May and June 2019

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ADMINISTRATIVE LAW JUDGE ORDERS

Review was granted in the following case during the month of June 2019:

Secretary of Labor v. American Aggregates of Michigan, Inc., Docket No. LAKE 2018-340 (Judge McCarthy, May 24, 2019)

No case review was denied during the months of May and June 2019.

COMMISSION ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 2, 2019

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	
v.	Docket No. WEST 2016-730-M
RAIN FOR RENT	

BEFORE: Rajkovich, Chairman; Jordan, Young, Althen, and Traynor, Commissioners

ORDER

BY THE COMMISSION:

On July 31, 2018, the Commission issued a decision in the captioned civil penalty proceeding in which it affirmed the decision of the Administrative Law Judge and the citations at issue. 40 FMSHRC 976 (Jul. 2018). Rain For Rent thereafter filed a petition for reconsideration with the Commission, stating that the matter should be reconsidered because the Judge had not been properly appointed to his position in accordance with the Appointments Clause of the U.S. Constitution, U.S. Const. Art. II § 2, cl. 2.[1] On August 30, 2018, the Commission issued an order denying reconsideration. Rain For Rent then appealed both of the Commission's decisions to the United States Court of Appeals for the D.C. Circuit.

Before the D.C. Circuit, Rain For Rent represented that it intended to argue to the Court that the Commission Judge had not been appointed in accordance with the requirements of the U.S. Constitution as explained in *Lucia v. SEC*, 138 S. Ct. 2044 (2018). The Secretary joined Rain For Rent in filing a joint motion to remand the case to the Commission for a new hearing.

[1] On July 31, 2018, the same day that the Commission issued its decision on this matter, the United States Court of Appeals for the Sixth Circuit vacated and remanded a separate matter for a new hearing before a constitutionally appointed Administrative Law Judge. *Jones Bros., Inc., v. Sec'y of Labor*, 898 F.3d 669 (6th Cir. 2018).

On March 22, 2019, the D.C. Circuit granted the parties' motion for remand, setting aside the Commission's July 31 and August 30 decision and order and "remanded [the case] to the [Commission] for a new hearing, in accordance with Lucia v. SEC, 138 S. Ct. 2044 (2018)." *Western Oilfields Supply Co., d/b/a Rain For Rent v. FMSHRC*, No. 18-1269, slip op. at 1 (D.C. Cir. Mar. 22, 2019).

Accordingly, the Commission hereby remands this matter to the Acting Chief Administrative Law Judge so that it may be reassigned to a different Judge for a hearing consistent with the D.C. Circuit's instructions.

/s/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Chairman

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

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

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

/s/ Arthur R. Traynor, III
Arthur R. Traynor, III, Commissioner

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVE., N.W., SUITE 520N
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May 22, 2019

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. INDUSTRIAL PROCESS EQUIPMENT CONSTRUCTORS	Docket No. LAKE 2018-302-M A.C. No. 20-00038-463276

BEFORE: Rajkovich, Chairman; Jordan, Young, Althen, and Traynor, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On July 2, 2018, the Commission received from Industrial Process Equipment Constructors ("Industrial Process") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on April 30, 2018, and became a final order of the Commission on May 30, 2018.

Industrial Process asserts that its failure to timely contest was the result of a typography error during informal negotiations with an MSHA representative. After MSHA issued Citation No. 8952382 to Industrial Process on March 19, 2018, Industrial Process requested an informal conference with a local MSHA representative in order to seek modifications to the cited safety standard. On May 8, 2018, the requested conference was held. As a result of the conference, changes were made to the citation. However, Industrial Process asserts that it typed the wrong citation number in the subject line of the email in which the May 8, 2018 conference was requested. Industrial Process asserts that, as a result of this typography mistake, the wrong citation was modified in MSHA records. By the time the mistake was discovered, the deadline for contesting the citation had passed. Industrial Process paid the penalty in full. Industrial Process filed a Motion to Reopen on June 29, 2018, 30 days after the Proposed Penalty Assessment became a final order of the Commission. The Secretary does not oppose the request to reopen.

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

/s/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Chairman

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

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

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

/s/ Arthur R. Traynor, III
Arthur R. Traynor, III, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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May 22, 2019

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	
v.	Docket No. LAKE 2018-304 A.C. No. 11-03141-459475
MACH MINING, LLC	

BEFORE: Rajkovich, Chairman; Jordan, Young, Althen, and Traynor, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On July 3, 2018, the Commission received from Mach Mining, LLC ("Mach Mining") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on March 5, 2018, and became a final order of the Commission on April 4, 2018. MSHA mailed a delinquency notice to Mach Mining on June 15, 2018.

Mach Mining asserts that its failure to timely contest the Proposed Penalty Assessment was caused by inadvertence by its Assistant Corporate Safety Director. Mach Mining personnel reviewed the Proposed Penalty Assessment and decided to contest six of the twenty-seven citations and pay the penalties for the remaining citations. However, the Assistant Corporate Safety Director, who was responsible for contesting or paying the various citations, failed to do so. According to an affidavit signed by the Assistant Corporate Safety Director, he realized his oversight when Mach Mining received a delinquency notice from MSHA on June 28, 2018. He immediately contacted outside counsel, who filed a Motion to Reopen on July 3, 2018, within a week of receipt of the delinquency notice. In its Motion, Mach Mining states that it has changed its contest procedures in order to prevent future errors. The Secretary does not oppose the request to reopen.

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

/s/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Chairman

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

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

/s/ William I. Althen
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/s/ Arthur R. Traynor, III
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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May 22, 2019

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. PEABODY TWENTYMILE MINING LLC	Docket No. WEST 2018-410-M A.C. No. 05-03836-461390

BEFORE: Rajkovich, Chairman; Jordan, Young, Althen, and Traynor, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On May 24, 2018, the Commission received from Peabody Twentymile Mining LLC ("Peabody") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on April 7, 2018, and became a final order of the Commission on May 7, 2018.

Peabody asserts that its failure to timely contest the proposed assessment was the result of inadvertence and mistake by company personnel. Peabody asserts that, on April 17, 2018, its Compliance Manager drafted a request directing outside counsel to file a contest of the proposed assessment. However, the Compliance Manager never sent the request to outside counsel.

On May 23, 2018, the Compliance Manager discovered his mistake and immediately contacted outside counsel. A Motion to Reopen was filed the next day, less than three weeks after the Proposed Penalty Assessment had become a final order of the Commission. The Secretary does not oppose the request to reopen.

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

/s/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Chairman

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

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

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

/s/ Arthur R. Traynor, III
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May 22, 2019

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. NEW GOLD NEVADA, INC.	Docket No. WEST 2018-430-M A.C. No. 26-02572-457995

BEFORE: Rajkovich, Chairman; Jordan, Young, Althen, and Traynor, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On June 11, 2018, the Commission received from New Gold Nevada, Inc. ("New Gold") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on February 5, 2018, and became a final order of the Commission on March 7, 2018.

New Gold asserts that it failed to timely contest the Proposed Penalty Assessment because it was awaiting a response from MSHA in regards to a conference held on January 4, 2018. After receiving the citations, New Gold requested an informal conference call with a local MSHA representative in order to negotiate modifications to the citations before penalties were assessed. New Gold asserts that it emailed inquiries concerning its proposed modifications to MSHA on January 24, 2018, February 27, 2018, and March 8, 2018, but did not receive a response until March 9, 2018, after the Proposed Penalty Assessment had become a final order of the Commission.[1] New Gold acknowledges the receipt of the Proposed Penalty Assessment, but states that it purposely did not respond due to what it thought were ongoing negotiations with the Secretary.[2] The Secretary does not oppose the request to reopen, but urges the operator to take steps to ensure that future penalty contests are timely filed.

[1] In its March 9, 2018 response, MSHA forwarded New Gold an email dated January 12, 2018, which contained MSHA's original response to the January 4, 2018 conference call. New Gold maintains that is has no record of receiving the January 12, 2018 email. It is unclear why MSHA did not promptly respond to New Gold's subsequent attempts to resolve the confusion.

[2] We note that, while parties are free to engage in pre-contest negotiations, such negotiations do not toll the deadline for an operator to contest proposed penalties. *See* 30 U.S.C. § 815(a).

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

/s/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Chairman

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

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

/s/ William I. Althen
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/s/ Arthur R. Traynor, III
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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May 22, 2019

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. UPLAND ROCK, INC.	Docket No. WEST 2018-452-M A.C. No. 04-05857-458100

BEFORE: Rajkovich, Chairman; Jordan, Young, Althen, and Traynor, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On June 22, 2018, the Commission received from Upland Rock, Inc. ("Upland") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on February 5, 2018, and became a final order of the Commission on March 7, 2018.

Upland asserts that its failure to timely contest the Proposed Penalty Assessment was the result of an employee's mistake. Upon receipt of the Proposed Penalty Assessment, an Upland employee stored the document in his personal binder without notifying any other Upland

personnel. After receiving a delinquency notice from MSHA dated May 18, 2018, the employee realized his mistake and came forward with the Proposed Penalty Assessment. Upland did not state when it received this delinquency notice. However, Upland filed its Motion to Reopen with the Commission on June 18, 2018, which could not have been more than 30 days from its receipt of the delinquency notice. The Secretary does not oppose the request to reopen, but urges the operator to take steps to ensure that future penalty contests are timely filed.

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

/s/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Chairman

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

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

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

/s/ Arthur R. Traynor, III
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May 22, 2019

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. CANYON FUEL COMPANY, LLC	Docket No. WEST 2019-270 A.C. No. 42-01890-480720

BEFORE: Rajkovich, Chairman; Jordan, Young, Althen, and Traynor, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On April 11, 2019, the Commission received from Canyon Fuel Company, LLC ("Canyon") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on January 15, 2019, and became a final order of the Commission on February 14, 2019.

Canyon asserts that its safety manager mailed a contest form for Citation Nos. 8537411 and 8537412 to the MSHA Penalty Compliance Office in January 2019. However, Canyon

provided no proof that the safety manager mailed the contest form. Canyon further asserts that it mailed payment for the uncontested citations to MSHA's Payment Office on or around January 31, 2019. However, while MSHA recorded a payment for the contested citations on February 20, 2019, it has no record of receiving the operator's contest. After Canyon received a delinquency notice from MSHA on April 1, 2019, it filed a Motion to Reopen within ten days. The Secretary does not oppose the request to reopen.

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

/s/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Chairman

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

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

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

/s/ Arthur R. Traynor, III
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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May 22, 2019

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. KINGSTON MINING, INC.	Docket No. WEVA 2018-480 A.C. No. 46-08625-456831

BEFORE: Rajkovich, Chairman; Jordan, Young, Althen, and Traynor, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On May 18, 2018, the Commission received from Kingston Mining, Inc. ("Kingston") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on January 19, 2018, and became a final order of the Commission on February 20, 2018.

Kingston asserts that its failure to timely contest the Proposed Penalty Assessment was the result of human error in the use of its case management system. Kingston states that it uses a software program to manage citations. The software alerts Kingston of the contest filing deadlines for each citation. However, Kington asserts that a safety analyst inadvertently entered the wrong case number into the company safety database. When inputting the relevant information for this case, she mislabeled the case number as "454631" rather than "456831." Thus, the system did not alert Kingston of the need to contest the citations. On or about May 11, 2018, Kingston received a delinquency notice from MSHA dated May 4, 2018. Kingston filed a Motion to Reopen on May 18, 2018, about one week after it received the delinquency notice. The Secretary does not oppose the request to reopen.

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

/s/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Chairman

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

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

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

/s/ Arthur R. Traynor, III
Arthur R. Traynor, III, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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May 22, 2019

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	
v.	Docket No. WEVA 2018-622 A.C. No. 46-04168-467185
WOLF RUN MINING, LLC	

BEFORE: Rajkovich, Chairman; Jordan, Young, Althen, and Traynor, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On August 8, 2018, the Commission received from Wolf Run Mining, LLC ("Wolf Run") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on June 19, 2018, and became a final order of the Commission on July 19, 2018.

Wolf Run asserts that it held a conference with an MSHA representative to discuss the citations before penalties had been proposed. Following this conference, Wolf Run told its

outside counsel that it intended to contest the citations once penalties were proposed. However, Wolf Run asserts that internal miscommunication resulted in the penalties inadvertently being timely paid, rather than contested. On August 6, 2018, Wolf Run discovered its mistake while responding to inquiries from mine management and immediately contacted outside counsel, who filed a Motion to Reopen less than three weeks after the Proposed Penalty Assessment had become a final order of the Commission. The Secretary does not oppose the request to reopen, but urges the operator to take steps to ensure that future penalty contests are timely filed.

Having reviewed Wolf Run's request and the Secretary's response, we find that the operator's failure to timely contest the assessment was the result of a communication mistake regarding whether management intended to contest or pay the penalties. In the interest of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Chairman

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

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

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

/s/ Arthur R. Traynor, III
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June 6, 2019

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. AMERICAN AGGREGATES OF MICHIGAN, INC.	Docket No. LAKE 2018-0340

ORDER

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012). On February 14, 2019, the Administrative Law Judge issued a decision denying a motion to approve settlement. On May 24, 2019, the Judge issued an Order Accepting Appearance, Rejecting Settlement, Recusing Undersigned, Requesting Reassignment, and Certifying Case for Interlocutory Review.

Commission Procedural Rule 76(a), 29 C.F.R. § 2700.76(a), provides that interlocutory review is not a matter of right but of the sound discretion of the Commission. In addition, under Rule 76(a)(2), a majority of Commission members must conclude that the Judge's interlocutory ruling involves a controlling question of law and that immediate review may materially advance the final disposition of the proceeding.

This standard having been satisfied, we hereby grant review. The question on review is whether the Judge abused his discretion in denying the Secretary's motion to approve settlement.

Briefing is stayed pending further order of the Commission.

/s/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Chairman

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

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

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

/s/ Arthur R. Traynor, III
Arthur R. Traynor, III, Commissioner

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 19, 2019

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	Docket No. CENT 2018-412-M A.C. No. 41-04718-456977
v.	Docket No. CENT 2019-237-M A.C. No. 41-04718-361889
STONE ZONE	Docket No. CENT 2019-238-M A.C. No. 41-04718-367048
	Docket No. CENT 2019-239-M A.C. No. 41-04718-389316
	Docket No. CENT 2019-240-M A.C. No. 41-04718-392027
	Docket No. CENT 2019-241-M A.C. No. 41-04718-399316
	Docket No. CENT 2019-242-M A.C. No. 41-04718-399406
	Docket No. CENT 2019-243-M A.C. No. 41-04718-401278
	Docket No. CENT 2019-244-M A.C. No. 41-04718-410608
	Docket No. CENT 2019-245-M A.C. No. 41-04718-429077
	Docket No. CENT 2019-246-M A.C. No. 41-04718-438742
	Docket No. CENT 2019-247-M A.C. No. 41-04718-454777

BEFORE: Rajkovich, Chairman; Jordan, Young, Althen, and Traynor, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On August 8, 2018, the Commission received from Stone Zone

a motion seeking to reopen twelve 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]

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).

The Secretary asserts that the proposed assessments in Docket Nos. CENT 2019-237-M, CENT 2019-238-M, CENT 2019-239-M, CENT 2019-240-M, CENT 2019-241-M, CENT 2019-242-M, CENT 2019-243-M, CENT 2019-244-M, CENT 2019-245-M, and CENT 2019-246-M were delivered to the operator's address of record and became final orders between October 22, 2014 and July 2017, when Stone Zone failed to contest the proposed penalties after 30 days.

Rule 60(c) of the Federal Rules of Civil Procedure provides that a Rule 60(b) motion shall be made within a reasonable time, and for reasons of mistake, inadvertence, or excusable neglect, not more than one year after the judgment, order, or proceeding was entered or taken. Fed. R. Civ. P. 60(c). The motion to reopen was filed more than one year after the aforementioned cases became final orders. Therefore, under Rule 60(c), Stone Zone's motion is untimely as it pertains to those cases. *J S Sand & Gravel, Inc.*, 26 FMSHRC 795, 796 (Oct. 2004).

However, the motion to reopen was timely filed in regard to Docket Nos. CENT 2018-412-M and CENT 2019-247-M. The Secretary states that in CENT 2019-247-M the proposed assessment was delivered on January 13, 2018 and became a final order of the Commission on February 12, 2018. According to the Secretary, in CENT 2018-412-M, the proposed assessment was delivered on February 17, 2018 and became a final order of the Commission on March 19, 2018.

[1] For the limited purpose of addressing these motions to reopen, we hereby consolidate docket numbers CENT 2018-412-M, CENT 2019-237-M, CENT 2019-238-M, CENT 2019-239-M, CENT 2019-240-M, CENT 2019-241-M, CENT 2019-242-M, CENT 2019-243-M, CENT 2019-244-M, CENT 2019-245-M, CENT 2019-246-M, and CENT 2019-247-M, involving similar procedural issues. 29 C.F.R. § 2700.12.

Stone Zone asserts that it received all twelve of the proposed penalty assessments from the Department of Labor's Mine Safety and Health Administration ("MSHA") but that it filed them away with the intention to contest and/or pay all of the penalties at a later date. Stone Zone further avers that its failure to timely contest was not a result of "indifference, or inattention, inadequate or unreliable office procedures of general carelessness." Rather, Stone Zone maintains that such failure was a product of not understanding that there was a "30 day window" for contesting proposed penalties.

The Secretary opposes the request to reopen, arguing that Stone Zone has failed to provide a valid reason to excuse its delinquency. The Secretary notes that Stone Zone admits that it received the proposed penalties and that MSHA inspectors specifically advised the operator to contest the penalties. Moreover, the Secretary implies that Stone Zone is not acting in good faith, only filing a motion to reopen after receiving a citation for failing to pay its penalties and a subsequent withdrawal order for substantial delinquent payments. The Secretary further argues that, in seeking to reopen these cases, Stone Zone is attempting to rescind on a recent agreement with MSHA to pay off its delinquent penalties in a series of monthly installments.

In regards to good faith, 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. *Lone Mountain Processing, Inc.,* 35 FMSHRC 3342, 3346 (Nov. 2013); *M.M. Sundt Constr. Co.,* 8 FMSHRC 1269, 1271 (Sept. 1986); *Easton Constr. Co.,* 3 FMSHRC 314, 315 (Feb. 1981). Some of the factors relevant to the good faith analysis are the number of delinquent penalties outstanding, the period of time the delinquent penalties accrued, and the seriousness of the citations underlying the aforementioned penalties. *Kentucky Fuel Corp.,* 38 FMSHRC 632, 633 (Apr. 2016). *See also Oak Grove Res. LLC*, 33 FMSHRC 1130, 1132 (June 2011).

According to the Installment Payment Agreement that Stone Zone entered into on July 3, 2018, Stone Zone owed MSHA a total amount of $214,756.95 in delinquent penalties, interest, and fees for civil penalties issued between 2010 and 2018. Of the 12 cases involved in the present motion to reopen, Stone Zone is seeking to reopen 58 citations and orders, 14 of which were issued under section 104(d) of the Mine Act.[2] In addition, we note that Stone Zone only filed a motion to reopen after MSHA issued a citation for failure to pay its penalties and section 104(b) withdrawal order for delinquent payments. Moreover, Stone Zone had already entered into an agreement with MSHA to pay all outstanding penalties a month before filing the motion to reopen.

These facts are clearly not consistent with an operator acting in good faith. The operator's record indicates that it has repeatedly disregarded final penalty assessments for many years. The

[2] The orders issued pursuant to section 104(d) were for unwarrantable failure to comply with mandatory health and safety standards. *See* 30 U.S.C. § 814(d).

large amount of penalties, which had accumulated in the years preceding the request to reopen, should have informed the operator of the need to be more attentive to proposed assessments from MSHA. Therefore, the operator should have taken precautions, due to the serious violations and high penalties at issue, to timely contest the proposed assessment.

Finally, 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. *Shelter Creek Capital, LLC*, 34 FMSHRC 3053, 3054 (Dec. 2012); *Oak Grove Res., LLC*, 33 FMSHRC 103, 104 (Feb. 2011); *Double Bonus Coal Co*., 32 FMSHRC 1155, 1156 (Sept. 2010); *Highland Mining Co.*, 31 FMSHRC 1313, 1315 (Nov. 2009); *Pinnacle Mining Co.*, 30 FMSHRC 1066, 1067 (Dec. 2008); *Pinnacle Mining Co.*, 30 FMSHRC 1061, 1062 (Dec. 2008). It is the operator's responsibility to read any information provided by MSHA in connection with a proposed assessment. In particular, the Secretary attaches to each proposed penalty a document titled *Notice of Contest Rights and Instructions* which clearly states in its first sentence that, "[p]ursuant to 30 CFR 100.7, you have 30 days from receipt of this proposed assessment to either (1) pay the penalty or penalties . . . or (2) notify MSHA that you wish to contest some of all of the proposed assessments. . . ."

Here, it is clear that Stone Zone operated for years without a process in place to review and contest proposed penalties. Rather, it appears that it was the operator's longstanding practice to simply file away the proposed assessments without reviewing the penalties or the *Notice of Contest Rights and Instructions* which accompany each assessment.

We have reopened final orders where an operator, though unfamiliar with contesting procedures, demonstrated a genuine interest to understand its obligations and liabilities under the Mine Act and act on such obligations. However, Stone Zone has provided no evidence that it attempted to follow up or seek clarification from MSHA or the Department of Treasury as to the deadline to contest the penalties. It strains credibility to believe that Stone Zone could operate for years under the mistaken belief that it could contest MSHA penalties years after they were proposed.

Accordingly, we find that the operator has failed to demonstrate an entitlement to extraordinary relief, and thus we deny Stone Zone's motion.

/s/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Chairman

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

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

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

/s/ Arthur R. Traynor, III
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ADMINISTRATIVE LAW JUDGE DECISIONS

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May 20, 2019

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. LAKE 2016-0305 A.C. No. 12-02295-409606
v.	
PEABODY MIDWEST MINING, LLC Respondent	Francisco Underground Pit

DECISION

Appearances: Edward V. Hartman, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for the Petitioner

Arthur Wolfson, Fisher Phillips LLP, Pittsburgh, Pennsylvania, for the Respondent

Before: Judge Moran

In this proceeding upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d), the Secretary alleges that the Respondent, Peabody Midwest Mining, LLC, violated 30 C.F.R. § 75.202(a), a safety standard titled "Protection from falls of roof, face and ribs," which provides "[t]he 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." A hearing was held on January 23 and 24, 2019 in Henderson, Kentucky.

For the reasons which follow, the Court finds that the violation was established, and that it was significant and substantial but that it was neither an unwarrantable failure nor, under any theory, was it a flagrant violation. A proposed civil penalty of $165,700.00 was assessed against Peabody for the violation in accordance with the special assessment provisions of 30 C.F.R. § 100.5(e). As also explained below, based on the Court's findings of fact and credibility determinations, a civil penalty in the amount of **$40,000.00** (forty thousand dollars) is imposed for this violation.

The Alleged Violation

On January 13, 2016, the Mine Safety and Health Administration (MSHA) issued a Section 104(d)(2) Order, No. 9036925, to Peabody Midwest Mining, LLC ("Peabody") at the Respondent's Francisco Underground Pit. (Ex. P-1). Order No. 9036925 alleges:

> 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 fall of the roof, face or ribs. Loose coal ribs were observed in 13 entries for a distance of approximately 500 feet on the MMU-002 and [MMU-022] [1] active working sections. The loose coal ribs measured approximately 4 inches to 18 inches in thickness for 6 ½ to 7 feet in height and 30 to 40 feet in length gapped away from the solid pillar approximately 3 to 6 inches with rock dust present behind them. The mine operator's pre-shift and on-shift record books indicate that the production crews had been prying down ribs but no evidence of correcting any hazardous condition was present at time of inspection. The mine operator has engaged in aggravated conduct constituting more than ordinary negligence by allowing this condition to exist until the arrival of MSHA. This violation is an unwarrantable failure to comply with a mandatory standard. Standard 75.202(a) was cited (34 times in two years at mine 1202295 (34 to the operator, 0 to a contactor.) *Id*.

Findings of Fact

MSHA Inspector Glenn Fishback testified for the Secretary. Fishback has been with MSHA for 11½ years. His total mining experience, including his years with MSHA, is 40 years. Tr. 25. Fishback has been an MSHA roof and rib control specialist for eight years. Tr. 26-29, 105. Some 29 years of his mining experience involved examining for bad roof and ribs. Tr. 106. Regarding the matter in issue, Fishback was at the mine on January 13, 2016. He was there to conduct his regular duties as a roof control specialist and to "extend the violation [regarding a separate roof control violation] which had been issued to the mine and to evaluate conditions of the area from an order that had been issued previously." Tr. 30. The extension was to allow the mine to submit a new roof control plan. Thus, he was at the mine to terminate a previous order, and in fact he did terminate that order on that day, January 13. Fishback required as part of that termination, that the mine retrain its management people in doing proper examinations. Tr. 34.

Following that, Fishback went underground. His escort that day was Travis Hayden. Tr. 36. It was during that inspection that Fishback issued the order which is the subject of this decision. Exhibit P-1 is Fishback's 104(d)(2) order for the alleged violation of standard 75.202(a), which he issued on January 13. Tr. 36. Fishback marked on a map, using an orange

[1] The order originally listed MMU-012, but was amended to reflect the correct MMU, which was 022. (Exhibit P-1, p. 4)

highlighter pen, the path, that is, the route he took that day on his inspection.[2] Tr. 38. Ex. P-2. On that day crosscut 11 was the last open crosscut. Tr. 39. Next to entry 5, the conveyor belt line, is entry 4, the travel road he used to arrive at the section. Fishback gave detailed testimony about the route he took that day and it was during that route that he came upon the areas he identified in his order.[3] Tr. 53. His examination of the cited areas took an hour or more. Tr. 54.

Referring to the conditions he observed in connection with his order, Fishback stated there was a lot of "rib rash … and a lot of broke up rib conditions." Tr. 60. "Ribs," of course, refer to the mine's sides and it was along those ribs that the inspector observed "various cracks running through it. Some of them were gap[ped] where [he] could see in between them, and they

[2] The map, Ex. P-2, was provided by the Respondent as part of the Secretary's discovery but the Respondent asserted during the hearing that the map could not be used as a device to actually show "where *the faces* were at the time of the inspection." Tr. 38. (emphasis added). It is true that Ex. P-2 is a more recent map, as it reflects mining activity well past crosscut 11, showing crosscuts from 12 to 23. However, that does not diminish the map's usefulness, as its purpose was to illustrate where Fishback traveled on the day in issue. The precise location of the faces on January 13 is not essential to the issues at hand, nor does it diminish the identification of the route Fishback took that day. Later, on recross-examination, Fishback confirmed that Ex. P-2 reflects, in orange, the route he could definitively say he traveled but, beyond the orange highlighter marking on the exhibit, he could not be sure about other details of his travel that day. Tr. 177, 182.

[3] Although Fishback described the route he took that day, to better visualize the inspector's route of travel that day, the Court recommends that the reader consult Ex. P-2 which includes the orange-highlighted depiction of his route, as mentioned above. In his testimony, he stated that he traveled up to crosscut 8, from entry 4 to crosscut 8. Tr. 39-40. The feeder was then at 9, which he indicated on the map with a small triangle, signifying the belt tail piece location. Crosscut 9 intersects with entry 5. This was marked using a black pen. Tr. 42. From that point, Fishback traveled through crosscut 8 over to entry 5 and then at the intersection of crosscut 8 in entry 5, he proceeded to crosscut 9. Tr. 43. After checking things in that area he then returned to entry 4 and from there up to crosscut 10 and then to was is listed on the map as entry 00. Tr. 43-44. The inspector added a black arrow showing his direction of travel there. Tr. 45. Crosscut 11 was the last open crosscut at that time. Tr. 45. He then traveled from entry 00 to entry 11, taking some air readings as he progressed. Id. This was part of his imminent danger run, a standard preliminary duty before visiting the area he intended to inspect. He then traveled down entry 11 up to crosscut 5, which is just below entry 6 and from there he returned to entry 8, traveling inby to the second opening, which was then at crosscut 10. Tr. 50. Next, he proceeded from entry 8 to entry 6 and then traveled outby from 6. Tr. 53. Also, in response to the Court's questions, in learning about the distances between crosscuts and entries, Fishback stated the distances between crosscuts varied between 60 to 80 feet, but typically they would be 60 feet apart. Roof stability can be a reason for these variations. Tr. 55. The entries are also not uniform, in the distances between them. Accordingly, a pillar length may vary. Further, for purposes of record clarification, Fishback stated that the lines he marked on Ex. P-2 with an orange highlighter represented the area he walked and where he found the problems he cited in Order No. 9036925. Tr. 57. The map pertains to one unit, for which the mine had two MMU's (mechanized mining units). The right MMU is 22 and the other MMU was 2. Tr. 58-59.

had rock dust behind them, which indicated they'd been there." Tr. 60. By stating "they'd been there," Fishback obviously meant the gaps were not recent, as there was rock dust behind them.

There was a mud seam in the cited are and this presented a problem, according to Fishback, because it increased the risk of a rib falling on miners. This was an ongoing problem and the mine had been cited for this issue before. Tr. 61. Exhibit P-1, Fishback's Order in this matter, describes but one bad rib, that is, loose coal measurement, in it. As reflected in the text his order, he measured it at 4 to 18 inches thick by 6 ½ to 7 feet in height and 30 to 40 feet in length and having a gap of 3 to 6 inches with rock dust behind it. Tr. 61. Asked why no precise location was listed for this bad rib in the order, Fishback stated that the measurement was representative, approximately, "of all of the conditions [he] found." Tr. 61, 65. He did not contend that the ribs were bad along "every step" but rather that similar conditions existed everywhere he traveled in that area. Tr. 62. Travis Hayden, the mine's representative who was traveling with Fishback at that time, then asserted to the inspector in response to those rib conditions that the mine "had been prying on them." Tr. 62. Significantly, to the Court, Fishback did not contradict that claim of Hayden. Instead, when asked if anybody else came up to him and asserted that they were prying ribs, Fishback only responded "[n]ot that I remember." *Id.* As noted in this decision, though asked several times about that issue, the inspector could never affirmatively state that he saw no one working on ribs – he could only state that he could not *remember* such activity.

Fishback also spoke to Ex. P-3, which is a book MSHA kept in its office, reflecting notification to a mine of conditions that are continuing to exist at a mine. Tr. 66. The purpose behind the book is to have the mine conduct "heightened awareness" of a given problem. Tr. 66, 162-163. The book reflects that the mine had been put on such heightened awareness status on August 12, 2015 for standard 202(a). Subsequently they were taken off that status for that condition. Tr. 67. However, as of January 13, 2016, the mine was on that "heightened awareness" status.

While the order describes only one, approximate, measurement of the rib conditions, taken by Fishback, and about which he characterized as representative of the conditions he observed, he did take numerous photographs of the conditions he observed, which were offered in support of his order. Tr. 62, Ex. P-5. The photos in this multi-page exhibit, Ex. P-5, reflect the date and time they were taken. Tr. 69. No photo lists the *exact* location where it was taken. The reason for this was the inordinate amount of time such an effort would require. Tr. 71. At the first page of Ex. P-5, that photo was taken between crosscut 5 and 12. For that first photo, Fishback stated that it shows a rib that had either rashed off or alternatively may have been taken down. Tr. 72. However, the photo also displays, he contended, "several other areas there that [were] about to fall on themselves." *Id.* He elaborated that these areas were on the left side of the photo and show "all those areas that are cracked, [as evidenced by] the black outline [ ] around each of them, that they are about to either fall off or they need to be pried off, one or the other." *Id.* In these photos, the light, whiter, color represents rock dust that's been applied, while the brown or light tan colors still reflect rock dust but where the moisture has been sucked out of the coal. Tr. 73. Black in the photos represents bare coal where the ribs had fallen. This fallen coal

was sometimes right by the ribs and sometimes in the middle of the entries, dependent upon the thickness of the fallen material. *Id.* The roof height was seven to eight feet.[4] *Id.*

Fishback then discussed several of his other photos from the exhibit and it is fair to state, that while the particular descriptions of the conditions in each photo varied, they all represented conditions that the inspector believed supported his opinion of ribs that were in need of attention.[5] Tr. 80, 82. Explaining the pictures further, Fishback stated that "[w]here you're seeing the black area, it's already fell off where it's black, and the cracks indicate that it's going to fall in the near future." Tr. 83. More examples were cited. Tr. 85.

The Secretary stated, quite reasonably in the Court's view, that he did not want to take the witness through each of the many photos the inspector captured that day. Given that, the Court inquired whether, for all of photos Fishback had described up to that point, if they were "representative of what [Fishback] saw throughout the section and caused [him] to issue [the order in this case]." Fishback responded, "Yes." Tr. 95.

Fishback stated that there would be exposure to these rib conditions. Therefore, the ribs did not present simply an academic issue. For example, there were electrical cables along the rib and these would need attention as mining advanced. Miners doing that work would be right next to the rib. Tr. 87-88. Similar issues were identified with cables and rib issues. *See also*, Tr. 89, and Tr. 90, with the latter an example of a rib that broke from the solid pillar. Tr. 90.

Fishback was then directed to page 53 of Ex. P-5. He identified it as a rib that had either fallen out or had been taken out by the operator and for which condition the operator had installed supplemental support, timbers, to help hold the lower portion of the rib. Tr. 96. That photo was taken on January 15, 2016. *Id.* and Ex. P-5, at 54 and 55. The photos were taken in connection with his termination of this order. Tr. 96-97.

The Secretary then asked Fishback about Pages 35 and 36 within Ex. P-5. He described it as a rib with cracks in it and which had been heavily rock dusted. The photo also showed the examiner's date, time and initials, marked by orange spray paint. Tr. 97. Page 38 of Ex. P-5 also shows the same spray painted initials but for that photo, beyond recording January 2016, the exact date was unclear. Tr. 98. Fishback stated that this photo also shows loose ribs. Tr. 98-99. The Court asked the witness to focus, for the moment, solely on Photo 38, asking whether, if he only saw that condition on that day, would he have issued a 75.202(a) violation for that alone? Fishback answered he *probably* would have issued a citation or order for that because the examiner's initials were right on it and therefore he could not contend that he did not see the

[4] To gain perspective of the photo's depiction, Fishback drew a red diagonal line on the exhibit to demarcate the roof's location in the photo. Tr. 74-76. He also drew a line to show the junction between the roof and the rib. Tr. 78-79.

[5] Fishback agreed that for these photographs, most consisted of paired sets of each photo. That is, for Ex. P-5, photos one and two are the same picture, with one simply being an obviously clearer picture of the other. As a second example, Ex. P-5, photos three and four, represent the same picture. Tr. 81. Ex. P-5, photos five and six, are yet another example. Tr. 83.

condition. However, as Fishback viewed the matter as encompassing multiple rib problems, he could not commit to asserting that condition alone would be a 75.202(a) violation. Tr. 100-101.

Fishback agreed that, for each of the photos he discussed in his testimony, the ribs were not adequately supported or otherwise controlled to protect persons from hazards related to falls. Tr. 104. When rib material comes down, it starts straight down, but he stated that if the material is sufficient it will fall into an entry. Tr. 107. Fishback knows firsthand of the hazard a rib can present, as he was once struck by a falling rib, though no broken bone resulted from that event. Tr. 108. It is noteworthy that the cited standard is considered important enough to have been designated by MSHA as one of its "rules to live by."[6] Tr. 109. The mud seam adds to the safety issue because it increases the chances of cracking and breaking around the seam and then material dislodging from the ribs. Tr. 110.

Fishback also informed that he had spoken to the mine's operations manager, Jon Dever and also "[p]robably everybody in management for sure at the mine at that time." *Id.* Those discussions included his suggestions for supplemental support, such as rib bolting and timbering, all with the idea of helping to eliminate the rib rashing. *Id.* However, he stated that so far none of his suggestions had been adopted, at least in that cited section of the mine.[7] Tr. 111-112.

As noted above, Fishback was not definitive when asked if he saw any miners taking down ribs when he issued his order, stating "not that I remember." Tr. 113-115, 140. He asserted inquiring "don't you think we need to pry some ribs around here?" Tr. 113. This was prompted because he "just kept finding" rib problems. *Id.* He then rephrased his question asking the miners "why are we not prying ribs down?" Tr. 114. Also, the mine was running coal at that time. *Id.*

Fishback's order did acknowledge that the pre-shift and on-shift record books reflected that the production crews had been prying down ribs. Tr. 115. The Order also listed his determination that an injury or illness was highly likely, because of the conditions he found that day. The result could be a serious injury, such as broken bones. The maximum number of miners exposed was listed as ten. Tr. 116. Weekly examiners and the rock dusting crew would have been exposed to the conditions. It was marked as significant and substantial because of the size of the ribs and the conditions he encountered. Tr. 117. He concluded that the conditions

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[6] The Court takes official notice of MSHA's "Fatality Prevention –Rules to Live By," its initiative to improve the prevention of fatalities in mining," lists the cited standard, 30 C.F.R. § 75.202, as one of the coal priority standards, falls of roof and rib. *See Fatality Prevention – Rules to Live By*, U.S. DEP'T OF LABOR, MINE SAFETY & HEALTH ADMIN., https://arlweb.msha.gov/readroom/coal%20handbook/MSHA%20-%20Initiatives%20-%20Fatality%20Prevention%20-%20Rules%20to%20Live%20By%20I.htm (last visited April 22, 2019).

[7] It was also brought up that MSHA determined that the mine's roof control plan needed to be amended. Tr. 112. This issue arose at a point in time before the order involved in this proceeding. *Id.* However, the changes were not implemented until after the order here was issued. Tr. 113.

presented a "major safety hazard." *Id.* In characterizing the conditions as "excessive," Fishback justified that term because "[i]t covered the whole working section and people were exposed to it." Tr. 118. Further, based on his experience, he believed the conditions had existed for "[o]ne to two weeks," and he expressed that they were obvious, a conclusion he believed was supported by his photographs. Tr. 119. Aggravating the situation, in his view, the operator had been put on notice that greater efforts were needed to address the issue. *Id.* In terms of correcting the suspect ribs, management informed Fishback that it took seven or eight miners over a period of seven shifts to accomplish this. Tr. 120, 161.

Before beginning cross-examination, Respondent's Attorney, Mr. Wolfson, reasserted an objection he had lodged earlier – namely that the photos should not be admitted because of the alleged "non-specificity of the location listed on the [inspector's] worksheets." Tr. 123. The Court ruled, as it had before,[8] that the inspector testified that "all these photographs were taken in the area which [the inspector] traced with the orange marker … [and that it would have been] "excessively burdensome and time-consuming" to have required the specific locations Respondent sought. The Court also noted that "[c]ertainly, there's no testimony that these were taken at some other mine or some other location." Tr. 124. For those reasons, as it did in its earlier decision involving this mine and this mud seam, the Court rejected the Respondent's objections.

Cross-examination began by directing the inspector to his notes, Ex. P-4, at page 27. They pertain to 30 C.F.R. § 75.223(a)(1), and deal with a citation he also issued on January 13, 2016, involving the mine's need to revise its roof control plan. Tr. 126. Fishback agreed that he did not issue an order shutting down the section until after he made his complete inspection of the working section. Tr. 132.[9]

The inspector concurred that he advised the crew to be more diligent in their rib prying, and that his notes reflected that the crew told him they had been prying down ribs, but he told them that he had seen no one pry a thing the whole time. Tr. 139-140.

In cleaning up material that has been pried down, depending upon the amount involved, typically a scoop will be used to clean up the fallen material. Tr. 141. When asked if he was able to see fallen material in the photos discussed during direct examination, Fishback stated he could not detect such material in the photos and Counsel for the Secretary stipulated that in photos 1

[8] See, the Court's earlier decision involving the same mud seam at the Respondent's mine and the issue of the sufficiency of the location of the loose ribs. *Peabody Midwest Mining LLC*, 2018 WL 816286 *11 (Feb 2018) (ALJ), for example.

[9] Following that, it was remarked that in his notes regarding the working section, Fishback marked "NVO," which is shorthand for "no violations observed." However, Fishback explained that was limited to methane or oxygen issues. Tr. 133.

through 22, 35, 36, and 53 through 55, they *do not* show material on the ground. Tr. 143.[10]

Respondent's Counsel raised the matter of alleged violations cited by Fishback in the prior year, on August 12, 2015. These were not located near the order in this case, but rather on the second southwest main travelway. Tr. 164-169.[11]

The Secretary then called MSHA Inspector Stephen William Tisdale. Tr. 186. His total mining experience, including that with MSHA, comprises about 15 years. Tr. 188. Directed to Ex. P-8, he identified it as orders he had previously issued on October 28, 2015 to the Francisco Mine for violations of 75.202(a), the same provision cited here, involving maintaining safe ribs and roof. Tr. 189. This was not new ground to the Court, as it presided in an earlier hearing involving those matters and had issued a decision regarding that, which decision was not appealed. *See, Peabody Midwest Mining LLC*, 2018 WL 816286 (Feb 2018) (ALJ). More will be said about this in the Discussion section below, because the Court has determined that it bears upon the present decision.

Then directed to January 14, 2016, Tisdale stated that he was at the mine that day to terminate an earlier issued (d) order, No. 9036925, the order at issue here, that as discussed had been issued by Fishback. However, Tisdale did not terminate the order that day. Tr. 194. This was because when he arrived at the areas covered by the order he "found miners still working on the conditions that were cited in the order … there was still a lot of material on the ground. There were bolters bolting [wide] bolt spacing. The faces actually had a lot of material in them also." Tr. 195. Tisdale added, "[i]n the faces, they would have been full almost to the point they were into the last open [crosscut]. And [he] believe[d] that is what prompted [him] to modify [Fishback's] order because they had nowhere else to store [the rib] material. And if they would have continued to put [that material] in the faces, they would have been creating another hazard." *Id.* That other hazard was the material was making it difficult to do adequate gas checks at the faces. Miners were having to crawl over coal piles to do those checks. Tr. 196. Also, while

[10] Fishback agreed that his order reflects *one set* of "measurements" that day but he stated that he took several measurements while at the site that day. However, the listed "measurements" do not reflect "actual" measurements in the sense one would typically use that term, but rather represent an average of the estimated measurements he took. Further, he was unable to recall the number of measurements he took in order to arrive at that average, nor specifically where they were taken in the section. Tr. 146-147. It is noted that within Ex. P-4, pages 11-12 of the inspector's notes, is listed the "measurements" he took and those are the same measurements he listed in his order. Tr. 148.

[11] The Court references this only for the purpose of completeness, but it does not believe it is pertinent, nor helpful, to resolving the issues in this case. In fact, the Court expressly remarked at the hearing that it did not see how it helped resolve the present controversy. Tr. 169. It would seem to have been offered to show that the Respondent addressed those earlier identified problems by having a roof bolter move to an outby location in order to attend to them. These involved alleged violations of 75.202(a) and 75.220(a)(1). Tr. 164. On redirect, the Secretary returned to Fishback's August 12, 2015 citation, which the inspector informed was issued for a section 202(a) violation, and involved a bad rib issue. Tr. 170.

he was there, Tisdale found some loose ribs that needed to be pulled down. In his opinion, the amount of material present was almost significant enough to prevent a scoop to drive through there. Tr. 197. Roof bolters were also working there, to replace areas where there was then wide bolt spacing created by the ribs being pulled down. Tr. 197-198.

Tisdale also identified Ex. P-8 as what was represented to him by Todd Seilhymer, who was at that time the mine's superintendent, as to the number of miners who had been working on the rib issue. Tr. 199. Yet, while the mine believed that the order was ready to be lifted and though two more shifts had elapsed before Tisdale arrived at the mine to assess the situation, work was still being done to address the problem. *Id.* Thus, the order remained intact and Tisdale only allowed a scoop to load the material on the belt. This modification was to make it clear that no mining could resume at that point – only continued cleanup was allowed. Tr. 200. At that time, Tisdale also observed scoops dealing with the ribs and pry bars being employed too. At least six ribs were pried down while he was there and some required effort to take them down, but "[t]here were [a] couple that very eas[ily] came down." Tr. 201. These pried ribs came out into the entry – they did not just fall straight down. *Id.* Tisdale knew that a lot of material had been taken down, by the amount of material that was in the faces. Tr. 202.

At that point, the Secretary having rested, subject to the potential for rebuttal testimony, the Respondent called its first witness, Casey Winters. Tr. 210. Winters has ten years of mining experience. Tr. 213. In January 2016, Winters was a "lead man," a position he described as a junior face boss or section foreman. Presently, he is an "operator." *Id.* At the time of Fishback's order, the mine ran three shifts. One of those shifts was idle, which meant that shift did anything that would help the mine run coal. This included belt moves, cleaning, building walls, and scooping. Tr. 211. Winters was then on Unit 2 production. There were then three working sections. *Id.*

Winters agreed that in January 2016, the mine had a mud seam. Tr. 213. He described the condition as "mud in between coal. It was coal on top, coal on the bottom. There would be a mud bank running all the way through it." Tr. 214. He stated that the condition did have an effect on the ribs, "Yeah, the ribs would, where the mud was, would usually kind of fall out." Tr. 214. He then elaborated how this condition was addressed, "We always – it was a rule that we always had someone, one person detected to prying ribs. All shift long, no matter shift it was, you had to have somebody prying ribs … and it was one of the biggest things we did, prying ribs and spot a bolt." Tr. 214. In response to the Court, Winters confirmed that the mine had one person dedicated to dealing with ribs at all times. Tr. 215. This was true, Winters stated for every shift. And this was full-time job, all the time, not just as needed. *Id.*

When the Court then suggested that such a practice must have meant there was much to attend to, Winters responded that he wasn't suggesting that person was "busy all the time … but it was their job to patrol the unit and look for anything, whether it would be the two-inch piece to pry down or you could spot … bolt[s]." Tr. 216. The mine also took other measures to deal with rib control. One of these was addressing mud vein corners by shearing them with the continuous miner, cutting it at an angle. This practice prevented the corners from falling out. Tr. 217.

Winters also spoke to the type of material that would come out upon prying a rib. It would vary, he said, asserting that it could be a foot by a foot or less, with a thickness of six inches. He described it as knocking chunks of coal down. Tr. 218. Asked if, per the Order in this matter, he encountered ribs in Unit 2 of the dimensions described in that Order, Winters responded that he never did. Tr. 219.

Directed to midnight shift on January 13, 2016, Winters stated that he worked the midnight shift that day on Unit 2. This was in the time frame *before* the Order in issue here, from 11 pm until 7 am. Tr. 227. He asserted that on that shift he was working on an outby drive belt, and also was there to bolt up the unit, and to add a new drive setup, which was not on Unit 2. Tr. 220. Two roof bolters did the work at the unit and, in total, there were three of them working that shift. He also asserted that he scaled the "whole time" that shift. Tr. 222. He acknowledged that coal might be run during this shift too. Tr. 223-224. Winters, while maintaining that the amount of material was only six inches to a foot or two, and up to three feet tall,[12] did acknowledge that the rib issue was *not* just in one location. Instead, it was "throughout the whole section." Tr. 225.

Winters was also shown Ex. R-3, the pre-shift book. It records the conditions he found during that exam. Tr. 228. As Respondent's Counsel walked him through that exhibit, Winters agreed that it noted wide bolt spacing and spotting 15 bolts in one location and four bolts in entry 2 and three bolts in Entry 1 and in 00, he spotted a corner bolt. Asked if those bolting actions were as a result of prying ribs, Winters responded, "[y]eah, I would say," adding that 95% of them were from prying. Tr. 229.

Winters stated that the spotting was also done outby the tail piece.[13] Tr. 230. He also maintained that, following the prying he would replenish the rock dust by hand, not by machine, and for loose debris he "would always scoop it up." Tr. 233-234.

On cross-examination, Winters agreed that if he threw rock dust on areas that had been pried, one would not expect to see blocks of black coal. Tr.236. Winters was less certain when asked whether, following the Order, issued after his midnight shift, for the next two days, there was no active mining, stating he would need to look at the production shift. *Id.* He explained that he might not have been up on that section for his next shift, the following night, but he couldn't have that response both ways, in that he could not know how much work had been done to correct the problem, following the order's issuance. Tr. 237. Thus, he admitted he could not speak directly to the assertion that it took eight miners per shift for seven shifts to correct the violation. Tr. 237-238. He then conceded that he did not know the material was sufficient that, when the new inspector arrived, that inspector found chunks of coal on the ground upwards of two to three feet thick. Tr. 238.

While Winters challenged the idea that the amount of material was sufficient to block his ability to do his gas checks at the face, he admitted he couldn't recall if he even was working on

[12] Winters did not view a piece of those dimensions to be "a big piece." Tr. 226.

[13] When shown the production report, it reflected his earlier testimony that there was no production on that midnight shift. Ex. R 2, Tr. 231-232.

that unit on the January 14. In fact, even for the next day, January 15, he could not recall if he was there following the Order. Tr. 238-239.

Travis Hayden, section foreman, then testified for the Respondent. Tr. 243. He held the same position in January 2016. However, while he escorted MSHA Inspector Fishback on that day, he had never worked in Unit 2. Tr. 244. He stated that at the tail piece Fishback found a loose rib, but that he, Hayden, was unable to get it to come down. Tr. 246. Hayden did not believe it really was a loose rib. Instead Hayden believed there was a crack in it. *Id.*
Their travel continued to the far left entry, at 00. Tr. 248. In the last open crosscut Fishback pointed out one rib with an issue, between zero and double zero ("00"). Hayden considered it to be a crack, very much like the crack they viewed at the tail piece. *Id.* Hayden spoke of a crack or a small gap as essentially the same condition. Tr. 249. Fishback used a stick to pry the condition, but according to Hayden, only small pieces came out. *Id.*

Their travel then proceeded to the last open crosscut, but Hayden stated that Fishback did not raise any other rib concerns. Tr. 249-250. Nor, Hayden stated, did Fishback note any other rib issues between entries 11 and 6. Tr. 250. However, at the power center Fishback "pointed out a few ribs" needing attention. *Id.* For one of those issues, near the power center, Winters again described some cracking, but Fishback did not ask that the condition be pried, nor did he ask him to find someone to pry it, nor did he require that the location be flagged. Tr. 251.
From there they continued to walk outby where some cracking was observed: "[k]ind of just cracking in the ribs. In the mud vein is what I call it." Tr. 252. He estimated there were "probably four or five spots [Fishback] pointed out to [him] in through that area." *Id.* As for the mud vein, Hayden did not view the rib issues as gapping. Instead, his description was that "it was more cracking." Tr. 253.

At that point in their route, after traveling entry 7 and over to entry 4, things changed, as Fishback told Hayden to "get ahold of the face boss on the unit. He was shutting down the unit, and … [Fishback] wanted to have … a safety meeting with the guys … on the unit." Tr. 255. Fishback, again according to Hayden, asked the crew if anyone had been prying down ribs that day. Everyone on the crew, Hayden stated, told Fishback that they had been prying ribs that day. Tr. 256. Also, at that time, Fishback pointed out a rib to the assembled crew, but when a miner, Joe Frederick, tried to deal with it, the rib could not be pried down. Tr. 256-257. The matter was addressed by having a scoop knock down the rib. Hayden also contended that he saw Fishback take only one measurement during the entire time – that was to measure the air in the width of the entry to the last open crosscut. Tr. 258.

Hayden further asserted that, while accompanying Fishback, he did see evidence that prying had occurred, as he observed pieces of rib on the ground next to the ribs. Tr. 259-260. In essence, Hayden presented a very different picture of the conditions from Fishback's accounting. For example, he stated that there were a lot of areas that had been "freshly scooped," meaning the ribs were square and the bottom was clean. Tr. 260. Despite that testimony, he acknowledged that "there were some ribs on the ground. [Hayden] even pointed some of them out to show [Fishback] that we was prying ribs out, just to show him we was making an effort to take care of the problem." *Id.*

Hayden informed that he made notes of the inspection. Tr. 262. This evolved into a statement that was derived from his notes while he was underground. Tr. 264. On cross-examination, although he may have filled out an "escort" sheet which would contain very basic information, such as stating that the inspector issued a (d) order on Unit 2, he could not be sure that was done in this instance. Tr. 265. It was in his statement that Hayden asserted that everyone had been pulling down ribs. Tr. 266. Hayden stated that whenever a (d) order is issued, a statement is to be made. Tr. 267. His statement was subsequently admitted as Exhibit R-4. Tr. 280. Although he asserted that the process at the mine was for each miner working at the unit to create a statement, he couldn't speak to whether that was actually done, nor could he inform whether Chris Robinson or Todd Seilhymer created their own statements. Tr. 269.
He then backed away from his earlier remark that statements were part of the mine's protocol. Tr. 270.

After the order was issued, Hayden did not return to the unit over the next seven shifts to view the conditions. Tr. 270. However, he acknowledged awareness of what had to be done to abate the cited conditions. This included knowledge that the amount of material from the bad ribs that was placed near the face was such that it was difficult to run gas checks along the face. Tr. 271. Confronted with the disparity between his testimony that Fishback noted only four or five cracks in the areas and the great effort it took to take down the bad ribs, Hayden answered that "you can bring down whatever you want if you start picking at it all day long." Tr. 272. However, he conceded that, with ribs, small pieces can come down, but large ones can fall too. Tr. 273. Importantly, he admitted that one can't know if a small piece or a large one may come down. Further, cracks can be an indicator of loose ribs. Tr. 274. Cracks, he conceded, are an indication that there is something wrong with a rib. *Id.* Hayden was with the inspector when he was taking the photographs. Tr. 279.

Zachary Hudson next testified for the Respondent. Tr. 281. In January 2016, he was a "fill-in" face boss at the mine. He was part of the B crew and, as alluded to in earlier testimony, the crews rotated, so that one crew would work two weeks on days and two weeks on the afternoon shift. Tr. 281-282. Though he agreed there was a mud seam present, and that the condition would cause the ribs to flake out, there was "nothing real big. You know, just push out little chunks of coal or something." Tr. 283. Hudson agreed that he had testified in an earlier proceeding regarding an order issued December 22, 2015 involving rib control on Unit 2.
Tr. 283. Following that order, additional steps were instituted to address rib control. *Id.*
This consisted of having a designated person prying down ribs. *Id.* He then added that "everybody" was participating in the rib control issue. Tr. 284, 285. He also contended that he would have meetings with the crew and that they talked about the rib issues "since we knew that we had that mud vein." Tr. 284.

While Hudson contended that everyone was attentive to the rib issue, he asserted that "just because the rib was gapped, doesn't mean that it was ready to come down because some of that stuff was still intact pretty damn good." Tr. 287. However, he asserted that they would still check on them, though again, at times, they turned out not to be loose. Tr. 288. He did not agree with earlier testimony that miners would hand dust after a rib had been pried down. It was not, he stated, a common practice to hand dust. Tr. 288-289, 307. When, as a result of rib issues, timbers

or bolting resulted, it would be noted in the mine reports. Ex. R-5, Tr. 289. He agreed that the report reflects that ribs were pried. Tr. 291-294.

Then directed to his January 13, 2016 section report, he noted that they were not running both sides of the split area unit that day. Tr. 296. MSHA inspector Danny Mann was there for part of that time, but Hudson stated that inspector did not raise any rib issues with him. Tr. 299. Hudson did not recall speaking with Fishback about his order, though he did recall Fishback meeting with the miners about the issue. Tr. 300. There was some history between Fishback and Hudson in that, according to Hudson, for that December 2015 order, Fishback asserted that Hudson was "a bad boss." Tr. 301. For that reason he kept his distance from Fishback during the January 13 event, not wanting to have any conflict in front of his crew. Tr. 301.

However, Hudson did hear his crew talking with Fishback. Specifically, he recalled Woody Hembry telling Fishback that he did not feel things were unsafe because they were "constantly prying down ribs." Tr. 302. Hudson also disagreed with Fishback's recording in Ex. P-1 regarding the claimed loose coal ribs dimensions, stating that he never saw anything of that size, remarking that dimension would be "the whole size of the pillar." Tr. 302-303.

During cross-examination, when asked about his knowledge of two previous 104(d)(2) orders for violations of section 75.202(a), Hudson stated he did not know what that meant and that he didn't know what 202(a) referred to. Tr. 305. Referencing Ex. P-8, Hudson said he could not recall those previous orders. He then explained that in his earlier reference to Fishback's meeting with the mine crew, he was referring to the December order for loose ribs, when he and Fishback exchanged words, meaning they had a confrontation. Tr. 306. He did agree that, following the time when he had words with Fishback, additional training ensued. This involved "examining the ribs a little bit better." Tr. 306.

He did admit that, if one sees a gap, one always wants to try and eliminate that. Tr. 309. He also agreed that in this unit a rib could come down anytime, because that mud seam was a chronic rib problem in this particular section of the mine. Tr. 309.

Chase Reneer was next called by the Respondent. In January 2016 he was a roof bolter on Unit 2 working the B crew. Tr. 317. Prior to the event in issue he had worked on Unit 2 for about three years. He described the mud seam as "a fragile, brittle separation in between the coal seam." Tr. 319. To him, this meant the seam was not as sturdy. However, despite its presence, he described the effect as only "little pieces coming out … nothing big." *Id.* He maintained that everybody participated in roof control "[e]very day." Tr. 320. It was his testimony, in effect, that the miners were quite diligent in dealing with the ribs. Tr. 319-321.

Addressing the day in issue, January 13, 2016, he was working the day shift then. Ex. R-6 reflects where he bolted on that shift. Before he started bolting on that shift, he said he saw evidence of rib prying. Tr. 323. There he noted a corner that had been pried and that it had been hand dusted. Tr. 323-324. He also contended seeing other areas that had been spot bolted, and during the shift itself, he saw miner John Butler prying ribs. Tr. 325.

He further asserted that Fishback spoke to him about a loose rib between entries 4 and 5. Tr. 326. Though he tried to pry it, it would not come down. Tr. 326-327. He then used a pinner but only a piece about the size of a tissue box came out. Ultimately it only came out after great effort. Tr. 328. He also supported the testimony of an earlier witness that, when Fishback was meeting with the miners, he directed Joe Frederick to pry down a rib, but nothing would come down. Tr. 329. After the order was issued, everyone had pry bars, trying to bring material down, but he contended that only "small, crumbly" stuff came down. Tr. 331.

On cross-examination, Reneer agreed that the mud seam was a well-known condition in that unit. Tr. 333. He remained on the unit following the issuance of the order. Tr. 335. He admitted that one can't tell, simply by looking at a rib whether the material will come down and he agreed that one starts the effort with a pry bar. One cannot say, he admitted, whether a given rib issue will come down in six minutes or six months. Tr. 336. He stated that they installed at least 200 bolts in one shift following the order's issuance. Tr. 337. He could not recall if he was present when Inspector Tisdale returned to the mine with the idea of lifting Fishback's order, nor could he recall if he was present when Fishback returned after that and did lift the order. Tr. 339. To sum up the practice they were employing, Reneer stated that if the miners saw something loose they would try and pry it down. But if it did not come down, "then it was left alone." Tr. 340.

At the start of day two of the hearing, testimony began with Joseph Frederick, who was called by the Respondent. Tr. 348. In January 2016 he was working in Unit 2 on the B crew. Tr. 349. Zach Hudson was his section foreman. Frederick had been on that unit for five years. He agreed there was a mud seam, but described the effect as causing material to "flake out," and that the pieces were "[n]ot very big most of the time." Tr. 350. This was dealt with by prying the material down and then scooping it up for the feeder. He stated that they were told to pry down the material if seen. Tr. 351. On the day in issue, January 13, Frederick was running the scoop, a machine with a bucket on the front of it. Tr. 352. Most of the time, scooped material was put into the faces and from there loaded up for the feeder. Frederick asserted that he was doing scaling on that day, using a pry bar or the scoop bucket itself. Tr. 353. After the order was issued shutting down the unit, Frederick stated that he used both a pry bar and the scoop for scaling. Tr. 353. He also asserted that he saw others engaging in scaling that day, stating that "multiple ones" were doing that. Tr. 354. He added that the scaling and scooping were being done both in the last and in the second to last open crosscut. Tr. 355. Asked about the size, how big the scaled pieces were, Frederick responded, "[m]aybe a couple feet big, yeah, couple feet big, I guess … [n]ot very big … there was some smaller ones … on average probably about two feet around or so." Tr. 355-356. He disputed the measurement listed in Ex. P-1, stating it was "not that big." Tr. 356.

Asked about the meeting with the MSHA inspector that day, he informed that the inspector told them about the hazards from loose ribs. Tr. 357. Then the inspector pointed out a rib he believed was loose and asked Frederick to attend to it. *Id.* He worked at it for 10 minutes but "got very little out of it." *Id.* Frederick stated there was a small crack in the rib, but asserted it was not loose. Tr. 358.

On cross-examination, Frederick agreed that at times the rib material would fall out on its own. When examining the ribs, he stated he would look to see if "it looked loose." A crack, he

stated, might indicate a loose rib, but if one pried and it did not come down, then he would leave it alone. Tr. 359. Frederick took the position that the mud seam did not affect the stability of the ribs. *Id.* He also disputed that they were having difficulty with loose ribs flaking out the entire time, asserting it was not the entire time. Tr. 360. However, he did admit that the mud seam created issues with the ribs. *Id.* Further, he agreed that the miners were always talking about the mud seam and how it was affecting the ribs. *Id.* While he asserted that most rib pieces were not big, some were larger, "maybe four feet or so." Tr. 362. He agreed that a rib piece of that size could seriously injure a miner. *Id.* In many respects, Frederick could not recall details associated with the order but he did acknowledge that rib control is one of the rules to live by. Tr. 361-366.

Jonathan Butler then testified for the Respondent. At the time in issue he was working in Unit 2 as a ventilation curtain operator. Tr. 368. He has five years of mining experience. Tr. 369. He agreed there was a mud seam in that area, but he didn't think it had an effect on the ribs. Tr. 370. Though some rib prying was needed it was to deal with "flaking." *Id.* The crew did talk about rib prying and to take care of any potential hazards and to "just look out for each other." Tr. 371. He maintained that he would "keep an eye out there [for rib issues]. *Id.* He repeated that the rib material he encountered was just "small, flaky material that … wouldn't amount to much." Tr. 372. As with several other witnesses for the Respondent, when asked about the rib dimensions referred to in Ex. P-1, he disagreed with those numbers, adding "[n]o, I've never seen something to this day that big." Tr. 373. In terms of addressing rib issues, Butler looked for things with a big gap that one could actually get a pry bar in. One does not, he said, "go just looking to pry stuff down if that's not ready." *Id.* Explaining further, he stated there "wouldn't really be a crack in it … [i]t would just be a solid seam." Tr. 373-374. It was his view that if one is working on a rib that isn't ready, there's a greater hazard in trying to do that. Tr. 374. He would determine this by putting some pressure on it and if it didn't move it was not wise to pry on it. Tr. 374.

Butler maintained that he was prying ribs that day before the order was issued. Tr. 375. As to where he had been doing that prying, he responded, "[i]t had been all over." *Id.* However, he reiterated that the unit's ribs "looked good." He saw no "major hazards …[nothing] besides the flaky material." Tr. 375-376. In fact, he expected that the inspector would be "pleased with the work we had done." Tr. 376. Later, Butler was part of the meeting with the inspector, who informed that the ribs were still bad and didn't look any better. *Id.*

Apparently, the miners were taken aback by the Inspector's reaction. Further, Butler confirmed that Fishback asked Joe Frederick to attend to a rib that he felt needed attention. However, Frederick, though he worked at it, could not get the rib to move. In Butler's view, trying to move a rib that is not ready to come down creates a greater hazard than leaving it alone for the time being. Tr. 380.

On cross-examination, Butler informed that the rib that Frederick could not bring down was not where the bolter cable was located. Tr. 378. He reiterated that the material he brought down was flaky, not very thick, but rather thin. Tr. 379. When asked for more specifics about the size, he stated they could be one to two feet. *Id.* He agreed that one needs to see a crack to tell if a rib is ready to come down. *Id.* Elaborating, he agreed that seeing a crack the whole length of a rib in the pillar means the rib needs to come down. Tr. 380. However, upon seeing a crack in the

coal seam of 40 to 50 feet in length one needs to pry on that and if one doesn't get any movement, it's not ready to come down. *Id.* Butler did not believe that the mud seam affected the stability or integrity of the pillars. *Id.* In circumstances where a rib would not come down, Butler's approach was to "[k]eep an eye on it." Tr. 382. However, he conceded that, in such circumstances, he "probably [would] put flagging around it." Tr. 383. Speaking generally, he believed that it would probably take days for a rib that was not ready to fall, not minutes. *Id.* There is certainly an element of uncertainty to the issue however, as Butler conceded that he has seen a rib fall out on its own without any warning. *Id.* Tr. 383-384.

Following the issuance of the order, Butler started taking care of the ribs during the two and a half hours remaining on his shift. "Everybody started scaling." Tr. 384-385. He admitted that, after his shift ended, another shift continued with the abatement, that is, as Butler put it, "[f]ixing the problem." Tr. 385-386.

Todd Seilhymer was the final witness for the Respondent. At the time of the order in this matter, he was the mine superintendent, a position he also held in December 2015. Tr. 395. At the time of his testimony in this matter he was no longer in that role, having moved to the compliance department. Speaking to the mud seam which is a central topic in this matter, Seilhymer agreed to what is undisputed – there is a mud seam throughout the mine. Initially, it was small, a half-inch, but as they progressed into Unit 2 the seam continued to thicken. Tr. 397. Moisture, he explained, affects the mud seam and the seam would deteriorate creating pressure on the coal, which would then form cracks in the ribs. Tr. 398. At first the seam would look normal but then it would deteriorate, with fractures or cracks appearing. *Id.* This condition was primarily controlled by scaling. *Id.* However, consistent with other witnesses, Seilhymer maintained that most of the material came out in small pieces and it could be controlled as long as one continued to do scaling. Tr. 399. To address this, it was decided to have one person designated to continuously scale across the section. Tr. 399-400. He added this did not mean only one person did scaling. He maintained that the approach was if anyone saw something that person was to pry it down. Tr. 400.

Seilhymer also contended that, after the December order, he would visit Unit 2 and would check on the rib conditions when making those visits. It was his assertion that he would see miners scaling during those visits, including the foreman. Tr. 401.

Ex. R-9, which was a citation for a failed rock dust sample, on Unit 2, at crosscut seven, five to six intake, was shown to Seilhymer. Tr. 404. The sample was taken on January 5, 2016. That citation was subsequently terminated on January 13, 2016 by Inspector Mann. The point of Respondent's Counsel introduction of this exhibit was that Inspector Mann went through the area marked in green, as reflected in Ex. P-2. Tr. 406-407, but that he did not issue any rib control violations at that time. Tr. 407 and Ex. R-11. On January 6, 2016, Inspector Mann was also at the mine at Unit 2. Tr. 412, Ex. R-13. No rib control violations were issued by Mann on that day either. Tr. 413.

Directed then to the matter in dispute, Seilhymer stated that on that day he received a call that Fishback had issued a (d) order on Unit 2 for ribs. Tr. 414. He then proceeded underground with mine manager Chris Robinson. They then met up with Fishback who "indicated [to them]

that the ribs were terrible, [that he] was not pleased with the intake [and] said [that] it was horrible and [he] couldn't believe that [the mine] would have allowed men to travel out through that at a primary escapeway [which is in the number six entry]." Tr. 415. Thus, Fishback's issues involved that escapeway and Unit 2. Tr. 416. The escapeway starts at the unit's tail piece. *Id.* Upon arriving at the unit, he saw that "guys had already started scaling ribs on the unit." *Id.* Seilhymer described some of the areas he walked. Tr. 417, Ex. P-2. In those areas, he described that the ribs looked good. There were some cracks, he acknowledged, but overall he believed that the ribs looked good and he added that the area was well rock dusted. Tr. 418. He described a crack as similar to a spider web but with a gap one can see down inside. In most cases, a gap is more dangerous because it indicates that the material is pulling away. *Id.* He admitted that the presence of a crack shows there is pressure present. That pressure causes the crack. Tr. 419. The cracks did not concern him at least in the sense that he did not feel there was a need to pull down the ribs at that time. *Id.* He didn't see any gaps, but admitted there might have been some. Still, he saw only small pieces. *Id.* While he saw one or two places that indicated some scaling may have been done, he did not see anybody scaling in that area while he was there. Tr. 420.

Seilhymer took many photos that day, some "80 or 90." Tr. 421. Ex. R-14. Photo 1, from those photos, was according to Seilhymer, generally representative of the rib material he saw that day. Tr. 422. When he took the photos, Inspector Fishback was not with him.
The order had already been issued. Tr. 423. He maintained that the photos he took were not post-abatement efforts. *Id.* As with the other witnesses for the Respondent, Seilhymer maintained that only little pieces came loose. Tr. 426. He stated that the photos he took were representative of the conditions in the primary escapeway and also in the five or six crosscuts previously discussed by the witness. Tr. 431.

Seilhymer also informed that he was with Fishback when the order was terminated. Fishback required some additional prying but "most of it was small pieces." Tr. 432. The theme presented by Seilhymer was essentially that, in some instances, ribs Fishback believed needed scaling took great effort to bring them down. Typically, only small pieces were produced from those efforts. In one instance prying didn't work, nor did bumping the rib with a scoop. Ultimately, that instance required a scoop operator "ramming" the rib and even then, initially, the rib did not fall out. Tr. 437-439. Driving a machine into a rib is not a normal rib control procedure. Tr. 440.

On cross-examination,[14] Seilhymer agreed that all of the photos he took were basically in the primary escapeway, which is entry six on the map. Tr. 449. He took no photos in entry 8, nor 11, nor in any of the entries in crosscut 10, nor entry 4. Tr. 449-450. He agreed that he went down entry 6 and that was the only place he took photos. Tr. 450. He could not recall how long it took to abate the cited conditions. *Id.* He could not recall giving information to Inspector Tisdale, nor giving him a form. Tr. 450-451, Ex. P-7, at 4. As for the number of miners it took to abate the order, so that it could be terminated, Seilhymer acknowledged he may have stated this to Fishback but could not recall beyond that. Tr. 452. Though he admitted being down in the cited section between when the order was issued and when he took his photos, he did not know how

[14] An interesting side note: Seilhymer, like Fishback, could not precisely identify the location of the photos he took either. In terms of how he knew the exact identification of a location, he simply responded, "[b]ecause I took the photo." Tr. 442, 444.

much material was up at the working face. Tr. 454. Significantly, he admitted that he did not walk the entire section. *Id.* He did not think he went across the face, "because normally, *the face area didn't have deterioration as the out by areas*." *Id.* (emphasis added). Though he maintained that a person was designated to do scaling, he could not identify the individuals so assigned. Tr. 456-457. Seilhymer admitted that scaling was the chief remedy applied to address the situation. Tr. 457. Timbering was not discussed, nor was bolting into the ribs, nor wrapping the ribs with mesh or wire, primarily, he maintained, because the material was so small. *Id.*

The Court had a few questions for Mr. Seilhymer. Showing him Ex. P-2, Seilhymer acknowledged that he did not walk the entire area, as marked in orange highlighter on that exhibit that Inspector Fishback walked on the day in issue. Tr. 460-461. He stated that "[m]ostly [he] walked in by the tail piece other than entry number six. [He] walked it in its entirety." Tr. 461. Asked to estimate the percentage he walked of the area Fishback covered, he responded, "40 to 50 percent." *Id.* When he walked that 40 to 50 percent he was by himself. *Id.* As the mine superintendent at the time of this event, he acknowledged he was familiar with the cited standard: 30 C.F.R. § 75.202. Tr. 462. He was then asked, given the areas he just testified about where he walked following the order's issuance, did he see violations of that standard. Seilhymer responded, "[v]iolations, yes." Tr. 463. With refreshing candor, and appreciated by the Court, he affirmed that as his view twice more. *Id.*

Applicable Law

Unwarrantable Failure Violations

As the Commission has noted, "[t]he unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp*., 9 FMSHRC 1997, 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 2002-04; *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). Whether the conduct is "aggravated" in the context of unwarrantable failure is determined by looking at all the facts and circumstances of each case, including (1) the extent of the violative condition, (2) the length of time that it has existed, (3) whether the violation posed a high risk of danger, (4) whether the violation was obvious, (5) the operator's knowledge of the existence of the violation, (6) the operator's efforts in abating the violative condition, and (7) whether the operator has been placed on notice that greater efforts are necessary for compliance. *Consolidation Coal Co*., 35 FMSHRC 2326, 2330 (Aug. 2013), citing *Manalapan Mining Co*., 35 FMSHRC 289, 293 (Feb. 2013); *IO Coal Co*., 31 FMSHRC 1346, 1350-57 (Dec. 2009); *Cyprus Emerald Res. Corp*., 20 FMSHRC 790, 813 (Aug. 1998), rev'd on other grounds, 195 F.3d 42 (D.C. Cir. 1999); *see also Consol Buchanan Mining Co. v. Sec'y of Labor,* 841 F.3d 642, 654 (4th Cir. 2016). These factors must be viewed in the context of the factual circumstances of a particular case. *Consolidation Coal Co*., 22 FMSRHC 340, 353 (Mar. 2000)." *American Coal Co.*, 39 FMSHRC 8, 9 (Jan. 2017).

Related to that is the subject of negligence, the Commission has noted that it "evaluates the degree of negligence using "a traditional negligence analysis." *Mach Mining, LLC v. Sec'y of Labor*, 809 F.3d 1259, 1264 (D.C. Cir. 2016) (citation omitted). Because the Commission is not bound by the Secretary's regulations addressing the proposal of civil penalties as set forth in 30 C.F.R. Part 100, the Commission and its Judges are not required to consider the negligence definitions in 30 C.F.R. § 100.3(d). *Id.* at 1263-64.

"Significant and Substantial" Violations

As the Commission has stated, a violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *See Cement Div., Nat'l Gypsum Co*., 3 FMSHRC 822, 825 (Apr. 1981). In *Mathies Coal Co*., 6 FMSHRC 1 (Jan. 1984), the Commission further explained 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 (footnote omitted); *accord Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria). *See also*, *Consol Pennsylvania Coal Co*., 39 FMSHRC 1893, 1899 (Oct. 2017).

Flagrant Violations Under the Federal Mine Safety and Health Act

In discussing preliminary matters with the parties in chambers before the hearing in this case began the Secretary indicated that he would proceed under a "repeat flagrant" theory of the case, instead of a "reckless flagrant" theory. The Secretary reiterated this litigation position in his opening statement. Tr. 15. The distinction between the two theories is more than academic, as the Secretary has two potential pathways to demonstrate a "repeat flagrant" violation under current Commission case law.

The flagrant violation provision is contained in Section 110(b)(2) of the Federal Mine Safety and Health Act ("Mine Act"). The provision was added to the Mine Act by the Mine Improvement and New Emergency Response Act of 2006 ("MINER Act") in the wake of the Sago Mine Disaster. Section 110(b)(2) provides that:

> [v]iolations under this section that are deemed to be flagrant may be assessed a civil penalty of not more than $220,000. For purposes of the preceding sentence, the term "flagrant" with respect to a violation means a reckless or repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury.

30 U.S.C. § 820(b)(2).

The phrase "reckless or repeated failure" has been interpreted to encompass two types of "flagrant" violations. The first is a "reckless flagrant" violation, where the operator failed to take the steps a reasonably prudent operator would have taken to eliminate the known violation and consciously or deliberately disregarded an unjustifiable, reasonably likely risk of death or serious bodily injury. At hearing, the Secretary disclaimed his intent to pursue a reckless flagrant theory at hearing on this matter. Accordingly, there is no purpose served for the Court to discuss the reckless flagrant theory in greater detail here. Tr. 8.

As to a "repeated flagrant" violation, the Commission has established that can be proven in two ways.

Commission Interpretations of "Repeated Flagrant" Violations Under Section 110(b)(2)

The Commission currently recognizes two methods that the Secretary may use to prove a repeated flagrant violation under section 110(b)(2) of the Mine Act. The first approach – known as the "narrow" approach, requires the Secretary to prove that "there was a single, continuing violation serious in nature that the operator could or should have become aware of at some point, i.e., known, such that it had multiple opportunities to address the condition, but did not avail itself of those opportunities." *The American Coal Co*., 38 FMSHRC 2062, 2065 (Aug. 2016) (*AmCoal*). In *AmCoal*, the Commission declined to delineate exactly how many opportunities to address the cited condition are necessary to prove a "repeated failure" under the narrow approach. The Commission did however agree with the parties in *AmCoal* that "two or three failures might amount to a flagrant violation in certain circumstances but not in others, depending on the particular facts." *Id.* at 2073. The principal difference between the "narrow" and the "broad" approach is that, under the "narrow" approach, the operator's past violative history plays no role in determining whether an operator "had multiple opportunities to address the condition." *Id.* at 2065.

The second approach – known as the "broad" approach – permits the Secretary to prove that the operator failed "to take reasonable steps" to eliminate a "serious, known violation" by reference to the operator's past violation history. The "broad" approach was first contemplated by the Commission in *Wolf Run Mining Co.*, 35 FMSHRC 536 (Mar. 2013) (*Wolf Run*). In *Wolf Run*, the Commission reversed the Administrative Law Judge's conclusion that past violative conduct may not be considered in determining whether a cited condition satisfies the repeat flagrant provision. However, the Commission did not articulate a standard for the Judge to apply the "broad" approach on remand, leaving the issue of which prior violations were relevant to the Judge's discretion.

While both the "broad" and "narrow" approaches remain valid under existing Commission precedent, the Commission in *AmCoal* again expressly left the issue of how to properly standardize the broad approach for another day, due to lack of consensus.[15]

Although the Secretary indicated that he intended to pursue this matter under a repeat flagrant theory, he did not state if his arguments would be restricted to the "broad" or "narrow" approaches. While both approaches remain valid under *Wolf Run*, the standard for utilizing the "broad" approach to find a repeat flagrant violation is evolving. By contrast, the "narrow" approach is largely settled Commission law under both *Wolf Run and AmCoal*.

Discussion

This case involves four distinct issues: whether the Respondent, Peabody Midwest Mining, LLC, violated 30 C.F.R. § 75.202(a), by not supporting or otherwise controlling ribs in certain identified entries on the MMU-002 and MMU-022 active working sections; whether the alleged violation was "significant and substantial; whether such violation was an "unwarrantable failure;" and finally, whether such violation constituted a "flagrant" violation under the Act. The Court read and fully considered the contentions advanced in the parties' post-hearing briefs. That any particular contention raised in those briefs is not explicitly discussed does not mean that it was not considered, but rather that the Court's findings of fact and analysis implicitly addresses the subject.

The Violation Was Established

The section 104(d)(2) Order, No. 9036925, alleged loose coal ribs in 13 entries on the mine's MMU-002 and MMU-022 active working sections. The Court finds that the testimony of Inspector Fishback and that of Inspector Tisdale established that ribs in the cited areas were not supported or otherwise controlled to protect persons from hazards related to falls of the ribs. Accordingly, the violation was established. While the inspectors' testimony was sufficient, it is noted that Todd Seilhymer, who was the mine superintendent at that time, conceded that the conditions cited by the inspector constituted a violation of the standard invoked, 30 C.F.R. § 75.202(a).

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[15] *AmCoal* produced three separate opinions on the issue of the "broad" approach. Commissioners Cohen and Young concluded that the past history of similar violations was at least "generally relevant to the determination of flagrancy," as "the essence of a repeated flagrant violation is a condition which threatens miners with serious bodily injury or death and which has been ignored or disregarded often enough to demonstrate intolerable irresponsibility." *AmCoal*, 38 FMSHRC at 2090. (Cohen, C., concurring, joined by Young, C.). Commissioners Young and Cohen stated that "Judges should considerer allegations of repeated failure case-by-case, and should consider the operator's history of violations where it may be probative of the issue." *Id.* at 2090-91. Commissioners Jordan and Nakamura would have declined to reach the issue, as they concluded the conditions for a flagrant violation had already been satisfied under the "narrow" approach to proving a repeat flagrant violation. *Id*. at 2094-95 (Jordan, C., concurring, joined by Nakamura, C.). Commissioner Althen would have disregarded the broad approach entirely as unworkable, which would prevent the Secretary from ever considering an operator's past history of violations. *Id*. at 2099 (Althen, C., concurring in part).

The Violation Was Significant and Substantial

With the violation established, the first *Mathies* element has been met. The second *Mathies* element, a discrete safety hazard associated with the violation was also met, as the Secretary observes, by "the fact it is well known that falling rib material presents a discrete safety hazard to miners working underground." Sec. Br. at 36. As the Secretary also notes, "Section 75.202(a) is identified as a "Rule to Live By" standard, meaning it is one of the standards most commonly contributing to fatalities in the mining industry. Thus, it is sufficient to conclude that the violation contributed to a discrete safety hazard, as an inadequately supported rib could fall, presenting a risk of injury to any miner who happened to be present upon the rib falling. *The American Coal Co*., 36 FMSHRC 1311, 1326 (May 2014) (ALJ), *Peabody Midwest Mining LLC*, 2019 WL 935968, at *9 (Feb. 2019) (ALJ). There is more to say. The Commission in *Newtown Energy*, 38 FMSHRC 2033 (Aug. 2016) stated that, for the second prong of *Mathies* to be satisfied, there must be "a determination of whether, based upon the particular facts surrounding the violation, there exists a reasonable likelihood of the occurrence of the hazard against which the mandatory safety standard is directed." *Id*. at 2038. Given that the record establishes that at least some of the ribs needed scaling, those conditions required prompt attention, as the record also establishes that there was exposure to them. Respondent's witness Frederick himself, while affirming that he could not remove much of the rib Fishback identified as a problem, acknowledged that *some* of the rib pieces were large – about two to four feet – and that pieces that large could cause a serious injury. Tr. 355, 362. Thus, the discrete safety hazard was not an academic exercise – it was reasonably likely that the hazard of a falling rib would occur, given the circumstances of the violation in this case.

As for the third and fourth *Mathies* criteria: a reasonable likelihood that the hazard contributed to will result in an injury, and a reasonable likelihood that the injury in question will be of a reasonably serious nature, these elements are supported by the testimony of Inspector Fishback. Miners regularly walked and worked in the area inspected by Fishback. Tr. 117, 175. Assuming, as required by the Commission in *Newtown Energy*, that the hazard identified is a rib fall, the presence of miners in the area makes it reasonably likely that the hazard contributed to will result in an injury. This satisfies the third prong of *Mathies*. Further, based on at least some number of the ribs for which he had safety concerns, the exposure to those concerns by miners in those areas, and Fishback's credible testimony that, if a miner were struck by a falling rib, the injury would be of a reasonably serious nature, the fourth prong of *Mathies* was established. Accordingly, Fishback's order and accompanying testimony, supports his finding that the violation was S&S. Tr. 115-119. That Inspector Tisdale credibly testified to observing material from pried ribs falling into the travelway, at a time when the mine believed that the conditions had been sufficiently addressed to warrant lifting the order, supports those elements as well.

The Violation Was Not an Unwarrantable Failure

As mentioned above, unwarrantable failure, is more than ordinary negligence, and has been described as conduct involving "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." Viewing the credible testimony as a whole, the Court cannot conclude that those terms apply in this instance. In reaching this conclusion, the Court has considered all the facts and circumstances, including (1) the extent of the violative

condition, (2) the length of time that it has existed, (3) whether the violation posed a high risk of danger, (4) whether the violation was obvious, (5) the operator's knowledge of the existence of the violation, (6) the operator's efforts in abating the violative condition, and (7) whether the operator has been placed on notice that greater efforts are necessary for compliance.

Before specifically addressing those seven factors, the Court takes note of its previous decision involving this mine, which addressed the same mud seam and the same section as in this matter, together with the specific facts involved here. In that earlier decision, *Peabody Midwest Mining, LLC*, 40 FMSHRC 87 (Jan. 2018) (ALJ),[16] the Court determined that the violation did not involve an unwarrantable failure by Respondent, Peabody Midwest. There, speaking to a violation of the same standard, 30 C.F.R. § 75.202(a), this Court found that "the Respondent was making some good faith efforts to address the ribs [and that] [t]o be fair, the mud seam was a bedeviling situation; the conditions could change as that seam dried out and it *was not entirely unreasonable for miners to reach different conclusions about the timing of the need for action to control the ribs*." *Id.* at 141, addressing Order No. 9036922. (emphasis added).

As discussed below, the Court believes that its previous analysis similarly bears upon the unwarrantable failure claim in issue here. While the Court has determined that the standard was violated, concluding that Inspector Fishback did observe areas of rib rash and broken rib conditions, and that he found various rib cracks and that some of them were gapped and had rock dust behind them, the unwarrantable failure issue is not similarly supported by the record.

For example, per the inspector's testimony, the miner accompanying him, Mr. Hayden, did not remain mute, but rather voiced that the mine had been prying on the ribs when Fishback asserted otherwise. Further, Fishback, repeatedly responded, when asked if he saw anyone working on the ribs during this time, that he could not remember such activity. Thus, he was unable to deny that such activity was occurring.

Also supporting the Court's determination that unwarrantability was not established is that Fishback himself viewed the support for his order as resting upon the entirety of the rib conditions he asserted finding that day. Thus, he did not commit that any single instance alleged to have been found would constitute a violation. Tr. 100-101. It is also worth noting that, regarding the many photographs he took that day, Fishback admitted that he could not detect such material on the ground in the photos and counsel for the Secretary also stipulated that in photos 1 through 22, 35, 36, and 53 through 55 of Ex. P-5, they do not show material on the ground. Tr. 142-143.

Additionally, the issue of when a rib needs to be taken down is not always a simple determination. There can be good faith differences on the timing for such action. Further, in the Court's view, that Fishback asserted by inquiring "don't you think we need to pry some ribs around here," illustrates that whether a given rib needs immediate attention can be a subject of legitimate debate. Tr. 113. As Inspector Tisdale's testimony shows, while some ribs he viewed came down easily, others required "effort to take them down." Tr. 202.

[16] The Court's January 26, 2018 *Peabody Midwest Mining LLC* decision also encompassed Docket No. LAKE 2016-0232, but none of the five orders in that docket involved 30 C.F.R. § 75.202(a), the standard in issue in this case.

Zachary Hudson, a fill-in boss at the time in issue, testified along the lines of the Respondent's other witnesses – namely that the mud vein presented issues but that those ribs which did need attention produced only small chunks of material. Tr. 283. He also was of the view that a gapped rib was not necessarily indicative that it was loose in fact. Because there was some past friction between Hudson and Fishback, the Court has relied more on the testimony of the Respondent's other witnesses in reaching its conclusions about the conditions. This does not reflect disbelief over Hudson's testimony. Rather, because other witnesses for the Respondent support the Court's conclusions, it is unnecessary to place great emphasis on Hudson's testimony.

Chase Reneer, a roof bolter on Unit 2 working the B crew at the time in issue, also testified that the rib pieces that came out were only little pieces, nothing big. Tr. 319-321. He too saw miners attending to rib issues through prying. Also, Reneer had a similar experience to that expressed by other miners, in that upon Inspector Fishback identifying a problem rib, he was unable to pry the rib down. Tr. 326-327. He also affirmed the incident that a rib identified as a problem by Fishback could not be brought down by Frederick. Thus, Reneer's testimony supported the view that determining if and when a rib needs attention can be subject to good faith differences. Applying that perspective, the mine applied a practice of trying to pry down a suspect rib, but if it would not come down it was left alone for the time being.

Jonathan Butler, then working as a ventilation curtain operator in Unit 2, held to the theme of many of the other witnesses for the Respondent, that the material which came down from the ribs was small and flaky. Tr. 372. Similar to the other witnesses for the Respondent, Butler expressed the view that sometimes it is premature to pry down a rib, that one doesn't "go just looking to pry stuff down if that's not ready." Tr. 373.

Todd Seilhymer also testified along the lines of the other witnesses for the Respondent, asserting that the condition was primarily controlled by scaling and that most of the material came out in small pieces. Tr. 398-399. He also stated that, when on the cited unit, he observed miners performing scaling. Tr. 401. As with the other witnesses for the Respondent, Seilhymer distinguished between cracks and gaps, with the latter needing prompt attention.

Upon considering the testimony of several of the Respondent's witnesses and upon concluding that, embellishments aside,[17] they presented credible testimony regarding the general condition of the ribs, the Court finds that there were legitimate differences of opinion as to the condition of the ribs and whether those conditions required immediate attention or watchfulness.

[17] Embellishments alone may not doom testimony. For example, the small, crumbly, flaky material so uniformly testified about by the Respondent's witnesses is at odds with the amount of time it took to correct the rib issues and with the amount of material from those activities that had been placed at the face but even that is not easily resolved. This is because of testimony that the presence of the mud seam meant that one could pick at a rib and eventually bring material down, sometimes with great effort. Once the order was issued the mine had to make such efforts in order to resume production. Those efforts could have included ribs which were difficult to take down, as the record reflects instances where Fishback required attention to some ribs that required such efforts.

For example, Winters, and several other witnesses for the Respondent, described relatively small amounts of coal that came down with prying. Another example demonstrating that there can be legitimate differences of opinion as to when a rib needed attention, Travis Hayden, section foreman, presented the example of a rib that Inspector Fishback believed to be loose but that Hayden was unable to bring it down. Tr. 246. A second instance was offered where Fishback identified a rib he believed in need of attention, but the rib could not be pried. Tr. 256-258. Hayden also stated that he identified instances to Fishback where scaling had been done but it is noted again that the Secretary, who has the burden of proof, did not use the process of rebuttal testimony to contradict such claims. Tr. 260.

Accordingly, when assessing credibility, the Court considered it to be important in this matter that the Secretary did not, through rebuttal testimony, refute the many assertions made by the Respondent's witnesses. The Court cannot simply ignore those credible accountings, which reflected a difference between a perceived rib condition requiring attention and one that in fact, arguably, was premature for scaling.

Another example demonstrating that the mine was not ignoring the rib issue and therefore of relevance to the unwarrantability issue, was that the mine also addressed the mud seam/rib issue by shearing corners with a continuous miner, thereby cutting it at an angle. This practice prevented such corners from falling out. Tr. 217. Also bearing on the unwarrantability issue, Fishback acknowledged that the pre-shift and on-shift record books reflected that the production crews had been prying down ribs. Tr. 115. It was unrebutted that that the mine always had a person dealing with ribs full time on each shift. Tr. 214- 215.

Applying the seven factors, and speaking to the first four of them – (1) the extent of the violative condition, (2) the length of time that it has existed, (3) whether the violation posed a high risk of danger, and (4) whether the violation was obvious, there was credible, good faith, disagreement between the government's and respondent's witnesses for each of those factors. The same good faith disagreement was present as to factor (5) the operator's knowledge of the *existence of the violation*, because the condition of at least some of the ribs did not call for scaling at that time. In such instances the existence of a violation was in issue. Factor (6), the operator's efforts in abating the violative condition, has been discussed and, similarly, the last factor, (7), whether the operator has been placed on notice that greater efforts are necessary for compliance, while notice was present, it was acted upon by the operator, and greater efforts were made.

The Violation Was Not Flagrant

Because of the seriousness of an alleged flagrant violation, which encompasses a reckless or repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury and because of the potential monetary impact, since a civil penalty up to $220,000 may be imposed where a violation is established, whether the alleged violation was flagrant is a notable issue.

The Secretary's Repeated, not Reckless, Flagrant Claim

As noted, the Secretary's flagrant allegation rests upon a "*repeated*" failure theory, *not* the *reckless failure* theory. The repeated failure theory can be established in two distinct ways. There is the *narrow approach*, which is ahistorical, by showing either a single, continuing, serious in nature, violation that the operator could or should have become aware of at some point but, despite multiple opportunities to address the condition, the operator failed to take action. The other is the *broad approach*, which is established by showing that the operator failed "to take reasonable steps" to eliminate a "serious, known violation" by reference to the operator's past violation history.

The Narrow Repeated Claim

In this instance the narrow approach fails because there was not a single, continuing, violation in the sense that the Court has not found that each rib described by the inspector was a violation. Some conditions in the cited area violated the standard, but each rib presented its own question. Thus, there was not a reflexive, required, remediating response for each location named by the inspector. Some indeterminate number of the claimed violative conditions did not violate the standard in the sense that scaling or some other action was not required then and there. The credible testimony, as described above, establishes this determination by the Court.

In addition, some reasonable efforts were made by the mine operator to address the effects of the mud seam, through scaling when the miners determined such action was needed, by assigning one miner per shift devoted to rib safety and through the control method of shaving corners.

Viewing the testimony overall, there is ample support for the conclusion that there could be honest differences of opinion regarding whether and when action was needed for a given rib location. That this was the case was shown by those instances when a rib was identified as a problem by Inspector Fishback but which would not come down or would not come down without unusual effort. Thus, in the Court's view, based upon the record testimony, it was not inherently unreasonable for a miner to conclude that a crack in a rib needed to be watched as opposed to requiring immediate action. If the former situation obtained, immediate action would not be required under the standard, as it requires ribs to be supported or otherwise controlled to protect persons from hazards related to rib falls. The decision to designate a miner on each shift to deal with rib issues in the cited area, a decision which came about because of an earlier order addressing rib control, shows that the mine did not simply sit on its hands so to speak and ignore rib control. This is not to say that there were no violations. There were and the Court has found that that the violation was established, and that it was significant and substantial, though no longer warranting the designation of a 104(d) order, as it lacked unwarrantability.

The Broad Repeated Claim

So too, the broad approach, viewing past violative conduct, in order to establish a flagrant violation comes up short, because the Court in this instance and in an earlier instance entailing a decision involving the same mud seam area, determined that there was no unwarrantable failure

involved. Given the near identity of the conditions in the prior decision and in this instance, it would be anomalous to conclude that the earlier instance, which was not an unwarrantable failure, grew into an unwarrantable failure here, especially where the mine operator took action after the earlier instance by assigning a designated miner on each shift to address rib control.

Beyond the analysis set forth above, the Court observes that reaching the question of whether a violation is flagrant contemplates a progression – one does not advance to a determination of whether an alleged violation is flagrant unless it is first determined that there was a violation, that it was significant and substantial and that it was an unwarrantable failure. Finding that there was no unwarrantable failure precludes a finding that a violation is flagrant. In other words, with no unwarrantable failure established, one cannot reach the issue of a flagrant violation, as such conduct is a step beyond that.

The Commission has previously stated that a Commission Judge is required to convert a 104(d)(1) order to a 104(a) citation where the order "lacked the required bases to stand as either a section 104(d)(1) order or 104(d)(1) citation." *Lodestar Energy, Inc*., 25 FMSHRC 343 (July 2003); *Cyprus Cumberland Res. Corp*., 21 FMSHRC 722, 725 (July 1999). As the Court determined, for the reasons described above, that Order No. 9036922 lacked the unwarrantable failure necessary to sustain a citation or order under section 104(d), it is concluded that Order No. 9036922 must be modified to a 104(a) citation.

Penalty Determination

Overview of Penalty Assessments

As this Court noted in its decision in *Peabody Midwest Mining LLC*, 2018 WL 816286 (Feb. 2018) (ALJ):

> In assessing civil monetary penalties, Section 110(i) of the Act requires that the Commission consider the six statutory penalty criteria: [1] the operator's history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] the effect on the operator's ability to continue in business, [5] the gravity of the violation, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. 30 U.S.C. § 820(i).
> As the Commission has noted, "Administrative Law Judges are accorded broad discretion in assessing civil penalties under the Mine Act. *Westmoreland Coal Co*., 8 FMSHRC 491, 492 (Apr. 1986). A Judge's penalty assessment is reviewed under an abuse of discretion standard. *Douglas R. Rushford Trucking*, 22 FMSHRC 598, 601 (May 2000)." *Knight Hawk Coal, LLC*, 38 FMSHRC 2361, 2373 (Sept. 2016).
>
> That said, the Court recognizes that there are two important considerations that must be evaluated; the Secretary's burden to provide sufficient evidence to support the proposed assessment; and the Court's obligation to explain the basis for any substantial divergence from the proposed amount. The Commission has

> noted that the "Secretary [ ] does bear the 'burden' before the Commission of providing evidence sufficient in the Judge's discretionary opinion to support the proposed assessment under the penalty criteria [and that] [w]hen a violation is specially assessed that obligation may be considerable. [On the other hand] the Secretary's proposed penalty cannot be glided over, as the Commission also stated, 'Judges must explain any substantial divergence between the penalty proposed by MSHA and the penalty assessed by the Judge. … If a sufficient explanation for the divergence is not provided, the credibility of the administrative scheme providing for the increase or lowering of penalties after contest may be jeopardized by an appearance of arbitrariness. [*The American Coal Co*., 38 FMSHRC 1987, 1993-1994 (Aug. 2016)], (citing *Sellersburg Stone Co*., 5 FMSHRC 287, 293 (Mar. 1983), aff'd, 736 F.2d 1147 (7th Cir. 1984))." *Consolidation Coal Co*. 38 FMSHRC 2624, 2643-2644 (Oct. 2016) (ALJ Moran).

Id. at *51-52.

Further, the Commission has recognized that in assessing a civil penalty, a Judge is not required to assign equal weight to each of the penalty assessment criteria. Rather, "[j]udges have discretion to assign different weight to the various factors, according to the circumstances of the case." *Lopke Quarries, Inc*., 23 FMSHRC 705, 713 (July 2001). … Indeed, the Commission has held that Judges have not abused their discretion by more heavily weighing gravity and negligence than the other penalty criteria. *Knight Hawk Coal, LLC*, 38 FMSHRC 2361, 2374 (Sept. 2016); *Signal Peak Energy*, LLC, 37 FMSHRC 470, 485 (Mar. 2015).

Penalty Assessment for the Former 104(d)(2) Order, Now Modified to a 104(a) Citation, No. 9036925

As noted, the Secretary has alleged that Order No. 9036925, a section 104(d)(2) order, was an unwarrantable failure and a significant and substantial violation of 30 C.F.R. § 72.202(a), and that it was also a repeat flagrant violation pursuant to the MINER Act, under 30 U.S.C. § 820(b)(2), for which, on those grounds, he sought the assessment of a civil penalty in the amount of $165,700.00.

Based upon the record evidence and discussion thereof, the violation and its significant and substantial nature have been upheld, but the unwarrantable failure and flagrant designations no longer stand. The same mud seam, as described in the Court's February 2018 decision, remained a bedeviling situation, but Peabody did not simply continue with business as usual following that earlier litigation, as it assigned an individual each shift solely to deal with the ribs impacted by the mud seam.

Could the mine have done better? The answer to that question is definitely "yes," as reflected by the fact that some, *but not all*, of the amount of material that was scaled following the issuance of the order. Given the mud seam, the credible testimony was that if one were to work at rib issues long enough some material would come down. The unrebutted testimony is that some of the ribs identified by the inspector as needing scaling then and there, in fact did not

need attention at that time, as reflected by this Court's finding that, in some instances the material would not come down and in some instances only small amounts came down from such efforts.[18] Thus, the Court has found that there could be honest differences of opinion as to whether a particular rib was in need of, that is to say, ripe for, immediate attention or whether it was premature to act.[19]

The Court considers it significant that, in the face of testimony from multiple witnesses for the Respondent testifying about disagreements as to whether a given rib location was ripe for scaling and the lack of success, in some instances, to achieve results from scaling attempts, the Secretary did not recall any witness, and particularly did not recall Inspector Fishback, to challenge the Respondent's claims.

Had Order No. 9036925 been regularly assessed, the proposed penalty would have been $44,645.00. Respondent's post-hearing brief at page 58 n.60. The Secretary has agreed this figure is correct. However that calculation assumed that the violation was an unwarrantable failure, and involved high negligence, neither finding to which the Court subscribes. *See* Order No. 9036925 and associated "Narrative Findings for a Special Assessment." ("Narrative").

As the Court has determined that the principal bases for specially assessing this violation – specifically, the flagrant designation and the unwarrantable failure designation – are inappropriate in the Court's appraisal of the facts and application of the law, it concludes that in this case the proper baseline for the *Sellersburg* substantial deviation requirement, as described above, is the violation as it would have been calculated under the regular assessment formula which would have been $44,645.00.

The Penalty Criteria as Applied to this Matter.

The operator's history of *previous* violations, and the appropriateness of such penalty to the size of the business of the operator charged were set forth in the Narrative and they are not in dispute. The mine is large, measured by both its size and the controlling entity's size. The history of violations per inspection day and repeat violations were on the high end. The effect on the operator's ability to continue in business is not in dispute and, even had the Court adopted the proposed penalty for the alleged flagrant violation, would not impact that criterion in this instance.[20] The mine operator clearly demonstrated good faith in attempting to achieve rapid compliance after notification of a violation.

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[18] On the issue of the extent of material produced through scaling, recall that Counsel for the Secretary stipulated that photos 1 through 22, 35, 36, and 53 through 55 in Exhibit P-5 do not show material on the ground. Tr. 143.

[19] **The Court hopes that the message from this decision to Peabody, and perhaps more importantly to its miners, is *not* that ribs may be viewed with casualness and that the efforts being made sufficed. Such an attitude would be misguided, and only invite serious injury or worse.**

[20] The parties stipulated that payment by Respondent of the proposed penalty of $165,700.00 would not affect Respondent's ability to remain in business. Tr. 10.

That leaves gravity and negligence for discussion. As for gravity, based on the credible evidence of record, the Court finds that it was reasonably likely for an injury to have occurred. The injury, should one have occurred, fell between lost workdays or restricted duty and permanently disabling. For those reasons, the Court concludes the Secretary correctly determined that the violation was significant and substantial, and upholds the Secretary's designation.

As for negligence, as explained above, the Court finds that it was moderate, but did not constitute an unwarrantable failure. A corresponding downward departure from the regularly assessed penalty of $44,645.00 is therefore warranted.

For those reasons, upon application of the statutory penalty criteria, and consistent with the credible evidence of record, the Court imposes a penalty of **$40,000.00** for this violation, Order No. 9036925, an amount which the Court considers to be both an appropriate, and significant, penalty under the circumstances. Order No. 9036925 is also modified to a section 104(a) citation.

Summary

It is **ORDERED** that, as it is not an unwarrantable failure, **Order No. 9036925** is **MODIFIED** to a Section 104(a) citation.

It is further **ORDERED** that, within 30 days of this order, Respondent pay a penalty of **$40,000.00** for this violation.

Upon receipt of the sum of $40,000.00, this case is **DISMISSED.**

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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May 24, 2019

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. LAKE 2019-0025 A.C. No. 47-02926-474835
v.	
YAHARA MATERIALS, INC., Respondent	Mine: Unit No. 7

ORDER ACCEPTING APPEARANCE
DECISION APPROVING SETTLEMENT
ORDER TO MODIFY
ORDER TO PAY

Before: Judge McCarthy

This case is before the undersigned upon a Petition for the Assessment of Civil Penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d).

The Secretary of Labor's Conference and Litigation Representative ("CLR") filed a notice of limited appearance with the penalty petition. It is **ORDERED** that the CLR be accepted to represent the Secretary. *Cyprus Emerald Res. Corp.*, 16 FMSHRC 2359 (Nov. 1994).

The CLR has filed a motion to approve settlement proposing a reduction in the penalty from $2,361.00 to $286.00. The CLR also requests that Citation No. 8956042–the sole citation in this matter–be modified to change the type of action from a section 104(d)(1) citation to a section 104(a) citation, and to reduce the level of negligence from high to moderate.

The citation alleges that the operate violated 30 CFR § 56.9300a by failing to provide a berm at a dump site. The Respondent, as part of the motion, alleges that there was always a spotter at the dump site and, in direct contradiction to the citation, that there were berms.

On February 13, 2019, the undersigned's law clerk requested further information in light of the apparent contradiction between the motion and the citation. The law clerk also inquired as to whether the inspector took any photographs of the missing berm. Although first indicating on February 13, 2019 that he was going to file an amended motion, the CLR responded on February 21, 2019 that the Petitioner was going to rely on the motion as submitted. The CLR also indicated that the inspector had taken photographs, but that they would not be provided to the undersigned.

Although Petitioner presents sufficient support for resolving the motion, Petitioner's failure to produce the requested clarification and documentary evidence is troubling. When an ALJ requests further information concerning a motion, it is usually an indication that there is insufficient support to grant that motion or, at the very least, a proper resolution is not clear from the motion as submitted. Ignoring such requests risks the denial of the motion. *See American Aggregates of Michigan, Inc.*, Unpublished Order (May 24, 2019) (denying motion for settlement based on lack of probative factual support).

However, as the undersigned ultimately resolves this motion without receiving the requested information–and the issue of producing evidence in support of a motion for settlement is already pending before the Commission on assignments of error to *Solar Sources, Inc.*, 39 FMSHRC 2052 (Nov. 2017) (ALJ)–this is not the appropriate case to discuss this matter further.

The undersigned has considered the representations and documentation submitted in this case, and the undersigned concludes that the proffered settlement is fair, reasonable, appropriate under the facts, and protects the public interest under *The American Coal Co.*, 38 FMSHRC 1972, 1976 (Aug. 2016), and is appropriate under the criteria set forth in section 110(i) of the Act.

WHEREFORE, the motion for approval of settlement is **GRANTED**.

It is **ORDERED** that Citation No. 8956042 be **MODIFIED** to change the type of action from a section 104(d)(1) citation to a section 104(a) citation, and to reduce the level of negligence from high to moderate.

It is further **ORDERED** that the operator pay a penalty of $286.00 within thirty days of this order.[1]

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

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

Distribution:

Daniel J. Goyen, U.S. Department of Labor, MSHA, 515 West First Street, Room 323, Duluth, MN 55802

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/ztb

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June 11, 2019

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. CONSOL BUCHANAN MINING COMPANY, LLC, Respondent.	CIVIL PENALTY PROCEEDING Docket No. VA 2012-0042 A.C. No. 44-04856-269664 Mine: Buchanan Mine #1

DECISION AND ORDER

Before: Judge Rae

I. STATEMENT OF THE CASE

This matter arises from a petition for assessment of civil penalty filed by the Secretary of Labor ("the Secretary") pursuant to the Federal Mine Safety and Health Act of 1977, as amended, ("the Mine Act") 30 U.S.C. § 815(d). A hearing was held in Kingsport, Tennessee on November 18, 2014, after which the parties submitted post-hearing briefs ("Post-Hr'g Br."). I rendered a Decision and Order after hearing, assessing the propriety of three citations and their respective S&S designations, contained in Docket Numbers VA 2012-0042 and VA 2013-0192. *Sec'y of Labor v. Consolidation Coal Co.*, 37 FMSHRC 2396 (Oct. 2015)(ALJ) ("*Consolidation Coal*"). In relevant part, I held that Citation No. 8189820, contained in Docket Number VA 2012-0042, was properly issued for a violation of Respondent's roof control plan, but was not properly designated as S&S.

The Secretary appealed my removal of Citation Number 8189820's S&S designation to the Commission which affirmed the removal of the S&S designation in a split decision. *Sec'y of Labor v. Consolidation Coal Co.*, 39 FMSHRC 1737 (Sept. 2017) ("*Comm'n Decision"*). The Secretary then appealed the Commission's affirmation to the D.C. Circuit, which vacated the removal of the S&S designation and remanded this matter for further consideration consistent with its instructions. *Sec'y of Labor v. Consolidation Coal Co.*, 859 F.3d 113, 119 (2018) ("*D.C. Cir. Decision*"). Specifically, the D.C. Circuit instructed that I consider whether Citation Number 8189820 is properly designated as S&S without considering redundant safety measures or miner precaution. *Id*.

II. BACKGROUND AND FACTS OF THE VIOLATION

On remand, the factual record established and credited in my original opinion remains undisturbed. Citation Number 8189820 was issued by Mine Safety and Health Administration ("MSHA") Inspector William G Ratliff[1] on July 14, 2011 at the Buchanan Mine #1, a large underground coal mine located in Buchanan County, Virginia. The parties have stipulated to the following relevant facts:

1. During all times relevant to this matter, Consolidation Coal Company ("Respondent") was the operator, as defined in Section 3(d) of the Mine Act, 30 U.S.C. § 802(d), of the Buchanan No. 1 mine, Mine ID No. 44-04856.
2. The Buchanan No. 1 mine is a "mine" as that term is defined in Section 3(h) of the Mine Act, 30 U.S.C. § 802(h).
3. At all material times involved in this case, the products of the Buchanan No. 1 mine entered commerce or the operations or products thereof affected commerce within the meaning and scope of Section 4 of the Mine Act, 30 U.S.C. § 803.
4. Respondent is large in size, having produced 5,654,353 tons of coal at its Buchanan No. 1 mine in 2011 and 3,506,216 tons in 2012.
5. The proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judges pursuant to Sections 105 and 113 of the Mine Act, 30 U.S.C. §§ 815 and 823.
6. MSHA Inspector William G. Ratliff, whose signature appears in Block 22 of Citation Numbers 8189820, was acting in his official capacity as an authorized representative of the Secretary of Labor when they issued the citations.
7. The citation at issue in this proceeding was properly served by a duly authorized representative of the Secretary of Labor, MSHA, upon an agent of Respondent.
8. The proposed penalty for Citation Number 8189820 will not affect Respondent's ability to continue in business.

Jt. Ex. 1; Tr. 6.[2]

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[1] Inspector Ratliff has worked for MSHA as a coal mine inspector since February 2008. He worked in the mining industry as an equipment operator, shop foreman, and fireboss for roughly 24 years before being hired by MSHA in 2007 and subsequently completed approximately one year of field training and coursework at the Mine Academy to become certified as an inspector. He cumulatively had about 28 years of experience in the mine industry at the time he issued Citation Number 8189820. Tr. 225–26.

[2] In this decision, the abbreviation "Tr." refers to the transcript of the hearing. The Secretary's exhibits are numbered S-1 to S-11 and Respondent's exhibits are numbered R-3 and R-4.

Citation Number 8189820 alleges that Inspector Ratliff observed a cut that exceeded the maximum cut length allowed by the mine's roof control plan in violation of § 75.220(a)(1).[3] Ex. S-6. Specifically, Part 1, Section K, Subsection K.7 of the mine's approved roof control plan limits cut depth to 20 feet in areas of the mine evidencing adverse roof conditions. Ex. S-8 at 4. The extended cut was taken in a crosscut in from the No. 3 to the No. 2 entry. *Id*. As the continuous miner began to breach the rib of the No. 2 entry, creating an eight-foot hole, the remainder of the roof collapsed onto the continuous miner. Tr. 267–68.

Inspector Ratliff issued Citation Number 8189820 at approximately 5:00 AM after traveling to the mine to investigate an unrelated complaint on the morning of July 14, 2011. While traveling the 17 Right development panel accompanied by Company Safety Inspector Robert Baugh, Inspector Ratliff encountered adverse roof conditions and a cut that he suspected exceeded 20 feet in length. Tr. 286, 229. By the time Inspector Ratliff's arrived at the extended cut, miners were in the process of bolting the unsupported roof using six-foot resin bolts, a longer bolt than is normally used in this mine. Tr. 241, 259–60. The miners were bolting in a tighter pattern that required by the mine's roof control plan, installing additional rows of bolts between the regularly spaced bolt-rows. Tr. 312–13. Inspector Ratliff waited until the miners finished bolting the entire cut through to the No. 2 entry before measuring the length of the cut the next day. Tr. 229–30, 244.

In my initial decision, I found that the cut was between 22 and 23.5 feet in length, as measured from the last row of roof bolts installed prior to the cut, and constituted a violation of § 75.220(a)(1). *Consolidation Coal*, 37 FMSHRC 2396, 2409. This holding was not challenged on appeal. *See Comm'n Decision*, 39 FMSHRC 1737; *D.C. Cir. Decision*, 859 F.3d 113.

III. LEGAL PRINCIPLES

A violation is S&S if the violation is "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 S&S designation is appropriate "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." *Sec'y of Labor v. Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981) ("*Nat'l Gypsum Co.")*.

In *Mathies Coal Company*, the Commission set forth the following four-part test to determine whether a violation is properly designated as S&S:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum, the Secretary of Labor must prove: (1) the underlying violation of a mandatory

[3] The cited standard, § 75.220(a)(1), operates as a mandatory safety standard and provides in pertinent part: "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." 30 C.F.R. § 75.220(a)(1); *Sec'y of Labor v. Martin County Coal Corp*., 28 FMSHRC 247, 252 (May 2006).

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

6 FMSHRC 1, 3-4 (Jan. 1984) ("*Mathies*"); *accord Buck Creek Coal, Inc. v. FMSHA*, 52 F.3d 133, 135 (7th Cir. 1995) ("*Buck Creek*"); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988); *Consolidation Coal Co. v. FMSHRC*, 824 F.2d 1071, 1075 (D.C. Cir. 1987). It is "well established that the burden of establishing S&S rests on the Secretary[.]" *Sec'y of Labor v. Topper Coal Co.*, 20 FMSHRC 344, 378 (Apr. 1998) (citing *Mathies*, 6 FMSHRC at 3-4).

The Commission later clarified the relationship between the second and third steps of the *Mathies*' analysis.[4] *Sec'y of Labor v. Newtown Energy, Inc.*, 38 FMSHRC 2033, 2037-38 (Aug. 2016) ("*Newtown*"). After the judge identifies the hazard at issue, step two requires a judge assess "whether the violation sufficiently contributed to that hazard." *Id*. at 2038. Specifically, the Commission clarified that "the second step requires a determination of whether, based upon the particular facts surrounding the violation, there exists a reasonable likelihood of the occurrence of the hazard against which the mandatory safety standard is directed." *Id*. If the violation sufficiently contributes to the occurrence of the hazard under step two, "the Judge then assumes such occurrence" for the analysis of step three. *Id*. Step three is satisfied if, based upon the particular facts surrounding the violation, the occurrence of that hazard "would be reasonably likely to result in an injury." *Id*.

Analysis of the likelihood of injury step is conducted assuming "continued normal mining operations." *Sec'y of Labor v. U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). Specifically, in assessing whether a hazard poses a reasonable likelihood of injury, judges consider "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." *Sec'y of Labor v. Black Beauty Coal Co.*, 34 FMSHRC 1733, 1740 (Aug. 2012); *Secy of Labor v. Rushton Mining Co.*, 11 FMSHRC 1432, 1435 (Aug. 1989). Additionally, analysis of the likelihood of injury should not rely on the expectation that miners will protect themselves. *Newtown*, 38 FMSHC at 2044; *see also Sec'y of Labor v. Eagle Nest, Inc.*, 14 FMSHRC 1119, 1123 (July 1992) ("We reject the judge's conclusion that the 'exercise of caution' may mitigate the hazard."). Similarly, analysis of the likelihood of injury under step three cannot consider the mitigating effects of redundant safety measures. *Secretary of Labor v. Black Beauty Coal Co.*, 38 FMSHRC 1307, 1313-14 (June 2016); *Sec'y of Labor v. Cumberaland Coal Res*., 717 F.3d 1020, 1029 (D.C. Cir. 2013) ("*Cumberland Coal Res.*"); *Buck Creek,* 62 F.3d at 136. Lastly, the Commission has recognized that an MSHA inspector's judgment is "an important element of an S&S determination." *Wolf Run*, 36 FMSHRC 1951, 1959; *Mathies*, 6 FMSHRC at 5.

[4] The S&S determination must be based on the particular facts surrounding the violation at issue. *Sec'y of Labor v. Peabody Coal Co.*, 17 FMSHRC 508, 511-12 (Apr. 1995); *see*, *e.g.*, *Sec'y of Labor v. Wolf Run Mining Co.*, 36 FMSHRC 1951, 1957–59 (Aug. 2014) ("*Wolf Run*").

IV. ADDITIONAL FINDINGS OF FACT

In my initial Decision, I held that the first and second steps of the *Mathies* test were satisfied, which was not challenged on appeal. *Consolidation Coal,* 37 FMSHRC 2396, 2409. With respect to the third step of *Mathies*, I held that the Secretary had not satisfied his burden of establishing that a roof fall caused by the extended cut was reasonably likely to injure a miner. *Id*. at 2410. I relied on: (1) the length of time the violative condition would exist in the context of continued mining operations; (2) the use of longer roof bolts and a tighter bolting pattern; (3) the use of an automated temporary roof support system ("ATRS"); and (4) the fact that miners would not go into the unbolted "red zone." *Id*. at 2409–2410. The D.C. Circuit remanded the issue of whether a roof fall would be reasonably likely to injure a miner with instructions that I not consider the ATRS or miner precaution in my analysis.[5] *D.C. Cir. Decision*, 895 F.3d 113, 119–20.

The issue of whether a roof fall caused by the extended cut was reasonably likely to injure a miner cannot be discussed until the relevant facts have been culled from the record. Specifically, the Secretary initially argued in his Post-Hearing Brief that a "roof fall would carry back through the adverse conditions to the previous cut where [examiners, car operators, and roof bolters] were working." Sec'y's Post-Hr'g Br. at 26. However, the Secretary conceded that

[5] The D.C. Circuit directed that settled Commission case law prohibits consideration of redundant safety measures in *Mathies* step three. Accordingly, I do not consider redundant safety measures in this decision. However, the D.C. Circuit specifically noted that it did not address whether redundant safety measures could be considered in *Mathies* step two. *D.C. Cir. Decision*, 859 F.3d 113, 120. I share similar reservations on the blanket refusal to consider compliance with relevant safety measures in any point in an S&S analysis. The policy concern associated with crediting the mitigating effects of redundant safety measures in a S&S analysis recognizes that "[i]f mine operators could avoid S&S liability . . . by complying with redundant safety standards, operators could pick and choose the standards with which they wished to comply." *Knox Creek Coal Corp. v. Sec'y of Labor*, 811 F.3d 148. However, this analysis cuts both ways. Disregarding the effect of redundant safety measures once a hazard has manifested may promote general compliance with safety standards. However, disregarding compliance with safety measures aimed at preventing hazards from manifesting in the first place would, in effect, punish operators for general compliance with such standards by subjecting them to S&S liability. Crediting standards which reduce the likelihood of hazards in occurring in *Mathies* step two would comport with the Mine Act's objective of removing hazards from mining environments while not providing complete defense to S&S liability by allowing operators to assume away any resultant harm in *Mathies* step three. It is also questionable as to which safety measures should be considered secondary or redundant. The use of ATRS is not similar to a fire extinguisher or a fire retardant belt. As Commissioners Young and Althen point out in their opinion, the "Automated Temporary Roof Support was not in any sense of the word a 'redundant' safety feature. Such support was a required and accepted aspect of the roof plan. Failure to use it would have been a violation; certainly, actual use of the prescribed roof control device bears upon the reasonably likely result of a roof fall." *Consolidation Coal Co*., 39 FMSHRC 1737, 1751-52 (Sept. 2017). To hold otherwise would lead to absurd results. The Court of Appeals is simply incorrect in its application of this principle as it applies to the instant case.

while "a roof fall did occur after the majority of the cut was competed" it did not carry back and "break through the bolts in this instance [but] it could have." *Id*. Accordingly, at the time of my initial decision, it was undisputed that a roof fall did not break through into the bolted area where iners were working. Therefore, there was no need to make a finding on whether a roof fall broke into the bolted area at the time I rendered my initial decision.

The Secretary maintains his theory, in his Brief on Remand ("Remand Br."), that a "roof fall that broke through the bolts" would injure a miner. Sec'y's Remand Br. at 7. However, the Secretary now argues, for the first time before me, "part of the roof actually fell and broke back through the bolts after the deep cut was made."[6] *Id*. I am not aware how the factual record could have possibly changed between the time I rendered my initial decision to when this matter was remanded to me from the D.C. Circuit. Nonetheless, it is now necessary to address the Secretary's newfound interpretation of the record.

The Secretary cites three points of testimony to support the assertion that a roof fall broke back through into and damaged the last row of bolts in the previously roof bolted area. First, the Secretary selectively cites to the testimony of Inspector Ratliff. *Id*. at n. 46. Inspector Ratliff did testify that the "cut actually fell out rock." Tr. 252. However, the Secretary attempts to conflate the roof fall that occurred at the opposite end of the extended 22 to 23.5 foot cut with a roof fall in the bolted area. This is a strained interpretation of Inspector Ratliff's testimony as Ratliff referenced the roof fall and said, "[y]ou've got quite a bit of rock. . .if this breaks around your roof bolts," thereby acknowledging that a the referenced "fell out rock" did not actually break around the roof bolts. Tr. 252.

Furthermore, Inspector Ratliff testified specifically that "[t]he roof had not fallen in the area where these bolts were at." Tr. 234. With respect to the row of damaged roof bolts and location of the rock fall, Inspector Ratliff said:

> The bolts were cut, folded over, damaged, the plates were missing, indicates that the miner cut the bolts out instead of the rock fall, which there was no rock that had fallen right there at this location. It was further into the cut. It indicated that the miner cut them out.

Tr. 234. In sum, Inspector Ratliff's testimony is consistent with the Secretary's previous position that a rock fall did not occur in the bolted area.

Next, the Secretary cites to the testimony of Terry Hamilton, the Section Foreman of the 17 Right development panel at the time the extended cut was taken. Sec'y's Remand Br. at 7, n. 46. When asked if there he noticed a problem with the last row of roof bolts after the rock fall, Hamilton responded, "it had fell and *I guess*, dislodged a couple of bolts[.]" Tr. 269 (*emphasis added*). However, in his very next statement Hamilton stated, "I can't remember exactly if it

[6] The Secretary first made this argument that a roof fall broke back into the roof-bolted area on appeal to the Commission, which Commissioners Althen and Young refused to address because the Secretary did not raise advance this argument at the trial level. *Comm'n Decision*, 37 FMSHRC 1737, 174–48.

would have been the miner done it or rock fell around it or what." *Id*. Hamilton's testimony indicates that the last row of bolts in the bolted area included damaged bolts.[7] However, it is ambiguous as to whether they were damaged by a rock fall or by mining operations.

Lastly, the Secretary cites to the testimony of Safety Inspector Baugh. Sec'y's Remand Br. at 7, n. 46. When asked if the roof fall damaged the last row of bolts he replied "right." Tr. 293. However, on the previous page of testimony Bough testified that "one of [the bolts] was damaged by the miner" and that based on his memory, "three of [the bolts] were damaged when the place fell." While this testimony attributes some of the damaged bolts to a roof fall, it does not indicate that the roof fell within the bolted area nor is it as detailed as Inspector Ratliff's description of state of the damaged bolts and his explanation of how they became damaged. Additionally, and as the Secretary acknowledges, Inspector Ratliff's testimony should be afforded great weight due to his training and experience. *See* Sec'y's Remand Br. at 8. Due to the detailed and unequivocal nature of Inspector Ratliff's testimony as well as his training and experience, I credit Inspector Ratliff's testimony that a roof fall did not occur in or break back into the bolted area.

V. ANALYSIS

The issue before me on remand is whether the Secretary has established by a preponderance of the evidence, considering the facts and circumstances surrounding the violation in the context of continued mining operations, that a roof fall was reasonably likely to break back into the bolted area and injure a miner.[8] If so, then the inquiry turns to whether the resulting injury would be of a reasonably serious nature pursuant to *Mathies* step four. However, consideration of the fourth step of *Mathies* is unnecessary, as the Secretary has failed to meet his burden in demonstrating that a roof fall was reasonably likely to break back into the bolted area and injure a miner.

First, as noted in my initial decision, the Mine was using resin bolts installed in a tighter bolting pattern than was required by the roof plan. Tr. 260, 312–13. In addition, the bolts used in the extended cut were six feet in length - longer than those normally utilized in Buchanan Mine

[7] Although the last row of roof bolts included damaged bolts, the damage to the bolts did not affect their structural integrity of their effectiveness in supporting the roof strata. Tr. 261.

[8] The Secretary does not argue that injury would result from the roof falling on miners working under unsupported roof outside of the roof-bolted area, nor would that be appropriate under settled Commission case law. *See Sec'y of Labor v. FMSHRC*, 111 F.3d 913, 917-18 (D.C. Cir. 1997) (Holding that the Secretary is not to consider "nonviolative surrounding conditions" in analyzing whether a violation significantly and substantially" contributes to a hazard.); *see also Cumberland Coal Res.*, 717 F.3d 1020, 1028 (Stating that "decision makers should not consider facts unrelated to the violation when undertaking a significant and substantial evaluation."). Accordingly, and consistent with the D.C. Circuit's remand instruction, miner precaution and Respondent's use of an ATRS is irrelevant to analysis of the Secretary's argument before me—that a roof fall would break back into the roof-bolted area and injure a miner—and therefore is not discussed herein.

#1. Tr. 260. Employing a tighter bolting pattern and switching to longer bolts in the extended cut reduced the likelihood that a roof fall in the unbolted area would destabilize the roof of previously bolted cut or the newly bolted roof established as the bolting crew advanced.

Second, as also noted in my initial decision, the violative condition was in the process of being corrected when Inspector Ratliff observed the extended cut. Tr. 253. The cut was fully bolted by the time Inspector Ratliff returned the next day to measure the extended cut. Tr. 244, 280. Accordingly, the relatively short period of time that the roof was left unbolted lessens the chance that additional roof falls would occur in the remaining unbolted area, let alone break back into the bolted area.

Third, it is significant that Inspector Ratliff allowed the miners to continue roof bolting the extended cut to completion when he observed the condition. As recognized by the Commission, an inspector's judgement is "an important element of an S&S determination." *Wolf Run*, 36 FMSHRC 1951, 1959. Inspector Ratliff was aware of the adverse roof conditions and believed the cut was of impermissible length at the time he allowed roof bolting to continue. Tr. 252. The Secretary's theory that a roof fall was reasonably likely to break back through the bolted area and injure a miner is inconsistent with Inspector Ratliff's decision to allow roof bolting to continue through the entirety of the extended cut. Otherwise, Inspector Ratliff's decision to let bolting continue would be tantamount to allowing continued exposure of the bolting miners to a reasonable likelihood of reasonably serious harm.[9]

Fourth, roof falls occur in the regular course of mining operations as recognized by the Buchanan Mine #1's approved ventilation plan. *See* Ex. S-3, pt. 1at 1. In the context of a cross cut as is at issue here, the greatest amount of stress rests on the intersection of the cuts over 20 feet away from the bolted area - where the extended cut intersected with the No. 2 entry. Tr. 251; Ex. R-3 at 5. It follows that, if a roof fall is to be assumed in assessing the likelihood of injury, this is the area that a roof fall is most likely to, and did, occur. However, the record contains no evidence that the roof fall that occurred in the final feet of the extended cut was caused by the extended cut.[10]

Fifth, the Secretary fails to provide any explanation as to why it is reasonably likely a roof fall at the intersection with the No. 2 entry would travel back into the roof-bolted area besides first alleging it "could happen" and now alleging it did happen. The Secretary does not point to any testimony on the record, expert or otherwise, explaining how characteristics of the cut structure and roof composition would make a roof fall likely outside of the final feet of the extended cut reasonably likely. The occurrence of a roof fall at the intersection with the No. 2

[9] If the Secretary's argument was to be accepted, any time a cut of two to three-and-a-half additional feet is taken, mining in that area would need to cease lest miners be exposed to a reasonably serious likelihood of harm.

[10] Foreman Hamilton testified that when a cut is taken close to an intersection, the last three feet of coal can fall in because of its soft composition. Tr. 281-83. Accordingly, the roof fall that occurred at the end of the cut may have been a result of the low structural integrity of the thin reaming seam of soft coal between the extended cut and the No. 2 entry – not a result of the cut's length.

entry does not constitute evidence that additional roof falls are likely to occur in other areas along the crosscut, bolted or unbolted. The Secretary does cite to testimony espousing that roof falls can break into roof-bolted areas, arguing that "a mine's history of roof falls is relevant to whether an injury from a roof fall is reasonably likely." Sec'y's Remand Br. at 7, n. 48, 49. However, the cited testimony is not cabined to the facts of this case and therefore is not probative of whether this deep cut, or any deep cut, is likely to result in a roof fall which breaks back into a roof-bolted area.[11]

VI. CONCLUSION

The Secretary's allegations that a roof fall breaking back into a roof-bolted area "could happen" in general does not satisfy the Secretary's burden of demonstrating it is reasonably likely to occur and injure a miner under the specific facts of this case. Having found that a roof fall did not occur in the roof-bolted area, the Secretary's allegation of a possible roof fall in a roof-bolted area is all that remains. Logically, all violations of mandatory safety standards could result in injury to miners, hence the reason for their implementation and enforcement. However, to accept the Secretary's argument that a violation is properly designated as S&S because it could result in injury to a miner would effectively allow all non-technical violations to be designated as S&S. This would be inconsistent with the graduated enforcement scheme of the Mine Act and is the very reason that the Secretary must prove, in relevant part, that harm is reasonably likely to result from a violation before it can be designated as S&S.[12] *Nat'l Gypsum Co.*, 3 FMSHRC 822, 825. Here, the Secretary has failed to meet his burden in showing that Respondent's taking an extended cut of an additional two to three-and-a-half feet was reasonably likely to result in harm to a miner. Accordingly, and for the reasons set forth above, I find that Citation Number 8189820 was not properly designated as S&S and therefore remove the S&S designation.

[11] The cited testimony of Hamilton and Bough does not speak to a "history of roof falls" that are relevant to the facts before me as the Buchanan Mine #1 has no history of taking extended cuts. Tr. 244-245. Accordingly, the testimony the Secretary relies on to establish a history of roof falls cannot possibly relate to roof falls caused by extended cuts, much less evidence that a roof fall potentially caused by an extended cut will travel back twenty feet into a roof-bolted area. Tr. 244–45.

[12] In *Nat'l Gypsum Co.*, the Commission rejected the Secretary's argument that a violation is properly designated as S&S, regardless of the gravity of the resultant harm, as long as a violation posed "more than a remote or speculative chance that injury . . . will result[.]" *Nat'l Gypsum Co.*, 3 FMSHRC 822, 825. Specifically, the Commission opined that such an interpretation of the S&S provision of the Mine Act would be inconsistent with the Act's "overall enforcement scheme, which generally provides for the use of increasingly severe sanctions for increasingly serious violations or operator behavior. *Id*. at 828. Here, the Secretary's theory that a roof fall could break back into a roof-bolted area and injure a miner is purely speculative.

ORDER

It is hereby **ORDERED** that the S&S designation associated with Citation Number 8189820 be removed. I incorporate my initial findings with respect to the appropriate civil penalty and **FURTHER ORDER** Respondent pay $1,500.00 within thirty (30) days of the date of this Decision and Order. [13]

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

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[13] *See Consolidation Coal*, 37 FMSHRC 2396, 2410-11. Payment should be sent to: U.S. Department of Labor, MSHA, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390. Please include docket and A.C. numbers.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 24, 2019

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner, v. HOPEDALE MINING LLC, Respondent.	CIVIL PENALTY PROCEEDINGS Docket No. LAKE 2019-0149 A.C. No. 33-00968-481020 Mine: Hopedale Mine

DECISION AND ORDER

Before: Judge Miller

This case is before me upon a petition for assessment of civil penalty filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d) ("the Act"). This docket involves four citations issued pursuant to Section 104(a) of the Act detailing alleged violations of mandatory health and safety standards with respect to Respondent's coal mine ventilation plan. The parties appeared at a hearing on April 24, 2019 in Pittsburgh, Pennsylvania. The parties called no witnesses but submitted stipulations regarding the citations at issue. Based upon the parties' stipulations, my review of the entire record, and consideration of the parties' legal arguments, I make the following findings and order.

I.BACKGROUND

The Hopedale Mine is an underground coal mine located in Harrison County, Ohio. The parties have stipulated that Hopedale Mining LLC is an "operator" as defined in Section 3(d) of the Mine Act, 30 U.S.C. § 803(d), and that the mine is subject to the provisions of the Mine Act and the jurisdiction of the Commission. Jt. Stips., Ex. J-2. ¶¶ 1-3.

The Secretary filed a petition for assessment of civil penalty regarding the four citations in this docket and Respondent filed a timely answer. The originally assessed amount for the citations at issue totals $18,093.00. The Secretary submitted two motions for settlement on behalf of the parties. In those motions, the parties represented that they had agreed to a significant reduction in penalty of almost 81.5% based upon information purporting to support reductions to the gravity and negligence for each citation.

The Secretary filed his initial settlement motion on March 25, 2019. The docket contains four ventilation violations in which the CLR proposed to modify the negligence on all four, and to change the highly likely to reasonably likely for two citations, thereby reducing the total penalty from $18,093.00 to $3,339.00 based upon the Secretary's schedule of penalties found at 30 C.F.R. § 100.3. After the parties were notified that same day via email that the court would not approve the proposed settlement, the Secretary filed an amended settlement motion on April 5, 2019. The amended motion included the same terms proposed in the initial motion along with some additional information concerning each citation. In their amended motion, the parties assert that they included a description of the "issue[s] on which the parties have agreed to disagree" and that the motion demonstrated "the proposed penalty reduction is fair, reasonable, appropriate under the facts, and protects the public interest," as required by *Am. Coal Co.*, 40 FMSHRC 983, 991 (Aug. 2018) [hereinafter "*Am. Coal II*"]. The Secretary did make an effort to provide some relevant information in the second motion, which was filed by the Solicitor's office, but the second motion was also deficient. That additional information is discussed in more detail below.

On March 29, 2019, the court issued a Notice of Hearing directing the parties to appear for hearing on April 24, 2019 in Steubenville, Ohio. Due to a lack of courtroom availability, the court issued a Notice of Hearing Site on April 9, 2019 and changed the location of the April 24, 2019 hearing to a courtroom at the Commission's Pittsburgh office. Each party filed its prehearing submission on April 15, 2019; both submissions indicated that no witnesses would be called at hearing and that the only exhibit offered would be a copy of the parties' joint stipulations. Following a conference call with the parties on April 16, 2019, the Secretary submitted a copy of the parties' initial joint stipulations to the court.

On April 17, 2019, the court issued an order denying the parties' amended motion for settlement. The order also addressed the stipulations, which in fact, contained the identical information found in the amended motion to approve settlement. The joint stipulations were considered to be an attempt to have a settlement motion approved and are addressed here as another effort to further the original settlement. A little over 36 hours prior to hearing, the Secretary filed a 94-page submission to request that the court reconsider the parties' settlement agreement, or alternatively, revoke the subpoena issued to the inspector, or alternatively, certify the order denying settlement for interlocutory appeal. The hearing was held as originally scheduled, and the parties introduced an updated copy of the joint stipulations as Exhibit J-2. On May 1, 2019, Respondent joined the Secretary's arguments requesting reconsideration of the settlement agreements and certification of certain issues for interlocutory review.

II.SETTLEMENT ISSUES

Prior to hearing, the parties' settlement proposals were rejected because they were not fair, reasonable, appropriate under the facts, or in furtherance of the public interest. The four citations at issue here involve violations of 30 C.F.R. § 75.370(a)(1), which requires operators to develop and follow a ventilation plan that is designed to control methane and respirable dust. Each citation was marked significant and substantial ("S&S"), and the parties' four settlement proposals retained those designations. However, in both of the motions and in the two stipulations, the parties suggested reducing the negligence of three of the four citations from moderate to low, reducing the negligence of one of the four citations from high to moderate, and

reducing the likelihood of injury of two of the four citations from highly likely to reasonably likely. This decision incorporates the order denying the Secretary's amended motion for settlement, which was issued on April 17, 2019 and addressed the motion for settlement and amended motion, as well as the parties' first joint stipulations. In addition to those three submissions, I address the second joint stipulation here.

The first motion for settlement was denied on March 25, 2019 in an email sent to the CLR and the mine operator. The email explained that the four ventilation citations were serious, as was the potential for exposure to dust, and that such a drastic reduction in the overall penalty was not supported. The first motion addressed each of the four violations in a limited manner. A proposal for Citation 8055975, which was issued for failure to maintain adequate air flow, included a modification to negligence from moderate to low and sought a reduction in penalty from $1,031.00 to $462.00. The parties justified the modification to low negligence by arguing that the "foreman stated" to the inspector that he had taken an air reading prior to the roof bolters entering the area and that reading was within the required parameters. The citation includes a statement that the mine was cited 10 times in the past two years for ventilation violations. In the amended motion that followed, the attorney for the Secretary added information explaining that the inspector's air reading was 93% of what was required by the plan and that the difference in the ventilation was not easily detectable by the roof bolter. The Secretary also added that the supervisor took the air reading "just prior to the inspector's arrival." No other changes were suggested and the proposed reductions to negligence and the penalty remained the same. In the next settlement attempt, the joint stipulations, one other item was added: the parties agreed that the foreman said he measured over 3,000 cfm of air prior to roof bolting. Finally in the fourth attempt, the second joint stipulations, the parties agreed that as the continuous miner advances, it is farther from the ventilation source. I credit the Secretary for making an effort to supply additional information, but a significant amount of the information contained conclusions rather than facts, and it was not sufficient to support the drastic reductions that were proposed. It is clear that the parties did not consult the Commission's case law on what constitutes the various levels of negligence. The Secretary may have more facts he relied upon, but if he does not, the parties should consider renegotiating the agreement.

Citation 8055976 was issued 35 minutes later on the same MMU-005 for a failure to remove a tail curtain. The CLR suggested a change from high negligence to moderate and a reduction to likelihood of injury or illness from highly likely to reasonably likely, reducing the penalty from $12,321.00 to $1,666.00 based on Part 100. The proposed reduction was based upon information the mine operator presented that included sampling results for the shuttle car operators taken at or near the time of the violation and demonstrating no overexposure to dust. In addition, the justification for modification included a statement that management was not aware of the violation and that the exposure was for a short duration. The amended motion added that the "Secretary agrees that the section foreman was at the continuous miner" but was not aware the curtain had not been adjusted. The next submission, the first joint stipulations, stated that the section foreman was present at the continuous miner for the cut from E to F, but unaware of the violation. The parties agreed that the violation was for a short period of time. Finally, in the second stipulation, the parties added that the exposure lasted for 45 minutes, but still agreed that it was for a short period of time. They also agreed that there was no evidence of overexposure. For each violation in the second joint stipulation, the parties added that the violation as set forth

was a true and accurate description of the condition observed by the inspector with the exceptions set out. Given all of the information provided, the Secretary has failed to justify the changes to moderate negligence and a reasonable likelihood of injury, as well as the drastic penalty reduction.

Citation 8055977, issued on MMU-005 just 45 minutes after Citation No. 8055976, cites the mine for having plugged water sprays on the continuous miner. The first motion suggested a reduction from moderate negligence to low and a reduction in likelihood of injury or illness from highly likely to reasonably likely. The proposed penalty was reduced from $3,710.00 to $749.00. The CLR justified the changes by stating that the personal samples taken by the shuttle car operators showed the dust levels in compliance and management was not aware that the sprays were plugged. The second motion added more to the parties' justifications and included a statement that the location of the plugged sprays made it difficult for the operator of the continuous miner to see the non-functioning sprays. The motion also included a statement that the respirable dust parameters were in compliance at the start of the shift and the sprays had been checked after the third cut. The motion added finally that there was no dust "rolling over" the continuous miner at the time. In the third attempt at settlement, contained in the first set of joint stipulations, the parties stated that "rolling dust" is a reliable sign of plugged sprays and there was no rolling dust. The parties also asserted that the sprays were checked after the cut from E to F. Finally, the last stipulation added that the inspector did not know about the samples from the shuttle car operators when he issued the citations and there was no reliable evidence as to the duration of the exposure. Given all of the information provided, the Secretary has not made a case for low negligence as it is defined by the Commission.

Inspector Dye issued the fourth citation, No. 8055978, about one and a half hours later on MMU-005 for failing to maintain the roof bolter vacuum as required by the ventilation plan. The CLR justified the change from moderate to low negligence by indicating that the bolter was in compliance at the beginning of the shift. The amended motion added that the 2 inch difference from 12 Hg. to 10 Hg. was not easily detectable by the roof bolter. The first stipulation added little to the parties' justification and the second stipulation stated further that there was no evidence an agent was aware of the violation. The second stipulation also included a statement that the parties agreed that two factors were material in assessing negligence: the fact that the agent was not aware of the condition and that the difference between 10 Hg. and 12 Hg. was not easily detected. Given the information provided for this particular violation, I would not agree that the Secretary has met the definition of low negligence. The fact that the agent was not aware does not support a reduction to low negligence. A reading that was taken at the beginning of the shift may justify such a modification if more information was provided to explain the reading. There are clearly more facts the Secretary could have added to make the settlement of this citation and the corresponding reduction in penalty from $1,031.00 to $462.00 acceptable.

The order denying the amended motion for settlement set forth the court's reasons for finding that the proposed penalty reduction was not fair, reasonable, appropriate under the facts, or protective of the public interest. First, the information available did not support the proposed reductions to gravity and negligence. For each citation at issue, the parties presented insufficient information or information that had little to no bearing on the designation for which they sought modification. Second, the exercise of setting forth facts on which the parties have agreed to

disagree may partially fulfill the Commission's directive from *Am. Coal II*, but it is not the sole criteria for the approval of settlement. Third, the parties' initial joint stipulations, filed just prior to the issuance of the order denying settlement, added little to the proposed settlement. The document was nearly identical in content to the previously filed settlement motions, but with a different heading. It was therefore considered in denying the motion for settlement. Ultimately, it was determined that the information the parties set forth in support of settlement combined with the information available in the case file[1] did not support the proposed modifications.

Following the court's order denying settlement, the Secretary filed a 94-page submission just 36 hours prior to the scheduled hearing. The Secretary's motion sought reconsideration of the settlement denial, or revocation of the subpoena to the inspector, or certification of certain issues for interlocutory appeal. In the interests of judicial economy, I convened the previously scheduled hearing and allowed counsel for both parties to address the outstanding motions. For the reasons set forth below, I deny the Secretary's motion and each of his requests in the alternative.

In the motion filed just prior to hearing, the Secretary first argues that the court abused its discretion by denying the parties' initial proposed settlement, which was filed on March 25, 2019. To support his argument, the Secretary asserts that the court failed to cite to the proper settlement standard and failed to provide guidance on what constitutes an appropriate settlement. As the Commission has observed repeatedly, a judge's "front line oversight of the settlement process is an adjudicative function that necessarily involves wide discretion." *Sec'y of Labor on behalf of Shemwell v. Armstrong Coal Co.*, 36 FMSHRC 1097, 1101 (May 2014) (citations omitted). In the court's initial email to the parties, they were advised that the settlement was not adequate, and that the four ventilation violations, as well as over exposure to dust, were serious issues. The email gave the parties an informal opportunity to go back and look at the settlement to decide if they wanted to present additional information or renegotiate the terms. The email was sent with the standards for reviewing penalty reductions in settlement in mind and was meant to give notice to the parties that they should revisit their settlement. As a result of that email, the parties submitted an amended motion that was then addressed, along with the first joint stipulations in a formal order denying the settlement.

The Secretary argues next in his Motion for Reconsideration that with respect to the denial of the parties' amended settlement motion, the court made four errors amounting to an abuse of discretion. First, the Secretary contends that the court relied on Section 110(i) as the legal standard for reviewing the proposed settlement. This assertion has no merit. *See* Order Denying Settlement at 2 (applying the standard the Commission has articulated for evaluating penalty reductions in settlements, which directs judges to determine whether a proposed penalty reduction is fair, reasonable, appropriate under the facts, and protects the public interest; and

[1] The Secretary, joined later by Respondent, expressed some concern as to the contents of the court's "file" in this case. Sec'y Mot. for Recons. at 3; Resp. Joinder. As clarified at hearing, the file referenced in the order denying settlement consists of the Secretary's petition, Respondent's answer, and any other documents that have been filed by or with the court since the penalty case commenced as well as information learned on a conference call and through emails. Tr. at 19-20.

referencing the requirement of the Mine Act to consider Sections 110(i) and (k) when evaluating proposed settlements). The Secretary then suggests that the Court's reliance on the standard set forth in *Am. Coal Co.*, 38 FMSHRC 1972, 1976 (Aug. 2016) [hereinafter "*Am. Coal I*"], is troubling. The Secretary bases this assertion on his belief that the *Am. Coal. II* decision "fully articulates the Commission's legal standard for evaluating proposed penalty reductions." Sec'y Mot. for Recons. at 4. I disagree. The Commission's 2018 decision does not add additional elements to the standard articulated in 2016—the standard remains the same. *Compare Am. Coal II*, 40 FMSHRC at 984, 988, 991, 993, *with Am. Coal I*, 38 FMSHRC at 1976. Nor does the 2018 decision supersede the standard set forth in the 2016 decision. Rather, *Am. Coal II* clarifies that mutually acceptable facts are sufficient *to meet* the standard for evaluating proposed penalty reductions in settlement.

The Secretary then argues that the court was wrong to disregard the purported "enforcement value" of the parties' proposed settlement. In support of this claim, the Secretary states that "the Commission *validated* the Secretary's interest in the enforcement value of *any given settlement*" in *Am. Coal II*, 40 FMSHRC at 989. Sec'y Mot. for Recons. at 4 (emphasis added).[2] The Secretary's position mischaracterizes the Commission's statement. Far from validating the Secretary's interest in the enforcement value of *any* given settlement, the Commission has observed that "[t]he Secretary makes a valid point that *the fact that the proposed settlement preserves all of the citations as written* could assist the Secretary in future enforcement efforts against this operator by ensuring that the paper record reflects the Secretary's views regarding gravity and negligence stated in the citations." *Am. Coal II*, 40 FMSHRC at 989 (emphasis added). In the settlement at issue here, the operator agreed to accept the citations in a modified form, and not as originally issued. The Secretary's motion fails to address the reason why accepting modified citations would be valuable in future enforcement actions.[3] As Congress has noted, the overall purpose of the penalty system is to encourage operator compliance with the Mine Act's requirements. *See* S. Rep. No. 95-181, at 41 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 629 (1978). While "enforcement value" could be a factor outside of the section 110(i) factors that *might* be relevant when evaluating a proposed settlement, the Secretary's statements on enforcement value in this case, both in the motion for reconsideration and in his previous settlement motions, have not demonstrated the appropriateness of the settlement at issue here.

The Secretary's final two arguments allege that the court abused its discretion by inappropriately assigning probative value to the operator's general history of ventilation violations, and by using hyperbole to misrepresent the terms of settlement. As the Commission has acknowledged, when reviewing information set forth in support of a reduced penalty in settlement, a judge should consider whether such information supports a finding that the

[2] The Secretary made a similar argument in another case before this court, *Northshore Mining Co.*, Docket No. LAKE 2018-0177.

[3] As Commissioner Cohen noted in *Am. Coal II*, "[t]he Secretary's boilerplate recitations of having evaluated the value of compromise, the prospects of coming out better or worse after a trial, and 'maximizing his prosecutorial impact' add nothing." 40 FMSHRC at 989 n.10.

proposed penalty reduction is fair, reasonable, appropriate under the facts, and protects the public interest. *Am. Coal I*, 38 FMSHRC at 1982. The exercise of highlighting certain facts that tend to support a judge's decision regarding the appropriateness of settlement does not necessarily mean that the judge has given probative value to those facts over others. Rather, it is a window into how the court is evaluating the information before it, and it alerts the Secretary and the mine operator as to which portions of the settlement may need further review or explanation by the parties. This, in turn, helps to achieve Congress' stated intent in the penalty settlement process to provide transparency to all interested parties. *See Am. Coal II*, 40 FMSHRC at 987-88.

The Commission's procedural rules require the parties to "provide factual support in the settlement proposal and for the Judge's decision approving settlement to be supported by the record." *Am. Coal I*, 38 FMSHRC at 1981; *see also* 29 C.F.R. §§ 2700.31(b), (c), and (g). In addition to looking to the modification to each citation, the settlement was reviewed and considered in its entirety. A full evaluation of the facts set forth in each citation reveals that all of the citations were issued within a relatively short period of time and in the same area of the mine. Each citation was issued for a violation of the ventilation plan and the mine foreman was in the area when the citations were issued. While the Secretary asserts that the negligence of three of the violations should be reduced from moderate to low largely because the foreman or an "agent of the operator" was not aware of the violations, the facts paint a different view. As explained below, the mine foreman is held to a higher standard and the negligence inquiry centers around whether he "knew or should have known." For all of these reasons, I deny the Secretary's request to reconsider my denials of settlement.

In the alternative to reconsidering the parties' proposed settlement, the Secretary argues next for revocation of the subpoena duces tecum the court issued to John William Dye, the MSHA inspector who issued the citations in this case. The Secretary claims that the subpoena is unreasonable and unnecessary, therefore constituting an abuse of discretion.[4] While Inspector

[4] In support of this argument, the Secretary once again references *Northshore Mining Co.*, LAKE 2018-0177, and the court's "unreasonable" statements at a hearing held on October 16, 2018 regarding several other Northshore cases. The Secretary includes only a part of that history. In his motion for reconsideration, the Secretary argues that just as in Northshore, the court here has engaged in a "judicial fishing expedition" by seeking more information, this time from the inspector, to support the parties' settlement proposal. Sec'y Mot. for Recons. at 9. The Secretary attempts to bolster this claim by alleging that the court previously made "inappropriate inquiries into the details of the parties' settlement discussions" in Northshore. *Id.* at 9 n.9.

From the time the parties submitted their initial motion to approve settlement in Northshore, LAKE 2018-0177, the court repeatedly requested additional information that would support the proposed modifications because the information made available was insufficient. As the Commission noted in *Am. Coal Co. II*, Commission judges who properly determine that "a settlement motion lacks sufficient information may permissibly request further facts from the parties." 40 FMSHRC at 988 (citing *Black Beauty Coal Co.*, 34 FMSHRC 1856, 1863 (Aug. 2012)). The initial motion, filed on July 24, 2018, did not contain facts sufficient to justify the Secretary's total proposed penalty reduction of 80%. Following an email to the parties requesting

(continued…)

Dye appeared at the April 24 hearing as directed, I did not ask him substantive questions, nor did I require him to turn over any documents. Although the Secretary's motions and stipulations make reference to the inspector's notes, they were not provided to the court here and thus not considered unless specifically set forth in a pleading. The Secretary's argument regarding what a Commission Judge may ask to review in furtherance of a settlement has not been addressed by the Commission, and I do not address it here.

Finally, in another alternative to his prior arguments, the Secretary requests the court certify for interlocutory review its two denials of settlement and issuance of the subpoena. Since the case has been heard, the matter is moot, but addressed briefly. The Secretary states that those decisions involve controlling questions of law and immediate review may materially advance the final disposition of these proceedings. Specifically, the Secretary argues that three controlling questions of law have been raised in this case:

1) Whether the judge's March 25, 2019 denial of settlement constitutes an abuse of discretion;
2) Whether the judge's April 17, 2019 denial of settlement constitutes an abuse of discretion; and
3) Whether the judge's April 17, 2019 subpoena to the MSHA inspector constitutes an abuse of discretion, or is otherwise unreasonable.

Sec'y Mot. for Recons., at 11.

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[4] (…continued)
additional facts, the Secretary submitted an amended motion, which also lacked sufficient information to demonstrate the appropriateness of the large penalty reductions. As a result, a conference call was held on August 13, and, in an email immediately following that call, the parties were directed yet again to provide more facts that would support the proposed penalty reductions. The Secretary then submitted a second amended settlement motion on August 23, 2018, which included no additional facts from the Secretary but did contain more information provided by the operator's counsel about the circumstances surrounding three of the violations.

Both the Secretary and operator's counsel were given the opportunity to discuss outstanding settlement issues related to Docket Nos. LAKE 2018-0177 and LAKE 2018-0147 at a hearing held on October 16, 2018. The Secretary attached the relevant excerpt of that hearing as Exhibit C to his motion for reconsideration here. The Secretary states in the motion filed in this case that the court's statement at the Northshore hearing that it had not yet heard from the Secretary following the operator's submission of additional information in LAKE 2018-0177 constituted an inappropriate inquiry into the details of settlement. Sec'y Mot. for Recons. at 9 n.9. With respect to the settlement reached in LAKE 2018-0147, it was the mine operator's counsel again who volunteered additional information, this time verbally at hearing, to help the court "fulfill the duty of articulating reasons for the [settlement] approval so that the process of compromising penalty amounts is transparent, as Congress intended." *Am. Coal II*, 40 FMSHRC at 988-89. In light of the additional information offered by the mine operator in both Northshore cases, I ultimately approved those settlement agreements.

Commission Rule 76 provides that a judge should certify a ruling for interlocutory review if it involves a controlling question of law and immediate review will materially advance the final disposition of the proceeding. 29 C.F.R. § 2700.76(a)(1). I find that interlocutory review of the court's March 25, 2019 and April 17, 2019 denials of settlement is not merited under the facts of this case. Neither of these questions involves controlling questions of law; these two questions are not novel nor do they involve an unresolved question of law relevant to the case. The Commission has repeatedly addressed settlement requirements as they relate to contested civil penalties. *See, e.g.*, *Am. Coal II*, 40 FMSHRC 983; *Am. Coal I*, 38 FMSHRC 1972; *Black Beauty*, 34 FMSHRC 1856. The Secretary may take issue with the Commission's decisions, but the case law is clear: when evaluating penalty reductions in settlement, a judge must determine whether the proposed penalty reduction is fair, reasonable, appropriate under the facts, and protects the public interest. *Am. Coal I*, 38 FMSHRC at 1976. Here, I considered the facts based on the standard the Commission has articulated for evaluating penalty reductions in settlement and determined the parties' proposed settlement was not fair, reasonable, appropriate under the facts, or protective of the public interest.

I find further that interlocutory review of the court's April 17, 2019 subpoena to the inspector is not merited based on the facts of this case. Although the Secretary's argument may have merit, the issue in this case involves a judge's authority to compel the inspector to appear *at hearing*, while the issue currently on review before the Commission deals with such authority during the settlement process and *before* a hearing on the merits. As the Secretary has recognized, the Commission and its judges have the authority to "compel the attendance and testimony of witnesses and the production of books, papers, or documents, or objects . . . at any stage of the proceedings before them." 30 U.S.C. § 823(e). However, given the Secretary's objection, the inspector was not questioned and no documents were produced. Accordingly, for the reasons set forth above, the Secretary's motion is denied in its entirety.

III.MATTERS FOR HEARING

At the hearing on April 24, the Secretary and the mine operator refused to present witnesses or exhibits in support of their case. Instead, the parties presented the court with amended joint stipulations. The stipulations contained provisions almost identical to the terms that comprised the previously rejected settlement motions, but with a few additional facts related to jurisdiction. The amended stipulations also included information related to the mine's history of violations, since that history had been raised in the order denying settlement, as well as a statement that the parties agreed that the information contained in each of the citations was accurate, with some exceptions. Finally, the amended stipulations contained statements that the parties agreed to the level of negligence, the modifications, and the modified penalty amount. Following a discussion regarding the appropriateness of reducing the parties' settlement agreement to stipulations, the Secretary's representative read the additional information into the record and the amended joint stipulations were admitted as Exhibit J-2. Tr. at 29-32. However, the stipulations were not accepted in lieu of evidence. The stipulations are more accurately characterized as a modified settlement motion at best, and the parties offered no evidence outside of those stipulations. Without an acceptable settlement agreement, the parties to a case are

expected to renegotiate a settlement that is acceptable to the Commission, or present evidence at hearing.[5] The parties did neither.

While ostensibly offered for the purpose of streamlining the hearing, the stipulations at issue here were inappropriate because they served as an indirect means of effectuating the same settlement that the court denied twice prior to hearing. In Exhibit J-2, the parties simply took their reasons and conclusions supporting settlement from the previously denied motions and reduced those reasons and conclusions to "stipulations of fact." Thus, for the most part, they were not stipulations of fact but legal conclusions. Stipulations of fact should not contain restated conclusions or arguments; stipulations of fact should contain facts only. For example, stipulation 7(i) states that "the parties agree the appropriate negligence level is '[l]ow.'" The parties make similar statements with respect to each remaining citation at issue. However, the degree of negligence is not a fact; rather, the degree of negligence is a legal conclusion to be determined by the court based on the facts available for review. I find it troubling and frustrating that instead of seeking to renegotiate a settlement, the parties have instead attempted to back door a settlement by reducing previously rejected arguments and conclusions to "stipulations of fact."

Stipulations of fact may be appropriate in two instances: when there are no facts in dispute and the parties are seeking summary judgment, and when the parties want to aid in the process of hearing. Tr. at 27. When viewed in the context of summary decision, stipulations may be appropriate with proper supporting evidence, such as affidavits. Stipulations may also be appropriate at hearing as a means to narrow certain issues, as the Secretary argues. However, stipulations are no substitute for and do not take the place of witnesses and exhibits at hearing. The information set forth in Exhibit J-2 was considered in the analysis above as part of an amended motion to approve settlement. Otherwise, the joint stipulations are simply a subterfuge to have a settlement approved that was unacceptable in its original form. Nonetheless, I address each citation below based upon the factual information provided in Exhibit J-2. In doing so, I accept the agreed upon facts contained in the stipulations but, as I would in any decision, come to conclusions that are supported by those facts contained in the record. The conclusions I have reached based upon the stipulated facts are not the same as those reached by the parties.

A. Citation No. 8055975

Citation No. 8055975 was issued by Inspector Dye on December 4, 2018 pursuant to Section 104(a) of the Act for a violation of 30 C.F.R. § 75.370(a)(1). The citation alleges that the operator did not follow its currently approved ventilation plan by failing to ensure that 3,000 cfm of air was provided behind the line curtain in the active section where the roof bolter was operating. The inspector determined that the cited condition was reasonably likely to cause a

[5] The Secretary routinely refuses to renegotiate settlements that have been denied, thereby rendering meaningless the requirement that a settlement be approved by the Judge.

permanently disabling injury to two people, was S&S,[6] and that it resulted from moderate negligence. The Secretary proposed a penalty of $1,031.00.

As part of the parties' proposed settlement, the Secretary has agreed to reduce negligence from moderate to low, thereby reducing the penalty to $462.00 based on the Part 100 point system. In their settlement motions and Exhibit J-2, the parties state that they agree to a reduction to low negligence because of mitigating circumstances. The parties explain that the section supervisor took an air reading behind the line curtain "just prior to the inspection," and that reading showed 3,200 cfm of air. However, when the inspector took an air reading, the anemometer showed 2,792 cfm, which is 93% of what is required by the plan. In addition, the parties agree that the inspector's notes confirm that the foreman stated he had taken an air reading that reflected over 3,000 cfm just prior to the roof bolters installing roof bolts. Based on the information presented, I cannot tell if the supervisor took one reading prior to the roof bolters entrance to the area or if the reading was taken again just prior to the inspector's arrival. I do accept the fact that the supervisor was present at the time of the violation and he did take an air reading at some point during the shift. In Exhibit J-2, the parties add that "[a]s the continuous miner advances through the section, it moves further away from the source of ventilation, potentially resulting in an air volume reading lower than what is required by the ventilation plan, but at a variation in volume not readily discernable to a miner. This fact was not considered by the inspector." It may be a fact that air does not reach equipment as it moves farther from the source, but there is no evidence that was the case in this instance. Furthermore, there is no evidence to show that the miner could not discern that the volume of air was less than originally measured. Instead, the parties use the term "potentially" to describe this alleged fact. The facts agreed to by the parties do not establish that negligence should more correctly have been marked as low.

In evaluating negligence, the Commission has explained that each mandatory standard carries with it an accompanying duty of care to avoid violations of that standard and "an operator's failure to meet the appropriate duty can lead to a finding of negligence if a violation of

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[6] A "significant and substantial" ("S&S") violation is described in Section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(l). 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 the overexposure to respirable dust resulting from a violation of the respirable dust standards, *i.e.*, 30 C.F.R. §§ 70.100 and 70.101, is presumed to be S&S. *U.S. Steel Mining Co.*, 8 FMSHRC 1274, 1281 (Sept. 1986); *Consol. Coal Co.*, 8 FMSHRC 890, 899 (June 1986). This conclusion was 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 Co.*, 8 FMSHRC at 1281. While there is no such presumption in this case because a respirable dust standard is not involved, the same principles apply.

the standard occurs." *A.H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983). In determining whether an operator met its duty of care, the judge must consider "what actions would have been taken under the same circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation." *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2047 (Aug. 2016); *Brody Mining, LLC*, 37 FMSHRC 1687, 1702 (Aug. 2015); *U.S. Steel Corp.*, 6 FMSHRC 1908, 1910 (Aug. 1984).

The Secretary defines negligence as "conduct either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm." 30 C.F.R. § 100.3(d). According to the Secretary's regulations, moderate negligence occurs when the operator knew or should have known of the violative condition, but there are mitigating circumstances that exist. *Id.* Low negligence occurs when the operator knew or should have known of the violative condition, but there are considerable mitigating circumstances. *Id.* Under the Secretary's own guidelines, the modification to low negligence is not warranted.

While the Secretary's Part 100 regulations evaluate negligence based on the presence of mitigating factors, Commission judges are not limited to that analysis. *Brody Mining*, 37 FMSHRC at 1702-03; *see also Hidden Splendor Res., Inc.*, 36 FMSHRC 3099, 3101-02 (Dec. 2014). Rather, Commission judges consider "the totality of the circumstances holistically" and may find high negligence in spite of mitigating circumstances or moderate negligence without identifying mitigating circumstances. *Brody Mining*, 37 FMSHRC at 1702-03. The Commission has recognized that "the gravamen of high negligence is that it 'suggests an aggravated lack of care that is more than ordinary negligence.'" *Id.* at 1703 (quoting *Topper Coal Co.*, 20 FMSHRC 344, 350 (Apr. 1998)).

Here, the information the parties presented, both in their settlement proposals and stipulations, does not support a legal finding of low negligence. It is not clear when the air reading was taken by the supervisor or if further air readings were taken as the roof bolters or continuous miner started to advance. A section supervisor, whose actions may be attributable to an operator, should be diligent in checking the air supply throughout the cut. This is particularly true when he understands that as the continuous miner advances, it is farther from the ventilation source and less effective. The Commission has explained in *Ohio County Coal*, 40 FMSHRC 1096, 1099 (Aug. 2018), that an operator's actual or constructive knowledge is a key component of a negligence evaluation. As part of the settlement on review in that case, the Secretary had agreed to reduce negligence on one citation from moderate to low specifically because the foreman was not present. *Id.* at 1098. Based on that reasoning, the Secretary would not accept a modification to low negligence for the citation at issue here, where the foreman was present. The proposed reduction to low negligence essentially takes the responsibility off of the foreman and the mine to live up to the standard of care that is required under the Mine Act.

The order denying the amended settlement explained that the history of the mine operator may be important to an evaluation of negligence in this case. In response, the Secretary included a statement in Exhibit J-2 that the operator had only violated the ventilation plan once in the past two years *in a manner similar to that cited here*. However, the plan is considered as a whole, and the supervisors, as well as the miners, are trained on the requirements of the plan. Ventilation is important to help prevent exposure to coal dust and silica every day, and by reducing the

negligence on all four citations, along with a large reduction in penalty, the Secretary is removing the deterrent effect contemplated by the Act. If the supervisor or the miners do not understand how to best effectuate the ventilation plan, then retraining may be necessary. Additionally, a supervisor must set a good example by continuing to monitor the air as the equipment moves and dust is generated. If indeed it is a fact that the ventilation effectiveness changes as the continuous miner moves, then the supervisor and the continuous miner operator should be aware of that fact and adjust accordingly. For all of these reasons, I do not agree that the record as a whole suggests that the negligence should be reduced to low for this violation. I find further that the Secretary has not met his burden of proving the violation, as issued or as he proposes to modify, through the stipulations presented here.

B. Citation No. 8055976

Inspector Dye issued this citation for another violation of 30 C.F.R. § 75.370(a)(1) only 12 minutes after Citation No. 8055975 was terminated. Citation No. 8055976 alleges that the operator did not follow the ventilation plan in the crosscut of an active section. Specifically, the operator failed to remove the tail curtain in the entry intake, which allowed dust generated by the continuous miner to be carried over the mining crew and exposed the miners to respirable coal dust and silica. According to the citation, page 3-9 of the ventilation plan requires the tail curtain to be dropped in the intake entry when cutting into the intake air. The inspector marked the citation as highly likely to cause a permanently disabling injury to five people, S&S, and resulting from high negligence. The citation was terminated 10 minutes after it was issued, and the Secretary subsequently proposed a civil penalty in the amount of $12,321.00.

The parties proposed to reduce negligence from high to moderate and to reduce the likelihood of injury from highly likely to reasonably likely. These modifications resulted in a drastic reduction in penalty to $1,666.00 based on Part 100. In support of the proposed reduction to likelihood of injury, the parties asserted that results of Continuous Personal Dust Monitoring ("CPDM") samples taken on shuttle car operators at the time the violation was issued were below the 1.5 mg standard. They also argued that a reduction in likelihood of injury was warranted because of the short duration of exposure to the condition. In support of reducing negligence from high to moderate, the parties stated that while the section foreman was at the continuous miner during the cut, he was unaware that the curtain had not been adjusted prior to the cut as required by the plan.

The Commission evaluates negligence from the starting point of a traditional negligence analysis and examines whether the operator has met "the requisite standard of care—a standard of care that is high under the Mine Act." *Mach Mining, LLC v. Sec'y of Labor*, 809 F.3d 1259, 1264 (D.C. Cir. 2016) (citing *Brody Mining*, 37 FMSHRC at 1702). The Commission has explained that the standard of care is that of a reasonably prudent person familiar with the mining industry. *Brody Mining*, 37 FMSHRC at 1702. The Mine Act places primary responsibility on operators to maintain safe and healthful working conditions in mines, and they are thus expected to set an example for miners working under their direction. *Newtown*, 38 FMSHRC at 2047; *Wilmot Mining Co.*, 9 FMSHRC 684, 688 (Apr. 1987); *see also* 30 U.S.C. § 801(e). "Such responsibility not only affirms management's commitment to safety but also, because of the

authority of the manager, discourages other personnel from exercising less than reasonable care." *Wilmot*, 9 FMSHRC at 688.

A reduction in negligence is simply not supported by the facts surrounding the violation and the information the parties have submitted in support of settlement. Section managers and foremen have a great responsibility to maintain safe and healthful working conditions at each mine. They must be proactive in their duties and take steps to ensure that they are in compliance with the very plans that are in place to protect the health and safety of miners. The argument that the foreman was unaware that the line curtain had not been advanced is wholly unpersuasive and does not comport with the reasonably prudent miner standard of care. As stated above, a foreman or manager must be familiar with the ventilation plan. The suggestion that the foreman was unaware of the cited condition indicates that the foreman was extremely careless or not properly trained. In any event, the foreman failed to live up to the standard of care required under the Mine Act and a downward adjustment to negligence is not appropriate in this circumstance. Just as with the other violations at issue here, certain factors such as supervisor familiarity with the plan, ventilation violations issued in a very short period of time with at least one supervisor in the working area, and the serious nature of exposure to coal dust support the findings initially made by the inspector. These factors therefore make it difficult to agree that the proposed modification to this citation and the accompanying severe reduction in penalty is fair, reasonable, or in the public interest.

Similarly, the information the parties have presented does not support a modification to the likelihood of injury. As the citation states, the failure to properly position the tail curtain caused dust from the continuous miner to be carried over the mining crew and exposed miners to respirable dust and silica. The fact that CPDM samples from shuttle car operators were below the standard has little impact on the evaluation of the likelihood of injury or illness for this citation. As I noted in the order denying settlement, shuttle car operators do not receive the same or similar respirable dust exposure as the continuous miner operators. Shuttle car operators drive in and out of the area being cut, whereas the continuous miner operators remain with the equipment in the area being mined. In addition, a short duration of exposure to respirable dust would not alone reduce the likelihood of injury or illness. While a single exposure to respirable dust or silica may not cause serious respiratory disease, there is little dispute that repeated exposure of short durations ultimately contributes to the development of such disease. *See Consol. Coal Co.*, 8 FMSHRC at 898-99. Pneumoconiosis, or black lung, is extremely serious and it is not always known how much exposure ultimately results in the disease. Accordingly, a reduction in likelihood of injury or illness would not be appropriate here and I cannot approve such adjustment. Even if I accept all of the facts presented in the parties' stipulations, I cannot reach the conclusions set forth by the parties. I find that the Secretary has not met his burden of proof with regard to this violation, as originally issued or in its proposed modified form.

C. Citation No. 8055977

Citation No. 8055977 was issued 35 minutes after Citation No. 8055976 was terminated, and alleges a third violation of 30 C.F.R. § 75.370(a)(1). The inspector observed that the operator was not maintaining the minimum number of operating water sprays on the continuous miner while it was operating on the active section. When the inspector checked the sprays, only 19 of

30 were operating. According to page 4-2 of the ventilation plan, a minimum of 27 of 30 sprays are required to be operating while the continuous miner is in use. The inspector marked the citation as highly likely to cause a permanently disabling injury to five people, S&S, and resulting from moderate negligence. The citation was terminated 55 minutes after it was issued. The Secretary proposed a civil penalty in the amount of $3,710.00 for this alleged violation.

As part of their settlement proposal, the parties agreed to reduce the likelihood of injury from highly likely to reasonably likely, and to reduce negligence from moderate to low. The modifications resulted in a reduced penalty of $749.00 per Part 100. The parties again pointed to the CPDM samples taken from the shuttle car operators and the short duration of exposure to the condition to support the modification to likelihood of injury. With respect to negligence, the parties stated that a reduction was justified because the location of the plugged sprays made it difficult for the operator of the continuous miner to recognize that the sprays were plugged. In Exhibit J-2, the parties assert that "the rolling of dust is a reliable visual sign that water sprays may be ineffectively controlling dust, and dust was not observed 'rolling' over the miner operator or shuttle car operators." According to the parties, this information was not known or considered by the inspector. The parties also agreed that the inspector's notes reflected that he was told that the respirable dust parameters were in compliance at the beginning of the shift and the sprays were checked after the third cut was completed. Finally, the Secretary submits that he has "no reliable evidence of the length of time the condition existed or that the concentration of respirable dust exceeded the standard."

The parties describe the same arguments regarding likelihood of injury as they did to support the reduction in gravity to Citation No. 8055976. Those arguments are equally unavailing with respect to this citation and I incorporate my reasoning set forth above in rejecting the modification here. Citation No. 8055977 indicates that it took almost an hour for the water sprays to be repaired and cleaned. The condition of the sprays suggests extensive build-up and clogging which would have taken a considerable amount of time to develop. In addition, the information the parties provided that dust was not observed "rolling" over the continuous miner operator or shuttle car operators is not enough to reduce the likelihood of injury. If dust were "rolling" over the continuous miner, it would indicate a serious problem that could be attributed to a number of issues. The absence of the rolling dust is not proof of anything.

The information that the parties submitted purporting to support a modification from moderate to low negligence is also unpersuasive. As described in the citation, the mine's ventilation plan requires that 27 of the continuous miner's 30 water sprays operate while the equipment is in use; the inspector found that only 19 of 30 were operational. This undoubtedly results in increased dust in the air as the continuous miner cuts into the active section. While I understand that the location of the non-operational water sprays may have made it more difficult to see exactly which sprays were plugged, it is hard to accept that a reasonably prudent miner would not recognize that only 63% of the sprays were operating as expected. As stated above, the assertion in the stipulation that there was no visible dust "rolling" over the miners or that there is no reliable evidence as to the length of time the condition existed are *not* facts that necessarily support a finding of low negligence. There is, in fact, evidence to suggest the plugged sprays were extensive, and there is information in the file to support the fact that supervisors were present. Finally, there is no requirement that the Secretary found, through dust samples, that

the miners were exposed to dust when looking at violations of the ventilation plan and when assessing negligence of a ventilation plan violation.

As the citation describes, the foreman was in the area of the MMU-005 during the course of the inspection. The Commission has long recognized that mine management is held to a heightened standard of care. *Newtown*, 38 FMSHRC at 2047. When a violation is committed by a non-supervisory employee, the conduct of the rank-and-file miner is typically not imputable to the operator for negligence purposes. *Ky. Fuel Corp.*, 40 FMSHRC 28, 31 (Feb. 2018). In such circumstances, Commission judges must analyze "whether the operator has taken reasonable steps to prevent the rank-and-file miner's violative conduct." *Id.*; *see also Knight Hawk Coal, LLC*, 38 FMSHRC 2361, 2369 (Sept. 2016). Relevant considerations include "the foreseeability of the miner's conduct, the risks involved, and the operator's supervising, training, and disciplining of its employees to prevent violations of the standard [at] issue." *A.H. Smith Stone Co.*, 5 FMSHRC at 15-16. The amount of non-operational water sprays leads me to conclude that there was general lack of initiative from miners and management to make sure that the continuous miner's water sprays were being properly cleaned throughout each shift. Given the overall circumstances related to the four ventilation violations, including the seriousness of exposure to coal dust and the reasonable expectation as to the supervisor's knowledge of a ventilation plan, the proposed modifications to this citation are not supported by the information available for review. In addition, there are insufficient facts in the file to support a conclusion that the Secretary has met his burden to prove the violation as issued.

D. Citation No. 8055978

Finally, Citation No. 8055978 was issued for a fourth violation of 30 C.F.R. § 75.370(a)(1) just 55 minutes after Citation No. 8055977 was terminated. The citation alleges that the roof bolter operating on the active section was not in compliance with ventilation plan requirements. When the inspector checked the vacuum on the return side of the roof bolter, only 10 in. Hg of pressure was provided. According to the citation, page 2-1 of the ventilation plan requires a minimum of 12 in. Hg to be maintained while the roof bolter is operating on the active section. Inspector Dye determined that the condition was reasonably likely to cause a permanently disabling injury to two people, was S&S, and resulted from moderate negligence. The citation was terminated 20 minutes after it was issued. The Secretary proposed a civil penalty of $1,031.00 for the alleged violation.

In their settlement proposals, the parties agreed to reduce negligence from moderate to low. To support this change, the parties explained that the vacuum's parameters were compliant at the beginning of the shift, which was reflected in the inspector's contemporaneous notes. The Secretary does not indicate who provided the inspector with that information or how much time had elapsed. The parties also asserted that the difference between 10 and 12 in. Hg is not easily detected by the roof bolter operator, but did not submit facts to support that supposition in general or as it relates to this violation. In Exhibit J-2, the parties added that there was no evidence to suggest an agent of the operator was aware of the pressure issue. They could not determine the length of time the condition existed, and there was no evidence that the concentration of respirable dust exceeded the standard.

While the parties have submitted information that relates to the evaluation of negligence, the information on its own does not justify a modification from moderate to low. The parties' statement that no evidence exists to suggest an agent of the operator was aware of the pressure discrepancy does not validate a reduction from moderate negligence to low. The standard of care here revolves around whether a reasonably prudent miner knew or should have known of the violative condition. Simply stating that an agent of the operator did not know of the condition, when it has been admitted that the foreman was at the location when the inspector arrived, is not enough. Also, there is no indication why a 2 in. Hg difference in pressure is not easily detected by the roof bolt operator. Without that information, it is difficult to fully assess whether the miner or operator should have known about the pressure differential. Just as with the citations addressed previously, the entire settlement for the four ventilation violations was considered in reaching the conclusion that the settlement is not supported by the record, and is not fair or in the public interest. I therefore cannot accept the parties' request to modify the negligence for this citation. In addition, the Secretary has not met his burden to demonstrate the violation as alleged in the citation, or the violation as modified.

IV. CONCLUSION

To prevail on a penalty petition, the Secretary bears the burden of proving an alleged violation by a preponderance of the evidence. *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000), *aff'd* 272 F.3d 590 (D.C. Cir. 2001); *Jim Walter Res., Inc.*, 9 FMSHRC 903, 907 (May 1987). The Secretary may establish a violation by inference in certain situations, but only if the inference is "inherently reasonable" and there is "a rational connection between the evidentiary facts and the ultimate fact inferred." *Garden Creek Pocahontas Co*., 11 FMSHRC 2148, 2152-53 (Nov. 1989). Once a ventilation plan has been approved and adopted, its provisions are enforceable at the mine as mandatory standards. *Martin County Coal Corp.*, 28 FMSHRC 247, 254 (May 2006). The Commission has recognized that a ventilation plan is violated when an operator does not follow its specific terms. *See Peabody Coal Co.*, 16 FMSHRC 2199, 2201-02 (Nov. 1994).

The parties submitted two motions and then joint stipulations in an effort to provide evidence sufficient to approve the proposed settlement. When those attempts failed, the parties submitted Exhibit J-2, the amended joint stipulation, as evidence for the violations at hearing. The Commission decisions regarding settlement explain that it is the Commission Judge who must review and approve a settlement. Further, the Judge is not required to blindly accept assertions and conclusions that are not supported in law. If the Secretary cannot provide an acceptable settlement and refuses to renegotiate the terms, the only other avenue is a hearing on the merits. Here the hearing held on April 24 addressed the proposed settlement, the motions filed by the Secretary, and the facts submitted in support of the Secretary's position. Given that an appropriate settlement was not submitted, the parties were expected to participate in the hearing and provide evidence to support their positions.

At the hearing, the parties called no witnesses and entered no evidence into the record except for Exhibit J-2, the Amended Joint Stipulation. The Secretary rested on the information

contained in the settlement motions and Exhibit J-2. Accordingly, the record in this case demonstrates that the Secretary did not meet his burden to establish the violations alleged in the citations and therefore the citations are vacated and the case dismissed.

V.ORDER

Based on the above findings, there is no acceptable settlement agreement and the Secretary has not met his burden of proof at hearing on the merits. Accordingly, the case is hereby **DISMISSED**.

/s/ Margaret A. Miller
Margaret A. Miller
Administrative Law Judge

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June 27, 2019

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner, v. PEABODY MIDWEST MINING, LLC, Respondent.	CIVIL PENALTY PROCEEDING Docket No. LAKE 2018-0159 A.C. No. 12-02295-457966 Mine: Francisco Underground Pit

DECISION AND ORDER

Appearances: Barbara M. Villalobos, U.S. Department of Labor, Office of the Solicitor, 230 S. Dearborn Street, Room 844 Chicago, Illinois 60604

Arthur M. Wolfson, Fisher & Phillips LLP, One Oxford Center, 301 Grant Street, Suite 4300, Pittsburgh, PA 15219

Before: Judge Simonton

I. INTRODUCTION

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration, against Peabody Midwest Mining, LLC, ("Peabody" or "Respondent"), pursuant to the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. §801.[1] At issue are two section 104(d)(2) Orders alleging violations of 30 C.F.R. § 75.400 and 30 C.F.R. § 75.363(a), respectively. Peabody challenges the fact of violation, S&S and gravity findings, and the negligence and unwarrantable failure designations for each Order.

The parties presented testimony and documentary evidence at a hearing held in Henderson, Kentucky on February 20, 2019. After fully considering the testimony and evidence presented at hearing and the parties' post-hearing briefs, I modify Order No. 9106459 to moderate negligence and vacate Order No. 9106460. I assess a penalty of **$2,500.00**.

[1] In this decision, the joint stipulations, transcript, the Secretary's exhibits, and Respondent's exhibits are abbreviated as "Jt. Stip.," "Tr.," "Ex. S–#," and "Ex. R–#," respectively.

II. STIPULATIONS OF FACT

The parties jointly filed eight stipulations of fact in their prehearing reports and read stipulations nine and ten into the record at hearing:

1. Peabody Midwest Mining, LLC, is an "operator" as defined in Section 3(d) of the Federal Mine Safety and Health Act of 1977, as amended (Mine Act), 30 U.S.C. § 803(d), at the time the citations at issue in this proceeding were issued.

2. Peabody Midwest Mining, LLC operated the Francisco Underground Pit located in Francisco, Gibson County, Indiana at the time the subject violations were issued.

3. The Francisco Underground Pit mine is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

4. These proceedings are subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judges pursuant to sections 105 and 113 of the Mine Act.

5. The individual whose signature appears in Block 22 of the citations at issue in this proceeding was acting in his official capacity and as an authorized representative of the Secretary of Labor when the citations were issued.

6. A duly authorized representative of the Secretary served the citations and terminations of the citations upon the agent of the Respondent at the date and place stated therein as required by the Mine Act, and the citations and terminations may be admitted into evidence to establish their issuance.

7. The total proposed penalty for the citations at issue ($23,519.00) will not affect the Respondent's ability to continue in business.

8. The Orders contained in Exhibit A attached to the Petition for Assessment of Penalty are an authentic copy of the citations at issue in this proceeding with all appropriate modifications and terminations, if any.

9. Citation No. 9106452, which is Secretary's Exhibit S–8, is a final violation with all original determinations. It was issued on October 31, 2017, at 8:45 a.m. and terminated by MSHA at 10:15 a.m.

10. Citation No. 9106453, which is Secretary's Exhibit S–9, is a final violation with all original determinations. It was issued on October 31, 2017, at 8:55 a.m. and terminated by MSHA at 10:18 a.m.

Secretary's Prehearing Report at 2-3; Tr. 9.

III. FINDINGS OF FACT AND SUMMARY OF TESTIMONY

Peabody Midwest Mining, LLC, owns and operates the Francisco Underground Pit, a bituminous coal mine located in Gibson County, Indiana. At the time of the inspection, the Francisco Pit had three working units. Tr. 140. Each unit contains two working sections. Tr. 140.

On the morning of October 31, 2017, MSHA Inspector Nicolas Vandergriff[2] and Supervisory Inspector Anthony DiLorenzo arrived at the mine to begin a routine inspection. Tr. 35, 139. Todd Seilhymer,[3] a compliance officer at Peabody, accompanied the inspection. Tr. 139. The party began the inspection in Unit 3 at the 3-C Beltline. Tr. 53-54, 139. Coal produced in Unit 3 will dump onto the 3-C Beltline, transfer to 3-B, to 3-A, and finally up the main south belt to the prep line. Tr. 141. Vandergriff issued two initial citations in the 3-C Beltline, one for improperly spaced fire suppression and another for accumulations along the tail piece that continued along 3-B. Exs. S–8, S–9; Tr. 143. Those citations were abated as the inspection party proceeded to 3-B, where Vandergriff met with mine examiner Ryan Kyle Brown to observe his examination of the beltline. Tr. 55. At this time, Seilhymer followed behind in a ride as the Inspectors and Brown walked along the belt. Tr. 148.

Miners examine the conveyor belts at each working section once a shift. Peabody conducts pre-shift examinations at the same time as its on-shift examinations. Examiners evaluate any conditions they find and determine whether or not those conditions rise to the level of a "hazard" that must be immediately addressed. If an examiner discovers a hazard, they will address the situation immediately. If the examiner decides that the condition does not require immediate attention, they will record the condition in the inspection book, and crews will address the matter if they have time or pass the matter to the next crew. Once a condition is corrected, the miner that completed the task will report to his supervisor, and one of those two miners will note the correction in the inspection book. Tr. 220.

As Brown conducted the examination, Vandergriff noticed that accumulations of float coal dust were present along the beltline. Tr. 149. He testified that the accumulations were extensive and stretched from crosscut 28 to 23, measuring between one-eighth and one-quarter of an inch. Tr. 58-59. He observed the accumulations on every horizontal structure, including the belts, the ground, the water line, and all over the ribs. Tr. 58. Although he noted that the accumulations existed for five shifts, at hearing Vandergriff estimated that the accumulations had been present for two to three active shifts based on their extensiveness and because the beltline was relatively new. Tr. 63, 120.

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[2] Vandergriff has been a MSHA Coal Mine Inspector since April of 2015. Tr. 32. Prior to that, Vandergriff worked at Sunrise Coal in Carlisle, Indiana for nine years. Tr. 32. There he worked in nearly every facet of the mine, from outby work to work on the unit. Tr. 32-33. He also served as a foreman and belt examiner for over two years. Tr. 32-33.

[3] Todd Seilhymer has been a coal miner for 22 years. Tr. 138. His job duties include escorting MSHA inspectors, inspection recordkeeping and documentation. Tr. 138. He is a certified mine foreman in Indiana and Illinois. He is also a certified examiner in Illinois. Tr. 138.

At or around crosscut 23, Vandergriff reportedly asked Brown whether he considered the accumulations to constitute a hazard or a condition. Tr. 57-58. Vandergriff testified that Brown told him that he did in fact consider the accumulations to be a hazard but was instructed to write it as a condition in the pre-shift inspection book. Tr. 58. According to Vandergriff, Brown told him that they do not have enough examiners and that he often felt rushed to complete the exam within the required timeframe. Tr. 58.

Brown disputed Vandergriff's recollection. He testified that Vandergriff and DiLorenzo accompanied him during his examination, but lingered behind him. Tr. 259. When he turned back he noticed the inspectors kicking rock dust on the ground and asked them if there was an issue. Tr. 259-60. Vandergriff then asked him if he believed the accumulations were a hazard. Tr. 263. When asked how he would categorize the accumulation, he told Vandergriff that he would call it a condition because there was no heat source or gas present and the size of the accumulations were not extensive and did not contain a significant amount of float coal dust. Tr. 260-63. He believed that the color of the material indicated that it was primarily road dust. Tr. 261. Brown also denied telling Vandergriff that he believed the accumulations constituted a hazard in his view, but admitted saying sometimes it is hard to get the work done with limited personnel. Tr. 264, 270-271. Brown also explained in his testimony that if the accumulations he finds are in fact hazards he doesn't write them in the examination book for the next shift to address but proceeds to immediately address the hazards. Tr. 264.

Vandergriff and DiLorenzo conversed and decided that the accumulations warranted a citation. Vandergriff asked Seilhymer to call out to see what examiners wrote about the belt line in the pre-shift inspection book over the previous two shifts. Tr. 149. Seilhymer did so and was informed that the book said that the 20 to the tail needed dusting, while 3-20 needed brooming. Tr. 150. It did not list any hazards for the dates in question. Exs. S–6, S–7. Vandergriff then issued the two (d) Orders at issue. He then proceeded from crosscut 29 to crosscut 3, taking pictures and notes regarding the accumulations along the way. Tr. 61. He used a white piece of notebook paper to note the contrast in color of the accumulations. Tr. 61. After he finished photographing the area, Vandergriff exited to make copies of the pre-shift inspection book. Tr. 63-64.

Once Vandergriff issued the (d) Orders, Seilhymer called mine manager Mike Butler to inform him that he was shutting off the beltline and to ensure that the mine did not start abatement efforts until he completed his investigation. Tr. 151-52. Seilhymer remained in the 3-B area after the Inspectors left to investigate on behalf of Peabody. Tr. 156. He had been alone on the inspection and unable to both take notes and keep up with the Inspectors as they photographed the belt line. Tr. 156. He proceeded to follow the Inspectors' route as closely as possible to take his own photographs and samples. Tr. 181. He used a paint chip, consisting of three shades of gray, to compare the color of the accumulations. Tr. 159-60. Following Seilhymer's investigation, Peabody terminated the Orders on the morning of November 1, 2018. Exs. S–2, S–3. The mine challenges the fact of violation; the gravity, negligence and unwarrantable failure designations; and the Secretary's penalty assessments for each Order.

IV. LEGAL PRINCIPLES

A. Establishing a Violation

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

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

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

The Secretary may establish a violation by inference in certain situations. *Garden Creek Pocahontas Co.*, 11 FMSRC at 2153. Any such inference, however, must be inherently reasonable, and there must be a rational connection between the evidentiary facts and the ultimate fact inferred. *Mid-Continent Res.*, 6 FMSHRC 1132, 1138 (May 1984). If the Secretary has established facts supporting the citation, the burden shifts to the Respondent to rebut the Secretary's prima facie case. *Construction Materials*, 23 FMSHRC 321, 327 (March 2001) (ALJ).

B. Significant and Substantial

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

In order to uphold a citation as S&S, the Commission has held that the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard—that is, a measure of danger to safety—contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. *Mathies Coal Co.*, 6 FMSHRC 1, 3–4 (Jan. 1984).

The Commission has held that the second element of the *Mathies* test addresses the extent to which a violation contributes to a particular hazard. *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2037 (Aug. 2016). Analysis under the second step should thus include the identification of the hazard created by the violation and a determination of the likelihood of the occurrence of the hazard that the cited standard is intended to prevent. *Id*. at 2038. At the third step, the Secretary must prove there was a reasonable likelihood that the hazard contributed to by the violation will cause an injury, not a reasonable likelihood that the violation, itself, will cause injury. *West Ridge Resources, Inc.*, 37 FMSHRC 1061, 1067 (May 2015) (ALJ), citing *Musser Eng'g, Inc.,* 32

FMSHRC 1257, 1280–81 (Oct. 2010). Evaluation of the four factors is made assuming continued normal mining operations. *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984).

C. Negligence and Unwarrantable Failure

Under the Mine Act, operators are held to a high standard of care, and "must be on the alert for conditions and practices in the mine that affect the safety or health of miners and to take steps necessary to correct or prevent hazardous conditions or practices." 30 C.F.R. § 100.3(d). The Mine Act defines reckless disregard as conduct which exhibits the absence of the slightest degree of care, high negligence as actual or constructive knowledge of the violative condition without mitigating circumstances; moderate negligence as actual or constructive knowledge of the violative condition with mitigating circumstances; and low negligence as actual or constructive knowledge of the violative condition with considerable mitigating circumstances. 30 CFR § 100.3: Table X.

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

More serious consequences can be imposed for violations that result from the operator's unwarrantable failure to comply with mandatory health or safety standards under section 104(d) of the Mine Act. Section 104(d)(1) states:

> If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health standard…and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such findings in any citation given to the operator under this Act.

"Unwarrantable Failure" is defined as aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (Dec. 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "willful intent," "indifference," or the "serious lack of reasonable care." *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co*., 13 FMSHRC 189, 193-94 (February 1991).

The Commission considers the following factors when determining the validity of 104(d)(1) and 104(d)(2) orders: (1) the length of time that the violation has existed and the extent of the violative condition, (2) whether the operator has been placed on notice that greater efforts

were necessary for compliance, (3) the operator's efforts in abating the violative condition, (4) whether the violation was obvious or posed a high degree of danger and (5) the operator's knowledge of the existence of the violation. *Consolidation Coal Co.,* 22 FMSHRC 340, 353 (Mar. 2000). All of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether mitigating circumstances exist. *IO Coal Co.*, 31 FMSHRC 1346, 1351 (Dec. 2009).

D. Penalty

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

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

30 U.S.C. § 820(i). These criteria are generally incorporated by the Secretary within a standardized penalty calculation that results in a pre-determined penalty amount based on assigned penalty points. 30 CFR 100.3: Table 1- Table XIV. If the conditions of the violation so warrant, the Secretary may waive the regular assessment under § 100.3(a) and specially assess a penalty. 30 C.F.R. § 100.5(a). The special assessment must also be based upon the six criteria outlined above, and all findings must be in narrative form. 30 C.F.R. § 100.5(b).

V. DISPOSITION

The Secretary argues that the Court should affirm both Orders as written. Secretary's Post-Hearing Brief ("Sec'y Br.") at 1. The Secretary contends that Respondent allowed float coal dust to accumulate along the 3B energized conveyor belt. The violation involved in Order 9106459 was S&S because the float dust accumulations were extensive and were located approximately one crosscut, or 35 to 50 feet, from the tail belt area, where Vandergriff also issued two separate S&S citations not at issue in this case for accumulations and improperly spaced fire suppressor sprinklers during the same inspection. *Id*. at 3-5, 8-9. The Secretary maintains this confluence of factors was thus likely to result in ignition or fire because the accumulations were extensive along the beltline and some were even in contact with the moving belt. *Id*. at 8. The Secretary also argues that the high negligence and unwarrantable failure determinations are proper because Peabody had previously been placed on notice that greater compliance efforts were necessary. *Id.* at 18, 25. The accumulations were obvious and extensive as demonstrated by photos taken by Inspector Vandergriff, existed for multiple shifts, and posed a serious risk of danger due to the presence of an ignition source. *Id*. at 18-23. Peabody managers and mine examiners had knowledge of or should have known of the condition yet failed to abate

the violative condition. *Id.* at 23-25. Specifically, when asked by Vandergriff mine examiner Brown said he considered the observed condition to be a "hazard" but was instructed by management to write it down as a "condition." *Id.* at 15. Peabody also has a history of violations of the cited standard and was on "heightened negligence" for violations of § 1731(a) which requires damaged belt conveyor components that pose a fire hazard to be repaired or replaced immediately. *Id*. at 25.

The Secretary contends that Peabody violated section 75.363(a) because the mine failed to immediately address the accumulations, which constituted a hazard. The Secretary points out that, despite the obvious hazard posed by these accumulations, mine examiners continued to identify the accumulation as a "condition" in the pre-shift inspection book for the beltline, and did not address it for multiple shifts. As such, the Secretary requests that the Court uphold both Orders and affirm the specially-assessed penalty of $23,519.00. *Id*. at 15, 20-21, 31.

Peabody seeks to have both Orders vacated. It argues that the accumulations around the beltline were not combustible coal dust, but rather a combination of rock dust and road dust with low amounts of permitted float dust. Respondent's Post-Hearing Brief ("Resp. Br.") at 18. Respondent contends that it did not violate section 75.400 because it did not permit the cited material to accumulate as it consistently detected and corrected any material around the beltline, and that the material cited in Order No. 9106459 was not combustible. *Id*. at 20-21. Even assuming that a violation is found, Peabody argues that it was not S&S because no ignition source existed near the beltline and the cited material was sufficiently mixed with incombustible rock dust and road dust. *Id*. at 30, 31. Specifically, the conditions relied upon by the Secretary as the potential ignition source that led Vandergriff to issue an accumulations citation, not at issue in this case, at the 3C beltline ended at cross cut number 29 whereas the condition under examination in this matter began at crosscut 28. *Id.* at 30. Furthermore, Peabody contends that the high negligence and unwarrantable failure designations are inappropriate because the mine examination records indicate that it adequately detected and corrected any conditions involving material along the beltline. *Id*. at 33-35. In addition, mine examiner Brown emphatically denied telling Vandergriff he would have characterized the noted accumulations at issue as "hazards" and that he was instructed to write them in his exam book as "conditions". *Id.* at 38-39.

Peabody also argues that Order No. 9106460 should be vacated because the condition was non-hazardous and did not need to be immediately corrected. *Id*. at 33-35, 37. Specifically, Respondent argues that the condition listed in the pre-inspection book was different than the one the inspector observed the following shift because additional production occurred in the interim. *Id*. at 35-36. It further argues that the observed accumulation did not amount to a "hazard" as defined by the standard and did not need to be corrected immediately. It contends that the condition was largely incombustible, that its color indicated that the material was primarily road dust, and that sufficient rock dust was present. *Id*. at 24-26, 29, 33-35, 37. Respondent contends that it would have addressed the matters the following day shift, which is within MSHA's requirements and company policy. *Id*. at 33-35. Peabody thus argues that it properly tailored its procedure to comply with section 75.363(a) and was taking appropriate steps to ensure that accumulations did not become hazards. *Id*. at 33-35. Finally, Peabody maintains that to the degree that any violation is found, the assessed penalties are excessive in that the Secretary has not met his burden of proof to justify the specially assessed penalty for Order No. 9106460, the

unwarrantable failure designations, high negligence levels nor the S&S findings for either Order No. 9106460 or 9106459. If violations are found, it proposes a regularly assessed, moderate negligence level, non S&S penalty of $232 for Order No. 9106460 and $477 for Order No. 9106459.

A. Order No. 9106459

Order No. 9106459 alleges:

> Combustible materials shall not be allowed to accumulate in active workings. Accumulations in the form of float coal dust was observed along the 3 B energized conveyor belt ranging from a film up to ¼ inch in depth from XC #3 to XC #28. Float coal dust was observed deposited on top of rock dusted surfaces including the mine floor, coal ribs, belt structure, water line, and all other vertical surfaces. This violation is an unwarrantable failure to comply with a mandatory standard.

Ex. S–2. Inspector Vandergriff designated the violation as S&S, with high negligence, and as an unwarrantable failure to comply with a mandatory safety standard. The Secretary assessed a penalty of $7,819.00.

1. The Violation

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

The parties do not dispute that accumulations of material existed in the cited areas. Inspector Vandergriff credibly testified that the accumulations measured one quarter to one eighth of an inch and were extensive along the entire beltline. Tr. 58, 95-96. He took photographs demonstrating accumulations all along the beltline. *See* Ex. S–5. Relatively dark accumulations are present on the ground and across the belt structure. *Id.*, pp. 1-4, 9-12, 15-18. Photographs show footprints in the accumulated material along crosscuts 9-10 and crosscut 17. *Id.*, pp. 5-8, 21-22. The photographs also indicate some accumulation on the ribs and walkway along crosscut 12 to 14. *Id*., pp. 13-14.

The parties' primary dispute is over what materials were present in the accumulation and whether that mixture was combustible under the standard. Seilhymer's pictures and samples appear to cast doubt on the exact composition of the accumulations based upon his inclusion of a paint chip to demonstrate the varying shades of gray. Ex. R–B; R–G. Many of his photographs also show lighter colors of grey or white near and underneath the belt floor and on the ribs. *Id.*, pp. 7, 8, 21, 22, 23, 33-34. He testified that the lighter colors indicated that the accumulations consisted mostly of road dust and not coal dust. Tr. 162-63. Other pictures also indicated the presence of moisture, thereby reducing the combustibility of the accumulations. Ex. R–35, 36, 80; Tr. 166, 171. Overall, Seilhymer testified that he saw very little evidence, if any, of coal dust

accumulations in his photographs. Tr. 210. He also testified that the samples, with the exception of a single sample, were all well within the prescribed incombustibility limits. Ex. R–G(2); Tr. 184-85. However, Seilhymer acknowledged that he was unable to take pictures in the exact same areas as Vandergriff because he did so after the initial inspection ended. Tr. 156-57. Furthermore, the material's shading varied significantly in different areas when compared to the paint chip, with some photographs showing much darker shades than others. *See generally*, Ex. R–B. Seilhymer also acknowledged that some of the photographs could have been affected by the camera flash or the printer. Tr. 199.

Upon review, I conclude that a sufficient amount of coal dust was present to affirm the violation. *See* Exs. S–5, R–B. The shades of accumulations varied and some showed dark gray accumulations, indicating that at least some float coal dust was present in the photographed areas. *Id*. Although some areas appeared lighter in color, the camera flash, which both Vandergriff and Seilhymer acknowledged affected the photographs, would tend to make the accumulations look lighter in color rather than darker.

Moreover, Respondent's samples of the material in the area indicated that at least some of the material did not meet MSHA's incombustibility standards. *See* Ex. R–G(2).[4] One of the samples taken tested less than 80% incombustible, which Respondent acknowledged at hearing to be below MSHA's required threshold. Tr. 185. While the exact concentration may have differed throughout the cited area, I find that the evidence supports that Peabody failed to address existence of combustible accumulations along the beltline.

Accordingly, I affirm the fact of violation.

2. Significant & Substantial

I have already found that Peabody Midwest violated section 75.400, a mandatory safety standard, when it allowed coal dust and other materials to accumulate along the 3-B beltline. The first *Mathies* element is therefore satisfied.

I next turn to whether the violation was reasonably likely to contribute to the hazard contemplated by the standard. Section 75.400 is intended to prevent accumulations of material that could lead to an ignition or propagation of a fire or ignition hazard. 30 C.F.R. § 75.400. Here, the Secretary has demonstrated that a confluence of factors exists around the violation that would reasonably contribute to the contemplated hazard. Earlier in the inspection, Vandergriff

[4] The Secretary cites to the Commission's decisions in *Black Diamond Coal Mining Co.*, 7 FMSHRC 1117 (Aug. 1985) and *Mid-Continent Resources, Inc.*, 16 FMSHRC 1218 (June 1994) to argue that Peabody's sample analyses (Ex. R–G(2)) are irrelevant and thus inadmissible. I reject the Secretary's claim. Although these cases do imply that a material need not have a high level of combustibility to qualify as S&S, they do not suggest that combustibility in itself is irrelevant. *See* 16 FMSHRC at 1222; 7 FMSHRC at 1120-21. Both cited provisions either explicitly mention combustibility or require a consideration of combustibility to determine whether a condition is hazardous, and are thus clearly relevant to the sample tests and are admitted into evidence.

issued citations alleging accumulations and Peabody's failure to install fire suppression sprinklers within the prescribed intervals along the conveyor branch lines located along the 3C beltline which is adjacent to the 3B. *See* Ex. S–8, S–9. Both of those citations were S&S because coal was running in the belt, creating an ignition source near the beltline. Tr. 113-114. He also testified that the mine was already on heightened negligence for bad belt rollers, increasing the opportunity for friction to create a heat source and ignite the accumulations. Tr. 66-67. Furthermore, he took two additional photographs that show the accumulations near the diesel fuel station and touching the belt on the 3-B tail roller. Ex. S–5, pp. 31-34; Tr. 113-14. The violation involved in Order 9106459 is located approximately one crosscut, or 35 to 50 feet, from this tail belt area ignition source. The accumulations were on the tail roller of the 3-B, the head roller of the 3C. Tr. 67. It is important to note here that Respondent's mine examiner Brown was not present for and was unaware of the issuance of the citations issued by Inspector Vandergriff on the 3C beltline, thus explaining his insistence that an ignition source did not exist along the 3B beltline at issue in this case. Tr. 271. Finally, I credit Inspector Vandergriff's testimony that he believed the violations he found on the 3C beltline had co-existed for two to three shifts with those on the 3B beltline. Tr. 67-68. My evaluation here also must take into account an assumption of continued mining operations absent the inspector discovering the hazardous conditions on the 3C beltline. For these reasons, I reject Respondent's argument that the violations found on the 3C beltline were abated by the time the inspector discovered the accumulations at issue in this case along the 3B beltline, thus eliminating the potential ignition source. Given the size of the accumulations along the 3B beltline and potential presence of a heat source in the area, I find that the violation was reasonably likely to result in an ignition.

Peabody contends that the violation was not reasonably likely to contribute to an ignition or fire because the majority of the cited accumulations consisted of road dust or rock dust and thus were unlikely to combust. Resp. Br. at 18-19, 24-26, 29, 33-35, 37. It offered sample analyses taken from the cited areas to show that nearly all of the alleged accumulations were above the acceptable incombustible level. Ex. R–G(2). However, at least one of those samples did not meet the minimum incombustibility level, and although the level of combustibility may have been low, "coal is, by its nature, combustible." *Mid-Continent Res.*, 16 FMSHRC 1218, 1222 (June 1994). The Secretary has satisfied the second *Mathies* element.

I credit Vandergriff's testimony that the hazard was reasonably likely to result in serious injuries such as flash burns or smoke inhalation. Tr. 70. Vandergriff testified that float coal dust was allowed to accumulate in numerous areas, including under the B belt tail roller, where the accumulations were in contact with the moving belt. Tr. 65. Since the fire suppression system would not be able to put the fire out and air ventilates outby in the mine, any fire would likely proceed along the 3-B belt line, the same path that served as the secondary escape way. Tr. 67, Sec'y Br. At 14-15. Due to the ventilation system in the area, an ignition may cause smoke inhalation injuries to any miner working downwind. Tr. 70. Assuming continuous normal mining operations, these accumulations were reasonably likely to result in an ignition that could cause flash burns and smoke inhalation injuries that would result in lost workdays.

Accordingly, I find that the violation was S&S.

3. Negligence and Unwarrantable Failure

Inspector Vandergriff designated the citation as high negligence and an unwarrantable failure. The Commission has recognized the close relationship between a finding of high negligence and a finding of unwarrantable failure. *See Dominion Coal Corp.*, 35 FMSHRC 1652, 1663 (June 2013) (ALJ), *citing San Juan Coal Co.*, 29 FMSHRC 125, 139 (Mar. 2007).

a. Operator's Knowledge of the Violation

An operator's knowledge of a violation is an important factor in unwarrantable failure analysis and is a requirement for a finding of high negligence under 30 C.F.R. § 100.3. *Maryan Mining, LLC*, 37 FMSHRC 1715, 1723 (Aug. 2015) (ALJ). Where an agent of an operator has knowledge or should have known of a safety violation, such knowledge should be attributed to the operator. *Martin Marietta Aggregates*, 22 FMSHRC 633, 637 (May 2000). The knowledge or negligence of an agent may be imputed to the operator. *Id*.

Due to the extensiveness of the violation and the fact that mine management was required to sign the pre-inspection book, the Secretary argues that Peabody should have been aware that the accumulations constituted a hazard. Tr. 71. Vandergriff testified that the condition along 3-B was so obvious that any properly trained miner would identify that as a hazard that required immediate correction. Tr. 71-72.

Peabody was aware of the accumulations. Its examiners wrote about the accumulations in the belt line pre-inspection book. Exs. S–6, S–7. Those examiners, however, did not believe that the accumulations consisted of much float coal dust, if any, or that the accumulation was otherwise so severe or hazardous that it required immediate attention. The inspection books thus recommended brooming[5] or dusting the accumulations when possible. Exs. S–6, S–7.

b. Extent and Duration of the Violation

Inspector Vandergriff testified that the accumulations were extensive all along the belt line. Tr. 71. He took numerous pictures that clearly show accumulations in multiple areas. Ex. S–5. Moreover, the violation existed for two to three shifts and was extensive along the beltline.[6] Tr. 63. However, the extensiveness and duration can both be attributed to Peabody's consistent belief that the accumulations were not combustible because they consisted primarily of road dust, and thus did not require immediate remediation.

[5] Brooming is a method, alternative to dusting, by which miners use a broom to sufficiently mix any coal dust accumulations with rock dust to eliminate a combustion hazard. Tr. 40-41.

[6] Although Vandergriff's inspection notes indicate that the condition existed for five shifts, he clarified that the fifth shift included Brown's examination shift and that the mine would have been idle for two of the shifts. Tr. 115.

c. Obviousness of the Hazard and Degree of Danger

As discussed above, the accumulations were obvious along the beltline but were not perceived to be a hazard during Peabody's pre-shift examinations. Peabody's miners credibly testified that in instances where a hazard was observed they would have immediately addressed the matter rather than writing it down in the book to pass it on for the next shift to address. Tr. 219, 253. Their testimony is supported by the pre-inspection books. *See* Ex. S–6. Listed hazards were addressed, while conditions, including those cited here, were noted and passed on as permitted by the regulations and mine policy. *Id*. Thus, while the accumulations themselves were obvious, the compositions of the accumulations remain the primary source of dispute between the parties. Given these factors, I find that the obviousness of the hazard and degree of danger were not significant factors weighing against Peabody's negligence.

d. Abatement Efforts

Abatement efforts relevant to the unwarrantable failure analysis are those made prior to the issuance of the citation or order. *Consolidation Coal Co.*, 35 FMSHRC 2326, 2342-43 (Aug. 2013); *New Warwick Mining Co.*, 18 FMSHRC 1568, 1574 (Sept. 1996).

Peabody's pre-inspection books and the corroborating testimony of its miners demonstrate a systematic approach to examining the beltline and both documenting and addressing conditions and hazards. Vandergriff testified that the accumulations were extensive enough to suggest that it could not have accumulated over the course of a single shift. Tr. 114-15. However, there is no evidence to suggest that Peabody's abatement efforts were insufficient or that, if not for the citation, the conditions would have been allowed to remain or worsen over a long period of time. Peabody's inspectors outlined the action to be taken in their view, either dusting or brooming the areas, that would likely have been taken care of shortly thereafter and before the mine considered the accumulations to become a serious hazard.

e. Notice to the Operator that Greater Efforts Were Necessary for Compliance

The notice factor of the unwarrantable failure analysis pertains to previous citations, directives, and communications prior to the violation at issue that notify the operator of hazardous conditions or practices. *Consolidation Coal Co.*, 22 FMSHRC 2326, 2342 (Aug. 2013); *IO Coal Co.*, 31 FMSHRC 1346, 1353-55 (Dec. 2009).

Here, Peabody had been cited for violations of § 75.400 on 146 occasions over the past two years. Ex. S–1. It was also placed on heightened negligence regarding bad belt rollers, suggesting that accumulations may be more subject to ignition risks. Tr. 24, 65-66. However, Inspector Vandergriff acknowledged at hearing that section 75.400 is a very broad standard, and can be used to cite for conditions other than float coal dust accumulations in the mine, including but not limited to other combustible materials, hydraulic oil, and trash. Tr. 106-107. He also testified that he did not observe any bad rollers along the 3-B beltline during the inspection at issue. Tr. 72.

f. Conclusion

Based on the foregoing, I find that the violation did not constitute an unwarrantable failure to comply with the standard. Although Peabody had knowledge of the accumulations, which were obvious and extensive along the beltline, I do not find sufficient evidence that the mine's efforts were unreasonable or constituted more than ordinary negligence. Peabody recorded the condition in its pre-inspection book for the beltline as something that ought to be addressed when time permitted, but that it did not amount to a hazard. It systematically addressed the matters according to its examination schedule, and there is no evidence that the accumulations would have been ignored for significantly more shifts. There is no evidence that Peabody knowingly ignored a hazard or would have done so if it believed the accumulations to constitute a hazard. "If an operator acted on the good-faith belief that its cited conduct was actually in compliance with applicable law, and that belief was objectively reasonable under the circumstances, the operator's conduct will not be considered to be the result of unwarrantable failure when it is later determined that the operator's belief was in error." *Kelly Creek Res., Inc.*, 19 FMSHRC 457, 463 (Mar. 1997); *Black Beauty Coal Co.*, 36 FMSHRC 778, 788-89 (Mar. 2014) (ALJ). I therefore find that the unwarrantable failure designation is inappropriate in this circumstance.

I therefore reduce Peabody's negligence to moderate and remove the unwarrantable failure designation.

4. Penalty

The Secretary proposed a penalty of $7,819.00. Peabody has had 146 previous violations of section 75.400 over the past two years. Ex. S–1. The parties stipulated that the penalty amount will not affect Peabody's ability to remain in business. Jt. Stip. # 7. Peabody quickly abated the citation by shutting down the belt line and rock dusting the entire 3-B beltline, removing all float coal dust following the mine's own investigation. Ex. S–2.

I have discussed my gravity and negligence findings in detail above. Peabody violated the standard and the violation was S&S and reasonably likely to result in lost workdays. I modified Peabody's negligence to moderate and removed the unwarrantable failure designation because there is no evidence indicating that Peabody had a lax attitude toward addressing accumulations that it deemed to be hazardous, but simply did not consider the cited accumulations to merit immediate action. Accordingly, I assess a penalty of $2,500.00.

B. Order No. 9106460

Vandergriff issued Order No. 9106460 alleging:

> Hazardous conditions shall be corrected immediately or the area shall remain posted until the hazardous condition is corrected. Hazardous conditions have existed on the 3B beltline for 5 consecutive shifts. These hazards have been listed in the "conditions observed" side of the company's belt inspection report book and have been continually carried over onto the next working shift without an

> action taken to immediately correct the hazards found. This is an unwarrantable failure to comply with a mandatory safety standard…

Ex. S-3. Inspector Vandergriff designated the violation as S&S, the result of high negligence, and as an unwarrantable failure. The Secretary specially assessed a penalty of $15,700.00.

1. Fact of Violation

30 C.F.R. § 75.363(a) states:

> 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. If the condition creates an imminent danger, everyone except those persons referred to in section 104(c) of the Act shall be withdrawn from the area affected to a safe area until the hazardous condition is corrected. Only persons designated by the operator to correct or evaluate the hazardous condition may enter the posted area. Any violation of a mandatory health or safety standard found during a preshift, supplement, on-shift, or weekly examination shall be corrected.

In order to establish a violation, the Secretary must demonstrate that hazardous conditions existed and that the hazard had not been corrected or posted. *Black Beauty Coal Co.*, 33 FMSHRC 1504, 1511 (June 2011) (ALJ). Once the existence of a hazard has been established, the focus shifts to the actions taken, if any, to remediate the condition. *Id*. There is no dispute that Peabody's examiners found the condition and recorded it in the belt inspection report book as such. Thus, the validity of the Order rests on whether the accumulations along the beltline constituted a "hazardous condition" as identified by the standard.

The Commission has approved the definition of "hazard" in the context of section 75.360 to be "a possible source of peril, danger, duress, or difficulty," or "a condition that tends to create or increase the possibility of loss." *Black Beauty Coal Co.*, 36 FMSHRC 778, 786 (Mar. 2014) (ALJ) (citing *Enlow Fork Mining Co.*, 19 FMSHRC 5, 14 (Jan. 1997)). That definition is equally applicable here.

Vandergriff believed the accumulations constituted a hazard because they were extensive along the entire beltline and created an ignition risk. Tr. 73-74. He noted that the conditions had been allowed to worsen over a couple of shifts, when they should have been immediately addressed. Tr. 74. Seilhymer testified that an ignition source was not required in order for an accumulation to be a hazard, but it would escalate the situation to that of a hazard if an ignition or heat source was present. Tr. 194, 207. He noted that a hazard would entail a high concentration of coal dust dark in color. Tr. 194. If the accumulation reached a certain amount and shade of darkness, an examiner would appropriately understand when immediate action was necessary. Tr. 194-95. However, he acknowledged that this may differ based on the individual

examiner. Tr. 195. Normally, however, the goal is to address the condition long before it escalates to a hazard. Tr. 195. He testified that he did not believe any of the accumulations amount to a "hazard" as contemplated by the examination standards. Tr. 208.

Miner Casey Winters testified that a hazard is a condition that requires immediate attention, while a condition is not time sensitive. Tr. 221. In the context of an accumulation, Winters testified that he believed the transforming factor would be a heat or ignition source. Tr. 222. He noted that he would not have called any of the cited accumulations a hazard. Tr. 234-42. However, after seeing photographs of an accumulation, he testified that he would have at the very least shoveled it out and if need be shut the belt down to do so safely. Ex. S–5; Tr. 230-31. Respondent's Mine Examiner Brown also confirmed that in the context of an accumulation near the beltline, a heat source was necessary to constitute a hazard. Tr. 254. At no point during his examination did he believe there to be an ignition source or any hazard along the belt line. Tr. 267. However, he was unaware of the citations issued by Vandergriff along the 3C beltline immediately prior to inspecting the 3B beltline. Tr. 271. He noted that he would be able to tell if coal dust accumulated because it is coarse and does not mix with rock dust. Tr. 268-69.

Although I found that the accumulations were reasonably likely to create a hazard, they did not amount to such a level at the time of the inspection. The Secretary has not shown that any of the accumulations created a potential for immediate danger. Although some photographs showed evidence of coal dust in accumulations of material, Respondent provided strong evidence that most of these accumulations were mixtures of road and rock dust that neutralized any presence of coal dust. It is critical to note that the Secretary failed to address Respondent's evidence on this point in their case in chief or by proffering any rebuttal on this issue. None of the photographs offered by either party indicate significant evidence of large amounts of coal dust. This assertion is supported by the majority of Peabody's samples, which were well above the minimal incombustibility level. Ex. R–G.

Furthermore, Peabody's examination books show that, it consistently noted ongoing accumulations issues and corrected them as necessary. I find that Brown credibly testified in an unwavering, forthright and consistent manner, supported by his essentially contemporaneous notes, that he did not consider any of the conditions to be a hazard and the specific reasons for that belief, contrary to Inspector Vandergriff's notes, and would have immediately addressed the matter had he believed otherwise. Ex. S-10. Vandergriff testified that Brown told him he was instructed to note the accumulations at issue as conditions in his examination book even when he believed they were hazards. However, Vandergriff's own notes do not reflect that is what Brown told him. Rather the notes merely indicate that when asked if Brown considered the accumulations to be a hazard or condition he said, "that he considers this a hazard but is told it is a condition." Ex. S-4, 47-48. I find it implausible to believe, given his testimony, that Vandergriff would not have specifically noted had Brown actually told him he was instructed to write conditions in the book when he found hazards. Brown, on the other hand, in an earnest and convincing fashion testified that had he found the accumulations hazardous, he would not have noted them in his exam book for the next shift to address, but rather immediately addressed them. Tr. 264.

This credibility dispute, while important, does not take away from the fact that the Secretary failed to rebut Respondent's primary defense that the observed accumulations along the 3B beltline were made up of primarily road dust from the adjacent travelway and rock dust with smaller non-combustible levels of coal dust, constituting a condition rather than a hazard. This, in conjunction with the totality of the evidence and testimony proffered and noted above, leads me to conclude that at the time of the pre-shift examination what Brown observed were in fact conditions rather than hazards which did not require immediate attention but needed to be addressed in a timely fashion at the end or beginning of the respective shifts.

Accordingly, Order No. 9106460 is **VACATED**. For these reasons, I need not address the Secretary's S&S, high negligence, and unwarrantable failure designations.

VI. ORDER

Respondent is hereby **ORDERED** to pay the Secretary of Labor the total sum of **$2,500.00** within 30 days of this order.[7]

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

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

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 27, 2019

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. CONSOL PENNSYLVANIA COAL COMPANY, LLC, Respondent.	CIVIL PENALTY PROCEEDING Docket No. PENN 2018-0116 A.C. No. 36-10045-453471 Mine: Harvey Mine

DECISION AND ORDER

Appearances: Maria Del Pilar Castillo, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania for the Petitioner

Patrick Wayne Dennison, Esq., Fisher Phillips LLP, Pittsburgh, Pennsylvania for the Respondent

Kenneth Polka, CLR, U.S. Department of Labor, MSHA, Mount Pleasant, Pennsylvania

Before: Judge William B. Moran

This case is before the Court upon a petition for assessment of a civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 815(d) for failure to keep travelways clear of obstruction, in violation of 30 C.F.R. § 75.205(b). A hearing was held in Pittsburgh, Pennsylvania on February 12, 2019. The Secretary of Labor ("Secretary") proposes a $625.00 penalty for the issues in this matter. For the reasons that follow, the Court upholds the violation, but modifies the citation in part and imposes a penalty of $200.00 to Consol Pennsylvania Coal Company, LLC ("Respondent").

Violations at Issue in Docket No. PENN 2018-0116

At issue in Docket No. PENN 2018-0116 is one 104(a) citation,[1] **Citation No. 9076875**.

Citation No. 9076875 alleged a violation of 30 C.F.R. 77.205(b).[2] The MSHA inspector assessed the likelihood of injury as "reasonably likely," with an expected injury of "lost workdays or restricted duty." The violation was listed as significant and substantial, with one person affected. Negligence was listed as "moderate." The condition or practice alleged stated:

> Travelways and platforms or other means of access to areas where persons are required to travel or work, shall be kept clear of all extraneous material and other stumbling or slipping hazards. On the slope belt near the mouth there were multiple tripping/slipping hazards on the elevated graded walkway. There was a 1.5" wash down hose on the steps and a 64" roller and coal spillage at the top of the stairs. It was raining during my inspection which limits visibility and traction. This belt is firebossed every shift in its entirety.
>
> Standard 77.205(b) was cited 3 times in two years at mine 3610045 (1 to the operator, 2 to a contractor).

Citation No. 9076875.

The citation was issued at 10:58 AM on October 23, 2017. The citation was terminated seven minutes later, at 11:05 AM that same day, with the notation that "[t]he hazards were removed from the walkway." *Id*.

Joint Stipulations & Findings of Fact

The Secretary submitted a post-hearing brief ("Secretary's Brief") on April 19, 2019, as did the Respondent ("Respondent's Brief"). The parties stipulated that the Harvey Mine was a "mine" within the meaning of the Mine Act, and subject to the jurisdiction of MSHA under the Mine Act. Secretary's Brief at 2.

The Secretary and Respondent agreed that a violation of 30 C.F.R. § 77.205(b) as described in Citation No. 9076875 occurred. Tr. 20. The parties also stipulated that the expected injury in this matter was Lost Workdays or Restricted Duty. Tr. 62-63. However, the Secretary

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[1] A separate citation – Citation No. 7031476 – was originally part of this docket. However, that citation was issued 20 days prior to Citation No. 9076875, involved a different inspector, and was resolved by a separate Decision Approving Settlement which is being issued contemporaneously with this decision. *See* Decision Approving Settlement, PENN 2018-0116 (unpub. order) (June 27, 2019).

[2] 30 C.F.R. § 77.205, titled "Travelways at Surface Installations" provides in subsection (b), "[t]ravelways and platforms or other means of access to areas where persons are required to travel or work, shall be kept clear of all extraneous material and other stumbling or slipping hazards."

argued that the injury was reasonably likely, Tr. 19, while the Respondent contended that the expected injury was unlikely. Tr. 12. The Secretary also argued that the violation was significant and substantial, Secretary's Brief at 5, while the Respondent countered that the violation was not significant and substantial. Respondent's Brief at 8.

Testimony of MSHA Inspector Lawrence Piko

MSHA Inspector Lawrence Piko was the Secretary's sole witness in this matter, and testified first. Piko has been an inspector with MSHA for the past four years. Tr. 24. Before his time at MSHA, Piko worked five years for Consol Energy at their Bailey Mine.[3] Tr. 25. Piko received MSHA's mandatory 22-week inspector training, and received what he referred to as "blur training," which he described as MSHA's attempt to combine training for metal, non-metal, and coal miners into a single course. Tr. 25-26.

On October 23, 2017, Inspector Piko arrived at the Harvey Mine to conduct an EO1 inspection, which covers "every part of the mine, surface and underground." Tr. 27. On that particular day, Piko covered the surface of the mine. *Id*. Upon his arrival at the mine, Piko went to the shop area, where he met Respondent's employee Matt West. As none of the Respondent's safety representatives volunteered to travel with Piko, West accompanied the inspector for his surface inspection. Tr. 29. Piko first reviewed the mine file, looking for prior accidents and citations logged in the file before conducting the surface inspection. Piko testified that there had been six accidents "involving something similar to this citation." at the mine. Tr. 30.

After reviewing the mine file, Piko went to the long belt identified in the photo labelled Joint Ex. J-1. Tr. 36. After walking the long belt, Piko and West went to the top of the silos indicated in J-1 to inspect for a variety of safety hazards, such as methane concentrations and faulty electrical wiring. Tr. 37.[4] No such violations were found. Piko and West then returned to the transfer building, made their way to the top, and began walking down the slope belt. *Id*. Piko asserted that there were five different tripping hazards in this portion of the slope belt: a roller, a plastic bag, a water hose, and some accumulations of coal. Tr. 46. He estimated the roller was approximately 64 inches in length. *Id*. At the hearing, Piko marked on Ex. J-1 with a red pen indicating where the hazards identified in Citation No. 9076875 were on the slope belt. Tr. 39. Piko took a photo of the area that was later admitted at hearing as Ex. P-2.

At that point, Inspector Piko decided to write a citation for a violation of the travelway obstruction standard: 30 C.F.R. § 75.202(b). Tr. 45. He said he considered writing the negligence for this citation as "high" rather than "moderate," because West informed him that "a certified individual, fireboss or mine examiner" was in that area "a few hours before." This meant

[3] That mine is not the subject of this hearing.

[4] At this point in his testimony, Piko indicated that he issued a citation for tripping hazards at the top of the silos. Tr. 37. That citation is not a part of this docket.

"[s]omeone had to have seen that [the alleged tripping hazards] or at least walked away."[5] Tr. 48. He indicated in his notes that West informed him the area was firebossed[6] between 5:00 AM and 8:00 AM that morning. Ex. P-1, at 11.[7] Piko then testified that the cited walkway is the only walkway on that particular belt, meaning that any individual travelling this belt would have to use this walkway. Tr. 51. The inspector made this distinction because the other belt depicted in Ex. J-1 has walkways on both sides of the belt. *Id*.

Inspector Piko next stated that he served the citation to West, as West was the individual travelling with him on that particular day. Tr. 51. According to Piko, West stated that independent contractors employed by GMS[8] worked there, though he was unsure exactly how many. Tr. 52. He testified that West did not contest the citation as the inspector wrote it, and that he recalled that Matt West "even shook his head in disappointment that stuff like this was left" on the walkway. Tr. 52-53. The inspector then testified that West immediately began abating the citation. Tr. 53. Piko did not walk through the area himself, noting that "it would be pretty hard to make it an S&S if you're going to walk through a hazard." *Id*. The inspector testified that he gave West "roughly 15 minutes" to abate the citation, which he also described as "more than enough time." Tr. 53. West abated the citation in seven minutes. Tr. 102.

Next, Piko testified that he took the pictures marked as Ex. P-2 concurrently with the issuance of the citation. Tr. 54. He testified that "it was a rainy day" on the day of the inspection, which was relevant to the citation because "it diminishes your visibility. You're dealing with wet conditions on metal, on rubber, on plastic, on coal making it easier to slip and fall, and even if you try to catch yourself because you're dealing with wet metal." Tr. 54.
The inspector estimated the width of the elevated walkway as approximately three and a half feet. Tr. 56. He also noted that, while it was "not unusual" to encounter rollers placed in a walkway, the rollers were usually "against the side, not right in the middle. This one is hanging out in the middle mainly because that conduit takes up a lot of room." Tr. 57. The inspector estimated the roller was 64-inches long and weighed "at least 50 pounds, if not more." Tr. 58.

Inspector Piko expressed that the most likely injury would occur when the miner tripped or slipped over the various hazards previously described. In addition to tripping or slipping, the inspector suggested that a miner could injure him or herself while attempting to grab onto

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[5] Though the transcript states that Inspector Piko testified that a fireboss "had to have seen that *or at least walked away*," (emphasis added), it appears to the Court that the inspector meant "someone had to have seen that or at least *walked that way*," which would be consistent with explaining his decision to write the citation with "moderate" negligence.

[6] "Firebossing" as described by Piko is when a fireboss – a supervisory position at the mine – walks a certain area looking for fire hazards. *See* Tr. 49.

[7] Inspector Piko stated that this statement was written on Page 10 of his inspector's notes, which is page 11 of the exhibit.

[8] Respondent later specifies in its post-hearing brief that "GMS" refers to contractors from GMS Mine Repair. *See* Respondent's Brief at 2.

something while stumbling. Tr. 63. From this, the inspector concluded that the injury expected should be marked as "lost workdays or restricted duty" on the citation.

During cross-examination by the Respondent, the inspector acknowledged that he arrived at the mine at 7:30 AM, which was a half-hour ahead of when the day shift begins. Tr. 70. The inspector estimated that it took him and West approximately an hour to an hour and a half to travel from the shop area to the belts. Tr. 71.

The inspector next acknowledged that a citation issued under 30 C.F.R. § 77.205(b) – as cited in this matter – can be designated as non-significant and substantial by an inspector, and that Inspector Piko had previously issued a non-significant and substantial citation for a violation of the aforementioned standard on the very inspection at issue in these proceedings. Tr. 73-74. When asked about how mine operators keep outdoor walkways clear such as the one at issue in this matter, Inspector Piko stated that typically the operator would use a hose to spray down the walkway with water. Tr. 77. Inspector Piko also testified that spraying the walkway down with water would be a standard part of maintaining the walkway, and that, at the time of the year when the inspection was conducted (late-October), it would not have been cold enough to warrant removing the hose from the walkway area when not in use. Tr. 79. The Court surmises from this testimony that the inspector does not believe that the mere presence of the hose in the walkway area constitutes a violation of the standard, but the manner in which the hose is stored might constitute a violation.

Upon further cross-examination, Inspector Piko admitted that it would not be unusual to find coal accumulations around a slope belt, and that when spraying down a walkway, the operator's employees would spray in a specific direction to make sure the coal consistently went in one direction. Tr. 83. He also admitted that, although he spoke with West and GMS Employees about who might have placed the roller in the walkway, nobody was able to tell him who last handled the roller or when it might have been placed in the walkway. Tr. 86-87. The inspector also acknowledged that, at some point when walking up the walkway, a miner would be "eye level" with the hose lying in the walkway. Tr. 90-91 and Ex. P 2. When asked by the Court, Piko was also unable to recall how West removed the coal accumulation or the roller in the seven minutes it took him to abate the violation. Tr. 106.

On redirect examination, Inspector Piko stated that he had conducted approximately "50 to 60" inspections between the inspection in this matter and the hearing, suggesting that it would be difficult to remember details from any individual inspection, such as how it was abated. Tr. 108. The inspector also indicated that, had the roller, the plastic bag, and the coal accumulations not been present, he would not have issued a citation for a violation of 30 C.F.R. § 77.205(b) simply for the presence of the hose in the walkway. Tr. 110.

When re-crossed, Inspector Piko engaged in a colloquy with the Court over why Piko described the roller as "in the middle" of the walkway. Piko acknowledged that the roller was not exactly in the middle of the walkway, and from looking at Ex. P-2, "[t]here's not another half of the walkway to the right of the roller," but rather, only a few inches. Tr. 116. Piko also stated that, had the roller been the only object in the walkway at the time of inspection, he still would have issued a citation for a violation of 30 C.F.R. § 77.205(b). Tr. 118. Instead, he explained that

he referred to it as "in the middle" of the walkway because there was grating from the walkway on both sides of the roller, and that the roller was not "off to the side." Tr. 120.

Testimony of Consol Pennsylvania Employee Matt West

After Piko testified, the Secretary rested. The Respondent called one witness to testify: Matt West. West is a Consol Energy employee who worked at Harvey Mine dating back to 2008. Tr. 126. In his time with the operator, West has worked as a roof bolter, shuttle car operator, and a mechanic/electrician. *Id*. At the time of the hearing, West was a mechanic/electrician, and had a federal electrician card since 2009, which requires at least 1,000 hours of supervised work under a qualified electrician and an 80-hour class. Tr. 127. West has worked aboveground for the operator for the past four years. *Id.* His job responsibilities as an aboveground electrician are "to repair any equipment, mobile equipment on the surface, as well as underground equipment, fan checks, elevator checks, basically repair anything on the surface." Tr. 128. West testified that he escorts MSHA inspectors on a regular basis as part of his job responsibilities. Tr. 129.

On October 23, 2017, West traveled with MSHA Inspector Piko on the aboveground inspection described in the inspector's testimony. Tr. 130. West stated that the walkway photographed in J-1 was used primarily by GMS employees who were responsible for maintaining the belt. Their responsibilities included "changing rollers, hosing, basically anything as far as keeping the belt clean." Tr. 139. He also testified that the GMS contractors are "supposed to maintain the walkways, as well as underneath the belt rollers." According to West, GMS contractors primarily maintain the walkways and belt by hosing it down to remove excess coal accumulations. *Id*.

West testified that the belt is examined by a fireboss "every shift," though West could not definitively say whether the belt was examined on the day of the inspection. Tr. 142-143. According to West, had the belt been examined by a fireboss on the day of the inspection, it would have occurred on the midnight shift "between 5:00 a.m. and 8:00 a.m." Tr. 143. West further testified that GMS contractors do not start their day-shift until 8:00 a.m. Tr. 144. West told the Court that, when Piko issued the citation, there was coal, a roller, and a hose "balled up" in the walkway. *Id*.

When asked by Respondent's counsel why a roller would be on the walkway, West said that they are typically "spotted" on a production shift, or in ordinary parlance, placed near a location on the belt where a roller needs to be replaced. Tr. 149. West stated that it is not unusual for a roller to be placed on the walkway in the manner depicted in Ex. P-2 when a roller on the belt is going to be changed out of the belt. *Id*. At the time the photo in Ex. P-2 was taken, West testified that he had no difficulty spotting the roller in the walkway. Tr. 150. West did not "express [his] agreement or disagreement with the inspector" as to the Citation, as he testified that he felt "it's my job if a citation is issued to correct the situation and make it safe at that point." Tr. 152. West testified that he terminated the citation by rolling the hose up and placing it clear off to the side of the belt and picked up the roller and carried it down the steps. West did not remove the coal accumulations identified by Piko in Ex. P-2. Tr. 154-156. Neither the coal accumulation nor the plastic bag were required to be addressed for the citation to be terminated.

Thus, West did two things to abate the citation; he moved the location of the water hose and the roller.

On cross-examination, West agreed with the Secretary's counsel that the hose on the belt was potentially a tripping hazard. Tr. 158. West also stated that it was his understanding that GMS contractors are responsible for maintaining the walkway on a regular basis. Tr. 163. West acknowledged he did not remove the plastic bag identified in Ex. P-2 while abating the citation. Tr. 164. While West could not definitively answer one way or another, West did say that he had no reason to believe the area had not been firebossed at some point between 5:00 and 8:00 a.m., as he stated to the inspector. Tr. 165. Finally, West agreed that he had not taken notes during the inspection, and that he had not read the portion of the citation where Piko stated that it had been raining that day. Tr. 166, 169.

Re-direct examination of West then commenced. West testified that the hose discussed earlier would be conspicuous to employees walking from the transfer house to the cited area. Tr. 175. He added that even were an employee to approach the walkway from the opposite direction, the yellow color of the hose would cause it to "stand out" and be seen. Tr. 176. When asked about the weather on the date of the inspection, West stated that even if it had been raining on that day, it would not make the belt walkway any less safe, because the walkway had a significant amount of expanded metal[9] which aids with traction. Tr. 178.

The Court had a brief discussion with West before the Secretary's counsel completed re-cross. The Court asked West if anyone from the Respondent had instructed him not to challenge the inspector. West stated that it was not a company directive but rather personal practice to not challenge the inspector during an inspection. On re-cross West testified that he did not feel intimidated by Piko and that, had he wanted to address Piko's decision to issue a citation, he could have. Tr. 180, 181. After this exchange, the Secretary rested, and with no other questions from Respondent's counsel, West was excused. After ensuring that all copies of the admitted exhibits had been identically marked by the witnesses, the hearing concluded.

Principles of Law

In all cases where an operator contests a violation, the Secretary must prove, by a preponderance of the evidence, that a violation occurred. *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000), citing *Consolidation Coal Co.*, 11 FMSHRC 966, 973 (June 1989). Preponderance of the evidence simply means that the trier of fact must believe "that the existence of a fact is more probable than its non-existence." *In re Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995), aff'd 151 F.3d 1096 (D.C. Cir. 1998), quoting *Concrete Pipe and Prod. of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 622 (1993).

[9] "Expanded Metal" refers to a form of sheet metal cut into grooves or patterns and used as a walking surface to increase traction. *See, e.g.* Ex. P-2.

Significant and Substantial

In order to prove a violation is significant and substantial, the Secretary must prove by a preponderance of the relevant evidence that there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *See Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). A determination that a violation is significant and substantial requires consideration of the particular facts surrounding the violation. *Texasgulf Inc.*, 10 FMSHRC 498, 501 (Apr. 1988). The Commission established a four prong test for significant and substantial violations in *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984). There, the Commission said that the Secretary of Labor must prove:

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

Mathies, 6 FMSHRC at 3-4; *accord Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria); *see also Consol Pennsylvania Coal Co.*, 39 FMSHRC 1893, 1899 (Oct. 2017). With regard to the second element of the *Mathies* test, the Commission has elaborated that "the second step requires a determination of whether, based upon the particular facts surrounding the violation, there exists a reasonable likelihood of the occurrence of the hazard against which the mandatory safety standard is directed." *Newtown Energy Inc.*, 38 FMSHRC 2033, 2038 (Aug. 2016) ("Newtown").

With respect to the third element of the *Mathies* test, the Commission states that "[t]he correct inquiry under the third element of *Mathies* is whether the hazard identified under element two is reasonably likely to cause injury." *Black Beauty Coal Co*., 34 FMSHRC 1733, 1742-43 n.13 (Aug. 2012). Finally, the Commission has stated that the evaluation of a significant and substantial violation should assume continued mining operations. *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985).

Negligence

An operator is negligent if it fails to meet the requisite standard of care in adhering to the standards set forth in the Mine Act and its associated regulations. *Brody Mining LLC*, 37 FMSHRC 1687, 1702 (Aug. 2015). Commission Judges, when determining negligence, are asked to consider "what actions would have been taken under the same circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation." *Jim Walter Resources*, 36 FMSHRC 1972, 1975 (Aug. 2014). … The Commission and its judges are not required to apply the 30 C.F.R. Part 100 regulations that govern the MSHA's determinations. *Newtown*, 38 FMSHRC at 2048, citing *Brody* at 1701-03. Therefore, the Commission's judges may consider the "totality of the circumstances" in assessing the operator's negligence for a given violation. *Brody*, at 1702; *Mach Mining, LLC v. Sec'y of Labor*, 809 F.3d 1259, 1264 (D.C. Cir 2016). The Commission

has described ordinary negligence as "inadvertent," "thoughtless," or "inattentive" conduct. *Emery Mining Corp*., 9 FMSHRC 1997, 2001, 2004 (Dec. 1987), while high negligence is described by the Commission as "an aggravated lack of care that is more than ordinary negligence." *Newtown*, at 2049, citing *Topper Coal Co*., 20 FMSHRC 344, 350 (Apr. 1998), citing *Eastern Associated Coal Corp*., 13 FMSHRC 178, 187 (Feb. 1991).

The Parties' Contentions

The Secretary contends that Citation No. 9076875 was properly designated as significant and substantial, asserting that the violation created a discrete safety hazard of tripping/stumbling, and that the hazard of tripping and falling was reasonably likely to cause an injury of cuts, bruises, and broken bones, which would be of a reasonably serious in nature. Secretary's Brief at 3, 7. Even if each individual item in the walkway may not have established a significant and substantial violation, the Secretary argues that the confluence of objects makes the violation significant and substantial: "[w]hile each of the hazards … on their own, may not individually establish an S&S violation, taken together they create[d] a dangerous situation that present[ed] a discrete hazard to safety." *Id*.

In contrast, the Respondent argues that the Secretary failed to establish by a preponderance of the evidence that the stumbling or tripping hazard was reasonably likely to occur as a result of the violation. Respondent's Brief at 12. The Respondent also argues that most of the walkway was free of extraneous materials, and that the objects in the travelway were highly visible to any miner who may have traveled the walkway. *Id*. at 13-14. Finally, the Respondent argues the inspector improperly based his conclusion as to significant and substantial on speculation and conjecture, unsupported by the actual conditions at the mine. *Id*. at 16-17.

Discussion

In the context of the specific facts involved in this matter, the Court will first add to its earlier remarks about the significant and substantial designation. To put it in practical terms, when analyzing S&S, the critical issues involve likelihood and gravity. Two important recent decisions speaking to those characteristics under *Mathies* are here noted – the Fourth Circuit's decision in *Knox Creek Coal Corp. v. Sec'y of Labor*, 811 F.3d 148 (4th Cir. 2016)("Knox Creek") and the Commission's decision in *Newtown*.

The first prong of *Mathies* is straightforward. A violation must be found; without that determination any further S&S analysis cannot proceed. As described above, the parties stipulated to the existence of a violation. Secretary's Brief at 3. This stipulation is sufficient for the Secretary to meet its burden of proof as to the existence of the violation under Commission precedent. However, the Court independently concludes that, after reviewing the photographic evidence submitted as Ex. P-2, and the testimony of both Inspector Piko and West, that a violation of 30 C.F.R. § 75.202(b) occurred in this case, as there were objects, located in the travelway. 30 C.F.R. § 75.202(b) is a mandatory safety standard. The Court therefore concludes that the first prong of the Mathies test has been satisfied by the parties' stipulations and its own review of the evidence.

Speaking to the second prong of *Mathies*, with its requirement that there be a showing of a "discrete safety hazard—that is, a measure of danger to safety—contributed to by the violation, that prong is focused upon the likelihood that a given violation may cause harm. This means that for any violation to contribute to a discrete safety hazard, the violation must be at least somewhat likely to result in harm. *Knox Creek* at 162.

The Commission's decision in *Newtown* tracks the *Knox Creek* analysis in that it follows the Fourth Circuit's explication of the correct S&S analysis. In *Newtown*, the Commission stated that "the relevant concept tying together the second step "likelihood" analysis and third step "gravity" analysis of *Mathies* is the "hazard" at issue." *Id.* at 2037. The Commission elaborated about the essential importance "for the Judge to adequately define the particular hazard to which the violation allegedly contributes. A clear description of the hazard at issue places the analysis of the violation's potential harm in context, by requiring a determination of the relative likelihood that the violation will have a meaningful, adverse effect on conditions miners will encounter during normal mining operations. That same clearly defined hazard will also frame the potential source of injury for purposes of determining gravity in the third step analysis. The Commission thus defines the 'hazard' in terms of the prospective danger the cited safety standard is intended to prevent." *Id.* at 2038.

The Commission added "[i]f the Judge concludes, based upon the evidence, that the violation sufficiently contributes to the hazard identified at step two, the Judge then assumes such occurrence and determines at step three whether, based upon the particular facts surrounding the violation, the occurrence of that hazard would be reasonably likely to result in an injury. At step four, the Judge determines whether any resultant injury would be reasonably likely to be reasonably serious." *Id*. at 2039. "All Commissioners agree that the Judge must analyze the likelihood of the occurrence of the hazard at step two of the *Mathies* test." *Id.*

Although the other three elements of the *Mathies* test have been sufficiently proven by the Secretary, the Court concludes that the Secretary failed to prove by a preponderance of the evidence the second prong of the *Mathies* test: that there was a discrete safety hazard contributed to by the violation. Both the Secretary and the Respondent devote a significant portion of their post-hearing briefs to the third prong of the *Mathies* test.[10] This emphasis is misplaced, as the second prong is where the "particular facts surrounding the violation" are primarily considered. *Newtown Energy*, 38 FMSHRC at 2038. The Secretary describes the discrete safety hazard in this matter for fulfilling the second prong of *Mathies* as "tripping/stumbling." Secretary's Brief at 7. However, the Court identifies the discrete safety hazard in this instance with more particularity as the possibility that miners working will trip or stumble *over the extraneous objects* in the travelway.

[10] The Respondent's brief does discuss *Newtown Energy* and "the interplay between the second and third prongs," though the Respondent does not itemize its arguments according to each specific prong. The Secretary for his part devotes just one paragraph to the second prong, and never cites to *Newtown Energy*, which discusses in detail how the facts of the violation are incorporated into the *Mathies* test, and which was decided more recently than *any* of the cases the Secretary cites in his significant and substantial analysis.

The Court concludes that the Secretary failed to prove that the area was traveled frequently enough for the violation to be reasonably likely to contribute to a discrete safety hazard. Respondent argued post-hearing that the area was not accessed frequently. Respondent's Brief at 13. As just mentioned, the discrete safety hazard of tripping/stumbling is more precisely identified as tripping and falling over the objects *while miners are on the travelway*. Therefore, how often the area is accessed is relevant as to the likelihood the violation creates a discrete safety hazard of a miner tripping/stumbling over the objects in the travelway.

The Secretary argues that the area was "regularly traversed by miners during their daily duties." Secretary's Brief at 9, citing Tr. 47. While the Secretary offered evidence that *the area* was regularly traversed by miners, he did not establish that *the walkway* was regularly traversed, as evidenced by the fact that Inspector Piko acknowledged he did not find anybody in the area while conducting the inspection, nor could he identify any miner who said they regularly traversed that walkway. Tr. 100. Additionally, the inspection was conducted at approximately 10:00 AM, according to West, and neither individual could say there were any workers on the travelway or even in the area at the time. Tr. 152. However, West also testified, and the Secretary did not refute, that GMS workers typically began their shift at 8:00 AM. Tr. 144.
To the Court, this shows that the entire area is not frequently traveled, as neither the inspector nor West saw any employees in the area a full two hours after the morning shift began. As a result, the Court concludes the Secretary failed to prove that the area was traveled frequently, which decreases the likelihood that the violation will contribute to the discrete safety hazard of miners tripping/stumbling over objects in the travelway in the ordinary course of continued mining operations.

Second, the Court concludes that the condition was sufficiently obvious to any individual travelling in the area that it was not reasonably likely to create a discrete safety hazard. The roller photographed in the citation was a 64-inches in length. The roller was not obscured by any other object or covering, and was easy to see even during the inspection. Tr. 150.
Furthermore, the roller was a bright white color which distinctly contrasted with the color of the metal walkway. Ex. P-2. As to the other objects in the walkway, the hose was a bright yellow color, and was clearly visible in the inspector's photo. *Id*. None of the cited objects were stacked on top of each or otherwise obscured from plain view. From these facts, the Court concludes that an ordinary miner would have likely spotted the potential tripping hazards while traversing the area, and therefore the objects in the walkway were not reasonably likely to contribute to a discrete safety hazard.

The Secretary states that the Court should not consider whether the roller, the hose, and the other alleged obstructions in this case might have been readily observable. Secretary's Brief at 7, citing *Eagle Nest, Inc.*, 14 FMSHRC 1119 (July 1992). However, *Eagle Nest* simply stands for the proposition that the Court cannot assume that miners would exercise heightened or unique caution when traveling in the area of an alleged hazard. In *Eagle Nest*, the judge committed error by "resting his decision on the possibility of mitigation by the use of caution." *Id*. at 1123. That does not require the Court to assume a miner is completely unaware or ignorant of his or her surroundings, merely that it would be inappropriate to decide a violation was not significant and substantial based *solely* on the miner's ability to exercise caution. Viewing the circumstances surrounding the violation as a whole, including the prominence of the roller and hose, is

ultimately relevant to the issue of whether the violation is reasonably likely to give rise to a discrete safety hazard.

Third, the condition was not extensive enough to be reasonably likely to create a discrete safety hazard. The objects cited were confined to one specific portion of the travelway. There was no evidence that these hazards were extensive across the entirety of the travelway. Furthermore, according to the text of the citation itself, the citation was written at 10:58 AM on October 23, 2017, and terminated at 11:05 AM on October 23, 2017. *See* Ex. P-1, Citation No. 9076875. That means that West was able to abate the violation in seven minutes,[11] which in turn means that the violation was not so extensive as to require a significant period of time to clean up. Additionally, the photographic evidence submitted by the parties shows that there was a considerable portion of the cited area of the walkway that was not obstructed by the objects referenced in the inspector's testimony. *See* Tr. at 120. Therefore, the Court concludes that the violation was not extensive enough to be reasonably likely to create a discrete safety hazard.

Finally, the Court concludes the Secretary did not prove by a preponderance of the evidence that it was raining at the time of the violation. On this point, the Secretary did provide testimony. *See* Tr. 54, Secretary's Brief at 7. However, none of the photos in Ex. P-2 show that the surfaces of the travelway were wet, and while the Respondent's witness could not say conclusively that it was or was not raining on the date of the inspection, West did say that an outdoor inspection typically would not be done if it were raining outside. Tr. 150. West also testified that there were no coverings over the top of the walkway, Tr. 151, meaning there should be water on the surfaces of the walkway and the objects in Ex. P-2 if it were raining that day. Considering all of the testimony and the exhibits, the Court concludes that the Secretary did not prove by a preponderance of the evidence that it was raining on the date of the inspection, which goes to the likelihood of a discrete safety hazard in the second prong of the *Mathies* test.

The Secretary also cites to *Summit Anthracite*, 29 FMSHRC 1062, 1081-1082 (Nov. 2007) (ALJ) (*Summit*) for the proposition that the violation in this case is significant and substantial. Pursuant to Commission Rule 69(d), the decision of one Commission Judge is not binding on other Commission Judges. Additionally, as the Secretary acknowledges in his own brief, the significant and substantial inquiry depends "on the particular facts surrounding that violation." Secretary's Brief at 6, citing *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (1981). The Court considers the facts in *Summit* sufficiently dissimilar from the facts of this case to be distinguishable. For instance, the alleged obstructions formed the actual frame of the generator building, meaning they would be impossible to remove. Furthermore, the Secretary established through testimony that the generator building was accessed daily. By comparison, the objects in this case were easily cleared from the area, and as explained above, the Secretary did not establish that the walkway was regularly traversed. Tr. 100. Therefore, the Court concludes

[11] The Secretary and Respondent focus particularly on the 64" roller and the hose, because those two objects were the largest objects in the walkway, and because Piko terminated the citation once West moved the roller and hose, but otherwise did not take any actions to abate the other initially alleged hazards: specifically, the plastic bag and coal accumulations. Tr. 164. As Respondent notes, Piko terminated the citation despite West not removing the coal accumulations and plastic bag. Respondent's Brief at 16.

that *Summit* is not sufficiently analogous to be persuasive as to the issue of a significant and substantial violation.

The Court agrees with the Secretary that the obstructions in the walkway contributed to some extent to a safety hazard. That is why the Court concluded the violation occurred separate from the parties' stipulation, and why the Court concludes a negligence finding south of moderate is appropriate. *Newtown Energy* makes it clear that merely "contributing" to a discrete safety hazard is insufficient to prove prong two of the *Mathies* test. Since regulations promulgated by the Secretary are ostensibly intended to create a safe working environment, *every* violation of a safety regulation contributes in some capacity to a safety hazard. Therefore, for the second prong of the *Mathies* test to have any meaning, not every violation can create a discrete safety hazard within the meaning of *Mathies*. Based on all of the factors described above, the Court ultimately decides that this particular violation was not reasonably likely to cause the occurrence of the hazard against which 30 C.F.R. § 77.205(b) is directed within the meaning of *Newtown Energy*. Therefore, the violation was not proven to be significant and substantial.

This does not mean that virtually every violation will amount to being S&S. The Fourth Circuit gave as an illustrative example a case where a roadway lacked berms for only a short distance, thereby making the hazard of a vehicle falling off the edge less likely. *Id.* at 163, citing *Sec'y of Labor v. Black Beauty Coal Co*., 34 FMSHRC 1733, 1741 n.12 (Aug. 2012). This Court concludes that the violation in this matter is a like situation: the hose presented a slip or stumble hazard for only a short distance; there was virtually no evidence of regular miner traffic along the walkway; the traffic which would primarily be using the walkway would be the GMS employees tasked with using the hose to maintain the walkway and the extraneous portion was the hose nozzle end, which end those employees would be using to clean the walkway. Again, the Court emphasizes that the violation was conceded here by Consol Pennsylvania – the only issue for this part of the discussion is whether it was also S&S.

Turning to the third prong of *Mathies*, the Fourth Circuit in *Knox Creek* noted that it has been argued by mine operators that the evidence must establish that the violation was reasonably likely to cause injury. The Court rejected that construction, informing that the test under the third prong is whether there is a reasonable likelihood that the hazard contributed to by the violation will cause injury. *Knox Creek*, 811 F.3d at 161. By contrast, the Fourth Circuit expressed that *Mathies*' third and fourth prongs, which it noted that the Commission expected would often be combined in a single showing, are primarily concerned with gravity—the seriousness of the expected harm.

This means that the Secretary need not prove a reasonable likelihood that the violation itself will cause injury. This is repetitive but bears repeating – the evidence of the likelihood of the hazard is not relevant at prong three. Instead, the relevant hazard is to be assumed when analyzing *Mathies*' third prong. *Id*. at 164. Accordingly, under the third prong, one assumes the existence of the relevant hazard. In the present case the relevant hazard is stumbling or slipping on a travelway.

Thus, the third prong assumes that if the hazard occurred, and regardless of the likelihood that it would occur, whether it was reasonably likely that a reasonably serious injury would result. Again here, that means if one were to stumble or slip on the travelway, a reasonably serious injury would result. The testimony from the inspector was uncontested that in this matter the injury cuts, bruises or broken bones, each of which would be a reasonably serious injury with the result of lost workdays or restricted duty.

The fourth prong of *Mathies* – An injury of a reasonably serious nature

After considering the evidence, the Court also agrees with the Secretary that the hazard would result in an injury of a reasonably serious nature were the injury to occur, satisfying the fourth prong of the *Mathies* test. The parties stipulated that the expected injury would be "lost workdays or restricted duty." Secretary's Brief at 3. At hearing, the inspector testified as to the possibility of injury from slipping and falling, including broken wrists or concussions. Tr. 63. While the Respondent asserts that the circumstances of the violation do not demonstrate a reasonable likelihood of an injury of a reasonably serious nature, the Respondent did not address whether the *hazard* of tripping and falling would create an injury of a reasonably serious nature. The Commission has recognized on several different occasions that stumbling over obstructions in a travelway can lead to an injury of a reasonably serious nature. *See e.g.*, *Consol Pennsylvania Coal Co.*, 39 FMSHRC 1893, 1900 (Oct. 2017) (trip and fall over "uneven floor and debris" satisfies prong four of *Mathies*); *S&S Dredging Co.*, 35 FMSHRC 1979, 1982 (July 2013) (slip and fall from steps of a loader would result in "reasonably serious injuries" under *Mathies*); *Buffalo Crushed Stone Inc.*, 19 FMSHRC 231, 238 n.9 (Feb. 1997) (slipping on a walkway would result in "reasonably serious injuries" under *Mathies*). The Court therefore concludes that the fourth prong of the *Mathies* test has been satisfied by the Secretary.

Summary of the Court's determination that the evidence of record failed to establish that the violation was "significant and substantial."

To recap, the Court, after considering the evidence presented at hearing and the post-hearing submissions of the parties, concludes that, while the Secretary established elements one, three, and four of the *Mathies* test, the second *Mathies* element – the discrete safety hazard, that is a measure of danger to safety – contributed to by the violation – was not established by the preponderance of the evidence. A number of facts lead to this conclusion.

To begin, there were two sources of concern – the water hose, which in fact was used to maintain the walkway, and the roller, placed on the walkway for the purpose of replacing a worn roller. The walkway is maintained by contractors, identified as GMS. The inspector did not require that either the coal spillage or the plastic bag needed to be removed for the citation to be terminated.

Regarding the roller, as the photograph clearly demonstrates, was white and highly visible against the contrasting metal walkway it rested upon. Further, contrary to the inspector's claim, the roller definitely was not in the center of the walkway. From the Secretary's own photos there is no disputing that the roller was to one side of the walkway and that there was

ample room for one to traverse the walkway at the roller's location.[12] Ineluctably, that leaves but one condition posing a genuine risk of stumbling or slipping – the water hose, and it must be noted, only a small portion of the water hose posed such a risk. As the government photos show, the hose is yellow and highly visible. Where the hose shares the same space on the walkway with the roller, it is straight, running parallel to the walkway and does not present a stumbling or slipping hazard at that location, as there is a path between the roller and the hose there.

There was, however, a small portion of the hose on the portion of the walkway where there are two or three stairs and that confined area did present a slip or stumbling hazard. This confined area of the hose represented the only genuine hazard among the four conditions initially relied upon by the inspector. In fact, at the hearing, the claimed basis was reduced to only two conditions, the water hose and the roller. However, as the Respondent has admitted that the standard was violated, the only question is whether that limited area presented a significant and substantial violation under *Mathies.*

Respondent contends that the contribution of the violation to the cause and effect must be significant and substantial and asserts that the second step of *Mathies* is primarily concerned with the likelihood of the occurrence of the hazard. In this instance that means determining the likelihood of the occurrence of miners stumbling or slipping. Restated, a determination must be made as to whether, *based upon the particular facts surrounding the violation*, there exists a "reasonable likelihood" of the occurrence of the hazard about which the safety standard is concerned. Accordingly, to express it plainly, the tangible hazard for determination was whether there was a reasonable likelihood of the occurrence of miners stumbling or slipping on the walkway *at the limited location* where the hose presented an issue. The Court finds, *based on the evidence of record,* that the Secretary did not establish such a reasonable likelihood.

Keeping in mind that the hazard to apply to the S&S inquiry has been found to be limited to the discrete area where the hose extended into a portion of the walkway stairs, which consisted of two or three steps,[13] primarily on the last step and a portion of the walkway after the bottom step, the record evidence essentially[14] established that only the GMS contractors would be exposed to the hose hazard, but it is precisely those employees who use the same hose for the purpose of cleaning the walkway. Given that, the likelihood of those employees stumbling or slipping was minimal, not reasonably likely. Further, it was the nozzle end of the hose on the steps, that is to say, the end of the hose that would be used by the GMS employees to maintain

[12] The inspector admitted that it "would be kind of hard I think to hold just the roller" as the basis for an S&S finding. Tr. 120-121.

[13] The inspector was not definitive as to the number of risers or steps were on the stairs, stating it was two or three.

[14] The record shows that the only other miner exposed to the hazardous portion of the hose was the fireboss. That individual, *whose job includes looking for hazards*, successfully negotiated the walkway that day, including that portion of the walkway where the hose presented an issue. Tr. 48.

the walkway. So too, those same GMS employees are the contractors who perform belt maintenance which includes changing out rollers.

While the Secretary could have learned from the issuing inspector about whom, if anyone, besides the GMS employees, would use the walkway, no such possible evidence was introduced and made a part of the record. Therefore, any use by other miners was in the realm of speculation and accordingly cannot be part of the S&S determination.

The record also does not support the claim that it was raining on the day the citation was issued and the inspector stated that rain was a factor which added to his S&S determination. The exhibit photos support this finding, as did the testimony of West, who offered, without contradiction, that typically they do not do an outdoor inspection if it's raining.

Having failed to meet the burden of proof for prong three of *Mathies*, the S&S claim cannot be affirmed by the Court.

The Negligence was less than moderate.

Regarding negligence, the Commission stated in *Newtown*, "[i]n analyzing an operator's degree of negligence, the Commission has recognized that '[e]ach mandatory standard … carries with it an accompanying duty of care to avoid violations of the standard, and an operator's failure to meet the appropriate duty can lead to a finding of negligence if a violation of the standard occurs.'" *Id.* at 2047, citing *A.H. Smith Stone Co*., 5 FMSHRC 13, 15 (Jan. 1983).

In determining whether an operator met its duty of care, the Commission considers what actions would have been taken under the same circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation. *Brody Mining, LLC*, 37 FMSHRC 1687, 1702 (Aug. 2015) (citations omitted); *U.S. Steel Corp*., 6 FMSHRC 1908, 1910 (Aug. 1984). However, it is noted that in this case, as distinct from *Newtown*, there was no evidence offered regarding managers or supervisors in high positions.

The Commission has also stated that "an ALJ 'is not limited to an evaluation of allegedly 'mitigating' circumstances' and should consider the 'totality of the circumstances holistically.'" *Id. at 1702; see also Mach Mining, LLC v. Sec'y of Labor*, 809 F.3d 1259, 1264 (D.C. Cir. 2016). And, as the Commission has repeatedly held, "the Commission and its Judges are not bound to apply the regulations in 30 C.F.R. Part 100 that MSHA uses to calculate most proposed penalties." *Newtown*, 38 FMSHRC at 2048, citing *Brody Mining, LLC,* 37 FMSHRC 1687, 1701-03 (Aug. 2015). The Commission instead employs a traditional negligence analysis, assessing negligence based on whether an operator failed to meet the requisite standard of care. *Brody*, 37 FMSHRC at 1702. In doing so the Commission considers what actions a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation, would have taken under the same circumstances. *Id.* Commission judges are thus not limited to an evaluation of mitigating circumstances but may instead consider the totality of the circumstances holistically. *Id.*

Although the parties dispute the level of negligence involved in this violation, the Court concludes that the inspector's designation of "moderate" negligence is more appropriately characterized as less than moderate. Though administrative law judges are not bound by the negligence categories set forth in Part 100, it is noted that "low negligence" is defined as where, "[t]he operator knew or should have known of the violative condition or practice, but there are considerable mitigating circumstances." 30 C.F.R.§ 100.3(d). In contrast, those regulations describe "moderate negligence" as where there are mitigating circumstances. *Id.*

As Respondent argues, and as this Court agrees, the roller and hose were so conspicuous on the walkway that it was unlikely that any miner traversing the area would trip and fall over them. Respondent's Brief at 15. The Respondent also takes note that

> [h]oses are used every day to clean and this part of the workers environment. They are trained to be aware of these conditions when traveling about. Have to string out the hoses to be able to use them and they will be in the walkways and on the stairs, etc. on a daily basis. … the walkway is an expanded metal gra[t]ing which provides traction in all weather conditions. … all workers are aware of this and use caution when traveling through there. This area is cleaned daily. Area has handrails and toeboards.

Ex. R-1.

The Court, considering the totality of the circumstances holistically, concludes that the negligence was less than moderate and approaching low negligence.

As Respondent notes in its post-hearing brief, all of the conditions cited were readily visible. While the better practice would have been for the GMS employees to completely loop up the limited portion of the hose that presented a hazard, and though it is recognized that neatness counts, the practical result *based on the record evidence* was that the GMS employees were the ones exposed to the hazard and were using the very hose to perform the walkway maintenance.

Penalty Determination

In assessing civil monetary penalties, Section 110(i) of the Act requires that the Commission consider the six statutory penalty criteria:

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

30 U.S.C. § 820(i).

As the Commission has noted, "Administrative Law Judges are accorded broad discretion in assessing civil penalties under the Mine Act." *Westmoreland Coal Co*., 8 FMSHRC 491, 492 (Apr. 1986). A Commission Judge's penalty assessment is reviewed under an abuse of discretion standard. *Douglas R. Rushford Trucking*, 22 FMSHRC 598, 601(May 2000); *see also Knight Hawk Coal, LLC*, 38 FMSHRC 2361, 2373 (Sept. 2016).

That said, the Court recognizes that there are two important considerations that must be evaluated; the Secretary's burden to provide sufficient evidence to support the proposed assessment; and the Court's obligation to explain the basis for any substantial divergence from the proposed amount. The Commission has noted that:

> [The] Secretary [ ] does bear the 'burden' before the Commission of providing evidence sufficient in the Judge's discretionary opinion to support the proposed assessment under the penalty criteria [and that] [w]hen a violation is specially assessed that obligation may be considerable. [On the other hand] the Secretary's proposed penalty cannot be glided over, as the Commission also stated, 'Judges must explain any substantial divergence between the penalty proposed by MSHA and the penalty assessed by the Judge. … If a sufficient explanation for the divergence is not provided, the credibility of the administrative scheme providing for the increase or lowering of penalties after contest may be jeopardized by an appearance of arbitrariness.

The American Coal Co., 38 FMSHRC 1987, 1993-1994 (Aug. 2016), citing *Sellersburg Stone Co*., 5 FMSHRC 287, 293 (Mar. 1983), aff'd, 57 736 F.2d 1147 (7th Cir. 1984).

Section 110(i) Penalty Factors As Applied to This Case

History of Previous Violations

As the citation indicated, 30 C.F.R. § 77.205(b) was cited three times in two years at this mine. However, only one of those citations was to the operator, with the other two citations cited to contractors. Neither party contested the existence of the prior violations of this standard. The Court therefore concludes that the history of previous violations of this sort at this mine is minimal.

Size of the Business

The parties stipulated that the Mine Data Retrieval System (MDRS) maintained by the Secretary accurately sets forth the size of the Respondent in production tons worked this year, the protection tons and hours worked at this mine specifically, the total number of assessed violations for the time period listed, and the total number of inspection days during that time period. Secretary's Brief at 3. The mine extracts 2,971,179 tons of coal per year, while the operator extracts 24,679,089 total tons of coal per year. Ex. A, Pet. for a Civil Penalty at 10.

Negligence

For the reasons described above, the Secretary's initial determination of "moderate" negligence is appropriate, and will be affirmed by this Court.

Operator's Ability to Remain in Business

The Secretary stated that the assessment of a civil penalty of $625.00 will not affect the operator's ability to remain in business. Secretary's Brief at 11. The Respondent did not contest this assertion in its own post-hearing briefs. Therefore, the Court concludes, in conjunction with the size of the mine and its annual production, that a penalty of $625.00 or less would not affect the Respondent's ability to remain in business.

Gravity of the Violation

For the reasons described above, the Court has determined that the gravity of the citation was over-evaluated; the Court concludes that the likelihood of injury was "unlikely" and was not significant and substantial, for several reasons: it took only seven minutes to abate the cited condition, the condition was obvious to any individual who might be walking through the area, the condition was not extensive, and the walking surfaces were not wet at the time of the inspection.

Good Faith Abatement

The Secretary's petition for assessment of civil penalty acknowledged Respondent's good faith abatement of the violation. As the citation was terminated seven minutes after issuance, the Court agrees that the Respondent abated the violative condition in good faith.

Analysis of Section 110(i) Penalty Factors

Most important of the six factors outlined in Section 110(i) to the ultimate penalty determination in this case was the gravity of the violation. Since the likelihood of injury and the significant and substantial designation as written in the citation were not sufficiently proved by the Secretary at hearing, the penalty should be adjusted downward accordingly. Furthermore, the fact that West immediately set out to abate the violation after it was cited, and the fact that he was successful in doing so less than ten minutes after the citation was issued, counsels in favor of reducing the penalty from the original $625.00 for good faith abatement, in addition to the reduction for gravity.

Respondent calculates that, without the significant and substantial designation and with the likelihood of injury modified to "unlikely," the penalty as calculated by 30 C.F.R. § 100.3 would be $129.00. Respondent's Brief at 22. The Court's $200.00 penalty reflects the Court's conclusion that, although the Respondent's conduct merely rises to the level of ordinary negligence, characterized as less than moderate, and approaching low negligence, in the future Respondent should be more diligent as to the requirements of the standard.

The Court ultimately determines that the 110(i) factors concerning the size of the operator, the history of previous violations, and the operator's ability to remain in business do not substantially alter the Court's determination of an appropriate penalty, especially given the already significant reductions in the penalty amount as a result of the gravity, negligence, and good faith abatement considerations.

Conclusion

Taking into account all of the preceding findings and observations, the Court concludes that the violation occurred, presented an "unlikely" risk of an expected injury of lost workdays or restricted duty. The Court also finds that one person would be affected by the violation, the violation was not significant and substantial, and that the negligence of the operator was less than moderate, approaching low negligence. In light of these considerations, the agreed-upon stipulations as to the violation and the injury expected, and the inherent power of Commission Judges to independently assess penalties based on their reasoned judgment of all the facts, the Court finds that the non S&S determination and the less than moderate negligence determination independently support the Court's imposition of a civil penalty of $200.00 for this violation.

ORDER

It is hereby **ORDERED** that Citation No. 9076875 be **MODIFIED** to change the likelihood of injury from "reasonably likely" to "unlikely," and to reflect a non-significant and substantial violation and less than moderate negligence. Respondent is **ORDERED** to pay a civil penalty in the total amount of **$200.00** within 30 days of this decision.[15]

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

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

ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, DC 20004

May 22, 2019

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	CIVIL PENALTY PROCEEDINGS Docket No. WEVA 2015-0074 A.C. No. 46-01968-361667
v.	Docket No. WEVA 2015-0425 A.C. No. 46-01968-371547
	Docket No. WEVA 2015-0473 A.C. No. 46-01968-373553
THE MONONGALIA COUNTY COAL COMPANY, successor to CONSOLIDATION COAL COMPANY, Respondent.	Mine: Monongalia County Mine

ORDER DENYING SECRETARY'S MOTION TO CONTINUE STAY AND ORDER LIFTING STAY

Before: Judge Feldman

Before me is the Secretary's Motion to Continue the Stay in the captioned proceedings. The captioned matters concern the term "repeated" as contemplated by the flagrant provisions of section 110(b)(2) of Mine Safety and Health Act of 1977, as amended by the Mine Improvement and New Emergency Response Act of 2006 (the "Mine Act"), 30 U.S.C §820(b)(2). Section 110(b)(2) provides, in pertinent part:

> [T]he term "flagrant" with respect to a violation means a [1] reckless or *repeated failure* to make reasonable efforts to eliminate a [2] known [3] violation of a mandatory health or safety standard that [4] substantially and proximately caused, or reasonably could have been expected to cause, [5] death or serious bodily injury.

30 U.S.C § 820(b)(2) (emphasis added).

The Commission has recognized alternative interpretations of the term "repeated" in section 110(b)(2) for accumulation violations of section 75.400, one "narrow" and one "broad."[1] *Sec'y of Labor v. The American Coal Co*., 38 FMSHRC 2062, 2064-65 (Aug. 2016) ("*American Coal")*. Under the narrow interpretation discussed in *American Coal*, an alleged flagrant violation can be characterized as "repeated" if the duration of the accumulation violation, without regard to a history of violations, is sufficient to satisfy the "repeated" statutory criterion. *Id*. at 2065. Thus, the Commission's narrow interpretation of the term "repeated" concerns a discrete ongoing accumulation violation. *Id*. In contrast, the Commission articulated that under its broad approach an alleged flagrant violation of section 75.400 can be characterized as "repeated" based on a recurrent-type violation analysis, i.e., analysis of a history of several discrete yet similar violations. *Id*. at 2064.

The captioned proceedings are related to an alleged "repeated" flagrant accumulation violation of section 75.400, cited in Order No. 8059209 in Docket No. WEVA 2015-0632, based on both the narrow and broad approach. *See Secretary of Labor v. Monongalia County Coal Co*., 40 FMSHRC 1234 (July 2018) (ALJ) ("*Monongalia*"). The captioned matters concern three alleged "predicate" accumulation violations that the Secretary relies on to support the "repeated" characterization under the broad approach for the alleged flagrant accumulation violation that is the subject of Order No. 8059209 in *Monongalia*.

Monongalia and the three captioned proceedings were consolidated and stayed on May 12, 2016, pending a final decision in *Secretary of Labor v. Oak Grove Resources,* 38 FMSHRC 957 (May 2016) (ALJ) ("*Oak Grove*"), which concerned an alleged "repeated" flagrant accumulation violation. Unpublished Consolidation Order and Stay Order (May 2016) (ALJ). The flagrant designation was deleted by an interlocutory order on June 1, 2015, as *Oak Grove* stood for the proposition that violative accumulations that cannot be reasonably expected to proximately cause serious bodily injury or death cannot be elevated to flagrant status simply because the violations are characterized as "repeated" based on a history of violations.[2] *See Oak Grove*, 38 FMSHRC 957, 960; Order Deleting Flagrant Designation, 37 FMSHRC 1311 (ALJ). *Oak Grove* became final after neither the interlocutory order nor the decision after hearing was appealed. Consequently, the stay in *Monongalia* was lifted on June 14, 2016. Severance Order and Prehearing Order, 38 FMSHRC 1573 (ALJ). However, the stay of the captioned "predicate proceedings" remained in effect. *Id*.

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[1] Section 75.400 provides:

> Coal dust, including float coal dust deposited on rock-dusted surfaces, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on diesel-powered and electrical equipment therein.

30 C.F.R. § 75.400.

[2] The May 3, 2016, decision in *Oak Grove* preceded the Commission's August 30, 2016, *American Coal* discussion of alternative broad and narrow analyses for demonstrating the "repeated" element of a flagrant violation.

A hearing in *Monongalia* was conducted in March 2017. Despite the Secretary's alternative reliance on a broad approach, the scope of the hearing in *Monongalia* was limited to whether the violation in Order No. 8059209 was properly characterized as "repeated" under a narrow analysis, as it was reasonably likely that the Secretary could demonstrate a prima facie case that the cited accumulations existed for several shifts.[3] Order, 39 FMSHRC 423, 425 (Feb. 2017) (ALJ). Although the decision found that the violation was "repeated" under the narrow approach, the flagrant designation in *Monongalia* was deleted because the evidence failed to establish that the cited accumulations could be reasonably expected to proximately cause serious bodily injury or death, as required by the statute. 40 FMSHRC at 1257. The Secretary's appeal of *Monongalia* is currently before the Commission. Unpublished Direction for Review (Sept. 6 2018).[4]

Following the July 2018, initial decision on the merits in *Monongalia*, conference calls were conducted on October 2, and December 4, 2018, to determine if the stay of the captioned proceedings should be lifted as the "repeated" element had been demonstrated under a narrow analysis. Despite my reservations, the parties expressed their desire to continue the stay pending the resolution of the *Monongalia* appeal. Consequently, the Secretary filed a motion in support of the continuation of the stay on November 6, 2018 and a supplemental brief in support of the stay on January 16, 2019. Given its unopposed nature, a ruling on the parties' request to continue the stay has been held in abeyance.

The Secretary's motion to continue the stay pending the Commission's review of *Monongalia* is based on the mistaken belief that the Secretary's predicate theory was rejected in *Monongalia* at the trial level. *See* Sec'y's Mot. to Continue the Stay. at 2; *see also* n. 4, *infra*. As noted, the evidentiary requirements for a broad analysis are not before the Commission as *Monongalia* explicitly noted that this question was moot as a consequence of a "repeated" finding under a narrow analysis. 40 FMSHRC at 1258.

It is true that I considered the Secretary's predicate theory to be legally flawed based on a number of concerns. *Id*. at 1258-60. However, the discussion was dicta in view of the Commission's prior expression of interest in considering the "Judge's input with respect to fashioning the criteria for a 'broad' analysis of the 'repeated' provision as it applies to accumulation violations." *Id*. (citing *Secretary of Labor v. The American Coal Co*., 38 FMSHRC 2062, 2082 (Aug. 2016)).

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[3] Order No. 8059209 notes that the subject accumulations were extensive in nature and contained footprints in areas traveled by belt examiners three times each day. *Monongalia*, 40 FMSHRC at 1241.

[4] The Commission's unpublished September 6, 2018, Direction for Review denied Monongalia's Petition for Discretionary Review ("PDR"). Although the Commission granted the Secretary's Amended PDR concerning the deletion of the flagrant designation, the deletion was not based on the Secretary's failure to demonstrate the "repeated" element. Consequently, satisfaction of the "repeated" element is not before the Commission on review in *Monongalia*.

While I am reticent to deny an unopposed motion to stay, there is no basis for further delaying disposition of the 104(d) orders that are the subjects of the captioned matters. The Secretary has failed to demonstrate that he will be prejudiced by lifting the stay in these civil penalty proceedings. Moreover, avoiding further delay of the disposition of the captioned cases may expedite future proceedings in the unlikely event that a broad "repeated" analysis becomes relevant.

With the benefit of hindsight, I regret not having lifted the lengthy stay in the captioned proceedings. As previously noted, it was clear that the Secretary could present a prima facie case that the cited accumulations in Order No. 8059209 in *Monongalia* satisfied the "repeated" element under a narrow approach. *See* n. 3, *supra*. Thus, to facilitate the disposition of *Monongalia*, I saw no need to take evidence with respect to the yet-to-be-decided criteria for establishing a "repeated" accumulation violation of section 75.400 under a broad approach. However, I did not foresee the Secretary's insistence in continuing to advance his predicate theory in furtherance of demonstrating the "repeated" element under a broad analysis.

It has been more than 12 years since the flagrant provisions have been added to the Mine Act. During this period, the Secretary, the Commission, and Commission judges have failed to fashion criteria for satisfaction of the "repeated" element under an alternative broad approach for section 75.400 accumulation violations. With the exception of violations caused by spillage, accumulation violations are "repeated" by nature in that they develop and remain unabated for several shifts. Consequently, continued efforts to identify the criteria necessary for demonstrating the "repeated" element under a broad approach may be a search for a solution to a non-existent problem. As evidenced by the lengthy stay in these proceedings brought about by the unsuccessful efforts to identify the requisite criteria for demonstrating "repeated" under a broad analysis, perhaps the time has come to reconsider the propriety of continuing this longstanding uncertainty.

ORDER

In view of the above, the Secretary's request to continue the stay **IS DENIED**. Consequently, **IT IS ORDERED** the stay in the captioned matters **IS HEREBY LIFTED**. A hearing date in the captioned proceedings will be specified in a subsequent order.

/s/ Jerold Feldman
Jerold Feldman
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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May 24, 2019

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. AMERICAN AGGREGATES OF MICHIGAN, INC. Respondent	CIVIL PENALTY PROCEEDING Docket No. LAKE 2018-0340 A.C. No. 20-02529-468328 Mine: Ray Road Plant

ORDER ACCEPTING APPEARANCE, REJECTING SETTLEMENT, RECUSING UNDERSIGNED, REQUESTING REASSIGNMENT, AND CERTIFYING CASE FOR INTERLOCUTORY REVIEW

Before: Judge McCarthy

This case is before the undersigned upon a Petition for the Assessment of Civil Penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 815(d). The Secretary of Labor ("Secretary") submitted a motion to approve settlement of this matter. For the reasons that follow, the undersigned declines to approve the proposed settlement agreement and requests that this matter be reassigned to another judge for hearing on the merits. Furthermore, the undersigned certifies, pursuant to Commission Procedural Rule 76, 29 C.F.R. § 2700.76, that this interlocutory ruling involves a controlling question of law and that immediate review will materially advance the final disposition of the proceeding.

I. STATEMENT OF THE CASE

This matter involves a single alleged violation, Order 8952500 ("Order"). The Order was issued on May 17, 2018 pursuant to Section 104(g)(1) of the Mine Act. The Order alleges that:

> [A miner] – Drill Operator, had not received the MSHA-required 4-hour new miner training prior to beginning work at the mine. [The miner] had no previous mining experience. The mine operator was aware of the Part 46 training requirements. The mine operator must withdraw [the miner] from the mine until

> he receives the required training. The Federal Mine Safety and Health Act of 1977 states that an untrained miner is a hazard to himself and to others.

Pet. for Civil Penalty at 11. The inspector marked the likelihood of injury as reasonably likely and the expected injury or illness as fatal. The inspector listed the violation as significant and substantial ("S&S"), with one person affected. The inspector recorded the level of negligence as high. The Order was terminated on May 21, 2018, after the miner received requisite safety training.

On February 14, 2019, the Secretary submitted a motion to approve settlement ("Motion"). The Secretary sought to reduce the proposed assessment from $2,007.00 to $132.00. The Secretary also sought to modify the likelihood of injury from reasonably likely to unlikely, the severity of injury from fatal to lost workdays or restricted duty, and the level of negligence from high to moderate, and to remove the S&S designation. Motion at 2. In support of these modifications, the Secretary offered the following:

> Respondent argued that the "reasonably likely," "fatal" and "high" negligence designations are not supported by the facts. Respondent asserts that [the miner] was not a driller but was a Driller's Helper. Respondent contends that [the miner] had received, at the time the order was issued, 19.5 hours of OSHA related classroom training, had received 4 hours of New Miner Training and had received on-the-job training working directly with its driller. Respondent concedes that on the day of the inspection [the miner] had not received training on all seven subject required by 30 C.F.R. 46.5 including 46.5(b)(4) 46.5(b)(5), 46.5(b)(6) and 46.5(b)(7), and the MSHA training that [the miner] had received had not been properly documented. Respondent stated that although [the miner] had no previous mining experience, he did have approximately one month of experience working with its driller as a Driller's Helper taking core samples at a non-mine property being considered for purchased [sic] for future mining. Respondent avows that [the miner]'s work off mine property was the exact same work conducted with the same drill rig the day the withdrawal order was issued. . . . Applying the penalty tables found at 30 C.F.R. § 100.3, these modifications result in a revised assessment of $132.00.

Id. at 3.

After reviewing the proffered basis for modifying the Order, the undersigned requested clarification on several portions of the motion that were unclear or unconvincing. Specifically, the undersigned stated:

1. The judge is also uncertain how the parties determined the violation was not significant and substantial given Respondent admits the miner did not have training on "[i]nstruction on the health and safety aspects of the tasks to be assigned" (30 C.F.R. § 46.5(b)(4)) and the "rules and procedures for reporting hazards" (30 C.F.R. § 46.5(b)(7)), such training is a mandatory safety standard under Section 115 of the Mine Act, Section 104(g)(1) expressly requires a

declaration that the miner is "a hazard to himself and to others," and the Respondent acknowledges that the injury would still potentially result in lost workdays or restricted duty.

2. The judge is concerned about the Respondent's contention that it was "unaware that the training the miner received" was not sufficient to satisfy 30 C.F.R. § 46.5(b) given that the operator knew or should have known what training was required under 30 C.F.R. § 46.5 before the miner could begin work, acknowledged that it failed to properly document the training it asserts it gave him, and conceded that the miner had not been trained on 30 C.F.R § 46.5(b)(4)-(7) when the Order was issued.

3. The judge is concerned about the size of the reduction in penalty that accompanies the modifications to the Order, especially in light of the concerns outlined above. The reduction ends up being approximately 93-94% of the original proposed assessment amount of $2,007.00.

E-mail from Brendan Porter, Attorney Advisor to Administrative Law Judge Thomas P. McCarthy, to MSHA Conference and Litigation Representative George F. Schorr (Feb. 14, 2019, 16:23 PM EST). Mr. Schorr responded to the requests for further clarification, as follows:

> The Secretary respectfully relies upon the settlement motion as it was filed. The Secretary relies on the requirements of settlement language as set out in the recent decision from the FMSHRC in *American Coal Co*., LAKE 2011-13, FMSHRC August 2, 2018. The Secretary asserts that the settlement motion includes a description of the "fact [sic] on which the parties have agreed to disagree." *American Coal*, page 9. Further, the settlement motion demonstrates "the proposed penalty reduction is fair, reasonable, appropriate under the facts, and protects the public interest." Id.

E-mail from George F. Schorr, MSHA Conference and Litigation Representative, to Brendan Porter (Feb. 21, 2019, 17:17 PM EST) (italics added). On February 28, 2019, the undersigned offered the parties one last opportunity to address the substantive concerns outlined above. E-mail from Judge Thomas P. McCarthy to the parties (Feb. 28, 2019, 2:17 PM EST) (italics added). The Secretary's representative again demurred and stated that "[t]he Secretary respectfully requests the judge reduce to an Order any requests for additional information or objection to the settlement." E-mail from George F. Schorr, MSHA Conference and Litigation Representative, to Judge Thomas P. McCarthy (Mar. 1, 2019 9:12 AM EST).

II. LEGAL PRINCIPLES AND ANALYSIS

Section 110(k) of the Mine Act provides that "[n]o proposed penalty which has been contested before the Commission under section 105(a) shall be compromised, mitigated, or settled except with the approval of the Commission." 30 U.S.C. Sec. 820 (k). The legislative history describes the Congressional rationale in great detail. The Senate Report states that the "compromising of the amounts of penalties actually paid" has reduced "the effectiveness of the

civil penalty as an enforcement tool." S. Rep. No. 95-181, at 44 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of* 1977, at 632 (1978) ("*Legis. Hist.*"). The Committee explained that its investigation of the penalty collection system under the Federal Coal Mine Safety and Health Act of 1969 revealed "that to a great extent the compromising of assessed penalties [did] not come under public scrutiny," and that "[n]egotiations between operators and Conference Officers of MESA [MSHA's predecessor] are not on the record." *Id.* To remedy this problem, Congress explained that "[b]y imposing [the] requirements" of section 110(k), it "intend[ed] to assure that the *abuses involved in the unwarranted lowering of penalties as a result of off-the-record negotiations* are avoided." *Id.* (emphasis added). Congress expressed its "inten[t] that the Commission and the Courts will assure the public interest is adequately protected before any reduction in penalties." *Id.* This "legislative history cannot be ignored simply because of the passage of time or because it may be convenient for the Secretary to do so." *The American Coal Co.*, 38 FMSHRC 1972, 1976 n.5 (Aug. 2016) (*American Coal I*).

Based on the language of section 110(k) and its legislative history, the Commission reaffirmed in *Black Beauty* that Congress authorized the Commission to approve the settlement of contested penalties in section 110(k) "[i]n order to ensure penalties serve as an effective enforcement tool, prevent abuse, and preserve the public interest." 34 FMSHRC at 1862 (citations omitted). To effectuate this Congressional mandate, the Commission in *American Coal I* held that the Commission and its Judges must "consider whether the settlement of a proposed penalty is fair, reasonable, appropriate under the facts, and protects the public interest." 38 FMSHRC at 1976.

The Commission has repeatedly observed that a Judge's "front line oversight of the settlement process is an adjudicative function that necessarily involves wide discretion." *Shemwell v. Armstrong Coal Co.*, 36 FMSHRC 1097, 1101 (May 2014) (citations omitted). As the Commission also observed in *American Coal II:*

> Judges must have sufficient information to determine if a settlement of a penalty is fair, reasonable, appropriate under the facts, and protects the public interest. Moreover, such information permits a Judge to fulfill the duty of articulating reasons for the approval [or rejection] so that the process of compromising penalty amounts is transparent, as Congress intended. A Judge who properly determines that a settlement motion lacks sufficient information may permissibly request further facts from the parties. (footnote 6 omitted) *See Black Beauty*, 34 FMSHRC at 1863.

American Coal Co., 40 FMSHRC 983, 991 (Aug. 2018) (*American Coal II*).[1]

[1] The Commission ruled in footnote 6 that "some Commission Judges have a practice of seeking additional information from parties when evaluating a proposed settlement, and that this procedure works effectively. Oral Arg. Tr. 21-22, 31-32, 34-35, 50, 75-76. If a party believes that a Judge has overstepped his or her authority or otherwise committed an abuse of discretion (continued…)

Applying these principles, I find that the proposed settlement is not reasonable, appropriate under the proffered facts, or in furtherance of the public interest. The Secretary seeks to reduce the proposed penalty assessment from $2,007.00 to $132.00. This amounts to an approximate 93.5% reduction in the penalty amount. While a significant reduction in the proposed assessment amount is not impermissible as part of a proposed settlement agreement, the steep reduction invites closer scrutiny of the facts presented to ensure that the settlement is "fair, reasonable, appropriate under the facts, and in the public interest," consistent with Commission precedent.

As a threshold matter, the admitted facts do not support removal of the S&S designation. The Mine Act describes an S&S violation as one "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 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 (Apr. 1981). The Commission has explained that the "reasonable likelihood" language in *National Gypsum* does not require the violation itself to create a reasonable likelihood of injury; a showing that the hazard contributed to by the violation can be reasonably likely to result in an injury is sufficient to affirm an S&S designation. *Musser Engineering, Inc.*, 32 FMSHRC 1257 (Oct. 2010).

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;[2] (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

[1] (…continued)
in requesting such facts, a party may appeal that matter to the Commission on an interlocutory basis. *See Solar Sources, Inc.*, Unpublished Order dated May 16, 2018 (granting interlocutory review of 39 FMSHRC 2052 (Nov. 2017) (ALJ))." *American Coal II*, 40 FMSHRC at 991 n.6.

[2] Step two of the *Mathies* analysis focuses on "the extent to which the violation contributes to a particular hazard." The Commission has recently clarified that this step is "primarily concerned with likelihood of the occurrence of the hazard against which a mandatory safety standard is directed." *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2037 (Aug.2016) (*citing Knox Creek Coal Corp. v. Sec'y of Labor*, 811 F.3d 148, 163 (4th Cir. 2016)). Step two of the *Mathies* test involves a two-part analysis: 1) identification of the hazard created by the violation of the safety standard; and 2) "a determination of whether, based on the particular facts surrounding the violation, there exists a reasonable likelihood of occurrence of the hazard against which the mandatory safety standard is directed." *Newtown Energy,* 38 FMSHRC at 2038.

reasonably serious nature. *Mathies Coal Co.*, 6 FMSHRC 1, 3-4. (Jan. 1984).[3] The S&S determination should be made assuming "continued normal mining operations." *U.S. Steel Mining Co.,* 7 FMSHRC 1125, 1130 (Aug. 1985). This evaluation also considers the length of time that the violative condition existed prior to the citation and the time that it would have existed if normal mining operations had continued, without any assumptions regarding abatement. *Elk Run Coal Co.*, 27 FMSHRC 899, 905 (Dec. 2005); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984).[4]

Section 104(g)(1) of the Mine Act states that, if a representative of the Secretary finds a miner "who has not received the requisite safety training as determined under section 115 of this Act [30 U.S.C. § 825], the Secretary or an authorized representative *shall* issue an order under this section which declares such miner *to be a hazard to himself and to others*, and requiring that such miner be immediately withdrawn from the coal or other mine, and be prohibited from entering such mine until an authorized representative of the Secretary determines that such miner has received the training required by section 115 of this Act." 30 U.S.C. § 814(g)(1) (emphasis added).

In the proffered factual basis for settlement, both parties acknowledge that the miner did not have all of the mandatory safety training. The parties agree that on the day of the inspection, the miner had not received "[i]nstruction on the health and safety aspects of the tasks to be assigned" (30 C.F.R. § 46.5(b)(4)) and the "rules and procedures for reporting hazards." (30 C.F.R. § 46.5(b)(7)). Such training is a mandatory safety standard under Section 115 of the Mine Act. Section 104(g)(1) declares that such an untrained miner is "a hazard to himself and to others." The parties agree that the injury expected to result from the untrained miner violation is likely to result in lost workdays or restricted duty. Given these undisputed facts and principles of law, the Secretary can offer no persuasive explanation for why the violation should be modified by removing the S&S designation, other than the fact that is just more convenient to

[3] The Secretary, mine operators, and the federal appellate courts have accepted the *Mathies* test as authoritative. *See Knox Creek Coal Corp.*, 811 F.3d at 160 (noting federal appellate courts' uniform adoption of *Mathies* test and parties' recognition of authority of the test); *Mach Mining, LLC v. Sec'y of Labor*, 809 F.3d 1259, 1267 (D.C. Cir. 2016) (applying *Mathies* criteria); *Buck Creek Coal, Inc. v. Fed. Mine Safety & Health Admin.*, 52 F.3d 133, 135 (7th Cir. 1995) (recognizing wide acceptance of *Mathies* criteria); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving use of *Mathies* criteria).

[4] *See also Black Beauty Coal Co.*, 34 FMSHRC 1733, 1740 (Aug. 2012), *aff'd sub nom. Peabody Midwest Mining, LLC v. FMSHRC*, 762 F.3d 611 (7th Cir. 2014); *Rushton Mining Co.*, 11 FMSHRC 1432, 1435 (Aug. 1989); *Knox Creek*, 811 F.3d at 165-66 (upholding Commission's rejection of "snapshot" approach to evaluating S&S for accumulations violation); *Mach Mining*, 809 F.3d at 1267-68 (discussing the operative timeframe for violations in the context of S&S analyses).

make this violation go away.[5] Accordingly, I conclude that the Secretary failed to adequately explain why the modifications to the Order are "appropriate under the facts" within the meaning of *American Coal I.*

The Secretary argues that he is merely required to present facts upon which the parties have "agreed to disagree" and that the facts need not raise a "legitimate disagreement that can only be resolved by a hearing." *American Coal II*, 40 FMSHRC at 991. This is not a situation, however, where the parties have agreed to disagree. Rather, the undersigned's review of the proffered settlement agreement indicates that the parties have agreed to fundamental, undisputed facts that would establish an S&S violation: the miner had not received the required mandatory training, rendering him "a hazard to himself and to others" according to the express language in the Mine Act, and there is a reasonable likelihood that the untrained-miner hazard contributed to by the violation will result in an injury that would result in lost workdays or restricted duty.[6]

Contrary to the Secretary, *American Coal II* does not dictate that the undersigned approve this settlement agreement. In fact, that decision counsels toward the opposite conclusion in fulfillment of my statutory obligations to review settlement agreements to ensure consistency with Commission precedent and the purposes of the Act. In *American Coal II*, the parties agreed to a 30% reduction in the overall proposed assessment in the penalty docket without changing the paper text of any the citations. *Id*. at 989. The Commission agreed with the parties that "the fact that the proposed settlement preserves all of the citations as written could assist the Secretary in future enforcement efforts against this operator by ensuring that the paper record reflects the Secretary's views regarding gravity and negligence stated in the citations." *Id.*

In the present settlement agreement, by contrast, the parties seek to modify the likelihood of occurrence, the severity of injury, the S&S designation, and the negligence of the underlying Order. In addition, the parties seek to reduce the proposed penalty by well-nigh 94%. Almost any future enforcement benefit that the Secretary might derive from the Order, as written, has been almost completely eliminated by the proposed extensive modifications to the paper text of

[5] It should be noted that this Order neither challenges the Secretary's discretion to initially designate a violation as S&S nor raises the issue of whether a judge on his own initiative can designate a violation as S&S. *Cf. Mechanicsville Concrete, Inc.*, 18 FMSHRC 877 (June 1996). Rather, the question is whether a Commission judge must accept—once the Secretary has already designated a violation as S&S—a settlement of an S&S violation that is not fair, reasonable, or appropriate under the facts, and does not protect the public interest.

[6] Based on this determination, the undersigned finds it appropriate to recuse himself from any hearing on the merits in this matter, and requests that the Acting Chief Judge reassign this matter to another judge for hearing.

the Order.[7] While there is likely still some marginal enforcement benefit to the modified Order, it is nowhere near as substantive as the terms of the settlement in *American Coal II*, and nowhere near as substantive as the terms of the original Order.

Beyond failing to be fair, reasonable, and appropriate under the facts, the Motion fails to protect the public interest. The Mine Act was passed in 1977 in response to several accidents that caused the deaths of dozens of miners. As noted, Congress in particular was concerned with what it viewed as a pervasive practice of erstwhile regulators within the Department of the Interior, who surreptitiously sold out the public interest to protect our nation's miners based on a cozy relationship with mine operators. Specifically, the Senate Report stated that the "compromising of the amounts of penalties actually paid" had reduced "the effectiveness of the civil penalty as an enforcement tool." S. Rep. No. 95-181, at 44 (1977), *reprinted* in Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1971*, at 632. The facts here elicit concerns that this is the same type of convenient or misguided sellout that Congress sought to guard against when lodging final approval for settlement agreements in contested cases with the Commission.

The Secretary asks that I approve a 93.5% penalty reduction, as well as modifications to nearly every portion of the original Order issued for violation of a mandatory training standard, enshrined in the text of the Mine Act, on the basis of admitted facts that bear no interpretation

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[7] The Secretary includes the following language in every motion to approve settlement that he submits to the Commission:

> In reaching this settlement, the Secretary has evaluated the value of the compromise, the likelihood of obtaining a better settlement, and the prospects of coming out better or worse after a trial. In deciding that such a compromise is appropriate, the Secretary has not given weight to the costs of going to trial as compared to the possible monetary results that would flow from securing a higher penalty total. He has, however, considered the fact that he is maximizing his prosecutorial impact in settling this case on appropriate terms and in litigating other cases in which settlement is not appropriate. The Secretary believes that maximizing his prosecutorial impact in such a manner serves a valid enforcement purpose. Even if the Secretary were to substantially prevail at trial, and to obtain a monetary judgment similar to or even exceeding the amount of the settlement, it would not necessarily be a better outcome from the enforcement perspective than the settlement, in which all alleged violations are resolved and violations that are accepted can be used as a basis for future enforcement actions. A resolution of this matter in which all violations are resolved is of significant value to the Secretary and advances the purposes of the Act.

Motion at 2. Irrespective of the merits of such regularly-inserted and practical language, the undersigned notes that one Commissioner in *American Coal II* cogently observed that "[t]he Secretary's boilerplate recitations of having evaluated the value of the compromise, the prospects of coming out better or worse after a trial, and 'maximizing his prosecutorial impact' add nothing" to the factual basis in support of settlement. *American Coal II*, 40 FMSHRC at 989 n.10 (Cohen, C.).

other than the fact that Respondent violated the Act by allowing an untrained miner to work as a hazard likely to result in lost workdays or restricted duty injury to himself and other miners. The Secretary insists that the Commission has no right to seek clarification of the facts submitted to justify a settlement motion and that the Secretary has no obligation to respond to questions from Commission Judges regarding how he reached the conclusions he did in the settlement motion. Assuming arguendo that the Secretary is correct,[8] the undersigned is not obligated to approve a settlement agreement that lacks factual support and fails to be fair, reasonable, and appropriate under the facts, and to protect the public interest. Other than transparency, the undersigned sees little substantive distinction between MSHA's approach to the proposed settlement resolution in this case and the pre-1977 enforcement regime that led to creation of the Commission's settlement approval authority in the first instance.

Under section 110(k), Commission judges do not act as a rubber stamp for the Secretary's proposed settlement agreements. As outlined above, the proposed Settlement Agreement in this case lacks probative factual support, contains substantive admissions that amount to an S&S designation, contravenes Commission precedent, and collides with Congressional intent to protect the health and safety of our mining industry's most precious resource, our miners. Accordingly, the Secretary's Motion to Approve Settlement is **DENIED**.

Under Commission Procedural Rule 76, 29 C.F.R. § 2700, the undersigned certifies, on his own motion, that this interlocutory ruling involves a controlling question of law and that, in his opinion, immediate review will materially advance the final disposition of the proceeding. This Decision Rejecting Settlement raises similar issues to those currently before the Commission on assignments of error in *Solar Services, Inc.*, 39 FMSHRC 2052 (Nov. 2007) (ALJ). As such, there is a question of law that would materially advance the final disposition of the proceeding, to wit, whether the undersigned abused his discretion in denying the Secretary's Motion to Approve Settlement. *See American Coal II*, 40 FMSHRC at 987 ("The Commission reviews a Judge's denial of a proposed settlement under an abuse of discretion standard.").

This interlocutory ruling is hereby **CERTIFIED** under Commission Procedural Rule 76, 29 C.F.R. § 2700.76. It involves a controlling question of law and interlocutory review will materially advance the final disposition of the proceeding.

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

[8] *But see Solar Sources, Inc.*, Unpublished Order dated May 16, 2018 (granting interlocutory review of 39 FMSHRC 2052 (Nov. 2017) (ALJ)).

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