’t Br. 14, 20-21; Resp’t Reply Br. 21, 23-24) However, it appears Respondent had a momentary lapse of memory when describing those same activities a few pages later for Citation No. 8820571, the illumination violation. There, Respondent wrote, “[t]o the extent that the [verge storage tank area] was accessed, that access was for greasing of a bulk loading conveyor for the Verge product that ran through the area. Tr.303:13-21; 418:18-419:16. This work was done by a contractor during daytime hours [ . . .].” (Resp’t Br. 34) (emphasis added)

conditions and any hazardous conditions would need to be promptly corrected.” *Id.* (emphasis added). The focus of this example sentence is not to describe the scope of what constitutes “work”; rather, the focus is to explain that the working place inspection must take place in the area where the work is performed.

Next, because the 1996 PPL and subsequent 2014 PPL did not explicitly list maintenance or repair duties as “work,” Respondent concludes it is appropriate to assume there was no intention to include them. (Resp’t Br. 20) Based on the totality of the 1995 draft language, however, I find that it is more appropriate to interpret “work” broadly. In the paragraphs that precede the “maintenance or repair duties” proposed draft language, MSHA stated its reason for proposing new language for standard 56.18002:

However, in a 5-year period, MSHA has investigated 17 serious and fatal accidents where working place examinations were not conducted or were inadequately conducted. In a significant number of these accidents, failure to conduct working place examinations was a contributing cause. Therefore, rigorous working place examinations are a fundamental accident prevention tool for the mining industry.

*1995 Proposal*, 60 Fed. Reg. at 9,988. Notably, a similar variant of this language was ultimately kept in the 1996 PPL.<sup>44</sup> Respondent’s narrow interpretation of the 1996 and 2014 PPLs disregards the history of accidents that served as the impetus for MSHA’s 1995 proposed language. Additionally, the 2014 PPL that was in effect at the time this citation was issued defined “working place” as “any place in or about a mine where work is being performed.” (Ex. R–18, at 2) (emphasis added). Given the broad language used here, had MSHA intended maintenance or repair work to not constitute “work” for the purposes of section 56.18002, they would have listed it. Instead, no specific exceptions are mentioned.

Finally, the explicit inclusion of new language referencing maintenance work in the 2015 PPL does not mean, as Respondent argues, that the 2014 PPL necessarily excluded areas accessed primarily during periods of maintenance or cleanup. The inclusion of the phrase “maintenance or cleanup” in 2015 did not expand the scope of “work”; it merely clarified an

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<sup>44</sup> The 1996 PPL stated the following in its background section:

Failure to conduct working place examinations has been a contributing cause of a significant number of recent accidents. In the 5-year period from 1988–1992, MSHA has investigated 17 serious and fatal accidents where working place examinations were not conducted or were inadequately conducted and were found to have contributed to the cause of the accident.

*1996 PPL*, 61 Fed. Reg. at 42,788.

already broad standard.<sup>45</sup> For these reasons, I find that the phrase “working place,” as used in the 2014 PPL, was broad enough to include those areas where maintenance work was performed, despite not being explicitly listed.

#### **(f) Respondent’s Employees Conducted Non-Maintenance Work Activities in the Verge Storage Tank Area**

Even assuming Respondent is correct regarding MSHA’s intention at the time this citation was issued to not include maintenance and repair activities as conduct triggering workplace inspection requirements, Respondent’s argument fails because it improperly characterizes the work that mine employees conducted at the verge storage tanks. Respondent states in its brief that only maintenance and cleanup activities took place in the verge storage tank area (Resp’t Br. 14) and that only contractors doing greasing maintenance for a non-mining-related function ever entered the area. (*Id.* at 17) Notably, Respondent argues that “no miners” worked in the verge storage tank area. (*Id.*) This is untrue. Superintendent Gibens stated at the hearing that, in addition to the maintenance personnel, plant employees would go into the verge storage tank area for the purpose of “loading the bulk.” (Tr.419:6-9) “Loading the Bulk” is properly characterized as work. Further, the record suggests that this amount of work was not trivial. Superintendent Gibens, although stating that he is responsible for processing and does not specifically work in the verge group, estimated that fifty to sixty percent of verge sales were in the form of bulk bags. (Tr.417:24-418:2) The storage tanks, however, were for bulk product. (Tr.418:3-4) Presumably, based on the testimony at hearing, the remaining verge product that was not sold as “bulk bags” was sold as “bulk.” Thus, up to fifty percent of verge was bulk product stored in the verge storage tanks. As mentioned before, this bulk product was loaded into trucks and railcars by plant employees. (Tr.419:6-9) Albeit not constantly or consistently, Respondent’s witness’ own statement indicates that employees worked in the verge storage tank area.<sup>46</sup> Since work was performed at the verge storage tank area, it is properly characterized as a working place. For the reasons stated, the verge storage tanks were an appropriate site requiring a workplace examination.

#### **(g) Respondent had Fair Notice**

Respondent argues that MSHA failed to give fair notice that the verge storage tanks required working place inspections. Respondent states that at least 14 inspections over seven years failed to express concern that working place inspections were not taking place at the verge storage tank area. (Resp’t Br. 19)

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<sup>45</sup> As a more relatable example, if my local dog park has a sign that says, “dogs allowed between 8 a.m. and 8 p.m.” and then later amends the sign to read, “dogs, including Irish Wolfhounds and Rhodesian Ridgebacks, allowed between 8 a.m. and 8 p.m.,” the addition of the phrase “including Irish Wolfhounds and Rhodesian Ridgebacks” did not expand the scope. Irish Wolfhounds and Rhodesian Ridgebacks were always welcome in the park because they are, by all reputable accounts, dogs.

<sup>46</sup> For additional testimony by Gibens regarding the bulk loading process, see Tr.403:17-404:6.



The mere fact that the verge storage tank area was not cited for workplace inspection violations in the previous seven years does not negate the fact that Respondent should have realized that MSHA had jurisdiction and that a workplace inspection was required. Furthermore, MSHA cannot be estopped from enforcing its regulations simply because it did not previously cite the mine operator. *See Mainline Rock & Ballast, Inc. v. Sec’y of Labor*, 693 F.3d 1181, 1187 (10th Cir. 2012) (citing *Emery Mining Corp. v. Sec’y of Labor*, 744 F.2d 1411, 1416-17 (10th Cir. 1984)). The Mine Act is a strict liability statute. As long as a regulation is sufficiently specific that a reasonably prudent person, familiar with the conditions the regulation is meant to address and the objective the regulation is meant to achieve, would have fair warning of what the regulation requires, then the due process requirements for notice are satisfied. *Id.* at 1187 (citing *Walker Stone Co. v. Sec’y of Labor*, 156 F.3d 1076, 1083-84 (10th Cir. 1998)).

LaRue credibly testified that Gibens, Cox, and Albertson did not contest that the verge storage tank area was not part of the working place inspection area when he issued the citation. (Tr.361:4-9) Moreover, Respondent’s own witness’ statements contradict Respondent’s argument that it did not have fair notice that the verge storage tank area was subject to section 56.18002(a). Superintendent Gibens agreed at hearing that management failed to ensure examinations were being done in the verge storage tank area (Tr.461:5-8) and should have been aware that examinations were not being done if they reviewed current work exam areas. (Tr.462:1-7)

For the reasons stated above, I conclude a reasonably prudent person would have recognized that the verge storage tank area was subject to the working place inspection requirements of section 56.18002(a). Accordingly, Respondent’s fair notice argument fails.

Based on the above, I conclude the verge storage tank area was a working place as contemplated by 30 C.F.R. § 56.18002(a) and the failure to conduct a working place examination constituted a violation of the standard.

## **2. Gravity and S&S**

Inspector LaRue determined that an injury was reasonably likely to occur. (Tr.273:10-19; Ex. S–12, at 1-2) I concur. Contrary to Respondent’s contention that the area was rarely accessed or worked in, Inspector LaRue testified that there was almost one hundred percent coverage of footprints in wet mud throughout the verge storage tank area. (Tr.267:11-15; 268:3-4) This is corroborated by video evidence taken the night before. (Ex. S–9, at 2:38-3:12) LaRue testified that although the wet mud in the verge storage tank area was comprised of “more of a coarse material,” it was still on a smooth steel plate, which would create a slipping, tripping, or falling hazard. (Tr.268:13-15)

I find it reasonably likely that personnel working in the area—whether loading the bulk or conducting maintenance work—could slip, trip, or fall and sustain an injury. I also concur with LaRue’s conclusion that the resulting injury—a muscle or joint injury—could reasonably be expected to result in lost workdays or restricted duty for one person.

I have found an underlying violation of 30 C.F.R. § 56.18002(a), a mandatory safety standard. The Commission has instructed that “the starting point for determining the hazard is the actual cited section” and is found “in terms of the prospective danger the cited safety

standard is intended to prevent.” *Newtown*, 38 FMSHRC at 2038. Unlike most safety standards, section 56.18002(a) does not have a particular hazard associated with it. Rather, the purpose of section 56.18002(a) is to detect and prevent “conditions which may adversely affect safety or health.” In this instance, the discrete safety hazard was the possibility of a miner slipping, tripping, or falling on wet mud in the verge storage tank area.

The operator’s failure to conduct a proper workplace examination contributed to the risk of a slip–trip–fall hazard. Such a hazard would reasonably likely occur, particularly in light of the fact that the area was often frequented as evidenced by the abundance of footprints. Assuming the occurrence of the foot-level-fall hazard, I find it reasonably likely that an injury of a reasonably serious nature, possibly resulting in muscle or joint injuries leading to lost workdays or restricted duty, would occur. I conclude this violation was S&S.

### 3. Negligence

The Secretary alleges that the violation was the result of high negligence. The “high” negligence designation “suggests an aggravated lack of care that is more than ordinary negligence.” *Brody Mining*, 37 FMSHRC at 1703 (quoting *Topper Coal Co.*, 20 FMSHRC 344, 350 (Apr. 1998)). ODPC had been cited for the same standard twice before in two years, which signaled to LaRue that Respondent was placed on notice. (Tr.277:2-9; Ex. S–12, at 1) Additionally, LaRue thought the extensive footprints in the wet mud in the area made it obvious that a workplace exam should have been conducted. (Tr.267:11-15; 275:10-13) LaRue detailed in his notes that there was an “on going [sic] practice of not inspecting” the verge storage tank area based on the fact that nobody was able to produce a workplace examination from the previous 12 months. (Tr.273:7-9; Ex. S–12, at 2) Inspector LaRue also testified that he provided multiple opportunities for supervisory staff to disclose mitigating circumstances as good reasons for Respondent’s failure to complete workplace examinations in the area, but none were presented. (Tr.274:14-275:9) Superintendent Gibens agreed at hearing that management should have been aware that examinations were not being done in the verge storage tank area if they had reviewed current work exam areas (Tr.462:1-7), but he disagreed that there was an ongoing practice of not inspecting the area. (Tr.461:18-21)

Respondent argues that it was not aware that the verge storage tank area needed to be inspected. (Resp’t Br. 23) As support, Respondent points to the fact that although the verge tanks have been in existence for seven years, at least 14 inspections failed to express concern that working place inspections were not taking place there. (*Id.* at 19) Additionally, Respondent argues that it had an “elaborate” working place SOP, which referenced MSHA guidance. (*Id.* at 21, 23) Respondent states this constituted a “significant mitigating circumstance.” (*Id.* at 23) For these reasons, Respondent contends that the negligence should be lowered to low or no negligence. (*Id.* at 21)

Although Inspectors’ previous representations about compliance with a regulation do not estop MSHA from issuing future citations, detrimental reliance on an inconsistent interpretation is properly considered in mitigating the penalty. *See Nolichuckey Sand Co.*, 22 FMSHRC 1057, 1063-64 (Sept. 2000); *U.S. Steel Mining Co.*, 6 FMSHRC 2305, 2310 (Oct. 1984) (noting that detrimental reliance may be considered in mitigation of penalty). Similarly, if the operator was misled—either with inconsistent enforcement of the regulatory provision or with ambiguous

interpretations in the agency manual—that circumstance may reduce the level of negligence. *Mach Mining*, 809 F.3d at 1266, *citing Mettiki Coal Corp.*, 13 FMSHRC 760, 770-71 (May 1991).

As belabored in the sections above, Respondent’s claim that it did not have actual knowledge that the verge storage tank area was a working place is inconsequential as a reasonably prudent person familiar with the mining industry, relevant facts, and protective purpose of the regulations would have recognized that section 56.18002(a) applied.

I am also not persuaded that Respondent detrimentally relied on previous inspector representations. Except for the fact that the verge storage tank area was not previously cited under section 56.18002, nothing in the record evidences that an MSHA inspector intimated the area was not part of the “mining or milling processes,” the activities conducted there did not constitute “work,” or the area was exempted in some other way.

Similarly, I am not persuaded that Respondent detrimentally relied on the 2014 PPL in its understanding of the working place examination standard. Respondent suggests a reliance on the 2014 PPL when it stated in its brief that the “Ripley Policy specifically referenced the MSHA PPL on workplace inspections that was in effect at the time of the inspection [ . . .].” (Resp’t Br. 16) (emphasis added) Respondent then dedicated the next five pages delving into the history of the PPL and its linguistic nuances. (*See Id.* at 16-21) However, contrary to Respondent’s claim in its brief, the SOP never actually referenced the 2014 PPL. Section 12 of the SOP (“References”) lists three sources: (1) MSHA Part 46 Training Plan at Location; (2) MSHA Standard, 30 C.F.R. § 56.18002, Examination of Working Places; and, (3) MSHA’s Program Policy Manual. (Ex. R–2, at 7) There is no mention of the 2014 PPL, let alone any PPL, anywhere in the SOP.

I also note other oddities that undermine Respondent’s claim that it had a genuine belief the verge storage tank area was not a “working place” based on MSHA materials at the time the citation was issued. In its post-hearing brief, Respondent states, “under [the workplace examination SOP], all areas where miners work ‘in the mining and milling processes’ were expected to be inspected each shift.” (Resp’t Br. 15-16) However, the phrase “in the mining or milling processes” only appears in Appendix D of the SOP, which provides a sample record form that examiners and auditors need to fill out. Respondent’s SOP does not define “mining” or “milling.” It does not carve out any exceptions. It does not, for example, delineate the point at which milling ends nor does it reflect Respondent’s currently-held view that not all centrally-located areas in a milling facility are considered part of the milling process. Similarly, the SOP did not use qualifying language to suggest a nuanced understanding of “work”—with maintenance and repair activities being considered “non-work.” Section 2.1 of the SOP states the scope of “workplace examinations” is “where work is being performed during scheduled work hours.” (Ex. R–2, at 1) Section 6.2.1, in the “Instructions and Procedures” section, broadly states that “Oil-Dri expects workplace examinations to be conducted in all ‘*working places.*’” (*Id.* at 3)

(emphasis in original) Unfortunately, the definitions for “working places” or “work” were not included in the exhibit that was admitted.<sup>47</sup>

Based on a plain reading of Respondent’s working place examination SOP, I am unable to find convincing support that Respondent held a belief about working places consistent with that espoused at and after hearing. Put bluntly, there is nothing more than a scintilla of evidence in the SOP to suggest that Respondent relied on MSHA representations and interpreted the working place examination standard to exempt the verge storage tank area. My deduction is strengthened by the fact that Gibens, Cox, and Albertson did not contest that the area was a working place at the time the citation was issued (Tr.361:4-9) and the fact that Gibens agreed at hearing that management should have been aware that examinations were not being done there if they reviewed current work exam areas. (Tr.462:1-7)

Given the above, I agree with the Secretary that the violation was the result of high negligence.

#### **4. Penalty**

I have reviewed and confirmed the data in Exhibit A to the Secretary’s Petition for Assessment of Civil Penalty showing the number of production hours for the mine and the mine controller, the number of prior violations per inspection days, the number of repeat violations, the number of persons affected, the negligence points, the likelihood points, and the good faith point reductions. Based on my gravity and negligence findings, and considering but not relying on the point calculation in 30 C.F.R. § 100.3, I find the Secretary’s proposed penalty of \$1,944.00 is appropriate. I impose a penalty in that amount.<sup>48</sup>

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<sup>47</sup> Of the 13 pages in the Workplace Examination SOP, only pages 1, 3, 5, 7, 9, 11, and 13 were submitted. The definition section, which started on the bottom-half of page 1, presumably continued on to page 2 and contained a definition for “working place.” I find it strange given the centrality of the “working place” definition in this citation that Respondent would choose to omit its standardized version.

<sup>48</sup> There is no need to adjust this penalty for the VPID distortion identified in relation to the housekeeping violations. The VPID calculation for this violation does not have the same defect.

## VII. ORDER

It is **ORDERED** that Citation No. 8818320 be **MODIFIED** to reduce the negligence from “Low” to “None.”

It is further **ORDERED** that Citation No. 8818317 be **VACATED**.

**WHEREFORE**, it is further **ORDERED** that Oil-Dri Production Company **PAY** a total penalty of \$12,483.00 within forty (40) days of the date of this Decision.<sup>49</sup>

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

Distribution:

Daniel Brechbuhl, Esq., Office of the Solicitor, U.S. Department of Labor, Cesar E. Chavez Memorial Building, 1244 Speer Boulevard, Suite 216, Denver, CO 80204-3598  
[brechbuhl.daniel.t@dol.gov](mailto:brechbuhl.daniel.t@dol.gov)

Douglas A. Graham, Esq., Laura G. Scheland, Esq., Oil-Dri Corporation of America, 410 N. Michigan Avenue, Suite 400, Chicago, IL 60611-4293  
[douglas.graham@oildri.com](mailto:douglas.graham@oildri.com)

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<sup>49</sup> Payment should be sent to: Mine Safety & Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.



# **ADMINISTRATIVE LAW JUDGE ORDERS**





**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 22, 2018

SECRETARY OF LABOR  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA),  
on behalf of LOUIS SILVA, JR.,  
Applicant

TEMPORARY REINSTATEMENT  
PROCEEDING

Docket No. WEST 2017-265-DM  
MSHA No. RM MD 2017-05

v.

Morrison Plant

AGGREGATE INDUSTRIES WRC, INC.,  
Respondent

Mine ID 05-00864

**ORDER DISSOLVING ORDER OF TEMPORARY REINSTATEMENT  
ORDER OF DISMISSAL**

This matter is before me on an application for temporary reinstatement filed by the Secretary of Labor (“Secretary”) on behalf of Louis Silva, Jr, pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 (“Mine Act”), 30 U.S.C. § 815(c)(2), against Aggregate Industries WRC, Inc. Silva was terminated from his position with Aggregate Industries on January 19, 2017.

On March 20, 2017, I granted the parties’ Joint Motion to Approve Terms of Economic Reinstatement and I ordered Aggregate Industries to provide temporary economic reinstatement to Silva. The terms of the reinstatement are described in the motion. As of this date, my order of temporary reinstatement is still in effect.

On April 17, 2018, following an evidentiary hearing, I issued a decision dismissing Louis Silva’s underlying discrimination complaint in Docket No. WEST 2017-482-DM. 40 FMSHRC \_\_\_\_ (April 2018) (ALJ). Section 113(d)(1) of the Mine Act states: "The decision of the administrative law judge ... shall become the final decision of the Commission 40 days after its issuance unless within such period the Commission has directed that such decision shall be reviewed .... " 30 U.S.C. § 824(d)(1). No party filed a petition for discretionary review with the Commission under section 113(d)(2)(A) and the Commission did not order the case for review under section 113(d)(2)(B). 30 U.S.C. § 823(d)(2)(A) & (B). As a consequence, my decision in WEST 2017-482-DM will become a final decision of the Commission on May 27, 2018.

In *Sec’y on behalf of Bernardyn v. Reading Anthracite Co.*, 21 FMSHRC 947 (Sept. 1999), the Commission held that a judge’s order of temporary reinstatement must remain in place until his decision on the merits of the discrimination complaint becomes a final decision of the Commission. Because I determined that Aggregate Industries did not discriminate against Silva, he is no longer entitled to temporary economic reinstatement.

For the reasons discussed above, my March 20, 2017 order of temporary economic reinstatement is hereby **DISSOLVED** effective May 27, 2018 and Aggregate Industries is no longer required to comply with the terms of the parties' Joint Motion to Approve Terms of Economic Reinstatement as of that date. Consequently, this proceeding is hereby **DISMISSED**.

/s/ Richard W. Manning  
Richard W. Manning  
Administrative Law Judge

Distribution:

Karen W. Bobela, Esq., Office of the Solicitor, U.S. Department of Labor, 1244 Speer Boulevard, Suite 515, Denver, CO 80204

Matthew M. Linton, Ogletree, Deakins, Nash, Smoak & Stewart, PC, 1700 Lincoln Street, Suite 4650, Denver, Colorado 80203

RWM

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
1331 PENNSYLVANIA AVE., N.W., SUITE 520N  
WASHINGTON, DC 20004-1710  
TELEPHONE: 202-434-9956 / FAX: 202-434-9949

May 31, 2018

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

v.

PENNSY SUPPLY INC.,  
Respondent

CIVIL PENALTY PROCEEDING

Docket No. YORK 2018-4-M  
A.C. No. 07-00059-449176

Mine: Bay Road Plant #7

**ORDER GRANTING MOTION TO AMEND**

Before: Judge Rae

This case is before me upon the Secretary’s petition for assessment of civil penalty under section 105 of the Federal Mine Safety and Health Act of 1977 (“Mine Act”), 30 U.S.C. § 815. On April 24, 2018, I set this matter for hearing on June 12, 2018, in Dover, Delaware.

On May 21, 2018, the Secretary filed a motion seeking to amend two citations contained in this docket, Citation Nos. 8802227 and 8802228, to allege the violations as section 104(d) citations with high negligence. (Mot. at 1.) Both citations were originally alleged as section 104(a) citations with moderate negligence. (*Id.*) The Secretary contends the amendments seek only to change the negligence and add an unwarrantable failure designation to each citation. (*Id.* at 2.) The Secretary states that he discovered new evidence during discovery that warrants the proposed amendments. (*Id.* at 3.) The Secretary also asserts that the amendments are not a result of bad faith, nor would they prejudice the Respondent or cause undue delay. (*Id.* at 3–4.)

The Respondent timely filed a response on May 22, 2018, asserting that the proposed amendments would require the Respondent to conduct further discovery and would therefore prejudice the Respondent and delay the hearing. (Resp. at 2.) The Respondent also argues that the proposed amendments are made in bad faith and that the Secretary has not offered any plausible excuse as to why the amendments could not have been made earlier. (*Id.* at 1–2.)

The Commission has held that modification of a citation is analogous to the amendment of pleadings under Federal Rule of Civil Procedure 15(a), which states that leave for amendment “shall be freely given when justice so requires” unless the moving party has been guilty of bad faith, has acted for the purpose of delay, or where the trial of the issue will be unduly delayed. *Wyoming Fuel Co.*, 14 FMSHRC 1282, 1290 (Aug. 1992) (quoting Fed. R. Civ. P. 15(a)). Delay alone is not a sufficient basis upon which to deny a motion to amend, even when such motion comes on the eve of trial. *Cypress Empire Corp.*, 12 FMSHRC 911, 916 (1990) (“Delay alone, regardless of length, does not bar a proposed amendment if the other party is not prejudiced.”)

In this case, the Respondent acknowledged receipt of the Secretary's motion on May 21, 2018, approximately three weeks before the scheduled hearing. (Resp. at 1.) The Respondent has not raised any basis to find actual prejudice or reason for delay in this proceeding in its response to the Secretary's motion. The Secretary avers that there are no new facts upon which the modification is sought, and the basis for reassessing the negligence is based upon information the Secretary learned during the discovery process, indicating that the facts were equally available to the Respondent, if not in the possession of the Respondent.

Based on the above, I conclude that the Secretary's proposed amendments are not made in bad faith, to delay this proceeding, or prejudicial to the Respondent. I also find that the Respondent has not demonstrated actual prejudice as a result of the amendment to the negligence allegations. Accordingly, the Secretary's motion to amend the petition is hereby **GRANTED**.

In granting the Secretary's motion, the Secretary is hereby **ORDERED** to make the MSHA inspector available for a supplemental deposition telephonically, or otherwise, at the Respondent's discretion. The deadline for submitting a supplemental witness and exhibit list by the Respondent is extended until close of business on June 11, 2018. The hearing will be conducted on June 12, 2018, as scheduled.

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

Distribution:

Maria del Pilar Castillo, Esq., Office of the Solicitor, U.S. Department of Labor, The Curtis Center, 170 S. Independence Mall West, Suite 630E, Philadelphia, PA 19106

David M. Toolan, Esq., Oldcastle Law Group, 900 Ashwood Parkway, Suite 700, Atlanta, GA 30338

/ivn

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
1331 PENNSYLVANIA AVENUE, NW, SUITE 520N  
WASHINGTON, DC 20004-1710  
PHONE: (202) 434-9933 FAX: (202) 434-9949

June 4, 2018

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

v.

THE OHIO COUNTY COAL COMPANY,  
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. WEVA 2018-0165  
A.C. No. 46-01436-455014

Mine: Ohio County Mine

**ORDER REGARDING MOTION TO CERTIFY FOR INTERLOCUTORY REVIEW**

Before: Judge Moran

The Secretary of Labor has filed a motion (“Motion”) to certify for interlocutory review this Court’s Decision Denying Settlement in this docket. The Court’s Decision denying settlement is included within this Order. The Secretary seeks the following question for certification for interlocutory review: “Whether the ALJ erred as a matter of law in rejecting as “facts in support” of the proposed settlement: (1) by the Secretary’s stated enforcement priorities, and (2) the Secretary’s identification of the facts disputed by the operator pertaining to the cited violations.” Motion at 1-2.

The Commission procedural rule pertaining to interlocutory review provides that “Interlocutory review by the Commission shall not be a matter of right but of the sound discretion of the Commission.” 29 C.F.R. 2700.76(a). The Court certifies that its ruling denying settlement “involves a controlling question of law and that in [its] opinion immediate review will materially advance the final disposition of the proceeding.” *Id.* at 29 C.F.R. 2700.76(a)(1)(i).

While the Court grants the Secretary’s Motion, pursuant to 29 C.F.R. 2700.76(d), “Scope of review,” it does adopt the characterization of the question, as framed by the Secretary. The Scope of Review provision provides “Unless otherwise specified in the Commission’s order granting interlocutory review, review shall be confined to the issues raised in the Judge’s certification or to the issues raised in the petition for interlocutory review.” *Id.*

As noted, in its Motion the Secretary described the question as “Whether the ALJ erred as a matter of law in rejecting as “facts in support” of the proposed settlement: (1) by the Secretary’s stated enforcement priorities, and (2) the Secretary’s identification of the facts disputed by the operator pertaining to the cited violations.”

The first question is one the Commission presently has under reconsideration in *Secretary of Labor v. The American Coal Company*, LAKE 2011-13. The second question, in the Court's view, is an incomplete recounting of the issue. It is true that the justification for the 55% reduction provides, in its entirety, that the "Respondent argued that the operator was unaware of the cited *practice*, which was committed by an hourly employee. The inspector's notes confirm that the foreman was not present when the violation occurred. In consideration of the above, the Secretary agrees to a reduction in negligence and a corresponding reduction in the penalty to \$2,438.00 pursuant to Part 100." Secretary's Motion for Decision and Order Approving Settlement, May 4, 2018 at 4 (emphasis added).

The Court, as reflected in its May 7, 2018 Decision Denying Settlement Motion, examining each of the citations involved in the settlement posed a question in that denial, regarding the nature of two citations, 9090883 and 9090884, which were issued on October 27, 2017, within minutes of one another. It noted that "[t]he problem is that the justification for the 55 % reduction for No. 9090883 does not square with the information contained in Citation No. 9090884, unless the Secretary is asserting that these citations do not relate to the same piece of equipment. This is so because, for Citation No. 9090883, the Secretary declares that the Respondent "argue[s] that the operator was unaware of the cited practice, which was committed by an hourly employee." Motion at 4 (emphasis added). Yet, Citation No. 9090884 does not indicate an incorrect practice. Rather it indicates a defect with the machine's ATRS, as it would not pivot to allow both pads to contact the roof, a function which the machine should have the ability to do." Decision at 2. On that basis, the Court concluded that the Motion was insufficiently supported.

It is the Court's view that its inquiry about the relationship, if any, between the two citations, Nos. 9090883 and 9090884, was a reasonable inquiry, consonant with its responsibilities under Section 110(k) of the Mine Act. Pursuant to 29 C.F.R. 2700.76(d), "Scope of review," the Court's granting of interlocutory is confined to this issue in its certification, namely the reasonableness of its inquiry to the parties regarding the settlement motion.

Accordingly, the Secretary's Motion to certify for interlocutory review is **GRANTED**.

**SO ORDERED.**

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

Distribution:

Robert S. Wilson, Esq., U.S. Department of Labor, 201 12th Street South, Suite 401, Arlington,  
VA 22202-5450

Wm. Allen McGilton, Murray Energy Corporation, 46226 National Road, St. Clairsville, OH 43950

## APPENDIX

### FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
1331 PENNSYLVANIA AVENUE, NW, SUITE 520N  
WASHINGTON, DC 20004-1710  
PHONE: (202) 434-9933 | FAX: (202) 434-9949

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

v.

THE OHIO COUNTY COAL COMPANY,  
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. WEVA 2018-0165  
A.C. No. 46-01436-455014

Mine: Ohio County Mine

### DECISION DENYING SETTLEMENT MOTION

Before: Judge Moran

The Secretary has filed, through a Conference and Litigation Representative (“CLR”),<sup>1</sup> a Motion for Decision and Order Approving Settlement (“Motion”). For the reasons which follow, the Motion must be denied.

This docket involves 5 (five) citations, for which a 55% reduction, and modification of the negligence from moderate to low, is being sought for one<sup>2</sup> of the citations: Citation No. 9090883. That citation, asserting a violation of 30 C.F.R. § 75.202(b), states:

During the investigation of an accident that occurred on October 3, 2017, it was determined through interviews and by a recreation of the accident scene that both ATRS pads were not in contact with the roof while roof bolting was being

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<sup>1</sup> The CLR has not complied with 29 C.F.R. § 2700.3, addressing who may practice per subsection (b)(4), “Other persons,” which provides that “[a] person who is not authorized to practice before the Commission as an attorney under paragraph (a) of this section may practice before the Commission as a representative of a party if he is: ... (4) Any other person with the permission of the presiding judge or the Commission.” The CLR has not sought permission from the presiding judge to practice for this docket. The routine statement from the non-lawyer CLR asserts that they are “authorized to represent the Secretary of Labor in this proceeding, in accordance with the enclosed Notice of Appearance.” This does not recognize that the authorization to practice before the Commission comes from the presiding judge, not the Secretary.

<sup>2</sup> The Motion provides for the other four citations to be settled for the originally proposed amounts. That does not negate the need for a proposed penalty reduction to be supported.



performed in the #2 entry of the 4-West B Setup Entry section. During the bolting process, the right side ATRS pad was in contact with the roof, but the left side pad could not touch due to potting out of the roof. Due to the left side pad not contacting the roof, the miner placing the drill steels into and out of the drill pod (from the right side of the machine) would've been reaching past roof support into the unsupported area. Both pads need to be touching the roof to create a supported area where the drill pod is located.

Citation No. 9090883.

The citation listed the gravity as highly likely, fatal, and significant and substantial, with one person affected. The negligence, as noted, was marked as "moderate."

The official file does not reveal anything about the nature of the accident alluded to in the Citation. In the name of "transparency," a term for which the Secretary invokes support, this information should have been provided. Despite this shortcoming, more is learned about the matter through Citation No. 9090884, which is also part of this docket. That Citation states:

The operator failed to maintain the Company #15 Fletcher single head roof bolter (serial # 2012043) on the 4-West B Setup Entry section. During the investigation of an accident that occurred on October 3, 2017, the ATRS on the machine would not pivot to allow both pads to contact the roof when uneven roof is present. According to the manufacturer's approval, the ATRS should have the ability to tilt 15 degrees in either direction so that the pads can contact the roof in varying conditions. The ATRS is also approved at its rated capacity when both pads are touching the roof. The machine was removed from service per K-order # 9124865-03 to correct the condition. Standard 75.1725(a) was cited 13 times in two years at mine 4601436 (13 to the operator, 0 to a contractor).

Citation No. 9090884.

The two citations, 9090883 and 9090884 were issued on October 27, 2017, within minutes of one another. The problem is that the justification for the 55 % reduction for No. 9090883 does not square with the information contained in Citation No. 9090884, unless the Secretary is asserting that these citations *do not* relate to the same piece of equipment. This is so because, for Citation No. 9090883, the Secretary declares that the Respondent "argue[s] that the operator was unaware of *the cited practice*, which was committed by an hourly employee." Motion at 4 (emphasis added). Yet, Citation No. 9090884 does not indicate an incorrect practice. Rather it indicates *a defect* with the machine's ATRS, as it would not pivot to allow both pads to contact the roof, a function which the machine should have the ability to do.

Therefore the Motion is insufficiently supported.<sup>3</sup> Within seven days, the parties are directed to advise the Court whether a sufficiently supported amended settlement will be provided. If such an amended settlement will not be forthcoming, this matter will be set for a prompt hearing.

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

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<sup>3</sup> Per usual, the Secretary presents his usual mantra that he “has evaluated the value of the compromise . . . . etc.,” with the end game being that he does not have to provide facts in support of penalty reductions to the Commission. One does wonder, however, in light of section 110(k) of the Mine Act, a provision which was new with that Act, exactly what the Secretary believes that provision does require and how the boiler-plate language employed in all of his settlements provides useful information beyond that presented under prior federal mine safety statutes.

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
721 19<sup>TH</sup> ST. SUITE 443  
DENVER, CO 80202-2500  
TELEPHONE: 303-844-5266 / FAX: 303-844-5268

June 5, 2018

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

v.

BRADLEY PATE, employed by THE  
AMERICAN COAL COMPANY,  
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. LAKE 2018-155  
A.C. No. 11-02752-29033 A

Mine: New Era

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

Before: Judge Simonton

This case is before me upon the Secretary's petition for assessment of civil penalty issued in accordance with the provisions of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* ("Mine Act") and 29 C.F.R. § 2700.20 *et seq.* At issue is Bradley Pate's ("Respondent" or "Mr. Pate") motion for summary decision, which also asks the court to deem Mr. Pate's First Requests for Admission ("First Requests") admitted due to the Secretary's untimely response to those requests. For the reasons below, I deny the Respondent's motion.

### **I. Factual & Procedural Background**

On January 24, 2017, MSHA issued Citation No. 9038849 to The American Coal Company, a corporate mine operator, pursuant to section 104(d)(1) of the Mine Act. The citation alleged violation of 30 C.F.R. § 75.1216(b)<sup>1</sup> for a failure to securely block a diesel powered front end loader while the loader was in raised position. The operator contested the associated civil penalty in docket LAKE 2017-346, and the docket was stayed pending MSHA's investigation into the individual liability of Mr. Bradley Pate under Section 110(c) of the Mine Act.

On March 22, 2018, the Secretary filed a petition for Assessment of Penalty against Mr. Pate pursuant to Sections 110(c) and (i) of the Mine Act. Pursuant to Section 110(c), the petition alleged that Mr. Pate "knowingly authorized, ordered or carried out a violation of the mandatory standard of 30 C.F.R. § 75.1726(b)." Respondent Brad Pate's Motion for Summary Decision

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<sup>1</sup> 30 C.F.R. § 75.1726(b) provides "No work shall be performed under machinery or equipment that has been raised until such machinery or equipment has been securely blocked in position."

(“Resp. Mot.”), Ex. A. Mr. Pate timely filed an Answer to the Petition, and the court later consolidated Mr. Pate’s docket with LAKE 2017-346.

On April 4, 2018, Mr. Pate, through counsel, served his First Requests for Admission (“First Requests”) on the Secretary. Resp. Mot. at 2. The Secretary served his Responses on May 7, 2018, eight days after the 25-day deadline prescribed by Commission Rule 58(b), 29 C.F.R. § 2700.58(b). On that same day, allegedly minutes prior to receiving the Secretary’s admissions, Mr. Pate filed his motion for summary decision. Secretary’s Motion to Withdraw Admissions and Response in Opposition to Respondent’s Motion for Summary Decision (“Sec’y Opp.”) at 3. The Secretary filed his Response in Opposition to Summary Decision on May 18, 2018, and on May 31, the Respondent filed his Reply.<sup>2</sup>

The Respondent alleges that the Court must deem his First Requests admitted because the Secretary failed to answer or object to the Requests within the 25-day deadline prescribed by Commission Rule 58(b). Resp. Mot. at 2-3. Because the First Requests pertain to information necessary for the Secretary to prove its allegation against Mr. Pate, Respondent argues that deeming the Requests admitted would resolve any disputed issues of material fact and would entitle Mr. Pate to summary dismissal as a matter of law. *Id.* Nonetheless, Respondent contends that even if the First Requests are not deemed admitted or the Court grants the Secretary’s motion to withdraw the admissions, Mr. Pate is entitled to summary decision as a matter of law. *See* Respondent Brad Pate’s Response in Opposition to the Secretary’s Motion to Withdraw Admissions and Reply in Support of Motion for Summary Decision (“Resp. Rep.”) at 8.

The Secretary argues that the Court retains discretion to determine whether the Respondent’s First Requests should be admitted due to the Secretary’s untimely response. Sec’y Opp. at 2-4. The Secretary argues that the Requests should not be deemed admitted because the responses were submitted a mere eight days late and were provided to the Respondent on the same day that the above motion was filed. *Id.* at 3. If the Court were to deem the Requests admitted, the Secretary moves in the alternative for leave to withdraw the admissions pursuant to Rule 58(b). *Id.* at 4. Finally, should the Court both deem the First Requests admitted and deny the Secretary’s motion for leave to withdraw, the Secretary contends that summary decision is not appropriate because numerous genuine issues of material fact still exist. *Id.* at 7.

## II. Summary Decision Standard

The Court may grant summary decision where the “entire record...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); *see also UMWA, Local 2368 v. Jim Walter Res., Inc.*, 24 FMSHRC 797, 799 (July 2002); *Energy West Mining*, 17 FMSHRC 1313, 1316 (Aug. 1995) (*citing Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986), which interpreted Fed.R.Civ.P. 56).

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<sup>2</sup> The Respondent filed a Motion for Leave to File a Reply simultaneously with the Reply itself. After review, the motion for leave is **GRANTED**, and the Respondent’s Reply was considered in full in this decision.

The Commission has analogized its Rule 67 to Federal Rule of Civil Procedure 56, which authorizes summary judgments upon a proper showing of a lack of a genuine, triable issue of material fact. *Hanson Aggregates New York, Inc.*, 29 FMSHRC 4, 9 (Jan. 2007). A material fact is “a fact that is significant or essential to the issue or matter at hand.” *Black's Law Dictionary* (9th ed. 2009, *fact*). “There is a genuine issue of material fact if the nonmoving party has produced evidence such that a reasonable factfinder could return a verdict in its favor.” *Greenberg v. Bellsouth Telecommunications, Inc.*, 498 F.3d 1258, 1263 (11th Cir. 2007) (citation omitted).

The court must evaluate the evidence “in the light most favorable to ... the party opposing the motion.” *Hanson Aggregates*, 29 FMSHRC at 9. Any inferences drawn “from the underlying facts contained in [the] materials [supporting the motion] must be viewed in the light most favorable to the party opposing the motion.” *Id.* Though the moving party bears the initial burden of informing the court of the basis for its motion, it is not required to negate the nonmoving party’s claims. *Celotex*, 477 U.S. at 323. “When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts .... Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no ‘genuine issue for trial.’” *Scott v. Harris*, 550 U.S. 372, 380 (2007) (citation omitted).

### **III. Discussion**

#### *A. Respondent’s Motion to Deem his First Requests Admitted*

The Respondent argues that the court should deem its First Requests to be admitted because the Secretary filed its response to his requests eight days after the prescribed 25-day limit. Resp. Mot. at 3-4. Respondent argues that the court should look at both Commission Rule 58(b) and Rule 36 of the Federal Rules of Civil Procedure to hold that the untimely filing requires admission of its Requests. *Id.*

29 C.F.R. § 2700.58(b) provides:

Any party, without leave of the Judge, may serve on another party a written request for admissions. A party served with a request for admissions shall respond to each request separately and fully in writing within 25 days of service, unless the party making the request agrees to a longer time. The Judge may order a shorter or longer time period for responding. A party objecting to a request for admissions shall state the basis for the objection in its response. Any matter admitted under this is conclusively established for the purpose of the pending proceeding unless the Judge, on motion, permits withdrawal or amendment of the admission.

Regarding time to respond to Requests for Admissions Rule 36 of the Federal Rules of Civil Procedure states:

A matter is admitted unless, within 30 days after being served, the party to whom the request is directed serves on the requesting party a written answer or objection addressed to the matter and signed by the party or its attorney. A shorter or longer time for responding may be stipulated to under Rule 29 or be ordered by the court.

Fed. R. Civ. P. 36(a)(3).

The court declines to deem the Respondent's Requests as admitted in these circumstances. As an initial matter, the court finds that Commission Rule 58 does not require requests for admission to be deemed admitted merely because the response to those requests was untimely. *See Michael Wilson v. Armstrong Coal Co., Inc.*, 40 FMSHRC 221, 227 (Jan, 2018) (ALJ) (holding that Commission Rule 58 permits the Judge to determine when a party must respond to Requests for Admissions, and thus it is unnecessary to look to the Federal Rules to fill in a perceived gap regarding when Requests should be deemed admitted.) The Rule does not speak to when, if ever, requests for admission must be deemed admitted. Rather, the Rule grants Commission Judges the discretion to determine whether a longer or shorter time period for responding is proper, and thus gives Judges the discretion to determine when requests should be admitted.<sup>3</sup> *Id.*

Respondent argues that the mere fact that an ALJ may adjust the time for filing responses to admissions "should not relieve the party from following the Commission's rules or eliminate the need for a mechanism to encourage or enforce compliance." Resp. Rep. at 4. Respondent continues that Commission judges do retain some discretion in the matter, but that such discretion should be used even handedly and not simply when it favors the Secretary's position. *Id.* The Court agrees wholeheartedly with these contentions and notes that the case law provided by the Respondent (and cited by both parties) indicates that previous judges have used their discretion consistently and according to the circumstances surrounding the case.

As a general course of practice, Commission Judges have deemed untimely responses admitted when the non-requesting party failed to respond to requests or motions on multiple occasions or for significant periods of time. In *Raymond Sand and Gravel*, 34 FMSHRC 1456, 1457 (June 2012) (ALJ), for example, the court did deem the Secretary's request admitted after a mere six-day delay. However, aside from the late filing, the court noted that the operator also ignored an email from the court and failed to respond to the Secretary's motion for summary judgment. *Id.* In *Mariposa Aggregates*, 1997 WL 138295, at \*2 (FMSHRC Mar. 1997) (ALJ), the court deemed the amended requests admitted after the operator failed to respond to the Secretary's amended motions for three months. Thus, Judges are inclined to deem late responses admitted when circumstances go well beyond untimely filing and impede the discovery and litigation process as a whole.

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<sup>3</sup> The Court notes that Federal Rule of Civil Procedure Rule 36 also gives the court discretion to order a shorter or longer response time. Fed. R. Civ. P. 36(a)(3).

Commission Judges have been less inclined to admit requests outright in cases where the non-requesting party has shown willingness to participate in the litigation and discovery process or does in fact respond to a Request, albeit in an untimely manner. *See Armstrong Coal Co., Inc.*, 40 FMSHRC at 226-27 (declining to deem disputed requests admitted despite a 367-day delay in response because discovery continued and pleadings were filed); *Durbin Coal, Inc.*, 22 FMSHRC 1150 (Sept. 2000) (ALJ) (declining to deem untimely answered and disputed requests admitted because less drastic remedies, such as directing supplemental responses or deferring resolution of issues until a later date, still existed). Commission case law thus demonstrates that its Judges have utilized their discretion evenhandedly and based on the procedural circumstances of the case. The mere fact that these past cases have benefited the Secretary does not suggest otherwise.

Here, the facts and current procedural posture in the instant case suggest that deeming the First Request admitted would be a harsh outcome, especially in support of a summary decision motion. The Secretary filed its responses to Mr. Pate's requests on May 7, 2018, eight days after the 25-day deadline (or three days after the 30-day deadline prescribed in Federal Rule 36) and the same day that Respondent filed his motion for summary decision. *See Sec'y Opp.* at 3. The delay was due to the Secretary's unintentional failure to calendar the response deadline, and there is no indication that he has been generally unresponsive throughout the course of litigation or discovery. *Id.* Furthermore, the court sees no indication that the 8-day delay prejudiced the Respondent in any manner or drastically affected the discovery or litigation schedule.

Respondent argues that the Secretary was further non-compliant because the late responses were substantively inadequate and did not comply with Rule 58(b). *Resp. Rep.* at 5. The court declines to consider the adequacy of the Secretary's responses in determining whether summary judgment is appropriate. The proper time to resolve discovery disputes is not within a motion for summary decision, and the court notes that there are "other, less drastic, and here more appropriate alternatives" than deeming the Requests admitted when a party objects to the sufficiency of the responses. *See Durbin Coal, Inc.*, 22 FMSHRC 1150 at \*3. (Sept. 2000) (ALJ).

In sum, to deem the requests admitted despite the fact that the Secretary has already submitted its late responses seems extreme given the present stage of discovery. The court therefore declines to deem the Requests admitted, and for that reason need not entertain the Secretary's motion for leave to withdraw the admissions.<sup>4</sup>

Accordingly, the Respondent's Motion to deem its First Requests admitted is **DENIED**, and for these same reasons, the Secretary's request for leave to withdraw the admissions is **DENIED**.

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<sup>4</sup> The court wishes to stress that this order should not in any way be viewed as a statement condoning the Secretary's untimeliness, nor does it give the Secretary license to ignore the requirements of Rule 58(b). The court will view any future violations in a more critical light absent good cause.

## B. Summary Decision

The Commission has stated that summary decision is an extraordinary procedure, and has analogized it to Rule 56 of the Federal Rules of Civil Procedure, under which granting summary decision is authorized only upon proper showings of a lack of genuine, triable issues of material fact.” *West Alabama Sand & Gravel, Inc.*, 37 FMSHRC 1884, 1887 (Sept. 2015) (citations omitted). In considering a motion for summary decision, a Judge’s role is limited to a determination of whether the case can be decided without resolving factual disputes, and may not weigh the evidence or engage in fact-finding beyond the facts established in the record. *Id.*

Given the court’s above denial of the Respondent’s motion on the First Requests and viewed in the light most favorable to the non-moving party, it is clear that genuine issues of material fact exist in this case. The Secretary’s Response to Respondent’s First Requests for Admission identifies various disputes regarding Mr. Pate’s statements regarding his actions and directions to Mr. Clark prior the accident, Mr. Clark’s actions prior to the accident, and the condition of the mine and the end loader at the time of the accident.<sup>5</sup> *See* Sec’y Opp., Ex. B. These disputes all speak directly to Mr. Pate’s liability under section 110(c) and cannot be resolved based on the information before without improperly weighing the evidence.

Separate and apart from the facts in the First Request, the Secretary identified a number of factual disputes that bear directly on Mr. Pate’s liability under section 110(c) and the cited standard. *See* Sec’y Opp. at 9-16. Those factual disputes include, but are not limited to, whether the position of the end loader relative to Mr. Pate prevented him from noticing the absence of cribbing, whether lighting conditions at the time of the accident affected Mr. Pate’s ability to notice that the end loader was not cribbed, and whether standard cribbing methods exist at the mine. *Id.* These issues speak directly to whether Mr. Pate should have noticed the absence of standard cribbing practices, whether those practices exist at the mine, and whether mine conditions indicate that Mr. Pate knew or should have known that the front end loader was not properly cribbed at the time of the accident.

On a broader scale, the statements of Mr. Pate and MSHA Special Investigator Phillip Stanley offer conflicting testimony on these material facts and many others. *See* Sec’y Opp., Exs. A, B. Most notably, this case turns on whether Mr. Pate “knowingly authorized, ordered, or carried out” the violation. *Resp. Rep.* at 16. At this time the court has little to no evidence before it beyond the conflicting testimony regarding the conditions at the mine and the facts surrounding the accident and Mr. Pate’s actions. The court would thus have to resolve conflicts in testimony to make the fact-finding and credibility determinations required to determine Mr. Pate’s state of mind at the time of the accident, and summary decision is not the proper means by which to make those determinations. *See KenAmerican Resources, Inc.*, 38 FMSHRC 1943,

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<sup>5</sup> Respondent argues that the Secretary’s Response to Mr. Pate’s First Request do not support his list of Disputed Material Facts because the Secretary did not actually deny any of the Requests. *Resp. Rep.* at 11. The court disagrees. The Court reads the Secretary’s refusal to admit the truth of Mr. Pate’s statements as a denial of the substance of those statements. *See* Sec’y Opp., Ex. B.



1953 n. 11 (Aug. 2016) (“[A] hearing, with the opportunity to observe a witness’ demeanor, is the proper venue to determine intent and credibility, not a summary decision motion”).

Respondent contends that the Secretary’s attached Declaration of Phillip Stanley should not be considered because he did not have “personal knowledge” of the accident in accordance with Rule 67. Resp. Rep. at 8-9. The court disagrees and notes that Mr. Stanley does have personal knowledge of the accident investigation that prompted the Secretary to file the petition against Mr. Pate in the first place. Mr. Stanley conducted his own interview with Mr. Pate and states that facts he found during his investigation contradicted Mr. Pate’s statements during that interview. *See* Sec’y Opp., Ex. A at 3-4. Inspector Stanley also has personal knowledge of standard mining practices that are relevant to determining Mr. Pate’s liability under section 110(c). Again, all of those factors are disputed and material in this case, and rest on determinations of witness credibility and additional fact-finding that the court is restrained from making in entertaining a motion for summary decision.

Furthermore, even assuming that no dispute in material facts exists based on the Secretary’s responses to the First Requests, the court refuses to disregard the findings of MSHA’s investigation and award Mr. Pate summary judgment in the action against him simply because he was the only one present at the time of the accident. Mine Inspectors are rarely, if ever, present at mines at the time of serious accidents, and to rule in this manner would not only be contrary to the presumption of viewing the facts in light most favorable to the non-moving Secretary, but would severely hinder MSHA’s ability to enforce 110(c) actions and bring them to hearing.

I therefore find that multiple genuine issues of material fact still exist and that summary decision is not appropriate at this time.

Accordingly, the Respondent’s Motion to Deem its First Discovery Requests as admitted is **DENIED**. Furthermore, Respondent’s Motion for Summary Decision is **DENIED**.

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

Distribution: (U.S. First Class Mail and e-mail)

Travis W. Gosselin, Attorney, U.S. Department of Labor, Office of the Solicitor, 8<sup>th</sup> Floor, 230 South Dearborn Street, Chicago, IL 60604

Jason Hardin, Attorney, Fabian VanCott, 215 South State Street, Suite 1200, Salt Lake City, UT 84111

Joseph M. Kellmeyer, Attorney for Bradley Pate, Thompson Coburn LLP, One US Bank Plaza, St. Louis, MO 63101

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
1331 PENNSYLVANIA AVENUE, NW, SUITE 520N  
WASHINGTON, DC 20004-1710  
PHONE: (202) 434-9933 | FAX: (202) 434-9949

June 5, 2018

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

v.

ROCKWELL MINING, LLC,  
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. WEVA 2017-0220  
A.C. No. 46-06618-427999

Mine: Gateway Eagle Mine

**ORDER REGARDING MOTION TO CERTIFY FOR INTERLOCUTORY REVIEW**

Before: Judge Moran

The Secretary of Labor has filed a motion to certify for interlocutory review this Court’s Decision Denying Settlement in this docket. (“Motion”) The Motion incorrectly lists the docket number as “WEVA 2018-0220,” but the correct docket number is WEVA 2017-0220. The Court’s Decision Denying Settlement is included within this Order as an appendix.

The Commission procedural rule pertaining to interlocutory review provides that “[i]nterlocutory review by the Commission shall not be a matter of right but of the sound discretion of the Commission.” 29 C.F.R. § 2700.76(a). The Secretary seeks the following question for certification for interlocutory review: “[w]hether the ALJ erred as a matter of law in rejecting as ‘facts in support’ of the proposed settlement: (1) the Secretary’s stated enforcement priorities, and (2) the Secretary’s *identification* of the facts disputed by the operator pertaining to the cited violations.”<sup>1</sup> Motion at 1 (emphasis added).

The Motion states that “[t]his case involves a question of law as to whether the ALJ interpreted Commission Rule 31(b)(1)’s phrase ‘facts in support’ too narrowly.” Motion at 2. However, the Motion is an oddity because, although the Secretary acknowledges that “Commission Rule 31(b)(1) (29 C.F.R. § 2700.31(b)(1)) requires a settlement motion to include ‘facts in support’ of the penalty agreed to by the parties,” the Motion never identifies the facts in support of the penalty reduction which the Secretary contends were interpreted too narrowly. *Id.* at 1.

The Court certifies that its ruling denying settlement “involves a controlling question of law and that in [its] opinion immediate review will materially advance the final disposition of the proceeding.” 29 C.F.R. § 2700.76(a)(1)(i). The Court grants the Secretary’s Motion, but on the

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<sup>1</sup> It is noted that the Secretary presented the same language in this motion as it did in in its motion seeking interlocutory review for WEVA 2018-0165, *Sec. v. Ohio County Coal*, filed the same day as this case.

basis that “[u]nless otherwise specified in the Commission’s order granting interlocutory review, review shall be confined to the issues raised in the Judge’s certification . . .” 29 C.F.R. § 2700.76(d). Here, examining the twin bases relied upon by the Secretary as potential error by the Court, as noted above, the “facts in support” of that claim are “(1) the Secretary’s stated enforcement priorities, and (2) the Secretary’s identification of the facts disputed by the operator pertaining to the cited violations.” Motion at 1.

As to the first basis, the Court views that it is inherently presently before the Commission in its reconsideration of *Secretary of Labor v. The American Coal Company*, LAKE 2011-13. With regard to the second question posed by the Secretary in his motion for interlocutory review, namely whether the Court erred as a matter of law in rejecting the Secretary’s identification of the facts disputed by the operator pertaining to the cited violations, that basis was explained in the Court’s May 9, 2018 denial of the settlement.

For *each* of the three citations proposed for reduction, the Secretary makes the same incantation, to wit: “Taking into account the Respondent’s arguments, as well as the uncertainties of litigation, the Secretary has agreed to a reduced penalty.” Secretary’s November 30, 2017 Motion to approve settlement, regarding Citation Nos. 9068232, 9070540, and 9070542.

In rejecting the settlement, the deficiencies were explained by the Court:

For the latter two of the three citations discussed above, the Secretary provided no substantive or case-specific information following the Respondent’s contentions. The repeated allusion to uncertainties of litigation does nothing to help the Court discern whether there is a legitimate dispute of fact or law at issue here.

For the first citation, Citation No. 9068232, the Secretary noted that “no rock dust was observed in the cracks in the ribs indicating that the cracks were fairly recent.” Motion at 3. While this additional information is at least somewhat helpful for the Court, the Secretary goes on to repeat the formulaic statement, “Taking into account the Respondent’s arguments, as well as the uncertainties of litigation, the Secretary has agreed to a reduced penalty.” *Id.* The Court has no representation from the parties that there is a legitimate dispute on any issue of fact or law. Indeed, while the Court could infer from the representations regarding Citation No. 9068232 that there would be evidence regarding the condition developing recently, which would therefore be relevant to the level of negligence on behalf of the operator, the Secretary acknowledges this only obliquely.

Again, the Secretary declined to provide any substantive information with regard to the proposed changes for Citation Nos. 9070540 and 9070542.

Decision Denying Settlement at 3.

The Court expressed in its Decision Denying Settlement that “[i]f this settlement motion were held to be sufficiently supported, then the Secretary will effectively have no

obligation to provide the Commission with any real information in the context of settlements.” *Id.* at 3-4.

Notwithstanding the Court’s view that the first issue is inherently before the Commission in *American Coal*, and that, for the second issue, the motion failed to identify the disputed facts and further that it is insufficient for the Secretary to merely *identify* the Respondent’s contentions, the Court still concludes that immediate review will materially advance the final disposition of the proceeding. Thus, as confined to the issues raised in this certification, the question is whether a settlement must be accepted without the Secretary forthrightly acknowledging that the Respondent has identified legitimate issues of fact, which matters are in dispute and which can only be resolved by the hearing process, or by simply acknowledging that the assertions made by the Respondent are acknowledged to be fact. Instead, the Secretary’s Motion to Approve Settlement only offers “[t]aking into account the Respondent’s arguments,” without any affirmative statement about their worth. Motion to approve settlement at 3-4. It is the view of this Court that it is too coy for the Secretary to merely *identify* facts disputed by the operator, as a motion for settlement must do more, if section 110(k)’s requirements are to have genuine meaning.

Pursuant to 29 C.F.R. § 2700.76(d), “Scope of review,” the Court’s granting of interlocutory is confined to the issue in its certification, as described above.

Accordingly, the Secretary’s Motion to certify for interlocutory review is **GRANTED**.

**SO ORDERED.**

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

Distribution:

Robert S. Wilson, Esq., U.S. Department of Labor, 201 12th Street South, Suite 401, Arlington, VA 22202-5450

John R Opperman, CMSP GSP, Safety Manager, Blackhawk Mining LLC, 3228 Summit Square Place, Suite 180, Lexington, KY 40509

**APPENDIX**

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
1331 PENNSYLVANIA AVENUE, NW, SUITE 520N  
WASHINGTON, DC 20004-1710  
PHONE: (202) 434-9933 | FAX: (202) 434-9949

May 9, 2018

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

v.

ROCKWELL MINING, LLC,  
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. WEVA 2017-0220  
A.C. No. 46-06618-427999

Mine: Gateway Eagle Mine

**DECISION DENYING SETTLEMENT**

Before: Judge Moran

This case is before the Court upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977. On November 30, 2017 the Secretary filed a motion to approve settlement. For the following reasons, the factual support presented for the proposed penalty reductions is inadequate, and the motion must be denied.

Seven citations are involved in this docket. The settlement motion proposed penalty reductions for three citations, and the Respondent agreed to pay the proposed penalties for three more, with no modifications. The motion also informed the Court that the Secretary had decided to vacate Citation No. 9070543, which alleged a violation of 30 C.F.R. § 75.400-2. The total proposed penalty amount was \$6,977.00, and the proposed settlement is for \$5,232.00. This amounts to a 25% reduction from the total proposed penalty.

Citation No. 9068232, which alleged a violation of 30 C.F.R. § 75.202(a), was proposed for a penalty reduction from \$446.00 to \$244.00. This citation alleged that,

on the CO #2 section, 012/013 MMU, the rib area of the #3 entry, on the inby right rib corner across from the loading point, has not been supported or otherwise controlled to protect persons from hazards related to fall of the rib. When checked, the rib corner was found cracked and loose. When the rib was pulled, the corner fell in two pieces. When measured, one piece was approximately 18"x21"x10" and was rectangular in shape and the second piece was approximately 12"x21"x9" and was triangular in shape.

Citation No. 9068232 (formatting added).

The Secretary alleged that this violation was S&S, reasonably likely to result in lost workdays or restricted duties for one person, and the result of moderate negligence.

In support of the proposed penalty reduction for this citation, the motion stated,

the Respondent argues that the evidence would establish that it was not negligent. The Respondent was taking steps to control the ribs by installing rib bolts throughout the section as needed. Furthermore, the cited conditions likely occurred since the most recent examination in the area. The Secretary notes that no rock dust was observed in the cracks in the ribs indicating that the cracks were fairly recent. Taking into account the Respondent's arguments, as well as the uncertainties of litigation, the Secretary has agreed to a reduced penalty.

Motion at 3.

Citation No. 9070540, which alleged a violation of 30 C.F.R. § 75.380(d)(4), was proposed for a penalty reduction from \$2,598.00 to \$2,000.00. The citation alleged that,

The operator failed to maintain 6 foot of clearance on the branch line leading from secondary escapeway lifeline to the section refuge chamber, on 1 Section (010 and 011 MMU), in that upon arrival to the section a 6 man Diesel mantrip was observed parked under the branch line leading from the secondary escapeway lifeline to the section refuge chamber.

Citation No. 9070540.

The Secretary alleged that this violation was S&S, reasonably likely to result in permanently disabling injuries for 10 persons, and the result of moderate negligence.

In support of the proposed penalty reduction for this citation, the Motion stated,

the Respondent argues that the evidence would establish that it was not negligent because there is no evidence as to how long the referenced mantrip was parked beneath the branch line or that management was aware of its presence. Taking into account the Respondent's arguments, as well as the uncertainties of litigation, the Secretary has agreed to a reduced penalty.

Motion at 3-4.

Citation No. 9070542, which alleged a violation of 30 C.F.R. § 75.604(b), was proposed for a penalty reduction from \$666.00 to \$443.00. The citation alleged that,

The operator failed to effectively insulate and seal a permanent splice in the energized 995 volt trailing cable supplying [sic] power to the Co.# 251 continuous mining machine located on the right side of the 1 Section (010 and 011 MMU), in

that an opening was observed in the permanent splice exposing the energized insulated inner conductors.

Citation No. 9070542.

The Secretary alleged that this violation was S&S, reasonably likely to result in permanently disabling injuries for one person, and the result of moderate negligence.

In support of the proposed penalty reduction for this citation, the Motion stated,

the Respondent argues that the levels of gravity and negligence were overwritten. The Respondent would argue that the violation should not have been issued as S&S because there were no exposed inner leads in the splice. Respondent also argues that the cable is being moved on a continuous basis and the damage to the splice likely occurred sometime after the most recent weekly electrical examination. Taking into account the Respondent's arguments, as well as the uncertainties of litigation, the Secretary has agreed to a reduced penalty.

Motion at 4.

## **Discussion**

The Court has considered the representations submitted in this case and concludes that the proffered settlement is not appropriate under the criteria set forth in section 110(i) of the Act. The Court recognizes that the penalty reduction proposed here is relatively modest, but as it has explained before, Commission approval under section 110(k) is not simply about dollars. For the latter two of the three citations discussed above, the Secretary provided no substantive or case-specific information following the Respondent's contentions. The repeated allusion to uncertainties of litigation does nothing to help the Court discern whether there is a legitimate dispute of fact or law at issue here.<sup>2</sup>

For the first citation, Citation No. 9068232, the Secretary noted that "no rock dust was observed in the cracks in the ribs indicating that the cracks were fairly recent." Motion at 3. While this additional information is at least somewhat helpful for the Court, the Secretary goes on to repeat the formulaic statement, "Taking into account the Respondent's arguments, as well as the uncertainties of litigation, the Secretary has agreed to a reduced penalty." *Id.* The Court has no representation from the parties that there is a legitimate dispute on any issue of fact or law. Indeed, while the Court could infer from the representations regarding Citation No. 9068232 that there would be evidence regarding the condition developing recently, which would therefore

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<sup>2</sup> The Court notes that Attorney Robert Wilson began representing the Secretary in this matter on October 12, 2017 and filed the instant motion. As such, Mr. Wilson is well aware from previous denials of inadequately supported motions of the type of information the Court requires from the Secretary in order to meet the Commission's responsibilities under Section 110(k) of the Mine Act, assuming of course that such representations obtain in this case.



be relevant to the level of negligence on behalf of the operator, the Secretary acknowledges this only obliquely.

Again, the Secretary declined to provide any substantive information with regard to the proposed changes for Citation Nos. 9070540 and 9070542. If this settlement motion were held to be sufficiently supported, then the Secretary will effectively have no obligation to provide the Commission with any real information in the context of settlements.<sup>3</sup>

**WHEREFORE**, the motion for approval of settlement is **DENIED**.

The parties are **ORDERED** to confer with the Court within ten (10) days of this order so that a conference call may be held to set this matter for a prompt hearing.

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

Distribution:

Robert S. Wilson, 1201 12th Street South, Suite 401, Arlington, VA 22202-5450

John R. Opperman, Blackhawk Mining LLC, 3228 Summit Square Place, Suite 180, Lexington, KY 40509

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<sup>3</sup> This is consistent with the Secretary's extraneous statement that that *he* has weighed the matter, considered the cost of going to trial, formed the belief that *he* has maximized his prosecutorial impact, and settled the matter, which in *his sole judgment*, is on appropriate terms, and which ends with his unusual conclusion that *even if he won at trial*, and *even if the judgment were greater than the settlement*, such a result would not necessarily be a better outcome. Motion at 2.