

May and June 2011

TABLE OF CONTENTS

COMMISSION DECISIONS AND ORDERS

05-03-2011	LUMINANT MINING COMPANY, LLC	CENT 2011-254	Page 1041
05-09-2011	U.S. SILVER – IDAHO, INC.	WEST 2011-160-M	Page 1044
05-15-2011	HOCKER CONSTRUCTION, LLP	WEST 2011-239-M	Page 1049
05-16-2011	LEFT FORK MINING COMPANY, INC.	KENT 2009-1053	Page 1053
05-16-2011	AGGREGATES INDUSTRIES WCR, INC.	WEST 2011-383-M	Page 1056
05-20-2011	NATIONAL CEMENT COMPANY OF CALIFORNIA	WEST 2006-568-DM	Page 1059
05-23-2011	STONECO INC.	LAKE 2011-146-M	Page 1091
05-24-2011	NEWMONT USA LIMITED	WEST 2010-464-DM	Page 1096
05-25-2011	MACH MINING, LLC	LAKE 2010-190	Page 1100
05-26-2011	LONE STAR AGGREGATES ACQUISITIONS, LLC	CENT 2011-233-M	Page 1104
05-26-2011	PEROVICH PROPERTIES, INC.	CENT 2011-663-M	Page 1107
05-26-2011	CUMBERLAND RIVER COAL COMPANY	KENT 2011-276	Page 1110
05-26-2011	OCI WYOMING, L.P.	WEST 2010-1659-M	Page 1113
05-26-2011	SPEED MINING, LLC	WEVA 2011-556	Page 1116
06-01-2011	CON-AGG OF MO, LLC	CENT 2011-193-M	Page 1120
06-02-2011	SHAMOKIN FILLER COMPANY, INC.	PENN 2009-775	Page 1124
06-03-2011	ABSMEIER LANDSCAPING AND CONSTRUCTION, LLC.	WEST 2011-249-M	Page 1127
06-07-2011	OAK GROVE RESOURCES LLC	SE 2011-16	Page 1130
06-09-2011	MRM MINING, INC.	KENT 2011-210	Page 1135
06-09-2011	ROBERT COLEMAN, Employed by CARMEUSE LIME AND STONE	SE 2011-146-M	Page 1139
06-09-2011	CALICO COAL, INC.	VA 2010-312	Page 1143

06-09-2011	SPARTAN MINING COMPANY	WEVA 2010-890	Page 1146
06-09-2011	MAMMOTH COAL COMPANY	WEVA 2010-1423	Page 1150
06-13-2011	KEMBEL SAND & GRAVEL	CENT 2011-432-M	Page 1153
06-29-2011	OVERTON SAND & GRAVEL COMPANY	CENT 2011-210-M	Page 1156
06-29-2011	NUCO INTERNATIONAL, INC.	WEST 2011-263-M	Page 1162
06-30-2011	JOHN RICHARDS CONSTRUCTION	WEST 2011-817-M	Page 1165

ADMINISTRATIVE LAW JUDGE DECISIONS

05-03-2011	CEMEX, INC.	KENT 2009-1197-M	Page 1169
05-03-2011	BLACK BEAUTY COAL COMPANY	LAKE 2009-565	Page 1174
05-03-2011	WOLF RUN MINING COMPANY	WEVA 2006-853	Page 1183
05-06-2011	WAKE STONE CORPORATION	SE 2010-95-M	Page 1205
05-06-2011	LTM INCORPORATED - KNIFE RIVER MATERIALS	WEST 2008-1268-RM	Page 1210
05-17-2011	SANGRAVL COMPANY	SE 2008-994-M	Page 1242
05-19-2011	WOLF RUN MINING COMPANY	WEVA 2007-600-A	Page 1270
05-19-2011	MOUNTAIN EDGE MINING, INC.	WEVA 2009-1519	Page 1272
05-19-2011	MOUNTAIN EDGE MINING, INC.	WEVA 2009-1617	Page 1290
05-20-2011	BIG RIDGE, INC.	LAKE 2011-116-R	Page 1306
05-23-2011	S & S DREDGING	SE 2007-447-M	Page 1324
05-23-2011	BRODY MINING, LLC.	WEVA 2009-1000	Page 1329
05-27-2011	INDEPENDENCE COAL COMPANY	WEVA 2011-402-R	Page 1387
05-27-2011	GMS MINE REPAIR & MAINTENANCE	VA 2011-338-D	Page 1405
05-27-2011	B&J EXCAVATING, INCORPORATED	YORK 2010-205-M	Page 1410
06-06-2011	HELDEBERG BLUESTONE & MARBLE INC.	YORK 2010-15-M	Page 1413
06-08-2011	EXCEL MINING LLC.	KENT 2009-200	Page 1421
06-08-2011	JOHNCO MATERIALS, INC.	SE 2009-994-M	Page 1431

06-09-2011	D. HOLCOMB & CO., and its successors	WEST 2008-1113-M	Page 1435
06-16-2011	KNIFE RIVER	WEST 2009-1147-RM	Page 1456
06-17-2011	SMALL MINE DEVELOPMENT	WEST 2010-1508-M	Page 1477
06-21-2011	BLACK BEAUTY COAL COMPANY	LAKE 2009-470	Page 1482
06-21-2011	BLACK BEAUTY COAL COMPANY	LAKE 2009-569	Page 1504
06-22-2011	LAKEVIEW ROCK PRODUCTS, INC.	WEST 2010-1856-RM	Page 1538

ADMINISTRATIVE LAW JUDGE ORDERS

06-15-2011	CUMBERLAND RIVER COAL COMPANY	KENT 2011-1044-D	Page 1547
06-15-2011	STATE OF ALASKA, DEPARTMENT OF TRANSPORTATION	WEST 2009-103-M	Page 1550
06-30-2011	REVELATION ENERGY, LLC	KENT 2011-71-R	Page 1555

MAY AND JUNE 2011

Review was granted in the following cases during the months of May and June 2011:

Secretary of Labor, MSHA v. Stillhouse Mining, LLC., KENT 2007-309. (Judge Paez, March 28, 2011)

Oak Grove Resources, LLC. v. Secretary of Labor, MSHA, SE 2009-261-R. (Judge Moran, April 1, 2011)

Secretary of Labor, MSHA v. Tilden Mining Company, LC, LAKE 2008-503-M. (Judge Paez, April 18, 2011)

Secretary of Labor, MSHA v. Mize Grantie Quarries, Inc., and others, SE 2009-401-M, et al. (Judge Rae, April 20, 2011)

Secretary of Labor, MSHA v. Black Beauty Coal Company, LAKE 2009-565. (Judge Miller, May 3, 2011)

Secretary of Labor, MSHA v. Wake Stone Corporation, SE 2010-95-M. (Judge Gill, May 6, 2011.)

Secretary of Labor, MSHA v. Wolf Run Mining Company, WEVA 2006-853, et al. (Judge Feldman, May 3, 2011)

Secretary of Labor, MSHA v. S & S Dredging, SE 2007-447-M. (Judge Weisberger, May 23, 2011)

Secretary of Labor, MSHA v. Mountain Edge Mining, Inc., WEVA 2009-1519. (Judge Moran, May 19, 2011)

Kemper Equipment, Inc., v. Secretary of Labor, MSHA, WEVA 2010-1316-RM, et al. (Chief Judge Lesnick, unpublished order of Dismissal, May 16, 2011)

Independence Coal Company, and others v. Secretary of Labor, MSHA, WEVA 2011-402-R, and others. (Judge Andrews, May 23, 2011)

Secretary of Labor, MSHA v. Brody Mining, LLC., WEVA 2009-1000, WEVA 2009-1306. (Judge Gill, May 23, 2011)

Review was denied in the following case during the months of May and June 2011:

Secretary of Labor, MSHA v. Mountain Edge Mining, Inc., Docket No. WEVA 2009-1617. (Judge Moran, May 19, 2011)

COMMISSION DECISIONS AND ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

May 3, 2011

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. CENT 2011-254
v.	:	A.C. No. 41-01192-232364
	:	
LUMINANT MINING COMPANY, LLC	:	

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On December 10, 2010, the Commission received from Luminant Mining Company, LLC (“Luminant”) a motion requesting that the Commission 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). On January 20, 2011, the Commission received a response from the Secretary of Labor stating that she does not oppose the request to reopen the assessment.

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

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

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

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy
Michael F. Duffy, Commissioner

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

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

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
SUITE 9500
WASHINGTON, DC 20001

May 9, 2011

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
 : Docket No. WEST 2011-160-M
v. : A.C. No. 10-00082-228212
 :
U.S. SILVER – IDAHO, INC. :

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

ORDER

BY: Duffy, Young, and Nakamura, Commissioners

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On October 29, 2010, the Commission received a motion from counsel for U.S. Silver – Idaho, Inc. (“U.S. Silver”), requesting that the Commission reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

U.S. Silver requests reopening of Proposed Assessment No. 000228212, issued by the Department of Labor’s Mine Safety and Health Administration (“MSHA”) on August 11, 2010. Its safety manager states, by affidavit, without further explanation, that because the operator was paying most of the penalties proposed by the assessment, “an administrative error was somehow made and the marked proposed assessment was sent to MSHA late.”

The Secretary does not oppose reopening, and reports that U.S. Silver made a partial payment on the assessment with a check dated October 7, 2010. She includes a copy of the completed contest form that appears to have been received by MSHA on October 4, 2010, and which shows that U.S. Silver intended to contest the three penalties it now seeks to reopen.

We also note that the operator had timely contested the three underlying orders when they were issued and that those contests are currently stayed before the Commission. Consequently, 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. § 2700.28.¹

/s/ Michael F. Duffy
Michael F. Duffy, Commissioner

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

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

¹ Our colleagues would deny the motion to reopen on the basis that in a 2009 motion to reopen, the operator stated it was implementing a plan to prevent failures to respond in a timely manner to penalty assessments, and its present motion does not explain how that new system failed in this instance. Given that the Secretary does not object to reopening, and this motion to reopen has been the only one received from the operator in the intervening two years, we are not persuaded that denying the motion and requiring further explanation from the operator in a renewed motion is necessary. Moreover, if U.S. Silver had a history of delinquencies, we believe the Secretary would have called that to our attention, as she recently did with respect to the operator in Docket No. SE 2011-16, *Oak Grove Resources, LLC*.

Chairman Jordan and Commissioner Cohen, dissenting:

U.S. Silver – Idaho, Inc., received a proposed penalty assessment on August 18, 2010. To timely contest the penalties, it was required to send a form to the Mine Safety and Health Administration (“MSHA”) within 30 days of receipt. However, it appears that the contest form was not received by MSHA until October 4, 2010. The only explanation offered by the operator in its request to reopen is that because it paid most of the penalties proposed in the assessment “an administrative error was somehow made.”

At the outset, we note that MSHA’s penalty contest form (attached to the submission of the Secretary of Labor in this case) is expressly designed for just the type of situation the operator faced in this case – the payment of some of the proposed penalties shown on the assessment form, and the contest of others. The front of the form explicitly states that “[i]f you wish to contest and have a formal hearing *on just some of the violations listed in the Proposed Assessment*, check the specific violation numbers in the first column and mail a copy” to MSHA (emphasis added). Despite these clear instructions, the operator did not comply. Its terse explanation does not tell us what type of “administrative error” led to the late filing, and this makes it difficult for us to ascertain whether its actions constituted “mistake, inadvertence, or excusable neglect,” pursuant to Rule 60(b)(1) of the Federal Rules of Civil Procedure.

This explanation is also insufficient in light of a recent Commission case involving a request to reopen a final order from this same operator. In *U.S. Silver-Idaho, Inc.*, 31 FMSHRC 1127 (Oct. 2009), the operator was also late in submitting a notice of contest to a proposed assessment. In our order granting relief we stated that the affidavit of U.S. Silver’s safety superintendent “notes that the company has now revised its procedure to more accurately calendar assessments in an effort to avoid the same circumstance in the future.” *Id.* at 1128. This new procedure placed “deadlines to contest all MSHA assessments, detailed by mine name and case number, on both the paper and electronic calendars of both the safety superintendent and the administrative assistant.” *Id.* at 1128 n.2.

This change in procedure would have occurred in 2009 (when our order issued). The relevant time period in the case before us now was 2010. The operator’s motion does not explain why this new system failed to ensure the filing of a timely penalty contest.

For the reasons set forth above, we would deny the request to reopen without prejudice to require the operator to explain in further detail the nature of the “administrative error” blamed for the missed deadline, and to explain why the change in procedures described in our earlier order was not sufficient to prevent the late filing of the contest of the proposed penalty.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

May 16, 2011

SECRETARY OF LABOR	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
	:	Docket No. WEST 2011-239-M
v.	:	A.C. No. 05-04877-210165
	:	
HOCKER CONSTRUCTION, LLP	:	

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On November 17, 2010, the Commission received a request to reopen a penalty assessment issued to Hocker Construction, LLP (“Hocker”) that became a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

On February 3, 2010, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000210165 to Hocker. The operator states that it did not send a contest of the proposed penalty assessment on time because it thought that the underlying citations had been terminated.

The Secretary opposes Hocker's request to reopen the proposed assessment. She submits that ignorance of the rules and the law is insufficient to justify reopening a case and that Hocker's misunderstanding of the term "termination" is not adequate grounds upon which the requested relief can be granted. The Secretary further states that MSHA's records indicate that Hocker received the proposed assessment by Federal Express on February 9, 2010. She also notes that although a delinquency notice was sent to the operator on April 29, 2010, Hocker did not file its request to reopen until it was contacted by a collection agency for the United States Treasury, and approximately five and one-half months after issuance of the delinquency letter.

Having reviewed Hocker's request to reopen and the Secretary's response thereto, we agree that the operator has failed to provide a sufficient basis for the Commission to reopen the penalty assessment. In addition, Hocker has failed to explain why it delayed more than five months after receiving the delinquency notice sent by MSHA to file its request to reopen.¹ Accordingly, we hereby deny without prejudice Hocker's request to reopen. *FKZ Coal Inc.*, 29 FMSHRC 177, 178 (Apr. 2007); *Petra Materials*, 31 FMSHRC 47, 49 (Jan. 2009). The words "without prejudice" mean that Hocker may submit another request to reopen Assessment No. 000210165.² Any amended or renewed request by the operator to reopen this assessment must be

¹ In considering whether an operator has unreasonably delayed in filing a motion to reopen a final Commission order, we find relevant the amount of time that has passed between an operator's receipt of a delinquency notice and the operator's filing of its motion to reopen. *See, e.g., Left Fork Mining Co.*, 31 FMSHRC 8, 11 (Jan. 2009); *Highland Mining Co.*, 31 FMSHRC 1313, 1316-17 (Nov. 2009) (holding that motions to reopen filed more than 30 days after receipt of notice of delinquency must explain the reasons why the operator waited to file a reopening request, and lack of explanation is grounds for the Commission to deny the motion).

² If an operator submits another request to reopen, it must establish good cause for not contesting the proposed penalties within 30 days from the date it received the assessment from MSHA. Under Rule 60(b) of the Federal Rules of Civil Procedure, the existence of "good cause" may be shown by a number of different factors including mistake, inadvertence, surprise, or excusable neglect on the part of the party seeking relief, or the discovery of new evidence, or fraud, misrepresentation, or other misconduct by the adverse party. Hocker should include a full description of the facts supporting its claim of "good cause," including how the mistake or other problem prevented it from responding within the time limits provided in the Mine Act, as part of its request to reopen. Hocker should also submit copies of supporting documents and specify which proposed penalties it is contesting. Hocker should further include an explanation for why it waited so long, after receiving the delinquency notice, to file its request to reopen.

filed within 30 days of this order. Any such request filed after that time will be denied with prejudice.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy
Michael F. Duffy, Commissioner

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

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

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

**601 NEW JERSEY AVENUE, NW
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WASHINGTON, DC 20001**

May 16, 2011

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. KENT 2009-1053
v.	:	A.C. No. 15-12564-183615
	:	
LEFT FORK MINING COMPANY, INC.	:	

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On April 11, 2011, Left Fork Mining Company, Inc. (“Left Fork”) filed with the Commission a motion to reopen this proceeding and relieve it from default.

On December 3, 2010, Chief Judge Lesnick issued an Order to Show Cause and Order of Default in response to Left Fork’s failure to answer the Secretary’s June 25, 2009 Petition for Assessment of Civil Penalty. In it, he ordered the operator to file its answer within 30 days or it would be in default as of the next day. The Commission apparently did not receive a copy of Left Fork’s answer within 30 days, so the order of default became effective on January 3, 2011.

The operator’s motion states that on December 9, 2010, it did file its answer to the Secretary’s Petition, and the operator includes a copy of its answer. Therein, Left Fork responded to 17 of the penalties and conceded the other 17. Left Fork states that its answer was received by the assigned attorney in the Office of the Solicitor of Labor but apparently not by the Commission.

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); 29 C.F.R. § 2700.70(a). If the Commission does not direct review within 40 days of a decision’s issuance, it becomes a final decision of the Commission. 30 U.S.C. § 823(d)(1). Consequently, here the judge’s order became a final decision of the Commission on Monday, February 14, 2011.

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, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *See* 29 C.F.R. § 2700.1(b) (“the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure”); *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). 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).

Upon review of the record, it appears that Left Fork timely attempted to file its answer in response to the show cause order and that it is unclear why the answer was not in the Commission’s files. Additionally, the Secretary has not opposed the motion to reopen.

In the interest of justice, we hereby reopen the proceeding and vacate the order of default. 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. In addition, if it has not done so already, Left Fork should pay the 17 penalties that it is no longer contesting.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy
Michael F. Duffy, Commissioner

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

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

/s/ Patrick K. Nakamura
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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May 16, 2011

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
 : Docket No. WEST 2011-383-M
v. : A.C. No. 05-00864-234744
 :
AGGREGATES INDUSTRIES WCR, INC. :

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On December 20, 2010, the Commission received from Aggregates Industries WCR, Inc. a request that the Commission 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). On January 19, 2011, the Commission received a response from the Secretary of Labor stating that she does not oppose the request to reopen the assessment.

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

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

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

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy
Michael F. Duffy, Commissioner

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

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

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

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WASHINGTON, DC 20001

May 20, 2011

JAYSON TURNER

v.

NATIONAL CEMENT COMPANY OF
CALIFORNIA

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Docket No. WEST 2006-568-DM

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

DECISION

BY: Young, Cohen, and Nakamura, Commissioners

In this discrimination proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act” or “Act”), Administrative Law Judge Jacqueline Bulluck concluded that the discharge of Jayson Turner by National Cement Company of California (“National Cement”) did not violate section 105(c)(1) of the Mine Act, 30 U.S.C. § 815(c)(1).¹ 31 FMSHRC 1179 (Sept. 2009) (ALJ). The judge consequently dismissed Turner’s discrimination complaint. *Id.* at 1186. The Commission granted Turner’s petition for discretionary review challenging the judge’s decision. For the following reasons, we vacate the judge’s decision and remand this matter for further consideration consistent with this decision.

I.

Factual and Procedural Background

National Cement operates the Lebec Cement Plant in Kern County, California. *Id.* at 1180. Jayson Turner worked at the Lebec Plant as an electrician for ten years and three months. *Id.*; Tr. 36. During the period relevant to these proceedings, Turner worked the swing shift,

¹ Section 105(c)(1) provides in pertinent part:

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner . . . because of the exercise by such miner . . . on behalf of himself or others of any statutory right afforded by this Act.

2:00 p.m. to 12:30 a.m., Sunday through Wednesday. 31 FMSHRC at 1180; Tr. 65, 77. While employed by National Cement, Turner held a second job with Innovative Construction Solutions (“ICS”), a contractor that provided water treatment services to National Cement on the premises of its Lebec Plant. 31 FMSHRC at 1180; Tr. 32-33, 90-91, 110-11, 263. Turner’s job at ICS had flexible hours, with no set schedule. 31 FMSHRC at 1180; Tr. 116.

National Cement has a “no fault attendance program” under which an employee earns credits for each month of perfect attendance and demerits for each “absence occurrence.” 31 FMSHRC at 1184; Tr. 271; Ex. C-21. The program lists a number of exceptions for absences which would not be counted as absence occurrences, such as vacation, jury duty, bereavement leave, and doctor and dental appointments. Ex. C-21. The program establishes a progressive schedule of discipline for accumulated absence occurrences. For example, after three absence occurrences, an employee receives a verbal warning; after four, a written warning; after five, the employee receives five work days disciplinary suspension without pay; after six, ten work days disciplinary suspension without pay; and after seven, an employee is terminated. *Id.* To request time off, an employee is to make a reasonable effort to contact his/her immediate supervisor to report an impending absence and if the employee is unable to contact his/her supervisor, the employee is to notify the Production Control Supervisor. Ex. C-11.

On September 24, 2003, nearly three years before the incident which gave rise to Turner’s termination, Turner did not report to his job at National Cement for “personal reasons.” 31 FMSHRC at 1180; Ex. R-6. On that day, however, his supervisor, chief electrician Julius Wetzel, observed Turner at the ICS building. 31 FMSHRC at 1180; Tr. 528. Normally, during that time, Turner would have been working his shift at National Cement, instead of working for ICS. 31 FMSHRC at 1180; Tr. 62. In a letter dated October 1, 2003, Wetzel issued a “written verbal” reprimand to Turner, stating that on September 24, he was “absent from work without consent of the Company,” and warning him that if such an incident happened again, it would result “in more severe disciplinary action, including possible discharge.” 31 FMSHRC at 1180; Ex. R-6.

On June 13, 2006, Turner informed Wetzel, orally and in writing, that he would be taking the following day off to go to a doctor’s appointment. 31 FMSHRC at 1180; Tr. 64; Ex. R-7. The following day, June 14, from approximately 10:30 a.m. until 1:30 p.m., Turner visited the ICS building to show the water treatment facility to his daughter, who was visiting Turner from out of town. 31 FMSHRC at 1180; Tr. 33-34, 68-70, 112-13. While at ICS, Turner engaged in work and “logged in some activities.” 31 FMSHRC at 1180; Tr. 80, 114; Ex. R-4. After leaving the Lebec Plant property, Turner had lunch with his daughter and, at 4:00 p.m., went to his doctor’s appointment. 31 FMSHRC at 1180-81; Tr. 69, 74-76.

On June 14, several National Cement employees informed Wetzel that “Turner was at the ICS water treatment plant.” 31 FMSHRC at 1181; Tr. 532; Ex. R-8. Wetzel went to the ICS building and spoke with the supervisor there. 31 FMSHRC at 1181. He testified to being informed that Turner had been working. *Id.*; Tr. 533. Wetzel reported his findings to his immediate supervisor, electrical manager Bill Russell, and to plant manager Byron McMichael, in a written statement dated June 15, 2006. 31 FMSHRC at 1181; Tr. 535; Ex. R-8. In a meeting

with Wetzel and Russell on June 16, 2006, McMichael reviewed Turner's personnel file and asked for Wetzel's and Russell's input on Turner's job performance, and whether they thought termination was an appropriate response to Turner's conduct in disregarding the previous warning not to allow his secondary job to interfere with his job at National Cement. Tr. 260-61, 537-42. McMichael was ultimately responsible for deciding what disciplinary measures, if any, National Cement would take against Turner for the June 14 incident. 31 FMSHRC at 1181; Tr. 249-50. According to Wetzel, he and Russell recommended to McMichael that Turner's employment be terminated. Tr. 539-42.

Later on June 16, a meeting was held involving Turner, McMichael, Wetzel, and a union representative, Neal Janousek, in which Turner was informed of the decision to suspend him "pending discharge." 31 FMSHRC at 1181; Tr. 281-82; Ex. R-1. McMichael subsequently decided to terminate Turner's employment. By notice dated June 23, 2006, McMichael provided Turner with the company's reason:

On Wednesday, June 14, 2006, you were on the premises of NCC working for Innovative Construction Solutions, Inc. The same day . . . you missed your entire shift (2:00 p.m. until 12:30 a.m.) at NCC. . . . As a result of your working for another firm on a day that you were absent from NCC and your less than acceptable performance[,] you are being terminated effective Friday, 6-23-06.

31 FMSHRC at 1181; Tr. 250, 267-69; Ex. R-2.

Turner testified that before his employment was terminated, he had brought safety concerns to the attention of his supervisors on at least four occasions.² 31 FMSHRC at 1182-83. During January 2006, Turner complained to management that the lack of lights on a manlift made it unsafe to operate the equipment at night. 31 FMSHRC at 1183; Tr. 49-50. He alleged that in April 2006, he requested that National Cement provide him with electrically-rated tactile gloves.³ *Id.* at 1182; Tr. 18-19, 105-06. In late May 2006, Turner also complained that a medium voltage disconnect, which he mistakenly energized, was mislabeled and not properly locked and tagged out of service. 31 FMSHRC at 1183; Tr. 20-25; Ex. C-2. (When Turner energized this piece of equipment, it caused the entire plant to lose power. 31 FMSHRC at 1183; Tr. 25-26. He was subsequently disciplined for his mistake in a written warning that was placed in his personnel file. 31 FMSHRC at 1183; Ex. C-5; ALJ-1.) Lastly, on June 12, 2006 – four days before his discharge – Turner complained to management that he had been directed to troubleshoot ignition controls on

² Turner withdrew his allegation that he made a fifth safety complaint concerning unsafe conditions existing on a blower. 31 FMSHRC at 1182 n.6; Tr. 123-24; T. Post-Hearing Br. at 4.

³ National Cement's safety manager, Randy Logsdon, testified that he told Turner that he had researched the availability of such gloves in his equipment catalogs, but could not find any thin rubber or latex gloves that had an electrical rating. 31 FMSHRC at 1183; Tr. 361-63.

Pre-Calcliner burners in an area that was allegedly very hot and gassy, needlessly placing him and his co-workers at risk. 31 FMSHRC at 1183; Tr. 43-45.

Turner filed a discrimination complaint with the Department of Labor's Mine Safety and Health Administration ("MSHA") pursuant to section 105(c)(2) of the Act, 30 U.S.C. § 815(c)(2), on July 25, 2006. 31 FMSHRC at 1179; Ex. C-9. In a letter to Turner dated August 18, 2006, MSHA notified him that, based on its investigation of the allegations contained in the Complaint, it had concluded that a violation of section 105(c) had not occurred. 31 FMSHRC at 1179. Turner, *pro se*, filed a complaint before the Commission on August 31, 2006, pursuant to section 105(c)(3) of the Act, 30 U.S.C. § 815(c)(3). 31 FMSHRC at 1179. A hearing was subsequently held before Judge Bulluck. *Id.* at 1180.

The judge concluded that, although Turner engaged in activity protected under the Mine Act, he had failed to prove that his protected activity served as the basis for his termination by National Cement. *Id.* at 1180. Specifically, the judge found that McMichael credibly testified that when he decided to terminate Turner, McMichael knew nothing of Turner's safety concerns. *Id.* at 1183. The judge also credited Wetzel, who testified that his recommendation to discharge Turner was based on Turner's poor job performance and the fact that Turner worked at the ICS plant on June 14. *Id.*

The judge, assuming *arguendo* that Turner had proven that his protected activity could have served as a basis for his termination, concluded that National Cement discharged Turner for reasons that were wholly unrelated to his protected activity. *Id.* at 1183, 1186. The judge found that National Cement "offered credible evidence, un rebutted by Turner, clearly establishing that he was discharged for legitimate, business-related reasons, entirely unrelated to any protected activity, and that [National Cement] would have taken the adverse action based solely on Turner's conduct" with respect to his outside employment at ICS. *Id.* at 1183. While the judge acknowledged the testimony about National Cement's "no-fault attendance program," she also cited McMichael's and Wetzel's testimony that it was improper for Turner to work for ICS on a day he had taken off from National Cement, that it was unnecessary for Turner to miss his entire shift for his medical appointment, and that Turner should have scheduled his personal business so as not to interfere with his National Cement shift. *Id.* at 1183-84. Based on the record evidence, she concluded that "National Cement had ample grounds, unrelated to his protected activity, upon which to terminate [Turner's] employment" and dismissed his complaint. *Id.* at 1185.

Turner argues that the judge's dismissal of his discrimination complaint was erroneous. He claims that substantial evidence supports the conclusion that he engaged in protected activity. PDR; T. Br. at 4-10; T. Reply Br. at 3-6, 14-20. He contends that the operator's asserted justification for firing him – allowing his secondary job to interfere with his primary job at National Cement and his unsatisfactory job performance – was pretextual. PDR; T. Br. at 6, 14-18. He explains that the prior incident in 2003 involving his work for the secondary employer was different from the current incident leading to his termination. T. Br. at 10-12. He argues that substantial evidence does not support the operator's claim of poor performance. T. Br. at 15-16, 23-24. Turner also claims that Byron McMichael and other supervisors knew about his safety

complaints. T. Br. at 20. Finally, Turner contends that the judge erred by excluding evidence that he sought to admit at trial and by denying his requests to compel discovery.⁴ PDR; T. Br. at 26-28; T. Reply Br. at 23-25.⁵

National Cement responds that the judge correctly found that its decision to terminate Turner was due solely to Turner's allowing his secondary job to interfere with his primary job at National Cement and for his poor job performance. NC Br. at 17-19. National Cement contends that there is no evidence that McMichael, the ultimate decisionmaker on Turner's termination, knew about Turner's protected activity. *Id.* at 20-21, 23-25. National Cement also argues that there is no evidence of hostility or animus toward Turner's protected activity or that Turner was disparately treated for his secondary job as compared to other National Cement employees. *Id.* at 21-23. National Cement explains that although some of Turner's protected activity occurred relatively close in time to his termination, the undisputed evidence is that the operator acted swiftly in response to the events of June 14. *Id.* at 22. National Cement contends that substantial evidence supports the conclusion that Turner's job performance was unsatisfactory. *Id.* at 25. National Cement also contends that the judge's discovery and evidentiary rulings were appropriate

⁴ Turner's personnel file, Safety Committee notes from February 2006 through June 2006, and Joseph Kowalski's personnel file were admitted into evidence after the hearing as ALJ Exhibit 1. Ex. ALJ-1.

⁵ While this case was on appeal, Turner submitted documents to the Commission by email, and requested that they be included as evidence in the record. On January 19, 2011, the Commission's Docket Office, at the direction of the Commission, sent an email to Turner and the operator's counsel, rejecting these documents and stating that "[n]o additional evidence may be submitted after the close of the hearing before the judge in any case, unless a party has special permission from the Commission or the judge." On February 2, 2011, Turner sent an email to the Commission containing a motion to reconsider acceptance of the evidence previously submitted to the Commission. We hereby deny Turner's motion for reconsideration. As provided in section 113(d)(2)(C) of the Mine Act, the record in the case consists of:

(i) all matters constituting the record upon which the decision of the administrative law judge was based; (ii) the rulings upon proposed findings and conclusions; (iii) the decision of the administrative law judge; (iv) the petition or petitions for discretionary review, responses thereto, and the Commission's order for review; and (v) briefs filed on review. *No other material shall be considered by the Commission upon review.*

30 U.S.C. § 823(d)(2)(C) (emphasis added). Contrary to Turner's understanding, the right of a miner or other party to "present additional evidence" pursuant to section 105(c)(2) of the Act, 30 U.S.C. § 815(c)(2), is limited to the period when the case is pending before the administrative law judge, and does not extend to the period when the case is on appeal before the Commission.

and not an abuse of her discretion. *Id.* at 25-29. Finally, National Cement argues that the judge's decision and order dismissing Turner's discrimination complaint should be upheld. *Id.* at 29.

II.

Disposition

A complainant alleging discrimination under the Mine Act establishes a prima facie case of prohibited discrimination by presenting evidence sufficient to support a conclusion that the individual engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. See *Driessen v. Nev. Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998); *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. See *Robinette*, 3 FMSHRC at 818 n.20. If the operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. See *id.* 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).

Although the judge did not make an explicit finding as to whether Turner established a prima facie case of discrimination, it appears that she concluded that Turner did not establish a prima facie case because he failed to establish motivation, i.e., that his adverse action was in any part motivated by his protected activity. Nevertheless, the judge proceeded in her analysis to consider evidence of the operator's defense, assuming that Turner successfully established a prima facie case, and essentially concluded that the operator had affirmatively defended by proving that it had terminated Turner for his non-protected activity alone. The judge accepted the operator's business justification for dismissing Turner – because he had worked for his secondary employer on a day that he was scheduled to work for the operator but did not do so, and for his allegedly poor job performance – as the sole bases for its decision to discharge Turner.

We conclude that the judge's analysis is flawed in certain respects. First, in analyzing Turner's prima facie case, the judge failed to consider circumstantial evidence of motivation and, in doing so, incorrectly elevated the burden of proving a prima facie case of discrimination. Specifically, the judge failed to address significant probative circumstantial evidence of National Cement's motivation. Second, in considering the operator's defense, the judge failed to address evidence that the justification proffered by National Cement for Turner's discharge was pretextual.

We first address the evidence regarding the prima facie case.

A. Prima Facie Case

A “prima facie case” is defined as “the establishment of a legally required rebuttable presumption; a party’s production of enough evidence to allow the fact-trier to infer the fact at issue and rule in the party’s favor.” *Black’s Law Dictionary* 1310 (9th ed. 2009) (emphasis added). To make out a prima facie case of discrimination, the complainant need only “present[] evidence sufficient to support a conclusion that the individual engaged in protected activity and that the adverse action complained of was motivated in any part by that activity.” See *Driessen*, 20 FMSHRC at 328 (emphasis added). This burden of proof is lower than the ultimate burden of persuasion, which the complainant must sustain as to the overall question of whether section 105(c)(1) has been violated. See *EEOC v. Avery Dennison Corp.*, 104 F.3d 858, 861 (6th Cir. 1997) (holding that “[t]here must be a lower burden of proof to sustain a prima facie case than to win a judgment on the ultimate issue of discrimination”); *Texas Dep’t of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981) (holding that “the burden imposed on a plaintiff at the prima facie stage is not onerous”); *McGuinness v. Lincoln Hall*, 263 F.3d 49, 53 (2d Cir. 2001) (stating that the burden of establishing a prima facie case of discrimination is “minimal”) (citing *St. Mary’s Honor Center v. Hicks*, 509 U.S. 502, 506 (1993); *Young v. Warner-Jenkinson Co., Inc.*, 152 F.3d 1018, 1022 (8th Cir. 1998) (“The prima facie burden is not so onerous as, nor should it be conflated with, the ultimate issue’ of discriminatory action.”).⁷ To establish a prima facie case, it is sufficient that the alleged discriminatee present evidence from which the trier of fact could infer retaliation. See *Young*, 152 F.3d at 1022 (concluding that plaintiff “produced evidence sufficient to raise an inference of discrimination”); see also *Long v. Eastfield College*, 88 F.3d 300, 304-05 n.4 (5th Cir. 1996) (stating that at prima facie stage, plaintiff need not prove that protected activity was sole factor motivating employer’s challenged decision; “[t]he ultimate determination . . . is whether the conduct protected . . . was a ‘but for’ cause of the adverse employment decision”).

Here, the judge applied the wrong evidentiary standard to the miner’s prima facie case and we review that legal conclusion de novo. *Mitchell v. Baldrige*, 759 F.2d 80, 84-87 (D.C. Cir. 1985) (holding that district court’s formulation of the elements of a Title VII prima facie case of disparate treatment was legally incorrect, and finding that, under the appropriate formulation, the district court’s factual findings required the conclusion that plaintiff had proved a prima facie case); see also *Avery*, 104 F.3d at 860-62 (stating that “the elements that must be proven in a prima facie case are a question of law which is reviewed de novo”). When reviewing a trial court’s determination that a plaintiff has failed to present sufficient evidence to meet the burden of establishing a prima facie case of discrimination, federal courts of appeals have proceeded to

⁷ The Commission has looked to case law under similar federal anti-retaliation provisions, including Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. (“Title VII”), and the National Labor Relations Act, 29 U.S.C. § 141 et seq. (1994) (“NLRA”), in resolving questions involving the anti-discrimination provisions of the Mine Act. See, e.g., *Pero v. Cyprus Plateau Mining Corp.*, 22 FMSHRC 1361, 1367-72 (Dec. 2000); *Delisio v. Mathies Coal Co.*, 12 FMSHRC 2535, 2542-45 (Dec. 1990).

consider the evidence pertaining to the elements of a prima facie case and reversed the trial court's determination, concluding that a plaintiff has "produced evidence sufficient to raise an inference of discrimination." *Young*, 152 F.3d at 1022; *see also King v. Rumsfeld*, 328 F.3d 145, 150-51 (4th Cir. 2003) (reversing trial court's conclusion that plaintiff failed to make out a prima facie case of retaliatory discharge based on evidence proffered by plaintiff that "his termination came so close upon his filing of [an EEO] complaint giv[ing] rise to a sufficient inference of causation to satisfy the prima facie requirement"); *Farrell v. Planters Lifesavers Co.*, 206 F.3d 271, 278 (3d Cir. 2000) (concluding that "the District Court erred by requiring that the causal connection . . . be supported by a pattern of antagonism, retaliation or hostility," the circuit court considered the record and found "ample evidence from which to infer a causal connection" between the plaintiff's rejection of her supervisor's sexual advance and her subsequent termination); *Williams v. Cerberonics, Inc.*, 871 F.2d 452, 457 (4th Cir. 1989) (disagreeing with trial court's conclusion that plaintiff failed to make a prima facie case of retaliation and finding that "the less onerous burden of making a prima facie case of causality" was satisfied by proving that plaintiff was fired after her employer became aware that she had filed a discrimination charge). Thus, "[t]o make out a prima facie case of discrimination, the [discriminatee] need only submit enough evidence so that the record *could* support an inference" that Turner's termination resulted, at least in part, from his protected safety complaints. *Sec'y of Labor on behalf of Garcia v. Colorado Lava, Inc.*, 24 FMSHRC 350, 358 (Apr. 2002) (Jordan, concurrence) (emphasis in original). We conclude that the record contains sufficient evidence to meet this low evidentiary burden.

In view of the cases cited herein, the dissent is incorrect in asserting that we have "stray[ed] well beyond the confines of the Commission's review function." Slip op. at 24. As a matter of law, a prima facie case is established by evidence from which a judge *could infer* retaliation. Since such evidence exists in the record, it is not necessary to remand the case to the judge on the issue of whether Turner has established a prima facie case. The record here compels the conclusion that retaliation *could* be inferred from the evidence, and thus that Turner established a prima facie case.

The judge found, and National Cement does not dispute, that Turner engaged in protected activity and that he suffered adverse action when National Cement discharged him. 31 FMSHRC at 1182-83. We disagree, however, with the judge's conclusion that there was no evidence of motivation. Indeed, Turner presented significant circumstantial evidence related to National Cement's motivation for his termination.

In *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corp.*, the Commission stated that "[d]irect evidence of motivation is rarely encountered; more typically, the only available evidence is indirect." 3 FMSHRC 2508, 2510 (Nov. 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983). In *Chacon*, the Commission identified several indicia of discriminatory intent, including: (1) knowledge of the protected activity; (2) hostility towards the protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the complainant. *Id.* at 2510. Consideration of indirect evidence involves the drawing of reasonable inferences from the facts of record. In *Bradley v. Belva Coal Co.*, with

regard to the issue of motivation, the Commission found that “circumstantial evidence . . . and reasonable inferences drawn therefrom may be used to sustain a prima facie case.” 4 FMSHRC 982, 992 (June 1982) (*citing Chacon*, 3 FMSHRC at 2510-12).

Although the judge recited the *Chacon* factors in her decision, she did not adequately consider the circumstantial evidence on several of the factors critical to Turner’s prima facie case, and failed to credit the evidence as establishing his prima facie case. We review the evidence under this minimal evidentiary standard to determine whether a reasonable person could infer that Turner was discharged, at least in part, for his protected activity. We conclude that there is ample evidence from which a reasonable person could infer a discriminatory intent for Turner’s termination.⁸

1. Knowledge

As to knowledge, the judge’s conclusion that “McMichael credibly testified that when he decided to terminate Turner, he knew nothing of Turner’s [protected activity]” is undermined by the record and does not end the inquiry. 31 FMSHRC at 1183. The record indicates that McMichael consulted Wetzel and Russell prior to making his decision to terminate Turner, and that both Wetzel and Russell knew about Turner’s protected activity. The Commission has stated that “[a]n operator may not escape responsibility by pleading ignorance due to the division of company personnel functions.” *Metric Constructors, Inc.*, 6 FMSHRC 226, 230 n.4 (Feb. 1984).

While the judge credited McMichael’s testimony that he did not know about Turner’s safety complaints and that he made his decision to terminate Turner based solely on his non-protected conduct, the judge did not reconcile this finding with the evidence that McMichael consulted Wetzel and Russell, who did in fact have knowledge of the complaints. Tr. 102-03, 148-49, 189, 198, 260-61, 438-40, 537-42. Nor did she consider the testimony of Bill Edminister that he raised Turner’s concern about thin electrically-rated gloves to National Cement management at a safety meeting, and the concern was laughed off. Tr. 148. The significance of this testimony as to management’s knowledge of Turner’s safety complaints is that McMichael attended the monthly safety committee meetings. Tr. 304. The safety committee minutes, ALJ Ex. 1, indicate that McMichael was at all but one of the meetings in the first part of 2006, that Gerald Guiot, who McMichael described as his “boss,” with whom he consulted before terminating Turner, Tr. 261, 266, was at the safety meeting which McMichael missed, and that Edminister was at a number of the safety meetings.

⁸ We recognize that the evidence of National Cement’s motivation is relevant to both Turner’s prima facie case and his ultimate burden of proving discrimination, which is intrinsically tied to his pretext claim. Therefore, where relevant, we address the evidence of motivation in both contexts in this portion of the decision.

Although the judge credited McMichael's testimony that he had no knowledge of Turner's safety complaints, based on the principles articulated by the Commission in *Metric*, a fact finder could still conclude that Wetzel's and Russell's knowledge should be imputed to McMichael. In *Metric*, the project superintendent terminated certain miners after being told by the night superintendent that these miners were refusing to perform work. However, the night superintendent had not communicated the protected safety reason behind the miners' refusal. 6 FMSHRC at 226, 228. The Commission rejected the operator's defense that the project superintendent himself did not know of the miners' protected activity and held that "the fact that [the night superintendent] did not communicate the miners' safety concerns to [the project superintendent] cannot serve to insulate Metric from liability for this unlawful discharge." *Id.* at 230 n.4. See also *Boston Mutual Life Ins. Co. v. NLRB*, 692 F.2d 169, 171 (1st Cir. 1982) (declining to "launder" regional sales manager's knowledge and animus through a neutral superior where superior had no knowledge of employee's protected activity, but "acted in direct response" to regional sales manager's recommendation to dismiss employee); *Grand Rapids Die Casting Corp. v. NLRB*, 831 F.2d 112, 117-18 (6th Cir. 1987) (imputing plant manager's knowledge of, and animus against, employee's protected activity based on his "involve[ment]" in decision to terminate employee by recommending employee's termination to company's industrial relations manager, who had no knowledge of employee's protected activity and relied on plant manager's recommendation) (internal quotations and citations omitted). Here, if Wetzel's and Russell's recommendations to terminate Turner were at least partially a result of retaliatory animus and if those recommendations influenced McMichael's decision to terminate Turner, then Wetzel's and Russell's knowledge and retaliatory animus may be attributed to the decision maker.

For purposes of the prima facie case, there is considerable evidence in the record to permit the conclusion that Wetzel's and Russell's recommendations influenced McMichael's decision. On June 16, McMichael consulted Wetzel and Russell just prior to making his decision to suspend Turner pending discharge. Tr. 260. McMichael testified that he asked Wetzel and Russell about Turner's job performance and whether they thought termination was appropriate. Tr. 260-62, 537-42. Wetzel testified that he and Russell recommended that Turner be terminated. Tr. 539-41. McMichael also testified that he reviewed Turner's personnel file before deciding to terminate Turner. Tr. 261. However, Turner's file is devoid of any past instances of significant discipline or poor performance, the other basis provided for his termination. Ex. ALJ-1. It is reasonable to infer that Wetzel's and Russell's recommendations influenced McMichael's decision to terminate Turner. Therefore, a fact finder could find the requisite grounds to impute Wetzel's and Russell's knowledge to McMichael. See *Garcia*, 24 FMSHRC at 358-60 (Jordan, concurring) (imputing the knowledge and animus of a supervisor to the operator where sufficient circumstantial evidence was presented to support an inference that the supervisor influenced the operator's decision not to employ the discriminatee).

As to the ultimate question of discriminatory motive, on remand, the judge must address whether McMichael's decision to terminate Turner was influenced by the recommendation of Wetzel and Russell. If so, Wetzel's and Russell's knowledge of Turner's protected activities should be imputed to McMichael.

2. Hostility or Animus

If the recommendation to terminate Turner made by Wetzel and Russell, who knew about Turner's protected activity, was the result of retaliatory animus for Turner's safety complaints, McMichael's ultimate decision to terminate Turner would likewise be tainted by the retaliatory animus. *See Metric*, 6 FMSHRC at 230 n.4. This is the case despite the judge's finding that McMichael had no personal knowledge of Turner's protected activity.

The judge failed to address any evidence of possible animus by the operator for Turner's safety complaints. In particular, she did not address whether such hostility on the part of Wetzel and Russell played any role in Turner's termination. Turner introduced evidence which could give rise to a finding of animus on the part of the operator. He contends that the operator was not responsive to his safety concerns for electrically-rated tactile gloves, driving lights on the manlift, safer means of repairing the Pre-Calciner burners and the mislabeled and unlocked power source for the roller mill which led to Turner's accidental powering of the machine. Tr. 37-38, 43-52, 189, 201-02, 228-29, 352-53, 361-63, 374-76, 438-41, 560-61; T. Br. at 15, 17; T. Reply Br. at 3; Ex. C-2.

Turner testified that Logsdon, National Cement's safety manager, did not share the results of his research on the safety-rated tactile gloves with Turner until he asked Logsdon about them again following his suspension meeting. Tr. 34-35. Indeed, Bill Edminister testified that when he raised Turner's concern about thin electrically-rated gloves to National Cement management at a union safety meeting, "the response I got was just kind of a chuckle and comments that had nothing to do with the request for it." Tr. 148.

Russell and Wetzel acknowledged Turner's safety concerns about the manlift, but told him to use a plug-in lamp in the basket and to pre-position the manlift during the day. Tr. 189, 438. Even after Turner continued to complain about the visibility at night, Wetzel testified that he did not further address the matter with Turner. Tr. 453-54, 457-60.

With regard to the Pre-Calciner burners, Thomas Hastings testified that he was acting as lead man for the crew, filling in for the shift supervisor, and called in Turner as the electrician to help repair the start-up problem. Tr. 349-51, 354-55. Hastings stated that Turner had angered management by what he had said over the radio at the time of the incident. Tr. 349.

At the hearing, Wetzel offered significant opinion testimony about Turner. He generally testified that Turner was a difficult employee and that he did not listen. Wetzel also provided hearsay testimony that other miners had stated that he was hard to work with. Tr. 460-61, 488. While the judge credited Wetzel's testimony regarding Turner's character and job performance, she failed to address whether Wetzel's characterization of Turner as "difficult" may have, at least in part, represented animus for his safety complaints. 31 FMSHRC at 1185-86. For example, Wetzel acknowledged that it was his responsibility to investigate the needs of National Cement employees for personal protective equipment. Tr. 438. He stated that he did not, however, investigate the possibility that electricians needed tactile electrically-rated gloves when Turner

raised this issue. *Id.* Wetzel explained, in an answer which suggests sarcasm, “I remember you mentioning it, but you’re not a lineman.” *Id.*

Thus, in addition to the consideration of knowledge, for purposes of deciding the ultimate issue of motivation, the judge must address on remand whether the recommendation to terminate Turner by Wetzel and/or Russell was influenced by hostility or animus engendered by Turner’s safety complaints.⁹

3. Coincidence in Time

In her decision, the judge noted that “Turner raised safety concerns in the months and days preceding his termination,” but she failed to acknowledge it as an indicator of possible motivation. 31 FMSHRC at 1183. The record indicates that Turner made a string of complaints in the months preceding his termination. Specifically, Turner complained to his supervisors about safety-related matters in January, April, and May 2006. Finally, on June 12, 2006 – just four days before his suspension pending discharge – Turner complained about the problem with the Pre-Calcliner burners and the need for driving lights on the manlift. Ex. C-9.

The Commission has noted that it “applies no hard and fast criteria in determining coincidence in time between protected activity and subsequent adverse action when assessing an illegal motive. Surrounding factors and circumstances may influence the effect to be given to such coincidence in time.” *Hicks v. Cobra Mining, Inc.*, 13 FMSHRC 523, 531 (Apr. 1991). In *Chacon*, for example, complaints ranging from four days to one and one-half months before the adverse action were deemed sufficiently coincidental in time to indicate illegal motive. 3 FMSHRC at 2511. *See also Donovan v. Stafford Constr. Co.*, 732 F.2d 954, 960 (D.C. Cir. 1984) (noting that two weeks between the alleged protected activity and the miner’s dismissal is “itself evidence of an illicit motive”); *Sec’y of Labor on behalf of McGill v. U.S. Steel Mining Co.*,

⁹ Our colleagues suggest that we “rely almost exclusively on the operator’s lack of responsiveness to Turner’s safety complaints to suggest animus or hostility towards his protected activity.” Slip op. at 25. However, hostility or animus may clearly be demonstrated by indirect evidence. *Chacon*, 3 FMSHRC at 2510; *see Sec’y of Labor on behalf of Price v. Jim Walter Res., Inc.*, 14 FMSHRC 1549, 1555 (Sept. 1992) (rejecting operator’s argument that discriminatory intent must be proven by direct evidence). Additionally, we disagree with our colleagues’ characterization of the evidence. In addition to being dismissive, Turner’s supervisor, Wetzel, who knew about Turner’s protected activity, clearly expressed his dislike of Turner and his view that Turner was “difficult.” 31 FMSHRC at 1185-86; Tr. 460-61. Such opinion testimony, taken in the context of Turner’s repeated safety complaints and the operator’s lack of response to such complaints, may be suggestive of hostility or animus. *See Sec’y of Labor on behalf of Williamson v. CAM Mining, LLC*, 31 FMSHRC 1085, 1089-90 (Oct. 2009) (acknowledging inferential evidence of animus that miner’s supervisor “‘dogged him,’ swore at him, and assigned him more difficult and onerous tasks”). Moreover, animus is but one of several indicia of discriminatory intent.

23 FMSHRC 981, 986-87 (Sept. 2001) (concluding that the judge correctly inferred discriminatory motive from adverse action taken hours after miner's safety complaint).

Considering the evidence as a whole, a judge could reasonably conclude that there is a coincidence in time between Turner's safety complaints and his termination. Given Turner's history of safety complaints, his most recent complaints in the days immediately preceding his termination could have been the last straw for the operator. Thus, the close proximity in time between Turner's latest complaints and his termination could support an inference that National Cement may have been improperly motivated by Turner's complaints when it fired him, and the judge therefore should have considered the proximity in time and whether it indicated any improper motivation.

4. Disparate Treatment

The evidence as to whether Turner was disparately treated by National Cement is equivocal. Regarding outside employment, the only evidence Turner presented on other employees who engaged in secondary jobs and were permitted to work those jobs during National Cement shifts was his own hearsay testimony and the hearsay testimony of another miner. Tr. 159-61, 178-81, 441-46.¹⁰

National Cement presented evidence that another employee was terminated for his outside employment during a time that he was excused from work at National Cement on medical leave. Tr. 327-30; Ex. ALJ-1 (Kowalski personnel file). However, unlike Turner's incident, the reason provided by the operator for that employee's termination was a violation of National Cement's written attendance policy. Ex. ALJ-1 (Kowalski personnel file); C-21. Specifically, National Cement terminated that employee because he was "absent for three (3) consecutive working days without notifying the Company and providing a satisfactory reason for such absence." Ex. ALJ-1 (Kowalski personnel file). By contrast, Turner was terminated for working at ICS on a day when he was no longer scheduled to work for National Cement because of a medical appointment, and at a time which was not part of his National Cement work shift. Thus, if anything, McMichael's testimony that Kowalski was the only other employee terminated for working another job, Tr. 330, would suggest a conclusion that Turner did, in fact, receive disparate treatment.

Based on our analysis of the foregoing factors, we conclude that the record presents sufficient circumstantial evidence of motivation on the part of National Cement to establish a prima facie case of discrimination. Because the judge analyzed the operator's defense under the assumption of a prima facie case and because we conclude that there is sufficient evidence to

¹⁰ While Turner does allege that he was disparately treated as compared to other National Cement employees when he was disciplined for the roller mill/power shut down incident (T. Br. at 5-6), the evidence does not seem to support Turner's allegations. The only evidence in the record regarding other employees causing a plant shutdown was Russell's and Wetzels's testimony that these employees, like Turner, received a written warning. Tr. 195-96, 507-08.

support a conclusion that Turner established a prima facie case of discrimination, we do not think that it is necessary to remand to the judge to address the prima facie case. However, as explained below, whether National Cement's purported reasons for terminating Turner were pretextual is intrinsically tied to the ultimate question of National Cement's motivation for terminating Turner. Thus, on remand, in the context of considering the issue of pretext, the judge must consider and address the circumstantial evidence of National Cement's motivation and make necessary findings on the ultimate issue of discrimination.

B. Operator's Affirmative Defense

The operator contends that Turner was terminated for working at ICS on a day that he was scheduled to work for National Cement, but did not, and for his poor performance. NC Br. at 17-19. Both below and on appeal, in response to the operator's defense, Turner argues that the decision to terminate him was a pretext. T. Post-Hearing Br. at 10; PDR; T. Br. at 6, 14-18. Given the considerable evidence supporting the argument, we conclude that the judge should have addressed this argument.¹¹

The Commission has explained that a defense should not be "examined superficially or be approved automatically once offered." *Haro v. Magma Copper Co.*, 4 FMSHRC 1935, 1938 (Nov. 1982). In reviewing defenses, the judge must "determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed." *Bradley*, 4 FMSHRC at 993. The Commission has held that "pretext may be found . . . where the asserted justification is weak, implausible, or out of line with the operator's normal business practices." *Sec'y of Labor on behalf of Price v. Jim Walter Res., Inc.*, 12 FMSHRC 1521, 1534 (Aug. 1990) (citing *Haro*, 4 FMSHRC at 1937-38).

¹¹ We disagree with our colleagues' suggestion that "the fact that the judge failed to discuss some of the evidence does not mean that she did not analyze it." Slip op. at 30. Commission Procedural Rule 69(a) requires that a Commission judge's decision "shall include all findings of fact and conclusions of law, and the reasons or bases for them, on all the material issues of fact, law or discretion presented by the record." 29 C.F.R. § 2700.69(a). As the D.C. Circuit has emphasized, "[p]erhaps the most essential purpose served by the requirement of an articulated decision is the facilitation of judicial review." *Harborlite Corp. v. ICC*, 613 F.2d 1088, 1092 (D.C. Cir. 1979). Without findings of fact and some justification for the conclusions reached by a judge, the Commission cannot perform our review function effectively. *Anaconda Co.*, 3 FMSHRC 299, 299-300 (Feb. 1981). The Commission thus has held that a judge must analyze and weigh all probative record evidence, make appropriate findings, and explain the reasons for his or her decision. *Mid-Continent Res., Inc.*, 16 FMSHRC 1218, 1222 (June 1994); *IO Coal Co., Inc.*, 31 FMSHRC 1346, 1351 (Dec. 2009). The evidence pertaining to the reasons for Turner's discharge is pertinent to his argument of pretext and thus probative of the ultimate issue of discrimination.

In the context of other federal discrimination statutes, courts have analyzed the issue of pretext as follows: “A plaintiff may establish that an employer’s explanation is not credible by demonstrating ‘either (1) that the proffered reasons had no basis *in fact*, (2) that the proffered reasons did not *actually* motivate his discharge, or (3) that they were *insufficient* to motivate discharge.’” *Madden v. Chattanooga City Wide Service Dep’t.*, 549 F.3d 666, 675 (6th Cir. 2008) (citing *Manzer v. Diamond Shamrock Chemicals Co.*, 29 F.3d 1078, 1084 (6th Cir. 1994)), *overruled on other grounds*, *Geiger v. Tower Automotive*, 579 F.3d 614 (6th Cir. 2009) (emphasis in original); *McNabola v. Chicago Transit Auth.*, 10 F.3d 501, 513 (7th Cir. 1993). As explained in *Manzer*, 29 F.3d at 1084, the first type of showing consists of evidence that the proffered bases for the plaintiff’s discharge never happened, *i.e.*, that they are “factually false.” The third type of showing ordinarily consists of evidence that other employees, particularly employees not in the protected class, were not fired even though they engaged in substantially similar conduct to that which the employer contends motivated its discharge of the plaintiff. These two types of rebuttal are direct attacks on the credibility of the employer’s proffered motivation for firing the plaintiff. The second type of showing is of a different ilk. There the plaintiff admits the factual basis underlying the employer’s proffered explanation and further admits that such conduct *could* motivate dismissal. However, the plaintiff attacks the credibility of the proffered explanation indirectly, by showing circumstances which tend to prove that an illegal motivation was more likely than that offered by the employer. In other words, the plaintiff argues that the sheer weight of the circumstantial evidence of discrimination makes it “more likely than not” that the employer’s explanation is a pretext.

The record demonstrates that, at trial, Turner presented a significant amount of circumstantial evidence that the operator’s purported reasons and explanations for firing him were inconsistent or otherwise suspect.¹² The record demonstrates that National Cement has a no-fault attendance policy and permitted its employees to work second jobs. Tr. 246-47, 271. The record also indicates that National Cement informed Turner not to allow his secondary job to interfere with his scheduled shifts for National Cement. Tr. 246-47, 258-59. It is undisputed that Turner followed the written procedure for requesting time off, and the operator does not dispute that he had permission to take the day off on June 14 to attend a doctor’s appointment. Tr. 110, 121, 283-84, 335, 447-48, 531; Exs. R-1, R-7, C-11. The record also indicates that it was common for employees to miss an entire shift for a doctor’s appointment. Tr. 171-73, 333.

¹² The dissent states, without citing any legal authority, that with regard to National Cement’s business justifications for Turner’s discharge, “even if neither reason standing alone may have justified the operator’s actions, both taken together could have.” We do not see how relying on two unsupported reasons offered by National Cement could justify its decision to fire Turner any better than reliance on one unsupported reason. As explained, *infra*, the dissent ignores the strong evidence in the record undermining each of the operator’s purported reasons for Turner’s discharge. See *Laxton v. Gap, Inc.*, 333 F.3d 572, 579-84 (5th Cir. 2003) (in overturning district court’s grant of employer’s motion for judgment as matter of law, circuit court considered evidence challenging employer’s proffered reasons for firing employee as false or unworthy of credence and thus indicative of pretext).

Only after the fact, when National Cement learned that Turner worked at ICS prior to his scheduled shift at National Cement, did Turner's supervisor intimate that he did not have permission to take the day off. McMichael and Wetzel testified that they were annoyed that Turner was absent from work, but worked at ICS on the plant grounds prior to the time his shift at National Cement would have started. They also speculated that he could have scheduled his doctor's appointment during the day before his shift at National Cement, and stated that he should not have allowed his personal business to interfere with his scheduled shift at National Cement. Tr. 252, 269-70, 276-77, 284, 483-85. However, Turner testified that he scheduled the first available appointment with his doctor on June 14 and explained that he needed to see the doctor on that day. Tr. 114-16, 284-85. His testimony was uncontradicted.

Although one of the reasons given for his termination was "working for another firm on a day you were absent from NCC," the incident leading to Turner's termination on June 14 is significantly different from the prior incident for which Turner was reprimanded. On October 1, 2003, Turner was disciplined with a "written verbal" warning for "being absent from work without the consent of the [c]ompany." Ex. R-6. In that prior incident, Turner did not report to work per his schedule on September 24, 2003, and was seen on National Cement property that day working for his secondary employer. *Id.* Turner admits that on that occasion, he had made the mistake of working for ICS during his scheduled National Cement shift. PDR; T. Br. at 10. In the warning letter he received from the operator for the September 2003 incident, he was reprimanded for "absenting [him]self from work without consent of the Company." Ex. R-6. Turner argues that the incident on June 14, 2006 does not involve the same type of infraction and therefore, it was not appropriate for National Cement to take the extreme and harsh measure of terminating him. PDR; T. Br. at 10.

We find Turner's argument persuasive. It is undisputed that on June 14, Turner worked at his second job *prior to* his scheduled shift at National Cement. The record shows that Turner was at the ICS facility from 10:30 a.m. to 1:30 p.m. to show the facility to his daughter, who was visiting, and also to perform some work. 31 FMSHRC at 1180 & n.4; Tr. 33-34, 68-70, 112-14. His shift at National Cement would not have started until 2:00 p.m. National Cement does not dispute that the incident in September 2003 involved Turner working for ICS *during* his National Cement shift. In addition, the prior incident occurred nearly three years earlier. While it is true that when Turner was disciplined for his prior incident in September 2003, he was warned that if such an incident occurred in the future, it "would result in more severe disciplinary action, including possible discharge," we find the decision to terminate Turner after the June 14, 2006 incident to be suspect given the very different factual circumstances. In short, the judge should have questioned whether Turner's work for a short time at a second job prior to a shift for which he properly requested medical leave was a sufficient basis for firing him. *See Madden*, 549 F.3d at 675.

Furthermore, the operator apparently did not follow its written attendance policy pursuant to the effective labor agreement.¹³ Ex. C-21. The operator's written attendance policy explicitly permits an employee to take time off for a doctor's appointment and does not provide any qualifications or limitations. If National Cement considered Turner's absence on June 14 to be unexcused, then it should have explained the basis for its disapproval and noted the incident as an absence occurrence in his personnel file. Because Turner's contention that he had a good attendance record is unrebutted, it seems very unlikely that this occurrence alone would have been enough to warrant terminating Turner. Tr. 119-20, 332.

Additionally, National Cement's reliance on "poor performance" as a basis for terminating Turner is suggestive of pretext. There was no mention of poor performance at the June 16, 2006 meeting where Turner's suspension pending discharge was discussed. Tr. 544-46. When Russell was asked why Turner was terminated, he did not mention poor performance but said, "Mr. Turner was terminated because he was working a secondary job, taking off from his primary job to do so." Tr. 208. Similarly, when Wetzel was interviewed by MSHA on August 3, 2006, and asked why Turner was terminated, he did not mention poor performance, but said:

Sometime ago he was counseled for absencing himself from work because he was working for a contractor. Just recently he was absent again and working for the contractor. He was terminated for that.

Ex. C-14. And when National Cement filed its Opposition to Turner's Petition for Discretionary Review with the Commission, it began by stating: "This case concerns the Company's decision to terminate Turner's employment because he allowed his secondary job to interfere with his primary job with National Cement." Opposition at 1. The absence of any mention of poor performance in these statements suggests that it was not a serious factor in the decision to terminate Turner.

Although McMichael's June 23, 2006 termination letter did mention "less than acceptable performance" as another reason for Turner's discharge, the only example cited was the roller mill incident, where Turner mistakenly energized the wrong equipment thus knocking out power to the plant, as documented in a June 5, 2006 letter. Ex. R-2; C-5. At trial, McMichael mentioned job performance as a factor, but he did not give any instances of less than acceptable job performance. Wetzel testified that Turner was not an adequate electrician, but only provided examples of the roller mill incident, an unauthorized repair to the air conditioning system a year before the termination, and an incident so minor that it was not documented in Turner's personnel file, where he did not satisfactorily wire circuits on top of the silo. Tr. 485-88, 558-60. The only

¹³ In other instances, National Cement has followed its written policy on attendance, which provides for progressive steps of discipline for unexcused absences. Ex. C-21. The other National Cement employee who was terminated for working a second job was terminated under this attendance policy. Specifically, the miner was fired for being "absent for three (3) consecutive working days without notifying the Company and providing a satisfactory reason for such absence." Ex. ALJ-1 (Kowalski personnel file).

documentation of Turner's allegedly poor performance contained in his personnel file was the roller mill incident referenced in the June 5, 2006 letter and a verbal reprimand issued on July 21, 2004 for the unauthorized repair to the air conditioning system.¹⁴ ALJ Ex. 1. We also note that in a letter dated August 4, 2006, Laurie Conroy, an Administrative Clerk for National Cement, informed the California Employment Development Department that Mr. Turner's "less than acceptable performance" was limited to the June 5, 2006 letter referencing the roller mill incident. *Id.*

Although the judge addressed the operator's evidence of the roller mill incident, crediting Russell's testimony that it was the proper subject of reprimand (31 FMSHRC at 1184-85), she failed to acknowledge that the inadvertent shutdown of power to the plant that occurred during Turner's mistaken racking in of the roller mill was not an uncommon occurrence. Tr. 26, 143-44, 507-08. Importantly, both McMichael and Wetzel testified that it was not a firing offense and that Turner would not have been terminated for his performance alone. Tr. 262, 273-74, 462-63. Moreover, the judge failed to address contrary testimony that Turner had a good attendance record and was considered a reliable and dependable employee by other employees. Tr. 94, 119-20, 158-59, 571. Nor did the judge consider the testimony of Russell that Turner was an average electrician. Tr. 210. Indeed, at the time Turner was terminated, he was a level four electrician, the highest level for that job classification. Tr. 514-15. Finally, aside from the incidents testified to by McMichael and Wetzel, Turner's employment record has scant documentation that he was ever counseled or disciplined for poor performance. Ex. ALJ-1 (Turner's personnel file).¹⁵

In addressing this portion of the case concerning the operator's defense, the dissent erroneously relies on "substantial evidence" to support the judge's determination that Turner was discharged for legitimate, business-related reasons. Slip op. at 29. The dissent's analysis is flawed because it ignores the fact that the judge failed to consider Turner's surrebuttal argument of pretext and the related evidence. The judge's error in not considering the issue of pretext involves a legal question rather than a factual question controlled by the principle of substantial evidence. In this context, the judge should have considered the countervailing evidence that the

¹⁴ Contrary to Wetzel's testimony, this occurred nearly two years prior to Turner's termination.

¹⁵ Our colleagues heavily rely on Wetzel's opinion testimony to substantiate National Cement's claim that Turner was a poor performer warranting discharge. Slip op. at 28-29 & n.4. However, the dissent fails to acknowledge that Turner's personnel file was almost devoid of past instances of discipline for poor performance. Under similar employment discrimination statutes, courts have questioned an employer's purported claims of poor performance, where such claims are undocumented and unsubstantiated by the record. *See, e.g., Birch v. Cuyahoga County Probate Court*, 392 F.3d 151, 167-68 (6th Cir. 2004) (in considering whether proffered nondiscriminatory justifications for plaintiff's lower rate of pay were pretext for sex discrimination, court concluded that "a reasonable jury could disbelieve [supervisor's] statement about [plaintiff's] poor performance," which was not documented in plaintiff's personnel file and largely unsubstantiated).

reasons given for Turner's discharge were pretextual, for instance, that Turner was in compliance with the operator's policy for requesting time off, that he did not work his ICS job during his scheduled National Cement shift, and that National Cement did not follow its written attendance policy pursuant to the labor agreement.¹⁶

Because the judge did not consider the pertinent evidence in light of a pretext argument, we vacate the judge's finding of no discrimination and remand the case to the judge for further consideration. *See Pero*, 22 FMSHRC at 1365-68, 1372 (remanding to the judge to consider evidence related to complainant's argument of pretext).

C. The Judge's Discovery and Evidentiary Rulings

Turner alleges that the judge erred in excluding certain evidence that he sought to admit into the record and complains that the operator failed to comply with his discovery requests. PDR at 2; T. Br. at 26-28; T. Reply Br. at 23-25. Turner also takes issue with the judge's exclusion of evidence he sought to admit post-trial. PDR at 2; T. Br. at 27; T. Reply Br. at 25. The operator contends that the judge did not abuse her discretion in making her evidentiary and discovery rulings. NC Br. at 25-29.

When reviewing a judge's pre-trial rulings, the Commission has set forth its standard of review as follows:

[T]he Commission cannot merely substitute its judgment for that of the administrative law judge The Commission is required, however, to determine whether the judge correctly interpreted the law or abused his discretion and whether substantial evidence supports his factual findings.

Asarco, Inc., 12 FMSHRC 2548, 2555 (Dec. 1990) ("*Asarco I*") (reviewing a judge's discovery rulings) (citations omitted).

An abuse of discretion standard is consistent with the discretion accorded judges in matters related to the conduct of a trial. *See Medusa Cement Co.*, 20 FMSHRC 144, 147 (Feb. 1998) (applying the abuse of discretion standard when reviewing a judge's pre-trial order); *Buck Creek Coal, Inc.*, 17 FMSHRC 500, 503 (Apr. 1995) (same). With regard to the judge's role at trial, the Commission has stated, "a judge is an active participant in the adjudicatory process and

¹⁶ Because we are remanding the case to the judge, we do not address the sufficiency of this counter-evidence or the weight of the evidence as a whole as to the operator's justification for dismissing Turner. It is appropriate for the judge in the first instance to address the relevant evidence pertaining to pretext and to weigh such evidence with her findings and conclusions regarding the operator's defense.

has a duty to conduct proceedings in an orderly manner so as to elicit the truth and obtain a just result.” *Sec’y on behalf of Clarke v. T.P. Mining, Inc.*, 7 FMSHRC 989, 993 (July 1985).

One of the evidentiary rulings involved certain photographs that Turner sought to include in the record. Turner took photographs on National Cement property without the operator’s approval. Before the hearing, the operator submitted a motion in limine to exclude such evidence. Resp’t Mot. in Limine to Exclude Petitioner’s Evidence dated July 16, 2007. The judge granted the operator’s motion and ordered that the inappropriately obtained photographs could not be admitted. Order dated Oct. 11, 2007. The judge did, however, permit Turner to arrange with the operator an opportunity to visit the National Cement property and obtain the photographs he sought. Tr. 130-32. At trial, Turner again attempted to admit the photographs. Tr. 130-31. Turner failed to follow the judge’s instructions and did not make arrangements with the operator to re-take the photographs. Tr. 135-37. We believe that the judge did not abuse her discretion in excluding such evidence. In any event, Turner does not articulate a basis for admitting such evidence given the judge’s ruling in his favor on the question of his protected activity.

The record below contains extensive submissions from Turner regarding his discovery requests, including numerous requests to the judge to compel discovery and for sanctions against National Cement. Turner does not raise any specific assignment of error, but generally objects to the operator’s uncooperative responses to his discovery requests. In reviewing a judge’s discovery rulings, the Commission “cannot merely substitute its judgment for that of the administrative law judge.” *Asarco I*, 12 FMSHRC at 2555. Rather, the Commission is required “to determine whether the judge correctly interpreted the law or abused his discretion and whether substantial evidence supports his factual findings.” *Id.*

We conclude that the judge did not abuse her discretion. The record indicates that National Cement substantially complied with Turner’s requests. In several instances, it appears that Turner lost documents that National Cement’s counsel sent to him. NC Br. at 27-28 (citing to letters in the case file from National Cement). It also appears that the judge conducted numerous conference calls to address Turner’s discovery concerns. *See* Turner’s FOIA requests for transcripts of conference calls dated Oct. 20, 22 and 29, 2009. Finally, Turner fails to establish any prejudice he has suffered as a result of these purported adverse rulings.¹⁷

After the hearing, Turner attempted to submit additional documentary evidence. T. Post Hearing Report at 3. The judge ruled on the matter, excluding the evidence. Order dated May 5, 2008. At trial, the judge did leave the record open to admit limited evidence, specifically, minutes of the safety committee meetings and Kowalski’s personnel file. Tr. 575-76. After submitting his

¹⁷ In reviewing the record below, it appears that many of Turner’s complaints about discovery matters center on issues that are irrelevant to his discrimination case, such as training and work logs. To the extent that any of this evidence relates to his safety complaints, because the judge ruled in his favor finding that he engaged in protected activity, we conclude that any possible error in failing to order the disclosure of such evidence is harmless.

post-hearing brief, Turner attempted to admit two packages of documents he labeled “Joe’s Records” and “Miner’s Safety Committee notes.”

The Commission has held that rulings on motions to reopen the record are “committed to the sound discretion of the trial judge.” *Kerr-McGee Coal Corp.*, 15 FMSHRC 352, 357 (Mar. 1993). The Commission has further noted that the factors to be considered on such motions are (1) the timeliness of the motion; (2) the character of the additional evidence; and (3) the effect of granting the motion. *Id.* It does not appear that any of the evidence Turner sought to admit post-trial was newly discovered evidence. National Cement alleges that granting Turner’s motion would prejudice the operator given the lack of opportunity to depose or examine witnesses concerning the content of the documents. NC Br. at 28-29. It appears that the documents Turner attempted to submit post-hearing were the very documents that the judge ordered the operator to submit at the conclusion of the hearing. Because Turner has not shown any prejudice, we conclude that the judge did not err in excluding such evidence.

Accordingly, we affirm the judge’s rulings on the evidentiary and discovery matters.

III.

Conclusion

For the foregoing reasons, we vacate the judge's determination that National Cement did not discriminate against Turner in violation of section 105(c)(1) of the Mine Act and remand this case to the judge for further consideration consistent with this decision. We also affirm the judge's rulings on the specific discovery and evidentiary issues raised by Turner.

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

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

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

Chairman Jordan and Commissioner Duffy, dissenting:

I. Introduction

Jayson Turner failed to establish that his termination was motivated by his protected activity in making safety complaints to the operator. Moreover, substantial evidence fully supports the judge's determination that Turner would have been fired irrespective of his protected activity, due to his poor job performance and his outside employment in contravention of National Cement rules. Consequently, we would affirm the judge's decision dismissing Turner's discrimination claim under section 105(c) of the Mine Act.¹

A complaint alleging discrimination under the Mine Act establishes a prima facie case of prohibited discrimination by presenting evidence sufficient to support a conclusion that the individual engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. *See Driessen v. Nev. Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998); *Sec'y on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds*, 633 F.2d 1211 (3d Cir. 1981); *Sec'y on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 805, 817-18 (Apr. 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. *See Robinette*, 3 FMSHRC at 818 n.20. If the operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. *See id.* 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).

II. Turner failed to establish a prima facie case that his termination was motivated by his protected activity

The judge determined that Turner "failed to prove that his protected activity served as the basis for his termination by National Cement." 31 FMSHRC 1179, 1180 (Sept. 2009) (ALJ). Although she did not explicitly state that he had failed to establish a prima facie case, it appears that she determined that, in light of National Cement's rebuttal evidence, Turner failed to establish that his adverse action was in any part motivated by his safety complaints. *See* 31 FMSHRC at 1183.

¹ We agree with the majority that the judge's discovery and evidentiary rulings appealed by Turner did not constitute an abuse of discretion.

Our colleagues in the majority reverse the judge's determination, and find that Turner did in fact establish a prima facie case that his termination was motivated by his protected activity in making safety complaints to National Cement. Slip op. at 14. We cannot agree.²

The majority's primary complaint is that the judge failed to consider certain circumstantial evidence that it contends shows that National Cement's termination of Turner was motivated at least in some part by his safety complaints. Slip op. at 6. In *Secretary on behalf of Chacon v. Phelps Dodge Corp.*, the Commission acknowledged that "[d]irect evidence of motivation is rarely encountered; more typically, the only available evidence is indirect." 3 FMSHRC 2508, 2510 (Nov. 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983). Consequently, the judge's treatment of the circumstantial evidence in this case merits careful review by the Commission.

However, to rectify the errors it believes the judge committed with regard to this evidence, the majority gives the judge's decision more than careful review; it considers the evidence, and proceeds to draw a number of inferences that support the conclusion that National Cement was unlawfully motivated in this instance. *See, e.g.*, slip op. at 10, 12-14. In so doing, the majority strays well beyond the confines of the Commission's review function.

First of all, as the Commission stated in *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1283 (Dec. 1998), "[i]t is for the judge in the first instance, not the Commission on review, to make inferences and findings based on record evidence." While a judge can be faulted for failing to consider evidence, and the case returned so that he or she can do so and draw such inferences as are reasonable, if the judge has considered the evidence but has not drawn certain inferences, there are no grounds for remand, much less reversal, as long as the failure or refusal to draw the inference is reasonable in the context of the overall record. *See, e.g., Garden Creek Pocohontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989).

This is consistent with the role of the Commission versus the role of its judges: the latter find facts, while the former determines if substantial evidence supports those findings.³ That the judge could have reasonably come to a different conclusion regarding the facts – that is, the judge could have inferred from the evidence that Turner's termination was motivated by his protected activity – is not a basis for overturning the judge's conclusion to the contrary. *See Chacon*, 709

² We recognize that this burden of proof is lower than a complainant's ultimate burden of persuasion, which he or she must sustain as to the overarching question of whether section 105(c)(1) was violated. *See EEOC v. Avery Dennison Corp.*, 104 F.3d 858, 861 (6th Cir. 1997).

³ When reviewing an administrative law judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion." *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

F.2d at 92 (even if Commission's own view is supported by the record, it is bound to uphold the judge's findings to the contrary if those findings are supported by substantial evidence); *Sec'y of Labor on behalf of Wamsley v. Mutual Mining, Inc.*, 80 F.3d 110, 113 (4th Cir. 1996) (the possibility of drawing two inconsistent conclusions from the evidence does not prevent the finding of the trier of fact from being supported by substantial evidence).

Secondly, before the Commission on review can reach a conclusion regarding a contested issue of fact, it must be satisfied that the evidence compels that conclusion, and only that conclusion. *See Walker Stone Co. v. Sec'y of Labor*, 156 F.3d 1076, 1085 n.6 (10th Cir. 1998); *Donovan ex rel. Anderson v. Stafford Constr. Co.*, 732 F.2d 954, 961 (D.C. Cir. 1984). The majority here does not even attempt to meet that standard; rather, it merely notes what a trier of fact "could" conclude regarding the evidence of motivation and then proceeds to replace the trier of fact (in this instance, the judge), and hold that a prima facie case has been established. *See, e.g.* slip op. at 9, 10, 13.

What the judge could have concluded is not at issue; rather, the question is whether substantial evidence supports the decision she reached regarding the evidence Turner submitted at hearing. In *Chacon*, the Commission identified several indicia of discriminatory intent, including (1) knowledge of the protected activity; (2) hostility towards protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the complainant. 3 FMSHRC at 2510. Reviewing the evidence in light of these factors, the judge's conclusion that Turner failed to establish motivation is well supported by the record.

First, Turner failed to demonstrate animus toward any of his protected activity. Our colleagues, citing no supporting caselaw, rely almost exclusively on the operator's lack of responsiveness to Turner's safety complaints to suggest animus or hostility towards this protected activity. *See* slip op. at 11-12. However, even if the managers had completely failed to address Turner's safety concerns, such inaction does not rise to the level of hostility or animus towards such complaints. There are a variety of reasons unrelated to animus towards safety complaints that might lead to a supervisor's failure to address concerns expressed by employees. Establishing discriminatory motivation as part of a complainant's *prima facie* case requires more than a lack of responsiveness to a miner's complaints.

In any event, the record demonstrates that some managers did in fact look into Turner's safety complaints, making suggestions on how to rectify safety problems. For instance, when Turner asked Randy Logsdon, the National Cement safety manager, for safety gloves, Logsdon responded that he had investigated the matter but could not find in his equipment catalogs the type of thin, rubber latex glove that had the requisite electrical rating. Tr. 18-19, 105-106, 361-63. In addition, Turner acknowledged that when he complained that there should be driving lights on the manlift, Bill Russell suggested that he put a job light in the receptacle on the man basket. Tr. 49-50, 103. Julius Wetzel, Turner's supervisor, testified that he suggested to Turner that he position the manlift in the quarry area during daylight so that it did not need to be driven there at night. Tr. 453, 459-60.

Our colleagues also fault the judge for failing to address whether Wetzel's characterization of Turner as "difficult" may have in part represented hostility towards Turner's safety complaints. Slip op. at 12. We believe that Wetzel's detailed and emphatic testimony regarding Turner's poor relationship with other employees and Turner's substandard job performance clearly explained why Wetzel considered him "difficult." For instance, the judge cited to Wetzel's testimony that Turner "doesn't listen. He's very hard to communicate with and he takes a lot of things personal that shouldn't be personal. . . . [He] didn't follow instructions The few other people in the shop expressed the concern that they would not work with him. They didn't like working with him." 31 FMSHRC at 1185, citing Tr. 460, 488. Wetzel also agreed that at times it was hard for him to get Turner to listen to him, to follow his instructions or to recognize his authority. Tr. 461.

Wetzel provided a clear rationale for his characterization of Turner. Asking the judge to decide whether the recommendation to terminate Turner by Wetzel and Russell was also influenced by hostility or animus engendered by Turner's safety complaints appears to us to be based on unfounded speculation.

Regarding the operator's knowledge of Turner's protected activity, Byron McMichael, the plant manager who fired Turner, testified that he was not aware of Turner's safety complaints, and other managers corroborated this statement. 31 FMSHRC at 1183, citing Tr. 238, 272-73, 310. *See also* Tr. 197-98, 311-12, 434-35, 468-69, 505-07. The judge credited this testimony. We note 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, 1540-41 (Sept. 1992); *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2770 (Dec. 1981).

Despite acknowledging that the judge credited McMichael's testimony that he did not know about Turner's safety complaints and that McMichael made his decision to terminate Turner based solely on his non-protected conduct, slip op. at 9, our colleagues attempt to link Wetzel and Russell's knowledge of those complaints to McMichael's decision. *Id.* at 9-10. They suggest that "if Wetzel's and Russell's recommendations to terminate Turner were at least partially a result of retaliatory animus and if those recommendations influenced McMichael's decision to terminate Turner, then Wetzel's and Russell's knowledge and retaliatory animus may be attributed to the decision maker." *Id.* at 10. However, as discussed above, we do not believe the record supports a finding of animus on the part of Wetzel and Russell, and accordingly, see no need for a remand to determine whether the termination decision was influenced by their recommendation.

Our colleagues also fault the judge for failing to consider, as possible proof of McMichael's knowledge of Turner's safety activities, the testimony of Bill Edminister regarding a discussion of Turner's concern about electrically-rated gloves at a safety meeting that McMichael allegedly attended. We see no need for the judge to have done so in light of McMichael's testimony that he remembered discussion at one of the meetings that Randy Logsdon was investigating gloves for electricians but that he "didn't know who prompted the question." Tr. 310.

Regarding any possible coincidence in time between the protected activity and the adverse action, the judge recognized that Turner voiced safety complaints in the months and days preceding his termination. She thus was aware of record evidence that could have, pursuant to *Chacon*, raised an inference of discriminatory motivation. However, we view her comment that Turner “did not produce any evidence that these protected activities were in any way related to his termination,” 31 FMSHRC at 1183, as implicitly rejecting the timing of the protected activity and adverse action as an indicia of retaliatory motive. In any event, as will be discussed below, the record reflects that the timing of his termination was a direct result of Turner’s outside employment on June 14.

The final *Chacon* factor which a complainant may use as indirect proof of illegal motivation is disparate treatment. The majority appears to agree that Turner failed to introduce persuasive evidence on this point. Slip op. at 13. However, at the same time our colleagues reject National Cement’s assertion that Turner was not disparately treated because they conclude that National Cement’s evidence on this point involved an employee who was not similarly situated. *Id.* at 13-14. They conclude that if Turner was the only other employee fired for working another job, this suggests that he did receive disparate treatment. *Id.* at 14. We believe, however, that the lack of affirmative evidence in the record establishing that other employees who worked secondary jobs during National Cement shifts were not fired leads to the conclusion that Turner was not disparately treated.

In sum, it cannot be said that the record compels the conclusion that Turner presented sufficient evidence to meet his burden of establishing a *prima facie* case of discrimination. We would be more inclined to remand this case to the judge if the record could provide the basis for reasonable inferences of motivation that the judge should have considered. Because record support for such inferences is lacking, we disagree with our colleagues’ conclusion, and would affirm the judge’s finding.

III. Substantial evidence supports the judge’s finding that the operator’s decision to fire Turner was in no part motivated by his protected activity

Although the judge found that Turner failed to establish a *prima facie* case, she continued her analysis and assumed, *arguendo*, that if he had done so, “the company offered credible evidence, unrebutted by Turner, clearly establishing that he was discharged for legitimate, business-related reasons, entirely unrelated to any protected activity, and that the company would have taken the adverse action based solely on Turner’s conduct respecting his outside employment.” 31 FMSHRC at 1183. Substantial evidence in the record also supports this determination.

The record makes clear that National Cement viewed Turner’s outside employment at ICS (his part-time employer) as interfering with his work at National Cement. As the judge noted, Turner knew that his employer had placed limitations on his outside employment at ICS. *Id.* at 1183, citing Tr. 32-33, 245-47. Significantly, on October 1, 2003, National Cement warned Turner that working for ICS in a way that interfered with his National Cement job would result in

“severe disciplinary action, including possible discharge.” 31 FMSHRC at 1183, citing Ex. R-6. On June 14, 2006, when Turner worked for ICS instead of for National Cement, McMichael concluded that Turner could have scheduled his doctor’s appointment at a time that would have permitted him to work his shift at National Cement. Tr. 276-77. McMichael explained that Turner could have scheduled his medical appointment for earlier in the day, when he could have been absent from his job at the ICS plant. Tr. 284. The judge found, in sum, that National Cement fired Turner because “[h]e chose to give his services to ICS . . . that day, rather than National Cement.” 31 FMSHRC at 1183-84, citing Tr. 276-77, 334.

When National Cement discovered that Turner had worked for ICS on June 14 instead of reporting to his National Cement shift, it responded swiftly. Wetzel spoke to the ICS supervisor and confirmed that Turner had been working there. *Id.* at 1181. The next day he reported his findings to his immediate supervisor and to the plant manager in a written statement. *Id.*; Tr. 535; Ex. R-8. A meeting was held shortly thereafter to discuss whether Turner should be terminated. 31 FMSHRC at 1181; Tr. 260-61, 539-41. On June 16, 2006, a meeting was held in which Turner was informed of the decision to suspend him “pending discharge.” 31 FMSHRC at 1181; Tr. 282; Ex. R-1.

Arguably, National Cement overreacted to Turner’s choice to miss work at its plant instead of at ICS. After all, Turner gave notice that he would be absent and offered to come to work at National Cement if he was needed. Nonetheless, the Commission’s responsibility in this discrimination matter is to ascertain whether the miner’s termination resulted from his protected activity, and our reading of the record does not support such a conclusion.

Substantial evidence in the record also supports the judge’s finding, 31 FMSHRC at 1184, that National Cement fired Turner in part due to his poor job performance. The judge fully credited Wetzel’s testimony that Turner’s poor performance was his primary motivation in recommending to McMichael that Turner be discharged and that Turner “didn’t follow instructions.” 31 FMSHRC at 1185, citing Tr. 488. Wetzel also testified that Turner was not a good electrician, Tr. 474, and Wetzel cited several instances where Turner’s performance was inadequate.⁴ Tr. 486-489. As noted above, he testified that Turner was extremely difficult to

⁴ Wetzel was unequivocal in this regard, providing several concrete examples:

I assigned him to repair the fan on the outside of the supply building and . . . when the job was done, he had blown a hole in the side of the wall and ducted the air-conditioner vents into the warehouse. That was not what I asked him to do. I didn’t ask him to do that. It was a fan repair, and I came in and found a hole in the wall and the air-conditioner duct.

Tr. 486. Wetzel confirmed that this incident was in Turner’s personnel file. Tr. 487. Moreover,

work with and that many employees refused to work with him. Tr. 461, 488, 558-59. The judge expressly credited Wetzel's testimony that his discharge recommendation was not based on any safety complaints made by Turner. 31 FMSHRC 1183, citing Tr. 527, 539.

The judge also credited Bill Russell's testimony regarding the incident in which Turner energized the wrong equipment, resulting in a power outage for the entire plant. 31 FMSHRC at 1184-85. She held that this was an appropriate factor to take into account in deciding whether to terminate Turner. *Id.* at 1185.

In light of the foregoing, we conclude that substantial evidence in the record supports the judge's determination that Turner was discharged for legitimate, business-related reasons. 31 FMSHRC at 1183. Accordingly, we disagree with the majority that remand is necessary in this instance. The majority appears to conclude that because neither reason given for Turner's termination was enough, standing alone, to justify termination, it is suggestive of pretext, and therefore the case must be remanded to the judge to consider the evidence on this issue. *See slip op.* at 15-19. In so doing, the majority commits multiple errors.

First, it relies on an improper weighing of the evidence of motivation. The reasons given for Turner's termination are only "suggestive" of pretext, as the majority holds (*id.* at 17), if there was enough evidence to even reach the issue of the operator's affirmative defense. As discussed earlier, the evidence of motivation to establish a *prima facie* case is lacking.

Secondly, the majority fails to take into account that, even if neither reason standing alone may have justified the operator's actions, both taken together could have. By parsing the reasons National Cement gave for terminating Turner, the majority fails to analyze the totality of the evidence.

Finally, this case is one that is largely determined by the judge's view of the credibility of the evidence, which here was predominantly witness testimony. The judge made an explicit finding that, having observed Turner's disruptive actions during the hearing, and generally

in describing an incident in which Turner failed to wire circuits on top of a silo, Wetzel commented that "this happened on numerous occasions. Whenever Mr. Turner was asked to do something extra or something unscheduled, he always had wires everywhere . . . which leads me to believe there's wires unterminated. And we can't leave circuits like that . . . I sent him to fix a circuit board and I got wires everywhere. It didn't make any sense." Tr. 488.

uncooperative nature throughout the proceeding, she would credit National Cement's witnesses such as Wetzler over Turner. *See* 31 FMSHRC at 1185.⁵

IV. Conclusion

Our colleagues suggest several scenarios that might conceivably have led to a finding of discrimination. However, the judge carefully reviewed the record, made credibility determinations, and provided record support for her findings. The majority, viewing the evidence in another light, speculates that certain inferences supporting a *prima facie* case may nonetheless be gleaned from this record and remands for the judge to make determinations on these issues and on whether the operator's affirmative defense was a pretext.

However, it is not the Commission's role to reweigh the evidence in this case. *See Island Creek Coal Co.*, 15 FMSHRC 339, 347 (Mar. 1993). Moreover, the fact that the judge failed to discuss some of the evidence does not mean that she did not analyze it. *See Caldwell v. Astrue*, 365 Fed. Appx. 740 (8th Cir. 2010) (unpublished), citing *Craig v. Apfel*, 212 F.3d 433, 436 (8th Cir. 2000) (administrative law judge is not required to discuss all evidence, and failure to cite specific evidence does not mean it was not considered).

⁵ We note that, despite being specifically directed to cease filing additional materials with the Commission since the record on appeal is closed, Mr. Turner has submitted 12 communications to the Commission, many of which are duplicative of included materials already in the record before the judge and on review.

Commissioner Duffy further notes that the Commission, now having gained this first-hand experience with Turner and his lack of adherence to instructions, is certainly not in a position to question the judge's credibility findings as to Turner. Litigants, whether represented by counsel or pro se, are expected to behave appropriately before the Commission and its judges. To now return the case to the judge, without as much a comment on this matter, simply invites further inappropriate behavior on remand. Commissioner Duffy believes the Commission owes the judge more in this instance.

Turner has the ultimate burden of persuasion in this case – that is, it is up to him to prove that his discharge was motivated by protected activity. The judge concluded that Turner’s dismissal was not motivated by his safety complaints, and this determination is amply supported by evidence in the record. Accordingly, we would affirm the judge’s decision.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy
Michael F. Duffy, Commissioner

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On June 30, 2010, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000224601 to Stoneco for two citations issued to the operator on May 4, 2010. Stoneco states that on May 13, 2010, it sent a fax to MSHA's office in Duluth, Minnesota requesting a conference regarding one of the citations. It further states that it simply overlooked the fact that it had to send the Proposed Assessment form to MSHA's office in Arlington, Virginia, in order to contest the assessment.

The Secretary opposes Stoneco's request, arguing that the operator's statement is conclusory and insufficient to justify reopening. The Secretary further states that an MSHA Conference and Litigation Representative notified the operator by letter dated May 13, 2010, that a conference would not be scheduled until after the operator received and contested the proposed assessment and that failure to timely contest would result in cancellation of its conference request. In addition, MSHA records show that the proposed assessment was delivered to Stoneco via Federal Express on July 9, 2010.

Having reviewed the operator's request to reopen and the Secretary's response thereto, we agree that Stoneco has failed to provide a sufficient basis for the Commission to reopen the penalty assessment. Accordingly, we hereby deny without prejudice Stoneco's request to reopen. *FKZ Coal Inc.*, 29 FMSHRC 177, 178 (Apr. 2007); *Petra Materials*, 31 FMSHRC 47, 49 (Jan. 2009). The words "without prejudice" mean that Stoneco may submit another request to reopen

Assessment No. 000224601.¹ Any amended or renewed request by the operator to reopen this assessment must be filed within 30 days of this order. Any such request filed after that time will be denied with prejudice.

/s/ Michael F. Duffy
Michael F. Duffy, Commissioner

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

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

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

¹ If Stoneco submits another request to reopen, it must establish good cause for not contesting the proposed penalties within 30 days from the date it received the assessment from MSHA. Under Rule 60(b) of the Federal Rules of Civil Procedure, the existence of “good cause” may be shown by a number of different factors including mistake, inadvertence, surprise, or excusable neglect on the part of the party seeking relief, or the discovery of new evidence, or fraud, misrepresentation, or other misconduct by the adverse party. Stoneco should include a full description of the facts supporting its claim of “good cause,” including how the mistake or other problem prevented it from responding within the time limits provided in the Mine Act, as part of its request to reopen. Stoneco should also submit copies of supporting documents with its request to reopen and specify which proposed penalties it is contesting. In addition, Stoneco should indicate when it first became aware that it had missed the contest deadline and whether it acted promptly in filing its motion to reopen.

Chairman Jordan, dissenting:

Stoneco failed to timely contest the penalties at issue in this case. It now asks the Commission to reopen these proceedings on the grounds that it “overlooked the fact” that it was required to send a contest notice to the MSHA office in Arlington, Virginia. However, it received clear notice of this requirement, not once, but two times before the deadline to file a contest.

Not only did the proposed assessment itself advise Stoneco of its duty to contest the assessment within thirty days, but in addition, MSHA’s Conference Litigation Representative notified the operator in a May 13, 2010 letter that in order to contest the penalties, the assessment form would need to be returned to the address shown on the form. This letter also made clear that a conference would only be scheduled after the penalties had been contested, and that the operator’s request for a conference did not alter the requirement for filing a penalty contest.

Having reviewed Stoneco’s motion and the Secretary’s response, I would deny the operator’s request with prejudice. The Secretary provided clear instructions two times to Stoneco regarding the necessity of filing a timely penalty contest. Consequently, this is not a situation in which the operator should be provided with another opportunity to expand on its failure to contest the penalty. *See Extra Energy, Inc.*, 31 FMSHRC 377, 379-80 (Apr. 2009) (opinion of Commissioners Jordan and Cohen) (denying the request to reopen when the operator’s sole excuse for not filing timely notices of contest was that its representative was instructed to file the contests and failed to do so because a telephone call was not returned); *Left Fork Mining Co., Inc.*, 31 FMSHRC 8, 10 (Jan. 2009) (denying the request to reopen because the operator’s conclusory statement that its failure to timely file was due to inadvertence or mistake did not provide an adequate basis to justify reopening).

/s/ Mary Lu Jordan

Mary Lu Jordan, Chairman

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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May 24, 2011

JUSTIN NAGEL

:
:

v.

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:

Docket No. WEST 2010-464-DM

NEWMONT USA LIMITED

:

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

On January 5, 2010, Justin Nagel, acting *pro se*, filed a complaint of discrimination against Newmont USA Limited (“Newmont”) under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(3) (2006). On January 10, 2011, the judge in that case issued a Decision and Order Granting Respondent’s Motion to Dismiss for Failure to Comply with Discovery Orders and Lack of Candor with the Tribunal.

Mr. Nagel filed a Notice of Appeal on January 24, 2011. In that document, he stated that he was appealing the judge’s decision of January 10, 2011. We treated this document as a timely-filed petition for discretionary review of the judge’s decision.¹ Commission Procedural Rule 70, 29 C.F.R. § 2700.70.

¹ The statute provides that the only way to seek review by the Commission of an Administrative Law Judge’s decision is to file a “petition for discretionary review.” Section 113(d)(2) of the Act, 30 U.S.C. § 813(d)(2). Although Mr. Nagel’s filing was entitled “Notice of Appeal,” we treated it as a petition for discretionary review. Mr. Nagel’s argument that he has a right to file a “notice of appeal” is apparently based on Commission Procedural Rule 80(d), 29 C.F.R. § 2700.80(d), which relates solely to a judge’s decision in a referral for disciplinary proceedings. Other than referrals for disciplinary proceedings, review of a judge’s decision may be had by filing a petition for discretionary review pursuant to Commission Procedural Rule 70, 29 C.F.R. § 2700.70.

On February 18, the Commission issued an order denying Mr. Nagel's petition for discretionary review as well as his motion for a new hearing filed on February 11, 2011.

On March 22, Mr. Nagel filed a Motion to Vacate Commission Order, in which he sought to overturn the Commission's February 18 order.

Pursuant to Commission Procedural Rule 78, 29 C.F.R. § 2700.78, a party may file a petition for reconsideration of a Commission order within 10 days of its issuance. We will treat Mr. Nagel's Motion to Vacate Commission Order as a petition for reconsideration. However, Mr. Nagel's motion was filed 32 days after the issuance of the February 18 order and therefore was not timely. Even if it had been timely, we conclude that it did not provide any basis for reconsidering the February 18 order. For the foregoing reasons, the Motion to Vacate Commission Order is hereby denied.²

² On May 3, 2011, Mr. Nagel also filed a "Motion to Vacate Newmont's answer to Nagel's complaint as ordered by judge Lesnick and answer truthfully," which addressed an answer served by the operator on June 10, 2010 – almost one year ago. We hereby deny that motion as being filed too late and lacking any merit.

The February 18 order denying Mr. Nagel's petition is the final Commission order in this case. Accordingly, *the Commission will no longer accept for filing any document submitted by Mr. Nagel seeking to vacate or modify the February 18 order in any way.* If any such document is submitted in the future, the Commission will not consider it and will not issue any order addressing the document.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy
Michael F. Duffy, Commissioner

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

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

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

**601 NEW JERSEY AVENUE, NW
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WASHINGTON, DC 20001**

May 25, 2011

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

v.

MACH MINING, LLC

:
:
:
:
:
:
:
:
:
:
:
:

Docket No. LAKE 2010-190

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

ORDER

BY: Duffy, Young, Cohen, and Nakamura, Commissioners

In this civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006), Mach Mining, LLC (“Mach”) seeks to stay the instant proceeding pending the Commission’s disposition of an issue relating to its ventilation plan in *Mach Mining, LLC*, Docket Nos. LAKE 2010-1-R, et al. (“*Mach I*”). On February 2, 2011, Administrative Law Judge Margaret Miller issued an order denying Mach’s motion to stay. On February 9, 2011, Mach filed a motion for certification of the ruling for interlocutory review and a motion to stay. On February 16, 2011, the Secretary of Labor filed an opposition to this motion. The Judge issued an order denying the motion for certification and motion to stay on February 25, 2011.

On March 25, 2011, Mach filed with the Commission a petition for interlocutory review pursuant to Commission Procedural Rule 76, 29 C.F.R. § 2700.76, and a motion to stay this proceeding pending Commission review. In its petition, Mach seeks review of the Judge’s February 2 order denying the stay and February 25 order denying the certification and motion to stay. On April 6, 2011, the Secretary filed with the Commission an opposition to the petition for interlocutory review.

Upon consideration of Mach's petition, we have determined that it has failed to establish that the denial of the stay involves a controlling question of law and that immediate review may materially advance the final disposition of the proceeding. 29 C.F.R. § 2700.76(a)(2). We therefore deny the petition. We further deny as moot Mach's March 25 motion to stay proceedings pending Commission review.

/s/ Michael F. Duffy
Michael F. Duffy, Commissioner

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

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

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

Chairman Jordan, dissenting:

I would grant the operator's petition for interlocutory review and reverse the judge's order denying the motion to stay this proceeding pending the Commission's disposition in *Mach I*. The central issue in both cases is whether the termination of the March 13, 2009 withdrawal order constituted an approval of the operator's ventilation plan. Thus the judge's terse conclusion that the connection between the order at issue in this case and the cases on appeal in *Mach I* is "tenuous at best," Unpublished Order at 2 (February 2, 2011), is erroneous. Given the overlapping questions presented, I believe that judicial resources would best be served by staying this proceeding pending the Commission's decision in *Mach I*.

/s/ Mary Lu Jordan

Mary Lu Jordan, Chairman

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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May 26, 2011

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
 : Docket No. CENT 2011-233-M
v. : A.C. No. 41-04474-234386
 :
LONE STAR AGGREGATES :
ACQUISITIONS, LLC :

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On December 8, 2010, the Commission received from Lone Star Aggregates Acquisitions, LLC, a motion requesting that the Commission 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). On January 6, 2011, the Commission received a response from the Secretary of Labor stating that she does not oppose the request to reopen the assessment.

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

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

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

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy
Michael F. Duffy, Commissioner

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

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

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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May 26, 2011

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
v. : Docket No. CENT 2011-663-M
PEROVICH PROPERTIES, INC. : A.C. No. 29-00495-244249

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On April 26, 2011, the Commission received a letter from the President of Perovich Properties, Inc. (“Perovich”) seeking to reopen a penalty assessment that may have become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).¹

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

The Secretary submits that, upon reviewing the records in this proceeding, she has discovered that the proposed penalty was timely contested.

¹ This case was initially mistakenly docketed under the caption “Taos Gravel Products” due to the letterhead used by the operator.

Having reviewed Perovich's request and the Secretary's response, we find the request to reopen to be moot. Perovich has properly contested the proposed penalty assessment and, therefore, it did not become a final order of the Commission. Accordingly, the request to reopen is dismissed as moot.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy
Michael F. Duffy, Commissioner

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

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

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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May 26, 2011

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. KENT 2011-276
v.	:	A.C. No. 15-19228-215422
	:	
CUMBERLAND RIVER COAL	:	
COMPANY	:	

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On December 3, 2010, the Commission received from Cumberland River Coal Company a motion requesting that the Commission 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). On January 7, 2011, the Commission received a response from the Secretary of Labor stating that she does not oppose the request to reopen the assessment.

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

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

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

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy
Michael F. Duffy, Commissioner

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

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

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

**601 NEW JERSEY AVENUE, NW
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May 26, 2011

SECRETARY OF LABOR, : Docket No. WEST 2010-1658-M
MINE SAFETY AND HEALTH : A.C. No. 48-00154-216377
ADMINISTRATION (MSHA) :
 : Docket No. WEST 2010-1659-M
v. : A.C. No. 48-00154-219246
 :
OCI WYOMING, L.P. :

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On August 13, 2010, the Commission received from OCI Wyoming, L.P., requests to reopen penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).¹ On September 1, 2010, the Commission received responses from the Secretary of Labor stating that she does not oppose the requests to reopen the assessments.

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

We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from

¹ Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers WEST 2010-1658-M and WEST 2010-1659-M, both captioned *OCI Wyoming, LP*, and both involving similar procedural issues. 29 C.F.R. § 2700.12.

a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *See* 29 C.F.R. § 2700.1(b) (“the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure”); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Having reviewed the facts and circumstances of this case, the operator’s requests, and the Secretary’s responses, 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 2700.² Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy
Michael F. Duffy, Commissioner

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

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

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

² We note that the operator asserts that it expected its Accounting Department to forward the contest along with the payment of the penalties it did not seek to contest. The proposed assessment form indicates that payments and contests are sent to two different offices of the Mine Safety and Health Administration (“MSHA”). Contests are sent to MSHA’s Civil Penalty Compliance Office in Arlington, VA, whereas payments must be sent to MSHA in St. Louis, MO.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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May 26, 2011

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. WEVA 2011-556
v.	:	A.C. No. 46-05437-234136
	:	
SPEED MINING, LLC,	:	

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On December 7, 2010, Speed Mining, LLC, (“Speed Mining”) filed a motion requesting that the Commission reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Speed Mining states that it intended to contest Citation Nos. 8101994, 8101995 and 8102002 contained in Proposed Assessment No. 000234136. It further states that due to a “clerical error,” however, the contest form was misplaced and was not filed.

On January 13, 2011, the Secretary of Labor filed a response to Speed Mining’s motion to reopen. She asserts, among other things, that the operator’s statements are conclusory and lack sufficient detail. Therefore, the Secretary requests that the operator’s motion be denied.

The Commission has established that “[a]t a minimum, the applicant for such relief must provide all known details, including relevant dates and persons involved, and a clear explanation that accounts, to the best of the operator’s knowledge, for the failure to submit a timely response and for any delays in seeking relief once the operator became aware of the delinquency failure.” *Higgins Stone Co.*, 32 FMSHRC 33, 34 (Jan. 2010). In addition, the request should include “[a]ffidavits from persons involved in and knowledgeable of the situation and pertinent documents.” *Id.*

Having reviewed Speed Mining's motion to reopen, we conclude that the operator has not provided a sufficiently detailed explanation for its failure to timely contest the proposed penalty assessment. As a result, we conclude that grounds for reopening have not been established. *See id.* at 34-35; *Long Branch Energy*, 32 FMSHRC 1220, 1221 (Oct. 2010). Accordingly, Speed Mining's request to reopen Proposed Assessment No. 000234136 is denied without prejudice. Any amended or renewed request by the operator to reopen this assessment must be filed within 30 days of this order. Any such request filed after that time will be denied with prejudice.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy
Michael F. Duffy, Commissioner

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

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

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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June 1, 2011

SECRETARY OF LABOR	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
	:	Docket No. CENT 2011-193-M
v.	:	A.C. No. 23-00078-230288
	:	
CON-AGG OF MO, LLC	:	

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On November 18, 2010, the Commission received a request to reopen a penalty assessment issued to Con-Agg of MO, LLC. (“Con-Agg”) that became a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).¹

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

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

¹ On November 15, 2010, Con-Agg filed a letter with the Commission entitled “Notice of Contest” of Citation No. 6473993. We are treating Con-Agg’s letter as a request to reopen a proposed penalty assessment.

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).

On August 31, 2010, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued Proposed Assessment No. 000230288 to Con-Agg for six citations issued to the operator in July 2010. Con-Agg states that it first had constructive notice of the “citation” on November 8, 2010, and received actual notice on November 12, 2010.

The Secretary opposes reopening because MSHA records show that the proposed assessment was delivered to Con-Agg via Federal Express on September 7, 2010. The Secretary notes that except for Con-Agg’s suggestion that it did not receive the proposed assessment, the operator does not explain why it failed to contest the proposed assessment within 30 days of receiving it.

Having reviewed the operator’s request to reopen and the Secretary’s response thereto, we agree that Con-Agg has failed to provide a sufficient basis for the Commission to reopen the penalty assessment. The record indicates that Con-Agg received the proposed assessment on September 7, 2010, and was notified that it had 30 days from that date within which to contest the proposed assessment. Accordingly, we hereby deny without prejudice Con-Agg’s request to reopen. *FKZ Coal Inc.*, 29 FMSHRC 177, 178 (Apr. 2007); *Petra Materials*, 31 FMSHRC 47, 49 (Jan. 2009). The words “without prejudice” mean that Con-Agg may submit another request

to reopen Assessment No. 000230288.² Any amended or renewed request by the operator to reopen this assessment must be filed within 30 days of this order. Any such request filed after that time will be denied with prejudice.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy
Michael F. Duffy, Commissioner

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

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

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

² If Con-Agg submits another request to reopen, it must establish good cause for not contesting the proposed penalties within 30 days from the date it received the assessment from MSHA. Under Rule 60(b) of the Federal Rules of Civil Procedure, the existence of “good cause” may be shown by a number of different factors including mistake, inadvertence, surprise, or excusable neglect on the part of the party seeking relief, or the discovery of new evidence, or fraud, misrepresentation, or other misconduct by the adverse party. Con-Agg should include a full description of the facts supporting its claim of “good cause,” including how the mistake or other problem prevented it from responding within the time limits provided in the Mine Act, as part of its request to reopen. Con-Agg should also submit copies of supporting documents with its request to reopen and specify which proposed penalties it is contesting. In addition, Con-Agg should indicate when it first became aware that it had missed the contest deadline and whether it acted promptly in filing its motion to reopen.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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June 2, 2011

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket Nos. PENN 2009-775
	:	PENN 2009-825
v.	:	PENN 2010-63
	:	
SHAMOKIN FILLER COMPANY, INC.	:	

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. On April 25, 2011, Shamokin Filler Company, Inc. (“Shamokin”) filed a document entitled “Petition for Interlocutory Review” with the Commission pursuant to Commission Procedural Rule 76, 29 C.F.R. § 2700.76, that is at issue in this Order. Shamokin seeks review of an order issued by Administrative Law Judge John Lewis on March 11, 2011, in which he ruled that Shamokin’s carbon plant is under the regulatory jurisdiction of the Mine Safety and Health Administration

Previously, on April 6, 2011, Shamokin had filed with the Commission a document entitled “Petition for Discretionary Review,” seeking review of the judge’s order. The Commission determined that this order was not a final decision that ended his jurisdiction over this matter. In his decision, the judge resolved the jurisdictional issue, but made no findings regarding the violations and penalties at issue. As a result, the Commission determined that Shamokin’s petition was not a valid petition for discretionary review of a final decision under section 113(d) of the Mine Act, 30 U.S.C. § 823(d). On April 8, 2011, the Commission issued an order denying the petition on that basis.

On April 8, 2011, Shamokin filed a Motion for Certification of Interlocutory Review with Judge Lewis. On April 12, 2011, Judge Lewis issued an Order Denying Certification for Interlocutory Review.

Upon consideration of Shamokin's petition, we have determined that it has failed to establish that the March 11, 2011, order issued by Judge Lewis involves a controlling question of law and that immediate review may materially advance the final disposition of the proceeding. 29 C.F.R. § 2700.76(a)(2). We therefore deny the petition.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy
Michael F. Duffy, Commissioner

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

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

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

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Absmeier is hereby ordered to show cause within thirty (30) days of the date of this order why its request to reopen should not be denied as moot because the penalty has been paid. In the event that Absmeier fails to timely respond to this order, its request will be deemed denied without further order of the Commission.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy
Michael F. Duffy, Commissioner

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

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

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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June 7, 2011

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. SE 2011-16
	:	A.C. No. 01-00851-221338
v.	:	
	:	
OAK GROVE RESOURCES LLC	:	

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On March 9, 2011, Oak Grove Resources LLC (“Oak Grove”) renewed its previous motion to reopen penalties that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

On June 3, 2010, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued Penalty Assessment No. 000221338 to Oak Grove, proposing penalties of nearly \$125,000 for 80 citations and orders issued to the operator. In its original motion to reopen, Oak Grove stated that it wished to contest 27 of the penalties proposed for a total of nearly \$111,000.¹ Oak Grove explained that it failed to timely file a contest due to a miscommunication between its counsel and its safety director. Its safety director further stated in an affidavit that the contest form was submitted in July 2010 to MSHA with Oak Grove’s payment of the uncontested penalties, with both sent to MSHA’s address for penalty payments, not to the separate address for contests.

The Secretary opposed reopening of the proposed assessment on the ground that Oak Grove’s inadequate or unreliable internal procedures did not constitute an adequate excuse for reopening. She further argued that the large amounts of the penalties involved suggested that the operator’s internal procedures were particularly inadequate. She also stated that payment for the uncontested penalties was actually by check dated October 7, 2010, that there was no contest form attached to the payment, and that the payment did not designate which penalties were being paid.

We denied Oak Grove’s original motion without prejudice. We held, as we had in the past, including in other instances of Oak Grove defaults, that an inadequate or unreliable internal processing system does not constitute inadvertence, mistake or excusable neglect so as to justify the reopening of an assessment. *Oak Grove Res. LLC*, 33 FMSHRC 103, 104-05 (Feb. 2011). We specified that should Oak Grove renew its request to reopen, it must do so within 30 days, fully explain the circumstances in its failure to timely contest the proposed assessment, and address what it has done to ensure that it responds to proposed assessments in a timely manner, in order to avoid a repeat of the mistakes it outlined in its motion. *Id.* at 105. We further noted that the public record indicated that Oak Grove was significantly delinquent in the payment of uncontested penalties to MSHA, including with regard to assessments where it had contested some penalties. *Id.* at 105 n.2.

Regarding the circumstances surrounding the failure to timely contest the assessment, Oak Grove’s renewed motion includes the same affidavit as was submitted with its original request that the Secretary has previously shown to be untrustworthy. Oak Grove’s renewed motion also includes an affidavit from another company official, who explains the steps that have been subsequently taken to ensure that Oak Grove responds in a timely fashion to penalty assessments.

The Secretary continues to oppose Oak Grove’s request to reopen, reiterating the grounds in her original response, and further arguing that Oak Grove’s total delinquencies – over \$750,000 – raise the question of whether the operator is acting in good faith. The Secretary additionally notes that the fact that such delinquencies extend to the present date casts doubt on Oak Grove’s claim that it has taken steps to timely respond to penalty assessments. Oak Grove did not reply to

¹ Oak Grove in its renewed motion, as it did in its original motion, refers to Order No. 6690851 and Citation No. 8518607 twice each when listing the penalties it seeks to reopen.

the Secretary's opposition, in which the Secretary raised serious issues regarding Oak Grove's penalty contest and payment practices.

The Commission has made it clear that where a failure to contest a proposed assessment results from an inadequate or unreliable internal processing system, the operator has not established grounds for reopening the assessment. *Pinnacle Mining Co.*, 30 FMSHRC 1061, 1062 (Dec. 2008); *Pinnacle Mining Co.*, 30 FMSHRC 1066, 1067 (Dec. 2008); *Highland Mining Co.*, 31 FMSHRC 1313, 1315 (Nov. 2009); *Double Bonus Coal Co.*, 32 FMSHRC 1155, 1156 (Sept. 2010); *Oak Grove*, 33 FMSHRC at 104. In this case, in the absence of any rebuttal or explanation, we conclude that the failure to communicate between Oak Grove's safety director and its counsel represents an inadequate or unreliable internal processing system as the Secretary has alleged. We also note that this type of miscommunication appears to be part of a pattern for Oak Grove, as shown by the fact that it also occurred in two other default cases recently before the Commission, Docket Nos. SE 2009-812 and SE 2009-850. See *Oak Grove Res. LLC*, 32 FMSHRC 1253, 1254 (Oct. 2010).

Additionally, the Secretary has questioned whether the operator is acting in good faith, based on a delinquency history showing 20 penalty cases with a total delinquency of approximately \$758,361. It is well recognized in federal jurisprudence that the issue of whether the movant acted in good faith is an important factor in determining the existence of excusable neglect. *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 395 (1993); *FG Hemisphere Assocs., LLC v. Democratic Republic of Congo*, 447 F.3d 835, 838 (D.C. Cir. 2006). Likewise, the Commission has recognized that a movant's good faith, or lack thereof, is relevant to a determination of whether the movant has demonstrated mistake, inadvertence, surprise or excusable neglect within the meaning of Rule 60(b)(1) of the Federal Rules of Civil Procedure. *M.M. Sundt Constr. Co.*, 8 FMSHRC 1269, 1271 (Sept. 1986); *Easton Constr. Co.*, 3 FMSHRC 314, 315 (Feb. 1981).

The operator's failure to respond to the Secretary's argument that Oak Grove's delinquency history demonstrates bad faith supports our conclusion that Oak Grove has not met its burden of establishing entitlement to extraordinary relief.

Consequently, we again deny Oak Grove's request, this time with prejudice.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy
Michael F. Duffy, Commissioner

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

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

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 9, 2011

SECRETARY OF LABOR	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. KENT 2011-210
v.	:	A.C. No. 15-18936-206241
	:	
MRM MINING, INC.	:	

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On November 12, 2010, the Commission received a request to reopen a penalty assessment issued to MRM Mining, Inc. (“MRM”) that became a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

On December 16, 2009, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000206241 to MRM for 15 citations. The record indicates that the assessment was returned undelivered, as was the subsequent delinquency notice sent by MSHA, and a letter notifying MRM that its contest filed on April 16, 2010, was untimely.¹ MRM states that it did not receive the assessment in a timely manner due to a change made to its address. It submits that it no longer receives its mail at a "physical address," but at a post office box instead.

The Secretary opposes MRM's request, asserting that it is the operator's responsibility to notify MSHA of any change of address within 30 days of the change. She acknowledges that according to MSHA records, MRM requested that its address be updated to reflect its new P.O. Box on April 8, 2010. The Secretary notes that in July 2010 the Department of Treasury notified the operator that the assessment was delinquent, and in response, MRM filed a Dispute Form with Treasury. She maintains that the operator's untimely contest establishes that MRM was aware of the proposed assessment as early as April 16, 2010, and that the notification from Treasury in July brought the delinquency to its attention again. However, the operator waited until November 2010 to file its request to reopen.

It is an operator's responsibility to file with MSHA the address of a mine and any changes of address within 30 days. 30 C.F.R. §§ 41.10, 41.12. In the present case, it does not appear from the record that MRM maintained its correct address with MSHA as required by the regulations. Because MSHA was not notified until April 8, 2010, of MRM's change of address, it appears that the proposed assessment, issued on December 16, 2009, was served at the operator's official address of record. *See The Pit*, 16 FMSHRC 2033, 2034 (Oct. 1994); *Harvey Trucking*, 21 FMSHRC 567, 569 n.1 (June 1999).

Having reviewed the operator's request to reopen and the Secretary's response thereto, we conclude that MRM has failed to provide a sufficient basis for the Commission to reopen the penalty assessment. MRM's request does not adequately explain the company's failure to timely contest the proposed assessment. Specifically, MRM has offered no explanation as to when it changed its address and why it delayed in notifying MSHA of the change. It also fails to provide a detailed explanation of when and how it first received the proposed assessment. In addition, the operator has failed to explain why it delayed approximately four months in filing its request to reopen after learning of the delinquency from Treasury. Accordingly, we hereby deny without prejudice MRM's request to reopen. *FKZ Coal Inc.*, 29 FMSHRC 177, 178 (Apr. 2007); *Petra Materials*, 31 FMSHRC 47, 49 (Jan. 2009). The words "without prejudice" mean that MRM may

¹ On April 16, 2010, the operator mailed in its contest form to the MSHA office in St. Louis, MO. The form did not identify which citations were being contested, nor did it contain any payment.

submit another request to reopen Assessment No. 000206241.² Any amended or renewed request by the operator to reopen this assessment must be filed within 30 days of this order. Any such request filed after that time will be denied with prejudice.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy
Michael F. Duffy, Commissioner

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

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

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

² If MRM submits another request to reopen, it must establish good cause for not contesting the proposed penalties within 30 days from the date it received the assessment from MSHA. Under Rule 60(b) of the Federal Rules of Civil Procedure, the existence of “good cause” may be shown by a number of different factors including mistake, inadvertence, surprise, or excusable neglect on the part of the party seeking relief, or the discovery of new evidence, or fraud, misrepresentation, or other misconduct by the adverse party. MRM should include a full description of the facts supporting its claim of “good cause,” and address the issues raised in this Order, as part of its request to reopen. MRM should also submit copies of supporting documents with its request to reopen.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

**601 NEW JERSEY AVENUE, NW
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June 9, 2011

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. SE 2011-146-M
v.	:	A.C. No. 09-01038-226939 A
	:	
ROBERT COLEMAN, Employed by	:	
CARMEUSE LIME AND STONE	:	

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On December 6, 2010, the Commission received from Robert Coleman (“Coleman”) a motion requesting that the Commission reopen a penalty assessment against Coleman under section 110(c) of the Mine Act, 30 U.S.C. § 820(c), that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). On January 4, 2011, the Commission received a letter from the Secretary of Labor (“Secretary”) stating that she did not oppose the motion to reopen.

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

Order No. 6505780 was issued by the Mine Safety and Health Administration (“MSHA”) on June 16, 2009, to Carmeuse Lime and Stone (“Carmeuse”). On August 2, 2010, the MSHA issued Proposed Assessment No. 00226939A to Coleman, alleging that he was personally liable, pursuant to section 110(c) of the Mine Act, for the violation alleged in Order No. 6505780. The proposed assessment was apparently delivered to the Marble Hill Mine on August 5, 2010. According to Coleman, it was signed for by a “W. Weaver,” whom he identifies as William Weaver, an hourly employee of Carmeuse. William Weaver states in an affidavit that he has no

recollection of receiving the proposed assessment. Weaver further states, that even if he did receive the assessment, he does not recall “personally hand deliver[ing] it to Robert Coleman.”

In his motion to reopen, Coleman asserts that he did not timely contest the proposed penalty because he did not receive the proposed assessment.¹ Coleman states that he first learned that a penalty had been issued to him for the order on November 1, 2010, after receiving a delinquency notice from MSHA. Coleman requests that the proceeding be reopened so that the penalty case can move forward.

Commission Procedural Rule 25 provides, in pertinent part, that the Secretary “shall notify . . . any other person against whom a penalty is proposed of the violation alleged.” 29 C.F.R. § 2700.25. Accordingly, a proposed assessment under section 110(c) does not become a final order within 30 days, if the manner in which the proposed penalty was delivered to the individual does not provide him or her with actual notice of the proposed assessment. *See Stech, employed by Eighty-Four Mining Co.*, 27 FMSHRC 891 (Dec. 2005) (finding that a proposed assessment does not become a final order when it was mistakenly delivered to a separate firm in counsel’s office building, and addressed to the respondent himself rather than “in care of” his counsel). In *Stech*, the Commission advised that “[i]f the Secretary had sent the penalty proposal at issue here to [the respondent] at his home address or ‘in care of’ counsel at the counsel’s address, the confusion would presumably have been avoided.” 27 FMSHRC at 892 n.1.

¹ In his affidavit Coleman mistakenly states that Case No. 00226939A involves a penalty issued for Order No. 6505870, when in fact it involves a penalty issued for Order No. 6505780.

We conclude that Coleman was not provided with notice, as required by Procedural Rule 25. Accordingly, Proposed Assessment No. 00226939A is not a final order of the Commission. We remand this matter to the Chief Administrative Law Judge for assignment to a judge. This case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy
Michael F. Duffy, Commissioner

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

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

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

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June 9, 2011

SECRETARY OF LABOR,	:	Docket No. VA 2010-312
MINE SAFETY AND HEALTH	:	A.C. No. 44-01486-205234
ADMINISTRATION (MSHA)	:	
	:	Docket No. VA 2010-313
v.	:	A.C. No. 44-01486-202416
	:	
CALICO COAL, INC.	:	

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On April 28, 2011, the Commission issued an order directing Calico Coal, Inc. (“Calico”) to show cause why its request to reopen should not be denied as moot because Calico appeared to have paid the subject civil penalties. The order stated that Calico had “30 days of the date of this order” to provide its response to the Commission.

Because Calico has not responded to the show cause order within 30 days of the date of the order, we hereby deny the request to reopen as moot.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy
Michael F. Duffy, Commissioner

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

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

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 9, 2011

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. WEVA 2010-890
	:	A.C. No. 46-01544-206635
v.	:	
	:	
SPARTAN MINING COMPANY	:	

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On April 9, 2010, the Commission received from Spartan Mining Company (“Spartan”) a motion by counsel seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of inadvertence or mistake. *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).

On December 17, 2009, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued a proposed assessment to Spartan, which was delivered by Federal Express to the mine’s address of record on December 28, 2009. Spartan asserts that it was signed for by a temporary receptionist because the safety director and many of the regular office personnel were out of the office due to the holidays at that time. It states that it is “unknown what [the receptionist] did with the FedEx package.” Mot. at 4. In addition, the operator explains that Massey Coal Sales, Inc. (“Massey”), Spartan’s parent company, had requested MSHA to deliver all proposed assessments of Massey mines to Massey’s corporate legal office. According to Spartan, this procedure was not followed in this case, and the proposed assessment did not make it into Massey’s internal process for handling such forms, which also contributed to Spartan’s failure to timely contest the assessment. Spartan asserts that it discovered the assessment for the first time on February 12, 2010, and attempted to contest it that same day. On March 10, 2010, MSHA sent Spartan a letter indicating that its contest was unsuccessful. Spartan filed the present motion to reopen within 30 days of receiving this notice.

The Secretary opposes reopening arguing that an inadequate office procedure and conclusory statements as to why the operator filed late are not sufficient grounds for reopening. She also acknowledges that MSHA had agreed to start the address change for all Massey mines as a courtesy to Massey. However, the Secretary notes that it was Massey’s responsibility to file an updated address of record, which it had not done at the time of the response.

Having reviewed Spartan’s request and the Secretary’s response, in the interests 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. We base our decision to reopen on the promptness of the motion to reopen and the operator’s attempt to contest the proposed assessment as soon as it was discovered, albeit 16 days late. *See, e.g., Genesis, Inc.*, 32 FMSHRC 770, 771 (July 2010) (reopening when operator filed a formal contest two weeks late by mistake and acted very promptly in submitting its request to reopen the assessment). In addition, there appears to have been an understanding, which the Secretary acknowledges, whereby MSHA was to send the proposed assessments to a central office. This was not done here, which may have contributed to Spartan’s failure to timely contest the assessment.¹

¹ We note that the Secretary urges the operator to file the correct legal ID report to avoid such problems in the future.

Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy
Michael F. Duffy, Commissioner

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

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

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

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Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
601 New Jersey Avenue, N. W., Suite 9500
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On June 18, 2009, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000188695 to Mammoth. Mammoth, through its counsel, contends that it had implemented a new procedure for handling and filing proposed assessment forms, bringing the entire process in-house in early to mid June 2009, around the time that it received the assessment in this case. The operator states that under the new procedure, Mammoth's safety director would review the assessment form, mark the violations the company intended to contest, and scan and email the form to the corporate legal department, which would then prepare and file the form. The operator asserts that the safety director believes, based on his hand-written notes on the assessment form, that he timely received and forwarded the form to the legal department on July 7, 2009. The operator further states that the safety director has no record of the email sent because his old emails were lost when an updated computer program was installed on his computer. The operator notes that it timely contested three of the orders contained in the proposed assessment, and that the contests were docketed and stayed (Docket Nos. WEVA 2009-1482-R through 1484-R). The operator contends that it was not aware of the delinquency until it received the judge's order to show cause in those contest proceedings, which was issued on June 30, 2010. Upon receipt of the judge's order, the operator asserts that the safety director discovered that the legal department had no record of receiving the proposed assessment. The operator contends that it did not receive a delinquency notice from MSHA in this case. The operator surmises that "[e]ither [the safety director] sent the form to the legal department and it did not receive it or it was misplaced or [the safety director] mistakenly believed he had sent the form to the legal department but had not actually done so." Mot. at 4. The operator argues that it intended to contest the proposed assessment for 12 of the violations contained on the assessment form, but failed to do so due to inadvertence.

The Secretary opposes the motion on the basis that the operator's internal procedures were inadequate and unreliable and do not constitute an adequate excuse under Rule 60(b). She also states that the operator's conclusory and speculative statements regarding what occurred in this case are insufficient to warrant reopening. She notes that the operator received the assessment on June 25, 2009, that the assessment became a final order on July 25, 2009 and that a delinquency notice was sent on September 10, 2009. She also notes that this delinquent assessment appeared on subsequent assessments issued to the operator. While the operator claims that denial of reopening this assessment would result in severe consequences due to the operator's potential designation for a pattern of violations, the Secretary argues that this should have put the operator on heightened alert and that the operator should have been more vigilant. She also notes that the operator submitted its request just 17 days shy of one year without explanation for the delay.

Given the significant delay in seeking reopening and the inadequacy of the operator's explanation for its failure to timely submit its contest here, we cannot conclude that the operator's actions amount to mistake or inadvertence warranting relief. Mammoth provided no explanation for its failure to discover the delinquency here despite numerous opportunities. This delinquency appeared as an "outstanding balance" on six subsequent proposed assessments issued to Mammoth. Mammoth's argument about the severe consequences of the finality of the assessment is undercut by its failure to exercise reasonable diligence. Mammoth should have been carefully monitoring its assessments and expecting the proposed assessment at issue here given the pending

contest proceedings of the underlying orders. Under the circumstances, we conclude that Mammoth's delay in filing a request to reopen for nearly one year after the assessment became final was too long.

Based on the foregoing, we conclude that Mammoth has failed to provide an adequate basis for the Commission to reopen the penalty assessment. *See Pinnacle Mining Co.*, 30 FMSHRC 1061, 1062-63 (Dec. 2008) (denying relief because operator's excuse was insufficient); *Pinnacle Mining Co.*, 30 FMSHRC 1066, 1067-68 (Dec. 2008) (same). Accordingly, we deny Mammoth's request to reopen.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy
Michael F. Duffy, Commissioner

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

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

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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June 13, 2011

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
 : Docket No. CENT 2011-432-M
v. : A.C. No. 25-01033-224809
 :
KEMBEL SAND & GRAVEL :

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On February 18, 2011, the Commission received from Kembel Sand & Gravel (“Kembel”) a letter seeking to reopen a penalty assessment that may have become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

The Secretary submits that this request to reopen actually involves two other penalty cases: Docket Nos. CENT 2010-1072-M and CENT 2010-1073-M. With respect to Docket No. CENT 2010-1072-M, involving Citation Nos. 6426384 and 6426385, the operator successfully contested the proposed assessment, and a penalty petition was filed by the Secretary on September 13, 2010. The Secretary asserts that because the operator failed to answer the petition, she filed a motion for issuance of order of default on January 4, 2011. Instead of filing an answer, the operator appears to have filed this motion to reopen on February 18, 2011, with the Commission. Chief Administrative Law Judge Robert J. Lesnick issued a show cause order on March 15, 2011, and the operator filed a timely response to that order on April 8, 2011.

Because the matter is now proceeding before the Chief Judge, the motion to reopen with regard to these two citations is no longer necessary and is moot.

With respect to Docket No. CENT 2010-1073-M, involving Citation Nos. 6426382 and 6426383 contained on the same penalty assessment at issue, the Secretary states that the parties have agreed on a settlement and that a Decision Approving Settlement was issued by the Chief Judge on February 2, 2011. Therefore, we also dismiss the request as moot as to the penalties at issue in Docket No. CENT 2010-1073-M.

Having reviewed Kembel's request and the Secretary's response, we find the request to reopen to be moot in all respects. Accordingly, the request is dismissed.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy
Michael F. Duffy, Commissioner

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

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

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

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June 29, 2011

SECRETARY OF LABOR :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
 :
 :
 : Docket No. CENT 2011-210-M
v. : A.C. No. 25-01010-229138
 :
 :
OVERTON SAND & GRAVEL COMPANY :

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On November 29, 2010, the Commission received from Overton Sand and Gravel Company (“Overton”) a motion by counsel to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

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

On July 7, 2010, MSHA issued seven citations to Overton. The operator believed that the citations contained such “egregious factual errors” that it immediately contacted MSHA and requested a conference. Mot. at 2. MSHA replied by letter dated August 2, 2010, informing Overton that a conference would be scheduled after the penalties had been received and contested. Proposed Assessment No. 000229138, containing five of the seven citations, was issued on August 18, 2010, and delivered to Overton by Federal Express on August 25, 2010.¹ In October 2010, after not hearing from MSHA, the operator contacted MSHA to repeat its request for a conference. On November 3, 2010, Overton received a call from the MSHA Conference and Litigation Representative (CLR), who again informed the operator that it needed to send back its contest information. At some point thereafter, Overton discovered that the time to contest the penalties had passed.

Overton asserts that it is a small operator, and being unfamiliar with MSHA’s contest procedures, its personnel erroneously believed that its letter requesting a conference to discuss the citations preserved its rights. Overton then states that it believes it missed the initial penalty assessment because its personnel coordinator was transferred from the Overton office in August and the remaining personnel failed to forward the MSHA mail because they were instructed to look for mail from the Rocky Mount MSHA District office. Overton contends that it always intended to contest the citations.

The Secretary opposes the request to reopen and responds that, not only did Overton receive the proposed assessment on August 25, 2010, but that it was previously informed by MSHA that a conference would not be scheduled until after the operator received and contested the proposed assessment. The Secretary argues that the operator’s confusion is “inexcusable given the crystal clear instructions” provided in both the letter and the assessment form. S. Resp. at 4.

Following Overton’s request for a conference, MSHA informed the operator by letter that a conference would be scheduled after the penalties were assessed and its contest received. The letter went on to explicitly warn Overton that its “request for a Part 100 Safety and Health Conference does not constitute a contest of the proposed civil penalties, and does not alter the requirements for filing such a contest” Mot. at Ex. D.

Having reviewed Overton’s request to reopen and the Secretary’s response thereto, we conclude that the operator has failed to provide a sufficient basis for the Commission to reopen the penalty assessment. In particular, Overton has failed to explain the circumstances surrounding the transfer of its personnel coordinator, including exactly when the transfer occurred and the specific impact the transfer had on Overton’s ability to timely contest the proposed assessment.

¹ The two remaining citations were separately assessed on October 13, 2010, as proposed Penalty Assessment No. 000235394 and timely contested.

Accordingly, we hereby deny without prejudice Overton's request to reopen. *FKZ Coal Inc.*, 29 FMSHRC 177, 178 (Apr. 2007); *Petra Materials*, 31 FMSHRC 47, 49 (Jan. 2009). The words "without prejudice" mean that Overton may submit another request to reopen Assessment No. 000229138.² Any amended or renewed request by the operator to reopen this assessment must be filed within 30 days of this order. If an amended motion is not submitted within 30 days, this matter is dismissed with prejudice, regardless of the merits.

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

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

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

² If Overton submits another request to reopen, it must establish good cause for not contesting the proposed penalties within 30 days from the date it received the assessment from MSHA. Under Rule 60(b) of the Federal Rules of Civil Procedure, the existence of "good cause" may be shown by a number of different factors including mistake, inadvertence, surprise, or excusable neglect on the part of the party seeking relief, or the discovery of new evidence, or fraud, misrepresentation, or other misconduct by the adverse party. Overton should include a full description of the facts supporting its claim of "good cause," including how the mistake or other problem prevented it from responding within the time limits provided in the Mine Act, as part of its request to reopen.

Chairman Jordan and Commissioner Duffy, dissenting in part:

Overton failed to timely contest the penalties at issue in this case. It now asks the Commission to reopen these proceedings. In his affidavit, Overton's president and owner states that the operator had a mistaken belief that it preserved its rights when it sent a letter to MSHA requesting a conference on the underlying citations. He adds that the operator also failed to timely contest the penalties because it thought it "should be looking for an envelope from the Rocky Mountain District Office." Although not included in this affidavit, Overton's counsel also asserts that a personnel transfer also contributed to the error. We conclude that these excuses do not merit relief under Rule 60(b).

The operator received clear notice of the need to send in the assessment form to contest the penalties and preserve its rights, not once, but two times before the deadline to file a contest. The penalty assessment form received by Overton on August 25, 2010, stated that the operator had 30 days after receipt of the form to either pay the penalty or request a hearing and contest the proposed assessment by mailing the form to MSHA in Arlington, Virginia. Not only did the proposed assessment itself advise Overton of its duty to contest the assessment within thirty days, but in addition, MSHA's Conference Litigation Representative had previously notified the operator in an August 2, 2010 letter that in order to contest the penalties, the assessment form would need to be returned to the address shown on the form. This letter also made clear that a conference would only be scheduled after the penalties had been contested, and that the operator's request for a conference did not alter the requirement for filing a penalty contest.

Given Overton's admission that it believed it did not need to contest the penalties (because it had sent a letter requesting a conference on the citations), we do not see the relevance of the transfer of its personnel coordinator. Even if he or she had not been transferred, because Overton thought it had already preserved its rights by requesting a conference, it appears that the presence or absence of this staff member would have made no difference to how the operator reacted once the penalty was received.¹ Thus the majority's invitation to Overton to explain the impact the transfer had on its ability to timely contest the proposed penalties seems superfluous.

Having reviewed Overton's motion and the Secretary's response, we would deny the operator's request with prejudice. The Secretary twice provided clear instructions to Overton

¹ Similarly, the fact that Overton's staff had been instructed to look for mail from the Rocky Mount District Office to forward to the Lexington office appears irrelevant in light of Overton's belief that it need not contest the penalties once it had requested a conference. Moreover, it is undisputed that it received the penalty assessment from MSHA via FedEx on August 25, 2010. Even if staff had been alerted to forward mail from MSHA's Rocky Mount District Office, this did not relieve the operator of properly contesting the proposed assessment once the form had actually been received.

regarding the necessity of filing a timely penalty contest. Consequently, this is not a situation in which it should be provided with another opportunity to expand on its failure to contest the penalty. *See Extra Energy, Inc.*, 31 FMSHRC 377, 379-80 (Apr. 2009) (denying the request to reopen when the operator's sole excuse for not filing timely notices of contest was that its representative was instructed to file the contests and failed to do so because a telephone call was not returned); *Left Fork Mining Co.*, 31 FMSHRC 8, 10 (Jan. 2009) (denying the request to reopen because the operator's conclusory statement that its failure to timely file was due to inadvertence or mistake did not provide an adequate basis to justify reopening).

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy
Michael F. Duffy, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

**601 NEW JERSEY AVENUE, NW
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June 29, 2011

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
v. : Docket No. WEST 2011-263-M
NUCO INTERNATIONAL, INC. : A.C. No. 26-00081-229859 E7C

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On December 1, 2010, the Commission received from Nuco International, Inc., (“Nuco”) a motion requesting that the Commission 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). On December 28, 2010, the Commission received a response from the Secretary of Labor stating that she does not oppose the request to reopen the assessment.

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

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

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy
Michael F. Duffy, Commissioner

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

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

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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June 30, 2011

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
 : Docket No. WEST 2011-817-M
v. : A.C. No. 24-02070-133919
 :
JOHN RICHARDS CONSTRUCTION :

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On April 1, 2011, the Commission received a request from John Richards Construction (“Richards”) to reopen a penalty assessment that may have become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

The Secretary submits that, upon reviewing the records in this proceeding, she has discovered that the proposed penalty was timely contested.

Having reviewed Richards' request and the Secretary's response, we find the request to reopen to be moot. Richards properly contested the proposed penalty assessment and, therefore, it did not become a final order of the Commission. Accordingly, the request to reopen is dismissed as moot.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy
Michael F. Duffy, Commissioner

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

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

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

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE N. W., SUITE 9500
WASHINGTON, D.C. 20001

May 3, 2011

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2009-1197-M
Petitioner,	:	A.C. No. 15-04469-186365
v.	:	
	:	
CEMEX, INC.,	:	Mine: Kosmos Cement Company
Respondent	:	

DECISION ON MOTION FOR SUMMARY DECISION

This case is before me upon petition for civil penalty filed by the Secretary of Labor pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977 (“Mine Act” or “Act”), 30 U.S.C. §§ 815, 820. The Secretary, on behalf of the Mine Safety and Health Administration (“MSHA”), issued one citation to CEMEX Group, Inc. (“CEMEX”), for an alleged violation of a mandatory safety standard on fall protection, which provides in relevant part that “[s]afety belts and lines shall be worn when persons work where there is a danger of falling.” 30 C.F.R. § 56.15005. In addition, the Secretary alleges that the violation was the result of low negligence and was “S&S” – i.e., it significantly and substantially contributed to the cause and effect of a mine safety hazard.¹ CEMEX timely contested the Secretary’s assessment of civil penalty, and the case was assigned to me for adjudication.

I. STATEMENT OF THE CASE

On November 5, 2010, I held a conference call with counsel for the Secretary and with CEMEX, who appeared *pro se* through its representative Gayle R. Harrison. The parties agreed that the facts in this matter were not in dispute and the case could be disposed of through a motion for summary decision. I asked that the parties confer to establish a joint statement of uncontested material facts and requested that the Secretary then initiate a motion for summary decision, after which CEMEX would file a written response.

On December 1, 2010, the Secretary filed Petitioner’s Motion for Summary Decision pursuant to Commission Rule 67. 29 C.F.R. § 2700.67. Under Commission Rules 7, 8, and 10, CEMEX had until December 20, 2010 to file a written response. 29 C.F.R. §§ 2700.7-.8, .10. On December 14, 2010, my office received a phone call from Harrison asking what he should do

¹ The S&S terminology is taken from section 104(d)(1) of the Act, 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.” 30 U.S.C. § 814(d)(1).

next. That day, I instructed my law clerk, Joshua Shaw, to grant CEMEX 30 days to file a written response to the Secretary's motion.

On December 16, 2010, CEMEX filed a one-page letter responding to the Secretary's motion. Harrison wrote: "I do not want to rescind my opportunity to state my case, as I was led to believe that a motion for summary decision might bring that about. I apologize for my lack of knowledge in legal proceedings, but I don't think that should preclude the mine operator from defending himself in legal action." (Letter from G. Harrison to J. Shaw of 12/16/2010.) Harrison then set forth his arguments for CEMEX in response to the Secretary's motion for summary decision. (*Id.*)

Thus, on January 11, 2011, I issued an order allowing CEMEX to file an additional written response to the Secretary's motion by January 31, 2011, if it wished to do so. Given Cemex's *pro se* status, I wanted to ensure it would have a full opportunity to defend itself in the matter. On January 24, 2011, Harrison stated in an email to my law clerk: "I returned to you what was essentially my defense in a letter dated 12-16-10. Other than the contents of that letter, I have no more input to present supporting my position in KENT 2009-1197-M." (Email from G. Harrison to J. Shaw of 1/24/2011.)

II. ISSUES

In contesting the civil penalty petition, CEMEX argues that it should not be held liable for the driver's violation because he was employed by Pyles Trucking, Inc., an independent contractor. Harrison asserts the inspector stated, "[A]ccording to MSHA standards I cannot legally write a citation to the contract carrier, so therefore it must go to the mine operator." (Letter from G. Harrison to J. Shaw of 12/16/2010.) Harrison argues that "research indicates that similar violations have occurred from contract carriers resulting in citations from MSHA." (*Id.*) The Secretary argues that the Act places operators under strict liability for violations of MSHA safety standards; thus, the driver's violation should be imputed to CEMEX as a matter of law. Neither party disputes the validity of the violation or the gravity, negligence, and significant and substantial designations.

The dispositive issues in this case are whether a mine operator may be held liable when a driver employed by an independent contractor violates a mandatory safety standard, and if so, whether the assessed penalty is appropriate.

III. FINDINGS OF FACT

The parties agree that the following material facts are undisputed in this case.

Cemex operates Kosmos Cement Company ("Kosmos"), a mine as defined by 30 U.S.C. § 802(h)(1). The Kosmos mine is located in Jefferson County, Kentucky. (Secretary's Mot. for Summ. Decision ¶ 3.)

On April 21, 2009, MSHA inspector Sonia Conway conducted a regular inspection of the Kosmos mine. (*Id.* at ¶4.) During the inspection, she observed the driver of a tractor trailer tanker standing on top of the tanker, attempting to close a hatch. (*Id.*) The top of the tanker was

about three-feet wide and rounded, and the driver stood approximately twelve feet above the ground. (*Id.*) He was not wearing a line, safety belt, or other fall protection. (*Id.*) Conway also observed gusty wind conditions at the time the driver stood on top of the tanker. (*Id.*)

On the day of the inspection, CEMEX had posted signs at the entrances to Kosmos, informing customers that they were required to use the provided enclosed safety platforms to access the tops of the tankers. (*Id.* at ¶ 5.) CEMEX posted similar signs at the platforms themselves. (*Id.*)

The driver who Conway observed was not a CEMEX employee but a driver for Pyles Trucking, Inc. (*Id.* at ¶ 4.) Pyles Trucking is an independent company that contracts with CEMEX customers to pick up the product from Kosmos for delivery. (*Id.*) Conway spoke to the driver after he descended from the tanker roof, and they discussed what she had seen. (*Id.* at ¶ 6.) The driver indicated that he knew CEMEX policy forbade customers from standing on top of their tractor trailer tankers and that, instead, customers were required to use the enclosed safety platforms. (*Id.*) He admitted to entering the enclosed safety platform, lifting its protective barricade, and climbing on the tanker roof. (*Id.*)

Conway thereafter issued Citation No. 6512890 to CEMEX for a violation of 30 C.F.R. § 56.15005. (*Id.* at ¶ 7.) In the citation, “[s]he assessed the violation as reasonably likely to occur, as having a risk of causing fatal injury, and as serious [*sic*] and substantial.” (*Id.*) Conway determined that CEMEX’s negligence was low. (*Id.*)

IV. PRINCIPLES OF LAW

Commission Rule 67(b) sets forth the grounds for granting summary decision and provides as follows:

A motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows:

- (1) That there is no genuine issue as to any material fact; and
- (2) That the moving party is entitled to summary decision as a matter of law.

29 C.F.R. § 2700.67(b) (2010).

With regard to the issue of operator liability, the Commission and various courts have long recognized that the Act imposes strict liability on mine operators for violations of mandatory safety standards, regardless of fault, even for violations committed by contractors. *Dotson Trucking Co.*, 22 FMSHRC 441, 446 (Mar. 2000) (holding a mine operator liable for a violation caused by an independent contractor); *Cyprus Indus. Minerals Co. v. FMSHRC*, 664 F.2d 1116, 1119 (9th Cir. 1981) (noting that if the Secretary could not cite a mine operator for a contractor’s violations “the owner could evade responsibility for safety and health requirements by using independent contractors for most of the work”). Section 110(a)(1) of the Act provides that “the operator of a coal mine or other mine in which a violation occurs of a mandatory health or safety standard . . . shall be assessed a civil penalty by the Secretary.” 30 U.S.C. § 820(a)(1). The

statute's plain language indicates that "when a violation of a mandatory safety standard occurs in a mine, the operator is automatically assessed a civil penalty." *Ascaro v. FMSHRC*, 868 F.2d 1195, 1197 (10th Cir. 1989). Moreover, the Commission and courts have held that the Secretary has wide enforcement discretion and may proceed against an independent contractor, an operator, or both for a given violation. *Carmeuse Lime & Stone*, 29 FMSHRC 815, 820 (Sept. 2007); *Dotson*, 22 FMSHRC at 446.

V. ANALYSIS AND CONCLUSIONS OF LAW

A. Operator Liability

Commission case law on operator liability for a contractor's actions is clear and long-standing. As a mine operator, CEMEX may be held liable for all safety violations that occur at the mine, including those committed by the employees of its contractors. *Bluestone Coal Corp.*, 19 FMSHRC 1025, 1032 (Jun. 1997) (holding a mine operator liable for safety violations committed by a truck driver employed by an independent contractor); see *El Paso Quarry*, 1 FMSHRC at 2047 (holding a mine operator liable for safety violations committed by a customer while he picked up product from a mine). Whether CEMEX and the driver had a formal contractual relationship is immaterial; even customers who fail to comply with standards on mine property are "miners" within the meaning of the Act, and the operator will be held liable for their violations. *C.D. Livingston*, 7 FMSHRC 1485, 1487 (Sept. 1985) (citing *El Paso Quarry*, 1 FMSHRC 2046, 2047 (Dec. 1979)). Thus, CEMEX is liable for the actions of the Pyles Trucking driver while on the Kosmos mine property, regardless if Conway was wrong in her belief she could not cite the contractor. Conway could have cited CEMEX, Pyles Trucking, or both. *Carmeuse Lime & Stone*, 29 FMSHRC at 820. I determine that the Secretary properly cited CEMEX for the driver's conduct, despite the fact he is employed by an independent contractor.

Therefore, based on the above analysis I conclude that CEMEX was properly cited for a violation of 30 C.F.R. § 56.15005, even though the violation was committed by an employee of one of its contractors. Consequently, the Secretary is entitled to summary decision as a matter of law pursuant to 29 C.F.R. § 2700.67.

B. Penalty

The Commission outlined its authority for assessing civil penalties in *Douglas R. Rushford Trucking*, stating that "the principles governing the Commission's authority to assess civil penalties *de novo* for violations of the Mine Act are well established." 22 FMSHRC 598, 600 (May 2000). While the Secretary's system for points in Part 100 of 30 C.F.R. provides a recommended penalty, the ultimate assessment of the penalty is solely within the purview of the Commission. *Id.* Thus, a Commission Judge is not bound by the penalty recommended by the Secretary. *Spartan Mining Co.*, 30 FMSHRC 699, 723 (Aug. 2008). The *de novo* assessment of civil penalties does not require each of the penalty assessment criteria to be given equal weight. *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997).

Here, the inspector viewed the driver standing atop the tanker in plain sight, and the driver stated that no one from CEMEX prevented him from accessing the tanker roof in this manner.

However, it is clear the driver knew of CEMEX's policy requiring him to use the enclosed safety platform – he simply chose to ignore it. Indeed, CEMEX provided drivers with enclosed safety platforms so they could safely access the tanker hatch and posted numerous signs notifying drivers they were required to use the platforms. Moreover, the driver is a contractor and not an employee subject to the discipline schemes of the operator. I note the operator does not contest the gravity, negligence, or S&S designations. Nevertheless, after reviewing all these facts when weighing the section 110(i) factors, especially as they relate to the operators level of negligence, I determine these mitigating factors should be reflected in the penalty. I therefore conclude that a penalty of \$500.00 for the violation is appropriate.

VII. ORDER

In view of my conclusions above, it is **ORDERED** that Petitioner's Motion for Summary Decision is **GRANTED**. Citation No. 6512890 is hereby **AFFIRMED**.

WHEREFORE, the Respondent is **ORDERED** to pay a penalty of \$500.00 within 40 days of this decision. Upon receipt of full payment, this case is **DISMISSED**.

/s/ Alan G. Paez

Alan G. Paez

Administrative Law Judge

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/nev

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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May 3, 2011

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 2009-565
Petitioner	:	A.C. No. 12-02295-188278
v.	:	
	:	
BLACK BEAUTY COAL COMPANY,	:	
Respondent	:	Mine: FranciscoMine-Underground Pit

DECISION

Appearances: Awilda Marquez, Pam Mucklow, Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Arthur Wolfson, Dana Svendsen, Jackson Kelly, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Miller

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 Black Beauty Coal Company at its Francisco Mine, 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" or "Act"). This case was heard along with six other dockets that involve alleged violations at Black Beauty's Air Quality #1 Mine. However, this decision is being issued separately due to the number of citations in the other dockets and the length of the decision. This case involves four alleged violations with a total proposed assessment of \$49,463.00. The parties have settled three of the violations, leaving one citation for decision after hearing. The parties presented testimony and documentary evidence at a hearing held in Evansville, Indiana that commenced on February 15, 2011.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Black Beauty Coal Company, ("Black Beauty") operates the Francisco Mine (the "mine"), a bituminous, underground coal mine near Vincennes, Indiana. The mine is subject to regular inspections by the Secretary's Mine Safety and Health Administration ("MSHA") pursuant to section 103(a) of the Act, 30 U.S.C. □ 813(a), as well as spot inspections. The parties stipulated

that Black Beauty is the operator of the mine, that the mine's operations affect interstate commerce, and that it is subject to the jurisdiction of the Mine Act. Jt. Ex. 1, Stip. 1-7; (Tr. 587-588). Black Beauty is owned by Peabody Energy and is considered a large operator.

a. *Citation No. 6682485*

On April 21, 2009, Inspector Shaun Batty issued Citation No. 6682485 to Black Beauty for an alleged violation of section 75.380(d)(7)(iv) of the Secretary's regulations. The citation alleges that:

The lifeline located in the North West sub main secondary escape way from cross cut 1 through cross cut 4 is not located in such a manner for miners to use effectively to escape. The lifeline in the affected area measures approximately 7 feet up to 12 1/2 feet above the mine floor, for a distance of approximately 120 feet. The operator tried but was unable to pull the lifeline down therefore in the event of a disaster the miners trying to use the lifeline to escape would not have been able to keep hold of the lifeline and safely exit the mine. The operator immediately began taking action to correct the hazard.

The inspector found that a fatal injury was reasonably likely to occur, that the violation was significant and substantial, that fourteen persons would be affected, and that the violation was the result of high negligence on the part of the operator. The Secretary has proposed a civil penalty in the amount of \$40,180.00.

1. The Violation

Shaun Batty, a MSHA mine inspector, has worked for the Mine Safety and Health Administration for nearly four years. (Tr. 14). Prior to his employment with MSHA, Batty worked in the mining industry for ten years. *Id.* Batty explained that the Francisco mine is located near Francisco, Indiana and is a gassy mine that is subject to spot inspections. The mine operates three shifts per day and utilizes the room and pillar mining method. Inspector Batty arrived at the mine on April 21, 2009 at approximately 7:05 am to conduct a regular inspection. He was accompanied on the inspection by Chad Dudley, a Black Beauty representative. (Tr. 16).

After viewing the directional lifeline in the number two secondary escapeway, he cited a violation of 30 C.F.R. § 75.380(d)(7)(iv) which requires that "[e]ach escapeway shall be . . . [p]rovided with a continuous, durable directional lifeline or equivalent device that shall be . . . [l]ocated in such a manner for miners to use effectively to escape". Batty observed that a length of approximately 100 to 110 feet of the lifeline was 7 to 12 feet above the mine floor and could not be reached by miners. (Tr. 18). Batty requested that Dudley reach up and attempt to pull the lifeline down to a location where it could be held. Dudley walked to a nearby area where the lifeline was at a height that allowed him to reach up and grasp it. Dudley attempted to pull the lifeline down from the roof to a height that would allow a miner to use it to quickly escape the

mine. Dudley was unable to successfully pull the line down to a reasonable height. (Tr. 19). Batty also attempted to pull the lifeline down but was unable to do so. Batty explained that, in the event of a mine fire where smoke filled the mine, a miner would be unable to use the lifeline for a distance of 100 to 110 feet. The lack of the lifeline over that distance created a hazard such that, when lost in smoke, a miner would not be able to locate or use the lifeline and, therefore, would have difficulty safely and quickly exiting the mine. (Tr. 18-19).

Chad Dudley, a maintenance supervisor who accompanied Batty, has worked on belt drives and equipment for the past two years and has seven years of mining experience. He testified that he traveled with Batty on the rubber-tired diesel equipment as they traveled to the newer #2 unit. (Tr. 56-57). Dudley agreed that the lifeline was at an unreachable height and that he was not able to pull it down to an accessible height for the distance described by Batty. However, Dudley disagrees that the position of the lifeline, high above the reach of a miner, created a hazard. (Tr. 63-64).

Dudley believes that the lifeline was seven to twelve feet above the mine floor because the mine had been grading the road as part of the construction of an undercast, i.e., a ventilation structure to separate the air courses. He testified that no one would travel on the road through the area while the grading was being completed. Once the grading was complete, the overcast was to be put in place. In this instance, the grading had been completed on Saturday or Sunday but, by the time the inspector arrived on Tuesday, the overcast had not yet been put in place. (Tr. 59-60).

The Commission has regularly held that an escapeway is important and must be always ready to use for a safe and quick escape in the event of an emergency. In *American Coal Company*, 29 FMSHRC 941 (Dec. 2007), the Commission discussed the importance of escapeways and concluded that:

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

29 FMSHRC at 948. In this case, the existence of a continuous lifeline is the means to quickly and safely exit the mine. Given that there is no dispute that the lifeline was at a height of seven to twelve feet above the mine floor, I find that the lifeline was not located such that a miner could effectively use it. For the foregoing reasons, I find that the Secretary has demonstrated the violation as alleged.

2. Significant and Substantial Violation

A significant and substantial ("S&S") violation is described in section 104(d)(1) of the Act as a violation "of such nature as could significantly and substantially contribute to the cause and

effect of a coal or other mine safety or health hazard”. 30 U.S.C. § 814(d)(1). A violation is properly designated S&S “if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *Cement Div., Nat’l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). The Commission has explained that:

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

Mathies Coal Co., 6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); *see also*, *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff’d* *g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (Dec. 1987) (approving Mathies criteria).

The difficulty with finding a violation S&S normally comes with the third element of the Mathies formula. In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985), the Commission provided additional guidance:

We have explained further that the third element of the Mathies formula “requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury.” *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1866, 1868 (August 1984); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574-75 (July 1984).

This evaluation is made in consideration of the length of time that the violative condition existed prior to the citation and the time it would have existed if normal mining operations had continued. *Elk Run Coal Co.*, 27 FMSHRC 899, 905 (Dec. 2005); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC at 1574. The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988) *Youghiogeny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987).

I have found that there is a violation of the mandatory safety standard as alleged by the Secretary. Second, I find that a discrete safety hazard existed as a result of the violations, i.e., the

danger of not being able to access or use the lifeline in the event of an emergency where visibility is reduced and miners must rely upon the tangible nature of the lifeline to quickly and safely escape the mine. While there may be safety measures in place, they do not take away from the fact that an incident necessitating the use of the lifeline is likely to occur in this gassy mine. Third, the hazard described will result in an injury. Fourth, and finally, that injury will be serious or even fatal.

While I do not disagree with the Secretary's argument that escapeway violations and citations that deal with emergency requirements should be subject to a presumption that an emergency will occur, no such presumption is required in this case. Batty explained that, based on the history of similarly situated mines, as well as his own experience, there is a likelihood of fire or explosion. There is a well-documented history of fires and explosions in underground mines where the lack of visibility and potential disruption in ventilation have caused miners to lose their lives. The Francisco mine is a gassy mine. On the day of the inspection, Batty observed a belt out of alignment in the entry adjacent to the escapeway. The belt rubbing on the metal of the conveyor was a heat source that would ignite the coal and coal dust if the conditions remained as he observed them. (Tr. 21-22). In addition, Batty has cited the mine in the past for extensive accumulations along the belt lines and on electrical and diesel powered equipment. (Tr. 22-23). Batty believes that there is a real likelihood of a fire and explosion that would bring in to play the lifelines in the escapeway.

Batty further addressed the likelihood of an accident or explosion when he testified that this is a gassy mine that, at the time of the inspection, was subject to a ten day spot inspection. Given the continued course of mining, the fact that this is considered a gassy mine, and the previous violations, I am persuaded that an emergency is reasonably likely to occur in the course of continued mining operations. It may be reasonably inferred that, in the continued mining operations and given the presence of accumulations and ignition sources, a fire was reasonably likely to occur which would have necessitated the use of the lifeline. *See Enlow Fork Mining Co.*, 19 FMSHRC 5, 9 (Jan. 1997); *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (Apr. 1988). Any fire or explosion necessitating the use of the cited lifeline would certainly have resulted in miners being seriously, or even fatally, injured.

In Batty's view, the fact that there is another, primary, escapeway does not take away from the hazard, as the other escapeway is equally vulnerable to the effects of a fire. (Tr. 23-24). When an explosion or fire does occur, mines quickly fill with smoke, thereby making it difficult, if not impossible, to see. Batty described the consequences of a fire or explosion in a mine without an accessible lifeline by stating that "the visibility it's next to nothing, you can't see your hand in front of your face. You're in such a panic, you're tripping, your stumble hazard, not being able to grab ahold of [the] lifeline." (Tr.25).

Lifelines serve the important purpose of facilitating a miner's quick and safe exit from a mine. Miners expect to easily locate and grab hold of the lifeline. Even if they can't see it, they are trained to know where it should be and how to find it. If the lifeline is not where it is expected to be, the miners become disoriented and it becomes even more difficult to safely and quickly escape, especially when combined with tripping and stumbling hazards along the escapeway that

may not be visible. There are not always mantrips available on the section, and even if one is available, the lack of visibility would hinder the ability to drive it out of the mine. Hence, if an escaping miner cannot reach the lifeline for 110 feet, he will become disoriented in a matter of seconds, could stumble and fall, and not know which way to travel to exit the mine. A miner unable to quickly find his way out would be exposed to toxic fumes and carbon dioxide. Serious injury or death would occur. Moreover, the likelihood of injuries or death increases as the distance of unavailability of the lifeline increases. There were 14 miners on the section at the time the citation was issued, all of whom would have been affected by this condition. In addition, approximately 28 miners could have been affected if a fire or explosion were to occur during a shift change. (Tr. 27).

Based on his experience and training, Batty determined that the lack of a lifeline over the cited distance was a hazard that was reasonably likely to cause an injury. The hazard would result in loss of life if this condition were allowed to exist during the continued course of mining. This mine is currently on a 103(i) spot inspection every 5 days, but was on a ten day spot at the time of the citation due to the large quantities of methane liberated. (Tr. 33). The mine argues that the methane is primarily emitted at the sealed areas of the mine but, nonetheless, the mine is considered a gassy mine.

In reaching my conclusion that this violation is significant and substantial, I have considered the arguments set forth by Black Beauty. The mine argues that this is a secondary escapeway and that miners are trained to first use the primary escapeway. Further, if using the secondary escapeway the miners would first attempt to drive out of the mine. (Tr. 57-58, 64). I credit Batty's testimony that the existence of the other, primary, escapeway does not take away from the hazard. Trained miners are still susceptible to panic and disorientation. The mine also argues that the nature of the ventilation system was such that if a miner became disoriented, he could easily correct his direction of travel by feeling the direction the air was blowing and determining if he was heading the right way. (Tr. 65). Again, I credit Batty's testimony regarding the panic and disorientation that miners often exhibit in an emergency. (Tr. 49-50).

I conclude that a preponderance of the evidence establishes that it was reasonably likely that the unreachable, and thus unusable, lifeline created a hazard, that the condition was reasonably likely to result in injury causing event, and that the injuries would be serious or fatal. I rely primarily on the testimony of Inspector Batty in reaching this conclusion. I find that the Secretary has satisfied the four Mathies criteria and established the violation as S&S.

3. High Negligence

When Batty arrived in the area, he immediately noticed that the lifeline was 7 to 12 feet above the ground. This condition existed for a distance of at least 100 feet. In Batty's view, management directed the building of the overcast. The grading of the road began on April 16th, i.e., five days prior to the citation he issued on April 21st. (Tr. 28). When the floor was lowered, the lifeline was kept in place instead of being dropped with the floor. The obvious violative condition existed for 5 days while superintendents, examiners, and foreman all traveled in the area. Management had to travel by the inaccessible lifeline during every shift for each of the five

days. The lifeline was in the travelway, and had reflective material which causes it to stand out and be more likely to be seen. (Tr. 28-29).

In this case, the lifeline was in a location that could not be reached by anyone, but was visible to everyone, for at least five days. The operator argues that, although the lifeline was higher than it should have been for a number of days, the mine was in the process of building an overcast. According to the mine, the road had been graded but the overcast was not yet in place at the time the violation was issued. However, I find that the mine did not offer a reasonable justification to have left the lifeline out of reach for the five days.

Based upon the credible evidence, the Respondent allowed the obvious condition to go uncorrected for an unjustified extended period of time. I find that the violation is a result of the operator's high negligence.

II. PENALTY

The principles governing the authority of Commission administrative law judges to assess civil penalties de novo for violations of the Mine Act are well established. Section 110(i) of the Mine Act delegates to the Commission and its judges the authority to assess all civil penalties provided in the Act. 30 U.S.C. § 820(i). The Act delegates the duty of proposing penalties to the Secretary. 30 U.S.C. 815(a), 820(a). Thus, when an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess the penalty. 29 C.F.R. § 2700.28. The Act requires that, in assessing civil monetary penalties, the Commission ALJ shall consider the six statutory penalty criteria:

[1] the operator's history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] the effect 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).

I accept the stipulation of the parties that the proposed penalty is appropriate to this operator's size and ability to continue in business and that the violations were abated in good faith. The history of violations at this mine is normal for its size.¹ The size of the operator is

¹At hearing, the Secretary mistakenly submitted a history of violations for a different mine than the Francisco mine. Consequently, I take judicial notice of the history of violations at the Francisco Mine for the time period 1/4/2008 through 4/21/2009. This information is publicly available on the MSHA website at <http://www.msha.gov/drs/drshome.htm>.

large. I have discussed the negligence and gravity associated with the citation above and I accept the designations of negligence and gravity as set forth in the citation. After considering all of the penalty criteria, I assess a penalty of \$45,000.00 for the citation discussed above.

The parties have settled the remaining citations in this docket. The terms of the settlement are as follows:

Citation No.	Cited Standard	Originally Proposed Assessment	Settlement Amount	Modification
8415720	75.370(a)(1)	\$2,473.00	\$499.00	Reduction in gravity to Non-S&S.
8415901	75.1714-6	\$3,405.00	\$687.00	Reduction in gravity to Non-S&S.
8415902	75.1914(f)	\$3,405.00	\$207.00	Reduction in gravity to Non-S&S; reduction in negligence to Moderate.
Total		\$9283.00	\$1393.00	

I have considered the representations submitted by the parties and I conclude that the proposed settlement is appropriate under the criteria set forth in section 110(i) of the Act. The motion to approve settlement is **GRANTED**.

III. ORDER

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), I assess the penalties listed for the citation heard and the settled citations listed above for a total penalty of \$46,393.00. Black Beauty Coal Company is hereby **ORDERED TO PAY** the Secretary of Labor the sum of \$46,393.00 within 30 days of the date of this decision.

/s/ Margaret A. Miller

Margaret A. Miller

Administrative Law Judge

Distribution: (First Class U.S. Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001

May 3, 2011

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2006-853
Petitioner	:	A.C. No. 46-08791-090341-01
	:	
	:	Docket No. WEVA 2006-854
	:	A.C. No. 46-08791-090341-02
v.	:	
	:	Docket No. WEVA 2007-666
	:	A.C. No. 46-08791-121866-01
	:	
WOLF RUN MINING COMPANY,	:	Sago Mine
Respondent	:	

DECISION ON REMAND

Appearances: Robert S. Wilson, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Petitioner;
R. Henry Moore, Esq., Jackson Kelly PLLC, Pittsburgh, Pennsylvania, for the Respondent.

Before: Judge Feldman

These civil penalty matters have been remanded by the Commission for further consideration. 32 FMSHRC 1669 (Dec. 2010). The subject five citations, that concern lightning arrester protection for exposed power conductors and telephone wires, were issued following the Mine Safety and Health Administration (“MSHA”) investigation of the January 2006 Sago Mine disaster. The explosion, in which 12 miners were killed and one was seriously injured, was caused by lightning that ignited methane in an inactive area of the mine. *Id.* at 1670. The explosion destroyed seals that separated the inactive area from the active workings. *Id.* The five citations at issue did not contribute to the accident.

A. Background

The five citations allege violations of the mandatory standard in 30 C.F.R § 75.521. Section 75.521 states:

[1] Each ungrounded, exposed power conductor and each ungrounded, exposed telephone wire that leads underground shall be equipped with suitable lightning

arresters of approved type within 100 feet of the point where the circuit enters the mine. [2] Lightning arresters shall be connected to a low resistance grounding medium on the surface which shall be separated from neutral grounds [for underground equipment] by a distance of no less than 25 feet.¹

An understanding of the design and function of lightning arresters is essential for an understanding of the resolution of the issues in this case. The parties have explained the principles behind the operation of lightning arresters:

A lightning arrester is a device that limits the overvoltage of lightning or other electrical surges by providing an electrical path between an ungrounded conductor and earth which is used as the grounding medium. A simple lightning arrester consists of two contacts that are separated by an air gap. One contact is connected to the transmission line and the other is connected to earth. The normal voltage of the circuit cannot bridge the gap. When an overvoltage occurs it sparks the gap between the contacts. This creates an electrical path for the excess energy to discharge to earth.

Jt. Ex. 1, at 3.

The Commission's remand described the interrelationship between the first provision of section 75.521 that requires lightning arresters, and the second provision that requires ground field separation. The Commission stated:

When an arrester directs overvoltage from lightning into the ground on the surface of the mine, an electrical field is created there, and serves as the grounding medium for that arrester. That area cannot be too close to the separate area serving as the neutral ground for a mine's underground electrical equipment, otherwise electrical current from a lightning strike could travel along the neutral grounding medium to the underground equipment. To reduce the likelihood of such an event occurring, the second sentence of section 75.521 requires that the grounding medium for a lightning arrester must be at least 25 feet away from the neutral grounding medium for the underground equipment. Tr. 344, 398-400;² Gov. Ex. 8 (MSHA Program Policy Manual ("PPM") excerpt for section 75.521 (stating that "[t]his distance prevents lightning surges from being transmitted to the neutral ground field where they could momentarily energize the frames of equipment grounded to the neutral ground field").

¹ The area designated to serve as the neutral ground for underground equipment is a low resistance ground bed, which would serve to dissipate electricity from the frames of such equipment in the event of an electrical fault in the system. Tr. 383-84.

² References to the trial and oral argument transcripts are by "Tr." and "OA Tr.," respectively, followed by the transcript page.

Electrical energy travels in all directions through the path of least resistance. Tr. 315. Consequently, the purpose of section 75.521 is twofold: (1) to provide arrester protection from a lightning surge in power conductors and telephone wires situated on the surface that lead underground; and, (2) to maintain a separation of at least 25 feet between the arrester ground field on the surface, and the neutral ground for underground equipment, to prevent a lightning surge from traveling underground.

B. Summary of Disposition

Specifically, the subject citations are: (1) a significant and substantial (“S&S”)³ “grounding medium citation” concerning the 25 feet minimum separation of a lightning arrester ground field from the neutral grounds in Citation No. 7583340; (2) the failure to install lightning arresters on power conductors in a 120-volt cable energizing an underground water pump from a power center on the surface, designated as non-S&S, in Citation No. 7582485; (3) the failure to install lightning arresters on exposed power conductors in two 575-volt cables that originated from a power station underground and energized two battery chargers on the surface, designated as S&S, in Citation Nos. 7583316 and 7583317; and, (4) the failure to install lightning arresters on two telephone wire conductors and trolley wire conductors that ran from the dispatcher’s office on the surface and entered the mine through a track entry, designated as S&S, in Citation No. 7335233.

The initial decision affirmed three of the five citations. The grounding medium and water pump citations were affirmed. The telephone and trolley wire citation also was affirmed, although the S&S designation was deleted. 31 FMSHRC 640 (June 2009) (ALJ). The two battery charger citations were vacated. *Id.*

In its remand, the Commission did not disturb the initial decision with respect to the affirmation of water pump Citation No. 7582485.⁴ 32 FMSHRC at 1688. The remand vacated the affirmation of S&S grounding medium Citation No. 7583340. *Id.* The initial determination vacating the two battery charger cable Citation Nos. 7583316 and 7583317 was reversed and remanded. *Id.* Finally, the telephone and trolley wire Citation No. 7335233 was affirmed in result and remanded for a resolution of the S&S issue. *Id.*

³ Generally, a violation is properly designated as S&S if it is reasonably likely that the hazard contributed to by the violation will result in a serious injury. *Nat’l. Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981).

⁴ As explained herein, there is an important distinction between the energy sources for the water pump and battery chargers. Unlike the water pump, which was energized from a power center located on the surface, the battery chargers were energized from an underground power center that was connected to the neutral grounds.

Following the remand, the parties participated in a telephone conference to discuss the issues raised by the Commission. The parties agreed to present oral argument, in lieu of filing briefs. The oral argument was held at the Commission's Headquarters on March 1, 2011. At the close of the oral argument, the parties waived the filing of additional briefs.

As discussed herein, S&S grounding medium Citation No. 7583340 shall be affirmed. Battery charger cable Citation Nos. 7583316 and 7583317 shall be vacated based upon a lack of adequate notice. As summarized below, the S&S designation in telephone and trolley wire Citation No. 7335233 shall be deleted.

With respect to the telephone and trolley wire citation, the Secretary argues that a lightning strike, however remote, should be assumed for the purposes of S&S. The Secretary's reliance on assumption is misplaced because whether a hazard posed by a violation can contribute to serious injury, and whether such injury is reasonably likely to occur, are independent issues. A relevant lightning strike may be assumed for the limited purpose of determining whether the hazard posed by a violation is capable of resulting in serious or fatal injuries. With regard to S&S, however, consistent with *Mathies*⁵ and its progeny, the Secretary retains the burden of demonstrating that a relevant lightning strike event is reasonably likely, in turn, posing the reasonable likelihood that serious injury or death will occur. The S&S designation shall be deleted because it is not reasonably likely that a lightning strike will occur in proximity to a particular location. Thus, it cannot be said that it is reasonably likely that a serious lightning related injury will occur as a consequence of the cited violation.

C. Separation of Grounding Mediums – Citation No. 7583340

At the Sago Mine, there were three high-voltage power lines, suspended on a series of poles, that originated from the substation. Gov. Exs. 9, 22, 23; 32 FMSHRC at 1672. The high-voltage lines were equipped with an overhead "static wire" that provided "umbrella" type protection from lightning. 32 FMSHRC at 1672. The high-voltage lines were also equipped with multiple lightning arresters. *Id.* The static line and the arresters had a common ground to earth at the base of one of the poles, known as a "butt ground," via copper wires designed to transfer energy from a lightning strike. *Id.* Intermingled with the high-voltage lines was a cable powering stacker belts that were located entirely above ground. *Id.* It is undisputed that one end of the copper ground wire in that cable was connected to the butt ground. *Id.*

i. Connection to the Belt Structure

The Secretary's mine inspectors testified, as alleged in Citation No. 7583340, that the other end of the ground wire in the cable was connected to the metal frame of the conveyer belt which, in turn, was connected to the neutral grounds through the underground power center. *Id.* at

⁵ As discussed *infra*, the Commission initially articulated the parameters for its analysis of whether a violation is significant and substantial in *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984).

1672-73. In contrast, Wolf Run's safety manager, John Stemple, denied that the ground wire was attached to the belt structure. Stemple asserted that the ground wire entered a steel pipe through a weatherhead where it connected to an electrical control box that powered the stacker belts. Tr. 727-28. In such a case, the butt ground would not have been connected to the neutral grounds.

Resolution of this issue is necessary to determine the fact of the alleged violation. If the ground wire was attached to the belt structure as alleged, it constituted a violation of the provision of section 75.521 that requires the arrester butt ground and the neutral grounds to be separated by at least 25 feet. The Commission's remand directs that I resolve this underlying credibility issue.

Although the initial decision did not explicitly discredit Stemple's testimony, the decision credited the testimony of MSHA inspectors James Honaker and Arthur Wooten, both of whom observed that the ground wire was attached to the belt structure. Tr. 69-71, 332, 359, 831. Their observations were discussed with Dave Mason, an electrical contractor employee, and Larry Dean, an electrician employed by Wolf Run, who were also present at the time of Wooten's and Honaker's observations. Tr. 831-34. Significantly, Wolf Run did not call Dean to rebut the recollections of Honaker and Wooten. More significant however, is the contemporaneous diagram drawn by Honaker, dated February 8, 2006, which depicts a "solid connection" between the cable's ground wire and the belt structure frame. Tr. 832-33; Gov. Ex. 22.

At oral argument, Wolf Run conceded that the record does not reflect when Stemple observed the subject ground cable. OA Tr. 23. Moreover, Stemple's assertion, without more, is a self-serving exculpatory statement entitled to little weight. In the final analysis, the weight of the evidence based on the objective and corroborated observations of two mine inspectors, as well as their contemporaneous notes, supports the fact of the violation with respect to the connected ground fields.

ii. Conductivity of the Belt Structure

The remand also directed that I address Wolf Run's alternative argument that, even if a belt structure connection was established, the belt structure lacked the conductivity to constitute a violation of the ground field separation requirement in section 75.521. 32 FMSHRC at 1676-77. Specifically, Wolf Run contends the belt structure was incapable of conducting electrical current the distance of approximately 75 feet that separated the grounded connection at the frame from the stacker motor.⁶ OA Tr. 48-50; Gov. Ex. 22. As a threshold matter, Wolf Run's assertion concerning the lack of conductivity of the belt structure is speculative. Moreover, it is not supported by Wooten's testimony that the belt structure serves as a grounding medium. Gov. Ex. 9; Tr. 278-80; 341-46. Wooten's testimony in this regard is consistent with MSHA's Sago Mine Accident Report that noted that "grounding conductors for

⁶ The stacker motor, which was bolted to the conveyor structure, was grounded to the neutral ground through the underground power center. Gov. Exs. 9, 22.

the belt starters and motors on all conveyor belts were connected to the frames of the starters, the belt drive motors, and the *metal frames of each conveyor belt.*” MSHA, *Report of Investigation of the January 2, 2006, Fatal Underground Coal Mine Explosion at the Sago Mine*, 163, (2007) (emphasis added).⁷

Finally, Wolf Run’s assertion that the belt structure is an ineffective grounding medium is belied by its own conduct. It is significant, if not dispositive, that Wolf Run’s utilization of the copper ground wire, by attaching it to the conveyor belt frame, is an evidentiary admission by conduct.⁸ In addition, the lack of conductivity argument is also at odds with Wolf Run’s assertion, articulated during oral argument, that current carried by the belt structure would be directed to ground at the base of the belt support structure on the surface, rather than to the neutral ground. OA Tr. 95.

In the final analysis, the evidence supports the fact that the copper ground wire in the cable energizing the stacker motor was connected to both the belt structure and the arrester butt ground field. Given the belt structure’s capacity to conduct electricity, the neutral grounds and the butt ground were not separated by 25 feet as required by section 75.521. Consequently, the Secretary has demonstrated the fact of the violation cited in Citation No. 7583340.

iii. S&S

Having established the fact of the violation, the remaining issue is the propriety of the Secretary’s S&S designation. As a general proposition, a violation is properly designated as S&S if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to by the violation will result in an injury or an illness of a reasonably serious nature. *Nat’l. Gypsum*, 3 FMSHRC at 825. In *Mathies*, the Commission explained:

In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary of Labor must prove:

(1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard – that is, a measure of danger to safety – contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to [by the violation] will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

⁷ Although not admitted in evidence, the Sago Mine Accident Report is a public document.

⁸ “Conduct of a party inconsistent with [its] position on trial is admissible against [it] as an ‘admission by conduct.’ . . . Conduct regarded as an admission is a form of circumstantial evidence. The inference is from the conduct to the state of mind of the actor, and from his state of mind to the fact which caused it.” *Richardson on Evidence*, 10th Ed., § 219.

6 FMSHRC at 3-4; See also *Austin Power Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria).

In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985), the Commission explained its *Mathies* criteria as follows:

We have explained further that the third element of the *Mathies* formula “requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury.” *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1834, 1836 (Aug. 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Company Co., Inc.*, 6 FMSHRC 1866, 1868 (Aug. 1984) (emphasis in original).

The Commission subsequently reasserted its prior determinations that as part of any S&S finding, the Secretary *must prove* the reasonable likelihood of an injury occurring as a result of the hazard contributed to by the cited violative condition or practice. *Peabody Coal Co.*, 17 FMSHRC 508 (April 1995); *Jim Walter Resources, Inc.*, 18 FMSHRC 508 (April 1996).

Resolution of whether a particular violation of a mandatory standard is S&S must be made assuming continued normal mining operations. *U.S. Steel Mining*, 7 FMSHRC at 1130. Thus, consideration must be given to both the time frame that a violative condition existed prior to the issuance of a citation, and the time that it would have existed if normal mining operations had continued. *Bellefonte Lime Co.*, 20 FMSHRC 1250 (Nov. 1998); *Halfway, Inc.*, 8 FMSHRC 8, 12 (Jan. 1986).

Consistent with *Mathies* and its progeny, the focus is on the hazard posed by the cited violation. Section 75.521 seeks to ensure that electrical energy dissipated into the surface butt ground is not transferred back through the underground mine by way of the neutral ground medium. Applying *Mathies*, the first element has been satisfied since the evidence supports the fact of the violation. The second and fourth elements of *Mathies* are self evident with respect to the dangers associated with a lightning strike, and the obvious potential for catastrophic injuries. This leaves the remaining third element of *Mathies* that “requires the Secretary to establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury.” *Bellefonte*, 20 FMSHRC at 1254-55. In evaluating the likelihood of injury, the analysis centers on the contribution of the violation to the cause and effect of the electrocution hazard. *U.S. Steel*, 6 FMSHRC at 1868.

Ordinarily, a section 75.521 violation involves the failure to provide adequate protection from lightning. But, here, Wolf Run not only failed to install lightning arresters – it negated any protection afforded by a grounding medium. In so doing, it provided a direct path for a lightning surge underground. The third element of *Mathies* only requires a showing that the violation *contributed* to the cause and effect of a hazard. But, here, Wolf Run *created* the cause and effect of the hazard by exposing underground miners to the possibility of a lightning surge.

Although lightning striking any given location is not a common occurrence, the likelihood of serious injury must be considered in the context of exposure to the electrocution hazard posed by the violation during continued mining operations. *Halfway, Inc.*, 8 FMSHRC at 12. As noted by the Commission, even if lightning does not strike directly, an indirect strike can induce thousands of volts and amps of electric current into power conductors. 32 FMSHRC at 1670-71. In such event, the hazard associated with this violation creates the heightened risk of electrocution that otherwise would not have existed. Thus, it is reasonably likely that serious or fatal injuries will occur, and, as such, the violation is properly designated as significant and substantial.⁹

With respect to Wolf Run's culpability, inspector Wooten's attribution of moderate negligence is supported by the record because the condition was obvious and in plain view. Tr. 403-05. There are no other mitigating or aggravating penalty criteria factors that affect the appropriate civil penalty. Given the S&S nature of the violation and its serious gravity, there is no adequate basis for modifying the \$963.00 proposed civil penalty for Citation No. 7583340.¹⁰

D. Absence of Arresters on Power Conductors Energizing Battery Chargers – Citation Nos. 7583316 and 7583317

Citation Nos. 7583316 and 7583317, both designated as S&S, concern the lack of lightning arresters on two 575-volt cables, both of which originated at a power center located underground and powered separate battery chargers located on the surface. In the initial decision, I concluded that "the installation of lightning arresters on power conductors in a cable that is grounded to the neutral ground is prohibited by section 75.521 because it would violate the 25 foot minimum separation [required by the section.]" 31 FMSHRC at 658. The Commission concluded that I erred, because unlike the ground medium violation, where the butt ground and neutral grounds shared a common ground wire, a ground wire conductor in a cable containing exposed power conductors does not share a common ground wire with arresters that direct overvoltage into the ground. 32 FMSHRC at 1683-84.

⁹ The S&S determination is not based on the assumption of the occurrence of a lightning strike. Rather it is based on Wolf Run's *creation of the hazard* by providing a path for lightning underground by connecting the butt ground to the neutral ground.

¹⁰ The statutory civil penalty criteria in 30 U.S.C. § 820(i) directs the Commission to consider:

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

I. Fair Notice Test

Thus, the Commission reversed the initial decision vacating Citation Nos. 7583316 and 7583317 and remanded for a determination of whether there was adequate notice that the term “‘ungrounded conductor’ . . . include[s] the conductors at issue [in the cables powering the battery chargers].” 32 FMSHRC at 1686. The Commission noted that considerations of due process prevent an agency from enforcing a regulation if “‘validat[ion] [of] the application of a regulation . . . fails to give fair warning of the conduct it prohibits or requires.” 32 FMSHRC at 1682 *citing Gates & Fox Co. v. OSHRC*, 790 F.2d 154, 156 (D.C. Cir. 1986). The Commission summarized its test for fair notice in its remand:

The Commission’s test for notice under the Mine Act 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 deciding whether a party had adequate notice of regulatory requirements, a wide variety of factors is relevant, including the text of a regulation, its placement in the overall regulatory 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.

32 FMSHRC at 1682 (citations omitted).

i. Multi-Directional Path of Electricity Undermining Purpose of Section 75.521

The lack of efficacy in the application of section 75.521 to the subject battery charger power conductors is central to resolution of the due process notice issue remanded by the Commission. While equipping arresters on exposed (surface) power conductors in a cable grounded to the neutral ground is not strictly prohibited by section 75.521, the weight of the evidence reflects that such installation would not adequately protect underground miners from a lightning strike. Unlike the cables powering the stacker motor, the water pump, and the telephone system, the cables powering the battery chargers are connected to the neutral ground medium through the underground power center. As explained below, given the multi-directional path of electricity, equipping arresters on exposed conductors in cables grounded to the neutral grounds through an underground power center, would be at odds with the purpose of the regulation.

As previously noted, electrical energy travels in all directions through the path of least resistance. Thus, power conductors, ground wire conductors, and lightning arresters can transfer electrical energy in all directions. Tr. 447. As such, the overvoltage resulting from lightning, capable of as much as a million volts, can bridge the gap, in both directions, between arresters and conductors. In such event, energy transferred back from the arrester to the power and ground

conductors in the battery cables will provide a path for an electrical surge to enter underground. In this regard, Wooten testified that “a lot” of electrical current can be transferred, “both ways,” from lightning arresters through the underground mine through the ground wire conductor in the cable. Tr. 448. Specifically, Wooten explained:

Moore: *And when you have lightning causing current to move in a cable, and I think you said repeatedly here this morning, it will go in all directions?*

Wooten: *All directions, all paths.*

Moore: *All paths?*

Wooten: *Yes, sir.*

Moore: *Some of it will go down – if there’s a lightning arrester, will go down the lightning arrester?*

Wooten: *Yes.*

Moore: *Some of it may go, for example, if you have a ground in that cable, it may go along the ground?*

Wooten: *Yes, sir. And it grounds to the equipment.*

Moore: *Well, actually the ground is designed – it normally has no current on it, does it?*

Wooten: *No, sir. Normally.*

Moore: *And it’s designed to take electricity from the equipment and take it to the ground bed?*

Wooten: *That’s correct.*

Moore: *And if you have lightning-induced electricity in a cable, and it’s induced on the grounding conductor, it will take that to the [neutral] ground bed, that’s what it’s intended to do?*

Wooten: *It takes it both ways. All paths.*

Moore: *So it will take it, some of it, to the ground field?*

Wooten: *That’s correct.*

Moore: Now, I'm puzzled here. We've got a grounding conductor essentially from the lightning arrester into the ground?

Wooten: Yes, sir.

Moore: And because that lightning arrester's hooked into the phase conductors, it too may send current into the phase conductors; isn't that right?

Wooten: You mean backwards?

Moore: Yes.

Wooten: It could.

Moore: Well, you said on the grounding conductor in the cable that it could send it both ways?

Wooten: Uh-huh (yes).

Moore: You're nodding your head. I assume you mean yes?

Wooten: I said yes.

Moore: So you have a grounding conductor for the lightning arrester, and it could send it both ways?

Wooten: Yes.

Moore: And so it could send it not only into the ground but it could also send it in the phase conductor?

Wooten: That's correct.

Moore: So if you have lightning and you have a lightning arrester, you could be – assuming you'd get a small enough strike it just affected the lightning arrester, it would be sending current into the mine too, right?

Wooten: It could, yes.

Moore: And you can't really quantify how much will go down into the ground from the lightning arrester and how much will go back into the phase conductor from the lightning arrester?

Wooten: I can't.

Moore: And if any of us have looked at the equations that Sandia did in their analysis of how far lightning would go for the [accident] report, we'd all sort of say maybe they can't, right? Because Sandia did an analysis, did they not? Sandia National Laboratories did an analysis for that report that tried to analyze particular strikes and particular locations, did they not?

Wooten: Yes.

Moore: And you can't really quantify for any current that's put onto the grounding conductor in a cable by lightning how much will go to the ground bed and how much will go toward the equipment?

Wooten: No, sir. But the magnitude of it, it's going to be a lot both ways.

Moore: A lot both ways?

Wooten: A lot both ways.

Moore: And probably the magnitude from the current induced in the lightning arrester will be a lot both ways, too, won't it?

Wooten: Could be, yes.

Moore: And as you said, lightning goes in all directions? The electricity from lightning goes in all directions?

Wooten: All paths.

Tr. 445-49 (emphasis added).

ii. Reasonably Prudent Person Analysis

In applying the reasonably prudent person test, the credible testimony of Denver "Dick" Wilfong, Jr., Wolf Run's chief maintenance foreman, concerning his understanding of "ungrounded conductors" in section 75.521 is revealing. Wilfong conceded that lightning arresters were necessary for power conductors connected to above ground surface power centers. Significantly, surface power centers are not connected to the neutral grounds. Tr. 819-20. However, Wilfong believed that installing arresters on power conductors energizing equipment on the surface from power centers underground was not required because of the protection afforded by the neutral ground medium. Tr. 823. Wilfong believed that the subject power conductors energizing the battery chargers were already "grounded" through the neutral grounds and through grounding resistors at a 600 volt circuit located underground. Tr. 823.

Significantly, Wilfong’s opinion regarding the efficacy of installing arresters on exposed conductors energizing equipment from underground power centers is supported by the testimony of inspectors Honaker and Wooten. Both Honaker and Wooten stated that it is “unusual” to power surface equipment from underground. Tr. 320-21, 862. Both inspectors testified that a lightning surge can be transferred underground from the arrester ground field to the neutral ground medium. Tr. 445-49, 861-62, 877-78.

Honaker unequivocally stated that attaching lightning arresters on conductors originating from underground power centers was “doomed to failure.” 31 FMSHRC at 658; Tr. 877. Honaker testified:

Wilson: So by definition, for a power conductor to provide energy to the equipment, it can’t be grounded, right?

Honaker: That’s right.

Wilson: Now, in all your experience, *how many times have you seen this type of a situation where you had either equipment on the surface being powered by a source from underground or equipment underground being powered from a source on the surface?*

Honaker: *It’s very seldom that you see that . . . [n]ow when they simply lay [a cable] on the ground, its very difficult to protect those cables in that type of installation from lightning strikes. It simply is hard to separate the ground field when you do that and make it work effectively. I never put that type of installation in because it’s so difficult to comply with 75.521 and do it as it should be done for the safety of the people [underground] when you put that system in in that manner.*

Wilson: And Judge Feldman asked you if a track being a power conductor was the only exception to [75.]521. There are also exceptions laid out in the program policy manual, is that right?

Honaker: Yeah. Those are exceptions, right. They weren’t necessarily – when those were written and I was with MSHA at the time and worked indirectly for Cecile Lester who wrote most of the policies during that time when I first came to MSHA, *lightning was one of the sections I wrote some policy on. It wasn’t finalized until I left the agency, and it certainly wasn’t written like I thought it should be. We never addressed the possibility of someone [powering equipment on the surface from a power source underground].*

* * * * *

Court: *But you can’t attach [the conductors in the cable] to the arrester ground if it’s attached through some other system of grounding and ends up on the earth.*

Honaker: *You're right. That's the problem with this type of system. When you put this system in, it's doomed to failure. I know what you're saying. It's not a system you would normally put in.*

Court: That's the problem. I understand. And that's the problem that we have because as you say this system can't be adopted to fit this regulation. . . .

Honaker: People don't normally [power equipment on the surface from a cable underground]. The only way you can [protect the cable from lightning] is like build a shelter so you could comply and have it sheltered from lightning and that would meet one of the criteria [in the program policy manual].

Tr. 861-62, 877-78 (emphasis added).

The Secretary asserts that a reasonably prudent person familiar with the purposes of the standard should recognize that lightning arresters were required on these ungrounded conductors because of the plain language of the standard. OA Tr. 159-62. Satisfying the “reasonably prudent person” test for adequate notice requires the Secretary to demonstrate industry recognition of its obligations in the context of the protective purposes of the standard. However, the Secretary’s inspectors have conceded that equipping these conductors with arresters was “doomed to failure” because it would not adequately protect underground miners. Although Honaker testified that “electrical people” understand section 75.521, he conceded that there was confusion amongst safety directors regarding their obligations under the regulation. Tr. 886. Having failed to demonstrate that the protective purpose of section 75.521 will effectively be served by application of section 75.521, the Secretary has failed to demonstrate that Wolf Run possessed the requisite adequate notice to satisfy due process.

iii. Regulatory Scheme and Program Policy Manual

Moreover, the Secretary’s application of section 75.521 to the subject conductors is fundamentally inconsistent with MSHA’s Program Policy Manual that provides guidelines for when surface power conductors are not deemed “exposed” and, therefore, not a threat to transfer lightning energy underground. The relevant provision of the Program Policy Manual for section 75.521 states:

Conductors that are (1) provided with metallic shields; (2) jacketed by a ground metal covering or enclosure; (3) installed under grounded metal framework; (4) buried in the earth; or (5) made of triplex or quadraplex that is supported by a grounded messenger wire, *are not considered exposed for the length so protected.*

Gov. Ex. 8 (emphasis added).

Inspector Honaker participated in the policy discussions concerning regulations dealing with lightning protection for power conductors. Honaker essentially stated that MSHA never addressed the issue of powering surface equipment from an underground power source. Tr. 862-63. Thus, the Program Policy Manual for section 75.521, which contains the preferred methods for protecting exposed conductors, implicitly recognizes that the installation of an arrester on an exposed surface conductor is an ineffective method of preventing electrical overvoltage from traveling underground.

iv. Regulatory History and Text of the Regulation

Section 75.521 was promulgated in February 1973. Tr. 849. Honaker explained that at the time of its promulgation the term “ungrounded conductors” had meaning with respect to electrical systems using direct current (“DC”). However, virtually all systems now use alternating current (“AC”). Tr. 848-50. Consequently, nearly all power conductors are now ungrounded rendering the term “ungrounded” power conductor in section 75.521 essentially superfluous, and exacerbating the section’s lack of clarity.

In the final analysis, the record fails to reflect that a reasonably prudent person familiar with the mining industry and the protective purposes of section 75.521 would have recognized that this mandatory standard required the installation of lightning arresters on the subject ungrounded power conductors. Consequently, the cited violations in Citation Nos. 7583316 and 7583317 as applied to Wolf Run, given the circumstances and testimony in this case, must be vacated on due process grounds for lack of notice.

In view of the unequivocal testimony of the MSHA inspectors, it is apparent that the efficacy of lightning arrester protection on exposed power conductors energizing surface equipment from underground is, at best, questionable. Perhaps MSHA should consider revising the provisions of section 75.521 to do directly what it, in effect, seeks to accomplish indirectly through its Program Policy Manual. Namely, prohibit exposed power conductors that originate underground unless they are compliant with MSHA’s Program Policy Manual and therefore are “*not considered exposed for the length so protected.*” Gov. Ex. 8 (emphasis added). Such a prohibition would prevent deriving a false sense of security from the installation of arresters on exposed conductors that the Secretary’s witness characterized as “doomed to failure.” Tr. 877.

E. Telephone Wire – Citation No. 7335233

i. Procedural History and
Reconsideration of S&S

Citation No. 7335233 concerns an alleged S&S violation of section 75.521 for failure

to equip lightning arresters on telephone conductor wires entering the underground mine.¹¹ The initial decision affirmed the violation of section 75.521 because the two conductors in the cited telephone wire were not grounded. In fact, Wilfong admitted that ungrounded telephone wires entering an underground mine require lightning arrester protection. Tr. 790-94. However, the initial decision removed the S&S designation. The non-S&S determination was based on a lightning surge's likely destruction of the 12-volt telephone conductors before any electrical energy could enter the mine. 31 FMSHRC at 663-65. The remand decision vacated the non-S&S finding. 32 FMSHRC at 1687. In readdressing the S&S issue, the Commission has directed me to more precisely discuss the potential for serious injury in the context of a detailed *Mathies* analysis. *Id.* at 1678.

The Commission vacated the non-S&S finding because the testimony of MSHA inspector Kevin Hedrick was limited to the voltage normally carried by the subject telephone wires rather than the capacity of such wires. Consequently, the parties were requested to stipulate to the telephone wires' capacity at the oral argument. *Order Scheduling Oral Argument* at 3 (Jan. 28, 2011). However, the parties were unable to agree on such a stipulation. OA Tr. 242-43.

At trial, Hedrick explained the protection achieved by the installation of arresters on telephone wires. Hedrick testified:

Well, the protection would be – when the lightning strike or nearby lightning strike occurred and the cable – signal cable and the telephone cable and the trolley phone cable became elevated – the voltage became elevated on those conductors, the lightning arrester would provide an immediate path to ground where they're connected to shunt energy to ground before it could reach the underground workings. It would certainly reduce the amount of energy that went underground significantly.¹²

Tr. 631.

As noted, the initial decision determined that the telephone wire would be destroyed by a lightning surge, capable of more than one million volts, before the electrical energy could enter underground. 31 FMSHRC at 664. However, upon reconsideration, this conclusion is not supported by the credible testimony. Hedrick noted that the destruction and disconnect of conductors at the source of an electrical surge does not immediately de-energize the load side of the conductors. Hedrick stated:

¹¹ Citation No. 7335233 also concerned an absence of lightning arresters on exposed trolley wire conductors. One conductor was grounded to the track at the mouth of the entry. The other conductor was hung along the roof and grounded to the track at the farthest end of entry. The initial decision determined that the trolley wire was adequately grounded for section 75.521 purposes. The Secretary does not dispute this finding. 32 FMSHRC at 1674; OA Tr. 245.

¹² The rerouting of overvoltage from the arresters through the underground mine was not at risk as the telephone wire was not connected to the neutral ground medium.

There could be energy still on the load side. For example, you've heard of people that work on television sets, and even though they're unplugged, they have to be careful. If you stick a screwdriver in the wrong place, you could injure yourself because there's large capacitors in there that store energy and there could remain energy on the load side.

Tr. 662.

Thus, on balance, the Secretary has demonstrated the subject telephone wire has the capacity to transmit a lightning surge underground that poses a risk of serious injury. Consequently, the Secretary has satisfied the first, second and fourth elements of *Mathies*. 6 FMSHRC at 3-44. However, the S&S analysis does not stop there. An S&S determination must be based on the *particular facts* surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (Apr. 1988). Consistent with the third *Mathies* element, these particular facts must establish a reasonable likelihood that the hazard contributed to will result in an event, *i.e.*, a lightning strike, causing serious injury or death. *Bellefonte*, 20 FMSHRC at 1254-55.

The Secretary has stipulated that it cannot demonstrate, by a preponderance of the evidence, the reasonable likelihood of lightning striking in the vicinity of a particular location, *i.e.*, the Sago Mine. Tr. 462-65, 699. However, the Secretary argues that, “[e]ven if a lightning strike and an overvoltage on the affected lines are found not to be reasonably likely to occur, the violations should still be considered S&S because the only proper way to evaluate the S&S finding is to assume such an overvoltage has occurred.” *Sec’y post-hrg. br.* at 49. In calling for an assumption of overvoltage caused by lightning, the Secretary states she is not arguing for a presumption in this case.¹³ *Id.* Yet the Secretary, in her brief, relies on the narrow presumption of the development of respiratory disease from exposure to violations of the respirable dust standard adopted by the Commission in *Consolidation Coal*.¹⁴ *Id.*

ii. Assuming the Event of a Lightning Strike
Rather Than the Likelihood of its Occurrence

In a split decision in *Manalapan*, the Commission addressed the role of assumptions in questions of S&S. *Manalapan Mining Company, Inc.*, 18 FMSHRC 1375 (Aug. 1996). The Commission lacked consensus on whether to adopt the Secretary’s proposed assumption of the

¹³ This nuance proffered by the Secretary is a distinction without a difference. A “presumption” is a “legal inference *or assumption* that a fact exists, based on the known or proven existence of some other fact or group of facts.” *Black’s Law Dictionary* 558 (3d. pocket ed. 2006). An “assumption” “is substantially synonymous with ‘inference,’ ‘probability,’ and ‘presumption.’” *Black’s Law Dictionary* 157 (4th ed. 1968) (citation omitted).

¹⁴ The Commission noted the presumption was adopted because “it is not possible to assess the precise contribution that a particular exposure will make to the development of respiratory disease.” *Consolidation Coal Co.*, 8 FMSHRC 890, 898 (June 1986) *aff’d*, 824 F. 2d 1071 (D.C. Cir. 1987).

occurrence of a fire in analyzing whether a fire suppression violation was S&S.¹⁵ Commissioners Holen and Riley, noting that the Secretary has the burden of proving a violation is S&S, declined to expand the Commission's narrow holding in *Consolidation Coal* to presumptions of the occurrence of an emergency. *Manalapan*, 18 FMSHRC at 1379-80 citing *Peabody Coal Co.*, 17 FMSHRC 26, 28 (Jan. 1995). Commissioners Holen and Riley stated:

The Secretary urges the Commission to presume an emergency for an undefined and potentially large class of health and safety standards without indicating what situations under those standards would qualify as an emergency. We decline to modify the time-tested Commission precedent that guides our analysis of violations alleged to be S&S by adopting such a broad based presumption.

Id. at 1380.

On the other hand, Commissioners Jordan and Marks, in adopting the Secretary's proposed assumption, summarized the assumption and underlying facts as follows, "[i]n this case, where a fire deluge system was not provided and where a fire extinguisher was not provided, *the assumption sought is the existence of a fire or explosion.*" *Manalapan*, 18 FMSHRC at 1384 (emphasis added). The decision, however, apparently did not directly address the propriety of assuming the reasonable likelihood of the emergency. In fact, Commissioners Jordan and Marks implicitly agreed with the Secretary that "[t]he likelihood of a fire or explosion occurring is not the relevant question." 18 FMSHRC at 1385 citing Sec'y Br. at 13-14 (emphasis supplied by Sec'y).

In the final analysis, it is the assumption of the existence of an emergency, rather than the reasonable likelihood of an actual emergency that is addressed in *Manalapan*. The merging of the concepts of "existence" and "reasonable likelihood" in resolving questions of S&S is contrary to the Commission directive that issues of S&S must be resolved on a case-by-case basis based on the particular circumstances surrounding the cited violation. *Texasgulf*, 10 FMSHRC at 501 (combustible fuel, capable of suspension, in the presence of ignition sources constitutes a "confluence of factors" necessary to support an S&S violation). Significantly, the split decision in *Manalapan* did not alter the narrow application of *Consolidation Coal* that limits presumptions dealing with the reasonable likelihood of injury or illness to respiratory disease.

Regardless of whether the issue of assuming the reasonable likelihood of a serious injury causing event was addressed in *Manalapan*, given the split decision, there is no majority

¹⁵ The Commission is currently considering a similar assumption sought by the Secretary with regard to the existence of a smoke-related emergency in determining whether a violation concerning an ineffective lifeline is properly designated as S&S. *Sec'y of Labor v. Cumberland Coal Resources LP*, 31 FMSHRC 1147 (Sept. 2009) (ALJ), *appeal pending*, argued Mar. 31, 2011. *Cumberland* is distinguishable because, unlike a lightning strike, the incidence of smoke and fire in a mine is enhanced by the potential ignition and fuel sources created during the mining cycle.

Commission decision that, in effect, *assumes S&S* by assuming the reasonable likelihood of an emergency. In the absence of a Commission consensus, the case law addressing the effect of precautionary measures on the issue of S&S is instructive. As a general proposition, safety measures and precautions do not preclude a finding of S&S. *See Buck Creek Coal, Inc., v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995) (fire suppression equipment such as CO monitors and water sprays do not mitigate an accumulation hazard); *AMAX Coal Company*, 19 FMSHRC 846, 850 (May 1997) (the presence of fire detection equipment and fire fighting equipment does not negate the serious safety risk posed by fires). In this regard, in *AMAX*, the Commission noted that a “hazard continues to exist regardless of whether caution is exercised” by installing fire fighting and detection equipment. 19 FMSHRC at 850 *citing Eagle Nest, Inc.*, 14 FMSHRC 1119, 1123 (July 1992).

However, although precautionary safety measures did not prevent an S&S finding in *Buck Creek* and *AMAX*, the Secretary was still required to demonstrate the reasonable likelihood of an actual fire or explosion as a consequence of violative coal dust accumulations. *See Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989) (the Secretary has the burden of proving all elements of a cited violation). For example, in *AMAX* the S&S finding was based on evidence of “[t]he presence here of an ignition source and large amounts of coal and coal dust that could propagate a fire or fuel an explosion satisf[ying] the third *Mathies* element.” *Id.* at 849.

The hazard posed by the subject section 75.521 violation is the potential transmission of a lightning surge underground through telephone power conductors on the surface that are not equipped with arresters. The question is whether it is reasonably likely that the hazard created by this violation will result in a lightning strike event in which there is serious injury. *Bellefonte*, 20 FMSHRC at 1254-55. Resolution of this question is dependent on the contribution of the absence of arresters to the likelihood of a lightning strike that results in electrocution. *U.S. Steel*, 6 FMSHRC at 1868.

Violations such as defective belt rollers and coal dust accumulations provide ignition sources and fuel for a fire or explosion, and increase its likelihood. Conversely, the failure to equip exposed conductors with arresters does not increase the likelihood of a lightning strike. Although the absence of arresters does affect the hazard associated with lightning, their absence does not contribute to the likelihood of the occurrence of lightning. Since a lightning strike in proximity to a particular location is a rare event, the Secretary has failed to demonstrate that it is *reasonably likely* that the failure to install lightning arresters will result in an injury or illness of reasonably serious nature.¹⁶ Consequently, the subject S&S designation shall be deleted.

¹⁶ I am mindful of the Secretary’s reliance on the testimony of inspectors that mines have experienced lightning strikes on multiple occasions. *Sec’y post-hrg. br.* at 49 *citing* Tr. 312, 836. However, given the random nature of lightning, the evidence does not reflect that mines are more uniquely susceptible to lightning strikes than are other locations.

In the final analysis, not all violations capable of contributing to the occurrence of serious injury are S&S. Significantly, MSHA citations require inspectors to separately evaluate both the potential degree of serious injury posed by the cited violation, and the reasonable likelihood of the occurrence of such injury.¹⁷ Nevertheless, violations designated as non-S&S are not necessarily trivial. In fact, non-S&S violations, such as the instant failure to protect underground miners from lightning, which create the potential for catastrophe, however unlikely, are more serious in gravity than many S&S violations that only contribute to lost workday injuries. Such non-S&S violations may warrant greater civil penalties.

Although initially designated as an S&S violation, the Secretary only proposed a \$440.00 civil penalty for the failure to equip the subject telephone wire with arrester protection. Although this violation has now been determined to be non-S&S, I am conflicted by the relatively small proposed civil penalties for the alleged section 75.521 violations given their serious gravity and their potential contribution to multiple serious injuries and/or fatalities as evidenced by the Sago Mine disaster. However, I reluctantly decline to disturb the \$440.00 civil penalty initially proposed for Citation No. 7335233.

¹⁷ For example, sections 10(A) and 10(B) on MSHA Mine Citation/Order Form 7000-3 for Citation No. 7335233 require inspectors to separately evaluate questions concerning the likelihood of injury, and, whether or not such injury can reasonably be expected to result in lost workdays, permanent disability or a fatality. Gov. Ex. 5.

ORDER

In view of the above, **IT IS ORDERED** that the violation designated as S&S in 104(a) Citation No. 7583340 **IS AFFIRMED**.

IT IS FURTHER ORDERED that Citation No. 7335233 **IS MODIFIED** to reflect that the cited violation is designated as non-S&S in nature.

IT IS FURTHER ORDERED that Citation Nos. 7583316 and 7583317 **ARE VACATED**.

IT IS FURTHER ORDERED that Wolf Run Mining Company shall pay a civil penalty of \$963.00 in satisfaction of 104(a) Citation No. 7583340.

IT IS FURTHER ORDERED that Wolf Run Mining Company shall pay a civil penalty of \$440.00 in satisfaction of 104(a) Citation No. 7335233.

IT IS ORDERED that, within 40 days of the date of this decision, Wolf Run Mining Company shall pay the total civil penalty of \$1,403.00 for Citation Nos. 7583340 and 7335233, as well as the \$25,257.00 it previously agreed to pay for the 31 other citations and orders at issue in these proceedings.¹⁸ In addition, Wolf Run **IS ORDERED** to pay the \$60.00 civil penalty for water pump Citation No. 7582485 affirmed by the Commission in its remand decision. 32 FMSHRC 1669, 1688 (Dec. 2010). Upon timely payment of the total civil penalty of \$26,720.00, these civil penalty proceedings **ARE DISMISSED**.¹⁹

/s/ Jerold Feldman

Jerold Feldman
Administrative Law Judge

¹⁸ The initial decision approved the parties' settlement terms wherein Wolf Run agreed to pay \$25,257.00 of the \$28,339.00 MSHA initially proposed for 31 additional citations and orders that also are the subjects of these proceedings.

¹⁹ The initial remand decision, issued on May 3, 2011, reflected a total civil penalty of \$26,660.00. The total civil penalty was corrected by Order dated May 9, 2011, to include the \$60.00 civil penalty for water pump Citation No. 7582485. Accordingly, this remand decision, which retains the original May 3, 2011, issue date, now reflects the correct \$26,720.00 total civil penalty that is due and payable.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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May 6, 2011

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

v.

WAKE STONE CORPORATION,
Respondent

CIVIL PENALTY PROCEEDING

Docket No. SE 2010-95-M
A.C. No. 31-02071-197617

Mine: Nash County Quarry

DECISION
PROCEDURAL AND FACTUAL HISTORY

This case is before the court on a petition for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 et seq. (the “Act”). The parties filed cross-motions for summary decision. This case involves a citation issued by the Department of Labor's Mine Safety and Health Administration (“MSHA”) under Section 104(a) of the Act alleging two violations of 30 C.F.R. §56.14132(a). The parties presented the following facts:

- On July 14, 2009, MSHA issued Citation Nos. 6512366 and 6512367 to Respondent at the Nash County quarry.
- Both Citations allege a violation of 30 C.F.R. §56.14132(a).
- Citation No. 6512366 was issued for failure to maintain a Caterpillar 345 B excavator’s service horn in working condition.
- Citation No. 6512367 was issued for failure to maintain a Komatsu D65Px dozer’s service horn in working condition.
- According to the Respondent, the vehicles were not in operation during the course of the shift.
- When the inspector asked to inspect the vehicles, Chris Pons, a Superintendent at the Nash County Quarry, insisted the vehicles be taken through their pre-shift examination, as required by 30 C.F.R. §56.14100, prior to being operated.
- According to the Respondent, it was during the pre-shift examinations that the malfunctioning horns were discovered.
- The defects were indicated in the Respondent’s pre-shift report and the vehicles were tagged as non-operational.

Relevant Regulations

29 C.F.R. §2700.67(b):

A motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows:

- (1) 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.

30 C.F.R. §56.14132(a):

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. §56.14100:

(a) Self-propelled mobile equipment to be used during a shift shall be inspected by the equipment operator before being placed in operation on that shift.

(b) 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.

(c) 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.

(d) Defects on self-propelled mobile equipment affecting safety, which are not corrected immediately, shall be reported to and recorded by the mine operator. The records shall be kept at the mine or nearest mine office from the date the defects are recorded, until the defects are corrected. Such records shall be made available for inspection by an authorized representative of the Secretary.

Discussion

The crux of the Secretary's argument is that Section 56.14132(a) should be construed irrespective of other parts of the Act. In this case, that means that if a vehicle's horn breaks for whatever reason, an operator has violated the Act. I reject this argument and embrace the notion that it is necessary to look at the Act as a whole. The Act was created to enforce and encourage miners' safety. When interpreting the Act, operators, regulators, and courts need to do so in a manner that best serves to protect miners. With regard to Section 56.14132(a), interpreting it in such a strict manner would be contrary to Congress's intention when it drafted the Act and, in my view, contrary to the overall intent of the Act to protect miners' safety.

Statutory construction requires that we look at the whole and not just a part of a statute. To do otherwise would distort the statute's true meaning. *United States Nat. Bank of Oregon v.*

Ind. Ins. Agents of Am., Inc., 508 U.S. 439, 454 (1993). In this matter, Section 56.14132(a) and other vehicle maintenance requirements are the reason Section 56.14100 exists. To focus on one and not the other in this situation would be contrary to the intent of Congress. Section 56.14100 requires that “[s]elf-propelled mobile equipment [. . .] be inspected by the equipment operator before being placed in operation on that shift.” Consequently, Section 56.14100 requires “horns or other audible warning” be inspected because these parts are required to be on vehicles and to be maintained by Section 56.14132(a). These two requirements compliment each other and should be viewed in concert.

According to the Secretary, the “plain meaning” of Section 56.14132(a) is if a horn fails, then the horn has not been maintained and a violation has occurred. This understanding is misguided for these reasons: First, one of the few ways an operator can determine that a horn is malfunctioning is when he tries the horn and it does not make a sound. Second, it is hard to believe that it was Congress’s intention that the phrase, “shall be maintained in functional condition,” did not include replacing the horn if necessary. 30 C.F.R. §56.14132(a). Congress, when drafting the Act, presumably cared about the condition of the overall vehicle more than the condition of the horn. Third, if an operator discovered a problem with a horn during a pre-shift inspection and subsequently corrected the problem, then the operator has *maintained* the horn. It is unrealistic to expect that a horn, or any piece of equipment, will last forever.

Section 56.14100 was created to catch a malfunctioning vehicle before it has the opportunity to endanger miners’ lives. To interpret the Act as the Secretary wishes would diminish the operator’s motivation to conduct a thorough examination of equipment, because the operator loses an incentive. It is best not to trivialize Section 56.14100 for two reasons: First, it encourages operator to find malfunctions because the operator will not be found in violation of the Act if it places the vehicles out-of-service until repaired. Second, and most importantly, it is safest for the miners to find a malfunction prior to placing a piece of equipment into service.

The Secretary argues that standards need to be interpreted to impose liability without regard to fault because it creates an incentive for the operator to ensure safety. To bolster her argument, the Secretary cited *Allied Products Co. v. FMSHRC*, 666 F.2d 890, 893 (5th Cir. 1982).¹ I agree with the Circuit Court’s belief that liability without regard to fault creates an incentive for the operator “to take all practicable measures to ensure the workers’ safety.” However, my finding here does not contradict *Allied Products*. In fact, it compliments it because this decision gives incentives to keep miners safe. Not punishing operators for finding malfunctioning equipment during pre-shift examinations is an incentive to thoroughly conduct such examination. A pre-shift examination is an operator’s chance to discover malfunctions prior to violating the act: i.e., operating a malfunctioning vehicle.

¹ Two decisions cited by the Secretary, *Sec’y of Labor v. Giant Cement Co.*, 13 FMSHRC 286 (Feb. 1991) (ALJ) and *Sec’y of Labor v. Martin Marrietta Aggregates*, 23 FMSHRC 533 (May 2001) (ALJ) are not relevant here because of factual and evidential differences to the facts at hand.

The Secretary argues that the two vehicles in question were not tagged out of service when the inspector arrived and asked to inspect the equipment. This, according to the Secretary, means that the vehicles were eligible for inspection and, if found, subsequent violations. Otherwise, the Secretary argues, the Respondent and future operators may “escape” strict liability for the alleged violations by declaring pre-shift examination and tagging the vehicles out of service while the inspector stands by. This is a reasonable concern that should not be taken lightly. In support of her argument, the Secretary also cited *Secretary of Labor v. Bilbrough Marble Div., Texas Architectural Aggregate*. In this decision, Administrative Law Judge Zielinski noted “Commission precedent is clear that standards like § 56.141132(a) must be complied with for all equipment located on mine property that *might be used*. Only if equipment has been effectively taken out of service can an operator avoid the consequences of defective conditions.” *Sec’y of Labor v. Bilbrough Marble Div., Texas Architectural Aggregate*, 24 FMSHRC 285 (2002) (ALJ). I agree with my colleague’s view to a point, however, it is important to also encourage thorough pre-shift examinations and I believe to place strict liability in this situation would have the opposite effect.²

Section 56.14100 and mandatory equipment safety standards need to coexist because of the importance of a harmonized and coherent treatment of all portions of the Miner Act and related regulations to miners’ safety, overall. In this matter, after construing the facts in the light most favorable to the Secretary’s position, I am not convinced nor can I reasonably infer that the operator was trying to “escape” strict liability by feigning the need for a pre-shift examination, and/or that the vehicles “might be used.” I decline to construe the conflicting legal standards in such a way as to effectively write Section 56.14100, the maintenance provision, out of the Regulations or seriously diminish its effect.³

ORDER

For the reasons set forth above, the Secretary's motion for summary decision is **DENIED**, the Respondent’s motion for summary decision is **GRANTED**, Citation Nos. 6512366 & 6512367 are **VACATED**, and these proceeding are **DISMISSED**.

/s/ L. Zane Gill
L. Zane Gill
Administrative Law Judge

² Administrative Law Judges are not bound by their counterpart’s decisions.

³ This ruling does not trivialize or diminish Section 56.14132(a). Instead it recognizes that Section 56.14132(a) and Section 56.14100 can and should coexist.

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May 6, 2011

LTM INCORPORATED -	:	CONTEST PROCEEDINGS
KNIFE RIVER MATERIALS,	:	
Contestant	:	
	:	Docket No. WEST 2008-1268-RM
v.	:	Citation No. 6398748 - 06/11/2008
	:	
SECRETARY OF LABOR,	:	Docket No. WEST 2008-1269-RM
MINE SAFETY AND HEALTH	:	Citation No. 6398749 - 06/11/2008
ADMINISTRATION,(MSHA),	:	
Respondent	:	Docket No. WEST 2008-1270-RM
	:	Citation No. 6398750 - 06/11/2008
	:	
	:	Docket No. WEST 2008-1271-RM
	:	Citation No. 6398751 - 06/11/2008
	:	
	:	Docket No. WEST 2008-1275-RM
	:	Citation No. 6398756 - 06/11/2008
	:	
	:	Docket No. WEST 2008-1272-RM
	:	Citation No. 6398752 - 06/11/2008
	:	
	:	Docket No. WEST 2008-1273-RM
	:	Citation No. 6398753 - 06/11/2008
	:	
	:	Docket No. WEST 2008-1274-RM
	:	Citation No. 6398755 - 06/11/2008
	:	
	:	Docket No. WEST 2008-1276-RM
	:	Citation No. 6398757 - 06/11/2008
	:	
	:	Mine: Mobile Crusher #1
	:	Mine ID: 35-02906
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. WEST 2009-6-M
Petitioner	:	A.C. No. 35-02906-161438-01
	:	
v.	:	
LTM INCORPORATED -	:	Docket No. WEST 2009-7-M
KNIFE RIVER MATERIALS,	:	A.C. No. 35-02906-161438-02
Respondent	:	
	:	Mine: Mobile Crusher #1

DECISION

Appearances: Evan H. Nordby, Esq., U.S. Department of Labor, Office of the Solicitor, Seattle, Washington, on behalf of Petitioner;
Chris Lawrence, Central Point, Oregon, on behalf of Respondent.

Before: Judge Zielinski

These cases are before me on Notices of Contest and Petitions for Assessment of Civil Penalties filed pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petitions allege that LTM, Incorporated, doing business as Knife River Materials, is liable for 12 violations of the Act and the Secretary's Safety and Health Standards for Surface Metal and Nonmetal Mines.¹ A hearing was held in Eugene, Oregon, and the parties submitted briefs following receipt of the transcript. The Secretary proposes civil penalties totaling \$1,872.00 for the violations. For the reasons set forth below, I find that LTM committed three of the alleged violations and impose civil penalties totaling \$300.00.²

Findings of Fact - Conclusions of Law

LTM operates several sand and gravel mines in the Oregon area. In June of 2008, one of its operations, Mobile Crusher #1 ("MC-1"), was located near Coos Bay, Oregon, in an area known as the Davis Slough. MC-1 consists of a feeder-hopper, crushers and screens, and conveyors that move material between the various pieces of equipment. As its name implies, MC-1 is a mobile facility. Its major components are mounted on rubber-tired trailers, which are stabilized by jacks and blocks in locations where it is placed into operation. Located adjacent to MC-1 was another facility known as the "truck dump stacker" ("TDS"). The TDS was a permanent facility, designed to create a stockpile of material trucked to the site.³ The TDS had been locked out of service, and was not operating when the contested citations were issued.

On June 11, 2008, Bryan Chaix, an inspector employed by the Secretary's Mine Safety and Health Administration, conducted an inspection of LTM's equipment located at the Davis

¹ 30 C.F.R. Part 56.

² LTM withdrew its contest of Citation No. 6398766, which alleged that miners' training records were incomplete. LTM will be ordered to pay the \$100.00 civil penalty proposed for that violation.

³ When operational, the TDS could efficiently off-load trucks and produce a stockpile. Raw material would be dumped from the trucks into a grizzly, run through a hopper and fed onto a long conveyor inclined upward at an angle of approximately 14 degrees. The base of the TDS was elevated, and the head pulley of the conveyor was 30-40 feet above the surface where the stockpile was built. The TDS is depicted in a photograph that was taken at an unknown point in time when it was idle and there was no stockpile. Ex. R-11 at 8.

Slough.⁴ Chaix had joined MSHA in April 2007, underwent training, and became an authorized representative of the Secretary approximately 10-12 months later. Consequently, he had limited experience as an inspector at the time of the inspection. Chaix had previously worked in several capacities in the mining field. His most pertinent employment experience was as a conveyor mechanic, a position he held for approximately six months prior to joining MSHA. Tr. 215. He holds a college degree in art, with a specialization in metalsmithing, blacksmithing, and tool and die production technology. Tr. 16.

Based upon his “observations and information provided to him,” Chaix concluded that the TDS was an operational part of MC-1, and was subject to inspection despite the fact that it was not in operation. Tr. 25. In the course of the inspection, Chaix issued four citations for conditions on the TDS and eight citations for conditions on MC-1. LTM timely contested the citations and the subsequently assessed civil penalties. In addition to challenging the merits of the citations, LTM contends that the TDS was not used or available for use, that it should not have been inspected, and that citations issued for conditions at that facility should be vacated.

The Truck Dump Stacker

In general, whether equipment and facilities must be maintained in compliance with safety standards, and whether they are subject to inspection by MSHA, is determined by their availability for use by miners. In *Ideal Basic Industries, Cement Div.*, 3 FMSHRC 843 (Apr. 1981), the Commission held that the fact that the equipment was located in a normal work area, was capable of being used, and had not been removed from service, meant that it had been “used” within the meaning of the standard there at issue. The “available for use” test also governs the applicability of most safety standards to mobile equipment. Only if the equipment has been effectively taken out of service, e.g., locked out and tagged out, can such equipment avoid inspection and the citation of conditions that violate safety standards. *Allen Lee Good*, 23 FMSHRC 995, 997 (Sept. 2001) (“As long as the cited equipment is not tagged out of operation and parked for repairs [the safety standard] applies, whether or not the equipment is to be used during the shift.”); *Eastern Associated Coal*, 1 FMSHRC 1473, 1474 (Oct. 1979) (placing a warning tag on equipment that remained operational in a working area was not sufficient to abate a violation because the tag could have been ignored). The same considerations should apply to the TDS.

At first blush, one might assume that the TDS was an operational part of MC-1. Chaix concluded as much shortly after he arrived on the site. As he explained, the TDS made stockpiles and the rest of the equipment consumed stockpiles. Tr. 223. However, the TDS was locked out and tagged out, and it was apparent that a large stockpile of raw material that had been built for feeding into MC-1 had not been made by the TDS.

⁴ The Act requires that surface mines be inspected twice per year. 30 U.S.C. 813(a). Regular inspections are referred to as E01 inspections. Inspections of intermittent operations, such as MC-1, may be less frequent, depending upon the amount of time the facility is operated.

It is not disputed that the TDS had been locked out and tagged out at the time of the inspection. Its main power switch was in the “off” position, and a lock had been inserted through the switch handle. Ex. R-5. A tag on the switch read “Danger - Do Not Operate,” and instructed that the lock could be removed only by Skip Borstad,⁵ the person who had placed it there and whose name was on the back of the tag.⁶

Photographs taken by Chaix, establish that, with one possible exception, LTM had not used the TDS to build the stockpile of raw material for MC-1. A photograph taken by Chaix shows the discharge end of the TDS conveyor and a portion of a very large stockpile. Ex. G-12/2.⁷ A large pile of material, well removed from and higher than the conveyor, shown on the left of the photograph, could not have been made by the stationary conveyor of the TDS. Tr. 425-26. It was built by a loader, using raw material that had been trucked to the site. Tr. 375-76. As the stockpile grew, the material was graded into a ramp that the loader used to increase its size. A small pile of material in the vicinity of the end of the conveyor arguably could have been made by the TDS.

Despite the fact that the TDS was deenergized and the vast majority of the stockpile had clearly not been built with the TDS, Chaix concluded that it should be inspected. It is evident that Chaix initially assumed that the TDS was an operational part of the MC-1 facility. While inspecting the TDS he believed his assumption was confirmed, and he concluded that the TDS had been operated in April. The two most significant factors upon which he based his conclusion were a statement by the MC-1 operator that he interpreted as an admission that the TDS had been operated in April, and the small pile of material in proximity to the TDS conveyor.

On close examination, however, none of the factors relied on to sustain the TDS citations, whether considered separately or together, establish that the TDS was operated in April, or was available for use at the time of the inspection.

The Admission

Brian West worked in Knife River’s coast operations for five years. He testified that the TDS was locked and tagged out when he became LTM’s aggregate manager in June of 2007. Tr. 480. It was old and worn out, particularly the hopper, and the repairs necessary to make it dependably operational were not deemed worth the investment. It had not been operated while he was in charge of the facility and, to his knowledge, had not been operated in the two years

⁵ Borstad, was a safety specialist. He had passed away subsequent to the June 2008 inspection, and his lock remained in place at the time of the hearing some two years later. Tr. 356-59.

⁶ Chaix was concerned about the adequacy of the information on the tag. Tr. 224, 238-50. However, it appears to have been appropriate.

⁷ The number following the backslash, when citing to a photographic exhibit, reflects the page number of the exhibit, e.g., Ex. G-12/2 refers to page 2 of Government Exhibit 12.

before he became aggregate manager. West did not know where the key to the lock was, and he had not attempted to replace the lock, because he had no intention of operating the stacker. Tr. 524, 545.

When Chaix was re-called as a witness to rebut LTM's evidence regarding the unavailability of the TDS, the first point addressed was the alleged admission, which occurred essentially at the beginning of the inspection. When Chaix arrived at the site, at approximately 8:00 a.m., he proceeded to what he thought was the office, but was informed that it was an office for a "hot plant" which was under OSHA jurisdiction. He then went to the area of MC-1 and sought out the person in charge. The operator of MC-1, Mike McDonald, identified himself as that person. Tr. 21-22. Chaix reviewed records and offered McDonald an opportunity for a pre-inspection conference. Curiously, the fact that the TDS was not operating does not appear to have been a topic of the pre-inspection discussion. There is no mention of it in Chaix's field notes, and Chaix did not recall any conversation concerning whether the TDS was part of the MC-1 operation. Tr. 223; Ex. R-1 at 55-75.

Chaix preferred to follow the flow of material when inspecting a facility, and he and McDonald proceeded to the area of the stockpile of raw material that would be fed into MC-1. Tr. 23-24. The stockpile had been built in the same general area that material discharged from the TDS would have been deposited. As evidenced by photographs taken by Chaix, his observations of the stockpile were made from the base of the TDS conveyor. Ex. G-12. One of the first things Chaix observed at that location was a fire extinguisher that bore a tag with a notation that it had been inspected in April 2008. He testified that the April 2008 date on the fire extinguisher tag "aroused [his] attention." Tr. 610. When asked why he did not issue a citation because the fire extinguisher had not been inspected in May, he explained it was "because [he] was told that [April] was the last time that it was in operation."⁸ Tr. 611.

Chaix's testimony about his interaction with McDonald was vague with regard to the alleged admission. Tr. 25-26, 610-11. The statement was not made in response to a direct inquiry about when the TDS had last been operated. Rather, it was made in an exchange regarding the April 2008 inspection notation on the fire extinguisher's tag, and the absence of a notation for May.⁹ There is no evidence as to exactly what was said by either party. Chaix was

⁸ Fire extinguishers are required to be examined monthly. 30 C.F.R. § 56.4201. West testified that LTM's policy is to inspect all fire extinguishers monthly, whether or not the facility is in use, and that he continues to inspect the fire extinguisher at the TDS. Tr. 352-53. West was not asked about the absence of a notation of an inspection in May. Chaix concluded that, since the TDS had not been operated after any failure to perform an examination in May, that no miners had been exposed to a hazard by the failure, and did not issue a citation. Tr. 611. The Secretary notes in her reply brief that the transcript, at page 610, line 25 to page 611, line 1, should reflect that the question Chaix was responding to was "Why did you *not* issue a citation on the fire extinguisher?" Sec'y. Reply Br. at 2 n 2. I agree, and the transcript is so amended.

⁹ Respondent argues that, based upon the time that Chaix arrived and the times that various events occurred, McDonald could not have been with Chaix when the alleged admission was made. Resp. Br. at 4-5. For the reasons advanced by the Secretary in her reply brief, I reject

obviously interested in why the fire extinguisher had not been inspected in May. McDonald may have said something to the effect that the TDS had not been run since, or after, April, and may have been stating simply that the TDS had not been operated in May. Chaix may have misinterpreted such a statement by erroneously inferring that the TDS had been operated in April, but not since then.

It is remarkable that Chaix did not record McDonald's statement in his field notes, either when it was made or when LTM's challenge to the TDS citations was made clear six days later. Chaix's notes reflect that at a June 17, 2008, close-out conference, LTM advised that it intended to contest the TDS citations because the equipment was locked out. Chaix's response, as recorded in his notes, read only, "(pile under stacker evidence of use)." Ex. R-1 at 72. Chaix knew that the TDS was not in operation and, if he did not know from his pre-inspection discussions, he soon discovered that its main electrical panel was locked out and tagged out. If one believed, as Chaix did, that the TDS had been operated in the recent past despite being locked and tagged out, evidence to that effect would be important for a number of reasons, and an admission by the facility's operator that it had been run recently would seem especially important. Yet, the supposed admission is not even alluded to in Chaix's notes, and his recollection of it at the time of the hearing was obviously not clear.

I place no weight on the alleged admission.

The Stockpile

The contour of the stockpile in the area of the TDS conveyor is not strong evidence that the TDS was operated, or when or under what circumstances it may have been operated. Photographs taken by Chaix show a pile of material near the end of the TDS conveyor. From some of the photographs one could conclude that the pile had been made by the TDS, although it looks to be slightly to the left of the conveyor.¹⁰ Ex. G-12/1, G-12/4. Another photograph, however, shows that the pile is relatively small compared to the main stockpile created by the loader, and appears to be well left of where it should have been if it had been created by the TDS conveyor. Ex. G-12/2. The road that the trucks used to access the site, the place where the trucks dumped their loads, and the place that the loader operated were on the side of the stockpile opposite the TDS. Tr. 375-76. Chaix did not travel around the stockpile to observe the other side. Tr. 84. He took no photographs from other perspectives, or at least none were introduced into evidence, that could have clarified the contours of the stockpile and the ramp(s) used to build it – photographs that may have shed considerable light on the origin of the smaller pile of material.

LTM's argument and find that McDonald was present and participated in an exchange with Chaix. Sec'y. Reply Br. at 2.

¹⁰ West agreed that, as depicted in one photograph, the top of the small pile "appear[ed] to be" under the top of the TDS head pulley. Tr. 480; Ex. G-12/5. LTM contends in its brief that the pile is to the left of where it should have been if it had been made by the TDS. Resp. Br. at 6.

Other Factors

The Secretary points to the fact that continuity and resistance testing was done on the TDS on June 1, 2007, and argues that the testing evidences an intent to use the equipment. She argues in her reply brief that “Respondent offers no explanation for the up-to-date electrical grounding continuity testing” that had been performed on the TDS in June 2007. Sec’y. Reply Br. at 2-3. However, it is questionable that the testing was up-to-date, and the records of electrical testing were, apparently, consistent with LTM’s position. Continuity and resistance of electrical grounding systems must be tested “immediately after installation . . . and annually thereafter.” 30 C.F.R. § 56.12028. Chaix’s field notes reflect that he reviewed records prior to starting the inspection and noted that a new cone crusher had been set up “last month” and that ground and continuity testing had been done on MC-1 after the set-up on May 29, 2008. Ex. R-1 at 55. When he returned to the mine on June 17 to continue the inspection and conduct a close-out conference, he again noted that testing had been done on MC-1 on May 29, but also noted that there was no record of testing of the TDS, and that the last record of testing for the TDS was dated June 1, 2007. Ex. R-1 at 68. If the TDS was last tested on June 1, 2007, it is questionable that the testing was up-to-date at the time of the June 11, 2008, inspection. Moreover, while testing in June 2007 would have been inconsistent with an intention to abandon the TDS *at that time*, failure to test the TDS on May 29, 2008, allowing more than a year to pass since the last test, was consistent with an intention to abandon the TDS, at least as of May 2008.

The Secretary also points to various conditions that she contends are shown in photographs taken during the inspection and argues that they indicate recent use of the TDS. The conditions include surfaces on components of the equipment that she contends show less corrosion than would be expected if simply allowed to weather for a significant period of time in the atmosphere near the Oregon coast, and items like a replaced bearing cap that she contends show that the TDS was serviced in the recent past. LTM disputes the conclusions drawn by the Secretary and counters that other conditions, such as plant growth, show non-use.

The Secretary’s arguments are based upon testimony by Chaix, wherein he offered his opinion that certain surfaces depicted in photographs appeared to be polished, when he would “expect over time [that they would] show rust based on the humidity and precipitation in the area.” Tr. 611-12. However, it is not at all clear that the areas identified in photographs are polished surfaces. For example, an area described as polished on a troughing roller appears to be similar in appearance to nearby surfaces that were stationary and could not be polished. Tr. 612-13; Ex. G-3/5. West disagreed that the photograph showed a polished surface, but agreed that there did not appear to be rust anywhere in the photograph. Tr. 540-41. LTM points out that at least one other photograph arguably shows a polished surface on the head pulley of the TDS conveyor, which from all appearances had not been used in many months. Ex. R-11/8. The Secretary attempts to buttress Chaix’s testimony by referring to his experience with “metallurgy.” Sec’y. Br. at 4. As LTM argues, that is a bit of an overstatement. Chaix’s degree was in art, with some specialization in “metalsmithing.” The extent to which his mining experience or his education or experience in art/metalsmithing included exposure to rates of corrosion of metals in outdoor settings is unknown. None of the “other factors” relied upon by the Secretary are

reflected in Chaix's field notes as evidence of recent use.¹¹ His testimony on those subjects apparently represents an attempt to interpret photographs taken during the inspection and draw conclusions about usage of the equipment from appearances of surfaces and the amount of corrosion present. The rates of plant growth and the chemical makeup of the materials and rates of corrosion are unknown, despite Chaix's volunteered opinions about likely metal composition.¹²

The difficulty with the Secretary's "other factors" argument is that there is virtually no evidence to establish the reliability of basing estimates of how long a machine has been idle on photographic depictions of machine components of unknown chemical composition, assuming that the appearances of surfaces could be accurately assessed from the photographs, which is doubtful. I find none of the supposed conditions urged by the Secretary or LTM to be sufficiently probative or reliable to establish either that the TDS was or was not operated within any given time frame.

The Secretary argues that the TDS could be operated at virtually any time simply by removing the lock and throwing the switch and, if it was operated shortly before the inspection, then it was available to miners. She further argues that allowing mine operators to avoid inspections by locking and tagging equipment when not in use would require MSHA to "catch" a facility in operation, a position rejected by the Commission. The Secretary's concerns are valid. If LTM actually operated the TDS periodically, allowing it to avoid MSHA inspections by locking it out when not in use could deprive miners of the Act's protections. However, the Secretary did not establish that LTM did so, and much of the available evidence is to the contrary.¹³

The size and contour of the stockpile confirms LTM's assertion that it used a loader, not the TDS, to build the stockpile. The TDS had been locked and tagged out of operation for many months. MSHA had last inspected the Davis Slough facility in March of 2008. At that time, the

¹¹ Chaix's recollection of particular aspects of the two-year-old inspection was, understandably, not crystal clear. For example, without consulting his field notes, he was reluctant to answer questions about where he first went during the inspection and when one of LTM's representatives joined him. Tr. 213-17.

¹² In its brief, LTM proffers information on the composition of materials and their capacity to resist corrosion. Resp. Br. at 7. The Secretary points out that that information is not properly part of the hearing record, and should be disregarded. Sec'y. Reply Br. at 3-4. The information was not offered at the hearing, is not part of the hearing record, and was not considered in deciding the issues.

¹³ Chaix's notes do not reflect that he engaged LTM in a discussion about operation of the TDS, or that he attempted to learn the location of the lock's key and whether it was available to MC-1 operators like McDonald, or whether operation of the TDS was or would have been reflected on shift reports or other records. West testified that Chaix asked him when the TDS had last been operated. He replied that he did not know, and that it had not been operated since he became aggregate manager. Tr. 544. Chaix did not record the interchange and, apparently, disbelieved West.

inspector determined not to inspect the TDS because it was not operational and had been locked and tagged out. Tr. 378. West testified that LTM did not have a policy or practice of locking equipment out when not in use. Tr. 482. LTM's intention to abandon the TDS is evidenced, as noted above, by its decision not to perform continuity and resistance testing on the TDS when such testing was performed on MC-1 on May 29, 2008. As noted *infra*, a color-coding system designating proper access points, caution areas, and guards was employed at the MC-1 facility. It was not used at the TDS because of LTM's intention not to use that facility. Tr. 437-38; Ex. R-9/1, R-9/4. LTM's post-inspection actions were consistent with its position. Even though it would have been free to operate the TDS once the violations were terminated on June 30, 2008, it did not do so.¹⁴ West testified that the TDS was not operated after June 30 because it was still worn out and the hopper had not been rebuilt. Tr. 534. At the time of the hearing MC-1 had been moved to a location closer to a raw material source. The unused TDS remained at the Davis Slough. Tr. 362.

Lastly, the Secretary argues that, even if the TDS had not been operated in April 2008, it was in the condition that it was in when Chaix inspected it when it had last been operated, and the citations should, therefore, be affirmed. It is, no doubt, correct that the TDS was in virtually the same condition on June 11, 2008, as when it had last been operated, whenever that was. However, that would often be the case for equipment that has been effectively taken out of service. The lesson of cases like *Ideal Basic Industries, Cement Div.* and *Allen Lee Good* is that equipment that is available for use by miners must be maintained in conformance with safety standards to protect miners from hazardous conditions. Conversely, equipment that is not available for use by miners does not pose a hazard to miners, and need not be so maintained. Inspection of such equipment, which does not pose a hazard to miners, would be counterproductive in that valuable and limited enforcement resources would be diverted from active mining operations.¹⁵ The Secretary's expansive liability theory must be rejected.¹⁶

¹⁴ The Secretary questions why LTM did not abandon the TDS as an abatement measure, thereby avoiding the expenditure of employee time and materials to abate the cited violations, and suggests that it evidences an intent to use or preserve the option of using the TDS. That question was raised during the hearing, and West explained that the subject of abatement by abandonment simply did not come up. Tr. 525. It is somewhat surprising that LTM, an experienced mine operator, did not itself raise the issue. On the other hand, it had essentially abandoned the facility and locked-out its power supply, only to find that a newly assigned MSHA inspector believed that it remained subject to inspections.

¹⁵ MSHA's inspection resources were stretched very thin in early 2008. The last previous inspection of MC-1, in March 2008, was conducted by an MSHA inspector on temporary assignment from Michigan because Oregon was "short-handed." Tr. 494-95.

¹⁶ The Secretary's theory is problematic for other reasons. Citing an operator for a violation that occurred at some unspecified time in the past could pose due process issues. It also could call for speculation on factors to be considered in evaluating whether a violation existed, if so, its gravity and the level of an operator's negligence. As noted *infra*, evaluation of such issues for an alleged guarding violation may involve staffing patterns at the time of the alleged violation, and other such factors.

As noted above, if the Secretary had established that LTM had operated the TDS periodically despite its being locked out, then it would have been available for use, and the citations would be considered on the merits. A closer question would have been presented if the Secretary had proven that the TDS had been operated “in the recent past,” as Chaix believed. However, recent operation was likewise not established.

Based upon the foregoing, I find that the TDS was not available for use by miners, and that the citations issued for conditions on the TDS must be vacated.

The Mobil Crusher #1 Citations

There are seven citations remaining at issue related to MC-1. Six of those allege a violation of the standard requiring that moving machine parts be guarded. The standard provides:

§ 56.14107 Moving Machine Parts

(a) Moving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and takeup pulleys, flywheels, couplings, shafts, fan blades, and similar moving parts that can cause injury.

(b) Guards shall not be required where the exposed moving parts are at least seven feet away from walking or working surfaces.

30 C.F.R. § 56.14107.

The standard is broadly worded because it must be applied to myriad circumstances and, as such, calls for interpretation by mine operators and MSHA inspectors. Not surprisingly, there is some variation, or inconsistency, in the application of the standard. The citations at issue here present a not uncommon factual pattern – a new or different inspector perceives a violation of the standard in conditions that were not viewed as violative by inspectors during prior inspections. Assessing the validity of such citations can present difficult issues. As explained in *Good*, when the Secretary’s interpretation of a regulation is challenged, the initial determination is whether the regulation or standard is plain or ambiguous. The Secretary’s interpretation of an ambiguous regulation must be deferred to if it is “reasonable, consistent with statutory purpose, and not in conflict with the statute’s plain language.” 23 FMSHRC at 1004. If the Secretary’s position is sustained, a separate inquiry must be made, i.e., whether an operator had fair notice of the Secretary’s interpretation.

To determine whether an operator received fair notice of the agency’s interpretation, the Commission asks “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 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 regulatory 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 [including the existing guarding on each moving part, the location of each part in relation to where miners traveled and worked, and when and how miners accessed each part, if at all].

23 FMSHRC at 1004-05 (opinion of Commissioners Jordan and Beatty) (citations omitted).

In evaluating whether a particular condition violated the standard, the gravity of any such violation, and whether LTM had fair notice of the Secretary's interpretation of the standard, the potential exposure of miners to the moving machine parts must be considered. In *Thompson Bros. Coal Co.*, 6 FMSHRC 2094, 2097 (Sept. 1984), the Commission held that a similar guarding standard must be interpreted by considering whether there is a reasonable possibility of contact and injury, including contact stemming from inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness. Chaix's determinations that guarding violations existed, and his assessment of the gravity of the violations, was premised upon two general theories of exposure. One was that a miner involved in inspecting or maintaining the machinery might become entangled while in the process of touching gear boxes or bearing caps and/or greasing the bearings while in operation. The other was the potential for a person to contact the moving parts while traveling or cleaning in the vicinity of the potential hazard, e.g., by falling. The inspection/maintenance theory is generally applicable to all of the guarding violations, and will be addressed first. The travelway/cleanup theory is particular to each violation, and will be discussed in conjunction with the specific citation at issue.

Chaix's inspection/maintenance theory of exposure was based upon his general mining experience, particularly his approximately six months in a position he described as "conveyor mechanic." Tr. 14, 214-15. He believed that miners would place themselves into very close proximity to moving machine parts on conveyors in order to perform inspection and maintenance tasks, e.g., physically touching gear boxes and bearing caps with their hands in order to feel for vibrations or excessive heat – indicators of problems or impending failure. Tr. 33, 97, 113, 128, 268-69. He also believed that close contact was required in order to grease bearings which he assumed was done while machinery was in operation to promote even distribution of grease. Tr. 34-35.

Brian West testified that LTM did not perform inspection and maintenance functions in the manner described by Chaix. He has worked with crushing operations for many years, and has nine to ten years of experience working on conveyors. Tr. 385, 405. West testified that LTM's crusher operator would perform a general walk-around inspection daily, but would not come into close proximity to any moving parts. Tr. 383, 425-27. Any maintenance that needed to be performed, and maintenance included greasing, was done while the equipment was deenergized and locked and tagged out.¹⁷ Tr. 408, 504-05, 536. West testified that it was not necessary to touch a bearing to determine if it was failing, because it could be heard, smelled, and/or seen. Tr. 385-86. Bearings were typically run to failure, even though that might result in unscheduled down time. Tr. 489. Touching bearing caps, guards, or other parts in the vicinity of moving parts was not the standard way to diagnose problems, and LTM's employees were not trained to do that. Tr. 385, 401-04, 408, 425. Chaix did not claim to have seen any of LTM's employees take such actions, and conceded that he did not know how LTM's employees were trained. Tr. 269-70.

Around the time of the inspection, MC-1 was staffed by the crusher operator and two loader operators, and virtually no maintenance was performed on the plant.¹⁸ Tr. 527-28. In order to perform maintenance, the men would have had to work overtime or shut the plant down early, and West did not recall any overtime being recorded on time cards and did not see the men performing any maintenance. Tr. 527-28.

I find West's testimony, which addressed actual practices at MC-1, to be credible. LTM did not closely inspect or service its conveyors or other equipment while in operation. In fact, the prospect of a miner reaching around or near guards in close proximity to moving machine parts like conveyor head or tail pulleys strikes me as a highly dangerous practice. LTM's practice of performing maintenance only when equipment was locked and tagged out, regardless of any advantages Chaix's touch/feel theory might have in the diagnoses of impending failure, seems eminently reasonable. It also is in conformance with other standards, e.g., 30 C.F.R. § 56.14204 which provides that machinery shall not be lubricated manually while it is in motion where application of the lubricant may expose persons to injury. In evaluating the guarding violations, no weight will be accorded to the close inspection/maintenance theory of exposure.

Citation No. 6398752

¹⁷ An exception to the lock out/tag out policy was that gear boxes on major equipment, e.g., screens, were monitored periodically with an infrared heat sensor gun, which could provide the operating temperature of the gearbox from a distance of 15-20 feet. Tr. 386-87, 497.

¹⁸ At the time of the hearing, the plant had been moved to a different location, and a ground man had been employed to perform maintenance tasks like greasing. He reported for his work after the crusher crew had gone home. Because many of the grease fittings were inaccessible without removal of guards, extended grease lines were installed as the plant was reassembled, in order to speed the maintenance operation. Tr. 527-29.

Citation No. 6398752 alleges a violation of the guarding standard, which is described in the “Condition and Practice” section of the citation as follows:

The left side of the head pulley on the #3 hopper feeder conveyor has not been adequately guarded. Open access to the moving machine parts was left at a height of 26 inches from the walkway, and 12 inches from the existing (inadequate,) side guard, exposing miners performing inspection, maintenance, lubrication, or cleanup activities in this area to the risk of very serious injuries resulting from entanglement with these moving machine parts. A miner was observed traveling on foot and working in and around the plant while in operation at the time of the inspection. Seven other guarding violations were cited in this inspection. Therefore, termination due time has been set to allow for all corrective action to be properly completed.

The citation was modified on June 25, by adding the following language to the Condition and Practice section:

The tail and head pulleys of the #3 feeder are inadequately guarded, offering exposure to the moving machine parts. The head and tail pulleys of the #1 and #2 feeder conveyors also offer access to the moving machine parts. Termination due time has already been extended to 06/30/2008 in order to allow for the completion of all corrective work.

Ex. G-13.

Chaix determined that it was reasonably likely that the violation would result in a permanently disabling injury, that the violation was significant and substantial (“S&S”), that one person was affected, and that the operator’s negligence was moderate. A civil penalty in the amount of \$176.00 was proposed for this violation.

LTM contends that the pulley was adequately guarded and did not present a hazard, and that it did not have fair notice of the Secretary’s interpretation of the standard. It also contests the special findings and the amount of the penalty.

The Violation

Raw material was fed into MC-1 through a three-bin hopper. Conveyor belts located under the hoppers transported material onto a collector belt, the under-hopper conveyor, which transferred it to a belt that fed it into a cone crusher. The hopper/conveyor assembly was trailer mounted, and access to the area was restricted by company policy. The Secretary introduced three photographs of the cited condition that were taken by Chaix on June 11. The first depicts the pulley in question. Ex. G-15/1. The other two depict the condition after the citation had been terminated by the installation of additional guarding and an extended grease line. Tr. 102; Ex. G-15/2, G-15/3. None of the Secretary’s photographs show the “existing (inadequate,) side guard” referred to in the citation. LTM introduced a photograph showing the area and the then-existing

side guard. Tr. 100, 381; Ex. R-6/2. Another photograph, a side view, shows that the shaft of the pulley was approximately one foot inside the edge of the existing guard. Ex. R-6/2. It also shows, in the far right background, the general area of the #2 hopper conveyor that Chaix noted as being inadequately guarded in the modification to the citation.

I have rejected the Secretary's inspection/maintenance theory of exposure. As to the travelway/cleanup theory, Chaix theorized that a person passing through the area could slip and fall and possibly become entangled in the pulley. Tr. 94. As depicted in a photograph, the area in question was an approximately two-foot wide passageway, or walkway, between the hoppers and what appears to be the body of a trailer. Ex. G-15/2. Dual trailer tires appear to extend across the passageway adjacent to what was then an opening in the guarding, and step plates were located on the tops of the tires. Chaix's concern was that a miner using the step plates on top of the tires could slip and fall possibly encountering the pulley. Tr. 94. LTM's policy, upon which its personnel were trained, was that no one was allowed to enter the subject area while the crusher was in operation. Tr. 384-85, 393. There was a gate mounted on the side of the trailer, barely visible in a photograph, that normally was closed and had a "Do Not Enter" sign on it. Tr. 391; Ex. G-15/2. The under-hopper conveyors were monitored from the other side of the conveyors, by someone standing on the ground and looking under the raised machinery. Tr. 384. Chaix had seen one miner in the general area, but had not seen anyone enter or travel the walkway in question. Tr. 94, 253-54. He also acknowledged that West told him about the no-entry policy when he inspected that area.¹⁹ Tr. 260.

In *Good*, all four Commissioners who decided the case concluded that the guarding standard was ambiguous when applied to the facts of that case, and I so find here.²⁰ The Secretary's interpretation of the standard is entitled to deference if it is reasonable, consistent with the statutory purpose and not in conflict with the statute's plain language. On the facts presented, the only issue is whether the Secretary's interpretation, i.e., that the pulley was not adequately guarded, is reasonable. Chaix's initial photo depicts a completely open rotating side of the head pulley and shaft, an obvious hazard.²¹ Ex. G-15/1. However, Chaix took the photograph by partially entering the restricted area and reaching inside the existing guard. Tr. 395-96.

¹⁹ When Chaix and West approached the area, Chaix motioned that West should enter the trailer. West explained LTM's policy, stated that he was not permitted to enter the area because the conveyors were running. Chaix then stepped into the area near, but not on, the tire step plate, to take his first photograph. Tr. 393-96, 496.

²⁰ The Secretary argues, citing *Good*, that the standard is not ambiguous, and clearly requires guarding of all moving machine parts that are not more than seven feet away from a walking or working surface. Sec'y. Br. at 14. However, all four Commissioners who decided *Good* held that the guarding standard was ambiguous in the applications there at issue in that it did not specify the extent to which moving machine parts should be guarded. 23 FMSHRC at 1004, 1008.

²¹ There was very little evidence introduced as to the alleged hazards presented by the pulleys on the #2 and #3 hopper conveyors noted in the amendment to the citation. The Secretary failed to carry her burden of proof as to those parts.

If it is assumed that a miner would violate LTM's policy by entering the walkway while the machinery was in operation, contact with the moving machine parts of the head pulley would have been at least theoretically possible. As LTM's photos make clear, in order to contact the rotating parts, a miner would have had to reach around the existing guard. It is highly unlikely that he would contact the pulley if he slipped and fell, because the pulley was significantly recessed behind the guard. In order to reach the pinch point where the belt started to wrap around the pulley he would have had to extend an arm around and inside the guard at least one foot.

I have serious doubts that the Secretary's interpretation is reasonable. In any event, it is clear that LTM did not have fair notice of the Secretary's interpretation. Consequently, the citation will be vacated.

The factors outlined in *Good* that are relevant to the fair notice defense as presented here are the consistency of the agency's enforcement, whether MSHA has published notices informing the regulated community with "ascertainable certainty" of its interpretation of the standard, and the circumstances at the operator's mine, including the location of the pulley in relation to where miners traveled and worked, and when and how miners accessed it.

Here, at least until the June 11, 2008, inspection, MSHA consistently enforced the standard as applied to the guarding for the pulley. The condition had been inspected by MSHA many times in the past, most recently in March 2008, and no previous inspector determined that the guarding, which had not been changed, was inadequate. Tr. 390. It was Chaix's issuance of the instant citation that created inconsistency in MSHA's enforcement. There is no evidence that MSHA has published notices that would have informed mine operators with ascertainable certainty that the guarding of the head pulley was inadequate.²²

The circumstances at MC-1 were that the pulley was located in an area where travel was restricted. LTM had a firm policy, upon which its miners were trained, that entry into the trailer's travelway was prohibited when the plant was operating. There is no evidence that that policy was ignored by LTM's employees, either routinely or occasionally. In fact, there was typically only one person in the general area, the crusher operator, who would not have had occasion to enter the area in violation of LTM's policy. As the Secretary argues, restrictive entry policies are not always followed, and the history of mining is replete with examples of injuries and fatalities that occurred when preventive practices that "always" were implemented, were not. Consequently, there is a possibility, albeit small, that a miner would attempt to use the walkway in the trailer, encounter a tripping hazard, and fall in the vicinity of the pulley. However, the pulley was located behind a substantial guard, and any inadvertent contact, e.g., by a person

²² Rodric Breland, supervisor of MSHA's Albany Field Office, identified a number of materials on guarding put out by MSHA, including the standard itself, the Policy and Procedures Manual, a guarding handbook, and a power-point presentation. Tr. 586. None of those instructional materials were introduced into evidence. Nor were any references made to such materials in an attempt to demonstrate that the Secretary had notified operators with ascertainable certainty of her interpretation of the regulation as applied to conditions like those cited here.

falling while on the restricted travelway, would have been highly unlikely. I have rejected the inspection/maintenance theory of exposure and there is no evidence of any exposure attributable to cleanup activities for the location in question.

Taking all of these factors into account, I find that LTM did not have fair notice of the Secretary's interpretation of the standard as to the condition cited. Accordingly, the citation will be vacated.

Citation No. 6398753

Citation No. 6398753 also alleges a violation of the guarding standard, described in the "Condition and Practice" section of the citation as follows:

The head pulley and shaft couplings on the "underhopper conveyor" have not been adequately guarded. Open access to the moving machine parts was left at a height of 60 inches, at a distance of 24 inches from the side of the chute, exposing miners performing inspection, maintenance, lubrication, or cleanup activities in this area to the risk of very serious injuries resulting from entanglement with these moving machine parts. A miner was observed traveling on foot and working in and around the plant while in operation at the time of the inspection. Seven other guarding violations were cited in this inspection. Therefore, termination due time has been set to allow for all corrective action to be properly completed.

Ex. G-16.

Chaix determined that it was reasonably likely that the violation would result in a permanently disabling injury, that the violation was S&S, that one person was affected, and that the operator's negligence was moderate. A civil penalty in the amount of \$176.00 was proposed for this violation.

LTM contends that the pulley was adequately guarded and did not present a hazard, and that it did not have fair notice of the Secretary's interpretation of the standard. It also contests the special findings and the amount of the penalty.

The Violation

The conveyor at issue passed under the three-bin feeder hopper. The hopper feeder conveyors deposited material onto the subject conveyor, which in turn deposited it onto another conveyor which fed it into a cone crusher. The head pulley at issue was on the upper, discharge, end of the conveyor, and is depicted in photographs taken by Chaix and LTM. Ex. G-18, G-19, R-7.

As with the previous citation, I find application of the broadly worded standard to the particular parts at issue to be ambiguous, and that deference should be afforded to the Secretary's interpretation if it is reasonable. Chaix's photograph of the purported hazard depicts a relatively open side of the head pulley, with some red-painted guarding in place. Ex. G-18/1. As with the previous citation, however, there is considerably more to the picture. Immediately adjacent to the pulley, and not shown in Chaix's photograph, were steel plates forming a "rock box" to keep materials on the conveyor at the transfer point. The plates are shown in photographs taken by LTM and by another MSHA inspector when he terminated the citation. Ex. R-7, G-18/2, 3 and 4. In order to reach the pulley, one would have to reach over the steel plates to the hazard, which was 60 inches off the ground and 24 inches away from the outer edge of the rock box. Tr. 265. A photograph taken by LTM shows the crusher operator standing in the location that Chaix was in when he took his photograph. Tr. 113-14, 406; Ex. R-7/1. Other photographs show the opposite side of the transfer point, steel deflector plates, and red-painted guarding of the conveyor drive. Ex. R-7/2, R-7/3.

The Secretary's inspection/maintenance theory of exposure has been rejected. As to the travelway/cleanup theory, Chaix believed that a miner would be in the area at least once at start-up, and that there might be more frequent travel because of the location. Tr. 117. West disagreed, stating that there would be no reason for a miner to be in the area, with the exception of an initial walk-around inspection. Tr. 406. West also believed that there was no possibility that a miner would inadvertently come into contact with the parts. Tr. 407-08. As the pictures readily establish, there was no possibility that a miner engaged in cleanup or traveling in the area would contact the supposed hazard, which was located five feet off the ground and two feet on the other side of shoulder-height steel plates. The Secretary's interpretation of the standard as to this condition is unreasonable, and is not entitled to deference. In addition, LTM did not have fair notice of the Secretary's interpretation.

The factors relevant to the fair notice defense are the same as those identified with respect to the previous citation. Here, as there, MSHA's enforcement of the standard was consistent, until Chaix issued his citation. The condition had been inspected by MSHA in the past, most recently in March 2008, and no previous inspector determined that the guarding was inadequate. There is no evidence that MSHA has published notices that would have informed mine operators with ascertainable certainty that the guarding of the head pulley was inadequate. Considering those factors, the isolated location of the pulley, the existing guarding and the additional protection provided by the rock box, LTM did not have fair notice of the Secretary's interpretation of the standard as applied to the subject pulley.

Citation No. 6398754

Citation No. 6398754 alleges a violation of the guarding standard, described in the “Condition and Practice” section of the citation as follows:

A keyed shaft on the v-belt drive on the "under 1400 feed" conveyor has not been adequately guarded. Open access to this rapidly moving machine part was left at a height of approximately 46 inches, at a distance of 17 inches from the handrail on the cone work deck, exposing miners performing inspection, maintenance, lubrication, or cleanup activities in this area to the risk of very serious injuries resulting from entanglement with this spinning machine part. A miner was observed working on this deck while the plant was in operation during the course of this inspection. Seven other guarding violations were cited in this inspection. Therefore, termination due time has been set to allow for all corrective action to be properly completed.

Ex. G-20.

Chaix determined that it was reasonably likely that the violation would result in a permanently disabling injury, that the violation was S&S, that one person was affected, and that the operator’s negligence was moderate. A civil penalty, in the amount of \$176.00 was proposed for this violation.

LTM does not explicitly assert that the shaft was adequately guarded, or that it did not have fair notice of the Secretary’s interpretation of the guarding standard with respect to the parts at issue here. Resp. Br. at 21-22. It does contend that the violation was not S&S.

Significant and Substantial

An S&S violation is described in section 104(d)(1) of the Act as a violation “of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard.” A violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat’l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

The Commission has explained that:

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

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

Mathies Coal Co., 6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); *see also*, *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999); *Austin Power, Inc. v. Secretary of Labor*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria).

In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985), the Commission provided additional guidance:

We have explained further that the third element of the *Mathies* formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the *contribution* of a violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1866, 1868 (August 1984); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574-75 (July 1984).

Consideration must be given to both the time frame that a violative condition existed prior to the issuance of a citation, and the time that it would have existed if normal mining operations had continued. *Bellefonte Lime Co.*, 20 FMSHRC 1250 (Nov. 1998); *Halfway, Inc.*, 8 FMSHRC 8, 12 (Jan. 1986); *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *Youghiogeny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987).

The condition is depicted in several photographs. A close-up view of the approximately one and seven-eighth's inch diameter shaft shows that it did not project beyond the woven steel mesh guard for the v-belt drive. Tr. 122, 415; Ex. G-22/1. A hole in the mesh, approximately four inches by four inches provided some access to the shaft. Other photographs provide a better perspective of the condition. A photo introduced by LTM shows the railing referred to in the citation, as does a photograph taken after the condition had been abated by welding a box shaped cap over the opening. Ex. G-22/2, R-8/1.

The exposed shaft was near a work platform for the cone crusher. The platform was about five feet wide, and a miner working on the platform would have been on the side farthest away from the railing depicted in the photographs. Tr. 277, 417. The guard and shaft surface were 17 inches outside the railing, and the shaft was several inches beyond where the platform and railing terminated, as shown in a photograph introduced by LTM. Tr. 418; Ex. R-8/1. Aside from the previously rejected inspection/maintenance exposure, Chaix determined that a miner traveling on the walkway might slip or trip, or become startled, or step back into the hazard. Tr. 278. West testified that a miner would rarely be in that corner of the walkway/platform, and that it would not be easy to contact the shaft, which was outside the rail extension. Tr. 418-19.

I find that the shaft was essentially flush with the existing guard and, because of its location, 17 inches away from and several inches outside the end of the railing and the fact that a miner would rarely, if ever, be in that corner of the platform, that the condition was unlikely to result in an injury. Because the shaft did not protrude beyond the surrounding guard, any injury would have resulted in lost work days, and would not have been permanently disabling. This condition, likewise, had not been deemed a violation during previous MSHA inspections, and I find that LTM's negligence was low.

Citation No. 6398755

Citation No. 6398755 alleges a violation of the guarding standard, described in the "Condition and Practice" section of the citation as follows:

The self-cleaning tail pulley on the "under 1400" conveyor has not been adequately guarded. Access to this rapidly rotating finned pulley was left open across the entire 42 inch width of the conveyor at a height of 20 inches at the bottom, and the top sides at a height of 36 inches, exposing miners performing inspection, maintenance, lubrication, or cleanup activities in this area to the risk of very serious injuries resulting from entanglement with this spinning machine part. This condition was obvious to the casual observer. A miner was observed traveling on foot and working in and around the plant while it was in operation during the course of this inspection. Seven other guarding violations were cited in this inspection. Therefore, termination due time has been set to allow for all corrective action to be properly completed.

Ex. G-23.

Chaix determined that it was reasonably likely that the violation would result in a permanently disabling injury, that the violation was S&S, that one person was affected, and that the operator's negligence was moderate. A civil penalty, in the amount of \$176.00 was proposed for this violation.

LTM contends that the pulley was adequately guarded and did not present a hazard, and that it did not have fair notice of the Secretary's interpretation of the standard. It also contests the special findings and the amount of the penalty.

The Violation

The self-cleaning tail pulley was located under the 1400 trailer-mounted crusher. It is depicted in photographs taken by Chaix and LTM. A close up of the pulley itself, taken by Chaix while he reached under an existing guard, and several other photographs show the condition of the existing guarding before abatement measures were taken. Ex. G-25/2, G-25/3, G-26/1. The location of the pulley and conveyor in relation to the trailer components is partially shown in another photograph introduced by the Secretary. Ex. G-25/1. As with other conditions,

photographs taken by LTM on the day of the inspection, present a considerably better perspective of the alleged hazard. Ex. R-9.

The conveyor in question was located underneath the trailer on which the crusher was mounted. The trailer deck was roughly four feet high, and the conveyor was recessed about three feet in from the sides of the trailer. Tr. 292, 425. It was recessed a greater distance from the ends of the trailer, and the trailer's framing further prevented access to the conveyor, as depicted in LTM's photographs. Tr. 422; Ex. R-9/1, R-9/2, R-9/7-9. A ladder providing access to the trailer deck, and jacks supporting the trailer, also inhibited access to the conveyor.²³ Ex. R-9/1, R-9/4. At its lowest point, the end where the pulley was located, the guard was slightly less than 20 inches off the ground. Tr. 133, 428; Ex. R-9/6.

There is little question that a person that became entangled in the rotating tail pulley would suffer a serious, possibly fatal, injury. LTM had installed guarding around the pulley to prevent such entanglements. The question is whether the guarding was adequate, i.e., met the requirements of the standard.²⁴ There were two alleged deficiencies in the guarding, an opening on the top near the tail pulley, and the absence of a bottom guard.

As with the previous citation, I find application of the broadly worded standard to the particular parts at issue to be ambiguous, and that deference should be afforded to the Secretary's interpretation if it is reasonable.

The Secretary argues the aforementioned two theories of exposure, inspection/maintenance and travelway/cleanup. The inspection/maintenance theory has previously been rejected, and this application further evidences the bases for doing so.²⁵ The photographs also make clear that the existing guarding was more than adequate to prevent contact by anyone walking in the vicinity who might trip and fall. Because of its location under the trailer deck, a person walking in the area would be at least three feet, and probably considerably farther, away from the guarding. A miner engaged in cleanup activities could, however, position himself under the trailer deck closer to the conveyor.

²³ LTM's photograph of the crusher illustrates a color-coding system that it employed at the MC-1 plant. Green denoted proper travelways and approaches to equipment, e.g., the ladder to the trailer deck and the gate to enter it. Orange denoted areas where caution was required, such as the railing around the trailer deck. Red signaled "stop" - do not proceed, as indicated by the guards around the conveyor and pulley. This color scheme was not implemented at the TDS, because there was no intention to use that facility. Tr. 437-38.

²⁴ As the photographs depict, not all of the attachment points for the guarding were in use. However, the guarding was substantial in construction, and was in the location it was intended to be in. Chaix did not cite the guard for being improperly secured. Tr. 295.

²⁵ As Chaix explained, the existing guarding inhibited a miner's ability to inspect and maintain the conveyor while it was in operation, and one would have to enter the guarded area to grease the pulley shaft bearings. Tr. 145. As West explained, however, LTM's employees do not perform those functions, or any function in close proximity to such equipment, while it is in operation. Tr. 425-27.

There was conflicting testimony on LTM's cleanup activity. Chaix explained that spillage would be inevitable in the area of the pulley, and the photographs confirm that spillage occurred at that location. Tr. 135. Because of the presence of the shovel, shown in the photographs, he assumed that spillage, including spillage under the conveyor's tail pulley, would be cleaned by a miner using the shovel. Tr. 134, 146. He did not see a skid steer at the plant, a piece of mobile equipment that could be used for cleaning, and assumed none was available. Tr. 146. He did not know how often cleaning would be needed, but stated that it would not be unusual to see it done once per shift. Tr. 135. He did not inquire about actual cleanup activities at MC-1, or, apparently, about the availability of a skid steer. Tr. 135. West testified that there was a skid steer available for use at MC-1, and that he believed that miners would use it rather than a shovel to clean the area. Tr. 430-32. The skid steer was located at LTM's nearby asphalt plant, approximately 150 yards from MC-1.

The presence of shovels in the MC-1 area strongly suggests that they were used for cleanup of fugitive material, and I so find. However, while a shovel was most likely used to clean small open areas, such as the approach to the ladder leading to the crusher deck, it is not clear that a shovel was used to clean underneath the conveyor. The pictures suggest that fugitive material was allowed to build up in that area, and it is more likely that removal of such material would have been done infrequently and that a skid steer would have been used because of the amount of material involved. Ken Hanson, one of Knife River's safety managers, testified that at Knife River facilities under his control, which did not include MC-1, build-ups of material under a tail pulley were either removed with a "skid loader," or by hand after the machinery had been locked and tagged out. Tr. 208. As previously noted, MC-1 was essentially a one-man operation, and it is highly unlikely, but possible, that the crusher operator would have used a shovel to clean under the conveyor and tail pulley.²⁶

Chaix opined that a miner using a long-handled tool, like the shovel shown in his photograph, near a conveyor pulley could suffer a very serious injury and that MSHA records include instances of fatalities occurring under such circumstances. Tr. 137. Unknown is the extent of guarding, if any, that was in place when such events may have occurred. Here the alleged deficiencies in the guarding were an opening on the top of the guard and the absence of guarding on the bottom of the pulley. The opening, which was located approximately one foot away from the end of the existing guard, is depicted in one of the Secretary's photographs. Ex. G-25/3. Access from the rear was blocked by the trailer's frame, and the solid metal guard around the pulley. A miner cleaning under the conveyor would not be exposed to danger because of the opening in the top of the guard. I find that that opening was not a deficiency that rendered the existing guarding inadequate, either solely or in conjunction with the alleged deficiency in bottom guarding.

As explained in the following discussion of the fair notice issue, there is a considerable history to MSHA's enforcement of the standard as it relates to the guarding of the bottoms of tail

²⁶ For example, a buildup of material that contacted the belt and threatened to disrupt operations might have been dealt with initially by simply shoveling some of the material away from the belt.

pulleys. Chaix did not explain, in detail, the mechanics of how use of a shovel near a conveyor could be hazardous. It appears that the concern is possible entanglement, i.e., that the tool may get caught between the belt and pulley and be forcefully rotated around the pulley resulting in flailing of the handle and possibly pulling the miner into the pulley. Here, the existing guard effectively covered the top and sides of the pulley and related portions of the conveyor. The pulley itself was recessed, such that no part of it extended below the guard. Two to three feet away from the pulley, the belt sagged slightly below the side guard. However, the guard appears to have been sufficient to prevent entanglement with the pulley, especially since a miner would most likely be sliding the bottom of the shovel along the ground and would not be attempting to shovel material onto the belt, which was inaccessible from that area.

Considering the relatively isolated location of the tail pulley, and the considerable guarding that was in place, guarding that had thus far been deemed in compliance with the standard by LTM and other MSHA inspectors, I find that the Secretary's interpretation of the standard, as applied to the cited condition is not reasonable, and is not entitled to deference. In addition, I find that LTM did not have fair notice of the Secretary's interpretation.

The factors relevant to the fair notice defense are the same as those identified with respect to previous citations. Here, as there, MSHA's enforcement of the standard was consistent, until Chaix issued his citation. The condition had been inspected by MSHA in the past, most recently in March 2008, and no previous inspector determined that the guarding was inadequate. Tr. 436. There is no evidence that MSHA has published notices that would have informed mine operators with ascertainable certainty that the guarding of the tail pulley was inadequate.

Unlike the guarding of conditions discussed in previous citations, the topic of bottom guarding for conveyor tail pulleys has provoked considerable interaction between mine operators and MSHA. Ken Hansen has worked with crushers for 40 years and has dealt with guarding issues throughout. Tr. 190-92. He testified that around 2004-2005, he was visited by two MSHA inspectors, who told him that they had been informed during an office meeting that bottom guarding would not be required on tail pulleys that were no more than 30 inches above the ground. Tr. 193-94. Knife River, and other mine operators it dealt with in Southern Oregon, applied that standard. It was applied throughout Knife River's 5-6 mines over the course of several years and there were no citations issued for the absence of bottom guarding on tail pulleys that were less than 30 inches off the ground. Tr. 195-96. However, around August or September of 2008, Hansen was told by another MSHA inspector, Mike Anderson, that the standard that was going to be applied was "knee height." Tr. 198. He did not like the ambiguity inherent in the new interpretation, and took a "wait and see" approach to the newly announced "guideline." Tr. 206-07. One of his concerns was that reducing ground clearance by lowering a tail pulley to avoid having to install bottom guarding would require more frequent stoppage of the equipment, because material has a tendency to build up at the tail pulley and cleaning it requires that the equipment be deenergized, and locked and tagged out. In his opinion, re-starting a plant like MC-1 is "the most dangerous time" because you have to know where all your people are, and things can break. Tr. 205-06.

Lynn Gullickson worked for Knife River for 11 years, and for the last six years held the position of Safety Resource Manager for the Western Oregon, Northwest Division. He has worked for 43 years in crusher operations, including 17 years as a crusher operator, maintenance man, and asphalt plant operator. Tr. 549. In 2005 and 2006 he requested and obtained compliance assistance visits from MSHA on two new crusher plants. The topic of bottom guarding for tail pulleys was discussed, and his understanding was that tail pulleys less than 28-30 inches off the ground did not require bottom guarding. Tr. 550. Then about 2007-08, the standard became “knee height.” Tr. 550. There was no official document establishing the rule, and he doesn’t know where it came from.²⁷

Michael Flewelling, one of three safety managers for Knife River Materials, testified that he was present at a meeting on June 11, 2008, when one of the meeting participants received a call regarding a citation that had been issued by Chaix at the Davis Slough for a tail pulley without a bottom guard that was close to the ground. His understanding was that the 30-inch guideline was in effect, i.e., bottom guarding was not required for pulleys less than 30 inches off the ground. Tr. 573. He called MSHA’s Albany Field Office and spoke to the Field Office Supervisor, “Brad” Breland. As a result of that conversation, his understanding was that the guideline was “knee height,” about 24 inches or so. Tr. 573-74. Several persons, including LTM’s representative, were present and overheard the call.

Rodric Breland, supervisor of MSHA’s Albany Field Office since January 2008, confirmed that he had a phone conversation on June 11, 2008, with Flewelling and other Knife River personnel on the subject of bottom guarding for tail pulleys. Tr. 588. While he did not recall the exact wording of the discussion, he did recall that the concept of “knee height” came up, “but there was a lot more to it.” Tr. 588. He explained that his position on bottom guarding has been relatively consistent, i.e., that there is no minimum standard and that all pertinent facts have to be examined. MSHA does not insist on guards when a person would have to lay on his back and reach up into a pulley – but a pulley that was 20 inches off the ground and in a position where it could cause injury would have to be guarded – every situation is different. Tr. 588-89. He also explained that there are a number of materials on guarding put out by MSHA, including the standard itself, the Policy and Procedures Manual, a guarding handbook, and a power-point presentation. Tr. 586.

²⁷ While not relevant to the issues presented here, controversy over application of the guarding standard to the bottoms of tail pulleys continued. Gullickson related that five citations for such violations were issued to Knife River on May 27, 2009, where the tail pulleys ranged from 10 to 32 inches off the ground. The Secretary determined to vacate those citations after Knife River contested them before the Commission. Tr. 559-62. The paperwork effectuating the actions noted that the citations would serve as notice for future enforcement. Ex. R-13 at 16-20. Subsequently Knife River representatives met with high level MSHA officials, who agreed to visit the MSHA Field Office and retrain the inspectors on the guarding of tail pulleys. Tr. 563, 565-68. The conditions that lead to the citations, which had not been altered, had not been cited subsequently. Tr. 563, 568. Roderic Breland, MSHA’s Field Office Supervisor, confirmed that higher level MSHA officials had determined to vacate the citations, and produced photographs of the cited conditions. Tr. 591-600; Ex. G-37.

Breland was an impressive witness. His approach to difficult guarding questions raised by mine operators and inspectors is commendable. He strives for consistency in enforcement and he often travels to a mine site to personally observe conditions in which an inspector's interpretation of the standard has been disputed. It is apparent that MSHA did not establish rigid criteria for interpreting the guarding standard as applied to bottom guarding for conveyor tail pulleys. The "30-inch" and "knee height" guidelines referred to by LTM's witnesses were not official MSHA-sanctioned interpretations. However, MSHA inspectors attempting to explain their interpretation of the standard to mine operators may well have used such terminology. LTM's witnesses credibly testified to conversations with MSHA inspectors that led them to reasonably conclude that the standard did not require bottom guarding for tail pulleys that were less than 30 inches, and later knee height, from the ground. Their understanding was validated by years of experience, and numerous inspections in which the "guidelines" appeared to have been consistently applied.

LTM reasonably viewed Chaix's citation for inadequate guarding of the tail pulley as a significant and unexpected departure from their settled understanding of how the standard applied to the subject condition. Upon consideration of the factors relevant to this defense, I find that LTM did not have fair notice of the Secretary's interpretation of the guarding standard as applied with respect to this citation.

Citation No. 6398756

Citation No. 6398756 alleges a violation of the guarding standard, described in the "Condition and Practice" section of the citation as follows:

The v-belt drive on the #2 (El Jay) screen has not been adequately guarded, offering open access to the rapidly rotating primary drive and idler pulleys. Both the leading and the trailing sides of the primary drive pulley were left open to contact. This condition was obvious to the casual observer. Miners performing inspection, maintenance, lubrication, or cleanup activities in this area risk very serious injuries resulting from entanglement with these moving machine parts. Seven other guarding violations were cited in this same inspection. Therefore, termination due time has been set to allow for all corrective action to be properly completed.

Ex. G-27.

Chaix determined that it was unlikely that the violation would result in a permanently disabling injury, that the violation was not S&S, that one person was affected, and that the operator's negligence was moderate. A civil penalty, in the amount of \$100.00 was proposed for this violation.

LTM contends that the v-belt drive was adequately guarded in that the guard extended down to within 20 inches of the walking surface, that it did not present a hazard, and that it did not have fair notice of the Secretary's interpretation of the standard.

The Violation

The cited condition is depicted in a number of photographs taken by Chaix and LTM. Ex. G-29, R-10. A large electric drive motor, which transmitted power to the v-belt drive, was traversed by an elevated walkway. The motor extended completely through the walkway, such that persons using the walkway had to climb over it. Tr. 154; Ex. R-10/2. Intermediate steps, approximately 14 inches above the walkway, were provided on each side of the motor. Ex. R-29/1-2, R-10/2-3. Adjacent to and about six inches from the steps, there were openings in the guarding that allowed direct access to the drive and idler pulleys. Tr. 152-54; Ex. R-29/1-2. Chaix believed that they presented an entanglement hazard that could lead to a permanently disabling injury.

The Secretary's inspection/maintenance theory of exposure has been rejected. However, the travelway/cleanup theory is more viable here. The steps adjacent to the openings in the guard were an integral part of a walkway used by miners to access part of the screen. While the walkway would have been used infrequently, it was designated as a travelway for use by miners. The openings in the guard were in close proximity to the steps and were large enough to admit a shoe or boot.

LTM argues that the factory-mounted guard was no more than 20 inches above the walkway, i.e., less than knee height, which met the previously noted guideline. However, application of any such guideline would be extremely doubtful here. As Breland noted in reference to this citation, the condition here was more hazardous to a foot, and a minimum height standard would have no application to this type of hazard.²⁸ Tr. 589.

Again, I find the standard ambiguous as applied to the specific condition at issue in this citation. However, I find the Secretary's interpretation of the standard to be reasonable and entitled to deference.

LTM's fair notice defense presents a close question. The guard for the v-belt drive was not painted red, as were the guards that LTM installed on MC-1. That was because it was incorporated into the design of the screen and was installed at the time the screen was manufactured. Tr. 441. It is a reasonable inference that it had been used in that condition for a

²⁸ LTM's argument is based, in part, on Chaix's termination of the citation, wherein he noted that the guard had been extended "down to approximately knee height." Ex. G-27/2. There were no photographs of the condition, as abated. It is unclear whether knee height was considered from the main walkway, from the step, or from some other reference point. As Chaix admitted, the termination documentation was vague and not his best work. Tr. 301-04.

number of years, and had not been cited as being in violation of the guarding standard in prior inspections of MC-1, including the March 2008 inspection.

In determining whether LTM had fair notice of the Secretary's interpretation, as with other citations at issue in this case, the pertinent factors to be considered are the consistency of the agency's enforcement, whether MSHA has published notices informing the regulated community with "ascertainable certainty" of its interpretation of the standard, and the circumstances at the operator's mine, including the location of the pulley in relation to where miners traveled and worked, and when and how miners accessed it. MSHA's enforcement of the standard with respect to this condition had been consistent, until Chaix issued the citation. No previous inspector determined that the guarding was inadequate. While, as Breland noted, MSHA has published a good deal of material addressing application of the guarding standard, there is no evidence that it has published notices that would have informed mine operators with ascertainable certainty that the guarding of the v-belt drive, as presented here, was inadequate.

While the cited condition was directly adjacent to an elevated walkway, that walkway was traveled infrequently, especially when the equipment was in operation. Chaix testified that the screen was an extremely noisy piece of equipment, and that he would not expect any miner to be in that area while the machinery was in operation unless he had some compelling reason to be there. Tr. 152. His evaluation of the gravity of the violation was based upon a "very, very low basis of frequency to exposure." Tr. 152. Considering the relatively isolated location of the cited condition, the previously recognized adequacy of the factory-installed guard, and the extremely limited occasions that a miner would have traversed the walkway while the screen was in operation, I find that LTM did not have fair notice of the Secretary's interpretation of the standard.

Citation No. 6398757

Citation No. 6398757 alleges a violation of the guarding standard, described in the "Condition and Practice" section of the citation as follows:

The self-cleaning tail pulley on the #2 underscreen conveyor has been inadequately guarded, exposing miners performing inspection, maintenance, lubrication, or cleanup activities in this area to the risk of very serious injuries resulting from entanglement with this rapidly rotating machine part. The finned rotating pulley, at a height of 20 inches to the bottom of the side guards and 28 inches to the center of the shaft, was exposed across its bottom side for the entire 44 inch width of the conveyor, with less than 6 inches from the existing (inadequate,) guards to the pulley. Grease points were located on the shaft bearings. This condition was obvious to the casual observer. A miner was observed traveling and working in and around the plant while it was in operation at the time of this inspection. Seven other guarding violations were cited during this inspection. Therefore, termination due time has been set to allow for all corrective action to be properly completed.

Ex. G-30.

The citation was amended on June 25, 2008, to add the following language to the “Condition and Practice” section:

There are also openings in the guard at the adjustment assemblies, large enough to easily admit a body part, at a distance of less than 6 inches from the existing (inadequate,) guard to the finned tail pulley.

Ex. G-30 at 5.

Chaix determined that it was reasonably likely that the violation would result in a permanently disabling injury, that the violation was S&S, that one person was affected, and that the operator’s negligence was moderate. A civil penalty, in the amount of \$176.00 was proposed for this violation.

LTM contends that the pulley was adequately guarded and did not present a hazard, and that it did not have fair notice of the Secretary’s interpretation of the standard. It also contests the special findings and the amount of the penalty.

The Violation

The condition at issue in this citation, the tail pulley on the No. 2 underscreen conveyor, is similar to that addressed by Citation No. 6398755. It is depicted in several photographs taken by Chaix and by LTM. Ex. G-32/1, G-32/2, G-33, R-11/1-7. Chaix’s photos are close-ups of the tail pulley that were taken by reaching down under the existing guarding, which extended down to 20 inches from the ground. Tr. 161, 305. LTM’s photos show that the tail pulley, like the one previously discussed, was located under a trailer deck and was recessed approximately three feet away from the sides of the trailer deck. There was no trailer framing immediately behind the existing guard. However, access to the pulley was impeded by blending chutes that extended down and away from the sides of the pulley/guard. Tr. 444; Ex. R-11/4. R-11/6-7.

In addition to those distinctions, there were also assemblies on each side of the conveyor that were used periodically to adjust the tension on the belt. They were the subject of the amendment to the citation two weeks after it was issued. The pulley shaft was mounted in bearings that were affixed to an assembly that was attached to square tubing that slid into an opening in a bracket. The end of the sliding adjustment consisted of a threaded rod, on which two nuts were placed and were used to make the adjustments. Chaix believed that the openings in the guard were large enough for a body part to be inserted. Tr. 313; Ex. G-30/5. He pointed out an opening in the guard that he believed did not “fully protect miners” by referring to a “dark spot behind the shaft and bearing” shown on the left side of a photograph taken by LTM. Tr. 165; Ex. G-33/1; R-11/1. Another photograph, a side view of the “opening,” shows that the adjustment mechanism almost completely blocked access to the opening. Ex. R-11/4. West described the spatial relationship between the slot on the guard and the square tubing of the adjustment mechanism and opined that it did not provide easy access to the tail pulley. Tr. 448-

50; Ex. R-11/4. Adjustments to belt tension and alignment are performed while the conveyor is running, but only when necessary. The nuts on the end of the sliding mechanism, where the adjustments are made, are about three feet away from the tail pulley, on the other side of the blending chutes. Tr. 447.

The presence of the adjustment mechanism and the need to occasionally adjust belt tension and alignment do not materially differentiate the conditions at issue in this citation from those at issue in Citation No. 6398755. For the reasons there stated, I find that the Secretary's interpretation of the guarding standard to the tail pulley in question is not reasonable and is not entitled to deference, and that LTM did not have fair notice of the Secretary's interpretation of the standard.

Citation No. 6398758

Citation No. 6398758 alleges a violation of 30 C.F.R. § 56.12032, which requires that "inspection and cover plates on electrical equipment and junction boxes shall be kept in place at all times except during testing or repairs." The violation was described in the "Condition and Practice" section of the citation as follows:

Fourteen holes had been left open on multiple components of the electrical equipment in the plant MCC trailer, ranging in size up to 3 inches in diameter and voltage up to 480 VAC. The electrical conductors, both insulated and exposed (bare metal,) were clearly visible through several of the uncovered openings.

The "JCI control" panel had 5 open holes, up to 1 1/8" diameter. 480VAC.

The 120/240VAC breaker panel had 3 holes up to 1 1/4" diameter.

The Cutler/Hammer disconnect box had one hole, 1 1/4" diameter. 480VAC.

The "El Jay #2" panel had 2 holes: one 1 1/2" diameter, one 1 3/4" diameter. 480VAC.

The "6x20 JCI" panel had one hole. 480VAC.

The "Jaw" panel had one hole, 3 inches in diameter. 480VAC.

The junction box above the "6x20" and "El Jay" panels also had one open hole.

This MCC electrical trailer is also used on a daily basis as a shop, an operator's station, and a break and lunch room, as well as for storage of tools and equipment (including combustibles and flammables.) The trailer had a narrow walkway, and the lunch room had one door to exit, requiring miners to pass in close proximity to the electrical panels in order to escape. Electrical equipment and junction boxes with open holes pose a shock /burn /fire hazard to miners working, traveling, or taking a break in this area. This condition was extensive and obvious to the casual observer. Termination due time is set to allow for proper corrective work to be completed.

Ex. G-34.

Chaix determined that it was reasonably likely that the violation would result in a fatal injury, that the violation was S&S, that one person was affected, and that the operator's negligence was moderate. A civil penalty, in the amount of \$392.00 was proposed for this violation.

LTM contends that there was "no likelihood that the hazard will result in injury, and thus the citation should be dismissed." Resp. Br. at 30. It also contests the special findings and the amount of the penalty.

LTM's assertion that there was no likelihood that an injury would result is not a defense, but goes to the gravity of the violation. *Allied Products Co. v. FMSHRC*, 666 F.2d 890 (5th Cir. 1982). While not broadly worded, the regulation has been applied to require that there be no openings in electrical control boxes. *Richard E. Sieffert Res.*, 23 FMSHRC 426 (Apr. 2001) (ALJ) (open backs of electrical control boxes violated regulation). There is no dispute that there were more than one dozen openings in electrical equipment/junction boxes that were located in a trailer that housed electrical controls for MC-1. Chaix took photographs of the bottoms of various electrical panel boxes showing holes ranging up to three inches in diameter. Ex. G-36. The regulation was violated.

S&S

The fact of the violation has been established. A measure of danger to safety was contributed to by the openings in the electrical boxes allowing access to energized electrical conductors. There is little question that if a miner came into contact with an energized electrical circuit he could reasonably have been expected to suffer a serious injury. As is often the case, the primary issue in the S&S analysis is whether the violation was reasonably likely to result in an injury causing event.

The exterior dimensions of the trailer in question were on the order of eight feet by eight feet. Tr. 460. It housed various electrical control boxes, as shown in photographs introduced by LTM. Ex. R-17. Some of the boxes were energized, and some were not. Tr. 321, 457. West testified that the box that had the three-inch hole in it was not energized. Tr. 457. The holes were on the bottoms of the boxes. Tr. 177. The trailer was used for a variety of activities, including energizing and deenergizing equipment, storage of tools and supplies and as a lunch/break room. A miner entering or exiting the lunch room would pass by one electrical panel. Tr. 515-16. Chaix noted that combustible and flammable materials were stored in the trailer, but aside from wood, he was unable to identify specific substances. Tr. 318-20. West testified that there were a couple of cans of aerosol brake cleaner in the trailer, but no oil or grease. Tr. 463-64, 517.

Chaix determined that there were a number of ways that the hazard posed by the holes could result in an injury. He cited, as an example, that the three-inch hole could lead to direct contact with an energized conductor. Tr. 181. He also noted that the voltage of at least some of

the circuits was well above that of potentially fatal household current, and that if something became energized a fatality could result. Tr. 183. Contact could also result in shock/burn injuries, and he cited the possibility of a fire starting through the ignition of materials that might accumulate inside an electrical panel. Tr. 184.

The possibility of a miner coming into direct contact with an energized conductor inside of one of the panels was extremely remote. While the trailer had multiple uses, miners would enter it for brief periods only a few times each day. All of the openings were on the bottoms of the boxes, and below waist height. Tr. 460-61. The box with the three-inch hole in it was not energized. Tr. 457. There is no evidence that any material had accumulated in the boxes, and the pictures do not show any accumulations. The boxes were inside the trailer, not open and exposed to the elements. While a serious injury, even a fatality, was possible, it was highly unlikely. The possibility of a fire appears to have been virtually non-existent.

I find that the violation was not S&S, and that it was unlikely to result in a fatal injury. I agree with Chaix's assessment that the operator's negligence was moderate.

The Appropriate Civil Penalties

The parties stipulated that Mobil Crusher #1 is a small mine; that its controlling entity is medium sized, and that it had not been cited for any violations within the fifteen months preceding the inspection. LTM does not contend that the maximum penalty that could be assessed for the violations would affect its ability to continue in business. The Secretary does not contend that the violations were not promptly abated.

Citation No. 6398754 is affirmed. However, the violation was unlikely to result in a lost work days injury and was not S&S. LTM's negligence was low. A civil penalty of \$176.00 was proposed by the Secretary. The lowering of the levels of gravity and negligence justify a reduction in the proposed penalty. Upon consideration of the above, the factors enumerated in section 110(i) of the Act, and guided by the Secretary's penalty calculation regulations,²⁹ I impose a penalty in the amount of \$100.00.

Citation No. 6398758 is affirmed. However, the violation was unlikely to result in a fatal injury and was not S&S. A civil penalty of \$392.00 was proposed by the Secretary. The lowering of the level of gravity justifies a reduction in the proposed penalty. Upon consideration of the above, the factors enumerated in section 110(i) of the Act, and guided by the Secretary's penalty calculation regulations, I impose a penalty in the amount of \$100.00.

LTM withdrew its contest of Citation No. 6398766, which alleged that miners' training records were incomplete. The civil penalty proposed for that violation, \$100.00, will be imposed.

²⁹ 30 C.F.R. Subchapter P, Part 100.

ORDER

WHEREFORE, Citation Nos. 6398748, 6398749, 6398750, 6398751, 6398752, 6398753, 6398755, 6398756 and 6398757 are **VACATED**. Citation Nos. 6398754 and 6398758 are **AFFIRMED as modified**. Citation No. 6398766 is **AFFIRMED**. Respondent is **ORDERED** to pay civil penalties in the total amount of \$300.00, within 45 days.

/s/ Michael E. Zielinski
Michael E. Zielinski
Senior Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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WASHINGTON, DC 20001
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May 17, 2011

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA)	:	Docket No. SE 2008-994-M
Complainant	:	A.C. No. 40-00811-160277
	:	
	:	Docket No. SE 2010-785-M
v.	:	A.C. No. 40-00811-219691
	:	
	:	Mine: Sangravl Company, Inc.
SANGRAVL COMPANY,	:	
Respondent	:	

DECISION

Appearances: Mr. John B. Herbert, representing Sangravl Company, Inc.

Schean G. Belton, Esq., U.S. Department of Labor, Nashville, TN on behalf of the Secretary

Before: Judge David F. Barbour

These cases are before me on a Petitions for Assessment of Civil Penalty filed by the Secretary of Labor (“Secretary”) on behalf of her Mine Safety and Health Administration (“MSHA”) against Sangravl Company, Inc. (“Sangravl”), pursuant to section 105 of the Federal Mine Safety and Health Act of 1977 (the “Mine Act” or “Act”), 30 U.S.C. §815. The Secretary seeks the assessment of penalties totaling \$18,908 for eight alleged violations of mandatory safety standards set forth in 30 C.F.R. Part 56.¹ The violations are alleged in six citations issued pursuant to section 104(a) of the Act , 30 U.S.C. § 814(a), one citation issued pursuant to section 104(d)(1) of the Act, 30 US.C. §814(d)(1), and one order issued pursuant to section 104(d)(1). *Id.* The citations and order involve conditions cited at Sangravl’s Humphreys County, Tennessee sand and gravel processing facility. The Secretary asserts that all of the alleged violations were significant and substantial contributions to mine safety hazards (“S&S” violations). She further asserts that two were the result of the company’s unwarrantable failure to comply with the cited standards.

¹ Part 56 contains standards applicable to the nation’s surface metal and nonmetal mines.

In answering the Secretary's petition the company argues that the Secretary's S&S allegations and other assertions of gravity do not take account of the lack of employee exposure to the alleged conditions. The company also argues that the Secretary's negligence assertions are inaccurate.

The matter was heard in Nashville, Tennessee. The Secretary was represented by counsel. The company was represented by its president.

STIPULATIONS

The parties agreed that Sangravl's facility is subject to the jurisdiction of the Act and that Sangravl is a small operator.² Tr. 10; *See also* Tr. 130.

THE EVIDENCE

THE MINE AND THE INSPECTION OF JUNE 23, 2008

Edward ("Ed") Jewell is a federal mine inspector. Prior to becoming an inspector Jewell worked in the mining industry as a general laborer, an electrician, a mechanic, a supervisor and a company safety director. Tr. 14-15. In June 2008, he conducted two inspections at Sangravl's mine. Tr. 15. At the facility sand and gravel is off-loaded from barges, screened and hauled to stockpiles. Tr. 15. Customers drive their haul trucks onto miner property where the resulting product is loaded onto the trucks. Tr. 15-16.

DOCKET NO. SE 2008-994

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>
7752045	6/23/08	56.16006

The citation states:

The valve of the oxygen cylinder on the portable welding/cutting unit is not protected against damage or contact. The valve of the cylinder is fully exposed. The unprotected cylinder valve is located just outside of the mine's office.

² John Herbert, the company's president, explained that the company employs seven persons: himself, his son, four miners, and a mine office worker. All of the employees work at the mine site. *See* Tr. 63-64, 138.

Equipment traffic is observed in the area. A front end loader is parked near the cylinder. This condition creates a hazard of the valve being knocked off and striking an employee with a propelled object.

Gov't. Ex. 1

On the morning of June 23, 2008, Jewell arrived at the mine and promptly began the inspection. One of the first things Jewell saw was an oxygen cylinder that was missing a cover for the cylinder's valve. Because the valve was fully exposed, Jewell believed the cylinder was in violation of 30 C.F.R. §56.16006. Tr. 16. The cylinder was located just outside the mine's shop. Tr. 17. According to Jewell, the supervisor's office was within 10 to 12 feet of the cylinder. *Id.* The cylinder was secured to a portable cart with a chain. Tr. 50. Jewell also noted that a front end loader recently was operating in the vicinity. Tr. 17.

Jewell believed the combination of circumstances made the cylinder "very dangerous." Tr. 17. If the valve stem was damaged, a sudden, uncontrolled release of gas could turn the cylinder into an erratic missile. *Id.* Jewell testified that such an accident could happen if the cart was struck and overturned by equipment operating near it. Tr. 50-51. Jewell photographed the cylinder. The photograph shows the cylinder's exposed valve, as well as the gauges on the cylinder. Gov't Ex. 2. According to Jewell, the gauges indicate the cylinder was approximately 60 percent full. Tr. 18.

Jewell described the area where the cylinder was located as "highly trafficked." Tr. 19. A parking area was located approximately 15 feet across the road from the cylinder, and the cart and cylinder were adjacent to the open door of the shop. Tr. 19. In Jewell's opinion, the easy access of equipment and people to the cylinder made an accident "reasonably likely" as mining continued. *Id.* He believed the cylinder's valve would be damaged and a miner would be struck by the resulting uncontrolled and uncontrollable cylinder-projectile. A fatality would result. Tr. 18.

Because the cylinder's missing valve cover was visually obvious and the cylinder was located near Herbert's office, Jewell thought that the condition was caused by the company's "high" negligence. Tr. 20. Although it was clear to Jewell that the cylinder had been used and the cap had not been replaced, he did not know how long the valve was exposed and unprotected. Tr. 20, 51.

John Herbert pointed out that the cylinder and the cart were next to a building and he thought it unlikely a large piece of equipment would come close enough to the building to knock over the cart and damage the valve. Tr. 65. Herbert also maintained that with only six miners working outside at the mine (Herbert, his son and four others) there was little "traffic" in the area. Tr. 64.

After the citation was issued, the condition was almost immediately corrected by covering the cylinder's valve. Tr. 20; Gov't. Ex. 3.

THE VIOLATION

The language of the standard is clear. In pertinent part section 56.16006 requires valves on compressed gas cylinders to "be protected by covers when being transported or stored." Both Jewell and Herbert agreed that the cylinder was stored and that its valve was not protected by a cover. The violation existed as charged.

S&S AND GRAVITY

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

It is the third element of the S&S criteria that is the source of most controversies regarding S&S findings. The element is established only if the Secretary proves "a reasonable likelihood the hazard contributed to will result in an event in which there is an injury." *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985). An S&S determination must be based on the particular facts surrounding the violation and must be made in the context of continued normal mining operations. *Texasgulf, Inc.*, 10 FMSHRC 1125 (Aug. 1985); *U.S. Steel*, 7 FMSHRC at 1130.

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

Here, the Secretary established the violation. She also proved that the cylinder's unprotected valve created a safety hazard that endangered miners. The inspector's testimony that

the cylinder could become an uncontrolled projectile if the valve was damaged and that miners worked and traveled in the area makes it clear that the violation endangered miners. It also is clear that if a miner was struck by an airborne cylinder the miner would be seriously, even fatally injured.

The question is whether the Secretary established the third element of the *Mathies* test, and I conclude that she did. The fact that equipment operated in the vicinity of the cart on which the cylinder was secured and the fact that miners worked and traveled in the area meant that as mining continued, it was reasonably likely a loader or other equipment would hit and upset the cart, that the valve would be damaged and the compressed oxygen would be released in an uncontrolled fashion and the cylinder would be projected into the area. Although Herbert maintained equipment did not come close enough to the building to hit the cart (Tr. 65), the history of the Mine Act repeatedly shows that heavy mobile equipment does not always travel where it is supposed to operate. Moreover, the nearby parking area meant such equipment either was present in the area or would be present as mining continued. Further, the cart was mobile and as mining continued it would presumably be moved to other areas as required and be subjected to the same and possibly to an increased danger of overturning. Given all of this, I conclude the violation was S&S.

The violation also was serious. As noted, if the cylinder became a projectile, it would subject miners to the hazard of a potentially fatal injury.

NEGLIGENCE

Jewell found that the violation was due to Sangravl's high negligence and I agree. Tr. 20; Gov't Ex. 1. The lack of a cover was visually obvious. The oxygen cylinder and cart were in an area where they could easily be seen. Miners worked and traveled in the area, which meant that either Herbert or his son, both of whom acted in a managerial capacity, had occasion to be in the area too. The hazard created by the violation reasonably could be expected to cause a fatal injury. The danger of the violation meant that management had a high standard of care. The company fell short of this standard, and I therefore find that it was highly negligent.

CITATION NO.
7752046

DATE
6/23/08

30 C.F.R. §
56.12030

The citation states in part:

A potentially dangerous condition is observed on the . . . portable welder. The positive and negative conductors of the welder are not protected at the connection point against employee contact. The connection points of the conductors are bare and fully exposed to contact. The bare connection points are six inches above ground level. The bare con-

nection points are within one foot of the stop/start switch on the welder. The welder is normally used for outside repair work. The welder is located just outside the mine office. This condition creates an electrical shock/burn hazard.

Gov't. Ex. 4.

Shortly after observing that the cap was missing on the oxygen cylinder, Jewell noticed a welder located just outside the shop. The connection points of the welder's positive and negative conductors were located close to the equipment's stop and start switch. Tr. 23. The connection points were bare. *Id.* They were not protected against accidental or inadvertent contact. The welder was used regularly to perform maintenance and repair work. Tr. 22-23.

In Jewell's opinion the condition created an electrical shock hazard to miners walking by the welder and to those doing repair work with the welder and turning it on and off. Tr. 23. The connection points and the control switch were located near the front of the welder. Tr. 52. A miner using the welder had to stand adjacent to the connection points. A miner turning the welder on and off or adjusting the welder had to access the on and off switch with his hand. The switch was adjacent to the connection points. Tr. 51-52. If a miner contacted the bare, uninsulated connection points, the miner could be fatally shocked. Tr. 52. Moreover, according to Jewell, because the welder was located outside the shop, miners who regularly pass it while it was in use could trip and contact the exposed connection points. *Id.* Jewell knew that the welder had been used for repair work recently, and he believed that it would be used again as mining continued. Tr. 24. Therefore, he found that it was reasonably likely a miner would touch one of the connection points and be killed.³ Tr. 23.

Jewell also found that the exposed connection points were the result of high negligence on the company's part. Gov't Ex. 4. He testified that the foreman's office was within 10 to 12 feet of the welding machine. Tr. 24. Jewell testified the foreman said he "was aware of [the bare connection points, but that he] had just not gotten to fix it." *Id.* The condition was corrected by insulating the connection points with non-conductive tape. Tr. 24-25; Gov't Ex. 5.

Herbert had little to say about the condition, except to maintain that few miners were endangered by it. He noted that Sangravl only had four hourly employees; the crane operator,

³ The welder was powered with 175 amps and 240 volts of electricity, more than enough to electrocute a person. Tr. 26-27.

two truck drivers and the loader operator.⁴ Tr. 64. He also testified that the foreman's office was located on the "other side of the shop," and that it was not adjacent to the welder. *Id.*

THE VIOLATION

Section 56.12030 requires the correction of a potentially dangerous condition before equipment is energized. The testimony establishes the violation. Jewell's description of the hazard was not refuted. Nor was his testimony that the welder was used regularly. Tr. 22-23. When in use the person doing the welding was required to stand adjacent to the bare connection points. In addition, when he or another miner activated the welder's on and off switch, his hand came very close to the exposed points. In either case, a slip or misjudgement could cause the miner's hand or other body part to contact the energized connection point or points. The miner could be electrocuted. Jewell's statement that the welder had been used recently was not disputed and there was no indication the insulation was going to be applied before mining continued and the welder was used again.

S&S AND GRAVITY

In addition to proving the violation, the Secretary easily established the other criteria set out in *Mathies*. 6 FMSHRC at 3-4. The violation exposed miners operating the welder or working in close proximity to the exposed connection points to a possibly fatal injury. Jewell's testimony in this regard was not rebutted and it established criteria two and four, leaving only criteria three. Tr. 23, 51-52.

The inspector believed an electrocution was reasonably likely because the welder had been used recently and as mining continued would be used again. Tr. 24. The inspector thought that the frequency of use when combined with the proximity of the exposed connection points to those using the welder meant that as mining continued a miner was likely to slip and fall onto or otherwise inadvertently contact the energized connection points. *Id.* I agree with Jewell that the combination of factors made a very serious accident reasonably likely, and I hold that he was right to find that the violation was S&S.⁵

⁴ According to Herbert, the crane operator did all of the welding at the facility. Tr. 64.

⁵ The finding is based solely on miners who used the welder. It is not based on the hazard posed to miners who passed by the welder during the course of the work day. While Jewell established that miners in fact passed the welder (Tr. 53), he did not testify as to how likely it was that the miners would trip or stumble and come in contact with the connection points. The record reveals nothing about the condition of the floor where miners passed or might pass as mining continued, nor does it reveal anything about the distance between where they might trip or stumble and the exposed connection points. Without evidence on these matters it is not possible to determine the likelihood of injury to passing miners.

The violation also was serious. With 175 amps and 240 volts of electricity coursing through the connection points, if a miner contacted the points, a fatality was likely. Tr. 26-27.

NEGLIGENCE

Jewell found that the violation was the result of Sangravl's high negligence, and I agree. Tr. 24; Gov't Ex. 4. Jewell testified the foreman stated he knew of the violation but "had just not gotten to fix it." Tr. 24. Herbert did not dispute Jewell's testimony. The high degree of danger posed by the violation meant that mine management was under a commensurately high degree of care to make sure the connection points were insulated. It was a duty management did not meet.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>
7752047	6/23/08	56.12004

The citation states in part:

The 120 volt orange power cable laying on the concrete floor of the shop is . . . in a defective condition. The inner conductors of the energized power cable are not protected against mechanical damage, in that the insulation is broken in two spots. The inner conductors are exposed in each spot for an area of approximately one inch. In one of the damaged spots the inner conductors are bare. This condition created an electrical shock/burn hazard.

Gov't Ex. 6.

On June 23 Jewell entered the mine's shop where he saw a 120 volt cable lying on the floor. Tr. 28. The cable was adjacent to a walkway. *Id.* Jewell testified that he saw two different openings in the cable's jacket and through each of the openings he saw the cable's exposed inner conductors. *Id.* The hazard created by the condition was that a miner who contacted the inner conductors would be electrocuted. Tr. 28. After he cited the condition as a violation, Jewell took a photograph of one of the openings. Tr. 29; Gov't Ex. 7.

Jewell believed the cited condition was reasonably likely to result in an electrocution. Tr. 29. Because the cable was energized and miners traveled on foot adjacent to the cable's openings, Jewell concluded that a miner was likely to contact the uninsulated conductors as mining continued. Tr. 30, 52. The hazard endangered Sangravl's miners and its contractors, all of whom traveled in and out of the shop. Tr. 31, 53. Jewell stated he was told that the cable was

used on an “as needed” basis, meaning it was used as much as once or twice a day or as little as once or twice a week. Tr. 55.

Jewell found the condition was due to the company’s moderate negligence. Tr. 31; Gov’t Ex. 6. The open areas in the cable were, he stated, “fairly small.” *Id.* He did not think that the condition was “readily obvious.” *Id.* Nonetheless, he believed that with “a little attention, [the condition] should have been corrected.”⁶ *Id.*

THE VIOLATION

Section 56.12004 requires in pertinent part that “[e]lectrical conductors exposed to mechanical damage shall be protected.” The violation existed as charged. It is clear from the testimony that the cable was damaged and that the conductors inside the cable were exposed. Tr. 28. In fact, they were exposed in two places. *Id.* Because the cable was open in two places, the conductors were not protected. I infer from the openings in the cable that the conductors were subjected to mechanical damage when the openings were made, and there is no evidence in the record to indicate otherwise. Moreover, I accept Jewell’s testimony that miners traveled on foot adjacent to the openings, and that the cable was used at the most once or twice a day and at the least once or twice a week. Tr. 30, 53, 54-55. If a miner slipped and fell onto or against the cable, the conductors would be subject to further damage. Tr. 30, 52; *See Owyhee Calcium Products, Inc.*, 21 FMSHRC 779, 781-782 (July 1999) (ALJ Cetti). In addition, ongoing use of the cable subjected the unprotected conductors to damage.

S&S AND GRAVITY

In addition to proving the violation, the Secretary established the other criteria set out in *Mathies*. 6 FMSHRC at 3-4. Jewell feared that the violation exposed miners traveling by the cable to the danger of slipping and contacting the exposed conductors. Tr. 30. He also testified that the cable was used on a fairly regular basis. Tr. 55. In fact the cable was energized when he observed the exposed conductors. Although the Secretary did not provide any evidence regarding the likelihood a miner’s slipping, falling and contacting the conductors, Jewell’s unrefuted testimony regarding use of the cable means those who used the cable were in close proximity to the exposed conductors on a regular basis. *Id.* I conclude that as mining continued, one of the miners who used the cable was reasonably likely to touch the exposed conductors and suffer a serious or fatal shock injury.

⁶ The cable was not required to be examined on a regular basis, except as part of the general inspection of the workplace. Tr. 54.

Jewell believed that with 120 volts of electricity passing through the conductors, the least that would happen if a miner contacted one of the open conductors is that the miner would be severely shocked. Tr. 28. 30. Jewell's testimony in this regard was not disputed. I accept it and find that the violation was serious.

NEGLIGENCE

Jewell found the violation was due to the company's moderate negligence. Tr. 31; Gov't Exh. 6. His finding was based on the fact that the openings in the cable were small. Tr. 31. While the openings should have been detected and repaired, I agree with Jewell that the fact the openings were small and presumably hard to detect meant that the company's lack of care was ordinary.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>
7752049	6/23/08	56.14101(a)(2)

The citation states in part:

The parking brake equipped on [a] . . . haul truck [was] not maintained in functional condition. When tested on the maximum grade it travels, with [its] typical load, the parking brake would not hold the truck in place. The truck is being used to haul sand from the barge off [the] loading area to stock piles. The truck travels upon grades and around other mobile equipment. This condition creates a haulage hazard of equipment due to insufficient braking and [of an] employee being struck by moving equipment.

Gov't Ex. 8.

Jewell testified that on June 23 he observed the truck in question traveling on 8 to 10 percent grades at the mine.⁷ He was told that the truck sometimes was parked on the grades. Tr. 32. Some of the grades were approximately 150 feet long. Tr. 33. When Jewell observed the truck on June 23 it was hauling a typical load. Tr. 33. Jewell asked the truck driver to go to one of the steepest grades the truck used, to apply the truck's service brakes, to set the park brake and to slowly let up on the service brakes. *Id.* The driver did as Jewell requested, and as he released the service brakes, the truck began rolling down the grade. *Id.* The truck was owned by Sangravl. Tr. 33, 55-56.

⁷ The truck is depicted in a photograph that Jewell took. Gov't Ex. 9.

Because the truck at times was parked on grades, Jewell believed the faulty park brake posed a fatal hazard to the truck driver and to others who worked and traveled at the mine. He feared that after the truck driver parked and exited the truck, it would begin to roll endangering the driver. Tr. 34, 56. The rolling truck would also endanger other miners traveling or working on foot in the area. Tr. 56. For example, Jewell testified that the crane operator walked back and forth from his equipment to the shop area and in doing so might pass the truck. *Id.* The foreman too might pass the truck on foot. *Id.* Also, Jewell believed that operators of other equipment using the same road were endangered. Tr. 34. The day he conducted the inspection Jewell saw other vehicles traveling the road. Tr. 35.

Herbert explained that typically the truck was loaded with sand and gravel at the river site hopper and it was then driven up a grade leading to the stockpiles. The product was dumped at a stockpile in the yard at the top of the grade and the truck was driven down the grade. Tr. 66-67. According to Herbert the truck was “not ever” parked on a grade. Tr. 65. It was usually parked in the yard which was “mostly flat.”⁸ Tr. 67. The only time the truck driver got out of the truck was “if he ha[d] to go or something.” *Id.*

In Jewell’s opinion, an accident was likely as mining continued because the truck driver told Jewell that he had to occasionally park the truck on a grade, get out, and walk around the truck to check conveyor belts or to check the belt feeder controls. An accident was made reasonably likely by the fact that the truck was used frequently. Tr. 36. On the day he found the defective brakes, the truck had already hauled 35 loads of sand. *Id.* Injuries resulting from being hit by the haul truck could, in Jewell’s opinion, be fatal, or at least very serious. Tr. 35.

Jewell found that the company was moderately negligent in allowing the defective park brake to exist. He was told by the truck operator that when the park brake was tested at the start of the shift, it was functioning properly. However, Jewell noted that the morning test did not meet the requirements of the safety standard because the test was conducted when the truck was empty, not when it was bearing its typical load. 30 C.F.R. §56.14101(a)(2); Tr. 37. Nonetheless, in Jewell’s view, testing the brake, albeit incorrectly, mitigated the company’s negligence to some extent. *Id.* In order to return the park brake to functioning condition the haul truck was taken out of service and repaired. Tr. 37-38; Gov’t. Ex. 10.

⁸ Herbert conceded however that in those instances when the truck was at the shop, there “might be just a little grade . . . not much.” Tr. 66.

THE VIOLATION

Section 56.14101(a)(2) requires that parking brakes on self propelled mobile equipment “be capable of holding the [self propelled mobile] equipment with its typical load on the maximum grade it travels.” Jewell described how the cited haul truck was carrying a typical load, was located on one of the steepest grades the truck travels, and how it rolled when the service brakes were released after the park brake was set. Tr. 33. I credit all of Jewell’s testimony in this regard, and I find the violation existed as charged.

S&S AND GRAVITY

In addition to proving the violation (number one of the four *Mathies* criteria, 6 FMSHRC at 3-4), the Secretary established the other criteria. The hazard to the driver when leaving the truck after parking it on a grade was real, as was the hazard posed to other miners who traveled on foot or in other vehicles in the vicinity of the truck. Tr. 34, 56. With a defective park brake the truck could roll at any time and do so without advanced notice. The driver and other miners would not expect the truck to move. The moving truck would catch them unawares, and place them in danger of being run over or otherwise struck. Although Herbert maintained the truck was “not ever” parked on a grade (Tr. 65), the record does not support him. Herbert also testified that the only time the driver got out of the truck was if he “ha[d] to go or something.” Tr. 67. This makes the issue one of “when,” not “if,” and I find the driver occasionally parked on a grade and left the truck. Moreover, Jewell testified he was told by the driver that he and others occasionally parked on a grade, got out of the truck and checked conveyor belts and feeders. Tr. 36. This testimony established additional situations in which the driver would place himself in danger.

Jewell’s testimony that other mobile equipment shared the road with the haul truck was not refuted. Tr. 35. Thus, in addition to those on foot, the operators of the other equipment were in danger of being injured if their vehicles were hit by the moving haul truck. Because a number of miners were exposed to the hazard and because of the unexpected nature of the danger, I find that in the context of continued mining miners and miner-operated equipment were reasonably likely to be hit by the rolling truck. I further find that the resulting injuries to the haul truck driver and other miners were likely to be serious, even fatal. The violation was S&S.

It also was serious. As I have noted, if the truck driver or other miners were on foot and were struck by the truck as it rolled, a critical injury was probably the least that could be expected. If a vehicle was struck, the driver of the other equipment would likely be seriously injured or killed.

NEGLIGENCE

Negligence is the failure to exercise the care required by the circumstances. Here, the park brake was tested just hours prior to the inspector finding it defective. Tr. 37. The test was inadequate. The standard requires the brake to hold the truck when carrying its typical load, and

as Jewell pointed out, the brake was tested while the truck was empty. *Id.* Still, the fact that the company tested the park brake signaled to Jewell that Sangravl was cognizant of the need to maintain the brake in functioning condition and mitigates its lack of care to some extent. Tr. 37. I agree with Jewell that the violation was the result of the company's moderate negligence.

CITATION NO.
7752050

DATE
6/23/08

30 C.F.R. §
56.12008

The citation states in part:

The 120 volt power cable for the . . . battery charger is pulled out of the entrance at the back of the charger. The charger is located on the . . . crane. The charger was used this morning to help jump start the crane. The charger is often used outdoors. The inner conductors of [the] power cable are exposed a length of three inches. A bare spot is observed in one of the conductors. This condition creates an electrical shock/burn hazard.

Gov't. Ex. 11.

Jewell testified that on June 23 he was inspecting the mine's crane when he noticed exposed conductors on a battery charger's power cable. Tr. 39. The charger was located in the crane's engine compartment. Tr. 40, 57. The cable provided power to the charger. Tr. 39. Where the cable entered the metal enclosure surrounding the charger, the insulation of the cable was pulled back exposing the inner conductors. *Id.* In addition, the insulation on one of the cable's inner conductors was worn to the point where the conductor itself was exposed. Tr. 40. Jewell explained that there were three conductors in the cable, two carried electricity and one was neutral. *Id.* The neutral conductor served as a ground for the charger. *Id.* One of the exposed electrical conductors was touching the metal frame of the charger. Tr. 39. Jewell photographed the cable. *Id.*, Gov't Ex. 12. The photograph shows the condition of the cable. Tr. 39-40; Gov't Ex. 12. The charger and the cable were not energized at the time of the inspection. Tr. 42. However, Jewell was told by the crane operator that the charger was used that morning to jump start the crane. Tr. 42, 57. According to Herbert, jump starting the crane was not unusual. Tr. 66. The crane operator did it frequently. Tr. 66. Jewell explained, however, that the problem with the procedure was that it brought the crane operator dangerously close to the exposed conductors. Tr. 58.

Jewell also noted that miners had to go into the engine compartment from time to time to check fuel and oil levels. Tr. 58. Jewell described the compartment as "pretty confined." *Id.* Once in the compartment a miner had to "pass close by" the exposed conductors. *Id.* In addition the control switch for the charger was located on the front of the charger, close to the walkway, and using the control switch also brought a miner close to the exposed conductors. *Id.*

Jewell believed that given the condition of the conductors, it was reasonably likely a miner would be very seriously or fatally shocked. Tr. 44. He noted that as mining continued the charger would be in “[c]ontinued use” and that the totally exposed conductor was as close as two feet away from the charger’s control switch. Tr. 42-43. An electrocution was made even more likely by the fact that it was wet around the crane. *Id.*

According to Jewell the condition of the cable was due to the company’s moderate negligence. Tr. 44. He credited the statement of the foreman that the cable had been examined in the morning and that the cable was not then in the condition Jewell observed. Tr. 44.

THE VIOLATION

Section 56.12008 requires in part that “Power wires and cables . . . be insulated adequately where they pass into or out of electrical compartments.” The standard is location specific. Jewell explained that the cable entered the metal enclosure of the charger. Tr. 40. In addition, a photograph taken by Jewell shows the metal enclosure and the cable where it enters the enclosure. Tr. 39-40; Gov’t. Ex. 12. The enclosure is an “electrical compartment” within the meaning of the standard, and I conclude that the Secretary has established the location requirement of the standard.

The standard also requires the power cable to “be insulated adequately.” Jewell testified without dispute that the insulation on the cable for the battery charger was worn away at the point where the cable entered the metal enclosure. Tr. 40. On one of the three conductors inside the cable, the insulation was completely gone. *Id.*; *See* Gov’t Ex. 12. From this testimony and from the photograph of the cited cable and metal enclosure, I find the Secretary established the power cable was not “insulated adequately” where it passed into the metal enclosure for the battery charger. 30 C.F.R. §56.12008. Therefore, I conclude the violation existed as alleged.

S&S AND GRAVITY

In addition to proving the violation (number one of the four *Mathies* criteria, 6 FMSHRC at 3-4), the Secretary established the other S&S criteria. Jewell testified that the violation created the hazard that a miner would inadvertently touch the uninsulated part of the cable and receive a severe, and perhaps fatal, shock. Tr. 42-44. He also believed it reasonably likely such an accident would occur. Tr. 42. Jewell was right. The battery charger was locate in the engine compartment. Although Herbert maintained that using the charger subjected a miner to “hardly any” exposure (Tr. 66), he did not, and I assume he could not, explain how this was so when the evidence established that the charger was used on a frequent basis to start the crane (Tr. 66) and when using the charger and its control switch brought a miner close to the exposed conductors. Tr. 42-43, *See* Tr. 58. Use of the charger and the proximity of those using it to the exposed energized conductors meant that as mining continued it was reasonably likely a miner would slip and touch the exposed conductors or would otherwise contact them. Obviously, the fact that the conductors were not adequately insulated meant that the violation contributed significantly to the likelihood the miner would be severely shocked or electrocuted. The violation was S&S.

It also was serious. Had a miner contacted the exposed conductors when the charger was energized the miner would have been seriously injured or killed.

NEGLIGENCE

Jewell found that the violation was due to the company's moderate negligence. I will not second guess the inspector for crediting the company's assertion that the lack of insulation was of recent origin (Tr. 44), and like the inspector, I find the Sangravl's negligence was moderate.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>
7752051	6/24/08	56.14206(b)

The citation states in part:

The bed of . . . [a] haul truck is raised to the maximum position and not secured against movement. The truck is parked outside the shop area and left [un]attended. An independent contractor was on site to repair the braking system, however [the contractor] has left temporarily to go after parts. The mine operator failed to assure that safe work practices were followed and the bed of the truck was blocked against movement. This condition creates a hazard of an employee being mashed by the . . . movement of the . . . [truck's bed].

Gov't. Ex. 13.

Jewell's inspection continued on June 24. During the inspection he noticed a haul truck with its bed raised. The truck was located behind the shop area. An employee of one of Sangravl's contractors had been repairing the truck. Tr. 46. The employee went for needed parts, and he left the bed raised. *Id.* The bed was not blocked against motion. Tr. 47. Nothing was in place (neither blocks nor pins) to keep the bed from moving unexpectedly. Tr. 45, 59. The truck and its raised bed are clearly shown in a photograph that Jewell took. Gov't Ex. 14. The person Jewell thought most likely to be injured was the employee who had gone for parts and who was expected to resume work. Tr. 47, 60-61. Jewell did not see the employee working, but he was told the employee had been performing maintenance on the truck with the bed raised. Tr. 60-61. Jewell also feared that because of the location of the truck in the shop area, an area where miners frequently traveled, "if someone [got] up [on the truck] and a hydraulic line [broke] or any air movement of the truck or whatever could cause a very serious accident." Tr. 47; *see also* Tr. 59.

Because Sangravl's foreman was "on site," Jewell thought the condition was the result of the company's high negligence. Tr. 47. He noted that the foreman's office was on the side of the shop where the truck was located. Tr. 47-48.

THE VIOLATION

Section 56.14206(b) requires in part that "When mobile equipment is unattended or not in use . . . moveable parts . . . shall be mechanically secured or positioned to prevent movement which would create a hazard to persons." Jewell's testimony established the violation. Certainly, the haul truck was "mobile equipment." When the employee left it to go for parts (Tr. 46), the truck was "unattended." The truck's bed was raised, and to abate the cited condition the bed was lowered. The bed was a "movable part." Tr. 46; Gov't Ex. 14. The raised bed was not blocked against motion in that no pins or blocks were in place to keep the bed from moving unexpectedly. Tr. 45, 59. These factors were not disputed.

S&S AND GRAVITY

In addition to proving the violation (number one of the four *Mathies* criteria, 6 FMSHRC at 3-4), the Secretary established the other S&S criteria. The unblocked and raised bed presented a discrete hazard. If the bed moved suddenly and unexpectedly while a miner was working on or under the truck, there was nothing to prevent the bed from hitting the miner, an accident that would cause a serious or fatal injury. I agree with the inspector that such an accident was reasonably likely to occur as mining continued. However, I do not find Jewell's fear that those traveling by the raised bed would get on or under the truck (Tr. 47) a proper basis for finding an accident was reasonably likely. Jewell did not explain why miners with no business pertaining to the truck would be likely to climb on or under it.

The same is not true of the contractor's employee who was working on the truck. Jewell was told that the employee was repairing the truck with the bed raised before he left for parts. Tr. 46. The employee did not block the bed to prevent it from moving prior to going for parts, and there is nothing to suggest he would have done so after he returned and continued his labors. All that was necessary for an accident was a failure of the truck's hydraulic system and/or a broken hydraulic hose. In either event, the truck's bed would slam down on the mechanic. It is common knowledge that such hydraulic failures occur, and I find in the context of continuing mining it was reasonably likely one would happen causing the unblocked bed to fall on the contractor's employee. Jewell was right to find the violation was S&S.

The violation also was serious. If the truck bed fell and hit a miner, the miner almost certainly would have been critically injured or killed. Gov't Ex. 13.

NEGLIGENCE

Jewell testified that the violation was due to the company's high negligence. The major factors leading to his conclusion was the presence of the mine foreman in his office which was located on the same side of the shop building where Jewell saw and cited the raised and unblocked truck bed. Tr. 47-48.

I do not agree with Jewell. Looking at the same factors, I conclude the company's negligence was moderate. There is no testimony the mine foreman actually saw the truck with the raised and unblocked bed. Nor is there any testimony the foreman should have seen the violation. The supervisory responsibility of Sangravl for its contractors was not spelled out in the testimony. This being the case, I find that the record does not support the inspector's high negligence finding, and although the company was negligent, I conclude its failure was moderate.

EVIDENCE REGARDING DOCKET NO. SE 2010-785

Robert Knight is a federal mine inspector who is assigned to MSHA's Franklin, Tennessee field office. Knight has worked for MSHA for the past five years. Before that Knight worked in private industry in several jobs holding positions as a health and safety manager and an environmental engineer at a cement plant. Tr. 70. On February 23, 2010, Knight conducted an inspection of Sangravl's facility during which he issued the section 104(d)(1) citation and order that are the subjects of Docket No. SE 2010-785. 30 U.S.C. § 814(d)(1).

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>
8545235	2/23/10	56.9300(a)

The citation states in part:

The approach to the scales and the scale house had drop-offs into a small pond below that had not been bermed off. The drop-off was approximately 12 to 15 feet and had tracks within two feet of the drop-off. There were loader tracks, track hoe tracks, and truck tires tracks in the area. There had been berms in the area but they had been removed approximately three months ago. Management has an office and a presence at the scale house and travels by this hazard multiple times daily. Multiple truck operators are exposed to this hazard daily as they approach the scales. Should trucks over-travel the roadway they would turn over and serious injuries would occur.

The foreman did not take any measures to guard miners from the hazard. The foreman engaged in an aggravated conduct constituting more than ordinary negligence. This violation is an unwarrantable failure to comply[.]

Gov't Ex. 15.

Knight testified that on February 23 he saw a haulage road at the mine that lacked a berm where the road bordered a drop-off. The road was traveled by trucks to reach the scales and scale house. Tr. 73. During normal travel, trucks were usually 10 feet to 15 feet from the edge. Tr. 85. The road is depicted in a photograph that Knight took. Gov't Ex. 16. In the photograph the drop-off and pond are clearly depicted to the left of the road. The scale house and scales are in the upper center of the photograph. Tr. 73; Gov't Exh 16. Government Exhibit 17 is another photograph taken by Knight. It shows the scale house, scales and the road in more detail. The drop-off appears on the far left of the photograph. Herbert has an office in the scale house. Tr. 98.

Knight recalled asking Preston Herbert, John Herbert's son about the depth of the drop-off. According to Knight, Preston Herbert told Knight that it was a 12 to 15 foot drop from the edge of the road to the pond. Tr. 75. Knight also remembered seeing trucks driving along the road during the course of his inspection. *Id.* In addition, he saw the tracks of a front end loader and of a track hoe less than two feet from the edge of the drop-off. Tr. 76.

Knight testified that Preston Herbert told him the berm along the drop-off was removed approximately three months before the inspection. Knight believed without a berm a truck or loader or other type of mobile equipment could over-travel the road and fall to the pond. The truck driver or equipment operator could suffer broken bones as a result, or if the equipment overturned in the pond the driver or operator could drown. Tr. 77-79. Knight felt an accident was reasonably likely because of the length of time the berm had been missing and because different contractors and drivers used the road and therefore many were not familiar with the hazard. Tr. 78. In addition, tracks indicated equipment had actually come within less than two feet of the unguarded drop-off. Tr. 85. Knight stated, "if they continue to operate this way, someone will go over the edge." Tr. 86.

Knight found that the condition was the result of the company's high negligence. The fact that the berm was missing was visually obvious. Knight stated, a person "can't come on the property without seeing . . . that the berm . . . is gone." Tr. 80. He also believed that Preston Herbert knew that the berm was missing. *Id.* Knight testified that he asked Preston Herbert why the berm was removed, and Preston Herbert told him "they had been working . . . on the pond." Tr. 80-81.

In addition to being highly negligent Knight found that the company exhibited “aggravated conduct . . . more than negligence” when it failed to make sure a berm or guardrail was in place along the cited part of the road. Tr. 81. The berm was missing yet the company and its customers continued to use the road. Tr. 81.

Once the citation was issued, the company made sure no one traveled the road until a new berm was installed. Tr. 84. The work was completed the next morning. Tr. 82. The new berm was 3 ½ feet high. It was, said Knight, a “real good” berm. *Id.*

John Herbert disagreed with Knight regarding the length of time the cited part of the road was without a berm. Herbert stated the berm had been removed for “[n]ot more than a month.” Tr. 87. Herbert explained that the State of Tennessee required the company periodically to drain and clean the pond. The berm was eliminated so a track hoe could dig settled sand out of the pond area. Tr. 88. Herbert maintained the company would not replace the berm until the work was completed. Tr. 94. However, Herbert did not know when the track hoe dug out the sand because he “didn’t write that down.” Tr. 91. Therefore, he did not know if the work was completed. The track hoe was not in operation when Knight conducted the inspection. Tr. 93, *see* Tr. 96.

Herbert stated that on any given day 25 to 100 trucks belonging to customers ran across the scale and used the road. Tr. 94. Most were return customers, but some were new to the mine. Tr. 95. Herbert describe the trucks as “barely creep[ing].” Tr. 89. Herbert believed there was “no way” a truck was going to go off of the road and into the pond. *Id.* It had not happened in the 30 years he operated the facility. Tr. 90. Herbert added that the drop from the edge of the road to the pond was eight feet, not 12 to 15 feet. Tr. 89.

THE VIOLATION

Section 56.9300(a) requires that berms or guardrails “be provided and maintained on the banks of roadways where a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment.” The cited area was a road used by trucks. Tr. 73. It also was used occasionally by other mobile equipment, as witnessed by the tracks Knight saw approximately two feet from the edge of the drop-off. Tr. 76. While Knight testified that the drop-off was a minimum of 12 to 15 feet (Tr. 78) and Herbert believed it was not more than eight feet, for the purposes of the standard it does not matter. At either distance a drop-off existed that was of sufficient depth to cause a vehicle to overturn and endanger people in the equipment.

The parties agree the berm was missing along the edge of the road that bordered the drop-off. The exhibits make clear that a guard rail was not installed. Gov’t Ex. 16, Gov’t. Ex. 17. As a result there was nothing between the edge of the road and the drop-off, and I accept Knight’s commonsense testimony that if a truck or other equipment over-traveled the road along the drop-off, the vehicles could have overturned injuring or killing the drivers or operators. Tr. 77-78. For these reasons, I find Sangravl violated section 56.9300(a).

S&S AND GRAVITY

In addition to proving the violation (number one of the four *Mathies* criteria, 6 FMSHRC at 3-4), the Secretary established the other S&S criteria. The lack of a berm or guardrail presented a discrete safety hazard in that if a truck or other mobile equipment approached the edge of the drop-off, there was nothing to restrain the vehicle from going over the edge and/or nothing to warn the driver or equipment operator before the vehicle went off the road. Berms or guardrails serve as visual and physical reminders of the hazards they guard against. They also serve a protective function, in that they may keep a truck or other vehicle from leaving the road. Without a berm or a guardrail those traveling the cited area of the road had an increased risk of over-traveling the road and falling to the pond below. A fall of either eight feet or 12 to 15 feet was reasonably likely to result in at least a serious injury. Tr. 79. As Knight testified broken bones or drowning could result. *Id.*

Knight also believed that an accident was reasonably likely to occur. Customers' trucks frequently traveled the road. Tr. 75. In fact, Knight saw some using the road during the inspection. *Id.* He testified the trucks came within ten to 15 feet of the unprotected edge. It would not take much for an inattentive driver to "wander" over the edge or to otherwise misjudge the distance between his vehicle and the edge. The fact drivers who were unfamiliar with the road traveled it, made it even more likely an over-travel accident would occur. Tr. 85-86. In the context of continuing mining I conclude that Knight was right and that it was reasonably likely that an accident would happen.

The violation was serious. If a vehicle went off of the road and over the edge the operator of the vehicle was likely to suffer broken bones or be killed. Tr. 78-79.

UNWARRANTABLE FAILURE AND NEGLIGENCE

As noted previously, the citation was issued pursuant to section 104(d)(1) of the Act. Such a citation must be issued if a violation is both S&S and caused by the unwarrantable failure of the operator. I have found that the violation of section 56.9300(a) was S&S. I also find the violation was the result of the company's unwarrantable failure.

The term "unwarrantable failure" is defined as aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSRHC 1997, 2004 (Dec. 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or the "serious lack of reasonable care." *Emery*, 9 FMSHRC at 2203-2204. Whether conduct is "aggravated" is determined by analyzing the facts and circumstances of each case and identifying whether any aggravating factors exist. Such factors include the length of time the violation existed, the extent of the violative condition, whether the operator was placed on notice that greater efforts were necessary for compliance, the operator's efforts in abating the violative condition, whether the violation was obvious and posed a high degree of danger, and the

operator's knowledge of the existence of the violation. *Jim Walter Resources, Inc.*, 28 FMSHRC 579 (August, 2006).

The berm was deliberately removed from the area above the drop-off. At the time Knight noted the condition, he was told by Preston Herbert the berm had been missing for approximately three months. Tr. 82. However, John Herbert testified it had been removed "not more than a month" previously. Tr. 87. I credit John Herbert's first hand testimony over the recollected hearsay testified to by Knight.

Herbert explained that the berm was removed so that the process of extracting settled sand from the pond could begin. He stated that the berm would not be replaced until the process was completed. Tr. 87-88. Nonetheless, sand was not being removed from the pond when Knight conducted his inspection (Tr. 93, 96), and it seems clear that truck drivers and equipment operators traveling the road in the cited area had been subject to the hazard for at least one month. No barricades were erected closing off the area, no warning signs were posted, nothing was done by the company to alert drivers and operators of the danger posed by the missing berm.

There is no doubt mine management knew of the violation from its inception, since the company was responsible for having the berm removed. Tr. 87. In addition, I infer from the fact that the missing berm was visually obvious and from the fact that the location the area was close to the scale house and along a main mine haul road that mine management had continuing and repeated reminders the berm was gone. The violation created a dangerous situation for the company's employees and for its customers. Because some of the customers were new to the mine (Tr. 95) and therefore unaware of the danger posed by the missing berm, the hazard was increased. Taken together these factors indicate that the violation was the result of the company's aggravated conduct, and I so find.

Not only was the violation due to unwarrantable failure on the company's part, it was also due to the company's high negligence. Negligence is the failure to exercise the care required by the circumstances. The missing berm was obvious and dangerous. Yet, for at least one month the company did nothing to alleviate the danger. No excuse is apparent in the record for the company's failure.

ORDER NO.
8545236

DATE
2/23/10

30 C.F.R. §
56.11001

The order states in part:

The 2500 gallon diesel storage tank had a fixed ladder that was used to access the top of the storage tank for the purpose of checking the levels within the tank and refilling the tank on a quarterly basis. Miners checking . . . or filling

the tank could not access the tank in a safe manner. The tank was accessed by management, and management was aware it was being filled quarterly. Should miners fall from the ladder and hit structures[,] serious injuries would occur. The foreman did not take any measures to guard miners from the hazard. The foreman engaged in aggravated conduct constituting more than ordinary negligence. This violation is an unwarrantable failure to comply with a mandatory standard.

Gov't Ex. 19.

Knight testified that on February 23 he inspected a 2500 gallon diesel storage tank that was located on mine property. Tr. 99. A ladder was affixed to the side of the tank. *Id.* The ladder stopped short of the top of the tank. *Id.* The tank is set into a rectangular concrete depression which caught fuel if the tank overflowed or ruptured. Tr. 101; *See* Gov't Ex. 20. Surrounding the depression was low concrete "curbing" that extended upward a foot or so above ground level. *See* Gov't Ex. 20.

Miners checked the amount of fuel in the tank by climbing the ladder and inserting a pole into an opening on top of the tank.⁹ Miners also used the ladder to fill the tank. Tr. 99. They climbed the ladder while carrying a fuel line and then inserted the spout of the line into the opening. *Id.*; *See* Gov't Ex. 20. A work platform with hand rails was not in place at the top of the tank and no handrails were present alongside the ladder. Tr. 104. In Knight's opinion, safe access was not provided to measure the fuel level and to fill the tank. Tr. 99-101, 102-103, *See* Gov't Ex. 21. As Knight explained, "There's nothing to keep a miner from falling." Tr. 104.

The bottom of the ladder was set into the retaining depression. *See* Gov't Ex. 20. To reach the ladder, a miner stood on the concrete "curb" and stepped approximately one foot across the depression. The miner then climbed almost to the top of the ladder and either worked from the ladder or clambered to the top of the tank to do the jobs required. If the miner worked from the ladder he had to stretch across the tank to access the tank top opening. To do this, Knight believed that the miner had to maintain both feet on the ladder, grab the ladder with one hand and use the other hand to check the fuel level or to fill the tank with the fuel line. Tr. 106. Or, the miner had to lift the pole with one hand and hold onto the ladder with the other and stretch to reach the opening. Tr. 106. If the miner climbed on top of the tank to do the jobs, he had to lift the pole to the top and then insert it into the opening or he had to carry the hose with one or both hands and insert the spout into the opening. Tr. 112. Doing either job meant that the miner's

⁹ The pole was approximately eight feet long. Tr. 101, 110, 112; *See* Gov't Ex. 20.

hands would be occupied. There was nothing in place to steady the miner if he lost his balance or slipped. Tr. 104.

If a miner fell from the ladder or from the top of the tank, he would drop approximately five to eight feet and land on concrete. Tr. 113. Knight believed that the fall would result in serious injuries with broken bones and/or soft tissue injuries being the most likely result. Tr. 107-108, 113. In Knight's opinion such an accident was reasonably likely. He believed at least once every three months miners accessed the ladder to checked the fuel level and filled the tank. Tr. 109.

Preston Herbert told Knight that he was one of the miners who used the ladder to checked the tank's fuel level. Tr. 106. Preston Herbert was part of miner management and Knight therefore believed the company was highly negligent in allowing the condition to exist. Tr. 109. In addition, Knight noted that Preston Herbert also knew that any miners filling the tank had to do the job from the ladder or the top of the tank. Tr. 109-110. The condition was corrected when a railed platform was installed on top of the tank. Tr. 115. As a result, miners could perform both jobs from a safe area. Tr. 115, Gov't Ex. 23.

Herbert testified that the tank had been in place for approximately 40 years, and that the same oil company had serviced the tank for 30 years. Tr. 116-117. According to Herbert, the company filled the tank on the average of one time a month depending on the amount of business at the mine. Herbert asserted that in the years the tank had been in place, there never was a problem filling it and checking its fuel level. Tr. 116-117.

Herbert noted that although MSHA had been inspecting the mine since 1979, and as a result had conducted approximately 60 inspections, the agency never had cited a violation with regard to the tank. Tr. 118. This testimony caused the Secretary to recall Jewell. For several years prior to Knight inspecting the mine on February 23, 2010, Jewell had inspected the facility. Tr. 123. Jewell did not remember ever seeing the tank during the inspections he conducted. Tr. 124. He stated that he asked where equipment was fueled and a foreman told him there was a fueling station behind the shop. *Id.* There was an area of the mine MSHA did not inspect because the agency did not believe it came within MSHA's jurisdiction, and Jewell implied the fuel tank could have been in that area. Tr. 125. He also speculated that MSHA could have assumed jurisdiction over the area when ownership of it and other parts of the mine was assumed recently by Sangravl. *Id.*, Tr. 126. This would account for the fact that the alleged violation was not cited until February 2010. However, Herbert testified that nothing changed when the ownership changed. The equipment remained the same and the employees remained the same. Tr. 126-127. Herbert emphasized that the fuel tank always was located directly behind the plant where gravel was processed. The tank was never moved. Tr. 128.

Herbert also testified that miners did not have to go to the top to of the tank to determine its fuel level or to fill it. Tr. 117. He maintained both jobs could be done safely from the ladder. *Id.* Knight disagreed, he thought that while a miner might be able to do the tasks from the top of the ladder, the miner would not be able to do them safely. Tr. 121.

THE VIOLATION

Section 56.11001 requires that safe access “be provided and maintained to all working places.” A “working place” is “any place in or about a mine where work is being performed.” 30 U.S.C. §56.2. The parties agree that work was performed in the cited area. Miners used the ladder to reach the opening on top of the fuel tank in order to check the fuel level in the tank. Tr. 99. Miners also used the ladder to reach the opening to fill the tank. Tr. 99-101, 109-110. These tasks were “work” within the meaning of the standard. Further, it is clear that this work was performed from either the ladder or the top of the tank. The issue therefore is whether the ladder and tank top provided “safe access” to perform the work.

To provide “safe access,” the operator had to ensure the ladder and the top of the tank were “secure from threat of danger, harm or loss.” *Western Industrial, Inc.* 25 FMSHRC 449, 452, 453 (August 2003) (quoting *Webster’s Third new International Dictionary* 1998 (1993)). They were not. If a miner tried to check the fuel level or fill the tank from the ladder, Knight persuasively explained that the miner could not safely maintain both feet on the ladder, steady himself with one hand, and use the other hand to reach across the tank and check the fuel level or fill the tank. Tr. 106, *See* Tr. 121. If a miner tried to do these tasks from the top of the tank, there was nothing for the miner to hold onto and steady himself. Tr. 104, 106-107; *Compare* Gov’t. Exs. 21 and 23. A slip or loss of balance while working from the ladder or the tank’s top was not unlikely. Falling from the ladder or the tank’s top meant falling five to eight feet onto the concrete curbing or into the concrete depression. Tr. 111- 113. Surely, such a fall would result in serious injuries.

For these reasons I conclude the company violated the cited standard.

S&S AND GRAVITY

In addition to proving the violation (number one of the four *Mathies* criteria, 6 FMSHRC at 3-4), the Secretary established the other S&S criteria. As noted, the lack of safe access at the top of the ladder and on the top of the tank meant that a slip or loss of balance would likely result in a five to eight foot fall to concrete. Thus, the violation created a measure of danger to safety. In addition, I conclude there was a reasonable likelihood the hazard would occur. By Herbert’s own account the tank’s ladder or top was accessed much more frequently than Knight was lead to believe. Herbert testified that, on the average, the company refilled the tank one time a month. Tr. 116-117. I credit his testimony, and I infer from this that a miner also checked the fuel level in the tank at least once a month. This means that during the course of a year as mining continued a miner or miners would be exposed to the hazard of falling from the ladder or the top of the tank at least 24 times.

Herbert testified that the condition existed at the mine for many years without an accident occurring. Tr. 139. I do not doubt this is true, but I conclude the lack of an accident speaks more to the company’s luck than to whether a fall was likely. Nothing was alongside the ladder or on

the top of the tank that a miner could hold when perform the tasks required. A slip or loss of balance and a resulting fall were made reasonably likely by the fact that the miner would have either the measuring pole or fuel hose in one or both hands as he worked. With nothing to steady himself or to grab onto in the event of a slip, falling five to eight feet to the concrete was reasonably likely. Broken bones and/or internal injuries would have been the likely result.

In additional to being S&S, the violation was serious. As I have just found, it was likely a miner would suffer disabling injuries.

UNWARRANTABLE FAILURE AND NEGLIGENCE

While I agree with Knight that the violation of section 56.11001 was S&S, I disagree that it was caused by Sangravl's unwarrantable failure. I recognize that several factors are present that might support an unwarrantable failure finding. For example, the condition was obvious, the condition existed for many years, the violation posed a serious hazard to those accessing the ladder and the tank's top, and management officials clearly knew of the existence of the condition. *See Jim Walter*, 28 FMSHRC at 605.

However, just as Sangravl knew of the condition, I find that MSHA did too. Herbert testified that MSHA inspectors had been coming to the facility since 1979, and that the tank had been in place for about 40 years. Tr. 116-117, 118. While Jewell suggested in his testimony that the area of the mine containing the subject fuel tank might not have been inspected by MSHA until ownership of that part reverted to Sangravl in January 2010, his testimony was too inconclusive to prove MSHA lacked jurisdiction. Tr. 124-125. Herbert, on the other hand, was convincing when he stated that the tank had been in the same place for many years and that although the ownership of part of the mine at one point changed, the equipment and employees remained the same. Tr. 126-127. If the tank came under MSHA's jurisdiction on February 23, 2010, the logical assumption is that it came under the agency purview prior to that time, no matter who "owned" the subject part of the mine. I conclude therefore that for many years MSHA failed to cite the condition. Sangravl was never placed on notice by MSHA that compliance was necessary, and if MSHA's inspectors "missed" the violation over the years it existed, it is understandable Sangravl's management also failed to see that the conditions constituted a violation. Certainly, there was no intentional misconduct on management's part, nor was there purposeful indifference to the safety of its employees and those of its contractors. There was a lack of reasonable care, but the lack of care was ordinary.

REMAINING CIVIL PENALTY CRITERIA

HISTORY OF PREVIOUS VIOLATIONS

At the close of the hearing the parties agreed that the Secretary could submit a certified copy of the company's applicable history of previous violations, and that the copy would be admitted into evidence. Tr. 131, Gov't Ex. 25. The history submitted by the Secretary shows that

the mine had a history of 13 prior violations, all of them cited pursuant to section 104(a) of the Act. *Id.*, 30 U.S.C. §814(a). None of the violations was assessed for more than \$725.00. I conclude from this that the company's history is small.

SIZE

The parties stipulated that Sangravl is a small operator. Tr. 10.

ABILITY TO CONTINUE IN BUSINESS

The burden is on the company to establish that any penalties assessed will affect its ability to continue in business. While John Herbert argued that the proposed penalties are "excessive" (Tr. 139), he did not assert that the penalties assessed will affect the company's ability to continue in business, and I find that they will not.

GOOD FAITH ABATEMENT

All of the violations were abated within the time as set or as extended by the inspector. This constitutes good faith abatement on the company's part.

DOCKET NO. SE 2008-994

CIVIL PENALTY ASSESSMENTS

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED ASSESSMENT</u>
7752045	6/23/08	56.16006	\$873

I have found that the violation existed, that it was serious, and that the negligence of the company was high. Given these findings and the other civil penalty criteria, I assess the Secretary's proposed penalty of \$873.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED ASSESSMENT</u>
7752046	6/23/08	56.12030	\$873

I have found the violation existed, that it was serious and that the negligence of the company was high. Given these findings and the other civil penalty criteria, I assess the Secretary's proposed penalty of \$873.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED ASSESSMENT</u>
7752047	6/23/08	56.12004	\$263

I have found that the violation existed, that it was serious and that the negligence of the company was moderate. Given these findings and the other civil penalty criteria, I assess the Secretary's proposed penalty of \$263.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED ASSESSMENT</u>
7752049	6/23/08	56.14101(a)(2)	\$263

I have found that the violation existed, that it was serious and that the negligence of the company was moderate. Given these findings and the other civil penalty criteria, I assess the Secretary's proposed penalty of \$263.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED ASSESSMENT</u>
7752050	6/23/08	56.12008	\$263

I have found that the violation existed, that it was serious and that the negligence of the company was moderate. Given these findings and the other civil penalty criteria, I assess the Secretary's proposed penalty of \$263.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED ASSESSMENT</u>
7752051	6/24/08	56.14206(b)	\$873

I have found that the violation existed, that it was serious and that the negligence of the company was moderate. Given these findings and the other civil penalty criteria, I assess a penalty of \$263.

DOCKET NO SE 2010-785

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED ASSESSMENT</u>
8545235	6/23/08	56.9300(a)	\$11,500

I have found that the violation existed, that it was serious and that the negligence of the company was high. Given these findings and the other civil penalty criteria, I assess a penalty of \$4,000. I have lowered the penalty from that proposed because I conclude \$4,000 more accurately reflects the company's small size and commendable prior history.

<u>ORDER NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED ASSESSMENT</u>
8545236	6/23/08	56.11001	\$4,000

I have found that the violation existed, that it was serious and that the negligence of the company was moderate. Given these findings and the other civil penalty criteria, I assess a penalty of \$873.

ORDER

Within 40 days of the date of this decision, Sangravl **IS ORDERED** to pay civil penalties totaling \$7,671 for the violations found above. In addition, the inspector's negligence finding on Citation No. 7752051 **IS MODIFIED** to "moderate," the inspector's negligence finding in Order No. 8545236 **IS MODIFIED** to "moderate" and the order **IS MODIFIED** to a citation issued pursuant to section 104(a) of the Mine Act. 30 U.S.C. §814(a).

Upon payment of the penalties these proceedings **ARE DISMISSED**.

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

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/sa

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001

May 19, 2011

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. WEVA 2007-600-A
Petitioner	:	A.C. No. 46-08791-120481-02
v.	:	
	:	
WOLF RUN MINING COMPANY,	:	Sago Mine
Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Feldman

This matter concerns 104(d)(1) Order No. 7100904 that cites a violation of 30 C.F.R. § 75.370(a)(1) as a result of Wolf Run Mining Company's ("Wolf Run's") alleged unwarrantable failure¹ to comply with an addendum to its approved ventilation plan. The cited violation concerns the construction of ten Omega Block seals that were installed to seal an abandoned area in the 2nd Left Mains. The seals were destroyed as a consequence of the fatal explosion that occurred at the Sago Mine on January 2, 2006.

At the time of the explosion, 30 C.F.R. § 75.335 required seals to withstand an explosive force of at least 20 pounds per square inch ("psi"). The accident investigators determined that the seals in the Sago Mine were exposed to explosive forces in excess of 90 psi. Prior to this accident, Mine Safety and Health Administration ("MSHA") investigators had never encountered this level of explosive forces that had originated in abandoned areas behind seals.

Following this accident, MSHA conducted extensive seal strength tests with the participation of the National Institute for Occupational Safety and Health and the State of West Virginia. Omega Blocks that simulated the construction of the seals that were destroyed by the Sago Mine explosion, as well as seals constructed in accordance with the ventilation plan, were exposed to explosive forces. It was determined that both types of seals would likely have withstood explosive forces of 20 psi, although both would likely have failed to withstand the force of at least 90 psi created by the Sago explosion.

¹ A violation of a mandatory safety standard is unwarrantable when the actions of the mine operator that resulted in the violation constitute more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec. 1987).

Consequently, MSHA determined that Wolf Run's strict compliance with the seal installation requirements in the ventilation plan would not have prevented the fatal mine explosion. Therefore, the Secretary has agreed to withdraw the unwarrantable failure allegation, thus reducing the negligence attributable to Wolf Run from high to moderate, as the subject seals apparently satisfied the 20 psi strength requirements in effect at the time of the accident. Section 75.335 has since been modified to require seals constructed after October 20, 2008, to withstand forces of at least 50 psi, or 120 psi, depending on the type of atmospheric monitoring of the sealed areas.

The Secretary initially proposed a penalty of \$9,700.00 for 104(d)(1) Order No. 7100904. The Secretary now has filed a motion to approve settlement wherein Wolf Run has agreed to pay a reduced civil penalty of \$8,500.00. The settlement terms include modifying 104(d)(1) Order No. 7100904 to a 104(a) citation to reflect that the cited violation was not attributable to an unwarrantable failure.

I have considered the representations and documentation submitted in this matter and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act. **WHEREFORE**, the motion to approve settlement **IS GRANTED**, and pursuant to the parties' agreement, Wolf Run Mining Company **IS ORDERED** to pay a civil penalty of \$8,500.00 within 30 days of this Order in satisfaction of 104(a) Citation No. 7100904.² Upon receipt of timely payment, the captioned civil penalty case **IS DISMISSED**.

/s/ Jerold Feldman

Jerold Feldman
Administrative Law Judge

Distribution: (Regular and Certified Mail)

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/jel

² 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. Please include the Docket No. and A.C. No. noted in the above caption on the check.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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May 19, 2011

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. WEVA 2009-1519
Petitioner	:	A.C. No. 184010
v.	:	
	:	
MOUNTAIN EDGE MINING, INC.	:	Mine: Sweet Birch
Respondent	:	
	:	

DECISION AND ORDER

Appearances: Allen Kelly, Esq. and Michelle Kim, Esq., Secretary of Labor, Office of the Solicitor, representing the Mine Safety and Health Administration;
Sam Madia, Esq. for the Respondent

Before: Judge Moran

Introduction:

At the time of the matters in issue in this proceeding under the Federal Mine Safety and Health Act of 1977 (“Mine Act”), miners at the Sweet Birch Mine were working in particularly adverse conditions. Engaged in retreat mining, they were toiling in a 3 ½ foot mining height environment, making crawling the means of moving about. It was while working under those circumstances that MSHA inspector Brandon Ellison issued a 104(d)(1) Citation on March 9, 2009 (“Citation”) and, eight days later, on March 17th, a 104(d)(1) Order (“Order”). The Citation alleged a failure to follow the mine’s approved roof control plan, while the Order alleged a failure to conduct an adequate preshift examination. A hearing ensued on February 3, 2011.¹

¹ The parties stipulated that the Respondent is an Operator under the Mine Act; that the Mine’s operations fall within that Act’s jurisdiction, that the proceeding is subject to the Commission’s jurisdiction and its judges, that the citation and order involved here were issued by an authorized representative, that such copies of those were authentic and that true copies of them were served on the Respondent. Tr. 8 -9.

For the reasons which follow, the Court affirms both violations, finds for each that they were “significant and substantial,” the result of high negligence and aggravated conduct, and hence unwarrantable failures, and that the appropriate penalty for the Citation is \$24,496.00 and for the Order, \$9,122.00, for a total penalty of \$33,618.00.

Findings of Fact and Conclusions of Law

A. Citation No. 6622239, the roof control violation²

Brandon Ellison,³ is a coal mine inspector for MSHA. At the time in issue here Ellison was conducting a regular inspection, referred to as an “E01.” Tr. 24. Referring to his 104(d)(1) Citation, No. 6622239, and GX 3, his notes relating to the issuance of that citation, Ellison stated that on March 9, 2009, he proceeded to the 001 Mechanized Mining Unit, or “MMU,” along with mine foreman Terry Walker.⁴ Tr. 26. It was at the No. 4 entry where he observed the continuous miner operating under circumstances where there were no test holes outby it. Tr. 27. The roof control plan requires a test hole and also calls for “six-foot torque tension bolts to be placed in a star pattern.” Tr. 27. Under the plan, a certified foreman is to examine those test holes prior to mining and then certify that, by listing the date, time and his initials. Tr. 27.

Referring to GX 4, the mine’s “safety precautions” which were in effect on March 9, 2009, Ellison stated that, under those provisions, the mine was not in compliance with safety precautions 1 and 4. Safety precaution 1 provides that “[p]rior to retreat mining, supplemental support will be installed in each intersection. The minimum support will be a six-foot fully grouted rebar bolt installed in a star pattern. Such supplemental support may be installed during development.” Tr. 28. Safety precaution 4 provides that “prior to retreat mining, a test hole shall be drilled in each intersection to determine any separation in the strata. Such test holes shall be examined by a certified foreman prior to beginning second mining in the pillar(s) immediately inby. The examiner shall place his dates/times/initials at the test hole upon completion of the examination. If any separations are detected, additional support such as longer bolts anchored above the separation, timbers, cribs or crossbars shall be installed prior to retreat mining.” Tr. 28-29. Ellison explained that these requirements mean that there must be a test hole at each

² The applicable provision related to the roof control violation, 30 CFR § 75.220 (a)(1), provides: Each mine operator shall develop and follow a roof control plan, approved by the District Manager, that is suitable to the prevailing geological conditions, and the mining system to be used at the mine. Additional measures shall be taken to protect persons if unusual hazards are encountered.

³ Government Exhibits 1- 12 were stipulated for admission at the outset of the hearing. Tr. 17-18.

⁴ Before doing that he had reviewed various documents on the surface, such as the operator’s plans and the preshift examination. Upon completing his imminent danger run, and citing the operator for an alleged violation which is not part of this docket, he traveled to the section feeder, finding another alleged violation, this time for coal accumulations at the No. 5 belt tailpiece. Tr. 27. These other alleged violations play no part in the violations at issue.

intersection.⁵ Tr. 30. In his view, this failure, by not having the initial support present, contributed to a safety hazard. He explained that retreat mining naturally weakens the mine roof because that process, by its design, causes the roof to collapse. The extra support, installed in the star pattern, is in the working area where miners would normally stand. By not having the test holes, one doesn't know if the roof is cracked above or if there are any coal or rider seams present. Tr. 31. The importance of this requirement was not theoretical. Ellison noted that in that particular area, only one crosscut outby, this mine did have a roof fall. It was his understanding that occurred due to a "rider seam," which is a "weaker type" of roof strata. Tr. 31.

Ellison was also asked about GX 5, a mine map of the Sweet Birch Mine and GX 5A, which is an accurate representation of a part of GX 5. Tr. 32. Ellison marked on 5A the area where he found the roof conditions he had just described, marking it with an "X."⁶ When Ellison found the problem, he was adjacent to the intersection where the miners were conducting the mining cycle. Tr. 98. Thus he affirmed seeing the continuous miner working, immediately inby. Being more particular as to his location, Ellison added that he had documented that he was three breaks inby spad 694. Tr. 99. He did watch the miners load one or two shuttle cars. Tr. 100.

Also pertinent was GX 6, which is a copy of the roof fall incident that Ellison referred to earlier in his testimony. The exhibit, which is an "accident report," stated that the roof fall occurred "[m]idway down to No. 9, area between spad 709 and 713 fell rib to rib, 20 foot long, four foot thick. There seems to be a one to two inch rider seam of coal at the top of the fall. The area is breakered off and will not be [] moved."⁷ Tr. 35. Per GX 6, that roof fall occurred on March 3, 2009, which was only a week before the inspection in issue here. Tr. 58.

Government Exhibit 12 consists of the preshift and onshift reports for the Sweet Birch Mine and its production reports. Turning to the daily production reports for March 4, 2009, the

⁵ The test holes can be drilled during development, in which case they must be left open so that they can be examined. Alternatively, they can be drilled as they retreat, that is, once the development for a panel is completed, they can install the test holes before the retreat mining commences. Tr. 30.

⁶ Ellison was confident of his location where he found the problem because he relied upon the mine's survey specs and his notes recorded that he was three breaks inby spad 3940. He also marked this area, encircling it with a green ink marker. Another confirmation of his location, Ellison added that he was in the No. 4 Entry, which he knew to be the belt entry and that the subject area was three breaks from the section "going straight ahead." Tr. 35. After he had checked the section feeder he crawled straight ahead to where the miners were working. Ellison crawled because, as noted, the mining environment is more even arduous than usual at this mine; miners work there within a floor to roof span of about 3 and a half feet. Tr. 35-37.

⁷ Ellison marked, again with a green marker, the area of the roof fall on the map. Tr. 36. On Exhibit 5A Ellison marked where mining was being conducted near to the area where he found cited the condition, marking between the large "4" and "6" on that map. Tr. 40. His notes also support the location he identified, as he indicated the spad number and the number of crosscuts inby the condition. Tr. 40.

inspector noted that “major delays” was listed there,⁸ providing that “Section area low to 40 to 42 inches. We are unable to see the pressure gauges on the MRS, so federal inspector suggested we pull back two to three rows and then continue pillaring... .” Ellison confirmed that the “inspector” referred to in that report was himself.⁹ Tr. 41. Leaving some allowance for down time and other intervening events, Inspector Ellison believed that in the time from the production report of March 4, 2009 to the date of his citation’s issuance, the miners could have completed two rows of mining. Tr. 43. It is for that reason that he concluded miners would have been exposed to the hazard of roof falls in the cited area. He noted again that, with the roof fall having occurred in a very nearby area, it is indicative that the roof is weaker in that location. Tr. 44. Three people would, typically, have been exposed: the continuous miner operator, a mobile roof support operator and the shuttle car operator. Significantly, he observed each of these operators at the time he cited the condition. Tr. 44.

Further addressing the cited violation of 30 C.F.R. 75.220(a)(1), Ellison emphasized that retreat mining is more dangerous, as that activity weakens the mine roof and the intent is to have the roof collapse. Tr. 49. Thus the extra precautions are especially important to assure roof support. Adding to that concern, he again noted the weaker roof in the area together with the indication that there was a coal rider seam. Tr. 48.

If a roof fall did occur, Ellison believed that fatal injuries could result. In this regard he noted the massive section of roof that fell nearby. Tr. 49. Additionally, as noted, because this is a “low coal” mine, miners have a diminished opportunity to get out of harms way because, should there be any advance warning, one is relegated to crawling away from such a hazard. Tr. 49. Further, it should be noted that it is not a given that one will even hear a warning of a roof fall, through cracking or popping, as there might not be any such prior indication. Nevertheless, it is obvious that, if such a warning does occur, crawling away from a danger is a slower process.

In terms of his finding that it was “S & S,” Ellison viewed it to be a discrete hazard, with a reasonable likelihood to cause an injury, which injury would be serious, including the risk of a fatality. Tr. 50. Because the certification process requires precautions be taken and the frequent checking of conditions, Ellison believed the violation was obvious. For example, he noted the foreman’s requirement to make the test hole examination. Each time the miners move from one place to another, the foreman is required to check that hole, making sure it is not cracked, or that

⁸ Ellison believed that production report related to his citation in that it shows that they moved back a few rows and shows the blocks of coal they left behind by that action and that those areas would typically have been mined. Independent of that, the Solicitor introduced the testimony to further establish the inspector’s location at the time he issued the citation. Tr. 47.

⁹ The inspector marked the number “1” at this low area from where he recommended they pull back, marking the new location the miners move to with a “2.” The low mining height made it difficult to see the gauges. Tr. 46. It is important to see the gauges to make sure the machine is not overpressurized. One then must either move the gauges to the outside of the machine so they can be viewed, or stop mining the area. Tr. 46.

there has been a roof shift. Thus, the foreman must continually evaluate the conditions, making sure it is safe before mining starts. Tr. 51.

Ellison also considered the condition to be extensive. As noted, no test hole had been made in the intersection. Tr. 52. The inspector expressed that in his view the problem was extensive. Tr. 52. Another related factor was the length of time the conditions had existed. Relying upon his notes, as reflected at GX 3, there had been eight shuttle cars loads removed from the applicable pillar block. Tr. 53.

As Ellison graphically, and credibly, described the circumstances in which he found the violation, he had just finished issuing a citation at section tailpiece when he “heard mining start . . . [s]o I worked my way, eventually crawling up to where they were working at. I watched them load out one or two shuttle cars. While I was on my hands and knees observing that, I was trying to look for the roof bolts to make sure they were in place, and I couldn’t see them. So once one of the shuttle cars left the continuous miner, I stopped for a second and crawled over to see if I could find them. I couldn’t find them. I looked for the test hole and the section foreman’s dates and initials, and couldn’t find it. That is when I brought it to [the company rep, Mr. Terry Walker asking about the additional support, the test holes and evidence that the foreman had examined them].” Tr. 55. Though he was asked, Walker did not know why no test holes had been installed. Tr. 61. Instead, Walker apologized for the problem and then had it corrected.¹⁰ Tr. 61.

¹⁰ Jerry Bias was the mine superintendent at the time in issue. Tr. 229. Bias agreed they were engaged in retreat mining in entries 1 through 8 during March 2009, an area he described as “First off of two north.” Tr. 232-234. Regarding the roof control citation, Bias was informed that there was an area that had not been bolted. Tr. 236. He did not view the condition at the time it was cited, but stated that he did later. Tr. 237. Bias felt it was, on balance, better to drill the test holes, not as they were advancing, but rather just before they began the retreat mining. Tr. 238. Referring to Ex 1A, Bias’s attorney circled the pillar at spad 812. Before retreat mining the circled pillar, the roof control plan required had to have five bolts, a “five-star pattern, six-foot bolts and a test hole.” Tr. 240.

Bias testified as to where they were mining on March 4th, but this was based on his reliance upon production reports from that date. Tr. 244. The mining environment had gotten so low, that the roof supports would not work properly, causing the mine to retreat to a point where they had sufficient clearance. Machines which temporarily support the roof require a minimum of 12 to 18 inches of movement “in case something happens,” but Bias informed they only had six inches. Tr. 244. These conditions required them to “pull back at least two rows” leaving those unmined. Tr. 245. On March 6th, the mine was able to produce some coal, based on Bias’s review of its production report. Tr. 247. On March 9th, when Ellison’s violation of the roof control plan was issued, by the time of its issuance, Bias *speculated* that the mine would have mined a third of the way through two pillars, “at best,” as there would have been only an hour of production by that time. Tr. 257. Bias continued, for some time, reviewing his interpretation of the mining activity, and problems they encountered, during the time frame connected with Ellison’s alleged violations. Tr. 230-262. In response to the Court’s inquiry, Counsel for Respondent explained that the purpose behind Bias’ recounting of the mining activity was to

It was Ellison's view that the section foreman, as a member of mine management, should have known about these failures since he was the individual who instructed the crew to start mining. Ellison spoke to both the section foreman and Terry Walker, the mine foreman, about this. Neither of those individuals could locate the required test hole nor any initials. Tr. 57. Further, Ellison considered the violation to be aggravated conduct, beyond ordinary negligence. He stated that the foreman's duty to check for these holes is a "very, very important process in this mining cycle."¹¹ Tr. 58. With the foreman then instructing his men to commence mining,

show the areas where Safety Precaution 1 and 4 were needed but that those areas were not the area for which the mine was cited. Tr. 259.

It was Bias' position that "if [they] were mining at spad 718, that intersection [was the only one which] would have had to have been bolted, but that was in No. 5 entry." Tr. 260. Thus, it was Bias' position that Ellison identified an intersection that "was three breaks inby spad 694, . . . which was the one he referenced in that entry, No. 4 entry. That would have been one break outby where we would have been mining that day, and that is not required to be bolted until you mine the block immediately inby." Tr. 261.

With testimony based on production reports, not firsthand knowledge, Bias stated that the mine was actually mining half what was recorded in its production report. Tr. 265. This was because they were misreporting the linear footage. R's Ex. 3, the March 9, 2009 production report, reflects there were "Major Delays." Bias noted that there was an inspector on the section and that the shift had to finish star bolting and finish the belt move. Tr. 266. The first shift operates from 7 a.m. to 3 p.m. and then the second shift operates from 3 p.m. to 11 p.m. Tr. 267. Bias maintained that those reports were written backwards, that is, that the what was listed as done on the second shift was actually done on the first shift. Tr. 267. R's Ex. 3, at page 16, notes: "Major delays, first shift, it says down because of an inspector 90 minutes." Tr. 274. Bias admitted that inspector was Ellison. This created an additional problem for Bias's contention, as Ellison testified that he was at the mine during the *first* shift. Tr. 274. Bias had to concede that the *mine's report* showed the belt move occurred during the second shift. Tr. 268. While Bias maintained that the No. 5 entry was actually being mined at that time, when Inspector Ellison's notes were brought to his attention and those notes stated, regarding the issuance of Citation No. 6622238, that a roller was turning in coal accumulation of loose coal, Bias was conflicted, as he agreed that the belt was running at 11:05 a.m. that day. Tr. 269 - 271, GX 3 at p.8. Even the contention by Bias that the mine never moves a belt on the second shift was qualified by himself as he stated that a move on the second shift can occur if "it's an absolute have-to case, which was the case earlier when [the mine] had the low area." Tr. 272. Bias could offer no credible explanation for an accumulation of eight inches in height and stretching for three feet to develop in five minutes. Tr. 271. The best Bias could offer up was that "if they had moved back in an area that had a spill . . . and they didn't clean it up, [the accumulation] would have been there. Tr. 271. This was pure speculation and without any record support. Therefore Bias' theories and speculations are rejected.

¹¹ Abatement was carried out by installing supplemental support, consisting of six-foot bolts, in the required star pattern. This was followed by drilling the test hole and then that was examined by the section foreman. Tr. 59.

without checking the hole to see if the hole was even present, let alone not examining it, he placed those miners in danger. Tr. 58. Compounding this failure was the fact that the roof was weaker in this area and, as the Inspector observed, “the company was well aware of [the roof issue].” Tr. 58.

Although Ellison agreed that he did not see any rib rolls outby the cited area, nor did he see other loose material in the cited area, the absence of these conditions must be understood in the context of the retreat mining. Tr. 96. As Ellison explained, “you’ve got to understand this is where they’re drilling. They’re actually causing the roof to collapse right in that area because they’re mining. So you are going to have sloughage. You’re causing the roof to fall naturally. That is how it is designed to work.” Tr. 96-97. The inspector’s larger point was that one wouldn’t be documenting things like “loose or shaggy top,” as counsel inquired about, because the whole idea with retreat mining is to have the roof collapse.¹² Tr. 98.

Further Discussion

The violation of the roof control standard was established.

It is clear that the violation was established; the intersection immediately outby where the continuous miner was operating had neither a test hole nor the required support of 6 foot rebar bolts installed in a star pattern, as required by the roof control plan. The preponderance of the evidence standard was more than met by the Secretary. Thus the Court rejects the contention that the intersection identified by Ellison was not immediately outby the area of retreat mining. Inspector Ellison’s testimony was credible and both his location and the area where mining was occurring were established by the reliable evidence.¹³

¹² Outby that area, as the inspector acknowledged is a different matter and, if found there, he would note such conditions. In this instance he did not find such problems outby the cited area. Tr. 98.

¹³ Accordingly, the Court rejects the Respondent’s claim that the belt move occurred during the day shift on March 9th. Instead, as the production report confirms, the belt move occurred during the second shift, that is, between 3 and 11 p.m. That report also references the delay because of Ellison’s findings during the first shift. Thus, the Respondent’s claim that the production reports were mixed up, that is, reversed, is rejected. Though reliance on Ellison’s credible testimony is sufficient in this regard, it is also noted that Bias was not present with the inspector when the violation was noted and that his version of the events was based on his interpretation of the production reports. Further, the Respondent could not even rely upon those reports, as it had to assert that the information in them had been reversed. Ellison also found the rollers of the No. 5 belt turning in an 8 inch high and 3 foot long coal accumulation, a condition that could not have developed in a mere 5 minutes time.

The special findings were also established. Applying *Mathies*,¹⁴ the violation having been established, the discrete safety hazard, or measure of danger, contributed to by the violation, is plain: roof falls are one of the most basic threats to mine safety. Here, the failure to comply with the minimum requirements of the plan, by not having created the test hole and by failing to install the supplemental support, inherently created a discrete safety hazard. That there was a reasonable likelihood that the hazard contributed to will result in an injury is demonstrated by the plan's requirement for such protection to be installed. Such roof control measures are not required as window dressing; they are included to reduce the odds of a roof fall's occurrence. Thus, Ellison's view that the lack of supplemental support made a roof fall reasonably likely, was fully justified. The last element, that there is a reasonable likelihood that the injury will be of a reasonably serious nature is a given, where roof falls are involved. While that observation is enough, the 20 foot long 4 foot thick roof fall in a nearby area only serves to underscore the demonstrated gravity of this failure to comply with the plan. Even if a miner were to sense, through tangible warning signs, that a roof fall was about to happen, this mine's environment, with its ceiling of only 3 ½ feet, meant that the ability to avoid such an event was compromised by the need to crawl, instead of run, from such a development.

The Court also finds that the violation resulted from high negligence and aggravated conduct and consequently was an unwarrantable failure. In support of this finding, Inspector Ellison's testimony that both of the hazardous conditions he found were obvious, is noted. This is because section foremen are to monitor whether such safety precautions have been taken. Here, the absence of a test hole and the missing supplemental support were obvious and readily ascertainable, had the duties been carried out. In the case of the test hole, those need to be drilled *prior* to the retreat mining cycle. Contrary to that requirement, Ellison determined and the Court finds that the problems continued, unaddressed, through eight shuttle car loads. This meant that the mining crew had been exposed to roof which was not in compliance with the roof control plan for that period of time.¹⁵ In addition to being obvious and continuing until the Inspector discovered the shortcoming, another factor supporting the unwarrantable failure finding is that the section foreman, as a supervisor and therefore a member of management, knew or should have known, of the deficiency. In fact, Inspector Ellison observed the section foreman direct the crew to begin mining, in spite of the minimum roof control requirements not having been carried out. While these findings are sufficient, it is noted again that the situation was further aggravated by the recent and close-by roof fall.

Penalty Determination

The Secretary's original proposed assessment was \$12,248.00 for the Citation. In its opening statement, the government announced that it was seeking an increase in its proposed penalty for Citation No. 6622239, involving a violation of 30 C.F.R. 75.220(a)(1), a section

¹⁴ *Secretary of Labor v. Mathies Coal Co.*, 6 FMSHRC 1 (January 1984)

¹⁵ Ellison estimated the time of exposure before he spotted the problem to have been 15 to 20 minutes.

104(d)(1) citation.¹⁶ As discussed *supra*, this involved a failure to follow the approved roof control plan, despite prior notice of the risk of roof falls in the area cited. As the Secretary notes, the violation involved two distinct failures of the roof control plan. The failure of either requirement established the cited violation and the proposed penalty would have \$12,248.00 under the penalty policy for either one of the two shortcomings. The Court agrees that as the Secretary could have cited two different provisions, but instead only cited one violation, the enhanced penalty is justified. Tr. 10.

Therefore, it is both rational and reasonable that the penalty should be doubled to \$24,496.00 where the record establishes two distinct and independent failures to comply with the minimum requirements of the Plan.¹⁷ The importance of these independent roof control requirements need to be understood in the context of the retreat mining that was occurring here. With retreat mining, collapse of the mine roof is part of the process. This makes the safety requirements particularly important. Test holes are drilled in order to determine if there have been cracks or shifts in the roof's strata. So too, the roof's collapsing creates added pressure on those roof areas that remain intact. It is for this reason that supplemental roof support is required when retreat mining.

The negligence and gravity have already been discussed. Size of business, history of violations, ability to continue in business have likewise been addressed above. While the Respondent demonstrated good faith in abating the violations, once Ellison brought them to the mine's attention, that does not afford a basis for any penalty reduction.

Accordingly, having considered the entire record related to this violation, and the parties' arguments related thereto, the Court concludes that the penalty for the roof control citation should be \$24,496.00.

B. Order No. 8082063, the inadequate preshift violation

This Order, issued under Section 104(d)(1) of the Mine Act, cites 30 C.F.R. § 75.360(b)(3). That Section, in relevant part, provides:

Preshift examination.

¹⁶ The parties stipulated that the total proposed penalties will not affect the Respondent's ability to continue in business, that the Violator Data Sheet, per Exhibit A as attached to the Secretary's penalty petition, accurately sets forth the Respondent's size, the total number of assessed violations for the time period therein listed, and the total number of inspection days for such time. Tr. 8-9.

¹⁷ In addition, the Court has independently examined each of the statutory penalty criteria, weighed the gravity and negligence and the other circumstances surrounding this violation, all as developed through the evidentiary record and, apart from the recommendation by the Secretary, concludes that a penalty of \$24,496.00 is appropriate for this roof control violation.

(a)(1) Except as provided in paragraph (a)(2) of this section, a certified person designated by the operator must make a preshift examination within 3 hours preceding the beginning of any 8-hour interval during which any person is scheduled to work or travel underground. No person other than certified examiners may enter or remain in any underground area unless a preshift examination has been completed for the established 8-hour interval. . . .

(b) The person conducting the preshift examination shall examine for hazardous conditions, test for methane and oxygen deficiency, and *determine if the air is moving in its proper direction at the following locations: . . .*

(3) Working sections *and areas where mechanized mining equipment is being installed or removed, if anyone is scheduled to work on the section or in the area during the oncoming shift.* The scope of the examination shall include the working places, approaches to worked-out areas and ventilation controls on these sections and in these areas, and the examination shall include tests of the roof, face and rib conditions on these sections and in these areas. . . .

30 C.F.R. § 75.360(b)(3) (emphasis added).

Inspector Ellison issued the Order on March 17, 2009. GX 3, and GX 7. Tr. 63-66. As with the prior citation, issued on March 9, 2009, and just discussed, Ellison was visiting the 001 MMU and, following his practice, he first reviewed mine records, such as the preshift and onshift exams, before going underground. Tr. 63. Terry Walker, mine foreman, accompanied Ellison on this day. Before coming upon the condition which prompted the issuance of the subject order, Ellison wrote up several other alleged violations.¹⁸ Following those actions, the inspector found that the mine's ventilation plan was not being followed in that the bleeder system lacked permanent controls. The air was found to be reversed at entry No. 4 and the bleeder and intake air were mixing, instead of being separated, as required. Also, several stoppings had holes and leaks.¹⁹ Tr. 65. Ellison took a smoke survey and used a chemical smoke to determine the direction of air flow and where it was mixing. Tr. 66. Explaining further, Ellison stated that the No. 5, 6 and 7 entries had ventilation controls which had been removed and this caused bleeder

¹⁸ These included an access road that lacked a berm in an area, a finding that a lifeline, at Break 2, didn't come completely out of the mine, and which lacked the required reflective material, and a communication cable that was touching the coal rib. Tr. 64-65. While noted, these problems are not considered at all in determining any of the issues here. It is highlighted here and noted by the Respondent in its Post-Hearing Reply Brief, that, while there was testimony from Inspector Ellison as to another citation he issued, Citation No. 8082062, regarding an alleged failure to establish escapeways, that matter has been contested by the Respondent and was not resolved at the time of the hearing. Accordingly, no part of this decision relies upon that alleged escapeway violation.

¹⁹ The context of these discoveries, where these controls should have been installed, was that the mine had started moving their mining equipment to a new location. Tr. 65-66.

air²⁰ and intake, that is, “fresh air” to mix before it arrived at the new section where miners were working. Tr. 67.

Per GX 7, pertaining to Citation No. 8082061, also issued on the same date, March 17, 2009, as Order No. 8082063, the inadequate preshift violation being addressed here, Ellison cited the Respondent for not following the approved ventilation plan. Citation No. 8082061 was issued some 35 minutes just prior to the Order presently under discussion, Order No. 8082063. Unlike the escapeway issue cited by Ellison, Citation 8082061 has become a final order and was paid. Tr. 73. Thus, it is considered here. That citation stated that:

The Approved ventilation plan is not being followed.
No ventilation control is present at spad # 692 to separate the bleeder system from the intake. A proposed set of double doors were to be installed at this location. This is allowing the bleeder air to mix with the intake air that is feeding the construction section being installed and the electrical installations. The ventilation controls at the mouth of the 1 right 2 right north panel are not in place. No ventilation controls are present in the #5, #6 and #7, entry's (sic) to separate the bleeder system from the intake. The bleeder system is not functioning properly. The air is reversed coming back out of the gob in the #7 entry. The controls that have been installed in this area are not adequate. Several holes are present in the stoppings in the #4, #3 and #2 entry's (sic). This is causing bleeder air to mix with the air in the belt entry and the electrical installations.

GX 7, Citation No. 8082061.²¹

By comparison, the subject Order, Order No. 8082063, asserted:

An inadequate preshift exam was conducted for the day shift on the construction section where equipment was being removed and installed. Several obvious hazards were found. No ventilation control is present at spad # 692 to separate the bleeder system from the intake. A proposed set of double doors were to be

²⁰ Bleeder air is involved with retreat mining. Once air has passes over coal blocks that have been mined, it is deemed “return” or “bleeder” air. Such air must be dumped into a return entry to the mine's surface. Tr. 67. While Ellison did not find low air or methane at the time of finding the violation, he stated that, if one allows bleeder air in with transit air, over a period of time low oxygen will develop. Tr. 114.

²¹ That citation's gravity was marked as “significant and substantial” and the negligence as “high,” that is, just below the “reckless disregard” categorization.

installed at this location. This is allowing the bleeder air mix with the intake air that is feeding the construction section being installed and the electrical installations. The ventilation controls at the mouth of the 1 right 2 right north panel are not in place. No ventilation controls are present in the #5, #6, and #7 entry's (sic) to separate the bleeder system from the intake. The bleeder system is not functioning properly. The air is reversed coming back out of the gob in the #7 entry. The controls that have been installed in this area are not adequate. Several holes are present in the stoppings in the #4, #3, and #2 entry's. (sic). This is causing bleeder air to mix with the air in the belt entry and the non permissible electrical installations. . . . [escapeway allegations omitted]. These hazards are obvious to the most casual observer. Management engaged in aggravated conduct constituting more than ordinary negligence by not adequately recognizing and recording these hazardous conditions. This is an unwarrantable failure to comply with a mandatory standard.

Order No. 8082063

Thus, comparing Citation No. 8082061 with Order No. 8082063, one notes that the two are nearly identical in describing the problem. The key difference is that the Citation holds the Respondent accountable for the ventilation plan violations, while the Order speaks to the Respondent's related failure to note those problems in its preshift examination. The former, paid violation for the ventilation failures, has significant implications for the latter alleged preshift violation.

As Ellison emphasized, the "whole ventilation was really messed up" at the time of his discovery of the problem, as controls were not in place and there were air reversals. Tr. 70.

Thus, the ventilation system was compromised.²² Nine people were in by this condition, installing equipment, and thereby exposed to the problem. Tr. 71. He listed the violation as "significant and substantial" in that, with ventilation controls out and the air compromised,

²² GX 8 is part of the mine's ventilation control plan, which plan was in effect on March 17, 2009. Tr. 68. It includes a schematic, showing where controls are to be located. Tr. 68. The plan requires that the ventilation controls are to be in place prior to installing mining equipment. Tr. 69. Ellison considered this failure to be "high negligence." This was based on the mine's failure to follow its plan, exposing miners to hazardous conditions by allowing intake and return air mixing. Low oxygen would be an issue in such circumstances. Ellison added that if any problem had arisen, as in the case of a mine fire, the intake air would have been compromised.

contaminated air in the intake was present, complicating matters in the event of an emergency. Tr. 71. He found no mitigating factors to be present.²³ Tr. 72.

The inspector explained that, as the preshift indicated there were no hazards, his subsequent findings led him to issue an order for an inadequate examination. Tr. 76. The problems, as identified in Citation 8082061 were obvious, and thus he issued the inadequate examination citation. Here, while the section foreman had examined the area, none of the ventilation problems were documented in then preshift examinations and this led the inspector to issue a violation for the inadequate examination, citing section 75.360(b)(3). Tr. 78-79.

Ellison's point was that once the mine had completed the pillaring, that production had stopped, and the ventilation controls should have been installed. Tr. 81.²⁴ A total of 9 preshifts had elapsed from the time when these controls, the ventilation controls, should have been in place. Tr. 82. The onshift report for March 17 records the problems identified by Ellison and notes that "[a]ll people working on violation."²⁵ Tr. 83. The Inspector added that he was referring to every type of hazard, air, roof and ribs, when he stated there were obvious hazards. Tr. 109. While other citations he issued at this time involved the conditions he found, this citation pertains to *the examination*, that is, what the examiner *should have* seen. Tr. 111.

Terry Walker, who as previously noted, was the mine foreman at the Sweet Birch Mine in March 2009,²⁶ identified R's Ex. 4 at 9 as a preshift report for March 15, 2009. Tr. 149-154. That report did not show any low oxygen level present. In fact, Walker noted that the oxygen

²³ On cross-examination Ellison was asked about the flow direction of the intake air and in this regard GX 5 was referenced. Ellison marked the No. 8 entry on that map, with an asterisk to identify the mine's intake air. Tr. 125. Referring to the intake air flow in the area the mine was cited, Ellison advised that the air was coming up near the No. 8 entry and then going into the bleeder system. Because stoppings were not in place across the mouth of the panel, the air was coming back out to the panel where the miners were installing equipment. Tr. 127. Ex. 5. Ellison then drew, using a pink ink marker, the air flow he just described, marking it on Ex. 5. Tr. 127. Ellison noted that the map, GX 5, that he was marking was created *after* the time he issued his citation and thus it reflects some ventilation controls *which were not present* when he cited the problem. Tr. 131. He therefore added "Xs" to indicate those controls which, while reflected on GX 5, were not in fact present when he found the violation. Tr. 132. He used a blue asterisk to mark the intake, blue "Xs" to show the controls that were not present when he found the violation but which are nevertheless present on GX 5. He then used a pink marker arrows to show the airflow as he found it.

²⁴ Ellison explained further the timing for installing controls, stating that once the mining was completed, the ventilation plan required that the controls be installed. Therefore once the equipment was out past where the controls should have been, the controls were to have been built. Tr. 140.

²⁵ That onshift report specifically mentioned that the intake needed to be extended, and that "[a]dditional controls [were] being installed." Tr. 83, onshift report.

²⁶ Walker informed that the mine has since been shut down. Tr. 152.

level was good. Tr. 156-157. Walker stated that the March 16, 2009 shift exam also showed no methane and good oxygen level. Tr. 161. These readings were taken in the No. 8 entry, the intake entry. Tr. 162. R's Ex. 5, an onshift report, similarly showed no methane and good oxygen level. Tr. 167. The other reports showed essentially the same results; all the reports for the entries showed good air and no methane. Tr. 170-177. Those reports also informed that construction was going on. Tr. 181. Walker agreed that a move was taking place at the time Ellison cited the mine. Tr. 183.

Referring to the equipment that was being moved, Walker stated that the miner, that is the machine that cuts the coal, along with the cables and water line associated with it, and three shuttle cars, are among the things that must be moved out to the new section. The roof bolter, and its cable, the power center, all water lines, the beltline, scoop chargers, and all spare parts, needed to be moved out. Tr. 189. Walker stated that these need to be moved *before* one can do any work on "ventilation and stuff in there."²⁷ Tr. 185.

Thus, it was Counsel for the Respondent's position that there still was equipment in the area they were leaving and that the ventilation requirements cited by the inspector do not become operative until after the equipment has all been removed. Tr. 196. However, these contentions were overtaken by the Respondent's conceding and paying the underlying ventilation violation. Respondent cannot now contend that those cited conditions did not apply, as that would mean it could relitigate the issue here. The only question at this point in time is whether the conceded ventilation violation should have been noted in the pre-shift exam. The answer to this is found in the preshift examination standard itself. That standard requires, among other things, that the areas be examined for "hazardous conditions" as well as to "determine if the air is moving in its proper direction."

²⁷ Walker agreed he was probably not present when the inspector wrote the violation for the inadequate preshift exam. Tr.207. Further, when asked if he discussed the matter with the inspector, he stated he could not remember. Tr. 208. Critically, when asked if he admitted to the inspector that he knew that the ventilation controls had not been established, he answered, "I might have, [then adding] I don't know. I don't remember." Tr. 209. After having Walker mark on the exhibit R 1B where spad 692 was located, the Court inquired of the witness whether equipment was or was not still in by that location at the time the violation was cited. Tr. 218. Walker answered that part of the beltline was still in there and some spare parts, but that was "about all that [was] in there." Tr. 218. Walker maintained that one couldn't have the ventilation controls in place because of the equipment yet to be moved. Tr. 219. Yet, despite that stance, he could not recall protesting about the violation to the inspector when it was issued. Tr. 219. Though he acknowledged that it would have been natural to protest the violation, given his perspective, he was unable to provide a credible reason for that failure to speak up. Tr 219-220. Further, the citation was issued to Walker. Tr. 224.

Although the Respondent contends that there were no hazards to list in its preshift report, the Secretary asserts that the failure to have installed the ventilation controls²⁸ constitutes such a hazard, as Inspector Ellison's gravity and negligence determinations, relating to the underlying violations, demonstrate that the failure did constitute a hazard. Sec. Br. at 23. The Court agrees.

The Secretary also contends that the Order, No. 8082063, was significant and substantial and constituted an unwarrantable failure. Regarding the "S&S" contention, the Secretary again points to the testimony of the inspector, expressing his view that an accident resulting in a fatality was reasonably likely to occur, as a consequence of the preshift failures. Those failures, that is, the failure to identify the hazards, allowed them to continue without correction. The ventilation shortcomings risked contamination of the intake air, as air from the bleeder was entering that air. Therefore *the risk* of diminished oxygen was present. As Ellison noted, nine miners were installing equipment inby and these shortcomings placed them at risk should a problem develop.²⁹

As to the high negligence, aggravated conduct, aspect of the violation, the Secretary notes that the Commission has identified seven factors which may be considered. Sec. Br. at 26, citing *Emery Mining*, 9 FMSHRC 1997 (Dec. 1987) and *Peabody Coal*, 14 FMSHRC 1258, 1261. Among those factors the Secretary points out that the condition was both obvious and extensive. Restated as the obverse, the condition was not latent at all.³⁰ Further, as agents of mine management, the preshift examiner's failure to record the hazard is imputable to the Respondent.

Establishment of the violation and Penalty Determination

The violation was established and, as the underlying ventilation violation was conceded, no material evidence was presented to demonstrate otherwise. As noted earlier, the cited standard expressly requires an examination for hazardous conditions and it must be determined if air is moving in its proper direction. Section 75.360(b)(3) expressly addresses the requirements, as cited by Inspector Ellison, which the Respondent failed to meet. The final order for the failure to follow the approved ventilation plan, and covering the same deficiencies identified as the basis for the inadequate preshift examination, establishes the shortcomings of the preshift exam. Accordingly, the Respondent is collaterally estopped from contesting the facts which were resolved by its conceding the failure to follow its ventilation plan. For that reason, much of the testimony offered through Walker was beside the point.

²⁸ Citing *Old Ben Coal Co.*, 7 FMSHRC 205, 209 (1985), the Secretary notes that the underlying ventilation violation, per Citation No. 8082061, was paid and consequently the hazards identified in that matter have been established.

²⁹ In this regard, the Secretary cites *Buck Creek Coal*, 17 FMSHRC 8, 15 (Jan. 1995) for the proposition that examination requirements are of "fundamental importance in assuring a safe working environment underground." Sec. Br. at 25.

³⁰ In terms of the length of time that the hazard continued, the Secretary contends that nine preshift and nine onshift exams failed to record the problem.

In terms of the special findings of unwarrantability and the violation's significant and substantial characteristic, a few preliminary observations are in order. As noted by Judge Miller in *Big Ridge*, 2011 WL 1621389 (F.M.S.H.R.C.) (March 2011), "the Commission has determined that preshift examinations are fundamental in assuring a safe work environment for the miners," citing *Enlow Fork Mining Co.*, 19 FMSHRC 5, 15 (Jan. 1997) and *Buck Creek Coal Co.*, 17 FMSHRC 8, 15 (Jan. 1995). Thus, Judge Miller rejected the contention that the lack of an adequate preshift does not create a hazard, quoting from *Enlow* that "[t]he preshift examination is intended to prevent hazardous conditions from developing . . . [t]he preshift examiner must look for all conditions that present a hazard."

So too, Judge Bulluck observed that "[t]he purpose of the pre-shift examination is to 'prevent loss of life and injury' resulting from hazards at mines," citing S. Rep. No. 91-411, at 71 (1969), reprinted in Senate Subcomm. on Labor, Comm. on Human Res., Part I Legislative History of the Federal Coal Mine Health and Safety Act of 1969, at 183 (1975). The Judge also observed that the "Commission has long recognized that '[t]he preshift examination requirement 'is of fundamental importance in assuring a safe working environment underground,'" citing *Enlow Fork*, 19 FMSHRC at 15 (quoting *Buck Creek Coal Co.*, 17 FMSHRC 8, 15 (Jan. 1995)).

The Commission has also made clear the inherent importance of the preshift examination for mine safety and health, describing it as "of fundamental importance in assuring a safe working environment underground." 17 FMSHRC 8, at * 15, 1995 WL 29274, *Buck Creek Coal Company, Inc.*, (January 20, 1995). There the Commission reversed an administrative law judge's finding that the failure to conduct a complete preshift examination and record the results before allowing miners to enter the mine was not S&S. As summarized by Judge Zielinski in *ICG Knott County, LLC*, the "Commission held [in *Buck Creek*] that the violation was S&S, even though no hazardous conditions were found upon completion of the examination. . . . Consequently, neither the absence of hazardous conditions, nor the fact that no injuries occurred, bar a finding that a violation was S&S." 2011 WL 840799, (February 2011).

It is noted that the Secretary has, at various times, maintained that a failure to conduct an adequate preshift examination is, *per se*, a "significant and substantial"³¹ violation. Although it is not necessary to reach such a conclusion here, it may be said that the preshift exam is by its very nature a fundamental and foundational requirement for effective mine safety. Without an adequate preshift examination, the conditions for avoiding a preventable mine accident are greatly diminished. Here, the admitted facts, by virtue of the Respondent's concession to the underlying ventilation violation, establish both the inadequacy of the preshift exam and its

³¹ A violation is "S&S" if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825-26 (April 1981). While fundamental and foundational to effective mine safety, not every failure to conduct an adequate preshift exam would necessarily be "S & S." For example, the failure to include one's initials, assuming all other aspects of the preshift requirements were adhered to, would not seem to justify an "S & S" designation.

significant and substantial characteristic. Ellison found the bleeder was not separated from the intake, that ventilation controls were not in place and that several holes were present in stoppings at multiple locations, and all of these deficiencies have been conceded by the Respondent. Ellison testified, and the Court adopts, the inspector's view that those deficiencies established the third and fourth elements of *Mathies*.³² Accordingly, the Court concludes that the violation was "significant and substantial."

As noted earlier, the underlying ventilation violations described the negligence as "high." Ellison's Order noted that the hazards were "obvious to the most casual observer." With the section foreman having ostensibly examined the area, but failing to note the deficiencies, the unwarrantable finding is sustained.

The Secretary contends that the full penalty, as originally proposed, should be assessed here. The other statutory criteria, such as size, ability to continue in business, and good faith are not altered from the analysis presented regarding the roof control violation. Given its unwarrantable failure and the gravity, as discussed above, the Secretary maintains that the penalty it seeks is fully justified.³³ The Court, finding that the special findings were justified, agrees with the Secretary's penalty proposal and imposes it here.

³² In *Mathies Coal Co.*, 6 FMSHRC 1 (January 1984), the Commission set forth that in order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard -- that is, a measure of danger to safety -- contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

³³ Although Respondent's Counsel believed that Walker's testimony established mitigating factors, the Secretary countered that, per GX 7, the mine paid the violation for the ventilation issues along with the findings for gravity and negligence, as contained in that citation. The Court, as previously expressed, agrees with the Secretary's perspective; Walker's testimony did not mitigate the penalty.

ORDER

For the reasons set forth above, **Citation No. Citation No. 6622239 is AFFIRMED and Order No. 8082063 is AFFIRMED.**

Respondent is **ORDERED** to pay a civil penalty in the amount of \$24,496.00 for the Citation and \$9,122.00 for the Order, for a total civil penalty of **\$33, 618.00**, within 45 days. Upon payment of the penalty, these proceedings are dismissed.

/s/ William B. Moran

William B. Moran

Administrative Law Judge

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WBM/ryg

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May 19, 2011

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2009-1617
Petitioner	:	A. C. No. 46-09150-186782-01
	:	
v.	:	
	:	
MOUNTAIN EDGE MINING, INC.,	:	Dorothy No. 3 Mine
Respondent	:	

DECISION AND ORDER

Appearances: Jonathan Marcus, Esq., Secretary of Labor, Office of the Solicitor, representing the Mine Safety and Health Administration;
Eric Thomas Frye, Esq., Flaherty, Sensabaugh Bonasso, PLLC, for Respondent.

Before: Judge Moran

In this case involving one section 104 (d)(1) citation, (No. 8081161), and two section 104(d)(1) orders, (Nos. 8081168 & 8081212), the Secretary of Labor, Mine Safety and Health Administration, (“Secretary,” or “MSHA”) alleged that Mountain Edge Mining, Inc. (“Mountain Edge”) violated its approved roof control plan by mining at widths which exceeded its roof control plan, as set forth in Citation 8081161, that it failed to follow its approved ventilation plan, as set forth in Order 8081168, and that it failed to record the results of tests for methane in any of nine working places, as set forth in Order 8081212. For the reasons which follow, the Court affirms the citation and both orders, the special findings associated with each of them and, based on the facts developed at the hearing, imposes an increased penalty for the 8081161 and 8081168 violations, and adopts the penalty, as originally proposed for Order 8081212.¹

¹ All post-hearing briefs were fully considered. Arguments not specifically addressed were either implicitly dealt with in this decision, rejected, or considered unnecessary to specifically address.

Findings of Fact – Conclusions of Law

Citation 8081161

Jack Hatfield, Jr., MSHA coal mine inspector testified with regard to all of the alleged violations in this case. Inspector Hatfield's coal mine experience is extensive, going back to 1970. Tr. 23. First addressing Citation 8081161, issued April 1, 2009 for an alleged violation of 30 C.F.R. 75.220 (a)(1), which pertains to the mine's approved roof control plan, Hatfield was aware that the mine's plan allowed 18 foot mining widths. That, he noted, was unusual, as typically such widths are 20 feet. Tr. 36-37. This was no secret, as signs were posted at the mine reminding miners of the 18 foot width limitation. Upon entering the mine, Hatfield immediately sensed that the widths seemed to be in excess of that limitation. Tr. 38. At that time of this inspection Hatfield was with the mine superintendent, Ralph Tabor. Tr. 38. Upon stopping to check his impression, Hatfield found that indeed the widths were in excess of 18 feet. Tr. 39. On the 001 Mechanized Mining Unit, or "MMU," Hatfield noted that the mining was nearing the outcrop, that is, the point where the coal seam ends, as surface is reached. Hatfield stated that as one moves towards the outcrop the likelihood of roof control problems increases. Tr. 42. At any rate, per his citation, Hatfield used a tape measure and found that the mining widths on the 001 MMU exceeded the 18 foot width "in numerous locations and the entries and adjoining crosscuts up on the section." Tr. 43. He had brought maps of the mine, section prints, with him underground and he proceeded to mark down the measurements. Hatfield marked on those section prints the locations where he found excessive widths. Tr. 39-44, GX 4. Mr. Tabor and, for some of the measurements, Roger Justice, held one end of tape, while Hatfield held the other end. Significantly, in terms of reliability of his findings, Hatfield noted the measurements taken right on the map he had with him and did so immediately upon taking each measurement. Tr. 45. Where a measurement was not excessive, he would note "OK." Tr. 46. Hatfield's notations of excessive widths were only recorded where they were greater than 5 feet long. Tr. 48-49. This is because exceedances over the 18 feet are only a violation when they continue for more than 5 feet. Tr. 49.

Of importance to the finding of violation made here but also as to the appropriate penalty to be imposed, Inspector Hatfield found over 50 of these violations, as reflected on his map. Tr. 51. Addressing the suggestion that a slopping roof makes it more difficult to mine precisely, and that width exceedances are therefore unavoidable, Hatfield acknowledged that there was a grade, but that one has to take more time in making cuts and may have to make a shorter cut under such circumstances. Tr. 52. This approach allows one to do a good job keeping the center lines correct. Hatfield knew that this mine had adverse roof and a history of roof falls. Tr. 53. Coal rider seams present a problem at this mine because if one does not anchor above such a seam, the roof may fall. Tr. 53. GX 2 represents an accident report for this mine, covering February 1, 2007 through March 6, 2009. The report reflects 12 roof fall accidents during that period. Tr. 56. Hatfield believed that number of such roof falls led to the requirement for 18 foot wide entries. Tr. 56. Whatever the origin, the 18 foot limitation did not simply materialize without a reason.

This was later acknowledged through the testimony of Respondent's witness, Frank Pearson, who acts as consultant for the Respondent in a variety of areas: production, safety and cost. Tr. 314. Pearson agreed that there was an old mine, worked out, above the Dorothy No. 3 and that the old mine is from 50 to 120 feet above it. Tr. 323. He also agreed that there were bodies of water above the Dorothy, but asserted that they had monitored them and drained them. Tr. 323. Of particular significance to this violation, while Pearson stated that there was no history of roof falls *in the section* cited, he did concede there were undetected rider seams at this mine and that there had been "problems." Tr. 324. This explains the basis for the origin of the 18 foot width limitation. Further, while he expressed that sandstone was the safest top one can have, he concluded, "all top, you know, can fall." Tr. 325.

In his citation, Hatfield wrote that the "mine roof is primarily sandstone with areas of slate joints, horsebacks and kettlebottoms."² Tr. 57. The roof also had areas with a slate joint butting up against the sandstone. This presents, he expressed, a dangerous situation, because the slate, a horseback, will fall with little or no warning. Tr. 57. Where these conditions exist, with the slicksided slate up against the sandstone, there is no binding between the two formations. Tr. 58. At any rate, each of these is considered to be adverse roof conditions. The presence of these problems makes the failure to comply with the 18 foot width requirement more serious. Tr. 60.

As noted, the mine's approved roof control plan requires that entry widths and crosscut widths be at a maximum of 18 feet. Tr. 63. Hatfield also pointed to a number of items which served to confirm what was not in any genuine dispute in this proceeding; this mine has long had adverse roof conditions.³ Tr. 67.

To abate the violation, supplemental roof support, consisting of timbers, were installed. Tr. 74. Some 215 such timbers, each of which are generally 6" by 6", were installed. Tr. 74. Hatfield marked "reasonably likely" for the box addressing the likelihood of an injury or illness. Tr. 81. He also marked that such injuries would be "permanently disabling," and credibly explained the basis for that view. Tr. 82. Similarly, he rationally explained the basis for his marking the violation as "significant and substantial." As to negligence, the inspector marked that it was "high" because of the extensive nature of the violation. In his words, the excessive widths were "everywhere." Tr.84. Further, as noted at the outset of this decision, warnings were everywhere that they were to mine at 18 foot widths. Tr. 84.⁴ The Court expressly adopts Hatfield's special findings as its own.

² "Kettlebottoms" are basically coal-encrusted petrified tree stumps. They are not found in sandstone top. Rather they are found in slate or shale tops. Tr. 58. A "horseback" is a slang coal term, also referring to pieces of petrified wood.

³ While observing this, the Court was fully cognizant of the Respondent's contention that *in the particular area cited* the roof appeared better.

⁴ Hatfield noted that management people were on the section, the mine had signs posted on the surface about the 18 foot limitation, and the approved roof control plan also expressed that limitation. Tr. 84.

Hatfield stated that mine management admitted that there were violations. Hatfield knew this, in part, because he asked the boss how wide they were to mine and the response was that it was to be 18 feet. Tr. 88. Tabor and Justice, who helped Hatfield take the measurements, admitted to him they were wide and the Court explicitly finds this to have been the case. Tr. 89.

On cross-examination, Hatfield was directed to the original of the map he used when he took his measurements. Instead, at the hearing, Respondent was only provided with a copy of the map, which is Exhibit 4. Respondent's Counsel's complaint was that the original map was not provided to it, despite having made a FOIA request. Tr. 173. Any FOIA failure was not Hatfield's doing. Nor did Respondent show it suffered any disadvantage from the omission.

Moving to Hatfield's measurements, it is sufficient to note that cross-examination did nothing to diminish the accuracy of the inspector's findings. Hatfield acknowledged that he had no actual knowledge of whether there were rider seams within 10 feet of the cited area. Tr. 178. He also acknowledged that he saw no roof falls, rib sloughage. Tr. 179. In terms of "kettle bottoms," which he agreed is the root base of an ancient tree, it was Hatfield's position that, by mining too wide, a kettle bottom could fall out. Tr. 181. Supplemental roof support is required if one encounters a kettle bottom. Although the inspector had never seen kettle bottoms in sandstone, he noted that the mine's top was *not* all sandstone. Tr. 183. Hatfield did not know whether the *current* roof control plan (as opposed to the plan *in effect* at the time when he made the inspection relating to this case) calls for 20 foot openings where sandstone is encountered. Tr. 184. Such issues are not relevant here anyway.

On his map Hatfield did record measurements greater than 20 feet wide. Tr. 185-186. As part of his actions concerning this matter, Hatfield did speak with the continuous miner operator, inquiring why he was cutting wide. Tr. 189. However, no explanation was offered. He advised the continuous miner operator that he needed to "take his time more." Tr. 190. Hatfield maintained that the condition was obvious in that, if one had sufficient experience, one could "eyeball" it, as he obviously did, and tell right away that it was wide. Tr. 194.

Respondent's witness Ralph E. Tabor, who is currently a foreman for Hanover Resources, was in April 2009 the mine superintendent for Mountain Edge. Tr. 232. He stated that he wrote down the measurements on a map but that his measurements were not recorded on GX 4. Instead, Tabor stated that he recorded the measurements on GX 5. Tr. 235. A review of GX 5, especially when compared with Hatfield's numbers on GX 4, reveals that the former is not useful and primarily serves as a defensive exhibit by prominently asserting that there is a steep slope, causing everything to slide to the right. Although Tabor stated that most of the exceedances were less than 19 feet and he could not "recall" if any were as wide as 20 feet. Tr. 236. Tabor, who held one end of tape, did not hold the end that reflected the widths found. Tr. 238. After a measurement was taken, Tabor would mark "how many timbers it would take to take care of the wide spot." Tr. 238. Though he had been to the area earlier that day, he did not notice any wide spots. Tr. 239. Tabor maintained that as they were advancing the entry they were moving downhill and that this made it more difficult to keep within the 18 foot width limit. Tr. 244. As to the number of timbers that actually had to be set to abate the condition, Tabor stated he did not

know, as he “didn’t count them,” although the number 215 appears on GX 5 beside the description “Total Timbers.” Tr. 240.

Accordingly, consistent with the Court’s credibility determination, above, it is found that in critical aspects, Tabor’s testimony must be discounted. He held the non-measuring side of the tape, he could not recall if areas were as wide as 20 feet, and he didn’t count how many timbers had to be installed. Even Tabor admitted the widths were over 18 feet, “we [Hatfield and Tabor] measured across the section and *all these wide places.*” Tr. 241-243. (emphasis added).

Respondent also called Frank Pearson on this violation. He acts as consultant for the Respondent in a variety of areas: production, safety and cost. Tr. 314. When asked if he had been to the cited wide area, he responded that he had, describing it as “basically not wide.” Tr. 316. His view was that one can’t “mine anywhere without cutting a wide place here or there.” Tr. 316. As with Tabor, he too maintained that due to slants in the road, it was real hard to maintain straight entries. Although he agreed that journeymen roof bolters would know if an entry was wide as they did their job, no roof bolters complained to him that the area was wide. Tr. 320. He also stated that the roof was then and remains today, standing, with no problems. Tr. 321. Critically, Pearson conceded that he was not present on the day the citation was issued, but rather visited that area a day or two later. Tr. 338. Thus he agreed he was not there to see what Hatfield observed at the time the citations were issued. He also agreed that, while the slope presented compliance issues, it did not make it impossible to comply with the roof control plan in the area cited. Tr. 340. Incredibly, Pearson expressed that a wide place “here or there” could mean 50 times in adverse conditions. Tr. 340. It must be said that Pearson’s testimony did not advance the Respondent’s defense.

On cross-examination, Tabor, who earlier had stated that he took notes regarding these issues, could not produce them, stating that “I’d say when I cleaned out my desk I threw them away.” Tr. 257. As to whether Hatfield had a map with him, Tabor admitted that he did not know if Hatfield had a map in his front pocket. Tr. 258. Further, Tabor admitted that he wasn’t there for all the measurements but that Roger Justice took over for part of the measurements. Tr. 258. Nevertheless, Tabor insisted that Hatfield’s measurements were incorrect. As one example, he offered up that by adding only 5 timbers at one location, it could not have been 19 feet wide for the entire 80 foot area. Tr. 260. In sum, Tabor stated that he recalled no 20 foot measurements and only “some” that were 19 feet. Tr. 262-263. He did recall one at 19.6 feet. Tr. 263. The Court did not find Tabor particularly credible.

Accordingly, regarding Citation 8081161, the Secretary clearly established the violation. Just as clearly, this violation was significant and substantial, unwarrantable, and the enhanced penalty sought by the Secretary is appropriate. Here, the violation occurred in the context of an abject failure to follow the roof control plan in 52 separate places, where the maximum mining entry width exceeded 18 feet. This was done despite the mine’s own obvious reminders to itself to not exceed the 18 foot limitation, as Hatfield observed.

As to the “S & S” aspect, the record supports the conclusion that there was a discrete safety hazard, a measure of danger to safety, contributed to by the violation because per force exceeding the maximum width increased the likelihood of a roof fall. To conclude otherwise would mean that the maximum width requirement was meaningless, a mere number inserted in the plan. But that number did not come out of the blue, it arose as a result of roof control problems at this mine. As to the twin “reasonable likelihoods” required by the *Mathies* decision, it was shown that there was a reasonable likelihood that the hazard will result in an injury both because the exceedances were present and because of the other factors, described by Hatfield, in this section. This included the risk of slate joint, kettle bottoms, horsebacks and the fact that mining was progressing toward the surface. The other “reasonable likelihood” element was also established and can hardly be disputed. Roof falls, by their nature, often carry the risk of permanently disabling injuries. All it takes is a person being in the wrong place at the wrong time. Here, miners were exposed to the risks resulting from the wide spaces.

Addressing the unwarrantable claim, oftentimes described as high negligence or aggravated conduct, constituting more than ordinary negligence and showing indifference or a serious lack of reasonable care, the Court finds that the violation did involve unwarrantable failure on the Respondent’s part. In this regard it bears repeating that Inspector Hatfield found the exceedances in 52 locations. That, by itself, establishes an unwarrantable failure. Beyond that, though unnecessary, the mine knew of both the history of its roof control problems and the resultant requirement for the 18 foot width limitation. Further, there was a disconcerting tone presented by the Respondent’s witnesses that, either they didn’t notice the problem, though immediately obvious to Hatfield, or that complying with the plan was difficult and that, at least in Pearson’s view, 50 such exceedances was just part of mining where adverse conditions exist.

Exercising its authority to impose an appropriate penalty, either lowering, raising, or accepting the originally proposed amount, the Court here agrees that the \$70,000.00 now proposed by the Secretary is justified. This enhanced penalty is justified both by the extent of the large number of violations and by the Court’s assessment of the low credibility of the Respondent’s witnesses in this regard. The unwarrantability finding, next above, also justifies the increased penalty. Further, as pointed out by the Secretary, the original assessment made no distinction between a single width exceedance and the 52 found here. Thus, based on the negligence involved, the inherent gravity associated with roof control violations, the fact this mine had a history that required it to mine at 18 foot widths, instead of the more usual 20 foot widths, the penalty imposed is appropriate. The size of the operator, with the Dorothy No. 3 being a medium to large mine and Mountain Edge itself a large operator, coupled with its history of roof falls, (GX 2, Tr. 57-61 and 81-82), do not operate to reduce this amount. While the violation was, upon being cited, abated in good faith, and as the penalty will not effect its ability to continue in business, neither of those factors operate to reduce the penalty imposed here.

Order 8081168

Turning to Order 8081168, issued April 2, 2009, Inspector Hatfield cited the mine for a violation of 30 CFR 75.370(e). Tr. 92, GX 1. That standard requires workers to be advised as to

changes in ventilation plans.⁵ The inspector noted that the mine was on a reduced standard because of the presence of quartz.⁶ Continuing with his earlier reference that he had previously discussed the insufficient air with the foreman, Hatfield related that the section foreman told him they had 3,000 cfm.⁷ Tr. 107. While the foreman showed Hatfield his notes reflecting the 3,000 cfm, Hatfield advised that the requirement was in fact for 4,500 cfm, which amount is considerably more. Tr. 108. Hatfield also determined that the miners had no idea how much air they were supposed to have behind the end of the line curtain. Tr. 109. More importantly, mine management people did not know about the minimum requirements under the ventilation plan. Tr. 110.

GX 8 reflects the approved methane/dust control plan for the 002 MMU. It is dated December 23, 2008 and it was in effect at the time the citations were issued and it reflects that the Plan requires that the CFM is to be at least 4,500.⁸ Tr. 116-117.

⁵ In the context of the alleged violation reflected by Order 8081168, GX 9 includes within it a section 104(a) citation, Citation 8081159, for an alleged violation of 30 C.F.R. 75.370(a)(1), issued the day prior to that Order 8081168, on April 1, 2009. Tr. 93. That citation, issued for MMU 1, was for a failure to follow the ventilation plan in that there was insufficient air velocity. The next day, Hatfield issued Citation 8081166, for another alleged violation of 30 CFR 75.370(a)(1), involving a violation of the mine's approved ventilation plan for methane and dust control. This was cited at MMU 002, the mine's other section. For that citation Hatfield observed visible dust where the roof bolt crew was working in the No. 2 heading. Tr. 97. Upon taking an air reading behind the end of the line curtain, he found there was insufficient air. He measured it at 1,908 cfm and the plan required 4,500. Tr. 97-98, 105. Hatfield spoke to section foreman Tim Shrewsberry about this and was advised that they were going to get to that. Tr. 98, 114. The foreman is supposed to know about the methane and dust control plan's requirements. Tr. 114. Yet, both Shrewsberry and the superintendent, Ralph Tabor, seemed to not know about the correct, that is to say, the minimum *required* amount under the plan. Tr. 115. While GX 7, which was attempted to be included in the evidentiary record, reflects a citation Hatfield issued to Ralph Tabor on April 2, 2009, shortly after he had issued 8081166, that Exhibit was not admitted because the matter is still in dispute. Tr. 105. However, Citation 8081166, GX 9, noted above, was admitted.

⁶ As alluded to in the earlier discussion of the excessive mining width violation, the Dorothy 3 is underneath Big Mountain 16. There is only about 90 feet separating the two. Big Mountain 16 has a lot of water in it and Hatfield advised that this can be a source for trapping methane. Tr. 119.

⁷ As noted, Hatfield's measurements were decidedly less than the foreman's reading as he found only 1908 cfm. Tr. 111. Hatfield however did not contend that the foreman's *reading* was inaccurate. Differences in the anemometer used and the recency of its calibration can account for this. Tr. 112. A line curtain coming down can also be a source for accounting the different readings. Tr. 113.

⁸ Note that GX 8, in the official record, is several pages long but that a blue divider sheet was apparently inadvertently added by the reporter. Thus, although the divider is present, the exhibit continues after that first page.

Referring back to GX 1, Hatfield agreed that it reflects that the MMU is on a reduced standard of .9 mgm3 because of the presence of quartz. Tr. 120. Where quartz is present, miners need to be exposed to much less dust because of the risk of silicosis. Hatfield could *see* dust in the air at that location. Tr. 121. The Court expressly finds that Hatfield's testimony was in fact the case; he did observe such dust. There is also no dispute that quartz is present with the dust at this mine. His visual observations prompted him to take a reading at the line curtain and the results showed that the miners were not getting sufficient air.⁹ Tr. 122. Thus, the reading confirmed what he had visually observed. Tr. 122. To Hatfield's consternation, the supervisors did not know the correct air requirement. Tr. 122. Hatfield's position was that management is held to a higher standard than the crew and accordingly that they *should know* the air requirements. Tr. 124. The Court agrees. Hatfield also expressed that the crew should know what the air requirements are too, but they have to rely upon management to correctly advise them of those requirements. Here, no one volunteered the correct information.¹⁰ Tr. 124. It was management's lack of knowledge of the ventilation requirements that caused Hatfield to deem the violation as unwarrantable. Tr. 139.

Hatfield marked the gravity for 8081168 as "reasonably likely" for injury or illness because he believed that exposure to this dust made it of such likelihood that the miners would contract silicosis or "black lung." Tr. 128. He also marked the violation as "significant and substantial" because he believed it to be reasonably likely that there would be serious illness from such dust exposure.¹¹ Tr. 130. Even apart from the presence of quartz, Hatfield still would have marked the violation as S & S because, while perhaps not permanently disabling, such dust exposures could still lead to lost workdays. Tr. 132. He felt the negligence was appropriately marked as "high" because management people did not know what the air requirements were. Tr. 132.

Directed to GX 10, copies of 5000-23 forms, which forms relate to employee training, such forms are to reflect annual training given to certain individuals. However, those forms do not reflect that those listed individuals were trained in methane and dust control. Those subjects are to be part of such annual training.¹² Tr. 135.

Regarding the training requirement identified in the citation, Hatfield stated that Shrewsbury and Tabor were present when he asked questions about the training.¹³ Tr. 197.

⁹ Later, one of the crew told Hatfield that the air was chronically insufficient. Tr. 127.

¹⁰ To his credit, Superintendent Tabor did apologize to the crew for not knowing the correct requirements and for failing to review the particulars of the ventilation plan with them.

¹¹ Six (6) miners were exposed to the dust conditions.

¹² David Crone III, a roof bolter, and Jason Atkins were the individuals listed. It was Crone who advised Hatfield that his boss had told him they were getting sufficient air. Tr. 138.

¹³ Respondent's counsel tried to make inroads in this area, inquiring if Hatfield actually attended the miners' training, knew what was covered in the refresher training, or whether he asked for their training forms. Although Hatfield answered in the negative to each of the

Tabor, referring to this dealing with ventilation and the crew's lack of awareness as to the required amount of air, stated he was not present for this issue. Tr. 247. However, he maintained that the men were trained on the ventilation plan.¹⁴ Tr. 247. Significantly, Tabor could not recall what the required CFM was for the section. Tr. 248.

Tabor having affirmed that he was not present when Hatfield issued that Order, necessarily agreed to not knowing about any conversations between Hatfield and those at the scene when the Order was issued. Tr. 265. While Tabor insisted that *he did know* how much air was required under the plan, when asked if he told Hatfield what that amount was, he responded, "I don't remember telling him that. I could have. I don't remember." Tr. 266. Thus, in critical areas of his testimony, Tabor's memory failed him.

Shown Ex 8, Tabor agreed that the methane and dust control plan requires 4500 cfm. Despite agreeing that this was readily discernable, Tabor still maintained that members of the crew had difficulty interpreting the plan because they didn't know of the requirement. Tr. 268. Shown Ex 10, the 500-23 forms, for David Crone and Jason Atkins, which reflect that those men had training in the provisions of the form, Tabor agreed those forms reflected such training. Tr. 269. As for foreman Tim Shrewsbury, Tabor had "no idea" where his training certificate form was. Again, the Court views the attempt, insufficient as it was, to show that miners had received training on this issue, as missing the point. Thus, this information serves only to distract and is not considered to be a mitigating factor in any sense, both because of its insufficiency and because it was ineffective if it is assumed that all were so trained. The key here is that no one knew at the time of the citation being issued how much air was required.¹⁵

questions, he reminded that it isn't simply about conducting such training but that, as plans change, the miners need to be informed about those changes too. Tr. 197. Here, it was clearly established that the miners had no idea about the required amount of air.

¹⁴ Tabor attempted to draw a distinction in the apology he made to Hatfield, asserting that he apologized for misinterpreting or misunderstanding the ventilation plan, but he maintained his apology did not speak to any alleged lack of training on the plan, as he asserted that the miners were trained. Trained or not, it is not necessary to resolve that issue for this Order. However, it would be fair to comment that, if it did occur, the effectiveness of it was wanting.

¹⁵ Because the following is deemed to be more of the same distraction and not considered to be mitigating, this has been footnoted: David Justice, mine superintendent at Mountain Edge, was also called by the Respondent. Tr. 273. At the time of these citations he was the mine foreman. Tr. 274. Referring the witness to citation 8081168, GX 1, Justice disagreed that the mine had failed to give the men proper instruction regarding the ventilation plan. Tr. 275. Justice stated that *he* had trained the men on the plan in February of that year. Justice also affirmed that Ex 8 reflects what he trained the men about at the annual refresher. All employees received this training. Tr. 276. He took offense at the citation because, to him, it implied that no one was listening to him during the training. On cross-examination, Justice agreed that the records at the hearing only reflected that Crone and Atkins were trained, at least based on the certificates of training that were presented. Tr. 278. In response to questions from the Court, Justice stated that the training lasts about an hour and that about 25 to 30 miners are in

Hatfield repeated that, upon asking the miners if they had been instructed on their plan, with management people present at that time, he then issued his order, shutting down the section and establishing a meeting concerning the ventilation requirements. Tr. 200. He noted that no one from management protested that action; no one asserted that they had all their training and knew the requirements. To the contrary, noting that, Hatfield stated that management's reaction to his order was "almost apologetic," he concluded that it was clear that management had not instructed the men about the plan.¹⁶ Tr. 200.

Respondent's counsel did establish that Hatfield's notes do not record that he observed visible dust in the section. Tr. 202-203. His order did not state that either. Hatfield agreed that MSHA's instruction to its inspectors is to record such observations, but that this policy did not come into effect until after the citation in issue here. Tr. 204. While he couldn't state how long the miners on the section had been exposed to excessive dust, he did note that he was in the process of making an imminent danger run when he observed the problem. As evidence of the gravity of the situation, Hatfield decided to stop his imminent danger run and speak to the roof bolter right then. Tr. 205. While Hatfield did not know how long it takes before adverse consequences may occur to a miner from exposure to silica, that hardly diminishes the gravity involved. Any exposure to such dust, or respirable dust without silica for that matter, is a serious

attendance. Tr. 282-283. However, he stated that, though he gives the training, he doesn't fill out the form for everyone who is trained, although he signs it. At any rate, he agreed that in the course of a year, as there are four different classes in a year, there would be on the order of at least a 100 such forms per year. Tr. 284. These forms then are kept as mine records in its files. Counsel for the government stated that it tried to reach these records, but only received the two forms presented at the hearing. Tr. 285. That is indeed the case, evidentiary-wise. Although Counsel for the Respondent stated that it was under the impression that the government only sought such records from the two individuals, Crone and Atkins, it is hard to understand why the Respondent would not have provided all the records anyway, as it apparently did view this information as helpful to its stance. Tr. 286. For the same reasons, Respondent's testimony from David L. Crone III, a roof bolter who was also performing that same task back in April 2009 at the mine, was not illuminating to the issues, nor otherwise informative. Tr. 289. Crone stated that he had been trained as to the ventilation plan in April 2009, but he could not recall the date of his training. Tr. 290. He also identified Ex 10 as his training form for his 2009 annual refresher training. Tr. 291. However he could not recall being asked by Inspector Hatfield about the ventilation plan in April 2009, nor could he recall other aspects of any conversation between them, stating that Mr. Hatfield does not talk a lot. Tr. 294. The Court did not find this witness to be especially credible.

¹⁶ Respondent's counsel suggested that perhaps the inspector had intimidated everyone and that they were reticent to speak up and challenge his actions. However, Hatfield rebutted this claim, noting that he knew David Crone, as well as his father and his grandfather and that having worked with all of them, there could be no element of shyness to speak up, had a counter claim been credible. Tr. 201. Instead, when he asked the youngest David Crone, if he knew how much air they were supposed to have, his response to Hatfield was that "the boss told me we had enough, Jack." Tr. 201. The Court finds that this response was made.

matter. MSHA cannot be at every section of every mine 24/7. Thus, even an incremental step down the road to respiratory disease must be taken very seriously.

Clearly the violation was established here. Individuals simply didn't know what was required, had it wrong, or were advised they had enough air. No documentation contradicts this conclusion. Even if it is assumed, for the sake of argument only, that training was given, it was manifestly ineffective. The section involved requires that *before* implementing an approved ventilation or a revision to a ventilation plan, persons affected by the revision shall be instructed by the operator in its provisions. This requirement necessarily carries with it the requirement that miners be *adequately and effectively* trained by such instruction. *Secretary of Labor v. Western Fuels-Utah, Inc.*, 900 F.2d 318, 320¹⁷ (D.C. Cir. 1990) and *RAG v. Cumberland Resources LP*, 26 FMSHRC 639, 647 (Aug. 2004).¹⁸

This violation was significant and substantial. Again, applying the second element of *Mathies*, the first having been discussed, a discrete safety hazard was demonstrated by virtue of the foreman and crew's ignorance of the ventilation plan's requirement. This apparently prompted them to continue working away despite the presence of visible dust, at less than half the required amount of air and in a dust made more treacherous by its quartz content. So too, as for the twin "reasonable likelihoods" required by the *Mathies* decision, it was shown that there was a reasonable likelihood that the hazard will result in an injury. Even if the dust had no quartz, Congress's concern fully reaches coal dust without that additional grave characteristic. It is obvious that working in conditions of visible coal dust is adverse to one's health. Further, even short term lung problems from such exposure such as bronchitis or inflammation are serious injuries to one's health.

The violation was also unwarrantable. As the Secretary points out, the conditions present here, as exacerbated by the presence of quartz in the dust, required a higher standard of care on the mine operator's part. Sealing the finding of unwarrantability here, supervisory people were present yet ostensibly ignorant of the amount of air required under the approved plan. In the

¹⁷ The full quote from the D.C. Circuit stated that "Section 115(a) of the Mine Act is intended to insure that miners will be effectively trained in matters affecting their health and safety, with the ultimate goal of reducing the frequency and severity of injuries in mines. 43 Fed.Reg. 47,454 (October 13, 1978). Indeed, Congress considered training to be of such great importance that it specifically empowered inspectors to withdraw untrained miners from the mines and to prohibit their reentry until they received proper training. 30 U.S.C. § 814(g)." 900 F.2d at 320.

¹⁸ Although *RAG v. Cumberland Resources LP*, dealt with a bleeder ventilation, the principle is fully applicable that whether it be a system or training, to have meaning they must be effective. Accordingly the absence of the literal word that a system or training be effective is no barrier. Following the analogy presented by *RAG* if such reasoning were adopted then any training, however useless, would pass muster and as the Commission has expressed it, lead to an "absurd result."

Court's view, the roof bolter's statement to Inspector Hatfield that the miners "never have any air in this place," a remark which the Court finds was made to the Inspector, was telling.

Given the entirety of the circumstances disclosed during the course of the hearing and the Court's findings regarding the collective absence of knowledge of the amount of air required, when coupled with Congress' long-standing deep concern about chronic lung diseases acquired by those in the occupation of coal mining, the Court agrees that, in these circumstances the enhanced penalty proposed now by the Secretary should be and is adopted here in the sum of \$54,732.00. None of the other statutory factors, each of which have been considered, operate to reduce that amount.

Order 8081212

Last, Hatfield was asked about his Order, number 8081212, issued April 20, 2009, in which he cited a violation of 30 CFR 75.360(f). Tr. 141. That standard requires that results of examinations are to be recorded in a book on the surface. Tr. 142. In order to have been in compliance for this violation of Section 75.360, the operator should have not simply written for hazards, "none observed" for the Number 1 heading, but rather should have included the methane readings and the air quality readings for the working places. Tr. 164.

GX 12, dealing with Citation 8081200, issued April 17, 2009 was issued because the book similarly did not reflect any methane concentrations. Tr. 144. Citation No. 8081206, issued April 18, 2009, also cited 30 CFR 75.360(f). This was attributable to the lack of a record of examinations to the approaches of the abandoned panel with AMP's¹⁹ No. 1, 2 and 3. Tr. 145. Intake air passes these approaches and ventilates the working place. Tr. 145. These areas are required to be preshifted and the results recorded. The same was true for Citation 8081207, also involving a violation of 30 CFR 75.360(f). The distinction is that they relate to different record books and different areas of the mine. Tr. 146. These approaches, as they still bring intake air, are to be preshifted three hours before workers go underground. Tr. 147. Although Counsel for the Respondent belatedly advised that these citations were being challenged, they were admitted for a limited purpose. Tr. 149. This ruling came about because Counsel for the Secretary's restricted purpose for their admission was to show that the operator was put on heightened alert as a result of their issuance. That is, that they were advised about the requirements for examinations and the proper recording of their results. Thus, the Court can take notice of these because the notice aspect for which they are being offered is not dependent upon whether those citations are ultimately affirmed or not. Tr. 151.

With that predicate, Hatfield believed that, as he kept finding the same type of violation, that the mine seemed to be taking a "cavalier attitude" about the requirements. Tr. 152. Thus, he

¹⁹ "AMPs" refers to air measurement points, for air going in. Tr. 155. "Eps" refers to evaluation points for air going out. Tr. 155.

was advising them that with the repeated nature of these violations, the negligence attributable to them was going to be higher with future failures of its obligation to both make and then record the examinations regarding air quality. Tr. 153. In fact, Inspector Hatfield spoke to Roger Justice and Ralph Tabor about this very issue. Tr. 154.

The relevance of this warning is displayed with Order 8081212, issued April 20, 2009, because that was only two days after the heightened alert warning. Tr. 155. For this violation Hatfield noted that the preshift would have been made for the 002 MMU on the day shift and that no record of methane readings were taken for nine working places. Tr. 156. This finding prompted him to order that the miners be pulled from the face until the methane readings were taken and recorded. Tr. 157. While no methane was found, the presence of methane can develop at any time; methane is endemic to coal mines. Hatfield's notes for this violation are found within GX 1 for the April 20, 2009 inspection, at page 8. Tr. 158-159. No methane record was reflected in the books.²⁰ Tr. 159. The methane readings and the air quality readings should have been recorded.²¹

Importantly, Hatfield reiterated that he had previously spoken to management, that is prior to April 20th, about their failure to properly keep the record books. Tr. 162. That is his practice when he issues a citation; he talks to the mine representative about the standard for which he has issued a citation and its requirements. Tr. 163, 165. Hatfield listed the gravity as unlikely because the violation was for failure to make the record, and he could not state that the company did not take a reading, (or that they did). What he could determine was that no record was made. Tr. 167. Hatfield did feel that lost workdays was the appropriate description because if there was an accumulation of methane there could be a "pop" resulting in burns. Tr. 167. Still, focusing upon the recordkeeping aspect, he did not list the violation as "significant and substantial." Tr. 167. However, those findings did not dissuade Hatfield from listing the negligence as "high" nor from issuing his D order. He noted, correctly, that a non-S&S finding and unwarrantability are not mutually exclusive. Tr. 168.

²⁰Marty Deck was the individual who made the preshift exam on the 002 on that day. Frank Pearson was the individual who took the call from Deck and wrote down the results. Tr. 160-161. Pearson was described by Hatfield as the "general manager" or "head boss" at the mine. Tr. 161.

²¹Hatfield pointed to other instances where the correct information was recorded, noting an instance where it reflected "zero percent methane" and 20.8 percent oxygen. Tr. 164. Thus, merely recording "NO" for "none observed" is insufficient. Tr. 165.

Respondent then turned to its Exhibits, marked for identification as 2 and 3.²² Inspector Hatfield identified R's Ex. 2 as the preshift exam for a citation in issue, number 8081212. Regarding Hatfield's notes for that, Hatfield stated that he does not recall speaking personally to Mr. Pearson or Mr. Deck, but that he had been told by Ralph and Roger that issues regarding citations are brought to Mr. Pearson. Tr. 213. Hatfield was next asked about GX 12, and upon reviewing it, stated that he did not know if Pearson or Deck had received additional training. Tr. 216. On redirect, Hatfield stated that he had never seen any certificates of training for anyone on the crew nor for foremen, with respect to the methane and dust control violations involved in this litigation. Tr. 225. Instead, all he was given were copies of 5000-23s, which deal with refresher training. Tr. 225. While the belt line is distinguishable from the working face, it is still an area of the mine where people normally work or travel, so it is an active area and must be preshifted. Tr. 216. The same statement applies to the man trip roadway. Tr. 216-217. As for abandoned panels, which Hatfield noted in his citation for 1206, there is a requirement to preshift three hours before men come to that section if intake air passes such abandoned works and is used to ventilate the working section. Tr. 217. Hatfield agreed that the missing element from the preshift, which caused the citation to be issued, was the failure to record the methane reading results. Tr. 218. No methane was found when the reading was taken to abate the citation. Tr. 219. Methane readings were taken during the on-shift.

To comply with standard he cited, Hatfield had the mine conduct a training class to ensure that the examiners are filling out the books correctly. Tr. 225. The essential problem here was that when the section foreman for the oncoming shift would review the books for hazards, there was no listing for methane. Accordingly that person would not know if they found methane or not. Tr. 227.

Marty Deck was called as a witness for the Respondent. Deck is an electrician at the mine and held the same position back in April 2009. Tr. 302. He was also shown GX 1, pertaining to Citation 8081212. While Deck did not have his glasses on the day of testimony, and needed them, nevertheless he knew that the citation was issued because he failed to record the methane reading. Tr. 304. On cross-examination, when shown R's Ex. 2, he agreed that Roger Justice's initials were recorded there. This meant that Justice filled out the form for him. Deck stated that, as he rarely filled out such forms, both Justice and Frank Pearson helped him complete the form. Tr. 309-310. Yet, Deck stated that he is part of mine management. Tr. 310.

²²As the Court's copy had no numbers on those exhibits, these were initially identified by counsel as exhibit 2 which lists "4/20/09, First Right" at the top of the page. Tr. 207. R's Ex. 1, a voluminous FOIA report, was not admitted after all because the Respondent agreed that its sole purpose was to show that Hatfield's map was not included in the FOIA response, as a basis to impeach the credibility of the map. The Court accepted R's Counsel's representation that the map was not so included. As it turned out R's Ex. 3 was never brought up during counsel's cross exam, so it was never offered into evidence. Tr. 223.

Witness Frank Pearson, at the time of the citations in issue here, had responsibilities then which were the same as presently. That is, to consult on any problems the mine may have in a wide number of matters. These include production, safety, human resources and equipment. Tr. 334. He admitted that he was a part of mine management, at least loosely speaking. Tr. 334-335. He believed it was more accurate to describe his role as one of oversight. Tr. 335. Pearson was asked about Order No. 8081212. For this, he denied that Jack Hatfield ever told him to make sure the preshift book was correctly filled out. Tr. 326. Usually he does not fill out such books but on this day, he filled in and took the report in issue. Tr. 326. In this instance he took the “call out” on the phone, scribbled the information down. Then, after others provide their information, it is entered in the preshift examiner book. Tr. 327, and referring to R’s Ex. 2, the preshift examiner’s book. He took the report and he was the one who entered the information. *He admitted that he failed to fill out “that top part.”* Tr. 327. While admitting this failure, he added that it used to be that one did not have to include such information. Tr. 328.

On cross-examination, Pearson admitted that he was not a novice to mining, having been vice-president of Trinity Coal and with the operations of six mines. Tr. 333. Amazingly, despite stating that he has had 38 years of coal mining experience, Pearson stated that in that entire experience he has never been privy to knowing of an MSHA inspector telling an operator to be on heightened alert, nor of even being warned not to violate a standard again. Tr. 348.

Although the violation identified in Order No. 8081212 was established, the Court concludes that, in the entire context, were it not for the fact that the Respondent had been warned about the requirement to record methane levels and that the failure was brought about by one who was clearly part of management, it might have been tempted to find a lesser degree of negligence than that advocated by the Secretary. Again, whether those prior citations were established or conceded or otherwise disposed of, it is the fact of prior warnings about this problem, not how they were resolved, that is critical. Thus, given the failure by management coupled with the warnings to adhere to the very requirement cited, high negligence, aggravated conduct, and consequently the designation of unwarrantability is inescapable.

Despite the foregoing, contrary to the Secretary’s urging, the Court concludes here that, in the complete context, a higher penalty is not appropriate. Hatfield noted that the likelihood was “unlikely” as he described the violation as a “recordkeeping” violation. Tr. 221. That does not mean that the violation should not be considered to be of minimal consequence because, as Inspector Hatfield expressed it, his “concern with that mine, once again, was the amount of water up - - entrapped overhead in the Big Mountain 16. And these hilltop mines, they’re apt to encounter methane and blow up.” Tr. 221. Along with that concern, he expressed that, although the failure *to record* a methane reading would not, by itself, make an injury likely to occur, one can encounter methane *at any time* and therefore designating the violation as having “no likelihood” would be an understatement. Tr. 221-222. However, Hatfield was not contending that the omission was intentional, but rather that it was “high negligence” because of the number of citations that he had served on mine management on this matter. Noting that the violation was not designated as significant and substantial, even considering its unwarrantable nature, the penalty does not deserve to be increased.

ORDER

The section 104 (d)(1) citation, No. 8081161, and the two section 104(d)(1) orders, Nos. 8081168 & 8081212, are hereby affirmed. Each of the special findings included with the citation and the orders are affirmed. Respondent, Mountain Edge Mining, Inc., is directed to pay within 40 days of the date of this decision, civil penalties as follows: \$70,000.00 for Citation No. 8081161, \$54,732.00 for Order No. 8081168, and \$2,341.00 for Order No. 8081212. Upon payment of the penalty, totaling \$127,073.00, these proceedings are DISMISSED.

/s/ William B. Moran

William B. Moran

Administrative Law Judge

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May 20, 2011

BIG RIDGE, INC.,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. LAKE 2011-116-R
v.	:	Citation No. 6670850; 11/09/2010
	:	
SECRETARY OF LABOR	:	Docket No. LAKE 2011-117-R
MINE SAFETY AND HEALTH	:	Order No. 6670851; 11/09/2010
ADMINISTRATION, (MSHA),	:	
Respondent	:	Mine: Willow Lake Portal
	:	Mine ID: 11-03054
	:	
PEABODY MIDWEST MINING LLC,	:	CONTEST PROCEEDINGS
Contestant,	:	
	:	Docket No. LAKE 2011-118-R
v.	:	Citation No. 6670852; 11/09/2010
	:	
SECRETARY OF LABOR	:	Docket No. LAKE 2011-119-R
MINE SAFETY AND HEALTH	:	Order No. 6670853; 11/09/2010
ADMINISTRATION, (MSHA),	:	
Respondent	:	Mine: Air Quality #1 Mine
	:	Mine ID: 12-02010

DECISION

Appearances: Daniel W. Wolff, Esq., Crowell & Moring, LLP, Washington, District of Columbia for Peabody Midwest Mining LLC

Samuel Charles Lord, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia for the Secretary of Labor

Before: Judge Andrews

These cases arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 et seq. (“the Act”).

These cases are before me upon Notices of Contest filed by the Contestants on November 11, 2010. Although the notices informally requested an expedited hearing, a separate formal motion for expedited proceedings under section 2700.52 of the Commission Rules was also filed on November 12, 2010. The motion was granted on November 24, 2010.

The Order of November 24, 2010, also consolidated Docket Nos. Lake 2011-116-R, 117-R, 118-R, and 119-R, involving two mines controlled by Peabody Energy (Peabody”). The hearing on these Dockets was held in Jeffersonville, Indiana, on December 14, 2010.

By agreement of all parties, additional Part 50 audit contest cases involving mines controlled by Massey Energy Company were heard in Charleston, West Virginia, on December 16, 2010. A separate decision will be issued for those Dockets.

PRELIMINARY MATTERS

On December 17, 2010, a request for intervention in the Willow Lake Portal (“Willow”) case was received from the Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers Local S-8 of Harrisburg, Illinois. Since the hearing had been held, limited intervention in form of a memorandum to be filed no later than December 31, 2010, the date for submission of post hearing briefs, was granted. However, no submission was received from the intervenor.

A Memorandum for District Managers regarding Part 50 Audit procedures for safeguarding personally identifiable medical or other sensitive information was admitted as Exhibit G-5, but the document did not bear a date. The Secretary of Labor (“Secretary”) later reported that the document had been distributed on December 13, 2010.¹

At the hearing, the Secretary moved for admission of the notes made by the inspector on November 9, 2010, at each of the mines. These notes had been referred to in the testimony of a witness, Mr. Peter J. Montali. After reviewing the notes, Contestants objected to their admission. By Order dated December 21, 2010, the notes were admitted. Ex. G-16, 17. On January 14, 2011, Contestants filed a motion for reconsideration of the decision to admit the Inspector’s notes, or in the alternative to strike section four of the Secretary’s Post Hearing Brief. The section referred to mentions the notes, along with other matters regarding time for abatement of the citations issued. Since the notes were recorded by the inspector at the times that the citations and orders were issued on November 9, 2010, they are relevant. While the notes are hearsay, they are admissible. The motion in the alternative is denied.

¹ This information was provided by Counsel for the Secretary on the record at the hearing held on December 16, 2010 in Charleston, West Virginia. See transcript, pg. 12 for Docket Nos. WEVA 2011-398R, 399 R, 402R and 403R, 540R, 541R; and KENT 2011-255R, 256R, 305R, 306R. The date of distribution was again reported in an email from counsel on December 21, 2010. All of the mines involved in both of the hearings received superseding letters requesting the contested information. Separate hearings were held due to the distant locations of these groups of mines, but for all major purposes, counsel treated them all as one large, related case.

The parties reported stipulations at the hearing, recited for the record, and summarized as follows:

1. Both Big Ridge, Inc., and Peabody Midwest Mining, LLC, are properly within the jurisdiction of the Federal Mine Safety and Health Review Commission.
2. The citations and orders and the modifications to the citations and orders were issued by an authorized representative of the Secretary to an agent of Big Ridge, Inc., and to an agent of Peabody Midwest Mining, LLC.
3. That various pieces of correspondence between the Secretary and Big Ridge, Inc., and Peabody Midwest Mining, LLC, including the October 20, 2010 request letters and the superseding October 28, 2010 request letters, and the responses from Ms. Mitchell-Bromfman, were authentic. There was no stipulation as to the truth of the matters asserted in such correspondence.

BACKGROUND

In October 2010, the Mine Safety and Health Administration (“MSHA”) began a nationwide initiative to conduct thirty-nine (39) compliance audits under the authority of 30 C.F.R Part 50. Ex. G-1, p.2, ¶8. Two subsidiary mines of the Peabody Energy Company (“Peabody”), Willow, and Air Quality #1 (“Air Quality”) are a part of this initiative.

On October 19, 2010, each mine was presented with a letter dated October 8, 2010, not specifically addressed to the mine, requesting certain documents. Ex. C-A, Tr. 106, 128-129. Two of the five requests, forms 7000-1 and 7000-2, maintained by the safety department of each mine, were made available to the MSHA inspector. Ex. G-2, 3. However, both Health and Safety Managers objected to providing the other requests, which included payroll records, time sheets, and a number of medical records. Tr. 107-09, 128. The requests for these records were repeated at each mine the next day, October 20, 2010. Tr. 109, 129. The records were not released by either mine. No citations or orders were issued at that time.

The first request was superseded by an October 28, 2010 request letter addressed to each mine and in pertinent part is as follows:

The Federal Mine Safety and Health Administration (MSHA) is conducting an audit to determine your mine’s compliance with the injury and illness reporting regulations in 30 Code of Federal Regulations (CFR) Part 50. Pursuant to 30 CFR §50.41, MSHA is requesting certain records that are considered to be relevant and necessary to complete its audit.

Please have the following information and documentation available for review by October 29, 2010. The documents should cover the period beginning July 1, 2009 through June 30, 2010.

1. All MSHA Form 7000-1 Accident Reports
2. All quarterly MSHA Form 7000-2 Employment and Production Reports
3. All payroll records and time sheets for all individuals working at your mine for the covered time period
4. The number of employees working at the mine for each quarter
5. All medical records, doctor's slips, worker compensation filings, sick leave requests or reports, drug testing documents, emergency medical transportation records, and medical claims forms in your possession relating to accidents, injuries, or illnesses that occurred at the mine or may have resulted from work at the mine for all individuals working at your mine for the period of July 1, 2009 through June 30, 2010.

“In your possession” means within your mine’s possession or within the control, custody, or possession of another entity or person from whom you have authority to obtain the required records. If any of the required records are in the exclusive possession of any other entity or person from who you do not have authority to obtain the required records, you must so certify and identify the entity or person who has exclusive possession. Ex C-D, C-E.

Since the content of the October 28, 2010 audit request letters is identical, they will be referred to as the Uniform Audit Request (“UAR”).

Peabody’s Senior Counsel responded by letters dated October 28 and 29, 2010, that the information listed in categories three (3) and five (5) would not be made available for MSHA’s review. There was an indication that Peabody would welcome further discussion with MSHA, but conditioned such discussion on MSHA’s cooperation in furnishing information regarding how the record demands could be narrowed to accommodate MSHA’s legitimate audit concerns without jeopardizing privacy rights of employees or revealing confidential business information. There is no evidence that the information requested by Peabody as a condition for further discussion was provided by MSHA. Ex. C-F, C-G.

On November 9, 2010, MSHA inspectors went to the Willow and Air Quality mines to review the documentation requested in the UAR. Ex. G-16, G-17. Both mines refused to provide any medical records. A 104(a) citation was issued to each mine based on the refusal. Ex. G-10, 11. The request was repeated and again refused, and a 104(b) order was issued fifteen (15) minutes after the initial citations. Ex. G-12, 13. The citations were later modified to include the time sheets and payroll records. Ex. G-14, 15. An unopposed motion to amend the citations to

include the timesheets and payroll records was granted.

Citation No. 6670850 was issued at Willow with the following notations:

Mike Baize, Safety Director, refused to permit an Authorized Representative of the Secretary of Labor to inspect and copy information to determine compliance with the reporting requirements related to accidents, injuries, or illnesses at the Willow Lake Mine (Mine ID 1103054). The requested documents include medical records. (Sic) Doctor's slips, worker compensation filings, sick leave request or reports, emergency medical claims forms relating to accidents, injuries, or illnesses that occurred at the mine or may have resulted from work at the mine for the period currently being audited (07/01/2009 – 06/30/2010). MSHA considers this information relevant and necessary to determine compliance with the reporting requirements of 30 CFR, Part 50.

Order No. 6670851 was issued fifteen (15) minutes later with the following notations:

Todd Grounds, Compliance Manager, continued to refuse to provide records requested by an Authorized Representative of the Secretary identified in citation 6670850 for the purpose of conducting a Part 50 Audit at the Willow Lake Potal (Sic) Mine (Mine ID 11-03054) in accordance with the requirements of 30 CFR, Part 50.41.

At Air Quality, Citation No.6670852 and Order No. 6670853 were issued, and were essentially the same with the exception of the name of the mine and the employee served.

Peabody timely contested the citations and orders for both mines.

The record also contains evidence from officials at Willow that some miners objected to the release of medical and workers compensation files. Ex. C-J, Tr. 111, 112, 134. Cross examination of Michael Middlemas, Manager of Health and Safety at Air Quality, revealed that the miners were told only of the citation, and not that the audit was limited to workplace injuries and illnesses and limited to a one year period. Tr. 139. Also noted is the intervention granted to the union, which was not pursued. Since the miners were not fully informed, and there is no intervention for consideration, this matter will not be further discussed.

LAW AND REGULATIONS

Section 103(a) of the Act states in pertinent part:

Authorized representatives of the Secretary...shall make frequent inspections and investigations in coal or other mines each year for the purpose of (1) obtaining, utilizing, and disseminating information relating to health and safety conditions, the causes of accidents, and the causes of diseases and physical

impairments originating in such mines, (2) gathering information with respect to mandatory health or safety standards, ... and (4) determining whether there is compliance with the mandatory health or safety standards or with any citation, order or decision issued under this title or other requirements of this Act. 30 U.S.C. §813(a).

Section 103(h) of the Act states in pertinent part:

In addition to such records as are specifically required by this Act, every operator of a coal or other mine shall establish and maintain such records, make such reports, and provide such information, as the Secretary ... may reasonably require from time to time to enable him to perform his functions under this Act. The Secretary ... is authorized to compile, analyze, and publish, either in summary or detailed form, such reports or information so obtained. 30 U.S.C. §813(h).

Section 103 (e) of the Act states in pertinent part:

Any information obtained by the Secretary ... under this Act shall be obtained in such a manner as not to impose an unreasonable burden upon operators, especially those operating small businesses, consistent with the underlying purposes of this Act. Unnecessary duplication of effort in obtaining information shall be reduced to the maximum extent feasible. 30 U.S.C. §813(e).

The purpose and scope of 30 C.F.R. Part 50 is found in section 50.1 and states:

This part 50 implements sections 103(e) and 111 of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 801 et seq., and sections 4 and 13 of the Federal Metal and Nonmetallic Mine Safety Act, 30 U.S.C. 721 et seq., and applies to operators of coal, metal, and nonmetallic mines. It requires operators to immediately notify the Mine Safety and Health Administration (MSHA) of accidents, requires operators to investigate accidents, and restricts disturbance of accident related areas. This part also requires operators to file reports pertaining to accidents, occupational injuries and occupational illnesses, as well as employment and coal production data, with MSHA, and requires operators to maintain copies of reports at relevant mine offices. The purpose of this part is to implement MSHA's authority to investigate, and to obtain and utilize information pertaining to, accidents, injuries, and illnesses occurring or originating in mines. In utilizing information received under part 50, MSHA will develop rates of injury occurrence (incident rates or IR), on the basis of 200,000 hours of employee exposure (equivalent to 100 employees working 2,000 hours per year). The incidence rate for a particular injury category will be based on the formula:

$$IR = (\text{number of cases} \times 200,000) \text{ divided by hours of employee exposure.}$$

MSHA will develop data respecting injury severity using days away from work or days of restricted work activity and the 200,000 hour base as criteria. The

severity measure (SM) for a particular injury category will be based on the formula:

$SM = (\text{sum of days} \times 200,000) \text{ divided by hours of employee exposure.}$

Section 50.41 states:

Upon request by MSHA, an operator shall allow MSHA to inspect and copy information related to an accident, injury or illnesses which MSHA considers relevant and necessary to verify a report of investigation required by 50.11 of this part or relevant and necessary to a determination of compliance with the reporting requirements of this part.

The preamble to the proposed rule at Section 50.41 sets forth the purpose of this regulation and explains what MSHA (then the Mining Enforcement and Safety Administration (“MESA”)) may request and the importance of cooperation with these requests:

Section 50.41 requires operators to allow MESA to inspect or copy any information the agency thinks may be relevant and necessary for verification of reports or for determination of compliance with Part 50. In effect, it allows MESA to copy company medical records, employment records, and other company information.

MESA believes that this provision is necessary if it is to be able to develop epidemiologic data essential to development of effective health standards. It is also necessary if MESA is to be able to discover instances of intentional violation of statutory or regulatory requirements. It will allow MESA to control the data flow, rather than depend upon operator filtered records. 42 Fed. Reg. 55569 (1977).

The preamble to the final rule addressed privacy concerns and the need for verification:

The patient-physician confidentiality privilege is not absolute. Where disclosure of patient data is related to a valid purpose, disclosure has been held not to be violative of privacy rights. It is questionable whether employers have standing to assert employees’ privacy rights and significant that no miner or representative of miners has objected to §50.41.

Without inspection of records beyond those required to be kept it is impossible to verify the required records. The Secretary’s power to acquire information related to his functions under the Coal Act and the Metal Act is not limited to any particular records. Section 111 (b) of the Coal Act and § 13 of the Metal Act explicitly authorize analysis of other information related to his functions, and only the Secretary, subsequent to inspection and copying, can determine relevance...42 Fed. Reg. 65535 (1977).

ARGUMENTS

Contestants contend, first, that the Act and MSHA Regulations do not require mine operators to maintain and/or provide access to the medical and personnel records demanded by the audit. Further, they contend that the heavy-handed, improper and unlawful attempt to gain access to highly private and confidential information was an abuse of executive authority. Third, they assert that MSHA has not engaged in the necessary notice and comment rulemaking procedure to permit such arbitrary, wholesale, warrantless, and broad and burdensome requests for hundreds of thousands of pages of records. Fourth, they argue that there is a constitutionally protected expectation of privacy in records not explicitly required to be kept by law, as well as legal record keeping obligations, and potential liability of the company under federal and state laws. Thus, due to the foregoing reasons, they contend that the citations and orders issued to Willow and Air Quality should be vacated.

The Secretary contends, in effect, that the plain meaning of the statutory and regulatory language, and Court precedents, permit MSHA to access relevant and necessary records even if they are not specifically required to be kept by the Act. Second, the regulations currently in effect and applicable to audits implement the statutory mandate and provide for verification of compliance with the reporting requirements, so no further rule making is required. Third, the audit request is limited to information regarding reportable, work-related injuries and illnesses and time and attendance data for a specific time period, and there is no reasonable expectation of privacy in such records. Fourth, the requirements of Part 50 are important to MSHA's mission of improving mine health and safety; compliance with the reporting requirement cannot be verified without the requested records. Finally, she argues that because of the foregoing, violations of section 50.41 exist and, therefore, the citations and orders issued are valid.

QUESTIONS PRESENTED

While the issue to be decided is whether the citations and orders written to each of the mines are valid, there are several questions for consideration:

- Are the medical, personnel, and timesheet records sought by the UAR relevant and necessary to determine compliance with the reporting requirements of the regulations?
- Does the Secretary have the authority to request medical and employment records and other company information pursuant to an audit request under the governing statutes and Part 50 of the regulations?
- Does the UAR impose an unreasonable burden upon the operator?

DISCUSSION

Reporting accidents, injuries, and illnesses occurring at a mine is a well-known

and long-established requirement under the Act and the Part 50 regulations. 30 C.F.R. §50.20. Definitions and instructions for reporting are provided in Sections 50.2(e)-(f), 50.20-3. The 7000-1 form is to be mailed to MSHA within ten (10) days of the accident, injury, or illness. MSHA then uses this information, in combination with the 7000-2 form, which is a quarterly calculation of the hours worked by each employee at the mine, to determine the mine's incidence rate and severity measure. These numerical indicators quantify a mine's overall safety record and may be used to objectively view a particular mine's record in comparison to national averages.

The IR for a particular injury category is calculated by multiplying the number of reportable incidents and the coefficient 200,000, and dividing that number by the total hours of employee exposure. The SM for a particular injury category is calculated by multiplying the total number of missed and restricted duty workdays and the coefficient 200,000 and dividing that number by the total hours of employee exposure. The incidence rate is important in that it gives an overall picture of the safety record of the operator. *Energy West Mining Company*, 15 FMSHRC 587, 591 (Apr. 1993). Knowing the prevalence of specific types of injuries and their usual severity allows for more efficient allocation of agency resources in developing strategies not only for enforcement but also for training with the goal of improving the health and safety of miners.

The responsibility for reporting via the 7000-1 and 7000-2 forms at Willow and Air Quality specifically belongs to the Safety Manager at the mine, who appears to be in the best position to determine if a particular incident is reportable. However, the record is not entirely clear as to how the Safety Manager learns of each and every injury or illness, whether reportable or not.

Mike Baize, Safety Manager at Willow, testified that he is responsible for the reports of injuries, coal production, and average [number] of employees. Baize receives information from the employee's supervisor, who fills out the initial report of injury. He might also get a note from a doctor regarding return to work or restricted duty. Any medical records are turned over to the Human Resources Department ("HR.") Tr. 116-118. He stated that he was not privy to payroll, personnel, medical or Worker's Compensation files. Tr. 101, 114. However, should he need information, he could ask HR for return to work information and the nature of an employee's injury or illness. Tr. 114, 116.

Michael Middlemas, Manager of Health and Safety at Air Quality, testified that he held the same position and had the same responsibilities as Baize. Tr. 124,125. Middlemas testified that the only verification of the information on the 7000-1 and 7000-2 forms was essentially whatever information he put on the forms. Tr. 136, 137.

Chad Barras, Safety Director for both mines, testified that he had prior experience at another mine preparing the 7000-1 and -2 documents, and with Part 50 reporting. Tr. 143,144. He stated that the foreman initially filled out the injury report, and the Safety

Manager would follow up with the foreman or the employee regarding days off and return to work or restricted duty. Tr. 149-151.

Robert Grossman, Senior Manager of Human Resources at Willow, and before August 2010, in a similar position at Air Quality, testified that he had the responsibility for employee and union relations, payroll, benefits, and worker's compensation. His department maintains medical files, personnel change actions, payroll deduction information and vacation and other leave information. Tr. 52-55, 63.

On direct examination, Mr. Grossman testified:

Q. ... Within your knowledge, does the Safety Department monitor those sets of records that you've just described?

A. No.

Q. Do they have general and ready access to those records?

A. No.

Tr. 55, 56

Grossman further testified that payroll records and timesheets had not been provided to MSHA, and he decided that the medical records request, item no. 5 of the UAR, would not be provided. Tr. 64, 66. In addition, he testified that even if given weeks to produce the requested records, he would not provide them. Tr. 90.

The testimony of the safety officials of the mines illustrates an important point. The Safety Manager, the person with the responsibility to submit the reports to MSHA, must first be informed of an accident, injury, or illness of an employee. The flow of this information is generally from the foreman, but the Safety Department may also receive medical documents, which are turned over to and kept by HR. The Safety Manager may follow up with the foreman or employee to complete the information to be reported, but does not have access to the various medical files safeguarded by HR. To the contrary, the time sheets, payroll records, worker compensation records and medical documents of all types are in the exclusive possession and control of HR and are essentially "off limits" to the Safety Manager and all other personnel. Tr. 55,65,74,75,77,91, Ex. C-K. No evidence was produced at the hearing to suggest that HR would take the initiative to provide relevant injury or illness time off information to the Safety Department.

Considering the volume of medical information that no doubt flows into HR, but not available to the Safety Manager, there is at least the potential for relevant events to go unreported. In addition, should the foreman or the employee fail to initiate a report to the Safety Manager, it appears likely that an otherwise reportable event would escape the

notice (and hence the reporting responsibilities) of the Safety Manager. The resulting lack of complete reporting could, of course, be inadvertent or unintentional. But the result is the under-reporting of information needed by MSHA to discharge its duties and responsibilities to compile and report incidence rates and severity measures as well as manage the allocation of agency resources.

Over-reporting would also result in inaccurate information and misallocation of resources. The mine would appear less safe than it actually is, and this could result in increased inspections. However, this would rarely be the concern to be addressed. On the other hand, there would be incentives to under-report injury and illness information to MSHA.

If the total number of reportable incidents is under-reported, a mine, obviously, will appear to be safer than it actually is. If the incidence rate and severity measure are artificially low, an unsafe mine may be able to avoid enhanced MSHA scrutiny. Further, an elevated severity measure is one criterion in the initial screening for establishing a “pattern of significant and substantial violations.” 30 C.F.R. 104.2(b)(3), Ex. G-4. Once this pattern has been established, the mine may be subjected to enhanced penalties and possible forced shutdowns. 30 C.F.R. §104.4. If given the power to solely control the information flow between itself and MSHA, an operator possesses incentives to constrict that flow and under-report incidents at the mine.

The purpose of the Part 50 regulations is to implement MSHA’s authority not only to investigate but also to obtain and utilize information pertaining to accidents, injuries or illnesses occurring or originating at mines. 30 C.F.R. §50.1. In order to develop effective health standards, control the data flow, and discover violations, MSHA is allowed to inspect and/or copy any information the agency thinks may be relevant and necessary to determine compliance with reporting requirements. This includes medical records, employment records, and other company records. 42 Fed. Reg. 55569, 65535 (1977), 30 C.F.R. §50.41. Under §50.41, it was intended that MSHA would not depend on operator-filtered records. *Id.* Forms 7000-1 and 7000-2, the only part of the audit request complied with by the mines, are operator-filtered records. Tr. 79. Without the cooperation of the operator, there can be no effective, independent verification of the information submitted to MSHA.

The suggestion advanced by the Contestants that MSHA inspectors would have the authority to interview miners with visible signs of injury could not serve to verify complete and accurate reporting. Tr. 147, 152, 153. This suggestion is contained in a MSHA handbook, where it is also stated that examination and comparison of state workers’ compensation records to the MSHA reports (7000-1, 2 forms) may be appropriate. Page 43, Metal and Nonmetal General Inspection Procedures Handbook, No. PH09-IV-1 (Oct. 2009).

Peter Joseph Montali, Acting Director of Accountability for MSHA, testified that

the same audit request, the UAR, was sent to all 39 mines audited. Tr. 28. Mr. Montali stated that the information reported on the 7000-1 and 7000-2 forms is used to determine the national incidence rates and averages, which can be compared to the rates at a particular mine. Tr. 19, 20, 22, 23. In a similar manner, the severity measure can also be calculated and compared. In the affidavit of record, Ex. G-1, Mr. Montali reported he had prior experience with Part 50 requirements. He pointed out that the medical records requested by the audit are limited to accidents, injuries, and illnesses that occurred at the mine or may have resulted from work at the mine. Also, he indicated that the payroll and time sheet records were only to verify the total number of employees and the total hours worked, as reported on the 7000-2 form. As to the various medical records, including the worker's compensation filings, Mr. Montali noted that these are cross-referenced with the 7000-1 forms submitted by the mine to verify proper and accurate reporting of all required information, including permanent total or partial disability, days away from work, restricted work activity, date of return to full duty, or no lost time. The drug-testing documents are limited to tests taken after an accident-causing injury, and the medical claims forms are limited to a determination of whether a particular illness would fit the definition of an "occupational illness". *Id.*

It is the operator who possesses the means to ensure complete and accurate reporting. Absent an audit of company records, MSHA must rely solely on the information provided by the operator's Safety Manager. If the company does not cooperate in the process, there can be no assurance that the safety and health information compiled by MSHA is correct.

In summary of the above discussion, the undersigned does not consider it to be an overstatement that the complete and accurate reporting of accidents, injuries, and illnesses occurring at mines is critically important to the mission of MSHA to protect the health and safety of miners. "The health, safety and the very lives of coal miners are jeopardized when mandatory health and safety laws are violated." *Youghioghney and Ohio Coal Company v. Morton*, 364 F.Supp. 45, 50 (1973). From the stated intent in the promulgation of 30 C.F.R. §50.41 it can be found that it is not what the operator considers important to report; rather, it is what MSHA thinks is relevant and necessary to verify reports or determine compliance with Part 50 of the regulations. It follows, then, that the particular records sought by the MSHA audit are relevant and necessary to verify compliance with all reporting requirements. Testimony confirms that the records are either maintained by the mine or a third party, or stored, but not destroyed. Tr. 83 ,85.

FINDINGS AND CONCLUSIONS

Commission precedent in this area is rare and does not address the specific set of facts in the instant case. In *BHP Copper*, 21 FMSHRC 758 (July 1999), a fall of ground caused the death of one miner and the injury of another. *Id.* at 759. While MSHA inspectors were allowed to interview several BHP employees, BHP would not provide the phone number and address for the injured miner who had just been released from the hospital, stating that the information was confidential. *Id.* In denying the contention of the operator, the Commission explained that the

Secretary has broad authority under the Act to investigate mine accidents and the operator may not impede that investigation *Id.* at 765-766. The Commission also rejected the argument that the Secretary must seek injunctive relief under Section 108 of the Act. *Id.* at 766.

A second, older Commission case is *Peabody Coal Company*, 6 FMSHRC 183 (Feb. 1984). Here, an inspector was refused access to accident reports because the operator had already filed them with MSHA. *Id.* at 185. Peabody argued that because this inspection was of a “type so random, infrequent, or unpredictable that the appellant, for all practical purposes, had no real expectation that its property would from time to time be inspected by government officials.” *Id.* Further, it asserted that, in order for MSHA to inspect, it must obtain a warrant. *Id.* In disagreeing with the operator, the Commission found that a search warrant was not required and since the Act required the operator to maintain the records of accidents for five years there was no realistic expectation of privacy in them. *Id.* at 186.

Although these Commission cases involve conflicts over information contained in the operator’s records, this is where the similarities end. No accident has occurred in the instant case; rather, MSHA is conducting audits. MSHA is requesting documents to verify that no accident, injury or illness has gone unreported, not investigating the facts and circumstances surrounding such an incident. In this respect, neither *BHP Copper* nor *Peabody* specifically addresses the questions raised by the compliance audit at hand.

In *Sewell Coal Company*, 1 FMSHRC 864 (1979)(ALJ), the Administrative Law Judge (“ALJ”) held that MSHA could not inspect the private personnel files of a mine, in the absence of a valid warrant. *Id.* at 872-873. In *Sewell*, a MSHA inspector began an inspection of the foremen’s records, accident, injury and illness records and medical and compensation records at the mine. *Id.* at 865. All of this information was contained in personnel records that contained other data as well. *Id.* After the discovery of two instances of failure to report, the safety manager informed the inspector that he would not be permitted to continue the inspection. In characterizing the inspection, the ALJ maintained that Part 50 does not explicitly authorize the warrantless search of personnel files containing medical and other information that may or may not be related to accidents, injuries, and illnesses that are reportable. *Id.* at 873. The ALJ thus held that MSHA could not inspect the private personnel files of a mine, in the absence of a valid warrant. *Id.* at 872-873. The Contestants rely heavily on this decision.

However, the instant case can easily be distinguished from *Sewell*. First, the actions of the MSHA inspectors here do not constitute warrantless searches; rather, they are simply requesting that the operator produce certain documents. Unlike in *Sewell*, the inspector would not be rummaging through the file cabinets or files of the operators.² At the hearing, it was acknowledged that no physical access to files was requested. Tr. 184, 185. Each mine operator would search his own files for this information, producing only those records meeting the specifics of the request, thereby limiting the chance that unrelated private information would be released to MSHA.

² In *Peabody*, the Commission similarly distinguished *Sewell* in this manner.

Second, this was not some wholesale demand that would cause the operator great cost and burden to produce. MSHA's request was for documents related only to those accidents, injuries, and illnesses that occurred while working at the mine or as a result of work at the mine. Moreover, MSHA is only requesting documents that were recorded within the span of one year. The request concerns only employees, not family members, relatives, or others; if non-employee medical or other records are maintained at the mine, they would not be required for the audit. Any medical tests or Emergency Medical Transportation ("EMT") records would concern only the employee, and as to drug tests, only those conducted following an accident that caused an injury. Ex. G-1, P. 3, ¶ 15. Family medical leave records involve care given *by* the employee, and not relevant to the audit, since the time off would be reflected in other records used to fill out the 7000-2 form. Tr. 53, 54, 57. In addition, only those employee disabilities occurring at the mine or as a result of work at the mine need be disclosed, and not disability records of non-employees that might be in company files. Tr. 56. Similarly, both insurance claims and worker's compensation information are limited to employees of the mine during the one year period. The timesheet and payroll records are to verify the hours actually worked and reported on the 7000-2 form, Ex. G-1, P. 2, ¶ 10. Banking information, including various deductions from pay, is not needed. When other parts of the statute require the operator to keep records of accidents for a period of five years³ and the testimony revealed that the types of records sought are maintained and not destroyed, Tr. 83-85, compiling records for only a one year period could hardly be burdensome.

Third, as an ALJ decision, this case does not have value as precedent. Admittedly, if the facts were so similar that they could barely be distinguished, I may have been persuaded to consider its reasoning. However, for the reasons listed above, I find the facts in the instant case to be so distinct, that *Sewell* does not provide guidance and is not controlling.

In the absence of controlling Commission precedent, we turn to the statutes, regulations and case law for guidance. We begin by noting that the Mine Act and the implementing regulations are to be liberally construed as long as the Secretary's interpretation is reasonable and promotes miner safety. *Hanna Mining Co.*, 3 FMSHRC 2045, 2048 (Sept. 1981); *Secretary of Labor v. Cannelton Industries, Inc.*, 867 F.2d 1432, 1437 (D.C. Cir. 1989).

In *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984), the Court explained that when confronted with review of an agency's construction of the statute it administers, a judge must consider two questions. The first is whether Congress has spoken to the issue in question. *Id.* If so, the questions are at an end and the language must be enforced as written. *Id.* If the statute is silent or ambiguous to the issue in question, however, the Court must question whether the agency's answer is a permissible interpretation of the language of the statute. *Id.* In this instance, the agency's interpretation must be reasonable, and if so, it will be accorded deference. "...Considerable weight should be accorded to an executive department's

³ See 30 CFR § 50.21, which requires operators to keep Form 7000-1 after an accident for a period of five (5) years.

construction of a statutory scheme it is entrusted to administer....” *Id.* At 844.

The same analysis applies equally to the language and interpretation of the Secretary’s own regulations. *Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 460 (D.C. Cir. 1994). Where the language of a regulatory provision is clear, the terms of that provision must be enforced as written unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results. *Utah Power and Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989); *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (Aug. 1993); *Cyprus Emerald Resources Corp.*, 20 FMSHRC 790 (Aug. 1998).

I find there is no need to go beyond the plain language of the statutes and regulations. In Section 103(a)(1)(4) of the Act the Secretary is empowered to obtain and utilize information to determine “...whether there is compliance with the mandatory health or safety standards or with any citation, order, or decision issued under this title or other requirements of this Act”. (Emphasis added). Section 103(h) of the Act broadens the scope of compliance actions by explicitly stating “[i]n addition to such records as are specifically required by this Act, every operator of a coal or other mine shall establish and maintain such records, make such reports, and provide such information, as the Secretary...may reasonably require from time to time....” (Emphasis added). These statutory provisions create a duty on the part of the operator to maintain and provide records to MSHA for the agency to determine compliance with any requirements of the Act. Hence, there would be a legitimate basis for enforcement of reporting requirements even without the Part 50 rules. *American Mining Congress*, 995 F. 2d 1106, 1109 (1993).

The Contestants argue that the records sought are highly sensitive and private, and granting the Secretary access to them would violate the privacy rights of its employees. Although no one would argue against the notion that medical and personnel records are of a highly sensitive and personal nature, there are certain important interests of the government that override these concerns. MSHA, a public health agency, does have the authority to obtain information to determine compliance with the above cited statutes, and permission from the employees is not required. *United Steelworkers of America, AFL-CIO-CLC*, 647 F.2d 1189, 1241 (Jan. 1981). The disclosure of private medical information to a public health agency is a reasonable exercise of government responsibility over public welfare where it is related to occupational health and safety and does not violate any rights or liberties protected by the Fourteenth Amendment. *Whalen v. Roe*, 429 U.S. 589, 597, 598, 602. Further, and importantly, it may be concluded that the governmental interest in promoting mine safety far outweighs any interest the mine operators may have in privacy. *Youghioghny* at 51.

Even if the statutes were considered ambiguous, the Part 50 rules are legislative rules. Their publication in 1977 satisfies the requirement that the rules have general applicability and legal effect. *American Mining Congress*, at 1109, 1110. Entirely consistent with the statutory mandate, the agency promulgated regulations, including 50.41, that also spelled out duties of the operator to cooperate in determinations of compliance, *Id.* at 1110, 1111. Section 50.41 of the regulations allows the Secretary “to inspect and copy information related to an accident, injury

or illnesses which MSHA considers...relevant and necessary to a determination of compliance with the reporting requirements of this part.” (Emphasis added). Both the statutory and regulatory provisions are clear in their purpose and intent to grant the Secretary authority to request documents that are not specifically required to be kept under the Act. To find otherwise would be to render these passages meaningless.

Further, as set forth and discussed above, the preambles to the controlling regulation, 30 C.F.R. §50.41, are instructive in that MSHA may request the employment, medical and other records of the employer. The Secretary is authorized to inspect records in order to determine reporting compliance. The reasoning is that reliance on the information provided in the required forms by the operator itself would do very little to verify and ensure complete reporting. In order to verify compliance, the Secretary must have some control over the flow of information. The power to acquire information was not limited to any particular records, and only the Secretary, subsequent to inspection and copying, could determine relevance. 42 Fed. Reg. 55569, 65535 (1977). The language of these preambles is persuasive.

The Health Insurance Portability and Accountability Act (“HIPAA”) created a national framework for health privacy protection while also protecting the rights of consumers to access their own health information. 45 C.F.R. §160.101. Without suggesting that HIPAA in any way extends the Secretary’s authority to request records, it is significant from the standpoint of expectations of privacy that it explicitly exempts “[a] public health authority that is authorized by law to collect or receive such information for the purpose of preventing or controlling disease, injury, or disability.” 40 CFR § 164.512. The preamble to the HIPAA regulations specifically lists MSHA as one of the entities included as a public health authority. 65 Fed. Reg. 82624 (Dec. 28, 2000).

Moreover, and in consideration of the Contestant’s concerns regarding the possibility of records containing both employee and non-employee information, the safeguards that MSHA utilizes during its Part 50 audits to prevent disclosure of private information are adequate. The agency has established specific procedures that must be followed when handling the records of an operator’s employees. These include special filing procedures, locked storage, limited access, safe transportation methods, and an alert that medical information is ordinarily exempt from Freedom of Information Act (FOIA) disclosure. Ex. G-5. While no procedures are fool-proof, these go a long way to ensuring that information will not be disclosed. Considering the Congressional mandate to the agency, the controlling regulations, and the exemption from HIPAA provisions, there can be no reasonable expectation of privacy in the records sought by MSHA.

Having found that the Secretary does have the authority to request the records at issue in these cases, I do not have to rule on the reasonableness of her interpretation of the statutes and regulations. However, given the compelling need to verify reports and determine compliance, I would have found her interpretation reasonable anyway. The request is limited to defined types of documents that are necessary to further her mission to protect the safety and health of miners. She is not requesting a wholesale search of all of the records of the operator, including those that

are irrelevant to the goals of the audit.

It follows also from the above discussion, that contrary to the Contestants' arguments, this is not arbitrary, ad hoc rulemaking that violates the necessary notice and comment rulemaking procedures. The Secretary has interpreted "in addition to such records" to broaden the document requesting power that she already possessed. She did not create new powers for herself, as the Contestants contend. Her interpretation further defines that this phrase includes employee time sheets, payroll records, medical records and such other documentation requested as relates to work at the mine. The language of the Act lends itself to this interpretation and, thus, the Secretary did not engage in arbitrary, ad hoc rulemaking.

In fact, legislative rulemaking has already been accomplished, in 1977, and there is no need for additional rulemaking. The regulatory scheme under Part 50 is adequate for the purposes of the audit. A reasonable interpretation of the statutory language would establish that documents, in addition to those required to be kept under the Act, may be requested by the Secretary from time to time as long as they are relevant and necessary. Specific types of documents or information do not need to be named in either the statutes or the regulations. There is no discernible inconsistency between the UAR and either the Act or the Part 50 regulations. The Secretary did not exceed her interpretation authority under *Chevron* analysis.

The Contestants further argue that the audit request amounts to a wholesale search of private company records that cannot be obtained absent a valid search warrant. The most obvious deficiency in this argument is that the Secretary is not demanding to rummage around in the files of the operator. To the contrary, she is requesting that the Contestants produce the documents for the Secretary. Moreover, the documents to be produced are limited by both content and time. By its own description, the request is not a wholesale search. Even if the UAR is considered to be a warrantless demand for the production of documents, as distinguished from a warrantless search and/or seizure of company files, it still does not violate the Fourth Amendment. It is authorized by law to verify compliance with the Act and regulations and necessary to further a federal interest, the health and safety of miners. Where Congress has allowed the agency access to the records, with the specific language of Section 103(h), in a pervasively regulated industry, there cannot be an expectation of privacy. *Donovan v. Dewey*, 452 U.S. 594, 599, 600 (1981). Neither the 1987 opinion of Associate Solicitor Edward P. Clair nor the recent statement of Assistant Secretary Joseph A. Main is helpful to the Contestants. Since the current audit request is not a wholesale, warrantless search of the operator's files, Mr. Clair actually concludes in his opinion that verification of compliance by a Part 50 audit would be entirely permissible. Ex. C-I, P. 3. Mr. Main's statement suggesting that MSHA should have subpoena powers does not undermine the Secretary's authority to request the production of documents under Part 50.

Finally, the Contestants argue that the information sought is overly broad, burdensome and unreasonable. I have discussed, above, that the audit request is not burdensome. I also find that it is neither overly broad nor unreasonable. The Secretary does not request every documented injury or illness to every miner for a number of years. She is only requesting the

documentation of reportable injuries, illnesses, or accidents that occurred while working at the mine or as a result of work at the mine. The UAR is for a lawful purpose. It is limited to the span of one year's time. Moreover, the records listed in #3 and #5 are maintained at the mine in HR or at a known third party. The records are clearly described. Peabody has not established on this record that the UAR is burdensome. In light of the significant limitations incorporated into the audit request, it is not overly broad, burdensome or unreasonable.

I find that the Contestant mines failed to fully cooperate in the Part 50 audit and violated 30 C.F.R. §50.41. I further find that Citations 6670850 and 6670852, as modified, and Orders 6670851 and 6670853 issued to the Willow and Air Quality mines are valid.

ORDER

The valid Citations and Orders issued to the Contestant mines are **AFFIRMED**.

/s/ Kenneth R. Andrews

Kenneth R. Andrews
Administrative Law Judge

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May 23, 2011

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. SE 2007-447-M
Petitioner	:	A.C. No. 09-00023-125618 E027
v.	:	
	:	Mine: Lithonia Mine Site
S & S DREDGING,	:	
Respondent	:	

DECISION

Appearances: Jonathan J. Hoffmeister, Esq., U.S. Department of Labor, Office of the Solicitor, Atlanta, Georgia, for Petitioner,
Patty Schildt, Pro Se, S&S Dredging, Lilburn, Georgia, for the Respondent.

Before: Judge Weisberger

Statement of the Case

This case is before me based upon a petition for assessment of civil penalty filed by the Secretary of Labor (“Secretary”) alleging that S&S Dredging (“S&S”) violated 30 C.F.R. §56.14100(b). The petition is based on a citation issued by the Secretary to S&S under Section 104(d) of the Federal Mine Safety and Health Act of 1977 (“Act”).¹ A hearing was held in Atlanta, Georgia on May 4, 2011. At the conclusion of the hearing, a bench decision was made. The decision is set forth below, with the correction of non-substantive matters.

Finding of Facts and Conclusions of Law

a. Violation of Section 56.14100(b)

On May 3rd, 2007, Robert Knight, an MSHA inspector who has had experience as a health and safety manager in private employment, inspected the Lithonia mine, located in DeKalb County, Georgia. S&S is an independent contractor that operates on the site.

¹ This citation had initially been issued as an order under Section 104(d)(1) of the Act, but was subsequently amended to a citation under Section 104(d)(1), *supra*.

In the course of Knight's inspection, he specifically examined an L160 Michigan loader that was owned and operated by S&S. He observed that there were two steps that were defective. The lower step was attached only in the front of the step by two chains, with one on each side of the step. Normally, the step should have also been supported by two cables, one on each side of the rear end of the step. In addition, the upper step was bent upwards and contained a hole.

The inspector testified as to various hazards of falling or slipping that could occur as a result of a person ascending or descending these steps and slipping or falling.

The citation the inspector issued alleges a violation of Section 56.14100(b), which provides as follows: "defects on any equipment, machinery and tools that affects safety shall be corrected in a timely fashion to prevent the creation of a hazard to persons."

According to the parties' stipulations filed at the hearing, the condition of the steps had been in existence for approximately two years prior to the time that the citation was issued.

Based on the parties' stipulations and the testimony of Knight, I conclude that the loader in question did have defects that did affect safety and that had not been corrected in a timely manner.

Accordingly, I conclude that S&S did violate Section 56.14100, as alleged.

b. Significant and Substantial

Knight also found this condition to be significant and substantial. He indicated that this determination was based upon a reasonable likelihood of injury. In support of this determination, he explained that because of the lack of adequate connection of the lower step, a person ascending or descending the loader could slip and contact his shins and could also sprain or break an ankle, or strain his back.

In addition, Knight noted that there was a cable sticking up from the lower step, so that if one falls, the cable then could impact a person's shin, causing some type of abrasion. As he indicated, these injuries could occur when one ascends or descends the first step.

Knight also indicated that there was a reasonable likelihood of injury if a person, in ascending or descending the loader, would avoid the lower step and instead use the next step. He explained that this step was bent upwards and also had a hole. Knight indicated that a person ascending or descending the loader could step in mud or water and therefore have mud or water on his shoes. If this occurred, there would be a heightened danger of slipping from the upper step, which was bent and had a hole, and a person could then fall to the ground. Knight indicated the upper step was approximately 3 feet above the ground. A fall from the upper step could therefore cause injuries, such as a sprained ankle, a broken ankle, or a strain to a back. Essentially, Knight indicated, and the evidence supports his testimony, that the loader at issue was used regularly, and in a day in which it's operated, a person using the loader would have to ascend or descend the loader many times.

Knight also indicated that he took into account the fact that this loader travels on-site, over various different types of terrain, and at any one place the loader could stop, requiring the operator to get off. He indicated that although there were not any "overly large aggregates" on the ground, there is "uneven ground in many locations and they do have gravel." (Tr. 33).

He concluded that based on all of these conditions, there was a reasonable likelihood of a serious injury, and therefore the violation was significant and substantial.

The determination of whether a violation is significant and substantial is governed by case law as cited by Government counsel.

The Commission has explained that:

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

Mathies Coal Co., 6 FMSHRC 1, 3-4 (Jan.1984).

It is clear, based on the earlier discussion, that the first two factors have been established here: one, the underlying violation of a mandatory safety standard, and two, a discrete safety hazard.

The third element requires a reasonable likelihood of an injury-producing event. In the situation at bar, this translates to a reasonable likelihood of a fall, i.e. somebody slipping or falling due to the conditions referred to earlier.

Based on the usage of the loader and the need to ascend and descend more than once in its use, and taking into account the continuing operation, I find that there was a reasonable likelihood that the hazard of the violation, specifically the condition the loader's steps were in, would result in an injury-producing event.

The key issue in this case is the fourth element, which is a reasonable likelihood that the injury in question “will be of a reasonably serious nature.” *Mathies*, 6 FMSHRC 3-4. This, in essence, is the problem in the Secretary's case.

The inspector testified that there was a reasonable likelihood that the injury in question would be of a reasonably serious nature based upon his opinion that injuries would result in lost workdays. There is not any evidence that any of the possible type of injuries that he set forth, specifically, sprains, possibly a broken ankle, would require hospitalization or surgeries.

He also indicated that there was not any “overly large aggregate” on the ground. The ground was uneven in “many locations,” and there was gravel. (Tr. 22).

However, significantly, there is an absence of any objects that would be likely to cause a serious injury, such as boulders, rocks, or sharp objects. I place particular emphasis on the absence of evidence of the objects that would cause head injuries, neurological injuries or any injuries that would have some lasting impact or would have a high likelihood of a long period of recuperation.

Further, the height at which these steps are located does not appear to be very significant in terms of a contributing factor to a serious injury. The lower step was only one foot off the ground. The inspector estimated the higher step the inspector to be at a height of three feet. There wasn't any evidence of an exact measurement, and it is unclear what the inspector's approximation was based upon.

I conclude that, based upon all of these factors, the Secretary has failed to prove, as required by case law, that the injury in question “will be of a reasonably serious nature.” *Mathies, supra*, at 4. Therefore, I find that the violation was not significant and substantial.

c. Unwarrantable Failure

The Secretary also asserts that the violation was as a result of the operator's unwarrantable failure as support for the Secretary's issuance of citation under Section 104(d)(1) of the Act. That section requires as follows:

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

30 U.S.C. §814(d)(1).

Based upon the wording of Section 104(d)(1), it is clear that the unwarrantable failure aspect of the violation must be predicated upon a finding of significant and substantial. Therefore, in order to find that a violation was the result of an unwarrantable failure, it first must be established that the violation was significant and substantial. For the reasons I indicated above, I find that the Secretary has not established that the violation was significant and substantial. Based upon that finding, and the clear wording of Section (d)(1), I find that unwarrantable failure does not apply in this case.

Therefore, I find that the Secretary did establish a violation of Section 56.14100(b), but that violation was neither significant or substantial, nor an unwarrantable failure.

d. Penalty

The next matter to be resolved is the issue of a penalty. The Act, under Section 110(i), requires the following factors be considered by the Commission in assessing a penalty: the operator's history of previous violations, the appropriateness of the penalty to the size of the business of the operator, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of a violation. 30 U.S.C. §820(i).

As to negligence, the evidence established here that the operator was negligent to a high degree. The condition involved two steps. Based upon the parties stipulations, the operator was aware of these conditions and the conditions had been in existence for two years.

With regard to gravity, the gravity was not of a highly significant nature, for the reasons set out earlier in discussing significant and substantial.

As to the size of the operator, there is uncontradicted testimony that two persons work at the mine. I conclude that the mine is very small in size, and this is a significant factor to be taken into account. Regarding the history of violations, I note the operator only received six violations within the last fifteen months. There isn't any evidence that this is an unusually high number for an operator of this size.

Another factor is whether the imposition of a penalty would have an effect on the operator's ability to continue in business. The owner and operator, Patty Schildt, testified that the company is no longer in business. The parties stipulated that the company went out of business after receiving the citation.

The last fact to be considered is good faith abatement, and there is not any evidence that the abatement was not abated in good faith.

Considering all these factors and placing considerable weight on the size of the operator and the ability to continue in business, and the history of violations, I find that a penalty of \$300 is appropriate.

ORDER

It is ORDERED that S&S shall pay a penalty of **\$300.00** within thirty (30) days of this decision.

/s/ Avram Weisberger

Avram Weisberger

Administrative Law Judge

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May 23, 2011

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2009-1000
Petitioner,	:	A.C. No. 46-09086-178774-01
	:	
v.	:	Docket No. WEVA 2009-1306
	:	A.C. No. 46-09086-181457-01
BRODY MINING, LLC.,	:	
Respondent.	:	Mine: Brody Mine No. 1

DECISION

Appearances: J. Matthew McCracken, Esq., United States Department of Labor, Solicitor’s Office, Arlington, VA, for the Secretary of Labor
Amos H. Presler, Esq. USDOL, United States Department of Labor, Solicitor’s Office, Arlington, VA, for the Secretary of Labor
Jason M. Nutzman, Esq. Smith, Moore, Leatherwood, LLP, Greenville, SC, for the Respondent
George J. Oliver, Esq., Smith, Moore, Leatherwood, LLP, Raleigh, NC, for the Respondent

Before: Judge L. Zane Gill

Procedural History

This case consolidates WEVA 2009-1000 and WEVA 2009-1306 and arises from petitions for civil penalties filed by the Secretary of Labor under Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 801 et seq., (the "Act").¹ The petition charges Brody Mining ("Brody") with eight violations of mandatory standards and seeks civil penalties for those violations, as summarized in the following table.

¹ This penalty assessment case was originally filed as WEVA 2009-1000 and WEVA 2009-1001 on or about May 18, 2009. The two cases were consolidated initially and assigned to me. WEVA 2009-1000 subsumed two previously filed contest cases, WEVA 2009-0813-R and WEVA 2009-0814-R. On or about June 7, 2010, counsel for the Secretary filed a motion to sever WEVA 2009-1000 from WEVA 2009-1001 and to consolidate WEVA 2009-1000 with WEVA 2009-1306, which had been assigned to Judge Feldman. The severance and consolidation motion was granted on June 25, 2010, resulting in the paring of WEVA 2009-1000 and WEVA 2009-1306 for purposes of this decision.

Cit/Ord No.	Date Issued	Inspect or	Standard	Docket No	Action	Penalty	Negligence
8075863	January 15, 2009	Ward	75.370 (a) (1)	WEVA 2009-1000	104 (d) (2)	\$5,211	High
8075864	January 15, 2009	Ward	75.360 (b) (3)	WEVA 2009-1000	104 (d) (2)	\$7,774	High
8079178	January 22, 2009	Jackson	75.380 (d) (1)	WEVA 2009-1000	104 (d) (2)	\$56,929	Reckless Disregard
8079179	January 22, 2009	Jackson	75.400	WEVA 2009-1000	104 (d) (2)	\$70,000	Reckless Disregard
8068033	October 8, 2008	Ward	75.1403	WEVA 2009-1306	104 (d) (2)	\$4,099	High
8075874	February 11, 2009	Ward	75.370 (a) (1)	WEVA 2009-1306	104 (d) (2)	\$4,440	High
8075906	March 3, 2009	Ward	75.1722 (a)	WEVA 2009-1306	104 (d) (2)	\$4,000	High
8079224	February 26, 2009	Jackson	75.400	WEVA 2009-1306	104 (d) (2)	\$70,000	Reckless Disregard

The general issue before me is whether Brody violated the standards as alleged and, if so, what the appropriate civil penalty is for those violations. Additional specific issues are addressed as noted. No objection was raised in the pleadings or during the trial to the jurisdiction of this court over the case.

The case was heard on December 16 and 17, 2010, at the National Mine Academy in Beckley, West Virginia.

Common Legal Standards

Concepts of negligence and gravity apply to all citations and orders under the Mine Act, irrespective of whether the Secretary pursues enhanced enforcement. They are codified and reduced to table form at 30 C.F.R. § 100.3 and form a defined and integral part of the penalty assessment mechanism used by MSHA and its inspectors. The concepts of “significant and substantial” and “unwarrantable failure” are applied, primarily to 104(d) orders², as part of the enhanced enforcement mechanism set forth in the Mine Act.

Negligence

Section 110(i) of the Mine Act requires that in assessing penalties the Commission must consider, among other criteria, “whether the operator was negligent.” 30 U.S.C. § 820(I). Each mandatory standard thus carries with it an accompanying duty of care to avoid violations of the standard. An operator’s failure to meet the appropriate duty can lead to a finding of negligence if a violation of the standard occurs. The fact that a violation was committed by a non-supervisory employee does not necessarily shield an operator from being deemed negligent. In this type of case, we look to such considerations as 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. *Southern Ohio Coal Co.*, 4 FMSHRC at 1463-64. See also *Nacco Mining Co.*, 3 FMSHRC at 848, 850-51 (April 1981) (construing the analogous penalty

² The Mine Act also contemplates that “any citation given to the operator under this Act” may form the basis for enhanced enforcement if the elements of “significant and substantial” and “unwarrantable failure” can be proved. 30 U.S.C § 814(d)(1)

provision in 1969 Coal Act where a foreman committed a violation), *cited in A. H. Smith Stone Company*, 5 FMSHRC 13, (January 1983).

Negligence “is conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm.” 30 C.F.R. § 100.3(d). “A mine operator is required [...] to take steps necessary to correct or prevent hazardous conditions or practices.” *Id.* “MSHA considers mitigating circumstances which may include, but are not limited to, actions taken by the operator to prevent or correct hazardous conditions or practices.” *Id.* Reckless negligence is when “[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 when “[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances.” *Id.* Low negligence is when “[t]he operator knew or should have known of the violative condition or practice, but there are considerable mitigating circumstances.” *Id.* No negligence is when “[t]he operator exercised diligence and could not have known of the violative condition or practice.” *Id.*

Gravity (“Seriousness”)

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. *Sellersburg Stone Co.*, 5 FMSHRC 287, 294-95 (March 1983), *aff’d*, 736 F.2d 1147 (7th Cir. 1984); *Youghioghny & Ohio Coal Co.*, 9 FMSHRC 673, 681 (April 1987). 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 (September 1996). The gravity analysis focuses on factors such as the likelihood of an injury, the severity of an injury, and the number of miners potentially injured. 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.1 (September 1987).

Gravity is “often viewed in terms of the seriousness of the violation.” *Consolidation Coal Co.*, 18 FMSHRC 1541, 1549 (Sept. 1996). The seriousness of a violation can be examined by looking at the importance of the standard which was violated and the operator's conduct with respect to that standard, in the context of the Mine Act's purpose of limiting violations and protecting the safety and health of miners. See *Harlan Cumberland Coal Co.*, 12 FMSHRC 134, 140 (Jan. 1990) (ALJ). The Commission has recognized that the likelihood of injury is to be made assuming continued normal mining operations without abatement of the violation. *Consolidation Coal Co.*, 8 FMSHRC 890, 899 (June 1986).

Significant and Substantial

In *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984), the Federal Mine Safety and Health Review Commission (“Commission”) explained that:

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

Id. at 3-4. In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125 (Aug. 1985), the Commission held:

We have explained further that the third element of the *Mathies* formula “requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury.”... We have emphasized that, in accordance with the language of section 104(d)(1), it is the *contribution* of a violation to the cause and effect of a hazard that must be significant and substantial.

Id. at 1129 (internal citations omitted) (emphasis in original). The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. See *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987).

S&S enhanced enforcement is applicable only to violations of mandatory standards. *Cyprus Emerald Res. Corp. v. FMSHRC*. 195F.3d42 (D.C. Cir. 1999)

Unwarrantable Failure

The term “unwarrantable failure” comes from section 104(d) of the Act and, taken together with “significant and substantial,” creates a standard for enhanced enforcement procedures, including withdrawal orders and potential enhanced liability, if a pattern of violations is eventually proved. Existing Commission authority is less than clear in defining the terms and tends to imply that they refer simply to more serious conduct by an operator in connection with a violation.

In *Emery Mining Corp.*, 8 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id.* at 2001. Unwarrantable failure is characterized by such conduct as “reckless disregard,” “intentional misconduct,” “indifference,” or a “serious lack of reasonable care.” *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); see also *Buck Creek Coal Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test). The Commission has examined various factors in determining whether a violation is unwarrantable, including the extent of a violative condition, the length of time that it has existed, whether the violation is obvious, or poses a high degree of danger, whether the operator has been

placed on notice that greater efforts are necessary for compliance, and the operator's efforts in abating the violative condition. *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988); *Kitt Energy Corp.*, 6 FMSHRC 1596, 1603 (July 1984); *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1129 (July 1992). The Commission has also examined the operator's knowledge of the existence of the dangerous condition. e.g., *Cyprus Plateau Mining Corp.*, 16 FMSHRC 1604, 1608 (Aug. 1994) (affirming unwarrantable failure determination where operator aware of brake malfunction failed to remedy problem); *Warren Steen*, 14 FMSHRC at 1126-27 (knowledge of hazard and failure to take adequate precautionary measures support unwarrantable determination); *see also Consolidation Coal Co.*, 23 FMSHRC 588, 593 (June 2001).

It is clear in the Mine Act that since negligence and gravity, which are clearly delineated in 30 C.F.R. § 100.3 and related tables, apply to all citations and orders, the enhanced enforcement provisions set out in Section 104(d) contemplate something distinct and “more,” when talking about “significant and substantial” and “unwarrantable failure.” The Secretary must prove negligence and gravity for all citations and orders and, in order to invoke the enhanced enforcement plan in Section 104(d), also must prove that the circumstances of the violation satisfy both the “significant and substantial” and “unwarrantable failure” standards. If the Secretary fails to prove both, there can be no enhanced enforcement. The Secretary has to prove four distinct elements³ when the enhancement scheme in Section 104(d) is alleged: (1) negligence; (2) gravity; (3) “significant and substantial;” and (4) “unwarrantable failure.” As a result of this, I generally treat the two groupings and each element in each grouping separately. In the interest of clarity, I see no advantage in blurring the distinctions between and among the concepts, the groupings, or the elements.

Findings of Fact - Conclusions of Law

The orders in this case arise from MSHA inspections of Brody's No. 1 mine, MSHA ID No. 46-09086, located in Boone County, WV.⁴ The contested citations were written by MSHA Inspectors, Charles H. Ward⁵ and James Jackson on six different dates between October 8, 2008, and March 3, 2009, as shown in the table above.

Dockets

[1.0] WEVA 2009-1000

Docket WEVA 2009-1000 comprises four citations/orders listed below as 1.1 through 1.4.

³ The Secretary must also prove the existence of the underlying strict liability violation of a health or safety standard.

⁴ According to the public data maintained by MSHA on its website, Brody No. 1 mine is operated by Brody Mining, LLC, and the operation is owned by the Brody Trust.

⁵ Ward assumed the duties of MSHA Health Specialist in December 2008. (Tr.15:22-16:21)

[1.1] **Order No. 8075863** reads as follows:

“The Approved Ventilation Methane and Dust Control Plan for the 009-0 MMU is [sic] not been complied with. The approved plan requires 3,00[0]⁶ CFM behind the line curtain in all idle faces. When using an approved calibrated anemometer behind the line curtain in the No.6 working face, the air measured 1,974 CFM. [At] [t]he No.5 working face behind the line curtain, the air measured 1,462 CFM. The operator was placed on heighten [sic] alert during this inspection. The mines [sic] liberates 1.5 million cube [sic] feet of methane in [a] 24 hour period.

This citation is unwarrantable failure to comply with a standard. Mine management has engaged in aggravated conduct by failure to take actions on this hazard.”

Exhibit S-2

The gravity of the violation was assessed as reasonably likely to result in lost workdays or restricted duty for five persons and as significant and substantial (S&S). The S&S designation was dropped by the Secretary at the hearing. (Tr. 12:6-13) It was written as a 104(d)(2) order, an unwarrantable failure to comply with a mandatory standard. The operator’s negligence level was assessed as “high”, and the proposed fine is \$5,211.00. (Petition for Assessment of Penalty)

The Standard

30 C.F.R. § 75.370(a)(1) states: “The operator shall develop and follow a ventilation plan approved by the district manager. The plan shall be designed to control methane and respirable dust and shall be suitable to the conditions and mining system at the mine. The ventilation plan shall consist of two parts, the plan content as prescribed in §75.371 and the ventilation map with information as prescribed in §75.372. Only that portion of the map which contains information required under §75.371 will be subject to approval by the district manager.”

⁶ Trial testimony makes it clear that this number should be 3,000 and not 3,00. (Tr. 39:23-40:24)

The Evidence

Ward inspected the Brody No. 1 Mine on January 15, 2009. He wrote the order in Exhibit S-2, No. 8075863. (Tr. 25:15-24) He testified that he wrote the order because he found that the fly pads⁷ at the No. 5 and No. 6 faces were being blown straight out by the ventilation airflow. As a result, the air was not going where it was intended. Instead of being diverted and directed by the fly pads, it was going under and through them at the last open break and exiting the section. Ward measured 1,462 CFM of airflow at the No. 5 face and 1,974 CFM at the No. 6 face. The ventilation plan for this mine calls for at least 3,000 CFM behind the line crew. (Tr. 26:15-27:8)

Brody asserted at trial that there should be a substantive distinction drawn between airflow volumes at “idle” vs. “active” faces. (Tr. 69:19-72:1)⁸ Brody also intimated in its questioning of witnesses that the focus of this order should have been whether the airflow, regardless of the measurable volume, was effective in removing methane from the faces rather than whether the airflow volume was at least 3,000 CFM, as required by the mine ventilation plan. On cross examination, Ward agreed that if there is no methane present, there is no chance for a methane ignition. (Tr. 76:20-77:2) And, the evidence showed that in January 2009, after this order was written, the ventilation plan was changed to focus more on whether the ventilation effectively removed methane rather than on the actual measurable volume of air at the faces. (Tr. 49:24-51:1; 74:6-23; 358:14-359:8)⁹ But, there is no dispute that the ventilation plan in place when this order was written called for measurable airflow volume of at least 3,000 CFM at all faces. (Tr. 74:6-23; 379:15-380:3) There is also no dispute that Ward obtained reliable airflow readings of 1,462 CFM at the No. 5 face and 1,974 CFM at the No. 6 face while the 3,000 CFM requirement was in place. (Tr. 380:9-381:11) Finally, it is clear that those two measurements were not in compliance with the ventilation plan in place at that time. (Tr. 381:12-18)

The 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. *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). In *Asarco*, the Commission concluded that “the operator's fault or lack thereof, rather than being a determinant of liability, is a factor to be considered in assessing a civil penalty.” *Id.* at 1636.

⁷ Fly pads are temporary, semi-clear plastic airflow control devices hung like curtains from the ceiling to direct ventilation air. They are about four feet wide and overlapped so as to be passable by equipment while still directing airflow. (Tr. 34:16-35:3 and 291:7-18)

⁸ The distinction between “idle” and “active” is of no import in relation to the issue of strict liability under the regulations. The regulatory standard relevant to this order requires ventilation airflow of at least 3,000 CFM at any face. Anything less than that constitutes a strict liability violation. It does have relevance as to the degree of negligence, as discussed further below.

⁹ With the change in the ventilation plan that happened in January 2009, this event would not have been a violation. The plan now focuses on whether there is any detectable methane above 1% behind the line curtain and not on the volume of airflow. (Tr. 85:12-24; 50:15-21; 86:3-9)

Accordingly, I conclude that the Secretary has proved a violation of the standard, as alleged in Order No. 8075863.

Significant and Substantial.

The Secretary stipulated that Order Number 8075863 was not a significant and substantial violation of 30 C.F.R. Section 75.370(a)(1).

Negligence.

The Secretary alleges that the conditions described in Order No. 8075863 and the evidence relating to them constitute “high” negligence, as that term is used at 30 C.F.R. §100.3(d) (Table X). High negligence describes a situation in which the operator knows or should know of a violative condition or practice, and there are no mitigating circumstances.

Brody addresses this point on two fronts: (1) A distinction should be drawn on the basis of whether the faces in question were “idle”. The implication is that there should be a substantive difference in the way the standard is applied based on whether the area is being actively mined at the time of the inspection, even though the regulations are silent with respect to this distinction¹⁰; and/or (2) The fact that there was no detectable methane at either face proves that it was not guilty of “high” negligence. This is, in effect, the “no harm – no foul” argument. This argument moves the focus from the unambiguous requirement in the mine ventilation plan that there be airflow of at least 3,000 CFM at all faces to whether the underlying purpose for the airflow requirement has been effectively addressed. The argument is that negligence should be lower because the ends (no detectable methane) take precedence over the means (the exact amount of airflow). (Tr. 386:11-387:17) This is an appropriate issue in the context of mitigating circumstances, which are, in turn, relevant to the degree of negligence to be assessed.

Mitigation is but one prong of a two-prong negligence analysis. The other element is whether the operator knew or should have known of the violating condition. The violating condition in this analysis is the low airflow at the faces, not the fact that this mine is considered “gassy.” There is no dispute between the parties that this is a “gassy” mine. Ward was aware that the mine liberates approximately 1.5 million cubic feet of methane per 24 hours. He felt that even though this area was arguably idle at the time, with that volume of methane, there is always a danger of explosion in any part of the mine that is not adequately ventilated. (Tr. 28:16-29:10) Jay Heiss, a Brody third shift move boss at the time of this violation, also testified that this mine is known as a “gassy” mine and produces around 1.5 million cubic feet of methane per day. (Tr. 318:16-21)

¹⁰ The CFR does not have a definition for “idle face.” It does have one for “working space.” Ward’s definition for “idle face” is a place in a mine where there are no miners present and coal is not being presently extracted. Ward is not certain, but he cannot say that there was anyone working at the No. 5 or 6 face. In his deposition six months earlier, he said there were no men working in those areas. (Tr. 69:19-72:1)

Although Ward considered the low volume of ventilation air to be the hazard rather than the relative concentrations of methane and oxygen (Tr.75:23-76:19), he considered it more than a simple violation that Brody failed to follow its ventilation plan, even though there was no methane/oxygen hazard. (Tr. 77:3-78:13) Ward's review of the pre-shift examination report showed him that there was no measurable methane. (Tr. 69:3-18) He took methane readings at all of the mine faces that day; there was zero methane and 20.8% oxygen, which is normal. (Tr. 75:3-19; 80:3-82:9) Ward considered this mine to meet the definition of a "gassy" mine under Section 103(i) of the Mine Act,¹¹ which to him meant that there was increased risk of a methane explosion which justified increased vigilance on the part of the inspector and the operator. (Tr. 28:16-30:23) It appears that Ward thought the low airflow measurements justified the assignment of high negligence, at least in part, just because this is a gassy mine.

However, the fact that this mine is gassy is not a violation of the standard. It also appears that Ward decided to make more of the gassy nature of this mine than the fact that there was no measurable methane present when he chose to charge this at the level of "high negligence." For example, at the hearing he testified that, even though these orders had been negotiated to eliminate the S&S designation as originally charged, the danger was still there. In his view, the fact that the mine liberates 1.5 million cubic feet of methane per twenty-four hours justifies a charge of "high negligence."

I find that this violation did not result from "high negligence." The definition of "moderate negligence" in 30 C.F.R. §100.3(d) fits these facts more closely. According to 30 C.F.R. §100.3(d) (Table X), moderate negligence is when "[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances." Brody is attributed with knowledge of the low airflow at the faces, but the lack of any measurable methane is a mitigating circumstance which justifies a finding of moderate negligence.¹²

Unwarrantable Failure

In order to establish unwarrantable failure under the Commission's case law, there must be a showing of aggravated conduct - significantly more than ordinary negligence - characterized by "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec. 1987) at 2003-04. Other relevant factors to consider include the length of time a violating condition has existed, the operator's efforts to abate the condition, whether the operator has been placed on notice that greater efforts are necessary to assure compliance, the operator's knowledge of the violating

¹¹ "For purposes of this subsection, 'liberation of excessive quantities of methane or other explosive gases' shall mean liberation of more than one million cubic feet of methane or other explosive gases during a 24-hour period." 30 U.S.C. 813(i)

¹² I am aware that Ward claims to have put Brody on notice that he would be more aggressive in his enforcement of this standard based on his opinion that this being a gassy mine justified stricter enforcement, and I am aware that Ward wrote several other similar citations during his tenure as MSHA inspector for this mine, but I am not persuaded that his announcement of his intentions is enough to make this strict liability violation subject to enhancement for the reasons stated above. (Tr. 31:10-32:19; 33:21-34:15)

condition (or lack thereof), and whether the violation poses a high degree of danger. See *Consolidation Coal Co.*, 23 FMSHRC 588, 593 (June 2001).

Ward issued the order under Sec. 104(d) for unwarrantable failure to comply with a mandatory safety standard. (Tr. 26:15-27:8) He wrote this order as “unwarrantable” because, in his experience a mine like this¹³, should have ventilation of at least 3,000 CFM at the idle faces. He wrote a series of 104(a) citations over the six months that he had been inspecting this mine. He was concerned about the lack of airflow at the 3,000 CFM level in the plan and had put management on alert that he would consider future violations of the 3,000 CFM limit an unwarrantable failure. (Tr. 29:15-30:23) Ward concluded from the timing of events that the fly pads were blowing up at the time of the pre-shift report, even though the report does not mention anything about them. (Tr. 72:6-24) He concluded that the fly pads were not properly constructed or hung, viz they were only a single layer thick. When they were corrected in response to this order, they were doubled and tripled. When the fix was done, the airflow rose to 4,368 CFM at the end of the line curtain. (Tr. 73:6-22)

As mentioned above regarding mitigation and the “high negligence” standard, the fact that there was no detectable methane is a mitigating factor. It should be noted that there is no evidence, other than a possible inference, that this was the result of the operator’s care or diligence – it appears to be a fortuitous circumstance. The violating condition was the low airflow and defectively deployed fly pads. It is appropriate to attribute to Brody knowledge of the low airflow and how to properly deploy fly pads. It is also clear that Brody was aware of the gassy mine issue that weighed on Ward’s mind. However, the fact that there was no measurable methane, whether it is attributable to anything Brody did or not, does act to mitigate.

It is quite apparent that Ward placed more emphasis on the airflows than the resulting methane levels. It is fair to conclude from these facts that Ward was more interested in addressing the potential for an ignition in this gassy mine than the facts relevant to the low airflows that underlie this order.¹⁴ The back-and-forth between MSHA and Brody evident in the changes in the ventilation plan and Ward’s role in it are evidence of this. Brody was clearly aware of the gassy nature of this mine, but that is not the appropriate focus of this analysis. The issue is whether Brody knew or should have known of the low airflows, not whether it knew that this was a gassy mine. Ward, on the other hand, placed more emphasis on the form of the regulation (the airflow measurements) and less on the substance (the lack of measurable methane). So, in this regard, the fact that there was no “harm” does affect the assessment of the “foul.” In sum, there are two elements that mitigate negligence and weigh against a finding of unwarrantable failure: (1) Ward’s personal emphasis on airflow rather than the result of the airflow; and (2) the lack of any measurable methane. The fact that there was no measurable

¹³ Ward referred to this mine as a “103-I methane mine”.

¹⁴ This is not an inappropriate issue for a MSHA inspector to take into account. However, placing extra emphasis on a “potential” condition when addressing actual events cannot bridge the gap between these facts and the quantity and quality of facts needed to prove unwarrantable failure.

methane is relevant and material, and Brody is correct to argue that absence of measurable methane is one of the ultimate objectives of requiring adequate airflow at the faces. Although Brody cannot take direct credit for the fortuitous lack of measurable methane under these facts, it also cannot be penalized by Ward's emphasis on the potential of a methane ignition in a gassy mine. I conclude that this violation did not arise from an unwarrantable failure on Brody's part.

Gravity

For the reasons stated above, I conclude that the facts do not support the Secretary's gravity allegation, i.e., that these conditions are "reasonably likely" to result in "lost workdays or restricted duty" for five persons. The gravity designation is modified to "unlikely" to result in lost workdays or restricted duty for five persons.

Summary and Decision for Order No. 8075863

The Secretary alleged that Brody was strictly liable for violating 30 C.F.R. § 75.370(a)(1) because measured airflows behind the line curtain at the No. 5 and 6 working faces at Brody Mine No. 1 were less than 3,000 CFM, as required by the Approved Ventilation Methane and Dust Control Plan in place at the time. The evidence establishes the strict liability violation.

The Secretary also alleged that Brody's violation constituted an unwarrantable failure to comply with 30 C.F.R. § 75.370(a)(1), that there was "high" negligence, that the violation was reasonably likely to result in lost workdays or restricted duty for five persons, and that the violation was significant and substantial (S&S). The evidence does not support these allegations for the reasons stated above. I conclude that this violation is the result of moderate negligence, and the violation is "unlikely" to result in "lost workdays or restricted duty" for five persons.

The proposed penalty is \$5,211.00. In reference to Sections 105(b) and 110(i) of the Mine Act and 30 C.F.R. §100.3(d), I conclude that the penalty should be reduced to \$350.00.

[1.2] **Order No. 8075864** reads as follows:

“An inadequate pre-shift examinations [sic] was conducted on the active 001-009 MMU, No. 1 Section for the day shift on this date. The person conducting the pre-shift examination shall examined [sic] for hazards. The appropriate ventilation plan requires 3,000 CFM in all idle faces. Citation is issued for low air in the No. 5 and 6 working face. The condition of the line curtains and controls were [sic] very obvious that the each [sic] working face to the most casual observer did not contain 3,000 CFM behind the line curtain at the working faces. The operator was placed on heighten [sic] alert during this inspection. The mines [sic] liberates 1.5 million cube [sic] feet of methane in [a] 24 hour period. This citation is unwarrantable failure to comply with a standard. Mine management has engaged in aggravated conduct by failure to take actions on working faces by a certified person.”

Exhibit S-4

The gravity was assessed as reasonably likely to result in lost workdays or restricted duty for 14 people and as S&S.¹⁵ It was also written as a Section 104(d)(2) violation, an unwarrantable failure to comply with a mandatory standard. The operator's negligence level was assessed as “high,” and the proposed fine is \$7,774.00.

The inspector alleged that Brody failed to perform an adequate pre-shift examination on the 001-009 MMU because the line controls in the No. 5 and No. 6 faces did not have 3,000 CFM behind each line curtain. The inspector alleged that the condition was reasonably likely to cause an injury resulting in lost workdays for fourteen persons.

The Standard

Section 75.360(b)(3) of the Department's regulations, 30 C.F.R. § 75.360(b)(3), requires that a coal mine operator must, prior to every shift, examine every working area for potential hazards. “The scope of the examination shall include the working places, approaches to worked out areas and ventilation controls on these sections and in these areas. 30 C.F.R. §75.360(b)(3) (emphasis added). The Commission has recognized that the preshift examination requirements are “of fundamental importance in assuring a safe working environment underground.” *Secretary of Labor (MSHA) v. Buck Creek Coal Co.*, 17 FMSHRC 8, 15 (Jan. 1995); see also 61 Fed. Reg. 9764, 9790 (Mar. 11, 1996) (“The preshift examination is a critically important and fundamental safety practice in the industry. It is a primary means of determining the effectiveness of the mine's ventilation system and of detecting developing hazards, such as methane accumulations, water accumulations, and bad roof.”).

¹⁵ The S&S designation was dropped by the Secretary at the hearing. (Tr. 12:6-13)

The Evidence

On January 15, 2009, Ward wrote an order for failure to conduct a thorough and accurate pre-shift examination on the 001-009 MMU, because the line controls in the No. 5 and No. 6 faces did not have 3,000 CFM behind each line curtain. (Exhibit S-4, Order No. 8075864)¹⁶ Ward concluded that the operator could not have done a competent pre-shift examination because he concluded that: (1) The fly pads at the No. 5 and No. 6 faces had been pushed out for the entire shift, including the time when the pre-shift examination should have been done. (Tr.41:14-43:11); (2) The airflow readings were below ventilation plan specifications when he checked them, implying the likelihood that they were low at the time of the pre-shift examination as well¹⁷; and (3) The pre-shift examination report for January 15, 2009, (Exhibit S-5) did not mention anything about defective ventilation controls or low airflows, indicating, in light of items (1) and (2), that the pre-shift examination could not have been conducted in compliance with the standard. (Tr. 43:15-24)

Ward tested for methane when he checked the airflow for three orders, No. 8075863, No. 8075864 (the present order), and No. 8075874. In each instance, he got zero methane readings. Ward's view is that there is still a danger with low airflows, even in the absence of methane. Adequate airflow is required to evacuate methane if it should be present. (Tr. 48:13-49:10)

Prior to issuing Order Number 8075864, Ward reviewed Brody's pre-shift report for the section where the No. 5 and No. 6 faces were located and confirmed that no hazards were noted. (Tr. 69: 3-11) Prior to issuing Order Number 8075864, Ward confirmed that Brody's pre-shift, daily, and on-shift reports, examiner's dates, times, and initials were present, which indicated that this pre-shift examination was completed. (Tr. 80:4-9 and Exhibit R-2)

Jay Heiss, Brody's third shift move boss, testified that as part of his pre-shift examination, he checked that the section was clean and rock dusted in the faces, that the curtain was hung properly, that there was proper airflow behind the curtains and proper airflow through each of the last open breaks, and checked for methane in every face. (Tr. 290:17-291: 1) According to Heiss, Brody hangs fly pads in the intersections to push air towards the faces. (Tr. 291:7-12) There are approximately five fly pads on each board which can be doubled or tripled to hold the air back depending on the air pressure. (Tr. 291:20- 23)

Heiss testified that at the time he completed his pre-shift examination on January 15, 2009, proper ventilation controls were in place. (Tr. 301:16-18)

According to Heiss, if Brody's scoop operators are running behind cleaning and rock dusting the faces of sections, they will complete those tasks after the pre-shift examination is completed. (Tr. 300:17-301: 3) It is possible that a scoop could have come by after the pre-shift examination and bumped the fly pad, causing it to lift up. (Tr. 301:6-11) When completing the cleaning and rock dusting process before the start of the new shift, the No. 5 and No. 6 faces are normally the last faces to be rock dusted. (Tr. 309:8-15)

¹⁶ This order is related to the fly pad violation covered in Order No. 8075863.

¹⁷ See the discussion of Order No. 8075863 for details about the condition of the fly pads.

According to Heiss, Brody management informed its miners to keep a close eye on ventilation to make sure that everything was correct in the faces. (Tr. 318:8-15)

Carl Blankenship, the Safety Manager for Brody Mining, testified that fly pads being blown straight out like this is a sign that there is a lot of airflow in the area. But, he agreed that it could also indicate that there may not be adequate airflow where it is needed, e.g., at the face area.¹⁸ Ward suspected as much, checked the airflow at the face, and found that it was below the amount called for in the ventilation plan. (Tr. 384:11- 386:10) Blankenship also speculated that the fly pads were knocked out of place by a piece of equipment after the pre-shift examination was conducted, but before the end of the prior shift. (Tr. 358:3-13) However, no coal had been mined during the prior shift. The prior shift was a non-production, maintenance shift. (Tr. 42:13-23)

Discussion

I conclude from the preponderant evidence that Brody's pre-shift examination did not satisfy the requirements of 30 C.F.R. § 75.360(b)(3). It is appropriate to consider the fact that three¹⁹ of the eight order/citations comprising this consolidated docket deal with the ventilation plan, alleging either that airflows were inadequate or that conditions relating to the airflow controls constituted violations of their respective standards. This weighs against the argument that this was a one-off event that is not representative of how Brody operates this mine. Brody's argument rests on two pillars: (1) The records of the pre-shift examination contradict Ward's allegations; and (2) It is possible that the condition of the fly pads and the resulting low airflows were caused by an event after the pre-shift examination was conducted and recorded. The first of these arguments deserves more attention than the second. However, in order to give it sufficient decisional weight, I would have to place considerable reliance on the speculation that something intervened after the pre-shift report to create the conditions Ward observed and on which he based this order. I cannot go this far. I give more weight to Ward's observations. I cannot join in Brody's speculation that there was an intervening event, nor am I convinced that the pre-shift examination described the conditions in the mine at the time.

¹⁸ According to Blankenship, it is not out of the ordinary to see a fly pad lifted up a little by the airflow. That is just evidence of good air volumes. (Tr. 360:11-17)

¹⁹ Orders No. 8075863, 8075864, and 8075874,

Violation / Negligence

The standard found at 30 C.F.R. § 75.360(b)(3) requires that a coal mine operator must examine every working area for potential hazards, including ventilation controls, prior to each shift. In this instance, there is a significant disconnect between Ward's inspection findings and Brody's pre-shift examination records. There is no evidence to challenge the accuracy of Ward's inspection findings or the method he used to test the airflow. Brody's witnesses suggested that some intervening cause might have accounted for the discrepancy between their pre-shift reports and Ward's inspection results, but I cannot agree, with nothing more than speculation for support. I find and conclude from the evidence that Brody's pre-shift examination, as reflected in their pre-shift report records, did not satisfy the requirements of 30 C.F.R. § 75.360(b)(3).

The negligence attributable to Brody's failure to adequately conduct its pre-shift report does not derive from the negligence allegation of Order No. 8075863. Failure to conduct and document an effective pre-shift report carries its own potential consequences and does not depend on the conditions described in the related low airflow order. I can infer from the defective condition of the fly pads that the condition existed at the time of the pre-shift examination and report.

I have found that the violation alleged in Order No. 8075863 had moderate negligence, but that conclusion was the result of taking into account the mitigating effect of the underlying conditions relating to the faulty fly pads. In this instance, there is nothing to mitigate the deficient pre-shift examination or related report. The fact that there was no detectable methane does not mitigate the fact that the examination and report missed the fly pad problem. As a result, the knowledge attributed to Brody for the violation in Order No. 8075863 carries over to this violation, but not the mitigating effect of no detectable methane. The failure here is not with how the fly pads degraded the ventilation plan, it is with the thoroughness and reliability of the examination process. I conclude, therefore, that Brody's negligence in relation to this violation was high.

Gravity

The Secretary alleges that the same facts that support the underlying fly pad violation should support the faulty pre-shift report violation. There is no separate allegation or separate proof that the faulty pre-shift examination itself was likely to cause injury to miners independent of the underlying fly pad violation. The gravity of a faulty examination and report must derive from the hazard the examination missed. Therefore I conclude that the gravity ruling for Order No. 8075863 applies here as well. The gravity designation is modified to "unlikely."

Significant and Substantial.

The Secretary stipulated that Order No. 8075864 was not a significant and substantial violation of 30 C.F.R. Section 75.370(a)(1).

Unwarrantable Failure

Here, too, the Secretary alleges that the same facts that support the underlying fly pad violation should support the faulty pre-shift report violation. This alleged violation derives from the underlying fly pad violation in Order No. 8075863. There is no separate allegation or separate proof that this faulty pre-shift examination order was anything more than a derivative action based on the deficient pre-shift examination report related to Order No. 8075863. Therefore I conclude that the unwarrantable failure ruling for Order No. 8075863 applies here as well. I conclude that this violation did not arise from an unwarrantable failure on Brody's part.

Summary and Decision for Order No. 8075864

On January 15, 2009, inspector Charles Ward issued Order Number 8075864, a 104(d)(2) order alleging high negligence and a violation of 30 C.F.R. Section 75.360(b)(3). Specifically, the inspector alleged that Brody failed to perform an adequate pre-shift examination on the 001-009 MMU because the line controls in the No. 5 and No. 6 faces did not have 3,000 CFM behind each line curtain. The inspector alleged that the condition was "reasonably likely" to cause an injury resulting in lost workdays to fourteen persons. The Secretary proposed a fine of \$7,774.00.

For the reasons stated above, I conclude that Brody's negligence was high, that the conditions underlying this violation were unlikely to cause injury amounting to anything more than lost workdays or restricted duty for fourteen persons, that the violating condition was not significant and substantial, and that Brody's actions did not constitute an unwarrantable failure to comply with the standard. The penalty will be adjusted to \$1,400.00.

[1.3] **Order No. 8079178** reads as follows:

"The primary escape way on the No. 3 section at Break 7 to Break 8 is not maintained in a safe condition to assure passage of anyone including disabled persons. Water covers the entry for approximately 175 feet, rib to rib, and was measured 12 to 20 inches deep in one area. The water is black to brown in color and is not transparent. The coal and rock under the water makes [sic] travel perilous. This condition is obvious, extensive, has existed for numerous shifts and was known by the foreman and examiners, who recorded it as 'Water at Break 7 in the primary escape way'. This is more than ordinary negligence and the operator displayed aggravated conduct in allowing persons to work with only one escapeway. This is unwarrantable failure to comply with a mandatory standard."

Exhibit S-8

The gravity was assessed as reasonably likely to result in fatalities for eight people and as S&S. It was also written as a Section 104(d)(2) violation, an unwarrantable failure to comply with a

mandatory standard. The operator's negligence level was assessed as "reckless disregard", and the proposed fine is \$56,929.00.

The Standard

30 C.F.R. §75.380(d)(1) provides: "Each escapeway shall be -- (1) Maintained in a safe condition to always assure passage of anyone, including disabled persons."

The Evidence

On January 22, 2009, inspector James Jackson issued Order Number 8079178, a 104(d)(2) order with reckless disregard, alleging a violation of 30 C.F.R. Section 75.380(d)(1), which provides:

Each escapeway shall be—

- (1) Maintained in a safe condition to always assure passage of anyone, including disabled persons.

Inspector Jackson alleged that Brody failed to maintain the primary escapeway on the No. 3 section at Break 7 to Break 8 because of presence of water in the entry for approximately 175 feet and 12 to 20 inches deep. He also alleged that the condition was reasonably likely to cause a fatal injury to eight persons. The Secretary assessed a penalty of \$56,929.00.

James Jackson is an MSHA mine inspector in Region 4 out of the Madison, WV Field Office. (Tr. 104:18-105:1) Jackson assisted Inspector Ward with some of the Brody mine inspections relevant to this order. Jackson was coming on as a new inspector for this mine at the time relevant to this order. (Tr. 33:1-20) This order arises from Jackson's inspection of the Brody No. 1 mine on January 22, 2009.²⁰ He wrote the order for the blocked escapeway in question here. Jackson was accompanied by a trainee inspector, Elmer Borne. (Tr. 107:15-23 and Exhibit S-8)

Prior to issuing Order No. 8079178, Jackson and Borne reviewed Brody's examination records which noted water at Break 7 in the primary escapeway of the No. 3 Section. (Tr. 108:4-21; 130:3-6 and Exhibit S-9) Brody's weekly examination for the week ending January 24, 2009, for the No. 3 section revealed that water existed at Break 7 on January 21, 2009. (Tr. 166:8-14 and Exhibit R-3) The water condition was first noted, according to the weekly examination report, on Wednesday, January 21, 2009. (Tr. 195:3-12 and Exhibit R-3) Brody's daily and on-shift examination for January 22, 2009, revealed that it was pumping water at this location. (Tr. 169:1-7 and Exhibit R-3)

²⁰ Jackson was on Section Number 3 on Wednesday, January 21, 2009, but did not issue a citation or order to Brody for accumulations of water in this escapeway. (Tr. 188:10-19)

Jackson and Borne went to Section 3. Jackson attended to the lifting of another citation, and Borne went to Break 7 to check on the water. Borne returned and reported to Jackson that there was water 12"-20" deep covering about 175 feet from rib to rib. Jackson testified that the bottom was uneven and the water was too cloudy to see the bottom. Jackson concluded the area was unsafe to travel through. The inspectors instructed the foreman to withdraw his miners from that area. (Tr. 109:12-110:12)

Jackson measured the water with a metal rule. (Tr. 111:15-17; 131:10-14) He did not travel the entire distance of the water accumulation to determine how deep it was, to see if the accumulations were black in color, or if the floor was smooth or passable for the entire distance of the accumulations. (Tr. 132:3-16) Jackson estimated that the area covered by water was 175 feet by counting the rows of roof bolts. There is a row of bolts every four feet. (Tr. 111:20-112:1)

Glenn Fields, has been Brody's Mine Superintendent since 2006. (Tr. 184:4-7) Fields is not required to by law, but he does review all of Brody's examination record books on his own. (Tr. 184:8-21) Fields traveled with Jackson on the day Jackson wrote the order for the water in the escapeway. Fields saw Jackson measure the water with a ruler close to the pump. (Tr. 185:14-186:1) However, Fields disputes that Jackson went into the water to the level of twenty inches. (Tr. 186:2-7) Exhibit R-3 states that the water was twelve to twenty inches deep. Fields testified that it was only twelve inches deep. (Tr. 211:23-212:5) Fields did not see Jackson measure the water with a ruler. But, he also did not challenge Jackson's intention to write a citation by showing him that the water was only twelve inches deep by walking out into it. (Tr. 212:6-214:2) Fields cannot dispute the record notation (Exhibit. R-3) that the water hazard covered an area approximately 175 feet long and from rib to rib. (Tr. 211:13-22)

Prior to Jackson's issuing Order No. 8079178, Brody had already placed a pump in the primary escapeway. (Tr. 113:7-13; 129:23-130:2; and 191:20-22) According to Jim Epperly, Brody's General Mine Foreman, Brody had completed a section move on the prior shift and moved the cable line supplying power to the pump. (Tr. 178:21-179:4) According to Glenn Fields, Brody's Superintendent, as part of the section move, Brody's miners have to travel approximately one and a half miles to pull the power off of the power center, lock and tag out the cable, pull the cables up with the section move, and then return to the power center to hook the power back up. (Tr. 191:5-16) After the section move, the cable that went to the pump had not been moved up because there was not enough cable on it. (Tr. 191:17-19) According to Jim Epperly, at the time the inspector issued Order No. 8079178, Brody was in the process of adding additional cable to the pump in order to continue pumping the water out of the section. (Tr. 180:12-15) At the time of this order, all equipment in the area was energized, except the pump. (Tr. 214:3-216:21)

Brody had tried to pump the water, but it was too soupy. They also tried to scoop it up, without success. So, they built a bridge over it. (Tr. 112:5-16) Jackson noted in his records that the pump found in the area was not energized and did not have a drain line attached. Jackson testified that miners told him that they had been using the pump until the mining advanced beyond it. When they moved the power center to stay with the advance, they did not have enough cable to reach the pump, so they just left it where it was. (Tr. 113:4-13)

The area in question was a primary escapeway. Jackson explained that in the event of a mine accident, this is the way miners would exit the mine. Jackson and Borne tried to walk through it, but determined they could not. (Tr. 110:13-111:3) Aubrey Hartman, Brody's Day Shift Foreman, testified that he did not have any trouble walking through the accumulations in the escapeway. (Tr. 245:8-24) Jackson testified about Hartman walking through the flooded area as well. He observed that Hartman walked through the water. Jackson's version is that it was hard for Hartman to walk through. When he came out on the other side, he was wet to his waist. (Tr. 111:4-14)

At the time Jackson issued Order No. 8079178, the secondary escapeway was the most direct route out of the mine from the section. (Tr. 133:14-16; 171:15-22; 196:21-197:1) The secondary escapeway was clear and did not contain any hazards. (Tr. 197:13-17) Also at this time, Brody was driving Section No. 3 (the section in question here) in order to connect with two bore holes – one of which was a de-watering hole. (Tr. 159:8-24) This mine has always been very wet. (Tr. 186:20-23) The predominant purpose of driving Section No. 3 was to develop a borehole in order to remove the water from the mine from its lowest point. Coal mining in this section was secondary to this purpose. (Tr. 186:8-19; 187:12-14)

Although Exhibit S-8 shows that the water in the escapeway is noted under the heading "Hazard," Fields argued that it was not a real hazard. (Tr. 216:22-217:18)

Jackson determined that this violation was S&S because, if there were a need to evacuate the mine, the miners could not use this primary escapeway. According to Jackson, it would have been too hazardous for an injured miner to exit through the water. If they had done a four man stretcher test, the stretcher would have been in the water. When they are in escape mode, the men are all tethered together - if one goes down, they all go down. The escapeway has to be usable by an injured miner by regulation. The stretcher test is one way of checking that possibility. (Tr. 113:19-114:20) In order to abate the water situation, Jackson ordered Brody to remove all the miners who were in by the water and move them out by, which meant in the area of Break 7. (Tr. 190:11-191:2)

Jackson considered this "reckless disregard" because the situation was noted in the log books, but Brody went ahead and mined in that area without abating the hazard. Upper management had counter signed the log books. (Tr. 114:21-115:7) Jackson's notes show that Jim Epperly, the mine foreman, and Eddie Lester, the mine manager, had apologized to Jackson for "dropping the ball" on "D" orders relating to the intake escapeway. They acknowledged that it was their fault, and they would do better. (Tr. 115:8-24) Brody had abated this "D" order by the next workday. (Tr. 116:2-5)

Discussion

Violation

The thrust of Brody's protest of Order No. 8079178 hinges on the argument that, even if the water obstructed the primary escapeway, it is of no effective consequence because: (1) the secondary escapeway remained open, unobstructed, and useable; and (2) miners used the secondary escapeway more than the primary anyway, even in the absence of any obstruction. This argument may pertain to the penalty issues arising from this violation, but not to the issue of whether the regulation was violated. The violation alleged by the Secretary is proved by preponderant evidence.

The regulation is clear. It requires that all escapeways be kept free of any obstruction that would impede travel of miners through the area, including an injured or incapacitated miner. Travel through the escapeway involved in this order was impeded by water accumulation for a distance of approximately 175 feet, rib-to-rib. The water's opacity prevented a view of the bottom, making it impossible to see the floor surface and making it even harder to travel this area safely and expeditiously. The fact that there was an alternate escapeway is irrelevant to the existence of the violation. The regulation requires more than one escapeway in a situation like this, and both escapeways must be kept free of obstruction, irrespective of whether the other escapeway is obstructed. *Sec'y of Labor and UMWA, vs. Maple Creek Inc.*, 27 FMSHRC 555, 561 (Aug. 2005)

We also reject Maple Creek's suggestion that the judge erred in ignoring the existence of an alternate escapeway. The regulation is clear that the maintenance requirement of section 75.380(d)(1) applies to "each" escapeway. More than one escapeway is required, not in recognition that conditions routine to the mine might prevent use of one of the escapeways, but rather because the emergency condition that causes the need to evacuate the mine may prevent use of one of the escapeways. The Senate Committee which was responsible for drafting the Coal Act explained the two-escapeway requirement in the following manner: Mine fires, extensive collapse of roof, or similar occurrences may completely block the regular travelway between the working section and the surface, thus cutting off escape in an emergency unless an alternate route is provided to the surface. As recently as March 1968, 21 men at a salt mine lost their lives because a travelable second escapeway was not provided.

S. Rep. No. 91-411, at 83 (1969), reprinted in Senate Subcomm. on Labor, Comm. on Labor and Public Welfare, 94th Cong., Part I Legislative History of the Federal Coal Mine Health and Safety Act of 1969, at 209 (1975).

Gravity

The Secretary alleges that this violation involves a reasonable likelihood of fatal injury to eight miners. The operator contends that the existence of a second escapeway mitigates the gravity of the violation. I find that there is a reasonable likelihood of fatal injury to eight miners.

All escapeways must be kept free and open to travel. The fact that a secondary escapeway was available is fortunate in the abstract but irrelevant in the specific. The language of the standard is clear and unambiguous. It requires “each” escapeway to be “maintained in a safe condition to always assure passage of anyone, including disabled persons.” Had there been any intent to allow for an adjustment of either the liability or the penalty assessment in this regard, it would have been included in the regulation (and addressed in precedent). Although the evidence of record does allow for some dispute as to whether the inundated area was totally impassible, it is clear enough that in an emergency situation requiring use of this passage as an escapeway in the true sense of the word, the amount of water present here, whether twelve inches or twenty, could render the passage impassible for a disabled person or those assisting a disabled person. The analysis must focus on the most restrictive provision in the standard, otherwise the legislative intent to require a reasonable opportunity for safe exit from a mine in an emergency situation would be undercut. I agree with Judge Barbour’s analysis of a similar issue involving the distinction between a primary and secondary escapeway in *Knox Creek Coal Corp. v. Secretary of Labor*, 2010 WL 5619977, VA 2010-0081-R, December 27, 2010. The designation of “primary” or “secondary” is of no legal significance. The standard does not allow that distinction to be drawn since it unambiguously refers to “any” escapeway.

Significant and Substantial

The Secretary alleges that the violation associated with Order No. 8079178 is “significant and substantial.” (Exhibit S-8) By Commission precedent, there are four elements that must be proved in order to establish a "significant and substantial" violation: (1) The underlying violation of a mandatory standard; (2) The existence of a discrete safety hazard contributed to by the violation; (3) A reasonable likelihood that the hazard contributed to will result in an injury; and (4) A reasonable likelihood that the injury in question will be of a reasonably serious nature. *Secretary of Labor v. Mathies Coal Company*, 6 FMSHRC 1 (January 1984).

In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125 (Aug. 1985), the Commission held:

We have explained further that the third element of the *Mathies* formula “requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury.”... We have emphasized that, in accordance with the language of section 104(d)(1), it is the *contribution* of a violation to the cause and effect of a hazard that must be significant and substantial.

Id. at 1129 (internal citations omitted) (emphasis in original). The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. *See Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *Youghiogeny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987).

First, the facts in this record establish an underlying violation of 30 C.F.R. § 75.380(d)(1), as discussed above. Second, the water accumulation presented a discrete safety hazard in that it hindered unobstructed use of the passage as an escapeway in the event of an emergency mine evacuation. Third, the hazard created by the obstructed escapeway was reasonably likely to cause or contribute to an injury. The Mine Act requires more than one

unobstructed escapeway in anticipation of a worst case scenario in which miners must evacuate a mine to escape harm or death. Conditions in an escapeway must not hinder safe evacuation in any significant way. If conditions as obvious, long standing, serious, and easily remedied as those in this case do impede evacuation, the very purpose of this portion of the Mine Act is compromised, i.e., to prevent injury to miners in emergent circumstances. Rather than prevent injury - the very purpose of requiring multiple clear escapeways - these conditions increased the likelihood of injury to miners by rendering one escapeway unuseable. Fourth, there was a distinct probability that these conditions would contribute to serious injury. During an evacuation, it is presumed that the miners are trying to move from danger to safety. Anything that disrupts or thwarts the evacuation, by definition, subjects the miners to the very dangers they are fleeing. The flooded escapeway here did that and more. It created the additional danger that miners would be injured in the process of evacuating or that rescue operations would be compromised.

The crucial third element of the *Mathies* test guides us to consider the way the violation contributed to either the cause or effect of a hazard in order to determine whether the violation can be considered significant and substantial. As mentioned in the previous paragraph, this violation tended to thwart one of the primary purposes of the Mine Act as it created a new and complicating hazard. This violation could have both caused and increased injury to miners. It was significant and substantial.

Negligence / Unwarrantable Failure / Reckless Disregard

The Commission has held that "unwarrantable failure" on the part of a mine operator in relation to a violation of the Mine Act connotes something more than ordinary negligence. *Secretary of Labor v. Emery Mining Corporation*, 9 FMSHRC 1997 (December 1987). "Unwarrantable failure" may be characterized by such conduct as "reckless disregard", "intentional misconduct", "indifference", or a "serious lack of reasonable care".

The formulations of what constitutes unwarrantable failure present a range of aggravating circumstances from the egregious, e.g., "intentional misconduct", to the dangerously careless, e.g., "reckless disregard", to careless, e.g., "serious lack of reasonable care", to sloppy execution, e.g., "indifference." These factors do not describe the underlying negligence as such, but rather the circumstances beyond negligence which may justify enhanced enforcement action in the context of a 104(d) order, i.e., potential withdrawal orders or pattern of violation enhancement. The facts of this case place the aggravating circumstances at the lower end of that continuum - somewhere between careless and sloppy. If Brody had restored power and a drain line to the pump they had used in the escapeway until the section move, they would have demonstrated reasonable care. The fact that they restored power to all other equipment in the area, but not to the pump, is an aggravating circumstance. Despite the claim that Brody was driving this section with the primary purpose of connecting to ventilation and water removal shafts, their priorities are clear. All other equipment was restored to power, but not the pump in this escapeway. This supports a finding of unwarrantable failure to comply with the standard.

It is also consistent with a finding of "moderate" negligence. "Moderate" negligence is described at 30 C.F.R. § 100.3, Table X as a situation in which the operator knew or should have

known of the violative condition or practice, but there are mitigating circumstances. This is where the existence of a second escapeway inures to Brody's benefit. There is no question that strict liability requires a finding that there was a violation of 30 C.F.R. § 75.380(d)(1) and that Brody's allowing or causing this situation to occur justifies a finding of unwarrantable failure to maintain both escapeways in a safe condition. However, the fact that there was an alternate escapeway in a safe condition and that Brody promptly remedied the violating condition mitigate the degree of negligence to "moderate." This draws an appropriate and fact-supported distinction between concepts of negligence, severity, and enhancement without inappropriately double-counting any individual factor.

Summary and Decision for Order No. 8079178

Order No. 8079178 was written as a Section 104(d)(2) violation alleging S&S and an unwarrantable failure to comply with a mandatory standard. The operator's negligence level was assessed as "reckless disregard," and gravity was assessed as reasonably likely to result in fatalities for eight people. The proposed fine is \$56,929.00.

The Secretary alleged that Brody was strictly liable for violating 30 C.F.R. §75.380(d)(1) because it failed to maintain the primary escapeway on the No. 3 section at Break 7 to Break 8. Specifically the Secretary alleged that Brody allowed water to accumulate in the entry covering an area approximately 175 feet long, rib-to-rib, and 12 to 20 inches deep.

The evidence establishes the strict liability violation. I find that there was a reasonable likelihood of fatal injury to eight miners. I find that this exhibits an unwarrantable failure to comply with the standard and that the violation is significant and substantial. However, for the reasons stated above, I conclude that Brody's negligence is more appropriately characterized as "moderate."

The proposed penalty is \$56,929.00. In reference to Sections 105(b) and 110(i) of the Mine Act and 30 C.F.R. §100.3(d), I conclude that the penalty should be reduced to \$ 18,750.00.

[1.4] **Order No. 8079179** reads as follows:

"Accumulation of combustible material in the form of loose coal, coal dust, and float coal dust is allowed to accumulate at the No. 3 Section tail piece. The front roller and the tail roller on the tail piece is [sic] completely gobbled out and turning in dry compact coal. The conveyor belt is running over top of compacted coal that measured 31 feet in length, 6 to 17 inches deep, and 4 feet wide on the off side of the belt. This condition is visible to the most casual observer. This mine has a history of 75.400 violations, and 29 of these violations have been cited in the last 4 months. This order is unwarrantable failure to comply with a mandatory standard. Mine management has engaged in aggravated conduct constituting more than ordinary negligence."

Exhibit S-10 and R-4

The gravity was assessed as reasonably likely to result in fatalities for eight people and as S&S. It was also written as a Section 104(d)(2) violation, an unwarrantable failure to comply with a mandatory standard. The operator's negligence level was assessed as “reckless disregard,” and the proposed fine is \$70,000.00.

The Standard

30 C.F.R. § 75.400 provides: “Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on diesel- powered and electric equipment therein.”

The Evidence

On January 22, 2009, inspector James Jackson issued Order No. 8079179, a 104(d)(2) order alleging a violation of 30 C.F.R. § 75.400. Jackson alleged “reckless disregard” and that Brody failed to maintain the No. 3 Section tail piece by allowing combustible loose coal, coal dust, and float coal dust to accumulate. (Exhibits S-10 and R-4)

After dealing with the blocked primary escape way in Order No. 8079178, Inspector Jackson and Glenn Fields, a Brody representative, went to the secondary escape way to withdraw the miners. As they did, they came across a belt line tail piece that was congested (“all gobbled up”) with coal accumulations. (Tr. 116:15-117:7) Jackson testified that he observed coal accumulations thirty-one feet long, four feet wide, and from six to seventeen inches deep under the belt line. In Jackson’s experience, this is a lot of accumulation. (Tr. 118:5-11) The accumulations were on the off-side of the belt.²¹ (Tr. 199:2-5)

There are two rollers on the tail piece. One is used to tension the belt, and the other to keep the belt elevated. Jackson testified that he observed coal touching the bottom of the belt and the rollers. The coal appeared dry from touching the rollers. The coal around the front “holdup” roller had turned gray to white in color, which, to Jackson, indicates heat and a potential fire hazard. (Tr. 119:23-120:11)

Jackson characterized this as an S&S violation because belt friction can cause an ignition and fire that could fill the area with smoke and flames, causing danger to the miners and the need to evacuate the area. (Tr. 120:12-19) Jackson also characterized this as “reckless disregard” because one of the miners told him that Brody had mined only thirty feet of coal on that shift, which, according to his experience, was not enough mining to account for that much coal accumulation. He determined that the belt had operated for a longer time because of the amount of accumulation. (Tr. 120:20-122:1) Another reason Jackson gave for the “reckless disregard”

²¹ According to Inspector Jackson the off side of the belt is the area where people do not normally travel or work. (Tr.143:14-17)

allegation was the fact that this mine had a history of 75,400 violations - 29 in the preceding four months. (Tr. 122:2-18)

Jackson felt there was a fire hazard despite the fact that this was a very wet area of the mine.²² He determined this because the coal fires he observed during his years of mining experience were due to friction with rollers on belt lines. (Tr. 122:20-123:7) Jackson also felt the hazard was greater because of the flooded escapeway covered by Order No. 8079178. If there were a fire due to the coal accumulation on the tail piece, the miners would have to exit through the flooded primary escape way. (Tr. 123:8-15)

Fields explained how a typical belt line is configured. When the belt line is moved up, the new area is first dusted with rock dust. (Tr. 209:3-24) There is fire suppression equipment on the feeder over the top of the tail piece. There is 500 feet of fire hose. There is an air regulator across from the tail piece that brings ventilation air in, across the face, and then outby. There is a gob switch at the head that will shut the line down if too much material accumulates there. (Tr. 200:7-14; 199:8-200:14) Fields testified that if the belt had been completely "gobbed out," the belt line would have shut down automatically. (Tr. 206:19-22) Jackson confirmed that the mine had fire suppression systems at the belt head, a water line beside the belt, a fire hose outlet every 300 feet, and fire extinguishers near the tail piece. (Tr. 140:14-17; 141:21-23)²³ Fields testified that there were carbon monoxide detectors at the belt head and at the tail piece in question. (Tr. 207:1-8)

According to Fields, Brody performs belt examinations as part of its pre-shift examination in order to determine if any hazards exist along the belt-lines. (Tr. 202:20-203:5) The day before Order No. 8079179, Brody cleaned and rock dusted²⁴ the tail piece. (Tr. 204:13-19; 209:3-24 and Exhibits R-4 and S-10) According to Fields, Brody applies rock dust every day. (Tr. 210:1-3) During Brody's last belt examination report between 4:00 AM and 7:00 AM on January 22, 2009, before Jackson issued Order No. 8079179, it was reported that the tail piece needed spot cleaning. (Tr. 206:7-15 and Exhibits R-4 and S-10)

On cross examination Jackson testified that the rock dust used in this mine is black, not gray. When pressed about the gray portions of the coal accumulations he testified about earlier, Jackson stated that the fact that the coal dust material was black only underscored his conclusion that the gray accumulations he observed had turned gray due to friction and heat. (Tr. 142:15-24) Fields, on the other hand, testified that rock dust is white. He opined that it is possible that Brody's men got some rock dust on the line when they were dusting below the line, and this is what Jackson saw and thought was dry coal accumulation. However, the coal accumulation was

²² It is in the same area as the flooded escapeway mentioned above in relation to Order No. 8079178.

²³ Counsel intimated in questioning that coal loaded on the belt line would be wet from spray at the feeder, but Jackson did not agree. He did not recall if the feeder's spray mechanism was operating. (Tr. 140:23-141:9)

²⁴ Rock dust is used to keep float coal dust down to prevent an explosion. (Tr. 209:3-14)

completely saturated with water. (Tr. 200:22-201:5; 210:4-10) Coal that is being mined is not sprayed with rock dust unless some gets on it unintentionally. (Tr. 217:19-219:21)

Fields testified that one shuttle car can carry between nine and ten tons of coal (Tr. 198:9-14); that because a shuttle car can carry that much coal, it is possible for one shuttle car load to cause the accumulations cited by the inspector (Tr. 201:18-21); and that this could happen in a matter of minutes. (Tr. 210:11-8)

According to Fields, when he and Jackson approached the belt line, he could detect no smoke, he could see no dust, and he could feel no heat on or near the accumulations. (Tr. 200:15-18)

30 C.F.R. § 75.400 is the most cited standard in the United States and could be issued for a number of different factual circumstances. (Tr. 143:18-144:16)

Discussion

Violation

Brody does not dispute that there were coal accumulations or that the amount of accumulations were essentially as described in Jackson's testimony and related exhibits. Nor does it dispute that the accumulations were in an area considered "active workings." It does dispute when and how the accumulations got there and whether there was evidence of a potential ignition. The fact that accumulations existed is sufficient to support a finding that the standard was violated. The standard does not designate what quantity of coal accumulation constitutes a violation, it merely mandates that any accumulation "in active workings" be cleaned up.²⁵ I conclude that the Secretary has proved a strict liability violation of 30 C.F.R. § 75.400 by a preponderance of the evidence.

Negligence / Unwarrantable Failure / Reckless Disregard

I refer to the prior discussion of the elements of "unwarrantable failure." There is no basis to discount Brody's evidence that it conducted an effective pre-shift examination as reflected in Exhibits R-4 and S-10. However, I cannot conclude that the accumulations Jackson saw were the result of spillage from the limited mining that occurred in the time between the pre-shift report and his inspection, as Brody argued. Although there is more inferential support for this than for the contrary view advocated by the Secretary, the weight of the evidence is still not convincing. Without more convincing evidence, and given that it is the Secretary's burden to prove this point, I cannot conclude that Brody's actions reflected an unwarrantable failure to abide by the standard. The evidence and reasonable inferences do not support a finding of

²⁵ Brody's evidence and argument is pertinent to the related issues of negligence and gravity.

"reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care."²⁶ I conclude, for purposes of this 104(d)(1) order that there was no unwarrantable failure.

I also conclude that the degree of negligence must be adjusted downward. I refer to the prior discussion of the elements of the various degrees of negligence addressed in the regulations. All levels of negligence allow for consideration of the operator's knowledge of the violating conditions and related mitigating circumstances.²⁷ See, 30 C.F.R. § 100.3, Table X. The most significant mitigating circumstance here is the fact that the mine in general and the specific area where this violation occurred are both considered wet. This fact is disputed by no one. Wet material is less likely to combust. Jackson noted in Exhibit S-10 and R-4 that he observed the tail roller turning in dry, compact coal. Further, in testimony, Jackson stated that the coal he observed touching the bottom belt and rollers appeared dry. (Tr. 119:23-120:11) Most of the evidence on this point dealt with the appearance of the accumulations. Moreover, there is no evidence that Jackson, or anyone else, actually felt the material to confirm that it was as dry as it looked or hot. This, taken with the evidence that the rock dust used in the area was white or gray - similar to how Jackson described the dry accumulations - reduces the convincing value of Jackson's observation. This significantly mitigates the degree of Brody's negligence.

According to 30 C.F.R. § 100.3, Table X, all degrees of negligence include knowledge of the violating condition as a factor. Jackson alleged reckless disregard based on Brody's history of being cited for similar incidents, inferring that a pattern existed from which one can further infer that the operator actively avoided "knowing" about violating conditions. I have already dealt with this issue above. Thus, based on the facts in this case, the difference between low, moderate, and high negligence hinges on the degree of mitigation, not on the element of knowledge. I turn then to whether the mitigation I discussed above fits better with low, moderate, or high negligence.

A finding of high negligence requires a finding of no mitigating circumstances. I have found that there are mitigating circumstances. For the reasons discussed above, the mitigation here is more than what is required to find low negligence. A finding of moderate negligence is more appropriate on these facts.

Gravity / Significant and Substantial

²⁶ I am aware that Jackson decided to cite this violation as an "unwarrantable failure" because: (1) miners told him that they had only mined thirty feet on that shift (Tr. 120:20-122:1); (2) Brody had received thirty-nine other 75.400 citations in the prior four-month period (Tr. 122:2-18); and the primary escapeway was flooded, increasing the risk of serious consequences should a fire occur from these accumulations. (Tr. 123:8-15) These items also fail to convince that Brody's actions constituted an unwarrantable failure.

²⁷ The category of "No Negligence" in Table X corresponds to the concept of strict liability and recognizes that an operator can be held strictly liable for violating a standard even though it cannot know of the violating condition by exercising reasonable diligence. Strict liability is not based on a finding of negligence.

The Secretary alleges that this violation results from negligence at the level of “reckless disregard” and gravity at the level of reasonable likelihood of fatal injury to eight miners. (Exhibit S-10) The Secretary also alleges that this violation was “significant and substantial” for purposes of the 104(d)(1) order. The operator asserts three points in defense: (1) The accumulations occurred in the short period between the pre-shift report and Jackson’s inspection, thus there was no notice of or opportunity to avoid the violation; (2) Jackson misinterpreted the appearance of the accumulations when he concluded they had become discolored from friction and heat from the moving belt line; and (3) The accumulations were too wet to be a potential ignition source.

I refer to the prior discussion of the elements of “significant and substantial.” First, the facts in this record establish an underlying violation of 30 C.F.R. § 75.400, as discussed above. Second, the coal accumulations described by Jackson create a discrete safety hazard. There is an articulable and credible danger that even wet coal accumulations can be heated by belt friction to the point of ignition. However on the third point, the evidence fails to convince that there is a reasonable likelihood that the coal accumulations described here will result in an injury. The evidence of a dedicated water spray fire suppression system along the belt line, carbon monoxide detectors, and secondary fire hose system at regular intervals leads to the conclusion that in the event of a fire or smoke caused by belt friction in coal accumulations, the likelihood of resulting injury is remote.²⁸ As a result of this conclusion, the fourth *Mathies* element is moot. I conclude that this violation was not significant and substantial.

For the same reasons, I conclude that it is “unlikely” that an injury or illness would occur, and any injury that might occur would be limited to “lost workdays or restricted duty.” To hold otherwise, I would have to engage in significant speculation beyond reasonable inference and give full credit to Jackson’s conclusions about what the appearance of the coal accumulations meant, a point that is discussed elsewhere in this decision. There is no reason to modify the number of persons potentially affected by the violation.

Summary and Decision for Order No. 8079179

The Secretary alleged that Brody was strictly liable for violating 30 C.F.R. § 75.400 because Inspector Jackson alleged that Brody failed to maintain the No. 3 Section tail piece by allowing combustible material in the form of loose coal, coal dust, and float coal dust to accumulate. Gravity was assessed as reasonably likely to result in fatalities for eight people. Regarding 104(d) enhancement, the Secretary alleged unwarrantable failure and S&S. The operator's negligence level was assessed as “reckless disregard,” and the proposed fine is \$70,000.00.

I find that it is “unlikely” that an injury or illness amounting to “lost workdays or restricted duty” would occur, that there was no unwarrantable failure to comply with the

²⁸ The Secretary produced no evidence that the redundant fire control systems would not work as designed.

standard, and that the violation was not significant and substantial. For the reasons stated above, I conclude that Brody's negligence is more appropriately characterized as "moderate."

In reference to Sections 105(b) and 110(i) of the Mine Act and 30 C.F.R. §100.3(d), I conclude that the penalty should be reduced to \$4,450.00.

[2.0] Docket WEVA 2009-1306

Docket WEVA 2009-1306 comprises four citations/orders listed below as 2.1 through 2.4.

[2.1] Order No. 8068033 reads as follows:

"Safeguard at this mines [sic] requires all employees working in the underground portion of this mine to wear safety goggles or eye shields while traveling in any open type transportation vehicle in this mine. Observed an open type man trip exiting the mine at the top of the slope with 14 miners on board and 5 miners without safety goggles or eye shields being used. One of the miners was the foreman, which [sic] is an agent of the operator being transported on this open type man trip. This citation is unwarrantable failure to comply with a mandatory standard. Mine management has engaged in aggravated conduct by failure to allowed [sic] this hazard to existed [sic]."

Exhibit S-1

Gravity was assessed as reasonably likely to be "permanently disabling" for five people. It was written as a Section 104(d) violation, alleging a "significant and substantial" violation and an unwarrantable failure to comply with a mandatory standard. The operator's negligence level was assessed as "high," and the proposed fine is \$4,099.00.

The Standard

30 C.F.R. § 75.1403 states:

"Other safeguards adequate, in the judgment of an authorized representative of the Secretary, to minimize hazards with respect to transportation of men and materials shall be provided."

The Evidence

On October 8, 2008, inspector Charles Ward issued Order Number 8068033,²⁹ a 104(d) order, alleging a violation of 30 C.F.R. Section 75.1403.³⁰ Ward alleged that the violation was significant and substantial and constituted unwarrantable failure for purposes of 104(d) enhancement. He assessed gravity as reasonably likely to be permanently disabling for five people because the miners were reasonably likely to incur a permanently disabling injury from a scratched cornea. He also determined that the operator showed a high degree of negligence, because the foreman, who is supposed to set an example and is a member of mine management, participated in the violation by not wearing his safety glasses or insuring that the other miners wore theirs. (Exhibits S-1 and R-5) The Secretary assessed a penalty of \$4,099.00. (Exhibit S-13)

Ward traveled with Aubrey Hartman, the mine foreman, on this day. They were going to enter the mine down the one-way slope entrance. (Tr. 228:5-6) They had to get clearance from a dispatcher. (Tr. 228:7-19) A mantrip was exiting the mine; they had to wait for it. (Tr. 59:22-60:4) Ward saw a miner at the front of the mantrip without safety goggles. He confirmed this with Hartman. Hartman spoke to the foreman on the mantrip, Robert Hill, and asked him where his glasses were. Foreman Hill told Ward that one of the men on his section had lost his glasses, so Hill had given him his. (Tr. 20:3-21)

The mantrip that the miners were traveling in on October 8, 2008, could hold 14 miners – two in the front (driver and passenger) facing the direction of travel; four in the middle of the mantrip facing the direction of travel; four in the middle facing the back of the mantrip; two at the back facing the direction of travel; and two in the back facing the back of the mantrip. (Tr. 230:12-231:4) Of the fourteen miners riding on this mantrip, five were not wearing safety glasses. One of the five miners not wearing safety goggles was Robert Hill, the foreman. In addition, there were three miners in the middle of the mantrip with no glasses and one at the back. None of the five men had safety glasses on their person. (Tr. 17:18-19:18) One of the men in the middle of the mantrip was facing backwards. The others were all facing the direction of travel. (Tr. 62:1-17)

The order alleges that the five miners were riding in an open mantrip and were not wearing safety goggles or eye shields. It further alleges that this was reasonably likely to cause an injury resulting in a permanent injury to five persons. (Exhibit S-1; Tr. 16:22-17:17) Ward's rationale in issuing this order was that failure to wear safety glasses while riding in a mantrip can result in eye injury because the mantrip traveled through entries where the airflow was high. Ward measured the airflow at the mine entrance. It was over 200,000 CFM. (Tr. 21:3-18) He testified

²⁹ Order Number 8068033 was admitted into evidence as Exhibits R-5 and S-1.

³⁰ Inspector Ward cited this as a violation of 20 C.F.R. § 1403. He could have cited this as a violation of 20 C.F.R. § 75.1720(a) Section 75, which explicitly requires the wearing of goggles or safety glasses in situations where the eyes need protection from airborne particles.

that this can create a whirlwind effect, which can cause dust, or water droplets containing dust or rust particles, to get into the miners' eyes if left unprotected. (Tr. 20:22-22:24)

The mantrip in question was covered on top and in the back. (Tr. 20:22-21:2; 59:18-2; 231:13-20; 241:21-242:23) The mantrip canopy is made out of sheet metal between 1/32 and 3/32 of an inch thick. (Tr. 232:6-13) At the back of the mantrip is an expandable metal sheet with holes no larger than a finger. (Tr. 233:4-14) There are no holes on the top of the mantrip. (Tr. 232:23-234:3) The mantrip does not have mud flaps because the wheels are set under the body. (Tr. 235:3-7) A loaded mantrip can travel only six or seven miles per hour. (Tr. 229:22-230:3) If miners were sitting on the mantrip facing the direction of travel, the air coming out of the mine would first hit the expandable metal sheet on the back of the mantrip and then hit the miners in the back of their heads. (Tr. 236:6-11)

Ward asked the miners if they had eye protection that day. They all said they did not. He did not ask them if they left it underground. (Tr. 65:12-66:23) Ward concluded that the men had entered the mine and worked the shift without safety glasses. (Tr. 19:19-20:2; 24:6-23) According to Ward, when he asked the miners where their eye protection was, some of them acted a little sheepish as if they knew they were in trouble, not only with MSHA but with Aubrey Hartman, their foreman. (Tr. 95:3-18)

The entry slope was 1,487 feet long with a grade of eleven degrees. (Tr. 227:22-228:4) There was water dripping off the roof of the mantrip which Ward alleged could have contained dissolved rust and other potential eye irritants. His theory is that the air could have blown these irritants into the miners' eyes. (Tr. 22:3-24:5)

In his thirty-three years of mining experience, Aubrey Hartman, has never heard of anyone being injured by something dripping off the ceiling or flipping up from the floor and getting in someone's eye. (Tr. 241:17-20) Ward also has never seen a miner get an eye injury from something dripping off the ceiling in his eight years as an inspector. He testified from personal experience that water dropping into the eyes can carry abrasive material that can scratch the cornea. (Tr. 67:2-68:4) In 35 years in the mining industry, Ward had only had one experience, either personally or as an inspector, where water dropped into someone's eye while riding on a mantrip. (Tr. 67:20-68:7)

Hartman appeared upset that these miners were not wearing eye protection in light of the fact that Brody has a policy and trains miners to always wear goggles when they are riding in a moving piece of equipment. (Tr. 68:11-19; 243:2- 11) Brody supplies its miners with safety goggles and requires all miners to wear them when riding in mantrips. (Tr. 237:6-15) All of the men riding on the covered mantrip in Exhibit S-1 were wearing hard hats with bills. (Tr. 61:20-24)

Discussion

Violation

Either of the safety standards mentioned above could serve as the basis for this order. They both reasonably comprehend the conditions Inspector Ward had in mind when he wrote it. There is no dispute that five miners, including a shift supervisor, traveled up the entry slope to the mine opening in a covered mantrip and that none of them was wearing eye protection. There is little to gain from debating whether a coal mine entry slope is an environment in which airborne dust and other eye irritants are common. Although there is no evidence specifically showing the type and amount of airborne dust and irritants, it is a matter of common sense that a coal mine is a dusty place in general, and that any volume of perceivably moving air can carry such irritants. This is also consistent with the fact that Brody had a company policy, independent of the safety directive in question here, that required its miners to wear eye protection at all time in the mine. In addition, although it is less obvious, any water dripping from a mine roof could contain suspended irritant particles. As a result, the preponderant evidence, reasonable inferences arising from it, and common sense support a conclusion that these conditions violate 30 C.F.R. Section 75.1403. The miners and their supervisor should have been wearing eye protection.

Negligence / Unwarrantable Failure

I refer to the discussion of negligence above. Inspector Ward alleged here that Brody's actions and omissions constituted high negligence as that term is defined at 30 C.F.R. §100.3(d) Table X. "High negligence" is roughly defined as a situation in which the operator knew or should have known of the violative condition and there are no mitigating circumstances. If there are any mitigating circumstances, a finding of "high negligence" is not appropriate. The definitions of all other levels of negligence include some degree of mitigation.³¹

The weight of the evidence here supports a finding that Brody knew of the violating conditions, particularly in light of the fact that a management employee was among the group of miners observed not wearing eye protection. (A foreman or superintendent is held to a higher standard of care. *Secretary of Labor (MSHA) v. S&H Mining, Inc.*, 17 FMSHRC 1918, 1923 (Nov. 1995)).

Mitigating circumstances are generally defined as actions taken by the operator to prevent or correct hazardous conditions or practices. See, *Rochester & Pittsburgh Coal Co.*, 9 FMSHRC 2069 (December 1987). Guided by that concept, it appears that Brody did some things affirmatively to address the danger underlying this order and was the beneficiary of some happenstance that also tended to reduce the danger. In the former group: (1) The mantrip was substantially enclosed. It had a roof, a windscreen in front, a rear passenger compartment guard,

³¹ The category of "no negligence" corresponds to the fact that a violation can be based on strict liability.

and its wheels were under the body. (2) Brody had in place a policy requiring the use of eye protection in this circumstance, it provided its miners with appropriate eye protection, and it trained to its policy. (3) The mantrip was traveling at a slow speed. (4) The miners were all wearing hard hats that afforded some degree of eye protection from above. (5) Traffic to and from the surface was restricted to one-way only and was regulated by a dispatcher, thus reducing the risk of debris being thrown up by other traffic. In the happenstance group: (1) No one was injured. (2) No witness had any personal experience over decades of mine experience that would confirm the likelihood of an injury. (3) The inspector did not observe any actual condition that would increase the likelihood of an injury, other than the fact that there was a substantial volume of airflow moving out of the mine and hitting the mantrip from behind.³² In sum, these items are mitigating factors which undercut a finding of “high negligence” and support a finding of “moderate negligence” under the operative definitions. An argument could be made for a finding of “low negligence” based on the list of mitigating facts, but I find that the miners had been without eye protection for the entire shift, and given that fact, there was ample time for protective eye wear to be brought into the mine for the men.

I refer to the discussion of unwarrantable failure above. A violation of a standard means that someone has failed to comply. The standard concepts of negligence and gravity as set out in 30 C.F.R. § 100.3 are applied to assess an appropriate penalty for a violation. To establish “unwarrantable failure” it is necessary to prove something more than what is needed to prove the violation and penalty. This is consistent with the notion of enhanced enforcement found in Section 104(d). For purposes of proving a violation and an appropriate penalty the focus is on culpability and severity. For purposes of justifying the enhanced enforcement of Section 104(b) the focus should be on why the operator violated the standard not if the standard was violated or how serious the violation was. It is sometimes difficult to avoid overlap between these areas, but careful analysis requires greater care to separate them.

There is a range of aggravating circumstances which justifies enhanced enforcement under Section 104(d), as discussed above. These factors do not describe the underlying negligence and gravity as such, but rather the circumstances beyond negligence and gravity which may justify enhanced enforcement action in the context of a 104(b) order, i.e., potential withdrawal orders or pattern of violation enhancement.

The facts of this case prove the existence of sufficiently aggravating circumstances to justify enhanced enforcement. One of the group of five unprotected miners was the shift foreman, Robert Hill. Not only is his status important for purposes of imputing knowledge of the violating condition to the operator, which is more relevant to determining the degree of negligence, but it is also important for enhancement purposes. The foreman is charged with knowledge of the relevant health and safety standards. He also had full and immediate knowledge of the violation, since he was one of the unprotected miners. He was in a position to

³² Without more detail in the evidence, it is impossible to be more specific about the volume of air involved here. There was no estimate of exiting air speed, and without information about the diameter of the exit slope (among other related factors) it is impossible to begin to calculate how fast the air was moving or whether it could carry with it anything likely to be an eye irritant.

make an on-the-spot management decision to effectively remedy the situation. However, Mr. Hill allowed the condition to persist the entire shift, adding to the likelihood of something untoward. This was an unwarrantable failure.

Gravity (“Seriousness”)

The inspector assessed gravity as reasonably likely to be permanently disabling for five people. I concur with the inspector’s assertion that five people could reasonably be affected by this violation. I also agree with the inspector that it is “reasonably likely” that this violation could result in some injury to miners. However, the facts do not convince me that the severity is as dire as predicted by the inspector. First, there was no specific evidence directed to the issue of severity. Second, the evidence on this issue is limited to inferences from the environment, the layout and construction of the mantrip, and the volume of air through the area in question. I am comfortable inferring that an injury involving “lost workdays or restricted duty” is possible under these conditions, but I cannot press the inference any further. This is consistent with common sense and the fact that Brody itself saw fit to adopt a policy requiring the use of protective eye wear in its mines, to provide its miners with such eye wear, and to train miners about prevention of eye injuries in general. For these reasons, I conclude that the severity designation should be reduced to “lost workdays or restricted duty.”

Significant and Substantial

I refer to the discussion of S&S above. The existence of a violation has been established. I find that the lack of protective eye wear in these circumstances and for this length of time contributed to the potential of eye injury to the miners involved. I also find that there is a reasonable likelihood that the lack of protective eye wear could contribute to the discrete hazard of eye injury. Finally, I find that an eye injury from airborne dust or other irritants could be of a reasonably serious nature, potentially resulting in a loss of workdays or restricted duty. I conclude that this violation was significant and substantial.

Summary and Decision for Order No. 8068033

On October 8, 2008, inspector Charles Ward issued Order Number 8068033, a 104(d) order, alleging a violation of 30 C.F.R. Section 75.1403. Ward alleged that the violation was significant and substantial and constituted unwarrantable failure for purposes of 104(d) enhancement. He assessed gravity as “reasonably likely” to be “permanently disabling” for five people. He also determined that the operator showed a “high” degree of negligence. The Secretary assessed a penalty of \$4,099.00.

For the reasons stated above, I conclude that Brody’s negligence was “moderate,” that these circumstances reflect an unwarrantable failure to abide by the standard, that gravity is consistent with a reasonable likelihood of “lost workdays or restricted duty” for five miners, and that the violation was S&S. The penalty will be reduced to \$1,050.00.

[2.2] **Order No. 8075874** reads as follows:

“The Approved Ventilation Methane and Dust Control Plan for the 007-0 MMU is not been complied with. The approved plan requires 3,000 CFM behind the line in all idle faces. The No. 4 working face that is idle, using an approved anemometer behind the line curtain 1,050 CFM was measured behind the line curtain [sic]. The operator has been placed on heighten [sic] alert during this inspection and has been cited for this condition. The mines [sic] liberates 1.5 million cube [sic] feet of methane in a 24 hour period.

This order is unwarrantable failure to comply with a mandatory standard. Mine management has engaged in aggravated conduct by failure to take action on this hazard.”

Exhibit S-6 and R-6³³

The gravity was assessed as reasonably likely to result in lost workdays or restricted duty for five people and as S&S.³⁴ It was also written as a Section 104(d)(2) violation, an unwarrantable failure to comply with a mandatory standard. The operator's negligence level was assessed as “high,” and the proposed fine is \$4,440.00.

The Standard

30 C.F.R. § 75.1403 states:

“The operator shall develop and follow a ventilation plan approved by the district manager. The plan shall be designed to control methane and respirable dust and shall be suitable to the conditions and mining system at the mine. The ventilation plan shall consist of two parts, the plan content as prescribed in §75.371 and the ventilation map with information as prescribed in §75.372. Only that portion of the map which contains information required under §75.371 will be subject to approval by the district manager.”

The Evidence

On February 11, 2009, inspector Charles Ward issued Order Number 8075874, a 104(d)(2) order with high negligence, alleging a violation of 30 C.F.R. Section 75.370(a)(1). Specifically, Ward alleged that Brody did not comply with its approved ventilation methane and dust control plan for the 007-0 MMU. He alleged that the airflow measured 1,050 CFM behind the line curtain in the No. 4 face, and that the condition was reasonably likely to cause an injury resulting in lost workdays to five persons.

³³ Order Number 8075874, including Brody’s pre-shift, daily, and on-shift reports, were admitted into evidence as Exhibit R-6.

³⁴ At the hearing, the Secretary stipulated that Order Numbers 8075863, 8075864, and 8075874 were non- S&S violations. (Tr. 12:2-11)

Ward conducted his examination of the No. 4 working face on the 007MMU on February 11, 2009, in the presence of Carl Blankenship, Brody's Safety Manager. It appeared to Blankenship as if the crew had just "scooped" before he got there. In doing this, they pushed loose material out into the face area causing a restriction of the airflow behind the line curtain. The mine's ventilation plan called for a minimum airflow of 3,000 CFM behind the line curtain at an idle working face. (Tr. 47:22-49:10) Ward tested the airflow and found 1,050 CFM. He explained to Blankenship that he was issuing a 104(d) order for unwarrantable failure and that he had warned Brody representatives several weeks earlier ("high alert") that he would use the more aggressive citation in the future. (Tr.44:12-46:18; 47:22-48:12 and Exhibit S-6)

The No. 4 face was empty of men and equipment at the time Ward inspected for this order. (Tr. 83:8-14; 362:5-12)

Ward tested for methane when he checked the airflow. He got a zero methane reading and oxygen at 20.8%. (Tr. 83:18-22; 361:1-362:4) According to Ward, there is still a danger with low airflows, even in the absence of methane. The airflow is required to evacuate methane if it should be present. Ward explained that unless there is a sufficient amount of airflow, methane will not get flushed out of the mine and can accumulate. A methane buildup can lead to an explosion, which can result in death or serious injury to miners. (Tr. 48:13-49:10) Since this mine expels approximately 1.5 million cubic feet of methane every twenty-four hours, Ward believed it imperative that Brody adhere to its ventilation plan and insure that it meet the plan's minimum airflow requirements. (Tr. 34:16-35:18) Ward agreed that when there is 0% methane and 20.8% oxygen, there is no chance of a methane explosion. (Tr.86:10-13)

Brody had a history of thirty-one citations for violating its ventilation control plan between October 28, 2008, and January 15, 2009, a ten week period . (Tr. 32:-34: 4 and Exhibit S-13)

Ward reviewed the pre-shift report. There was no mention of any hazard. (Tr. 83:23-84:6)

The cause of the low airflow at the No. 4 face was lack of space and obstruction behind the curtain. There was gob at the face that restricted the airflow. Blankenship did not remove the gob, he just moved the curtain back from the face a little while Ward was standing there. He moved it to the next row of roof bolts to create more space between it and the face. (Tr. 84:14-21; 390:1-391:1) Ward took another air reading. It showed airflow of 3,408 CFM and again, zero methane. (Tr. 84:14-21; 362:17-363:15; 387:18-390:7) The order was abated in six minutes. (Tr. 46:20-21; 84:7-13; 362:13-16)

Ward testified that the gob that restricted the low air in the No. 4 face was near the fly pad for no longer than one shift, even though Carl Blankenship testified that there was no gob at the face. (Tr. 47:15-21; 362:21- 23)

Blankenship argued that there was adequate airflow behind the line curtain, regardless of what the ventilation plan required, because there was no methane there. He agreed that the

measured airflow was less than required by the ventilation plan in effect at the time. (Tr. 391:2-9)

Prior to Inspector Ward starting his inspection at the Brody mine, there was a different methane and dust control plan in place. In January 2009, the plan was changed at the request of Inspector Ward. According to Ward, if he encountered the condition cited in this order today, he would not find a violation. (Tr. 50:4-21) The plan in effect at the time of this order focused on whether there is any detectable methane above 1% behind the line curtain and not on the volume of airflow. (Tr. 85:12-24)

Discussion

Violation

There is no dispute that the mine ventilation plan in place at the time relevant to this order called for a minimum of 3,000 CFM of airflow at all idle faces. The No. 4 face was idle at the time of this order. Ward took valid readings of the air flow at face No. 4 and detected only 1,050 CFM of air flow. This is sufficient to prove a strict liability violation of 30 C.F.R. Section 75.370(a)(1) and the portion of the mine's ventilation place that requires 3,000 CFM at all idle faces.

I take note of the "no harm, no foul" argument raised by Mr. Blankenship, but as I discussed above in relation to order No. 8075863, such an argument is of no avail with regard to whether a violation has occurred in a strict liability environment. It is relevant and will be considered in relation to other issues.

Negligence / Unwarrantable Failure

Inspector Ward alleged "high negligence" in Exhibit S-6. "High negligence" describes a situation in which the operator knew or should have known of the violative condition and there are no mitigating circumstances. If there are any mitigating circumstances, a finding of "high negligence" is not appropriate, according to the categories of negligence shown at 30 C.F.R. § 100.3 Table X. The definitions of "low negligence," "moderate negligence," and "high negligence" all include some degree of mitigation.

With few departures, I adopt and repeat my analysis of negligence and mitigation in relation to order No. 8075863 above. Here again Brody raises two points: (1) A distinction should be

drawn on the basis of whether the face in question was "idle"; and/or (2) The fact that there was no detectable methane mitigates against a finding of "high" negligence, again the "no harm – no foul" argument.

The evidence shows that the condition causing the low airflow was the presence of gob between the No. 4 face and its line curtain. The only evidence pertinent to whether Brody had knowledge of the low airflow is the pre-shift report which made no mention of it. As a result, the weight of the evidence supports a finding that Brody did not have actual knowledge of the low airflow. There is no evidence that would show that Brody should have known that gob was restricting the airflow at face No. 4 prior to Ward's inspection. Nothing was presented to call into question Brody's thoroughness, accuracy, or diligence in performing its examination and pre-shift report. The Secretary argues, in broad strokes, that Brody's history of prior violations of the same standard should be considered as evidence of knowledge. However, her argument has little traction with this evidence. The low airflow in this instance has a clear cause which has nothing to do with any reasonable inference to be drawn from Brody's violation history. The evidence fails to show any deficiency in the examination or pre-shift report, despite Brody's history of accused noncompliance. I find that Brody did not know and is not imputed to know of the condition causing the low airflow in this instance.³⁵

This does not affect my finding of a strict liability violation of the standard, but it is important vis-a-vis negligence. All degrees of negligence summarized at 30 C.F.R. § 100.3 Table X require a finding that the operator knew or should have known of the violating condition. The only category of liability associated with a lack of culpable knowledge is that for a strict liability violation. I find that this violation did not result from "high negligence." The definition of "no negligence" in 30 C.F.R. §100.3 fits these facts more closely. According to 30 C.F.R. §100.3(d) (Table X), "no negligence" is when "[t]he operator exercised diligence and could not have known of the violative condition or practice." I conclude that Brody was not negligent in relation to this strict liability violation.

The Commission has examined various factors in determining whether a violation is unwarrantable, including the extent of a violative condition, the length of time that it has existed, whether the violation is obvious, or poses a high degree of danger, whether the operator has been placed on notice that greater efforts are necessary for compliance, and the operator's efforts in abating the violative condition. *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988); *Kitt Energy Corp.*, 6 FMSHRC 1596, 1603 (July 1984); *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1129 (July 1992). The Commission has also examined the operator's knowledge of the existence of the dangerous condition. E.g., *Cyprus Plateau Mining Corp.*, 16 FMSHRC 1604, 1608 (Aug. 1994) (affirming unwarrantable failure determination where operator aware of brake malfunction failed to remedy problem); *Warren Steen*, 14 FMSHRC at 1126-27 (knowledge of hazard and failure to take adequate precautionary measures support unwarrantable determination); *see also Consolidation Coal Co.*, 23 FMSHRC 588, 593 (June 2001).

One of the various factors relevant to unwarrantable failure is whether the operator has been placed on alert that greater compliance efforts are required. There is evidence of heightened

³⁵ I repeat my treatment of the "gassy" condition of this mine from above as to the facts, analysis, and conclusion. As above, the fact that this mine was gassy was not a violation of the standard.

alert in this record. However, there must be a nexus between the actions relevant to a given violation and MSHA's having put the operator on heightened alert. A heightened alert must be shown to have a specific point of connection to the facts of an alleged violation. A general statement of heightened alert cannot substitute for the Secretary carrying her burden of proof. With all alleged violations, it is the Secretary's burden to prove all elements necessary to support the violation, the proposed penalty, and any enhanced enforcement consequences. The fact that an operator is on heightened alert about violations of its ventilation plan in general does not change the Secretary's burden of proving anything. The Secretary cannot bootstrap a violation up to the level of enhanced enforcement consequences without proving a convincing connection between the circumstances giving rise to the heightened alert and the specific circumstances of the violation. The Secretary has not proved the nexus in this instance. The fact that Brody was on heightened alert from its prior history of ventilation plan violations is inapposite to the issue of unwarrantable failure on the facts of this order. Had there been evidence that the physical obstruction that disrupted the airflow existed for a longer period of time, or evidence of methane buildup, an argument could be made that the heightened alert that Inspector Ward noted when he wrote this order had a connection to the facts giving rise to the violation. But, such evidence is not in this record. The heightened alert that Ward refers to relates to the effectiveness of Brody's ventilation actions, in general, not to this one-off and very short-term airflow obstruction. To find that the heightened alert in this case had a bearing on this violation would bypass the very important requirement that the Secretary prove a nexus between her theory of generalized compliance laxity and the specific facts of this violation. The nexus has not been proved; the theory remains unconnected to this violation.

Another relevant factor is knowledge of a dangerous condition. The Brody mine is known as a gassy mine. Depending on the facts of a case, this could be a relevant and dangerous condition and could support a finding of unwarrantable failure. The low airflow in this case was caused by debris between the face and the line curtain that obstructed flow. As soon as the curtain was repositioned to provide a larger area for the air to flow through, the airflow reading increased to approved levels. There is no evidence to suggest that Brody knew or could have known that this otherwise innocuous circumstance could affect the airflow, nor was there any evidence that the condition existed for long enough to become apparent. Despite this being a gassy mine, the reading detected no methane, so its being gassy has no connection to any real danger. The condition did not exist long enough to put Brody on notice. Had there been evidence showing that Brody could have and should have anticipated that such an accumulation of gob would occur, and that it would likely cause an airflow disruption, or that this type of airflow obstruction was foreseeable with any amount of gob obstruction when the line curtain is placed so close to the face, the Secretary's argument that Brody had the type of actionable knowledge necessary to apply this precedent would be much stronger. I am not able to find that Brody had knowledge of this type of dangerous condition such as would be needed to elevate this situation to the level of an unwarrantable failure.

Another of the factors mentioned in precedent that can support enhanced enforcement is the existence of a high degree of danger. Nearly all activity in a mine is attended by some

danger. There is no debate that given the right mixture of oxygen and methane, a devastating explosion is a possibility. But, in order to have the advantage of this common knowledge for purposes of penalty enhancement, the Secretary has to prove the existence of the conditions likely to likely to cause an explosion. It is not enough to ask the fact finder to agree that, in the abstract, a disaster is possible. There must be some evidence capable of taking the fact finder from the abstract possibility to a distinct likelihood. In other words, the Secretary has to prove by a preponderance of the evidence that the conditions reflected in the evidence are, in reality, reasonably likely to pose a high degree of danger. The evidence here does not go that far, in fact it falls quite short. Despite these violations of the extant ventilation plan, there was never any measurable methane detected. It is impossible to infer a high degree of danger with this evidence.

Finally, it bears mention that the fix for the violation took only six minutes. It is hard to argue that a short-term condition that has the effect of obstructing airflow to a level in violation of the plan is serious enough to warrant enhanced enforcement treatment when the fix is so immediate and when, despite the violation, no methane has accumulated. This weighs against a finding of unwarrantable failure.

In sum, none of the various factors cited in precedent as a basis for finding an unwarrantable failure avails here. I conclude that Brody's violation of its ventilation plan was not an unwarrantable failure.

Gravity

Gravity was assessed as "reasonably likely" to result in "lost workdays or restricted duty" for five people. I conclude that there is no likelihood that any loss of workdays or other greater consequence would result from these conditions. I base this conclusion on the analysis in the previous section. Under these facts, I must also conclude that with no likelihood of occurrence, there is "no likelihood" of any workdays or anything more dire. As a result, I also conclude that with no likelihood of any injury or lost work, no miners are involved.

Summary and Decision for Order No. 8075874

On February 11, 2009, inspector Charles Ward issued Order Number 8075874, a 104(d)(2) order with "high" negligence, alleging a violation of 30 C.F.R. Section 75.370(a)(1). Ward alleged that Brody did not comply with its approved ventilation methane and dust control plan for the 007-0 MMU. He alleged that the air measured 1,050 CFM behind the line curtain in the No. 4 face, and that the condition was "reasonably likely" to cause an injury resulting in lost workdays to five persons. The Secretary assessed a penalty of \$4,440.00.

For the reasons stated above, I conclude that Brody has no negligence, that the violation is not an unwarrantable failure to abide by the standard, that there is "no likelihood" of any loss of workdays for any miners, and that the parties stipulated that the violation was not S&S. The penalty will be reduced to \$100.00.

[2.3] **Order No. 8075906** reads as follows:

“Mechanical equipment guards that exposed moving machine parts which may be contacted by persons shall be guarded. The Joy High Land shuttle car Co. No. 4, Ser. No. 2006-04-1001 being used on the 005-0 MMU, No. 2 Section is missing a guard that exposed an opening 1 foot by 1 foot to the cable reel sprocket. The guard was laying [sic] in the operator compartment. The operator stated that the guard has been missing for at least 2 weeks.

This order is unwarrantable failure to comply with a mandatory standard. Mine management has engaged in aggravated conduct by failure to act on this hazard.”

Exhibit S-7

The gravity was assessed as “reasonably likely” to be “permanently disabling” for one person and as S&S. It was also written as a Section 104(d)(2) violation, an unwarrantable failure to comply with a mandatory standard. The operator's negligence level was assessed as “high,” and the proposed fine is \$4,000.00.

The Standard

30 C.F.R. § 75.1722(a) states:

“Gears; sprockets; chains; drive, head, tail, and take up pulleys; flywheels; couplings, shafts; saw blades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons shall be guarded.”

The Evidence

On March 3, 2009, Inspector Ward issued Order No. 8075906, a 104(d)(2) order, alleging a violation of 30 C.F.R. Section 75.1722(a)³⁶ and high negligence. The inspector alleged that a missing guard on a shuttle car exposed an opening of one foot by one foot to moving parts. The inspector alleged that the condition was “reasonably likely” to cause a “permanently disabling” injury to one person. (Tr. 51:8-19 and Exhibit S-7)

Accompanied by Carl Blankenship, Ward traveled down to the No. 2 Section where he observed the mining of coal. Ward and Blankenship walked across an entry to where a continuous miner was digging coal. A shuttle car came up to the continuous miner to retrieve some coal, and Ward, standing on the offside of the shuttle car, noticed that the reel unit wheel sprocket compartment was missing a guard plate. (Tr. 52:5-53:9) He pointed it out to Blankenship who promptly ordered the operator to shut the car down. Ward and Blankenship walked to the shuttle car. Ward asked the shuttle operator, Mr. Lambert, where the 12" x 12" guard plate was. Lambert told him it was under his feet in the cab compartment. (Tr. 53:10-13)

³⁶ Order Number 8075906, including Brody's electrical examination reports, were admitted into evidence as Exhibits R-8 and S-7.

According to Scott Watkins and Carl Blankenship, the operator's compartment on a shuttle car is small. It would be annoying and possibly in the way to have a 12" x 12" guard plate rattling around in the cage. (Tr. 340:19-341:11)

Ward asked Lambert how long the plate had been missing. According to Ward, Lambert answered, "Two weeks." (Tr. 53:5-21; 89:7-23)

Ward testified that he was concerned that someone approaching from the offside of the shuttle car, as he and Mr. Blankenship had just done, could slip, fall, and accidentally thrust a limb into the unguarded wheel sprocket which could cause a serious injury. (Tr. 56:6-57:12) Consequently, Inspector Ward issued a 104 (d) Order, for failure to guard exposed moving machine parts.

Ward testified that Scotty Ray Watkins, the electrician who came to repair the guard plate, told him that he had reported the missing plate two weeks earlier. Watkins took a notebook out of his pocket and showed Ward a notation to that effect. (Tr. 54:3-24; 89:7-23)

The guard was located on the left side of the shuttle car, opposite the driver, on the same side as the cable reel and toward the dumping end. (Tr. 86:17- 87:3; 99:5- 101:15; 336:1-11; 364:3-365:13) It was about waist high. It covered an opening about 12" x 12" over a six inch chain sprocket wheel. It was part of what is called the "leveling wind." There was about three inches of clearance from the sprocket wheel to the plate opening. (Tr. 55:1-21) According to Ward, anyone walking on the left side of the shuttle car could trip over loose material, throw out a hand to catch his fall, and have it wind up inside the sprocket housing. (Tr. 90:9-91:11)

Ward also testified that the shuttle operator cannot reach around from the operator's compartment and put his hand in the cable reel sprocket. (Tr. 88:6-9) For the shuttle operator to come into contact with the cable reel sprocket, the operator would have to get out of the shuttle car and walk around to the other side of the car (off side). (Tr. 327:23-328:10) There is a panic bar in the operator cage that shuts the vehicle off if the operator leaves the cage. (Tr. 405:24-409:1)

Brody has a policy that forbids anyone walking on the off side of the shuttle car while it is in operation. (Tr. 329:20-329:2) Because of the gear ratio, the shuttle car would only have to move a little for the sprocket wheel to turn enough to catch a hand. Despite the company policy, Ward concluded there was still a danger of an injury with the plate missing. (Tr. 55:22-57:7) Brody developed evidence at the hearing that despite the company policy to the contrary, during this inspection, Ward and Blankenship were on the off side of the shuttle car while it was operating. (Tr. 57:8-12)

When the operator of a shuttle car exits the compartment, he is trained to turn the machine off and de-energize the equipment. (Tr. 328:14-18; 407:21-408:4)

Ward did not observe any debris that would create a tripping hazard or any men working on the off-side of the shuttle car. (Tr. 88:10-24; 367:8-11)

Regulations require the mine operator to do a weekly mine equipment inspection and note any hazards in a log book. Ward did not review that log book. (Tr. 92:4-16; 364:3-365:13)³⁷ Ward was on the Brody premises on March 3, 2009, to test for respirable dust, not airflow. He was not looking for anything not related to dust testing. However, when he saw the missing guard plate, he felt he had a duty to write it up. According to Ward, that is one reason why he did not review the company examination records regarding the missing guard plate. Ward testified that if he had known that the examination records did not mention the missing plate, and had learned from the miners what he did about the plate, he would have written them up for a violation of an additional standard.³⁸ Ward stated that he had failed in his duty with respect to this. (Tr. 98:1-24)

Based on his experience, Ward has seen situations where coal “humps up” on the feeder system so the shuttle car driver cannot see anything on the off-side. So, even though a company may have a policy prohibiting miners from being on the off-side of a shuttle car in operation, if someone violates the policy by being where he shouldn’t, the operator cannot always see someone over there. (Tr. 99:5-100:1)

In March 2009, Scotty Ray Watkins was a troubleshooter on the day shift working in the Brody mine. (Tr. 323:7-326:7) He was present when Ward wrote citation No. 8075906. Watkins testified that Ward noticed that the guard plate was missing. Shuttle operator Lambert reached inside the operator’s deck and pulled the guard out. Lambert said, sarcastically: “The guard has been off for two weeks. I told them to fix it, and they just disregard it.” Kevin Webb, Brody’s day shift mine foreman, was in on the last of this exchange. Webb told Watkins to fix the problem. (Tr. 333:18-335:3) Watkins got the service scoop and came back and fixed the guard plate. The repair was done the same shift; it took about ten minutes. (Tr. 51:21-54:50; 335:4-11; 349:10-12; 366:23-367:2)

According to Watkins, the guard plate covered an opening about one foot square, not large enough to get a foot into. (Tr. 335:12-24)

According to Watkins, the examination report for the shuttle car for the most recent examination before this order was February 28, 2009. It does not show anything related to the guard plate. There was no report of any problem with the cable reel on the shuttle car for the two weeks prior to the order. If the guard plate had been missing during any of the prior examinations, the shuttle operator has a legal obligation to note it in the records and to get it

³⁷ According to counsel, Brody’s records for the shuttle car for the four weeks prior to this order did not show any hazard. This is not evidence. (Tr. 89:4-11)

³⁸ Although the record is silent as to what additional or different standard Ward would have used as a basis for the hypothetical second order, I take from context that he would have cited Brody for failing to note the missing guard plate in its examination records.

fixed. (Tr. 336:12-340:18; 329:21-23; 366:15-22) During the two weeks prior to the order, the shuttle car would have been inspected several times. (Tr. 342:10-343:6)

Kevin Webb described how frequently a shuttle car is examined and what a typical examination entails. If an operator finds something wrong with the shuttle car, he shuts it off and reports it to management. (Tr. 409:7-410:21) Webb reviewed the documents in Exhibit R-8 and noted that they do not talk about any problem with a missing guard plate. (Tr. 410:22-412:11)

Brody operated this shuttle car on two production shifts with two different miner operators. (Tr. 330:18-23) Brody performed a weekly permissibility check by a certified electrician once a week on shuttle cars and a physical examination of the equipment two times per day (Tr. 330:2- 331:1 and Exhibit R-8)

Brody cleaned and washed the shuttle car on February 16, 2009, and did not note any hazards on that date. (Tr. 331:18-21 and Exhibit R-8) Brody performed a ground continuity check on February 20, 2009, which included checking the cable reel. (Tr. 332:1-4 and Exhibit R-8) Brody cleaned and washed the shuttle car on February 23, 2009, and did not note any hazards on that date. (Tr. 332:19-21 and Exhibit R-8) Brody performed a ground continuity check on Saturday February 28, 2009, which included checking the cable reel. (Tr. 338:17-22 and Exhibit R-8)

Watkins testified that the bolts on the guard plate had been sheered off, which would have taken more force than just prying on it. It would take something like an impact with another piece of equipment to do it. One of the bolts looked like it had just been broken. The other one had been broken long enough to rust a little. (Tr. 341:12-342:9)

The notes on page 14 of Exhibit S-7 indicate that Watkins showed Ward his notes where it states that Watkins had reported that the guard plate was missing. Watkins denied this in his testimony. (Tr. 344:20-346:21) At his deposition, Watkins conceded that he may have “possibly” written something in his personal work notebook about the missing guard plate. When pressed on this point, Watkins stood firm on his denial that he wrote anything about this in his notebook. (Tr. 345:13-349:4) Watkins was keeping a personal notebook at work and had been doing so for some time prior. (Tr. 348:7-349:4)

As shown in Exhibit R-8, Carl Blankenship was with Ward when this order was written. In his testimony, Blankenship described the dimensions of a shuttle car and Brody’s policy regarding what an operator must do to inspect the vehicle before using it. He also explained the “off side” rule about miners not working around a shuttle car. (Tr. 364:3-365:13) Blankenship saw the guard plate missing. He saw that there was a bolt missing on the guard plate. (Tr. 367:5-7) He did not measure it. Both he and Ward were off side while they looked at the missing plate. The shuttle car was not energized, so he felt it was nothing of any consequence. (Tr. 365:14-366:14; 419:5-7)

According to Blankenship, it is not realistic to believe that someone could get their foot or hand inside the guard plate opening and be injured. (Tr. 367:8-368:1) Blankenship does not believe it would be prudent to operate the shuttle car with the guard plate rattling around inside the operator cage. (Tr. 369:8-19)

Blankenship goes over the daily and weekly examinations Brody reports does on each shuttle car. (Tr. 369:1- 9) If anyone had been aware of the guard plate issue, it would have been fixed immediately. (Tr. 369:10- 13) Blankenship does not believe that the guard plate could have been missing for two weeks. (Tr. 369:14-370:6)

Regarding the apparent conflict between Ward's recollection and notes about Lambert's purported statement that he had notified Brody maintenance people about the missing plate two weeks prior to this order, Blankenship stated that a miner would make up a story about the plate missing for two weeks to cover his own failure for not reporting it sooner. A miner would have been written up for this. (Tr. 370:7-14)

Webb saw that the guard plate was missing. He did not remember any damage to the plate. Webb stated that it took Watkins 15 - 20 minutes to fix it. He also confirmed that it would be possible, but annoying, to operate the shuttle car with a loose guard plate in the operator's cage. (Tr. 412:12- 415:22)

Webb denied hearing Lambert say anything about the guard plate missing for two weeks. (Tr. 415:5-416:5)

Discussion

Violation / Negligence

There is no dispute that the shuttle car was missing a guard plate and that mechanical parts, including a sprocket wheel, were exposed. Brody does not dispute that the missing guard over the sprocket wheel on the shuttle car was a violation. (Brody's Motion for Summary Decision at 39, n. 9) The other element necessary to prove a violation of 30 C.F.R. § 75.1722(a) is whether a person might come in contact with the exposed moving parts. The parties dispute this second element. Brody raises four points in its defense³⁹: (1) The opening was too small to pose a threat of "contact"; (2) In order for a person to be on the offside of the shuttle, where the plate should be while the shuttle is in operation, he/she would have to violate a company policy; (3) There was no trip and fall hazard that could result in a person falling into the mechanism; and (4) It would be impossible for the operator to come in contact with the moving parts while the shuttle is operating.

The "violation of company policy" defense is the least compelling vis-a-vis whether a violation occurred. Would that all that was required to avoid injury to miners was a company

³⁹ These defense issues are also relevant to the analysis of negligence, gravity, S&S, and unwarrantable failure.

policy! It is easily foreseeable that a miner might violate a company policy, even one designed to protect him/her. The fact that Brody anticipated the likelihood of injury when miners work on the blind side (offside) of dangerous equipment shows how weak this defense is. There is no better evidence of the seriousness of a hazard than when a company implements a policy to avoid it - and no weaker defense for a violation. It avails them nothing to argue that they should be absolved of liability for a violation if a miner violates one of their policies.

On the other hand, the offside policy does help Brody when we consider negligence. Recognition of a hazard and implementation of a protective policy is evidence of due care that can be weighed with other evidence pertinent to negligence.

The arguments that the opening was too small and that there was no evidence of a trip-and-fall hazard are discussed in tandem.⁴⁰ The argument that the opening was too small to allow a miner's body to contact the moving parts under the guard is not convincing. Brody's evidence was primarily focused on whether a miner's boot would fit through the opening. Again, it is easily foreseeable that a miner (who is violating the offside policy) might fall toward the unprotected opening and throw out a hand to break the fall. There is no need for a special finding of a distinct trip and fall hazard. Falls at work (especially in mines) can occur in the absence of a specific trip and fall hazard. Other dangerous scenarios are easy to foresee, e.g., articles of clothing being drawn into the moving parts or objects that get into the gears and become missiles. The 12" x 12" opening is large enough to present a danger.

Finally, Brody contends that it would be impossible for the shuttle operator to come in contact with moving parts under the missing guard plate. This argument is strongest when considered as part of the gravity analysis, but it does tend to weigh against a finding of violation. However, since the shuttle operator is only one person among many who might come into contact with this dangerous situation, the fact that there are other miners potentially exposed to the danger of unprotected moving machine parts supports my conclusion that a violation of the standard occurred.

Inspector Ward alleged "high negligence" with this order. Three of the four defense issues just addressed can be recast as mitigation issues, which become relevant for the negligence assessment: (1) There was a company "offside" policy; (2) A shuttle operator could not contact moving parts under the missing guard plate; and (3) There was no trip-and-fall hazard.⁴¹

The "offside" policy argument arises from actions purposely taken by Brody that are directed, if not at this specific instance, at circumstances very similar to these. The fact that Brody had a policy relevant to this circumstance can legitimately be considered in mitigation of its negligence.

⁴⁰ These two issues are relevant to the likelihood component of the gravity analysis.

⁴¹ The "small opening" defense is not realistically relevant to mitigation and is more pertinent to the likelihood analysis to follow.

Brody did not build or design the shuttle car, so the fact that it is effectively impossible for the shuttle operator to come in contact with moving parts under the missing plate does inure to its benefit, but only slightly. However, the fact that Brody trains its operators to de-power the shuttle car when they leave the operator's cab, taken in conjunction with the design elements that are intended to prevent the parts from moving if the operator leaves the cab, does amount to mitigation.

The absence of an obvious trip-and-fall hazard mitigates against the likelihood of an injury, but not against the extent of Brody's negligence in allowing the guard plate to go missing for so long. I will consider the trip-and-fall issue again later.⁴²

Brody's negligence is mitigated to "moderate" by the factors described above. Brody is imputed with knowledge of the missing guard plate due to the length of time the condition existed and the fact that at least two employees knew of it. The weight of mitigation here is quite low, but still sufficient to justify reducing the negligence assessment to "moderate."

Gravity / Significant and Substantial

The order alleged gravity at the level of reasonably likely to be permanently disabling for one person and constitutes a significant and substantial violation deserving of enhanced enforcement treatment. Brody asserts that the Secretary improperly assigned the gravity of the violation and that it does not rise to the level of S&S. Three issues are presented here: (1) Do the conditions underlying this violation present a reasonable likelihood of an injury to a miner? (2) Is the injury potentially permanently disabling? (3) How many miners were exposed to these conditions?

Starting with the last of the three gravity issues, I find nothing in the record to weigh against the Secretary's allegation that one miner would be potentially injured by these conditions. There is also nothing in the record to support a finding that more than one miner is potentially exposed to this hazard. I find that these conditions would subject one miner to a risk of injury.

Regarding the issue of reasonable likelihood, I take guidance from the Commission position that the Department's regulations require the guarding of machine parts that "may be contacted." 20 C.F.R. § 75.1722(a); *Secretary of Labor (MSHA) v. Thompson Brothers Coal*

⁴² The Secretary argues that the guard plate was missing for at least two weeks. For reasons that will be more thoroughly discussed below, I agree with the Secretary on this point and find that the guard plate had indeed been missing for at least two weeks. This can be seen as an aggravating circumstance. Mitigating circumstances can be offset by aggravating circumstances, so it might seem to some that this would be the logical point to consider evidence of aggravation. However, I choose to treat aggravating circumstances in the context of the enhanced enforcement issues of S&S and "unwarrantable failure" to follow.

Co., 6 FMSHRC 2094, 2097 (Sept. 1984). In *Thompson Brothers Coal Co.*, the commission reasoned:

Use of the word "may" in these key phrases introduces considerations of the likelihood of the contact and injury, and requires us to give meaning to the nature of the possibility intended. We find that the most logical construction of the standard is that it imports the concepts of reasonable possibility of contact and injury, including contact stemming from *inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness.*

Thompson Brothers Coal Co., 6 FMSHRC at 2097 (emphasis added).

The fact that the operator may not allow the equipment with the exposed moving parts to be operated while people are present is not inconsistent with a finding that the violation is reasonably likely to occur or amounts to S&S. See *Crimson Stone v. FMSHRC*, 198 Fed. App. 846 (11th Cir. 2006) (court upheld an ALJ's finding that failure to guard machine parts in a plant was significant and substantial even though the equipment was not energized if anyone was near it).

Although Brody was prudent to have a policy of not allowing people around a shuttle car while it is operating⁴³, rules are not always followed by mine personnel. See *Thompson Brothers Coal Co.*, 6 FMSHRC at 2097 (human carelessness a factor in determining occurrence of a violation for guarding standard). Case in point - both Blankenship and Ward approached the shuttle car in question from the offside while it was in operation. (Tr. 57:8-12)

Brody challenges the likelihood of injury by stressing the fact that the area exposed by the missing guard plate was only 12" x 12", too small for a miner's boot. This argument is too restrictive to have real weight. First, the opening was approximately waist high. At that height, it is much more likely that a smaller item, e.g., a hand or some loose equipment or clothing item attached to a miner, would come in contact with the exposed mechanism. Second, irrespective of the height, a 12" x 12" opening would accept the toe or heel of any boot, and definitely something as small as a hand. An opening of that size presents a real and significant hazard and supports a finding of reasonable likelihood of injury. Obviously, if the guard plate is in its proper place, there is no hazard of injury related to this condition. It follows that the missing guard plate violation does more than contribute to the hazard here, it creates the hazard. As such, the key element of the *Mathies Coal S&S* test, as clarified in *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125 (Aug. 1985), is satisfied.

The final point of consideration is whether a potential injury could be permanently disabling, which for S&S purposes is an injury of "reasonably serious nature." Without cataloging all the possible injuries that could result from this hazard, suffice it to say that the loss of fingers, toes, a hand, or a foot is permanently disabling to some extent.

⁴³ I considered Brody's offside policy as a mitigating element in the negligence assessment above.

I refer to the prior discussion of the elements of “significant and substantial.” As to the first of the four S&S elements outlined above, I have found that there was a violation of 30 C.F.R. § 75.1722(a). The second step is to determine whether the violation constitutes a discrete safety hazard. I have found that the missing guard plate creates an injury hazard that is reasonably likely to result in a permanently disabling injury. Third, this violation contributes to the cause and effect of an injury hazard. Fourth, there is a reasonable likelihood that the injury will be of a reasonably serious nature.

In sum, I find and conclude that the conditions underlying this violation are reasonably likely to be permanently disabling for one person. I find further that the violating condition is significant and substantial.⁴⁴

Unwarrantable Failure

I refer to the prior discussion of the elements of “unwarrantable failure.” There is considerable evidence in this record on the issue of whether two Brody employees, Scotty Ray Watkins and Mr. Lambert, had known about the missing guard plate, and in the case of Mr Watkins, kept notes about it, and shared their knowledge with Brody management. Inspector Ward testified, and his inspection notes in Exhibit S-7 confirm, that Watkins and Lambert both told him they knew the plate was missing for two weeks. This evidence is pertinent to several of the issues identified in the following cases as having probative relevance to the issue of unwarrantable failure. See, *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988); *Kitt Energy Corp.*, 6 FMSHRC 1596, 1603 (July 1984); *Beth Energy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1129 (July 1992). In addition to the basic and universal considerations of whether a violation has occurred, what degree of negligence is involved, and how serious or grave the violation is, the cited cases suggest the following as evidence of the aggravating circumstances that will support a finding of unwarrantable failure in the context of the enhanced enforcement objective of a 104(d) order: (1) how long the violating condition existed; (2) whether it is obvious; (3) whether the operator has been placed on notice that greater efforts are necessary for compliance; (4) the operator’s efforts to abate the condition. This is not an exhaustive list of relevant factors.

There is a clear conflict of evidence regarding whether Watkins told Ward he had noted the absence of the guard plate in a personal notebook and showed the notes to Ward on March 3, 2009. At the hearing, Watkins denied that he showed the notes to Ward. (Tr. 344:20-346:21) But, in an earlier deposition, Watkins allowed that he may have written something about the missing guard plate in his personal work notebook. (Tr. 345:13-349:4) Watkins also conceded that he had kept a personal notebook at work for some time prior to this incident. (Tr. 348:7-349:4) Ward’s inspection notes, page 14 of Exhibit S-7, mention that Watkins showed Ward his

⁴⁴ Generally, a violation is properly designated as S&S if it is reasonably likely that the hazard contributed to by the violation will result in a serious injury. *Nat’l. Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981).

notes about the missing guard plate. I conclude from this that Watkins did keep notes about the missing plate and showed them to Ward on March 3, 2009. Watkins is still employed by Brody, was called as a witness by Brody, and has an understandable motive to preserve an appearance of loyalty to his employer. I find his disavowal of his notes at the hearing unconvincing and lacking credibility.

In consideration of Watkin's notes, Lambert's blurted statement that he had known about the situation and reported it to management, Ward's entry in his inspection notes, and Brody's unconvincing general denial of knowledge about the missing plate, I find that the plate had been missing for at least two weeks and Brody either knew about it or had ample reason to know about it. Brody's regularly kept examination and maintenance records were silent about this missing plate. These two items are evidence of an aggravating circumstance that deserves enhanced enforcement consideration under the cited case precedent. Two weeks' knowledge of a violating condition without any effort to remedy is an aggravating circumstance. Brody was on notice, due to the fact this condition had been noted and reported to management, that corrective action was needed. Yet it did nothing. In light of all the facts of this violation, I find and conclude that Brody's failure to repair the missing guard plate was unwarrantable.

Summary and Decision for Order No. 8075906

On March 3, 2009, Inspector Ward issued Order No. 8075906, a 104(d)(2) order, alleging a violation of 30 C.F.R. Section 75.1722(a) and "high" negligence. The inspector alleged that a missing guard plate on a shuttle car exposed an opening of 12"x12" to moving parts. The inspector alleged that the condition was "reasonably likely" to cause a "permanently disabling" injury to one person, was significant and substantial, and constituted an unwarrantable failure to comply with Section 75.1722(a). The Secretary assessed a penalty of \$4,440.00.

For the reasons stated above, I conclude that Brody's negligence was "moderate," that the conditions underlying this violation were "reasonably likely" to be "permanently disabling" for one person, that the violating condition is significant and substantial, and that Brody's actions constituted an unwarrantable failure to comply with the standard. The penalty will be adjusted to \$450.00.

[2.4] **Order No. 8079224** reads as follows:

"Accumulation of combustible material in the form of loose coal, coal dust, and float coal dust saturated with hydraulic oil was allowed to accumulate on the Co. No. 602 Stamler feeder. This condition exists around the oil tank, oil filters, valve chest, electrical components, and hydraulic hoses. The oil tank and filter area on the off side of the [sic] was hot to the touch. The accumulations were approximately up to 18 inches deep, and 12 feet long. The feeder was energized and the section crew was loading coal. Twenty three [sic] citations have been issued at this mine for violations of 75.400 in the past 2 months.

This order is unwarrantable failure to comply with a mandatory standard. Mine management has engaged in aggravated conduct constituting more than ordinary negligence.”

Exhibit S-11

The gravity was assessed as reasonably likely to be fatal for 14 persons and as S&S. It was also written as a Section 104(d)(2) violation, an unwarrantable failure to comply with a mandatory standard. The operator's negligence level was assessed as “reckless disregard,” and the proposed fine is \$70,000.00.

The Standard

30 C.F.R. § 75.400 states:

“Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on diesel- powered and electric equipment therein.”

The Evidence

On February 26, 2009, inspector James Jackson inspected Brody Mine No. 1 and issued Order

Number 8079224,⁴⁵ a 104(d)(2) order alleging reckless disregard and a violation of 30 C.F.R. Section 75.400.

Inspector Jackson alleged that Brody failed to maintain the stamler feeder by allowing loose coal, coal dust, and float coal dust to accumulate. (Exhibit S-11) According to Jackson, the condition existed on the oil tank, oil filters, valve chest, electrical components, and hydraulic hoses. Jackson also alleged that the oil tank and filter area on the off side of the feeder were hot to the touch. The accumulations were alleged to be up to eighteen inches deep and twelve feet long and saturated with hydraulic oil. Jackson was concerned that the heat from the oil tank, oil filter, and various electrical components could serve as an ignition source of the coal dust mixed with hydraulic oil. (Tr. 124:9-125:11) Jackson alleged that the condition was reasonably likely to cause a fatal injury to fourteen persons. (Exhibit S-11)

Jackson found coal accumulations on a Stamler feeder. A feeder is a stationary piece of equipment where shuttle cars dump coal to send down the belt line. (Tr. 254:13-22) The feeder acts like a funnel at the end of a belt line. Shuttle cars bring coal to the feeder and dump it in. The feeder connects to the tail piece and funnels the coal onto the tail piece and the belt line. Jackson found an accumulation of coal dust, loose coal, and coal float dust saturated with what he took for hydraulic oil. The accumulation was in the area of the oil tank, oil filters, a valve

⁴⁵ Order Number 8079224, including Brody’s pre-shift, daily, and on-shift reports, were admitted into evidence as Exhibit R-7 and with Jackson’s field notes as S-11.

chest, and electrical components. The feeder was energized and running, and the crew was actively loading coal into it. (Tr. 124:9-125:11)

The oil filters, hydraulic hoses, and valve chest will heat up when in use. Jackson observed these items to be hot to the touch. (Tr. 147:7-18 and Exhibit S-11, p. 9) The material was not dry because it was saturated with what Jackson believed to be hydraulic oil. (Tr.125:12-23)

Jackson also wrote a citation for an electrical cable splice on the feeder that was not done with the right type of connectors and issued Citation No. 8079225.⁴⁶ (Tr. 126:14-127:24 and Exhibit S-12) Jackson concluded that the faulty splice could have led to a spark, which in turn could have ignited the coal accumulations and started a fire. (Tr. 126:14-128:8)

According to Jackson, he wrote the order alleging “reckless disregard” because Brody had been cited twenty-three times within the previous two months for allowing combustible materials to accumulate and had been warned about running equipment under these conditions. Brody was on heightened alert as to the coal accumulations and dirty equipment but continued to operate without cleaning things up. Jackson felt the mine needed to be more vigilant. (Tr. 128:9-23)

Brody had water hoses, CO monitors, fire extinguishers, and other fire suppression near the stamler feeder on the No. 2 section. (Tr. 256:9- 21) There was a fire hose within as little as ten feet of the feeder. (Tr. 147:19-148:1)

The fluid Jackson took for hydraulic oil was not on top of the feeder; it was around the valve chest, the hoses, and the tank itself. Jackson did not test to determine if the substance around the valve chest, the hoses, and the oil tank was hydraulic oil. According to him, it is not likely that he mistook the fluid for water because water and hydraulic oil are different colors. (Tr. 145:13-146:7) Although Jackson believed that hydraulic oil is flammable, he cannot prove that it is. (Tr. 148:15-17)

Jamie Lester, Brody’s Assistant Shift Foreman, testified that he did not observe hydraulic oil on the coal - only water. (Tr. 254:4-9)

According to Lester, Jackson did not take any measurements of the accumulations on the feeder. (Tr. 253:20- 22) Lester did not see any oil on the coal fines. He did not smell any oil. Jackson did not take any samples of the oil. (Tr. 258:8-15)

According to Brody’s witnesses, the accumulations were loose, wet coal. It had not been there long enough to be compacted. (Tr. 266:6-13) The accumulated coal consisted of pieces of coal, each about 2 inches in diameter. (Tr. 266:16-22)

⁴⁶ Citation No. 8079225 is not part of this case. It was offered as evidence of another possible ignition source for the coal accumulations in Exhibit S-11.

Lester testified that Jackson decided to write the order within one minute of looking at the machine. (Tr. 253:17-254:3)

Lester did not observe any smoke near the feeder. There are systems with detectors to alert the miners if smoke occurs. The law requires a dispatcher to send someone to check on smoke and CO sensors if there is an alarm. (Tr. 260:13-21) Prior to the issuance of this order, there were no reports of any CO monitor going off near the feeder. (Tr. 261:3-5)

Lester did not observe Jackson touching anything to determine whether the feeder was hot to the touch. Lester testified that if the feeder had been hot to the touch, he would have done something immediately and would definitely remember something like this. Lester testified he would have de-energized the feeder and sprayed it with water to cool it down. (Tr.257:17-258:7)

Each shuttle car can carry from ten to fifteen tons of material at a time. In a twelve-hour shift, from fifty to eighty shuttle car loads are dumped at the feeder. (Tr. 255:12-256:3)

There are conditions that can occur instantaneously that can cause coal to accumulate such as in this case. For instance, a large rock can block the pick breaker. (Tr. 258:16-259:13) The pick breaker has a mechanism that will shear off a pin if it gets blocked by hard and big objects, but if it just gets overloaded, there is nothing that will shut it off to prevent spillage. (Tr. 259:15- 260:3)

It is possible that the coal on the feeder could have accumulated to the extent alleged by Jackson during a single shift. But, according to Jackson, the coal dust with the hydraulic oil would have taken more than a single shift. It is on another part of the feeder, and there are covers over the area. It would have taken a lot longer for the material to have accumulated in the covered area. (Tr. 128:24-129:12)

There are also times when the shuttle operator cannot see what is happening with the feeder so that accumulations may happen even though he is there. (Tr. 260:4-12)

The area of the mine where the Stamler feeder is located is wet. In addition, the feeder has sprayers on it to wet the material down. The area was wet; the feeder was wet; the feeder was standing in about 6 inches of water from when the maintenance crew had cleaned it. (Tr. 263:2-264:7)

The feeder was cleaned by the second shift every day at the end of their shift by soaking it with water for ten to fifteen minutes. (Tr. 263:14-264:7) As part of Brody's regular maintenance, the feeder is greased and rocked dusted. (Tr. 264:8-17) Brody examines the feeder on a weekly basis. (Tr. 257:3-5 and Exhibit R-7) When Brody calls out the weekly report, it does so from a telephone located near the feeder. (Tr. 262:15-18)

If there had been any accumulations, they would have been called out as part of the pre-shift report process and included in the pre-shift report. There are no accumulations noted in the reports. (Tr. 261:6-262:22)

To abate the order, Brody personnel removed the accumulated coal from the feeder. The accumulations were loose, not compacted. They did not have to use a scoop to remove the accumulations, however they were dense enough that they had to be washed off, not just brushed away. (Tr. 146:8-147:2) The abatement was finished about one hour and fifteen minutes later. (Tr. 148:2-14) It took about fifteen minutes to remedy the situation. (Tr. 265:2-21)

Discussion

Violation

There is no dispute that Inspector Jackson found coal accumulations in the Brody Mine No. 1 on February 26, 2009, that measured up to eighteen inches deep and twelve feet long. The standard at 30 C.F.R. § 75.400 requires that coal dust and other combustible materials be cleaned up and not permitted to accumulate in active workings or on electric equipment. The area in question was an active working area, being actively mined at the time. The stamler feeder on which the accumulations were found is a piece of electrically powered equipment. All of the elements needed to prove a strict liability violation of the standard are present. I conclude that the coal accumulations observed by Inspector Jackson constituted a violation of 30 C.F.R. § 75.400.

Negligence

Inspector Jackson alleged that Brody exhibited reckless disregard by allowing the coal accumulations he observed on February 26, 2009 to occur. I address the following questions related to negligence: (1) Did the accumulations occur in a short time? (2) Were the accumulations saturated with water or oil? (3) Were there potential ignition sources in the area?

A scenario can be constructed from the facts in this case in which reckless disregard is the resulting finding. However, the evidence has to be convincing that the coal accumulations were saturated with oil and/or that they had been present for an extended period. Short of that, a lesser degree of negligence is more appropriate.

The most important disputed fact issue is whether the accumulations were saturated with oil instead of water. Obviously, a petroleum based substance can be presumed to be flammable and lend its flammable nature to something soaked with it. On the other hand, coal accumulations saturated with water are presumably less flammable than they would be in a dry state.

The strongest evidence tending to prove that the substance was oil is the proximity of the accumulations to a source of hydraulic oil, e.g., a hydraulic oil reservoir or hydraulic lines. That

fact is established in this record. However, the evidence does not show convincingly that the fluid was oil instead of water even given the proximity. To the contrary, there is no dispute that the environment where this violation occurred was wet with water. Inspector Jackson did not smell the fluid; he did not feel its consistency; he did not sample it; he did not have it tested. The evidence is that he observed that the coal accumulations were saturated with something that did not look like water and that he felt the oil tank, oil filters, valve chest, electrical components, and hydraulic hoses and determined that they were hot to the touch. In the space of a minute, Jackson determined that it was oil and proceeded to construct the order based on that conclusion. When pressed on cross examination, Jackson conceded that he could not prove that the fluid was hydraulic oil.

I am guided by the knowledge that I can give an MSHA inspector a presumption of credibility due to his experience. But, that presumption is overcome by the evidence in total. Brody's witnesses testified that the accumulations appeared to be wet with water. There is nothing that compels me to discount that testimony. In fact, their description of the accumulations is more detailed and convincing than Jackson's. They testified that the area of the mine where the Stamler feeder is located is wet. It had sprayers on it to wet the material down. The area was wet; the feeder was wet; and the feeder was standing in about six inches of water from when the maintenance crew had cleaned it. The feeder was cleaned every day soaking it with water for ten to fifteen minutes. There is nothing implausible about these facts that would call them into question. In short, without additional evidence from the witnesses to bolster the notion that the fluid was oil, the evidence that it was water is more convincing. Under the circumstances, I am not inclined to bridge the gap between the evidence in the record and Jackson's belief at the time he wrote this order. The Secretary has failed to carry her burden to prove this point by a preponderance of the evidence.

The evidence of heat from the oil tank, oil filters, valve chest, electrical components, and hydraulic hoses is consistent with Jackson's conclusion that there was a potential ignition source, particularly given his belief that the soaking fluid was oil. There was another possible ignition source from an improper electrical splice in the vicinity, documented in Citation No. 8079225. But, the fact that the accumulations were wet with water mitigates significantly against a potential ignition.

I am unable to resolve whether the coal particles accumulated in a short time. Brody put on credible evidence that it is possible that this volume of accumulations could have built up in very short order. To the contrary, the Secretary's evidence on this point focused on the likelihood that, if the soaking fluid was oil, it was also likely that it would have taken longer than a single shift to get to the condition that Jackson observed on February 26, 2009. The weakness of the evidence tending to prove that the fluid was oil undercuts the Secretary's position. At base, the evidence does not mitigate Brody's negligence greatly, but it also does not support the Secretary's position that Brody's negligence is at the level of reckless disregard.

I conclude from the foregoing that Brody's negligence is more appropriately characterized as "moderate." Even if the accumulations built up rapidly, Brody should have been more on top

the situation than these facts reveal. The fact that the accumulations were wet with water is a mitigating factor, as mentioned already. These findings do not support a negligence determination lower than “moderate.”

Gravity / Significant and Substantial

Jackson characterized the gravity as reasonably likely to be fatal for fourteen persons and as S&S. If the facts supported Jackson’s conclusion that the accumulations were soaked with oil and that there was a possible ignition source in the immediate vicinity, his conclusion could be consistent with his gravity assessment. There is no dispute about the number of miners potentially affected by the violation. The issues to be resolved are whether the violation was reasonably likely to result in an injury and whether the potential injury could be a fatality, as alleged.

In order to consider gravity and S&S with some separation, I am guided by *Consolidation Coal Co.*, 18 FMSHRC 1541, 1550 (September 1996): 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.” The potential effect of a wet coal accumulation in the presence of an ignition source is not severe. In this instance, there is not much difference between a raw assessment of likelihood and a more nuanced analysis of the effect of the hazard. Whether one looks at simple likelihood or the potential effect of the hazard, the result is the same. The likelihood of an ignition is remote, and the potential of a serious injury is also remote.⁴⁷ There was no evidence of any heat from belt friction that could have dried out the wet accumulations; there was also no specific evidence as to how hot the oil tank and other heat sources were. I conclude that it was unlikely that an injury would result from these facts, and due to the fact that there was little likelihood of an event, there was also lower potential severity. I conclude that the severity level should be “no lost workdays.”

I turn now to the question of whether this violation should be characterized as “significant and substantial.” The Commission looks at a “confluence of factors” in determining whether or not an accumulation of coal or coal dust is likely to lead to a fire or explosion, and therefore constitutes a significant and substantial violation, including the extent of the accumulations and the presence of potential ignition sources. *Amax Coal Co.*, 19 FMSHRC 846, 849 (May 1997). The Commission has found that friction from a belt line or roller, electrical equipment, and power cables can all serve as ignition sources, *Mid-Continent Resources, Inc.*, 16 FMSHRC at 1222 (June 1994). No matter what the relevant standard is, there must be evidence in the record sufficient to prove the various elements. The facts supported by the record must establish that the violation contributes to the cause and effect of a hazard, according to the Commission opinion in *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985), citing *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1866, 1868 (August 1984); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574–75 (July 1984).

⁴⁷ It is easy to hypothesize a set of facts similar to these that would support a vastly different conclusion, however we react to proven facts - not hypotheticals.

On these facts, this violation does not contribute to a discrete safety hazard. I am aware that the build up of coal accumulations wet with water could, with the right combination of additional causation elements such as belt friction or other prolonged heat exposure sufficient to cause an ignition, contribute to a safety hazard. However, the Secretary did not prove the additional causation elements, and I cannot infer them. I conclude that this violation was not significant and substantial.

Unwarrantable Failure

The Secretary argues that Brody had also been repeatedly cited for allowing combustible materials to accumulate in violation of 20 C.F.R. § 75.400, and was therefore put on notice that it should employ increased measures to insure that coal and coal dust not accumulate. *Eagle Energy, Inc.*, 23 FMSHRC, 829, 838 (Aug. 2001) (prior citations put operator on notice of recurring problem); *IO Coal Company, Inc.*, 31 FMSHRC 1346, 1351 (Dec. 2009) (repeated violations of the same standards serve to put operator on notice that greater efforts are required for compliance). Brody had been cited for Section 75.400 violations twenty-three times in the previous two-month period. I find that Brody was on notice from this relevant and recent history that it should put forth greater effort to comply with Section 75.400. From this I conclude that Brody was generally indifferent to the requirements of Section 75.400 and that the facts of this violation constitute an unwarrantable failure to comply with the standard and that the penalty should be affected by Brody's indifference independent of the methodology reflected in 30 C.F.R. § 100.3, Table X.

Summary and Decision for Order No. 8079224

On February 26, 2009, inspector James Jackson inspected Brody Mine No. 1 and issued Order Number 8079224, a 104(d)(2) order alleging reckless disregard and a violation of 30 C.F.R. Section 75.400. The inspector alleged that the condition was "reasonably likely" to cause a permanently disabling injury to one person, was significant and substantial, and constituted an unwarrantable failure to comply with Section 75.1722(a). The Secretary assessed a penalty of \$70,000.00.

For the reasons stated above, I conclude that Brody's negligence was "moderate," that the conditions underlying this violation were unlikely to cause injury amounting to anything more than "lost workdays or restricted duty" for fourteen persons, that the violating condition was not significant and substantial, and that Brody's actions constituted an unwarrantable failure to comply with the standard. The penalty will be adjusted to \$7,000.00.

Order

It is ORDERED that Citation No. 8075863 be MODIFIED to reduce the negligence level from "high" to "moderate," the gravity level from "reasonably likely" to "unlikely," and to delete the unwarrantable failure designation.

It is ORDERED that Citation No. 8075864 be MODIFIED to reduce the gravity level from “reasonably likely” to “unlikely,” and to delete the unwarrantable failure designations.

It is ORDERED that Citation 8079178 be MODIFIED to reduce the negligence level from “reckless disregard” to “moderate.”

It is ORDERED that Citation No. 8079179 be MODIFIED to reduce the gravity level from “reasonably likely” to “unlikely,” and to delete the significant and substantial and the unwarrantable failure designations.

It is ORDERED that Citation No. 8068033 be MODIFIED to reduce the negligence level from “high” to “moderate,” and the gravity level from “permanently disabling” to “lost workdays and restricted duty.

It is ORDERED that Citation No. 8075874 be MODIFIED to reduce the gravity level from “reasonably likely” to “no likelihood,” from “lost workdays or restricted duty” to “no lost workdays,” to reduce the negligence level from “high” to “no negligence,” and to delete the significant and substantial and the unwarrantable failure designations.

It is ORDERED that Citation No. 8075906 be MODIFIED to reduce the negligence level from “high” to “moderate.”

It is ORDERED that Citation No. 8079224 be MODIFIED to reduce the gravity level from “reasonably likely” to “unlikely,” and from “permanently disabling” to “lost workdays or restricted duty,” and the negligence level from “reckless disregard” to “moderate.”

It is further ORDERED that the operator pay a penalty of \$33,550.00 within 30 days of this order. Upon receipt of payment, this case will be DISMISSED.

/s/ L. Zane Gill

L. Zane Gill
Administrative Law Judge

Distribution: (CERTIFIED RECEIPT)

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May 23, 2011

INDEPENDENCE COAL COMPANY, INC., Contestant	:	CONTEST PROCEEDINGS
	:	
	:	Docket No. WEVA 2011-402-R
	:	Citation No. 4900014; 11/10/2010
v.	:	
	:	
	:	Docket No. WEVA 2011-403-R
	:	Order No. 4900015; 11/10/2010
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Respondent	:	Mine: Justice #1 Mine
	:	Mine ID: 46-07273
	:	
INMAN ENERGY CORPORATION, Contestant	:	CONTEST PROCEEDINGS
	:	
	:	Docket No. WEVA 2011-398-R
	:	Citation No. 490011; 11/09/2010
v.	:	
	:	
	:	Docket No. WEVA 2011-399-R
	:	Order No. 4900012; 11/09/2010
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Respondent	:	Mine: Randolph Mine
	:	Mine ID: 46-09244
	:	
PROCESS ENERGY, Contestant	:	CONTEST PROCEEDINGS
	:	
	:	Docket No. KENT 2011-255-R
	:	Citation No. 8257128; 11/18/2010
v.	:	
	:	
	:	Docket No. KENT 2011-256-R
	:	Order No. 8257129; 11/18/2010
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Respondent	:	Mine: Mine No. 1
	:	Mine ID: 15-19097

This case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 *et seq.* (“the Act”).

Notices of Contest were initially filed by the Contestants on November 15 and 16, 2010. Although the notices informally requested an expedited hearing, separate formal motions for expedited proceedings under section 2700.52 of the Commission Rules were also filed on November 15 and 22, 2010. The motions were granted on November 24, 2010.

The Order of November 24, 2010, also consolidated Docket Nos. WEVA 2011-402R, 403R, 398R, 399R, and KENT 2011-255R, 256R, involving mines controlled by Massey Energy Company (“Massey”). Docket Nos. WEVA 2011-540R, 541R and KENT 2011-305R, 306R were not formally consolidated at that time; however, the Respondents were present by counsel at hearing.

Although not present at the hearing, Knox Creek Coal Corporation entered its Notice of Contest and filed a Motion to Consolidate Docket Nos. WEVA 2011-386R and 387R with the aforementioned dockets. As such, it was assigned to the undersigned on April 26, 2011.

By Order dated May 5, 2011, all dockets were formally consolidated.¹

PRELIMINARY MATTERS

The parties reported joint stipulations at the hearing, cited for the record, and summarized as follows:

1. Process, Inman, and Independence were, during all relevant times herein, the operators of coal mines located in Pike County, Kentucky, Boone County, West Virginia, and Boone County, West Virginia, respectively.
2. The Contestants are subject to the provisions of the Mine Act.
3. Process received a citation under § 104(a) of the Mine Act on November 18, 2010, for an alleged failure to permit inspection of certain records in response to a request by an authorized representative of the Secretary of Labor, pursuant to 30 C.F.R. § 50.41. A subsequent citation was issued under § 104(b).
4. Inman received a citation under § 104(a) of the Mine Act on November 9, 2010, for an alleged failure to permit inspection of certain records in response to a request by an authorized representative of the Secretary of Labor, pursuant to 30 C.F.R. § 50.41. A subsequent citation was issued under § 104(b).

¹ Additional Part 50 audit cases involving mines controlled by Peabody Energy were heard in Jeffersonville, Indiana on December 14, 2010. Separate hearings were held due to the distant locations of these groups of mines, but for all major purposes, counsel treated all of the contests as one large, related case.

5. Independence received a citation under § 104(a) of the Mine Act on November 10, 2010, for an alleged failure to permit inspection of certain records in response to a request by an authorized representative of the Secretary of Labor pursuant to 30 C.F.R. § 50.41. A subsequent citation was issued under § 104(b).
6. The citations and orders were issued by an authorized representative of the Secretary to an agent of Process, an agent of Inman, and an agent of Independence.
7. That the following various pieces of communications between the Secretary and Process, Inman, and Independence were authentic, but not the truth of the matters asserted therein:
 - a. The records requests that occurred on October 8, October 25, and October 27, 2010.
 - b. The October 28, 2010 letter from Charlie Lord to M. Shane Harvey.
 - c. The November 9, 2010 and November 10, 2010 letters from Mark Heath and Alex Marcia to Charlie Lord and Robert Hardman, respectively.
8. The records at issue are the medical records requested in the letters of October 25 and October 27, 2010.

BACKGROUND

In October 2010, the Mine Safety and Health Administration (“MSHA”) began a nationwide initiative to conduct thirty-nine (39) compliance audits under the authority of 30 C.F.R Part 50. Six subsidiary mines of Massey are a part of this initiative: the Justice #1 mine of the Independence Coal Company, Inc. (“Justice”); the Randolph Mine of Inman Energy Corporation (“Randolph”); Mine #1 of Process Energy (“Process”); the Road Fork #51 mine of the Spartan Mining Company (“Road Fork”); the Love Branch South mine of the Road Fork Development Company (“Love Branch”); and the Coal Creek Prep Plant of the Knox Creek Coal Corporation (“Coal Creek”).

The initial audit request was presented by letter dated October 8, 2010, addressed to Inman Energy. Ex. J-A. Mr. M. Shane Harvey, Vice President and General Counsel of Massey Energy Company responded by letter dated October 13, 2010, that Forms 7000-1, 7000-2, and the number of employees for each quarter would be made available for the audit team’s review; however, the payroll records and timesheets (request #3), and the medical records (request #5) would not be made available.

The superseding Part 50 audit request was provided to Mr. Harvey by letter of October 25, 2010. Ex J-C, J-D. The superseding audit request was also sent to Independence Coal and Process Energy on October 27, 2010. Ex. J-E, J-H. Somewhat later, in November and December, 2010, and April 2011, Spartan Mining, Road Fork Development, and Knox Creek Coal also received the respective audit requests.

The superseding audit request provided to each mine is, in pertinent part, as follows:

The Federal Mine Safety and Health Administration (MSHA) is conducting an audit to determine your mine's compliance with the injury and illness reporting regulations in 30 Code of Federal Regulations (CFR) Part 50. Pursuant to 30 CFR §50.41, MSHA is requesting certain records that are considered to be relevant and necessary to complete its audit.

Please have the following information and documentation available for review by The documents should cover the period beginning July 1, 2009 through June 30, 2010.

1. All MSHA Form 7000-1 Accident Reports
2. All quarterly MSHA Form 7000-2 Employment and Production Reports
3. All payroll records and time sheets for all individuals working at your mine for the covered time period
4. The number of employees working at the mine for each quarter
5. All medical records, doctor's slips, worker compensation filings, sick leave requests or reports, drug testing documents, emergency medical transportation records, and medical claims forms in your possession relating to accidents, injuries, or illnesses that occurred at the mine or may have resulted from work at the mine for all individuals working at your mine for the period of July 1, 2009 through June 30, 2010.

“In your possession” means within your mine's possession or within the control, custody, or possession of another entity or person from whom you have authority to obtain the required records. If any of the required records are in the exclusive possession of any other entity or person from who you do not have authority to obtain the required records, you must so certify and identify the entity or person who has exclusive possession. Ex. J-C, J-D

Counsel for Massey responded to the audit requests at the Inman and Independence mines expressing concerns about the medical records request. Ex J-F, J-G.

Since the content of the superseding audit request letters is essentially the same, they will be referred to as the Uniform Audit Request (“UAR”).

Photocopies of forms 7000-1 and 7000-2 are of record at Exhibits A and B of the Secretary's Pre-Hearing Bench Memorandum.

The audit letters, citations, and orders for each of the six mines are dated beginning in October 2010 and ending in April 2011. Rather than setting forth at length all of the particulars of each citation and order, the following is a brief summary of the general circumstances:

- Each mine received a UAR.
- All mines provided the 7000-1 and 7000-2 forms and the number of employees.
- Not all of the mines provided timesheet data at the time of the audit.
- Personnel records and medical information were not provided by any mine.
- Section 104(a) citations were issued to each mine upon refusal to disclose.
- Section 104(b) orders were issued to each mine upon continued refusal.

Reported at the time of the hearing was the policy of Massey to provide timesheet information or a Lawson Report (described as a big summary sheet) for Part 50 audits. Tr. 91, 92, 99, 100, 149, 159. The timesheet information is essentially a record of the on or off duty time of each employee.

It should also be noted that the citations and orders issued to Road Fork and Love Branch cited Section 103(h) of the Act rather than Section 50.41 of the regulations. However, in the condition or practice narrative of each of these citations, 30 C.F.R. Part 50 was correctly referenced.

LAW AND REGULATIONS

Section 103(a) of the Act states in pertinent part:

Authorized representatives of the Secretary...shall make frequent inspections and investigations in coal or other mines each year for the purpose of (1) obtaining, utilizing, and disseminating information relating to health and safety conditions, the causes of accidents, and the causes of diseases and physical impairments originating in such mines, (2) gathering information with respect to mandatory health or safety standards,...and (4) determining whether there is compliance with the mandatory health or safety standards or with any citation, order or decision issues under this title or other requirements of this Act. 30 U.S.C §813(a).

Section 103(h) of the Act states in pertinent part:

In addition to such records as are specifically required by this Act, every operator of a coal or other mine shall establish and maintain such records, make such reports, and provide such information, as the Secretary ... may reasonably require from time to time to enable him to perform his functions under this Act. The Secretary ... is authorized to compile, analyze, and publish, either in summary or detailed form, such reports or information so obtained. 30 U.S.C. § 813(h)

Section 103(e) of the Act states in pertinent part:

Any information obtained by the Secretary ... under this Act shall be obtained in such a manner as not to impose an unreasonable burden upon operators, especially those operating small businesses, consistent with the underlying purposes of this Act. Unnecessary duplication of effort in obtaining information shall be reduced to the maximum extent feasible. 30 U.S.C. §813(e)

The purpose and scope of 30 C.F.R. Part 50 is found in section 50.1 and states:

This part 50 implements sections 103(e) and 111 of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 801 et seq., and sections 4 and 13 of the Federal Metal and Nonmetallic Mine Safety Act, 30 U.S.C. 721 et seq., and applies to operators of coal, metal, and nonmetallic mines. It requires operators to immediately notify the Mine Safety and Health Administration (MSHA) of accidents, requires operators to investigate accidents, and restricts disturbance of accident related areas. This part also requires operators to file reports pertaining to accidents, occupational injuries and occupational illnesses, as well as employment and coal production data, with MSHA, and requires operators to maintain copies of reports at relevant mine offices. The purpose of this part is to implement MSHA's authority to investigate, and to obtain and utilize information pertaining to, accidents, injuries, and illnesses occurring or originating in mines. In utilizing information received under part 50, MSHA will develop rates of injury occurrence (incident rates or IR), on the basis of 200,000 hours of employee exposure (equivalent to 100 employees working 2,000 hours per year). The incidence rate for a particular injury category will be based on the formula:

$IR = (\text{number of cases} \times 200,000) \text{ divided by hours of employee exposure.}$
MSHA will develop data respecting injury severity using days away from work or days of restricted work activity and the 200,000 hour base as criteria. The severity measure (SM) for a particular injury category will be based on the formula:

$SM = (\text{sum of days} \times 200,000) \text{ divided by hours of employee exposure.}$

Section 50.41 states:

Upon request by MSHA, an operator shall allow MSHA to inspect and copy information related to an accident, injury or illnesses which MSHA considers relevant and necessary to verify a report of investigation required by 50.11 of this part or relevant and necessary to a determination of compliance with the reporting requirements of this part.

The preamble to the proposed rule at Section 50.41 sets forth the purpose of the

regulation and explains what MSHA (then the Mining Enforcement and Safety Administration (“MESA”)) may request and the importance of cooperation with these requests:

Section 50.41 requires operators to allow MESA to inspect or copy any information the agency thinks may be relevant and necessary for verification of reports or for determination of compliance with Part 50. In effect, it allows MESA to copy company medical records, employment records, and other company information.

MESA believes that this provision is necessary if it is to be able to develop epidemiologic data essential to development of effective health standards. It is also necessary if MESA is to be able to discover instances of intentional violation of statutory or regulatory requirements. It will allow MESA to control the data flow, rather than depend upon operator filtered records. 42 Fed. Reg. 55569 (1977).

The preamble to the final rule addressed privacy concerns and the need for verification:

The patient-physician confidentiality privilege is not absolute. Where disclosure of patient data is related to a valid purpose, disclosure has been held not to be violative of privacy rights. It is questionable whether employers have standing to assert employees’ privacy rights and significant that no miner or representative of miners has objected to §50.41.

Without inspection of records beyond those required to be kept it is impossible to verify the required records. The Secretary’s power to acquire information related to his functions under the Coal Act and the Metal Act is not limited to any particular records. Section 111 (b) of the Coal Act and § 13 of the Metal Act explicitly authorize analysis of other information related to his functions, and only the Secretary, subsequent to inspection and copying, can determine relevance...42 Fed. Reg. 65535 (1977).

ARGUMENTS

Contestants argue, first, that the Secretary does not have the right to inspect records possessed by an operator that are not required to be maintained by the Act without obtaining a warrant. This proposition, founded in *Sewell Coal Co.*, 1 FMSHRC 864 (1979)(ALJ), has stood without being overturned for nearly thirty-two (32) years and cannot be overlooked. Further, the legislative history of the Act itself expresses that, while the Secretary’s powers of inspection are broad, those powers should also be limited to prevent unnecessary burden on operators. Second, they argue that the Secretary must use her rulemaking authority to obtain the information requested. As such, this request is ad hoc rulemaking that violates the standard notice and

comment rulemaking requirements. Third, they argue that MSHA's request to inspect private medical records of the employees is not authorized under the provisions of the Health Insurance Portability and Accountability Act ("HIPAA"). MSHA could verify reporting accuracy with much less information and, therefore, has not met the standard of requesting only that information that is the "minimum necessary" to accomplish the intended purpose. Moreover, Contestants argue that MSHA's procedures are insufficient to ensure the nondisclosure of private employee information. Their final contention is that, due to the foregoing reasons, the citations and orders issued to the mines should be vacated.

The Secretary argues, first, that Part 50's role in advancing miner safety and health cannot be overstated, as it identifies the aspects of mining that require intensified attention with respect to health and safety regulation. The under-reporting of accidents undermines this role by diverting MSHA attention from important areas of risk. Second, the information sought is relevant and necessary to verify accurate compliance with the regulations. Third, she argues that the Act, by its plain language, permits MSHA to obtain records that are relevant and necessary even when the statute and regulations do not require such records to be maintained. The Secretary asserts that the inclusion of "[i]n addition to such records" is evidence of the Act's intent. (Emphasis Added). Finally, the Secretary argues that, as a public health agency, MSHA may obtain the records that have been requested without violating the medical privacy rights of mine employees. Moreover, she contends that MSHA has protective procedures that sufficiently protect private employee information from public disclosure.

QUESTIONS PRESENTED

While the issue to be decided is whether the citations and orders written to each of the mines are valid, there are a number of questions for consideration:

-Are the medical, personnel, and timesheet records sought by the UAR relevant and necessary to determine compliance with the reporting requirements of the regulations?

-Does the Secretary have the authority to request medical and employment records and other company information pursuant to an audit request under the pertinent statutes and Part 50 of the regulations?

-Does the UAR impose an unreasonable burden upon the operator?

DISCUSSION

Reporting accidents, injuries, and illnesses occurring at a mine is a well-known and long-established requirement under the Act and the Part 50 regulations. 30 C.F.R. §50.20. Definitions and instructions for reporting are provided in Sections 50.2(e),(f) and 50.20-3. The 7000-1 form is to be mailed to MSHA within ten (10) days of the accident, injury, or illness. MSHA then uses this information, in combination with the 7000-2 form, which is a quarterly calculation of the hours worked by each employee at the mine, to determine the mine's incidence rate ("IR") and

severity measure (“SM”). These numerical indicators quantify a mine’s overall safety record and may be used to objectively view a particular mine’s record in comparison to national averages.

The IR for a particular injury category is calculated by multiplying the number of reportable incidents and the coefficient 200,000 and dividing that number by the total hours of employee exposure. The SM for a particular injury category is calculated by multiplying the total number of missed and restricted duty workdays and the coefficient 200,000 and dividing that number by the total hours of employee exposure. The incidence rate is important in that it gives an overall picture of the safety record of the operator. *Energy West Mining Company*, 15 FMSHRC 587, 591 (Apr. 1993). Knowing the prevalence of specific types of injuries and their usual severity allows for more efficient allocation of agency resources in developing strategies, not only for enforcement, but also for training with the goal of improving the health and safety of miners.

David Brown is the Safety Director for Independence and Inman Coal Companies. Tr. 86. James Endicott is the Safety Director for Road Fork Development Co. and Sidney Coal Company, which covers Process Energy. Tr. 113. Both men described essentially the same functions. Their responsibilities include keeping basic training records, completing accident reports, and handling federal and state citations. Tr. 87, 113. Although both men are responsible for completing the 7000-1 Form, neither maintains possession of medical records, worker’s compensations records, or doctor’s or emergency room slips. Tr. 87-88, 114-116. Instead, the Human Resources Department (“HR”) maintains all of the aforementioned records in a separate location. Tr. 87-88, 116. At least in Brown’s case, he testified that he relies on phone calls from miners, the foremen’s investigation and accident reports, and the supervisors’ reports to fill out the 7000-1 Forms. Tr. 96. He had only received information from HR on one occasion. Tr. 99.

Steven E. Richards, Human Resources Manager for Independence Coal, testified that he maintains the medical, personnel, and worker’s compensation records. Tr. 74-75. This information is kept at a single location, although in separate rooms, and is maintained for “several years,” which he implied meant more than ten (10) years. Tr. 77, 83. Although Richards receives the doctor’s slips, he has never filled out a 7000-1 or 7000-2 Form. Tr. 84. Further, he has never experienced a situation in which a safety director has called to ask about a particular miner’s absence. Tr. 85. Jeffery Ratliff is the Human Resources Manager for Process Tr. 105. He confirmed that he also maintained workers’ compensation, medical, and personnel records for each miner in separate files and stored separately with security measures in place. Tr. 106, 107. Mr. Ratliff was present at the time of the audit request at Process and testified that the medical records had not been provided to MSHA Inspectors. Tr. 110,111.

It is clear from the testimony of Safety Directors Brown and Endicott that information regarding accidents, injuries and illnesses must be provided to them if they are to submit the required reports to MSHA. The flow of this information is generally from the Supervisor or Foreman, but the Safety Department may also receive medical documents, which are turned over to and kept by HR. The Safety Director may follow up with the Supervisor, Foreman or employee to complete the information on the 7000-1 form, but does not have access to the

various medical files safeguarded by HR. To the contrary, the time sheets, payroll records, worker compensation records and medical documents of all types are in the exclusive possession and control of HR. Tr. 74-75. While the records are not necessarily “off limits,” HR Manager Richards stated that he had never experienced a situation where a Safety Director called to inquire about the absence of a particular miner. Tr. 85. Neither was evidence produced at the hearing to suggest that HR would take the initiative to provide relevant injury time off information to the Safety Department.

Considering the volume of medical information that undoubtedly flows into HR, but not available to the Safety Director, there is at least the potential for relevant events to go unreported. In addition, should the Supervisor, Foreman or employee fail to initiate a report to the Safety Director, it appears likely that an otherwise reportable event would escape the notice (and hence the reporting responsibilities) of the Safety Director. The resulting lack of complete reporting could, of course, be inadvertent or unintentional. But the result is the under-reporting of information needed by MSHA to discharge its duties and responsibilities to compile and report incidence rates and severity measures as well as manage the allocation of agency resources.

Over-reporting would also result in inaccurate information and misallocation of resources. The mine would appear less safe than it actually is, and this could result in increased inspections. However, this would rarely be the concern to be addressed. On the other hand, there would be incentives to under-report injury and illness information to MSHA. Contestants suggest that MSHA has the authority to interview miners. Tr. 17, 18, 61, 93, 94, 149. But such interviews would be prohibitively time consuming and, without 100 percent participation, could fail to verify complete and accurate reporting. This suggestion is also contained in a MSHA handbook, where it is stated that examination and comparison of state workers’ compensation records to the MSHA reports (7000-1, 2 forms) may be appropriate. Ex. J-M, Page 43, Metal and Nonmetal General Inspection Procedures Handbook, No. PH09-IV-1 (Oct. 2009).

Peter Joseph Montali, Acting Director of Accountability for MSHA, testified that the same audit request, the UAR, was sent to all of the mines audited, including Process. Tr. 26, 31, 32. All of the mines provided the 7000-series forms, and some timesheet information (request #3). Tr. 27, 28. In the affidavit of record, *See Secretary’s Pre-hearing Bench Memorandum*, Ex. D, Mr. Montali reported that he had prior experience with Part 50 requirements. He pointed out that the medical records requested by the audit are limited to accidents, injuries, and illnesses that occurred at the mine or may have resulted from work at the mine. Also, he clarified that the payroll and time sheet records were only to verify the total number of employees and the total hours worked, as reported on the 7000-2 form. As to the various medical records, including the Worker’s Compensation filings, sick leave requests and emergency medical transportation (EMT) records, Mr. Montali provided information to the effect that these are cross-referenced with the 7000-1 forms submitted by the mine to verify proper, complete and accurate reporting of all required information, including severity, treatment, permanent total or partial disability, days away from work, days of restricted work activity, date of return to full duty, or no lost time. The drug-testing documents are limited to tests taken after an accident-causing injury, and the medical claims forms are limited to a determination of whether a particular illness would fit the

definition of an “occupational illness”. *id.*

It is understood that the Massey policy is to release the timesheet data to the audit team. While this may be adequate to verify information on the 7000-2 form, regarding employee hours worked, this would not suffice to verify accident, injury or illness reporting. As is made clear by the affidavit and testimony of Montali, discussed above, much more information is needed to fully and properly complete the 7000-1 form. Therefore, the medical and personnel information sought by the Secretary is relevant and necessary to cross-reference with forms that were submitted to the agency by the operator. Indeed, without the documents, verification of all of the information listed on each form is not possible, nor would it be possible to discover instances of injuries that were not reported.

It is the operator who possesses the means to insure complete and accurate reporting. Absent an audit of company records, MSHA must rely solely on the information provided by the operator. If the operator does not cooperate in the process, there can be no assurance that the safety and health information compiled by MSHA is correct.

If the total number of reportable incidents are under-reported, a mine, obviously, will appear to be safer than it actually is. If the incidence rate and severity measure are artificially low, an unsafe mine may be able to avoid enhanced MSHA scrutiny. Further, an elevated severity measure is one criterion in the initial screening for establishing a “pattern of significant and substantial violations.” 30 C.F.R. 104.2(b)(3). Once this pattern has been established, the mine may be subjected to enhanced penalties and possible forced shutdowns. 30 C.F.R. §104.4. If given the power to solely control the information flow between itself and MSHA, an operator possesses incentives to constrict that flow and under-report incidents at the mine.

The purpose of the Part 50 regulations is to implement MSHA’s authority not only to investigate but also to obtain and utilize information pertaining to accidents, injuries or illnesses occurring or originating at mines. 30 C.F.R. §50.1. In order to develop effective health standards, control the data flow, and discover violations, MSHA is allowed to inspect and/or copy any information the agency thinks may be relevant and necessary to determine compliance with reporting requirements. This includes medical records, employment records, and other company records. 42 Fed. Reg. 55569, 65535 (1977), 30 C.F.R. §50.41. Under 50.41, it was intended that MSHA would not depend on operator-filtered records. *Id.* It is pointed out that the 7000-1 and 7000-2 forms are operator-filtered records. Absent all of the documents and information listed in the UAR, there can be no effective, independent verification of the information submitted by the operators to MSHA.

In summary of the above discussion, the undersigned does not consider it to be an overstatement that the complete and accurate reporting of accidents, injuries, and illnesses occurring at mines is critically important to the mission of MSHA to protect the health and safety of miners. “The health, safety and the very lives of coal miners are jeopardized when mandatory health and safety laws are violated.” *Youghiogeny and Ohio Coal Company v. Morton*, 364 F.Supp. 45, 50 (1973). From the stated intent in the promulgation of 30 C.F.R. §50.41 it can be

found that it is not what the operator considers important to report; rather, it is what MSHA thinks is relevant and necessary to verify reports or determine compliance with Part 50 of the regulations. It follows, then, that the records sought by MSHA are relevant and necessary to verify compliance with all reporting requirements. Testimony confirms that the records are either maintained by the mine or a third party, or stored, for more than 10 years. Tr. 83.

FINDINGS AND CONCLUSIONS

Commission precedent in this area is rare and does not address the specific set of facts in the instant case. In *BHP Copper*, a fall of ground caused the death of one miner and the injury of another. *Id.*, 21 FMSHRC 758, 759 (July 1999). While MSHA inspectors were allowed to interview several BHP employees, BHP would not provide the phone number and address for the injured miner who had just been released from the hospital, stating that the information was confidential. *Id.* In denying the contention of the operator, the Commission explained that the Secretary has broad authority under the Act to investigate mine accidents and the operator may not impede that investigation *Id.* at 765-766. The Commission also rejected the argument that the Secretary must seek injunctive relief under Section 108 of the Act. *Id.* at 766.

A second, older Commission case is *Peabody Coal Company*, 6 FMSHRC 183 (Feb. 1984). Here, an inspector was refused access to accident reports because the operator had already filed them with MSHA. *Id.* at 185. Peabody argued that because this inspection was of a “type so random, infrequent, or unpredictable that the appellant, for all practical purposes, had no real expectation that its property would from time to time be inspected by government officials.” *Id.* Further, it asserted that, in order for MSHA to inspect, it must obtain a warrant. *Id.* In disagreeing with the operator, the Commission found that a search warrant was not required and since the Act required the operator to maintain the records of accidents for five years there was no realistic expectation of privacy in them. *Id.* at 186.

Although these Commission cases involve conflicts over information contained in the operator’s records, this is where the similarities end. No accident has occurred in the instant case; rather, MSHA is conducting an audit. MSHA is requesting documents to verify that no accident, injury or illness has gone unreported, not investigating the facts and circumstances behind such an incident. In this respect, neither *BHP Copper* nor *Peabody* specifically addresses the questions raised by the compliance audit at hand.

The Contestants argue that the decision in *Sewell Coal Company*, 1 FMSHRC 864 (1979)(ALJ) cannot be overlooked. In *Sewell*, an MSHA inspector began an inspection of the foremen’s records, accident, injury and illness records and medical and compensation records at the mine. *Id.* at 865. All of this information was contained in personnel records that contained other data as well. *Id.* After the discovery of two instances of failure to report, the safety manager informed the inspector that he would not be permitted to continue the inspection. In characterizing the inspection, the ALJ maintained that Part 50 does not explicitly authorize the warrantless search of personnel files containing medical and other information that may or may not be related to accidents, injuries, and illnesses that are reportable. *Id.* at 873. Accordingly, the

Administrative Law Judge (“ALJ”) held that MSHA could not inspect the private personnel files of a mine, in the absence of a valid warrant. *Id.* at 872-873.

However, the instant case can easily be distinguished from *Sewell*. First, the actions of the MSHA inspectors here do not constitute a warrantless search; rather, they are simply requesting that the operator produce certain documents. Unlike in *Sewell*, the inspector would not be rummaging through the file cabinets or files of the operator.² The mine operator would search his own files for this information, producing only those records meeting the specifics of the request, thereby limiting the chance that unrelated private information would be released to MSHA.

Moreover, this was not some wholesale demand that would cause the operator great cost and burden to produce. MSHA’s request was for documents related only to those accidents, injuries, and illnesses that occurred while working at the mine or as a result of work at the mine. Furthermore, MSHA is only requesting documents that were recorded within the span of one year. The request concerns only employees, not family members, relatives, or others; if non-employee medical or other records are maintained at the mine, they would not be required for the audit. Any medical or EMT records would concern only the employee, and as to drug tests, only those conducted following an accident that caused an injury. *See*, Affidavit of Montali. Since the requested records are maintained for a number of years, compiling the requested records for only one year would not be burdensome.

Third, as an ALJ decision, this case does not have value as precedent. Admittedly, if the facts were so similar that they could barely be distinguished, I may have been persuaded to consider its reasoning. However, for the reasons listed above, I find the facts in the instant case to be so distinct, that *Sewell* does not provide guidance and is not controlling.

In the absence of controlling Commission precedent, we turn to the statutes, regulations and case law for guidance. Initially, we note that the Mine Act and the implementing regulations are to be liberally construed as long as the Secretary’s interpretation is reasonable and promotes miner safety. *Hanna Mining Co.*, 3 FMSHRC 2045, 2048 (Sept. 1981); *Secretary of Labor v. Cannelton Industries, Inc.*, 867 F.2d 1432, 1437 (D.C. Cir. 1989)

In *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984), the Court explained that when confronted with review of an agency’s construction of the statute it administers, a judge must consider two questions. The first is whether Congress has spoken to the issue in question. *Id.* If so, the questions are at an end and the language must be enforced as written. *Id.* If the statute is silent or ambiguous to the issue in question, however, the Court must question whether the agency’s answer is a permissible interpretation of the language of the statute. *Id.* In this instance, the agency’s interpretation must be reasonable, and if so, it will be accorded deference. “...Considerable weight should be accorded to an executive department’s construction of a statutory scheme it is entrusted to administer....” *Id.* At 844.

² In *Peabody*, the Commission similarly distinguished *Sewell* in this manner.

The same analysis applies equally to the language and interpretation of the Secretary's own regulations. *Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 460 (D.C. Cir. 1994). Where the language of a regulatory provision is clear, the terms of that provision must be enforced as written unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results. *Utah Power and Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989); *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (Aug. 1993); *Cyprus Emerald Resources Corp.*, 20 FMSHRC 790 (Aug. 1998).

I find no need to go beyond the plain language of the statutes and regulations. Section 103 (a)(1)(4) of the Act empowers the Secretary to obtain and utilize information to determine “...whether there is compliance with the mandatory health or safety standards or with any citation, order, or decision issued under this title or other requirements of this Act.” (Emphasis added). Section 103(h) of the Act broadens the scope of compliance actions by explicitly stating “[i]n addition to such records as are specifically required by this Act, every operator of a coal or other mine shall establish and maintain such records, make such reports, and provide such information, as the Secretary...may reasonably require from time to time....” (Emphasis added). These statutory provisions create a duty on the part of the operator to maintain and provide records to MSHA for the agency to determine compliance with any requirements of the Act. Hence, there would be a legitimate basis for enforcement of reporting requirements even without the Part 50 rules. *American Mining Congress*, 995 F. 2d 1106, 1109 (1993).

The Contestants argue that the records sought are private, and the procedures for safeguarding the information released to MSHA are insufficient. Although no one would argue against the notion that medical and personnel records are of a highly sensitive and personal nature, there are certain important interests of the government that override these concerns. MSHA, a public health agency, does have the authority to obtain information to determine compliance with the above cited statutes, and permission from the employees is not required. *United Steelworkers of America, AFL-CIO-CLC*, 647 F.2d 1189, 1241 (Jan. 1981). The disclosure of private medical information to a public health agency is a reasonable exercise of government responsibility over public welfare where it is related to occupational health and safety and does not violate any rights or liberties protected by the Fourteenth Amendment. *Whalen v. Roe*, 429 U.S. 589, 597, 598, 602. Further, and importantly, it may be concluded that the governmental interest in promoting mine safety far outweighs any interest the mine operators may have in privacy. *Youghioghney* at 51.

Even if the statutes were considered ambiguous, the Part 50 rules are legislative rules. Their publication in 1977 satisfies the requirement that the rules have general applicability and legal effect. *American Mining Congress*, at 1109, 1110. Entirely consistent with the statutory mandate, the agency promulgated regulations, including 50.41, that also spelled out duties of the operator to cooperate in determinations of compliance, *Id.* at 1110, 1111. Section 50.41 of the regulations allows the Secretary “to inspect and copy information related to an accident, injury or illnesses which MSHA considers...relevant and necessary to a determination of compliance with the reporting requirements of this part.” (Emphasis added). Both the statutory and regulatory provisions are clear in their purpose and intent to grant the Secretary authority to

request documents that are not specifically required to be kept under the Act. To find otherwise would be to render these passages meaningless.

Further, as set forth and discussed above, the preambles to the controlling regulation, 30 C.F.R. §50.41, are instructive in that MSHA may request the employment, medical and other records of the employer. The Secretary is authorized to inspect records in order to determine reporting compliance. The reasoning is that reliance on the information provided in the required forms by the operator itself would do very little to verify and ensure complete reporting. In order to verify compliance, the Secretary must have some control over the flow of information. The power to acquire information was not limited to any particular records, and only the Secretary, subsequent to inspection and copying, could determine relevance. 42 Fed. Reg. 55569, 65535 (1977). The language of these preambles is persuasive.

The Health Insurance Portability and Accountability Act (“HIPAA”) created a national framework for health privacy protection while also protecting the rights of consumers to access their own health information. 45 C.F.R. §160.101. Without suggesting that HIPAA in any way extends the Secretary’s authority to request records, it is significant from the standpoint of expectations of privacy that it explicitly exempts “[a] public health authority that is authorized by law to collect or receive such information for the purpose of preventing or controlling disease, injury, or disability.” 40 CFR § 164.512. The preamble to the HIPAA regulations specifically lists MSHA as one of the entities included as a public health authority. 65 Fed. Reg. 82624 (Dec. 28, 2000).

Moreover, and in consideration of the Contestant’s concerns regarding the possibility of unauthorized disclosure of private employee information, the safeguards that MSHA utilizes during its Part 50 audits to prevent any further release are adequate. Among the joint exhibits is a memorandum, distributed on December 13, 2010, Tr. 12, outlining procedures for safeguarding personally identifiable medical or other sensitive information. Ex. J-K. The agency has established specific procedures that must be followed when handling the records of an operator’s employees. These include special filing procedures, locked storage, limited access, safe transportation methods, and an alert that medical information is ordinarily exempt from Freedom from Information Act (FOIA) disclosure. *Id.* While no procedures are fool-proof, these go a long way to ensuring that information will not be disclosed. Considering the Congressional mandate to the agency, the controlling regulations, and the exemption from HIPAA provisions, there can be no reasonable expectation of privacy in the records sought by MSHA.

Having found that the Secretary does have the authority to request the records at issue in this case, I do not have to rule on the reasonableness of her interpretation of the statutes and regulations. However, given the compelling need to verify reports and determine compliance, I would have found her interpretation reasonable anyway. The request is limited to defined types of documents that are necessary to further her mission to protect the safety and health of miners. She is not requesting a wholesale search of all of the records of the operator, including those that are irrelevant to the goals of the audit.

It follows also from the above discussion, that contrary to the Contestant's arguments, this is not arbitrary, ad hoc rulemaking that violates the standard notice and comment rulemaking requirements. The Secretary has interpreted "in addition to such records" to broaden the document requesting power that She already possessed. She did not create new powers for herself. Her interpretation further defines that this phrase includes employee time sheets, payroll records, medical records and such other documentation requested as relates to work at the mine. The language of the Act lends itself to this interpretation and, thus, the Secretary did not engage in arbitrary, ad hoc rulemaking.

In fact, legislative rulemaking has already been accomplished, in 1977, and there is no need for additional rulemaking. The regulatory scheme under Part 50 is adequate for the purposes of the audit. A reasonable interpretation of the statutory language would establish that documents in addition to those required to be kept under the Act may be requested by the Secretary from time to time as long as they are relevant and necessary. Specific types of documents or information do not need to be named in either the statutes or the regulations. There is no discernible inconsistency between the UAR and either the Act or the Part 50 regulations. The Secretary did not exceed her interpretation authority under *Chevron* analysis.

The Contestants, citing *Sewell*, argue that the audit request amounts to a search of private company records that cannot be conducted absent a valid search warrant. The most obvious deficiency in this argument is that the Secretary is not demanding to rummage around in the files of the operator. To the contrary, She is requesting that the Contestants produce the documents for analysis by MSHA. Moreover, the documents to be produced are limited by both content and time. By its own description, the request is not a wholesale search. Even if the UAR is considered to be a warrantless demand for the production of documents, as distinguished from a warrantless search and/or seizure of company files, it still does not violate the Fourth Amendment. It is authorized by law to verify compliance with the Act and regulations and necessary to further a federal interest, the health and safety of miners. Where Congress has allowed the agency access to the records, with the specific language of Section 103 (h), in a pervasively regulated industry, there cannot be an expectation of privacy. *Donovan v. Dewey*, 452 U.S. 594, 599, 600 (1981).

Finally, the Contestants argue that the Secretary could verify reporting accuracy with much less information. This argument suggests that the audit is unreasonable. I have discussed above, that the audit request is not burdensome. I also find that it is neither overly broad nor unreasonable. The Secretary does not request every documented injury or illness to every miner for a number of years. She is only requesting the documentation of injury, illness, or accident that occurred while working at the mine or as a result of work at the mine. The UAR is for a lawful purpose. It is limited to the span of one year's time. Moreover, the records listed in #3 and #5 of the UAR are maintained at the mine, in HR, or with a known third party. The records needed to verify compliance are clearly described. The undersigned is of the opinion that the Part 50 audit requests are the minimum necessary to verify all of the information submitted to MSHA on the 7000 forms. Therefore, and in light of the significant limitations incorporated into the audit request, it is not overly broad, burdensome or unreasonable.

I find that the Contestant mines failed to fully cooperate in the Part 50 audit and violated 30 C.F.R. §50.41. I further find that Citations 4900014, 4900011, 8257128, 7281434, 8257134 and 8185763 and Orders 4900015, 4900012, 8257129, 7281435, 8257135 and 8185768 issued to the Justice, Randolph, Process, Road Fork and Love Branch mines and Coal Creek Prep Plant, respectively, are valid.

ORDER

The valid Citations and Orders issued to the Contestant mines are **AFFIRMED**.

/s/ Kenneth R. Andrews

Kenneth R. Andrews

Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

**OFFICE OF ADMINISTRATIVE LAW JUDGES
601 NEW JERSEY AVENUE, N.W., SUITE 9500
WASHINGTON, DC 20001**

May 27, 2011

SECRETARY OF LABOR, MSHA on behalf of LOUIE ALBERT ROCCHETTI, Complainant	:	TEMPORARY REINSTATEMENT PROCEEDING
	:	Docket No. VA 2011-338-D NORT-CD-2111-02
v.	:	
GMS MINE REPAIR & MAINTENANCE, Respondent	:	Buchanan No. 1

DECISION AND ORDER GRANTING TEMPORARY REINSTATEMENT

Appearances: A. Scott Hecker, Esq., U.S. Department of Labor, Office of the Solicitor, Arlington, Virginia, for the complainant

Maria W. Hughes, Esq., JACKSON LEWIS, LLP, Pittsburgh, Pennsylvania, for the respondent

Before: Judge Koutras

This matter is before me on an application for Temporary Reinstatement filed by the Secretary on behalf of the complainant Louie Albert Rocchetti pursuant to Section 105(c)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(1). A hearing was held in Beckley, West Virginia on May 16, 2011, and the parties appeared and participated fully therein.

The complainant filed his complaint with MSHA alleging that his discharge by the respondent on February 14, 2011, was motivated by his protected activity. The Secretary contends that the complaint is not frivolous and seeks an order requiring the respondent to temporarily reinstate the complainant to his former position, or a comparable position, within the same commuting area and at the same rate of pay and benefits he received prior to his discharge, pending a final commission order on the complaint.

The MSHA Discrimination Complaint Form 2000-123, filed by the complainant reflects that it was filed because he believed he was discharged for requesting to file an accident report. (Secretary's application, Exhibit B).

A copy of a sworn affidavit of MSHA Inspector David E. Smith, in support of the Secretary's temporary reinstatement application (Exhibit A), asserts that the complainant injured his right hand on February 4, 2011, while performing his normal work duties, and after attempting to report his accident for more than an hour, he left the mine to seek medical treatment. The persons allegedly responsible for the alleged discriminatory action are identified on the face of the form as Curtis Lusk, supervisor, and Adam Smith, coordinator.

The supportive affidavit asserts that the complainant's unsuccessful efforts to report his accident included speaking with various respondent (GMS) and mine operator (Consolidation Coal) management members, on-site, and leaving messages for Curtis Lusk, GMS job coordinator for the Buchanan Mine, Adam Smith, GMS safety coordinator based in Beckley, West Virginia, and Mike Hudson, his designated GMS crew leader.

The supportive affidavit further asserts the complainant filed a workers' compensation claim and on February 6, 2011, spoke with Messrs. Lusk, Smith, and Hudson concerning his attempts to file an accident report, his filing of the compensation claim, and his doctor's orders concerning his work.

Stipulations

The parties stipulated to Commission and ALJ jurisdiction; that GMS is a contractor performing services at Consolidation Coal Company's Buchanan Mine No. 1; that GMS is "a person" as defined by Section 3(f) of the Mine Act; and that Mr. Rocchetti was employed by GMS from July 29, 2011, and was discharged on February 14, 2011. (Tr. 7).

Pre-Hearing Order

On May 6, 2011, I granted the Secretary's Motion In Limine based on Commission Rule 45(d), 29 C.F.R. § 2700.45(d), and the supporting Commission case precedents cited therein concerning the limited scope of the hearing to determine whether an application for temporary reinstatement was frivolously brought. A copy of my ruling was served on the parties in advance of the hearing in this matter.

Complainant's Testimony

Miner Louie Rocchetti was employed by the respondent, GMS as a general laborer on July 29, 2011, until his discharge on February 14, 2011. GMS was a contractor providing services to the mine operator Consolidation Coal Company at its Buchanan No. 1 mine. Mr. Rocchetti testified that during a work break after helping to move 12 or 15 I-beams on the third shift on February 4, 2011, his hand tightened up and was swollen. At the end of the shift, he went to the hospital for treatment and a doctor's report indicated that he was treated for strains and was off work for two days, with light duty for five days. (Tr. 35, ALJ Exhibit 1). He also filed a workers' compensation claim at the hospital. (Tr. 79).

Mr. Rocchetti and fire boss John Smith discussed the filing of an accident report, and Mr. Smith referred him to Consol foreman Steve Bell after his shift ended at 7:30 a.m. Mr. Rocchetti and Mr. Bell went to the GMS office and found a Consol accident reporting form.

However, day shift foreman Dave Lambert informed Mr. Bell that GMS had to use its own accident report forms. (Tr. 36-39). Mr. Rocchetti drove to the GMS office trailer to obtain a form but was unable to find one. He spoke to third shift crew man Daniel Adams who referred him to GMS supervisor Curtis Lusk and safety coordinator Adam Smith. Mr. Rocchetti called and left telephone messages for Mr. Lusk, Mr. Smith, and crew chief Mike Hudson informing them that he was going to the hospital. (Tr. 41-43, 65). Mr. Smith also called him at his home two days after his accident asking him about his workers' compensation claim and his hospital doctor's placing him two days off work and five limited duty days. (Tr. 75). Mr. Rocchetti requested a copy of the report from Mr. Adams, but Mr. Adams would not accept his request and rejected it because Mr. Rocchetti and Mr. Hudson did not work on the same shift. (Tr. 70, 84).

Mr. Rocchetti stated that after his accident Mr. Hudson eventually filled out an accident report and informed him that he gave it to Mr. Lusk. After several contacts with Mr. Lusk requesting a copy of the accident report, including two scheduled meeting which Mr. Lusk stated

he forgot about, and one statement by Mr. Lusk that he would provide him with a copy, Mr. Lusk told him he needed to get the copy from Adam Smith. (Tr. 70, 86-88). Mr. Rocchetti confirmed that he has never received a copy of any accident report and was unable to report his accident because he could not obtain a reporting form that he had requested, and no one was made available to assist him in obtaining the form or give him a copy that may have been filled out. (Tr. 85, 90-91).

Respondent's Testimony

Randy Scott Smith, GMS vice-president for sales, explained company policy regarding accident reports as stated in its employee handbook. He stated that there is an 800 phone number for reporting an accident to the GMS office in Maryland and to leave a message for the mine safety coordinator. He stated that an attempt should be made to contact an immediate supervisor or safety director at the mine where the employee is working. (Tr. 94-96). He confirmed that he was not at the mine on February 4, 2010, was not involved with the accident, and had no knowledge of the content of any conversations related to Mr. Rocchetti's attempts to report his accident. (Tr. 97).

Mr. Smith stated that accident forms are available at the mine locations and that the safety coordinator is responsible to make sure they are accessible for everyone. The form itself is not posted, but the procedures are generally posted. Attempts are made to give copies of the form to all crew leaders. (Tr. 98-100).

Note: The GMS employee manual dated January 1, 2010, was produced and without objection two relevant paragraphs were recorded for the transcript by the official court reporter. (Tr. 100-101). Paragraph one states as follows:

Accidents and injuries, all work related injuries must be reported immediately after the occurrence to the GMS Oakland offices at (301) 334-8186 and an accident report filled out. All injuries must be reported for insurance and MSHA purposes. Emergency medical attention will be provided as required.

Mr. Smith confirmed that the procedures for reporting of accidents varies from MSHA districts and Consol's requirements, and that the forms used by GMS and Consol overlap and are at times interchanged. (Tr. 95). He stated that procedures for reporting accidents are posted at the mine, but the form is not. Attempts are made to give every crew leader a supply of forms and it is the responsibility of the safety coordinator to make sure they are available to everyone. (Tr. 99).

Mr. Smith stated that Mr. Rocchetti's understanding of the handbook accident reporting procedures "was fairly accurate," and he confirmed that a miner should try and contact his immediate supervisor or a safety director in his area or mine management where he is working. (Tr. 96).

Mr. Smith stated that the policy manual does not explicitly direct the miner to report an accident, and while he guessed that it was general policy that a miner remain at the mine if he is injured to fill out a form, he did not know what is further posted at the mine site in this regard. (Tr. 102-103).

Respondent's counsel failed to produce or present testimony from GMS management members Curtis Lusk, a supervisor, and Adam Smith, the safety coordinator, who were named in the complaint filed by Mr. Rocchetti as the individuals who allegedly interfered with his efforts to report his accident, and whose alleged actions are directly related to the critical issue of whether the complaint filed by Mr. Rocchetti was frivolous or non-frivolous.

Counsel's theory of the case and the reasons for not presenting the testimony of the two critical witnesses was raised for the first time at the hearing during her opening statements, and at the conclusion of the Secretary's testimony and closing arguments. (Tr. 11-29, 108-109).

Although acknowledging her understanding of the limited and narrow scope of the hearing, as well as the motion granted regarding this issue, counsel asserted her intention to present evidence of events that would have tolled the respondent's ability to be reinstated with back pay because of a layoff and because there is no work being done at the mine of the type Mr. Rocchetti was performing prior to his discharge. (Tr. 10-11). She further stated that she intended to present testimony from her witness regarding the layoff. (Tr. 12-13).

I informed counsel that her arguments, raised for the first time, were premature and that the testimony that I will accept is strictly limited to whether or not Mr. Rocchetti's complaint that he was unable to file an accident report was frivolous, and the Secretary's objections expanding the scope of the hearing as proposed by respondent's counsel were granted, and the respondent's proffers were rejected. (Tr. 17, 20, 25). However, her objections were noted and she was permitted to file a brief preserving her legal argument for the record. (Tr. 106-110).

The parties filed post-hearing briefs on May 20, 2011. The Secretary re-states its hearing position that any evidence or argument regarding the availability of Mr. Rocchetti's reinstatement relates to the respondent's affirmative defenses on the merits and is outside the limited bounds of the instant temporary reinstatement proceeding. The Secretary asserts further that the respondent may advance these arguments in the context of a merits proceeding after the parties have had sufficient time to evaluate the merits claim and complete full discovery on these issues, and that until such time as respondent can properly plead and prove such a defense, an order of temporary reinstatement must remain in effect.

The respondent's submission includes a Motion to Exclude Evidence Exceeding Order Granting Motion in Limine and Motion for Reopening of Hearing, with supporting memoranda. The Secretary filed a letter in response to the motions, pointing out that the fact that counsel for the respondent was confused or unprepared to address the "frivolously brought" issue should not bear on that determination. The Secretary pointed out that the respondent had significant time to familiarize itself with the Application and Motion in Limine and to educate itself as to the proper boundaries of a temporary reinstatement proceeding.

After careful consideration of the respondent's post-hearing motions, and the responses by the Secretary, the motions ARE DENIED, and my hearing rulings in this regard are RE-AFFIRMED.

With respect to Mr. Rocchetti's complaint, I conclude and find that his attempts to secure, complete, and file an accident report after he was injured at work were made in good faith and constituted protected activity within the intent and meaning of the Mine Act. The credible and un-rebutted testimony of Mr. Rocchetti clearly establishes that the respondent's management officials, namely safety coordinator Adam Smith, supervisor Curtis Lusk, and crew leader Mike Hudson were all aware of Mr. Rocchetti's injury for several days following that event as well as his efforts to obtain an accident form.

I further conclude and find that rather than reasonably accommodating and facilitating Mr. Rocchetti's attempts to obtain an accident form in order to fill it out and file it, respondent's management officials did the opposite. The credible and un-rebutted testimony of Mr. Rocchetti, in much detail, chronicle a series of telephone calls, conversations, both personal and by telephone, between Mr. Rocchetti and respondent's management officials, including its safety coordinator Adam Smith, on the day he was injured and after that event, all of which resulted in his failure to obtain an accident report form for filing. Indeed, he testified that as of the date of the hearing he had never been given a copy of any accident form related to his accident that had

been filed, notwithstanding the statutory and regulatory requirement to file one. Under all of these circumstances, I conclude and find that Mr. Rocchetti's failed efforts and requests to obtain an accident report and to report his injury was a direct result of the non-responsive, evasive, and non-cooperative conduct by management to accommodate his requests.

The Secretary's arguments that the relatively short time period between Mr. Rocchetti's protected activity and his discharge; management's inquiries concerning his filing of a workers' compensation claim about his medical treatment; and his transfer from his usual work location to another one, for less pay, arguably demonstrates animus against Mr. Rocchetti, and his accident reporting efforts are persuasive.

Based on all of the aforementioned circumstances, I find that there is reasonable cause to believe that Mr. Rocchetti may have been discriminated against as alleged in his complaint, and conclude that the Application for Temporary Reinstatement has not been frivolously brought.

ORDER

The Application for Temporary Reinstatement IS GRANTED. The respondent IS ORDERED TO REINSTATE Mr. Rocchetti to the position that he held prior to his February 14, 2011, discharge, or to a similar position, at the same rate of pay and benefits, IMMEDIATELY ON RECEIPT OF THIS DECISION.

/s/ George A. Koutras
George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 NEW JERSEY AVENUE, N.W., SUITE 9500
WASHINGTON, DC 20001

May 27, 2011

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. YORK 2010-205-M
Petitioner	:	A.C. No. 18-00017-212386 x358
v.	:	
	:	
B&J EXCAVATING, INCORPORATED,	:	Mine: Union Bridge, MD / LeHigh Cement
Respondent	:	

DECISION

Appearances: Matthew Epstein, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Petitioner

Steven D. Sandbrook CMSP, President, Eagle Mine Safety, Inc., Nazareth, Pennsylvania, for the Respondent

Before: Judge Koutras

This civil penalty proceeding was held pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 802 et seq. (2000), (the "Mine Act"). This matter concerns an alleged violation of the mandatory safety standard 30 C.F.R. § 56.9315. Citation No. 6537795, a 104(d)(1) violation, was served on the respondent on January 11, 2010. This alleged violation was found to be significant and substantial, (hereafter "S & S"), and an unwarrantable failure. The cited mandatory safety standard requires the control of dust at muck piles, material transfer points, crushers, and on haulage roads where hazards to persons would be created as a result of impaired visibility. In this case, the alleged violation is in connection with reduced visibility on the quarry haulage roads.

A hearing was held in Frederick, Maryland, on March 8, 2011, and the parties appeared and participated fully therein. The critical issue was whether the violation was the result of the respondent's unwarrantable failure to comply with the cited safety standard, which resulted in a proposed civil penalty assessment of \$3,689.

The inspector issued the citation because he believed the most effective way to control roadway dust was through the application of water. The respondent agreed that dust could have been controlled by applying water, but also believed that the dust could have been controlled using other methods. The respondent asserted that it acted to control the dust by scraping the road and applying clean stone, and by reducing the speed limit. The respondent contends that it

did not initially apply water to the road because it was restricted from doing so by Lehigh Cement's quarry foreman, who had authority to permit the use of water to control the dust. Lehigh Cement chose not to initially allow the respondent to apply water to the road due to freezing temperatures. (Tr. 79 - 82).

Mr. Bartsch, the respondent's representative, testified that attempts to control the dust without the use of water began at 6:00 a.m., and were ongoing when he arrived at 11:00 a.m.; approval for using water started at 2:00 p.m. He explained the procedures to safely control truck traffic during that time. (Tr. 87 - 92).

At the close of all of the testimony, the petitioner's counsel requested a short recess to further confer with the inspector, and the respondent's representative. Upon resumption of the hearing on the record, counsel stated that the parties agreed to settle the matter by modifying the Section 104(d)(1) unwarrantable failure citation to a Section 104(a) "S & S" citation, with a moderate negligence finding and a penalty assessment of \$2,000.

In support of the settlement proposal, petitioner's counsel agreed that the respondent's failure to use water to control the dust was due to its limited options based on contractual limitations with the mine operator, Lehigh Cement. Under these circumstances, counsel agreed that the attempts and efforts by the respondent to control the dust were mitigating circumstances that warranted the issuance of a Section 104(a) citation rather than a Section 104(d)(1) unwarrantable failure citation. (Tr. 114-115).

In addition to the aforementioned mitigating circumstances, which I accept as a reasonable and credible compromise of this case, I have considered the stipulations by the parties that the respondent abated the citation in good faith, that it is a small to medium sized contractor, that the assessed civil penalty will not adversely affect its ability to continue in business, and with a relatively good prior history of eight violations in the past 15 months, none of which is the same as the one issued in this case. (Tr. 6 - 8).

Wherefore, in view of the foregoing and after consideration of the criteria set forth in Section 110(i) of the Mine Act, I conclude and find that the settlement agreed to by the parties in this case is appropriate and in the public interest and it is **APPROVED**. My prior approval on the record is **RE-AFFIRMED**.

The contested Section 104(d)(1) "S & S" Citation No. 6537795 that was issued on January 11, 2010, is modified to a Section 104 (a) "S & S" citation, with a "moderate negligence" finding and a civil penalty of \$2,000 is assessed.

The respondent is **ORDERED** to pay the \$2,000 civil penalty assessment within 30 days of the date of this decision. Payment shall be made to the Mine Safety and Health Administration, U. S. Department of Labor, Payment Office, P. O. Box 790390, St. Louis, MO 63179-0390. Upon receipt of payment, this matter is **DISMISSED**.

/s/ George A. Koutras
George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

**OFFICE OF ADMINISTRATIVE LAW JUDGES
601 NEW JERSEY AVENUE, N.W., SUITE 9500
WASHINGTON, DC 20001
June 6, 2011**

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. YORK 2010-15-M
Petitioner	:	A.C. No. 30-03038-198913
v.	:	
HELDEBERG BLUESTONE &	:	Grippee Quarry #4 South
MARBLE INC.,	:	
Respondent	:	

DECISION

Appearances: Paul Koob, Esq., U.S. Department of Labor, Office of the Solicitor, Philadelphia, Pennsylvania, for the Petitioner

Paul F. Giebitz, President, Heldeburg Bluestone & Marble, Inc., East Berne, New York, for the Respondent

Before: Judge Koutras

STATEMENT OF THE CASE

This civil penalty proceeding, pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 802 et seq. (2000), (hereafter “Mine Act”) concerns an alleged violation of mandatory safety standard 30 C.F.R. § 56.15004, as stated in a Section 104(d)(1) significant and substantial (hereafter “S & S”) unwarrantable failure citation No. 6536680, served on the respondent on August 3, 2009. The cited standard, in relevant part, requires all persons to wear safety glasses when in or around an area of a mine where a hazard exists which could cause injury to unprotected eyes.

A hearing was held in Albany, New York on March 22, 2011, and the parties appeared and participated fully therein. The issues include whether the alleged condition or practice, if established, could significantly and substantially contribute to the cause and effect of a mine hazard resulting from the respondent’s alleged unwarrantable failure to comply with the cited safety standard resulting in a penalty assessment of \$2,000.00.

The parties stipulated to the following:

1. The respondent and its quarry operations that are the subject of these proceedings are subject to the jurisdiction of the Mine Act and the Commission.
2. MSHA Inspector Matthew Mattison was acting in his MSHA official capacity when he issued the citation on August 3, 2009, and that a true copy was properly served on the respondent.

3. A prior citation was issued on July 21, 2009, for a violation of Section 30 C.F.R. § 56.15004, was served on the respondent and issued to foreman Mark Kudlack. The respondent did not contest that citation and the assessed civil penalty was paid. (Tr. 5-7).

Petitioner's counsel noted my partial summary decision of March 1, 2011, finding that miner, Perry Shaul failed to wear protective glasses while performing work, striking stone with a sledge hammer. (Tr. 7). I take note that Respondent failed to respond to Petitioner's motion in this regard. The respondent does not dispute the fact that no safety glasses were worn.

MSHA inspector, Matthew Mattison testified that when he arrived at the quarry on August 3, 2009, at approximately 2:30 p.m., he observed two miners extracting stone and that he was 40 to 60 feet away. He observed stone splitter, Perry Shaul using a sledge hammer and a chisel on the stone striking it two or three times without wearing any eye protection. The chisel was positioned on the bluestone stone bottom where he was trying to pop it off the ground, and he observed shards of stone splinters and dust coming off the stone. The other individual working with him was foreman Mark Kudlack. (Tr. 16-18).

Mr. Mattison stated that he was familiar with bluestone quarries and has inspected many such operations and that workers typically wear eye protection. He explained that the stone would break apart when struck when someone was hitting a wedge with a sledge hammer. The size of the chips and dust he observed ranged from the size of a penny/dime to dust particles. (Tr. 19-20).

Mr. Mattison stated that Mr. Shaul was directly facing and leaning into the stone while swinging the sledge hammer. He was concerned for Mr. Shaul's safety when he observed him working without wearing his safety glasses because the debris, chips, and splinters could enter his eyes causing possible blindness and permanently disabling eye injuries. (Tr. 20). He was not concerned with the foreman's safety because he was wearing his safety glasses. (Tr. 21).

Mr. Mattison stated that the foreman was standing five to six feet from Mr. Shaul observing his work and that during this time the foreman never told Mr. Shaul to put his glasses on or to stop working. Mr. Mattison believed that had he not been present, Mr. Shaul would have continued his work without eye protection because two weeks earlier on July 21, 2009, he observed him doing the same work without eye protection and issued a citation that he served on foreman Kudlack. (Tr. 22-23; Exhibit P-2).

Mr. Mattison stated that after he issued the previous citation he spoke to Mrs. Giebitz, one of the respondent's owners who was working at the quarry office about the matter. (Tr. 24-26).

On cross-examination by Mr. Paul Giebitz, Mr. Mattison confirmed that he terminated the citation in issue after Mr. Shaul put on the safety glasses that were provided to him by the respondent that was nearby where he was working. (Tr. 30). The glasses were ten to 12 feet away, sitting on an air compressor. (Tr. 33).

Mr. Mattison confirmed that when he initially observed Mr. Shaul working on the stone from a distance of 40 to 60 feet, he could see dust and chip debris coming from the stone, and that Mr. Shaul and Mr. Kudlack showed him where the glasses that were not worn were located on the compressor. (Tr. 32-33).

Mr. Mattison explained that while he indicated on the face of the citation that any resulting injury would be "fatal", he did not believe that a fatal accident would occur. He further confirmed that while he never observed any stone debris striking Mr. Shaul's face, it was flying off the stone while it was struck. (Tr. 36).

Mr. Mattison further explained that the basis for his “high negligence” finding was due to the fact that foreman Kudlack was present during the work performed by Mr. Saul and was the designated individual responsible to ensure the safety of the miners. Petitioner’s counsel confirmed that a Section 110(c) investigation concerning foreman Kudlack did not result in any further action against him because it involved a higher burden of proof as is required pursuant to a Section 104(d)(1) citation. (Tr. 37).

Quarry foreman Mark Kudlack testified as an adverse witness and that his duties include maintaining safety, training miners, and correction violations. He confirmed that he issues safety glasses to the miners in the morning and insures that they have them before leaving the office (Tr. 42-45). He testified that on August 3, 2009, he observed miner Perry Shaul working to extract stone using a wedge and sledge hammer without wearing his safety glasses for approximately five minutes. He confirmed that Mr. Shaul was previously cited for not wearing safety glasses two weeks prior to the issuance of the citation in issue in this case. Although Mr. Shaul was extracting stone in both instances, Mr. Kudlack explained that on the prior occasion he was using a jackhammer rather than a sledge hammer. (Tr. 47-48).

Mr. Kudlack testified that Mr. Shaul obviously had a problem with failing to wear his eye protection “because he was cited beforehand,” as well as previous instances when he was observed without wearing eye protection. (Tr. 48-49). Mr. Kudlack further explained that Mr. Shaul complained that his glasses did not fit him well and was given larger ones. Even though they were a better fit, Mr. Kudlack stated “I’d catch him without them on,” and confirmed that he fired Mr. Shaul after the citation was issued. (Tr. 50).

The Violation

The respondent did not dispute the fact that miner Perry Shaul was not wearing his safety glasses while working to extract stone with a wedge and sledge hammer on August 3, 2009. The respondent’s admission, and the credible testimony of the inspector clearly establish this was the case. I therefore conclude and find that the failure of the cited miner to wear his safety glasses constituted a violation of mandatory safety standard Section 30 C.F.R § 56.15004, AND IT IS AFFIRMED.

Significant and Substantial Issues

A significant and substantial (“S&S”) violation is described in Section 104(d)(1) of the Act as a violation “of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard.” A violation is properly designated S&S “if based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *Cement Div., Nat’l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

The Commission has explained that in order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary of Labor must prove:

(1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard—that is, a measure of danger to safety—contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

Mathies Coal Co., 6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); see also, *Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary*, 861 F.2d 99,

103-04 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria).

In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985), the Commission provided additional guidance:

We have explained further that the third element of the *Mathies* formula “ requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury.” *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the *contribution* of a violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1866, 1868 (August 1984); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574-75 (July 1984).

This evaluation is made in terms of “continued normal mining operations.” *U.S. Steel Mining Co., Inc.*, 6 FMSHRC at 1574. The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987).

The existence of a violation has clearly been established pursuant to the first prong of the *Mathies* Test. With respect to the second prong requiring a discrete safety hazard contributed to by the violation, Inspector Mattison testified that he observed shards of stone splinters and dust coming off the stone as the miner was striking a chisel or wedge placed under the stone with a sledge hammer in an effort to raise and extract the stone. (Tr. 16-18; 32, 36). Although the inspector did not include his observations on the face of his citation, after observing his demeanor during his testimony, I find his testimony to be credible. He further testified that the miner could be struck in the eye by shards, dust, or debris causing an injury. (Tr. 20).

Foreman Kudlack did not rebut the inspector’s testimony regarding his observations of shards, splinters, and dust on the day of his inspection. Although Mr. Kudlack testified during his deposition that he observed no chips, he explained that the presence of such debris would depend on the condition of the wedge. However, he agreed that a miner striking a wedge into stone without eye protection presents a slight degree of danger and a hazard to the eyes. (Exhibit P-1; 14-17).

Given the fact that foreman Kudlack was wearing his safety glasses while in close proximity to the miner who was wielding the sledge hammer as he struck the wedge, there is a credible inference that he was aware of the existence of a hazard and wore his safety glasses to protect his eyes against injury. Under all of these circumstances, I conclude and find that the petitioner’s evidence clearly establishes the existence of a discrete safety hazard that satisfies the second prong of the *Mathies* Test.

With respect to the third prong of the *Mathies* Test requiring the establishment of a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury, an evaluation of the risk of injury necessarily assumes the continuance of normal mining operations. In this case, the inspector testified that had he not been present when he observed the miner without wearing eye protection, it was his belief that the miner would have continued working without wearing eye protection that would expose him to an injury. (Tr. 22-23). He based this conclusion on the fact that he cited the same miner for a prior violation of the same safety standard for not wearing eye protection, and took note of the fact that foreman Kudlack never instructed the miner to put on his glasses while he observed his work and never instructed him to stop. (Tr. 22-23).

Foreman Kudlack confirmed that the cited mine had a problem with failing to wear protection, and that he observed him working without eye protection on several prior occasions,

in the issuance of the prior citation of July 21, 2009. (Tr. 50). Under all of these circumstances, I conclude and find that if it were not for the issuance of the citation by the inspector, one can reasonably conclude that the work being performed by the miner without eye protection would have continued in an unsafe manner exposing him to an injury to his eyes. The rather short five-minute window between the inspector's observations that the miner was not wearing safety glasses, thereby exposing him to injury to his eyes, and the issuance of the citation, does not on the facts of this case negate the reasonable expectation of a hazardous situation exposing the miner to injury to his eyes in the event he continued with his normal mining work duties. Under all of these circumstances, and the evidence presented in this case, I conclude and find that the third prong of the Mathies Test has been established.

With respect to the fourth Mathies Test, requiring a showing that any injury resulting from the safety hazard would reasonably likely be of a reasonably serious nature, the credible testimony of the inspector reflects that the miner worked directly within the hazardous work area facing and leaning into the stone while performing his task. The inspector observed chips and dust particles that came off the stone, and he was concerned for the miner's safety because stone debris, chips, and splinters entering the eye would cause possible blindness, eye damage, or permanently disabling eye injuries. Based on his experience with bluestone operations, he believed it was reasonably likely that the miner working without protection could sustain an injury. (Tr. 19-21). I conclude and find that the fourth prong of the Mathies Test has been met in this case.

Under all of the aforementioned circumstances, I conclude and find that the inspector's significant and substantial ("S&S") finding is supported by a preponderance of the credible evidence presented by the petitioner and IT IS AFFIRMED.

The Unwarrantable Failure Issue

In *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference" or a "serious lack of reasonable care." *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); see also *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test).

The Commission has recognized that a number of factors are relevant in determining whether a violation is the result of an operator's unwarrantable failure. *Consolidation Coal Co.*, 23 FMSHRC 588, 593 (June 2001). These include the extent of the violative condition, the length of time that it has existed, the operator's efforts at abating the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator's knowledge of the existence of the violation, whether the violation is obvious, and whether the violation poses a high degree of danger. *Id.* See also *San Juan Coal Co.*, 29 FMSHRC 125, 128 (Mar. 2007).

Although the cited condition existed for only five minutes, a discrete danger existed that the respondent would not have corrected the condition and the miner would have continued his work without eye protection if it were not for the intervention of the inspector. The inspector first observed the miner striking the stone two or three times without wearing his safety glasses, while the foreman was standing next to him observing his work. At no time did the foreman instruct the miner to stop work or to put his glasses on. Although he had an opportunity to do this before the inspector appeared on the scene, he did not do so.

The foreman confirmed that management was responsible for training workers to wear eye protection. Nonetheless, he observed the cited miner splitting stone without wearing

protective eye wear, was aware that the same miner had been cited two weeks earlier by the same inspector, and admitted that he observed the same miner on prior occasions performing similar work without wearing eye protection. While he candidly admitted that the cited miner had a problem wearing his safety glasses and that he would “catch him without them on,” there is no evidence that he, as well as the respondent’s owners, ever disciplined the miner until after the second violation was issued. Such inaction constitutes indifference and a serious lack of reasonable care, aggravating factors supporting the inspector’s unwarrantable failure finding. *See Sec’y v. Lopke Quarries Inc.*, 23 FMSHRC 705, 711 (July 2001).

The Commission has recognized that supervisors, being held to a higher standard of care, must ensure their workers take proper safety precautions. *Sec’y v. REB Enterprises Inc.*, 20 FMSHRC 203, 225 (March 1998). On the facts of the instant case, the foreman disregarded the safety of the miner, albeit for a short period of time, but did nothing to stop him from working or instructing him to put on his safety glasses which were nearby.

The petitioner’s credible and un rebutted evidence supports the inspector’s high negligence finding. I find that the foreman knew, or should have reasonably known, of the existence of the obvious nature of the violation as he stood next to the miner observing him working without protective eye wear, and the high degree of danger presented at that time. I further find that the lack of any effort by the foreman to take reasonable protective action prior to the issuance of the citation by insuring and requiring the miner to put on his protective glasses, and management’s knowledge of the prior citation and instances of the miner’s failure to wear eye protection, was conduct that should have alerted management that greater efforts were necessary for compliance, and are relevant factors supporting the inspector’s unwarrantable failure finding. *Sec’y v. Consolidation Coal Co.*, 22 FMSHRC 340, 353 (March 2000).

Under all of the aforementioned circumstances, I conclude and find the inspector’s unwarrantable failure finding is supported by a preponderance of the credible evidence presented by the petitioner and IT IS AFFIRMED.

Remaining Mine Act Section 110(i), civil penalty assessment criteria.

History of Prior Violations

An MSHA mine violation report dated March 18, 2011, reflects one prior violation of Section 30 C.F.R. § 56.15004, for which a penalty of \$100.00 was paid, and two unrelated citations with a total penalty of \$200.00, which was paid. I conclude that the respondent has no significant violation history.

Size and ability to continue in business

The evidence establishes that the respondent is a seasonal small family owned bluestone mine quarry owner who operates the mine eight months a year. (Tr. 56).

With respect to the effect of a civil penalty assessment on its ability to continue in the business, I take note of the fact that in its answer to the civil penalty petition, the respondent stated its continued operation would depend on the outcome of this case. In the course of the hearing, the respondent pointed out that it paid a \$100.00 civil penalty for the first citation of Section 56.15004, and believed that the proposed penalty of \$2,000.00 in the instant case “is very high,” and expressed a willingness to pay a lesser assessment. (Tr. 52-53).

Petitioner’s counsel stated that as a routine matter he requested information from the respondent concerning its financial position, and was only provided with partial tax return deductions information and nothing further has been forthcoming from the respondent. (Tr. 57-58).

The burden of proof to establish that the imposition of a civil penalty assessment would adversely affect its ability to continue in business lies with the respondent, and in the absence of any proof in this regard it is presumed that no such adverse effect would occur. *See Sellersburg Stone Co.*, 5 FMSHRC 287, 294 (March 1983), aff'd 763 F. 2d 1147 (7th Cir. 1984); *Broken Hill Mining Co.*, 19 FMSHRC 673, 677 (Apr. 1997); *Spurlock Mining Co.*, 16 FMSHRC 697, 700 (Apr. 1994).

I conclude and find that the respondent has failed to provide evidence establishing that the imposition of the proposed civil penalty assessment of \$2,000.00, for the contested Section 104 (d)(1) citation would adversely affect its ability to continue business.

Good Faith Abatement

The citation was terminated within minutes after the cited miner retrieved his safety glasses from where they were located nearby his work area.

ORDER

Based on the aforementioned findings and conclusions, the contested Section 104(d)(1) "S & S" unwarrantable failure citation IS AFFIRMED, and the respondent IS ORDERED TO PAY a civil penalty assessment of \$2,000.00, which I find is appropriate in this case, within 30 days of the receipt of this decision.

/s/ George A. Koutras
George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
601 New Jersey Avenue, NW, Suite 9500
Washington, DC 20001-2021

June 8, 2011

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. KENT 2009-200
Petitioner	:	A.C. No. 15-18839-164793
	:	
v.	:	
	:	
EXCEL MINING LLC.,	:	Van Lear Mine.
Respondent	:	

DECISION

Appearances: Matthew Shepard, Esq., U.S. Department of Labor, Nashville, TN, on behalf of the Secretary

Gary D. McCollum, Esq., Excel Mining, LLC, Lexington, KY on behalf of Excel Mining, LLC

Before: Judge David F. Barbour

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor (“Secretary”) acting through her Mine Safety and Health Administration (“MSHA”) against Excel Mining, LLC (“Excel”) pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977 (the “Mine Act”) 30 U.S.C. §§ 815 and 820. In the petition the Secretary seeks the assessment of civil penalties for 10 alleged violations of the Secretary’s mandatory safety standards for underground coal mines. She charges that the violations occurred at Excel’s Van Lear Mine, an underground bituminous coal mine located in Martin County, Kentucky.

After the petition was filed, the company answered and the matter was assigned for hearing and decision. Upon the court’s order, the case was consolidated with two additional civil penalty cases (Docket Nos. KENT 2009-521 and KENT 2009-523), which also involved Excel. The parties conferred to determine whether they could settle the matters. As a result of their discussions, they resolved all of their differences regarding Docket Nos. KENT 2009-521 and KENT 2009-523. The settlements were approved and the matters were dismissed. The parties also settled all issues with regard to nine of the alleged violations in the subject docket, and on October 29, 2010, the court issued a partial decision approving the settlement. The court noted that the parties remained at odds over the alleged violation of 30 C.F.R. §75.202(a) set forth in Citation No. 8218342.

Citation No. 8218342 was issued pursuant to section 104(a) of the Mine Act. 30 U.S.C. §814(a). Section 75.202(a) requires in part that a mine operator protect persons in areas where

they work or travel from hazards related to roof falls.¹ In addition to alleging a violation of the standard, the Secretary asserts that the violation was reasonably likely to result in lost workdays or restricted duty to one miner, that the violation was a significant and substantial contribution to a mine safety hazard (an “S&S” violation) and that the violation was caused by the company’s moderate negligence. The Secretary proposes a civil penalty of \$687.00. The issues were tried in Pikeville, Kentucky.

STIPULATIONS

At the commencement of the hearing the parties stipulated as follows:

1. At all times relevant to this proceeding [Excel] was the operator of the Van Lear Mine . . .
2. The Van Lear Mine is a “mine” as that term is defined in Section 3(h) of the Mine Act, 30 U.S.C. §802(h).
3. At all times relevant to this proceeding, products of the Van Lear Mine entered commerce, or the operations or products thereof affected commerce, within the meaning and scope of Section 4 of the Mine Act, 30 U.S.C. §803.
4. Employees at the Van Lear Mine produced more than 800,000 tons of coal in 2008. Excel . . . is a large operator.
5. A copy of the citation at issue in this proceeding was served on Excel . . . by an authorized representative of the Secretary.
6. Excel . . . timely contested the citation.
7. Excel . . . is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and the presiding Administrative Law Judge has the authority to hear this case and issue a decision regarding this case.
8. The proposed penalties will not affect [Excel’s] ability to remain in business.

Jnt. Exh. 1 at 1-2; *See* Tr. 11-13.

THE TESTIMONY

Billy Ray Meddings is a federal mine inspector working in MSHA’s Pikeville, Kentucky office. Meddings began working for MSHA in April 2007. Tr. 15. After being hired by the agency Meddings received inspector training at the MSHA academy in Beckley, West Virginia.

¹ Section 75.202(a) states:

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

Tr. 16. He also received on-the-job training by traveling with other inspectors for a little over a year. Tr. 16-17. Before becoming an MSHA employee Meddings worked for Excel for 26 years, beginning as a day laborer and rising to the position of a mine foreman. Tr. 17. Along the way he held the positions of section foreman, shift foreman and safety coordinator. Tr. 18, 22.

Most of Meddings's Excel-related experience was at the Excel Two Mine. The mine was located on the site of the present Van Lear Mine. Coal from the Pond Creek seam was extracted at the mine. Tr. 20. When the Pond Creek seam was exhausted, the company began mining the Van Lear seam which was located above the Pond Creek seam, and the mine's name was changed to the Van Lear Mine. Tr. 20-21. Meddings explained that the Van Lear Mine is at the "same location" and in the "same drift or slope" as the Excel Two Mine. Further, the Van Lear Mine uses the "same portal, same bathhouse, [and] same office" as the Excel Two Mine. Tr. 20. Approximately 150 miners are employed at the Van Lear Mine. Tr. 53.

The roof at the Van Lear Mine consists of "laminated shale, shale and sandstone." Tr. 24. Had the roof consisted primarily of sandstone, Meddings believed the roof would have "tend[ed] to stay together." *Id.* However, because of the laminated shale and sandstone mix, separation of the seams in the roof is always "a good possibility." *Id.* To keep the roof stable, the company uses two kinds of roof bolts: fully grouted resin bolts and cable bolts.² Tr. 23-24, 27. The resin bolts are five or six feet long. Tr. 27-28. The cable bolts used at the mine are 10 feet long.³ According to Meddings, roof falls usually originate 10 to 12 feet into the roof. Tr. 28. In Meddings's opinion by using 10 foot cable bolts the company is "trying to keep from having major roof falls." Tr. 24.

Prior to inspecting the mine, Meddings reviewed the records of its reported roof falls. He found there were fourteen roof falls in the three-year period of 2005 through 2008. Tr. 27-28. In addition, from 2005 through 2008 the mine experienced 11 draw-rock injuries. *Id.*⁴ Meddings described draw-rock injuries as "a piece of draw-rock . . . falls and injures a person." *Id.*

On August 27, 2008, Meddings conducted an inspection of the mine. Meddings traveled with Daryl Banks. They rode on Banks's rubber tired permissible buggy. Tr. 33-34. The men proceeded along a return airway when they came to a part of the entry that was cribbed on both sides. Tr. *Id.*, 100. There was a swag in the entry.⁵ *Id.* Meddings estimated that the cribbed entry, which was located between the intersections of two crosscuts, was "probably 70 feet long."⁶ Tr. 37, see Tr. 99; Gov't Exh. 2 at 4. A cutter was visible in the roof of the entry.

² Banks explained that resin bolts are used at the mine because when they are tightened, their resin is released and is forced into the cracks and seams of the roof. The resin sets and forms a solid "beam" in the roof's strata. Tr. 83-84. The cable bolts supplement the resin bolts by providing support higher into the roof. Tr. 84.

³ There is inconsistent testimony regarding the length of the resin bolts. Meddings testified that five foot resin bolts are used at the mine. Tr. 27-28. Darryl Banks, a company mine examiner, testified that six foot cable bolts are generally used. Tr. 84, 92. The actual length of the resin bolts is not critical to this decision.

⁴ The term "draw-rock," while not defined in commonly used mining dictionaries, is understood to refer to shale or slate pieces in the outer roof that tend to fall easily when under pressure.

⁵ Meddings described a "swag" as a dip in the mine floor. Tr. 37.

⁶ Banks testified that the entry was between the Number One and Number Two crosscuts. Tr. 99. Banks traveled through the entry at least one time each week as part of examination duties he undertook for the company. *Id.*

Tr. 35.⁷ On one side of the cutter the roof dropped two to eight inches. Tr. 36.

Banks did not think the deformity in the roof was a cutter. Although Banks agreed that the roof was uneven, in his opinion the roof area that Meddings thought was a cutter was simply a place where draw-rock had fallen making a two to eight inch difference in the roof's elevation. Tr. 103.

According to Meddings, draw-rock existed though out the entry, both along the cutter and along the middle of the roof. Tr. 43. He estimated that the draw-rock pieces weighed from five to 500 pounds. Tr. 73. Roof support in the entry consisted of cribs, resin bolts and 10 foot cable bolts. The resin bolts were installed and spaced according to the mine's roof control plan. Tr. 59. The 10 foot cable bolts were installed throughout the entry and the cribs were installed along the entry's sides. Tr. 43, 44, 59-60. Normally cable bolts would have been installed in the intersections, not in the entry. Tr. 44. Meddings believed that the cable bolts and cribs helped to disburse the weight of the roof and were added to stop draw-rock from falling. Tr. 61.

Meddings speculated that when the company was driving the entry there "were some signs of the top getting bad or they wouldn't have bolted the whole entry . . . full of cable bolts." 44. He believed that the 10 foot cable bolts were installed first, and when draw-rock continued to fall, the cribs were installed. Tr. 45. However, according to Meddings even with the supplemental support, the roof in the entry continued to deteriorate and draw-rock continued to fall. *Id.* Draw-rock in the roof was so extensive Meddings thought that the only ways to eliminate its danger were to install chain link netting across the entry roof, install steel crossbars every four feet along the roof, or close the entry and have the mine examiner take a new route around the area. Tr. 45-47.

In Meddings's opinion the cutter in the roof had existed for a couple of months. Tr. 48. Because the situation was worsening and because Banks passed through the entry at least every seven days when examining the airways, Meddings thought that it was reasonably likely Banks would be seriously injured by falling draw-rock. Tr. 48-49. Meddings speculated that the vibration from the buggy could cause the draw-rock to fall on Banks.⁸ Tr. 50. Meddings also suggested that Banks might pile things on the back of the buggy, and the material would strike draw-rock in the roof and cause the rock to fall. The height of the entry was five feet. Tr. 51.

Meddings told Banks that he, Meddings, had "no choice but to cite" a violation. Tr. 38, 90. Meddings stated that the entry was "too dangerous to be traveling through even if it's just once a week." Tr. 39. Meddings remembered Banks saying he knew that the condition "was getting worse," a statement that Banks denied making.⁹ Tr. 38, 63. Tr. 106, *see also* Tr. 91. Meddings described his reaction to the roof in the entry. He testified that "the hair on my neck stood up." Tr. 38.

After Meddings and Banks passed through the entry, Meddings asked Banks to stop and park the buggy in the adjacent crosscut, which Banks did. Meddings and Banks got out of the buggy and walked back to the entry. Tr. 58. Before entering the affected area Meddings noticed a "dog-eared" plate on a roof bolt.¹⁰ Tr. 39; Gov't Ex. 2 at 9. As the men continued into the entry and walked between the cribs, Meddings noticed several more dog-eared plates as well as

⁷ Meddings described a "cutter" as "where the roof is actually separated." Tr. 35.

⁸ Banks was skeptical. He testified that he never heard of vibration from a buggy causing draw-rock to fall. Tr. 97.

⁹ Meddings wrote in his contemporaneous notes, "[Banks] said he realized that the top was getting worse, but didn't think he needed to do anything about it yet." Gov't Ex. 2 at 10.

¹⁰ The plate was also seen by Banks. Tr. 102.

fallen draw-rock in the entry.¹¹ Tr. 40, 55, *see also* Tr. 90. In addition, Meddings noticed several squeezed crib wedges. Tr. 40, 56; Gov't Ex. 2 at 9. Banks too saw the squeezed wedges. Tr. 102. The dog-eared plates and squeezed wedges indicated to Meddings that the roof was bearing additional weight, and Banks agreed. Tr. 41; 102.

Meddings found that Excel's negligence in allowing the condition to exist was "moderate." Gov't Ex. 2. He thought the cable bolts in the entry and the cribs on each side of the entry indicated Excel had tried to do something about the condition. Tr. 52.

The condition was abated when Excel placed timbers and "do not enter" signs at the ends to the entry blocking access to it. Tr. 52-53; *see* Gov't Ex. 2 at 12. Banks now had to take a new route around the area when he conducted his weekly examination. Tr. 53.

Meddings agreed that during the summer when the humidity increased the mine experienced a "sweat season" and draw-rock conditions generally worse.¹² Tr. 64. He conceded that the loose and scaling draw-rock in the roof could have developed since Banks last conducted an examination of the area. He agreed he did not know for sure if the roof conditions that existed on August 27, were there the week before. Tr. 64-65, 69. Banks speculated that perhaps the fallen draw-rock in the entry was due to the "sweat season." *Id.* Banks also testified that in his experience intake airways were more affected by the increased humidity than return airways, and he noted that the cited area was ventilated by return air. Tr. 112-113.

Meddings found that falling draw-rock could cause Banks to suffer lost work days or restricted duty. Tr. 48; Gov't Ex. 1. There was even a chance that Banks could be fatally injured. Tr. 48. However, Meddings agreed that a large majority of draw-rock injuries were not reportable because they did not cause lost work days or restricted duty. Tr. 70-71.

Banks testified that he examined all of the Van Lear Mine's airways at least once every seven days. Tr. 77-78. On any given day, he traveled six to ten miles in the mine. Tr. 78. Banks estimated that he had traveled through the cited area 30 times before August 27, 2008. Tr. 80. As far as he knew, he was the only company miner who passed through the entry. *Id.* He further stated that it took him between 30 seconds and a minute to pass under the cited roof. Tr. 80-81. During air way examinations he mainly looked for "loose rock on the top." Tr. 81. When he saw loose rock, he stopped and took it down with a slate bar. Tr. 81.

Banks agreed that on August 27, 2008 roof support in the area consisted of resin bolts, 10 foot cable bolts and cribs and that the combined support extended for approximately 70 feet. Tr. 83. Banks speculated that the 10 foot bolts were installed because miners "probably encountered" adverse roof conditions as they drove the entry. Tr. 85. As far as Banks knew, the 10 foot bolts and the cribs were not required under the mine's approved roof control plan. Tr. 101. They were purposefully added to address roof hazards particular to the entry. Tr. 102.

Banks testified that when he first examined the area in December, 2007 the three types of roof support were already in place. Tr. 87-88. At that time some of the cribs and some of the 10 foot bolts showed signs of taking weight. Tr. 88. For the next eight months the roof conditions remained the same except for some "draw-rock scaling out here and there." *Id.* Banks insisted that when Meddings issued the citation on August 27, 2008 conditions were as they had been except for "two or three pieces of [draw-rock] that [had] fallen in the middle of the entry," and "a few pieces [of draw-rock that had fallen] . . . toward the left cribs." Tr. 89.

¹¹ Meddings did not know when the draw-rock fell. Tr. 67.

¹² According to Banks, the "sweat season" occurred when temperatures outside the mine were significantly hotter than temperatures inside the mine. The temperature differential caused condensation on the roof, ribs and bottom, which in turn could cause the roof to scale. Tr. 91-92.

Banks was asked about the cutter. He defined a cutter as “where the main roof is weighing maybe above the . . . [resin] bolts and maybe not above the 10 foot [cable] bolts, and it’s breaking like in the middle or down the sides . . . and you see pieces of rock separating from one another.” Tr. 92. Banks was asked if he saw a cutter in the affected area. He responded that he saw a place four feet from the right rib where draw-rock had fallen out of the roof. Tr. 93-94. He would not call what he saw a cutter. Rather, he saw “cracks and where the draw-rock and stuff was separating.”¹³ Tr. 95, *see also* Tr. 102-103. Banks explained that “Cracks in the mine roof will cause the draw-rock to break apart from itself and scale out and try to fall.” Tr. 109. He agreed that on August 27 cracks in the roof caused draw-rock to develop above the entry. *Id.* In addition, he noted that when, as at the Van Lear Mine, the mine roof is laminated shale, cracks are “[r]eal common” and the roof is “just not very stable.” Tr. 110.

VIOLATION

Citation No. 8218342 states in part:

The roof and ribs of areas where persons work or travel [are] not being supported or otherwise controlled to protect persons from the hazards related to [the] fall of the roof or ribs. Approximately 70 [feet] between [the] No. 1 and No. 2 entry at the mouth of Room-1 off the 1st Southeast Submains the room has visible cutters running parallel and across the entry. The roof in this area has sagged down in the center and loose draw-rock measuring approximately two to 8 inches thick. [*sic*] This condition exposes the mine examiner who travels this area once per week to crushing hazards associated with the fall of the roof and ribs. The areas has been cribbed and cable bolts [have been] installed in the past.

Gov’t Ex. 1.

Section 75.202(a) pertains to specified components of a mine’s underground workings. To prove a violation the Secretary must establish a number of things. First, she must show that the challenged citation relates to an area specified in the standard, in this case, to the mine’s roof. Here the witnesses consistently testified that the area cited encompassed approximately 70 feet of roof between two crosscuts, and I so find. Tr. 37, 99.

The standard also contains a specific location requirement. It is only applicable to “areas where persons work or travel.” 30 C.F.R. § 75.202(a). The inspector understood that Banks, as Excel’s mine examiner, traveled under all 70 feet of the cited area one time a week when he conducted his examination, and Banks agreed. Tr. 48-49, 99. Therefore, the Secretary established the location requirement of the standard.

Finally, the standard contains a protective component. It requires that the roof “be supported or otherwise controlled” to protect miners from hazards as they work or travel beneath it. The requirement is generally worded so as to be adaptable to mining’s myriad roof conditions. Liability is determined by deciding whether a “reasonably prudent person familiar with the

¹³ It is clear from the testimony that although Meddings and Banks saw the same physical deformity in the roof, they referred to it differently. Meddings called the crack in the roof a “cutter.” Tr. 38. Meddings though the same feature was a crack where draw-rock had fallen causing a separation in the roof. Tr. 103-104.

mining industry and the protective purposes of the standard, would recognize the hazardous condition the standard seeks to prevent and would properly support or otherwise control the roof. *Cannon Coal Company*, 9 FMSHRC 677, 668 (April 1987). I conclude the company did not meet this requirement. While Meddings and Banks disagreed as to whether or not a “cutter” existed in the roof, their disagreement was one of semantics rather than substance. Tr. 32, 103. The testimony of both established that in the cited entry, draw-rock had loosened and fallen. On August 27 some of the draw-rock was on the floor and more was hanging in the roof. Tr. 40, 42-43. In addition, both Meddings and Bank agreed that along a crack in the roof, fallen draw-rock left the roof at different levels, one level being two to eight inches below the other (Gov’t Exh. 2 at 10, Tr. 36, 103) and that there were physical indications – dog-eared roof bolt plates and squeezed crib wedges – which signaled that the roof was continuing to take weight. Tr. 39, 41, 67, 102; Gov’t Exh. 2 at 9. Further, Banks testified cracks would cause draw-rock to scale and fall and that there were cracks in the roof. Tr. 109. Banks added that the kind of roof that existed at the mine was “just not very stable.” Tr. 110. The fallen draw-rock and the indications of weight on the roof meant that the roof was subject to ongoing stresses and confirmed the instability to which Banks referred.

I accept Meddings common sense testimony that hanging draw-rock posed a hazard to Banks when he traveled under it. Tr. 39. Meddings’s estimate that the pieces of draw-rock weighed between five and 500 pounds was not disputed by Banks. Tr. 38. Meddings’s fears that vibrations from Bank’s passing buggy could cause draw-rock to fall (Tr. 50) or items protruding from the buggy could strike the roof and bring down draw-rock (Tr. 51) were unsupported, and I give them no credence. However, I find the presence of fallen draw-rock on the floor of the entry establishes that the force of gravity and the stresses on the roof made it likely draw-rock would fall at any time, including the 30 seconds to one minute that Banks spent beneath the roof on a weekly basis. Tr. 80-81. In addition, the fact that it was the “sweat season” increased to some extent the likelihood that pieces of draw-rock would fall even in an entry ventilated by return air. Tr. 91-92. Although, as Meddings agreed, a great majority of draw-rock caused injuries did not result in lost workdays or restricted duty (Tr. 70-71), with draw-rock weighing up to 500 pounds in the roof (Tr. 38), I conclude that a hazard existed that was capable of causing grave injury to Banks. For these reasons I find that the condition of the roof in the cited area posed a roof fall hazard to Banks, a hazard a reasonably prudent operator would have noted and eliminated, and I conclude the violation existed as charged.¹⁴

S&S AND GRAVITY

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

¹⁴ Meddings persuasively testified that the danger could have been obviated either by placing steel netting or steel bars across the roof or by closing the entry and rerouting the examiner’s path. Tr. 45-47. As noted, the company chose the latter course to abate the violation.

It is the third element of the S&S criteria that is the source of most controversies regarding S&S findings. The element is established only if the Secretary proves “a reasonable likelihood the hazard contributed to an event in which there is an injury.” *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985). An S&S determination must be based on the particular facts surrounding the violation and must be made in the context of continued normal mining operations. *Texasgulf, Inc.*, 10 FMSHRC 1125 (Aug. 1985); *U.S. Steel*, 7 FMSHRC at 1130.

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

The Secretary established the first of the S&S criteria. There was a violation of section 75.202(a). The violation created a discrete safety hazard in that it subjected Banks to the possibility of being hit by falling draw-rock as he traveled under the cited roof during the course of his weekly examination. I find as well that in the context of continued normal mining it was reasonably likely Banks would be hit and injured by falling rock. The draw-rock on the floor of the entry and the signs of stress on the roof bolt plates and crib wedges (Tr. 39, 41, 67, 102) evidenced that the roof in the entry was under stress and that forces were at work causing draw-rock to loosen and fall. Further, the “sweat season” meant that condensation made falling draw-rock at least somewhat more likely as mining continued.¹⁵ There was no indication that Excel planned to support the roof with steel mesh or beams, close the entry, or take other remedial measures. This means that in the context of continued mining Banks would have traveled once a week under a portion of the roof where forces were at work causing draw-rock to fall, and I conclude it was reasonable likely that as mining continued Banks would have been hit. Excel did not challenge Meddings’s testimony that the draw-rock weighed between five and 500 pounds (Tr. 73). Although Meddings agreed that a large majority of draw-rock falls did not cause lost workdays or restricted duty, there obviously were pieces of draw-rock in the roof, which if they fell and struck Banks, would have caused him to suffer broken bones and/or contusions or worse. I therefore find that it was reasonably likely an injury caused by the violation would have been of a reasonably serious nature. The violation was S&S.

The violation also was serious. As noted, if an injury occurred broken bones and/or cuts or even a fatality were not out of the question.

NEGLIGENCE

Negligence is the failure to exercise the care required by the circumstances. Meddings found that Excel, through Banks, was moderately negligent, and I agree. Gov’t Ex. 1. The violation was visually obvious. Banks traveled under the cited roof on a weekly basis. The conditions deteriorated over time. By August 27 they reached the point where draw-rock on the floor, dog-eared roof bolt plates, pinched crib wedges and the uneven roof indicated the inadequacy of roof support measures.

Banks first examined the entry in December 2007. Tr. 87-88. Banks estimated he made 30 trips through the area between his first examination and August 27, 2008. Tr. 80. He testified that true to his once-a-week schedule, he traveled through the entry on August 20. Tr. 108. Banks maintained that in general the roof conditions on August 20 were the same as on August 27 and that except for some fallen draw-rock the conditions were as they always had been. Tr.

¹⁵ I take judicial notice of the fact that summer temperatures are likely to continue well into September in eastern Kentucky.

89. However, I infer from the testimony that the fallen draw-rock indicated changes in the roof were ongoing and that its condition was in fact deteriorating. The dog-eared plates, squeezed wedges and uneven level of the roof were signs that Banks should have heeded. It may be as Medding speculated that Banks became used to the roof's condition and failed to appreciate the hazard it posed. Tr. 69. Or, it may be that he misjudged the roof's condition because he honestly believed it did not pose a hazard. In either event, Banks was wrong and his failure to exercise the care that was required establishes the company's negligence. Since there is no suggestion that Banks purposefully looked the other way or that he was highly indifferent to his own safety, I agree with Meddings that the company's negligence was moderate.

HISTORY OF PREVIOUS VIOLATIONS

The Van Lear Mine's history of previous violations is reflected in a computer printout that shows in the two years prior to August 27, 2008 the company paid civil penalties for 408 violations. Gov't Ex. 3 at 37-46. Of the paid violations, 23 were violations of section 75.202(a). This is a large history of prior violations.

SIZE AND ABILITY TO CONTINUE IN BUSINESS

The parties agreed that Excel is a large operator and that the proposed penalties will not adversely affect the company's business. Stips. 4, 8 *infra*.

GOOD FAITH ABATEMENT

Within a few minutes after he was notified of the violation of section 75.202(a), Banks dangered off the area with tape. Tr. 96. That evening or the following morning, Banks returned and set timbers to block both ends of the entry to travel. *Id.* He spray painted a danger sign to warn unsuspecting miners about the area. *Id.* Closure of the area to travel meant that Banks had to take a new and different route, one under a safe roof, when conducting future examinations. Tr. 96-97. Banks's timely and effective efforts constituted good faith abatement of the violation. *See* Gov't Ex. 1 at 2.

CIVIL PENALTY ASSESSMENT

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED ASSESSMENT</u>
8218342	8/27/08	75.202(a)	\$687.00

I have found that the violation existed, that it was serious and that the negligence of the company was moderate. Given these findings and the other civil penalty criteria, I assess the Secretary's proposed penalty of \$687.00.

ORDER

Within 40 days of the date of this decision, Excel should pay a civil penalty of \$687.00. 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. The payment should reference Docket No. KENT 2009-200 and A.C. No. 15-18839-164793.

This case **IS DISMISSED**.

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

Distribution: (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
601 NEW JERSEY AVENUE N. W., SUITE 9500
WASHINGTON, D.C. 20001

June 8, 2011

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. SE 2009-994-M
Petitioner	:	A.C. No. 01-03331-000195920
	:	
v.	:	
	:	
JOHNCO MATERIALS, INC.,	:	Mine: JohnCo Materials #1
Respondent	:	

DECISION

Appearances: Sophia Haynes, Esq., Office of the Solicitor, U.S. Department of Labor, Atlanta, Georgia, on behalf of the Petitioner;
Clatus Junkins, Esq., JohnCo Materials, Inc., Fayette, Alabama, on behalf of the Respondent.

Before: Judge Melick

This case is before me upon a petition for civil penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (“the Act”), charging JohnCo Materials, Inc. (“JohnCo”) with three violations of mandatory standards and seeking civil penalties of \$9,527.00 for those violations. At hearing on May 4, 2011 JohnCo admitted the violations and the findings relating thereto and challenged only the amount of civil penalties proposed by the Secretary. In this regard Respondent maintains that the penalties proposed by the Secretary would affect its ability to remain in business.

Citation Number 6515787

This citation alleges a “significant and substantial” violation of the standard at 30 C.F.R. § 56.14100(b) and charges as follows:

The oxygen/acetylene torch on the service truck had a defect affecting safety (a broken gauge on the acetylene bottle regulator, and another one on the oxygen bottle regulator). The lens was missing on each. The faces of both gauges showed some corrosion, and the needle and the outside case were bent on the one on the oxygen. Dust, dirt, moisture or impact would contribute to these gauges giving inaccurate readings once the protective lens is gone. The torch is used as needed around the mine, and was up on the crusher platform and had been used by the welder just prior to the inspection. Should a welder use improper pressure, accidents resulting in burns would likely result.

The cited standard provides that “[d]efects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons.”

Issuing Inspector White described the hazard as burns to a miner resulting from inaccurate pressure readings on the oxygen and acetylene bottles and resulting in a hose burst or a torch flare (Ex. G-5). Respondent also admits that the violation was properly characterized as “significant and substantial¹.” The violation was therefore of high gravity.

Respondent does not dispute the inspector’s findings of high negligence. Inspector White noted that the mine’s general manager, Matt Junkin, admitted that he had not been “properly checking the pre-op exams” and had not done one that day. The evidence clearly supports the admitted findings of high negligence (Ex. G-5).

Citation Number 6515788

This citation alleges a “significant and substantial” violation of the standard at 30 C.F.R. § 56.14100(a) and charges as follows:

The service truck was not inspected by the operator prior to being put in to service. The welder had driven the truck and was using the torch and welder on it without inspecting any of the equipment for safety problems. The torch had a defect affecting safety, which the welder should have seen and reported. Should serious defect [sic] go undetected, fatal accidents would be reasonably likely.

The cited standard, 30 C.F.R. § 56.14100(a), provides that “[s]elf propelled mobile equipment to be used during a shift shall be inspected by the equipment operator before being placed in operation on that shift.”

Inspector White characterized this violation as “significant and substantial.” Respondent admits this finding. White noted that the failure to conduct a pre-op examination would likely result in fatal accidents (Ex. G-6). The violation was therefore of high gravity. Furthermore, Respondent does not dispute the inspector’s findings of high negligence. General Manager Matt Junkin admitted that he had not been properly checking the pre-op exams and had not performed one that day (Ex. G-6). The evidence clearly supports the admitted findings of high negligence.

Citation Number 6515791

This citation also alleges a violation of the standard at 30 C.F.R. § 56.14100(b) and charges as follows:

¹ In *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984), the Commission explained its interpretation of the term “significant and substantial” as follows:

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.

The back-up alarm installed on the Cat D6H dozer failed to work when tested. The dozer is used about once per month, usually around the pit area, exposing miners to being struck. Should a miner be struck by the dozer, fatal crushing injuries would likely occur.

Inspector White found this violation “unlikely” to cause injuries because there was “good vision to the rear” of the cited bulldozer and “very little foot traffic” in the area (Ex. G-7). Under the circumstances, gravity would properly be characterized as low.

White found Respondent’s negligence to be “moderate” based on the statement of the general manager “that he was not aware of the condition” (Ex. G-7). In light of the additional evidence that the general manager had not been checking the pre-op examinations, I accept the admission as to that level of negligence.

Civil Penalties

Under Section 110(i) of the Act, the Commission and its judges must consider the following factors in assessing a civil penalty: the history of violations, the negligence of the operator in committing the violation, the size of the operator, the gravity of the violation, whether the violation was abated in good faith and whether the penalties would affect the operators ability to continue in business.

The Secretary’s undisputed representations in her petition established that Respondent is small in size and has a moderate history of violations. There is no dispute that the violations herein were abated in good faith. The gravity and negligence of the violations have been admitted by Respondent and have previously been discussed.

As noted, the Respondent claims only that the civil penalties proposed by the Secretary would affect its ability to remain in business. This Commission has held that the mine operator has the burden of proving such a claim. *Sellersburg Stone Co.*, 5 FMSHRC 287, 294 (Mar. 1985). To provide the most credible form of financial data, Respondent was afforded the opportunity to produce, post-hearing, an audited financial statement which Respondent agreed to provide. However, Respondent subsequently provided only an unaudited statement from certified public accountants McCabe and Associates dated May 11, 2011. That financial statement has, nevertheless, been marked and admitted as Respondent’s Exhibit No. 16.

A second document, purportedly a judgement against the individual, Clatus Junkin, is marked for identification and admitted as evidence as Respondent’s Exhibit No.17. I find however that since this judgement is against Mr. Junkin personally, it is not relevant to the corporate entity, JohnCo Materials, Inc. The unaudited statement labeled “Accountant’s Compilation Report” provides as follows:

We have compiled the accompanying balance sheet of Johnco Materials, Inc., (an S corporation) as of March 31, 2011 and the related statement of income and retained earnings for the three month period then ended in accordance with Statements on Standards for Accounting and Review Services issued by the American Institute of Certified Public Accountants.

A compilation is limited to presenting in the form of financial statements information that is the representation of management. We have not audited or reviewed the accompanying financial

statements and accordingly, do not express an opinion or any other form of assurance of them.

Management has elected to omit substantially all of the disclosures and the statement of cash flows required by generally accepted accounting principles. If the omitted disclosures and statement of cash flows were included in the financial statements, they might influence the user's conclusion about the Company's financial position, results from operations and cash flows. Accordingly, these financial statements are not designed for those who are not informed of such matters.

Johnco Materials, Inc., with the consent of its shareholders, has elected under the Internal Revenue Code to be an S Corporation. In lieu of corporate income taxes, the shareholder(s) of an S corporation are taxed on their proportionate share of the Company's taxable income. Therefore, no provision or liability for federal income taxes has been included in these financial statements.

(Ex. R-16)

Clearly, with the significant limitations noted in the accountant's report, I find that Respondent has failed to sustain its burden of proving that the penalties of \$9,527.00 would affect its ability to remain in business.

ORDER

Citations Number 6515787, 6515788 and 6515791 are affirmed and JohnCo Materials, Inc., is directed to pay civil penalties of \$9,527.00 within 40 days of the date of this decision.

/s/ Gary Melick
Gary Melick
Administrative Law Judge
202-434-9977

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/to

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

721 19th Street, Suite 443
Denver, CO 80202-2500
303-844-3577/FAX 303-844-5268

June 9, 2011

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	
	:	Docket No. WEST 2008-1113-M
	:	A.C. No. 45-03570-149664-01
	:	
v.	:	Docket No. WEST 2008-1114-M
	:	A.C. No. 45-03570-149664-02
	:	
	:	Docket No. WEST 2008-1196-M
D. HOLCOMB & CO., and its successors, Respondent	:	A.C. No. 45-03570-153016
	:	
	:	Black Diamond Quarry

DECISION

Appearances: Matthew Vadnal, Esq., Office of the Solicitor, U.S. Department of Labor, Seattle, Washington, for Petitioner;
Merrily Munther, Esq., Munther Goodrum, Chartered, Boise, Idaho, for Respondent

Before: Judge Manning

These cases are before me on petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”), against D. Holcomb & Company (“Holcomb & Company”) 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 introduced testimony and documentary evidence at a hearing held in Seattle, Washington, and filed post-hearing briefs. MSHA Inspector Ron Eastwood testified for the Secretary and Dennis Holcomb testified for Holcomb & Company.

Holcomb & Company operates a small sand and gravel quarry in Clallam County, Washington. This facility employed four people at the time of the MSHA inspection including the owner, Dennis Holcomb, and his son, Tim. These cases involve 17 citations issued under section 104(a) of the Mine Act. The Secretary proposes a total civil penalty of \$65,039.00 in these cases.

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

A. Citation No. 6433221

On March 27, 2008, MSHA Inspector Ron Eastwood issued Citation No. 6433221 under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 56.15005 as follows:

An employee was standing on the edge of the elevated Pioneer screen working on the screen without being tied off. Two employees were changing the screens with one inside the screen and the other standing on the edge which was approx. 10 inches wide and 6 ft. in length. The ledge was approx. 10 ft. above ground level.

(Ex. G-1). The inspector determined that an injury was reasonably likely and if an injury did occur it could be fatal. He determined that the violation was of a significant and substantial nature (“S&S”) and that Respondent’s negligence was high. Section 56.15005 provides, in part, that “[s]afety belts and lines shall be worn when persons work where there is a danger of falling.” The Secretary proposes a penalty of \$6,458 for this citation.

Inspector Eastwood testified that when he arrived at the quarry, he observed Jim Crist, an hourly employee, standing on a beam of the screen crusher that was about 10 feet above the ground. Crist was helping change the screen on the crusher and the beam he was standing on was 10 inches wide and six feet long. (Tr. 17). Crist was not wearing any fall protection and, given the nature of the work he was performing, a fall was reasonably likely. The inspector testified that when he asked Crist, he was told that he had not been trained concerning the need to tie off. (Tr. 20). When Crist went to get a harness from his own service truck, the inspector saw that it was brand new and was still in the original packaging. The Secretary argues that the citation should be affirmed as written. Inspector Eastwood determined the Holcomb & Company’s negligence was high because the miner had not been trained to tie off and the harness that he retrieved was still in the original packaging.

Holcomb & Company does not dispute that Crist should have been tied off when changing the screen. Inspector Eastwood testified that he was told by Tim Holcomb that the employee was new and he had been told to tie off. (Tr. 20). Respondent submits that the citation should not have been designated as S&S, and that if an injury did occur, it would have at most resulted in lost workdays or restricted duty. In addition, it argues that its negligence was low. When Crist was hired, he told Dennis Holcomb that he was familiar with and had used fall protection during previous employment. (Tr. 150). Fall protection was available to its employees and four hours of training had been provided to employees. *Id.* Tim Holcomb, his supervisor, was operating the excavator at the time and he did not know that Crist was changing a screen without using fall protection. *Id.* Respondent maintains that the violation was the result of employee misconduct.

I find that the Secretary established an S&S violation of the safety standard. It is undisputed that Mr. Crist was helping to change a screen without using a safety belt and line. He was standing on the edge of the Pioneer screen at the time and was about ten feet off the ground. A violation is properly designated S&S “if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to by the violation will result in an injury or illness of a reasonably serious nature.” *Cement Division, National Gypsum*, 3 FMSHRC 822, 825 (Apr. 1981). The Commission has set forth the elements that the Secretary must establish. *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984). The elements are:

- (1) [T]he underlying violation of a mandatory safety standard;
- (2) a discrete safety hazard—that is, a measure of danger to safety—contributed to by the violation;
- (3) a reasonable likelihood that the hazard contributed to will result in an injury; and
- (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

Id. In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985), the Commission provided additional guidance:

We have explained further that the third element of the Mathies formula “requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury.” *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that

must be significant and substantial. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1866, 1868 (August 1984); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574-75 (July 1984).

This evaluation is made in terms of “continued normal mining operations.” *U.S. Steel*, 6 FMSHRC at 1574. The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *Youghiogeny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987).

The Secretary established all four elements of the S&S test. There was a violation of a mandatory standard that created a discrete safety hazard. I find that the Secretary established that it was reasonably likely that the hazard contributed to would have resulted in an injury. Maneuvering a screen while standing on the edge of the equipment makes it reasonably likely that the employee will fall. A fall of ten feet will likely result in a serious injury including lost workdays, permanently disabling injuries, or a fatality.

The evidence as to Holcomb & Company’s negligence is conflicting. The inspector testified that Mr. Crist told him that he had not been trained to tie off. Mr. Holcomb testified that Crist told him that he had used fall protection in his previous job. (Tr. 150). He also testified that Respondent’s employees were trained to use safety belts and lines. *Id.* Respondent argues that this evidence plus the fact that Crist’s immediate supervisor could not see him when he was changing the screen should be credited and that the degree of negligence attributed to Respondent should be reduced.

The negligence of a rank-and-file miner is not imputable to an operator for the purposes of assessing a penalty. *Whayne Supply Co.*, 19 FMSHRC 447, 451, 453 (Mar. 1997); *Fort Scott Fertilizer-Cullor, Inc.*, 17 FMSHRC 1112, 1116 (July 1995); *Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1463-64 (Aug. 1982). The Secretary argues that Tim Holcomb was on the property that day but he did not direct Crist to tie off. (Sec. Br. 6). I find that the Secretary established that the violation was the result of the operator’s high negligence. When the inspector advised Crist that he had to wear fall protection, he went to his own truck to get a harness rather than to the trailer or the shop where Respondent’s harnesses were kept. (Tr. 151-52). I find that Crist was not told to use fall protection and that Dennis Holcomb relied on the fact that Crist had previous work experience in construction. Crist was not adequately trained or supervised for the task to which he was assigned. It is worth noting that fall protection is not necessary at any other location at this quarry. The operator’s negligence was high and a penalty of \$600 is appropriate.

B. Citation No. 6433222

On March 27, 2008, MSHA Inspector Eastwood issued Citation No. 6433222 under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 56.11004 as follows:

The portable aluminum ladder the employees were using to access the Pioneer screen was not secured at the top of the ladder. The employees were changing the screens on the elevated screen deck. The ladder was an extension ladder which was not extended and was approx. 10 ft. in length for this application.

(Ex. G-2). The inspector determined that an injury was unlikely but that if an injury did occur it could be fatal. He determined that the violation was not S&S and that Respondent’s negligence was moderate. Section 56.11004 provides, in part, that “[p]ortable rigid ladders shall be provided with suitable bases and placed securely when used.” The Secretary proposes a penalty of \$392 for this citation.

Inspector Eastwood testified that he issued this citation when he saw that the ladder employees used to change out the screen was not secured at the top. (Tr. 22-23). The ladder was a 10-foot portable extension ladder made of aluminum. Eastwood testified that an injury was unlikely because the base of the ladder was on firm ground and the ladder was at a good angle. If an injury did occur it could be fatal. (Tr. 24). The inspector stated that the operator could have complied with the standard by securing the ladder at the top or having someone hold the ladder from the bottom. (Tr. 26-27).

The operator argues that a violation was not established because the cited ladder was provided with a suitable base and was placed securely when used. There is nothing in the safety standard that requires that ladders be secured at the top. The Secretary argues that, because the ladder was not secured at the top, it was not secured in a manner that complied with the safety standard.

This citation is vacated because the safety standard only requires that portable ladders be placed securely when used. The fact that the ladder was not secured at the top does not establish that it was not placed securely when used. *See Higman Sand & Gravel Inc.*, 24 FMSHRC 87, 103 (Jan. 2002) (Judge Manning). The photograph shows that the top of the ladder straddled a beam, which would prevent it from moving to the side. (Ex. G-2, p. 3). The inspector merely speculated that someone could fall backwards off the ladder because it was not secured at the top. The inspector agreed that the ladder was at a proper angle and that it did have a suitable base.

C. Citation No. 6433223

On March 27, 2008, MSHA Inspector Eastwood issued Citation No. 6433223 under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 56.14107(a), as follows:

The drive line on the 1 1/4 inch chip conveyor belt extended out approximately 6 inches and was not guarded. The diameter of the drive shaft was approx. 2 inches. The drive line was approx. 3 ft. up from ground level next to a walkway. The shaft had a slot in it for a shear pin.

(Ex. G-3). The inspector determined that an injury was reasonably likely and that if an injury did occur it could result in lost workdays or restricted duty. He determined that the violation was S&S and that Respondent's negligence was moderate. Section 56.14107(a) provides that "[m]oving 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 parties that can cause injury." The Secretary proposes a penalty of \$4,329 for this citation.

Inspector Eastwood testified that he issued this citation because the drive line protruded about 6 inches beyond the guard on the tail pulley on the chip conveyor. (Tr. 28). The drive line was about three feet above the ground and it had a keyway in it, enhancing the danger to employees. The shaft was next to a walkway that is used when maintenance is performed and when the area is examined. (Tr. 30). The inspector determined that an injury was reasonably likely because a person walking or working in the area could be come entangled in the fast moving drive line and could be permanently disabled as a result. He believed that the violation was S&S because the cited condition had existed for a long time. (Tr. 31). Inspector Eastwood evaluated the negligence as moderate because the drive line had been previously guarded. He determined that the shaft had previously been guarded because the condition was immediately terminated when the operator covered the shaft with a previously-manufactured guard. (Tr. 32).

Holcomb & Company argues that the quarry was not operating at the time the citation was issued. More importantly, it argues that its employees were not exposed to the hazard

because of the location of the shaft. A large concrete block was immediately adjacent to the cited shaft which would prevent anyone from accidentally coming into contact with it. (Tr. 159; Ex. G-3 p. 5). This screen sits on this block. MSHA's Guide to Equipment Guarding recognizes that not all shafts and shaft ends require guarding:

Shafts and shaft ends need guarding if they present a hazard. Rotation speed, size, location, keyways, burrs and other factors need to be considered when determining which shafts need guarding. Not all shaft ends require guarding. . . .

(Ex. G-23, p. 17).

Third, it argues that this condition has existed since 2005, including during a previous inspection by Inspector Eastwood. (Tr. 157). As a consequence, Holcomb & Company was not provided with fair notice of the requirements of the safety standard at this location.

I address the notice issue first. The Secretary's safety standards must "give a person of ordinary intelligence a reasonable opportunity to know what is [required or] prohibited, so he may act accordingly." *Lanham Coal Co.*, 13 FMSHRC 1341, 1343 (Sept. 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 recently 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 requirements of the standard.

Id. (citations omitted).

In *Alan Lee Good d/b/a/ Good Construction*, 23 FMSHRC 995 (Sept. 2001), the Commission grappled with the notice issue. Although the Commission split on the application of the facts of that case to the law, the legal principles set forth are basically the same in both opinions.

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 look to accepted safety standards in the field, considerations unique to the mining industry and the circumstances at the operator's mine.

23 FMSHRC 1005 (citations and footnotes omitted). The regulatory history of section 56.14107(a) makes clear that the Secretary provided notice to the mining community that she interprets the safety standard very broadly to protect persons from coming into contact with moving machine parts and that the standard covers inadvertent, careless or accidental contact. See *Higman Sand & Gravel Inc.*, 24 FMSHRC 92-93.

In this case, the operator is arguing that fair notice was not provided because the shaft had never been cited by MSHA despite the fact that the quarry had been inspected several times by MSHA with the shaft in the same condition and in the same location in relation to other equipment since 2005. Mr. Holcomb testified that the shaft had never been guarded and that it simply used a part of a conveyor roller to quickly abate the condition. (Tr. 158, 163-64). After the citation was terminated, Respondent cut the shaft off so that it was no longer protruding past the existing wire mesh. *Id.* The Respondent also argues that MSHA's guarding guide makes clear that not all shaft ends require guarding. Taking into consideration the location of the shaft, which was protected by the large concrete block, and the fact that it had never been cited, Respondent did not believe that the shaft required guarding.

I find that Respondent was provided with fair notice of the requirements of the standard. The shaft presented a hazard of accidental contact, especially since it contained a keyway. The guarding standard is designed to protect against the possibility of contact and injury, including contact stemming from inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness. *Thompson Bros. Coal Co.*, 6 FMSHRC 2094, 2097 (Sept, 1984). Although it appears that the condition had not been previously cited by MSHA during inspections between 2005 and 2008, the condition was not particularly obvious because of its location and may have simply been missed.¹ The fact that the quarry was not producing aggregate or operating its equipment at the time of the inspection is irrelevant. I find that the violation was neither serious nor S&S because contact with the shaft was not very likely. Respondent's negligence was low because it reasonably believed that a guard was not required at that location. A penalty of \$100 is appropriate.

D. Citation No. 6433224

On March 27, 2008, MSHA Inspector Eastwood issued Citation No. 6433224 under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 56.14107(a), as follows:

The Chicago brand hand-held grinder did not have the safety shield on the grind[er]. The safety shield had been removed. The grind[er] had been used to grind off a weld on a pair of vice grips earlier in the shift. The grinder was laying in the back of a service truck where it had been left.

(Ex. G-4). The inspector determined that an injury was reasonably likely and that if an injury did occur it could result in a permanently disabling injury. He determined that the violation was S&S and that Respondent's negligence was moderate. The Secretary proposes a penalty of \$4,329 for this citation.

Inspector Eastwood testified that he issued the citation because a grinder located on the bed of the truck was not equipped with any type of guard. (Tr. 36). The grinder was plugged into an electrical outlet. Mr. Crist told the inspector that the grinder had been recently used. (Tr. 37). Inspector Eastwood determined that the violation was S&S because it was reasonably likely that someone would be injured and that the injury would be reasonably serious. Without a guard, metal slivers or sparks can injure the user's eyes, face, or arms. (Tr. 34).

¹ In *Higman Sand & Gravel*, on the other hand, the cited condition had existed for over 20 years, the tail pulley was completely guarded except for openings on the sides, and the moving machine parts were recessed more than eight inches from each side. 24 FMSHRC 91-92. In that case, I determined that the Secretary failed to give adequate notice to Higman that the guard on the tail pulley was no longer sufficient to meet the requirements of the safety standard. *Id.* at 93.

Apparently, Mr. Crist used his own grinder rather than one owned by Holcomb & Company because the grinding wheel on Respondent's grinder was worn out. (Tr. 166). Mr. Holcomb testified that Respondent's grinder had a guard on it and the employee could have installed a new grinding wheel. *Id.* Holcomb & Company argues that it had no way to know that the hourly employee would use his own unguarded grinder rather than a guarded grinder supplied by Respondent. A mine operator's supervisor cannot be expected to stand alongside its employees "to prevent him from making stupid mistakes." (Resp. Br. 7). There were three other grinders available at the shop, as well as other grinding wheels. (Tr. 166). In addition, it maintains that the evidence shows that employee told Mr. Holcomb that he was wearing a face shield while using the grinder. (Tr. 167).

I find that the Secretary established an S&S violation of the safety standard. I credit Inspector Eastwood concerning the hazards presented when using a grinder without a guard. I do not credit the hearsay testimony that the employee was fully protected by a face shield when he was using the grinder. I also find that Respondent's negligence was low. The negligence of a rank-and-file miner is not imputable to an operator for the purposes of assessing a penalty. I agree with the operator's argument that it could not have anticipated that an employee would use his own unguarded grinder rather than a company-issued grinder with a guard on it. A penalty of \$100 is appropriate for this violation.

E. Citation No. 6433226

On March 27, 2008, MSHA Inspector Eastwood issued Citation No. 6433226 under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 56.14112(b), as follows:

The back side of the tail pulley guard on the VSI exit conveyor was not secured. The bolt securing the guard had come loose and did not keep the guard from pushing outward. The rest of the tail pulley was guarded. The tail pulley was located on the ground level and was not located in a highly traveled area. The conveyor belts was not running when inspected.

(Ex. G-5). The inspector determined that an injury was unlikely but that if an injury did occur it could be permanently disabling. He determined that the violation was not S&S and that Respondent's negligence was moderate. Section 56.14112(b) provides that "[g]uards shall be securely in place while machinery is being operated, except when testing or making adjustments which cannot be performed without removal of the guard." The Secretary proposes a penalty of \$176 for this citation.

Inspector Eastwood determined that the back side of the guard on the cited tail pulley was not secured, which allowed access to the moving pulley. (Tr. 40-41). Based on the presence of mud caked on the bolt, the inspector concluded that it had not been tight for a long time. (Tr. 41). He was concerned that someone could lift up the guard and attempt to clean around the area while the tail pulley was operating. (Tr. 42). He determined that an injury was not reasonably likely.

Mr. Holcomb testified that someone had pulled the guard up to clean up accumulations under the tail pulley. (Tr. 171). Whoever did this cleaning failed to completely secure the nut after he was finished cleaning. The plant was not operating at the time the citation was issued because it has been down for two weeks for maintenance. Mr. Holcomb testified that a walkaround inspection would have been conducted before the plant was started again. Employees do not enter the area when the plant is operating because the loader dumps gravel in the area and it would be too dangerous to be in that location. (Tr. 172). He believed that the presence of mud on the bolt did not establish that the condition had existed for a period of time.

The area around the tail pulley was muddy and the employee who cleaned under the tail pulley could have easily gotten mud on the bolt. (Tr. 174).

The photograph establishes that the tail pulley was provided with a substantial guard and that the guard was secured in most areas. (Ex. G-5; Ex. R-5). The guard on the back was slightly loose because it was not bolted down securely. The likelihood that anyone would become entangled in the tail pulley was remote at best, especially because of its location. (Ex. R-5). In addition, the plant was not operating and the condition may well have been corrected during the pre-operational examination. The fact that mud was on the bolt does not establish that the condition had existed while the plant was operating. The bolt could have become muddy in any number of ways including while an employee shoveled loose accumulations from under the tail pulley. I find that there is insufficient evidence to establish that the equipment was operated while the guard on the back side was not secured bolted down. Such a finding is a prerequisite to a violation of section 56.14112(b). See *Northwest Aggregates*, 20 FMSHRC 518, 523 (May 1998) (Judge Manning). Consequently, this citation is vacated.

F. Citation No. 6433227

On March 27, 2008, MSHA Inspector Eastwood issued Citation No. 6433227 under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 56.12016, as follows:

The electrically powered Pioneer Screen was not locked/tagged out before 2 employees changed the screens. The generator was shut off but no means of locking the power source [was] taken. There was no tag stating who was working on the piece of equipment or when they were working on it. There was no place to lock out the generator.

(Ex. G-6). The inspector determined that an injury was reasonably likely and if an injury did occur it could be fatal. He determined that the violation was S&S and that Respondent's negligence was moderate. Section 56.14107(a) provides, in part, that "[e]lectrically powered equipment shall be de-energized before mechanical work is done on such equipment. Power switches shall be locked out or other measures taken which shall prevent the equipment from being energized without the knowledge of the individuals working on it." The Secretary proposes a penalty of \$2,106 for this citation.

The inspector determined that the Pioneer Screen was not locked out or tagged out when two employees were changing the screen. (Tr. 45-46). If someone were to turn on the screening equipment while the men were changing the screen at the top, the men could be seriously injured or killed. An injury was reasonably likely and the violation was S&S. The inspector determined that Respondent's negligence was moderate because the miners had turned off the generator that supplies power to the Pioneer Screen prior to working. (Tr. 46-47).

Inspector Eastwood testified that, although Holcomb & Company has a policy that only the lead mechanic can energize equipment, that policy did not comply with the safety standard because it requires that it be locked out and tagged out by the miners performing the maintenance in electrically powered equipment. (Tr. 48). The men changing the screen may not have been visible to anyone who closed the switch providing power to the screen. (Tr. 50).

Mr. Holcomb testified that the only people authorized to energize electrical equipment that has been shut down for repair were his son Tim and himself. (Tr. 176-77). Other employees could de-energize equipment in an emergency but they were trained to never energize equipment on their own.

I find that the Secretary established a violation. Respondent argues that the safety standard authorizes an operator to take “other measures to prevent the equipment from being energized without the knowledge of the individuals working on it.” Although that language is contained in the safety standard, the measures taken by Holcomb & Company do not fit into the category of “other measures” as contemplated by the standard. The standard clearly requires that some sort of mechanical device to prevent equipment from being energized without the knowledge of the employee work on the equipment. Indeed, the final sentence of the standard states that “[s]uch locks or *preventive devices* shall be removed only by the persons who installed them or by authorized personnel.” (emphasis added). The lockout standard is not satisfied by having a company policy that only grants certain management employees the authority to energize machinery and equipment.

I also find that the violation was serious and S&S. Many serious and fatal accidents at sand and gravel quarries could have been avoided if electrically-powered equipment had been locked out and tagged out. There is a history of such accidents at quarries for violations of this safety standard. I credit the Secretary’s evidence on this issue. I find that it was reasonably likely that the violation would result in an accident of a reasonably serious nature. Respondent’s negligence was moderate. A penalty of \$500 is appropriate.

G. Citation No. 6433228

On March 27, 2008, MSHA Inspector Eastwood issued Citation No. 6433228 under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 56.12008, as follows:

Several 480 volt power cables entered the generator trailer through the door frame. The conductors controlled the various conveyor belts and equipment used to screen the rock. There were no bare conductors visible going into the trailer.

(Ex. G-7). The inspector determined that an injury was unlikely but that if an injury did occur it could be fatal. He determined that the violation was not S&S and that Respondent’s negligence was moderate. Section 56.12008 provides, in part, that “[p]ower wires and cables shall be insulated adequately where they pass into or out of electrical compartments. Cable shall enter metal frames of motors, splice boxes, and electrical components only through proper fittings. When insulated wires, other than cables, pass through metal frames, the holes shall be substantially bushed with insulated bushings” The Secretary proposes a penalty of \$392 for this citation.

The electrical cables at issue entered the open door to the trailer that contained the quarry’s power center. (Tr. 52; Ex. G-7). These cables carry 480 volts from the generator in the trailer to electrically-powered equipment at the quarry. The inspector believed that, because the power cables were unprotected where they entered the trailer, they could be cut at that location. (Tr. 53). Vibration in the trailer could also damage the cables where they enter the trailer. (Tr. 58). He determined that it was unlikely that anyone would be injured because the door to the trailer was tied open so it could not close on the cables. (Tr. 54-55). The cables were substantially bushed where they entered the control box inside the trailer. (Tr. 56).

I find that the Secretary did not establish a violation of the cited standard. Because cables are involved in this instance, such cables “must enter the metal frames of motors, splice boxes, and electrical components only through proper fittings.” 30 C.F.R. § 56.12008. The cables were supplied with proper bushings and/or fittings where they entered the control box inside the trailer. The safety standard does not apply to the area where the cables passed through the doorway of the trailer. This location was not a metal frame of a motor, splice box, or any type of electrical component or equipment. It was simply an open doorway at the back of a trailer. The doorway for the trailer had a metal frame, but this frame was not part of the electrical system or

an electrical component. The inspector's interpretation of the safety standard to require bushings or other protection whenever cables "go through metal" is incorrect. In any event, the cables did not "go through metal" at this location. The cables were substantially protected with an outer jacket and insulating material around the conductors inside. The door to the trailer could not be closed because there was a metal landing at the doorway that would prevent the door from closing. (Tr. 180). There was no evidence that the cables were damaged or that vibrations were causing any wear on the cables. This citation is therefore vacated.

H. Citation No. 6433229

On March 27, 2008, MSHA Inspector Eastwood issued Citation No. 6433229 under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 56.11002, as follows:

The stairway accessing the generator trailer did not have handrails on the stairways. The landing at the top of the stairway had a handrail. The stairway elevates approx. from 0 ft. to approx. 5 ft. The stairs are used daily to access the generator that provides power to various equipment.

(Ex. G-8). The inspector determined that an injury was unlikely but that if an injury did occur it could result in lost workdays or restricted duty. He determined that the violation was not S&S and that Respondent's negligence was low. Section 56.11002 provides, in part, that "[c]rossovers, elevated walkways, elevated ramps, and stairways shall be of substantial construction provided with handrails, and maintained in good condition." The Secretary proposes a penalty of \$100 for this citation.

Inspector Eastwood testified that the cited stairways provided access to a landing for the generator trailer from each side. (Tr. 60). The elevated landing between the two stairways was equipped with a handrail. There were two steps on each stairway that were made of expanded metal inside a metal frame. (Ex. G-8). The stairways were of substantial construction. There was no handrail for these two stairways. The landing was about five feet off the ground and it was accessed at least twice a day. (Tr. 61-62). Inspector Eastwood was concerned that someone using the stairs could slip and fall. If someone were to fall away from the trailer while on the stairs he could fall ten feet to a lower area of the plant. (Tr. 63; Ex. R-8). Inspector Eastwood determined that the violation was not S&S because the landing had a handrail that could be reached from the stairs. *Id.* He determined that Respondent's negligence was low because of the presence of the handrail for the landing and because the condition had existed through several MSHA inspections.

Mr. Holcomb testified that employees use the upright supporting the handrail on the landing to provide stability while walking up or down the stairs. (Tr. 184). There have been no slips or falls at this location.

I find that the Secretary established a violation. Although the upright for the handrail around the landing provided some measure of safety, the stairs themselves were not provided with handrails as required by the safety standard. Handrails or other means of support would be especially important if an employee were walking down the stairs carrying supplies or materials. The citation is affirmed as written. A penalty of \$50 is appropriate.

I. Citation No. 6433230

On March 27, 2008, MSHA Inspector Eastwood issued Citation No. 6433230 under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 56.14107(a), as follows:

The return roller on the VSI exit conveyor belt was not guarded. The roller was approx. 4 ft. above ground level. Employees access the area of the roller to clean up under the conveyor belt. The conveyor belt was not running at the time of the inspection.

(Ex. G-9). The inspector determined that an injury was unlikely but that if an injury did occur it could be permanently disabling. He determined that the violation was not S&S and that Respondent's negligence was moderate. The Secretary proposes a penalty of \$873 for this citation.

Inspector Eastwood testified that a return roller on the VSI exit conveyor belt was not guarded. (Tr. 70). The roller was about 4 feet above the ground. He testified that miners will occasionally clean up accumulations under this belt in the vicinity of the roller. An employee or his clothing could become entangled between the belt and the unguarded roller. In such an event, he could be pulled into the pinch point and sustain a serious injury. (Tr. 71; Ex. G-9). He determined that an injury was unlikely because the area is cleaned only once or twice a year. An excavator is typically used to clean up accumulations in the area.

Mr. Holcomb testified that employees do not work around this conveyor while it is operating. (Tr. 189). Any accumulations are cleaned out first thing in the morning before the plant is operating. (Tr. 190). After the plant starts operating, the employees are operating an excavator or a loader; they are "not wandering around." *Id.*

Holcomb & Company argues that this roller had existed in the same location since at least 2005 and had never been cited by an MSHA inspector. It contends that it had not been given fair notice that this condition might be a violation of the safety standard. (Resp. Br. 13). If the citation is not vacated, the negligence should be reduced to low because of the mitigating circumstances testified to by the inspector. It also argues that the quarry was not operating at the time the citation was issued and that uncontradicted evidence establishes the miners are never in the cited area while the belt is running.

The Secretary counters the operator's notice argument by observing that the conditions under the roller will be different during each MSHA inspection. Indeed, Inspector Eastwood warned Holcomb & Company that a change in conditions under the roller could result in a citation. He issued this warning during an inspection in December 2007. At that time the return roller was "pretty much at ground level" because of the accumulation of material at that location. (Tr. 73). The Secretary also contends that the fact the quarry was not in a production mode when the citation was issued is not relevant.

I find that the citation should be affirmed as written. Holcomb & Company was previously warned that the cited return roller could possibly be cited if it were high enough above ground level. Respondent's "fair notice" and negligence arguments are not well founded. I also conclude that the fact that the quarry was not in production at the time of Eastwood's inspection, so that subject conveyor belt was not operating, is not determinative. The operator had shut down operations for about two weeks to conduct maintenance. Holcomb & Company did not allege that it was planning to install a guard at this location as part of the scheduled maintenance. Equipment and facilities that are available for use by miners must be maintained in compliance with applicable safety standards and are subject to inspections whether or not they are actually being used at the time. *See, e.g., Ideal Basic Ind., Cement Div.*, 3 FMSHRC 843 (Apr. 1981) (equipment located in a normal work area and capable of being used must be in compliance with safety standards).² A penalty of \$75 is appropriate.

² I vacated Citation No. 6433226, above, because I found that the Secretary had not established that the VSI exit conveyor had been used while part of the guard on the tail pulley

J. Citation No. 6433231

On March 27, 2008, MSHA Inspector Eastwood issued Citation No. 6433231 under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 56.14107(a), as follows:

The return roller on the 1 1/4 inch chip conveyor belt was not guarded. The return roller was approx. 6 ft. 6 inches above ground level. It was located in an area accessible by anyone working in the area. The conveyor belt was not running at the time of the inspection.

(Ex. G-10). The inspector determined that an injury was unlikely but that if an injury did occur it could be permanently disabling. He determined that the violation was not S&S and that the Respondent's negligence was moderate. The Secretary proposes a penalty of \$873 for this citation.

Inspector Eastwood testified that the return roller was in a location that was accessible to miners. (Tr. 77). His testimony with respect to this citation was similar to that of the previous citation, except that this roller was 6 feet 6 inches above the ground level. (Tr. 77-80). The inspector was concerned that, if material built up under the conveyor were, the roller would be more accessible to miners. He had warned Respondent during his December 2007 inspection that he would cite the roller if it was less than seven feet above the ground. (Tr. 80). Mr. Holcomb testified that the inspector did not give him this warning. (Tr. 193). He also testified that employees do not walk in the cited area and that accumulations in the area are cleaned up using mobile equipment. (Tr. 194; Ex. R-10).

I find that the citation should be affirmed. Holcomb & Company was previously warned that the cited return roller could possibly be cited if it were less than six feet off the ground. I credit the testimony of Inspector Eastwood on this issue. The violation was not very serious because of the height of the roller. My findings and conclusions for this citation are the same as in the previous citation. A penalty of \$75 is appropriate.

K. Citation No. 6433233

On March 27, 2008, MSHA Inspector Eastwood issued Citation No. 6433233 under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 56.14107(a), as follows:

A return roller located on the under jaw conveyor belt was not guarded. The return roller was approx. 4 ft. above ground level and had recently been cleaned underneath it. The return roller was accessible to the employee cleaning underneath the conveyor belt.

(Ex. G-12). The inspector determined that an injury was reasonably likely and that if an injury did occur it could be permanently disabling. He determined that the violation was S&S and that Respondent's negligence was moderate. The Secretary proposes a penalty of \$4,329 for this citation.

was loose. I draw a distinction between that situation and the present situation because, in the former, the quarry operator was performing maintenance on its equipment and the guard may well have been tightened before operations commenced. In this citation, the return roller was not guarded at all and it is quite clear that this condition would not have been corrected before the quarry started producing again.

Inspector Eastwood testified that this condition was on a different belt from the two previous citations. (Tr. 92). As with the two previous citations, Inspector Eastwood testified that he warned Holcomb & Company in December 2007 that a citation would be issued if the roller remained unguarded and was at a height that exposed miners to a hazard. (Tr. 93, 97-98). The inspector determined that an injury was reasonably likely because he observed shovels in the area that led him to believe that someone had been cleaning up accumulations. (Tr. 94). On that basis, he determined that the violation was S&S.

Mr. Holcomb testified that the area under this belt is cleaned with a shovel and with an excavator. He said the area is shoveled out every morning before the belts are started. (Tr. 205-06). He also said that a guard had been on the roller at this location but it had to be replaced because it ripped up the belt. (Tr. 208). The guard was being fabricated at the time of Inspector's Eastwood's March 2008 inspection. (208-09).

I find that Holcomb & Company violated the safety standard because a guard was required at that location. I find, however, that an injury was not reasonably likely, the violation was not S&S, and Respondent's negligence was low. The mere fact that shovels were in the area does not establish that an injury was reasonably likely. I credit the testimony of Holcomb that the area is shoveled out in the mornings before production begins. Thus, although an accident was possible at this location, it was not reasonably likely. I find that the operator's negligence was low because a guard had been installed after MSHA's December 2007 inspection, but it did not function correctly. Respondent was in the process of fabricating a new guard to replace the old one. The violation was serious. A penalty of \$75 is appropriate.

L. Citation No. 6433232

On March 27, 2008, MSHA Inspector Eastwood issued Citation No. 6433232 under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 56.11011, as follows:

The elevated walkway to access the control booth on the jaw crusher was unsafe. The walkway was sitting on the rock pile used to feed the crusher. The rock pile had eroded and the walkway was twisted down where it was not sitting on solid ground. A chain had been installed from the crusher frame to hold the walkway. The walkway was approx. 15 ft. above the ground and was approx. 25 ft. in length. The walkway had handrails and toe boards.

(Ex. G-11). The inspector determined that an injury was reasonably likely and that if an injury did occur it could be fatal. He determined that the violation was S&S and that Respondent's negligence was high. Section 56.11001 provides that "[s]afe means of access shall be provided and maintained to all working places." The Secretary proposes a penalty of \$6,458 for this citation.

Inspector Eastwood testified that the walkway was supported by feed material for the jaw crusher. (Tr. 83). This material had deteriorated with the result that the walkway was starting to lean out away from the crusher. Someone had attached a chain to the walkway to try to prevent the walkway from rolling over. The operator was taking material from the feed pile that was supporting the walkway to the feed hopper for the jaw crusher. *Id.* The jaw crusher operator would have to use this walkway several times a day. This person also operated the excavator used to feed the hopper with material. The walkway was about 15 feet above the ground and it was equipped with handrails. (Tr. 84). The walkway was sitting on a rock pile that was being undermined as the rock was removed to feed the hopper. (Tr. 85; Ex. R-9). The inspector was concerned that the walkway could collapse or roll down the hill. (Tr. 86).

Based on the above, Inspector Eastwood determined that the violation was S&S because a serious injury or fatality was reasonably likely. *Id.* Someone could be killed if the walkway rolled and flipped because there was a vertical drop below the outer edge of the walkway. He determined that the negligence was high because the presence of the chain indicated that the operator knew about the hazard and failed to take adequate steps to correct it. (Tr. 87). The inspector admitted that Tim Holcomb advised him that when he noticed that the walkway was starting to sag earlier that day, he had shut down the jaw crusher and excavator to fix the walkway. (Tr. 90).

Dennis Holcomb testified that Tim had run into the walkway with the track of his excavator on the day of the inspection. (Tr. 197-98). He shut down his excavator and went to get his tools. When he returned, Inspector Eastwood had arrived. (Tr. 198). Neither Tim nor any other employee had any need to use the walkway after the excavator was shut down. (Tr. 198-99). Dennis Holcomb testified that he installed the chain when the walkway was first placed there because he “knew, with the walkway sitting on that product there, that as we ate away at the pile, that some of that rock was going to fall down the hill.” (Tr. 199, 204). He said that he paid good money for the walkway and he did not want it to fall or get damaged. The walkway was safe when he installed it. Dennis Holcomb admitted that Tim had to walk across the walkway to shut down the jaw crusher after he hit the walkway with his excavator. (Tr. 203).

Holcomb & Company argues that Tim Holcomb hit the walkway and was in the process of repairing it when the inspector arrived. Because the walkway would not have been used until it was repaired, it did not pose a hazard to anyone. It was not used for access while it was in the condition observed by Inspector Eastwood. (Resp. Br. 16).

I find that the Secretary established an S&S violation of the safety standard. I credit the testimony of Inspector Eastwood. The conditions observed by the inspector establish that safe access was not provided to the jaw crusher. The fact that Dennis Holcomb used a chain to help support the walkway indicates that he knew that the walkway was in a precarious position. By excavating the rock under the walkway, the operator was removing the support for the walkway. When Tim Holcomb bumped the walkway with the excavator he made the condition worse, but a hazard was already present. The violation was S&S because it was reasonably likely that the hazard contributed to by the violation would have resulted in a very serious injury. I find that the negligence was moderate rather than high because I credit the testimony of Holcomb that his son Tim had begun the work to correct or at least mitigate the hazard. A penalty of \$200 is appropriate.

M. Citation No. 6433234

On April 1, 2008, MSHA Inspector Eastwood issued Citation No. 6433234 under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 56.12030, as follows:

The ground prong on the plug of the green and black extension cord had been cut off. The cord was plugged into the United Rentals Miller welder. The cord was not energized at the time of the inspection. The extension cord was laying [sic] in mud and water and had a burn in the outer insulation exposing the inner individual conductors. No bare conductors were visible.

(Ex. G-13). The inspector determined that an injury was reasonably likely and that if an injury did occur it could be fatal. He determined that the violation was S&S and that Respondent’s negligence was moderate. Section 56.12030 provides that “[w]hen a potentially dangerous condition is found it shall be corrected before equipment or wiring is energized.” The Secretary proposes a penalty of \$1,944 for this citation.

Inspector Eastwood testified that without the ground prong on the plug, any electrical equipment plugged into the extension cord would not be adequately protected in the event of a fault. (Tr. 100-01). The extension cord had been used for the grinder, as described in Citation No. 6433224 above. There was also a burn on the cord which exposed the inner conductors. The inspector testified that, because the extension cord was lying in the water and the ground prong was missing, there was a reasonable possibility that the person using the extension cord would suffer an electrical shock. (Tr. 102).

Dennis Holcomb testified that Crist had used the extension cord when he used the grinder. (Tr. 209). He said that the cord had been hanging up in the shop to be repaired. He believes that he told Crist that anything hanging above the shop's vice was there to be repaired. He further testified that there were three other extension cords in the shop available for use that were in safe condition. Holcomb & Company discharged Crist from his employment after this inspection.

Respondent argues that the extension cord had been "taken out of service" and put in the shop for repair. Thus, Respondent recognized the hazard and removed the cord from service. The cord was used "by the same 'cowboy' who failed to wear fall protection and took it upon himself to use his own grinder without a shield." (Resp. Br. 18). There were other extension cords available for use on the shop door. It should have been obvious to Crist that the ground plug was missing and that the cord itself was damaged.

I affirm the violation and the inspector's S&S determination. I find that Respondent's negligence was low because it should have been obvious to Crist that the cord was not safe to use. Holcomb had other extension cords that could have been used. Crist was an hourly employee and his negligence should not be imputed to the operator. The Mine Act is a strict liability statute, however. A penalty of \$50 is appropriate.

N. Citation No. 6433235

On April 1, 2008, MSHA Inspector Eastwood issued Citation No. 6433235 under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 56.14107(a), as follows:

The tail pulley on the under the jaw conveyor belt was not guarded on the bottom and back side of the tail pulley. The tail pulley was approx. 5 ft. above ground level. The sides were guarded. The area is not a highly traveled area and is cleaned with an excavator. There is no ground person work[ing] on the ground around the equipment.

(Ex. G-14). The inspector determined that an injury was unlikely but that if an injury did occur it could be permanently disabling. He determined that the violation was not S&S and that Respondent's negligence was moderate. The Secretary proposes a penalty of \$807 for this citation.

Inspector Eastwood testified that the tail pulley on the jaw conveyor was not properly guarded. (Tr. 105). The sides of the tail pulley were well guarded, but the bottom and back side were not. He was concerned that someone working in the area could become entangled in the fast moving, self-cleaning, pulley. (Tr. 105-06). He did not consider that an accident was reasonably likely because the pulley was guarded on the sides.

Mr. Holcomb testified that, as with the other tail pulleys at the mine, any cleaning with a shovel is performed at the beginning of the day before the plant is operating. (Tr. 210-11). As a consequence no hazard was present. In addition, this tail pulley has been inspected many times by MSHA inspectors and no citations have been issued. He also testified that the tail pulley is

normally less than two feet above the ground. It is raised only when it is necessary to clean out accumulations with the excavator. (Tr. 212-13).

As with previous guarding citations, Respondent argues that it did not receive fair notice that the bottom and back of the tail pulley was required to be guarded because it had never received a citation in the past for this condition. Employees do not work on the ground while the conveyor is running so there was no risk of injury from this condition.

For the reasons discussed above with respect to other guarding citations, above, this citation is affirmed as written. The violation was not especially serious because the hazard was largely protected by location. A penalty of \$75 is appropriate.

O. Citation No. 6433237

On April 1, 2008, MSHA Inspector Eastwood issued Citation No. 6433237 under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 56.14107(a), in part as follows:

The drive line and drive pulley and belts on the Detroit Diesel motor providing power for the jaw crusher were partially guarded. A section of approx. 18 inches could be accessed on the 3 inch drive line. The drive line had a slot for a shear pin machined into it. The drive line bolts onto a flange that connects to the drive pulley for the crusher. A hole had been cut in the original metal guard on the flange approx. 2 inches X 4 inches exposing the rapidly moving flange and flange bolts. Another hole had been cut in the guard approx. 6 inches X 4 inches allowing access to the rapidly spinning drive pulley. The owner Dennis Holcomb stated that the holes had been cut in the guard in order to grease the equipment.

(Ex. G-15). This citation was originally written under section 104(d)(1) but it was modified the following day by Inspector Eastwood to a section 104(a) citation. As modified, the inspector determined that an injury was reasonably likely and that if an injury did occur it could be permanently disabling. He determined that the violation was S&S and that Respondent's negligence was moderate. The Secretary proposes a penalty of \$29,529 for this citation.

Inspector Eastwood testified as to the conditions he observed. (Tr. 110-22). The conditions he observed are shown on the photos he took. (Ex. G-15). The drive line shaft was partially guarded. (Tr. 111). An employee could access the area adjacent to the cited motor by climbing down a ladder on the jaw crusher to a platform that was 16 inches wide and 6 feet long. There were fixed ladders at either end of this platform. An employee had to climb down onto this platform to turn the motor off, check the oil, and perform maintenance. (Tr. 112). The shaft could be reached from this platform and, if an employee stumbled, he could get tangled up in the moving shaft. (Tr. 113).

Two holes had been created in a guard adjacent to the shaft using a torch. (Tr. 113). The holes were 2 by 4 inches and 4 by 6 inches. These holes exposed a rapidly moving flange and a rapidly spinning drive pulley. (Tr. 114-15). Dennis Holcomb told the inspector that the holes had been cut in order to grease the equipment. (Tr. 116). As modified, the citation alleges that an injury was reasonably likely. The inspector was concerned that, because the rung on one of the adjacent ladders was loose, an employee could slip and his hand could enter one of the holes or come in contact with the moving shaft as he tried to brace himself. (Tr. 118-20). Because the platform was small and confined, it would be easy for someone to become entangled in the moving parts and be severely injured or killed. He considered the violation to be S&S. He

admitted that the equipment had to be shut down to grease it. (Tr. 124). The operator of the jaw crusher has to travel to the platform to turn the motor off and on. (Tr. 125-26).

Mr. Holcomb testified that when he purchased the equipment, the cited holes were already present. (Tr. 217). The partially-guarded shaft and holes were present during previous MSHA inspections. He testified that the moving machine parts were protected by their remote location. The shaft for example was protected by hydraulic hoses in the area. (Tr. 220). He admitted that the platform shakes as the jaw crusher is operating. (Tr. 223). Holcomb said that the guard would have to be removed to grease the machinery if the holes were not present. (Tr. 225). The guard weighs about 150 pounds. (Tr. 226). The excavator would need to be used to accomplish this. The condition was abated by placing a special guard over the existing guard and this extra guard is removed for greasing. Finally, he testified that the ladder with the broken rung was not used as a ladder but was used as a barrier or guard to prevent an employee from falling off that end of the platform. (Tr. 228).

Holcomb & Company argues that it was unlikely that anyone would be able to access the shaft or the pulleys because they were guarded by location behind several hydraulic hoses and the clutch lever, as well as the heavy, substantial guard. (Resp. Br. 19). No maintenance or greasing occurs when the jaw crusher is operating. Respondent also makes the fair notice argument on the basis that the equipment has been in the same condition since it was purchased.

I find that the Secretary established a violation. Whether the violation was S&S is a closer question. I credit the testimony of Mr. Holcomb that the exposure is not that great. Tim Holcomb and other employees are rarely on the platform when the jaw is operating. Greasing and other maintenance is performed with the equipment shut down. In addition, the drive shaft and openings are partially protected by location. I also credit the testimony of Mr. Holcomb that the cited ladder is rarely if ever used to access the platform. On this basis, I find that it was not reasonably likely that the hazard contributed to by the violation would have led to an injury. The violation was serious, however, because if someone were injured by the moving machine parts, he could experience significant trauma. I also find that Respondent's negligence was moderate to low because the violation was not obvious and it had not been previously cited by MSHA. A penalty of \$200 is appropriate.

P. Citation No. 6433238

On April 1, 2008, MSHA Inspector Eastwood issued Citation No. 6433238 under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 56.11003, in part as follows:

The metal fixed ladder to access the Detroit diesel motor that provides power to the jaw crusher had the top rung unsecured on the right hand side of the ladder. The weld had broken loose on the rung and it had separated from the framework of the ladder. The ladder was approx. 3 ft in length and accessed a walkway along the side of the motor.

(Ex. G-16). The inspector determined that an injury was reasonably likely and that if an injury did occur it could be fatal. He determined that the violation was S&S and that Respondent's negligence was moderate. The safety standard provides that "[l]adders shall be of substantial construction and maintained in good condition." The Secretary proposes a penalty of \$1,944 for this citation.

Inspector Eastwood testified that the top rung of the ladder had become "unwelded" on one side and was no longer attached to the right side of the ladder. (Tr. 128). He testified that someone has to go down that ladder to turn on the diesel engine that operates the jaw crusher. He believed that it was reasonably likely that someone would be injured while descending the

ladder. The rung would give way and the person would fall to the platform and could hit his head. A person could also come into contact with the moving machine parts discussed in the previous citation. (Tr. 132). He determined that the negligence was moderate because Dennis Holcomb did not know that the ladder was broken and the ladder is not used that often.

Mr. Holcomb testified that the ladder in question was not used to get to the platform. Instead, it was used as a barrier to keep anyone from falling off the end of the platform. (Tr. 231). It was placed there at the request of an MSHA inspector. Indeed, the MSHA inspector was present when the ladder was welded in place. *Id.* This ladder was never used to get to the platform. (Tr. 233).

The Secretary argues that the cited ladder was available for use as a ladder and that in Respondent's answer to the petition for assessment of penalty, it stated that the "rung on the ladder needed to be welded and was on the repair list. . . ." (Ex. G-21). Respondent argues that the ladder was used as a barrier and was not used to get to the platform. Employees accessed the platform using the ladder at the other end of the platform. (Resp. Br. 21). In addition, the "ladder" had only two rungs and if someone were to slip, it was unlikely that he would sustain a serious injury.

I find that the Secretary established a violation but that the violation was not S&S. I credit the testimony of Holcomb that the ladder was rarely if ever used. It was placed there to prevent anyone from falling off the edge of the platform. It was not reasonably likely that the condition would contribute to an injury. The violation was not very serious. Respondent's negligence was low. A penalty \$50 of is appropriate.

Q. Citation No. 6433239

On April 2, 2008, MSHA Inspector Eastwood issued Citation No. 6433239 under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 56.12016, in part as follows:

The Detroit diesel motor that powers the jaw crusher was not locked or tagged before an employee worked on it. The employee had removed the guarding on the fan, fan belts alternator, and alternator belt to work on the alternator. The employee did not lock out or put a tag on the motor saying who was working on the motor or what date the motor was being worked on.

(Ex. G-17). The inspector determined that an injury was reasonably likely and that if an injury did occur it could be permanently disabling. He determined that the violation was S&S and that Respondent's negligence was moderate. The Secretary proposes a penalty of \$873 for this citation.

Inspector Eastwood testified that Tim Holcomb had removed a guard from the diesel motor and was working on the motor without locking or tagging out the motor in violation of the safety standard. (Tr. 134). The key was in the ignition so any employee could have started the motor while Tim was working on it. The inspector testified that Tim should have removed the key from the ignition and kept it in his pocket. He should have also tagged the diesel motor out to show that he was working on it. The inspector believed that a serious injury was reasonably likely because the guard for the fan on the generator had been removed exposing the moving parts.

Mr. Holcomb testified that nobody other than Tim had the authority to start the diesel motor. He also testified that he wants employees to keep the key in the ignition so the key does not get lost. (Tr. 235). The key is always kept in the ignition.

I affirm this citation as written by Inspector Eastwood. Lockout and tagout procedures are crucial because miners can be seriously injured or killed when an employee turns on machinery or equipment while someone else is working on it. Mr. Holcomb can make a duplicate key that he keeps in his possession if he is concerned that someone could lose it. A penalty of \$200 is appropriate.

III. APPROPRIATE CIVIL PENALTIES

Section 110(i) of the Mine Act sets forth the criteria to be considered in determining an appropriate civil penalty. Holcomb & Company had a history of eleven paid citations prior to the March/April 2008 inspection. (Ex. G-18). Only two of these citations were designated as S&S. Holcomb & Company is an extremely small operator. It employed four people in 2008 and three people in 2010, including Dennis and Tim Holcomb. The total number of hours worked by all employees in 2008 was 8,345. In 2010, the total hours worked was 4,198. It currently employs two people.³ Holcomb & Company is a sole proprietorship that is not affiliated with any other operator. I have reduced the penalties substantially based on the very small size of the operator. Evidence of an operator's financial condition is relevant to the ability to continue in business criterion. See *Unique Electric*, 20 FMSHRC 1119, 1122-23 (Oct. 1998). Respondent submitted its profit and loss statement for 2009, which showed a net annual income of \$6,661. (Ex. R-20). Its net profit for 2008 was about \$21,000 and it showed a net loss between January and July 2010. (Exs. R-19, R-21).⁴ I have taken into account Respondent's financial condition when considering the ability to continue in business criterion. (Tr. 246-50). The violations were abated in good faith. The gravity and negligence findings are set forth above.

IV. ORDER

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), I assess the following civil penalties:

Citation No.	30 C.F.R. §	Penalty
WEST 2008-1113-M		
6433221	56.15005	\$600.00
6433222	56.11004	Vacated
6433223	56.14107(a)	100.00
6433224	56.14107(a)	100.00
6433226	56.14112(b)	Vacated
6433227	56.12016	500.00
6433228	56.12008	Vacated
6433230	56.14107(a)	75.00
6433231	56.14107(a)	75.00
6433232	56.11001	200.00
6433233	56.14107(a)	75.00
6433234	56.12030	50.00
6433237	56.14107(a)	200.00

³ This employment information was obtained from MSHA's website.

⁴ Exhibits R-19, R-20, and R-21 were discussed at the hearing, but were not officially entered into the record. I hereby admit them as exhibits to these proceedings.

6433238	56.11003	50.00
6433239	56.12016	200.00
WEST 2008-1114-M		
6433229	56.11002	50.00
WEST 2008-1196-M		
6433235	56.14107(a)	75.00
TOTAL PENALTY		\$2,350.00

For the reasons set forth above, Citation Nos. 6433222, 6433226, and 6433228 are **VACATED** and the other citations are **AFFIRMED** or **MODIFIED** as set forth above. D. Holcomb and Company is **ORDERED TO PAY** the Secretary of Labor the sum of \$2,350.00 within 40 days of the date of this decision.⁵

/s/ Richard W. Manning
Richard W. Manning
Administrative Law Judge

⁵ 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.
33 FMSHRC 1454

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RWM

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

Office of Administrative Law Judges
601 New Jersey Avenue, NW, Suite 9500
Washington, DC 20001-2021
June 16, 2011

KNIFE RIVER,
Contestant,

: CONTEST PROCEEDINGS
:
: Docket No. WEST 2009-1147-RM
: Citation No. 6479737; 07/22/2009
:
: Docket No. WEST 2009-1167-RM
: Citation No. 6479744; 07/28/2009
:
: Docket No. WEST 2009-1168-RM
: Citation No. 6479745; 07/28/2009
:
: Docket No. WEST 2009-1169-RM
: Citation No. 6479738; 07/22/2009
:
: Docket No. WEST 2009-1170-RM
: Citation No. 6479741; 07/27/2009
:
: Docket No. WEST 2009-1171-RM
: Order No. 6479742; 07/28/2009
:
: Docket No. WEST 2009-1172-RM
: Order No. 6479743; 07/28/2009
:
:
: Docket No. WEST 2009-1185-RM
: Citation No. 6479746; 07/29/2009
:
: Mine ID: 35-02968
: Mine: Reed Pit
:
: CIVIL PENALTY PROCEEDINGS
:
: Docket No. WEST 2009-1437-M
: A.C. No. 35-02968-195779-01
:
: Docket No. WEST 2009-1438-M
: A.C. No. 35-02968-195779-02
:
:
: Docket No. WEST 2010-232-M
: A.C. No. 35-02968-202121
:
:
: Mine: Reed Pit

v.

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

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

v.

KNIFE RIVER,
Respondent.

DECISION

Appearances: Patricia Drummond, Esq., Office of the Solicitor, U.S. Department of Labor, Seattle, Washington, on behalf of the Secretary of Labor;
Adele L. Abrams, Esq., Law Office of Adele L. Abrams, P.C., Beltsville, Maryland, on behalf of Knife River.

Before: Judge Paez

I. Statement of the Case

The above-captioned proceedings are before me on Notices of Contest filed by Knife River against the Secretary of Labor, acting on behalf of the Mine Safety and Health Administration (“MSHA”) pursuant to section 105 of the Federal Mine Safety and Health Act of 1977 (“Mine Act”), 30 U.S.C. § 815 (2006).¹ In accordance with my Order of Consolidation, the above-captioned penalty proceedings are before me upon the Secretary of Labor’s Petitions for Assessment of Civil Penalties pursuant to section 105 of the Mine Act.

In these combined contest and civil penalty proceedings, Knife River challenges the validity of five citations and one order issued in July 2009 at its Reed Pit mine.² Citation No. 6479741 and Order No. 6479743 allege violations of 30 C.F.R. § 56.14100(b), a mandatory safety standard requiring correction of defects on any equipment, machinery and tools that affect safety.³ Citation No. 6479746 alleges a violation of Order No. 6479743. Citation Nos. 6479737, 6479744 and 6479745 allege violations of 30 C.F.R. § 56.11027, a mandatory safety standard requiring working platforms to be of substantial construction and provided with handrails and toeboards in good condition.⁴

I conducted a hearing in Portland, Oregon where both parties offered documentary evidence and witness testimony.⁵ Both parties submitted post-hearing briefs including supplemental exhibits, which I admitted into the record. The parties have agreed to several stipulations and facts established by admissions regarding the Commission’s jurisdiction and the factual circumstances leading to the citations and order. (Sec’y Prehr’g Report 2–3; KR Prehr’g Report 1–3.)

II. Issues

Knife River denies any violations occurred and denies the allegations set forth in the citations and order. It further contends that the cited conditions in question existed for many years with MSHA’s knowledge and contests the Secretary’s application of the regulations. Knife River argues that the issuance of these citations violated its rights to fair notice and due process. The

¹ In this decision, the hearing transcript, Knife River’s exhibits, and the Secretary’s exhibits are abbreviated as “Tr.,” “Ex. KR-#,” and “Ex. S-#,” respectively. In citations, Knife River is abbreviated as “KR.”

² Initially, the company challenged a sixth citation and a second order, but at the hearing the parties stated that Citation No. 6479738 and Order No. 6479742 were settled out of court. (Tr. 10:1–11:17.) After the hearing, the parties filed a Joint Motion to Approve Settlement, and the motion is considered at the end of this decision.

³ Unless otherwise indicated, all citations to the Code of Federal Regulations are to the 2009 edition, the provisions of which were in effect at the time these citations and orders were issued.

⁴ Citation No. 6479737 was originally issued on July 22, 2009, as a violation of 30 C.F.R. § 57.11002. It was first amended on July 23, 2009, to reflect a violation of 30 C.F.R. §56.11002 and then subsequently amended on July 27, 2009, to reflect a violation of 30 C.F.R. § 56.11027.

⁵ Knife River filed a Motion to Expedite Proceedings, which was denied by Order dated August 5, 2009.

Secretary responds that the conditions were properly cited as violations and that the allegations underlying the citations and order are valid. Accordingly, the following issues are before me:

Whether the cited conditions were violations of the Secretary's mandatory health and safety standards.

Whether the Secretary's assertions regarding the gravity of the alleged violations are supported by the record.

Whether the Secretary's assertions regarding Knife River's negligence in committing the alleged violations are supported by the record.

Whether the proposed civil penalties are appropriate.

III. Background and Findings of Fact

A. The Operation at Reed Pit

Knife River owns and operates Reed Pit, a mine located near Salem, Oregon. (KR Prehr's Statement 1.) The mine produces sand and gravel and operates twenty-four hours a day. (Tr. 24:2-7, 24:21-25.) The sand and gravel deposit is extracted by a floating piece of machinery, a dredge, which removes the gravel from the surface below the mine site's pond and transports it to land where it is dewatered, sized, and screened. (Tr. 24:22-25.) Knife River uses floating machinery as well as land-based machinery for dewatering, sizing, and crushing. (Tr. 25:3-5.) The dredge sits on a pond that is more than seven hundred square feet in size and approximately fifteen to twenty feet deep. (Tr. 25:10-14.) A walkway leads to a dock on the edge of the pond. (Tr. 29:25-30:4.) The pond water levels fluctuate, which can change the angle of the walkway that leads to the dock. (Tr. 34:14-15.) Reed Pit requires that life jackets be used at all times when work is being conducted over water. (Tr. 337:17-338:1.)

Once gravel is extracted, it is sorted by size, and a portion of it is conveyed to a cobble surge pile. (Ex. S-12, at 3.) A single feeder sits below approximately at the center of the pile. (Tr. 493:13-20.) A draw-off tunnel ("tunnel"), which is also known as a culvert, runs from the feeder out through the side of the pile. (Ex. S-12, at 3.) The tunnel is made of corrugated galvanized steel and is ninety-three feet long. (*Id.* at 4.) A forty-foot section of the middle of the tunnel is reinforced by twelve vertical posts, spaced approximately four-and-a-half feet apart. (*Id.* at 4-5.) Nine posts measure four-and-a-half inches in diameter; two measure six-and-a-half inches in diameter; and one is a three- by five-inch rectangular steel tube. (*Id.* at 4.) A conveyor belt runs through the tunnel. (*Id.* at 3.) Half of the belt is held up and suspended by turnbuckles, which are similar to hangers, and attached to the structure of the tunnel, and the other half of the belt is supported by the floor of the conveyor. (Tr. 276:4-15.)

A twenty- to thirty-foot wall was erected adjacent to the crushing unit to contain dust and noise. (Ex. S-12, at 8.) The wall is held up by several wooden structural columns. (*Id.* at 8-9.) These columns are supported by steel brackets installed at their bases, which were installed following MSHA's inspection of the mine. (*Id.* at 8.) The trailer housing the crusher operator station, which also serves as a break room, passes through and beneath the wall. (Tr. 50:13-14.) A small workshop is located off to one side of the operator station. (Tr. 50:18-19.)

B. Knife River's Report Concerning the Tunnel

Around September 2008, Lynn Gullickson, Knife River's Safety Director, asked Dr. Keith Kaufman, Chief Engineer of Knife River's prestress plant in Harrisburg, Oregon, to inspect the tunnel and to give his viewpoints on its structural condition. (Tr. 353:1-4, 407:23-408:2.) Gullickson made the request because MSHA had identified a structural issue at Knife River's

Springfield quarry, and he wanted to confirm that the tunnel was a “safe structure.” (Tr. 352:22–353:3, 407:23–408:2.) On September 8, 2008, Kaufman inspected the tunnel for fifteen to twenty minutes. (Tr. 408:18–19.) He did not walk the tunnel’s entire length or take any measurements of it. (Tr. 409:2–3, 410:7.) Kaufman also inquired of Steve Zurfluh, Reed Pit’s plant manager at the time, about information concerning the tunnel’s design. (Tr. 408:19–21.) Zurfluh had no information about the tunnel’s design. (*Id.*)

Kaufman issued his report on the tunnel on October 26, 2008. (Ex. S-6.) He noted that “[a] structural analysis of the culvert would be extremely difficult to perform. The age of the structure combined with the deformed shape and temporary shoring would require difficult engineering assumptions in the analysis.” (*Id.* at 2.) Kaufman made six recommendations concerning the tunnel:

1. Provide a sump pump to remove the standing water in the culvert.
2. Provide horizontal control points spaced at 10 feet along the length of the culvert. . . . Record measurements on a weekly interval and then monthly once it has been identified that the geometry is stable. If the geometry of the stock pile changes significantly or becomes non symmetric to the axis of the culvert then measurements should be increased as required.
3. Measure and record the deformations between adjacent seams that have exhibited movement.
4. Make sure the stockpile loading does not extend to the region of the culvert where the local buckling and damage has [sic] occurred as shown in the second photo.
5. Maintain a balanced geometry of the stockpile on each side of the longitudinal axis of the culvert.
6. Inspect the condition of the temporary struts and the top of the culvert to ensure the concentrated reactions do not result in localized failure of the culvert skin.

(Ex. S-6, at 3.) Kaufman further stated:

Signs of deformation changes might require discontinued use of the culvert. Replacement of the culvert should be considered. Though I have little knowledge of this type of stock pile access of aggregates, a flexible culvert is a wrong application. A rigid culvert would better handle the possibilities of unbalanced loading if a continued bottom stock pile access is desired.

(Ex. S-6, at 3.)

C. MSHA’s Inspection of Reed Pit

In July of 2009, Brad Breland, MSHA supervisory mine inspector of the Albany, Oregon, field office, was asked to select mines that MSHA officials would tour while in Oregon for a meeting. (Tr. 163:9–18.) MSHA Acting Deputy Administrator Neal Merrifield, MSHA Western District Manager Art Ellis, and Conference Litigation Officer John Perez toured the Reed Pit mine. (*Id.*) The MSHA officials were accompanied on the tour by Knife River representatives, including Knife River Safety Director Lynn Gullickson, Reed Pit Superintendent Bill Wetmore, and Corporate Safety Manager Zack Knoop. (Tr. 164:19–165:7.) During the tour, Art Ellis viewed the dredge area and spoke with Zack Knoop regarding the need for handrails on the work

boats and docks, as well as the need for adequate illumination for miners working after dark.⁶ (Tr. 164:19–25.) Knoop asked Ellis to speak with Bill Wetmore, the mine superintendent, regarding the matter. (Tr. 348:7–9.) Even though Ellis and Wetmore never had a conversation about the handrail and illumination issues, Knoop told Gullickson about his conversation with Ellis. (Tr. 347:4–10, 347:20–348:16.) After the tour concluded, Gullickson and Knoop met with Ellis and Merrifield to further discuss MSHA’s position regarding the requirement for handrails. (Tr. 348:17–350:15.) According to Gullickson, the conversation was rather heated. (*Id.*)

A few weeks after the tour, Breland informed MSHA Inspector Brian Chaix that it was time to administer a “regular” inspection of Reed Pit and that he should follow up on the handrail and illumination concerns. (Tr. 23:5–20.) On July 21, 2009, Chaix began his inspection, which lasted several days. (Tr. 23:19–23, 27:9–12.) Initially, Breland was not present at the inspection; however, Breland returned to Reed Pit mine at the request of Production Superintendent Fred Sondermayer and met with Chaix to discuss the inspection and Kaufman’s October 2008 report. (Tr. 165:20–166:22.)

Chaix cited several conditions as alleged violations of the Secretary’s mandatory safety standards, which are now at issue before me. On July 22, Chaix issued Citation No. 6479737 pursuant to section 104(a) of the Mine Act alleging that the work boats and dock at the mine site’s pond lacked handrails and toeboards, exposing miners to the risk of fatal drowning by falling into the pond after a slip or fall. (Ex. S-2, at 1.) Chaix alleged that the gravity of the citation was “significant and substantial” (“S&S”).⁷ (*Id.*) In accordance with MSHA policy, on July 28, Chaix divided Citation No. 6479737 and issued Citation Nos. 6479744 and 6479745 specifically covering the lack of handrails and toeboards on Knife River’s work boats. (Tr. 28:18–29:13; Ex. S-2, at 21–24.)

Additionally, Chaix issued a citation and an order under section 104(d)(1) of the Mine Act, alleging the existence of S&S violations that were the result of Knife River’s unwarrantable failure to comply with the Secretary’s mandatory health and safety standards.⁸ Chaix issued Citation No. 6479741 on July 27 asserting that the tunnel underneath the surge pile had structural failures and was not being maintained properly. (*Id.* at 10.) On July 28, Chaix issued Order No. 6479743, noting that five of the six posts in the wall alongside the crushing unit had rotted away, creating the risk of the wall falling on the miners. (*Id.* at 17.)

After the issuance of the order, Knife River, on its own initiative (Tr. 73:14–16), put up caution tape around the wall in an attempt to comply with the order’s requirement to withdraw from the affected area (Tr. 173:3–174:8). Sondermayer showed the tape to Breland and stated that his miners could operate the crusher without entering the taped-off area. (Tr. 173:9–174:17, 581:12–582:23.) At the time, though, Breland was unaware the crusher operation booth was in the area subject to closure under the order. (Tr. 183:9–19.) On July 29, Chaix issued Citation No. 6479746 under section 104(a) of the Mine Act asserting that miners improperly entered the area subject to the order. (Ex. S-2, at 25.) No evidence suggests that the alleged violations before me

⁶ Knife River subsequently added more illumination, which addressed this issue. (Tr. 24:8–10.)

⁷ The S&S terminology is taken from section 104(d)(1) of the Mine Act, 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.” 30 U.S.C. § 814(d)(1).

⁸ The unwarrantable failure terminology is taken from section 104(d) of the Mine Act, which establishes more severe sanctions for any violation that is caused by “an unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards.” 30 U.S.C. § 814(d)(1).

had been previously cited or even raised into question during prior MSHA inspections in 2008 and 2009. (Tr. 93:19–107:24.)

IV. Principles of Law

A. The Secretary’s Interpretation of Regulations

To assess the validity of the Secretary’s interpretation of her regulations, the Commission explains as follows:

[w]here the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results. *See Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987); *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989). If, however, a standard is ambiguous, courts have deferred to the Secretary’s reasonable interpretation of the regulation. *See Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 463 (D.C. Cir. 1994); *accord Sec’y of Labor v. Western Fuels-Utah, Inc.*, 900 F.2d 318, 321 (D.C. Cir. 1990) (“agency’s interpretation of its own regulation is of ‘controlling weight unless it is plainly erroneous or inconsistent with the regulation.’”) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)). The Secretary’s interpretation of her regulations is reasonable where it is “logically consistent with the language of the regulation[s] and . . . serves a permissible regulatory function.” *General Elec. Co. v. EPA*, 53 F.3d 1324, 1327 (D.C. Cir. 1995) (citations omitted).

Lodestar Energy, Inc., 24 FMSHRC 689, 692 (July 2002). The required analysis asks whether the Secretary’s interpretation of the regulation is reasonable. *Id.* (citing *Energy West Mining*, 40 F.3d at 463). The Secretary’s interpretation must harmonize with and advance the objective of the statute it implements and not conflict with it. *Lodestar Energy*, 24 FMSHRC at 692 (quoting *Emery Mining Corp. v. Sec’y of Labor*, 744 F.2d 1411, 1414 (10th Cir. 1984)). An individual provision of the Secretary’s regulations should comport with the other sections of the regulations so as “to effectuate the Mine Act’s goal of promoting the safety and health of miners.” *Consolidation Coal Co.*, 14 FMSHRC 956, 969 (June 1992) (citing *Emery Mining*, 744 F.2d at 1414).

B. Fair Notice

Regarding the minimum notice due that is due to the regulated community with regard to the Secretary’s enforcement position of a particular regulatory provision, the Commission states that

“[d]ue process . . . prevents . . . deference from validating the application of a regulation that fails to give fair warning of the conduct it prohibits or requires.” *Gates & Fox Co. v. OSHRC*, 790 F.2d 154, 156 (D.C. Cir. 1986). An agency’s interpretation may be “permissible” but nevertheless fail to provide the notice required under this principle of administrative law to support imposition of a civil sanction. [*General Elec. Co. v. EPA*, 53 F.3d 1324, 1333–34 (D.C. Cir. 1995)].

Island Creek Coal Co., 20 FMSHRC 14, 24 (Jan. 1998).

Actual notice of the Secretary’s interpretation is not required. *Id.* Instead, the test for notice follows an objective standard that asks “‘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.* (quoting *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990)). A regulation cannot be “‘so incomplete, vague, indefinite or

uncertain that men of common intelligence must necessarily guess at its meaning and differ as to its application.” *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2129 (Dec. 1982) (quoting *Connolly v. Gerald Construction Co.*, 269 U.S. 385, 391 (1926)). Under the Commission’s test, the reasonably prudent person, the operator, is “charged with knowledge of the ‘mining industry and the protective purposes of the standard.’” *Island Creek Coal*, 20 FMSHRC at 25 (quoting *Ideal Cement*, 12 FMSHRC at 2416).

The analysis of the notice afforded to the operator is explicitly focused on the facts of that particular case. *Alabama By-Products*, 4 FMSHRC at 2129. In applying this test, the Administrative Law Judge should consider a “wide variety of factors,” such as “the text of [the] regulation, its placement in the overall regulatory 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.” *Lodestar Energy*, 24 FMSHRC at 694–95 (citations omitted).

C. 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)(1). 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. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Sec’y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving the *Mathies* criteria). The Commission has further found that “an inspector’s judgment is an important element in an S&S determination.” *Mathies*, 6 FMSHRC at 5 (citing *National Gypsum*, 3 FMSHRC at 825–26); see also *Buck Creek Coal*, 52 F.3d at 135–36 (stating that ALJ did not abuse discretion in crediting opinion of experienced inspector). An evaluation of the reasonable likelihood of injury should be made assuming continued normal mining operations. *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985) (quoting *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984)).

D. Unwarrantable Failure

The unwarrantable failure terminology is taken from section 104(d) of the Mine Act and refers to more serious conduct by an operator in connection with a violation. 30 U.S.C. § 814(d). In *Emery Mining*, the Commission determined that an unwarrantable failure is “aggravated conduct constituting more than ordinary negligence.” 9 FMSHRC 1997, 2001 (Dec. 1987). Unwarrantable failure is characterized by such conduct as “reckless disregard,” “intentional misconduct,” “indifference,” or a “serious lack of reasonable care.” *Id.* at 2003–04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); see also *Buck Creek Coal*, 52 F.3d at 136 (approving the Commission’s unwarrantable failure test).

Whether conduct is “aggravated” in the context of unwarrantable failure is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist, such as the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator’s efforts in abating the violative condition, whether the violation is obvious or poses a high degree of danger, and the operator’s knowledge of the existence of the violation. See *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000); *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev’d on other grounds*, 195 F.3d 42 (D.C. Cir. 1999); *Midwest*

Material Co., 19 FMSHRC 30, 34 (Jan. 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243–44 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988). All of the relevant facts and circumstances of each case must be examined to determine if an actor’s conduct is aggravated or whether mitigating circumstances exist. *Consolidation Coal*, 22 FMSHRC at 353.

V. Further Findings of Fact, Analysis, and Conclusions of Law

A. Citation No. 6479737 – The Dock and Walkway

1. Violation

Originally, Citation No. 6479737 was issued for alleged violations found on the work boats, the dock, and the walkway. However, Chaix modified the citation to cover only the docks and the walkway. (Tr. 28:18–29:13.) The modification resulted from a conclusion that the work boats “were different pieces of equipment” and Chaix “needed to issue separate citations for separate pieces of equipment” in accordance with MSHA policy. (Tr. 28:21–24.) Also, Citation No. 6479737 originally alleged a violation of the mandatory safety standard at 30 C.F.R. § 57.11002 but was amended to allege a violation of the mandatory safety standard at 30 C.F.R. § 56.11027 (Tr. 29:3–6), which requires, in pertinent part, that “[s]caffolds and working platforms shall be of substantial construction and provided with handrails and maintained in good condition. . . . Working platforms shall be provided with toeboards when necessary.” Chaix deemed the alleged violation to be S&S based on his reasoning that “the hazard was clear and present” and “the sort of injuries that [he] would expect to result from an accident . . . would be serious.” (Tr. 31:24–32:8, Ex. KR-1, at 1.) According to Chaix’s documentation in the citation, the dock lacked handrails and toeboards, “exposing miners to the risk of fatal drowning in the event of a slip or fall into water reported to be . . . approximately 20 feet deep.” (Ex. KR-1, at 1.)

Knife River contends that no work is performed on the dock or walkway. (Tr. 337:10–14.) Additionally, it argues that the walkway has handrails, that life jackets are required, and that no accidents have occurred in the area, demonstrating the existence of minimal safety risks. (Tr. 337:15–338:1, 343:19–344:2, 558:8–11.) However, the evidence shows that miners assembled materials, as well as loaded and unloaded items from the dock. (Tr. 31:18–23, 395:25–396:2.) Also, miners traveled in this area at least twice each shift—to get to the dredge and back—and when making trips for materials. (Tr. 31:4–12.) MSHA Supervisor Breland personally observed two miners on the dock who did not properly secure their life jackets, such that had they fallen into the water, the life jackets could have either slipped off or choked the miners. (Tr. 178:24–179:25.)

The Secretary’s and Knife River’s witnesses acknowledged that work activities regularly took place on the dock. Because miners periodically performed work-related tasks on the dock, it is a working platform that falls within the cited regulation at 30 C.F.R. § 56.11027. Under these circumstances, a reasonably prudent operator like Knife River should have recognized that the dock would be considered a “working platform.” Based on these facts, this citation does not involve a novel interpretation of § 56.11027. Even assuming, *arguendo*, that this proceeding involves a novel regulatory interpretation, Knife River had prior, explicit notice of the Secretary’s enforcement position of § 56.11027. During the visit by MSHA officials preceding Chaix’s inspection, MSHA Western District Manager Art Ellis informed Knife River’s officials about the need to install handrails.

2. Gravity and S&S

As for the question of whether this violation was S&S, Knife River's violation of a mandatory safety standard establishes the first element of the *Mathies* test. As for the remaining elements of *Mathies*, the Secretary asserts that the discrete safety hazard is the danger of slipping and falling on the dock, potentially falling into the water and drowning. The evidence demonstrates that miners frequently worked on the dock, which lacked both handrails and toeboards. Knife River admitted that it regularly operates in rainy weather, a common occurrence in the area. (Tr. 570:23–571:3.) Given that miners worked frequently in this area, often in wet conditions, the lack of handrails and toeboards created the discrete safety hazard of slipping and falling. The handrails on the walkway to the dock did not obviate this risk.

Given the dock's proximity to water, the risk of slipping and falling created not only the possibility of a miner hitting an object from such a fall but also the possibility of a miner falling into the water, potentially incurring hypothermia or drowning. (Tr. 178:24–179:13.) Knife River's lifejacket policy did not ameliorate the risk of injuries associated with falling into the water. Supervisory Mine Inspector Breland's observations about the miners' improper use of lifejackets demonstrate that miners do not always properly secure life jackets, and as a consequence, miners could be seriously injured or drown should they fall into the water.

Besides Knife River's lifejacket policy, another factor offered to mitigate the risks associated with this violation is the assertion that some of Knife River's miners work in steel-toed boots. (Tr. 223:17–224:24.) Nevertheless, despite the rugged construction of such shoes, they do not guarantee stability, particularly if their soles are worn. (Tr. 225:1–15.) This possibility is why toeboards are required in slippery areas to increase surface traction. (*Id.*)

In light of the slippery environment where this violation took place and the miners' frequent exposure to that environment, I determine that the violation created the reasonably likely risk that the hazard would contribute to injuries associated with slipping, falling, and drowning. These injuries could be broken bones, or in the case of falling into the water with an improperly secured lifejacket, death by drowning. These types of injuries are more serious than mere bumps and bruises and are to be expected from the types of accidents associated with the hazards created by this violation. Significant injuries, including fatal ones, were reasonably likely as a result of this violation. I conclude that the gravity of this violation was appropriately assessed as a reasonable likelihood of fatal injuries. Accordingly, I determine that the violation created the reasonable likelihood that the expected injury would be of a reasonably serious nature. This violation created a discrete safety hazard that gave rise to the reasonable likelihood of an injury of a reasonably serious nature, establishing the remaining three elements of the *Mathies* test. I conclude that the violation was S&S.

3. Negligence

The Secretary asserts that Knife River was moderately negligent in committing this violation. Here, Knife River required the use of life jackets in the area at issue. Unfortunately, as noted above, this policy did not adequately guard against the risks associated with working in this area. The evidence demonstrates that the improper use of lifejackets was not uncommon. Knife River could have taken the cost-effective measures of installing handrails and toeboards on the dock and significantly reduced the risks of working in this area. In light of the fact that Knife River took partial measures to address the risks in this area, I determine that Knife River's violation constitutes moderate negligence. Citation No. 6479737 is hereby **AFFIRMED**, as written.

4. Civil Penalty

Under section 110(i) of the Mine Act, the Administrative Law Judge must consider six criteria in assessing a civil penalty: the operator's history of previous violations, the

appropriateness of the penalty relative to the size of the operator's business, the operator's negligence, the penalty's effect on the operator's ability to continue in business, the violation's gravity, and the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of a violation. 30 U.S.C. § 820(i).

Knife River's history of violations over the fifteen months preceding this violation consists of merely nine non-S&S violations assessed at \$100 each, none of which involve the standard breached in Citation No. 6479737. Nothing in the record suggests that the proposed penalty amount of \$585 that the Secretary seeks in these proceedings is inappropriate for the size of Knife River's business or that it would infringe on Knife River's ability to remain in business. Moreover, once this citation was issued, nothing suggests that Knife River failed to make a good faith effort to achieve rapid compliance with the safety standard. Knife River was moderately negligent, and the violation exposed one miner to a reasonable risk of fatal injuries. In considering all of the facts and circumstances of this matter, I hereby assess a civil penalty of \$585.

B. Citation Nos. 6479744 and 6479745 – The Work Boats

1. Violation

Citation No. 6479744 was issued for the 40-horsepower work boat not having handrails or toeboards. The boat measured approximately 15-feet long and 10-feet wide, and according to Inspector Chaix “[t]his boat was observed to be in use by the dredge operator for transport to and from the dredge at least twice each shift.” (Ex. KR-10.) Citation No. 6479745 was issued for the 20-horsepower work boat not having handrails or toeboards. (Ex. KR-12.) The boat was approximately 14-feet long and 8-feet wide and according to Chaix was “used on an as-needed basis for transport and as a work platform.” (*Id.*) Like a platform, these work boats are flat with no sides or gunnels. (Ex. S-9.) Also, the boats have cranes built onto them. (Ex. S-9.) On the night of the inspection, the 40-horsepower boat was holding welding equipment. (Tr. 58:17–25; Ex. S-9.)

Citation Nos. 6479744 and 6479745 allege violations of 30 C.F.R. § 50.11027, which, as stated above, require working platforms to be provided with handrails and toeboards. Both of the alleged violations were deemed S&S by Chaix based on his determination that miners were exposed to the risk of drowning. (Exs. KR-10, KR-12.) Knife River does not view the boats as work platforms. (Tr. 337:6–7.) However, uncontroverted testimony showed that miners work on the dredge and pipeline from the boats. (Tr. 58:17–59:9, 60:3–15.) Miners position the boats on the water where they must perform necessary work tasks, such as moving them against the pipeline so that they can use the welder, torches, and the crane. (Tr. 60:7–15.) Miners stand on the boats to bolt and maintain the pipeline that carries out the sand, rock, and slurry mixture. (Tr. 60:16–61:21.) Periodic work is conducted on the boats, and the work is not so infrequent as to preclude them from being regarded as working platforms. *See Rohloff Sand & Gravel Co.*, 20 FMSHRC 868 (Aug. 1998) (ALJ Barbour) (finding a water pump platform floating on a pond to be a “working platform”). Accordingly, I find that these boats constitute working platforms.

The analysis of Knife River's notice regarding the application of § 56.11027 to its work boats parallels the analysis of § 56.11027's application to the dock. *See* discussion *supra* Part IV.A.1. Knife River's miners regularly performed work tasks from these boats. A reasonably prudent operator should have recognized that the boats would be considered “working platforms.” Even if the need to install handrails had been unclear, Knife River received notice from MSHA official Art Ellis prior to Chaix's inspection that it needed to install handrails on the boats. Thus, I reject Knife River's arguments to the contrary.

2. Gravity and S&S

As articulated above, Knife River's violations of a mandatory safety standard establishes the first element of the *Mathies* test for an S&S violation. Like the dock, the boats need handrails and toeboards to keep miners from slipping and falling either against other objects or into the water, notwithstanding any mere inconvenience these safeguards may pose. (Tr. 575:1–19, 576:23–577:11.) The heightened possibility of such falls caused by this violation constitutes a discrete safety hazard.

The miners had relatively frequent exposure to the hazard in these violations. The fact that a miner had fallen off of a work boat in the past while on the job demonstrates the risks of working in this environment. (Tr. 63:6–10.) Work is conducted on the boats during inclement weather, such as rain, heightening the risk of slipping on a wet surface despite scoring on the boats' surfaces designed to add foot traction. (Tr. 91:14–15, 151:2–5, 570:10–571:3.) Life jackets do not adequately ameliorate the varied hazards of this work environment, as they may not be properly secured. Moreover, besides drowning, a falling miner could catch hypothermia from exposure to the water or break a bone. As with the violation concerning the dock, the nature of this hazard exposes one miner to the risk of drowning, a potentially fatal injury. Given the nature of the hazard, the miners' exposure to it, and the likelihood of injury, I conclude that the violation resulted in a discrete safety hazard associated with the reasonable likelihood of an injury of a reasonably serious nature. This conclusion establishes the remaining three elements of the *Mathies* test for an S&S violation. I determine that these violations were S&S.

3. Negligence

These citations charged Knife River with moderate negligence. The general circumstances surrounding these violations are similar to the circumstances surrounding Knife River's failure to provide adequate safety measures on the dock. In light of Knife River's notice of these violations, the likelihood of injury, and the nature of the injury, I agree with the inspector's determination that Knife River's negligence was moderate. As a result, Citation Nos. 6479744 and 6479745 are hereby **AFFIRMED**.

4. Civil Penalty

The Secretary seeks a civil penalty of \$585 for each of these violations. I have considered Knife River's history of few violations. I have determined that the gravity and negligence of Knife River's violations in these two citations is the same as that committed in Citation No. 6479737, which involves the same safety standard as the one breached in Citation Nos. 6479744 and 6479745. Nothing suggests that Knife River failed to make a good faith effort to achieve rapid compliance with the safety standard once Citation Nos. 6479744 and 6479745 were issued. Accordingly, based on the six civil penalty criteria, I conclude that the proposed civil penalty for these violations is appropriate and hereby assess a civil penalty of \$1,170.

C. Citation No. 6479741

1. Additional Findings of Fact – The Experts' Reports

Citation No. 6479741 was issued by Inspector Chaix because the corrugated steel tunnel running underneath the cobble surge pile had "at least two radial seams" that were failing and "other significant deformations in the structure." (Ex. KR-4, at 10.) One of the radial seams split near the first vertical support. (Ex. S-5, at 3.) The second radial seam split near the twelfth vertical support. (Ex. S-5, at 6.) The tunnel's "other significant deformations" included buckling, areas where the roof is inverted (Tr. 246:22–247:2), and distortion of the tunnel's vertical supports. Chaix felt the damage was "obvious" because the tunnel was visibly buckled, curved, kinked, and bulged. (Tr. 35:13–38:22, 44:9–45:4.)

Two experts and one of Knife River's engineers offered detailed testimony concerning the

condition of the tunnel. Terence Taylor testified on behalf of the Secretary and was accepted as an expert in civil structural engineering. (Tr. 241:8–10.) H. John Head testified on behalf of Knife River and was accepted as an expert in mining engineering. (Tr. 472:7–14.) Dr. Keith Kaufman, author of Knife River’s 2008 report concerning the tunnel and Chief Engineer at Knife River’s prestress plant in Knife River’s western Oregon division, also testified on behalf of Knife River. (Tr. 404:19–405:4.)

Taylor observed that the overall shape of the tunnel was skewed, meaning the tunnel was not a perfect ellipse or circle. (Tr. 250:8–14.) Part of the tunnel had widened out, but the expansion ranged between only seven and thirteen inches. (Tr. 250:15–24.) This expansion occurred in an area reinforced by the vertical posts. (*Id.*) Kaufman and both experts agreed that the tunnel’s circular design is integral to its function. (Tr. 290:20–25, 409:18–25, 476:8–15.) They also agreed that the cobble must be loaded evenly on the tunnel, as uneven loading could compromise its strength. (Tr. 261:10–19, 418:22–419:1, 477:10–22.) Kaufman asserted that cobble should not be removed from the tunnel in such a way as to unbalance its load. (Tr. 441:3–8; Ex. S-6, at 3.) Head agreed with this point and stressed that the tunnel should never be uncovered. (Tr. 480:6–9.)

Taylor explained that a twenty percent deflection measurement indicates a risk of incipient collapse, which is the point when the tunnel will buckle (or bulge) and go into a reverse curvature shape. (Tr. 291:6–13.) Taylor relied upon two separate criteria to determine whether a particular part of the tunnel had failed: (1) a measurement of twenty percent deflection or (2) buckling. (Tr. 310:24–311:1.) Knife River engineer Kaufman acknowledged that a buckle constitutes a localized failure of the tunnel. (Tr. 450:4–6.) Here, the range of the tunnel’s deformation measurements equated to a six to eleven percent deflection of the pipe. (Tr. 251:2–3.) According to Taylor, the industry allows a deflection measurement of five percent. (Tr. 291:1–4.)

Taylor documented six bulges in the tunnel. (Tr. 244:16–18.) He stated that the tunnel had permanently deflected in the bulging areas and would not return to its original shape. (Tr. 290:16–18.) Taylor described two bulges at the back of the tunnel and opined that the feeder frame had prevented the tunnel’s complete collapse in that section. (Tr. 245:7–13.) Two bulges were observed in the middle section of the tunnel. Head, Kaufman, and Taylor noted that the vertical supports in this area added redundant support to the tunnel. (Tr. Tr. 293:5–16, 413:3–12, 516:19–24.) Finally, Taylor described two bulges at the entrance of the tunnel, which he recognized as the ones shown in Kaufman’s report. (Tr. 246:12–17.)

Taylor’s analysis corroborated the two seam splits identified by Chaix and recognized a third one located between the sixth and seventh vertical supports. (Tr. 247:15–21, 249:16–17.) Kaufman’s report identified only the seam split near the first vertical support. (Ex. S-6, at 2.) Kaufman recognized seam separation as a criterion indicating failure of the tunnel. (Tr. 450:7–9.)

Taylor testified that the tunnel’s design did not give it a safety factor of two, the prudent design standard, and that in its current condition a variety of potential structural failures could occur, such as the sudden buckling of a portion of the tunnel’s roof. (Tr. 269:9–270:5.) The safety factor measures the ratio of the tunnel’s load bearing capacity over the load associated with the height of the cobble pile. (Tr. 501:3–8.) To compute the safety factor, Taylor estimated the load on the tunnel based on the cobble density measurement of one hundred pounds per cubic foot provided by Knife River. (Tr. 288:11–21.) He approached the calculation from “an engineering standpoint,” estimating the safety factor based on the maximum expected load, that is, the maximum estimated height of the cobble pile, which he stated to be thirty feet. (Tr. 288:11–289:25.) Head disagreed with Taylor’s calculations, criticizing the compaction value chosen by Taylor.⁹ (Tr. 503:23–505:14.) Head stated that although the exact value is unknown, it lies somewhere between the extremes of seventy percent—“almost no compaction”—and eighty

⁹ The compaction value measures how tightly packed the cobble is. (Tr. 503:23–504:7.)

five percent—“the good end” of the range. (Tr. 507:20–508:3.) Noting that Taylor used a compaction measurement of seventy percent, Head explained that a compaction factor of seventy-three percent would yield a safety factor of two. (Tr. 505:16–506:14.) In response to this criticism, Taylor explained his position that a compaction measurement of seventy percent “really [gave] the company the benefit of the doubt,” in light of how loose the cobble material surrounding the tunnel is. (Tr. 592:12–21.) Nevertheless, Taylor conceded that his analysis did not account for the tunnel in its present condition, i.e., with installation of supplemental supports and buckles in the tunnel’s structure. (Tr. 297:25–298:4.)

As one of the steps taken to abate this citation, MSHA required Knife River to measure changes in the tunnel’s size. (Tr. 361:7–365:24.) Knife River measured the tunnel’s width in four locations and also measured the size of two of the larger bulges. (Tr. 362:23–363:6.) The monitoring data reveal that the measurements of these locations did not change in a sample of thirty-five days spanning from September 2009 to October 2009. (Ex. KR-26.) During that time, the cobble pile’s height varied from fifteen percent to eighty-five percent of its maximum. (*Id.*)

Although the tunnel has been damaged for a number of years, the damage’s cause is unclear. (Tr. 135:20–136:6, 280:11–19.) The experts and Knife River’s engineer agree, however, that at least the two bulges located nearest to the tunnel’s entrance were created by equipment loading and unloading the surge pile. (Tr. 256:14–24, 258:9–15, 280:20–281:1, 432:13–22, 479:21–480:1.)

Indeed, no expert could specifically trace the progression of the tunnel’s damage, and it was evident that the tunnel existed in mostly the same condition for a long period of time. The tunnel’s vertical supports were installed approximately fourteen years ago. (Tr. 253:25–254:4.) Kaufman and Head reported that they spoke with Knife River employees who stated that the tunnel has been in its present condition for at least fourteen years. (Tr. 408:3–25, 484:11–14.) Taylor noted that the bearing channel, which runs along the roof of the tunnel and connects to the vertical supports, had rotated at the site of one of the buckles, implying that the tunnel was damaged after the installation of the vertical supports. (Tr. 253:13–254:4.) Kaufman agreed that “a lot of [the] deformation occurred after the retrofit,” specifically identifying the area with the vertical supports. (Tr. 422:13–423:17.) He did state, though, that the bulges are not new developments. (Tr. 421:22–422:1.) Head concurred that none of the damage to the tunnel was new. (Tr. 484:15–21.) In contrast to Taylor and Kaufman, Head did not think that the tunnel had deformed after the installation of the vertical supports. (Ex. KR-28, at 5.)

The substantial education and experience of Taylor, Kaufman, and Head allowed them to make expert conclusions about the tunnel’s present condition. (Tr. 237:1–241:7, 405:2–406:16, 465:18–472:5.) Taylor’s analysis carefully documented the condition of the tunnel, finding several locations where it had failed. In contrast, Kaufman visited the tunnel for fifteen minutes and neither walked its entire length nor noted all of its deformations. (Tr. 410:5–19.) Head explained that because some of the facts concerning the tunnel are unknown, he felt that a “subjective analysis” was more appropriate than a “detailed, quantitative analysis.” (Tr. 473:24–474:7.) Head acknowledged that he did not perform “a rigorous technical evaluation” and admitted that it was not “quite as complex as Mr. Taylor’s exam.” (Tr. 485:13–23.) Also, in discussing his conclusion that the tunnel is safe, Head stated his opinion that “[s]hort of complete inversion, [the] tunnel would not make me uncomfortable.” (Tr. 541:14–15.) The notion that a tunnel on the verge of collapse is acceptable is incongruent with the Mine Act’s goal of protecting miners’ safety. I grant more weight to Taylor’s analysis of the tunnel because it was more thorough than Kaufman’s and Head’s reports and because Taylor did not rely on premises contrary to the purpose of the Mine Act.

2. The Violation

This citation alleges a violation of 30 C.F.R. § 56.14100(b), which states that “[d]efects on

any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons.” Chaix deemed the alleged violation S&S and an unwarrantable failure to comply with a mandatory safety standard. He regarded the violation as unwarrantable because Knife River had notice of the defect through a written report emailed on October 26, 2008, by engineer Keith Kaufman to Gullickson, Dave Bull, Knife River Western Oregon Division President, and Steve Zurfluh, Superintendent of Reed Pit prior to Wetmore. (Tr. 44:25–45:12; Ex. S-6.)

Knife River objects to the application of § 56.14100, and argues, in essence, that the tunnel in question is not “equipment” within the ordinary meaning of the word as set forth in § 56.14100(b). Knife River further contends that even if, *arguendo*, the tunnel is considered “equipment,” the Secretary has not demonstrated that the structures at issue had “defects affecting safety” because no “mining” occurs within the tunnel; only a conveyor runs through it, and the tunnel is rarely occupied by miners.¹⁰

Equipment is defined, in pertinent part, as “1a: the equipping of a person or thing; b: the state of being equipped; 2a: the physical resources serving to equip a person or thing as (1): the implements (as machinery or tools) used in an operation or activity (2): all the fixed assets other than land and buildings of a business enterprise. . . .” *Webster’s Third New International Dictionary, Unabridged* 768 (2002). Accordingly, inasmuch as the testimony indicates that the tunnel is a fixed asset used in Knife River’s mining operation but is not a building, and is used in the transport of materials in Knife River’s mining operation, it comes within the definition of “equipment,” and thus is within the purview of § 56.14100(b).

Additionally, reference to the regulations further illuminates the Secretary’s interpretation of her regulation. Part 56, Subpart M—“Machinery and Equipment,” regards large physical components of mining operations as equipment. Several sections of the subpart regulate conveyor systems, of which the tunnel is an integral part. *E.g.*, 30 C.F.R. § 56.14109. The Secretary’s interpretation of § 56.14100 is consistent with 30 C.F.R. Part 56, which sets forth the safety and health standards governing surface metal and nonmetal mines, such as Reed Pit. I find that the Secretary’s definition is a reasonable interpretation, as the tunnel allows Knife River to carry on its aggregate mining activity. Therefore, the Secretary has established a violation. In light of this conclusion, a reasonably prudent operator should have recognized that this standard applied to its operation. Indeed, as noted by the Secretary (Sec’y Br. 61), Knife River admitted that it initiated Kauman’s report in light of MSHA’s enforcement action against a structure at another one of its facilities, implying that it was well aware equipment like the tunnel is subject to MSHA’s regulatory authority.

3. Gravity and S&S

Having established a violation of a mandatory safety standard, the first element of the *Mathies* test, I now turn to the questions of gravity and whether this violation was S&S. The tunnel deformations resulted in a discrete safety hazard. The buckling and deformations of the tunnel could easily contribute to the potential collapse of the tunnel. Because the damage has been present for a significant period of time, continued mining operations, with no additional remedial measures, could contribute to increased deterioration. Assuming continued mining operations from the issuance of the citation, further deterioration of the tunnel’s structure was reasonably likely, creating a discrete hazard that could contribute to a miner’s injury. Significantly, no accurate means exist to predict what circumstances might cause the tunnel to collapse or even when a collapse might occur. (Tr. 298:20–25.) Miners must regularly work in this environment, and to perform maintenance work, miners access the entire tunnel. (Tr.

¹⁰ Knife River acknowledged that miners access the cited culvert tunnel periodically to perform workplace examinations or maintenance on the conveyor. (KN’s Prehr’g Statement 2.)

430:19–21.) At least one miner is required to spend some time in the tunnel every day as part of his job. (Tr. 484:4–6.) A tunnel cave-in with miners inside of it would result in a reasonably serious, if not fatal, injury. Accordingly, the hazard associated with this violation was properly cited as a reasonably likely risk of fatal injury to one miner. The violation created a discrete safety hazard associated with the reasonable likelihood of a reasonably serious injury. I conclude that this violation was S&S.

4. Negligence and Unwarrantable Failure

In this case, Knife River initiated the report on its own accord to confirm the tunnel's safety in light of MSHA's concerns of a structure at another one of its mines. Moreover, Knife River followed several of Kaufman's recommendations. Its employees visually inspected the tunnel's deformations and temporary struts on a daily basis, recording their observations of the struts, as recommended by the report. (Tr. 381:20–382:2, 383:14–23.) Most importantly, Knife River ensured that it evenly loaded the tunnel in accordance with Kaufman's recommendation. (Tr. 382:11–383:13.) Indeed, all of the experts agreed that evenly loading the tunnel was crucial to preserving its structural integrity. Nonetheless, Knife River did not implement all of Kaufman's recommendations. It did not install a sump pump to remove water from the tunnel.¹¹ (Tr. 381:9–15.) Most significantly, Knife River did not install horizontal control points in the tunnel in order to take periodic measurements of the tunnel's geometry. (Tr. 381:16–19.)

When the violation was cited, the tunnel's condition was relatively static. Only some of the damage had occurred since the installation of the tunnel's vertical supports approximately fourteen years ago. All of the experts agreed that the vertical supports supplemented the tunnel's strength. Moreover, Taylor's albeit thorough analysis of the tunnel did not account for these supports. This fact softens Taylor's criticism of Knife River that the tunnel, as originally designed, was inadequate to its use. The present stability of the tunnel given Knife River's own observations of it and the tunnel's 2009 size measurements under MSHA's direction suggest that the tunnel is not in immediate danger of collapse. At the same time, although the tunnel conditions remained static, none of the experts could provide calculations that accurately established its safety factor. This unknown risk factor posed a risk to miners' safety that Knife River failed to adequately address.

Here, Knife River did take some steps to investigate the condition of its damaged tunnel and implemented measures to ensure that it did not pose a danger to its miners. The relatively static condition of the tunnel did not give Knife River reason to think that its tunnel posed an immediate threat to its miners. At the same time, Knife River failed to take significant, yet cost-effective, steps to mitigate the dangers posed by the tunnel, including researching its original design plan and measuring its size. Furthermore, relying on visual observations, instead of taking measurements of horizontal control points, is no way to ensure equipment such as this tunnel, which had sustained visible damage long ago, was in a condition that it would not fail. Based on these considerations, I conclude that Knife River's violation evinced a high degree of negligence.

None of the evidence suggests that in using the tunnel Knife River engaged in aggravated conduct constituting more than ordinary negligence. Knife River took steps to ensure that its miners would not be exposed to the tunnel's collapse. Knife River could have taken further simple steps to ameliorate the hazards associated with this tunnel. However, it should not be penalized for its self-directed efforts to investigate the tunnel and its attempt to address the tunnel's compromised structure. I conclude that this violation did not constitute an aggravated

¹¹ Chaix issued Order No. 6479742 alleging standing water in the tunnel, and he referenced Kaufman's recommendation to install a sump pump. As explained below, I have approved the parties' agreement to settle the order, modifying it to a section 104(a) citation.

failure to adhere to a mandatory safety standard.

Accordingly, Citation No. 6479741 is hereby **MODIFIED** to a section 104(a) citation.

5. Civil Penalty

The Secretary seeks a civil penalty of \$2,000 for this violation. Here, nothing suggests that Knife River failed to make a good faith effort to achieve rapid compliance after this citation was issued. However, I have determined that this citation still involved Knife River's high negligence with regard to a hazard involving the reasonably likely risk of fatal injuries to one miner. Therefore, a civil penalty of \$1,000 is appropriate for this violation.

D. Order No. 6479743

1. Violation

Both Order No. 6479743, issued July 28, 2009, and Citation No. 6479746, issued July 29, 2009, involve a wooden barrier wall. The wall is 100-feet long by 28-feet high and was built to suppress noise and dust. (Tr. 370:1–3, Ex. S-12, at 8.) It originally surrounded the entire crusher, but some sections had been removed. (Tr. 370:5–12, Ex. S-12, at 8.) Order No. 6479743 was issued based on Inspector Chaix's assertions that five of the six support columns in the wall were significantly rotted at the time of the inspection, and the remaining column was only slightly less rotted. (Ex. KR-8.) Chaix testified that daylight was visible beneath the posts. (Tr. 46:22–24, Ex. S-8.) Also, the wall was attached to the crusher operator station and to a workshop.¹² (Tr. 318:7–15; 520:1–4; Ex. S-12, at 8.) Chaix determined that miners working and traveling in the area would be exposed to the hazard of the wall moving abruptly or collapsing altogether. (Tr. 49:23–50:21, 52:20–23.)

Order No. 6479743 was issued as a section 104(d)(1) order for an alleged violation of 30 C.F.R. § 56.14100(b), which requires that “[d]efects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons.” Chaix found the alleged violation to be S&S and an unwarrantable failure, stating that “[m]ine management engaged in aggravated conduct constituting higher than ordinary negligence in that they were aware of the condition of the wall and the need for it to be removed, but failed to act to protect their miners by ensuring the correction of the condition prior assigning miners to continue to work and travel in the area.” (Ex. KR-8.) Chaix's allegations of “aggravated conduct” stem from the “obvious” poor condition of the wall and the fact that Reed Pit management allowed miners to travel to and from the crusher operator station located under the wall. (Tr. 53:12–24.) Terence Taylor testified that due to the rotted columns, it would not have the capacity to resist the significant wind loading expected for that part of Oregon—eighty-five miles per hour. (Tr. 272:17–273:1.) The order required Knife River employees to be withdrawn from the north wall along the crusher and the area beneath the wall on both sides “for a distance equal to its height.” (Ex. KR-8.) Citation No. 6479746 was issued for an alleged failure by Knife River to follow the withdrawal order. (Ex. KR-14.)

Knife River contends that the wall is not within any ordinary definition of “equipment, machinery, and tools.” While Knife River acknowledged that it was aware of the condition of the wall and was in the process of taking it down, it had been almost a year since Knife River worked

¹² The wall's plywood paneling was toed into the sill plate, and angled bracing also supported the wall. (Tr. 520:1–521:2, Ex. S-12, at 8–9.)

on removing the wall. (Tr. 56:14–23, 565:19–566:1, 572:13–23.)¹³ Also, the evidence showed that the wall still blocks noise and dust—intentionally or not. (Tr. 48:13–49:22, 131:20–22, 370:1–3; Ex. S-12, at 8.) I find that the wall served as a physical resource, equipping Knife River in its mine operation in that the wall still blocks dust and noise. *See* discussion *supra* Part IV.C (analyzing the meaning of the term equipment). Reference to Subpart M of 30 C.F.R. Part 56 reveals that the regulations regard items like this barrier wall as “equipment.” Section 56.14110 requires the construction of “guards, shields, or other devices that provide protection against . . . flying or falling materials.” Knife River constructed the wall, in part, to block the dust generated by the crusher unit. Therefore, I find that the Secretary has reasonably interpreted the term “equipment” to include the wall and has therefore established a violation.

2. Gravity and S&S

Based on the evidence, a danger to safety from the wall was present because the posts holding the wall were rotted, posing a high risk of the wall falling in light of the expected wind velocities in that part of Oregon. Even though the wall is reinforced by plywood backing anchored into a concrete and steel base, the base posts were extensively rotted and cracked. (Tr. 124:3–125:21, 561:11–24.) Simply because the wall had not previously shown signs of instability in high winds does not mean a gust could not knock the wall over. This fact simply means that a wall collapse is not highly likely should mining operations continue. Even though MSHA Supervisor Breland testified that the crusher operator station would protect the miners if the wall fell, miners not inside the operator station were exposed to the risk of the falling wall. (Tr. 230:16–231:16.) A wall collapse could result in severe or even fatal injuries. The gravity of this violation was properly cited as a reasonably likely risk of fatal injuries to two miners. I conclude that this violation was S&S.

3. Negligence and Unwarrantable Failure

Here, the evidence demonstrates that the posts supporting the wall had severely rotted away. This deterioration could not have happened abruptly. Instead, it developed over time. Prior to the abatement of this violation, the wall was reinforced by plywood backing anchored into a concrete and steel base. (Tr. 124:3–125:21, 561:11–24.) Furthermore, the structure of the wall is such that its position abutting the trailer gave the wall added stability. In light of these reinforcements, the deteriorated condition of the wall was not so extensive as to justify a finding of unwarrantable failure. Knife River had taken steps to remove other parts of the wall and stated it had intentions of removing the remaining portion, though the subsequent dismantling of the wall had not yet occurred. Additionally, during prior inspections Knife River had not been told that their measures to secure the wall were inadequate. Aggravated conduct exhibiting more than ordinary negligence is not present in this case, and I conclude that the violation cited in Order No. 6479743 does not rise to the level of unwarrantable failure. Instead, a finding of high negligence more accurately reflects Knife River’s dilatory response to the wall’s structural problems.

Based on the foregoing, Order No. 6479743 is hereby **MODIFIED** to a 104(a) citation.

4. Civil Penalty

Here, the Secretary seeks a civil penalty of \$2,341. This violation involved Knife River’s high negligence as to a hazard involving the reasonably likely risk of fatal injuries to two miners.

¹³ Knife River planned on removing the wall because it was considered an “eyesore” and because it created a blind spot for mobile equipment. (Tr. 566:2–15.)

No evidence leads to the conclusion that Knife River failed to make a good faith effort to achieve rapid compliance after this citation was issued. Given the significant gravity of this violation, I determine that a civil penalty of \$1,100 is appropriate.

E. Citation No. 6479746

1. Violation

Citation No. 6479746 alleges Knife River's violation of Order No. 6479743, which was issued under section 104(d)(1) of the Mine Act. (Ex. KR-14.) Inspector Chaix asserted that "[m]iners were not withdrawn from the area affected . . . in [the] Order of Withdrawal # 6479743 Two miners were observed to have been assigned to work and travel in, through, and near the crusher operator shack, which was located through and underneath the North wall." (*Id.*) Knife River argues that should Order No. 6479743 be found invalid, Citation No. 6479746 should be vacated. (KR Br. 34.) Given that I have modified Order No. 6479743 to a section 104(a) citation, the issue presented by Citation No. 6479746 is whether the Secretary can establish a violation.

In *Lodestar Energy, Inc.*, 25 FMSHRC 343 (July 2003), the Commission vacated an Administrative Law Judge's decision affirming a section 104(d)(1) withdrawal order on the basis that the Judge negated the section 104(d)(1) citation underlying the order, thereby removing one of the necessary predicates to the issuance of the withdrawal order. *Id.* at 346. The difference between *Lodestar Energy* and this case, however, is that the underlying violation in *Lodestar Energy* could still stand as a section 104(a) citation, as the violation concerned the breach of a particular safety standard. *Id.* at 346–47. Here, Citation No. 6479746 concerns the breach of a withdrawal order that has been invalidated by this decision.

Although the withdrawal order underlying Citation No. 6479746 has been found to be invalid, when the Citation No. 6479746 was issued, the withdrawal order was still effective. The question here is whether the post-citation invalidation of the order underlying a section 104(a) citation through the judicial process necessitates the invalidation of the section 104(a) citation. The text of section 104(a) is silent on this issue:

If, upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a coal or other mine subject to this Act has violated this Act, or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to this Act, he shall with reasonable promptness, issue a citation to the operator.

30 U.S.C. § 814(a).

The Commission has recognized that "[s]ection 104(d) is an integral part of the Mine Act's graduated enforcement scheme." *Greenwich Collieries*, 12 FMSHRC 940, 945 (May 1990). As the Secretary's representatives, mine inspectors play a crucial role in ensuring miners' health and safety. See *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2164 (Nov. 1989) (discussing the mine inspector's discretion to issue imminent danger orders).

If the violation of a withdrawal order may be vacated simply by the Commission's post-inspection modification of the underlying withdrawal order to a section 104(a) citation, then mine operators will have a significantly reduced incentive to comply with the withdrawal order. Adherence to withdrawal orders is vital to the Mine Act's enforcement scheme, and violating these orders, even if they are ultimately found not to be sustainable under section 104(d), may risk the lives of miners. Moreover, the unprecedented caseload before the Commission means that the validity of a particular withdrawal order may go unresolved for a significant period of time. Based on the text and purpose of the Mine Act, I conclude that a violation of an effective

withdrawal order may be established by demonstrating the breach of the order, notwithstanding the result of the post-inspection adjudication of the withdrawal order.

As for the factual circumstances surrounding this citation, the facts demonstrate that following the issuance of the withdrawal order concerning the wall, miners entered and exited the crusher operator station. (Tr. 69:5–72:3.) This structure ran underneath and adjacent to the barrier wall and was clearly visible within the area subject to the order. (Tr. 51:21–52:13, 68:16–20; Ex. S-8, at 1.) Miners entered an area closed by MSHA’s withdrawal order, so I conclude that a violation occurred.

2. Gravity

The Secretary has asserted that the likelihood of injury in this violation was non-existent. Here, the deteriorated wall had remained standing for years. Miners entered the area affected by the risk of the wall’s collapse in violation of Order No. 6479743 for merely a day. Indeed, the wall did not fall during that brief time period. Application of the “continued normal mining operations” test invokes a counterfactual inquiry into the risks associated with an operator continuing to mine in spite of a particular condition that violates a mandatory health or safety standard. The instant violation does not involve a condition that breaches a particular mandatory safety standard. Instead, the instant violation involves the breach of a government order. Given this distinction and the limited duration of the violation, the continued normal mining operations test has limited use here. I conclude that this violation was not associated with the risk of any injury.

3. Negligence

Knife River argues that its negligence should be reduced based on its good faith effort to comply with the withdrawal order. (KR Br. 33–34.) Knife River put up tape around the area affected by the withdrawal order in an attempt to comply with it. Inspector Chaix did not direct Knife River to erect this tape. (Tr. 73:14–16, 126:19–21.) In Knife River’s favor, MSHA Supervisor Breland did state that Knife River could continue operating its crusher, not realizing that the crusher was in the area subject to the order. (Tr. 183:9–19.) MSHA Supervisor Breland acknowledged that a misunderstanding may have occurred, and he modified the citation from high negligence to moderate. (Tr. 181:16–22.) Regardless of whether a miscommunication occurred, if Knife River had any doubts as to the parameters of the order, Knife River could have clarified thoroughly with Chaix or Breland. Most importantly, the crusher operator station’s location inside the tape set up by Knife River was clear to the naked eye. Knife River violated the withdrawal order because miners continued to work near the crusher operator station, which was within the parameters of the area subject to the withdrawal order.

At the same time, the evidence demonstrates that the risk of Knife River’s violation was low. The miners were entering and exiting the crusher operator station where the expectation of injury was virtually non-existent. Based on all of these factors, I conclude that Knife River committed no more than ordinary negligence in this violation and conclude that the violation was appropriately determined to involve moderate negligence. Citation No. 6479746 is hereby AFFIRMED.

4. Civil Penalty

The Secretary seeks \$112 for this violation. Based on the gravity and negligence associated with the violation, as well as the fact that the evidence does not reveal any lack of good faith by Knife River to achieve rapid compliance after being alerted of the violation, I conclude that a civil penalty of \$112 is appropriate for this violation.

F. Settlement of Citation No. 6479738 and Order No. 6479742

As stated above, the parties reported at the hearing that Citation No. 6479738 and Order No. 6479742 have settled. The Secretary has filed a Joint Motion to Approve Settlement pursuant to Commission Rule 31, 29 C.F.R. § 2700.31. The originally assessed amount of the applicable two citations at issue was \$2,117, and the proposed settlement is \$410. The proposed settlement is as follows:

Docket No. WEST 2009-1437-M

<u>Citation/ Order No.</u>	<u>Date</u>	<u>30 C.F.R.</u>	<u>Assessment</u>	<u>Settlement</u>
6479742	07/28/2009	56.20003(b)	\$2,000	\$293

Docket No. WEST 2009-1438-M

<u>Citation/ Order No.</u>	<u>Date</u>	<u>30 C.F.R.</u>	<u>Assessment</u>	<u>Settlement</u>
6479738	07/22/2009	56.18002(a)	\$117	\$117

Knife River has agreed that as a condition of settling Citation No. 6479738, it will conduct visual inspections of the escape tunnel at issue on a daily basis, and someone will travel and inspect the entire length of the tunnel on a quarterly basis. (Tr. 9:25–10:17.) In the Joint Motion to Approve Settlement, the Secretary has agreed to modify Order No. 6479742 to a citation under section 104(a) of the Mine Act involving Knife River’s “moderate” negligence.

In support of the proposed settlement, the Secretary has submitted information pertaining to the six statutory civil penalty criteria found in section 110(i) of the Act, 30 U.S.C. 820(i), including information regarding Knife River’s size, ability to continue in business, and history of previous violations.

In addition, the Secretary has stated reasons fully warranting the agreed upon reduction in the proposed penalties.

After review and consideration of the pleadings, arguments, and submissions in support of the settlement motion, I find the proposed settlement is reasonable and in the public interest. Pursuant to 29 C.F.R. 2700.31, the motion is **GRANTED**, and the settlement is **APPROVED**.

VI. ORDER

In light of the foregoing, it is hereby **ORDERED** that Citation Nos. 6479737, 6479744, 6479745, and 6479746 are **AFFIRMED**. Knife River is **ORDERED** to pay a civil penalty of \$4,377 within 40 days of this decision. Upon payment of the civil penalty, the above-captioned contest proceedings are **DISMISSED**.

Also within 40 days of this decision, the Secretary is **ORDERED** to **MODIFY** Order No. 6479742 by striking its designation as an unwarrantable failure to comply with a mandatory safety standard, reducing its negligence to “medium,” and changing it to a citation issued under section 104(a) of the Mine Act.

/s/ Alan G. Paez

Alan G. Paez
Administrative Law Judge

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/jts

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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June 17, 2011

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	
	:	Docket No. WEST 2010-1508-M
	:	A.C. No. 26-02314-223636 A3V
	:	
v.	:	
	:	
SMALL MINE DEVELOPMENT, Respondent	:	Mine: Midas Mine

DECISION

Appearances: Isabella M. Finneman, Esq., Office of the Solicitor, U.S. Department of Labor, San Francisco, CA, on behalf of the Secretary of Labor;
Charles W. Newcom, Esq., Sherman & Howard, 633 Seventeenth Street, Suite 3000 Denver, CO 80202, on behalf of Small Mine Development.

Before: Judge Kenneth Andrews

This case is before me upon the petition for assessment of a civil penalty filed by the Secretary of Labor (“Secretary”) pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C §801 et seq. (the “Act”) charging Small Mine Development (“Respondent”) with violations of mandatory standards and seeking civil penalties in the Special Assessment amount of \$52,500.00 for one safety violation. The order is a section 104(d)(1) action. Section 104(d)(1) of the Act provides as follows:

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

A hearing was held on March 15, 2011 in Reno, Nevada.

The general issues before me are whether Small Mine Development violated the cited standard as charged and, if so, what are the appropriate civil penalties to be assessed for those violations. Additional specific issues are addressed as noted below.

Discussion with Findings of Fact and Conclusions of Law

The Midas Mine is an underground gold mine, which necessitates quarterly inspections. Hearing Transcript (Tr.) 25.

On February 9, 2010, Mine Safety and Health Administration (“MSHA”) Inspector Lawrence King performed an E01 inspection of the Midas Mine. (Tr. 18). Before working for MSHA, Inspector King spent 21 years as a supervisor of heavy construction projects for E.T. Simonds, where he gained experience with fall protection and fall arrest systems. (Tr. 22-23). Inspector King also received 23 weeks of training at the Mine Safety and Health Academy in Beckley, West Virginia. (Tr. 23). Interspersed with his training in West Virginia, Inspector King traveled to Anchorage, Alaska for field training with experienced MSHA inspectors. (Tr. 23).

Citation No. 85554051

Citation No. 85554051, issued at 1055 hours, alleges a violation of a mandatory safety standard, section 57.15005, and states:

The project superintendent John Boltz and a second miner was [*sic*] observed on the roof of a connex without safety belts and lines. One side had a tent like structure used as a temporary shop to prevent a fall, but one side and both ends had no rails to prevent falling. The connex was approxatimly [*sic*] 8 feet 8 inches high from the ground, and 8 foot wide and 40 foot long. This creates a fall hazard to miners. Project superintendent John Boltz engaged in aggravated conduct constituting more than ordinary negligence by allowing a miner and himself to be on the roof of the connex with no fall protection. This violation is an unwarrantable failure to comply with a mandatory standard.

Petitioner (“P”) Exhibit (“Ex.”) 2.

Inspector King testified that from a distance he noticed a man without fall protection climbing a ladder that leaned against an unfamiliar structure. (Tr. 26). As he approached, King realized that the structure consisted of two connexes with a tent in between them. (Tr. 26). King learned that the man on top of one of the connexes was project superintendent John Boltz. (Tr. 27). Although he could not see what Boltz was doing, King insisted that Boltz return to the ground because Boltz did not have any fall protection. (Tr. 26-27). King says that Boltz claimed he was tying down the tent, and that he “sheepish[ly]” admitted to forgetting fall protection. (Tr. 27).

Inspector King determined that failing to use fall protection in this situation constituted a violation of MSHA standard 57.15005. King found that the connex was eight feet wide, 40 feet long and eight feet, eight inches tall. (Tr. 29). He said that there was no railing on the 8 foot wide front. (Tr. 32). Based upon what Boltz told him, King also says that Boltz was moving from kneeling to standing while he worked. (Tr. 36).

30 C.F.R §57.15005 states:

Safety belts and lines shall be worn when persons work where there is danger of falling; a second person shall tend the lifeline when bins, tanks, or other dangerous areas are entered.

A violation of 30 C.F.R §57.15005 is determined by an objective standard that does not consider the skill of the miner involved. It occurs when “a reasonably prudent person...would recognize a hazard warranting corrective action.” *Secretary of Labor v. Great Western Electric*

Company 5 FMSHRC 840, 841 (1983); *See also Secretary of Labor v. Lexicon Inc., D/B/A Schuek Steel Company* 24 FMSHRC 1014, 1021 (2002).

John Boltz was admittedly not wearing fall protection, and I credit Inspector King's testimony that the unguarded front edge presented a danger of falling. Therefore, Small Mine Development violated the mandatory safety standard at section 57.15005.

Significant and Substantial

The inspector designated citation No. 85554051 as significant and substantial ("S&S"). A violation is S&S when it is "of such a 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 as 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." *Secretary of Labor v. Cement Division, National Gypsum Company*, 3 FMSHRC 822, 825 (Apr. 1981). In order to establish that a violation is S&S, 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.

Secretary of Labor v. Mathies Coal Company, 6 FMSHRC 1, 3 (Jan.1984); *See also Buck Creek Coal Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary of Labor*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria). The evaluation is made in terms of "continued normal mining operations." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984).

I have found a violation of the cited mandatory safety standard, which meets the first criterion. John Boltz did not wear a safety belt or fall protection as required by 30 C.F.R §57.15005. Inspector King found, and the Secretary proved on this record, a danger of falling existed on the front edge of the connex where the ladder was placed. There were no railings along that edge of the connex. (Tr. 31-32); *see also* P. Ex. 4. Showing that a violation should be designated S&S, however, requires a finding "to be made in addition to a finding of a violation; something more than the violation of a standard itself is required." *National Gypsum*, 3 FMSHRC at 826 (emphasis in original).

In accordance with Inspector King's testimony, I find that the discrete safety hazard of falling existed at the unprotected front edge of the connex. Respondent did not deny King's testimony that the 8-foot front edge of the connex where the ladder was placed did not have a railing. King estimated that the ladder extended no more than 18 inches from the top of the connex, which would not act as a safety railing for a falling miner. (Tr. 31-35). Considering that a miner had to use the ladder to travel between the ground and the top of the connex, the front edge presented a danger of falling that could not be avoided. (Tr. 102). The act of getting on and off of the ladder made a miner even more likely to fall due to the movements involved in the process and the need to approach the edge of the connex. Fall protection would have removed this hazard. The failure to wear fall protection in violation of §57.15005 contributed to the discrete safety hazard of falling from a height of 8 feet 8 inches.

Furthermore, at some point Boltz would have to secure the tie-downs closest to the front edge of the connex. Considering that he stood up to move between tie-downs, the possibility that he could lose his balance and fall in the process of securing the last tie downs increased. (Tr. 31-32). Although Boltz did not work near the front edge for the entire time he was on the connex, he could reasonably have fallen over that edge due to the fact that he had no fall protection, had to

use the unsecured ladder leaning against the front edge, and had to approach the edge to secure the last tie downs.

In the reasonably likely circumstance that a miner were to fall off of the front edge of the connex, it is reasonably likely that a fatal injury could occur. Three to four inch rocks- comprised the base around the connexes. (Tr. 28). Based on personal experience and MSHA fatalgrams, Inspector King testified that an 8 foot fall onto stone ground could kill a miner. (Tr. 34-35). John Boltz also testified that he had heard of 8 foot-fall resulting in broken bones and fatalities. (Tr.106). There was a reasonable likelihood that falling would result in an injury of a reasonably serious nature. Accordingly, I find that the violation was S&S.

Unwarrantable Failure

The inspector also designated citation No. 85554051 as an unwarrantable failure, as set forth in section 104(d)(1) of the Mine Act, 30 U.S.C. §814(d)(1). Unwarrantable failure means “aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act.” *Emery Mining Corporation v. Secretary of Labor*, 9 FMSHRC 1997, 1997 (Dec. 1987). An unwarrantable failure is characterized by language such as: “reckless disregard” “intentional misconduct” “indifference” or a “serious lack of reasonable care.” *Id.* at 2003-04; *Secretary of labor v. Rochester & Pittsburgh Coal Corp.*, 13 FMSHRC 189, 193-94 (Feb. 1991).

In *Mullins & Sons Coal Co.*, the Commission set forth factors to be considered in an unwarrantable failure (“UWF”) analysis: “the extensiveness of the violation, the length of time that the violative condition has existed, the operator's efforts to eliminate the violative condition, and whether an operator has been placed on notice that greater efforts are necessary for compliance.” *Secretary of Labor v. Consolidation Coal Co.*, 18 FMSHRC 1541, 1548 (Sept. 1996), *citing Secretary of Labor v. Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994).

The violative condition was eliminated even before receipt of the citation. When Inspector King noticed the two miners on top of the connex, he approached them immediately and told them to return to the ground. (Tr. 26). The miners complied and Inspector King subsequently wrote the citation and recorded the violation as terminated. *See* P. Ex. 2.

The violation existed for a short period of time. The work of tying down the tent needed to be done only once. (*See* Tr. 73-74). The miners spent less than one hour on top of the connex. (Tr. 104). This violation did not threaten the safety of the miners continuously over a long period of time; it did not even last as long as the MSHA inspection.

Respondent had no prior notice that greater efforts were necessary for compliance, such as warnings from MSHA personnel or even conversations with inspectors about working on the connex. Respondent was not previously cited for this type of violation, even though they had used the tent structure before. (*See* Tr. 118). John Boltz testified that he was convinced he was safe without fall protection at the time of the violation. (Tr. 93-94); (*see also* Tr. 90-91). Without a citation or other communication from MSHA about the safety standard, there is insufficient evidence that Respondent was on notice that compliance required greater efforts on their part.

Although the extent of this violation endangered the lives of two miners, Respondent had no advance notice of the problem. Furthermore, the violation was terminated immediately and only lasted a short period of time. This violation does not constitute any intentional, indifferent or reckless behavior, or even a serious lack of reasonable care. Therefore, the Secretary has not carried the burden of proof by a preponderance of the evidence that the violation constituted UWF on the part of Respondent Small Mine Development.

Notwithstanding that UWF is not established, I find that the degree of negligence was correctly designated as “High”. As a supervisor, Boltz should have known of the requirement of fall protection for persons working at unprotected heights, such as the top of the connex with no

hand or guard rails installed, and no secure ladder access. Considering supervisory responsibility to protect workers, mitigating circumstances are not shown.

Lastly, It is again noted that the violation was abated immediately and in good faith.

Penalty

Pursuant to section 110(i) of the Act, “[t]he Commission shall have authority to assess all civil penalties provided in this Act.” §30 U.S.C. 820(i). The following six statutory criteria are to be considered:

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

Id. I have considered each of the statutory criteria in assessing the penalties.

Citation No. 85554051 is found to be S&S, non-UWF, and with high negligence. This results in a penalty reduction from \$52,500.00 to \$9,882.00.

ORDER

For the reasons set forth above, Citation No. 85554051 is **MODIFIED** to delete the unwarrantable failure designation. Small Mine Development is hereby **ORDERED TO PAY** the sum of **\$9,882.00** within 30 days of the date of this decision.¹ Upon receipt of payment, this case is **DISMISSED**.

/s/ Kenneth R. Andrews
Kenneth R. Andrews
Administrative Law Judge

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¹ 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

A. Common Facts and Law

In addition to the penalty criteria and jurisdictional matters, there are a number of facts that are common to the citations and orders discussed below. The parties have agreed that each of them is “free to argue that evidence admitted in the context of a particular Citation or Order is relevant to the court’s determination of other Citations and Orders. Further, if the Court accepts the party’s argument, the Court may consider that evidence in reaching her decision concerning those other Citations and Orders.” Jt. Ex. 1, Stip. 11. I have used the evidence in total in reviewing the various violations.

At the time the subject citations and orders were issued the mine had been on the (d)(2) series for quite some time. Each inspector who testified indicated that this mine has had a number of serious, ongoing problems. The primary ongoing problem has been accumulations, including coal, float coal dust, and oil. The mine has also had chronic issues with keeping the accumulations out of the belt areas, and keeping the ventilation in place to prevent exposure to dust. This mine has a greater than normal number of permissibility violations. All inspectors credibly testified that the mine was on notice, both from past violations and meetings with management, that it should be paying attention to the violations related to accumulations, ventilation plans, roof control plans, and dust exposure.

The mine is on a 103(I) five day spot inspection due to the large quantities of methane liberated. The mine argues that the methane is primarily emitted at the sealed areas. Nevertheless, the mine is considered a gassy mine. During the time frame that many of these citations and orders were issued, from March 30, 2009 until June 29, 2009, the mine received 271 citations and 11 orders. Sec’y Ex. 60. The mine history shows that, in the less than one year period prior to when the subject violations were issued, the mine received 102 citations and orders for accumulations violations, Sec’y Ex. 63, and 47 violations for permissibility violations, Sec’y Ex. 64. Further, a number of the subject violations were issued in February 2009. The history also shows 234 violations of accumulation standards in the prior two year period. Sec’y Ex. 69. Finally, the history shows that, from March 2007 to March 2009, there were a large number of permissibility, accumulations, ventilation and roof violations, all or which are very serious matters. Sec’y Ex.71. During testimony, each of the inspectors who issued the subject violations found that the violations were obvious and were something that should have been discovered prior to the inspection on either a preshift examination, an onshift examination, or during the regular course of mining.

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

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

Mathies Coal Co., 6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); *see also*, *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff’g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (Dec. 1987) (approving Mathies criteria).

The difficulty with finding a violation S&S normally comes with the third element of the Mathies formula. In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985), the Commission provided additional guidance:

We have explained further that the third element of the Mathies formula “requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury.” *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1866, 1868 (August 1984); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574-75 (July 1984).

This evaluation is made in consideration of the length of time that the violative condition existed prior to the citation and the time it would have existed if normal mining operations had continued. *Elk Run Coal Co.*, 27 FMSHRC 899, 905 (Dec. 2005); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC at 1574. Further, the question of whether a violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *Youghiogeny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987).

In addition to being designated S&S, many of the citations and orders were designated as an unwarrantable failure or attributable to high negligence. The term “unwarrantable failure” is defined as aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (Dec. 1987). Unwarrantable failure is characterized by such conduct as “reckless disregard,” “intentional misconduct,” “indifference,” or the “serious lack of reasonable care.” *Id.* at 2004-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC at 193-94. Aggravating factors include the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts were necessary for compliance, the operator’s efforts in abating the violative condition, whether the violation was obvious or posed a high degree of danger, and the operator’s knowledge of the existence of the violation. *See Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Windsor Coal Co.*, 21 FMSHRC 997, 1000 (Sept. 1999); *Consolidation Coal Co.*, 23 FMSHRC 588, 593 (June 2001). All of the relevant facts and circumstances of each case must be examined to determine if an actor’s conduct is aggravated, or whether mitigating circumstances exist. *Consol*, 22 FMSHRC at 353.

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

B. Docket No. LAKE 2009-470

This docket contains three violations, all of which remain at issue, with a total proposed penalty of \$190,787.00.

1. *Order No. 8414994*

On February 26, 2009, Inspector Danny Franklin issued Order No.8414994 to Black Beauty for a violation of section 75.400 of the Secretary's regulations. The citation alleges that:

Combustible material is allowed to accumulate around the 1 West "B" tail roller. The accumulations are in the form of loose and fine coal measuring approximately 2 by 5 feet by 19 inches width. The tail roller was touching and running in coal 17 inches wide by 2 feet tall and 4 feet in length. When inspected there was a distinctive odor indicating there was material getting hot. With past history, the operator has engaged in aggravated conduct constituting more than ordinary negligence by continuing to violate this standard. This violation is an unwarrantable failure to comply with a mandatory standard.

The inspector found that a fatal injury was highly likely to occur, that the violation was significant and substantial, that six persons would be affected, and that the violation was the result of the operator's high negligence and unwarrantable failure to comply with the mandatory standard. The Secretary has proposed a civil penalty in the amount of \$70,000.00.

a. The Violation

Inspector Danny Franklin started in coal mining in 1973 and has worked for MSHA for the past four years. While conducting an inspection of the Air Quality mine on February 26, 2009, he issued a citation for a violation of section 75.400 which prohibits the accumulation of combustible material. Franklin was accompanied by Randy Hammond, a representative of the mine. After arriving in the 3 main north area he traveled on foot toward the west 1b belt area. (Tr. 79). After turning the corner to the three main north and walking an additional 60 feet, Franklin noticed the distinct odor of burning coal. He questioned a belt examiner about the odor and was told that the belt examiner had noticed and investigated the odor about 30 minutes prior to Franklin's arrival, but found nothing of concern. (Tr. 81-82). Franklin followed the smell and immediately found the problem at the tail roller. He observed the roller turning in the coal which had compacted in the guard around the roller. (Tr. 85).

The accumulation around the tail roller was approximately 2 feet deep and covered an area 5 feet in length by 19 inches wide. (Tr. 86). This is an active working area where there was combustible material in the form of coal and an ignition source created by the friction of the turning belt and roller. The coal had compacted near the guard and was spilling off the belt onto the bottom and along the sides of the belt for about 5 feet in length. The accumulation was 2 feet in depth and packed alongside the belt. Franklin observed that no one was posted at the tail, but several people were working about 100 feet in by the area, and mining was taking place in 3 locations near the cited area. Franklin described the material as coal that was black in color. He described the smell as obviously that of coal, however, no smoke was present and the CO monitor did not sound its alarm.

Randy Hammond a production foreman at the mine, accompanied Franklin on his inspection. Hammond is currently in the safety department and has been working as a compliance supervisor for about one year. He has 26 years experience in mining and holds a BS degree in mining engineering. (Tr. 148-149). Hammond testified that he observed the tail piece of the west 1 belt and he could smell hot rubber. When Franklin walked on the off-side of the belt, Hammond observed coal spilling out of the transfer point where skirt rubber had come loose. Hammond remembered that the area was wet, the belt was fire resistant and, while friction would have created a smell, it would not have been the smell of burning coal. Hammond believed that the smell was burning rubber and there was no smoke or flame present. (Tr. 159-161).

James Villain, an employee at the mine, was a belt shoveler at the time the order was issued. He has worked in the mining industry for approximately 17 years. (Tr. 171). Villain testified that, on February 26, 2009, he was working the day shift, during which he cleaned the tail of the B belt around 9:15 a.m. Villain does not recall much spillage and believes that the belt skirt

was in place. The area was wet because he had hosed off the spillage. At some point while he was traveling to the head of the one west B belts, the belts went down. Villain promptly turned around and went back to the tail area where he met Franklin and Hammond. There he observed the spillage and the damaged skirt rubber. He explained that two bolts had passed through the rubber, caused it to wear out, and had pulled the rubber back. (Tr. 173-175). According to Villain, the spill had not been in place for very long because he had just cleared the area about ten minutes before Franklin arrived.

There is no factual dispute that there was an accumulation of coal packed in the guard and the rollers were turning in it. The parties agree that some coal had spilled on the ground but disagree as to the amount. The testimony of the mine witnesses is that there was some spillage, but it was permissible spillage as opposed to an accumulation of coal. I need not address the issue of spillage on the ground since it is undisputed that there were accumulations packed in the guard on the conveyor and the rollers were turning in that accumulation. For the above reasons, I find that a violation of the cited standard did exist.

b. **Significant and Substantial Violation**

I have found that, as alleged by the Secretary, there is a violation of the mandatory safety standard. Second, I find that a discrete safety hazard existed as a result of the violation, the danger of fire and explosion given that presence of combustible material and an ignition source. The fact that there are safety measures in place along the belt does not take away from the fact that an incident is likely to occur in a gassy mine with many accumulation violations and a history of ignitions. Third, the hazards associated with this condition such as being trapped or required to fight a fire, exposure to smoke from a belt fire, and the hazards associated with an explosion, will result in an injury. Fourth, that injury will be serious or even fatal.

Franklin explained that a fire hazard definitely existed due to the combustible material surrounding the roller, which was turning and creating friction, thereby providing an ignition source and a fuel source. (Tr. 87). The coal was dark and dry. (Tr. 92). No cleaning was going on at the time that would have prevented the accumulation from continuing to exist. Franklin explained that a fire grows rapidly under the conditions he observed. (Tr.98). In addition, he opined that there is little room for error in this area because there is only one air course and, in the event of a fire, there would be no alternative for a smoke free escape. (Tr. 101).

There were three miners working in the immediate area and Franklin observed three additional miners working nearby. At least two of the individuals in the area were trainees that were accompanying the belt mechanic. I find that at least six miners were immediately exposed, that it reasonably likely that an injury will occur as a result of the accumulation turning in the rollers and, further, that the injury will be fatal. Franklin testified that he was concerned about smoke inhalation and burns that would be suffered while trying to put out a fire. According to Franklin, the end result would be smoke inhalation and burns that would be fatal.

The S&S evaluation is made in consideration of the length of time that the violative condition existed prior to the citation and the time it would have existed if normal mining operations had continued. *Elk Run Coal Co.*, 27 FMSHRC 899, 905 (Dec. 2005); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC at 1574. While Villain testified that the accumulation was probably only present for ten minutes, his testimony conflicts with Franklin's, who was told by a miner in the area that he investigated the burning odor 30 minutes prior to the arrival of Franklin. The condition was serious and the rubber and coal were already beginning to put off the "burning" odor. If left unabated, a fire was certain to start. . In addition, Franklin observed that the miners in the area were not paying attention and either had not looked, or had dismissed as irrelevant, the source of the burning smell. Based on such, Franklin concluded that a fire would start and flare out of control before the miners even noticed. I credit the testimony of Franklin and find that the

condition had existed for some time. If this condition had been allowed to persist, it is reasonably likely that it would have led to a fire or explosion. See *Black Diamond Coal Mining Co.*, 7 FMSHRC 1117, 1121 (Aug. 1985). The particular facts surrounding this violation lead to a finding of significant and substantial.

The mine argues that the violation is not significant and substantial because the condition existed for only a short time and the fire suppression system that was in place would control any fire that might start. Again, I credit the inspector's testimony regarding the length of time the condition existed. Further, I reject the argument that the fire suppression system would negate the finding of S&S.

The mine operator argues that all of the other protections required by the Mine Act and its regulations detract from the possibility of an injury producing event. The Courts and the Commission have found to the contrary. The Commission, relying on *Buck Creek Coal, Inc.*, 52 F.3d 133, 136 (7th cir. 1995), has rejected arguments that after-the-fact safety systems, such as carbon monoxide detectors, fire suppression systems, and fire retardant belts, reduce the likelihood of serious injury. In *Buck Creek* the mine operator argued that carbon monoxide detectors, a fire-retardant belt, a fire suppression system, a fire brigade team, a rescue team, fire fighting equipment and ventilation all undermined the likelihood of a serious injury that would result from a coal accumulation violation. The Seventh Circuit, in upholding the decision of the ALJ regarding the serious nature of the accumulations, determined that the existence of other safety measures to deal with a fire does not mean fires are not a serious safety hazard since the precautions are in place because of the "significant dangers associated with coal mine fires." *Id.*

I conclude that the preponderance of the evidence establishes that coal accumulations were reasonably likely to result in injury causing events, and that the injuries would be serious or fatal. I rely primarily on the testimony of Inspector Franklin in reaching this conclusion. I find that the Secretary has satisfied the four Mathies criteria and established the violation as S&S.

c. Unwarrantable Failure

The burning odor that Franklin and Hammond described was distinctive and should have given the miners good reason to search for the cause. However, when the miners did not discover the source of the odor, they simply returned to their duties. Those miners confirmed that the burning odor had been in the air for a minimum of 30 minutes prior to the inspector's arrival. Franklin testified that the miners were desensitized to the smell and a fire would get started before they even noticed. Franklin believes that the work force is a reflection of the management, particularly the attitude toward safety, and it was obvious to him that this smell was ignored. (Tr. 102).

Hammond explained that the skirt rubber looked as if it had been torn, thereby creating a chute to send coal down from the belt to the ground. According to Hammond, a tear can happen "in an instant" and result in spillage, but not necessarily a lot of spillage. In his opinion, the spill had been ongoing for only a short time, perhaps a minute or less, based upon the quantity he observed spilling and the amount on the ground. Hammond testified that the material on the ground was wet, had been sprayed at the transfer point, and was newly on the ground. Franklin agrees that this kind of spill can occur at any moment but explained that he based his unwarrantable designation primarily on the lack of concern about the coal turning in the rollers resulting in a burning odor and this mine's history of accumulations. While the parties agree that the spill could have occurred quickly, the operator did not explain why the odor of burning coal had been evident for more than 30 minutes prior to the arrival of Hammond and Franklin. It is fair to assume that coal had been turning in the rollers for some time in order for the burning odor to permeate the air. While the spill on the ground may have been recent, it is clear that the coal turning in the belt was not. The coal on the belt should have been seen and noted by Villain. Villain did not recall any spill, at least on the ground, and he testified that the ground was wet

because he had sprayed off the spillage. Hammond agrees that the spillage was wet because the coal had traveled through the water sprays. Neither witness explained the coal turning in the rollers emitting the burning odor and, therefore, I find that Franklin presented a scenario that was the most likely and well grounded in fact. While he cannot be certain how long the condition existed, it is fair to say that it existed far longer than it should have. (Tr. 90).

This mine has had a number of prior violations for accumulations, along with prior warnings for excessive accumulations on the belt line. Franklin cited 3 other nearby accumulations on the same day. (Tr. 89). The mine has not taken effective measures to correct the continued accumulation violations and, according to Franklin, it is possible that it has made no effort to correct these persistent conditions. (Tr. 102). Many accumulation violations have been issued at the mine since 2007 and, in Franklin's view, the mine was not doing enough. It is clear to me that the mine has failed to train its miners to call or seek help when they cannot discover the source of a burning smell. The actions of the miners lead Franklin to assume that little had been done to address accumulations on the belt at this mine. Moreover, the mine did not refute the allegations made by Franklin. In light of the foregoing, I agree with Franklin that the negligence was high, that the operator demonstrated indifference or lack of reasonable care and that the violation was the result of the operator's unwarrantable failure to comply with the mandatory standard. I assess the proposed \$70,000 penalty.

2. *Order No. 8415253*

On February 27, 2009, the day following the numerous accumulations cited by Franklin, Inspector Glenn Fishback issued Order No. 8415253 to Black Beauty for a violation of section 75.400 of the Secretary's regulations. The citation alleges that:

Obvious an[d] extensive accumulations of combustible material in the form of loose coal, coal fines and float coal dust (Dry and black in color) have been allowed to accumulate on the 4 West A energized conveyor belt Drive and Take-up located at crosscut number 2 to crosscut 3 on the return side of the 4 West roadway. The combustible material measured approximately 38 feet in length by 20 foot in width and 8 inches to 2 ½ feet in depth directly behind the take-up. From the take-up to the drive rollers the accumulations measured approximately 2 inches to 16 inches in depth by 3 feet in width and 39 feet in length of loose coal, coal fines and float coal dust. These accumulations were observed on all of the frame work and structure of the drive and take-up[.] [T]he belt was observed smoking and running in accumulations of float coal dust measuring approximately 5 inches in depth and 12 inches in width and also rubbing the drive frame at this same location. The belt was also observed rubbing the frame work in the take-up and the hanger which holds the cross under up, float coal dust was present on all of the water lines and electrical cables and starter boxes from crosscut #1 to #3. With past history, the operator has shown more than ordinary negligence by allowing the belt to run under this known condition until the arrival of MSHA to the area. This violation is an unwarrantable failure to comply with a mandatory standard.

The inspector found that a permanently disabling injury was highly likely to occur, that the violation was significant and substantial, that ten persons would be affected, and that the violation was the result of the operator's high negligence and unwarrantable failure to comply with the mandatory standard. The Secretary has proposed a civil penalty in the amount of \$70,000.00.

a. **The Violation**

Inspector Glenn Fishback has been with MSHA for three years and has 20 years of mining experience. He worked at the Air Quality mine for a time during his career. On February 27, 2009, while inspecting the conveyor, Fishback found an accumulation of combustible material and issued an order for a violation of 30 C.F.R. § 75.400 which prohibits the accumulation of combustible material.

Prior to going underground Fishback reviewed the mine books and noticed a problem in the 4 west A area. (Tr. 427). When he arrived in the subject area, he observed accumulations of coal on the running, energized belt. He observed accumulations of loose coal, coal dust, and fines that were black, dry, dusty, and existed for a distance of 38 feet long, and 20 feet wide. There were various lengths and depths of accumulations along the belt, with one accumulation being 38 feet long and 2 feet in depth as measured by tape. (Tr. 429). Fishback observed the accumulations running in the belt, and could smell burning and see smoke on the belt at the tandem rollers. (Tr. 432). He found the belt out of alignment and rubbing in the framework. He asked the operator to shut it down immediately. The belt, which was rubbing the framework in the tandem rollers and in the take up, had cut $\frac{3}{4}$ of an inch into the metal framework. (Tr. 430-431). In addition to running on the frame, the belt was rubbing in the accumulated material.

Fishback could not understand why it took an hour for the mine to lock out the belt after he shut it down and issued the citation. (Tr. 438). He testified that, when asked, the shift foreman refused to remove a guard so that Fishback could measure under the belt, until management arrived and told Fishback that “this is the one he’s been waiting for.” (Tr. 439). Fishback was unclear as to the meaning of the foreman’s statement. Once the belt was locked out, Fishback took his measurements and completed the citation.

The mine argues that there was not a violation as described by Fishback, that there were not dangerous accumulations and the area was well rock dusted. In support of the proposition, the mine called Kim Orr, an hourly employee who accompanied Fishback on his inspection. Orr saw the belt rubbing on the frame but she did not recall it cutting into the structure and she did not remember any smoke. She agreed that some accumulations of pressings, rock dust, and some float dust were seen between the drive and the take-up. (Tr. 516-517). She explained that it was not a hazard “right there.” (Tr. 518). Orr agreed that there was a little float dust, but disagreed with Fishback that it was all float dust. Instead, she testified that what she observed was rock dust. She couldn’t estimate how much rock dust, but she thinks it was “quite a bit.” (Tr. 519).

Jamie Haantz, the operation superintendent at the mine, oversees the entire plant and mine and has done so since July 2010. At the time this order was issued he was the underground superintendent, in charge of the entire underground mine. (Tr. 531-532). Haantz holds a number of certifications, including a BA in mining engineering and several MAs, including safety management and engineering. (Tr. 533) On February 27, 2009, he learned from Randy Hammond that the 4 west belt had been shut down due to accumulations. He testified that he “[w]ent ahead and got ahold of everybody[,] we treat the D order like an accident. We start bringing the mine managers, the assistant mine manager, we all-we all go to that location.” (Tr. 534).¹ When he arrived, the belt was down. Haantz did not see the belt rubbing, but saw rock dust and some float dust on the water line. He touched the dust and saw that it was white and had moisture in it. At the sump he saw some coal pressings, but no accumulation. (Tr. 537-538). He did not observe the extent of accumulations that Fishback described in other areas (i.e., around the take-up and drive roller areas) and, as far as he could see, everything was rock dusted.

Randy Hammond traveled with Haantz and took photographs. BB Ex. R-S. Haantz testified as to the locations in photographs A through X. *Id.* He identified the sump area, power boxes coming into crosscut 2, the drive at crosscut 2, drive and take-up area, waterlines, a rib, waters supply, south side of the take-up unit, and guard on the drive. He testified that there was very little float dust or other accumulations in any of the pictures and, rather, there was rock dust in virtually every picture. Setting aside for a moment the fact that the photos were taken without the knowledge of Fishback or MSHA, they remain unreliable because they contained no date to identify when they were taken. Further, no other reliable evidence was offered to support that the

¹ I note that during the hearing of these cases there were many unwarrantable violations but this is the only instance where the mine alleged or presented evidence that a (d) order is treated like an accident.

photos did indeed depict the areas and conditions cited by Fishback. Instead Hammond testified that he took the photos and that they represented the conditions he observed. However, Fishback testified that he observed no one taking photos and, further, he was unable to testify that the photos represented what he observed during the investigation. In addition, the photos do not square with the testimony of Orr, the miner who accompanied the inspector. I do not credit Hammond's testimony and, without any further evidence, I give very little weight to the photographs.

While the testimony concerning the accumulations is disputed, i.e. there are three different descriptions of the area, I credit the description provided by Fishback and I find that the Secretary has shown that accumulations, which were black and dry, were present on the belt and the surrounding areas. In light of the foregoing, I find a violation.

b. Significant and Substantial Violation

I have found that there is a violation of the mandatory safety standard. Second, I find that a discrete safety hazard existed as a result of the violations, the danger of a belt fire caused by the belt rubbing on the frame and igniting the accumulations of coal and float coal dust. Third, there is a high likelihood of an accident occurring in this gassy mine that has many accumulation violations, and a belt rubbing on a metal frame. A fire on the belt caused by the friction of the belt in the coal accumulation will result in an injury. Fourth, any injury sustained will be serious or even fatal.

Fishback based his conclusions on his experience. He credibly testified that the belt was creating friction and providing an ignition source as it turned in coal and against the side of the metal framework. In his view, the hazard presented by the accumulation at the belt drive was the creation of a mine fire and, when combined with the float coal dust and the gassy nature of the mine, the possibility of an explosion. (Tr. 430). Fishback could smell burning rubber and noticed that the belt had folded over on its edge and was rubbing in the tandem. (Tr. 433-436). He explained that fire and smoke would travel quickly to the face where the men were working. According to Fishback, a minimum of ten persons would be exposed. (Tr. 435). Fishback opined that any injury would be permanently disabling or even fatal, given that a fire will result in burns and smoke inhalation. (Tr. 437). If an explosion were to occur, the result would be worse. Given the presence of an ignition source, along with the size of the accumulation he observed, a mine fire was reasonably likely to occur given the cited conditions. (Tr. 430-431).

The operator's argument regarding the S&S designation is primarily factual. Orr testified that she did not believe that the accumulation was as extensive as Fishback described. She did, however, concede the existence of accumulations and the fact that the belt was rubbing on the frame. Haantz also testified that he believed that the accumulations were not as extensive as Fishback described and that they consisted primarily of rock dust and not coal dust as asserted by Fishback. Fishback described the accumulations as black in color and agreed that there was some rock dust under the float dust he cited. Haantz indicated that the accumulations in certain areas were white or gray with rock dust, but not black. I credit the observations of Fishback in this regard. If this condition had been allowed to persist, as it obviously had up to this time, it is reasonably likely that it would have led to a fire or explosion. *See Black Diamond Coal Mining Co.*, 7 FMSHRC 1117, 1121 (Aug. 1985).

The Commission has addressed the issue of accumulations and conveyor belts a number of times. In *Amax Coal Co.*, 19 FMSHRC 846 (May 1997), the Commission upheld an ALJ's finding that a belt running on packed coal was a potential ignition source for extensive accumulations of loose, dry coal and float coal dust along a belt line, and that the condition presented a reasonable likelihood of an injury causing event. In addition, in *Mid-Continent Resources, Inc.*, 16 FMSHRC 1218, 1222 (June 1994), the Commission held that accumulation violations may properly be designated as S&S where frictional contact between belt rollers and

the accumulations, or between the belt and frame, results in a potential ignition source for the accumulations. The Commission in *Mid-Continent* found that it was immaterial that there was no identifiable hot spot in the accumulations because continued normal mining operations must be taken into account when evaluating the circumstances. In the present case, if the violative condition had been allowed to persist, it would have reasonably led to smoke, fire and, potentially, an explosion. In fact, Fishback testified that he could smell smoke as he entered the area.

The Respondent argues that all of the other protections required by the Mine Act and its regulations, which it alleges were properly in place at the time of the order, reduced the possibility of an injury producing event, thereby rendering the violation non-S&S. Specifically, the Respondent points out that the CO detector did not activate and that the belt is made of fire resistant material. (Tr. 469-471). The Courts and the Commission have addressed the issue of other required safety standards that come into play in discussing whether a violation is S&S. In *Buck Creek Coal*, 52 F.3d 133, 136 (7th cir. 1995), the mine operator argued that carbon monoxide detectors, a fire-retardant belt, a fire suppression system, a fire brigade team, a rescue team, fire fighting equipment and ventilation all undermined the likelihood of a serious injury that would result from a coal accumulation violation. The Seventh Circuit, in upholding the decision of the ALJ regarding the serious nature of the accumulations, determined that the fact that there were other safety measures to deal with a fire does not mean that fires are not a serious safety hazard and, rather, the precautions are in place because of the “significant dangers associated with coal mine fires.” While extra precautions may help to reduce some risks, they do not render accumulations violations non-S&S.

I conclude that the preponderance of the evidence establishes that it was reasonably likely that the coal accumulations, combined with the other conditions cited, would result in injury causing events, and that the injuries would be serious or fatal. I rely primarily on the testimony of Inspector Fishback in reaching this conclusion. I find that the Secretary has satisfied the four Mathies criteria and established the violation as S&S.

c. **Unwarrantable Failure**

This order for accumulations on the belt was issued only one day after the order discussed above that was issued by Inspector Franklin for accumulations on the belt. Fishback testified that the accumulations were “obvious and extensive. I don’t know how the examiner didn’t trip over some of it.” (Tr. 443). Fishback could smell the rubber burning when he arrived. While there is some dispute as to how long the accumulation had existed, it was in place at least for the hours between 9:00 a.m., when the onshift examination was conducted, and 5:00 p.m., the time of the citation. Fishback believes that, given the extent of the accumulations, it had to exist for a longer period of time. However, the examiner testified that he did not see this extensive accumulation when he conducted his examination at 9:00 a.m. Therefore, it is unlikely that the extensive accumulation existed for more than the eight hours.

In addition to the obvious and extensive nature of the accumulation, Fishback relied on the mine history of accumulations in determining that the violation was unwarrantable. He has issued previous orders for accumulations, including some specifically for accumulations on the belt. He has spoken to the safety director, mine manager and section foreman, as well as others at the mine, about the accumulation problems at this mine. (Tr. 449-450). He talked about the number of accumulations and the lack of improvement with the accumulation issue. After being questioned on cross examination, Fishback candidly said that he has been trying to avoid a major catastrophe at this mine, given the continued problem of accumulations.

The Respondent denies that it has a problem with accumulations and believes that it was not put on notice of the need to improve. However, this mine has demonstrated a serious lack of reasonable care. The mine’s primary argument is that the accumulations were not as extensive and serious as Fishback described. I have already credited the testimony of Fishback in that

regard and, therefore, I agree with Fishback that the negligence was high and the result of the operator's unwarrantable failure to comply with the mandatory standard. I assess a \$70,000 penalty.

3. *Order No. 8415254*

On April 27, 2009, Inspector Glenn Fishback issued Order No. 8415254 to Black Beauty for a violation of Section 75.360(b) of the Secretary's regulations. The citation alleges that:

An inadequate onshift examination was conducted for the 7:30 AM to 3:30 PM examination on 2/27/2009 for the second shift production. Order number 8415253 was issued under this 104(d)(2) Order. Obvious and extensive accumulations of combustible material in the form of loose coal, coal fines and float coal dust (Dry and black in color) was observed by MSHA with the conveyor belt running in this material on this date. The examination record for the 7:30 AM to 3:30 PM examination of this affected area showed no hazards listed. This violation is an unwarrantable failure to comply with a mandatory standard. Management will have a meeting with all mine examiners to terminate this 104(d)(2) Order.

The inspector found that a permanently disabling injury was highly likely to occur, that the violation was significant and substantial, that ten persons would be affected, and that the violation was the result of the operator's high negligence and unwarrantable failure to comply with the mandatory standard. The Secretary has proposed a civil penalty in the amount of \$50,787.00. The citation was amended at hearing to reflect a violation of section 75.362(b).

a. **The Violation**

As a result of the accumulation violation discussed above, Inspector Glen Fishback issued this citation for failure to note the accumulation violation during the onshift examination of the belt. The cited standard, as modified to at hearing, requires that "[d]uring each shift that coal is produced, a certified person shall examine for hazardous conditions along each belt conveyor haulage way where a belt conveyor is operated." 30 C.F.R. § 75.362(b).

Fishback testified that he looked at the examination books both before he went underground and after the citation was issued and could find no indication that the accumulation he cited on the belt was noted by the mine examiner. He determined that nothing was listed about either the belt or the accumulation. (Tr. 455-456). He testified that there was no entry in pre-shift exam book on February 27, 2009 about the 4 west A belt. BB Ex. R-V; (Tr. 442). In Fishback's view, the accumulations were obvious and extensive and he couldn't see how the examiner would have been able to avoid tripping over them. Fishback further testified that the violation was S&S because the accumulation of coal and float dust would lead to a fire and explosion. In addition, he marked the negligence as high for the same reasons he described in the accumulation violation.

Buskirk, the mine employee who conducted the inspection of the belts on the day of the alleged violations, testified that, had he seen the amount of accumulation described by Fishback, he would have noted it in the report and shut down the belt. On the day of the alleged violation, Buskirk noted several conditions in his report, including that rock dust was needed in the belt area of 4-5. The report says that the rock dusting was done. BB Ex. R-V; (Tr. 495). His report also indicates that, at crosscut seven through nine, Buskirk observed that the drive and takeup needed to be cleaned and dusted. (Tr. 495). He saw no combustible material so he did not record it as a hazard, but he did record it as a condition. (Tr. 496). He listed other hazards that day that were corrected. (Tr. 497). He has reviewed the citations issued by Fishback and is certain that the cited condition was not present when he made his onshift examination at 8:45 a.m. (Tr. 493, 498). Buskirk explained that, had he seen such a condition, he would have listed it as a hazard and shut the belt down.

Contrary to Fishback's belief, on Feb 27, 2009, Buskirk was not conducting an onshift exam of the belts at 1:51 p.m. and, instead, was conducting a preshift of the power center and drive boxes at that time. There is a drive on the belt near where Fishback cited the condition, but it is between the roadway and the belt. Further there is a date board near the drive where he would have initialed. He conducted his onshift of the belt on his way into the mine at around 9:00 a.m. and would have examined the box on his return at approximately 2:00 p.m. At the time he was examining the electrical installation he would not have gone along the four west A belt or to the drive. (Tr. 501). Given that Buskirk was only in the cited area during his onshift exam at 9:00 a.m. and not at 2:00 p.m. as believed by Fishback, there was ample time between the examination and the issuance of the citation, i.e., nearly eight hours, for coal and float dust to accumulate to the degree cited by Fishback. Without further evidence, the Secretary has not met her burden of demonstrating that the onshift examination was inadequate. Therefore, the citation is vacated.

C. Docket No. LAKE 2009-471

This docket contains twenty-two violations with a total proposed penalty of \$172,506.00. The parties have agreed to settle all but the three violations addressed below. The terms of the settlement are addressed near the end of the decision.

1. *Citation No. 6681954*

On February 17, 2009, Inspector Marsha Price issued citation number 6681954 for a violation of section 75.220(a)(1). The citation alleges the following:

The operators approved roof control plan was not being complied with on the number 2, (MMU 002-0, 1 Left 2 Right / 4 Main North active working section. The number 5 entry right that creates an intersection with number 5 entry right is not permanently bolted with the at least two rows of bolts or one row of temporary support before work or travel is permitted in the intersection. The number 45, Joy CM 14 miner is cutting in the number 5 entry right. Work was stopped and the area was secured until the number 5 entry could be bolted.

The inspector found that a fatal injury was reasonably likely to occur, that the violation was significant and substantial, that one person would be affected, and that the violation was the result of moderate negligence.

The cited standard requires that "[e]ach mine operator shall develop and follow a roof control plan, approved by the District Manager, that is suitable to the prevailing geological conditions, and the mining system to be used at the mine. Additional measures shall be taken to protect persons if unusual hazards are encountered." 30 C.F.R. § 75.220(a)(1). The Black Beauty plan requires that two rows of roof bolts must be placed for the first cut that creates an intersection. The Secretary has proposed a civil penalty in the amount of \$5,080.00.

a. **The Violation**

Marsha Price, has been an inspector with MSHA for 2 years and has 17 years mining experience. She is a health specialist but also an authorized representative of the Secretary. (Tr. 329-330). On February 17, 2009, Price conducted an inspection at the mine and was accompanied by Dave Winger. (Tr. 331). She observed the alleged violation of the roof control plan after checking the miner to see that all ventilation controls were in place. As she walked to the other side of the miner to watch the cutting process, she noticed that, while the plan calls for two rows of support, there was only one. (Tr. 333). Price said that she did not notice whether there were two rows of bolts when the 5 entry began, but she did notice it on the right side as the cut on the right concluded. According to Price, the mine's roof control plan requires that first cuts that

create an intersection must have either temporary support or two rows of bolts installed. Sec'y Ex. 34 p. 7 item 6; (Tr. 334). The entry that had just been cut was 18 to 20 feet wide and the one row of bolts in place did not qualify as temporary support. (Tr. 336). Price testified that she observed cracks in the roof and ribs that created a hazard. In the event of a roof fall, a fatal crushing injury would be sustained. Miners, including foremen and supervisors, often travel in the area to move equipment and examine the area. According to Price, it was a busy area. (Tr. 337). Price testified that the first cut off of the five straight entry, to the right, created an intersection in that area. At the time she initially observed the area they had not made the turn to the right. (Tr. 364). Price explained that the entry was bolted but, as the cut went further and the intersection was created, there was only one row of bolts installed instead of the required two rows. (Tr. 366).

John Rennie offered testimony, albeit somewhat confusing, that he did not agree with Price that there was a violation. Aside from creating a drawing of what he believed were the two row of bolts at issue, Rennie did not explain the reason for his opinion that there was no violation. (Tr. 376). However, Chad Barras, the Midwest safety director for Peabody, did attempt to explain his view of the roof control plan and why it was not applicable in this instance. Barras is responsible for 12 mines, including Air Quality. He has a BA in mining engineering and has worked in various mines and held various responsibilities over the course of his career. He has negotiated roof control plans at other mines and has worked on roof plans at Air Quality. (Tr. 408-412). Barras does not believe that the cited condition is a violation of the plan. He testified that Item 6 of the roof control plan, cited by Price, requires that the first cut creating the intersection must be permanently bolted. According to Barras, the cut that created the intersection was the cut from the 4 to 5 entry. He opined that the area cited by Price was not the first cut that created an intersection and, hence, there was no violation.

The requirement for each underground coal mine to develop a roof control plan is a fundamental directive of the Mine Act and its predecessor, the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976). *See* 30 U.S.C. § 862(a) (setting forth general requirements for plans "to protect persons from falls of the roof or ribs."). The intent of the provision was "to afford comprehensive protection against roof collapse - the 'leading cause of injuries and death in underground coal mines.'" *UMWA v. Dole*, 870 F.2d 662, 669 (D.C. Cir. 1989) (citations to legislative history omitted). The Commission has acknowledged the high degree of danger posed by roof control plan violations. *See Cyprus Plateau Mining Corp.*, 16 FMSHRC 1610, 1616 (Aug. 1994).

In this instance both parties seemingly did their utmost to make the issue confusing and incomprehensible. I do not find Barras to be a credible witness and I give little weight to Rennie's responses to leading questions. I find Price to be the most credible and straight forward. She agreed with the operator that the #5 entry was bolted when she arrived but she left that entry before mining continued straight and then to the right. It is unclear whether Price believes that the first opening into the intersection was the straight cut or the cut to the right. The Secretary's brief indicates that "5 entry straight" was the subject cut. Sec'y Br. 20. However, after carefully reading the transcript, I cannot understand where Price believes the two rows of bolts should have been placed, nor can I find any indication about MSHA's position as to what "the first cut in openings that create an intersection" means. The Secretary has the burden to prove all elements of the violation. I find that the Secretary has failed to prove every element of the violation and, as a result, the citation must be vacated.

2. *Citation No. 6681953*

On February 17, 2009, Inspector Marsha Price issued citation number 6681953 for an alleged violation of section 75.208. The citation alleges that "no visible warning or physical barrier is installed to impede travel beyond the permanent support in Entry number 5 of the number 2 unit, (MMU 002-0), 1 left 2 right/4 main north inby crosscut 39 of the active miner

unit.” She designated the violation as significant and substantial with moderate negligence and a penalty of \$3,689 has been proposed.

a. The Violation

Marsha Price issued this citation in the same location and at the same time as the roof control citation discussed immediately above. She observed that there were no flags or barriers to keep persons from proceeding under the unsupported top. (Tr. 344). The cited area of the five entry was 18-20 feet wide, 35-40 feet deep, and was referred to as the #5 straight. The area had not been roof bolted after the cuts were taken and, as a result, it was required to be barricaded so that no miner would unknowingly walk under the unsupported roof. Unsupported roof is, by its nature, unstable and a hazard to those walking under or even nearby. (Tr. 346). As Price explained, a barricade is important because a miner “wouldn’t know that it wasn’t supported, because there wasn’t a flag in there and at the same time you’re watching your feet where you’re walking a lot and not paying attention a lot of times whenever you’re helping move equipment, so you wouldn’t be—you wouldn’t notice an unsupported top.” (Tr. 345). As a result of her observation, Price cited a violation of 30 C.F.R. § 75.208 which requires that “[e]xcept during the installation of roof supports, the end of permanent roof support shall be posted with a readily visible warning, or a physical barrier shall be installed to impede travel beyond permanent support.” Miners are trained to look for the barrier to indicate unsupported roof thereby directing their route of travel. No installation of roof support was observed and she saw no barricade or flag to impede travel beyond the last permanent support. (Tr. 344).

The respondent argues that a visible warning device had been in place but had been unknowingly removed. John Rennie is a mine examiner, lead man, and fill-in section foreman who has held a number of positions in the mine. Rennie testified that, when he entered the area, he believes there was a red reflective baton acting as a warning device hanging from the ceiling. In his opinion, the baton was knocked down and got loaded out without the knowledge of those working in the area. The respondent agrees that there was no warning or barrier at the time Price issued the citation, and Price agrees that, given the position of the miner operator, the operator may not have seen that the barrier/warning device was missing. Based on such, Price ascribed moderate negligence to the violation. Given the undisputed testimony that there was no warning or barrier in an area of unsupported roof, I find that a violation occurred as alleged.

b. Significant and Substantial

I have found that there is a violation of the mandatory safety standard. Second, I find that a discrete safety hazard existed as a result of the violations, the danger of a miner walking under unsupported roof. Third, the hazards described, that of walking under unbarricaded or unmarked, unsupported roof, would result in an injury. Finally, the injury would be fatal.

This evaluation is made in consideration of the length of time that the violative condition existed prior to the citation and the time it would have existed if normal mining operations had continued. *Elk Run Coal Co.*, 27 FMSHRC 899, 905 (Dec. 2005); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC at 1574. Price testified that, while the baton was not in view at all times, it was certainly not in place for a period of time. Black Beauty agrees that it was not in place but argues that it had only been missing for a short, but undetermined, length of time. Rennie explained that, from his location he could not always see the area where the flag should have been placed. However, he opined that the baton may have been dragged off the roof and loaded with the coal, thereby explaining its absence. (Tr. 385). Price testified that she did not see the flag on the ground or anywhere in the vicinity. She could not say if it was in place earlier since the miner had just begun the cut when she left the area. I give greater weight to Price’s recollection of the events and find that the baton or flag was not in place at any time. I do not find Rennie’s testimony to be credible given that most of his responses were made primarily to very leading questions. I find

that, had Price not brought the matter to the attention of the mine, it would have remained uncorrected for some time.

Price believes that there was a reasonable likelihood that, given the weight of the unbolted roof, it would fall at any time. Price observed cracks in the roof and ribs. (Tr. 359). Anyone traveling in the area would be struck by falling material and suffer serious, and potentially fatal, crushing injuries. (Tr. 346). The failure to provide a flag created the hazard for miners who would unknowingly walk under unsupported roof and be crushed by falling rock and coal. While the mine examiner, foreman, workers, and persons moving cable, would all have been in the area and exposed to the unsupported roof, it is likely that only one miner at a time would be exposed. Price explained that cars back up to the miner in that intersection and it is a constant working area. (Tr. 357). Given that the roof was newly cut, a roof fall was likely. Such falls are known to cause crushing injuries, including broken bones, severe internal injuries and often fatal injuries. (Tr. 345). A person working in the area or walking through the area would not realize that the roof had not yet been supported without some warning or barricade to alert them and keep them out. (Tr. 345). Based upon the foregoing, all of the circumstances surrounding this violation lead to a finding that it was S&S.

Price testified that she believed the negligence to be moderate at the time she issued the citation because, even though miner operators are trained to look for flags or barricades, this miner operator told her that a flag had been in place in earlier. Since issuing the citation, she found that the mine had been cited for an identical violation five times in the 18 months prior to the time she issued the subject violation. (Tr. 347). I agree with Price that the negligence was moderate. However, this violation is especially serious given that the required act, while routine, can result in deadly consequences when not performed. In light of the foregoing, I assess a penalty of \$10,000.00.

3. *Citation No. 8414992*

On February 25, 2009, Inspector Danny Franklin issued a citation for a guarding violation on a belt. The citation alleges the following:

The guards protecting the miners from the hazards of the two moving take-up rollers and two drive rollers for the 3 West “B” drive are not extended a distance sufficient to protect persons from reaching over or tripping and falling between the belt and the pulleys. An area over the guards measuring approximately 20' by 13' exposing miners to the hazards of these massive rollers.”

The inspector found that a fatal injury was reasonably likely to occur, that the violation was significant and substantial, that one person would be affected, and that the violation was the result of moderate negligence. A penalty of \$3,689 has been proposed.

a. **The Violation**

Franklin cited the Respondent for an alleged violation of 30 C.F.R. § 75.1722(b) which requires that “[g]uards at conveyor-drive, conveyor-head, and conveyor-tail pulleys shall extend a distance sufficient to prevent a person from reaching behind the guard and becoming caught between the belt and the pulley.” Franklin testified that, while in the 3 West B drive area, he observed that the guards were not installed to extend a sufficient distance over the take-up rollers and the drive rollers such that they would prohibit reaching around and becoming entangled. The belt was running when he arrived in the area and he immediately noticed that the guards were not sufficient over both sets of rollers. In his view, the take up and drive rollers require more guarding due to their destructive nature. In his experience, there have been many injuries and fatalities as result of getting caught in one of these moving parts.

The drive rollers require regular clean-up, rock dusting, and examination, during which miners walk within inches of the moving rollers. This guard extended from the ground, up 4 feet, so that the rollers were level or above the top of the guards and were approximately 16-18 inches from the walkway. There was no means to protect the miners from tripping and falling into the either set of rollers. Franklin explained that the guards were insufficient because they were not high enough to prevent accidental contact. The walkway was packed down but contained areas of uneven ground that built up 10-14 inches in some areas. Given the difficulty of walking the path, and the fact that the rollers were higher than the guards, persons would not be prevented from reaching behind the guard and becoming caught between the belt and the pulley.

Franklin's concern was with reaching around the guard while the belt was in operation. He agreed that this guard could be made to work if it were installed differently. Hammond, testified on behalf of Air Quality that he accompanied Franklin during the inspection. Hammond viewed the area, including the take up and drive rollers, which were near one another but still in two different locations. In the first area, the drive rollers were on the outby side of the drive and he observed that the guard was parallel to the drive frame and, in his view, there was not a 16 by 20 inch opening which could be accessed. Additionally, there was a cross-under nearby that would be used by miners, keeping travel five feet away from location cited. Hammond further testified that contact with drive rollers is not likely to occur. He couldn't reach the drive rollers and during normal mining activity and in his view, someone could only touch it if they intentionally sought to do so. Regarding the take-up pulleys, he testified that they are on the side of the belt that is not traveled, i.e. the back side. He recalled that Franklin demonstrated the hazard by reaching over the guard, however, it is Hammond's opinion that the demonstration did not mimic normal activities since no one would have a reason to reach over the guard. Hammond saw no tripping hazards in the area.

The mine operator argues that these guards were installed in an effort to abate a number of guarding citations issued by MSHA inspector Johnny Moore. Brandon Flath testified that he has been the belt supervisor at the mine since 2007. In February, 2008, he had a conversation with inspector Johnny Moore, who had written a number of guarding violations requiring more rigid frames to replace the ones held together with wire. Flath made a plan and, after four or five months, completed the change of the guards on all of the belts. Flath testified that at some point Moore told him that all of the guards looked good. This guards in this area were completed in March 2008, and no citations had been issued from 2008 until February 2009.

I am not persuaded by Flath that this particular guard or area was approved by any person with MSHA. I am also not persuaded by Hammond that the take-ups and the drive-pulleys would not be inadvertently contacted by those working in the area. Instead, I agree with Franklin and credit his testimony describing the condition. I find that the guarding did not adequately protect persons from harm and, accordingly, I find a violation.

b. Significant and Substantial

I have found that there is a violation of the mandatory safety standard. Second, I find that a discrete safety hazard existed as a result of the violations, i.e., the danger of being caught in the turning rollers either by tripping and falling while on the walkway, or during maintenance and clean-up tasks along the belt. Once a miner comes into contact with a moving part on the belt, there is little to no chance of escape from being pulled into the belt. Such an occurrence will result in being crushed in the rollers and seriously, or even fatally, injured. Franklin explained that the miners work alone in the area and, therefore, even if a miner somehow manages to free himself from the belt, it is an impossible distance to travel for aid or to the surface. Franklin explained that a miner's arm is no match for the power of the drive rollers. Given the nature of the walkway and its uneven bottom, it is even more likely that an injury will occur. I credit Franklin's testimony and his understanding of the hazards. I find that the violation is S&S. Based upon the foregoing analysis, and considering all of the penalty criteria, including the gravity and negligence, I assess the \$3,689.00 penalty proposed by the Secretary.

D. Docket No. LAKE 2009-612

This docket contains eighteen violations with a total proposed penalty of \$106,988.00. The parties have resolved all but the one violation discussed below.

1. *Citation No. 8416307*

On May 26, 2009, Inspector Anthony DiLorenzo issued Citation No. 8416307 to Black Beauty for a violation of section 75.362(b). At hearing, the cited standard was modified to section 75.362(a)(1). The citation alleges that:

Inadequate on-shift examinations have been performed on MMU 004-044. The following conditions were observed; The secondary escapeway lifeline was 2 crosscuts outby the section loading point; The escapeway maps were not being kept in a current, up to date condition in that the maps were marked to crosscut #89 when in actuality . . . [they] were at crosscut #105. The life line has existed since the morning of 5/22/2009 and the escapeway maps have not been marked up for several weeks based on the normal mining times.

The inspector found that a fatal injury was reasonably likely to occur, that the violation was significant and substantial, and that the violation was the result of high negligence. The Secretary has proposed a civil penalty in the amount of \$45,708.00

The cited standard, as modified at hearing, requires the following:

At least once during each shift, or more often if necessary for safety, a certified person designated by the operator shall conduct an on-shift examination of each section where anyone is assigned to work during the shift and any area where mechanized mining equipment is being installed or removed during the shift. The certified person shall check for hazardous conditions, test for methane and oxygen deficiency, and determine if the air is moving in its proper direction.

30 C.F.R. § 75.362(a)(1). The Secretary must demonstrate first that the either someone was assigned to work during the shift or the MMU equipment is being installed or removed during that shift. Next, she must show that a hazardous condition existed that should have been observed, recorded and eliminated by the onshift examiner.

a. **The Violation**

Inspector DiLorenzo testified that, while conducting an inspection of the Air Quality mine on May 26, 2009, he observed conditions at MMU044 that lead him to believe that an inadequate onshift examination had been conducted. First, the lifeline was not extended to the working face and, second, the escapeway map was several weeks out of date. According to DiLorenzo, a hazardous condition exists if there is no updated escapeway map and the lifeline does not go directly to the working section. (Tr 1038-1039). DiLorenzo explained that the hazard he observed is that, in the event of a fire or explosion, heavy dust and smoke would be created and miners could not safely exit the mine from the face since the lifeline was not extended to that area. According to DiLorenzo, the miners “might not get the two crosscuts outby the working section to find the lifeline.” (Tr. 1040). He notes that a miner can become disoriented quickly, have a difficult time traversing the 100 feet to the lifeline, panic, and fail to escape. The lack of a lifeline in the secondary escapeway could cause the miners to turn around and look for the primary escapeway. (Tr. 1041-1043). This lack of a lifeline is compounded by the fact that the escapeway map indicated that the mine was cut to crosscut 89 instead of crosscut 105, i.e., where the miners were working. If a miner attempting an escape grabs the map to help find his way, the fact that it is out of date adds to total confusion.

Based upon the observations of DiLorenzo, it may be reasonably inferred that the missing lifeline and faulty map existed at the time of the on-shift examination. DiLorenzo viewed the on-shift examination reports for MMU004. There were no entries to show that the lifeline was not extended to the working area and that the escapeway map had not been updated. The mine records demonstrate that the last advanced belt move for that unit was 4 days prior, which indicated to DiLorenzo that the lifeline had not been moved up for at least 4 days, i.e., 12 shifts. Sec'y Ex. 42; (Tr. 1048).

Air Quality does not dispute that the lifeline was missing for two crosscuts or that the escape map was not updated. They argue instead that neither of these conditions created a hazard and, therefore, did not need to be noted by the on-shift examiner. The operator's proof of this contention is found in the testimony of Mr. Hammond:

Q. Is the escapeway map noted in the condition or practice an item that would be covered on an on-shift examination?

A. No

Q. Why not?

A. It's not

(Tr. 1084).

Given the obvious nature of the violation herein, I find that a reasonably prudent person, familiar with the mining industry and the protective purpose of the safety standard herein, would have recognized that this hazard needed to be recorded in the examination book. *Utah Power & Light Co.* 12 FMSHRC 965,968 (May 1990) *aff'd* 951 F.2d 292 (10th Cir. 1991). Accordingly, I find Respondent's argument to be without merit. I find that a violation did exist.

b. Significant and Substantial

Based upon the case law discussed above, I find that this violation is not significant and substantial. I base this finding primarily upon the fact that the evidence presented goes to the S&S nature of the hazard created by the lack of a lifeline and the lack of a map, and not by an inadequate onshift examination. Different proof is required for an S&S finding of an inadequate onshift examination violation.

While I have found that there is a violation of the mandatory safety standard as alleged by the Secretary, and I can infer that not conducting an adequate on-shift examination creates a discrete safety hazard, the third element of the Mathies formula is not shown here. The third element is often the most difficult to prove, and this case is no exception. The fact that the on-shift examiner failed to mention the lifeline and map in the report does not make it reasonably likely lead to a serious injury. According to DiLorenzo, the danger associated with being unable to quickly and safely escape the mine in the event of smoke and fire is connected to the violation of the missing lifeline. I note that much of DiLorenzo's testimony was in response to leading questions and he did not fully explain why the failure to note the hazard of the missing lifeline during an on-shift examination would result in an injury.

While I find that the absence of the lifeline is a serious problem, I cannot find that omitting mention of the lifelines from the on-shift report is, in and of itself, a S&S violation. Hammond, who testified on behalf of Black Beauty, focused, as DiLorenzo had, on the fact that the lifeline was missing for 100 feet, and not on the actual violation of identifying and recording the hazard in the on-shift book. In any event, the Secretary has not provided substantial evidence to support a finding of S&S in this matter.

c. Negligence

DiLorenzo designated this violation as high negligence. He relied on the fact that the condition existed for 12 shifts, i.e., since the time of the belt move. Again, DiLorenzo focused on the length of time the lifeline and map went unchanged, but in this instance, the fact that it went unchanged substantiates that it was not noted on any on-shift examination for an extended period of time. The Commission has often discussed the importance of preshift and on-shift examinations and that the failure to conduct adequate inspections, as evidenced by the violations found, can be the result of high negligence. See *Quinland*, 10 FMSHRC 705, 708-09 (June 1988) (obvious nature of lack of proper roof support), *Youghioghney & Ohio Coal Co.*, 9 FMSHRC 2007, 2010-11 (Dec. 1987) (finding of unwarrantable failure where preshift examinations had been conducted but the roof control violations were not reported), *Eastern Associated Coal Corp.*, 13 FMSHRC 178, 187 (Feb. 1991) (violations not reported following preshift examinations).

The mine operator asserts that it was not highly negligent because the condition had only existed for one shift prior to the citation. Hammond testified that failing to extend the lifeline and update the map was an oversight and the mine was not highly negligent. He explained that the belt was moved on May 22, 2009, as DiLorenzo described, but the move was followed by a holiday weekend. When the crew arrived on the evening of the 25th for the midnight shift on the 26th, there was no production. Therefore, the first production in this area was the shift on which DiLorenzo issued the violation and, likewise, the first shift on which any person was assigned to work in the area.

While the lifelines should have been extended at the time of the belt move, there is little evidence to show that the negligence in not doing so was high, and even less evidence to support that not noting it during an on-shift examination constitutes high negligence. In this case, the lifeline and map seemingly should have been discovered during what would have been the onshift examination that would have taken place had it not been a holiday weekend. Outside of the disputed timing, the Secretary has presented no other evidence of high negligence. As a result I find the negligence to be moderate. After consideration of all of the penalty criteria, I assess a \$10,000.00 penalty.

II. PENALTY

The principles governing the authority of Commission Administrative Law Judges to assess civil penalties de novo for violations of the Mine Act are well established. Section 110(I) of the Mine Act delegates to the Commission and its judges the “authority to assess all civil penalties provided in [the] Act.” 30 U.S.C. § 820(I). The Act delegates the duty of proposing penalties to the Secretary. 30 U.S.C. §§ 815(a), 820(a). Thus, when an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess the penalty. 29 C.F.R. § 2700.28. The Act requires, that in assessing civil monetary penalties, the Commission [ALJ] shall consider the six statutory penalty criteria:

[1] the operator’s history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] the effect 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).

I accept the stipulation of the parties that the penalties proposed are appropriate to this operator’s size and ability to continue in business and that the violations were abated in good faith. The history shows the past violations at this mine, including citations for the standards discussed above. The size of the operator is large. I have discussed the negligence and gravity associated with each citation and, except where noted, I accept the designations as set forth in each citation. I assess the following penalties:

Docket Lake 2009-470:
 Order No. 8414994 \$ 70,000.00
 Order No. 8415253 \$ 70,000.00
 Order No. 8415254 Vacated

Docket Lake 2009-471:
 Citation No.6681954 Vacated
 Citation No 6681953 \$ 10,000.00
 Citation No.8414992 \$ 3,689.00

Docket Lake 2009-612:
 Citation No.8416307 \$ 10,000.00

Total: \$ 163,689.00

The parties have settled the remaining citations and orders contained in these dockets. The settlement terms are as follows:

Citation/Order No.	Originally Proposed Penalty	Settlement Amount	Modifications
LAKE 2009-471			
8415129	\$15,570.00	\$946.00	Reduction in gravity to Non-S&S. Reduction in negligence to Moderate.
8415230	\$7,578.00	\$2,282.00	Reduction in negligence to Moderate.
8414977	\$10,437.00	\$2,106.00	Reduction in gravity to Non-S&S.
8415232	\$11,306.00	\$687.00	Reduction in gravity to Non-S&S. Reduction in negligence to Moderate.
8415235	\$7,578.00	\$2,282.00	Reduction in negligence to Moderate.
6681955	\$7,578.00	\$3,405.00	Reduction in gravity to Permanently Disabling.
8415237	\$3,689.00	\$1,111.00	Reduction in negligence to Moderate.
8415247	\$7,578.00	\$1,530.00	Reduction in gravity to Non-S&S.
8415250	\$14,373.00	\$1,304.00	Reduction in gravity to Lost Workdays or Restricted Duty. Reduction in negligence to Moderate.
8415260	\$7,578.00	\$2,282.00	Reduction in negligence to Moderate.
8415255	\$8,209.00	\$6,567.00	
8415259	\$7,578.00	\$2,282.00	Reduction in negligence to Moderate.
8415262	\$7,578.00	\$2,282.00	Reduction in negligence to Moderate.
8415513	\$4,689.00	\$1,203.00	Reduction in gravity to 1 Person Affected.
8415267	\$7,578.00	\$7,578.00	
8415271	\$7,578.00	\$2,282.00	Reduction in negligence to Moderate.

8415268	\$4,689.00	\$1,412.00	Reduction in negligence to Moderate.
8415221	\$7,578.00	\$1,412.00	Reduction in negligence to Moderate.
8415263	\$11,306.00	\$9,045.00	
Docket Total	\$160,048.00	\$51,998.00	
LAKE 2009-612			
8415789	\$5,961.00	\$362.00	Reduction in gravity to Non-S&S. Reduction in negligence to Moderate.
8415790	\$1,111.00	\$550.00	Reduction in negligence to Moderate.
8415791	\$687.00	\$207.00	Reduction in negligence to Moderate.
8416303	\$2,473.00	\$1,000.00	Reduction in gravity to 2 Persons Affected.
8415388	\$12,248.00	\$3,698.00	Reduction in gravity to 2 Persons Affected. Reduction in negligence to Moderate.
8416306	\$2,901.00	\$2,300.00	
8416401	\$2,901.00	\$873.00	Reduction in negligence to Moderate.
8416403	\$873.00	\$873.00	
8416404	\$873.00	\$873.00	
8416314	\$873.00	\$285.00	Reduction in gravity to 3 Persons Affected.
8416315	\$873.00	\$285.00	Reduction in gravity to 3 Persons Affected.
8416406	\$4,689.00	\$2,106.00	Reduction in gravity to Permanently Disabling.
8416316	\$2,282.00	\$2,282.00	
8416318	\$1,657.00	\$1,657.00	
8416319	\$946.00	\$285.00	Reduction in gravity to Lost Workdays or Restricted Duty.
8415398	\$12,248.00	\$3,689.00	Reduction in negligence to Moderate.
8416312	\$7,578.00	\$6,062.00	
Docket Total	\$61,174.00	\$27,387.00	
Overall Total	\$221,222.00	\$79,385.00	

I have considered the representations submitted by the parties and I conclude that the proposed settlement is appropriate under the criteria set forth in section 110(I) of the Act. The motion to approve settlement is **GRANTED**.

III. ORDER

Based on the criteria in section 110(I) of the Mine Act, 30 U.S.C. § 820(I), I assess a total penalty of \$243,074.00 for the heard and settled citations and orders. Black Beauty Coal Company is hereby **ORDERED TO PAY** the Secretary of Labor the sum of \$243,074.00 within 30 days of the date of this decision.

/s/ Margaret A. Miller
Margaret A. Miller
Administrative Law Judge

Distribution: (First Class U.S. Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 21, 2011

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 2009-569
Petitioner,	:	A.C. No. 12-02010-188272-02
	:	
v.	:	Docket No. LAKE 2009-570
	:	A.C. No. 12-02010-188272-03
	:	
BLACK BEAUTY COAL COMPANY,	:	
Respondent.	:	Mine: Air Quality #1 Mine

DECISION

Appearances: Awilda Marquez, Pam Mucklow, Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner; Arthur Wolfson, Dana Svendsen, Jackson Kelly, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Miller

These cases are 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 Black Beauty Coal Company at its Air Quality #1 Mine, 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" or "Act"). The two dockets captioned above, which are the subject of this decision, were heard along with four other dockets, LAKE 2009-470, 471, 565 and 612, and share a common transcript and exhibits. Docket Nos. LAKE 2009-470, 471, 565 and 612, are addressed in two other decisions. With the exception of the fifteen citations and orders discussed below, the parties have agreed to settle all citations and orders in the captioned dockets. The settlement terms are set forth at the end of this decision. The parties presented testimony and documentary evidence at the hearing held in Evansville, Indiana commencing on February 15, 2011.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Black Beauty Coal Company, ("Black Beauty") operates the Air Quality #1 mine (the "mine"), a bituminous, underground coal mine, near Vincennes, Indiana. The mine uses a continuous miner and utilizes the room and pillar method. (Tr. 15). The mine is subject to regular inspections by the Secretary's Mine Safety and Health Administration ("MSHA") pursuant to section 103(a) of the Act. 30 U.S.C. § 813(a). The parties stipulated that Black Beauty is the operator of the mine, that the mine's operations affect interstate commerce, and that it is subject to the jurisdiction of the Mine Act. *Jt. Ex. 1*; (Tr. 587-588). Black Beauty Coal, like a number of other mines in the Indiana-Illinois area, is owned by Peabody Energy. The mine is a large operator.

A. Common Facts and Law

In addition to the penalty criteria and jurisdictional matters, there are a number of facts that are common to the citations and orders discussed below. The parties have agreed that each of them is "free to argue that evidence admitted in the context of a particular Citation or Order is

relevant to the court's determination of other Citations and Orders. Further, if the Court accepts the party's argument, the Court may consider that evidence in reaching her decision concerning those other Citations and Orders." Jt. Ex. 1, Stip. 11. I have used the transcript in its entirety in addressing citations and orders.

At the time the subject citations and orders were issued the mine had been on the (d)(2) series for an extended period of time. Each inspector who testified indicated that this mine has had a number of serious, ongoing problems. The primary ongoing problem has been accumulations, including coal, float coal dust, and oil. The mine has also had chronic issues with keeping the accumulations out of the belt areas, and keeping the ventilation in place to prevent exposure to dust. This mine has a greater than normal number of permissibility violations. All inspectors credibly testified that the mine was on notice, both from past violations and meetings with management, that it should be paying attention to the violations related to accumulations, ventilation plans, roof control plans, and dust exposure.

The mine is on a 103(I) five day spot inspection due to the large quantities of methane liberated. The mine argues that the methane is primarily emitted at the sealed areas. Nevertheless, the mine is considered a gassy mine. During the time frame that many of these citations and orders were issued, from March 30, 2009 until June 29, 2009, the mine received 271 citations and 11 orders. Sec'y Ex. 60. The mine history shows that, in the less than one year period prior to when the subject violations were issued, the mine received 102 citations and orders for accumulations violations, Sec'y Ex. 63, and 47 citations and orders for permissibility violations, Sec'y Ex. 64. Further, a number of the subject violations were issued in February 2009. The history also shows 234 violations of accumulation standards in the prior two year period. Sec'y Ex. 69. Finally, the history shows that, from March 2007 to March 2009, there were a large number of permissibility, accumulations, ventilation and roof violations, all or which are all very serious hazards. Sec'y Ex. 71. During testimony, each of the inspectors who issued the subject violations found that the violations were obvious and should have been discovered prior to the inspection by either a preshift examination, an onshift examination, or during the regular course of mining.

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

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

Mathies Coal Co., 6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); *see also, Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (Dec. 1987) (approving Mathies criteria).

The difficulty with finding a violation S&S normally comes with the third element of the Mathies formula. In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985), the Commission provided additional guidance:

We have explained further that the third element of the Mathies formula “requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury.” U.S. Steel Mining Co., Inc., 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. U.S. Steel Mining Co., Inc., 6 FMSHRC 1866, 1868 (August 1984); U.S. Steel Mining Co., Inc., 6 FMSHRC 1573, 1574-75 (July 1984).

This evaluation is made in consideration of the length of time that the violative condition existed prior to the citation and the time it would have existed if normal mining operations had continued. *Elk Run Coal Co.*, 27 FMSHRC 899, 905 (Dec. 2005); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC at 1574. Further, the question of whether a violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987).

In addition to being designated S&S, many of the citations and orders were designated as an unwarrantable failure or attributable to high negligence. The term “unwarrantable failure” is defined as aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (Dec. 1987). Unwarrantable failure is characterized by such conduct as “reckless disregard,” “intentional misconduct,” “indifference,” or the “serious lack of reasonable care.” *Id.* at 2004-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC at 193-94. Aggravating factors include the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts were necessary for compliance, the operator’s efforts in abating the violative condition, whether the violation was obvious or posed a high degree of danger, and the operator’s knowledge of the existence of the violation. *See Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Windsor Coal Co.*, 21 FMSHRC 997, 1000 (Sept. 1999); *Consolidation Coal Co.*, 23 FMSHRC 588, 593 (June 2001). All of the relevant facts and circumstances of each case must be examined to determine if an actor’s conduct is aggravated, or whether mitigating circumstances exist. *Consol*, 22 FMSHRC at 353.

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

Finally, there are a number of citations that were issued based upon a safeguard for clear walkways along the side of each belt. I have already ruled on the validity of the underlying safeguard. As a result, two of the citations that remain at issue were not addressed at hearing and, instead, the parties stipulated that “the only defenses . . . [Black Beauty is] raising concerning Citations 8415372 and 8415373 are (1) the Citation must be vacated because the underlying Safeguard is invalid and (2) the Court could not find the violations to be significant and substantial because safeguards are not mandatory standards.” *Jt. Ex. 1, Stip. 15*. The parties further “stipulate that neither will present evidence particular to Citations 8415372 and 8415373.” *Id.* at *Stip. 16*.

B. Docket No. LAKE 2009-569

This docket contains five violations with a total proposed penalty of \$73,045. The parties have agreed to settle one of the violations. The remaining violations are addressed below. The terms of the settlement are addressed near the end of the decision.

1. *Citation No. 9942563*

On April 9, 2009, Inspector Charles Weilbaker issued citation number 9942563 for a violation of section 70.100(a). The citation, in pertinent part, alleges the following:

The average concentration of respirable dust in the working environment of the designated occupation was 2.691 milligrams per cubic meter which exceeds the 2.0 milligrams per cubic meter standard. This finding was based on the results of five (5) valid dust samples collected by the operator. The operator shall take corrective action to lower the respirable dust.

The inspector found that a permanently disabling injury was reasonably likely to occur, that the violation was significant and substantial, that six persons would be affected, and that the violation was the result of high negligence.

The cited standard requires the following:

Each operator shall continuously maintain the average concentration of respirable dust in the mine atmosphere during each shift to which each miner in the active workings of each mine is exposed at or below 2.0 milligrams of respirable dust per cubic meter of air as measured with an approved sampling device and in terms of an equivalent concentration determined in accordance with §70.206 (Approved sampling devices; equivalent concentrations).

30 C.F.R. § 70.100. The Secretary has proposed a civil penalty in the amount of \$42,600.

a. **The Violation**

Inspector Ron Hayes, the health supervisor in MSHA Vincennes office, has been with MSHA for 22 years. He was a member of the team of “dust busters” sent to the mine to address issues of respirable dust. Hayes supervises the dust and noise groups and reviews the dust violations for the mines in his district. (Tr. 183-185).

According to Hayes, in each dust case, including the one here, the violation for an overexposure to dust is based upon the average of five valid samples collected by the mine operator and sent to the MSHA lab for analysis. The results are entered into a computer and the district office is notified. The mine receives an advisory if it is out of compliance and the district office issues a violation. At this mine the maximum allowable respirable dust exposure is 2.0 milligrams per cubic meter in an eight hour period. The hazard associated with exposure to respirable dust is that, in the case of coal dust, it will be brought into the lungs, cause damage, and eventually lead to “black lung.” The greater the exposure, the greater the hazard. The samples are taken for designated miner occupations. Here, the samples are those for the continuous miner operator. (Tr. 186-188).

Several witnesses testified on behalf of the mine operator, however, there is no dispute that the weighted samples demonstrated an overexposure, i.e., the average weighted samples exceeded the 2.0 limit. While Mr. Polston and others at the mine expressed their opinion that the manner in which the Pittsburgh lab weights the samples results in inaccurate results, there is no evidence that the testing was faulty. The five weighted dust samples collected by the mine demonstrated an exposure over the 2.0 milligrams per cubic meter limit allowed by the MSHA standards. Accordingly, I find that a violation has been established.

b. Significant and Substantial

This case involves a mandatory health standard as opposed to a safety standard. In *Consolidation Coal Co.*, 8 FMSHRC 890 (June 1986), *aff'd* 824 F.2d 1071 (D.C. Cir. 1987), the Commission applied the *Mathies* test to a violation of a mandatory health standard. The Commission stated the following:

Adapting this test to a violation of a mandatory health standard, such as section 70.100(a), results in the following formulation of the necessary elements to support a significant and substantial finding: (1) the underlying violation of a mandatory health standard; (2) a discrete health hazard--a measure of danger to health--contributed to by the violation; (3) a reasonable likelihood that the health hazard contributed to will result in an illness; and (4) a reasonable likelihood that the illness in question will be of a reasonably serious nature.

Id. at 897. The Commission went on to state the following:

[G]iven the nature of the health hazard at issue [i.e., respirable dust induced disease], the potentially devastating consequences for affected miners, and strong concern expressed by Congress for eliminating respiratory illnesses in miners, . . . if the Secretary proves an overexposure to respirable dust in violation of § 70.100(a), based upon designated occupational samples, has occurred, a presumption arises that the third element of the “significant and substantial” test - - a reasonable likelihood that the health hazard contribute or will result in an illness - - has been established.

Id. at 899.

Hayes testified that two of the tested samples showed dust levels that were double the allowable amount. The miners were exposed to these excessive levels of respirable dust for two shifts over the course of two days, and to relatively high levels on three other shifts. (Tr. 198). Hayes stated that this overexposure is S&S because it harms the lungs immediately, as well as in the long term by causing black lung.

I have already found that there is a violation of the mandatory health standard. Second, I find that a discrete safety hazard existed as a result of the violation, the danger of overexposure to respirable dust which causes significant lung damage. Third, there is a reasonable likelihood that the health hazard contributed to will result in an illness. The operator offered no evidence suitable to overcome the presumption that the exposure to dust would result in a serious injury. The mine focused on the ventilation that was in place on the day the citation was issued and the fact that they noticed nothing out of the ordinary. I find that operator has failed to rebut the presumption discussed above. The Respondent’s witness testimony primarily focused on the negligence attributed to the violation, and not the S&S nature. Fourth, the illness will be serious. The damage to the lung is permanent and irreversible and will eventually lead to death. In light of the foregoing analysis, I find that the violation was properly designated S&S.

c. Negligence

Weilbaker designated the citation as high negligence. According to Hayes, the designation was based on the previous history of violations and the existence of several trigger samples that came back as overexposed. Hayes testified that, given that the high level of dust should have been visible in the air and therefore, the mine foreman should have known that the dust concentration was high. Further, Hayes opined that, even if the mine was adhering to the approved ventilation plan when the samples were taken, the mine should have seen the large quantities of dust in the air given that two samples demonstrated exposure of more than double the allowable limit. (Tr.

194-196, 199, 208). Initially, Hayes did not clarify when the earlier exposures occurred. However, on cross-examination, he explained that he reviewed dust reports for the mine and found that it had received two citations on the same MMU during a four month period beginning in 2008. Hayes viewed the “trigger samples” taken on the coal haulers that indicated overexposure to respirable dust. (Tr. 209-211).¹

Elliot Polston was the section foreman at the mine at the time the violation was issued. He saw nothing in the notes or reports on the day of the overexposures that would have led him to believe there was a dust issue. Polston testified that it is an ongoing process throughout the day to keep ventilation in place, keep the roads watered, and make sure that miners stand behind line curtains in order to minimize dust exposure. He was in charge of, for the most part, collecting the samples that were out of compliance, but he has no explanation for the over exposure. It is his belief that the mine was complying with the ventilation plan on the day the samples were taken. In his view, the manner in which the samples were weighted caused the inaccurate results. (Tr. 238-244).

Jeff Buskirk is presently, and was at the time of the violation, a lead man at the mine. He reviewed the mine’s documents, including the preshift and onshift records, and could not identify anything that would lead him to believe that there were elevated dust levels that day. Although Buskirk was lead through his testimony, it appears that, in his view, the amount of air was adequate and the ventilation was working as required by the plan. (Tr. 249-250).

David Winger is currently retired but worked at Air Quality for nine years as a safety technician. He was certified “to run dust pumps” and was in charge of the dust program. He reviewed the samples. Winger stated that he does not see any pattern of violation in the MMU 4 and the mine “hadn’t had a citation for awhile.” He opined that an issue with dust on one unit does not necessarily indicate a problem with the other continuous miner since the equipment operates on separate splits of air. At one time, 19 months prior to this violation, the mine did have some single samples that were over the 2.0 limit. (Tr. 267). After reviewing a dust sampling result report for the mine, Winger agreed that there were a number of samples over the 2.0 limit but, in his view, those samples would not put the mine on notice that they had any unusual problem with respirable dust. *See* BB Ex. TT. Winger believes that many things can happen to elevate the dust sample over the limit. In his opinion, the violations were not consistent and did not demonstrate a pattern. I give little credit to Mr. Winger’s testimony as his answers were limited to a few words except on cross-examination.

I find Hayes to be a credible and knowledgeable witness with a good basis for his opinion regarding the overexposure to dust. However, I can’t agree that the Secretary has proven by a preponderance of the evidence that the negligence was any more than moderate. The mine has offered some mitigating, albeit confusing, evidence regarding the negligence. Therefore, I find the negligence to be moderate and based upon the statutory penalty criteria, assess a penalty of \$20,000.

2. *Order No. 8415738*

On April 20, 2009, Inspector Anthony DiLorenzo issued order number 8415738 to Black Beauty for a violation of 30 C.F.R. § 363(a) of the Secretary’s regulations. The citation alleges the following:

Hazardous conditions found during the onshift of the 1 “B” belt have been carried in the book, maintained at the mine surface, since the 4/14/2009 day

¹ I note here that, while the mine had two prior violations and a number of trigger samples out of compliance, the Secretary did not adequately explain the trigger samples and their significance.

shift. The hazards are preventing the examiner from making a complete examination from crosscuts #51-#52 and #61-#62. The areas are not safe for travel due to the excessive water, obstructions in the passageway and slip/trip/fall hazards. No effort has been made to correct these hazards. The conditions are obvious, extensive and have existed for a significant amount of time. This violation is an unwarrantable failure to comply with a mandatory standard.

DeLorenzo initially found that the violation was non-S&S and that an injury or illness was unlikely, but that any injury could reasonably be expected to result in lost workdays or restricted duty. He later modified the citation to reflect that it was S&S and that an injury or illness was reasonably likely. In addition, he found that 1 person would be affected by the condition and that the violation was the result of the respondent's high negligence and unwarrantable failure to comply with the mandatory standard. The Secretary has proposed a penalty of \$4,000.

a. **The Violation**

DiLorenzo issued the order for a violation of section 75.363(a) which requires, in pertinent part, the following:

Any hazardous condition found by the mine foreman or equivalent mine official, assistant mine foreman or equivalent mine official, or other certified persons designated by the operator for the purposes of conducting examinations under this subpart D, shall be posted with a conspicuous danger sign where anyone entering the areas would pass. A hazardous condition shall be corrected immediately or the area shall remain posted until the hazardous condition is corrected

30 C.F.R. § 75.363(a). The dictionary defines hazard as "a source of danger." *Webster's New Collegiate Dictionary* (1979) at 522. In the context of this analysis, the danger associated with a hazardous condition is damage to, or accidents involving, miners.

DiLorenzo issued this order after observing a number of hazards, primarily large pools of water, along the 1 B belt that had been listed in the examination books of the mine for several days. (Tr. 856-857). In his view, the areas referenced in the order were not safe to travel and no effort has been made to correct the hazards. The hazards were the subject of a separate violation, and were issued primarily for water, mud, and debris in the walkway along the belt. (Tr. 858-859). He explained that, while no one was traveling through the area while he was present, the belt examiner was required to travel the area at least once on each production shift. (Tr. 858). The examination books indicated that there was "work in progress" but DiLorenzo saw no pumps or pump lines, no warning signs, and no other evidence of work being done at that time to correct the conditions. He did see a make-shift dam that proved to be inadequate, but he could not discern any other measures in place to alleviate the water problem. (Tr. 859-860).

Horst, an hourly employee at Air Quality, accompanied DiLorenzo on the inspection. Horst has worked in the mining industry for over eight years. He recalled that, as he walked the 1 B belt with DiLorenzo, there was water in the walkway but it did not go over the top of his boots. He estimated that the water was around 13 inches deep. Horst agreed that the water was rib to rib, but stated that the water was clear and he was not concerned about falling as he walked through it. The examiner would not be prohibited from making his examinations with this amount of water. Horst would not describe the condition as creating a hazard. DiLorenzo, on the other hand, determined that, given the water was 13 inches deep, murky, and covered up an uneven bottom of rock and coal, there was a hazard. (Tr. 842-843).

In order to establish a violation, the Secretary must first demonstrate that “hazardous conditions” existed. Next, she must establish that the hazard had not been corrected or posted. Hence, the Secretary has the burden of demonstrating that the conditions listed by DiLorenzo are a hazard, that they can cause damage or accidents. Once the existence of a hazard has been established, the focus shifts to the actions, if any, taken to remediate the condition. In his testimony, DeLorenzo refers to the hazardous conditions he cited in citation number 8415735, discussed below, for an alleged failure to keep a clear 24 inch walkway on either side of the beltway. I rely on the description of that hazard here. The safeguard that is the subject of that violation requires that the travelway be kept free from water and mud such that a clear 24 inch width of travelway is provided along the belt. The safeguard must, and in this case does, address the hazard associated with walking in water along the beltway. While there is some disagreement about the condition of the water, I credit DiLorenzo’s testimony that it was dark, murky, difficult to see through, and contained rocks and debris. Given that the water was undeniably 13 inches deep, and the bottom could not be seen, the Secretary has demonstrated that the water in the walkway was a hazard. As a result, the condition was a hazard and should be immediately corrected or posted. The evidence establishes that the condition was neither posted nor corrected. I find that the violation has occurred.

b. Significant and Substantial

DiLorenzo initially marked this violation as “unlikely” and, therefore, not S&S. He later modified the citation to “reasonably likely” and S&S. However, DiLorenzo’s testimony about the S&S nature of the violation was limited. In response to one question about why this was S&S, DiLorenzo essentially restated certain elements of the S&S analysis. (Tr. 867-868). There was no further explanation or elaboration. I have already found a violation, and that a hazard existed, but the third element of the *Mathies* test has not been sufficiently addressed and, therefore, the Secretary has not shown that the violation is S&S.

c. Unwarrantable Failure

The mud and water obstructing the walkway was obvious and extensive. As far as DiLorenzo could see, little if any effort was made to correct the condition even though it had been noted by the examiner for six days, on each production shift. The 1 B belt line was taken out of service to terminate the violation and it took about five hours to adequately pump out the water. (Tr. 863-865). DiLorenzo explained that, given the amount of time he spent in the belt area, he would have noticed corrective efforts. However, there were no corrective measures being taken. DiLorenzo testified that management was on notice that there continued to be water and mud in the walkway since the condition had first been entered in the record of examination six days prior. Despite that knowledge, the condition was not corrected. At times, the examination book contained a notation that work was in progress to correct the condition. However, since the condition existed for an extended period of time and there was nothing noticeable being done, DiLorenzo felt it was inexcusable. He explained that “there was no corrective action taken to correct that condition. The - it’s been carried in the record books for approximately six days. A mine management and officials have countersigned the belt examining record books acknowledging that they have read and understand what they have entered.” (Tr. 861).

Eric Carter, an assistant mine manager for Air Quality, oversees all outby activities and has 17 years mining experience. He assisted in terminating the order by getting tools and pumping the water. He testified that the water at crosscut 62 was only a small amount, but agrees that the water near crosscut 50 had been coming through the walls and was more extensive. Nevertheless, Carter believes that the amount of water at both locations did not amount to a hazard. When he arrived at the belt walkway on the day the order was issued, the miners were mucking the water with buckets. He brought a pump to use at crosscut 62. After the water had been mostly pumped out, rock dust was put down to dry the area. He does not believe that the condition prevented an examination. After the belt was shut down, he saw that the bottom belt

spray was stuck and was causing water to leak and accumulate. In addition, he testified that washing equipment nearby had caused water to seep through the walls. He stated that he discovered the notes in the examination books about the water and, as a result, had contractors shoveling and rock dusting the walkway. Reports provided by the operator for 4/15/09 indicate work in progress on water in 1 B belt. The same is true on 4/16/09.

A few days prior to the citation, Carter had been told by an examiner that water was unexpectedly coming into the belt-way. As a result, Carter sent workers to shovel and rock dust. However, there is no evidence that any pumps were used until after the citation was issued. Once the pumps were brought in, and the belt shut down, a leak was found and repaired, and the water was removed. The mine has no explanation as to why the search for the cause and the use of pumps were not initiated until after a citation was issued. They had not done enough to correct the water problem over a lengthy period of time. I credit the testimony of DiLorenzo and characterize the Respondent's behavior as "indifference" or "serious lack of reasonable care." Therefore, I find that the negligence is high and that the violation was a result of an unwarrantable failure to comply. I assess a \$4,000 penalty.

3. *Order No. 7522964*

Inspector Donald Roby issued order number 7522964 on April 27, 2009, citing a violation of section 75.370(a)(1) for a failure to follow the mine's ventilation plan. The order alleges that "[t]he respirable dust portion, (requiring the scrubber screen to be cleaned after each cut) of the ventilation plan approved 05-27-2007 is not followed on the 003-MMU, in that; the scrubber screen is not cleaned prior to the beginning a second cut." Roby determined that a permanently disabling injury was reasonably like to occur, that the violation was significant and substantial, and that one person would be affected. Further, he found that the violation was the result of the operator's high negligence and unwarrantable failure to comply. A penalty of \$9,882 is proposed.

a. **The Violation**

Inspector Don Roby, a health specialist with MSHA, has 21 years mining experience. Prior to working for MSHA he held many positions, including mine foreman, and mine superintendent. Roby was at the Air Quality mine on April 27, 2009 as a part of the "dust busters" team. The team is a group organized by MSHA to target mines with respirable dust issues and assist those mines in eliminating the problems. The subject violation occurred on the 003-MMU, the working section where Roby was observing the continuous miner operator. (Tr. 276). After taking a cut, which consists of 4 lifts, the miner operator failed to clean the scrubber as required by the mine's ventilation plan. The mine's plan defines a cut, by way of a diagram, as four lifts of 20 feet deep by 10 feet wide, for a total cut size of 40 feet deep by 20 feet wide. Sec'y Ex. 33 p. 25; (Tr. 281). The scrubber screen is a mesh of wire that is layered, encased in a rubber frame, and inserted into the continuous miner. The screen collects particles of dust so that the particles are prevented from being liberated into the air. The intent of the screen is to cut down on exposure to respirable dust. (Tr. 280).

On the day of the violation, Roby was watching the miner while it was cutting a crosscut from the 4 entry to the 5 entry. The machine must make two runs to make the 20 feet wide cut, and 4 runs to make the 40 feet deep cut. Roby observed the operator check the scrubber and sprays, cut 4 lifts, and then stop and check the scrubber. He then watched lift 1 and 2 of the next cut. When the operator turned the scrubber on to take lift number three, Roby issued the order for not cleaning the scrubber screen.

Mark Bedwell II, a lead man and former section foreman, testified on behalf of Air Quality. Bedwell was in charge on the day the citation was issued, and deferred to the inspector as the work progressed. He remembers the sequence differently than Roby, but states that he asked Roby if he should clean the screen and was told he was not required to do so. Bedwell's testimony is unclear. On one hand, his understanding of "one cut" is different than Roby's. At

the same time he knew the meaning of a cut as evidenced by the fact that, shortly before the citation was issued, he asked the inspector if the screen needed to be cleaned. (Tr. 315-317). I do not find Bedwell to be a credible witness.

The evidence supports the finding that the miner operator did not clean the screen after the full cut, as was required by the plan. There was some discussion by the operator about how many lifts must be completed in order to constitute a full cut for purposes of the ventilation plan. I find that the plan speaks for itself and the cut was made without the screen being cleaned. The violation is proven.

b. Significant and Substantial

The Secretary contends that, since the scrubber screen was not cleaned, the operator of the machine was exposed to respirable dust. Roby testified that the miner operator was exposed to “an undue amount of respirable dust” because the screen would have been clogged with coal dust from the previous cut, thereby diminishing its effectiveness. (Tr. 288-289). While there is no question that exposure to respirable dust is serious and will result in black lung or other debilitating diseases, there is no evidence in the record to demonstrate that the miner operator was exposed to any amount of dust. Roby assumed that he was exposed for the short period of time but provided no further information regarding the exposure. Roby stated that, while he tested the effectiveness of the screen prior to this cut, it did not fall below the requirements in the ventilation plan. (Tr. 289). There is little evidence presented by the Secretary to demonstrate that the miner operator was exposed to dust, and no evidence that he was overexposed.

The Secretary has the burden of proving all elements of the *Mathies* test. While in dust cases there may be a presumption applicable in examining the third prong of that test, the Secretary has not even proven that a hazard existed as a result of the violation. Further, I am not convinced that the scrubber would have remained in operation without the proper cleaning for any length of time. The scrubber screen was working and was collecting dust, even though, after the first cut, it had diminished effect. There is no evidence that the diminished effect exposed anyone to any amount of respirable dust. Without more, I cannot find that the failure to clean the scrubber, resulted in a hazard. Therefore, I find that the violation is not S&S.

c. Unwarrantable Failure

The Secretary presented little evidence to substantiate a finding of unwarrantable failure. There was no evidence that the action of the foreman in not cleaning the scrubber was aggravated conduct or intentional. Indeed, with the inspector watching, it is fair to assume that the mine operator would strictly adhere to its ventilation plan and follow the course it believed to be correct. In addition, the Secretary has not sufficiently demonstrated the existence of any aggravating factors. The violation cannot said to be extensive, to pose a high degree of danger, or that the operator had knowledge of the violation. Again, it is not clear from Bedwell’s testimony why he failed to clean the scrubber. Nevertheless, there is no evidence adduced by the Secretary to show that he or other management demonstrated aggravated conduct. Therefore, I find that the violation is not unwarrantable and that the negligence is moderate. I assess a \$5,000 penalty.

4. Order 8415756

On April 30, 2009, Inspector DiLorenzo issued citation number 8415756 to Black Beauty for a violation of section of the Secretary’s regulations.² The citation alleges that:

An adequate examination has not been performed on the 5 “C” belt conveyor drive. Upon activation of the fire suppression system, no alarm

²DiLorenzo initially cited a violation of 75.1103-8 but prior to hearing amended the citation to show a violation of 75.1101-11.

was given to all locations where miners would be endangered by a belt fire or at a manned location where the posted person has telephone or equivalent communications with all persons who may be endangered. A record of any examination could not be found at or near the belt drive or at any location on the surface. Wires inside the control panel had to be switched with different channels and reconfiguration with the computer system had to be made for the system to become operable. This belt drive has been in service since 04/15/2009. This violation is an unwarrantable failure to comply with a mandatory standard.

The inspector found that a fatal injury was reasonably likely to occur, that the violation was significant and substantial, that two persons would be affected, and that the violation was the result of the Respondent's high negligence and unwarrantable failure to comply. The Secretary has proposed a civil penalty in the amount of \$12,563.

a. The Violation

Inspector DiLorenzo testified that, while conducting an inspection of the Air Quality mine on April 30, 2009, he tested the fire suppression system. During the test of the system, he asked to see the examination book, but it could not be found. The standard requires that the sprinkler system be examined weekly. DiLorenzo testified that an examination of the system includes an examination of the piping and sprinkler heads, making sure that the sprinklers are pointed the right direction and that spacing is correct, and that the alarms and warnings are in working condition. (Tr. 935). The examination book, which is used to document these weekly examinations, is normally kept at the belt drive. (Tr. 936). Initially a book could not be found underground, but DiLorenzo testified that the mine eventually produced something that appeared to be a log book used at the surface to record tests of the system. DiLorenzo had no reason to question the authenticity of the book (Tr. 939).

DiLorenzo learned that the belt drive was installed on April 15, and the alarm system was also installed and in service at that time. However, when tested by DiLorenzo two weeks later, the fire suppression system was not functional, as it failed to send an audible alarm to the surface. After being at the mine for a number of hours, a log book was produced, but, in DiLorenzo's estimation, it did not indicate that any tests of the alarm systems had been conducted as required (Tr. 939).

Dustin Galloway is an hourly employee at the mine and has ten years of coal mining experience. He accompanied DiLorenzo to the 5 B belt drive. While Galloway watched, DiLorenzo tested the fire suppression system. According to Galloway, a visual warning, flashed and the belt shut down when it was tested. (Tr. 963-965). Galloway agreed that the audible alarm on the surface didn't sound and, as a result, the maintenance foreman was called. Galloway acknowledged that DiLorenzo asked to view the exam book for the fire suppression system, but it couldn't be located. According to Galloway, the examination book is kept at the drive and at the surface in the maintenance planner's office, yet it could not be found at the time of the inspection. (Tr. 966-967).

Mark Bedwell, the shift maintenance foreman, conducted the trouble shooting when the alarm failed to activate. He determined that the flow to the box was good and then began to examine the electrical box where he found that a neutral wire had been pulled out of the channel in the box. He repaired the problem by reattaching the wire. (Tr. 978). He agreed with DiLorenzo that it took a little time to find the problem, but he disagrees that he had to reconfigure the box in order to make the visible alarm operational.

Additional witnesses for the operator testified that the examination was done weekly, as required by the regulation, and that the results of the tests of the fire suppression system are kept

in the computer and in a book on the surface, as well as in an examination book kept underground. Eventually, all books were found and presented to the Secretary. One witness, Kenneth Shuts, knew the mine was looking for the examination books and observed that the books had recently been placed in protective covers and moved from the starter box to the top of the box. (Tr. 990). Shuts told DiLorenzo that the system had been operational since the belt move, but DiLorenzo would not discuss it. (Tr. 992). However, after DiLorenzo mentioned that he thought the system had not functioned for some time, Shuts pulled the data base logs and satisfied himself that the system was activated and operated as it should. *See* BB Ex. R-KKK; (Tr. 993-995). In order to demonstrate the functionality of the warning system, and to show that the weekly examinations had been conducted on the belt fire suppression system, there are a number of records of the system kept both underground and in the office at the surface.

The Secretary has not provided enough evidence to support the violation as alleged. The fact that the book was missing, and missing for the remainder of the shift, along with the fact that the system did not operate at the time it was tested, is not enough to support a finding that the weekly examination was not conducted. The Secretary does not indicate when the last examination was made. Instead, because the book could not be found, she assumes that the last examination was two weeks prior when the system was put in place. There is little evidence about the examination book, what was reviewed, and what it demonstrated once it was discovered. The Secretary did not establish that the weekly examination had not been conducted or, if it had been, that it was inadequate. The witnesses for Air Quality indicated that the examination was conducted weekly, that all aspects of the system were tested, and that the condition cited by DiLorenzo would have been discovered during the next weekly examination.

The Mine Act imposes upon the Secretary the burden of proving each alleged violation by a preponderance of the credible evidence. *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1878 (Nov. 1995), *aff'd sub nom. Sec'y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998) (quoting *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989)). The preponderance standard, in general, means proof that something is more likely than not. *Id.* at 1838. There is not enough evidence presented by the Secretary to meet the burden of proof. Therefore, the citation is vacated.

C. Docket No. LAKE 2009-570

This docket contains sixty-three (63) violations with a total proposed penalty of \$262,994. The parties have resolved a number of the violations, leaving eleven for decision here.

1. *Citation No. 8415735*

On April 20, 2009, Inspector Anthony DiLorenzo issued citation number 8415735 to Black Beauty for a violation of section 75.1403-5(g), based upon an earlier notice to provide safeguard. The citation alleges that:

A clear travelway at least 24 inches wide was not being provided on both sides of the energized 1 "B" conveyor belt. Water, mud, rock and coal was observed at crosscut #62 in the beltline up to 13 inches in depth, 17.5 feet in width and up to 30 feet in length. At crosscut #51-#52 no clear walkway was provided in the beltline due to rock, coal, curtain and water measuring up to 9 inches in depth, 16 feet wide and up to 20 feet in length.

The inspector initially found that an injury was unlikely to occur, but that any injury could reasonably be expected to result in lost workdays or restricted duty. Further, he found that one person would be affected, and that the violation was non-S&S and result of moderate negligence. He subsequently modified the order to reflect that an injury was reasonably likely and that the violation was S&S and the result of high negligence. The Secretary has proposed a civil penalty in the amount of \$3,405.

a. **The Violation**

Inspector DiLorenzo testified that he has been an authorized representative of the Secretary since 2008. He is currently, and has been, the supervisor at Vincennes since the summer of 2010. He worked in mines during his senior year of high school in 2003, and through college, where he earned a degree in safety management. He conducted mine examinations and worked as a lead man while working in the mines. (Tr. 839-840).

On May 11, 2009, DiLorenzo walked the beltway at the 1 B conveyor while he conducted an inspection of the Air Quality mine. He observed sufficient water in the travelway to hinder walking. According to DiLorenzo, the water limited the travel area to less than 24 inches, thereby violating a safeguard that had been issued to the mine in 2003, Sec'y Ex. 45, and modified in 2007, Sec'y Ex. 46. The water was dark and murky as a result of the rock, coal and debris on the bottom, thereby making it difficult to see the mine floor. (Tr. 841-843). Absent the water and mud, the travelway was the 24 inches required by the safeguard. (Tr. 844-845). The safeguard specifically requires that "a clear travelway at least 24 inches wide be provided on both sides of all belt conveyors." The modification of the safeguard adds that the travelway "shall be clear of mud and water." (Tr. 845).

DiLorenzo observed the water and mud at two separate areas along the belt; first, near crosscut 51-52 and, second, near crosscut 62. (Tr. 849). In each area, the water and mud hindered the ability to travel along the belt and prevented the existence of a clear 24 inches of travelway. The rock and coal in the water, along with the water itself, created a slip, trip, and fall hazard. The water depth of 13 inches reached to the middle of DiLorenzo's calf. (Tr. 874).

While the mine does not dispute that the travelway contained water, thereby limiting the access to less than 24 inches, the mine does dispute that the water created a hazard. Damian Horst, a utility worker for the mine who accompanied DiLorenzo, testified that there was water covering the walkway, but the mine examiner had continued to conduct his examinations. It was Horst's belief that the water was not deep enough and that the bottom could be seen, thereby eliminating any hazard. However, Horst agreed that he would have listed the condition in the belt examination book as a hazard. (Tr. 885-886).

Rick Carter, the mine manager, abated the citation after observing the condition. He believed that there was "a small amount if (sic) water at 61/62 [crosscut] and then . . . from that area down to the 50's where the water had been coming through the walls." (Tr. 895). When Carter arrived, miners were mucking water at one location. Carter used a pump at the other location to remove the water, and then rock dust was put down to dry all the areas. (Tr. 895-896). After the belt was shut down, he saw that the bottom belt spray was stuck and was causing water to leak and accumulate in the area. Carter testified that he was also aware that washing equipment nearby had caused water to seep through the walls. (Tr. 897). While Carter testified that he discovered the notes in the examination books about the water and had people working in the wet areas, shoveling and rock dusting the walkway, I note that his testimony was not specific about when the work was done. Carter reviewed the mine reports and explained that on 4/15/09 the examination book indicated work on water in 1 B belt. The same is true on 4/16/09. (Tr. 900). At some point prior to the citation being issued, Carter had been told by an examiner that water was coming into the beltway, but he didn't know where. Carter responded by getting involved and sending workers to shovel and rock dust. However, there is no evidence that any pumps were used until after the citations was issued. It took just one pump about ten to 20 minutes to pump out the water at 62 crosscut once the citation was issued. (Tr. 912). I do not find Carter to be a credible witness.

The mine has raised the issue of the validity of the safeguard itself. Prior to hearing, the mine filed a motion to dismiss citation numbers 8415735, 8415371, 8415372, and 8415373, which are all based on the safeguard at issue. (See Black Beauty Mot. to Dismiss). Black Beauty alleges that the notice to provide safeguard and subsequent modifications are invalid and,

therefore, the citations issued for violations of such should be vacated. Black Beauty makes two arguments in support of its motion. First, Black Beauty argues that the notice to provide safeguard as originally issued, and the second modification of that safeguard, do not specifically identify a hazard. Second, Black Beauty argues that the second modification of the notice to provide safeguard does not provide any “indication that it was based on specific conditions that actually existed at the mine.” *Id.* at 6.

The Secretary argues that the notice to provide safeguard, as originally issued, identifies with necessary specificity the hazard of “‘rib coal and rib rock’ blocking the travelway.” Sec’y Resp. to Mot. to Dismiss 3. Moreover, the second modification of the notice to provide safeguard identifies with necessary specificity the hazard of “‘mud and water’ in the travelways.” *Id.* at 4. A reading of the safeguard makes it clear that a 24 inch clear travelway on each side of the belt is required and that to have it otherwise would create a walking hazard along the belt.

Section 314(b) of the Mine Act grants the Secretary authority to issue “[o]ther safeguards adequate, in the judgment of an authorized representative of the Secretary, to minimize hazards with respect to transportation of men and materials.” 30 U.S.C. § 874(b). A representative of the Secretary, generally an inspector, may issue a notice to provide safeguard only after “determin[ing] that there exists . . . an actual transportation hazard that is not covered by a mandatory standard.” *Southern Ohio Coal Co.*, 14 FMSHRC 1, 8 (Jan. 1992). The Commission has held that, because a notice to provide safeguard is issued by an inspector and is not subject to the notice and comment procedural protections of section 101, the language of a notice to provide safeguard “must be narrowly construed” and is “bounded by a rule of interpretation more restrained than that accorded promulgated standards.” *Southern Ohio Coal Co.*, 7 FMSHRC 509, 512 (Apr. 1985). In recognition of such, and in order to provide proper due process, a notice to provide safeguard “must identify with specificity the nature of the hazard at which it is directed and the conduct required of the operator to remedy such hazard.” *See id.*; *see also Cyrus Cumberland Resources Corp.*, 19 FMSHRC 1781, 1784-1785 (Nov. 1997).

On February 4, 2011 I issued an order denying the mine’s motion to dismiss in which I noted I agree that, in order for a safeguard to be validly issued, it must be based on specific conditions that actually existed at the mine. In *Southern Ohio Coal Co.*, the Commission stated that “[t]he Secretary is required to demonstrate only that the inspector evaluated the specific conditions at the particular mine and determined that a safeguard was warranted in order to address a transportation hazard.” 14 FMSHRC 1, 14 (Jan. 1992). The Secretary has the burden of establishing the validity of a safeguard.

At hearing, the Secretary was required to establish that the second modification of the notice to provide safeguard was issued based upon specific conditions that actually existed at the mine. To that end, the Secretary called Kenny Benedict who was present when the modification to the safeguard was issued in August, 2007. Benedict recalled mud and water in the travelway and along the belt, that was deep enough that he avoided walking through it. (Tr. 592). The Secretary also introduced the field notes of the issuing inspector, Sec’y Ex. 72, and Benedict testified that the safeguard and notes were written as a result of finding water and mud in the travelway, thereby making it difficult, if not impossible, to walk along the belt. (Tr. 603). The safeguard, as originally issued, requires at least 24 inches on each side of the conveyor. The modification also requires 24 inches and adds that the travelway be clear of water and mud. The general hazard identified by the safeguard and modification is obvious, that of water and mud obstructing the use of the 24 inch travelway. A miner should be able to travel along the belt without fear of slipping and falling. Given the nature of safeguards, and this particular safeguard, the face of the notice need not be as detailed and specific as Black Beauty would require. This safeguard requires a 24 inch travelway, and specifically requires that the 24 inch travelway be free of water and mud. I find that the Secretary has demonstrated the inspector evaluated the conditions at the mine and determined that the safeguard was warranted. I further find, as I did in my previous order, that this safeguard identifies with specificity the hazard at which it is directed and what is required to abate the violation of such safeguard.

The Secretary has met her burden of establishing the validity of the safeguard. DiLorenzo testified, without dispute, that there was water to a depth of 13 inches. I find that a clear 24 inch travelway along the belt was not provided. Accordingly, I find that a violation has been established.

b. Significant and Substantial

I have found that there is a violation of the mandatory safety standard. Second, I find that a discrete safety hazard existed as a result of the violation; mud, water, rock and coal preventing safe travel along the belt line. DiLorenzo observed the water and mud at two distinct areas along the belt. The conditions hindered the ability to travel and did not provide the required 24 inches of travelway. The water contained rock and coal, making it murky and even more of a travel hazard according to DiLorenzo. (Tr. 847-850). According to DiLorenzo, any fall would result in lost workdays or restricted duty due to injuries such as broken bones, strained ankles or knees, or head injuries. He determined that only one miner would be exposed. (Tr. 848). Witnesses for the mine credibly testified that they disagreed with DiLorenzo and asserted that the water was not as deep or as murky as he described.

Air Quality argues that a violation of a safeguard may not be designated as S&S because it does not qualify as a violation of a mandatory standard. According to the Respondent, even if the violation meets the *Mathies* test for S&S, the Secretary is prohibited from designating it as such. The Commission has disagreed with the mine's argument and, instead, has determined that a violation of a safeguard is a violation of a mandatory safety standard and, therefore, can constitute a S&S violation. *Wolf Run Mining Company*, 32 FMSRHC 1228, 1236 (Oct. 2010). In spite of such, in this case the Secretary has not met her burden of establishing that the violation was S&S. There is a dispute as to the condition of the water and exactly what 13 inches means, i.e., over the shoes or up to the calf, and a dispute about whether the bottom could be seen while wading through the water. DiLorenzo briefly mentioned that he has seen people fall in water, but he did not establish what the result of falling in this particular part of the mine would mean. Hence, while I believe that the water created a hazard to those walking in it, I find that the Secretary has not shown that this particular violation is reasonably likely to lead to an injury-causing event. In light of the foregoing analysis, I find that the Secretary has not met her burden of proving that the violation was S&S.

c. Negligence

DiLorenzo reviewed the examination books when he returned to the surface and found an entry for April 20th that mentions "crosscut 61 to 62 excessive water intake walkway." Sec'y Ex. 30; (Tr. 854). As far back as April 14th, the examination book shows a notation for water along the 1 B beltway. DiLorenzo reviewed 11 or 12 exams that mentioned water in the 1 B beltway. Some of those exams contained a notation that work was in progress. DiLorenzo explained that the work in progress was not enough, as the water remained and continued to be noted in the examination records.

DiLorenzo estimates that the mine had ample time to correct the problem. While Carter testified that he sent some workers to shovel and put down rock dust, it wasn't clear when this occurred or how often he did so. It is undisputed that he did not resort to a pump until after the citation was issued, nor did he take the time to discover the source of the water until that time. Taken as a whole, the testimony demonstrates that the mine did not take the issue seriously and made little, if any, effort to correct a hazard that had been listed in the examination books for nearly a week. The mine was indifferent, at best. I find that the violation was the result of high negligence. I assess a penalty of \$2,500.

2. *Citation No. 8415779*

On May 11, 2009 Inspector Anthony DiLorenzo issued a citation for a violation of the

ventilation plan, and cited to 30 C.F.R. § 75.370(a)(1). The violation alleges that “[t]he approved ventilation plan was not being complied with on MMU 005 on the Co. #19 Stamler feeder located in the #4 entry between crosscuts #8-#9 on the 5 ‘C’. The energized feeder did not have any functioning water sprays while mining. The water to the feeder was shut off.” The inspector found that the violation was reasonably likely to result in a permanently disabling injury, that three persons would be affected, that the violation was S&S, and that it was the result of the operator’s high negligence. A penalty of \$9,634 has been proposed.

a. The Violation

DiLorenzo arrived at the Air Quality mine on May 11, 2009, to conduct a spot inspection, primarily of the ventilation system. He traveled to the MMU 005 where he observed the No. 19 feeder in operation and found that the water sprays were not functioning. According to DiLorenzo, this condition was a violation of the mine’s approved ventilation plan. (Tr. 1019-1020). After further investigation, he found that the water valve supplying water to the feeder was turned off. The ventilation plan requires that a minimum number of water sprays must be maintained operational at belt transfer points, one at each transfer point, and loading points such as the one at the ratio feeder. Sec’y Ex. 33 p. 9 ¶ 2(a); (Tr. 1021-1022). The inspector testified that the feeder must have at least one spray, which I take to mean that the one spray should be turned on, or operational, during coal production. (Tr. 1022). The lack of working sprays created a large, visible cloud of dust for one and a half crosscuts. (Tr. 1021). The mine does not dispute that the water valve to the sprays was turned off or that there is a violation of the ventilation plan. Hence I find that there is a violation as alleged.

b. Significant and Substantial

I have determined that there is a violation of a mandatory standard and I agree with the Secretary that the lack of water sprays, as required by the ventilation plan, allows respirable dust to enter into the atmosphere where miners are working, thereby, creating the hazard of overexposure to respirable dust. Over time, the exposure to dust causes lung disease, specifically black lung. Three operators of the coal hauling equipment who traveled in the area were exposed to the respirable dust. The coal haulers continuously rotate between moving to the feeder, dumping, and then returning. DiLorenzo surmised that, since he could see a thick cloud of dust for one and a half crosscuts, there were quantities of respirable dust in the air. (Tr. 1025). The feeder was breaking down the coal, thereby creating dust that was not controlled or suppressed as it should have been by operational water sprays. (Tr. 1023). DiLorenzo opines that the exposure to the dust in the air is likely to lead to a serious injury. (Tr. 1027).

Hayes, an MSHA health specialist, testified that an MSHA group known as the dust busters were assigned to the mine due to the dust issues. Although they had some problems getting enough valid air samples, a number of the results showed that the mine atmosphere exceeded the standard for respirable dust. Sec’y Ex. 59. The coal haulers are exposed to dust when in the area where coal is dumped onto the belt, such as the area near the feeder cited here, as well as other areas. Hayes explained that the only control of the dust is the spray at the feeder. Hayes agreed that the violation is S&S and that any exposure, even a short exposure, will cause harm to the miner. Hayes understands that one of the persons wearing a dust monitor in the area registered the dust concentration at 1.94. He stated that, even though that concentration does not exceed the concentration allowed by the regulations, it is very close. Given that close reading, Hayes believes it has the potential, like any overexposure, to lead to black lung.

Cameron McCallister, a foreman at the mine on MMU-05 on May 11, testified that he was called to the feeder to speak with the mine inspector. He saw no visible problem with respirable dust and noted no ventilation problems in the report of examinations that he reviewed. (Tr. 1070-1071). McCallister explained that, given the location of this feeder, the sprays cannot be seen when standing in certain areas and, accordingly, he believes that no one saw that the sprays were not operating that day. McCallister agrees that the valve was turned off and no sprays were

operating, but cannot explain why. He did suggest that the sprays do not operate continuously and, rather, only when coal is in the shoot. (Tr. 1072). He disagrees that the miners were exposed for the entire shift since his records indicate that mine production did not begin until about 9:40 a.m. on that day, just one hour before the citation was issued.

While the mine operator argues that miners were not exposed to dust for any length of time, and that the only reading available showed an exposure concentration below the 2.0 ceiling, I find that, over that time period, there remains sufficient evidence of a hazard. The Commission has held that the overexposure to coal and quartz dust resulting from a violation of the respirable dust standards, i.e., 30 C.F.R. §§ 70.100 or 70.101, is presumed to be S&S. *U.S. Steel Mining Co., Inc.*, 8 FMSHRC 1274, 1281 (Sept. 1986); *Consolidation Coal Co.*, 8 FMSHRC 890, 899 (June 1986). The Commissioners reached this conclusion based on “the nature of the health hazards at issue, the potentially devastating consequences to affected miners, and the strong concern expressed by Congress for the elimination of occupation-related respiratory illnesses to miners.” *U.S. Steel*, 8 FMSHRC at 1281. While there can be no such presumption in this case, since a respirable dust standard is not involved, the same concerns still apply. This is particularly true here, where the exposure was extensive and could have lasted at a minimum of one hour. Therefore, I find that because of the visible dust in the air, as well as the length of time the violation continued, it was reasonably likely that an injury would result; and that the injury would be serious and potentially result in silicosis and/or pneumoconiosis. Therefore, I conclude that the violation was S&S.

c. Negligence

DiLorenzo issued this citation with a designation of high negligence because, in his view, the lack of sprays should have been noted during the preshift examination. DiLorenzo believes that it is reasonable to assume that the feeder was operating without any sprays for the entire shift, which began at 7:00 a.m. and continued until the time he issued the citation three hours later. (Tr. 1026-1027). DiLorenzo surmises that the water was probably turned off when the belt was moved during the previous shift, as it is a general practice to turn off the water during the move. (Tr. 1027). This area of the belt had been examined by the belt examiner at 8:30 a.m., but the exam books showed nothing was noted. In addition, the foreman should have checked during the onshift, yet there is nothing to demonstrate that he had conducted an onshift examination. (Tr. 1028).

McCallister disputes DiLorenzo’s assumption that the feeder was operating when the belt examiner walked the area at 8:30 a.m. He credibly explained that, due to problems at the mine, coal was not produced until at least 9:40 a.m. No sprays would be expected to be turned on until coal entered the chute. (Tr. 1074). The citation was terminated by turning the valve on, which took less than a minute to do. (Tr. 1073). McCallister admits that he was in the process of doing his dust parameter checks and had not yet made it to the feeder when DiLorenzo found the violation. He agrees that he is obligated to check the sprays before he begins cutting coal, but he had not done that by 10:45 that day. Although McCallister’s testimony, as well as DiLorenzo’s, is confusing in this regard, there is not substantial evidence to support that this violation is anything more than ordinary negligence. I assess a penalty of \$5,000.

3. Citation No. 7445937

Quentin Blair issued this violation on May 7, 2009, for a violation of the mine’s ventilation plan. The citations alleges the following:

The operators approved ventilation plan was not being followed on the 004-0 and 044-0 MMU. The operators approved plan requires a line curtain to be installed in all working places. The installed line curtains were rolled up and nailed to the curtain boards in entries 0 thru 9. Methane was detected during this inspection in entries 0 through 9 ranging from

0.1% to 0.6%. If not corrected this condition will cause a serious accident.

The inspector determined that an injury or illness resulting in lost workdays or restricted duty was reasonably likely to occur, that 13 persons were affected, that the violation was S&S, and that it was the result of moderate negligence. A penalty of \$5,961 has been proposed.

a. The Violation

Quentin Blair is employed by MSHA as a coal mine inspector and electrical specialist. He has 16 years of underground mining experience in various positions, including crew leader, electrician, and others. On May 7, 2009, Blair arrived at the mine around 2:00 a.m., met with the shift foreman, checked the examination books, and then traveled underground. The crew was getting ready for a belt move in the number 4 section when he arrived, and 13 miners were cleaning and doing maintenance in the area. (Tr. 614-615). Blair immediately noticed that the ventilation devices, the check curtain, back up curtain, and line curtains were rolled up and were not serving their intended purpose. He issued a citation for a violation of section 75.370(a) for a failure to follow the approved ventilation plan. The ventilation plan requires that the maximum curtain setback distance during clean up activities shall be 55 feet from the deepest corner of penetration or point of deepest penetration. Sec’y Ex. 33, p. 4, ¶ 6. Blair explained that, when doing the clean up, the curtains have to be in place and extended, and not rolled up. (Tr. 618). The curtains were not directing ventilation in the area as required by the plan and, as a result, a hazard in the form of methane accumulation was created. Blair took readings with his methane detector and checked nine areas, all with curtains rolled up in the entries, and found from 0.1 to 0.6 percent methane.

Chad Barras, who testified on behalf of the company, stated that he is familiar with the ventilation plan. In his opinion, the rolled up curtains did not violate this particular section of the plan, and the portion referred to by Blair refers to areas that are being cleaned with the continuous miner. (Tr. 658-659). It appears that, in this area, the miners may have been using a battery-powered scoop, not the continuous miner. (Tr. 626). Barras argues that the curtains were in place as required by the plan, and the fact that they were rolled up does not indicate a violation.

Page 2 of the ventilation plan refers directly to the ventilation system and contains seven items related to that system. Sec’y Ex. 33, p. 4. Item number 6 addresses clean-up activities. It reads in its entirety: “The maximum curtain setback distance during clean-up activities shall be 55 feet from the point of deepest penetration. If cutting occurs at the face during the cleanup the curtain must be within 40 feet of the deepest penetration. The scrubber will be on during the cleanup operations.” *Id.* Not only is this the only paragraph to address clean-up activities, it has a separate sentence for cleanup using the miner. Therefore, I agree with Blair that the first part of this section applies in this circumstance and that rolling up the curtains renders them ineffective. Therefore, although the curtains may be in the proper location, they are not in place such that they function effectively. The Commission has recognized that, although sections of the regulations do not literally set forth a requirement that the items function effectively, such a requirement is implicit in the standard’s language and is consistent with the standard’s underlying statutory purpose. *Cumberland Coal*, 28 FMSHRC 545 (Aug. 2006). Thus, I find that a violation has occurred.

b. Significant and Substantial

I have found a violation of the ventilation plan, and I find that the lack of effective curtains results in the hazard of methane build up in the area. According to the readings taken by Blair, methane was building as he walked the entries. The critical question then becomes, is there a reasonable likelihood that the hazard will result in an injury. Blair unequivocally stated that there is such a likelihood. First, the mine is on a five day spot inspection, and is therefore considered a gassy mine that liberates high amounts of methane. In the event the curtains remained nailed to

the wall, as Blair observed, the methane would continue to build to the explosive range. Second, the buildup of methane creates the likelihood of an explosion when combined with an ignition source in the mine. Here, he described several ignition sources, particularly those created by the electrical equipment. There was electrical equipment in the area and, in Blair's view, it was only a matter of time until there was an explosion. The battery powered scoop cleaning the face was the immediate ignition source, and the other electrical equipment, such as the miner, were also sources of ignition. Although the electrical equipment working in the area is required to be maintained in permissible condition, Blair found permissibility violations during this same inspection. Finally, the mine has a significant history of accumulation violations and permissibility violations, further leading to the likelihood of an ignition or explosion. Sec'y Exs. 60 and 64. The Secretary has established the third element of the *Mathies* formula that the hazard associated with this violation of the ventilation plan is reasonably likely to lead to an injury-producing event. The fourth element, that the injury be reasonably serious, can be reasonably assumed from the fact that the hazard in this case, the build-up of methane, will result in an explosion with a number of miners working in the area. The best those miners can hope for is a serious injury in such a situation.

Barras, on the other hand, testified that the violation was not S&S because .6 percent is not in the explosive range of methane. (Tr. 660). This practice of rolling curtains is not unusual during clean-up at this mine and is not a hazard. He further explained that before a miner goes into an area, the mine must have 7,000 cfm of air and there must be spot inspections for methane. (Tr. 662). Although this mine is on a spot inspection and methane is liberated while cutting coal, there is little liberation while cleaning up and little chance of accumulation. (Tr. 663). Air Quality methane is found primarily in the return air courses and liberation at face areas is minimal. (Tr. 663).

The Commission and courts have observed that 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); *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135-36 (7th Cir. 1995). Blair, who certainly qualifies as an experienced MSHA inspector, fully explained his reasoning and for the reasons described above, I accept his assessment that the violation was significant and substantial.

c. **Negligence**

Blair initially designated the violation as moderate negligence, but at hearing explained that perhaps the negligence was higher. (Tr. 628). He found that there was a foreman directing the clean up work, and that the foreman told Blair that it is a practice to roll up the curtains when cleaning. In Blair's view, this is a very dangerous practice. Ventilation plans are an important part of the safety and health at any mine. Compliance with the plan is essential to make certain that overexposure to respirable dust is minimized and that methane is diluted and rendered harmless. Every person, and particularly every foreman, must know the parameters of the plan and follow them carefully. I agree with Blair that this is more than moderate negligence and assess a penalty of \$10,000.

4. *Citation No. 7445941*

On May 7, 2009, Inspector Blair was conducting a regular inspection of the equipment at the Air Quality mine when he discovered a roof bolter that was not in permissible condition. Blair issued a violation which alleges the following:

The Fletcher Twin boom Roof Bolter s/n 97037 (co.no.006-012) being operated on the 004-0 and 044-0 MMU was not being maintained in a permissible condition. The following conditions were observed. 1. the rear area light had an opening greater than .005 of an inch. 2. the operators side back area light had an opening greater than .003 of an inch and two bolts

missing from the lid. This mine is on a five day spot inspection due to the amount of methane liberated.

a. **The Violation**

Quintin Blair issued this violation after examining the roof bolter and other electric face equipment. He found two parts that were not in permissible condition. Blair cited a violation of 30 C.F.R § 75.503, which requires that all electrical face equipment be maintained in permissible condition. (Tr. 629). Blair checked the electrical parts on the roof bolter and then moved on to check the gaps of each part with the feeler gauge to determine if an excessive gap existed. Blair found that the opening on the rear area light was greater than .005 of an inch, and that the side back area light had an opening greater than .003 of an inch and was missing two bolts from the lid. The regulation requires that there be no gap greater than .002. (Tr. 630). The roof bolter was not being used at the time of the examination, but was available for use and, in Blair's estimation, would have been used immediately upon the beginning of coal production. (Tr. 631). Blair discovered that bolts were missing from the back light, which led him to believe that they were in non-permissible condition for several days. He explained that the last time the permissible check was required, the bolts would have had to have been loose, in order to work their way completely out by the time he inspected the equipment

The testimony is undisputed that Blair observed an extra wide gap in the rear light, as well as the back area light, that exceeded the standard for permissibility on the roof bolter. Accordingly, I conclude that a violation has been established.

b. **Significant and Substantial**

I have found that there is a violation of a mandatory standard and that violation demonstrates a discrete safety hazard, i.e., exposing an electrical ignition source in the mine atmosphere. The impermissible equipment was found in the same area discussed above, where Blair noted that the methane levels were on the rise due to the lack of ventilation. Third, the hazard created, the exposure of an ignition source, is reasonably likely to lead to an explosion or fire. Fourth, the explosion of fire would lead to a serious injury.

Blair explained that this is a gassy mine that liberates excessive methane. His concern about methane was heightened given the gas readings he took when he wrote the ventilation violation. There were 3 other violations found on unit 4, including an accumulation of coal. Although the earlier accumulation violation had been abated, the condition did exist at the same time the permissibility violation existed. If the mine used the roof bolter while being in non-permissible condition, then it becomes a hazard likely to ignite any methane. Blair testified that, if left unabated, a fire or explosion was reasonably likely due to gas he already detected and the accumulation violation on this bolter that was issued on the same day. (Tr. 632). The testimony of Blair regarding this permissibility violation, coupled with the ventilation violation discussed above, have established that the violation is S&S.

Air Quality asserts that the violation is not S&S because the mine would have tested the face for methane prior to moving the equipment to the face. There is also a methane monitor on the bolter that would have alerted the mine to the presence of methane. (Tr. 664). Further, the ventilation at the face would have diluted any methane and moved it away from the bolter. Essentially, the mine argues that the other mandated safety precautions would negate the likelihood of an explosion or fire. However, the Federal Mine Safety and Health Commission, relying on *Buck Creek Coal, Inc.* 52 F.3d 133, 136 (7th Cir. 1995), has rejected arguments that after-the-fact safety systems reduce the likelihood of serious injury. The Seventh Circuit, in upholding the decision of the ALJ regarding the serious nature of the accumulations, determined that the existence of other safety measures to deal with a fire does not mean fires are not a serious safety hazard and, rather, the precautions are in place because of the "significant dangers associated with coal mine fires." *Id.* Here, the same rationale applies to equipment that is not

permissible and thereby introduces an ignition source into a gassy mine environment. The other mandatory safety precautions that are in place to protect against a build-up of methane do not detract from the hazard associated with the ignition source. I credit the testimony of Blair and his understanding of S&S. I find the violation to be significant and substantial. Based upon a review of all of the penalty criteria, including the history of permissibility violations, I assess a penalty of \$2,000.

5. *Citation No. 8415754*

On April 30, 2009, Inspector Anthony DiLorenzo issued citation number 8415754 to Black Beauty for a violation of 30 C.F.R. § 75.1103-5(a)(2) of the Secretary's regulations. The citation alleges the following:

The fire suppression system provided for the 5 "C" belt drive has not been installed to provide an effective warning signal. Upon activation of the system no alarm was given to all location were miners would be endangered by a belt fire or at a manned location where the posted person has telephone or equivalent communication with all persons who may be endangered.

At hearing the Secretary moved and was granted a modification of the citation to a violation of section 75.1101-10. The inspector determined that a fatal injury was reasonably likely, that two persons were affected, that the violation was S&S, and that it was the result of the operator's high negligence. A penalty of \$11,306 has been proposed.

a. **The Violation**

DiLorenzo conducted an inspection of the mine's fire suppression system at the 5C belt drive during the course of his regular inspection on April 30, 2009. The fire suppression system installed on the drive is a sprinkler system and, when tested, the system shut the belt off but no alarm, either audible or visible, was given. (Tr. 916). As a result, Lorenzo cited a violation of the regulations that requires "each water sprinkler system shall be equipped with a device designed to stop the belt drive in the event of a rise in temperature and each such warning device shall be capable of giving both an audible and visual warning when a fire occurs." 30 C.F.R. § 75.1101-10.

DiLorenzo tested the warning system a second time with the same results. The alarm, when triggered, is relayed to a surface manned location and the tracker calls down to the area to alert them to a fire. (Tr. 917). Since the alarm is monitored at the surface, DiLorenzo was able to learn that it was not functioning when the surface person failed to call down about the alarm. Finally, after the second try, they placed a call to the surface monitor to inquire about the alarm. The surface monitor confirmed that the alarm had not been sent. The Respondent has stipulated to the violation and, therefore, I find that the violation occurred as set forth in the citation. (Tr. 969).

b. **Significant and Substantial**

DiLorenzo avers that the violation creates a hazard that would lead to a fatal injury. In his view, the hazard is not having an audible alarm or warning when there is a belt fire. The lack of an audible alarm translates into a miner entering an area without knowing of, or being prepared for, a fire. Persons would enter the subject area either for routine checks, or because the belt is off, but have no knowledge of a fire because the alarm would not have sounded. Panic or confusion may ensue and lead to exposure to fire or smoke. In addition, those fighting the fire would be exposed to burns and smoke inhalation resulting in a fatal injury. This is a belt drive transfer point and, consequently, there is coal as well as hydraulic and gear oil nearby. This area is also near the working area and, since the air travels inby, the smoke would reach the workers

and they would be overcome by smoke and flames. In DiLorenzo's opinion, given that miners rely on the warning system to avoid entering a smoke or fire filled area, the lack of the audible alarm system is reasonably likely to lead to a fatal accident. Without the alarm, miners would enter the area without being prepared for the conditions and may panic or become disoriented.

I have found that there is a violation of a mandatory standard and that the violation demonstrates a discrete safety hazard, that of a faulty alarm which fails to adequately warn the miners of a fire on the belt. This is the same fire suppression system discussed in the docket above that was cited for an inadequate examination. In the earlier discussion DiLorenzo described the importance of warning the crew in the event a fire erupted on the belt.

Air Quality asserts that the violation is not S&S because the mine would have detected the malfunctioning notification system during the next weekly examination, and because there are many other safety measures in place in the case of a belt fire. Further, the mine's CO detectors are activated before a fire breaks out, which will, in turn, activate flashing lights in the section. Moreover, there is fire fighting equipment, including the sprinkler system that was intact. Essentially, Air Quality argues that the other mandated safety precautions would negate the likelihood of a fire on the belt and that other warning devices were in place. The Federal Mine Safety and Health Commission, relying on *Buck Creek Coal, Inc.*, 52 F.3d 133, 136 (7th Cir. 1995), has rejected arguments that after-the-fact safety systems such as carbon monoxide detectors, fire suppression systems, and fire retardant belts reduce the likelihood of serious injury. The Seventh Circuit, in upholding the decision of the ALJ regarding the serious nature of the accumulations, determined that the presence of other safety measures to deal with a fire does not mean fires are not a serious safety hazard, as the precautions are in place because of the "significant dangers associated with coal mine fires." *Id.*

DiLorenzo's testimony does not address the likelihood of a fire on the belt and, therefore, standing alone, it is not enough to substantiate a finding of S&S. However, when taken with the other testimony presented in these dockets as a whole, the result is different. The parties have stipulated that "[t]he Secretary and Black Beauty are free to argue that evidence admitted in the context of a particular Citation or Order is relevant to the court's determination of other Citations and Orders. Further, if the Court accepts the party's argument, the Court may consider that evidence in reaching her decision concerning those other Citations and Orders." *Jt. Ex. 1, Stip. 11.* The record is replete with testimony about accumulations rubbing in the belt at this mine, as well as other types of accumulations and ventilation violations. The record also includes testimony that the mine is a gassy mine on a five day spot inspection, and that a fire is likely to occur on the belt. Given that a fire is likely to occur, and that the audible warning to alert miners of that fire was not working, a hazard is created that would lead to a reasonably serious injury. Therefore, I find the violation to be S&S.

c. **Negligence**

In Docket No. LAKE 2009-569, I discussed the testimony of DiLorenzo, as well as various witnesses for the mine, when I addressed the issue of an inadequate weekly examination of the fire suppression system. I refer back to that testimony here. DiLorenzo designated the negligence for this violation as high. He explained that his primary reason for the high negligence was the extensive work that was necessary in order to repair the visible warning device, in addition to his belief that the condition had existed for some time. Both reasons were refuted by the witnesses for Air Quality. Bedwell, who was responsible for the repair, testified that, although it took a little time to find, an electrical wire had been knocked loose, thereby causing the warning to malfunction. A number of witnesses testified that the condition had not existed for long as DiLorenzo believed. Further, the mine produced records to demonstrate that it had been functioning. The mine observed that the system was functioning when the weekly check was last complete, and attests that they would have found this problem during the next weekly check. In considering all of the testimony, I find that the negligence was not high and was, instead, moderate. I assess a penalty of \$6,000.

6. *Citation No. 8415368*

On May 6, 2009, Inspector Phillip Herndon issued a citation to Air Quality for a violation of 30 C.F.R. § 75.400 for accumulation of combustible material. The citation alleges the following:

There was an accumulation of coal fines, fine belt shavings and coal dust, black in color and dry to the touch at cross cut No. 159 along the 3 West C belt line. The accumulation measured approximately 2 feet wide by 2 feet long by 6 inches to 10 inches deep. The belt frame work was warm to the touch w[h]ere the belt was cutting into the framework at this location by approximately 2 inches and was also turning in the accumulation of combustible material.

Herndon determined that the violation was reasonably likely to cause an injury that resulted in lost workdays or restricted duty, that three persons were affected, that the violation was S&S, and that it was the result of the company's high negligence. A penalty of \$10,437 has been proposed.

a. **The Violation**

Inspector Herndon has been an MSHA inspector for four years and has been working in mining since 1982. (Tr. 672). He conducted an inspection of the Air Quality mine on May 6, 2009. While walking the three west C belt line, he found an accumulation of coal at crosscut 159. The accumulation was located underneath the belt line and was up against the roller and the framework of the belt. (Tr. 675). He noticed that the accumulation was black in color, 100 percent coal, and it was dry to the touch. The belt was operating, but it had cut two inches into the framework, causing it to be out of alignment. (Tr. 676-677). The accumulation was warm to the touch due to "the friction of the belt it was cutting into the frame [and] heat was being generated through the frame into the pile of accumulation and the . . . roller [was] actually turning in the accumulation." (Tr. 678). The accumulation was made up of small coal fines, fine belt shavings and coal dust. Herndon testified that, if left in this condition, a fire would definitely occur. As a result, Herndon issued a citation for a violation of 30 C.F.R. § 75.400, which prohibits the accumulation of combustible material in any active working section of the mine.

Hammond accompanied Herndon and testified on behalf of Air Quality. According to Hammond, the belt had been modified in that particular area to allow scoops to dump. Hammond described seeing coal and rock on the floor, and accumulated material in contact with the roller. In his opinion it was not extensive and was only a small accumulation. (Tr. 732). It is his view that the majority of the material was from the spillage from the scoop since it was in a concise area and he saw no evidence of spillage off the belt. (Tr. 734). However, he did agree that the belt had to be realigned in order to terminate the citation.

I find that an accumulation of combustible material existed in the active working, and that the Secretary has established a violation of the cited standard.

b. **Significant and Substantial**

According to Herndon, the danger that is presented by the accumulation is that of a fire occurring which will, at a minimum, lead to a lost workdays or restricted duty injury. The injury would be smoke inhalation or burn related and would affect at least three persons. (Tr. 680). Herndon testified that, given the condition he observed, including the combustible material and ignition source, it was reasonably likely that a fire would break out. Fires on belt lines are serious hazards, and lead to burns, smoke inhalation, or worse. For example, the 2005 Aracoma belt fire involved an accumulation. That fire resulted in the loss of two miners. Here, a friction ignition source is presented by the belt running on the frame and the belt turning in the coal. The accumulation of coal dust and fines would be ignited if the belt continued to turn in the coal. The

combustible material, combined with the ignition source, is likely to lead to a fire or explosion. (Tr. 680). Herndon believed that this accumulation was S&S given that coal dust is a serious hazard and will lead to an fire or explosion.

The mine operator argues that all of the other protections required by the Mine Act and its regulations, which it alleges were properly in place at the time of the order, reduced the possibility of an injury producing event, thereby rendering it non-S&S. The Courts and the Commission have found to the contrary. In *Buck Creek Coal*, 52 F.3d 133, 136 (7th cir. 1995), the mine operator argued that carbon monoxide detectors, a fire-retardant belt, a fire suppression system, a fire brigade team, a rescue team, fire fighting equipment and ventilation all undermined the likelihood of a serious injury that would result from a coal accumulation violation. The Seventh Circuit, in upholding the decision of the ALJ regarding the serious nature of the accumulations, determined that the fact that there are other safety measures in place to deal with a fire does not mean that fires are not a serious safety hazard and, rather, the precautions are in place because of the “significant dangers associated with coal mine fires.” *Id.* While extra precautions may help to reduce some risks, they do not make accumulations violations non-S&S.

The Commission has addressed the issue of accumulations and conveyor belts a number of times. In *Amax Coal Co.*, 19 FMSHRC 846 (May 1997), the Commission upheld an ALJ’s finding that a belt running on packed coal was a potential source of ignition for extensive accumulations of loose, dry coal and float coal dust along a belt line, and that the condition presented a reasonable likelihood of an injury causing event. In addition, in *Mid-Continent Resources, Inc.*, 16 FMSHRC 1218, 1222 (June 1994), the Commission held that accumulation violations may properly be designated as S&S where frictional contact between belt rollers and the accumulations, or between the belt and frame, results in a potential ignition source for the accumulations. The Commission in *Mid-Continent* found that it was immaterial that there was no identifiable hot spot in the accumulations because continued normal mining operations must be taken into account when evaluating the circumstances. In the present case, if the violative condition had been allowed to persist, it would have reasonably led to smoke, fire and, potentially, an explosion. Further, an additional potential ignition source was present in the form of the belt rubbing the frame structure, which could generate a spark.

I have found a violation of a mandatory standard. Second, I find that the accumulations of coal turning in the belt roller presented a discrete safety hazard, i.e., the danger fire, smoke, or potentially an explosion if left unabated. Third, the above analysis establishes the more than reasonable likelihood that the hazard will result in an injury. Fourth, and finally, the injury would be serious to those fighting the fire, those who inhale the smoke, and any person caught up in an explosion. I credit the testimony of Herndon and find that the violation is S&S.

c. **High Negligence**

Herndon explained that the accumulation violation history at this mine, combined with the notice provided by earlier citations and Herndon advising the mine about the accumulation problem, lead to a finding of high negligence. Sec’y Ex. 63; (Tr. 683). Air quality was cited 102 times for accumulations during the time period from August 22, 2008 until April 30, 2009, i.e., a period of less than one year. Further, Herndon found the date, time and initials to evidence that an examination had been completed 20 minutes before his inspection. In Herndon’s view, the accumulation was not only too extensive to have happened right before his arrival, but the two inch cut into the steel frame by the belt demonstrated that it had been ongoing for some time. (Tr. 685-686). In fact, when the belt was examined at 5:00 p.m. the afternoon before the citation, the accumulation must have been present given the condition of the belt and the amount of accumulation. (Tr. 688). I find Herndon to be a credible and thorough witness.

Hammond disagrees that the violation was a result of high negligence. He believes that a scoop had dumped onto the belt just prior to the inspector’s arrival, causing the spill, which was common in that area. Further Hammond testified that this was a small accumulation in a limited

area and he saw no reason for the negligence to be high. He doesn't know if an examiner or anyone else had been in the area prior to the citation. (Tr. 735). I credit the testimony of Herndon and find that the negligence is high and assess the proposed penalty of \$10,437.

7. *Citation No. 8415370*

On May 6, 2009, Inspector Phillip Herndon issued a citation to Air Quality which alleged that “[t]he 3 West B, belt tail was observed turning in an accumulation of coal. The accumulation measured approximately 2 feet wide by 2 feet long by 8 inches to 16 inches deep.” Herndon determined that the violation was reasonably like to cause an injury that would result in lost workdays or restricted duty, that three persons were affected, that the violation was S&S, and that it was the result of the company's high negligence. A penalty of \$10,437 has been proposed.

a. **The Violation**

After discovering accumulations on the belt and issuing the citation discussed above, Herndon continued his travels on the 3 west B belt and observed a second accumulation at the tail roller. The accumulation of coal was 2 feet wide by 2 feet long by 8 to 16 inches deep. (Tr 689). The accumulation was under the tail piece, on the floor, and behind the tail roller. There was such an accumulation behind the tail roller that it had conformed to the shape of the belt roller. (Tr. 690). The discharge roller for 3 west C dumps here onto the tail piece of the B belt and Herndon could see that there was a faulty wiper which was causing at least a portion of the accumulation. (Tr. 690). Herndon described the hazard of a fire. He stated that the tail roller was turning in coal and coal fines, meaning that there was a frictional ignition source that, when mixed with the coal fines, would create a fire hazard. The three miners working nearby would be the first to notice the belt fire, attempt to extinguish it, and be exposed to the hazard of smoke inhalation.

Hammond did not dispute that the accumulation described by Herndon was present, but he focused on the safety measures in place to prevent the fire. He did agree that the material was coal, but explained that it contained some incombustible rock. Hammond saw less material than that described by Herndon, i.e., maybe only ten to twelve shovelfuls of coal and rock. I credit the undisputed testimony of Herndon that there was a coal accumulation as he described and find that there was a violation.

b. **Significant and Substantial**

Herndon explained that this violation is S&S based upon his observation of the belt roller turning in the dry coal would created a friction source that could easily ignite the dry coal. A belt fire creates a great deal of smoke and the three men in the area would be exposed to, at a minimum, smoke inhalation. I have already found that there is a violation of the mandatory standard. I find that the violation creates a discrete safety hazard, i.e., the danger of accumulations igniting and causing smoke and fire. Herndon explained that the hazard is reasonably likely to create a fire given the presence of an ignition source and the circumstances that he observed. While the coal was damp in some areas, it was dry under the roller and around the tail piece. I rely not only on Herndon's testimony regarding this accumulation but also his testimony with regard to the accumulation cited above and the hazards that result from accumulations.

Air Quality disputes that the violation was significant and substantial. According to the mine, when coal and rock move down the belt, sensors are activated, causing the water sprays to turn on. Coal is moving frequently and hence sprays are activated frequently. Much of the material was coal, but there was also a lot of incombustible rock. Hammond described the coal as moist, and being shaped by the belt. (Tr. 736-738). Hammond did not believe that the coal in the belt was an ignition source because it was wet and the water would continue to be applied. The moistness also indicated that the coal accumulation had not existed for the number of hours that

Herndon suggested. Hammond did not consider the condition serious, nor as extensive as the inspector described. (Tr. 739). There are belt sprays in place to control dust. Although he agreed that a belt rubbing the frame of the conveyor would create heat, it is not enough to start a fire.

As discussed in connection with the accumulation citation above, the Commission has addressed the issue of accumulations and conveyor belts in the context of an S&S analysis. *Amax Coal Co.*, 19 FMSHRC 846 (May 1997); *Mid-Continent Resources, Inc.*, 16 FMSHRC 1218, 1222 (June 1994). In any event, even if the coal was wet, the Commission has recognized that wet coal can dry out and ignite. See *Black Diamond Coal Mining Co.*, 7 FMSHRC 1117, 1121 (Aug. 1985).

The mine operator argues that all of the other protections required by the Mine Act and its regulations, which it alleges were properly in place at the time of the order, reduced the possibility of an injury producing event, thereby rendering it non-S&S. I have discussed this issue a number of times above and relying on *Buck Creek Coal*, 52 F.3d 133, 136 (7th cir. 1995) find that the other safety measures in place do not make the accumulations non S&S.

I credit Herndon's testimony in general regarding accumulations, and specifically as it applies to this violation. I find that the violation is S&S.

c. Negligence

Herndon indicated on his citation that this violation was the result of high negligence. The examiner had traveled through the area at 9:24 a.m. and Herndon arrived 11:12 a.m. By the time Herndon arrived, the coal was compact and compressed, as well as damp, but the accumulation under the roller and under the tail piece was dry. Thus, Herndon believed that the condition had existed for at least several hours. Hammond, on the other hand, asserts that the condition was present for 30 minutes or less based upon what he observed at the location. He testified that it took only a short time to shovel to abate the condition, so it could not have been as extensive as the inspector described. (Tr. 741). In reviewing all of the evidence, I find that the Secretary has not demonstrated that the violation was a result of high negligence and, therefore, I assess a penalty of \$7,500.

8. Citation No. 8415371

While Herndon was at the mine on May 6, 2009, he issued this citation for a violation of a safeguard. The citation alleges the following:

The travelway along the 3 West belt line at cross cut No. 83 was not being maintained free of mud and water as required by Safeguard No. 7591942-03. There was an incline from both directions covered in slick mud creating a slip hazard. At the bottom of the incline was a hole filled with black, murky, wet, mud measuring approximately 15 feet long by 10 feet wide by 2 feet deep.

Herndon determined that the violation was reasonably likely to cause an injury that would result in lost workdays or restricted duty, that one person was affected, that the violation was S&S, and that it was the result of the company's moderate negligence. A penalty of \$1,026 has been proposed.

a. The Violation

Herndon issued a 104(a) citation on May 6, 2009, for a safeguard violation at the 3 west C belt near the area where he had discovered accumulations of coal on the belt. At crosscut 83 he found mud and water along the belt line, making it nearly impossible to pass. The walkway

inclined in both directions along the belt and was covered with slippery mud. Herndon testified that “[a]t the bottom of the incline was a hole filled with black, murky, wet mud[.]” He explained that “[e]verything around [the area] was muddy and slick. Very, very small area to pass through it was timbered along the edge.” (Tr. 697). The condition created a slip, trip and fall hazard. The safeguard at issue, Safeguard No. 7591942-03, could be found in the in the mine file. Sec’y Ex. 46. Herndon reviewed the safeguard prior to his inspection and carried a summary of the safeguards with him. The safeguard requires a clear travelway of at least 24 inches. Contrary to the assertion of the mine, Herndon testified that there were no planks or other material available to assist walking over or around the mud and water.

Hammond, on the other hand, testified that there were two planks, each 10 to 12 inches wide, that were parallel to and on the “travelway side going up the incline.” (Tr. 743). He saw no hazard in the area, but he does not deny that there was not a 24 inch clear travelway. I note that Hammond did not describe the length of the planks, nor their position over the hole that Herndon described. Hammond testified that he did walk on the planks and was able to pass through without falling.

Kenny Benedict, an MSHA inspector and health specialist, had been with MSHA for about four years prior to the time in question. Prior to working for MSHA, he worked in numerous positions for 31 years at Old Ben Coal Company. (Tr. 590-591). In August, 2007, while a trainee inspector, he traveled with Johnny Moore when the modification to the notice to provide safeguard 7591942-03 was initially written. (Tr. 591, 603). Together they examined the belt line from one end to the other and discovered that the large quantity of water spraying onto the conveyor was causing water and mud to accumulate along the beltway. Benedict recalled that, in one area, he refused to walk through the water and mud and, instead, chose to walk around. However, Inspector Moore went through the water and had water and mud up to his knees. According to Benedict, on the day the modification was made there was no clear travelway on the edge of the water which was rib to rib and existed for a distance of 25-30 feet. (Tr. 593); Sec’y Exs. 46 and 61. The modification of the safeguard states that mud and water must be kept a clear of the 24 inch travelways on each side of the belt. (Tr. 601, 603). On cross-examination Benedict explained that the original safeguard had to do with debris, and this modification was necessary to address the more specific hazard of mud and water, but since it was along the same travelway along the belt line, a new safeguard was not appropriate. Instead, a modification was the correct way to address the issue of water and mud. Both the original safeguard and the modification address maintaining a clear walkway of 24 inches along the belt.

DiLorenzo testified regarding the original safeguard issued on May 7, 2003. He indicated that the original safeguard referred to rock, coal, or debris that prohibited clear travel in the walkway. The modification, relied on by Herndon for this violation, required that the travelway must also be free of mud and water. According to DiLorenzo, the original safeguard, addresses a rib roll at crosscut 17. Sec’y Ex. 45; (Tr. 843-844).

Black Beauty alleges that the notice to provide safeguard and its subsequent modification are invalid and, therefore, the citation issued for a violation of such should be vacated. Black Beauty makes two arguments in support of its motion. First, Black Beauty argues that the notice to provide safeguard as originally issued, and the second modification of that safeguard, do not specifically identify a hazard. Second, Black Beauty argues that the second modification of the notice to provide safeguard does not provide any “indication that it was based on specific conditions that actually existed at the mine.” BB Mot. to Dismiss 6.

I have addressed the issues raised by Black Beauty in my earlier ruling on a motion to dismiss. I further addressed the issues in my discussion above of the safeguard violation issued by DiLorenzo. The same reasoning and ruling apply to this citation. I find that the modification to the safeguard was issued as a result of conditions found at the mine at the time it was issued. I further find that the safeguard identifies with necessary specificity the nature of the hazard at which it is directed, and that it clearly sets out the conduct required to remedy the hazard, i.e.,

removal of the water and mud. *Southern Ohio Coal Co.*, 7 FMSHRC 509, 512 (Apr. 1985); *Cyrus Cumberland Resources Corp.*, 19 FMSHRC 1781, 1784-1785 (Nov. 1997). Since it is undisputed that the travelway was not clear, I find that a violation has been established.

b. Significant and Substantial

The mud and water created a slip, trip, and fall hazard. The water was murky and dark, making it impossible to see the bottom as it was traversed. The area was slippery and Herndon fell while attempting to navigate through the mud and water. (Tr. 699-700). In his view, it is reasonably likely that anyone who needed to get through the area would slip and fall in the travelway. A slip and fall would result in a blow to the head, cuts, twisted ankles, broken bones, or any other number of injuries. (Tr. 699). The following exchange between Herndon and counsel for the Secretary is telling:

Q: How did you fair when you encountered the muddy water?

A: I busted my butt in this location.

Q: Okay. How likely was it that if the mud and water had - muddy water had remained in the travelway a miner would have suffered injuries which had (sic) caused him to lose work or be placed on restricted duty?

A: Reasonably likely.

Q: Okay. And why do you say that?

A: Because I fell

Q: Okay.

A: Absolutely 100 percent sure that it would be easy to fall.

(Tr. 699-700).

Hammond did not believe that the water and mud were a hazard, but did see Herndon fall. I credit Herndon's testimony about the hazard and the likelihood that an injury would occur as a result of the hazard. Further, the injury would be of a reasonably serious nature. Therefore, I find the violation to be S&S.

Herndon designated the negligence as moderate even though he testified that, while the water had been in place for some time, the examiner did not note or remedy the problem. Herndon's testimony lacks sufficient facts to support a negligence finding higher than moderate. In light of the foregoing analysis, I assess the penalty of \$1,026 as proposed by the Secretary.

9. Citation Nos. 8415372 and 8415373

Both of these citations were issued based upon the notice to provide safeguard that requires a clear 24 inch travelway along the belt. I have ruled on the issues raised by the operator, both in the order denying their motion to dismiss and in discussing the safeguard above. Those rulings apply here. The parties have agreed to not submit any further evidence with regard to either citation. As a result, the two citations that remain at issue, Citation Nos. 8415372 and 8415373, were not addressed at hearing and, instead, the parties submitted the following: "Black Beauty stipulates that the only defenses they are raising concerning Citations 8415372 and 8415373 are (1) the Citation must be vacated because the underlying Safeguard is invalid and (2) the Court could not find the violations to be significant and substantial because safeguards are not mandatory standards." Jt. Ex. 1, Stip. 15. The parties further "stipulate that neither will present evidence particular to Citations 8415372 and 8415373." Jt. Ex. 1, Stip. 16. Accordingly, I affirm the citations as issued and assess the proposed penalty of \$3,405 for each of the violations.

10. Citation No. 8415379

On May 15, 2009 Inspector Douglas Herndon issued a citation that alleged a violation of

section 75.220(a)(1) for the mine's failure to follow its approved roof control plan. The citation alleges the following:

The approved roof control plan was not being followed on the MMU-003. A remote controlled continuous miner operator was observed positioned in the Red Zone between the coal rib and the continuous miner as it was being trammed past his body. The condition was a factor that contributed to the issuance of Imminent Danger Order number 8415378 dated 5/14/2009.

Herndon determined that the violation was highly likely to cause a fatal injury, that one person was affected, that the violation was S&S, and that it was the result of the company's moderate negligence. A penalty of \$9,122 has been proposed.

a. The Violation

On May 14, 2009 Herndon was on the MMU-003 section. As he approached the mining area he observed the continuous miner backing out from a cut. (Tr. 773-774). Herndon could not see the miner operator as the miner backed out from the cut. Herndon hurried through the crosscut and found the miner operator between the rib and miner. (Tr. 774, 776-777). He immediately issued an imminent danger order because the miner operator was in the "red zone". (Tr. 778-779). The red zone is the area between the continuous miner and the rib where the miner operator is in jeopardy of being pinned between the two. It is considered a red zone only if the pump motor is on, as it was in this case. (Tr. 779). The Air Quality roof control plan prohibits the miner operator from placing himself in the red zone. Sec'y Ex. 34; (Tr. 779-780). The roof control plan requires miners to stay out of the danger zone while trampling the miner. If it is necessary to travel between the machine and the rib, the operator must deactivate the machine by turning the pump motor off. (Tr. 781). When Herndon arrived, there was no one else in the immediate vicinity besides the miner operator. The miner operator told Herndon that he was aware of the danger of operating the miner while in the red zone, but said he was focused on keeping cables from being run over. (Tr. 782). The miner operator had two years of mining experience with six months as continuous miner operator. *Id.*

The operator does not dispute that the continuous miner operator was in the red zone between the continuous miner and the rib, and that his actions violated the roof control plan as described by Herndon. Sec'y Ex. 34, pp. 10 and 11; (Tr. 780-781, 834). After conducting an internal review of the matter, the operator terminated the employment of this miner for working in the red zone. (Tr. 806). Thus, I conclude that there is a violation of the roof control plan as alleged.

b. Significant and Substantial

Working in the red zone, with the pump motor in the on position, creates a hazard of the miner operator being crushed between the equipment and the ribs, resulting in serious injury or death. Two such fatalities have occurred in this district, including one at the Air Quality mine. (Tr. 783). According to Herndon, there have also been at least two miners permanently disabled in the same district as a result of working in the red zone. (Tr. 783-784). A miner working between the rib and the machine is standing in an area that is uneven, sloping back from the face, often slippery and wet, and often muddy; all while he has a remote control device in his hand. Herndon stated that it is highly likely that, based upon the position of the operator in the red zone, between the rib and the machine on uneven ground, the operator will be seriously injured or killed. (Tr. 784).

Mike Middlemas testified on behalf of the operator. He has been the safety manager at the Air Quality mine for a year and a half and has a total of four and a half years experience as a mine safety manager for Peabody. (Tr. 802-803). He met with Boyd, the continuous miner operator, and witnessed Boyd sign a statement regarding the red zone citation. (Tr. 804) Subsequently, the

operator terminated Boyd's employment because he violated a "cardinal" safety rule. (Tr. 806). Air Quality mine management communicates the red zone policy to miners during 40 hour orientation training and covers it in safety talks throughout the year. (Tr. 809). The rules, including the rule about the red zone, are also posted and miners are told that if the rules are violated, the miner can be terminated. (Tr. 809-810). Middlemas agreed that a violation of the policy regarding the red zone can result in a serious injury or a fatality. (Tr. 810, 823). The operator did present one witness, Cameron McCallister, who stated that it was not likely that Boyd would have inadvertently enabled the machine while in the red zone because "it takes a little bit to get it to enable." (Tr. 829-830).

I have found a violation of a mandatory standard. Next, I find that the violation contributes to a discrete safety hazard, that of being crushed while standing in an uneven, potentially slippery area between a large energized mining machine and the rib. I find that the hazard is likely to lead to an injury and that the injury will be serious or even fatal. This is, without a doubt, a S&S violation.

c. Negligence

Although Herndon designated the violation with moderate negligence, both parties focused large parts of their evidence on negligence. Herndon testified that approximately one week before issuing this citation he issued a different citation for a red zone violation at the Air Quality mine. (Tr. 785). The operator highlighted the mine's safety rules and the training provided to miner operators regarding the red zone. (Tr. 809, 812).

The miner operator, Boyd, was an hourly employee. The Commission has long held that the negligence of a "rank-and-file" miner cannot be imputed to the operator for civil penalty purposes. *Fort Scott Fertilizer-Cullor, Inc.*, 17 FMSHRC 1112, 1116 (July 1995); *Western Fuels-Utah, Inc.*, 10 FMSHRC 256, 260-61 (Mar. 1988); *Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1464 (Aug. 1982) ("SOCCO"). Specifically, the Commission has stated that: "[W]here a rank-and-file employee has violated the act, the operator's supervision, training and disciplining of its employees must be examined to determine if the operator has taken reasonable steps necessary to prevent the rank-and-file miner's violative conduct." SOCCO at 1464. Given that Boyd was trained, and the mine made reasonable efforts to alert employees to the dangers associated with the red zone, I conclude that the violation is the result of moderate negligence and assess the penalty of \$9,122 as proposed.

II. PENALTY

The principles governing the authority of Commission administrative law judges to assess civil penalties de novo for violations of the Mine Act are well established. Section 110(I) of the Mine Act delegates to the Commission and its judges the "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(I). The Act delegates the duty of proposing penalties to the Secretary. 30 U.S.C. §§ 815(a), 820(a). Thus, when an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess the penalty. 29 C.F.R. § 2700.28. The Act requires, that in assessing civil monetary penalties, the Commission [ALJ] shall consider the six statutory penalty criteria:

[1] the operator's history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] the effect 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).

I accept the stipulation of the parties that the penalties proposed are appropriate to this operator's size and ability to continue in business and that the violations were abated in good faith. The history shows the past violations at this mine, including citations for the standards discussed above. The size of the operator is large. I have discussed the negligence and gravity associated with each citation and, except where noted, I accept the designations as set forth in each citation. I assess the following penalties:

Docket No. LAKE 2009-569

Citation No. 9942563 \$ 20,000.00
 Order No. 8415738 \$ 4,000.00
 Order No. 7522964 \$ 5,000.00
 Order No. 8415756 Vacated

Docket No. LAKE 2009-570

Citation No. 8415735 \$ 2,500.00
 Citation No. 8415779 \$ 5,000.00
 Citation No. 7445937 \$ 10,000.00
 Citation No. 7445941 \$ 2,000.00
 Citation No. 8415754 \$ 6,000.00
 Citation No. 8415368 \$ 10,437.00
 Citation No. 8415370 \$ 7,500.00
 Citation No. 8415371 \$ 1,026.00
 Citation No. 8415372 \$ 3,405.00
 Citation No. 8415373 \$ 3,405.00
 Citation No. 8415379 \$ 9,122.00

Total: \$ 89,395.00

The parties have settled the remaining citations and orders contained in these dockets. The settlement terms are as follows:

Citation/Order No.	Originally Proposed Penalty	Settlement Amount	Modifications
LAKE 2009-569			
8415376	\$4,000.00	\$4,000.00	
Docket Total	\$4,000.00	\$4,000.00	
LAKE 2009-570			
8415331	\$3,143.00	\$635.00	Reduction in gravity to Unlikely and Non-S&S.
8415716	\$1,026.00	\$207.00	Reduction in gravity to Unlikely and Non-S&S.
8415718	\$8,209.00	\$6,567.00	
8415719	\$3,405.00	\$2,724.00	
8415335	\$634.00	\$191.00	Reduction in gravity to Lost Workdays or Restricted Duty.
8415338	\$3,143.00	\$2,514.00	

8415724	\$1,203.00	\$1,203.00	
6675755	\$362.00	\$362.00	
8415734	\$5,961.00	\$5,961.00	
8415737	\$3,143.00	\$2,514.00	
6681988	\$8,893.00	\$500.00	Reduction in gravity to Unlikely, Non-S&S, and 4 persons affected.
6681826	\$1,795.00	\$688.00	Reduction in gravity to 4 persons affected.
6675756	\$1,530.00	\$1,203.00	Reduction in gravity to 1 person affected.
6681989	\$5,961.00	\$4,769.00	
6675757	\$1,026.00	\$207.00	Reduction in gravity to Unlikely and Non-S&S.
8415348	\$5,503.00	\$1,112.00	Reduction in gravity to Unlikely and Non-S&S.
8415741	\$3,689.00	\$3,689.00	
6675758	\$2,282.00	\$874.00	Reduction in gravity to 4 persons affected.
6675759	\$1,657.00	\$634.00	Reduction in gravity to 4 persons affected.
6675760	\$2,282.00	\$874.00	Reduction in gravity to 4 persons affected.
6675761	\$6,996.00	\$6,996.00	
8415744	\$4,329.00	\$2,405.00	Reduction in gravity to Unlikely and Non-S&S.
6681992	\$10,437.00	\$807.00	Reduction in gravity to Unlikely, Non-S&S, and 4 persons affected.
8319878	\$224.00	\$224.00	
8491715	\$8,893.00	\$1,796.00	Reduction in gravity to Unlikely and Non-S&S.
8415751	\$1,412.00	\$800.00	Reduction in gravity to Unlikely and Non-S&S.
8319880	\$100.00		Vacated.
7421674	\$3,143.00	\$634.00	Reduction in gravity to Unlikely and Non-S&S.
6681993	\$5,503.00	\$4,440.00	Reduction in gravity to 4 persons affected.
7421675	\$11,306.00	\$2,282.00	Reduction in gravity to Unlikely and Non-S&S.
7054587	\$12,248.00	\$243.00	Reduction in gravity to Unlikely, Lost Workdays or Restricted Duty, Non-S&S, and 3 persons affected.
8415357	\$745.00	\$745.00	
8415755	\$100.00		Vacated.
9942569	\$18,271.00	\$3,406.00	Reduction gravity to 7 persons affected. Reduction in negligence to Moderate.
8415759	\$5,961.00	\$5,961.00	

7445931	\$2,678.00	\$541.00	Reduction in gravity to Unlikely and Non-S&S.
7445933	\$2,678.00	\$541.00	Reduction in gravity to Unlikely and Non-S&S.
7445935	\$2,473.00	\$500.00	Reduction in gravity to Unlikely and Non-S&S.
8415766	\$946.00	\$946.00	
8415369	\$1,944.00	\$1,203.00	Standard violated modified to 75.1731(a).
7445936	\$1,657.00	\$1,657.00	
7445938	\$946.00	\$946.00	
7445942	\$2,678.00	\$541.00	Reduction in gravity to Unlikely and Non-S&S.
7445946	\$2,473.00	\$500.00	Reduction in gravity to Unlikely and Non-S&S.
8224833	\$1,795.00	\$1,795.00	
8224835	\$1,795.00	\$363.00	Reduction in gravity to Unlikely and Non-S&S.
8415778	\$946.00	\$946.00	
8415780	\$5,961.00	\$5,961.00	
8415375	\$2,106.00	\$2,106.00	
8415377	\$334.00	\$334.00	
8415786	\$1,026.00	\$309.00	
8224846	\$5,961.00	\$1,203.00	Reduction in gravity to Unlikely and Non-S&S.
Docket Total	\$192,912.00	\$88,559.00	
Overall Total	\$196,912.00	\$92,559.00	

I have considered the representations submitted by the parties and I conclude that the proposed settlement is appropriate under the criteria set forth in section 110(I) of the Act. The motion to approve settlement is **GRANTED**.

III. ORDER

Based on the criteria in section 110(I) of the Mine Act, 30 U.S.C. § 820(I), I assess a total penalty of \$181,954.00 for both the citations and orders that were heard and those that were settled. Black Beauty Coal Company is hereby **ORDERED TO PAY** the Secretary of Labor the sum of \$181,954.00 within 30 days of the date of this decision.

/s/ Margaret A. Miller
 Margaret A. Miller
 Administrative Law Judge

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June 22, 2011

LAKEVIEW ROCK PRODUCTS, INC., Contestant	:	CONTEST PROCEEDING
	:	
v.	:	Docket No. WEST 2010-1856-RM
	:	Citation No. 6580393; 09/08/2010
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Respondent	:	Lakeview Rock Products Mine ID 42-01975

DECISION

Appearances: Timothy S. Williams, Esq., Office of the Solicitor, U.S. Department of Labor
Denver, Colorado, for the Secretary of Labor;
Kevin R. Watkins, Esq., Hughes General Contractors, Inc., North Salt Lake, Utah,
for Lakeview Rock Products, Inc.

Before: Judge Andrews

This Contest Proceeding is before me pursuant to Section 105 of the Federal Mine Safety
and Health Act of 1977, 30 U.S.C. § 801 et seq. (the “Act”).

The Procedural History

The parties in conference and by email made a joint request for summary decision, and
have filed a Joint Statement of Undisputed Facts, Joint Exhibits of the Parties, Cross-Motions for
Summary Decision, and Cross Oppositions to the motions. The case involves a citation issued by
the Department of Labor’s Mine Safety and Health Administration (“MSHA”) under Section 104
(a) of the Act alleging a violation of 30 C.F.R. §56.9300(b) by Lakeview Rock Products, Inc.
 (“Lakeview”).

The Citation

Section 8, Condition or Practice, reads as follows:

The six truck scales located on the mine property were not provided with berms or guard
rails that were mid-axle height of the largest self-propelled mobile equipment that travels
the roadway. The mid-axle height of the trucks that run on these scales are [*sic*]
approximately 24 inches. The rub rails that were provided on the scales were between 8
and 8.5 inches in height. Several sections of these rub rails in various areas on different
scales had broken welds and pipe. These scales are used by approximately 5 to 100 plus
trucks per day. The broke [*sic*] sections of the rub rails as well as the height of the scales
AGL creates a rollover hazard should contact occur. The two scales at the upper pit were
approximately 54 inches AGL. The two scales at the lower pit were approximately 36
inches AGL. The two scales at the Thomas pit were approximately 32 inches AGL.

Berms or guardrails shall be at least mid-axle height of the largest self-propelled mobile equipment which usually travels the roadway. Joint Exhibit No. 1.

Lakeview timely contested the citation.

The Issue Presented

Whether Citation No. 6580393 issued to Lakeview on September 8, 2010 is valid.

The Stipulations

The Joint Statement of Undisputed Material Facts is as follows:

The Secretary of Labor (the “Secretary”) and Lakeview Rock Products, Inc. (“Lakeview”) through their counsel, stipulate to the following undisputed material facts to be submitted with their respective Motion for Summary Decision to be filed in this matter:

1. At all times relevant to this proceeding, Lakeview was an “operator” as defined by section 3(d) of the Federal Mine Safety and Health Act of 1977 (“the Act”).
2. At all times relevant to this proceeding, Lakeview operated a sand and gravel quarry at 2600 North Beck Street, Salt Lake City, Utah 84054 (“the mine”). The quarry is a “mine” as defined by Section 3(h)(1) of the Act, and its mining services affect interstate commerce. Lakeview is Assigned Mine Id. No. 42-01975.
3. Lakeview is subject to the jurisdiction of the Mine Act, and the Administrative Law Judge has jurisdiction in this matter.
4. On September 8, 2010, MSHA Inspector Mike Tromble (“Inspector”) issued to Lakeview a Citation, numbered 6580393 (“Citation”) for allegedly violating 30 CFR 56.9300(b). 30 CFR §56.9300(b) reads, in part:
 - (a) Berms or guardrails shall be provided and maintained on the banks of roadways where a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment.
 - (b) Berms or guardrails shall be at least mid-axle height of the largest self-propelled mobile equipment which usually travels the roadway. A copy of the Citation is attached as “Joint Exhibit 1.”
5. The Citation was properly served by a duly authorized representative of the Secretary upon an agent of Lakeview on the date and at the place stated therein, and may be admitted into evidence for the purpose of establishing its issuance, and not for the truthfulness or relevancy of any statements asserted therein.
6. The Inspector alleged in the Citation that three pair of scales that are located at the mine did not comply with § 56.9300(b). (Joint Exhibit 1.)
7. Lakeview’s mine includes three pits from which sand and gravel is mined. Both customers and Lakeview employees drive their trucks onto the mine property and sand and gravel products are loaded by Lakeview loaders into either the beds of the trucks or trailers being pulled by tractor trucks. The trucks then drive with their loaded sand and gravel products to one of the six scales, and drive the trucks on the scales to be weighed. At the entrance of the scales at the lower and upper pits (as described in paragraph 8 below) there are signs measuring eighteen inches wide by twenty-four

inches high that read “Stop Before Entering Scale, Then Idle On.”

8. There are a total of six scales at Lakeview’s pits; two at what is referred to as the “Thomas Pit,” two at what is referred to as the “Lower Pit,” and two at what is referred to as the “Upper Pit.” All of the scales are elevated in order for Lakeview employees to perform annual maintenance and calibration work on each of the scales.
9. One of the two scales at the Thomas Pit is elevated to a height of thirty one and a half inches above ground level and the other scale at the Thomas Pit is thirty-eight inches above ground level; both scales are steel plates with the north scale measuring eleven feet four inches wide and one hundred twenty feet long, and the south scale is ten feet six inches wide and one hundred five feet six inches long. Both scales have eight inch high steel “rub rails” running the length of the scale (See photographs attached as “Joint Exhibits 2-9.”)
10. At the Lower Pit one of the scales is thirty-five inches above the ground, and the other scale is thirty-eight inches off the ground. Both scales are also steel plates, with the north scale measuring eleven feet wide by one hundred ten feet long, and the south scale measuring eleven feet wide and one hundred five feet six inches long. Both have eight inch high steel “rub rails” running the length of the scales. (See photographs attached as “Joint Exhibits 10-18.”)
11. At the Upper Pit the west scale is fifty-four inches above the ground, and the east scale is fifty-four inches on one side of the scale and is at ground level at the other side of the scale. The east scale measures ten feet wide by seventy feet six inches long, and the west scale measures ten feet by one hundred four feet long. The Upper Pit scales also both have eight inch high steel “rub rails” running the length of the scales. (See photographs attached as “joint Exhibits 17-25.”)
12. The trucks that use the scales include ten-wheeled dump trucks, ten-wheeled dump trucks with a “pup” trailer, single or double belly dump trucks, and tractors with end or side dump trailers. Their wheelbases range from twenty-two feet eight inches to sixty-one feet two inches. The mid-axle height of these trucks range from twenty inches to twenty-four inches. Their loaded weights vary from 19,000 pounds empty, to 80,000 pounds loaded. Between fifteen and one hundred trucks use the scales daily.
13. At the Upper Pit the trucks, after they are loaded, travel less than ¼ mile from a loading area and descend down a roadway, and then to the west down a ramp to the scales. (Joint Exhibits 23 and 24). After driving on the scales trucks then travel out of the mine area.
14. At both the Thomas and Lower Pits trucks are loaded with material at a loading area where other stockpiles are located. Trucks then travel across the loading area to a point that exits the pits where the scales are located; all the vehicles must travel across the scales to exit the loading area. The trucks drive on the scales, are weighed, and then exit the scales to turn on a public roadway.
15. At least one accident has occurred when a truck traveling from the loading area of the upper pit slid down the ramp and struck the scale house that sits adjacent to the east scale at the upper pit (see photographs attached as “Joint Exhibits 23 and 24”). This accident occurred on a day when the Lakeview mine had posted a sign at the entrance of the pit that the pit was closed. Lakeview posted this sign because there was approximately four to six inches of snow on the ground; this amount of snow was present at the time of the accident.

16. Were the Citation terminated, MSHA's Office of Assessments would propose a civil penalty of one hundred ninety-six dollars (\$196.00) for the alleged violation. Lakeview reserves its right to contest the fact of violation and the negligence attributed to it therein. However, Lakeview stipulates that the proposed penalty would be appropriate if the violation were found to have occurred. Lakeview further agrees that payment of the proposed penalty would not impair its ability to remain in business.

The Contentions

Contestant Lakeview argues that there is no evidence the rub rails at Lakeview's scales would not prevent trucks traveling slowly over the scales from dropping off the scales; that the evidence submitted by Respondent MSHA does not prove that a truck could drive off of their scales, overturn or drop onto its axle, and endanger the person in the truck; that there is no scientific or expert analyses of variations in truck speeds or expert biomechanical analyses showing the potential effects on occupants of trucks dropping onto axles or driving off of scales similar to Lakeview's; that the rub rails at Lakeview's scales are of sufficient height and strength that even a fully loaded truck would merely push against the rail and slide along the rail rather than climb up and over the rail and drive off the scale; that there is no evidence of any kind about actual accidents or injuries resulting from trucks driving off scales like those at Lakeview; and that the rub rails at Lakeview's scales do not create a rollover hazard.

Respondent Secretary argues that each scale at Lakeview has a drop-off of sufficient grade or depth to cause a vehicle to overturn and endanger persons in equipment; that the Lakeview scales are not equipped with guardrails of at least mid-axle height of the largest self-propelled mobile equipment which usually travels the roadway; that the rub rails at Lakeview's scales are eight inches high, only one-third of the twenty-four inches required by the regulation; that the Secretary has provided a detailed engineering analysis, the opinion of the Inspector, and citations to Commission case law showing that each of the Lakeview scales has a drop-off as would cause a vehicle to overturn and the standard at 30 C.F.R. §56.9300(a) is applicable; and that the Program Policy Letter No. P10-IV-1 clarifies that elevated truck scales require guardrails and also provides design parameters.

The Standard of Review

Summary decisions may be granted only where 1) the entire record, including pleadings affidavits, and answers to interrogatories, establishes that there is no genuine issue as to any material fact; and 2) the moving party is entitled to summary decision as a matter of law. Commission Rule 67, 29 C.F.R. § 2700.67(b); *UMWA, Local 2368 v. Jim Walter Resources, Inc.*, 24 FMSHRC 797, 799 (2002). *See also Energy West Mining Co.*, 17 FMSHRC 1313, 1316 (1995), citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (interpreting Fed. R. Civ. P. 56). In this contest case, the burden of proof rests with the Secretary. *Asarco Mining Company*, 15 FMSHRC 1303, 1306-1307 (Jul. 1993).

The Questions for Consideration

-Whether a scale roadway presents the same circumstances of use, conditions and dangers as the haulage roadways on Lakeview's mine property.

-Whether a truck, traversing Lakeview's scales at idle speed and required to stop twice for entry and for weighing, would climb up and over or through the eight inch high rub rail and drive off of the platform.

-Whether Lakeview's scales constitute a drop-off and/or overturn hazard to vehicles crossing the scale roadway to be weighed.

The Evidence Submitted

The Declaration of Mike H. Tromble, the inspector, is of record as Exhibit 1 of the Secretary's Motion for Summary Decision. Mr. Tromble has been a MSHA Inspector since 2008, with prior experience at mines as a mechanic and lead blaster. While inspecting Lakeview in March 2010, he observed trucks being driven onto the elevated scales for weighing. He measured the height of the six scales as ranging from thirty-one to fifty-four inches above the ground. He opined that if a wheel of a truck went off the edge, the vehicle would either overturn and crash onto the ground or an axle would crash onto the edge of the scale, seriously jarring and risking injury to the occupant(s). He measured the rub rails at the scales as eight to eight and a half inches high. He gave the mine operator a copy of a MSHA slide presentation on truck scales. When he returned to Lakeview on September 8, 2010, none of the rub rails had been raised, and he issued Citation No. 6580393. He took the twenty-four photographs introduced as evidence. Joint Exhibits 2-25. Tromble concluded, in effect, that MSHA policy had not been complied with and therefore the mandatory safety standard at 30 C.F.R. §56.9300(b) had been violated.

The slide presentation contains the information that since 2005, MSHA has issued citations for inadequate berms or guardrails on truck scales. It was noted that MSHA personnel have been told of numerous near misses of truck or equipment runovers at scales. The remainder of the statistics and information presented concerned powered haulage and not scales. The photographs of various scales in this presentation did not show any drive-over or roll-over incident at any scales. Only one of the photographs showed a scale similar to those at Lakeview. In the summary of the presentation, it was noted that berms and guardrails are meant to moderate or limit travel and provide the driver a warning. Exhibit No. 2, Secretary's Motion for Summary Decision.

Exhibit No. 3 of the Secretary's Motion is the Declaration of Terence M. Taylor. Mr. Taylor is a Senior Civil Engineer employed by MSHA since 1987. He holds Bachelors and Masters Degrees in civil engineering, and is a Registered Professional Engineer. He assisted in the preparation of the Program Policy Letter No. P10-IV-1 ("PPL"). Based on his measurement assumptions, a truck with a twenty-four inch axle height and a vertical center of gravity of eight feet would overturn if it drove over the edge of the two Upper Pit scales. At the four scales of the Thomas Pit and the Lower Pit, the truck would not overturn. For all six scales, if the front tire drove over the edge, the axle would likely impact the deck of the scale. Hand written calculations and information relating to haulage roadway roll over and truck structures are a part of this exhibit. Although he had prepared over five hundred sixty engineering reports that included field investigations, accident investigations and design reviews, the Declaration did not contain any report based on either his experience or his research of a vehicle being driven over or through a rub rail eight inches in height.

Submitted as Exhibit 4 of the Secretary's Motion for Summary Decision is the PPL regarding elevated truck scales at mines that became effective on August 26, 2010. The purpose of the PPL was to clarify that truck scales are considered elevated roadways and require guardrails under 30 C.F.R. §56.9300. It was also issued to provide guidance on the design parameters for the guardrails,¹ which would depend on the elevation level of the scales and the size of the trucks or equipment traversing the scales. It was noted that most truck scales are provided with a rub rail intended to guide the vehicle and provide a visible, audible, or tactile indication to the driver identifying the edge of the scale roadway.

Submitted as Exhibit A of Lakeview's memorandum in Support of the Motion for Summary Decision is the Affidavit of Scott G. Hughes with a CD disk containing two short video clips. Mr. Hughes is the Vice President of Lakeview, who has installed, calibrated, repaired and

¹ Other structures listed are "curb", and "rub rail".

maintained all of the scales and equipment supporting the scales at the mine. In the thirty-five years he has watched thousands of trucks cross the scales, there has never been an accident involving a haul truck overturning by driving off or falling off the scales. All trucks come to a complete stop before driving onto the scales, then slowly roll, coast, or idle onto the scales to be weighed. There are rub rails attached to the side of the scales that prevent trucks from driving off the scales. In a test he attempted to drive a truck, loaded and unloaded, against the rub rail to determine whether the truck could be driven up onto the top of the rub rail. He was unable to make the truck drive up onto the rub rail or off the scales. His attempt was documented by a co-worker with a handheld video. Mr. Hughes also opined that even if a truck could be driven off the scales, it would come to rest on its axle and not overturn.

The CD at Attachment A contains the two short videos referred to by Mr. Hughes. In one video, as the truck rolls at what appears to be idle speed from the haulage roadway forward onto the entry platform the driver steers the front wheel into the rub rail. The wheel is kept turned into the rail, and the wheel slides or rubs along the rail but there is no indication that it starts to climb up onto the rub rail. The second video clip is similar, but the truck starts with the wheel further away from the rub rail, yet again after turning into the rail the wheel rubs along the rail but does not climb up the rail.

The Joint Exhibits of the parties consist of Citation No. 6580393 issued to Lakeview on 9/8/2010 and twenty-four photographs of the six scales. Since the scale measurements have been specifically set forth in the stipulations and do not need to be repeated here, the undersigned would only observe that each of the scales does have rub rails at edges with drop-offs.

The Discussion

At Lakeview there are six scales, two at each of three pits. The scales are elevated from approximately two feet eight inches to four feet six inches above ground in order that employees can perform annual maintenance and calibration work. The Joint Exhibit photographs show the steel construction, the entry/exit platforms, and a separate but adjoining middle platform used for weighing. The length of Lakeview's scales varies from seventy feet six inches to one hundred twenty feet, and all have eight inch high steel rub rails installed the entire length. At the entrance of the scales there are eighteen inch by twenty-four inch signs that read "Stop Before Entering Scale, Then Idle On". The trucks that usually use the scales have mid-axle heights from twenty inches to twenty-four inches.

When observing the scales in March 2010 Inspector Tromble gave the mine operator a copy of the MSHA slide presentation on truck scales. Exhibit 2, Secretary's Motion for Summary Decision. This presentation is entitled to little, if any, probative value in the instant determination. This is because the photographs of the scales, with one exception, bear scant resemblance to those at Lakeview. The information and statistics listed regarding fatalities and tip-overs concerned *powered haulage* and not *truck scale* usage. Very revealing was the admission that MSHA personnel has been told of "numerous near misses" at scales, essentially establishing that no accident, injuries or fatalities had occurred due to drive-overs at truck scales. The presentation did not consider the effect of eight inch rub rails, except to label them as inadequate, and this in the face of the summary information that guard rails are meant to limit travel and provide the driver a warning. As shown by the videos, the eight inch rub rails do indeed serve these purposes.

It is useful to take notice of the common conditions of use of truck scales such as those at Lakeview. When approaching the scales from the haulage roadway the truck must come to a complete stop at the entry platform. The truck then "idles" onto the platform, stopping completely again when positioned on the weighing section. After being weighed, and upon idling forward onto the exit platform, the truck may be required to stop again before re-entering the haulage roadway. In using the scales, the truck has traveled only about thirty to forty yards at very low

speed and stopped two to three times. This means that the truck has only moved about ten to fourteen yards between complete stops. In stark contrast is a truck's typical use of haulage roadways.

Commission judges have considered the question of whether scales are a part of a mine's roadways. Administrative Law Judge ("ALJ") Maurer found that where scales were elevated three and a half feet above ground level with **no guardrail provided**, §56.9300 was violated. *Walker Stone Company, Inc.*, 16 FMSHRC 1955, 1960 (1994) (*emphasis added*). In *Highway 195 Crushed Stone, Inc.*, Judge Melick found that an elevated roadway going to and exiting from a set of scales with **no berm or other guarding** was a violation even though the cited standard, 30 C.F.R. §56.9300, suffered from ambiguity and vagueness. 21 FMSHRC 800, 803-804 (Jul. 1999) (*emphasis added*). In a later case again involving scales with an **unguarded** edge Judge Weisberger relied on the dictionary definition of the term "roadway" to find that a scale was considered to be a part of that mine's roadway. *APAC-Mississippi, Inc.*, 26 FMSHRC 811, 812-815 (Oct. 2004) (*emphasis added*). Judge Manning vacated a similar citation involving elevated scales with **no berms or guardrails** on the basis that the mine did not have adequate notice that guardrails were required. *Carder, Inc.*, 27 FMSHRC 839, 858 (Nov. 2005) (*emphasis added*). Judge Manning pointed out that a reasonably prudent person familiar with the mining industry would not have recognized that the scale was covered by §56.9300 because, in part, the truck drivers drive over the scale at a very low rate of speed. *Id.* Notwithstanding the notice issue and the circumstances of use, Judge Manning found that the scale did fit within the scope of the safety standard. *Id.*

All of the above ALJ decisions are distinguishable from the instant case. Each of the decisions involved elevated platforms and scales with **no** berms, guardrails or guarding of **any** kind. With these types of scales it would appear that a truck driver with no visual, tactile, or audible warning could drift close to and possibly over the edge of the metal deck even at idle speeds. The fact that Lakeview's scales have rub rails at the edges with drop-offs sets the instant case apart from the decisions cited above.

While accepting the guidance of the prior ALJ decisions that scales are a part of a mine's roadways, in the opinion of the undersigned a distinction must be drawn between the use of haulage roadways as opposed to the use of scale roadways. Already noted is the marked difference in the speed of the truck. The surface conditions are quite different; the scales are made of metal and level, whereas haulage roadways might be dirt, gravel, or both, with inclines and slopes contributing to the dangers of travel. Established hazards are also markedly different, since haulage roadways have an unfortunate history of accidents, injuries and fatalities, yet on the record before me there is no evidence of such incidents at scale roadways. I find the statement of Hughes that there has never been an accident involving a truck using the scales at Lakeview to be credible.

A recent case did involve elevated truck scales with nine inch high manufacturer-installed rub rails along the length of the edges of the scales at the Coffee Lake Road mine of the Knife River Corporation. *Knife River Corporation v. Secretary of Labor*, 2010 WL 2995087 (July 2010). Judge Rae found the Secretary had failed to meet the burden of proof that the scales were of a depth and/or grade as would trigger application of the standard and dismissed the citation. The reasoning was that no expert's statement, case law, or any other authoritative guidance was provided as to how or why a twenty-six to thirty-six inch elevation would pose a danger of a vehicle overturning or endangering persons in equipment.

Soon after Judge Rae's decision, MSHA released the PPL apparently to address the lack of authoritative guidance. The citation in the instant case was issued soon after the release of the PPL.

Despite the assumptions and calculations of Taylor, and those contained in the PPL, just as

in *Knife River*, there is still a lack of probative evidence to establish that truck scales such as those at Lakeview pose a danger of a vehicle overturning or endangering persons in equipment. This is because the Secretary has failed to establish how and/or under what circumstances a truck's front tire would be able to drive up onto and over or through the eight inch high rub rail installed on the scales. Neither the engineering analysis nor the PPL contains information regarding the speed, force, amount of power/throttle, angle of steering, or other physical factor leading up to the driving over or breach of these rub rails. It would be obvious even to a lay person that once a front wheel is almost or completely over the edge of a scale platform the vehicle would fall down onto its axle. The conclusion of the engineering study that a vehicle might overturn depending on the depth of drop-off may be correct, and this does stand uncontroverted by any expert opinion submitted by Lakeview. But the conclusion begs the question of how the front tire could climb over or breach the rub rail *before* any drop-down or tip-over could even occur. The undersigned finds the engineering analysis remarkable mainly for what is *not* shown. The report assumes a drive-over would occur, but does not establish how this would happen. One might speculate that with the wheels forcefully turned and kept angled into a rub rail, and with sufficient throttle, a truck could intentionally be powered up onto and over the rail. However, the record is devoid of evidence as to how such an incident could actually occur or facts of such an event occurring in the past.

On the other hand, the respondent has provided demonstrative evidence that the undersigned considers to have great probative value. The CD at Attachment A contains two short, yet persuasive, videos. In one video, as the truck rolls at what appears to be an idle speed from the haulage roadway forward onto the entry platform the driver steers the front wheel into the rub rail. Although the wheel is kept turned into the rail, the wheel slides or rubs along the rail but there is no indication that it starts to climb up onto or break through the rub rail. The second video clip is similar, but the truck starts with the wheel further away from the rub rail, yet again after turning into the rail the wheel rubs along the rail but does not climb up the rail.

Close and repeated observation of these videos reveals that they do accurately reflect the circumstances under which a truck would traverse the scales. Trucks would be traveling at minimal speeds due to the fact that the scale platforms are too short for any substantial momentum to be accumulated and the fact that the trucks come to a complete stop at least two times. These low speeds are imposed on the trucks by Lakeview. The posted signs require the trucks to stop and idle onto the scales.

It is clear, then, that the eight inch high rub rails do limit the travel of a truck and are sufficient to provide the driver with tactile, visual and/or audible warnings that the side of the scale platform has been reached. The driver would be able to take corrective action to position the truck.

I agree with Lakeview's contentions to the effect that the scales do not present a drop-down or tip-over hazard to trucks, equipment or personnel. The Secretary has not carried the burden of proof and has failed to establish by a preponderance of evidence that Lakeview's scales present a drive-over hazard and constitute a violation of a mandatory safety standard.

ORDER

The Secretary's Motion for Summary Decision is **DENIED**. Lakeview's Motion for Summary Decision is **GRANTED**. Citation No. 6580393 issued on September 8, 2010 is not valid and is hereby **VACATED**.

/s/ Kenneth R. Andrews
Kenneth R. Andrews
Administrative Law Judge

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ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 15, 2011

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	TEMPORARY REINSTATEMENT
ADMINISTRATION (MSHA),	:	PROCEEDING
on behalf of	:	
CHARLES SCOTT HOWARD,	:	
Complainant	:	Docket No. KENT 2011-1044-D
	:	
v.	:	
	:	
CUMBERLAND RIVER COAL	:	
COMPANY,	:	Band Mill No. 2
Respondent	:	

ORDER DENYING REQUEST FOR HEARING
ORDER OF REINSTATEMENT

Appearances: Mary Sue Taylor, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, on behalf of the Secretary of Labor; Tony Oppegard, Esq., Lexington, Kentucky, and Wes Addington, Esq., Appalachian Citizens Law Center, Whitesburg, Kentucky, for Charles Scott Howard; Timothy M. Biddle, Esq., and Willa B. Perlmutter, Esq., Crowell & Moring LLP, Washington, D.C., for Cumberland River Coal Company.

Before: Judge Lesnick

This case is before me on an Application for Temporary Reinstatement brought by the Secretary of Labor, on behalf of Charles Scott Howard, pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2). The application seeks the reinstatement of Mr. Howard as an employee of the Respondent, Cumberland River Coal Company (“Cumberland”), pending final disposition of the discrimination complaint Howard has filed with the Mine Safety and Health Administration (MSHA) against the company.

A dispute has arisen in this case as to the timeliness of Cumberland’s request for a hearing. The Secretary filed her application for Mr. Howard’s reinstatement with the Commission via facsimile on May 27, 2011. Counsel for Cumberland received a copy of the application via facsimile on that same day, May 27, 2011. Respondent’s Request for Hearing, Declaration of W. Perlmutter at ¶ 3. Cumberland, however, asserts in an email to the Commission’s Docket Office that it received the application on June 3, 2011, the day on which the company received a service copy of the application sent via certified mail. Cumberland filed a request for a hearing with the Commission on June 13, 2011.

Under Commission Procedural Rule 7(c)(2), service by facsimile is “effective upon successful receipt by the party intended to be served.” 29 C.F.R. § 2700.7(c)(2). An application for temporary relief must include “proof of notice to and service on the person against whom relief is sought by the most expeditious means of notice and delivery reasonably available.” 29 C.F.R. § 2700.45(b) (emphasis added). An operator may request a hearing pursuant to Commission Procedural Rule 45(c) “[w]ithin 10 calendar days following receipt of the Secretary’s application

for temporary reinstatement.” 29 C.F.R. § 2700.45(c) (emphasis added).

It is undisputed that Cumberland *received* the Secretary’s application on May 27, 2011. The Commission’s rules do not distinguish between receipt of or being served with such an application. Under Commission Procedural Rule 45, the relevant events for purposes of determining the timeliness of a request for a hearing on the application are *notice* and *receipt* of the application. 29 C.F.R. § 2700.45(b)-(c). Here, given that Cumberland had both notice and actual receipt of the Secretary’s application on May 27, 2011, any request for a hearing had to have been made by the company on or before June 6, 2011. I conclude that Cumberland’s June 13, 2011 Request for Hearing was untimely, and I therefore deny the request.

Commission Procedural Rule 45(c) provides in relevant part: “If no hearing is requested, the Judge assigned to the matter *shall review immediately the Secretary’s application* and, if based on the contents thereof the Judge determines that the miner’s complaint was not frivolously brought, he shall issue immediately a written order of temporary reinstatement.” 29 C.F.R. § 2700.45(c) (emphasis added). Pursuant to this provision, I have reviewed the Secretary’s application and find that Mr. Howard’s complaint was not frivolously brought.

In adopting section 105(c), Congress indicated that a complaint is not frivolously brought if it “appears to have merit.” S. Rep. No. 181, 95th Cong., 1st Sess. 36-37 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong. 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 624-25 (1978). In addition to Congress’ “appears to have merit” standard, the Commission and the courts have also equated “not frivolously brought” to “reasonable cause to believe” and “not insubstantial.” *Sec’y of Labor on behalf of Price v. Jim Walter Res., Inc.*, 9 FMSHRC 1305, 1306 (Aug. 1987), *aff’d*, 920 F.2d 738, 747 & n.9 (11th Cir. 1990). In order to establish a prima facie case of discrimination under section 105(c) of the Act, a complaining miner must establish (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. *Sec’y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (Oct. 1980), *rev’d on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981); *Sec’y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (April 1981).

In this case, the Secretary has established that Mr. Howard has a long history of bringing safety concerns to the attention of Cumberland, MSHA, and members of Congress. Soon after his return to work on May 16, 2011 after suffering a work-related injury in July 2010, Cumberland removed Mr. Howard from the company payroll, effectually terminating all his employment rights. Given the very public nature of Mr. Howard’s past protected activities, I find that there is a reasonable cause to believe that he could establish that Cumberland’s adverse action was motivated by those activities.¹

Moreover, as the Secretary notes in her response to Cumberland’s request for hearing, Mr. Howard “currently remains under Court ordered temporary reinstatement as a miner,” citing Judge Zielinski’s September 4, 2009 Order of Temporary Reinstatement in Docket No. KENT 2009-1427-D. Sec’y Resp. at 5. The complaint on which Judge Zielinski granted Mr. Howard temporary reinstatement is pending before Judge Gill in Docket No. KENT 2010-493-D. Thus, under the circumstances, even if Mr. Howard’s instant complaint had been frivolously brought, he would be entitled to immediate reinstatement pursuant to Judge Zielinski’s order, which has not been modified since it was issued and regarding which no final order on the complaint has issued.

¹ Although under Rule 45(c) I am not required to consider any of Cumberland’s arguments having found it did not file a timely request for hearing, I have done so and conclude that the company’s assertions that Mr. Howard was not a miner on May 16, 2011, and that his employment was not actually terminated on that date, lack any merit whatsoever.

Accordingly, I conclude that Mr. Howard's discrimination complaint has not been frivolously brought and that he is entitled to immediate reinstatement pending final order on his complaint.

ORDER

Cumberland River Coal Company's Request for Hearing is **DENIED** as untimely.

The Secretary's Application for Temporary Reinstatement made on behalf of Charles Scott Howard is **GRANTED**. Cumberland River Coal Company is **ORDERED TO REINSTATE** Mr. Howard to the position that he held on May 16, 2011, or to a similar position, at the same rate of pay and benefits, **IMMEDIATELY ON RECEIPT OF THIS DECISION**. In addition, Cumberland River Coal Company is **ORDERED TO PAY** Mr. Howard his pay and benefits retroactive to MAY 16, 2011.

/s/ Robert J. Lesnick
Robert J. Lesnick
Chief Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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June 15, 2011

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2009-103-M
Petitioner	:	A.C. No. 50-01741-165232
	:	
v.	:	
	:	
STATE OF ALASKA, DEPARTMENT	:	
OF TRANSPORTATION,	:	
Respondent	:	Mine: Nome Screener

AMENDED DECISION DENYING MOTION TO DISMISS

Before: Judge Miller

This case is before me upon a petition for assessment of civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (the “Act”). On January 5, 2009, Respondent filed a Motion to Dismiss the Civil Penalty Proceeding and asserted that MSHA lacked jurisdiction and had failed to state a claim. The issue before me is whether MSHA has jurisdiction over the Nome Screener, a mobile piece of screening equipment owned and operated by the Alaska Department of Transportation. For the reasons that follow, I find that MSHA has jurisdiction over the Nome Screener and I **DENY** the Respondent’s Motion to Dismiss.

On July 14, 2008, MSHA inspector Michael Murray issued eleven separate citations regarding the Nome Screener, Mine ID 50-01741, owned and operated by the State of Alaska Department of Transportation (“AKDOT”). Inspector Murray issued the citations for a violation of 30 C.F.R. § 46.9(b)(5) for improperly completed safety training paperwork for eleven AKDOT employees. On July 22, 2008, Inspector Murray issued a second set of eleven citations when the mine failed to correct the condition originally cited.

On December 5, 2008, the Secretary issued a Petition for Assessment of Civil Penalty to AKDOT regarding the July 14th citations. The Secretary proposed a \$112.00 penalty for each improperly completed certificates, for a total proposed assessment of \$1,232.00.

I. STATEMENT OF FACTS

The affidavits and statement of facts submitted by the parties show little, if any, disagreement as to the facts of the case. AKDOT owns a portable screener, i.e., the Nome screener, which used to size sand and gravel for the Nome, Alaska airport. Resp. Supp. Mot. to Dismiss 2. During the winter, AKDOT spreads sand on the airport runway to prevent airplanes from sliding on ice and snow. Murray Declaration ¶ 5b. The screener separates raw beach sand into three types: (1) undersized ¼ inch minus aggregate, (2) midsized ¼-½ inch aggregate, and (3) oversized ½ inch plus aggregate. *Id.* at ¶ 5a-5c. AKDOT spreads the midsized sand on the airport runway and discards the undersized and oversized material that could be potentially hazardous to jet engines. *Id.*

AKDOT operates the Nome Screener annually at various location for a three to four week period in order to stockpile enough sand for use in the winter. Oden Affidavit ¶ 3. In some instances, AKDOT transports the portable screener to one of two AKDOT owned ocean beach borrow pits. Murray Declaration ¶ 5d. Neither of the beach extraction points is registered with MSHA as a mine. Resp. Supp. Mot. to Dismiss 2. At these two locations, front-end loaders place unsorted sand into the screener and then load the processed mid-sized sand into trucks that then transport the material to the Nome airport. Murray Declaration ¶ 5d. On other occasions, trucks haul beach sand from the borrow pits to a warehouse yard at the Nome airport where the screener is used to size the sand. *Id.* at ¶ 5e. AKDOT stores the Nome screener at the Nome airport when it is not in use. Resp. Supp. Mot. to Dismiss at 2.

In 2002, MSHA requested that AKDOT register the Nome Screener as a mine. *Id.* AKDOT complied and was subject to regular inspections by MSHA. *Id.* On July 14th, 2008, MSHA inspector Michael Murray conducted an inspection of the Nome Screener at the Nome Airport. Murray Declaration ¶ 2. The Nome Screener, along with a front end loader and several piles of sand, was located inside a barricaded area of the airport warehouse yard. *Id.* at ¶ 6. Inspector Murray noted that the annual training certificates had not been signed by the Safety Director in charge of health and safety training. Resp. Supp. Mot. to Dismiss 3. AKDOT had repeated the error on eleven separate training certificates. Inspector Murray issued separate citations for each certificate. *Id.*

AKDOT's Safety Director, Mike Oden, spoke with Inspector Murray by cell phone during the inspection and informed the inspector that he was in Fairbanks, Alaska and would correct the forms and replace the originals at that time. Oden Affidavit ¶¶ 9-10. A week later, when the forms remained uncorrected, Murray issued a second set of eleven citations for failure to abate the condition cited. *Id.* at ¶¶ 11-12. AKDOT was not operating the Nome Screener at the time of either citation and the screener was located at its usual storage location near the airport. *Id.* at ¶ 7.

II. SUMMARY OF THE PARTIES' ARGUMENTS

AKDOT contends that MSHA cannot assert jurisdiction over the Nome Screener because it is not a "mine" and, therefore, is not subject to MSHA regulation. Resp. Supp. Mot. to Dismiss 1-2. AKDOT concedes that, generally, MSHA can regulate mine equipment under Section 3(h)(1)(C) of the Mine Act. *Id.* at 3. However, AKDOT contends that there is no precedent for MSHA to assert jurisdiction over mobile equipment not associated with a registered mine. *Id.* at 4-5. While the screener itself has a mine ID, the locations where it is used do not. *Id.* at 2. AKDOT distinguishes the Nome Screener from those screeners and other equipment that are located at permanent extraction pits and are subject to MSHA jurisdiction. *Id.* at 4-5. AKDOT argues further that the Nome Screener is in essence a "scalping screen" that operates under the borrow pit exception of the MSHA Interagency Agreement. *Id.* at 5.

The Secretary asserts several independent grounds for MSHA jurisdiction of the Nome Screener. Pet. Supp. Response 4. The Secretary contends that the beach sand extraction points are mines and not "borrow pits." *Id.* By sizing the sand and using it as a traction control material, AKDOT performed "milling" operations and used the material for its "intrinsic qualities" rather than for bulk fill. *Id.* at 5. The Secretary argues that milling a material for its intrinsic qualities prevents an operator from designating an area as a "borrow pit" under the MSHA-OSHA Interagency Agreement. *Id.* at 6.

The Secretary also argues MSHA has independent jurisdiction over the Nome Screener and that it qualifies as a "mine" standing alone. *Id.* at 7. The Secretary states that in 2002 the Respondent registered the Nome Screener as a mine with MSHA and has not raised a jurisdiction argument until many years later despite the fact that the screener has not changed. *Id.* The Secretary relies on two precedent cases in which Commission Judges held that MSHA retained jurisdiction over a piece of mobile equipment regardless of where the equipment was located. *Id.*

at 7-8; *Wallace Brothers*, 16 FMSHRC 1889 (Aug. 1994) (ALJ); *Fred Knobel*, 15 FMSHRC 742, 744 (Apr. 1993) (ALJ). The Secretary avers that MSHA retains jurisdiction over equipment even when it is not operating, unless the equipment is completely tagged out and decommissioned. *Id.* at 9.

III. PRINCIPLES OF LAW

The Federal Mine Safety Act of 1977 defines a “mine” as “an area of land from which minerals are extracted in nonliquid form.” 30 U.S.C. § 802(h)(1). MSHA has the authority to regulate all equipment, structures, and personnel within a mine. *Id.* Further, MSHA has broad authority to make informed and reasonable jurisdictional determinations as, “Congress clearly intended that . . . jurisdictional doubts be resolved in favor of coverage by the Mine Act.” *Watkins Eng’rs & Constructors*, 24 FMSHRC 669, 675-676 (July 2002). However, in 1979 the MSHA-OSHA Interagency Agreement (the “Agreement”) designated borrow pits as exempt from MSHA regulation and defined borrow pits as:

an area of land where the overburden, consisting of unconsolidated rock glacial debris, or other earth material overlying bedrock is extracted from the surface. Extraction occurs on a one-time only basis or only intermittently as need occurs, for use as fill materials by the extracting party in the form in which it is extracted. No milling is involved, except for the use of a scalping screen to remove larger rocks, wood and trash. The material is used by the extracting party more for its bulk than is intrinsic qualities on land which is relatively near the borrow pit.

MSHA-OSHA Interagency Agreement, 44 Fed. Reg. 22827 (1979). Further, the Agreement defined “milling” to include “sizing,” i.e., the “process of separating particles of mixed sizes into groups of particles of all the same size, or into groups in which particles range between maximum and minimum size.” *Id.* In 1996, MSHA issued interpretive guidelines intended to clarify the definition of borrow pits:

Thus, if earth is being extracted from a pit and is used as fill material in basically the same form as it is extracted, the operation is considered to be a “borrow pit.” For example, if a landowner has a loader and uses bank run material to fill potholes in a road, low places in the yard, etc and no milling or processing is involved, except for the use of a scalping screen, the operation is a borrow pit. The scalping screen can be either portable or stationary and is used to remove large rocks, wood or trash. In addition whether the scalping is located where the material is dug, or whether the user of the material from the pit is the owner of the pit or a purchaser of the material from the pit, does not change the character of the operation, as long as it meets the other criteria.

I MSHA, US. Dep’t. Of Labor, *Program Policy Manual*, Section 4, I.4-3 (1996).

Commission judges have previously considered dismissal motions based on claims that an operation is a “borrow pit” and not a mine. Those judges have consistently applied a strict interpretation of the term “borrow pit.” *Kerr Enterprises, Inc*, 26 FMSHRC 953, 957 (Dec. 2004) (ALJ); *New York State Department of Transportation*, 2 FMSHRC 1749, 1761 (July 1980) (ALJ). For instance, a state entity that extracts and screens sand for use as a traction control material in winter operates a mine and does not qualify for the “borrow pit” jurisdictional exception. *New York State Department of Transportation*, 2 FMSHRC at 1761. In *New York Department of Transportation*, the New York DOT owned and operated a shaker screen that only

allowed material ¼ inch or less to pass. *Id.* at 1755. New York DOT stockpiled the sand at a gravel quarry for highway ice control during the winter. *Id.* The court held that sand was not being used as “fill” merely for its bulk. *Id.* at 1758-59. Instead, the court found that the New York DOT had used the shaker screen to select a particular size sand for its “intrinsic qualities” and therefore did not operate a “borrow pit” within the meaning of the MSHA-OSHA Interagency Agreement. *Id.* The court also held that using a screen to select 1-1/2" gravel constituted “milling.” *Id.* at 1761. This “milling” removed the NY DOT from the MSHA-OSHA Interagency Agreement definition of “borrow pits.” *Id.*

MSHA has asserted jurisdiction over operators that employ a minimal “scalping screen” when the operator does not use the product for bulk fill on nearby sites. *Kerr Enterprises*, 26 FMSHRC at 957. In *Kerr Enterprises*, an operator used a scalping screen to remove wood debris from earthen material at an extraction pit. *Id.* at 954. The court noted that this minimum screening operation did technically meet the definition of a scalping screen as allowed for in section of the MSHA-OSHA Interagency Agreement addressing borrow pits. *Id.* at 957. However, the court held that the operator did not qualify for the borrow pit exception because the material was sold for use in a variety of purposes that were not bulk fill related. *Id.*

Commission judges have consistently upheld MSHA regulation of individual pieces of equipment independent from the jurisdiction conferred by a separately named mine. *Wallace Brothers, Inc.*, 16 FMSHRC at 1891 (holding portable crusher was subject to MSHA jurisdiction when it operated at various rock pits); *Fred Knobel*, 15 FMSHRC at 744 (holding that portable crusher used to crush rock on roadway projects not designated as mines was performing mining activities and, therefore, was subject to MSHA regulation). Further, “[e]quipment and facilities that are available for use by miners must be maintained in compliance with applicable safety standards, and are subject to inspections whether or not they are actually being used at the time.” *Beylund Construction, Inc.*, 31 FMSHRC 1410, 1416 (Nov. 2009) (ALJ); see also *Ideal Basic Ind., Cement Div.* 3 FMSHRC 843 (Apr. 2001). Moreover, MSHA may inspect inactive equipment that is “not tagged out of operation and parked for repairs.” *Alan Lee Good*, 23 FMSHRC 995, 997 (Sept. 2001).

IV. ANALYSIS

The AKDOT Nome Screener is used to size ¼” to ½” sand particles. Only particles of this size are retained and used for traction control on runways because smaller or larger sand causes damage to airplanes using the runway. As such, AKDOT clearly uses the screener to “mill” or “size” the sand and operates no differently than any other sand and gravel operation that is subject to MSHA jurisdiction.

AKDOT does not use the Nome Screener for the typical “borrow pit” purpose of providing bulk fill. AKDOT uses the Nome Screener to produce a material uniquely capable of providing traction control on icy pavement. Because AKDOT uses the sand for its “intrinsic qualities” rather than bulk fill, the Nome Screener is properly classified as a mine rather than a “borrow pit.”

MSHA has authority to regulate the AKDOT Nome Screener as a mine because the Nome Screener mills earthen material in order to produce a particular sized sand. AKDOT uses the Nome Screener to generate sand for its intrinsic traction control qualities rather than for bulk fill. Thus, the Nome screener does not fall under OSHA “borrow pit” jurisdiction according to the MSHA-OSHA Interagency Agreement.

MSHA has authority to assert jurisdiction over the Nome screener independently of a separately named mine. The Nome Screener is a mobile piece of equipment and apparently operates at two beach sand extraction points and the Nome airport yard. Due to its mobile nature, MSHA was justified in requesting that AKDOT register the screener as an independent mine. If the Commission accepted the Respondent’s argument that MSHA jurisdiction only exists within a

mine attached to a physical parcel of land, AKDOT and other operators could avoid MSHA jurisdiction simply by moving equipment on and off designated mine parcels or relocating equipment to new extraction pits without notifying MSHA. Such an interpretation would thwart the safety purposes of the Act and prevent MSHA from fulfilling its obligation to ensure the safe operation of mining equipment.

MSHA has authority to inspect and regulate the Nome Screener when it is not in active use. At the time of the inspection the Nome Screener was located at the Nome Airport yard. Inspector Murray observed piles of sand and a front-end loader at the site. Inspector Murray gathered statements from the Nome Airport Manager that indicated AKDOT transported sand to the airport yard and operated the Nome Screener at the airport yard. Respondent's Motion to Dismiss and AKDOT Safety Director's affidavit do not refute that AKDOT previously operated the Nome Screener at the airport yard. Respondent also does not contend that it had tagged out the Nome Screener or notified MSHA that it was no longer operating the screener as a mine. Although AKDOT was not operating the Nome Screener on the day of the inspection, the screener was available for use and positioned in a location where it regularly milled sand. Thus, MSHA properly asserted jurisdiction over a piece of mining equipment available for use.

V. ORDER

In view of the above, the Nome Screener is subject to Mine Act jurisdiction and MSHA regulation. Consequently, the State of Alaska's Department of Transportation's Motion to Dismiss, and its subsequent Supplement, are **DENIED**.

/s/ Margaret A. Miller

Margaret A. Miller

Administrative Law Judge

Distribution: (U.S. First Class Mail)

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June 30, 2011

REVELATION ENERGY, LLC,	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. KENT 2011-71-R
	:	Order No. 8247763;10/08/2010
v.	:	
	:	
SECRETARY OF LABOR,	:	S-1 Hunts BR
MINE SAFETY AND HEALTH	:	Mine ID 15-18280
ADMINISTRATION, MSHA,	:	
Respondent	:	

ORDER ON MOTIONS

Before the Court are Contestant Revelation Energy, LLC’s Renewed Motion for Summary Decision (“Revelation’s” or “Contestant’s” Motion) and Respondent, Secretary of Labor’s Motion to Dismiss (“Secretary’s” or “Respondent’s” Motion). Revelation’s Motion presents the legal issue succinctly, that is, “whether a large rock leaving a mine site after a blast and landing in a residential yard, with no injuries, constitutes an ‘accident’ for purposes of a Section § (sic)103(k) Order.”¹ Revelation Motion at 1. Under the Mine Act, a section 103(k) order authorizes a mine inspector, in the event of an accident which occurs in a coal or other mine to issue such orders as he deems appropriate to insure the safety of any persons in the coal or other mine. 30 U.S.C. 813(k). This issue was addressed in the Court’s January 21, 2011 Order Denying Contestant’s Motion for Summary Decision and the parties acknowledge that the purpose behind their respective motions here is to place the case in a posture for review by the Commission. For the reasons which follow, the Court DENIES Contestant’s Renewed Motion and GRANTS the Secretary’s Motion to Dismiss Revelation’s Notice of Contest.

Reduced to its essence, Contestant contends in its Renewed Motion for Summary Decision that the Secretary should be bounded by its definition of an “accident” per its regulation in Part 50 at 30 C.F.R. § 50.2(h). The regulations in Part 50 address “Notification, Investigation, Reports and Records of Accidents, Injuries, Illnesses, Employment and Coal Production in Mines.” Beyond Part 50, the Contestant also points to the Secretary’s Program Policy Manual, which cites the same regulation for the definition of an “accident.” Thus, Contestant asserts that the Secretary cannot escape the regulatory definition, as echoed by the Policy Manual. It is the Contestant’s position that to allow the Secretary to go beyond its regulatory and policy manual enunciations amounts to permitting “*ad hoc* definitions of the term ‘accident’ after the fact to justify 103(k) orders.” Contestant’s Motion at 2.

¹ Factually, Revelation’s description understates the event, as the “large rock” was about 6 feet in diameter and weighed approximately 2 tons. Although its Notice of Contest challenges “each and every allegation in the Order,” Revelation has never asserted different facts about the rock’s size, despite several opportunities to do so. Rather, its challenge has been solely about whether a section 103(k) accident event occurred.

In its Response to Revelation's Motion, the Secretary notes this Court's January 21, 2011 ruling and urges that there is no need for the Court to reconsider its earlier decision but that, if it elects to do so, the same result should be reached and the Renewed Motion denied. It asserts that the Court's earlier ruling "did not overlook controlling precedent, controlling legal principles and did not misapprehend the facts or law in any way, much less in any way that affected the outcome stated in the Order." Sec's Response at 4.

Alternatively, the Secretary argues that the Contestant has misconstrued the MSHA Program Policy Manual. While the Secretary agrees that the Policy Manual does note that the term "accident" is defined at 30 C.F.R. Part 50.2(h), it does not follow that the statutory definition of an "accident," per 30 U.S.C. § 802(k) is not authoritative in this proceeding, because the Manual does not preclude the broader definition's use. Thus, "accidents" are not limited to those spelled out in the regulation. The Secretary sees logic in this distinction, maintaining that the Part 50.2(h) provisions identify those types of accidents which must be reported, but that they do not otherwise constrain the statutory provision. *Id.* at 6. Last, the Secretary notes that neither policy statements by the Agency, nor views expressed by other administrative law judges, are binding upon this administrative tribunal. *Id.*

Turning to the Secretary's Motion to Dismiss Revelation's Notice of Contest, the Secretary states that the basis for Contestant's Contest was its claim that "there was no basis for any enforcement action against [Revelation Energy, LLC] in this case," because there was no "accident" at the S-1 Hunts Branch Mine. As with its response to Contestant's Renewed Motion for Summary Decision, the Secretary notes that 30 C.F.R. § 50.2 itself provides that it applies only to "this part," by which it is clearly referring to Part 50 of the Mine Act. In contrast, 30 U.S.C. § 802, the "Definitions" section of the Mine Act, which includes subsection (k) "accident," applies to "this chapter," a reference to Chapter 22 of the Act. Given that, the Secretary contends that, as there was an accident, the basis for Contestant's Contest fails and dismissal must follow.

Consistent with its view of the applicability of Section 802(k), the Secretary observes that "blasting a 2 ton piece of rock off of mine property and into a nearby yard presented a potential for injury similar to that of a mine explosion, mine ignition, mine fire, mine inundation or injury or death of any person." Sec's Motion at 4. (emphasis removed). In support of this perspective, the Secretary notes that the Commission itself has stated that Section 802(k) was "drafted to provide an inclusive, broad definition of the term 'accident,'" and that it has observed that the definition employs the word *includes* in then listing specific events. *Id.* at 4, citing *Aluminum Co. of Am.*, 15 FMSHRC 1821 (Sept. 1993). "Includes," it points out, is rather obviously a term of enlargement and as such the specific events then listed cannot then be turned around as if the statute had provided "*includes only*" followed by specific listed events.

Last, the Secretary asserts that Section 802(k), as the statutory provision, must be the source consulted in determining whether an "accident" has occurred. However, even if one could argue that there was some ambiguity as to whether that section or the regulatory provision at 30 C.F.R. § 50.2(h)(2) should control, under the well-established *Chevron* analysis, deference must be afforded to the Agency's interpretation of its regulation if it is reasonable. *Id.* at 5, citing *Chevron U.S.A. Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837 (1984). Accordingly, even if a reviewing body might come to a different choice in its own interpretation, it is not entitled to substitute its wisdom for that of the agency's reasonable view.

In its Response to the Secretary's Motion to Dismiss, Contestant, as did the Secretary for its part, repeats the arguments made in its original motion for summary decision, and which arguments the Court outlined in its January 21st Order denying that motion. One difference is that it characterizes the Court's earlier ruling, stating that under it, "the occurrence of an 'accident,' for purposes of a §103(k) Order, is left to the sole discretion of the Secretary." Contestant's Response at 2. Contestant adds that "[a]bsent any controlling definition, an operator has no advance knowledge of what constitutes an 'accident' for purposes of a §103(k) . . . [and such an] interpretation is inconsistent with the intent of §§ 103(j) and 103(k) and [would] violate[]

Revelation's due process rights. *Id.* As the Court will explain *infra*, the Contestant overstates the consequences of the ruling.

At least it may be said that the Contestant clearly stakes out its position in this matter, contending, as it does, that "events that constitute an 'accident' *cannot* be enlarged beyond those events set forth in 30 C.F.R. §50.2(h)." *Id.* at 3 (emphasis added). Yet, the Contestant seems to acknowledge that there is not a single source to consult in figuring out when an "accident" has occurred, as it states "[e]ven when an incident does not fall within the **statutory** or **regulatory** definition of accident, and **no one is injured**, the Secretary believes she has the authority to proceed pursuant to §103(k)." ² *Id.* (emphasis in original).

Contestant also asserts that the event giving rise to the issuance of the 103(k) Order here must be similar to the incidents enumerated in that statutory provision or those in 30 C.F.R. §50.2(h). Contestant's Response at 6. Under its "similar" test, Contestant notes that the event here is not "similar" to a mine explosion, mine ignition, mine fire, or mine inundation – and did not cause death or bodily injury to an individual.³ Then, consulting 30 C.F.R. §50.2(h), it interprets that provision as speaking to incidents occurring off of mine property only at subsection (h)(12) and for that to apply, there must be death or bodily injury to an individual. *Id.* at 7.

DISCUSSION

The first point which needs to be made is that this matter is appropriately disposed of at this time. The parties do not have any genuine factual dispute; that is to say that none have been raised by either of them. The dispute is purely a legal one and whether the rock that blasted off of the mine property was in fact about 6 feet in diameter and weighing about 2 tons has not been challenged, nor would the rock's exact diameter or weight be determinative of the present issue. Instead the issue is whether a 103(k) Order can be issued in these circumstances:

A non injury blasting accident occurred at this surface at approximately 6:30 pm resulting in a rock about 6 feet in diameter and weighing approximately 2 tons leaving the mine property. This rock rolled down the hill through a citizens yard and came to rest in the creek next to the roadway below the citizens residence. This 103 (k) order is issued to protect the safety of all persons on mine site and off mine site.

Order No. 8247763, the Section 103(k) Order in issue here.

The Court incorporates and reaffirms its original Order addressing this legal issue. For convenience, that Order is attached at the end of this Order. However the Court augments its January 21, 2011 Order with the following additional remarks. First, Contestant elides over the

² Contestant then repeats itself, maintaining that it is then in the posture of lacking "advance warning as to what type of incident could be considered an 'accident' for purposes of §103(k) liability." Contestant's Response at 3. Again, as will be explained *infra*, this dire forecast is unwarranted.

³ Contestant notes that the Court did find that similarity to the listed events is not a requirement for issuance of a 103(k) Order, but that the fly rock was an exquisitely similar event to events listed in that provision. However, it is Contestant's position that it is not similar because fly rock is not listed in the definition of an accident, at Section 3(k) of the Act. The short answer is that section 802(k) does not restrict the definition of "accident" to events *similar* to those expressly included.

fact that the statutory definition of an “accident” begins with the expansive verb “includes.” Accordingly, the fact that it then lists a number of events so included does not operate to exclude events not expressly named. The word “includes” is usually a term of enlargement, and not of limitation.⁴

It is the words employed by the statute, not those of a regulation, and even less so the statements within a program policy,⁵ that control the outcome here. The term defined, “accident,” is succinctly expressed in the Mine Act:

DEFINITIONS Sec. 3. For the purpose of this Chapter, the term –
... (k) “accident” includes a mine explosion, mine ignition, mine fire,
or mine inundation, or injury to, or death of, any person. 30 U.S.C. § 802

It seems clear that, beyond using the non-restrictive term “includes” for the definition of “accident,” Congress cited some of the more frequent examples of mine accidents, but that, just as clearly, by referring to injury or death, all conjoined by use of the alternative conjunction “or,” that it intended an expansive meaning to “accidents.”⁶ Accordingly, any analysis of the scope of

⁴ *U.S. v. Alvarez*, 638 F.3d 666 (9th Cir. 2011) quoting *Burgess v. United States*, 553 U.S. 124, 131 n.3 which refers to Singer & J. Singer, *Sutherland on Statutory Construction*, at §47:7, at 305 (7th ed. 2007). See also, *Jones v. American Postal Workers Union*, 192 F.3d 417 (4th Cir.1999), for the same principle that words which follow “includes” do not constitute an all-embracing definition nor an exhaustive list. Further, as noted in *U.S. v. Angelilli*, 660 F.2d 23, (C.A. N.Y. 1981) using “includes” is quite different from a statutory definition which instead employs the term “means.” Here, Congress used the phrase ‘accident *includes*,’ it did not express the definition as ‘accident *means*.’

⁵ In *Tilden Mining company, L.C.*, 2011 WL 1924263 (F.M.S.H.R.C.), April 18, 2011, Administrative Law Judge Paez addressed whether a program and policy manual’s provisions (“PPM”) are substantive rules. The judge noted that the Commission has held that, “the Enforcement Guidelines and the PPM are not binding on the Secretary or the Commission,” and in citing to *King Knob Coal Company* noted that “the Manual’s ‘instructions are not officially promulgated and do not prescribe rules of law binding upon this Commission.’... [T]he express language of a statute or regulation ‘unquestionably controls’ over material like a ... manual.” *Sec’y of Labor v. D.H. Blattner & Sons*, 18 FMSHRC 1580, 1586 (Sept. 1996) (quoting *King Knob Coal Co.*, 3 FMSHRC 1417, 1420 (June 1981) (citations omitted)). The judge observed that the PPM and the PPL are not rules of law but are the Secretary’s interpretations of a particular regulation and that neither were binding on the Commission or the Secretary.

⁶ The Commission has agreed that “includes” as used in the definition of “accident” is a term of enlargement. In *Aluminum Co. of Am.*, 15 FMSHRC 1821 (Sept. 1993), the Commission dealt with a Section 103(k) order which had been issued upon an inspector’s determination that an area of a plant was contaminated by mercury. Upon hearing, the administrative law judge held that the Secretary had failed to prove that there had been an “accident.” While the Commission affirmed the judge, it did so on an evidentiary basis, stating that the Secretary was “[i]n general . . . correct,” agreeing with the Secretary that the use of the term “includes” in the definition of accident, per section 3(k) of the Mine Act, is a term of enlargement, and that events not specifically listed in section 3(k) do fall within the definition if they are similar in nature or present a similar potential for injury or death. Importantly, the Commission added that whether a

33 FMSHRC 1558

the definition of “accident” must also take into account the ordinary meaning of that term. It is certainly not an esoteric term, nor otherwise difficult to understand, being defined in the dictionary as “An unexpected and undesirable event.” See, for e.g., Webster II New Riverside University Dictionary 1984.

Applying that common definition of the term, it would be hard to conclude that a rock of about 6 feet in diameter and weighing about 2 tons, which exited mine property, traveling down a hill and through a citizen’s yard before coming to rest in a creek below the citizen’s home, could be described in any other manner than as an accident. Certainly it was unexpected and equally so, it was undesirable. Further, it occurred in connection with a mine explosion. Blasting most often is an intended event but, intended or unplanned, it is an explosion and a mine explosion occurred at Revelation Energy’s S-1 Hunts Branch mine. Thus, it is inaccurate to claim that which constitutes an “accident” is left to the sole discretion of the Secretary. One can evaluate a given set of facts and apply that to the very common definition and determine whether there has been an accident.⁷

In addition to the Program Policy Manual’s inability to restrict a statutory provision, a fact which by itself is fatal to the Contestant’s assertion that it limits the statute,⁸ it is noteworthy that, as pertinent here, the Manual focuses primarily on Section 103(j) and only tangentially on 103(k).⁹

given event is similar in nature must be determined on a case-by-case basis. Also, notably, indirectly addressing one of the arguments made by the Contestant here, the Commission stated that in 30 C.F.R. Part 50 the Secretary set forth the meaning of the term accident “for reporting purposes.” * 1826 (emphasis added).

⁷ For the same reasons, the claim that a mine operator would have no advance knowledge what constitutes an “accident” is without merit. The Contestant’s theory, if adopted, would mean that the statutory provision would be entirely unenforceable absent a regulation or a policy statement, an untenable conclusion.

⁸ As noted by Administrative Law Judge Miller in *Performance Coal Co.*, 32 FMSHRC 1352, 2010 WL 3826411, (Sept. 2010), a “section 103(k) provides that it is MSHA, not the operator, who is in charge of the investigation. . . . [and the] Act gives MSHA plenary power to make post-accident orders for the purpose of protection and safety of all persons. . . . [Consequently,] MSHA has broad authority to issue 103(k) orders to effectuate this purpose.” at * 1357, citing *Rockhouse Energy Mining Co.*, 26 FMSHRC 599, 602 (July 2004) (ALJ), *Miller Mining Company, Inc. v. FMSHRC*, 713 F.2d 487, 490 (9th Cir. 1983), *Buck Mountain Coal Co.*, 15 FMSHRC 539 (Mar. 1993) (ALJ) and *West Ridge Resources, Inc.*, 31 FMSHRC 287 (Feb. 2009) (ALJ). Judge Miller also observed that “[t]his broad grant of authority is recognized in the legislative history, which states that: [t]he unpredictability of accidents in mines and uncertainty as to the circumstances surrounding them requires that the Secretary or his authorized representative be permitted to exercise broad discretion in order to protect the life or to insure the safety of any person. The grant of authority under section [103(k)] to take appropriate actions and . . . to issue orders is intended to provide the Secretary with flexibility in responding to accident situations, including the issuance of withdrawal orders.” quoting S. Rep. No. 95-181, at 29 (1970, reprinted in Senate Subcomm. on Labor, Comm. on Human Res., Legislative History of the Federal Mine Safety and Health Act of 1977, at 617 (1978).

⁹ In fact, MSHA’s Program Policy Manual, at Volume I, while addressing many aspects of section 103 of the Mine Act, omits any direct attention to section 103(k), which, as mentioned, is referenced only in the context of addressing section 103(j), dealing with Mine Accident and

In sum, the construction urged by the Contestant would deny MSHA authority to deal with an event which, by any rational measure, was clearly an accident. As such, it is within the reach of a section 103(k) Order. To reach the result urged by Contestant would affront common sense and be at odds with the remedial nature of the Mine Act.¹⁰

Accordingly, for the reasons articulated in this Order and in the Court's earlier Order denying Contestant's Motion for Summary Decision, the Court DENIES Contestant's Renewed Motion and GRANTS the Secretary's Motion to Dismiss Revelations' Notice of Contest.

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

Rescue, Recovery and Preservation of Evidence. So too, 30 C.F.R. Part 50, by its very title, is of broad coverage, speaking to the notification, investigation, reports and records of accidents, injuries, illnesses, employment and coal production in mines. As applicable here, it is in the context of such investigations and reports that accident is defined, but it in no way purports to corral the statutory definition of accident, nor could it. Even if, for arguments sake, one were to claim that it did limit the statute, accidents included within 30 C.F. R. § 50.2 (h) can be considered to apply to the situation which occurred here, as (h)(7) references an "unplanned ignition or explosion of . . . an explosive." Certainly, the effect of the explosion here was not planned to have such effects.

¹⁰ See, for example, *Walker Stone Co., Inc. v. Secretary of Labor*, 156 F.3d 1076 C.A.10,1998, September 22, 1998 upholding the Commission's interpretation of a standard as "consistent with the safety promoting purposes of the Mine Act," and that the Mine Act should be liberally construed to accomplish its remedial purposes and rejecting a construction that would create absurd results. (internal citations omitted). Congress intended the Mine Act to be liberally construed to accomplish its remedial purposes. *Cyprus Indus. Minerals Co. v. FMSHRC*, 664 F.2d 1116, 1118 (9th Cir.1981), *Joy Technologies, Inc. v. Secretary of Labor*, 99 F.3d 991 C.A.10,1996, (November 5, 1996)

Attachment:

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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January 21, 2011

REVELATION ENERGY, LLC,	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. KENT 2011-71-R
	:	Order No. 8247763;10/08/2010
v.	:	
	:	
SECRETARY OF LABOR,	:	S-1 Hunts BR
MINE SAFETY AND HEALTH	:	Mine ID 15-18280
ADMINISTRATION, MSHA,	:	
Respondent	:	

ORDER DENYING CONTESTANT’S MOTION FOR SUMMARY DECISION

Contestant, Revelation Energy, LLC, has filed a motion for summary decision (“Motion”) along with a memorandum in support thereof (“Memorandum”). The Secretary filed a Response (“Response”) to those filings. For the reasons which follow, the Court DENIES the Respondent’s Motion.

Contestant’s Motion is based upon the assertion that the MSHA Order at issue in this proceeding is invalid because the subject of that Order, an accident, does not fall within the definition of an “accident” under the Mine Act. The Section 103(k) Order in issue, Order No. 8247763, stated in relevant part that:

A non injury blasting accident occurred at this surface at approximately 6:30 pm resulting in a rock about 6 feet in diameter and weighing approximately 2 tons leaving the mine property. This rock rolled down the hill through a citizens yard and came to rest in the creek next to the roadway below the citizens residence. This 103 (k) order is issued to protect the safety of all persons on mine site and off mine site.

Reduced to its essence, the Contestant asserts that, whether one looks to the statute or the regulations, neither provides authority for the Order issued here. To arrive at that contention, the Respondent notes that the issuance of a 103(k) Order is available “[i]n the event of any accident occurring in a coal or other mine.” Under those circumstances the authorized representative of the Secretary, when present, may issue such orders as he deems appropriate to insure the safety of any person in the coal or other mine. Contestant also observes that when one looks to the statutory definition of an “accident” that provision provides that an accident “*includes* a mine explosion, mine ignition, mine fire, or mine inundation, or injury to, or death of, any person.” Section 3 (k) (emphasis added). Further, the Contestant notes that the regulation further defines the term “accident” stating that the term means twelve (12) enumerated events. Contestant concludes that, whichever measure is used to define the term “accident,” none apply to the circumstances which occurred here and consequently MSHA had no legal authority to issue the 103 (k) Order. Accordingly, Respondent maintains that as the event did not involve “injury, death or **any** of the events included in the definition of “accident” set forth in the Mine Act,” no accident occurred and the Order should be vacated. Memorandum at 4.

In response, it is the Secretary’s position that, because there are genuine issues of material facts, the Motion should be denied. The Secretary contends that the proper authority for

determining the meaning of an “accident” is set forth in 30 U.S.C. § 802(k). In this respect, it is noted that the parties agree, as the Respondent asserts, that the “key question in determining the validity of a §103(k) citation is whether ‘an accident within the meaning of Section 103(k)’ occurred.” Motion at 3. There is also agreement with the parties that the term “accident” is also defined at 30 C.F.R. § 50.2(h). However, as the Secretary points out, Section 103(k) applies to “this chapter,” and that the chapter it refers to is Chapter 22, that is, the Federal Mine Safety and Health Act of 1977 (“Mine Act”). Citing *Newmont U.S.A. Ltd.*, 32 FMSHRC 391 (April 14, 2010), the Secretary asserts that Section 802(k) is broader in its application than § 50.2(h).

The Court concludes that summary judgment is clearly not appropriate. As the Secretary has noted, Section 802(k) provides that, for the purpose of the Chapter, the term “accident” includes a mine explosion, mine ignition, mine fire or mine inundation, or injury to, or death of, any person.” It is a fundamental tenet of statutory construction that use of the term “includes” is a term of enlargement and not one of limitation. Congress could have easily omitted the word “includes” and simply listed certain mine events, such as “mine explosion” and the other events listed in that section but it expressly decided not to so limit the scope of the term “accident.” Accordingly, the listing of certain known historical bases for mine accidents when coupled with the term “includes,” cannot reasonably be construed to limit accidents to those named. In fact, to limit the definition to those named circumstances would eviscerate Congress’ use of the term “includes,” making it meaningless.

Although the Secretary also asserts that the incident which resulted in the issuance of the Order here “presented a potential for injury [which was] similar to that of a mine explosion, mine ignition, mine fire, mine inundation or injury to or death of any person,” that is to say, the listed events in Section 103(k), the Court does not conclude that “similarity” to those listed events is an essential requirement.¹ This is because the Mine Act is remedial legislation with its primary concern directed to the preservation of human life and as such is to be construed broadly to effectuate its purpose. *See, for e.g., Cyprus Cumberland Resources*, 21 FMSHRC 722, 1999 WL 557063, July 1999, *quoting Cannelton Industries*, 867 F.2d 1432, 1437 (C.A. D.C. 1989), and *Freeman Coal Mining Co.*, 504 F.2d 741, 744 (7th Cir. 1974).

Accordingly, the Contestant’s Motion is DENIED.²

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

¹ However, while concluding that similarity to the listed events is not a *sine qua non* to establishing that an event is included within the term “accident,” the Court agrees that the Secretary’s characterization of a 2 ton piece of rock some 6 feet in diameter blasted from mine property and ending up off mine property in an individual’s back yard, as claimed, is an exquisitely similar event, with the fly rock, *writ large*, which apparently occurred here.

² **The parties are directed to arrange a conference call with the Court on Wednesday January 26, 2011, so that this matter may be set for hearing**