November 2016

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Review was granted in the following case during the month of November 2016:

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Secretary of Labor v. Tilcon New York, Inc., Docket No. YORK 2016-66-M, et al. (Judge Miller, October 6, 2016)

Secretary of Labor v. APAC-Kansas, Inc., Docket No. CENT 2015-1-M, et al. (Judge Bulluck, October 7, 2016)

Secretary of Labor v. GMS Mine Repair & Maintenance, Inc., Docket No. WEVA 2015-793-D (Judge Andrews, October 21, 2016)

COMMISSION ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

November 30, 2016

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), v. LINWOOD MINING AND MINERALS CORPORATION	Docket No. CENT 2014-599 A.C. No. 13-00097-359206

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On October 1, 2015, the Commission received from Linwood Mining and Minerals Corporation ("Linwood") a motion seeking to reopen a penalty assessment proceeding and relieve it from the Default Order entered against it.

On June 11, 2015, the Chief Administrative Law Judge issued an Order to Show Cause in response to Linwood's perceived failure to answer the Secretary of Labor's September 17, 2014 Petition for Assessment of Civil Penalty. By its terms, the Order to Show Cause was deemed a Default Order on July 13, 2015, when it appeared that the operator had not filed an answer within 30 days.

Linwood asserts that the company's safety director, tasked with contesting the proposed penalties, was extremely ill during 2015 and, as a result, was out of the office for extended periods of time. Despite assurances that the safety director had completed all of his assignments, Linwood claims that it discovered that this case was inadvertently ignored. Further, Linwood asserts that it will attempt to prevent future mistakes by instituting a review of all regulatory issues by the company's general counsel. The Secretary does not oppose the request to reopen.

The Judge's jurisdiction in this matter terminated when the default occurred. 29 C.F.R. § 2700.69(b). Under the Mine Act and the Commission's procedural rules, relief from a Judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2)(A)(i); 29 C.F.R. § 2700.70(a). If the Commission does not direct review within 40 days of a decision's issuance, it becomes a final decision of the Commission. 30 U.S.C. § 823(d)(1). Consequently, the Judge's order here has become a final decision of the Commission.

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

Having reviewed Linwood's request and the Secretary's response, in the interest of justice, we hereby reopen the proceeding and vacate the Default Order. Accordingly, this case is remanded to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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November 10, 2016

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	CIVIL PENALTY PROCEEDING Docket No. WEST 2016-0001 A.C. No. 02-02663-3909322
v.	
SOUTHWEST ROCK PRODUCTS, LLC, Respondent.	Mine: Portable #1

DECISION AND ORDER

Appearances: Ms. Hannah Harris-Yager, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado for Petitioner

Mr. John Palmer, Environmental Health and Safety Director, Southwest Rock Products, San Tan Valley, Arizona for Respondent

Before: Judge Moran

This case is before the Court upon a petition for assessment of a civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d) ("the Act"). At issue is Citation No. 8828132 ("the citation"), which requires areas such as workplaces and passageways to be kept clean and orderly. Respondent challenges the Secretary's allegation that a violation occurred. For the reasons which follow, the Court finds that the cited standard was not violated, as the mine had not started its operations at the time the citation was issued.

The citation alleges a violation of 30 C.F.R. §56.20003(a), which states: "Workplaces, passageways, storerooms, and service rooms shall be kept clean and orderly" at all mining operations. 30 C.F.R § 56.20003(a).

The citation states,

> Housekeeping was not kept in order in the work platform of the JCI shaker screen, C/N 5000, on the northeast side under the rock return belt. Material was observed built up to the rubber springs. Continued normal mining operations expose miners to lost workdays/restricted duty slip, trip and fall hazards. The work platform is accessed twice daily for pre-shift workplace examination making the chances of an accident occurring reasonably likely.

Ex. P-2.

A hearing was held on August 5, 2016 in Phoenix, Arizona, at which MSHA Inspector Joseph Summers Jr. and mine owner Chris Reinesch testified.

Factual Background

Respondent's Portable #1 is located in Pinal County, Arizona. It is a very small sand and gravel mine, which operates with 2 employees.[1] Tr. 93. The mine is a single bench, excavated by a front-end loader. Tr. 23. The cited area bordered a JCI shaker screen, which sizes sand and gravel. Tr. 23-24. Inspector Summers began inspecting the mine around 8:00 a.m. on July 7, 2015, accompanied by the lone employee present at that time, Mr. Preston Walters. Tr. 25. Importantly, the mine was not operational at the time of the inspection: Summers and Walters were the only people present at the time of the issuance of the citation. Tr. 40-41.

At 8:50 that morning, Summers wrote one citation concerning accumulated material on an elevated walkway bordering the three-level JCI shaker screen. The walkway is about 10 feet high; it is used to perform inspections and maintenance on the pulleys and belts that feed into the shaker screen, and to work on the shaker screen itself when necessary. Tr. 51-53. The parties do not dispute the inspector's finding that there was a pile of material built up on the elevated walkway, "almost to the top of the rubber screens that this shaker screen sits on." Tr. 25. Although the parties disputed when the cited accumulation began building up prior to the inspection, they agreed that the material had remained on the walkway throughout the 13 hours that had elapsed between the end of the evening shift when the mine closed for the day and the morning of the inspection the following day. Tr. 78-79.

Nor is it disputed that the operator had not yet conducted a preshift examination prior to Summers' inspection. The loader, an essential part of the two person operation, was down for repairs. It was only later in the day that the mine's Health and Safety Director, Mr. John Palmer, arrived along with the lead man and a Caterpillar representative. Tr. 35. The loader was still being serviced when Summers left the mine that afternoon. Tr. 60-61. Thus, from the time of the inspector's arrival to the time he left, the mine had never been operational. At the time of the inspection, the operator knew it was possible that the plant would be unable to run at all that day.[2]

Based on the evidence presented, upon applying the burden of proof the Secretary must meet, the Court concludes that no violation of the standard was established. The Court will first discuss the facts and case law highlighted by the Secretary at hearing and in his Post-Hearing Brief, and then turn to the Respondent's contentions.

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[1] The inspector testified that at the time the citation was issued, the mine employed 5 people. Tr. 23-24. Although the inspector spoke of 5 employees, testimony established that the mine is even smaller — the respondent clarified that only 2 people run the plant per shift. Tr. 93.

[2] As Palmer asked, "[T]he loader was — was not functional, so there was a possibility that the plant wouldn't have ran the whole day?" Tr. 96-97. Reinesch replied, "Yeah. Until we knew the loader was going to be up, but he didn't know when it would run." *Id*.

The Parties' Contentions

The Secretary's Contentions

According to Summers' observations, the dimensions of the cited accumulation were roughly: 12 inches high, covering the width of the walkway, and extending roughly 30 inches along the walkway, with tapered sides and the highest point in the middle.[3] Tr. 73-74. He testified that, because the toe board on the walkway is only about four inches high, some of the accumulated material appears to have spilled over the edge of the walkway. Tr. 114. This adds to the difficulty in estimating when the accumulation began.

The hazard that Summers identified in the citation was that a miner might trip and fall on the built up material he observed on the metal walkway. Tr. 39-40. However, he acknowledged that, due to the presence of a hand rail, there was little risk of someone falling off the walkway to the ground below. Tr. 53.

Summers concluded that material had been accumulating on the walkway over the course of multiple shifts, based on his observations of the quantity of the material as well as its color and texture.[4] Tr. 31-33. He noted that no pre-shift inspection had taken place before he arrived, and that the operator had taken no steps to remedy the accumulation.[5] Tr. 50-51. It was noteworthy that Summers testified that if he conducts an inspection in the middle of an afternoon shift, he does not cite material that has built up because "that's normal spillage during the course of the operation." Tr. 55-56. This strikes the Court as inconsistent, as it is not the condition which prompts the issuance of a citation, but rather the timing of its discovery. Under the inspector's approach, the walkway accumulation could continue uncited for hours on end so long as the walkway had been cleaned up at the start of the shift.

Based on this evidence, the Secretary argues that the citation must be upheld. Under his interpretation, the standard, "imposes a continuing obligation on the operator to ensure that workplaces, passageways, [and other areas] are clean and orderly" at all times. Sec'y's Post-Hearing Br. 10. He concludes, "Southwest Rock violated standard 56.20003(a) because it failed to keep the elevated walkway in a clean and orderly condition at all times." *Id*. However, the inspector himself did not espouse such a theory. The testimony establishes that such a

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[3] Inspector Summers has over 10 years of experience as an MSHA inspector, and approximately 40 total years of experience in the mining industry. Tr. 22-23. The mine's owner, Mr. Reinesch, has worked in the construction aggregate industry for 43 years, and founded Southwest Rock Products 15 years ago. Tr. 91.

[4] As discussed, *infra* at 6, during the hearing Summers offered inconsistent (and increasing) estimations of how long the accumulation had existed.

[5] As Inspector Summers testified, "[Mr. Walters] was the only one there… The loader is down. The lead man was off the property. And he wasn't cleaning up. He wasn't doing anything. He wasn't making any effort to correct the conditions that had existed, and he had plenty of opportunity to." Tr. 50-51.

construction would be impractical, causing the mine to repeatedly shut down its operation. Beyond that, during operation, the mine had access to the area blocked off by a chain.

The Secretary cites *Nally and Hamilton Enterprises* in support of this ongoing responsibility. *Nally and Hamilton Ent. Inc.*, 33 FMSHRC 1759 (2011). In *Nally*, an operator was cited for a violation involving a back-up alarm that had allegedly stopped functioning during a short interval after a pre-shift examination. *Id*. at 1760. The Commission overturned the ALJ's reasoning that there was only a violation after the operator had had a reasonable amount of time to discover and address a defective alarm, and held that the operator had an ongoing responsibility to ensure that warning devices on trucks are functional at all times. *Id.* at 1763. In other words, the respondent could not escape liability by arguing a lack of knowledge or negligence. As discussed below, there are salient differences between the facts of these two cases, but the Court's holding here does not in any way suggest that the standard cited contains a negligence or knowledge requirement.

A second precedent the Secretary cites is *Wake Stone Corporation*. *Wake Stone Corp.*, 36 FMSHRC 825 (2014). There, the operator prevented a MSHA inspector from operating a vehicle for the purposes of inspection, and insisted on first conducting a pre-operational examination. The Commission held that operators cannot avoid liability by insisting on a Section 56.14100 pre-operational examination when they learn of an impending MSHA inspection. *Id*. at 829. In the words of the Commission, the "strict liability nature of the Act does not allow for this sort of gamesmanship." *Id*. That case does not translate to the facts here, as the mine was not in operation, and in fact *could not* operate at the time the citation was issued.

The Court does not view either Nally or Wake Stone to be instructive. The mines were operating in those instances. By contrast, here not only was SW Rock not operating, the 2 man operation, with only 1 person present and with an essential piece of equipment broken, was incapable of conducting mining.

<u>Respondent's Contentions</u>

The Respondent challenged the Secretary's contention that the accumulated material had been present more than one shift prior to the inspection. Through Reinesch's testimony, it contended that the accumulated material appeared dry and hardened only because it had remained on the walkway for approximately 13 hours between the end of the evening shift and the inspection the following day. Tr. 78-79. Reinesch pointed out, "in the middle of July… it's over 100 degrees out. It don't take long for this material to make it look like it's old" in the desert climate. Tr. 99. He added that the vibration of the screen helps to separate the moisture from the rock and sand, so it becomes solid faster. *Id*.

Reinesch testified that, although he was not present on the day of the inspection and had no personal knowledge of the particular accumulation that gave rise to the citation, he has seen similar accumulations of material build up around conveyor belts and other equipment at the mine. Tr. 98-99. He stated that similar-looking material accumulates every shift at his mine, because "it's very fine material. It wants to stick to the belt, and it will come around the head pulley and drop on the catwalk." Tr. 102. Some of this fine material being fed onto the shaker

screen becomes stuck to the conveyor belt in part because the operator has to spray it with water to control dust. Tr. 98.

The essence of Respondent's defense was stated by Reinesch:

> We had not started up, and if – if the inspector would have shown up and the plant was running and that [the accumulation] was there and he had done a pre-trip and he could determine that it was from a prior shift, it would have been a violation… but this operator did not have an opportunity to clean it up because – just because there's that [accumulation] doesn't mean that's the first task of the – order of the day… That might be the very last thing that [the operator] conducts [sic] before he starts up. And that's – my position is – is that we weren't in violation because he never had an opportunity [to clean] before he started up."

Tr. 96.

Because some amount of accumulation near the feeder belt is inevitable, Reinesch testified that his company takes specific precautions to prevent a slip and fall injury: the area is restricted when the plant is in operation, and there is a chain and a sign across the entry to the elevated walkway. Tr. 103-04. He stated,

> If the plant is in operation, if the switch is on, this is a restricted area. Our policies and all our training[6] and everything dictates that you are not to enter this. The only time is when it's locked out.

Tr. 103.

These policies are in place specifically because there is "continual" accumulation from spilled material while the mine is in operation. Tr. 110. This spillage is due to the placement of the conveyor belt. Tr. 103. Reinesch testified that the company could not possibly remain competitive in the industry if they had to shut down operations for 30 minutes several times per shift to clean up small accumulations as soon as they occurred. Tr. 110-11. "I can't shut it down every 30 minutes and shovel it off. And this was – this – we were not given the opportunity to shovel this [walkway] off prior to starting." Tr. 103-04.

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[6] Respondent also presented evidence that the management instructs its employees on how to conduct a workplace examination. Tr. 106, referencing Ex. R-1.

The Court adopts Reinesch's testimony that, while the condition was present when the previous shift ended the night before the inspection, such accumulations below the conveyor occur continually due to the configuration of the mine.[7]

The Respondent opted to file a single brief in response to the Secretary's Post-Hearing Brief. Beyond highlighting some of the testimony from the hearing, Respondent also differentiated some of the non-precedential ALJ opinions that the Secretary cited for the proposition that similar accumulations have been found to violate Section 56.20003(a). Respondent's Post-Hearing Br. 2. Similar to the Court's analysis above, the Respondent also noted that the facts of *Wake Stone* are not analogous to the facts of this case:

> Southwest Rock Products' personnel never once asked to do a workplace exam *prior* to the inspector inspecting the plant. We are fully aware that, being able to conduct a workplace exam before an inspector inspects would jeopardize miner safety, as well as compromise MSHA's goal of protecting the miner… [Furthermore, it] is obvious that we are not dealing with safety defects on mobile equipment.

Id. at 3 (emphasis in original).

The Respondent then noted that, in the absence of MSHA policy guidance and inspector assistance, it has developed internal policies and procedures "to mitigate hazards to our miners, vendors and contractors before and during operations to comply with this standard." *Id.*

Finally, Respondent argued that adopting the Secretary's interpretation of the standard would lead to an undue burden on the operator and which would produce absurd results. *Id*. at 2. An interpretation requiring the Respondent to continuously monitor and clean workplaces and passageways would necessitate that it "operat[e] for approximately 1 hour, spen[d] approximately 1 hour to shut down the plant, lock it out, clean off all workplaces and travel ways and start the plant back up. This would effectively cut production time in half, making Southwest Rock Products uncompetitive in the industry." *Id*. This elaborates upon Reinesch's testimony, recounted above. *See* Tr. 110-11. The Court would add that, as miners do not use the walkway when the conveyor is running, a continuous clean up requirement would serve no safety value.

Discussion

The Secretary correctly points out that the regulatory standard contains no limiting language but, as noted here, the parties do not contest whether Respondent knew or should have

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[7] This view is supported by the inspector's testimony on cross examination. Respondent queried, "Would you say that 13 hours, wet material in July in Glendale, Arizona, would have enough time to dry and crusted over?" Tr. 78. Summers admitted, "During July, yes, it's possible for a surface crust, yes." Tr. 79. The Court notes that this undercuts the inspector's previous assessment on this point, although the central issue still remains that the mine was not operational at the time of inspection.

known of the accumulation. No one has suggested that the standard includes a knowledge or negligence requirement; it does not. Nor, as the Commission held in *Wake Stone*, would it be acceptable for a respondent to attempt to evade that citation through insisting on examining equipment and work-spaces ahead of an inspector. 36 FMSHRC at 829.

Whenever 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 (2000). The Secretary did not satisfy this burden as to two allegations: (1) that the accumulation had been present for more than one shift and, (2) that but for the inspection Respondent would have begun production before cleaning up the accumulated material. As Inspector Summers himself testified, he would not have written a citation for an accumulation at an inactive mining site were it not for his assessment on these two factors. Tr. 55-56.

Nor does the Court subscribe to Summers' estimate that the accumulation had been present for multiple shifts. Initially, when asked how long it had been on the walkway, Summers estimated, "more than one shift [because] in my mining experience, to have that much material [accumulate] in a six-hour period is uncommon for the mining industry." Tr. 33. Summers later increased his estimate, concluding that the condition had existed for "at least two shifts." Tr. 37. Against these estimations, Summers was told, "the plant ha[d] not run since 8:00 the previous evening, and no workplace examination ha[d] been conducted; and [he] was told, had the plant been in operation, the work platform would have been cleaned pre-shift." Tr. 40-41. The inspector agreed that Walters made that latter remark on pre-shift cleaning, "at the time of the issuance of the citation at 08:50 [a.m.]" Tr. 41. Although Summers did not believe this assertion, the Court finds the claim to be more credible since Walters made it at the time the citation was issued, rather than long afterwards. Tr. 43. Regardless, these contentions are overridden by the fact that the plant was not operating, nor capable of being operated, at the time of the citation's issuance.

Summers found it damning that the condition had not been abated while the plant was idle, noting that Walters "wasn't cleaning up. He wasn't doing anything. He wasn't making any effort to correct the conditions that had existed, and he had plenty of opportunity to." Tr. 51. Yet Summers also agreed on direct examination that "the operator isn't required to do pre-operational workplace examinations." Tr. 48. The Court notes that this is accurate — and because the mine was not operating at the time the citation was written, it is irrelevant to discuss duties that arise *during* a shift. In response to a hypothetical posed by the Court, Summers stated his belief that if the operator "performed the housekeeping *sometime* during that shift [when the accumulation occurred,] there wouldn't be a violation." Tr. 55 (emphasis added). At hearing, the Court inquired whether the inspector may have "jumped the gun" in issuing the citation. Tr. 54. Given the undisputed facts, that descriptive phrase remains apt.

The Secretary asked, "Inspector, is it your testimony that an operator has an obligation to clean up a spill *during* the shift in which the spill occurs?" Tr. 59 (emphasis added). Contradicting his own testimony, Summers responded, "Yes, they do." *Id.*[8] In the Court's view,

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[8] Summer also stated, "Yes, sir" on cross examination in response to the question, "Before they shut off business that night, they should have cleaned it?" Tr. 59.

an inspector attempting to declare when an accumulation in a restricted area of the mine must be cleaned, during an idle time between shifts, amounts to an attempt to assume the role of the mine's manager.[9] Certainly, the standard does not instruct that if a spill occurs near the end of a shift, it must be cleaned up before the day ends rather than before operations resume the following morning. Nor is it an MSHA inspector's role to make these determinations on granular "policies and procedures to protect [mine] employees and function as a sand and gravel operation." Tr. 69. Upon further questioning, the inspector testified that he would not have issued a citation if a worker had been in the process of cleaning the accumulated material when he arrived. Tr. 60. In the Court's view, the inspector realized during this exchange that his statement demonstrated that he was attempting to dictate when the cleanup had to occur; he then reversed course and confirmed that the mine was *never* in operation while he was present that day. Tr. 60-61.

The Court asked the inspector how he would have replied to the mine's safety director had he contended during the inspection that there was no violation, "as long as they clean [the spill] up before they resume operations." Tr. 62. Summers replied, "If Congress had intended for this particular regulation to be enforced in that way, it would have been stated so in the regulation. The regulation says they shall maintain." *Id*. Setting aside the inaccuracies in that statement (e.g., that the regulatory standard is not promulgated directly by Congress and does not contain the word "maintain"), the Court disagrees with the view that the Act requires constant and continual cleaning. MSHA has never publicly interpreted the housekeeping standard to contain this requirement either.[10]

Unlike the sporadic mechanical malfunctions at issue in the cases cited by the Secretary, gradual accumulation of wet sand and fine rock is a constant and inevitable challenge for Respondent during production. If operators like Southwest Rock were in violation of standard 56.20003(a) for every instance that an accumulation were allowed to stand, they would be forced to either be subject to repetitive penalties or to constantly, yet unnecessarily, in terms of safety, pause and restart operations in order to clean up accumulations. Such untenable conclusions allow the Court to apply reasonable interpretations in the context of the particular facts. *Allan Lee Good*, 23 FMSHRC 995, 997 (2001).

Recognizing the Secretary's illogical claims, at the conclusion of the hearing, the Court observed that the inspector may have issued the citation prematurely, and therefore requested that the Secretary consider vacating it. Tr. 120. Subsequently, the Secretary advised that it decided not to vacate the citation.

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[9] *See* Tr. 56; when questioned further on this perspective Summers retreated from this stance and responded, "I can't direct the workforce." Tr. 65, *see also* Tr. 69.

[10] As of October 2016, MSHA has not published any policy guidance pertaining to the housekeeping standard. At hearing, Summers testified that he did not rely on any policy documents in determining whether a violation had occurred. Tr. 70.

Conclusion

If Respondent had begun operating the mine during or before the inspection at issue, without first remedying the accumulation at issue, arguably there might have been a violation and this citation could have been upheld. However, there was no violation in this case because, at the time of the inspection, the mine was not in operation and only one person besides the inspector himself was present. The mine could not begin operations until the loader was fixed. In fact, when the inspector departed the mine was still not operating. It is not for the inspector to dictate the order of the safety items that a mine must address, a proposition which the inspector conceded several times during his testimony. Therefore, under these facts, the citation must be vacated.

ORDER

For the reasons stated above, the Court finds the Secretary did not establish a violation of 30 C.F.R. § 56.20003(a). Accordingly, Citation No. 8828132 is **VACATED**[11] and this matter is hereby **DISMISSED**.

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

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Mr. John Palmer, 85 West Combs Road, Suite 101, #444, San Tan Valley, AZ 85140, jpalmer@swrpaz.com

[11] In the alternative, had the Secretary successfully established a violation of Section 56.2003(a), the Court would, in light of the significant mitigating factors presented by the Respondent at hearing as to negligence and gravity, impose a greatly reduced civil penalty.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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November 10, 2016

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	CIVIL PENALTY PROCEEDING Docket No. WEST 2016-0001 A.C. No. 02-02663-390322
v.	
SOUTHWEST ROCK PRODUCTS, LLC, Respondent.	Mine: Portable #1

AMENDED DECISION AND ORDER[1]

Appearances: Ms. Hannah Harris-Yager, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado for Petitioner

Mr. John Palmer, Environmental Health and Safety Director, Southwest Rock Products, San Tan Valley, Arizona for Respondent

Before: Judge Moran

This case is before the Court upon a petition for assessment of a civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d) ("the Act"). At issue is Citation No. 8828132 ("the citation"), which requires areas such as workplaces and passageways to be kept clean and orderly. Respondent challenges the Secretary's allegation that a violation occurred. For the reasons which follow, the Court finds that the cited standard was not violated, as the mine had not started its operations at the time the citation was issued.

The citation alleges a violation of 30 C.F.R. §56.20003(a), which states: "Workplaces, passageways, storerooms, and service rooms shall be kept clean and orderly" at all mining operations. 30 C.F.R § 56.20003(a).

The citation states,

> Housekeeping was not kept in order in the work platform of the JCI shaker screen, C/N 5000, on the northeast side under the rock return belt. Material was observed built up to the rubber springs. Continued normal mining operations expose miners to lost workdays/restricted duty slip, trip and fall hazards. The

[1] This Amended Decision and Order is issued to correct a clerical error in the original decision, namely an incorrectly typed AC number.

work platform is accessed twice daily for pre-shift workplace examination making the chances of an accident occurring reasonably likely.

Ex. P-2.

A hearing was held on August 5, 2016 in Phoenix, Arizona, at which MSHA Inspector Joseph Summers Jr. and mine owner Chris Reinesch testified.

Factual Background

Respondent's Portable #1 is located in Pinal County, Arizona. It is a very small sand and gravel mine, which operates with 2 employees.[2] Tr. 93. The mine is a single bench, excavated by a front-end loader. Tr. 23. The cited area bordered a JCI shaker screen, which sizes sand and gravel. Tr. 23-24. Inspector Summers began inspecting the mine around 8:00 a.m. on July 7, 2015, accompanied by the lone employee present at that time, Mr. Preston Walters. Tr. 25. Importantly, the mine was not operational at the time of the inspection: Summers and Walters were the only people present at the time of the issuance of the citation. Tr. 40-41.

At 8:50 that morning, Summers wrote one citation concerning accumulated material on an elevated walkway bordering the three-level JCI shaker screen. The walkway is about 10 feet high; it is used to perform inspections and maintenance on the pulleys and belts that feed into the shaker screen, and to work on the shaker screen itself when necessary. Tr. 51-53. The parties do not dispute the inspector's finding that there was a pile of material built up on the elevated walkway, "almost to the top of the rubber screens that this shaker screen sits on." Tr. 25. Although the parties disputed when the cited accumulation began building up prior to the inspection, they agreed that the material had remained on the walkway throughout the 13 hours that had elapsed between the end of the evening shift when the mine closed for the day and the morning of the inspection the following day. Tr. 78-79.

Nor is it disputed that the operator had not yet conducted a preshift examination prior to Summers' inspection. The loader, an essential part of the two person operation, was down for repairs. It was only later in the day that the mine's Health and Safety Director, Mr. John Palmer, arrived along with the lead man and a Caterpillar representative. Tr. 35. The loader was still being serviced when Summers left the mine that afternoon. Tr. 60-61. Thus, from the time of the inspector's arrival to the time he left, the mine had never been operational. At the time of the inspection, the operator knew it was possible that the plant would be unable to run at all that day.[3]

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[2] The inspector testified that at the time the citation was issued, the mine employed 5 people. Tr. 23-24. Although the inspector spoke of 5 employees, testimony established that the mine is even smaller — the respondent clarified that only 2 people run the plant per shift. Tr. 93.

[3] As Palmer asked, "[T]he loader was — was not functional, so there was a possibility that the plant wouldn't have ran the whole day?" Tr. 96-97. Reinesch replied, "Yeah. Until we knew the loader was going to be up, but he didn't know when it would run." *Id*.

Based on the evidence presented, upon applying the burden of proof the Secretary must meet, the Court concludes that no violation of the standard was established. The Court will first discuss the facts and case law highlighted by the Secretary at hearing and in his Post-Hearing Brief, and then turn to the Respondent's contentions.

The Parties' Contentions

The Secretary's Contentions

According to Summers' observations, the dimensions of the cited accumulation were roughly: 12 inches high, covering the width of the walkway, and extending roughly 30 inches along the walkway, with tapered sides and the highest point in the middle.[4] Tr. 73-74. He testified that, because the toe board on the walkway is only about four inches high, some of the accumulated material appears to have spilled over the edge of the walkway. Tr. 114. This adds to the difficulty in estimating when the accumulation began.

The hazard that Summers identified in the citation was that a miner might trip and fall on the built up material he observed on the metal walkway. Tr. 39-40. However, he acknowledged that, due to the presence of a hand rail, there was little risk of someone falling off the walkway to the ground below. Tr. 53.

Summers concluded that material had been accumulating on the walkway over the course of multiple shifts, based on his observations of the quantity of the material as well as its color and texture.[5] Tr. 31-33. He noted that no pre-shift inspection had taken place before he arrived, and that the operator had taken no steps to remedy the accumulation.[6] Tr. 50-51. It was noteworthy that Summers testified that if he conducts an inspection in the middle of an afternoon shift, he does not cite material that has built up because "that's normal spillage during the course of the operation." Tr. 55-56. This strikes the Court as inconsistent, as it is not the condition which prompts the issuance of a citation, but rather the timing of its discovery. Under the inspector's approach, the walkway accumulation could continue uncited for hours on end so long as the walkway had been cleaned up at the start of the shift.

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[4] Inspector Summers has over 10 years of experience as an MSHA inspector, and approximately 40 total years of experience in the mining industry. Tr. 22-23. The mine's owner, Mr. Reinesch, has worked in the construction aggregate industry for 43 years, and founded Southwest Rock Products 15 years ago. Tr. 91.

[5] As discussed, *infra* at 6, during the hearing Summers offered inconsistent (and increasing) estimations of how long the accumulation had existed.

[6] As Inspector Summers testified, "[Mr. Walters] was the only one there… The loader is down. The lead man was off the property. And he wasn't cleaning up. He wasn't doing anything. He wasn't making any effort to correct the conditions that had existed, and he had plenty of opportunity to." Tr. 50-51.

Based on this evidence, the Secretary argues that the citation must be upheld. Under his interpretation, the standard, "imposes a continuing obligation on the operator to ensure that workplaces, passageways, [and other areas] are clean and orderly" at all times. Sec'y's Post-Hearing Br. 10. He concludes, "Southwest Rock violated standard 56.20003(a) because it failed to keep the elevated walkway in a clean and orderly condition at all times." *Id*. However, the inspector himself did not espouse such a theory. The testimony establishes that such a construction would be impractical, causing the mine to repeatedly shut down its operation. Beyond that, during operation, the mine had access to the area blocked off by a chain.

The Secretary cites *Nally and Hamilton Enterprises* in support of this ongoing responsibility. *Nally and Hamilton Ent. Inc.*, 33 FMSHRC 1759 (2011). In *Nally*, an operator was cited for a violation involving a back-up alarm that had allegedly stopped functioning during a short interval after a pre-shift examination. *Id*. at 1760. The Commission overturned the ALJ's reasoning that there was only a violation after the operator had had a reasonable amount of time to discover and address a defective alarm, and held that the operator had an ongoing responsibility to ensure that warning devices on trucks are functional at all times. *Id.* at 1763. In other words, the respondent could not escape liability by arguing a lack of knowledge or negligence. As discussed below, there are salient differences between the facts of these two cases, but the Court's holding here does not in any way suggest that the standard cited contains a negligence or knowledge requirement.

A second precedent the Secretary cites is *Wake Stone Corporation*. *Wake Stone Corp.*, 36 FMSHRC 825 (2014). There, the operator prevented a MSHA inspector from operating a vehicle for the purposes of inspection, and insisted on first conducting a pre-operational examination. The Commission held that operators cannot avoid liability by insisting on a Section 56.14100 pre-operational examination when they learn of an impending MSHA inspection. *Id*. at 829. In the words of the Commission, the "strict liability nature of the Act does not allow for this sort of gamesmanship." *Id*. That case does not translate to the facts here, as the mine was not in operation, and in fact *could not* operate at the time the citation was issued.

The Court does not view either Nally or Wake Stone to be instructive. The mines were operating in those instances. By contrast, here not only was SW Rock not operating, the 2 man operation, with only 1 person present and with an essential piece of equipment broken, was incapable of conducting mining.

<u>Respondent's Contentions</u>

The Respondent challenged the Secretary's contention that the accumulated material had been present more than one shift prior to the inspection. Through Reinesch's testimony, it contended that the accumulated material appeared dry and hardened only because it had remained on the walkway for approximately 13 hours between the end of the evening shift and the inspection the following day. Tr. 78-79. Reinesch pointed out, "in the middle of July… it's over 100 degrees out. It don't take long for this material to make it look like it's old" in the desert climate. Tr. 99. He added that the vibration of the screen helps to separate the moisture from the rock and sand, so it becomes solid faster. *Id*.

Reinesch testified that, although he was not present on the day of the inspection and had no personal knowledge of the particular accumulation that gave rise to the citation, he has seen similar accumulations of material build up around conveyor belts and other equipment at the mine. Tr. 98-99. He stated that similar-looking material accumulates every shift at his mine, because "it's very fine material. It wants to stick to the belt, and it will come around the head pulley and drop on the catwalk." Tr. 102. Some of this fine material being fed onto the shaker screen becomes stuck to the conveyor belt in part because the operator has to spray it with water to control dust. Tr. 98.

The essence of Respondent's defense was stated by Reinesch:

> We had not started up, and if – if the inspector would have shown up and the plant was running and that [the accumulation] was there and he had done a pre-trip and he could determine that it was from a prior shift, it would have been a violation… but this operator did not have an opportunity to clean it up because – just because there's that [accumulation] doesn't mean that's the first task of the – order of the day… That might be the very last thing that [the operator] conducts [sic] before he starts up. And that's – my position is – is that we weren't in violation because he never had an opportunity [to clean] before he started up."

Tr. 96.

Because some amount of accumulation near the feeder belt is inevitable, Reinesch testified that his company takes specific precautions to prevent a slip and fall injury: the area is restricted when the plant is in operation, and there is a chain and a sign across the entry to the elevated walkway. Tr. 103-04. He stated,

> If the plant is in operation, if the switch is on, this is a restricted area. Our policies and all our training[7] and everything dictates that you are not to enter this. The only time is when it's locked out.

Tr. 103.

These policies are in place specifically because there is "continual" accumulation from spilled material while the mine is in operation. Tr. 110. This spillage is due to the placement of the conveyor belt. Tr. 103. Reinesch testified that the company could not possibly remain competitive in the industry if they had to shut down operations for 30 minutes several times per shift to clean up small accumulations as soon as they occurred. Tr. 110-11. "I can't shut it down every 30 minutes and shovel it off. And this was – this – we were not given the opportunity to shovel this [walkway] off prior to starting." Tr. 103-04.

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[7] Respondent also presented evidence that the management instructs its employees on how to conduct a workplace examination. Tr. 106, referencing Ex. R-1.

The Court adopts Reinesch's testimony that, while the condition was present when the previous shift ended the night before the inspection, such accumulations below the conveyor occur continually due to the configuration of the mine.[8]

The Respondent opted to file a single brief in response to the Secretary's Post-Hearing Brief. Beyond highlighting some of the testimony from the hearing, Respondent also differentiated some of the non-precedential ALJ opinions that the Secretary cited for the proposition that similar accumulations have been found to violate Section 56.20003(a). Respondent's Post-Hearing Br. 2. Similar to the Court's analysis above, the Respondent also noted that the facts of *Wake Stone* are not analogous to the facts of this case:

> Southwest Rock Products' personnel never once asked to do a workplace exam *prior* to the inspector inspecting the plant. We are fully aware that, being able to conduct a workplace exam before an inspector inspects would jeopardize miner safety, as well as compromise MSHA's goal of protecting the miner… [Furthermore, it] is obvious that we are not dealing with safety defects on mobile equipment.

Id. at 3 (emphasis in original).

The Respondent then noted that, in the absence of MSHA policy guidance and inspector assistance, it has developed internal policies and procedures "to mitigate hazards to our miners, vendors and contractors before and during operations to comply with this standard." *Id.*

Finally, Respondent argued that adopting the Secretary's interpretation of the standard would lead to an undue burden on the operator and which would produce absurd results. *Id*. at 2. An interpretation requiring the Respondent to continuously monitor and clean workplaces and passageways would necessitate that it "operat[e] for approximately 1 hour, spen[d] approximately 1 hour to shut down the plant, lock it out, clean off all workplaces and travel ways and start the plant back up. This would effectively cut production time in half, making Southwest Rock Products uncompetitive in the industry." *Id*. This elaborates upon Reinesch's testimony, recounted above. *See* Tr. 110-11. The Court would add that, as miners do not use the walkway when the conveyor is running, a continuous clean up requirement would serve no safety value.

Discussion

The Secretary correctly points out that the regulatory standard contains no limiting language but, as noted here, the parties do not contest whether Respondent knew or should have

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[8] This view is supported by the inspector's testimony on cross examination. Respondent queried, "Would you say that 13 hours, wet material in July in Glendale, Arizona, would have enough time to dry and crusted over?" Tr. 78. Summers admitted, "During July, yes, it's possible for a surface crust, yes." Tr. 79. The Court notes that this undercuts the inspector's previous assessment on this point, although the central issue still remains that the mine was not operational at the time of inspection.

known of the accumulation. No one has suggested that the standard includes a knowledge or negligence requirement; it does not. Nor, as the Commission held in *Wake Stone*, would it be acceptable for a respondent to attempt to evade that citation through insisting on examining equipment and work-spaces ahead of an inspector. 36 FMSHRC at 829.

Whenever 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 (2000). The Secretary did not satisfy this burden as to two allegations: (1) that the accumulation had been present for more than one shift and, (2) that but for the inspection Respondent would have begun production before cleaning up the accumulated material. As Inspector Summers himself testified, he would not have written a citation for an accumulation at an inactive mining site were it not for his assessment on these two factors. Tr. 55-56.

Nor does the Court subscribe to Summers' estimate that the accumulation had been present for multiple shifts. Initially, when asked how long it had been on the walkway, Summers estimated, "more than one shift [because] in my mining experience, to have that much material [accumulate] in a six-hour period is uncommon for the mining industry." Tr. 33. Summers later increased his estimate, concluding that the condition had existed for "at least two shifts." Tr. 37. Against these estimations, Summers was told, "the plant ha[d] not run since 8:00 the previous evening, and no workplace examination ha[d] been conducted; and [he] was told, had the plant been in operation, the work platform would have been cleaned pre-shift." Tr. 40-41. The inspector agreed that Walters made that latter remark on pre-shift cleaning, "at the time of the issuance of the citation at 08:50 [a.m.]" Tr. 41. Although Summers did not believe this assertion, the Court finds the claim to be more credible since Walters made it at the time the citation was issued, rather than long afterwards. Tr. 43. Regardless, these contentions are overridden by the fact that the plant was not operating, nor capable of being operated, at the time of the citation's issuance.

Summers found it damning that the condition had not been abated while the plant was idle, noting that Walters "wasn't cleaning up. He wasn't doing anything. He wasn't making any effort to correct the conditions that had existed, and he had plenty of opportunity to." Tr. 51. Yet Summers also agreed on direct examination that "the operator isn't required to do pre-operational workplace examinations." Tr. 48. The Court notes that this is accurate — and because the mine was not operating at the time the citation was written, it is irrelevant to discuss duties that arise *during* a shift. In response to a hypothetical posed by the Court, Summers stated his belief that if the operator "performed the housekeeping *sometime* during that shift [when the accumulation occurred,] there wouldn't be a violation." Tr. 55 (emphasis added). At hearing, the Court inquired whether the inspector may have "jumped the gun" in issuing the citation. Tr. 54. Given the undisputed facts, that descriptive phrase remains apt.

The Secretary asked, "Inspector, is it your testimony that an operator has an obligation to clean up a spill *during* the shift in which the spill occurs?" Tr. 59 (emphasis added). Contradicting his own testimony, Summers responded, "Yes, they do." *Id*.[9] In the Court's view,

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[9] Summer also stated, "Yes, sir" on cross examination in response to the question, "Before they shut off business that night, they should have cleaned it?" Tr. 59.

an inspector attempting to declare when an accumulation in a restricted area of the mine must be cleaned, during an idle time between shifts, amounts to an attempt to assume the role of the mine's manager.[10] Certainly, the standard does not instruct that if a spill occurs near the end of a shift, it must be cleaned up before the day ends rather than before operations resume the following morning. Nor is it an MSHA inspector's role to make these determinations on granular "policies and procedures to protect [mine] employees and function as a sand and gravel operation." Tr. 69. Upon further questioning, the inspector testified that he would not have issued a citation if a worker had been in the process of cleaning the accumulated material when he arrived. Tr. 60. In the Court's view, the inspector realized during this exchange that his statement demonstrated that he was attempting to dictate when the cleanup had to occur; he then reversed course and confirmed that the mine was *never* in operation while he was present that day. Tr. 60-61.

The Court asked the inspector how he would have replied to the mine's safety director had he contended during the inspection that there was no violation, "as long as they clean [the spill] up before they resume operations." Tr. 62. Summers replied, "If Congress had intended for this particular regulation to be enforced in that way, it would have been stated so in the regulation. The regulation says they shall maintain." *Id*. Setting aside the inaccuracies in that statement (e.g., that the regulatory standard is not promulgated directly by Congress and does not contain the word "maintain"), the Court disagrees with the view that the Act requires constant and continual cleaning. MSHA has never publicly interpreted the housekeeping standard to contain this requirement either.[11]

Unlike the sporadic mechanical malfunctions at issue in the cases cited by the Secretary, gradual accumulation of wet sand and fine rock is a constant and inevitable challenge for Respondent during production. If operators like Southwest Rock were in violation of standard 56.20003(a) for every instance that an accumulation were allowed to stand, they would be forced to either be subject to repetitive penalties or to constantly, yet unnecessarily, in terms of safety, pause and restart operations in order to clean up accumulations. Such untenable conclusions allow the Court to apply reasonable interpretations in the context of the particular facts. *Allan Lee Good*, 23 FMSHRC 995, 997 (2001).

Recognizing the Secretary's illogical claims, at the conclusion of the hearing, the Court observed that the inspector may have issued the citation prematurely, and therefore requested that the Secretary consider vacating it. Tr. 120. Subsequently, the Secretary advised that it decided not to vacate the citation.

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[10] *See* Tr. 56; when questioned further on this perspective Summers retreated from this stance and responded, "I can't direct the workforce." Tr. 65, *see also* Tr. 69.

[11] As of October 2016, MSHA has not published any policy guidance pertaining to the housekeeping standard. At hearing, Summers testified that he did not rely on any policy documents in determining whether a violation had occurred. Tr. 70.

Conclusion

If Respondent had begun operating the mine during or before the inspection at issue, without first remedying the accumulation at issue, arguably there might have been a violation and this citation could have been upheld. However, there was no violation in this case because, at the time of the inspection, the mine was not in operation and only one person besides the inspector himself was present. The mine could not begin operations until the loader was fixed. In fact, when the inspector departed the mine was still not operating. It is not for the inspector to dictate the order of the safety items that a mine must address, a proposition which the inspector conceded several times during his testimony. Therefore, under these facts, the citation must be vacated.

ORDER

For the reasons stated above, the Court finds the Secretary did not establish a violation of 30 C.F.R. § 56.20003(a). Accordingly, Citation No. 8828132 is **VACATED**[12] and this matter is hereby **DISMISSED**.

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

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[12] In the alternative, had the Secretary successfully established a violation of Section 56.2003(a), the Court would, in light of the significant mitigating factors presented by the Respondent at hearing as to negligence and gravity, impose a greatly reduced civil penalty.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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November 10, 2016

MARK BAILEY, Complainant, v. REX OSBORNE, COLIN MILAM, ROCKWELL MINING, LLC, and GATEWAY EAGLE COAL CO., LLC, Respondents.	DISCRIMINATION PROCEEDING Docket No. WEVA 2016-241-D PINE CD-2016-03 Mine: Gateway Eagle Mine Mine ID: 46-06618

DECISION AND ORDER

Appearances: Samuel B. Petsonk & Sarah K. Brown, Mountain State Justice, Inc., Charleston, West Virginia, for Complainant;

Jonathan R. Ellis & Thomas S. Kleeh, Steptoe & Johnson, PLLC, Charleston, West Virginia, for Respondents Rockwell Mining, LLC, Rex Osborne, and Colin Milam.

Before: Judge Miller

This matter is before me on a complaint of discrimination and interference brought by Mark Bailey against Gateway Eagle Coal Company, LLC, Rockwell Mining, LLC, Rex Osborne, and Colin Milam pursuant to Section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815(c)(3). The parties presented testimony and documentary evidence at a hearing commencing on August 24, 2016, in South Charleston, West Virginia.

I. FINDINGS OF FACT

Mark Bailey was employed at Gateway Eagle Mine beginning February 5, 2014. The mine was operated at that time by Gateway Eagle Coal Company. Bailey alleges that he began making safety complaints in the fall of 2014 regarding conditions at the mine, and refused to operate his roof bolting machine in return air because of concerns about excessive dust. He alleges acts of interference with his refusal to work culminating in his suspension with intent to discharge on September 10, 2015. He seeks reinstatement to his former position, back pay, attorneys' fees, and other injunctive relief. Bailey has named as respondents Gateway Eagle Coal Company, LLC, and two of its employees, Rex Osborne and Colin Milam. He has also named Rockwell Mining, LLC, alleging that Rockwell is a successor-in-interest to Gateway Eagle.

Bailey's Safety Complaints

Mark Bailey started work as a roof bolter at the Gateway Eagle mine in February 2014. At the time, the mine was owned and operated by Gateway Eagle Coal Company. Bailey worked primarily at the No. 1 section on the left side and worked with a number of different bolting partners and supervisors. In the summer of 2014, the mine began a project of tunneling through the rock to create the No. 5 and No. 6 belt entries. According to Bailey, the height of the entry was around eight feet, but it increased to 10 or 12 feet as the crew worked into the No. 5 tunnel. He asserts that at that height, it became impossible to reach the roof with the bolter he normally used. He was instead forced to leave the protective canopy of the roof bolter and climb onto the machine or onto a ladder to install the bolts. Allen Holstein, Bailey's bolting partner at the time, agreed that they did sometimes bolt by standing on top of the machine.

Bailey testified that he brought the issues of the roof height to the attention of the union and management at weekly safety meetings. The mine superintendent, Rex Osborne, and the mine foreman, Steve Gibson, would have been present at those meetings. Holstein agreed that Bailey brought up the issue at the meetings, and said that management told Bailey to "put it to bed," which he took to mean forget about the issue. Osborne disagreed with Holstein's account, and instead explained that he was not aware that miners were standing on the machine to bolt. He stated that the maximum height of the roof in the No. 5 development area was 9 feet 5 inches, which the bolter should have been able to reach with extensions, ladders, or grease guns. While it was possible that miners had been taking a short cut, if he had known about it he would have told them to stop. He would not have allowed bolting without the use of the bolter's temporary roof support.

In the fall of 2014, Bailey brought his problem with the roof height to the attention of Marshall Justice, who was a union representative at the time. Justice filed a complaint with MSHA that resulted in an inspection but no citations were issued.

Sometime in the fall of 2015, Bailey asserts that he stood on top of the roof bolter in order to hang a ventilation curtain and fell off of the machine. He incurred a neck injury and reported the incident to the section boss, who filled out an accident report. Bailey claims that when Osborne learned of the incident, he encouraged Bailey to work light duty rather than taking time off so the company would not have to report a lost-time accident. A claim denied by Osborne. Bailey worked for several days on light duty, but then became unable to work and sought treatment. Osborne agrees that he called Bailey at home while he was off work. Bailey claims that Osborne asked him to tell the hospital he was sick rather than injured, and threatened that he would become a "target" if he made a compensation claim for the accident. Osborne denied Bailey's allegation and explained that he called to check on Bailey when Bailey did not show up for work, as he did with all miners. Bailey's absence from work for the injury was excused and I find Osborne's recount of the call to be the more reliable.

In addition to the roof height, Bailey had concerns about excessive dust while bolting. The mine's ventilation plan allows for roof bolting in return air once per shift, but in the fall or winter of 2014, Bailey and others expressed concern about the amount of dust when the continuous miner was operating. Bailey complained to management and the union at safety meetings about having to bolt in the return air, and also told Osborne that the dust was causing

health problems for him. A union representative, Gary Scott, conducted a safety run in the area in November or December 2014. He observed the dust and instructed the bolters and others in the area not to work in the dusty area. Scott spoke to the section foreman, Chris Blankenship, who called the shift foreman, Frank Javins. After some discussion, Javins agreed that miners would not be required to bolt in return air.

As Bailey describes it, he began refusing to bolt in the return air after Scott's inspection. Because of this, his section boss, Chris Blankenship, began to refuse to allow Bailey and his partner to take lunch breaks. Blankenship also kept records of how fast Bailey and his partner bolted and would watch them working and tell them to go faster. Bailey believes this was meant to intimidate him. He claims that he encouraged the bolters on the other section to refuse to work in return air as well, but they would not because of pressure from their section boss.

The mine's witnesses denied that miners were pressured to bolt in return air, though they admitted that the practice slowed production. Osborne testified that the issue was handled on the sections. When Scott told him that it was unsafe for miners to bolt in return air, management did not push back. Scott testified that while Osborne knew Bailey had complained about the dust, it was Scott who encouraged the miners to refuse to bolt, and management was aware of that. He stated that none of the miners had reported being pressured to bolt in return air. The foreman on Bailey's section, Conley Tadd Bailey, credibly testified that management did not pressure the sections to bolt in return air. He admitted that he discussed Bailey's bolting speed with him, but said that this was not related to Bailey refusing to bolt in return air. Osborne also met with complainant Bailey, along with a union representative, to discuss the rate at which Bailey was bolting. Osborne said that the low numbers were due to factors other than not bolting in return air, since Bailey was bolting more slowly than other miners who did not bolt in the return. Bailey was not disciplined for any problems involving his work. Finally, Scott, the union representative, explained that on the evening shift, miners are not given a full lunch break. Thus, if Bailey's supervisor told him to take a short lunch, it was probably not retaliation. After Bailey left the company, the crew continued not to bolt in return air. None of the other roof bolters, including those who worked with Bailey, have been discharged.

Bailey raised two other safety issues in early 2015. First, Bailey noticed an oil leak on the roof bolter which he believed it to be a hazard because the oil was leaking onto a portion of the machine where he climbed to reach the high roof. Bailey claims he told his shift boss of the problem three times and nothing was done. Bailey then spoke to a co-worker, Marshall Justice, who in turn made a complaint to MSHA. MSHA issued a citation and the bolter was repaired. There is nothing in the file to indicate that the mine knew, or tried to discover, who made the complaint to MSHA.

Finally, Bailey complained of a problem with the water supply to the underground machinery. The water came from a pond near the bath house, and around March 2015 it began to have a foul smell. Bailey raised the issue in safety meetings, as did other miners who believed they were getting ill from the water. Bailey had a respiratory infection around that time, which he believes may have been caused by the water. When Osborne learned of the foul-smelling water, he called the company responsible for treating the water and the matter was resolved by adding more chlorine to the water.

Bailey's Attendance Issues and Discipline

Throughout his employment at the mine, Bailey was subject to increasingly serious discipline based on his attendance. The mine has an attendance policy as a part of the contract with the UMWA. Attendance is monitored by the human resources department, which is off the mine site and handles attendance for several mines. The mine's witnesses testified that the plan is enforced uniformly. Miners at the mine are given a certain number of floating vacation and contractual personal or sick days. Those days are paid but must be scheduled 24 hours in advance. If a miner misses a day without providing advance notice, he will not be paid, but he may present a doctor's note to have the absence excused. An unscheduled absence for which a doctor's note is not provided is unexcused. Miners typically provide their excuses to a manager, and the managers send them to the payroll office. If there is a question about an excuse, it is handled by Colin Milam who works in the off-site human resources department.

In order to address chronic and excessive absenteeism at the mine, Gateway implemented a "standard attendance control program" consistent with the UMWA contract. *See* Ex. R-9. The program authorizes increasingly serious discipline for missing work. It is administered by Milam, using information he receives from the mines. Under the attendance plan, a miner would be subject to counseling if he had two unexcused absences in 30 days, three in 180 days, or four in 365 days. If after counseling the miner again accumulated two unexcused absences in 30 days, three in 180 days, or four in 365 days, and the miner is suspended with notice of intent to discharge.

In addition to this program, the mine maintained a chronic and excessive absenteeism program that dealt with all absences, including excused absences. If management determined that a miner was "chronically and excessively absent," they would notify him in writing that his attendance needed to improve. *See* Ex. R-9. If after receiving that notification the miner did not improve his attendance to at least the mine average, he would receive a final warning. If his attendance did not improve dramatically, the next step was suspension with intent to discharge. *Id*. The miner would remain on the program until he worked six months with an attendance rate at or better than the mine average. *Id*.

Bailey received a counseling letter pursuant to the standard attendance control policy on June 15, 2014. Ex. R-1. The letter referred to three unexcused absences in the previous 180 days: February 13, 2014; April 14, 2014; and June 6, 2014. The letter advised that if Bailey incurred another two unexcused absences in 30 days, three in 180 days, or four in 365 days, he would be discharged. A meeting was held to discuss the letter, in which Bailey claimed that the June 6th absence should have been excused. Bailey testified at hearing that he was involved in a car accident on June 5, 2014, and was hospitalized overnight. He claims that he produced a doctor's excuse on June 7th when he returned to work, but that the mine lost it. He gave Osborne another copy of the excuse, a hospital discharge report, on June 16 after he received the attendance control letter. A copy of the discharge slip was introduced as Complainant's Exhibit 7. Bailey testified that Osborne told him he would be taken off of the attendance control list at that time. However, he did not provide corroborating evidence at hearing that the attendance letter had been rescinded.

Bailey received a second attendance warning letter, two months later, on August 6, 2014. Ex. R-3. This notice was pursuant to the mine's chronic and excessive absenteeism program,

and alleged that Bailey's total absences from March 1, 2014, through July 31, 2014, were twice the mine average—6.61% days absent as opposed to the mine average of 3.09%. The June 6th absence would have counted against Bailey under this calculation whether or not the mine accepted his excuse. The letter stated that if Bailey did not improve his attendance to at least the mine average, he would be suspended with intent to discharge. At some point, Bailey was also disciplined for violating the mine's policy against tardiness and leaving early, but those actions were not noted in the attendance letter or action taken against Bailey.

Bailey received a third attendance warning letter on April 3, 2015, stating that he was being suspended with intent to discharge for a second violation of the standard attendance control program. Ex. R-2. It referred to three unexcused absences occurring in the preceding 180 days: December 5, 2014; January 27, 2015; and March 5, 2015. *Id*. A meeting, called a 24/48 hour meeting, was held shortly after with Bailey, a union representative, and management. Milam agreed at hearing that the mine received Bailey's excuse regarding the June 6th absence at this point. However, he stated that the hospital discharge report was not accepted as a valid excuse because, while it states that Bailey arrived at the hospital on June 5th at 11:19 p.m., it does not specify that he should be excused from work on June 6th. *See* Ex. C-7. Milam testified that Bailey could have been discharged after this 24/48 meeting, but was instead given a last chance agreement. *See* Ex. R-4.

When a miner reaches the suspension level of one of the attendance programs, the mine will frequently offer him a "last chance agreement" rather than discharging him immediately. The mine's union witnesses explained that in some instances, a last chance agreement can be extended even after it is violated. However, that is up to the mine's discretion and is based on the miner's attitude and work ethic or the presence of extenuating circumstances.

Bailey was put on a last chance agreement on April 13, 2015. Ex. R-4. The agreement was negotiated and signed with union representation present. It provided that Bailey would not incur another unexcused absence for 365 days and would maintain an absentee rate at or below the mine average. To have an absence excused for personal illness, he would need to present a doctor's note. His failure to meet the requirements of the agreement would subject him to discharge. Ex. R-4.

Bailey received his last attendance letter from the mine on September 10, 2015, stating that he was suspended with intent to discharge. The letter stated that Bailey incurred an unexcused absence on September 4, 2015, and failed to maintain an absentee rate at or below the mine average. *Id*. The months when he was over the average absentee rate were June and July, when he missed one day each because of illness. In response to the letter, Bailey produced a doctor's note relating to the September 4th absence. Ex. R-8. The note stated that Bailey was treated on September 5, 2015, but should have been excused from work for September 4, 2015. *Id*. Milam explained that the mine has an unwritten policy against accepting so-called "backdated doctor's excuses," where the employee was treated on one day but asks to be excused for an earlier day. The mine produced an example of an instance where it did not accept a similar backdated doctor's note from another miner. Ex. R-10. The union witnesses agreed that the company does not accept backdated doctors' excuses.

A 24/48 hour meeting was held to discuss Bailey's suspension with intent to discharge. Bailey presented his excuses for his absences to mine management and union representatives.

One of the excuses was a doctor's note excusing him from work on June 6, 2014, but it was dated over a year later for September 10, 2015. *See* Ex. R-6. Milam believed the excuse should have been submitted when Bailey was first put on the last chance agreement. Bailey also submitted a number of backdated doctors' excuses that the company had accepted in the past. Milam insisted that those were only accepted because the company had not noticed that they were backdated. In the course of the 24/48 hour meeting, Bailey admitted that in July 2015 he had taken a day off to deal with damage from a flood at his house, but had then obtained a doctor's excuse for that day to cover himself. Milam explained that in some instances, miners are given a second last chance agreement, but Bailey's admission of submitting a false excuse removed him from consideration of that option. The mine's union witnesses agreed. Bailey asserts that he raised the issue of discrimination at the 24/48 hour meeting, but the union and management witnesses agreed that he did not.

Following the 24/48 hour meeting, management informed Bailey that he would be discharged. The mine's witnesses testified that he was terminated for excessive absenteeism alone. Bailey asserts that others missed more work than he did but remained employed. Justice testified that one miner in particular was not fired even though he used a backdated doctor's excuse after being put on a last chance agreement. Carl Egnor, the UMWA president, believed the miner's last chance agreement was extended because he had missed work to care for his wife while she was sick. When miners are put on last chance agreements, Egnor said he tells them they need to be perfect and try not to miss work at all, even if they are sick. Gary Scott, the safety committee representative for the union, explained that few miners get their last chance agreements extended and that it depends on individual circumstances.

Bailey filed a grievance challenging his discharge, but was unsuccessful. The union elected not to pursue the grievance and withdrew its support after the 24/48 meeting. Bailey claims he raised the issue of discrimination at his 24/48 hour meeting, but the union and management witnesses did not recall any statements about MSHA at the meeting. Bailey filed a complaint of discrimination with MSHA on November 23, 2015, claiming that he had been discharged because he made safety complaints and refused to work in return air. MSHA notified him that it was declining to pursue the complaint on January 21, 2016. He filed his complaint with FMSHRC on February 22, 2016.

Rockwell's Acquisition of the Gateway Eagle Mine

When Bailey was employed at the Gateway Eagle Mine, it was owned and operated by the Gateway Eagle Coal Company ("Gateway"). Gateway and its parent company, Patriot Coal, filed voluntary petitions for relief under Chapter 11 on May 12, 2015. A bar date for creditors to file proofs of claim was set for June 27, 2015. In early June 2015, Patriot entered into an agreement with Blackhawk Mining for the company to purchase Patriot's assets, including the Gateway Eagle Mine. The plan of acquisition was confirmed by the bankruptcy court on October 9, 2015. *In re Patriot Coal Corp*., Ch. 11 Case No. 15-32450 (Bankr. E.D. Va. Oct. 9, 2015) (order confirming plan of reorganization) ("Confirmation Order").

Relevant to this case, the bankruptcy court's confirmation order of the sale of assets to Blackhawk states that the sale is "free and clear of all Liens, Claims and interests." Confirmation Order ¶ 114. It further states that:

> Blackhawk is not and shall not be deemed, as a result of any action taken in connection with the Blackhawk Transaction, to: 1) be a successor (or other such similarly situated party) to any of the Debtors) . . . .
>
> Blackhawk … is not, and shall not be, a successor to the Debtors by reason of any theory of law or equity . . . .
>
> [Blackhawk and its affiliates] shall have no successor or vicarious liabilities of any kind or character, including, but not limited to, any theory of antitrust, environmental, successor or transferee liability, labor, employment or benefits law … whether known or unknown as of the closing of the Blackhawk Transaction, then existing or hereafter arising … with respect to the Debtors . . . .

Confirmation Order ¶¶ 76, 116, 120.

Rockwell Mining, LLC, a subsidiary of Blackhawk, now operates the Gateway Eagle Mine. The parties agree that Rockwell's operation maintains the same location, production methods, product, and many of the same employees and supervisors that Gateway used. They also agree that Gateway no longer has any assets and is unable to provide relief to Bailey.

II. DISCUSSION

For the reasons that follow, I find that while Bailey has shown he engaged in a number of activities protected by the Act, he has failed to meet his burden of proof that he was a victim of discriminatory discharge or that the mine operator or its agents interfered with his rights under the Mine Act.

A. Bailey's Discrimination Claim

Section 105(c)(1) of the Mine Act provides that a miner cannot be discharged, discriminated against, or otherwise interfered with in the exercise of his statutory rights because he "has filed or made a complaint under or related to this Act, including a complaint notifying the operator … of an alleged danger or safety or health violation" or "because of the exercise by such miner … of any statutory right afforded by this Act." 30 U.S.C. § 815(c)(1).

In order to establish a prima facie case of discrimination under Section 105(c)(1), a complaining miner must produce evidence sufficient to support a conclusion that (1) he engaged in protected activity, (2) he suffered an adverse action, and (3) the adverse action was motivated at least partially by that activity. *Driessen v. Nev. Goldfields, Inc*., 20 FMSHRC 324, 328 (Apr. 1998); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co*., 3 FMSHRC 803, 817-18 (Apr. 1981); *Sec'y of Labor on behalf of Pasula v. Consol. Coal Co*., 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds sub nom. Consol. Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981). The burden of proof for a prima facie case is "lower than the ultimate burden of

persuasion, which the complainant must sustain as to the overall question of whether section 105(c)(1) has been violated." *Turner v. Nat'l Cement Co. of Cal.*, 33 FMSHRC 1059, 1065 (May 2011).

The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by the protected activity. *Driessen*, 20 FMSHRC at 328-29; *Robinette*, 3 FMSHRC at 818 n.20. The operator may also defend affirmatively by demonstrating that the adverse action was in part motivated by unprotected activity of the miner, and that it would have taken the adverse action based on the unprotected activity alone. *Driessen*, 20 FMSHRC at 328-29 (citing *Robinette*, 3 FMSHRC at 817; *Pasula*, 2 FMSHRC at 2799-2800). The operator bears the burden of persuasion for the affirmative defense. *Pasula*, 2 FMSHRC at 2800.

i. Protected Activity

The Act's discrimination provisions provide miners with protections against reprisal for certain protected activities in the hope that miners will be willing to aid in the enforcement of the Act and, in turn, improve overall safety. Section 105(c)(1) enumerates four protected activities: (1) filing or making a complaint under or related to the Act, including a complaint of an alleged danger or safety or health violation; (2) being the subject of medical evaluations and potential transfer under a standard published pursuant to Section 101; (3) instituting a proceeding under or related to the Act or testifying in such a proceeding; and (4) exercising "on behalf of himself or others . . . any statutory right afforded by this Act." 30 U.S.C. § 815(c)(1). The legislative history of the Mine Act states that Congress intended that "the scope of the protected activities be broadly interpreted." S. Rep. No. 95-181 at 35 (1977).

Bailey engaged in a number of protected activities. He believed that the roof in Section 1 of the mine was too high for the roof bolter and that the safety of the bolting process was thus compromised. He described having to stand on top of the machine instead of under the protective canopy to install bolts and hang the ventilation curtain. He brought his concerns about the roof height to his union representative and to mine superintendent, Rex Osborne, directly. Bailey also complained about the dusty conditions when bolting in return air. He reported the conditions to his union representative and to management, including Osborne and the shift foreman, Frank Javins. Bailey further complained to the union and management about a bad odor in the water sprays, and complained to his shift supervisor, Chris Blankenship, about oil leaking from the roof bolting machine. He informed his coworker Marshall Justice of an oil leak in the bolter and about the high roof, and Justice in turn reported those issues to MSHA. Bailey also alleges that he told those present at the 24/48 hour meeting that he was going to complain to MSHA.

The many safety complaints Bailey made to management and the union constitute protected activity as contemplated by the Mine Act. Bailey also argues in his post-hearing brief that he engaged in protected activity by naming Marshall Justice as his personal miner's

representative. However, he has offered no legal support for the existence of a right to name a personal miner's representative, and there is little in the record to support his assertion factually.[1]

ii. Adverse Action

Bailey was put on the first level of the standard attendance control program on June 15, 2014. He received a second attendance warning letter on August 6, 2014, and a third on April 3, 2015. He was put on a last chance agreement on April 13, 2015. On September 10, 2015, he was notified that he was suspended with intent to discharge, and a meeting and grievance hearing were held shortly thereafter where the discharge became final. Each of these actions culminating in the discharge constitutes an adverse action.

iii. Discriminatory Motive

To prove that discrimination has occurred, a complainant must show that an adverse action taken against him was motivated at least in part by his protected activity. *Driessen v. Nev. Goldfields, Inc*., 20 FMSHRC 324, 328 (Apr. 1998). Thus, Bailey must prove that at least one of the actions taken against him was based on either his safety complaints or his refusal to work in return air. A complainant is not required to produce direct evidence of an operator's motive, but rather may prove motive through circumstantial evidence. *Sec'y on behalf of Chacon v. Phelps Dodge Corp*., 3 FMSHRC 2508, 2510 (Nov. 1981). Facts that may be relevant to establishing motive include the timing of the adverse action in relation to the protected activity, the operator's knowledge of the protected activity, the operator's hostility or animus towards the protected activity, and disparate treatment. *Id*. at 2510-13.

In the instant case, the connection between Bailey's protected activities and his termination is tenuous. First, the timing of the adverse actions against Bailey weighs against a finding of illicit motive. Bailey first began making safety complaints in the fall of 2014. However, he received warning letters about his attendance prior to that, in June and August of 2014. While his ultimate discharge occurred after he made the complaints, the process leading up to the discharge was set in motion well before he engaged in protected activity.

The operator did have knowledge that Bailey was making safety complaints, which ordinarily weighs in favor of a finding of motive. Bailey raised his complaints about the roof height and excessive dust at safety meetings where management would have been present. However, decisions regarding the attendance discipline that Bailey received were made primarily by Colin Milam in the off-site human resources office. Milam sent out counseling letters and notices based on statistics sent to him from the mines and had little direct contact with miners. While it is possible that management conveyed to Milam that Bailey was making complaints or that Osborne would like to see Bailey terminated, there is no evidence to support that supposition

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[1] Bailey attached as an exhibit to his post-hearing brief a citation to the mine regarding Justice's status as a miner's representative. However, I indicated at the end of the hearing that the record was closed. Accordingly, the citation is excluded from the record. A discrimination complaint and records release attached as exhibits to Respondent Rockwell's post-hearing brief are also excluded.

in the record. For example, there is no evidence that Osborne and Milam spoke, how often or what subjects they may have addressed. Instead, the only evidence in the record is that Milam received attendance information from each mine and sent out a number of letters each month. Milam then attended the meeting with Osborne to discuss attendance letters with workers. In addition, Milam indicated through his testimony that he was isolated in a number of ways from the mines and from management.

Bailey also presented evidence that the operator exhibited animus towards Bailey's protected activity. On several occasions, his shift supervisor, Chris Blankenship, hassled him about bolting too slow. However, there is no evidence that Blankenship played any role in human resources decisions at the mine or that Osborne was aware of Blankenship's actions. Blankenship was let go on some undisclosed date and Bailey had a number of other foremen up until the time he was terminated. Bailey also alleges that Osborne was hostile to his protected activity. He states that he brought complaints to Osborne about having to stand on top of the roof bolter to bolt in certain areas of the mine, and that Osborne dismissed the issue. Osborne denies that he received such complaints, saying that he would not have allowed the practice of climbing and standing on the roof bolter. Bailey also testified that he at one point fell off the roof bolter and injured his neck, and that Osborne told him not to report the accident and threatened that Bailey would become a target if he made a compensation claim. The conversation is denied by Osborne and I credit the nature and content of the conversations as described by Osborne. Finally, Bailey alleges that mine management in general was hostile to his refusal to bolt in return air. He alleges that other roof bolters were pressured to bolt in return air and were afraid to refuse. However, the testimony of union and management witnesses indicated that most bolters at the mine did not bolt in the return, that it was accepted by the mine, and that no other roof bolter has been terminated who worked with Bailey or who refused to bolt in the return air. I credit the testimony of the union witnesses that the mine responded quickly to complaints about dust and did not pressure miners to bolt in return air.

Bailey has also not been able to show that he was treated differently than other miners. The mine had a strict attendance policy that was instituted to deal with attendance problems and appears to have been applied uniformly. At the final stage of the attendance program, mine management had discretion as to whether to discharge a miner. Bailey alleges that two other miners with attendance problems similar to his were not discharged after receiving a last chance agreement, whereas he was. One of those miners appears to have been excused because he had taken time off to care for his sick wife. There was little evidence regarding the second miner to show that Bailey was treated differently. Additionally, many of the issues Bailey complained about, such as the bad smelling water and the dust, were also complained about by other miners, and there is nothing to demonstrate that those miners were discharged or otherwise subject to an adverse action.

Moreover, I find that the mine had a legitimate reason to terminate Bailey's employment based on the attendance policy it had negotiated with the union. The documents produced at hearing show that Bailey missed the requisite number of days to receive counseling letters and to be discharged. He was given several opportunities to improve his attendance but failed to do so. Bailey argues that several of the days he missed should have been excused, and that the mine unfairly applied an unwritten rule against so-called backdated doctor's excuses as a pretext for

discharging him discriminatorily. However, the mine produced an example of a similar backdated excuse from another miner, which it did not accept. Finally, Bailey told those present at his discharge meeting that he had obtained a doctor's excuse for a day when he was not actually sick. It is true that management had the discretion to continue Bailey's last chance agreement after the discharge meeting. However, I find that their decision not to was based not on Bailey's safety complaints, but instead on his absences and his behavior in submitting a doctor's note for a day on which he was not sick. Bailey's absences and falsified excuse violated the mine's attendance policy and constituted just cause for discharging him.

In consideration of these factors, I find that Bailey has failed to prove that the mine had a discriminatory motive in discharging him, and that the mine had a legitimate business purpose for doing so.

iv. Affirmative Defense

A company that discriminates on the basis of protected activity may avoid liability by proving that its action was also motivated by unprotected activity, and it would have taken the action based on the unprotected activity alone. *Pero v. Cyprus Plateau Mining Corp*., 22 FMSHRC 1361, 1365 (Dec. 2000). While I find that the mine did not have a discriminatory motive in discharging Bailey, I will nevertheless address its affirmative defense.

In evaluating whether an operator had a legitimate, non-discriminatory reason for its action, the Commission looks to factors including "evidence of the miner's unsatisfactory past work record, prior warnings to the miner, past discipline consistent with that meted out to the complainant, and personnel rules or practices forbidding the conduct in question." *Pero*, 22 FMSHRC at 1365 (citing *Bradley v. Belva Coal Co*., 4 FMSHRC 982, 993 (June 1982)). The Commission has indicated that an affirmative defense should not be "examined superficially or be approved automatically once offered." *Id*. (quoting *Haro v. Magma Copper Co.*, 4 FMSHRC 1935, 1938 (Nov. 1982)). An employer's asserted justification is more likely to be pretextual if it is "weak, implausible, or out of line with the operator's normal business practices." *Id*. (quoting *Sec'y on behalf of Price v. Jim Walter Res., Inc.,* 12 FMSHRC 1521, 1534 (Aug. 1990)).

As described above, I find that the mine did have a legitimate reason to discharge Bailey because of his chronic attendance problems. He was disciplined throughout his time at the mine consistent with the mine's attendance policy. Even if mine management had a discriminatory reason for discharging Bailey, I find that he would have been discharged anyway because of his frequent absences and fraudulent doctor's excuse. I agree that the attendance policy was harsh, but it was enforced against all miners, and it was negotiated and agreed to by the union at the mine.

B. Bailey's Interference Claim

Bailey also alleges that mine management interfered with his rights under the Mine Act on a number of occasions. He has raised this claim inconsistently throughout the proceeding and often confuses the interference and discrimination causes of action. Bailey claims that several actions of mine management interfered with his right to refuse to work in unhealthy conditions.

First, he alleges that after he refused to bolt in return air, his shift boss, Chris Blankenship, denied him lunch breaks and sat on the deck of his bolting machine telling him to work faster. Bailey also alleges that Rex Osborne individually interfered with Bailey's rights by making comments pressuring him to work faster. He next alleges that in a safety meeting where miners complained about the dust levels in the mine, Osborne ran a dust monitor in his office and told the miners there was more dust in his office than underground. Bailey interpreted this as trivializing miners' complaints about the dust and discouraging them from making future complaints. Finally, Bailey alleges that Osborne threatened him with retaliation if he reported a workplace accident.

Section 105(c) of the Mine Act states that "[n]o person shall discharge or in any manner discriminate against … or *otherwise interfere with* the exercise of the statutory rights of any miner." 30 U.S.C. § 815(c)(1) (emphasis added). While the Commission has not yet settled on a test for analyzing interference claims, it has approved of the application of the test advocated by the Secretary in other litigation, under which a claim for interference is established when:

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

See Sec'y of Labor on behalf of McGary v. Marshall County Coal Co., 38 FMSHRC __, No. WEVA 2015-583-D, slip op. at 7 n.11, 22 n.22 (Aug. 26, 2016); *UMWA on behalf of Franks v. Emerald Coal Res., LP*, 36 FMSHRC 2088, 2108 (Aug. 2014) (Jordan & Nakamura, Comm'rs).

Here, I do not credit Bailey's allegation that Osborne threatened him with retaliation if he reported a workplace injury. Bailey asserts that he fell off a roof bolter and injured his neck in the fall of 2014. He worked light duty for several days after the incident, then became unable to work and sought treatment. He claims that Osborne called him at home and threatened that he would become a target if he made a compensation claim. Osborne agreed that he called Bailey to check on why he had missed work after the accident, but said he did not threaten Bailey or ask him not to report the accident. I found Osborne to be a credible witness and credit his account.

I also find that, while Blankenship may have limited Bailey's lunch breaks, this had nothing to do with Bailey's safety complaints. Bailey did not explain how this interfered with a protected right, but union representative Gary Scott testified that miners on Bailey's shift do not receive a full unpaid lunch, but rather are asked to take a short break during the shift. If Bailey is alleging that Blankenship somehow interfered with his right to make complaints about working in dusty returns, the allegation is not supported by the record.

As to Bailey's allegations regarding Blankenship and Osborne pressuring him to work faster, Osborne admits that he discussed Bailey's production levels with him and there is no dispute that Blankenship also addressed the issue with Bailey. While there is limited evidence on the issue, I credit Bailey's account of Osborne's comments about the dust monitor as the mine

did not dispute the account. However, I do not find that these occurrences constituted interference with Bailey's protected rights. While Bailey has the right to make safety complaints, Osborne and Blankenship were within their rights to tell Bailey to work faster. Osborne testified that Bailey's production rates were below that of other roof bolters, including those who did not bolt in return air. It is reasonable to expect a mine manager to address production issues with a miner and I cannot find that the manner in which it was done was intimidating. In any event, there is not sufficient evidence to surmise that the conversations were retaliatory or that they discouraged Bailey from refusing to bolt in return air. In fact, Bailey and other miners continued to bolt in return air. A reasonable person would not have interpreted the incidents described by Bailey as tending to interfere with his rights under the Act. As discussed above, the claims made by Bailey are more appropriately analyzed pursuant to the discrimination provisions.

The mine's witnesses credibly testified that it is common practice at the mine for miners not to work in return air. While there was brief discussion over the issue when it first arose, management quickly accepted the practice and does not object to it. The management and union witnesses indicated that miners are comfortable raising safety issues at the mine and are not pressured into working in unsafe or unhealthy situations. I do not find that the events alleged by Bailey jeopardized or interfered with his right to complain to the union or to the mine.

C. Liability of Colin Milam and Rex Osborne

There is no evidence that Milam or Osborne acted independently or engaged in any action that could be construed as discriminating against Mr. Bailey individually, and therefore the complaint against each is dismissed.

D. Liability of Rockwell Mining, LLC

Bailey has named Rockwell Mining, LLC, as a party in this action under a theory of successor liability. The Commission has determined that a corporate successor may be held liable for its predecessor's violations of the Mine Act. *Sec'y of Labor on behalf of Corbin v. Sugartree Corp*., 9 FMSHRC 394, 397 (Mar. 1987), *aff'd sub nom. Terco, Inc. v. Fed. Coal Mine Safety & Health Review Comm'n*, 839 F.2d 236 (6th Cir. 1987); *see also Munsey v. Smitty Baker Coal Co*., 2 FMSHRC 3463, 3465 (Dec. 1980) (applying successorship doctrine in a Coal Act case). Imposing successor liability in cases brought pursuant to federal labor and employment statutes is often necessary to achieve the statutory goal of protecting workers' rights, since "the workers will often be unable to head off a corporate sale by their employer aimed at extinguishing the employer's liability to them." *Teed v. Thomas & Betts Power Sol., L.L.C.*, 711 F.3d 763, 766 (7th Cir. 2013). While I have found that Bailey's discrimination and interference claims are without merit, I will nevertheless address the successor liability issue.

In analyzing whether it is appropriate to impose liability on a successor, the Commission applies a nine-factor test derived from Title VII case law. *Corbin*, 9 FMSHRC at 397-98; *Munsey*, 2 FMSHRC at 3465-66. The relevant factors are:

> 1) [W]hether the successor company had notice of the charge, 2) the ability of the predecessor to provide relief, 3) whether there has been a substantial continuity of business operations, 4) whether the

> new employer uses the same plant, 5) whether he uses the same or substantially the same work force, 6) whether he uses the same or substantially the same supervisory personnel, 7) whether the same jobs exist under substantially the same working conditions, 8) whether he uses the same machinery, equipment and methods of production and 9) whether he produces the same product.

Munsey, 2 FMSHRC at 3465-66 (alteration in original) (quoting *EEOC v. MacMillan Bloedel Containers, Inc*., 503 F.2d 1086, 1094 (6th Cir. 1974)).

The Commission has not specified what weight is to be given each factor of the *Munsey* test. However, some federal courts have determined that notice in successor liability cases is mandatory or nearly so. *See, e.g., Golden State Bottling Co., Inc. v. NLRB*, 414 US 168, 172 n.2 (1973) ("[O]ne who acquires and operates a business of an employer … under circumstances which charge him *with notice* of unfair labor practice charges against his predecessor should be held responsible . . . ." (emphasis added)); *Rabidue v. Osceola Ref. Co., a Div. of Tex.-Am. Petrochems.*, 805 F.2d 611, 616 (6th Cir. 1986) (finding that lack of notice removed the case from rationale of successor liability) *overruled on other grounds by Harris v. Forklift Sys., Inc*., 510 U.S. 17 (1993); *Scott v. Sopris Imports Ltd.*, 962 F. Supp. 1356, 1359 (D. Colo. 1997). These courts have emphasized that the successor liability doctrine is derived from equitable principles, and that "it would be grossly unfair, except in the most exceptional circumstances, to impose successor liability on an innocent purchaser … when the successor did not have the opportunity to protect itself by an indemnification clause in the acquisition agreement or a lower purchase price." *Musikiwamba v. ESSI, Inc*., 760 F.2d 740, 750 (7th Cir. 1985); *see also Teed*, 711 F.3d at 766. In view of the rationale for the notice prong, the relevant time for notice is at the transfer of the business. *Rabidue*, 805 F.2d at 616; *Musikiwamba*, 760 F.2d at 740.

As noted above, Rockwell acquired the Gateway Eagle mine after Rockwell's parent company, Blackhawk Mining, purchased the assets of Gateway's parent company, Patriot Coal, as part of Patriot's reorganization in bankruptcy. There is evidence that Rockwell has continued to use substantially the same employees and managers as did Gateway, as well as the same equipment at the same location. However, the evidence indicates that Rockwell did not have notice of the charge prior to Blackhawk's acquisition of Patriot. Bailey was suspended with intent to discharge on September 10, 2015. The plan confirming the sale of Patriot to Blackhawk was approved by the bankruptcy court on October 26, 2015. But Bailey did not file his complaint with MSHA until November 23, 2015. Further, the mine and union witnesses agreed that Bailey did not raise the issue of discrimination in his 24/48 meeting with the mine after his discharge or in his grievance of the discharge. I thus find that there is insufficient evidence to find that Rockwell and its management had knowledge of Bailey's intent to file a complaint with MSHA at the time of the acquisition of Patriot.

In light of the equitable principles underlying the successor liability doctrine, I conclude that it is inappropriate to impose liability where the successor did not have notice of the potential liability. Accordingly, I find that, even if Bailey had proven a valid claim of discrimination, it would be not be appropriate to impose liability on Rockwell.

Rockwell has also made the argument throughout this litigation that it cannot be held liable for the actions of Gateway because Rockwell's parent company, Blackhawk, purchased the Gateway mine in a bankruptcy sale "free and clear," and the bankruptcy court declared in the confirmation order that "Blackhawk … is not, and shall not be, a successor to the Debtors by reason of any theory of law or equity." I rejected this argument in an earlier order, finding that the bankruptcy court's determination that Rockwell is not a successor to Gateway could not be binding on Bailey consistent with due process. 38 FMSHRC __, No. WEVA 2016-241-D (July 14, 2016) (ALJ). I indicated to the parties at hearing that I would reconsider Rockwell's argument on this point based upon new case law on the issue, and the parties addressed the issue in their post-hearing briefs. After reviewing the new information, I conclude that my original order is correct and remains as issued. I incorporate my previous findings here.

V. ORDER

The complaints against Rex Osborne, Colin Milam, and Rockwell Mining, LLC, are hereby **DISMISSED**. Each party shall pay its own costs and expenses. Respondent Gateway Eagle Coal Company failed to appear at the scheduled hearing. Accordingly, it is **ORDERED** that Gateway Eagle Coal Company be held in default and that all relief sought by Bailey against Gateway is hereby awarded.

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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November 16, 2016

THE DOE RUN COMPANY,

Contestant,

v.

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

Respondent.

CONTEST PROCEEDINGS

Docket No. CENT 2016-279-RM
Citation No. 8626619; 03/17/2016

Sweetwater Mine/Mill
Mine ID 23-00458

Docket No. CENT 2016-280-RM
Citation No. 8626620; 03/17/2016

Viburnum #29 Mine
Mine ID 23-00495

Docket No. CENT 2016-281-RM
Citation No. 8626621; 03/17/2016

Brushy Creek Mine/Mill
Mine ID 23-00499

Docket No. CENT 2016-282-RM
Citation No. 8626622; 03/17/2016

Fletcher Mine/Mill
Mine ID 23-00409

Docket No. CENT 2016-283-RM
Citation No. 8626623; 03/17/2016

Viburnum #35 (Casteel Mine)
Mine ID 23-01800

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. THE DOE RUN COMPANY, Respondent.	CIVIL PENALTY PROCEEDINGS Docket No. CENT 2016-392 A.C. No. 23-00409-408952 Mine: Fletcher Mine and Mill Docket No. CENT 2016-393 A.C. No. 23-00458-408953 Mine: Sweetwater Mine/Mill Docket No. CENT 2016-394 A.C. No. 23-00495-408954 Mine: Viburnum #29 Mine Docket No. CENT 2016-395 A.C. No. 23-00499-408955 Mine: Brushy Creek Mine/Mill Docket No. CENT 2016-396 A.C. No. 23-01800-408957 Mine: Viburnum #35 (Casteel Mine)

DECISION APPROVING SETTLEMENT
ORDER TO DISMISS

Before: Judge Simonton

These dockets are before me upon The Doe Run Resources Corporation's ("The Doe Run Company" or "Doe Run") notices of contest and the Secretary's petitions for assessment of civil penalty issued in accordance with the provisions of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 *et seq.* ("Mine Act") and 29 C.F.R. § 2700.50 *et seq.* The Parties have filed a Joint Motion to Approve Settlement and Dismiss Proceeding, as well as a formal Agreement with Figures 1-8 appended thereto (the "Agreement").

On March 17, 2016, MSHA issued Citation Nos. 8626619, 8626620, 8626621, 8626622 and 8626623 to multiple Doe Run mines alleging violations of 30 C.F.R. § 57.11050(a) on the basis that two escapeways were not provided to the surface from all working areas. Doe Run timely contested the issuance of each citation pursuant to 29 C.F.R. § 2700.20. Doe Run further contested the proposed penalty assessments to the aforementioned citations pursuant to 29 C.F.R. § 2700.26. On August 19, 2016, I granted the Secretary's Unopposed Motion to Consolidate and

Stay Civil Penalty Proceedings which consolidated the Contest cases with the Civil Penalty cases and stayed the Civil Penalty cases pending a final resolution of the Contest cases.

Doe Run maintains that 30 C.F.R. § 57.11050(a) limits the two escapeway requirement to the lowest levels of the mine rather than all working areas. MSHA disagrees. Beginning on June 20, 2016, a four (4) day trial on the merits was held before me in St. Louis, Missouri. Recognizing, however, the risks associated with an adverse ruling against either Party, as well as facts and circumstances specific to the Doe Run mines and Department of Labor's administration of the Mine Act at these mines, the Parties engaged in significant settlement discussions following the trial which resulted in a comprehensive settlement agreement. As set forth in the Agreement, in consideration of MSHA voluntarily vacating Citation Nos. 8626619, 8626620, 8626621, 8626622 and 8626623, Doe Run will, among other things, locate and install Refuge Chambers and designated points of safety ("DPOS") in single access areas as specified in the Agreement.

The Commission has made clear that "[s]ettlement of contested issues is an integral part of dispute resolution under the Mine Act." *Hickory Coal Co., 16 FMSHRC 226 (Rev. Comm. February 1994)*. A settlement agreement is a form of contract; therefore, basic principles of contract law govern the existence and enforcement of such agreements. *Chaganti & Assocs., P.C. v. Nowotny*, 470 F.3d 1215, 1221 (8th Cir. 2006); *MLF Realty L.P. v. Rochester Ass'n,* 92 F.3d 752, 756 (8th Cir. 1996). To establish a contract with the United States, as is the case here, the party seeking to enforce the contract must demonstrate a mutual intent to contract, including an offer, an acceptance, and consideration, as well as a showing that the government representative had actual authority to bind the United States. *Compliance Sols. Occupational Trainers, Inc. v. United States*, 118 Fed. Cl. 402 (2014); *Anderson v. United States*, 344 F.3d 1343, 1353 (Fed. Cr. 2003).

After thoroughly reviewing the Agreement, it is clear to me that the Agreement is the product of extensive negotiation over a number of months between the Parties. It is further evident that the terms of the Agreement were negotiated and approved by Neal H. Merrifield, Administrator for Metal and Nonmetal Safety and Health, and Steve Batts, Vice-President Southeast Missouri Operations, both of whom have the authority to enter into the Agreement on behalf of MSHA and Doe Run, respectively. It is unmistakable that the Parties intend for the Agreement to be legally binding upon and shall inure to the benefit of each of them and their respective successors and assigns. In sum, I find that the Parties' Agreement contains all of the necessary elements of an enforceable contract, including mutual intent, offer, acceptance, consideration, and authority to bind.

It is also evident that the Agreement is designed (1) to resolve the current litigation and (2) absent future rulemaking modifying relevant miner escape provisions in Subpart J of 30 CFR Part 57, to provide a defined and enforceable means of compliance with the escapeway provisions contained in 30 C.F.R. § 57.11050(a) (as such standard exists as of the date of the Agreement) at all currently existing Doe Run mines (comprising of Sweetwater Mine/Mill, Mine ID No. 23-00458; Viburnum #29 Mine, Mine ID No. 23-00495; Brushy Creek Mine/Mill, Mine ID No. 23-00499; Fletcher Mine/Mill, Mine ID No. 23-00409; Viburnum #35 Casteel Mine, Mine ID No. 23-01800; and Buick Mine, Mine ID No. 23-00457) presently and in the future. In

the event Doe Run consolidates any of the aforementioned mines and/or MSHA assigns new Mine IDs to the aforementioned mines, the Parties intend for the Agreement to apply to the consolidated mine(s) (regardless of mine name) and newly issued mine IDs.

ORDER

After considering the representations and documentation submitted in this case, I conclude that the Agreement is appropriate under the criteria set forth in the Mine Act.

WHEREFORE, the Parties' Joint Motion to Approve Settlement and Dismiss Proceeding is **GRANTED**.

It is **ORDERED** that Citation Nos. 8626619, 8626620, 8626621, 8626622 and 8626623 are vacated.

It is **FURTHER ORDERED** that the Parties' Agreement be approved as an enforceable Order of the Federal Mine Safety and Health Review Commission.

It is **FURTHER ORDERED** that Doe Run locate and use Refuge Chambers and DPOSs and follow other protective provisions as provided in the Agreement.

It is **FURTHER ORDERED** that absent future rulemaking modifying relevant miner escape provisions in Subpart J of 30 CFR Part 57, the Agreement is to provide a defined and enforceable means of compliance with the escapeway provisions contained in 30 C.F.R. § 57.11050(a) (as such regulation exists as of the date of the Agreement) at all Doe Run mines (Sweetwater Mine/Mill, Mine ID No. 23-00458; Viburnum #29 Mine, Mine ID No. 23-00495; Brushy Creek Mine/Mill, Mine ID No. 23-00499; Fletcher Mine/Mill, Mine ID No. 23-00409; Viburnum #35 Casteel Mine, Mine ID No. 23-01800; and Buick Mine, Mine ID No. 23-00457) presently and in the future.

It is **FURTHER ORDERED** that the above-captioned Contest and Penalty dockets be dismissed.

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

Distribution: (U.S. First Class Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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November 21, 2016

SANDRA G. MCDONALD, Complainant, v. GEORGE KING, MARK TOLER, GUARDCO SECURITY, LLC, and NEW TRINITY COAL, INC., as successor-in-interest to FRASURE CREEK MINING, LLC, Respondents.	DISCRIMINATION PROCEEDING Docket No. WEVA 2014-387-D HOPE-CD 2013-10 Mine ID 46-07014 5G1

DECISION APPROVING SETTLEMENT
DISMISSAL ORDER
AND
ORDER TO PAY

Before: Judge Feldman

This case is before me based on a discrimination complaint filed on January 7, 2014, pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815(c)(3) (2006) (Mine Act). Sandra G. McDonald seeks to recover relief under Section 105(c) of the Mine Act,[1] based on her September 2013 termination of employment by George King and Mark Toler,[2] who were providing contract security guard services at a mine

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[1] Section 105(c)(1) provides, in pertinent part:

> No person shall discharge or in any manner discriminate against … any miner … because such miner … has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent … of an alleged danger or safety or health violation in a coal or other mine … or because such miner … instituted any proceeding under or related to this Act ….

30 U.S.C. § 815(c)(1).

[2] McDonald's initial complaint identified her employer as TMK Enterprise Security Services, Inc. ("TMK"). However, the evidence of record reflects that TMK's corporate status was terminated by the state of West Virginia on June 12, 2009. As McDonald began working for TMK in May 2011, McDonald was never employed by TMK, but rather was employed by King and Toler, the former principals of TMK, who were apparently operating their security services business as a non-corporate entity.

site operated by Frasure Creek Mining, LLC ("Frasure Creek"). McDonald's discrimination complaint alleges, *inter alia*, that her employment was terminated following safety complaints concerning the failure of employees to wear hardhats on Frasure Creek property, as well as King and Toler's failure to provide timely security guard refresher training.

On May 24, 2016, McDonald's request to amend her complaint to include Guardco Security, LLC ("Guardco"), and New Trinity Coal, Inc. ("New Trinity") was granted. 38 FMSHRC 1261 (May 2016) (ALJ Feldman). The amended complaint, with regard to Guardco, was granted based upon the following analysis:

> The undisputed fact that Guardco has employed Karen Payne as site supervisor for their operations, who was previously employed in the same capacity by King and Toler, for the purpose of performing, essentially, the identical security services performed by King and Toler, provides a colorable claim of successorship to include Guardco as a party at this stage of the proceeding.

Id. at 1263.

Additionally, New Trinity acquired the property of Frasure Creek following a January 2014 Chapter 11 bankruptcy proceeding. Consequently, New Trinity was added as a respondent in this matter as a successor-in-interest to Frasure Creek. *Id.* at 1264-65.

A hearing in this matter was scheduled for September 13, 2016. On September 11, 2016, two days before the scheduled hearing on the merits, McDonald advised that the parties had reached a settlement agreement. On November 4, 2016, McDonald filed a Motion to Approve Settlement and to Dismiss. As terms of the parties' settlement agreement, McDonald represents as follows[3]:

- McDonald has withdrawn her complaints against individual respondents George King and Mark Toler. *Mot. to Approve Settl. And to Dismiss,* at 2 (Nov. 4, 2016).

- Guardco agreed to pay $15,000.00 to McDonald, payable at the time the agreement was signed. *Id.* at Ex. A, p.1.

- Guardco agrees to pay $10,000.00 to Mountain State Justice for attorney fees in three monthly installments of $3,333.34, payable on the fifteenth day of October, November, and December 2016. *Id.*

- New Trinity agrees to pay $15,000.00 to McDonald, in two installments: $5,000.00 payable on or before October 30, 2016, and $10,000.00 payable on or before November 30, 2016. *Id.* at Ex. B, p. 1.

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[3] While neither Guardco nor New Trinity signed McDonald's Motion to Approve Settlement, on November 7, 2016, counsel for both respondents advised the undersigned via email that their clients agree to the terms of the agreement, as set forth by McDonald.

- New Trinity agrees to pay $10,000.00 to Mountain State Justice on or before October 30, 2016. *Id.*

ORDER

I have considered the representations and documentation submitted in this matter and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act. **WHEREFORE**, the motion to approve settlement **IS GRANTED**, and pursuant to the parties' agreement, Guardco Security, LLC **IS ORDERED** to pay, consistent with the agreed-upon payment schedule, $15,000.00 in damages to Sandra G. McDonald and $10,000.00 to Mountain State Justice in attorney fees. Furthermore, New Trinity Coal, Inc. **IS ORDERED** to pay, consistent with the agreed-upon payment schedule, $15,000.00 in damages to Sandra G. McDonald and $10,000.00 to Mountain State Justice in attorney fees.

In sum, Guardco Security, LLC, and New Trinity Coal, Inc. **ARE ORDERED** to pay a total of $50,000.00 to Complainant Sandra G. McDonald in damages and attorney fees, in accordance with the payment schedule noted above.

Accordingly, Docket No. WEVA 2014-387 **IS DISMISSED**.[4]

/s/ Jerold Feldman
Jerold Feldman
Administrative Law Judge

Distribution:

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Mark Toler, P.O. Box 88, Delbarton, WV 25670
George King, 1704 Jackson Avenue, St. Albans, WV 25177

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[4] McDonald has reported that, to date, New Trinity has failed to make the scheduled payments approved in this Order. The parties' agreed-upon payments constitute the final determination of the relief awarded to McDonald in this matter. Counsel for McDonald may take whatever legal actions deemed appropriate to compel New Trinity to perform as required by this Order.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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November 22, 2016

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. LEHIGH ANTHRACITE COAL, LLC, Respondent	CIVIL PENALTY PROCEEDINGS Docket No. PENN 2014-0108 A.C. No. 36-01761-340312 Docket No. PENN 2014-0109 A.C. No. 36-01761-340312 Mine: Tamaqua Mine
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. SHANE T. WETZEL, EMPLOYED BY LEHIGH ANTHRACITE COAL, LLC, Respondent.	CIVIL PENALTY PROCEEDING Docket No. PENN 2016-0135 A.C. No. 36-01761-402886A Mine: Tamaqua Mine

DECISION AND ORDER

Appearances: Jennifer L. Bluer, Esq., U.S. Department of Labor, Office of the Solicitor, Philadelphia, PA for Petitioner;

R. Henry Moore, Esq., Jessica M. Jurasko, Esq., Jackson Kelly, PLLC, Pittsburgh, PA for Respondents.

Before: Judge L. Zane Gill

These proceedings arise under the Federal Mine Safety and Health Act of 1977 ("the Mine Act"), 30 U.S.C. § 801 et seq. (1994). This case involves two citations issued by the Secretary of Labor ("Secretary") to Respondent Lehigh Anthracite Coal, LLC ("Lehigh") pursuant to sections 104(a) and 104(d)(1) of the Act, 30 U.S.C. § 814(a), 814(d)(1), and a civil penalty issued to Respondent Shane Wetzel pursuant to section 110(c), 30 U.S.C. § 820(c). The Secretary seeks to impose a total penalty of $23,514.00 against Lehigh for two alleged violations of health and safety standards and an individual civil penalty of $2,900.00 against Shane Wetzel in his capacity as an employee and agent of Lehigh for his involvement in one of the alleged violations.

The sole matter at issue in Docket No. PENN 2014-108 is Citation No. 8000958, which alleges that Lehigh violated 30 C.F.R. § 77.1006(a) by allowing an employee to work near or under a dangerous highwall and bank. The Secretary seeks a $23,229.00 penalty against Respondent Lehigh for this alleged violation. In addition, the Secretary seeks a $2,900.00 penalty against Respondent Wetzel in Docket No. PENN 2016-135 for his involvement in this alleged violation. In the sole matter at issue in Docket No. PENN 2014-109, Citation No. 8000959, the Secretary seeks a $285.00 penalty for Lehigh's alleged violation of 30 C.F.R. § 77.1710(g), which requires employees to wear safety belts and lines in situations where there is a danger of falling.

Counsel for Respondent initially filed a motion to dismiss the 110(c) proceeding for delay and prejudice, which I denied on April 8, 2016. The matter proceeded to hearing, and the parties presented testimony and evidence on April 12-13, 2016, in Allentown, Pennsylvania.

For the reasons discussed below, after considering all the evidence, I conclude that:

- For Citation No. 8000958, Lehigh violated Section 77.1006(a), injury was highly likely, the injury could reasonably be expected to be a fatality, the violation was significant and substantial and the result of the operator's unwarrantable failure to comply with the mandatory safety standard, one person was affected, and there was high negligence. I assess a penalty of $6,996.00 against Lehigh for the violation and a penalty of $1,000.00 against Wetzel for his knowing authorization of the violation.
- For Citation No. 8000959, Lehigh violated Section 77.1710(g), injury was reasonably likely, the injury could reasonably be expected to result in lost workdays or restricted duty, the violation was significant and substantial, one person was affected, and there was moderate negligence. I assess the proposed penalty of $285.00 for the violation.

I. STIPULATIONS

The parties have entered into the following stipulations of law and fact, which were listed in the parties' Joint Prehearing Statement:

1. At all relevant times, Lehigh Anthracite is/was an "operator" as defined in § 3(d) of the Federal Mine Safety and Health Act of 1977, as amended (hereinafter referred to as "the Mine Act"), 30 U.S.C. § 803(d), of the Tamaqua Mine.
2. 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.
3. The individual whose name appears in Block 22 of the citations in contest was acting in an official capacity and as an authorized representative of the Secretary of Labor when the Citations were issued.
4. The Citations were served by a duly authorized representative of the Secretary of Labor, the Mine Safety and Health Administration, upon an agent of Respondent on the date and place stated therein.

5. Shane T. Wetzel was the second-shift foreman at the times relevant to these matters.
6. The assessed penalties, if affirmed, will not impair Lehigh Anthracite's ability to remain in business.
7. The assessed penalty, if affirmed, will not affect Shane Wetzel's personal financial obligations.
8. In 2014, Lehigh Anthracite Coal, LLC, produced 705,963 tons of coal, of which 212,922 tons were produced from the Tamaqua Mine.
9. The penalty, if any, should be based in part upon the violation history summarized in Exhibit A to the penalty petitions in these dockets.

Jt. Prehearing Statement at 2-4.

II. FACTUAL BACKGROUND

The Mine and the Extraction Process

Lehigh's Tamaqua Mine is a 9000 acre open pit anthracite coal mine in Tamaqua, Pennsylvania, with several distinctive and noteworthy features. (Tr. 368:17-20) The pit that is the subject of these proceedings resembles the shape of a modified "V." (Tr. 26:16-17) On the north side there is a nearly vertical highwall, roughly 55 feet deep – but only 40 feet deep at the time of the cited conduct due to the presence of coal in the pit. (Tr. 26:16-17; 45:6-16; 48:22-24; 78:4 - 79:19) On the south side, forming the other side of the V, there is a coal seam and bottom rock (where the coal lies) at a slope of 50 degrees. (Tr. 26:18 - 27:11) The distance between the walls of the pit at the top is approximately 50-60 feet, but the distance narrows considerably further down such that the floor of the pit is only 10-30 feet wide. (Tr. 45:8-12; 469:9-17) Unlike a typical open pit mine containing a flat bed of coal extending out horizontally, there is not a large open area at the bottom of this pit capable of safely accommodating large vehicles and regular traffic in and out. (Tr. 159:5-17) Accordingly, the mine's ground control plan prohibits haulage roads from traveling through the pit.[1] (Tr. 222:20-23)

In order to extract coal, the company first blasts open the pit with explosives, mucks out overburden (rock covering the coal) to expose the coal seam, and digs out the coal from the pit with an excavator, which gradually increases the depth of the high wall. (Tr. 26:9-13; 357:25 - 358:3; 365:3-6) All loose rock dug from the pit is deposited in a spoil pile at the top found on both the north and south sides. (Tr. 29:6-14; 52:7-13) Coal, some of which falls from the southern seam, is then collected and retrieved at the bottom of the pit with the use of a dragline when the high wall becomes too unstable to keep an excavator in the pit. (Tr. 357:25 – 358:4)

[1] The mine's safety director, John Hadesty, testified that he believed this ground control provision was intended to protect vehicles from being struck by the dragline boom above, rather than any highwall or bank hazards. He also noted that the ground control plan does not explicitly prohibit miners from entering the pit, and that the mine does have roads that travel near bottom rock that is much higher than the southern coal seam in this pit. (Tr. 377:18 - 378:22)

The dragline is a track-mounted vehicle situated at the top of the pit — in this instance, on the west side — with a boom crane that extends out and a bucket attached to the boom which is lowered into the pit. (Tr. 25:25 - 26:15) A lift line moves the bucket closer or farther away from the crane operator. The operator drops the bucket down into the pit and then pulls it back with the dragline so that the bucket digs into and scoops up coal as it scrapes across the floor. (Tr. 26:3-6) Eventually, the bucket is lifted and withdrawn horizontally out of the pit area. The coal is ultimately deposited into a collection pile at the side of the pit. (Tr. 26:6-7) The bucket for the dragline involved in this matter is approximately nine feet long, six feet wide, four feet deep, and capable of holding seven cubic yards of material. (Tr. 345:8 - 346:2)

The Alleged Violations

On the night of June 19, 2013, in the middle of the process described above, a dragline operator stepped out of his cab briefly while the dragline was extended and the bucket was resting at the bottom of the pit. Conditions being dark at that time of the night, the dragline operator paused his work and exited the vehicle in order to replace a dying light bulb on the boom. While he was out of the cab, he felt a vibration which indicated that coal had fallen off the face of the seam and struck the bucket. On his way back to the cab, he felt a second vibration. By the time he returned to the cab, enough coal had fallen off the face to bury the entire bucket. This presented a problem for the company because the dragline operator was no longer able to retrieve the bucket through the normal operation of the dragline. The bucket would not budge as the operator attempted to raise or move it. (Tr. 60:14-20; 108:17-22; 110:11 - 111:7; 344:17 - 345:1; 431:8-16; Sec'y Ex. 10)

Mine management, specifically second-shift foreman Shane Wetzel, and hourly personnel arrived on the scene and (after trying again unsuccessfully to remove the bucket with the dragline) had an extended discussion regarding how to retrieve the bucket. (Tr. 431:17 - 433:16) One option was to abandon the bucket and sacrifice production for the day. Other options involved creating a new road to access the bucket, but such options were dismissed as infeasible or requiring too much time and loss of production. (Tr. 86:20 - 87:24; 433:21 - 434:7) Another option, which was apparently not considered initially but which eventually succeeded the following day, was to use another drag bucket to scoop down and unbury the first bucket. All of these options had the advantage of not placing any miners in harm's way. (Tr. 73:4-8; 206:2-210:15)

Instead, the company decided to allow an hourly employee, Erik Osenbach, to descend by foot, unsecured, down a steeply inclined path into the bottom of the pit from the southwest side to hook a chain around the "crow's foot" attached to the buried bucket. (Tr. 330:17 - 331:5; 335:3-13; 348:9-17) The crow's foot was the point at which the two control chains for the dragline attached to the bucket converged. (*See* Sec'y Ex. 11; Resp't Ex. 3) The company then attempted to use an excavator to pull the bucket out from under the muck using the chain it had attached to the crow's foot. However, the chain broke when the excavator attempted to pull it. (Tr. 59:17-19) Osenbach went down into the pit a second time and hooked a cable to the buried bucket's control chains in order to carry out the same plan. This attempt was equally unsuccessful. (Tr. 59:19-22)

Foreman Wetzel initially volunteered to enter the pit and carry out the attempt. (Tr. 331:6-10) However, Osenbach, an hourly employee, told Wetzel, "[You have] a wife and kids," and volunteered to go in his place.[2] Wetzel accepted Osenbach's suggestion, and Osenbach ended up going into the pit on both attempts instead. (Tr. 82:12-20; Sec'y Ex. 4 at 2) Osenbach was not provided with standard fall protection, but he did hold on to the drag rope as he descended. (Tr. 65:12-16) Lehigh turned on the dragline lights and provided the dragline operator with a horn to monitor conditions in the pit and to alert Osenbach if hazards developed. (Tr. 398: 17-20) As a part of the retrieval plan, Osenbach attempted to stay close to the side of the pit with the coal seam and tried to keep his distance from the highwall for his own safety. (Tr. 399: 1-4) The highwall contained cracks from prior blasting and a recent rock fall that indicated the possibility of additional rock falls. (Tr. 272:13 - 273: 24) Since the bucket was at the bottom of the pit and closer than the crow's foot to the most severe highwall hazard, the miners involved recognized that Osenbach should not venture past the crow's foot as far as the bucket. (Tr. 398: 22:25) Whether Osenbach actually did avoid travelling to the bottom of the pit is disputed by the parties. *See* Resp't Br. at 3; Sec'y Reply Br. at 3.

There is conflicting testimony about whether the company took any other safety precautions before sending Osenbach into the pit. Wetzel told an MSHA inspector that the area where Osenbach entered the pit was "benched," that is purposefully filled with material, to decrease the slope of the path down to the pit. (Tr. 38:14 – 39:19) In contrast, another employee told the inspector, and Osenbach testified at hearing, that the area was filled in to allow the excavator tasked with pulling out the bucket room to move closer to the buried bucket so that the chain attached to the excavator could reach the bucket. (Tr. 40:1-5; 344:10-13) And Osenbach and the excavator operator on the scene at the time, Richard Rudinsky, both informed MSHA, and testified at hearing, that the area was not benched until Osenbach had already descended into the pit once. (Tr. 103:4-16; 240:10-15; 340:16-25; 361:19 - 362:1)

An unidentified individual called MSHA on June 24 to report the hazardous condition described above.[3] (Tr. 22:20 - 23:3) That same day, MSHA supervisor Tom Yencho called the mine and issued a verbal imminent danger order over the phone, and then MSHA Inspector David Labenski traveled out to the mine and conducted interviews with Lehigh employees primarily to discover whether the situation still posed an imminent danger to anyone at the mine. (Tr. 31:6-16; 67:18-21; 183:1 - 185:9) When Labenski arrived, he learned that the situation had actually occurred five days earlier, on June 19, and that the bucket had been successfully removed from the area on June 20, four days earlier. (Tr. 67:18-19; 71:3-5) This was accomplished by first detaching the buried drag bucket from the dragline machine, attaching another bucket from another dragline machine to the dragline over the pit, and using that bucket

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[2] Osenbach and Wetzel testified that the "wife and kids" comment was made in jest in reference to the number of children Wetzel has. (Tr. 331:11-16; 449:6-15)

[3] Pursuant to section 103(g) of the Act, miners may call MSHA anonymously to report a hazardous condition, and if it is determined that a miner has reasonable grounds to believe that a violation of the Act or a mandatory health or safety standard exists, or that an imminent danger exists, MSHA will send an inspector immediately to the mine to investigate the complaint. 30 U.S.C. § 813(g)(1).

to scoop down and unbury the bucket. (Tr. 72:19-25; 246:11-17) Further, during that time, the company had conducted its own thorough investigation into the matter, which included photographing the condition and taking statements from the individuals involved. Indeed, much of the evidence at hearing derived from this investigation. (Tr. 138:11-14) At the conclusion of its investigation, the company sanctioned and gave written counseling to four individuals involved in the situation, including Wetzel.[4] (Tr. 73:12 - 74:6)

After informing Lehigh that there was no imminent danger at the mine, Labenski returned to the mine with MSHA supervisors Tom Yencho and George McIntyre, and MSHA continued its investigation over the next several days. (Tr. 67:9-69:6) MSHA ultimately concluded that the company had violated multiple surface coal health and safety standards in sending Osenbach into the pit under or near dangerous highwalls and banks without sufficient fall protection. MSHA also determined that Wetzel should be held individually liable for knowingly authorizing Osenbach's entry into the pit.

III. LEGAL PRINCIPLES

Section 110(c) Liability

Section 110(c) of the Mine Act provides that "[w]henever a corporate operator violates a mandatory health or safety standard … any director, officer, or agent of such corporation who knowingly authorized, ordered or carried out such violation shall be subject to the same civil penalties" as the corporate operator. 30 U.S.C. § 820(c).

Thus, as a threshold matter, section 110(c) requires a showing that the individual respondent is a director, officer, or agent of a corporate operator. A necessary predicate for 110(c) liability is a finding that the operator violated the Mine Act. *Kenny Richardson*, 3 FMSHRC 8, 9-11 (Jan. 1981), *aff'd on other grounds*, 689 F.2d 632 (6th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983).

Importantly, section 110(c) also requires a showing that the individual respondent knowingly authorized, ordered, or carried out the violation. The Commission has construed "knowingly" to include both actual and constructive knowledge, explaining that 110(c) liability is triggered whenever a person "in a position to protect employee safety and health fails to act on the basis of information that gives him *knowledge or reason to know* of the existence of a violative condition." *Kenny Richardson*, 3 FMSHRC at 15-16 (emphasis added); *accord Sumpter v. Sec'y of Labor*, 763 F.3d 1292, 1299-1300 (11th Cir. 2014); *Freeman United Coal Mining Co. v. FMSHRC*, 108 F.3d 358, 362-64 (D.C. Cir. 1997). Specific intent is not required. The Secretary must prove only that the individual knowingly acted, not that the individual knowingly violated the law. *McCoy Elkhorn Coal Corp.*, 36 FMSHRC 1987, 1996 (Aug. 2014) (citing *Warren Steen Constr. Co.*, 14 FMSHRC 1125, 1131 (July 1992)). Although a showing of willfulness is not required either, "section 110(c) liability is generally predicated on

[4] The citing inspector claimed that these disciplinary actions played no part in his own decision making in this proceeding, and likewise I will not rely on those actions for my own findings. (Tr. 74:18-21)

aggravated conduct constituting more than ordinary negligence." *Ernest Matney*, 34 FMSHRC 777, 783 (Apr. 2012) (citing *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1245 (Aug. 1992)); *see also Freeman United*, 108 F.3d at 360.

Whether conduct is "aggravated" is determined by looking at all the facts and circumstances of the case to see if any aggravating or mitigating factors exist. *Manalapan Mining Co.*, 35 FMSHRC 289, 293 (Feb. 2013); *IO Coal Co.*, 31 FMSHRC 1346, 1351 (Dec. 2009); *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000); *Big Ridge, Inc*., 34 FMSHRC 119, 125 (Jan. 2012) (ALJ Zielinski). These include: (1) the extent of the violative condition; (2) the length of time that the violative condition existed; (3) whether the violation posed a high degree of danger; (4) whether the violation was obvious; (5) the respondent's knowledge of the existence of the violation; (6) the respondent's prior efforts in abating the violative condition; and (7) whether the respondent had been previously placed on notice that greater efforts were necessary for compliance. *Sierra Rock Products, Inc*., 37 FMSHRC 1, 4 (Jan. 2015); *ICG Hazard, LLC*, 36 FMSHRC 2635, 2637 (Oct. 2014); *Manalapan*, 35 FMSHRC at 293; *IO Coal*, 31 FMSHRC at 1351-57; *Consolidation Coal*, 22 FMSHRC at 353; *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev'd on other grounds*, 195 F.3d 42 (D.C. Cir. 1999); *Midwest Material Co.*, 19 FMSHRC 30, 34 (Jan. 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *BethEnergy Mines, Inc*., 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988); *see also Ernest Matney*, 34 FMSHRC at 783-87 (analyzing aggravated conduct in 110(c) case by discussing unwarrantable failure factors).

Assuming that 110(c) liability applies, the gravity of the violation and negligence must also be evaluated in accordance with the Commission's well-established legal principles, summarized below, in order to determine the appropriate penalty.

Significant and Substantial (S&S)

Two of the citations at issue in this case have been designated by the Secretary as significant and substantial ("S&S"). 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 question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987). S&S enhanced enforcement is applicable only to violations of mandatory health and safety standards. *Cyprus Emerald Res. Corp. v. FMSHRC*, 195 F.3d 42, 45 (D.C. Cir. 1999). The Secretary bears the burden of proving all elements of a citation by a preponderance of the evidence. *In re: Contests of Respirable Dust Sample Alteration Citations: Keystone Coal Mining Corp.*, 17 FMSHRC 1819, 1838 (Nov. 1995), *aff'd*, 151 F.3d 1096 (D.C. Cir. 1998); *Jim Walter Res., Inc.*, 30 FMSHRC 872, 878 (Aug. 2008) (ALJ Zielinski) ("The Secretary's burden is to prove the violations and related allegations, e.g., gravity and negligence, by a preponderance of the evidence.").

In *Mathies Coal Co.*, the Commission established the standard for determining whether a violation was S&S:

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

6 FMSHRC 1, 3-4 (Jan. 1984).

The second prong addresses the extent to which the violation contributes to a particular hazard, and is primarily concerned with the "*likelihood* of the occurrence of the hazard…." *Newtown Energy, Inc.,* 38 FMSHRC 2033, 2037 (Aug. 2016) (citing *Knox Creek Coal Corp. v. Sec'y of Labor*, 811 F.3d 148, 162 (4th Cir.)) (emphasis added). By contrast, the third prong is "primarily concerned with *gravity* –the seriousness of the expected harm." *Knox Creek Coal Corp.*, 811 F.3d 148 at 162. The 'hazard' at issue is the relevant concept tying together the second prong's "likelihood" analysis and the third prong's "gravity analysis." *Newtown Energy, Inc.*, 38 FMSHRC at 2037. The Commission has made explicit that an ALJ must "adequately define the particular hazard to which the violation allegedly contributes." *Id.* at 2038. The 'hazard' must be "clearly defined" and defined in terms of "the prospective danger the cited safety standard is intended to prevent." *Id*.

After first "[h]aving clearly defined the hazard," the ALJ's next task at the second prong is to assess "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 Judge concludes, based upon the evidence, that the violation sufficiently contributes to the 'hazard' defined in the second prong, the Judge then *assumes* the occurrence of the hazard in analyzing the third prong. *Id*. (citing *Knox Creek Coal Corp*., 811 F. 3d at 161-62; *Peabody Midwest Mining, LLC*, 762 F.3d at 616; *Buck Creek Coal*, 52 F.3d at 135).

In the third prong of the *Mathies* test, the Judge must assess whether the assumed hazard would be reasonably likely to result in an injury. The Secretary, however, "need not prove a reasonable likelihood that the violation itself will cause injury." *Cumberland Coal Res.*, 33 FMSHRC 2357, 2365 (Oct. 2011) (citing *Musser Eng'g, Inc.*, 32 FMSHRC 1257, 1281 (Oct. 2010)), *aff'd*, 717 F.3d 1020 (D.C. Cir. 2013). Further, the Commission has found that "the absence of an injury-producing event when a cited practice has occurred does not preclude a determination of S&S." *Id*. (citing *Elk Run Coal Co.*, 27 FMSHRC 899, 906 (Dec. 2005) and *Blue Bayou Sand & Gravel, Inc.*, 18 FMSHRC 853, 857 (June 1996)). This evaluation is also made in consideration of the length of time that the violative condition existed prior to the citation and the time it would have existed if normal mining operations had continued. *Elk Run Coal Co.*, 27 FMSHRC at 905; *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). In its

recent *Knox Creek* opinion, the Fourth Circuit also found that "[e]vidence of intended but not-yet begun abatement efforts ought not be considered when making an S & S determination." 811 F.3d at 166.

Gravity

The gravity penalty criterion under section 110(i) of the Mine Act, 30 U.S.C. § 820(i), "is often viewed in terms of the seriousness of the violation." *Consolidation Coal Co.*, 18 FMSHRC 1541, 1549 (Sept. 1996) (citing *Sellersburg Stone Co.*, 5 FMSHRC 287, 294-95 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984) and *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 673, 681 (Apr. 1987)). The seriousness of a violation can be examined by looking at the importance of the standard which was violated and the operator's conduct with respect to that standard, in the context of the Mine Act's purpose of limiting violations and protecting the safety and health of miners. *See Harlan Cumberland Coal Co.*, 12 FMSHRC 134, 140 (Jan. 1990) (ALJ Fauver). The gravity analysis focuses on factors such as the likelihood of an injury, the severity of an injury, and the number of miners potentially injured. The Commission has recognized that the likelihood of injury is to be made assuming continued normal mining operations without abatement of the violation. *U.S. Steel Mining Co.*, 7 FMSHRC at 1130.

Negligence

"Negligence" is not defined in the Mine Act. The Commission, has, however,

> recognized that "[e]ach mandatory standard … carries with it an accompanying duty of care to avoid violations of the standard, and an operator's failure to meet the appropriate duty can lead to a finding of negligence if a violation of the standard occurs." *A.H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983). In determining whether an operator met its duty of care, we 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. *See generally U.S. Steel Corp.*, 6 FMSHRC 1908, 1910 (Aug. 1984).

Brody Mining, LLC, 37 FMSHRC 1687, 1702 (Aug. 2015); *Jim Walter Res., Inc.*, 36 FMSHRC 1972, 1975 (Aug. 2014); *Spartan Mining Co.*, 30 FMSHRC 699, 708 (Aug. 2008). "Thus in making a negligence determination, a Judge is not limited to an evaluation of allegedly 'mitigating' circumstances. Instead, the Judge may consider the totality of the circumstances holistically." *Brody Mining, LLC*, 37 FMSHRC at 1702.

Indeed, the Part 100 regulations "apply only to the *proposal* of penalties by MSHA and the Secretary of Labor; under both Commission and court precedent, the regulations do not extend to the independent Commission, and thus the MSHA regulations are not binding in any way in Commission proceedings." *Id.* at 1701-02 (citing *Jim Walter Res., Inc.*, 36 FMSHRC at 1975 n.4, and *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151-52 (7th Cir. 1984) ("[N]either the ALJ nor the Commission is bound by the Secretary's proposed penalties … we

find no basis upon which to conclude that [MSHA's Part 100 penalty regulations] also govern the Commission."), *aff'g* 5 FMSHRC 287 (Mar. 1983)). Although the Secretary's part 100 regulations are not binding on the Commission, the Secretary's definitions of negligence in those provisions are illustrative.

Mitigation is something the operator does affirmatively, with knowledge of the potential hazard being mitigated, that tends to reduce the likelihood of an injury to a miner. This may include actions taken by the operator to prevent or correct hazardous conditions.

Unwarrantable Failure

In *Lopke Quarries, Inc.,* 23 FMSHRC 705, 711 (July 2001), the Commission reiterated the law applicable to determining whether a violation is the result of an unwarrantable failure:

> The unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp*., 9 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id*. at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id*. at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991) ("*R&P*"); *see also Buck Creek* [*Coal, Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995)] (approving Commission's unwarrantable failure test).

See Manalapan Mining Co., 35 FMSHRC 289, 293 (Feb. 2013). Whether conduct is "aggravated" in the context of an unwarrantable failure analysis is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist. *Big Ridge, Inc*., 34 FMSHRC 119, 125 (Jan. 2012) (ALJ Zielinski). These include:

> (1) the extent of the violative condition, (2) the length of time that the violative condition existed, (3) whether the violation posed a high degree of danger, (4) whether the violation was obvious, (5) the operator's knowledge of the existence of the violation, (6) the operator's efforts in abating the violative condition, and (7) whether the operator had been placed on notice that greater efforts were necessary for compliance. *See IO Coal Co.*, 31 FMSHRC 1346, 1351-57 (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).

Manalapan Mining Co., 35 FMSHRC at 293; *ICG Hazard, LLC*, 36 FMSHRC 2635, 2637, (Oct. 2014); *Sierra Rock Products, Inc.*, 37 FMSHRC 1, 4 (Jan 2015); *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000); *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813; *Midwest Material Co.*, 19 FMSHRC 30, 34 (Jan. 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988) All of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether mitigating circumstances exist. *Consolidated Coal*, 22 FMSHRC at 353; *IO Coal*, 31 FMSHRC at 1351; *Manalapan Mining Co.*, 35 FMSHRC at 293. "Because supervisors are held to a high standard of care, another important factor supporting an unwarrantable failure determination is the involvement of a supervisor in the violation." *Big Ridge, Inc.*, 34 FMSHRC at 125; *REB Enters., Inc.*, 20 FMSHRC 203, 225 (Mar. 1998).

Penalties

The principles governing the authority of Commission administrative law judges to assess civil penalties *de novo* for violations of the Mine Act are well established. Section 110(i) of the Mine Act delegates to the Commission and its judges the "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(i). The Act delegates the duty of proposing penalties to the Secretary. 30 U.S.C. §§ 815(a), 820(a). When an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess said penalty. 29 C.F.R. § 2700.28. Thus, the Commission alone is responsible for assessing final penalties. *See Sellersburg Stone Co. v. FMSHRC*, 736 F.2d at 1151-52; *American Coal Co.*, 35 FMSHRC 1774, 1819 (June 2013) (ALJ Zielinski).

Under Section 110(i) of the Mine Act, the Commission is to consider the following when assessing a civil penalty: (1) the operator's history of previous violations; (2) the appropriateness of such penalty to the size of the business of the operator charged; (3) whether the operator was negligent; (4) the effect on the operator's ability to continue in business; (5) the gravity of the violation; and (6) the demonstrated good faith in abatement of the violative condition. 30 U.S.C § 820(i). Thus, the Commission alone is responsible for assessing final penalties. *See Sellersburg Stone Co. v. FMSHRC*, 736 F.2d at 1151-52 ("[N]either the ALJ nor the Commission is bound by the Secretary's proposed penalties. … [W]e find no basis upon which to conclude that [MSHA's Part 100 penalty regulations] also govern the Commission.").

These six criteria also apply, with appropriate revisions, to the assessment of penalties against individuals under section 110(c). *Mize Granite Quarries, Inc.*, 34 FMSHRC 1760, 1764 (Aug. 2012). Specifically, the Commission has indicated that judges should consider the following criteria when assessing a penalty against an individual: (1) the individual's history of previous violations; (2) the appropriateness of the penalty to the individual's income and net worth; (3) the effect of the penalty on the individual's ability to meet his financial obligations; (4) whether the individual was negligent; (5) the gravity of the violation; and (6) the

demonstrated good faith in abatement of the violative condition. *Id.*; *Ambrosia Coal & Constr. Co.*, 19 FMSHRC 819, 823-24 (May 1997); *Sunny Ridge Mining Co.*, 19 FMSHRC 254, 271-72 (Feb. 1997).

The Commission has repeatedly held that substantial deviations from the Secretary's proposed assessments must be adequately explained using the Section 110(i) criteria. *E.g.*, *Sellersburg Stone Co.*, 5 FMSHRC at 293; *Hubb Corp.*, 22 FMSHRC 606, 612 (May 2000); *Cantera Green*, 22 FMSHRC 616, 620-21 (May 2000). A judge need not make exhaustive findings but must provide an adequate explanation of how the findings contributed to his or her penalty assessments. *Cantera Green*, 22 FMSHRC at 621.

Although all of the statutory penalty criteria must be considered, they need not be assigned equal weight. *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997). Generally speaking, the magnitude of the gravity of a violation and the degree of negligence are important factors, especially for more serious violations for which substantial penalties may be imposed. *Musser Eng'g, Inc.*, 32 FMSHRC 1257, 1289 (Oct. 2010) (judge justified in relying on utmost gravity and gross negligence in imposing substantial penalty); *Spartan Mining Co.*, 30 FMSHRC 699, 725 (Aug. 2008) (appropriate for judge to raise a penalty significantly based upon findings of extreme gravity and unwarrantable failure); *Lopke Quarries, Inc.*, 23 FMSHRC 705, 713 (July 2001) (judge did not abuse discretion by weighing the factors of negligence and gravity more heavily than the other four statutory criteria). For example, violations involving "extreme gravity" and/or "gross negligence," or, as stated in the former section of 105(a), "an extraordinarily high degree of negligence or gravity, or other unique aggravating circumstances," may dictate higher penalty assessments. *See* 30 C.F.R. Part 100, Final Rule, 72 Fed. Reg. 13592-601, 13621.

IV. FINDINGS AND DISCUSSION

Citation No. 8000958

MSHA Inspector David Labenski issued Citation No. 8000958 to Lehigh at its Tamaqua mine on July 3, 2013. It alleges a violation of 30 C.F.R. § 77.1006(a). The regulation states: "Men, other than those necessary to correct unsafe conditions, shall not work near or under dangerous highwalls or banks." 30 C.F.R. § 77.1006 (a). Section 77.1006 is a mandatory safety standard. The citation narrative alleges:

> The second shift foreman knowingly allowed a miner to enter into the westerly end of Bank #8 Pit to attempt to retrieve the [. . .] bucket on the [. . .] Dragline [. . .] stuck in the pit on 6/19/2013 at approximately 2300 hrs. The bucket [. . .] was buried when the coal slid down the pitch to the bottom of the pit. The miner accessing the dragline bucket at the bottom of the pit was situated between an undercut highwall which consisted of previously shot, unconsolidated rock on the north side of the pit, and an undercut spoil pile on top of the south side of the pit. The highwall measured 55 ft. in height on the north side of the pit and 70 ft. high

> at the spoil pile on the south side. Miners, other than those necessary to correct unsafe conditions, shall not work near or under dangerous highwalls or banks. Contact with falling and or sliding material would result in fatal injuries. The foreman engaged in aggravated conduct constituting more than ordinary negligence by allowing the employee to enter the pit and work under a dangerous highwall and spoil bank without the hazardous conditions being corrected. This violation is an unwarrantable failure to comply with a mandatory standard.

Sec'y Ex. 5. The violation was designated as significant and substantial, highly likely to lead to a fatal injury to one person, and the result of the operator's reckless disregard for the safety of miners. The violation was abated on July 8, 2013, when the mine's safety director conducted a safety talk with miners and discussed the new procedure for retrieving a buried dragline bucket, which had been successfully implemented on June 20. The company also incorporated this new procedure into its Ground Control Plan. *Id.*

Violation

Citation No. 8000958 alleges that Lehigh violated 30 C.F.R. § 77.1006(a) by allowing an employee to work near or under dangerous highwalls and banks. While section 77.1006(a) is inapplicable in situations where it is necessary for a miner to subject himself to danger in order to correct unsafe conditions, Inspector Labenski determined that this exception did not apply to the cited condition because leaving the dragline bucket buried would not endanger miners' safety. (Tr. 164:10 - 166:2) Labenski then concluded that Osenbach's entry into the pit subjected him to multiple hazards contemplated by the standard. I agree with the inspector's conclusions on both of these points.

Based on Labenski's credible testimony, which was supported by photographic evidence and testimony from Lehigh employees, I find that the northern highwall, the spoil piles at the top of the pit, and the loose coal on the south side of the pit presented multiple hazards for any miners working in the pit, even briefly.[5] The highwall was cracked and contained unconsolidated material that could fall at any time on a miner below. (Tr. 100:25 - 101:4; 107:10-12; 194:20 - 195:11; 273:5-18; Sec'y Exs. 7, 12) The spoil banks at the top of the pit on the south side were undercut, meaning over-steepened, and also posed a falling hazard. (Tr. 98:24 - 99:4; 107:16-21; 274: 7-17; Sec'y Exs. 8-9) The coal seam on the south side was cracked and fractured, and coal had fallen twice a few hours before Osenbach entered. (Tr. 98:15-23; 108:3-7; Sec'y Exs. 8-9) This collapse not only indicated a high risk of further collapse, but also removed much of the

[5] In *Secretary v. Diamond May Mining*, 20 FMSHRC 1050, 1054 (Sept. 1998) (ALJ), the Administrative Law Judge noted that the term "bank" is broadly defined within the industry to mean "a usually steeply sloping mass of any earthly or rock material rising above the digging level from which the soil or rock is to be dug from its natural or blasted position in an open-pit mine or quarry." Consistent with this definition, I find that the south side of the pit containing loose coal and an undercut spoil pile above constituted a "bank" for the purposes of the standard.

lateral support for the remaining coal and spoil pile that had yet to fall and therefore increased the risk of a repeat fall. (Tr. 202:8-13)

Not only did the pit's highwall and banks pose a serious danger to Osenbach upon his entry, but the limited space for safe travel in the pit ensured that he would inevitably be "near" if not "under" those dangerous conditions at some point in his attempt to retrieve the buried bucket. According to Labenski's credible testimony, the crow's foot that Osenbach reached was within 10 feet of both the northern highwall and southern bank hazards. (Tr. 167:6-17) Osenbach entered an area of the pit where a coal collapse had already occurred hours earlier. Photographs taken by Lehigh during the course of the company's investigation into the matter confirm that Osenbach was subsequently under or near the cracked highwall. (Sec'y Exs. 6-7)

The Respondent argues that the inspectors' findings were colored by their incorrect assumption that any entry into the pit would have given rise to a violation. Resp't Br. at 18-19. Although I cannot envision many circumstances in which entry by foot into this particular steep and narrow pit would ever be safe, my findings are based on the specific conditions and numerous hazards in the pit at the time of the retrieval effort. Conditions were especially hazardous immediately after a collapse of the coal seam and shortly after blasting that had left cracks in the highwall.

For the reasons above, I find the Secretary has established a violation of the standard.

S&S and Gravity

Inspector Labenski marked this violation as S&S and highly likely to result in a fatal injury to one miner. (Sec'y Ex. 5) Labenski's S&S and elevated gravity findings were based not only on the highwall and bank hazards establishing a violation of the standard, but also on the surrounding conditions and circumstances. These included the inadequate lighting at night, Osenbach's multiple trips into the pit, and the steep and uneven terrain of the pit which posed tripping hazards that could further prolong exposure to dangerous highwall and bank conditions. (Tr. 116:3 – 120:12)

I have already found a violation of the mandatory safety standard at section 77.1006(a), satisfying the first element of the *Mathies* test for S&S.

The second *Mathies* element, as clarified by *Newtown*, 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. The discrete safety hazard against which section 77.1006(a) is directed is the possibility of a rock fall or a collapse of material from a highwall or bank directly above a working miner. In this case, I find it more than reasonably likely that material could have fallen from the highwall, spoil bank, or coal seam while Osenbach was down in the pit, directly below those hazards, retrieving the dragline bucket.

My findings are based on both photographic evidence and witness testimony. First, photographs of the pit confirm the presence of highwall cracks, loose coal, undercut spoil banks,

and Osenbach's likely presence underneath these hazards. (Sec'y Exs. 7-9) Although the photographs do not indicate whether the crow's foot to which Osenbach attached a chain and cable was directly below a hazard, they indicate enough hazards in a narrow area to persuade me that Osenbach would have likely passed underneath one during his retrieval effort. Second, all witnesses agreed that the highwall contained unconsolidated material that posed a danger to miners standing underneath. Wetzel himself believed that the highwall posed a "moderate risk" or "somewhat likely possibility[. . .] of some rocks coming down into the pit if someone was in there." (Tr. 461:3-12) The narrow dimensions of the pit and diminished lighting would have made it difficult to avoid the highwall hazard, and indeed first shift foreman Lou Mitchalk concluded that Osenbach would have been exposed to that hazard.[6] (Tr. 238:17-19; 239:18-21) Third, all MSHA personnel present at the hearing testified to the severe coal and spoil hazards on the south bank. (Tr. 98:15 - 99:4; 107:16 - 108:7; 274:7-17) Lehigh agents Hadesty and Wetzel agreed that Osenbach was under the southern spoil pile. (Tr. 420: 21-23; 458:4-10) Mitchalk also agreed that Osenbach was exposed to the remaining coal on the southern bank that had not yet fallen. (Tr. 238:13-16) I find that Osenbach's multiple trips into the pit, each one lasting at least two minutes, created a high likelihood of exposure to these numerous hazards.

The Respondent argues that the crow's foot was only a short distance down the western wall, far enough from the hazards at the bottom of the pit to protect a miner sent in to attach a chain. Resp't Br. at 19-20. However, Osenbach testified that he went all the way down to the bottom of the pit. (Tr. 348:15-17; 349:7-9) Hadesty and Wetzel agreed that Osenbach reached the bottom of the pit, which Hadesty added was a dangerous area. (Tr. 413:8-21; 458:8-10) Photos of the crow's foot appear to confirm that it was situated at the bottom of the pit, close enough to both the highwall and south bank hazards to pose a high safety risk. (Sec'y Ex. 6; Tr. 468: 5-24) Consequently, I find that Osenbach did venture to the bottom as a part of his retrieval effort.

Next, the Respondent contends that the highwall was scaled by the dragline in order to prevent rock from contaminating the coal below, that the upper part of the highwall was sloped back, and that the coal that had fallen from the south bank hours earlier would have subsequently buttressed the south side of the pit. Resp't Br. 20-23. Combined, these facts indicate to the Respondent that any loose material from the highwall and coal seam would have either remained in place or not made it very far down and would not have reached Osenbach. *Id.* In that vein, the Respondent also highlights testimony from Lehigh personnel denying the presence of falling or trickling highwall material or undercut spoil piles, arguing that if they were truly undercut they would have fallen already. *Id.* However, I credit the testimony of MSHA inspectors and first-shift foreman Mitchalk in identifying the numerous hazards in the pit and Insepctor Labenski's testimony explaining that the only reason that the undercut spoil bank had not already resulted in falling material was that the bank was being precariously supported by coal seams that had already proved unstable immediately prior to the retrieval attempt. (Tr. 141:10-14; 157:11 - 158:7)

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[6] Even though Mitchalk did not directly observe the initial retrieval effort, I credit his testimony on this point based on his knowledge of the pit and the conditions in the area at the time. (Tr. 247:25 – 248:12)

While conditions in the pit were hazardous enough on their own, I note that the retrieval effort occurred at night, with insufficient lighting, increasing the likelihood that Osenbach and Lehigh personnel would fail to observe developing hazards in the area as Osenbach descended into the pit. (Tr. 115:11-15) Although the Respondent notes that light bulbs on the dragline boom did provide some lighting, MSHA personnel credibly testified that they would be inadequate for illuminating large portions of the pit. (Tr. 90:6-25; 117:12 - 118:6; 216:1-24; 277:4-14) Given these factors, I find that this violation contributed to a discrete safety hazard. Accordingly, the second Mathies element is satisfied.

The third and fourth *Mathies* elements inquire into whether the hazard would be reasonably likely to result in a reasonably serious injury. As noted above, the hazard presented by this violation was the possibility of a rock fall or a collapse of material from a highwall or bank directly above a working miner. If rock or coal had fallen from above while Osenbach was working below, I find it highly likely that an injury would have occurred. This is due to the height and slope of the walls and banks from which material would have fallen, along with the inadequate lighting, narrow dimensions, and steep and uneven terrain of the pit that would have made it extremely difficult to promptly exit the area once material began falling. (Tr. 118:16-20; 120:3-12) Consistent with Inspector Labenski's testimony, I find that even a small rock falling from the wall of a pit of this height could reasonably be expected to injure a miner. (Tr. 102:4-22) I also find that coal or spoil sliding down a steeply sloped bank would be equally likely to injure a miner below.

Further, any injury resulting from a rock fall on the north highwall or a collapse on the south bank could have reasonably been expected to be fatal to Osenbach. (Tr. 198:1-8) This conclusion is supported not only by common sense but also by the fact that the previous collapse of coal into the pit was sufficient to bury a large bucket capable of holding seven cubic yards of material. (Tr. 345:8 - 346:2) Inspector Yencho testified that there was somewhere between a few hundred pounds and 10 tons of coal still hanging on the south bank when Osenbach descended the pit. (Tr. 200:17-25) This amount of coal could easily crush and kill a miner standing below. Therefore, the Secretary has satisfied all the elements necessary for an S&S finding.

Based on my findings above, I also find that the gravity of this violation was serious because it was highly likely to result in a fatal injury to a miner.

Unwarrantable Failure

Unwarrantable failure requires a showing of aggravated conduct - significantly more than ordinary negligence - characterized by "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Emery Mining Corp.*, 9 FMSHRC 1997, 2001, 2003-04 (Dec. 1987). Relevant factors to consider in determining whether the operator is guilty of aggravated conduct include the extent of the violative condition, the length of time a violating condition has existed, the operator's efforts to abate the condition prior to a citation, whether the operator has been placed on notice that greater efforts are necessary to assure compliance, the operator's knowledge of the violating condition (or lack thereof), and whether the violation is obvious and poses a high degree of danger. *Consolidation Coal Co.*, 23 FMSHRC at 593; *IO Coal*, 31 FMSHRC at 1351.

The Secretary and the Respondent both focus much of their attention on one factor in particular: the degree of danger posed by the highwall and south bank when Osenbach entered the pit. For the reasons discussed in my S&S and gravity analysis, I find that the cited conduct posed a high degree of danger. This finding also has important implications for how I evaluate the duration and extent of the violating condition in my unwarrantable failure analysis. In this case, Osenbach was exposed to the hazard for at least four minutes over the course of two separate trips into the pit, and the hazard was confined to a single pit. (Tr. 119:2-16) This would be a relatively short duration of time and a limited extent for a condition posing *little* danger. However, the Secretary correctly notes that the Commission has relied on the high degree of danger posed to support an unwarrantable failure finding even when the duration of the exposure was relatively short. Sec'y Br. at 24 (citing *Lafarge Construction Materials and Theodore Dress*, 20 FMSHRC 1140, 1145-48 (Oct. 1998)). Accordingly, I find the high degree of danger to be an aggravating factor, even considering Osenbach's limited exposure to the pit hazards, and I do not find the limited duration or extent of the hazard to be mitigating factors.

I also find, based on the photographic and testamentary evidence, that these dangers were obvious and known to the company. Hadesty, the safety director at the mine, conceded that the two retrieval attempts were "dangerous" and that because of that danger it should have been common knowledge not to go down into the dragline pit. (Tr. 411:2 - 412:9; 413:2-7) Lehigh and Wetzel were both aware that a coal collapse had occurred in the pit just hours earlier, and nearly all witnesses including Wetzel acknowledged the hazards in the northern highwall due to blasting which had left cracks in the wall. (Tr. 85:16 - 86:12; 461:3-12) The highwall, spoil bank, and coal seam hazards were all clearly visible in the photos submitted into evidence and all MSHA witnesses credibly testified to their obviousness. The narrow dimensions of the pit would have also been visibly obvious to all miners working in the area and would have consequently made the risks of entering the pit under or near the above hazards obvious as well. Additionally, the company's own incident report at the conclusion of its investigation into the matter identified "two risky attempts" and "unsafe acts" warranting discipline, and this conclusion was supported by the testimony of first shift foreman Mitchalk, who said that the dangers were obvious and that all involved should have known not to enter the pit. (Tr. 247:8-13; Sec'y Ex. 20 at 11)

As a supervisor, Wetzel's involvement in the decision to send Osenbach down into the pit not only establishes the company's knowledge of the violation but constitutes in itself an aggravating factor that weighs in favor of an unwarrantable failure finding. *Newtown Energy, Inc.*, 38 FMSHRC at 2046. Wetzel was specifically alerted to the danger by Osenbach, who told him not to enter the pit because he had a wife and children. (Tr. 82:12-20; Sec'y Ex. 4 at 2) While the statement may have been made half in jest as the Respondent argues, I find that it was also in part a recognition of the high level of danger associated with the retrieval effort and that Wetzel should have understood this.

Lehigh was not necessarily placed on notice of the need for greater compliance efforts largely because bucket retrieval efforts are rare; Wetzel had not attempted anything of the sort before and therefore would not have been previously sanctioned by MSHA for similar conduct. (Tr. 249:14-21; 251:9-15; 379:19-25) I find this to be an insignificant mitigating factor. Although MSHA had not alerted Lehigh to the risks of the cited conduct, it had never condoned

such behavior either, and the obviousness of the hazard by itself should have been enough to put the operator on notice that greater efforts at compliance were needed.

Additionally, I do not find that Lehigh engaged in any effort to abate the violative condition that could be deemed a mitigating factor for an unwarrantable finding. Lehigh violated the act by sending Osenbach into the pit to retrieve the buried bucket, and then repeated the violative conduct when the first retrieval effort failed. Osenbach was permitted to complete both attempts without any intervening effort to abate the violation.

In summary, I find that the violation was obvious, directly involved a supervisor's knowing conduct, posed a high degree of danger, and that these are aggravating factors for an unwarrantable failure finding. I also do not find the extent and duration of the violation, the operator's abatement efforts, or the lack of notice of greater efforts necessary for compliance to be significant mitigating factors. Such factors could be relevant aggravating or mitigating factors for a violative condition that developed over time and could have escaped the notice of management personnel, and where the danger to miners would depend on lengthy and pervasive exposure to hazards. However, I find these factors to be less relevant in a case such as this where a supervisor directed a miner into a situation that posed an immediate and appreciable risk to the safety of that miner. Therefore, I find that the Secretary has met his burden for establishing an unwarrantable failure.

Although the Commission has found that an operator's good faith and reasonable belief that it engaged in the safest means of complying with a standard does not support an unwarrantable failure finding, I do not find this exception applicable in this case. *See Consolidation Coal Co.*, 23 FMSHRC at 594. My finding that the danger was obvious undermines the Respondent's claim that its belief in the safety of its conduct was reasonable. Furthermore, I find that the Respondent considered several safer alternatives for complying with the standard but dismissed them because they would have taken too long and forced the company to sacrifice production. (Tr. 86:20 – 87:24) Therefore, I do not find that Lehigh genuinely believed it had chosen the safest means of complying with the standard.

Negligence

For many of the reasons stated above, I also find that both Lehigh and Wetzel were negligent in allowing Osenbach entry into the pit near or under dangerous highwall and bank conditions. Once again, Wetzel was aware of the numerous hazards in the pit and should have been aware of the risks in permitting Osenbach near those hazards. This failure of judgment from a supervisory official is imputed to the company and establishes an aggravated lack of care. *Wilmont Mining Co.*, 9 FMSHRC 684, 687 (Apr. 1987) (holding that the negligent actions of an operator's foremen, supervisors, and managers may be imputed to the operator), *aff'd in part*, 848 F.2d 195 (6th Cir. 1988). However, I do not find that Wetzel's actions, and Lehigh's by extension, rise to the level of reckless disregard designated by MSHA on the face of the citation.

The Commission has stated that "'reckless disregard' is often provided as a definition of unwarrantable failure," which equates to "aggravated conduct constituting more than ordinary negligence," *Sierra Rock Products, Inc.*, 37 FMSHRC 1, 4-6 (Jan. 2015) (citing *Emery Mining*

Corp., 9 FMSHRC 1997, 2001-03 (Dec. 1987)), but that "high negligence [also] suggests an aggravated lack of care that is more than ordinary negligence." *Brody Mining, LLC*, 37 FMSHRC 1687, 1703 (Aug. 2015) (quoting *Topper Coal Co.*, 20 FMSHRC 344, 350 (Apr. 1998)). Therefore, "reckless disregard" and "high negligence" are closely related concepts. However, "reckless disregard" is the highest level of negligence that MSHA may attribute to an operator for the purpose of assessing a penalty under the Secretary's Part 100 regulations, and the Commission has likewise recognized reckless disregard as the highest degree of negligence the judge can take into account when assessing a penalty. *See Brody Mining*, 37 FMSHRC at 1703 n.17 ("When a Judge finds an operator negligent, the Judge would take the degree of negligence, which would be on a scale between low negligence and reckless disregard, into account in assessing an appropriate penalty.") MSHA defines "reckless disregard" to mean that the "operator displayed conduct which exhibits the absence of the slightest degree of care."[7] 30 C.F.R. § 100.3.

Wetzel's initial willingness to enter the pit to retrieve the bucket before Osenbach intervened indicates that his decision to send Osenbach into the pit was not the product of reckless indifference to the safety of Lehigh employees. (Tr. 449:2-5) Instead it reflected poor judgment and a failure to properly evaluate the obvious health and safety risks around him. As Wetzel stated, he would not have initially volunteered to enter the pit if he had felt that it was dangerous. (Tr. 457:5-11) While he recognized some of the hazards in the pit, he failed to grasp the extent of the risk involved in his plan. Accordingly, he testified that he believed the southern slope did not pose any hazard because the soil was strong enough to support itself and that likewise the hazardous portion of the northern highwall was far enough from Osenbach's intended route and destination not to pose any risks either. (Tr. 438: 2 - 440:9; 443:24 - 444:1; 445:1-9) While I do not find this belief to be reasonable, I credit from his testimony that his misunderstanding was genuine. Further, the efforts taken to ensure that Osenbach stayed away from the northern highwall and did not linger in the pit , while wholly inadequate, do demonstrate some degree of care to comply with the standard. (Tr. 437:4-9; 448:12-23) Again, I find it credible from witness testimony that these efforts were undertaken in good faith. Therefore, I find Lehigh's and Wetzel's negligence to be "high" rather than "reckless."

Respondent Wetzel's Individual Liability and Negligence

Wetzel may be held individually liable for a penalty under section 110(c) if he is found to be a "director, officer, or agent" of a "corporate operator," and if he is found to have "knowingly authorized, ordered or carried out" a violation. As a preliminary matter, I find that Lehigh is a "corporate officer." Lehigh is a Limited Liability Corporation ("LLC"), and the Commission has held that LLC's are "corporate operators" for purposes of section 110(c) of the Act. *Bill Simola, employed by United Taconite, LLC*, 34 FMSHRC 539, 550-51 (Mar. 2012). Further, I find that Wetzel was an agent of Lehigh at all times relevant to this matter. Wetzel was the "second-shift foreman" at the Tamaqua Mine, responsible for assigning work and enforcing safety during his shift. (Tr. 455:23 - 456:9; 457:16-19) This type of managerial responsibility has been held by the

[7] While MSHA's negligence definitions are not binding on the Commission, they do help me to understand and evaluate the Secretary's rationales for his elevated penalty assessments.

Commission to establish agency status for the purpose of section 110(c). *See Nelson Quarries, Inc.*, 31 FMSHRC 318, 328 (Mar. 2009).

Next, I find that Wetzel authorized the violation for which Lehigh was cited, since Wetzel admitted to Inspector Labenski that it was ultimately his decision to send Osenbach into the pit. (Tr. 84:12-16). Most importantly, I find that Wetzel knowingly authorized this violation. The Act's "knowing" standard does not require intent to violate the standard, knowledge that the standard was being violated, or willfulness. *See Freeman United Coal Mining Co. v. FMSHRC*, 108 F.3d 358, 362-64 (D.C. Cir. 1997) (actual knowledge or specific intent not required); *Ernest Matney*, 34 FMSHRC 777, 783 (Apr. 2012) (willfulness not required). Instead, it is sufficient to find that Wetzel acted or failed to act "on the basis of information that [gave] him knowledge or reason to know of the existence of a violative condition." *Kenny Richardson*, 3 FMSHRC at 15-16. I have already found that the hazards in the pit were obvious, and that Wetzel was aware of the dangerous northern highwall cracks and the recent southern bank collapse. Wetzel even recognized that there was a "moderate level of risk" involved in sending Osenbach into the pit because of the "somewhat likely possibility . . . of some of the rocks coming down into the pit if someone was in there." (Tr. 461:3-12) These facts gave Wetzel more than sufficient reason to know that sending Osenbach into the pit was a violation.

Although a showing of willfulness is not required, "section 110(c) liability is generally predicated on aggravated conduct constituting more than ordinary negligence." *Ernest Matney*, 34 FMSHRC 777, 783 (Apr. 2012) (citing *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1245 (Aug. 1992)); see also *Freeman United*, 108 F.3d at 360. The same factors that are relevant to an aggravated conduct finding in the context of an unwarrantable failure are equally applicable here. For the reasons stated in my unwarrantable failure analysis, including the obvious and high degree of danger involved in the retrieval attempts, I find aggravated conduct on Wetzel's part constituting more than ordinary negligence. However, for the same reasons mentioned in my analysis of Lehigh's negligence, I find that Wetzel's level of negligence was "high" instead of "reckless."

Penalties

The Secretary proposes a penalty of $23,229.00 against Respondent Lehigh and $2,900.00 against Wetzel for these violations.

The first penalty criterion considered when assessing a penalty is the history of previous violations. Wetzel does not have a prior history of 110(c) violations. Exhibit A of the Secretary's penalty petition indicates that Lehigh's violation history is quite clean.

In the case of Respondent Lehigh, the parties have stipulated that the penalty will not affect its ability to remain in business. Exhibit A shows that Lehigh is a moderately large operator and that the Tamaqua Mine is a moderately large mine. In the case of the individual penalty assessed against Respondent Wetzel, the comparable penalty criteria are intended to account for factors such as the Respondent's income and family support obligations, the appropriateness of the penalty in light of his job responsibilities, and his ability to pay. *Sunny Ridge*, 19 FMSHRC at 272. The Commission has encouraged ALJs to make specific findings as

to the Respondent's net worth and income and the nature and extent of his financial obligations. *Ambrosia*, 19 FMSHRC at 824. In this case, the parties have stipulated that the proposed penalty will not affect Wetzel's personal financial obligations. (Stip. 7) I also find the proposed penalties appropriate in light of Wetzel's job responsibilities as a second shift foreman, which included assigning work and enforcing safety during his shift.

The remaining penalty criteria are negligence, gravity, and good faith abatement efforts. The citation states that the violation was promptly abated in good faith when the mine's safety director conducted a safety talk with miners and discussed the new procedure for retrieving a buried dragline bucket, which had been successfully implemented and incorporated into the company's Ground Control Plan. My findings on gravity and negligence are discussed at length above. While I found the gravity of the violation to be serious based on the high likelihood of a fatal injury, I found the negligence for both Lehigh and Wetzel to be "high" rather than "reckless," as designated on the face of the citation. After considering the statutory penalty criteria, I find that $1,000.00 is an appropriate penalty to assess against foreman Wetzel for this violation, and that $6,996.00 is an appropriate penalty to assess against Respondent Lehigh.

Citation No. 8000959

MSHA Inspector David Labenski issued Citation No. 8000959 to Lehigh at its Tamaqua mine on July 3, 2013. It alleges a violation of 30 C.F.R. § 77.1710(g). The regulation states: "Each employee working in a surface coal mine or in the surface work areas of an underground coal mine shall be required to wear protective clothing and devices as indicated below: (g) Safety belts and lines where there is danger of falling; a second person shall tend the lifeline when bins, tanks, or other dangerous areas are entered." 30 C.F.R. § 77.1710(g). Section 77.1710 is a mandatory safety standard. The citation narrative alleges:

> [A] miner descended into the Bank #8 Pit to attach a chain to the [. . .] dragline bucket from the [. . .] Dragline. [. . .] The miner who climbed down the western end of the pit was not provided with any means of fall prevention equipment when climbing into the pit. The pit measured 55 ft. deep from top of the northerly highwall to the pit floor. [. . .] Employees working in a surface coal mine shall be required to wear safety belts and lines where there is danger of falling.

Sec'y Ex. 15. The violation was designated as significant and substantial, reasonably likely to lead to lost workdays or restricted duty, and the result of the operator's moderate negligence. The violation was abated on July 8, 2013, when the mine's safety director conducted a safety talk with miners and "discussed the proper use of Personal Protective Equipment when working where there is danger of falling." *Id.*

Violation

Citation No. 8000959 alleges that Lehigh violated 30 C.F.R. § 77.1710(g) by not providing Osenbach with sufficient fall prevention equipment when he entered into the pit. Since it is undisputed that Osenbach was not wearing a safety belt and line when he entered the pit, the primary dispute among the parties is whether the situation at issue posed the sort of "danger of falling" contemplated by the standard. *Id.* The Respondent argues that this type of standard is "generally considered to address the hazard of falling from a height," while the hazard in this case was Osenbach losing his footing on the sloped, uneven terrain, and fall protection would do nothing to address or mitigate that risk. Resp't Br. at 25. While the Respondent appears to be arguing that fall protection is only required when there is a risk of falling from a purely vertical drop, I find that fall protection may be just as necessary on a sufficiently steep slope descending to sufficient depths.

In this case, the western bank descended to depths of at least 40 feet on a slope containing unconsolidated material. (Tr. 134:14 - 135:3) While the inspector could not measure the exact angle of the slope because it was no longer present when he arrived on the scene, he concluded that it was steeper than the angle of repose based on Osenbach telling him that rock had slid down to the bottom of the pit from the top. (Tr. 144:15-23) Additionally, Danny Baer, the dragline operator at the time, told the inspector that he would not walk down that slope because it was too steep to go down. (Tr. 77:4-15) And in a deposition, the mine's lead foreman Lou Mitchalk acknowledged that he believed fall protection was required in this situation. (Tr. 241:18 – 242:6) Photographic evidence also appears to depict a dangerously steep slope on the west side of the pit. (*See* Sec'y Ex. 16.) I find these facts and the inspector's reasonable conclusions to be sufficient to trigger the requirements of this standard. Whether Osenbach had been standing near the vertical highwall or the sloped western bank, he would have been at risk of dangerously falling or tumbling to the bottom of the pit without sufficient fall protection. (Tr. 144:11-14)

For the reasons above, I find the Secretary has established a violation of the standard.

Gravity and S&S

Inspector Labenski designated this violation as S&S and reasonably likely to result in lost workdays or restricted duty. (Sec'y Ex. 15) I have already found a violation of the mandatory safety standard at section 77.1710(g), satisfying the first element of the *Mathies* test for S&S.

Regarding the second *Mathies* step, Labenski concluded that the violation contributed to the hazard of a fall, and I agree. Without fall protection, Osenbach was reasonably likely to fall down a steep slope containing unconsolidated material. (Tr. 129:11-18; 134:10-21) While a miner could still lose his footing and hit the ground with fall protection, he would not roll to the bottom of the pit. (Tr. 144:11-14) Additionally, the fact that Osenbach's attempts were conducted at night with inadequate lighting increased the likelihood of a fall.

Under the third and fourth *Mathies* elements, I find that, assuming the occurrence of the fall hazard, a reasonably serious injury such as a sprain or broken bones was reasonably likely to

result from Osenbach's unsecured entry into the pit. (Tr. 134:10-13) This is primarily due to the 40 foot height of the pit and the steepness of the slope.

Based on my findings above, I find that the gravity of this violation was moderately serious because it was reasonably likely to lead to a bruise or sprain for Osenbach.

Negligence

I find Lehigh's negligence to be moderate based on foreman Wetzel's direct knowledge and authorization of the violation. (Tr. 136:8-10) Inspector Labenski did not assess the level of negligence any higher than that because Lehigh provided Osenbach with a rope to assist him in his descent. (Tr. 136:24-25) While Labenski found that the rope was insufficient to satisfy the fall protection requirements, he concluded that it did mitigate the company's negligence slightly by demonstrating some effort to meet the necessary standard of care. I agree with Labenski's finding and affirm the moderate negligence designation.

Penalty

The Secretary requests that I assess a penalty of $285.00 against Respondent Lehigh for this alleged violation.

Exhibit A of the Secretary's penalty petition indicates that Lehigh had a minor history of violations. The exhibit also indicates that Lehigh is a moderately large operator and that the Tamaqua Mine is a moderately large mine. The parties have stipulated that the penalty will not affect the operator's ability to remain in business.

The remaining penalty criteria are negligence, gravity, and good faith abatement efforts. The evidence shows that the violation was promptly abated in good faith when the mine's safety director conducted a safety talk with miners discussing the proper use of fall protection when working where there is a danger of falling. My findings on gravity and negligence are discussed at length above. I found the gravity and negligence to both be moderate. After considering the statutory penalty criteria, I find that $285.00 is an appropriate penalty to assess against Respondent Lehigh for this violation.

ORDER

In view of the above findings, conclusions, and settlement approval, within 30 days of the date of this decision the Secretary **IS ORDERED** to modify Citation No. 8000958 to reduce the level of negligence from "reckless disregard" to "high."

WHEREFORE, it is **ORDERED** that Lehigh pay a penalty of $7,281.00 and that Wetzel pay a penalty of $1,000.00 within thirty (30) days of the filing of this decision.[8]

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

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[8] 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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November 28, 2016

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. SE 2014-299-M A.C. No. 01-00016-349326
v.	
CEMEX SOUTHEAST, LLC, Respondent	Mine: Demopolis Plant CEMEX Inc.

DECISION AND ORDER

Appearances: Timothy J. Turner, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner

Michael T. Cimino, Esq. & Adam J. Schwendeman, Esq., Jackson Kelly PLLC, Charleston, West Virginia, for Respondent

Before: Judge McCarthy

I. STATEMENT OF THE CASE

This case is before me upon a petition for assessment of civil penalties under section 105(d) of the Federal Mine Safety and Health Act of 1977, as amended, ("the Mine Act"), 30 U.S.C. § 815(d). The matter arises out of three citations and one order issued by the Secretary of Labor ("the Secretary") to mine operator CEMEX Southeast, LLC ("Cemex") in February and March 2014. The citations and order allege that safety violations relating to elevators occurred at the Demopolis Plant CEMEX Inc. ("the Demopolis Plant" or "the mine"), a cement processing plant operated by Cemex in Demopolis, Alabama that is subject to the Secretary's health and safety regulations at 30 C.F.R. Part 56. The parties settled three of the violations prior to hearing. I approved the settlement by Order dated June 16, 2016. The parties litigated the remaining citation, Citation Number 8641317.

Citation Number 8641317 was issued under section 104(a) of the Mine Act and alleges that Cemex violated the mandatory health and safety standard at 30 C.F.R. § 56.18002(a).[1] The Secretary filed a petition seeking assessment of a $3,996.00 penalty for the alleged violation. Cemex contested the violation and the citation's gravity and negligence designations and

[1] The cited standard states: "A competent person designated by the operator shall examine each working place at least once each shift for conditions which may adversely affect safety or health. The operator shall promptly initiate appropriate action to correct such conditions." 30 C.F.R. § 56.18002(a).

contended that it was not afforded fair notice of the Secretary's interpretation of § 56.18002(a). Accordingly, I held a hearing to determine whether the Secretary properly charged Cemex with a violation of the cited standard, and, if so, whether the Secretary's gravity and negligence designations were appropriate and what penalty should be assessed against Cemex.

The hearing was held in Birmingham, Alabama on April 25, 2016. During the hearing, the parties presented testimony and documentary evidence.[2] After the Secretary presented his case, Cemex moved for judgment as a matter of law, arguing that the Secretary had failed to prove a violation. Tr. 115-19. I denied that motion. Tr. 119-20. The Respondent elected to rest without calling any witnesses. Tr. 120-21. The parties subsequently filed post-hearing briefs.

For the reasons set forth below, I now vacate Citation Number 8641317 on the grounds that the Secretary has failed to establish a violation of § 56.18002(a) and that Cemex did not receive fair notice of the Secretary's interpretation of § 56.18002(a) before the citation was issued. Based on the entire record, including my observation of the demeanor of the witness, and after considering the post-hearing briefs, I make the following findings:

II. STIPULATIONS OF FACT AND LAW

At hearing, the parties agreed to the following stipulations (see Ex. S2 and Tr. 15):

1. Cemex was at all times relevant to this proceeding engaged in mining activities at the Demopolis Plant where the citations in this matter were issued.

2. Cemex's mining operations affect interstate commerce.

3. Cemex is subject to the jurisdiction of the Mine Act.

4. Cemex is an "operator" as that word is defined in section 3(d) of the Mine Act, 30 U.S.C. § 802(d), at the mine where the contested citations in this proceeding were issued.

5. The Administrative Law Judge has jurisdiction over this proceeding pursuant to section 105 of the Mine Act, 30 U.S.C. § 815.

6. On the dates the citations in this docket were issued, the issuing MSHA inspectors were acting as duly authorized representatives of the Secretary, were assigned to MSHA, and were acting in their official capacity when conducting the inspections and issuing the subject MSHA citations.

7. The citations at issue in this proceeding were properly served upon Cemex as required by the Mine Act.

8. The citations at issue in this proceeding may be admitted into evidence.

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[2] Exhibits S1 through S11 and Exhibits R1 through R27 were received into evidence at the hearing. Tr. 10-14, 70, 122. The abbreviation "Tr." refers to the hearing transcript. The MSHA representative who issued the disputed citation was the sole witness to testify.

9. The certified copy of the MSHA Assessed Violation History (marked as Exhibit S1) reflects the history of the citation issuances at the mine prior to the date of the last citation.

10. Cemex demonstrated good faith in abating the violations.

11. The penalties proposed by the Secretary in this case will not affect the ability of Cemex to stay in business.

III. FINDINGS OF FACT

The sole citation remaining at issue in this proceeding was written by MSHA Safety Specialist Michael Evans[3] on March 5, 2014 during a spot inspection of the elevators at the Demopolis Plant that was spurred by a recent fatality involving an elevator at a different cement plant in Louisville, Kentucky. Tr. 38-40. The citation alleges that Cemex violated the mandatory safety standard at 30 C.F.R. § 56.18002(a) by failing to designate a competent person to examine the elevators at the Demopolis Plant during each shift. Ex. S6; Ex. R3.

Maintenance of the Demopolis Plant Elevators

The mine has elevators at four locations: the preheater tower, the mill room, the pack house (or silo), and the office. Tr. 49-52.[4] At the time of the spot inspection, the elevators were maintained by contractor ThyssenKrupp Elevator Corporation ("TKE") pursuant to a service agreement. Tr. 41-42; *see* Ex. R17 (showing regular payments from Cemex to TKE for "our existing maintenance agreement" during the year leading up to the inspection). This arrangement was consistent with industry practice and with Alabama law prohibiting anyone but licensed elevator mechanics from performing maintenance work on elevators. Tr. 81-82; *see* Ex. R16 (containing copy of Ala. Code § 25-13-4).

The precise terms of the contractual arrangement between Cemex and TKE at the time of the spot inspection are not clear. The contract itself was not offered into evidence. The Secretary produced a copy of a different contract that became effective approximately one month after the inspection, on April 1, 2014, and he relies on this contract to show how elevator maintenance duties were allocated between Cemex and TKE at the time of the inspection. Ex. S10; *see* Sec'y Br. 23-24. Under the April 1, 2014 contract, TKE's obligations include providing repair services,

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[3] Evans began his career in the mining industry as an underground coal miner. He worked for 31 years as an inside laborer, electrician, and eventually a maintenance supervisor. He was hired by MSHA in 2008, and became an inspector for the agency in 2009, after undergoing training in Beckley, West Virginia. In 2012, he became a Safety Specialist, which did not require any specialized training. His job duties include accident investigation, reporting, and follow up; handling mine rescue competitions; and reviewing records such as impoundment plans, mine maps, ventilation plans, and escape and evacuation plans. Tr. 32-38.

[4] Evans, the sole witness, was unsure whether "silo" was a reference to the mill room or the pack house. Tr. 49, 51. Cemex has indicated that "silo" is another name for the pack house. Resp. Br. 16. This makes sense because both terms refer to buildings used for storage.

which are billed separately from the regular contract payments, and making six visits to the mine each year to conduct "limited preventative maintenance." Ex. S10. The contract specifies that regular preventative maintenance includes lubrication of the guide rails, "minor adjustments," and the examination, cleaning, and lubrication of the elevators' major mechanical components, namely, the controller, the machine, the motor, and the interlocks, which are the mechanisms that ensure that the hoistway doors on each floor do not open onto the elevator shaft unless the car is present. Ex. S-10; Tr. 82.

It would be improper for me to assume that the contractual arrangement between Cemex and TKE at the time of the inspection was identical to the arrangement described above. However, the evidence suggests that it was similar. Specialist Evans testified that Cemex employees performed minor elevator maintenance tasks such as changing burned-out lightbulbs on elevator lights, but in general, a miner who observed an elevator hazard was expected to lock and tag out the elevator and call TKE to repair it. Tr. 62-63, 69-71; Ex. R27 at 30.[5] Cemex asserts that TKE performed regular quarterly elevator inspections and maintenance. Resp. Br. 24 n.11.[6] Miners mentioned quarterly maintenance to Specialist Evans, but did not produce any records of quarterly examinations. Tr. 65, 67. Instead, Evans was shown a "break-and-fix" record and records of annual inspections performed by TKE in 2011 and 2012. Tr. 64-67; Ex. S7 at 4.[7] Considering this evidence, I conclude that at the time of the spot inspection, the elevators at the Demopolis Plant were being examined by TKE four times each year for preventative maintenance purposes, and were subject to separate annual inspections in 2011 and 2012.

The Louisville Fatality

The March 5, 2014 spot inspection of the Demopolis Plant elevators was spurred by a fatal accident that had occurred less than two weeks earlier at a different cement plant operated by Cemex in Louisville, Kentucky. Tr. 39, 99. A miner attempting to use an elevator at the Louisville facility on February 21, 2014, had opened the hoistway doors on the fourth floor of

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[5] Invoices submitted by Cemex confirm that TKE was called out to the mine to perform repairs on numerous occasions during the one-year period preceding the spot inspection. Ex. R18.

[6] This assertion is supported by a notation in a March 11, 2014 email sent to Cemex by a TKE representative. The email proposes to increase the number of maintenance visits each year from quarterly to monthly. Ex. R21. As noted above, Cemex and TKE ultimately entered into a contract on April 1, 2014 providing for six maintenance visits per year. Ex. S10.

[7] An annual inspection had not been performed in 2013 due to a billing issue, even though TKE had submitted a quote for it. Ex. S7 at 4, 7. Exhibits R20 and S11 contain quotes sent from TKE to Cemex for big-ticket items, including two quotes submitted in September 2013 and January 2014 for a "safety inspection" consisting of "no load safety tests." If purchased, the safety inspection would have cost Cemex more than a years' worth of regular contract fees. *Compare* Exs. R20 & S11 *with* Ex. R17. It seems likely that this is the "annual inspection" to which Evans was referring when he mentioned the billing dispute in his field notes. Such safety inspections are therefore separate from any regular, periodic maintenance examinations contemplated under the contract.

the building, stepped into the elevator shaft without noticing that the elevator car was actually on the ground floor, and fell several stories onto the top of the car, sustaining fatal injuries. Tr. 39-40; Ex. S8; Ex. S9; Ex. R9.

On February 28, 2014, MSHA issued a Fatalgram describing the accident and listing the following best practices:

- Immediately report any elevator problems to management.
- Ensure that any problems affecting the safety of an elevator are repaired promptly.
- Ensure that elevator door interlocks, that prevent the door from being opened unless the elevator car is present, are functional.
- Ensure that elevator doors will not open unless an elevator car is at the floor landing.
- Install audible signals that sound when the elevator car is at the landing prior to the doors opening.
- Train all persons to be aware of their surroundings when entering or exiting an elevator car.

Ex. S8; Ex. R9. MSHA also dispatched inspectors, including Evans, to conduct spot inspections of elevators at other cement plants, with special instructions to check the doors at all the landings to ensure that they would not open unless the car was present. Tr. 21-22, 59-60, 92. MSHA's post-fatality enforcement activity relating to elevators has spurred litigation resulting in at least three Commission Administrative Law Judge opinions so far. *Ash Grove Cement Co.*, 38 FMSHRC __, Nos. WEST 2014-963 et al. (Aug. 4, 2016) (ALJ Barbour); *Cemex Constr. Materials, Atl., LLC*, 38 FMSHRC 827 (Apr. 2016) (ALJ Barbour); *Cemex Inc.*, 37 FMSHRC 2886 (Dec. 2015) (ALJ Rae) (order on summary decision motions).

Meanwhile, in the wake of the fatality, Demopolis Plant Manager Gary Pinault had been told by a regional manager to "make sure we are having all of our elevators inspected by a professional third party ASAP … to be assured that they are safe and the doors cannot be opened unless the elevator is present." Ex. R22 (email dated February 26, 2014). Demopolis' four elevators were duly examined by TKE on February 28, 2014. Tr. 90-91, 104; Ex. S7 at 1-2; Ex. R19. The mill room elevator had been shut down ten days earlier for repairs to the motor, and it remained locked and tagged out after the examination. Tr. 52; Ex. S7 at 4. The preheater elevator was also locked and tagged out during the examination because the hoistway doors could be opened on two different floors when the elevator car was not present, indicating defective door interlocks. Tr. 50-51; Ex. S7 at 1-2; Ex. R19.

The Inspection

MSHA Specialist Evans arrived at the Demopolis Plant to initiate the spot inspection on March 5, 2014. He first visited the mine office, where he learned that only two of the elevators were operational. Tr. 40, 49; Ex. S7 at 1. He set off to inspect all of the elevators, joined by Safety and Health Manager Ann Saelens and a miners' representative, whose name Evans could not recall at the hearing. Tr. 40-41, 46-47.

The first location visited by the inspection party was the preheater tower, which is an eight-story building where material is heated. Tr. 50; Ex. S7 at 1-3. The elevator at this location has a manually operated hoistway door, with a window at each landing. Tr. 84-87. The elevator was danger-taped off and the power to it was shut down, which prevented Evans from inspecting elements such as the lights, the door buttons, and the bell buttons. Ex. S7 at 1-3. However, Evans was able to test the hoistway doors at each landing and confirm that they could be opened on two of the floors when the car was not there, which, as noted above, was the reason the elevator had been locked and tagged out following examination by TKE on February 28. Tr. 50-51; Ex. S7 at 2-3.[8] Because the elevator was shut down and no one was using it, Evans did not issue a citation for the defective doors. Tr. 103. At hearing, he did not claim to observe anyone working near the elevator. Tr. 74-75. In fact, he testified that he did not recall seeing anyone at the preheater tower at all. Tr. 75. However, his field notes state that he saw an employee doing cleanup work "on 1½ level" of the building. Ex. S7 at 2.

The inspection party next traveled to the mill room, a three-story building that has an elevator with automatic doors. Tr. 86-87; Ex. S7 at 3-4. As mentioned above, the elevator had been locked and tagged out since February 18 for repairs to the motor. Tr. 52; Ex. S7 at 4. According to Evans, the miners' representative told him that the mill elevator "had problems with its lights," but because the power was off, Evans could not check this himself. Tr. 62. Evans did not further describe his visit to the mill room, except to say that he recalled seeing people working in the building, although he was unsure exactly what they were doing and could not say what sort of work was generally performed at the mill. Tr. 52-55; Ex. S7 at 3-4.

The inspection party next visited the pack house, a five-story building with an elevator that, like the preheater elevator, has a manually operated door at each landing. Tr. 51-52, 84-87; Ex. S7 at 4. The pack house elevator was operational, and Evans testified that he saw a miner or miners using it. Tr. 51-52, 56, 75. He did not mention what work these miners were performing, and he was unsure of the pack house's general function, although he believed that the building may be involved in the shipping process. Tr. 51-52, 75. Evans checked the pack house elevator's hoistway doors on all floors and found no problems. Tr. 105; Ex. S7 at 4. However, he issued one non-significant and substantial (non-S&S) citation for a defective retiring cam release roller on the third floor, and another non-S&S citation for nonfunctional in-use lights at the call stations on four different floors. Tr. 56, 100-03; Ex. S7 at 4, 7; Ex. R5; Ex. R7.[9]

At some point during the inspection, Evans also checked the elevator at the mine office, which serves three floors and has automatic doors. Tr. 85, 87; Ex. S7 at 5. Evans testified that there were no problems with the hoistway doors, but he did not further describe his observations. Tr. 105; Ex. S7 at 5.

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[8] Although Evans testified that the defective doors were located on the fourth and eighth floors, his field notes from the day of the inspection indicate that they were actually located on the sixth and eighth floors. Ex. S7 at 2-3.

[9] Exhibit R5 is the citation issued for the cam roller (Citation No. 8641319) and Exhibit R7 is the citation issued for the in-use lights (Citation No. 8641320). These two citations were initially included in this case (*see* Ex. S4), but settled prior to hearing.

Aside from checking all the elevators himself, Evans also discussed them with several miners. He asked for records showing whether the elevators were included in the workplace examinations that the mine allegedly was required to conduct each shift pursuant to 30 C.F.R. § 56.18002. Tr. 41, 46. Saelens informed Evans that Cemex did not include elevators in its workplace examinations, that miners performed such examinations only in areas where they were working, and that TKE handled all work relating to the elevators. Tr. 41-42, 66; Ex. S7 at 2. As mentioned above, Evans was shown a "break and fix" record, (that is, a record of repair work performed by TKE at the mine), and records of annual inspections that TKE had performed in 2011 and 2012, but no records of regular maintenance examinations. Tr. 64-67; Ex. S7 at 4, 7.

Evans was told that TKE was called to the mine fairly often to perform repairs. Tr. 64. Evans learned from the miners' representative and Plant Manager Pinault that the elevators had been installed in the 1970s and were now "old and in bad shape," and the mine had "spent thousands of dollars trying to keep them running." Tr. 55, 87-88; Ex. S7 at 5. The miners' representative expressed concern about the elevators and said that the elevators had broken down and caused an entrapment or entrapments in the past. Tr. 55, 88; Ex. S7 at 6; Ex. R4; *see* Ex. R1.[10]

The Citation & MSHA Specialist Evans' Supportive Testimony

Based on his observations and the information he had gathered from the March 5, 2014 spot inspection, Evans issued Citation Number 8641317 that afternoon. Ex. S6; Ex. R3; Tr. 42-44. The narrative portion of the citation states, in pertinent part:

> The mine operator failed to designate a competent person to examine the elevators for hazards each shift at this operation. Defects affecting the safe operation of the elevator car and the hoistway doors, at each floor, exposed miners to fatal injury when using the elevator and/or working near the hoistway doors on a daily basis. Management is aware of the MSHA regulation requiring work place exams each shift.

Ex. S6; Ex. R3. Evans assessed the violation as reasonably likely to cause a fatal injury affecting one person, significant and substantial (S&S), and the result of Cemex's high negligence. Ex. S6; Ex. R3; Tr. 60-66. As noted above, he issued the citation under the mandatory safety standard at 30 C.F.R. § 56.18002(a), which requires a competent person to examine each working place at least once each shift for conditions which may adversely affect safety or health. Ex. S6; Ex. R3.

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[10] Exhibit R1 contains a copy of Citation No. 8810886, which was issued on February 11, 2014, after an elevator entrapment occurred at the mine. The citation was initially included in this docket (*see* Ex. S4), but settled prior to hearing. The citation alleges that Cemex violated 30 C.F.R. § 46.7(a) by instructing two miners to rescue the person, who was trapped in the elevator, even though the miners had not received task training for this job. Ex. R1. Because a trained elevator mechanic was not immediately available to free the trapped person, the miners had freed him on their own, relying on instructions relayed by a TKE representative over the phone. Ex. R1; Ex. R2.

Although Evans had inspected the Demopolis Plant before, he had never before asked Cemex for workplace examination records for elevators, had never told Cemex that such records needed to be kept, and had never cited Cemex for failing to designate a competent person to conduct workplace examinations of elevators or for failing to report elevator defects to management. Tr. 87, 98-99, 112-13. In fact, this was the first citation that Evans had ever written involving an elevator. Tr. 59.

Evans conceded that he was not aware of any regulations or MSHA guidance documents, such as Program Policy Letters (PPLs) or the Program Policy Manual (the PPM), which define elevators as part of the "working place" that must be included in workplace exams. Tr. 89, 93-96, 106. He further conceded that MSHA's interpretation of workplace exams with respect to elevators had changed since the Louisville fatality because elevators previously did not need to be included in these exams. Tr. 105-06. Nonetheless, Evans believed that his issuance of the citation was appropriate because "[w]e'd just had an accident that killed a man and if [examining the elevators] could prevent it from happening here at Demopolis, then we needed to get them to do that. That's the only tool that you've got to get them to do what will protect the miners." Tr. 43-44; *see also* Tr. 61 ("[I]f a workplace examiner writes a defect affecting safety anywhere, they usually take care of it pretty quick, and they weren't doing that regarding the elevators."); Tr. 63-64 ("[T]hey should have a regular program that identifies hazards that can kill people and … may have prevented the [fatality] in Louisville.").

When asked at hearing to define the term "working place" as used in the workplace exam regulation, Evans first provided several examples. "[I]f they were going to change a motor on the fourth floor of the preheater tower, that working place would be the area that they're working at on the fourth floor," he explained. Tr. 47. If miners were working at the bag house, "That would be a working place. It's where people travel to work." Tr. 48. Evans later seemed to embrace a broader definition of the term: "I consider the whole mine a working place. Anywhere that people work or travel is a working place." Tr. 57. On cross-examination, however, he conceded that not every location inside a cement plant is a working place. Tr. 77. For example, he agreed that the regulations do not require travelways in cement plants to be examined each shift. Tr. 107. However, he suggested that a travelway could constitute a "working place" such that it was subject to the workplace exam regulation if a person were injured there. Tr. 110-11. With respect to elevators, Evans e conceded that he believes an elevator becomes a working place only when someone is using it or working close to the hoistway doors, but he opined that Cemex's elevators were part of the working place when he issued the citation "because people get on the elevator to get to the different levels that they work in" and because miners working on a floor with defective hoistway doors would be exposed to a hazard. Tr. 48-49, 75-76.

IV. ANALYSIS AND CONCLUSIONS OF LAW

A. The Alleged Violation of § 56.18002

The Secretary bears the burden of proving by a preponderance of the evidence that a violation of the cited standard, § 56.18002, occurred. *Jim Walter Res., Inc.*, 9 FMSHRC 903, 907 (May 1987); *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000), *aff'd*, 272 F.3d 590 (D.C. Cir. 2001).

As noted at the outset of this decision, § 56.18002 requires Cemex to "examine each working place at least once each shift for conditions which may adversely affect safety or health." 30 C.F.R. § 56.18002(a). The major requirements of the safety standard are that (1) daily workplace examinations are mandated for the purpose of identifying workplace safety or health hazards; (2) the examinations must be made by a competent person; and (3) a record of the examinations must be kept. *See FMC Wyo. Corp.*, 11 FMSHRC 1622, 1628 (Sept. 1989) (discussing identically worded regulation at § 57.18002). In addition, the standard carries an implicit adequacy requirement: an examination must be adequate in the sense that it must identify those hazardous conditions which would be recognized by a reasonably prudent competent examiner. *Sunbelt Rentals, Inc.*, 38 FMSHRC 1619, 1627 (July 2016). The standard is intended "to require regular close examination of the total mining environment to find and eliminate potential hazards," 60 Fed. Reg. 9985, 9987 (Feb. 22, 1995), and was "drafted in general terms in order to be broadly adaptable to the varying circumstances of a mine," *Sunbelt Rentals*, 38 FMSHRC at 1627 (quoting *FMC Wyo.*, 11 FMSHRC at 1629).

At issue in this case is whether the standard is broad enough to require examinations of elevators and elevator landing areas. Although Cemex examined its elevators after the Louisville fatality and relied on contractor TKE to perform quarterly maintenance examinations, there is no evidence that Cemex included the elevators and landing areas in its regular workplace examination program under § 56.18002 by instructing a designated competent person to examine them and keeping a record of the examinations, and mine management admitted as much to Specialist Evans. Tr. 41-42, 90-91, 104; Ex. S7 at 1-2; Ex. R19. Accordingly, the Secretary will meet his burden of proving a violation if he prevails on his argument that the term "working place," as used in § 56.18002(a), categorically includes elevators. *See* Sec'y Br. 13-18; Tr. 24-25. He can also prove a violation by establishing that the elevators in question constituted "working places" within the meaning of the regulation. These issues present a question of regulatory interpretation.

1. Legal Principles Governing Regulatory Interpretation

Where the language of a regulatory provision is clear, the provision must be enforced as written unless the regulator clearly intended the words to have a different meaning or enforcement would produce absurd results. *Hecla Ltd.*, 38 FMSHRC __, Nos. WEST 2012-760-M et al., slip op. at 6 (Aug. 30, 2016); *Austin Powder Co.*, 29 FMSHRC 909, 913 (Nov. 2007); *see Pfizer, Inc. v. Heckler*, 735 F.2d 1502, 1509 (D.C. Cir. 1984) ("Under settled principles of statutory and rule construction, a court may defer to administrative interpretations of a statute or regulation *only* when the plain meaning of the rule itself is doubtful or ambiguous.").

To the extent that a regulation is silent or ambiguous on a particular point, the Commission follows the doctrine of deference established in *Bowles v. Seminole Rock and Sand Company*, 325 U.S. 410 (1945), and reaffirmed in *Auer v. Robbins*, 519 U.S. 452 (1997). *See, e.g.*, *Hecla*, slip op. at 6; *Tilden Mining Co.*, 36 FMSHRC 1965, 1967 (Aug. 2014), *aff'd*, __ F.3d __, 2016 WL 4254997 (D.C. Cir. Aug. 12, 2016). Under this doctrine, the promulgating agency's interpretation of the regulation is entitled to full deference (referred to as *Auer* deference) unless the interpretation is unreasonable, plainly erroneous, or inconsistent with the regulation, or there is reason to suspect it does not reflect the agency's fair and considered

judgment on the matter. *Drilling & Blasting Sys., Inc.*, 38 FMSHRC 190, 194 (Feb. 2016) (citing *Christopher v. SmithKline Beecham Corp.*, 567 U.S. __, 132 S. Ct. 2156 (2012)); *see, e.g.*, *id.* at 194-97 (declining to defer to plainly erroneous interpretation); *Hecla*, slip op. at 6-9 (deferring to reasonable interpretation); *Tilden Mining*, 36 FMSHRC at 1967-68 (same); *Twentymile Coal Co.*, 36 FMSHRC 2009, 2012-13 (Aug. 2014) (declining to defer to unreasonable interpretation).

If there is reason to suspect that an agency's interpretation does not reflect its fair and considered judgment, the interpretation is not entitled to full *Auer* deference, but is still entitled to a measure of deference or respect proportional to the "thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade." *Christopher v. SmithKline Beecham*, 132 S. Ct. at 2168-69 (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), and *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001)).[11]

In evaluating the merits of a proposed regulatory interpretation, the Commission has considered factors such as whether the interpretation is consistent with the language and ordinary usage of the cited standard, whether it harmonizes with the purpose and structure of the regulations, and whether it furthers the policy goals of the Mine Act, particularly the Act's safety-promoting purposes. See, for example, *Hecla*, slip op. at 6-9 (analyzing the language of the regulation, the regulation's specific purpose, and the general policy goals of the Mine Act, particularly the goal of promoting safety); *Nally & Hamilton Enters.*, 38 FMSHRC 1644, 1648-51 (July 2016) (adopting an interpretation that was consistent with the language of the regulation, as determined by reliance on dictionary definitions and prior case law; that harmonized with the regulatory scheme; and that furthered the goals of the Mine Act); *Twentymile*, 36 FMSHRC at 2012-13 (rejecting an interpretation that was not suggested by the language of the standard or its regulatory history and that did not advance mine safety); *Wolf Run Mining Co.*, 32 FMSHRC 1669, 1681-82, 1685-86 (Dec. 2010) (analyzing one ambiguous term with reference to the broader regulatory context, including analogous regulations, and adhering to another ambiguous term's customary technical usage, as demonstrated by a mining dictionary and the testimony of knowledgeable witnesses); *Daanen & Janssen, Inc.*, 20 FMSHRC 189, 193-94 (Mar. 1998) (analyzing regulatory language with reference to ordinary dictionary meanings, the Mine Act's safety-promoting goals, the PPM, the Secretary's past application of the

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[11] Thus, *SmithKline Beecham* can be viewed as extending *Skidmore* deference from the statutory interpretation context to the regulatory interpretation context. The difference is that in the statutory interpretation context, *Skidmore* deference is triggered by the conditions set forth in *Mead*, while in the regulatory interpretation context, it is triggered by a finding under *SmithKline Beecham* that the agency's proffered interpretation may not represent its fair and considered judgment. *Compare Mead*, 533 U.S. at 226-27, 234-35 (providing for full *Chevron* deference only "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority," and *Skidmore* deference in all other contexts), *with SmithKline Beecham*, 132 S. Ct. at 2166-69. If the agency's regulatory interpretation is unreasonable, plainly erroneous, or inconsistent with the regulation, courts presumably need not accord it any deference at all under either *Auer* or *Skidmore*. *See, e.g.*, *Drilling & Blasting Sys.*, 38 FMSHRC at 194-97; *Twentymile*, 36 FMSHRC at 2012-13.

regulation, and the regulatory structure); *Island Creek Coal Co.*, 20 FMSHRC 14, 19-24 (Jan. 1998) (evaluating the ordinary meaning of the regulatory language; "contextual indications," including the meaning of similar language in other regulations; and the Mine Act's purposes).

2. The Parties' Positions

The Secretary argues that it is reasonable to interpret the term "working place" to include elevators and elevator landings because the definition of "working place" found in § 56.2 includes the expansive word "any"; because § 56.18002 is a broad standard intended to require close examination of the total mining environment; and because miners use elevators to perform "work," as defined in the Merriam Webster Online Dictionary, bringing them within the plain meaning of "working place." Sec'y Br. 13-17.[12] Noting that Administrative Law Judge David Barbour recently interpreted § 56.18002 to cover elevators when they are being used to perform work, the Secretary suggests that I should adopt and broaden this holding to apply to elevators "as a unit" without temporal limitations – that is, he suggests that elevators should categorically be included in workplace exams. *Id.* at 17-18 & n.11 (citing *Cemex Constr. Materials, Atl., LLC*, 38 FMSHRC 827 (Apr. 2016) (ALJ)). The Secretary contends that in this case, § 56.18002 was violated because MSHA Specialist Evans observed employees using the pack house elevator, and was told that employees use the mine's elevators on a daily basis, yet Cemex had not designated a competent person to examine them. *Id.* at 18. The Secretary further asserts that even if elevators constitute travelways rather than "working places," they are still subject to workplace exams. *Id.* at 18-20.

Cemex argues that the elevators at the Demopolis Plant do not fall within the definition of a "working place." Resp. Br. 5-19. Cemex first contends that the Secretary's purported interpretation of "working place" is actually a substantive rule change imposing a new obligation to examine not only areas where miners work, but also where they travel, which is contrary to the plain meaning of the standard. *Id.* at 6-7 & n.4. To the extent that this is a new substantive rule, Cemex argues that the Secretary was required to engage in notice-and-comment rulemaking. *Id.* at 25-28. To the extent that this is a new interpretation of an ambiguous standard, Cemex argues that the interpretation is unreasonable and not entitled to deference because it is inconsistent with the language and structure of the regulations and would produce absurd results. *Id.* at 7-14. Cemex further asserts that, even if an elevator could be construed as a working place, the Secretary has failed to meet his burden of establishing that work was being performed at the time of the inspection, or would be performed in the foreseeable future, on or near the cited elevators. *Id.* at 14-19.

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[12] The Secretary further takes the position that an elevator shaft is a "working place" for any contract workers who are servicing the elevator's internal workings, obligating the contractor to conduct workplace exams of the shaft. Sec'y Br. 15 n.9. I need not address this contention, as neither the contractor nor Cemex were cited for failing to examine elevator shafts.

3. Interpretation of § 56.18002

a. Whether the Language of the Regulation Is Clear

The regulatory language at issue in this case is not clear. Section 56.18002 requires examination of "each working place" each shift, but does not define "working place." A separate regulation defines a "working place" in a metal or nonmetal mine as "any place in or about [the] mine where work is being performed." 30 C.F.R. § 56.2. However, the regulations are silent and therefore unclear as to whether and under what circumstances the Secretary considers elevators and elevator landings to be part of the working place such that they fall within the scope of § 56.18002.

I reject the Secretary's assertion that "[t]here is simply no ambiguity to the standard when measuring it with the definition of work." Sec'y Br. 14. The Secretary's own witness admitted that the Secretary has changed his interpretation of the standard to cover elevators and elevator landings, whereas previously they were not required to be examined as part of the "working place." Tr. 105-06. I further reject Cemex's assertion that the "regulatory language *plainly* requires examinations where miners are conducting work, not travel." Resp. Br. 7 (emphasis added). The parties have advanced competing definitions of both "work" and "working place," showing that the meaning of this language is not plain. Because the regulatory language is subject to more than one interpretation, I find it to be ambiguous. *See Alcoa Alumina & Chems., LLC*, 23 FMSHRC 911, 915 (Sept. 2001) (rejecting competing plain language interpretations and finding regulatory language to be ambiguous due to its silence on the issue in question); *Island Creek*, 20 FMSHRC at 19 (finding a regulatory term to be ambiguous because it was open to alternative interpretations).

b. Whether *Auer* Deference Is Warranted

To the extent that § 56.18002 is ambiguous, the Secretary's interpretation is entitled to *Auer* deference unless it is unreasonable, plainly erroneous, inconsistent with the regulation, or there is reason to suspect it does not reflect his agency's fair and considered judgment. The Supreme Court has cautioned that a regulatory interpretation may not reflect an agency's fair and considered judgment if it conflicts with a prior interpretation or if it appears to be nothing more than a "convenient litigating position" or a "'*post hoc* rationalizatio[n]' advanced … to defend past agency action against attack." *SmithKline Beecham*, 132 S. Ct. at 2166-67 (citing *Auer*, 519 U.S. at 462; *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 515 (1994); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988)); *see also Talk Am., Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50, 63-64 (2011) (noting that "novelty alone is not a reason to refuse deference," but suggesting that it would be improper to accord deference to a new interpretation set forth for the first time by agency counsel to rationalize an agency action that is under judicial review). *But see Sunbelt Rentals*, *supra*, 38 FMSHRC at 1622-23, and *Sunbelt Rentals, Inc.*, Nos. VA 2013-275-M et al. (June 30, 2015) (unpublished Order), where the Commission permitted the Secretary's appellate counsel to advance a new regulatory interpretation for the first time during oral argument and subsequent supplemental briefing, despite the ALJ's dismissal on summary judgment grounds based on regulatory interpretation <u>and</u> fair notice grounds.

For example, in *SmithKline Beecham*, the Court found that the agency's proffered interpretation did not represent its fair and considered judgment when the agency had first announced the interpretation during an enforcement proceeding following a lengthy period of inaction. 132 S. Ct. at 2167-68. By comparison, in a subsequent case, the Court found that an agency's interpretation reflected its fair and considered judgment where the agency had offered the interpretation in an amicus brief and had been consistent in its views over time, as opposed to changing its views in response to litigation. *Decker v. Northwest Envtl. Defense Ctr.*, 568 U.S. __, 133 S. Ct. 1326, 1337-38 (2013).

In this case, I find reason to suspect that the Secretary's proffered interpretation does not reflect MSHA's fair and considered judgment on the matter at issue, for several reasons. First, the Secretary's desired interpretation is unclear in some respects. Judge Barbour recently issued a thoughtful opinion in *Cemex Construction Materials, Atlantic*, that addressed (1) when a workplace exam must be performed;[13] (2) where it must be performed;[14] and (3) what specific components of an elevator must be examined when the elevator is part of a working place. 38 FMSHRC at 839-40. By contrast, the Secretary has not clearly addressed all of these points, and because his desired interpretation is not embodied in the citation, the regulations, or any agency guidance documents, I am left to discern its scope and bounds on my own, relying on the testimony and arguments presented in this case.[15] I am hesitant to find that a new interpretive

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[13] Judge Barbour held that an exam must be performed on or during a shift when work is being performed, is assigned to be performed, or is reasonably expected to be performed. *Cemex Constr.*, 38 FMSHRC at 839.

[14] Judge Barbour held that the operator must examine the places where work is being or will be performed, noting that the standard "is directed at the examination of 'each working place' not at a generic type of working place, i.e., 'the elevators.'" *Id.* at 840.

[15] The testimony of the Secretary's sole witness, Specialist Evans, is self-contradictory in some respects and ultimately unclear. For example, Evans testified at one point that he considered the whole mine to be a working place, but later essentially recanted this testimony. Tr. 57, 77. He failed to offer a clear theory as to whether and when § 56.18002 applies to elevators and, more generally, to travelways, defined under § 56.2 as "passage[s], walk[s] or way[s] regularly used and designated for persons to go from one place to another." He first stated that the operator should keep exam records for elevators for every shift when they are in use, or for stairways if they are used instead, but later conceded that travelways are not covered under the workplace exam regulation and that he believes an elevator is a "working place" only if someone is working on the elevator or near the doors. Tr. 67, 75-76, 107.

The Secretary's brief clarifies that he prefers a broad definition of "work" and "working place." However, the rule he ultimately settles on is so open-ended that it is unclear, and likely will be difficult for operators to apply going forward to determine what areas of a mine need to be examined and when they need to be examined. *See* Sec'y Br. 17 ("Finally, if there is even a reasonable expectation of work taking place, essentially anywhere in the Mine, including the elevator car and landing areas – that is, if there is a reasonable expectation of a miner engaging in an activity where he exerts himself to perform some task, duty, function, or assignment as part

(continued…)

rule that I must cobble together from a litigation brief and the testimony of one MSHA employee represents the Secretary's fair and considered judgment as a policymaker.

Additionally, the Secretary's new interpretation of § 56.18002 is in conflict with MSHA's past interpretation and enforcement of the standard. MSHA did not previously require elevators to be examined as part of the "working place." Tr. 105-06. There is no record evidence that the Secretary or anyone at MSHA thought to apply the standard in this manner until Evans issued the disputed citation.[16] Thus, it appears that the proffered interpretation was first announced by taking the very enforcement action that triggered this proceeding, and the arguments that the Secretary has mustered in favor of his newly adopted position appear to constitute a *post hoc* rationalization of that past agency action.

In addressing a similar situation in *SmithKline Beecham*, the Supreme Court reached the following conclusion:

> Our practice of deferring to an agency's interpretation of its own ambiguous regulations undoubtedly has important advantages, but this practice also creates a risk that agencies will promulgate vague and open-ended regulations that they can later interpret as they see fit, thereby "frustrat[ing] the notice and predictability purposes of rulemaking." It is one thing to expect regulated parties to conform their conduct to an agency's interpretations once the agency announces them; it is quite another to require the regulated parties to divine the agency's interpretations in advance or else be held liable when the agency announces its interpretations for the first time in an enforcement proceeding and demands deference.
>
> Accordingly, whatever the general merits of *Auer* deference, it is unwarranted here.

132 S. Ct. at 2168 (citations and footnote omitted).

Consistent with this guidance, I find that full *Auer* deference is unwarranted here. Nonetheless, the Secretary's interpretation of § 56.18002 is entitled to a measure of deference proportional to "all those factors which give it power to persuade." *Id.* at 2168-69. Accordingly, I will evaluate it on its own merits.

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[15] (…continued)
of a greater phase or larger task – it does not matter if it is performed daily, weekly, or even infrequently, if he is doing it, intends to do it, or if there is a reasonable expectation he will do it, the operator must designate a competent person to perform a workplace exam.").

[16] I note that although the Secretary's new interpretation has already been addressed in two other cases, *Ash Grove Cement Co.*, 38 FMSHRC __, Nos. WEST 2014-963 et al. (Aug. 4, 2016) (ALJ), and *Cemex Construction Materials, Atlantic*, *supra*, the citation at issue in the instant case was written before the citations at issue in those cases.

c. Analysis of the Secretary's Interpretation

As a preliminary matter, regarding Cemex's argument that the Secretary's interpretation amounts to a substantive rule change requiring notice-and-comment rulemaking under the Administrative Procedure Act (APA), I find that the Secretary is merely advancing a new interpretive rule. The APA does not require notice-and-comment rulemaking for interpretive rules issued to advise the public of an agency's construction of the regulations it administers. *See* 5 U.S.C. § 553(b)(A); *Small Mine Dev.*, 37 FMSHRC 1892, 1899 n.7 (Sept. 2015); *see also Perez v. Mortg. Bankers Ass'n*, 575 U.S. __, 135 S. Ct. 1199, 1206 (2015). However, this does not mean that the APA condones promulgating interpretive rules by any means possible, such as by springing unexpected enforcement actions upon the regulated community. The Secretary should be aware that he subjects his interpretive positions to heightened scrutiny and risks losing the benefit of *Auer* deference when he attempts to legislate through enforcement, which I believe has occurred in this case.

Turning to the interpretation itself, the Secretary proposes to require inclusion of elevators in workplace examinations conducted under § 56.18002. For the reasons discussed below, I conclude that, although elevators may fall within the scope of § 56.18002 under some circumstances, the Secretary has failed to establish that such circumstances exist in this case. Moreover, to the extent that the Secretary is asking me to define an elevator as a "working place" under all circumstances, I find this interpretation to be unreasonable and unpersuasive because it is not suggested by the language and regulatory history of § 56.18002, does not harmonize with the language and structure of the regulations, and is not necessary to protect miner safety.

The language of § 56.18002 and the regulatory definition of "working place" in § 56.2 are so broad and general that they offer little help in divining whether elevators and elevator landings are meant to be included. I reject the Secretary's textual argument that the word "any" in the regulatory definition of "working place" in § 56.2 is intended to provide absolute coverage. *See* Sec'y Br. 15. The full definition of a working place is "any place in or about a mine where work is being performed." 30 C.F.R. § 56.2. The Secretary's argument for absolute coverage ignores the limiting phrase "where work is being performed." I find that the language of § 56.18002 and § 56.2 does not directly conflict with the Secretary's new interpretation, but it is so general that it does nothing to suggest this interpretation, either.

The language of § 56.18002 and the current definition of "working place" have been in the regulations since 1979. *See* Final Rule: Metal and Nonmetal Mine Safety; Advisory Standards Revoked or Revised and Made Mandatory, 44 Fed. Reg. 48490, 48505, 48525 (Aug. 17, 1979). However, a review of the regulatory history and pertinent interpretive documents shows that the Secretary has never provided guidance as to whether elevators or functionally analogous spaces such as stairways and travelways are intended to be included in workplace exams, even after the Louisville fatality.

The Secretary's Program Policy Manual (PPM) states that the term "working place," as used in § 56.18002, "applies to those locations at a mine site where persons work during a shift in the mining or milling processes." Ex. R10. Like the regulations themselves, this statement is broad, general, and unhelpful. The Secretary has issued several Program Policy Letters (PPLs)

pertaining to § 56.18002 over the years, but some of them merely recite the language set forth in the PPM. *See* Ex. R11; Ex. R12. One PPL, issued in July 2015, more than a year after the Louisville fatality, adds that working places include "areas where work is performed on an infrequent basis, such as areas accessed primarily during periods of maintenance or clean-up." Ex. R13. A rulemaking notice recently published by MSHA clarifies that such areas are covered only "if miners will be performing work in these areas during the shift." Proposed Rule and Notice of Public Hearings: Examinations of Working Places in Metal and Nonmetal Mines, 81 Fed. Reg. 36818, 36821 (June 8, 2016). However, neither the PPL nor the rulemaking notice addresses elevators or travelways.

Similarly, a 1995 policy notice published in the Federal Register provides examples of what sort of areas need or need not be examined, but fails to address elevators or travelways:

> The working place for an individual assigned to perform maintenance or repair duties, for example, is the area where the individual performs the maintenance or repair work. For an operator to be in compliance, that area would need to be examined … Standard 56/57.18002 does not apply to access or other roads not directly involved in the mining process, administrative office building[s], parking lots, lunchrooms, toilet facilities, or inactive storage areas. Isolated, abandoned, or idle areas of mines or mills need not be examined, unless persons perform work in these areas during the shift.

Notice: Examination of Working Places, 60 Fed. Reg. 9985, 9988 (Feb. 22, 1995).

I find that the available regulatory history and agency guidance documents do not suggest that § 56.18002 is intended to cover elevators or functionally analogous spaces such as travelways, although they do not foreclose the possibility that the standard could be interpreted in this manner. Because the language and regulatory history of the standard, considered in conjunction with the Secretary's guidance documents, do not suggest that the standard is intended to cover elevators, the inquiry turns to whether it is reasonable to expand the definition of "working place" in this manner.

The Secretary's argument in favor of the expansion relies heavily on a wide-reaching interpretation of the term "work," as used in the definition of "working place" in § 56.2 ("*Working place* means any place in or about a mine where work is being performed."). The Secretary contends that "work and working places is a fluid concept." Tr. 23. Citing the Merriam Webster Online Dictionary, he broadly characterizes work as any exertion of physical or mental effort undertaken as part of a miner's job, including carrying tools and materials while riding in an elevator. Sec'y Br. 14-16.

By contrast, Cemex characterizes riding in an elevator as travel, not work, and notes that the Secretary distinguishes between these two activities in a number of regulatory provisions. Resp. Br. 11-12. Cemex contends that accepting the Secretary's definition would have the absurd result of requiring the mine operator to examine the whole mine during each shift and would render superfluous the various regulations applying to travelways. *Id.* at 8-14.

After considering both parties' arguments, I find that the Secretary's proposed interpretation of "work" and "working place" sweeps so broadly that it does not harmonize with the structure of the regulations. Contrary to the Secretary's proposed definition of "work," which is so broad that it encompasses travel, *see* Sec'y Br. 14-16 (defining work as an "activity in which one exerts strength or faculties to do or perform something"), the regulations clearly treat work and travel as separate concepts and distinguish between places where people work and places where they travel. The regulations separately define "working place" and "travelway." A travelway is defined as "a passage, walk or way regularly used and designated for persons to go from one place to another," which is functionally distinct from a "place … where work is being performed," that is, a working place. 30 C.F.R. § 56.2.

This distinction is borne out by the fact that numerous other regulations apply, by their specific terms, both to places where miners work and places where they travel. *See, e.g.*, 30 C.F.R. § 56.3130, § 56.3131 (requiring ground control in "places where persons work or travel"); § 56.3200 (requiring hazardous ground conditions to be taken down before "other work or travel is permitted in the affected area"); § 56.3430 (stating that persons "shall not work or travel" between machinery and the highwall, except that "[t]ravel is permitted when necessary for persons to dismount"); § 56.16015 (prohibiting "work from or travel on the bridge of an overhead crane" unless certain precautions are taken). It would be unnecessary for these regulations to list both activities if the Secretary were correct in arguing that "work" is so broad as to encompass "travel." But the use of both terms indicates that work and travel are distinct activities. To interpret the terms otherwise would violate the rule against surplusage. *See, e.g.*, *Cotter Corp.*, 8 FMSHRC 1135, 1137 (Aug. 1986) (avoiding an interpretation of a regulation that would render a provision mere surplusage).

An elevator serves as a "way … for persons to go from one place to another," rather than a place where the actual work of mineral extraction or milling takes place. An elevator is therefore, in my view, more properly described as a travelway than a working place under § 56.2.

The Secretary asserts that ALJs have consistently required travelways to be examined during workplace exams, and cites several cases where ALJs have upheld citations for unsafe conditions found in travelways. Sec'y Br. 19 (citing *Northshore Mining Co.*, 37 FMSHRC 372 (Feb. 2015) (ALJ Barbour); *U.S. Silica Co.*, 32 FMSHRC 1699, 1707 (Nov. 2010) (ALJ Miller); *USS, Div. of USX Corp.*, 13 FMSHRC 145, 153 (Jan. 1991) (ALJ Broderick)). However, the cases he cites are inapposite because they pertain to different safety standards – specifically, § 56/57.20003 and § 56/57.11001 – that expressly apply to travelways, unlike § 56.18002. *Compare* 30 C.F.R. § 56.18002 (regulating "working places") *with* § 56.11001 (regulating "means of access" to working places) *and* § 56.20003 (regulating both working places and "passageways," along with storerooms, service rooms, and floors). There is no support for the Secretary's assertion that travelways have customarily been treated the same as working places in the metal/nonmetal context.

By contrast, in the underground coal mining context, the Secretary has promulgated a detailed pre-shift examination standard that specifically includes "[r]oadways, travelways, and track haulageways where persons are scheduled … to work or travel during the oncoming shift." 30 C.F.R. § 75.360(b)(1). Moreover, the coal mine safety standards expressly require daily

examination of "[h]oisting equipment, including automatic elevators, used to transport persons," and specify what components of the elevators should be examined. *Id.* § 75.1400(d), § 75.1400-3; *see also id.* § 77.1403 (requiring daily examinations of elevators at surface coal mines). The Secretary could have inserted analogous provisions into Part 56 to ensure that travelways are examined at the same frequency as working places and that elevators are included in workplace exams, but he did not. The metal/nonmetal regulations simply are not structured to treat elevators or travelways the same as working places.[17] The Secretary's proposed interpretation of § 56.18002 conflicts with the regulatory structure in Part 56.

Aside from conflicting with the regulations' dichotomy between working places and travelways, the Secretary's definition of "work" is also so broad that, as essentially conceded by the Secretary, it would render the entire mine a "working place" whenever a miner is present and on the clock. *See* Sec'y Br. 17 n.10; Tr. 57, 111, 117. This would contradict the Secretary's assurance in the PPM that the phrase "each working place" refers only to "*those* locations at a mine site where persons work during a shift in the mining or milling processes," not to *every* location at the mine. *See* Ex. R10 (emphasis added). If the entire mine is a "working place," this phrase would cease to be a term of art requiring a special definition. The Secretary would have had no reason to use it in § 56.18002. Instead of saying that the operator must "examine *each working place* at least once each shift," he could have simply stated that the operator must "examine *the mine*" each shift. But this is not what the standard says. I am unwilling to expand the standard to give it such a broad reach without a compelling reason to do so.

The Secretary asserts that Cemex ran its elevators into the ground, picking and choosing what to fix and what not to fix, and asks me to interpret § 56.18002 broadly in order to further the Mine Act's safety-promoting goals. Sec'y Br. 13, 17; *see also Island Creek*, 20 FMSHRC at 22 (referencing the "well-established maxim that regulations must be interpreted in a manner consonant with the safety-promoting purposes of the Mine Act"). But I find it unnecessary to stretch § 56.18002 in the manner he suggests, because the Secretary can protect miners from hazards related to elevators by issuing citations under a variety of other applicable regulations.

For example, the Secretary already regulates machinery and equipment under Part 56, Subpart M and could issue citations under the broadly applicable provisions in this subpart, such as § 56.14100, which requires miners to inspect self-propelled mobile equipment before placing it in use and to timely correct any defects. 30 C.F.R. § 56.14100. Automatic elevators fall within

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[17] This makes sense in some ways. Mining poses unique hazards. However, these hazards are more likely to be present in places were the actual "work" of mining takes places – that is, where miners engage in mineral extraction and milling tasks – than in places that are simply traveled through by miners, especially at facilities where ventilation and roof control are not a concern. Thus, for example, one of the safety standards in Part 56 requires "areas where work is to be performed" to be examined for loose ground more frequently than "[h]ighwalls and banks adjoining travelways." 30 C.F.R. § 56.3401. The Secretary explained in his rulemaking notice that he was drawing this distinction because he expected ground conditions to change more rapidly in areas where work was being performed than along travelways and haulageways. Final Rule: Safety Standards for Ground Control at Metal and Nonmetal Mines, 51 Fed. Reg. 36192 (Oct. 8, 1986). This seems to represent a policy judgment that active work areas pose greater dangers than travelways, and therefore warrant more frequent examination.

the scope of § 56.14100 because they are self-propelled mobile equipment. In fact, the Secretary cited this provision in this very case to address the defective cam roller and in-use lights on the pack house elevator. *See* Ex. R5; Ex. R7.

As another example, the Secretary has promulgated regulations governing travelways in Subpart J, including a general provision that mandates: "Safe means of access shall be provided and maintained to all working places." 30 C.F.R. § 56.11001. Because elevators and elevator landings provide access to working places, they could be cited under this standard if they were not being maintained in safe condition.

As yet another example, the Secretary has promulgated detailed regulations governing hoisting equipment in Subpart R, including a provision requiring operators to follow a "systematic procedure of inspection, testing, and maintenance of shafts and hoisting equipment." 30 C.F.R. § 56.19120. The Secretary has successfully applied this provision to elevators in at least one other case. *See Cemex Inc.*, 37 FMSHRC 2886 (Dec. 2015) (ALJ Rae) (granting partial summary decision on the issue of whether an elevator can be classified as a "hoist" under § 56.19120 such that it is subject to a systematic procedure of inspection, testing, and maintenance). Thus, the Secretary can require operators to adopt inspection, testing, and maintenance procedures for elevators without adopting a new interpretive rule.

In sum, I find that the Secretary's new interpretation of § 56.18002 is not necessary to promote elevator safety, because other provisions can be applied to elevators to accomplish the same safety-promoting goals with less violence to the structure of the regulations. Because interpreting the term "working place" in § 56.18002 to categorically include elevators is inconsistent with the structure of the regulations and is not necessary to promote safety, I find that this interpretation is unreasonable and unpersuasive, and I decline to adopt it.

It may be possible for miners to use an elevator in such a way that it becomes a working place, that is, a place where work is being performed, during a particular shift. However, the Secretary has failed to put on any evidence that the elevators at issue in this case were being used as working places at the time of the inspection, were scheduled or expected to be used as working places in the future, or had been used as working places during any particular shift in the past.

The sole evidence put on by the Secretary regarding the use of the elevators was Evans' testimony that he learned from a company representative that the elevators are used on a daily basis, as needed, and that the mine "needed to get [the downed elevators] running again because they have to carry their tools to the – up those flights of stairs and things, parts and things, you know, just a big inconvenience." Tr. 55-56. Evans admitted that he did not see any work being performed on or near the elevators at the time of the inspection. Tr. 73-75. The preheater and mill room elevators were locked and tagged out and the only miners he saw using an elevator were at the pack house, but he could not say what sort of work they were performing or even explain the general function of the pack house. Tr. 50-52, 74-75. He did not describe any past work or future work that he expected to be performed on or near the elevators. When asked what type of work a miner would use an elevator for, he responded, "I mean, just to get to the different floors where they're working at, you know … otherwise, they have to use the stairways

alongside the building." Tr. 50. In other words, the miners used the elevators for travel. Evans did not explain or provide any examples of how miners would use the elevators to perform work, as opposed to travel. He did not describe what other items would be transported in elevators and for what purpose, and could not even identify what work was generally performed at the mine.

The Secretary did not put on any other evidence to show how the elevators at the Demopolis Plant are used or have ever been used as working places. I find that the Secretary has failed to establish that the elevators were used or were expected to be used as "working places" such that they needed to be included in workplace exams under § 56.18002. Accordingly, he has failed to establish a violation.

However, regardless of whether or not a violation occurred, there is another reason that Citation No. 8641317 cannot be upheld. Cemex did not have fair notice of the Secretary's new interpretation of § 56.18002 before the citation was issued.

B. Fair Notice

1. Legal Principles

Even if an agency's interpretation of a regulation is reasonable, fundamental due process considerations preclude adoption of that interpretation without fair notice. *See Hecla Ltd.*, 38 FMSHRC __, Nos. WEST 2012-760-M et al., slip op. at 9 (Aug. 30, 2016); *Am. Coal Co.*, 38 FMSHRC __, No. LAKE 2009-35, slip op. at 15 (Aug. 30, 2016); *Energy West Mining Co.*, 17 FMSHRC 1313, 1317-18 (Aug. 1995); *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1328-29 (D.C. Cir. 1995). In Mine Act proceedings, this means that before the Secretary can penalize a mine operator for a violation of a safety standard, the operator must be placed on notice of what conduct the standard forbids or requires such that it has an opportunity to act accordingly. *See Hecla Ltd.*, slip op. at 9 ("To comport with due process, laws must 'give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.") (citing *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972)); *Energy West*, 17 FMSHRC at 1318 (same); *Mathies Coal Co.*, 5 FMSHRC 300, 303 (Mar. 1983) ("[E]ven a broad standard cannot be applied in a manner that fails to inform a reasonably prudent person that the condition or conduct at issue was prohibited by the standard."), *aff'd*, 725 F.2d 126 (D.C. Cir. 1984) (table).

To resolve issues of notice, the Commission applies an objective standard called the "reasonably prudent person" test. *Hecla*, slip op. at 9; *Sunbelt Rentals, Inc.*, 38 FMSHRC 1619, 1627 (July 2016); *Energy West*, 17 FMSHRC at 1318. The test is "whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard." *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990). Many different factors may be relevant to this inquiry, including the text of the regulation, its placement in the overall regulatory scheme, its regulatory history and purpose, the consistency of the agency's enforcement, whether MSHA has published notices informing the regulated community with ascertainable certainty of its interpretation, and whether the operator would have been aware of the requirement of the standard because of past

case precedent. *See Sunbelt Rentals*, 38 FMSHRC at 1627; *Wolf Run Mining Co.*, 32 FMSHRC 1669, 1682 (Dec. 2010); *Lodestar Energy, Inc.*, 24 FMSHRC 689, 694-95 (July 2002).

2. The Parties' Positions

The Secretary asserts that Cemex had fair notice that it needed to incorporate elevators and elevator landing areas into its workplace examinations under § 56.18002. Sec'y Br. 22-24. The Secretary first suggests that this is not a new interpretation of § 56.18002. *Id.* at 22-23. To the extent that the interpretation is new, the Secretary argues that three factors should have placed Cemex on notice of the interpretation: the contract between Cemex and TKE; the fatality at the Louisville plant; and § 56.18002 itself. *Id.* at 23-24.

Cemex asserts that the citation should be vacated because the Secretary failed to provide adequate and fair notice of his new interpretation of § 56.18002, in violation of the U.S. Constitution's Due Process Clause. Resp. Br. 19-25. Cemex argues that a reasonably prudent person would not have known of the Secretary's new interpretation before the citation was issued because the Secretary chose "to ambush unknowing operators and legislate its new requirement through enforcement methods" without first alerting mine operators to the change through the Secretary's authorized representatives or through specific published guidance. *Id.* at 22. Cemex also suggests that its employees were acting with reasonable prudence at the time the citation was issued. *Id.* at 24.

3. Analysis

I find that the Secretary has not met the notice requirement. Contrary to the Secretary's argument, his proffered interpretation of § 56.18002 is new. Specialist Evans admitted that interpreting the standard to cover elevators represents a change from the agency's prior position. Tr. 105-06. Evans admitted that before the March 4, 2014 spot inspection, he had never asked Cemex for examination records for elevators or their functional analog, stairwells; he had never told Cemex that such records needed to be kept; and he had never cited Cemex for failing to designate competent persons to examine elevators or stairwells or for failing to report elevator defects to management. Tr. 87-89, 97-100, 112-13. In fact, Evans had never before issued a citation involving an elevator. Tr. 59.

Apparently, MSHA had not previously paid much attention to elevators at cement plants, and it was only after the Louisville fatality that MSHA decided to prioritize elevator safety at these plants. Tr. 21-22, 39. Rather than communicating this decision to cement plant operators and notifying them of what they must do to improve elevator safety at their facilities, such as incorporate elevators into workplace exams, MSHA dispatched inspectors to issue citations, resulting in Evans' issuance of the instant citation under a novel theory of violation. In Judge Barbour's words, "the agency effectively 'sandbagged' the company." *Cemex Constr. Materials, Atl.*, 38 FMSHRC at 846.

The facts before Judge Barbour in his *Cemex Construction Materials* case were nearly identical to those at issue in this case. On those facts, Judge Barbour concluded that the mine operator was not properly on notice of the Secretary's new interpretation of § 56.18002. 38

FMSHRC at 845-46. He found that the operator reasonably could have read the standard as not applying to elevators due to the Secretary's "total lack of prior enforcement, the broad wording of the definition of 'working place' and the fact that elevators are not specifically mentioned in the regulations for surface and underground metal and non-metal mines." 38 FMSHRC at 846. These factors are equally valid here, and I agree with his analysis.

Judge Barbour also rejected the Secretary's specific arguments that the regulation itself, the Louisville fatality, and the contract between the mine operator and an elevator maintenance company would have placed a reasonably prudent operator on notice of the need to incorporate elevators into its workplace exams under § 56.18002. *Id.* at 846-47 n.19. The Secretary has raised the same three arguments in this case, and they are equally unavailing here.

First, the regulation itself is so broadly worded that it does not place a reasonably prudent operator on notice of the Secretary's purported intent to require inclusion of elevators and elevator landings in workplace examinations. The Secretary contends that the regulation provided Cemex with fair notice of this interpretation because "[u]nder a clear mandate from the standard, an operator must examine *any* workplace." Sec'y Br. 24. However, I have already found the standard to be ambiguous, not clear, in terms of intended coverage. As the Commission has noted, the standard was "drafted in general terms." *Sunbelt Rentals, Inc.*, 38 FMSHRC 1619, 1627 (July 2016). Its broad, general terms do not amount to the sort of "clear mandate" that would notify a reasonably prudent operator of the specific meaning the Secretary wishes to attribute to the regulation in this case.[18]

The ambiguity in the standard would not foreclose a finding of fair notice if the Secretary had communicated his interpretation of the provision to Cemex before issuing the citation, such as through specific pre-enforcement warnings to Cemex or guidance published to the regulated community at large. *See, e.g.*, *Consolidation Coal Co.*, 18 FMSHRC 1903, 1907 (Nov. 1996) (holding that operator was on notice of a particular regulatory requirement when management had been informed of that requirement in seven prior meetings with MSHA), *aff'd*, 136 F.3d 819 (D.C. Cir. 1998); *Tilden Mining Co.*,36 FMSHRC 1965, 1970-71 (Aug. 2014), *aff'd*, __ F.3d __, 2016 WL 4254997 (D.C. Cir. Aug. 12, 2016) (holding that operator had received actual notice of

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[18] Usually, in cases where the Commission has found that a regulation itself provides fair notice of the Secretary's interpretation, the standard either expressly mandates or clearly indicates the interpretation. For example, in *Austin Powder Company*, the Commission found that the language of a regulation placed the operator on notice that a detonator must be stored in a magazine because the regulation expressly mandated that "[d]etonators … shall be stored in magazines." 29 FMSHRC 909, 919-20 (Nov. 2007). As another example, in *Bluestone Coal Corporation*, the Commission held that a regulation requiring equipment operating speeds to be "prudent" provided fair notice that unsafe speeds were prohibited because the meaning of the standard was clear. 19 FMSHRC 1025, 1030-31 (June 1997). Similarly, in *Sunbelt Rentals*, the Commission held that § 56.18002 includes an adequacy requirement for workplace examinations, even though this requirement is not expressly stated, because otherwise the purpose of the standard would be thwarted. 38 FMSHRC at 1627. As discussed at length above, unlike in these example cases, in this case there is no express regulatory mandate or clear indication that elevators must be included in workplace examinations.

an interpretation when the interpretation in question had been published in the PPM five years before the citation was issued). However, there is no indication that the Secretary gave any prior warnings to Cemex. Cemex had never received a citation under the Secretary's new interpretation of § 56.18002, and as noted above, Evans admitted he had never asked Cemex for examination records for elevators or stairwells and had never suggested such records needed to be kept. Tr. 87-89, 97-100, 112-13. Evans could not point to any MSHA regulations or guidance documents that suggested that workplace exams performed under § 56.18002 must include elevators or even travelways. Tr. 89-96, 106-07. As discussed above, the Secretary has not come forward with any such evidence.[19] I conclude that the regulation itself, even when considered in light of relevant guidance from MSHA, is not sufficient to place a reasonably prudent operator on notice of the specific requirement that the Secretary now seeks to impose.

Second, I also find that the Louisville fatality would not have placed a reasonably prudent operator on notice that elevators should be included in workplace exams under § 56.18002. The fatality should have alerted Cemex that it would be a good idea to make greater efforts to ensure that its elevators were safe for miners to use, and perhaps to check the doors on its elevators, since the accident was caused by a faulty door interlock. Cemex did, in fact, check the doors on all of its elevators after the fatality (Tr. 90-91, 104; Ex. S7 at 1; Ex. R19), and apparently took some steps toward improving elevator safety. *See* Ex. R22; Ex. R23; Ex. R24. However, there is no reason to expect that, simply because a fatality involving an elevator occurred, Cemex would know to take the specific step of incorporating elevators into workplace exams under § 56.18002. Even the Fatalgram issued by MSHA after the fatality does not name this as a best practice. Ex. S8; Ex. R9. Accordingly, I reject the Secretary's argument that the fatality provided Cemex with fair notice of his new interpretation of the standard.

Finally, I also reject the Secretary's argument that the contract between Cemex and TKE provided Cemex with fair notice. The contract the Secretary offered into evidence excludes from TKE's coverage "cosmetic, construction, or ancillary components of the elevator," such as ceiling and door panels, light fixtures, floor coverings, belowground or unexposed components, and communication devices. Ex. S10. The Secretary contends that when this contract or one like it went into effect, Cemex was placed on notice that the listed components were its responsibility rather than TKE's. Sec'y Br. 23-24. However, the contract relied upon by the Secretary did not go into effect until after the inspection, *see* Ex. S10, and the Secretary has not established that the contract in effect at the pertinent time excluded the same components. More importantly, even if the terms of the contract in effect on the day of the inspection were the same or substantially similar to those that appear in the contract relied upon by the Secretary, (which seems likely), those terms provided notice only that Cemex was liable for maintaining the cosmetic, construction, and ancillary components of the elevators, not that Cemex would be expected to treat elevators and elevator landings as "working places" for purposes of § 56.18002. In fact, rather than alerting Cemex to the need to incorporate elevators into its workplace exam regimen,

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[19] To drive home the point, Cemex has introduced into evidence relevant portions of the PPM and the Metal/Nonmetal General Inspection Procedures Handbook, along with a PPL addressing § 56.18002 that was in effect at the time of the inspection, to show that none of these sources mentions the Secretary's new interpretation of the standard. *See* Ex. R10; Ex. R11; Ex. R15. I also note that, as discussed above, the standard's regulatory history does not contain any mention of elevators and does not suggest that travelways must be examined.

I find that the contract likely had the opposite effect. Cemex likely believed that it was not responsible for conducting regular maintenance examinations of the elevators because it had delegated its elevator maintenance duties to TKE by entering into an arrangement which was consistent with industry practice and Alabama law, and to which MSHA had never objected. *See Cemex Constr. Materials, Atl.*, 38 FMSHRC at 846-47 n.19 ("The Secretary states that Cemex's contract with Otis put the company on notice that areas not listed in the contract are Cemex's responsibility … However, a more reasonable conclusion is that the long standing nature of the contract … and the lack of any indication from MSHA that Cemex's practice of relying on Otis violated any regulatory provision, led the company logically to conclude its practice did not run afoul of the Act and Part 56.").

The Secretary broadly asserts that "MSHA simply expected the elevator car and the surrounding landing area to fall under the exam umbrella especially considering CEMEX inspected the adjacent stairs, walkways, toeboards, etc." Sec'y Br. 22. Aside from the fact that there is no evidence that Cemex ever inspected stairs, walkways, and toeboards, the record is also devoid of any evidence that MSHA ever actually expected elevators to fall under the exam umbrella at any point before Specialist Evans issued the disputed citation. As suggested by Judge Barbour, this claim seems disingenuous under the circumstances:

> Given the documented history of Secretarial non-enforcement at the plant, the Secretary's assertion that "MSHA simply expected the elevator car and the surrounding landing area to fall under the exam umbrella" rings hollow. A far more likely scenario is that MSHA never gave a thought to the inspection of elevators under any standard until after the February 21, 2014, accident [the Louisville fatality] and then decided that section 56.18002(a) could be stretched to fit the need.

Cemex Constr. Materials, 38 FMSHRC at 846 n.17.

I conclude that the Secretary attempted to stretch § 56.18002 to cover elevators after the Louisville fatality, but without providing any sort of signal that would have led a reasonably prudent person familiar with the mining industry and the protective purposes of § 56.18002 to recognize, before the citation at issue in this case was written, that elevators should be incorporated into workplace exams. Accordingly, Cemex was not provided with fair notice of the Secretary's interpretation of § 56.18002, and Citation No. 8641317 must be vacated.

I emphasize that this conclusion does not mean that miners are left unprotected against hazards associated with elevators. The Mine Act gives the Secretary multiple avenues to protect miner safety while still respecting operators' due process rights. *See Mathies Coal Co.*, 5 FMSHRC 300, 303 (Mar. 1983) (rejecting the Secretary's particular application of a broad standard to elevators, but describing other ways that the Secretary "could have accomplished abatement of the hazardous condition while at the same time avoiding the due process problems posed by seeking a civil penalty for a violation of a standard that did not provide adequate notice"). As discussed above, and as occurred in this very case, the Secretary can cite elevators under existing applicable regulations such as § 56.14001. *See, e.g.*, Ex. R5; Ex. R7. Also, as always, the Secretary is free to promulgate more specific standards or guidance notifying

operators of steps they must take to improve elevator safety, such as a PPL specifying under what conditions he considers elevators to be part of the "working place" and identifying the components of the elevator that must be examined under § 56.18002. In this case, even a step as simple as directing an authorized representative to give cement plant operators a warning before issuing citations may have sufficed to avoid notice problems. The Secretary instead chose to issue Citation No. 8641317 to Cemex without fair notice. Because the Secretary could have protected miners through other means that respected due process, there is no need to validate his issuance of the citation under these circumstances.

V. ORDER

For the foregoing reasons, Citation No. 8641317 is **VACATED**. Because no issues remain for adjudication, this docket is **DISMISSED**.

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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November 30, 2016

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. ROCK N ROLL COAL COMPANY, INC., Respondent	CIVIL PENALTY PROCEEDING Docket No. WEVA 2015-0889 A.C. No. 46-09093-384746 Docket No. WEVA 2015-0890 A.C. No. 46-09093-384746 Docket No. WEVA 2016-0084 A.C. No. 46-09093-394900 Mine: Mine No. 7

DECISION AND ORDER

Appearances: Brian Krier, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania for Petitioner

Thomas McLoughlin, Tri-State Geologic & Mining Services, LLC, Norton, Virginia for Respondent

Before: Judge McCarthy

I. STATEMENT OF THE CASE

These consolidated cases are before me upon Petitions 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 Mine Act"). Docket No. WEVA 2015-0889 involves one 104(d)(1) citation and one 104(d)(1) order charging Respondent, Rock N Roll Coal, Inc. ("Respondent"), with unwarrantable failures to comply with the Secretary of Labor's ("the Secretary's") mandatory safety standards. Docket No. WEVA 2016-0890 involves three 104(a) citations alleging violations of the Secretary's mandatory standards. Docket No. WEVA 2016-0084 involves one specially-assessed 104(d)(1) order charging Respondent with an unwarrantable failure to comply with a mandatory safety safety standard.

A hearing was held in Bluefield, West Virginia on June 7-8, 2016. During the hearing, the parties offered testimony and documentary evidence.[1] Witnesses were sequestered. Prior to hearing, I granted the Secretary's Motion to Amend the Petition to include the narrative findings for the special assessment proposed for Order No. 9061162 in Docket No. WEVA 2016-0084. Tr. I-8. At the hearing, after oral arguments, I issued a bench decision affirming all of the citations and orders, as written, and assessing the penalties, as proposed, essentially for the reasons set forth by the Secretary in closing argument. Tr. II-229-45. Having carefully reviewed the record, I affirm my bench decision, as set forth below.

II. PRINCIPLES OF LAW

A. Gravity and Significant and Substantial (S&S)

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). By contrast, the gravity of a violation "is often viewed in terms of the seriousness of the violation." *Consolidation Coal Co.*, 18 FMSHRC 1541, 1549 (Sept. 1996). The gravity component of the penalty assessment is not synonymous with finding that a violation is S&S, but may be based on the same evidence. The gravity inquiry is concerned with the effects of a hazard, while the S&S analysis focuses on the reasonable likelihood of serious injury. *See Consolidation Coal Co.*, 18 FMSHRC at 1550 (explaining that "the focus of the [gravity inquiry] is not necessarily on the reasonable likelihood of serious injury… but rather on the effect of the hazard if it occurs"). Alternatively, 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).

To establish an S&S violation, the Secretary must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard–that is, a measure of danger to safety–contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. *Mathies Coal Co.*, 6 FMSHRC 1, 3-4. (Jan. 1984). [2] The S&S determination should be made assuming "continued normal mining operations." *U.S. Steel*

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[1] In this decision, "Tr. I-#" and "Tr. II-# refer to the first and second volumes of the hearing transcript, respectively; "Jt. Ex. #" refers to joint exhibits; "P. Ex. #" refers to the Petitioner's exhibits; and "R. Ex. #" refers to the Respondent's exhibits. Jt. Ex. 1, P. Exs. 1-30, and R. Exs. 2 and 3 were received into evidence.

[2] The Secretary, mine operators, and the federal appellate courts have accepted the *Mathies* test as authoritative. *See Knox Creek Coal Corp. v. Sec'y of Labor*, 811 F.3d 148, 160 (4th Cir. 2016) (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).

Mining Co., 7 FMSHRC 1125, 1130 (Aug. 1985). This evaluation is also made in consideration of the length of time that the violative condition existed prior to the citation and the time it would have existed if normal mining operations had continued, 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).[3]

Once the fact of the violation has been established, 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.*, 811 F.3d at 163). 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.

The third step of the *Mathies* analysis is "primarily concerned with gravity," and whether the hazard identified in step two "would be reasonably likely to result in injury." *Id*. at 2037 (internal citations omitted). The third step's inquiry is whether the hazard, assuming it occurred, would likely result in serious injury. *Knox Creek*, 811 F.3d at 161-65. The question in applying the third step of *Mathies* "is not whether it is likely that the hazard . . . would have occurred[,]" but "whether, if the hazard occurred (regardless of likelihood), it was reasonably likely that a reasonably serious injury would result." *Peabody Midwest Mining, LLC v. Fed. Mine Safety & Health Rev. Comm'n*, 762 F.3d 611, 616 (7th Cir. 2014). The Secretary "need not prove a reasonable likelihood that the violation itself will cause injury." *Cumberland Coal Res., LP*, 33 FMSHRC 2357, 2365 (Oct. 2011) (*citing Musser Engineering, Inc.*, 32 FMSHRC 1257, 1281 (Oct. 2010)). Further, "the absence of an injury-producing event when a cited practice has occurred does not preclude a determination of S&S." *Musser Engineering, Inc.,* 32 FMSHRC at 1281 (citing *Elk Run Coal Co.*, 27 FMSHRC at 906); *Blue Bayou Sand & Gravel, Inc.*, 18 FMSHRC 853, 857 (June 1996).

The fourth *Mathies* factor requires the Secretary to show a reasonable likelihood that the injury in question will be of a reasonably serious nature. *Mathies*, 6 FMSHRC at 3. As a practical matter, the last two *Mathies*' factors are often combined in a single showing. *Id*. Consistent with this approach, MSHA inspectors determine whether a violation meets the criteria for S&S by the

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[3] *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).

likelihood of injury and the expected severity of injury, which correspond to the third and fourth *Mathies* factors.[4]

B. Negligence

Negligence is not defined in the Mine Act. The Commission has found that "[e]ach mandatory standard thus carries with it an accompanying duty of care to avoid violations of the standard, and an operator's failure to satisfy the appropriate duty can lead to a finding of negligence if a violation of the standard occurred." *A.H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983) (citations omitted). In determining whether an operator meets its duty of care under the cited standard, the Commission considers what actions would have been taken under the same or similar circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation. *See generally U.S. Steel Corp.*, 6 FMSHRC 1908, 1910 (Aug. 1984); *see also Jim Walter Res., Inc.*, 36 FMSHRC 1972, 1975-77 (Aug. 2014) (requiring Secretary to show that operator failed to take specific action required by standard violated); *Spartan Mining*, 30 FMSHRC at 708 (negligence inquiry circumscribed by scope of duties imposed by regulation violated). In this regard, the gravamen of high negligence is "an aggravated lack of care that is more than ordinary negligence." *Brody Mining*, 37 FMSHRC 1687, 1701 (Aug. 2015) (*citing Topper Coal Co.*, 20 FMSHRC 344, 350 (Apr. 1998)).

Commission judges are not required to apply the level-of-negligence definitions in Part 100 penalty regulations and *may* evaluate negligence from the starting point of a traditional negligence analysis rather than from the Part 100 definitions. *Brody Mining*, 37 FMSHRC at 1701; *accord Mach Mining*, 809 F.3d at 1263-64. Thus, in making a negligence determination, a Commission judge is not limited to an evaluation of allegedly mitigating circumstances, but may consider the totality of the circumstances holistically. Under such an analysis, an operator is negligent if it fails to meet the requisite high standard of care under the Mine Act. *Brody Mining*, 37 FMSHRC at 1701.

C. Unwarrantable Failure

The unwarrantable failure terminology is taken from Section 104(d) of the Act, 30 U.S.C. § 814(d). The Commission has defined an unwarrantable failure as aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec. 1987). Unwarrantable failure is defined by such conduct as "reckless disregard," "intentional misconduct," "indifference" or a "serious lack of reasonable care." *Emery Mining Corp.*, 9 FMSHRC at 2003; *see also Buck Creek Coal,* 52 F.3d at 136.

Whether conduct is "aggravated" in the context of an unwarrantable failure analysis is determined by looking at all the facts and circumstances of each case to see if any aggravating factors. The Commission examines seven aggravating factors, which include the length of time

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[4] Per training, MSHA inspectors do not designate a violation as S&S unless item 10.A on the citation form is marked "reasonably likely," "highly likely," or "occurred," and item 10.B is marked "lost workdays or restricted duty," "permanently disabling," or "fatal." *See* MSHA, PROGRAM POLICY MANUAL, Vol. I, § 104 (2003).

that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance with the standard, the operator's efforts in abating the violative condition, whether the violation is obvious, whether the violation poses a high degree of danger, and the operator's knowledge of the existence of the violation. *See, e.g.*, *Manalapan Mining Co.*, 35 FMSHRC 289, 293 (Feb. 2013); *IO Coal Co.*, 31 FMSHRC 1346, 1350-51 (2009); *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000). The Commission and its judges must take into account all of the factors, but may determine, when exercising discretion, that some factors are not relevant, or are much more or less important than other factors under the circumstances. *IO Coal Co.*, 31 FMSHRC at 1351; *Excel Mining, LLC*, 497 F. App'x 78, 79 (D.C. Cir. 2013); *Consolidation Coal Co.*, 23 FMSHRC 588, 593 (2001).

D. Penalty Criteria

Under the Mine Act's bifurcated penalty assessment process, the Secretary initially proposes a penalty. 30 U.S.C. § 815(a). The operator has the right to challenge the Secretary's proposed penalty assessment. *Id*. This contest results in a penalty proceeding before the Commission. There is no requirement in the Mine Act mandating that the Secretary explain the basis for his proposed penalty when he makes the discretionary decision to specially assess a penalty. 30 C.F.R. § 100.5.

An Administrative Law Judge has the independent authority to assess all penalties. 30 U.S.C. § 820(i). In so doing, he or she must consider six statutory criteria set forth in Section 110(i), and the deterrent purpose of the Mine Act. The six statutory criteria are: 1) the operator's history of previous violations; 2) the appropriateness of the penalty to the size of the business; 3) the operator's negligence; 4) the operator's ability to stay in business; 5) the gravity of the violation; and 6) any good-faith compliance after notice of the violation. *See e.g*., *Douglas R. Rushford Trucking*, 22 FMSHRC 598, 600 (May 2000); 30 U.S.C. § 820(i). Equal weight need not be given to each criteria *Spartan Mining*, 30 FMSHRC at 723.

Commission Judges are neither bound by the Secretary's proposed assessment nor by his Part 100 regulations governing the penalty proposal process. *American Coal Co.*, 38 FMSHRC 1987, 1993-94 (Aug. 2016) (*citing Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1150-51 (7th Cir. 1984); *Mach Mining, LLC*, 809 F.3d 1259, 1263-64 (D.C. Cir. 2016) (MSHA Part 100 regulations are not in any way binding in Commission proceedings)). The Judge must provide an explanation for a substantial divergence between the Secretary's proposed penalty and the Judge's assessed penalty. *Sellersburg Stone* Co., 5 FMSHRC 287, 290-94 (Mar. 1983). The Commission reviews a Judge's civil penalty assessment under an abuse of discretion standard. *Douglas R. Rushford Trucking*, 22 FMSHRC 598, 601 (May 2000) (citation omitted).

My independent penalty assessment for each citation or order at issue is set forth herein.

III. FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

A. Stipulations of Fact and Law

The parties have stipulated to the following:

1. Respondent was an "operator" as defined in Section 3(d) of the Mine Act, 30 U.S.C. § 803(d), at the mine at which the citations and order at issue in this proceeding were issued.

2. Operations of the Respondent at the mine at which the citation and orders were issued are subject to the jurisdiction of the Mine Act.

3. This 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.

4. The individuals whose names appear in Block 22 of the citations and orders were acting in their official capacities and as authorized representatives of the Secretary of Labor when the citations were issued.

5. True, authentic copies of the citations and orders were served on the Respondent or its agent as required by the Mine Act.

6. The proposed penalty for the citations and order at issue in this proceeding will not affect Respondent's ability to stay in business.

7. The citations and order contained in Exhibit "A" attached to the Secretary's Petitions are authentic copies with all appropriate modifications or abatements, if any.

8. MSHA's Data Retrieval System publicly available at http:www.msha.gov/drs/drshome.htm, accurately sets forth:
    a. The size of Respondent in production tons or hours worked per years;
    b. The size, in production tons or hours worked per year, of the mine;
    c. The total number of assessed violations for the time period listed; and
    d. The total number of inspection days for the time period listed therein.

9. Exhibit "A" of the Secretary's Petitions for the Assessment of Civil Penalty accurately sets forth:
    a. The size of Respondent in production tons or hours worked per years;
    b. The size, in production tons or hours worked per year, of the mine;
    c. The total number of assessed violations for the time period listed; and
    d. The total number of inspection days for the time period listed therein.

10. Fact of violation is established for each violation in each of the above-captioned dockets.

11. With respect to Citation No. 9061132, the distance between the #5 seal and the first row of bolts closest to the seal was 13 feet, 6 inches on the date the citation was issued.

12. With respect to Citation No. 9061132, the distance between the #3 seal and the first row of bolts closest to the seal was approximately 8 feet on the date the citation was issued.

13. With respect to Citation No. 9061132 and Order No. 9061133, Chauncy Easterling was an agent of the operator on the date the citation and order were issued.

14. With respect to Citation No. 9051132 and Order No. 9061133, Chauncy Easterling conducted a weekly examination of the #1 to #7 seals on April 19, 2015.

15. With respect to Citation No. 9061479, the lifeline in the secondary escapeway of the #8 mains section had only one cone leading to the branch line leading to the refuge alternative at the time the citation was issued.

16. With respect to Citation No. 9061120, the closest CO monitor to the section load point was located five crosscuts outby the load point at the time the citation was issued.

17. With respect to Citation No. 9061120, the section was mining coal at the time the citation was issued.

18. With respect to Citation No. 9061131, the operator could not produce training records for any of the certified persons who conduct exams of the mine seal at the time the citation was issued.

19. The Certified Assessed Violation History Report (P. Ex. 1) is an authentic copy and may be admitted as a certified business record of the Mine Safety and Health Administration.

Jt. Ex. 1. The following stipulations were admitted into the record at hearing:

20. With respect to Order No. 9061133, none of the roof conditions the inspector described in Section 8 "Condition or Practice" of Citation No. 9061132 and the corresponding inspection notes were listed or otherwise described in the most recent weekly examination records that covered the #1 to #7 seals in the right return on the date the order was issued. P. Ex. 22 at 12; Tr. I-27.

21. The weekly examination records for the mine seals that Inspector Daniel Morgan reviewed prior to going underground as part of his E01 inspection of the mine on April 30, 2015 did not list any hazards, violations, or unsafe conditions in the areas of the #1 to #7 seals. P. Ex. 22 at 12; Tr. I-28.

B. The April 14, 2015 Inspection

On April 14, 2015, MSHA Inspector Herman Morgan arrived at Rock N Roll Coal's Mine No. 7 at 6:30 a.m. to conduct a regular E01 inspection.[5] Tr. I-86, 89. Morgan was accompanied by MSHA trainee Shawn Tichnell. Tr. I-92. Prior to April 2015, Mine No. 7, a slope mine, had been idle, and had been actively producing coal for only about six weeks. Tr. I-85. The mine had one active continuous mining section, and used a mobile bridge hauling system to transport coal out of the mine. Tr. I-75. The mine had a low-ceiling with an average height of 40 inches. Respondent employed about 12 miners on the working section, and two on the surface named Josh and Caleb Cline, the owner's sons. Tr. I-104, 80.

After a pre-inspection conference, Morgan reviewed the weekly exam books. He noticed that the weekly exam records did not contain exam records of several of the measuring points ("MPs") in the left return airway. Tr. I-94, 96. Morgan consulted with Chauncy Easterling, the fire boss and weekly examiner. Morgan asked whether Easterling had performed the weekly examinations at the left return airway MPs. Easterling told Morgan that he had completed the examinations, but had forgotten to record the results. Tr. I-97.

Easterling and Morgan then used a permissible vehicle to travel to the left return airway. Easterling pointed out the dates, times, and initials ("DTI") board and showed Morgan a notebook, which indicated that Easterling had examined the required MPs during his prior weekly examination. Tr. I-97-98.[6]

1. Lifeline Violation, Citation No. 9061479

After traveling the left return airway, Morgan and Easterling returned to the surface, and then took a different permissible vehicle down the secondary escapeway toward the working section. Tr. I-99. Morgan saw that the lifeline was missing one of the two directional cones that

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[5] Morgan had been employed with the Mine Safety and Health Administration ("MSHA") as a coal mine and accident inspector for four years. Tr. I-56. Before joining MSHA, he worked for sixteen years in both underground and surface coal mines, and received his West Virginia mine foreman certification in 2008. Tr. 61-62.

[6] Morgan issued Citation No. 9061477 under 30 C.F.R. §75.364(h) for Easterling's failure to record the results of his left return airway exam. MSHA records indicate that the proposed assessment for that citation has been paid in full and the citation has been closed. *See* P. Ex. 4 at 6-7; *see also* Mine Safety and Health Administration, *Mine Data Retrieval System*, http://arlweb.msha.gov/drs/drshome.htm (last accessed Oct. 21, 2016).

indicate a branch line juncture. Morgan issued Citation No. 9061479 alleging a violation of 30 C.F.R. § 75.380(d)(7),[7] based on the following condition:

> The operator failed to securely attach 2 consecutive cones, to signify a branch line leading to the outby refuge alternative, located in the secondary escapeway. When checked, the secondary escapeway life line was observed having only one cone leading to the refuge alternative. In the event of a mine emergency, the proper markings would not be found on the secondary escapeway life line to properly signal the proper escapeways.

P. Ex. 2. Morgan designated the citation as S&S, reasonably likely to result in fatal injuries to eight people, and the result of Respondent's moderate negligence. *Id*. The Secretary proposed a penalty of $4,689.

a. The Violation in Citation No. 9061479 was S&S

Respondent stipulated to the fact of the violation. Stip. Fact No. 10, Jt. Ex. 1. Accordingly, the missing directional cone on the lifeline constitutes a violation of 30 C.F.R. § 75.380(d). P. Ex. 2.

I next identify the hazard in the first part of step two of the clarified *Mathies* test. *Newtown Energy,* 38 FMSHRC at 2038. As the Commission explained, "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." *Id.* Under *Mathies*, the hazard contributed to by the violation is defined "in terms of the prospective danger the cited safety standard is intended to prevent," and therefore "the starting point for determining the hazard is the actual cited section [of the Code of Federal Regulations]." *Id.*

Section 75.380(d)(7)(vii) requires the installation of two, consecutive, tapered cones on the lifeline to indicate an upcoming branch line juncture. This two-cone marking requirement indicates to miners,who are following the lifeline, that eight to twelve inches ahead, there is a branch juncture, which will lead them to either a refuge alternative ("RAs") or a cache of self-contained self-rescue devices ("SCSRs"). Tr. I-105, 107-109.[8] I find that the hazard contributed

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[7] 30 C.F.R. § 75.380(d)(7)(vii) provides:

> Each escapeway shall be . . . [p]rovided with a continuous, durable directional lifeline or equivalent device that shall be . . . [e]quipped with two securely attached cones, installed consecutively with the tapered section pointing inby, to signify an attached branch line is immediately ahead.

[8] Branch lines lead to either RAs or caches of SCSRs. Tr. I-107. RAs are marked by spirals, while caches of SCSRs are indicated by four cones, which are placed wide end to wide end and then narrow end to narrow end. These indicators are installed on the actual branch of the lifeline leading to the RA or SCSRs, rather than on the main lifeline as in the case of branch line junction cones. Tr. I-105, 107-08, 119.

to by the missing cone is that miners following the lifeline during an emergency evacuation might fail to recognize the branch line junction and thereby bypass potentially life-saving equipment. Tr. I-112.

Having determined that the missing lifeline cone presents a hazard to evacuating miners, I now consider whether "there exists a reasonable likelihood of the occurrence of the hazard against which the [standard] is directed," i.e., whether, in an emergency situation, the missing come is reasonably likely to cause miners exiting through the escapeway to bypass the branch line junction.[9] *Newton Energy*, 38 FMSHRC at 2037.

I find that there is a reasonable likelihood that miners using the lifeline to evacuate during an emergency could bypass potentially life-saving equipment due to the missing branch line identification cone. Lifelines are used in all types of mine emergencies, including smoke incidents, fires, and water inundations. Tr. I-108. As Morgan testified,

> We get down to 42 inches high, the smoke is more compressed now so I'm probably going to have to belly-crawl, maybe and get under [the smoke] if I can get under it then. Now, I can't do that because to reach the lifeline I'm going to have to be on my knees crawling. If the markings aren't right on that lifeline, I'm liable to miss a very important lifesaving device that is installed in that mine to save my life.

Tr. I-112, 114. I credit Morgan's testimony that even miners familiar with the locations of rescue equipment could become confused or panic during an emergency, and bypass the branch junction without the aid of the cone to alert them to the location of such equipment. Tr. I-113-14.

I also find that the hazard presented by the missing cone is reasonably likely to result in an injury of a reasonably serious nature, thereby satisfying the third and fourth *Mathies* factors. *See Mathies*, 6 FMSHRC at 4. In an emergency situation, the particularly low seam height in Mine No. 7 would require miners to crawl as they follow the lifeline, slowing their evacuation. Tr. I-112; 115.[10] I credit Morgan's testimony that the low seam height and the missing branch

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[9] In the context of escapeway violations, the Commission's administrative law judges "routinely assume[] the occurrence of the contemplated emergency in evaluating the significant and substantial nature of violations that only come into play in the event of an emergency." *Cumberland Coal Res., LP v. Fed. Mine Safety & Health Rev. Comm'n*, 717 F.3d 1020, 1027 (D.C. Cir. 2013), *aff'g sub nom. Cumberland Coal Res., LP*, 33 FMSHRC 2357 (Oct. 2011) (internal citations omitted). This is appropriate because "evacuation standards are different from other mine safety standards. They are intended to apply meaningfully only when an emergency actually occurs." *Cumberland Coal Res. LP*, 33 FMSHRC at 2367.

[10] MSHA acknowledges that "the height of the travelway affects the speed of travel" in underground coal mines, and recognizes a direct relationship between the height of the travelway and the speed at which miners can travel. *See* MSHA, PROGRAM POLICY MANUAL, Vol. V, § 75.1714-2, *Self-Rescue Devices; Use and Locations Requirements* (2003). According to MSHA's calculation, miners traveling the secondary escapeway in Mine No. 7 would only be able to travel between roughly 120 and 140 feet per minute. *Id*.

line cone could lead to a fatality if an evacuating miner inadvertently bypassed lifesaving equipment:

> [I]n an emergency situation, minutes make all the difference. A marking missing off a lifeline could cost you minutes, could cause your SCSR to run out of power. I mean, it might make you hesitate just long enough to where you don't reach the next SCSR cachet. You know, if it stops you for two minutes, that might be the two minutes that you fall short of reaching the next available rescue option.

Tr. I-115.

Although Morgan credibly testified that he believed a fatality was likely to result from miners bypassing lifesaving equipment in the event of an emergency, smoke inhalation and burns also constitute serious injuries for purposes of the *Mathies* analysis. *Amax Coal*, 19 FMSHRC 846, 847 (May 1997) (upholding judge's finding of S&S based on evidence of smoke inhalation and burns that would result in serious injuries). In addition, Morgan testified that mine rescue teams traveling into the mine rely on the proper placement of lifeline cones to navigate underground during emergency situations, and the missing cones could delay or confuse the team's rescue efforts, making it more likely that miners would suffer from serious and potentially fatal injuries due to a delay in rescue efforts. Tr. I-113.

I conclude that the lack of one of two required branch cones on the lifeline was reasonably likely to contribute to the hazard of miners bypassing life-saving equipment when attempting to escape the mine via the lifeline during an emergency, which was reasonably likely to result in an injury of a reasonably serious nature. *Mathies*, 6 FMSHRC at 3-4. I therefore affirm the Secretary's S&S designation for Citation No. 9061479.

b. Citation No. 9061479 was the Result of Respondent's High Negligence

In determining whether an operator meets its duty of care under the cited standard, the Commission considers what actions would have been taken under the same or similar circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation. *See generally U.S. Steel Corp.*, 6 FMSHRC at 1910. Morgan testified that he designated Citation No. 9061470 as moderate negligence because the missing cone should have been noticed and replaced during the pre-shift examination. Tr. I-116-17. Pre-shift examinations are required where miners are expected to work or travel during a shift, including RAs. Tr. I-116. Since miners typically travel the secondary travel way to access the working section, the lifeline should have been included during the pre-shift examination. Tr. I-117. Morgan did not observe the missing cone lying on the ground in proximity to the branch line, and concluded that the cone had not "just fallen off" and had likely "been missing for awhile." Tr. I- 116. Morgan testified that Easterling offered no mitigating circumstances or explanation. Tr. I-117. In these circumstances, I affirm the Secretary's moderate negligence designation for Citation No. 9061470.

c. Penalty Assessment

The Secretary proposed a penalty of $4,689 for this violation after considering the six penalty criteria. 30 C.F.R. Pt. 100; *see* Ex. A, *Petition for the Assessment of Civil Penalties,* Docket No. WEVA 2015-0890. The parties have stipulated that Respondent produced 598 tons of coal in 2015, and that Respondent had a total of 20 violations in the 15 months preceding the issuance of Citation No. 9061479. Stip. Fact. No. 9, Jt. Ex. 1; Ex. A, *Petition for the Assessment of Civil Penalties*, Docket No. WEVA 2015-0890. The parties have also stipulated that the proposed penalty will not affect Respondent's ability to remain in business. Stip Fact. No. 6, Jt. Ex. 1. I have affirmed the Secretary's gravity and negligence designations. Respondent demonstrated good faith in abating the violation. *See* Ex. A, *Petition for the Assessment of Civil Penalties*, Docket No. WEVA 2015-0890 (reflecting 10% discount for good faith abatement). Based upon my consideration of the Section 110(i) penalty criteria and the deterrent purposes of the Act, I assess a penalty of $4,689.

2. CO Monitor Violation, Citation No. 9061120

After issuing Citation No. 9061479, Morgan and Easterling continued down the secondary escapeway toward the working face and approached the belt's section loading point. Morgan observed that the section loading point of the secondary escapeway's main belt was missing a carbon monoxide ("CO") monitor in violation of 30 C.F.R. § 75.351(e)(1)(i).[11] Based on that observation, Morgan issued Citation No. 9061120, alleging the following condition:

> The operator failed to provide a CO monitor at a required location. When observed the CO Monitor located at the section loading point was located 250' outby the section loading point. The last CO monitor located on the company #5 beltline was five breaks outby the section loading point. There was no CO monitor coverage anywhere inby this point on the beltline. The violation is an unwarrantable failure to comply with a mandatory standard.

After issuing the citation, Morgan then traveled outby the section loading point to determine the location of the nearest CO monitor, and discovered it about 250' away from the required location, lying with the sensors face down on a wooden spool. He did not observe

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[11] 30 C.F.R. § 75.351(e)(1)(i) provides that:

> In addition to the requirements of paragraph (d) of this section, any [atmospheric monitoring system] used to monitor air belt courses under 75.350(b) must have approved sensors to monitor for carbon monoxide at the following locations: (i) At or near the working section belt tailpiece in the air stream ventilating the belt entry. In longwall mining systems the sensor must be located upwind in the belt entry at a distance no greater than 150 feet from the mixing point where intake air is mixed with the belt air at or near the tailpiece.

anyone else in the belt line area. Morgan later decided to modify Citation No. 9061120 from a 104(d)(1) order to a 104(a) citation, based on the following conditions:

> After further review, the citation will be dropped from a D-1 citation S&S, to a 104-a citation non-S&S due to the following reasons. After further thought the affected area was found to have 1. No CH4 was found in the area. 2. The beltline airstream travels outby and not toward the section. 3. No other hazards such as stuck rollers, belt rubs, or accumulations were found in the area.

The Secretary alleges that the violation was non-S&S, unlikely to cause permanently disabling injuries to eight persons, and the result of Respondent's high negligence. P. Ex. 3. The Secretary proposed a penalty of $1,412.

a. The Gravity of Citation No. 9061120 was Properly Designated as Unlikely to Cause Permanently Disabling Injuries to Eight Miners

Respondent stipulated to the fact of the violation. Stip. Fact No. 10, Jt. Ex. 1. I next identify the discrete safety hazard contributed to by the violation. *Mathies*, 6 FMSHRC at 3-4. Mines generate CO in a number of ways, i.e., through fires, belt rubs, coal accumulations, and electrical equipment. Tr. I-128. CO monitors detect carbon monoxide and provide early warning of smoke and fire inside the mine. Tr. I-127. Morgan testified that the CO monitors installed at required places in the mine form a continuous line to the surface, where the system terminal is usually located in the mine office. Tr. I-128. When a monitor detects carbon monoxide, the terminal in the mine office sounds an alarm. Tr. I-129. The person in the office responsible for monitoring the system then notifies the underground miners that a monitor at a particular location has been triggered, and an underground miner investigates the CO sensor at that location to determine the source of carbon monoxide. Tr. I-139.

I find that the hazard presented by the misplaced CO monitor is that miners would not receive an early warning alarm regarding the potential for a smoke or fire incident near the secondary escapeway belt tailpiece. Tr. I-133. Morgan testified that the section loading point is particularly prone to accumulations, spillage, and belt alignment problems, which augment the likelihood of smoke inhalation and an actual ignition incident due to the delayed warning, although Morgan found no belt rubs, bad rollers, or accumulations in the area. Tr. I-129-30; P. Ex. 4 at 15.

While Morgan recognized that the violation contributed to a hazard that could cause permanently disabling injuries to eight miners as a result of potential smoke inhalation and burns from a smoke or fire incident, he found that such injuries would be unlikely to occur. The miners were working inby the section loading point, while the air on the secondary escapeway flows outby the belt line, thus carrying any potential smoke towards the mine exit, rather than towards the working section. Tr. I-135. Morgan also recognized that the primary escapeway was an available route of evacuation in the event of a smoke or ignition incident in the secondary escapeway. Further, Morgan determined that injuries would be unlikely because of the firefighting equipment located at the section loading point, and the miners' training in firefighting techniques and participation in quarterly firefighting training drills. Tr. I-136. Finally, Morgan determined

that all eight miners working the section would have assigned tasks during a firefighting incident and the designated hazard would affect eight miners. Tr. I-137.

The Commission has concluded that its administrative law judges may not make *sua sponte* S&S determinations that usurp the Secretary's enforcement authority. *Mechanicsville Concrete*, 18 FMSHRC 877, 879-80 (June 1996). Accordingly, I affirm the Secretary's gravity and non-S&S designations.

b. Citation No. 9061120 was the Result of Respondent's High Negligence

Morgan found that the violation in Citation No. 9061162 was the result of Respondent's high negligence because Respondent offered no mitigating circumstances. Tr. I-139.

Ralph Steele, Respondent's chief electrician, admitted that mine management had been aware of the misplaced monitor for at least a week while the section was actively mining, but that Respondent did not fix the problem because it did not have adequate cable to place the monitor closer to the section loading point. Tr. I-139, 141; II-220-21. The violation was abated that same day, when Steele installed new cable from one of the mine owner's other mines, and moved the misplaced CO monitor to the section loading point. Tr. II-216. Based on Respondent's admitted knowledge of the violation and the fact that Respondent could have immediately corrected the violation by obtaining cable from a sister mine, I find that Respondent's actions were not consistent with what a reasonably prudent operator would have done under the circumstances, that is, immediately correct the condition. I therefore affirm the high negligence designation for Citation No. 9061162.

c. Penalty Assessment

The Secretary proposed a penalty of $1,412 for this violation. The parties have stipulated that Respondent produced 598 tons of coal in 2015, and that Respondent had a total of 20 violations in the 15 months preceding the issuance of Citation No. 9061120. Stip. Fact. No. 9, Jt. Ex. 1; Ex. A, *Petition for the Assessment of Civil Penalties*, Docket No. WEVA 2015-0890. The parties have also stipulated that the proposed penalty will not affect Respondent's ability to remain in business. Stip Fact. No. 6, Jt. Ex. 1. I have affirmed the Secretary's gravity and negligence designations. Respondent demonstrated good faith in abating the violation. *See* Ex. A, *Petition for the Assessment of Civil Penalties*, Docket No. WEVA 2015-0890 (reflecting 10% discount for good faith abatement). Based upon my consideration of the Section 110(i) penalty criteria and the deterrent purposes of the Act, I assess a penalty of $1,412.

C. The April 30, 2015 Inspection

On April 30, 2015, Morgan arrived at the mine at 7:45 a.m. to continue his E01 inspection. Tr. I-151-52. He reviewed the examination record books in the mine office and found that examinations had not been recorded for some MPs and mine seals. Tr. I-153. Morgan was concerned that the examinations for seal No. 8 had never been recorded in the exam books. Tr. I-

168.[12] Morgan discussed the lack of seal No. 8 exam records with Easterling, who indicated that seal No. 8 had "[fallen] through the cracks, [and] nobody had remembered to go examine it." Tr. I-168.

After that discussion, Morgan and Easterling traveled to the No. 8 seal. They had difficulty locating the seal monitor tube because it was covered by leaves. Tr. I-169. Morgan instructed Easterling to conduct a regular seal exam. According to Morgan's testimony, Easterling showed "no knowledge of being able to use the pump." Tr. I-169. Morgan testified that Easterling "turned [the pump] on, but [Easterling] waved it in front of the tube like a spotter . . . he didn't, actually, hook it up to the tube and try to pump it at that time." Tr. I-169.[13] Morgan then halted Easterling's examination and gave Easterling on-the-spot training on how to properly conduct seal examinations. Tr. I-174; 225.

After witnessing Easterling's inability to properly conduct a seal examination, Morgan returned to the mine office and asked mine foreman Ricky McGuire whether anyone at the mine was certified to conduct seal examinations. Tr. I-175. McGuire indicated that he had received seal examination training when MSHA originally approved the use of Omega block seals back in 2006, but McGuire could not produce training certificates for anyone at the mine. Tr. I-170, II-106. After further questioning, Morgan determined that McGuire knew how to conduct proper seal examinations, and allowed McGuire to train other miners in proper seal examination procedures. Tr. I-170.

1. Failure to Provide Certified Training Records for Persons Conducting Mine Seal Sampling, Citation No. 9061131

Based on Easterling's demonstrated lack of knowledge regarding proper seal examinations, Morgan issued Citation No. 9061131, alleging a violation of 30 C.F.R. § 75.338(a) due to the following practice:

> The operator failed to provide certification that the persons conducting seal sampling/exams has been trained in proper methods for taking samples or the use of sampling equipment. When asked to produce the training records for the

[12] Morgan issued Citation No. 9061134 alleging a violation of the approved ventilation plan for the failure to examine the No. 8 seal. P. Ex. 8 at 7-10. MSHA's records indicate the proposed assessment has been paid in full and the citation is closed. *See* Mine Safety and Health Administration, *Mine Data Retrieval System*, http://arlweb.msha.gov/drs/drshome.htm (last accessed Oct. 21, 2016).

[13] Mr. McLoughlin, the Respondent's representative, informed the undersigned that Respondent was unable to locate Easterling to call him as a witness. Tr. I-174.

> examiners at this mine the operator could not produce records for any of the certified people who conducts [sic] exams on the seals.[14]

P. Ex. 5. The Secretary alleges that the citation was non-S&S, unlikely to cause fatal injuries to fourteen miners, and the result of Respondent's moderate negligence. *Id*. The Secretary proposed a penalty of $807.

a. The Gravity of Citation No. 9061131 was Properly Designated as Unlikely to Cause Fatal Injuries to Fourteen Miners

The parties stipulated to the fact of the violation and agreed that Respondent could not produce certified training records for anyone who had been conducting mine seal examinations at the time the citation was issued. Stip. Fact Nos. 10, 18; Jt. Ex. 1; P. Ex. 5.

Respondent's failure to provide certified training records for seal examiners presents the possibility that the miner(s) conducting the seal exams did not have the requisite knowledge of sampling methods and the use of sampling equipment that is required to conduct adequate seal examinations. By failing to provide records to ensure that a properly trained and certified miner was examining the seals, Respondent created a risk that an uncertified miner was conducting seal examinations which contributed to the hazard that problems with the seals would not be detected and addressed. When Morgan requested Easterling to demonstrate a proper seal examination on seal No. 8, Easterling was unable to do so. Tr. I-169. Although McGuire later demonstrated to Morgan that he knew how to conduct a proper seal examination, the record establishes that it was Easterling, not McGuire, who conducted the weekly examinations of the seals in the No. 5 entry. Tr. I-170

Morgan credibly testified that failure to properly inspect the seals could lead to seal failures in the form of explosions, flooding, or black damp. Tr. I-172-73. Morgan also determined that the low ceiling height in Mine No. 7 would slow miners' evacuation in the event of an emergency, increasing the likelihood that a seal failure would cause a fatality. Morgan testified that a flood would drown miners caught underground in the event of a seal failure. Tr. I-178-79. In addition, the No. 5 entry where the seals were located is but one entry away from the No. 4 entry used by miners to enter and exit the mine on a daily basis, making it more likely that any explosion or flood resulting from a seal failure would affect all fourteen miners working the section. Tr. I-179. I find that the failure to provide records that a certified examiner was conducting seal sampling contributed to the hazard of potential seal failures. While in the first

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[14] 30 C.F.R. § 75.338(a) provides:

> Certified persons conducting sampling shall be trained in the use of appropriate sampling equipment, procedures, location of sampling points, frequency of sampling, size and condition of the sealed area, and the use of continuous monitoring systems if applicable before they conduct sampling, and annually thereafter. The mine operator shall certify the date of training provided to certified persons and retain each certification for two years.

instance, I might find that the record supports an S&S designation for Citation No. 9061131, as noted above, the Commission's administrative law judges do not have authority to designate violations S&S where the Secretary has not made such an allegation. *Mechanicsville Concrete*, 18 FMSHRC at 879-80 (June 1996). In these circumstances, I affirm the Secretary's gravity designation for Citation No. 9061131.

b. Citation No. 9061131 was the Result of Respondent's Moderate Negligence

Considering the totality of circumstances, I find that Citation No. 9061131 was the result of Respondent's moderate negligence. Although McGuire demonstrated that he knew how to properly conduct seal exams, and testified that he received training on proper seal examination procedures from an MSHA inspector-at-large immediately after the installation of the mine seals, McGuire never filled out a training certification form, although he continued inspecting the seals for 11 years without training certification. Tr. II-107. Easterling demonstrated during Morgan's inspection that he did not know how to properly examine mine seals. Tr. I-169-70; II-106. Moreover, Easterling had been conducting the examinations since the mine had reopened six weeks before Morgan's E01 inspection began, and McGuire had been signing off on Easterling's seal inspections. P. Ex. 9. A reasonable operator familiar with the industry would have established that its examiners had the proper certifications in order to complete their assigned tasks. McGuire in fact admitted that he knew that underground miners must be "task-trained" and that the mine is required to produce training records at the request of MSHA inspectors. Tr. II-110. I therefore affirm the Secretary's moderate negligence designation for Citation No. 9061131.

c. Penalty Assessment

The Secretary proposed a penalty of $807 for this violation after considering the six penalty criteria. The parties have stipulated that Respondent produced 598 tons of coal in 2015. Respondent had a total of 20 violations in the 15 months preceding the issuance of Citation No. 9061131. Stip. Fact. No. 9, Jt. Ex. 1; Ex. A, *Petition for the Assessment of Civil Penalties*, Docket No. WEVA 2015-0890. The parties also stipulated that the proposed penalty will not affect Respondent's ability to remain in business. Stip Fact. No. 6, Jt. Ex. 1. I have affirmed the Secretary's gravity and negligence designations. I find that Respondent demonstrated good faith in abating the violation. *See* Ex. A, *Petition for the Assessment of Civil Penalties*, Docket No. WEVA 2015-0890 (reflecting 10% discount for good faith abatement). Based upon my consideration of the Section 110(i) penalty criteria and the deterrent purposes of the Act, I assess a penalty of $807.

2. Hazardous Roof Conditions Violation, Citation No. 9061132

Morgan and Easterling went into the mine to inspect the underground seals, located in the crosscuts near the right return air course at the No. 5 entry. Tr. I-176; P. Ex. 19. The crosscuts were on average twenty feet wide and the seals were set back from the roadway at distances of between four and thirteen-and-a-half feet. Tr. I-179-80; *see also* P. Ex. 17 at 2. The mine height in the area was between 48 and 50 inches. Tr. I-180.

As they advanced down the return, Morgan noticed hazardous conditions involving roof support cribs that were installed in 2005 to support the mine roof in front of seals Nos. 1 through 7. Tr. I-176. The cribs blocks were eight-inch-by-eight-inch blocks of solid wood stacked two by two in alternating directions to form a square. The blocks were stacked as close as possible to the mine roof, with wooden, wedge-shaped half-headers inserted between the blocks and the roof to tighten the entire structure against the roof surface. Tr. I-184, II-95. Although Morgan did not actually enter any of the crosscuts to measure the spacing between the cribs due to the conditions, the roof control plan required that the cribs be installed at four-foot by four-foot intervals. P. Ex. 17 at 4, 6.

Morgan estimated that the seal entries contained about 50 cribs. Tr. I-185. Morgan estimated that sixty to seventy percent of the cribs were ineffective, and described them as "deteriorated," "rotting," or "falling over." He specifically noted that some of the cribs had shrunken or collapsed and fallen away from the roof, while some of the standing cribs were no longer flush against the mine roof. Tr. I-176, 181, 185-86. He also observed that a large section of roof, twelve feet long, four feet wide, and three or four inches thick, had fallen and was crushing the cribs inside the No. 5 seal entry. Tr. I-182, 188. Morgan did not observe any roof bolts in the sections of roof between the roadway and the seals, and he concluded that roof bolts had not been in use when those areas of the mine were sealed off. Tr. I-181, 187.

Easterling attempted to access one of the seals to demonstrate to Morgan that he could conduct a seal exam and to draw Morgan's attention to the dates, times and initials ("DTIs") boards for prior exams conducted at each seal, but Morgan prevented Easterling from traveling underneath the hazardous roof conditions in between the roadway and the seals. Tr. I-177, 183. Although Morgan stayed in the roadway as he observed the seals and the surrounding roof conditions in the crosscuts, he was able to see the DTI boards for some of the seals. Morgan specifically asked Easterling whether he had traveled under the hazardous unsupported roof conditions to conduct his seal exams, and Easterling answered in the affirmative. Tr. 183. Morgan also asked Easterling how long the conditions had existed, and Easterling replied that the conditions had been that way since Easterling started working at the mine about six weeks earlier. Tr. I-196.

Based on his observations of the deteriorated roof cribs and unsupported roof in the seal crosscuts, Morgan issued Citation No. 9061132 under section 104(d)(1) of the Mine Act. The citation alleged a violation of 30 C.F.R. § 75.364(d) for failure to immediately correct the hazardous roof conditions, as follows:

> The operator failed to correct hazardous conditions encountered during a weekly examination immediately. The #1-#7 50 PSI seals located in the right return was [sic] found to have areas that was not roof bolted when mined and the cribs that were built in the area to supplement the roof control were allowed to deteriorate to the condition of rotting and falling out, being crushed out, and not providing any support for the mine roof. The examiner was crawling between these cribs to conduct his exam and was not correcting the condition or recording it in the exam book. At seal #5 the distance from the first row of installed roof bolts to the seal was measured to be 13' 6". The cribs in this area was [sic] rotted and on they [sic]

> inby end the mine roof had fallen on top of the cribs crushing them down approximately 8". This violation is an unwarrantable failure to comply with a mandatory standard.[15]

P. Ex. 6. Morgan designated the violation as S&S, reasonably likely to contribute to a hazard that would cause fatal injuries to fourteen miners, and the result of Respondent's high negligence. As noted, Morgan also designated the alleged violation as an unwarrantable failure to comply with the Secretary's mandatory safety standard. *Id*. The Secretary proposed a penalty of $3,405.

a. The Violation in Citation No. 9061132 was S&S

Respondent stipulated to the fact of the violation. Stip. Fact. No 10; Jt. Ex. 1.

I turn next to the first part of step two of the *Mathies* test as clarified in *Newtown Energy*, i.e., identifying the discrete safety hazard that was contributed to by the failure to immediately correct the adverse roof conditions. *Mathies*, 6 FMSHRC at 6; *Newtown Energy, Inc.*, 38 FMSHRC at 2037. I find that the hazard presented by the failure to immediately correct the hazardous roof conditions was another roof fall.[16]

Having identified the hazard, I now turn to "a determination of whether, based on the particular facts surrounding the violation, there exists a reasonable likelihood of the occurrence of the [roof fall] hazard." *Id.* Although Morgan did not approach the cribs due to the unsupported roof, he estimated that 30-35 out of the 50 cribs that he observed were hazardous. Tr. I-185. McGuire testified that 26 cribs were installed in the seal area to abate Citation No. 9061132. Tr. II-92. Some cribs had partially collapsed or fallen over, some were rotted, and others were no longer in contact with the roof to provide support. Tr. I-181. The roof inside the crosscuts housing the seals had not been roof bolted. *Id*. The parties stipulated that the distance between the No. 3 seal and the first row of roof bolt closest to the seal was approximately eight feet. Stip. Fact No. 12; Jt. Ex. 1. The parties also stipulated that the distance between the No. 5 seal and the first row of roof bolts closest to the seal was thirteen feet and six inches. Stip. Fact No. 11; Jt. Ex. 1.

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[15] 30 C.F.R. § 75.364(d) provides:

> [H]azardous conditions shall be corrected immediately. 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. Any violation of the nine mandatory health or safety standards found during a weekly examination shall be corrected.

[16] In addition to actually observing a section of fallen roof in the No. 5 seal entry, Morgan testified that Mine No. 7 had a history of roof falls, and there had been at least four roof falls previously. Tr. I-182, 188, 204. Two roof falls occurred while Morgan was at the mine conducting his E01 inspection, although they occurred on June 9 and July 15, 2015, after the issuance of Citation No. 9061132. Tr. I-204-05. On June 9, a roof fall occurred in the left return about ten breaks off the working section. On July 15, a section of roof on the working section fell and struck a piece of equipment. *Id*.

In addition, Morgan observed that a large section of roof, a rock measuring twelve feet long, four feet wide, and three or four inches thick, had fallen and was crushing the cribs inside the No. 5 entry. Tr. I-182, 188. Morgan determined that the hazardous conditions would have been obvious even to a miner trainee with little to no experience, much less to an experienced underground miner. Tr. I-181-82. Easterling told Morgan that the condition had lasted for six weeks, i.e., ever since the mine had reopened and Easterling had begun conducting the seal examinations. Tr. I-196.

Based on the particular facts surrounding the violation, I find that the Secretary established a reasonable likelihood that a roof fall would occur.

The third step in the *Mathies* analysis requires a determination of whether the hazard identified in the second step, a roof fall, was reasonably likely to cause injury. *See Knox Creek*, 811 F.3d at 161-65. Easterling was regularly traveling underneath the unsupported roof near the seals in the No. 5 entry, and a large section of roof had already fallen on the deteriorated cribs. Tr. I-182-83, 188. I find that the Secretary established a reasonable likelihood that an injury would result from a roof fall in the No. 5 entry.

Regarding the fourth *Mathies* factor, I find that the Secretary established a reasonable likelihood that any injury resulting from a roof fall would be of a reasonably serious nature. Morgan designated the injury likely to occur as fatal, and I affirm that designation. As demonstrated by the size of the roof fall that had already occurred in the No. 5 seal entry, and by the damage to the crib on which it had landed, any roof fall would be reasonably likely to result in a fatality. Tr. I-183-84, 188. Furthermore, the Commission has long acknowledged that roof falls are a leading cause of death in underground coal mines. *See Halfway, Inc.*, 8 FMSHRC 8, 13 (Jan. 1986) ("Our decisions have stressed the fact that roof falls remain the leading cause of death in underground coal mines.").

Based on the foregoing, I find that the violation of 30 C.F.R. § 75.362(d) in Citation No. 9061132 was S&S and reasonably likely to contribute to a roof fall hazard that would cause fatal injuries to one miner.

b. Citation No. 9061132 was the Result of Respondent's High Negligence

Morgan designated Citation No. 9061132 as the result of Respondent's high negligence because examiner Easterling, an agent of the operator, had personal knowledge of the hazardous conditions for about six weeks and took no action to correct them. Tr. I-200. Morgan credibly testified that the conditions he observed were so obvious that even an inexperienced miner would have known not to enter the area. Tr. I-182. Morgan also asked Easterling whether he had taken any steps to correct the hazardous conditions, and Easterling told Morgan that he was "one man responsible for all of the outby area and [he] was working on it when [he] can get to it." Tr. I-195. Easterling also told Morgan that he had not made any efforts to correct the hazardous conditions in the No. 5 entry because he had been working in the other return air course. Morgan observed no evidence indicating that corrective action had been taken. Tr. I-194. I find that Respondent failed to take any corrective action to abate an extremely dangerous roof fall hazard for six weeks, and that such actions constitute high negligence because a reasonably prudent operator would have acted immediately to correct the hazard.

c. Citation No. 9061132 was an Unwarrantable Failure to Comply with 30 C.F.R. § 75.364(d)

Whether conduct is "aggravated" in the context of an unwarrantable failure analysis is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist. The Commission specifically considers seven aggravating factors: the length of time that the violation has existed; the extensiveness of the violation; the duration of the violation; whether the operator has been placed on notice that greater efforts are necessary for compliance with the standard; the operator's efforts in abating the violative condition; whether the violation is obvious; whether the violation posed a high degree of danger; and the operator's knowledge of the existence of the violation. *See, e.g.*, *Manalapan Mining Co.*, 35 FMSHRC 289, 293 (Feb. 2013); *IO Coal Co.*, 31 FMSHRC 1346, 1350-51 (2009); *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000).

i. The Extent of the Violative Condition

The extent of a violative condition is an important element in the unwarrantable failure analysis. *IO Coal* Co., 31 FMSHRC at 1351-52. This factor considers the scope or magnitude of the violation. *See Eastern Associated Coal Corp.,* 32 FMSHRC 1189, 1195 (Oct. 2010), *citing Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 708 (June 1988). Extensiveness often concerns the degree of the violation and is a question of fact regarding the material increase in the degree of risk posed to miners as a result of the violation. *Eastern Associated* Coal, 32 FMSHRC at 1195. In some situations, extensiveness depends on the number of people affected by the violation. *See Watkins Eng'rs & Constructors,* 24 FMSHRC 669, 681 (July 2002).

Morgan estimated that 30-35 out of the 50 roof cribs that he observed in the No. 5 entry had deteriorated to the point that they were not providing roof support in the seal area. Tr. I-176, 181, 185-86. None of the area around the seals, including the roof between the roadway and the crosscuts in which the seal were located, had been roof bolted. Tr. I-181, 87. I find that the hazardous roof conditions at issue in Citation No. 9061132 were extensive, and this factor supports a finding of unwarrantable failure.

ii. The Duration of the Violation

The duration of the violative condition is a necessary consideration in the unwarrantable failure analysis. *See, e.g., Windsor Coal Co.*, 21 FMSHRC 997, 1001-04 (Sept. 1999) (remanding for consideration of duration evidence regarding cited conditions). The duration or length of time that the violation exists is particularly critical, because the longer a violative condition or practice exists, the more likely miners will be injured. *Coal River Mining, LLC,* 32 FMSHRC 82, 92 (Feb. 2010); *see also Buck Creek Coal,* 53 F. 3d at 136 (7th Cir. 1995) (violation that lasted more than one shift was properly designated as unwarrantable failure); *Consol Coal Co.*, 23 FMSHRC 588, 594 (June 2001) (violation was unwarrantable failure where the violation existed over several shifts).

The violation in Order No. 9061162 lasted at least six weeks, since the mine had reopened after an idle period. Tr. I-196. I find that the duration of the violation weighs in favor of an unwarrantable failure finding.

iii. Whether Respondent was Placed on Notice that Greater Efforts were Necessary for Compliance with 30 C.F.R. § 75.362(d)

The Commission has stated that repeated, similar violations are relevant to an unwarrantable failure determination to the extent that they serve to put an operator on notice that greater efforts are necessary for compliance with the cited standard. *IO Coal*, 31 FMSHRC at 1353-55; *Amax Coal Co.*, 19 FMSHRC 846, 851 (May 1997); *see also Consolidation Coal Co.*, 23FMSHRC 588, 595 (June 2001). The purpose of evaluating the number of past violations is to determine the degree to which those violations have "engendered in the operator a heightened awareness of a serious . . . problem." *San Juan Coal Co.*, 29 FMSHRC 125, 131 (Mar. 2007), *citing Mid-Continent Res., Inc.*, 16 FMSHRC 1226, 1232 (June 1994). The Commission has also recognized that "past discussions with MSHA" about a problem "serve to put an operator on heightened scrutiny that it must increase its efforts to comply with the standard." *San Juan Coal*, 29 FMSHRC at 131, *citing Consolidation Coal*, 23 FMSHRC at 595.

The Secretary failed to establish that the Respondent was placed on notice that greater efforts were necessary to comply with 30 C.F.R. § 75.362(d). There is no prior violation of this standard in Mine No. 7's Assessed Violation History Report. P. Ex. 1. Moreover, Mine No. 7 had only recently re-opened, and Morgan was conducting the first E01 inspection since the re-opening. In these circumstances, I find that the operator was not placed on notice that greater efforts were necessary for compliance with 30 C.F.R. § 75.362(d). Accordingly, this factor weighs against a finding of unwarrantable failure.

iv. Respondent's Knowledge of the Existence of the Violation

The Commission has held that knowledge is established by showing "the failure of an operator to abate a violation [that] he knew or *should have known* existed." *Emery Mining Corp.*, 9 FMSHRC 1997, 2002-03 (Dec. 1987); *see also* Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Cong., 1st Sess., Part I Legislative History of the Federal Coal Mine Health and Safety Act of 1969, at 1602 (1975). In the absence of past violations, an operator's knowledge may be established "where an operator reasonably should have known of a violative condition." *IO Coal Company, Inc.* 31 FMSHRC at 1356-57; *Drummond Co., Inc.,* 13 FMSHRC 1362, 1367-68 (Sept. 1991), *quoting Eastern Assoc. Coal Corp.,* 13 FMSHRC 178, 187 (Feb. 1991). Further, the Commission has held that the extent of the involvement of supervisory personnel in a violation should be taken into account in determining whether an unwarrantable failure occurred, because supervisors are held to a higher standard of care. *Lopke Quarries, Inc.*, 23 FMSHRC 705, 711 (July 2001); *REB Enters., Inc.*, 20 FMSHRC 203, 225 (Mar. 1998). A section foreman is held to a "demanding standard of care in safety matters." *Youghiogheny & Ohio Coal Co.,* 9 FMSHRC 2007, 2011 (December 1987) (*quoting Wilmot Mining Co.,* 9 FMSHRC 684, 688 (April 1987)). A mine superintendent is also held to a heightened standard of care. *S&H Mining, Inc.,* 17 FMSHRC 1918, 1923 (Nov. 1995) (heightened standard of care required of section foreman and mine superintendent).

As noted above, Morgan asked Easterling how long the adverse roof conditions had exited, and Easterling told Morgan that the conditions had existed ever since he had begun working at the mine six weeks earlier. Tr. I-196. Morgan also asked Easterling whether he had taken any steps to correct the hazardous conditions, and Easterling told Morgan that he was "one man responsible for all of the outby area and [he] was working on it when [he] can get to it." Tr. I-195. Easterling also told Morgan that he had been working in the other return air course, and had not made any efforts to correct the hazardous conditions in the No. 5 entry. Morgan observed no evidence indicating that corrective action had been taken. Tr. I-194. Although Easterling was not a section foreman, he was the designated examiner at Mine No. 7, and the designated agent responsible for examining and maintaining all of the area outby the working section. Tr. I-91, 195. Accordingly, his knowledge of the violative conditions is imputable to Respondent. Indeed, the parties have stipulated that Easterling was an agent of Rock N Roll for the purposes of Citation No. 9061132. Stip. Fact. No. 13, Jt. Ex. 1. I find that the Respondent had knowledge of the violation and demonstrated indifference or a serious lack of reasonable care by allowing the violation to continue unaddressed for six weeks. I find that this factor strongly weighs in favor of find an unwarrantable failure.

v. Whether the Violation was Obvious

Morgan credibly testified that the hazardous conditions were obvious, and even a newly trained miner with no underground experience would have recognized the danger. Tr. I-181-82. Respondent offered no probative evidence to the contrary. I find that the obviousness of the violation weighs in favor of an unwarrantable failure finding.

vi. Whether the Violation Posed a High Degree of Danger

A high degree of danger posed by a violation may also support an unwarrantable failure finding. *See e.g., BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Quinland Coals*, 10 FMSHRC 705, 709 (June 1988). The degree of danger is a relevant factor, but not a threshold requirement for determining whether a violation is unwarrantable. *Manalapan Mining Company, Inc.*, 35 FMSHRC 289, 294 (2013), *citing Windsor Coal Co.*, 21 FMSHRC 997, 1001 (Sept. 1999) (Commission recognizes a number of factors relevant to determining whether a violation is the result of an operator's unwarrantable failure). The factor of dangerousness may be so severe that, by itself, it warrants a finding of unwarrantable failure, but the converse is not true, i.e., that the absence of danger precludes a finding of unwarrantable failure. *Manalapan,* 35 FMSHRC at 294. Further, a violation may be aggravated and unwarrantable based on "common knowledge that certain equipment, such as power lines, are hazardous and that precautions are required." *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1129 (July 1992). For purposes of evaluating whether violative conditions pose a high degree of danger, it may be appropriate to consider the same facts already considered as part of the gravity evaluation in an S&S analysis. *See San Juan Coal*, 29 FMSHRC at 125, 132-33 (remand for failure to apply S&S findings to danger factor in unwarrantable failure analysis).

I find that the violation posed a high degree of danger. A section of roof in the No. 5 seal area had already separated from the mine roof and was crushing the crib underneath. Easterling was regularly traveling under the crushed crib to inspect the seals. Tr. I-182, 188, 199. As

Morgan testified, a rock that large falling on someone would likely result in a fatality. Tr. I-199. Accordingly, I find that the violation posed a high degree of danger and this factor weighs in favor of finding an unwarrantable failure.

vii. Respondent's Efforts to Abate the Violative Condition

An operator's efforts to abate a violation are relevant to an unwarrantable failure determination. Thus, where an operator has been placed on notice of a problem, the level of priority that the operator places on abatement of the problem is relevant. *IO Coal*, *supra*, 31 FMSHRC at 1356, *citing Enlow Fork Mining*, 19 FMSHRC at 17. The focus is on abatement efforts made prior to issuance of the citation or order. *Id.* An operator's efforts to abate a violation before a citation or order issues, even during an inspection, may be a mitigating factor in an unwarrantable failure analysis. *Utah Power & Light Co.*, 11 FMSHRC 1926, 1934 (Oct. 1989). Here, although Respondent was not on notice regarding the violation, Easterling admitted that he made no effort to abate or mitigate the obviously hazardous roof conditions. Tr. I-181-82, 195. I find that this factor tips in favor of an unwarrantable failure finding.

Having considered all the relevant factors, I find that the extent of the violation, the duration of the violation, the operator's knowledge of the violation, the obviousness of the violation, the failure to abate the obvious violation, and the high degree of danger posed by the violation, all weigh in favor of finding an unwarrantable failure. I therefore find that Citation No. 9061132 was the result of Respondent's unwarrantable failure to comply with 30 C.F.R. § 75.3643(d).

d. Penalty Assessment

The Secretary proposed a penalty of $3,405 for this violation. The parties stipulated that Respondent produced 598 tons of coal in 2015, and that Respondent had a total of 20 violations in the 15 months preceding the issuance of Citation No. 9061132. Stip. Fact. No. 9, Jt. Ex. 1; Ex. A, *Petition for the Assessment of Civil Penalties*, Docket No. WEVA 2015-0889. The parties e also stipulated that the proposed penalty will not affect Respondent's ability to remain in business. Stip Fact. No. 6, Jt. Ex. 1. I have affirmed the Secretary's gravity and negligence designations, and note that Respondent demonstrated good faith in abating the violation. *See* Ex. A, *Petition for the Assessment of Civil Penalties*, Docket No. WEVA 2015-0889 (reflecting 10% discount for good faith abatement). Based upon my consideration of the Section 110(i) penalty criteria and the deterrent purposes of the Act, I assess a penalty of $3,405.

3. Recordkeeping Violation, Order No. 9061133

After inspecting the right return, Morgan returned to the mine office with Easterling, where Morgan again reviewed the seal examination records that had been conducted by Easterling the day before, on April 29, 2015. Tr. I-209. Easterling's entry for the April 29 examination of the Nos. 1 through 7 seals includes the notation "Seal- 1-7 ok at time of exam." The notations for March 26, April 2, and April 22, 2015 also state that seals Nos. 1 through 7 were "ok at time of exam." The notation for April 9 states "none observed" underneath the heading "Examination of pillar falls, seals, idle workings, abandoned areas." The April 15 notation under the same heading reads "none," although the right-return examination entry for

April 29 noted "loosse rock" [sic]. P. Ex. 9. Each of the examinations was countersigned by McGuire. None of the seal examination entries referenced the hazardous roof conditions that Morgan observed during his inspection of the right return. *See id*.

Based on his observations underground in the right return and his review of the seal inspection records, Morgan issued Order No. 9061133 under section 104(d)(1) of the Mine Act, alleging a violation of 30 C.F.R. § 75.364(h), as follows:

> The operator failed to conduct a proper examination of return air courses that pass by seals for hazardous conditions and record these conditions in the record book. The examiner was at #1-#7 seals in the right return on 4/29/2015 and did not list any hazardous conditions in the exam book. When the examiner and myself traveled to this area on 4/30/2015 the area was found to have large areas of unsupported roof, and insufficient supplemental roof control installed. The cribs built in the area were rooted, [sic] falling, loose and crushing out. The examiner is required to crawl between these cribs and no mention of the conditions was recorded in the exam book. One area at the #5 seal was measured to be 13'6" from the roof bolts installed in the roadway to the seal. The mine roof has fallen on the cribs located at the inby end of this seal. A large rock, more than 12' long, 4' wide, and 3" thick has fallen on these cribs. This violation is an unwarrantable failure to comply with a mandatory standard.[17]

Morgan designated the violation as non-S&S, unlikely to contribute to a hazard that would cause fatal injuries to one miner, and the result of Respondent's high negligence and unwarrantable failure. P. Ex. 7. The Secretary proposed a penalty of $2,000.

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[17] 30 C.F.R. § 75.364(h) provides:

> At the completion of any shift during which a portion of a weekly examination is conducted, a record of the results of each weekly examination, including a record of hazardous conditions and violations of the nine mandatory health or safety standards found during each examination and their locations, the corrective action taken, and the results and location of air and methane measurements, shall be made. The results of methane tests shall be recorded as the percentage of methane measured by the examiner. The record shall be made by the person making the examination or a person designated by the operator. If made by a person other than the examiner, the examiner shall verify the record by initials and date by or at the end of the shift for which the examination was made. The record shall be countersigned by the mine foreman or equivalent mine official by the end of the mine foreman's or equivalent mine official's next regularly scheduled working shift. The records required by this section shall be made in a secure book that is not susceptible to alteration or electronically in a computer system so as to be secure and not susceptible to alteration.

a. Order No. 9061133 was Unlikely to Result in a Fatal Injury to One Miner

Recording hazardous conditions discovered in examinations is crucial to the health and safety of miners. *Mach Mining,* LLC, 39 FMSHRC__, Docket No. LAKE 2014-0746, slip op. at 23 (Sept. 23, 2016) (ALJ) (*citing American Coal Co.*, 34 FMSHRC 2058, 2082 (Aug. 2012) (ALJ) (when evaluating the gravity of recordkeeping violations, the Commission must determine whether the failure to record contributed to a hazard that could cause an injury)). Having determined that the hazardous roof conditions cited in Citation No. 9061132 were reasonably likely to cause fatal injuries to one miner, I now turn to whether the failure to record those same hazardous conditions under Order No. 9061133 was likely to contribute to an injury.

As noted above, although the roof conditions Morgan observed in the No. 5 entry (and cited in Citation No. 9061132) were reasonably likely to result in a serious injury, I affirm Morgan's gravity designation that the failure to record those violations was unlikely to result in a fatality for one miner. Morgan testified that Easterling's failure to record the hazardous roof conditions was unlikely to affect other miners working under normal, continuous mining operations. The No. 5 entry was not regularly traveled by miners, and Easterling was, in fact, the only miner who regularly traveled in the No 5 entry to conduct seal exams. Tr. I-216. While in the first instance, I might find that the record supports an S&S designation for Order No.9061133, as noted above, the Commission's administrative law judges do not have authority to designate violations S&S where the Secretary has not made such an allegation. *Mechanicsville Concrete*, 18 FMSHRC at 879-80 (June 1996). In these circumstances, I affirm the Secretary's gravity designation for Citation No. 9061133.

b. Order No. 9031133 was the Result of Respondent's High Negligence

Morgan designated Order No 9061133 as high negligence because Easterling, Respondent's examiner and agent, had direct knowledge of the hazardous conditions, knew that the conditions needed to be corrected, and still failed to either record the conditions or take action to correct them. Tr. I-216. A reasonably prudent operator would have recorded and corrected the hazardous roof conditions immediately. Accordingly, I affirm Morgan's negligence designation and find that Order No. 9061133 resulted from Respondent's high negligence.

c. Order No. 9061133 was an Unwarrantable Failure to Comply with 30 C.F.R. § 75.364(h)

Based on the aggravating facts and circumstances surrounding Respondent's failure to record the hazardous roof conditions in the No. 5 entry, I find that the violation was an unwarrantable failure to comply with the Secretary's mandatory safety standard. Morgan testified that 30 to 35 out of 50 roof support cribs were not providing roof support in the seal area. McGuire testified that 26 cribs were installed in the seal area over the next two days in order to abate Citation No. 9061132. Tr. II-92; 100-101. Thus, the hazardous roof conditions that Easterling failed to record were both obvious and extensive. *See Mach Mining, LLC*, 35 FMSHRC 2937, 2942 (Sept. 2013) (relying on ALJ's determinations regarding the extent and obviousness of the underlying hazardous conditions for a citation alleging an unwarrantable failure to comply with § 75.364(h)). Easterling had also been conducting the seal examinations since the mine's reopening, and he admitted to Morgan that the hazardous roof conditions in the

No. 5 entry had existed for as long as he had been conducting the examinations. Despite Easterling's direct knowledge of the hazardous conditions, none of the recorded seal examinations noted the obviously hazardous roof conditions, thus establishing that the failure to record continued for at least the six weeks since the mine reopened. P. Ex. 9; Stip. Fact. Nos. 20, 21; P. Ex. 22 at 12. Thus, examiner Easterling, the responsible agent of the Respondent, knew that Respondent had not been recording or correcting the obviously hazardous roof conditions for six weeks. Moreover, the underlying hazardous conditions that were not recorded posed a high degree of danger, as evidenced by both the large section of roof that had already fallen in the No. 5 seal crosscut and Morgan's testimony that the majority of roof falls are fatal. Tr. I-215. *Cf.*, *Mach Mining*, 35 FMSHRC at 2942 (failure to record hazardous conditions that posed a high degree of danger would frustrate the purpose of § 75.354(h) and supports an unwarrantable failure finding). As noted above, Easterling's failure to record the hazardous roof conditions contributed to the likelihood that miners traveling in the No. 5 entry would be exposed to a roof fall hazard. I therefore find that the failure-to-record violation was obvious, extensive, posed a high degree of danger, and was of long duration. In addition, Easterling, as examiner and agent of the operator, had knowledge that he was not recording the hazardous roof conditions and had failed to make any attempt to abate them. Although the violation history and recent reopening of the mine support a finding that the Secretary failed to establish that the operator was on notice that greater efforts were necessary to comply with 30 C.F.R. § 75.364(h), the remaining factors strongly weigh in favor of an unwarrantable favor determination and outweigh any contrary analysis. I therefore affirm the Secretary's unwarrantable failure designation.

c. Penalty Assessment

The Secretary proposed a penalty of $2,000 for this violation. The parties stipulated that Respondent produced 598 tons of coal in 2015, and that Respondent had a total of 20 violations in the 15 months preceding the issuance of Citation No. 9061133. Stip. Fact. No. 9, Jt. Ex. 1; Ex. A, *Petition for the Assessment of Civil Penalties*, Docket No. WEVA 2015-0889. The parties also stipulated that the proposed penalty will not affect Respondent's ability to remain in business. Stip Fact. No. 6; Jt. Ex. 1. I have affirmed the Secretary's gravity and negligence designations. I find that the violation was abated by the installation of additional roof support cribs over the two days subsequent to the issuance of Citation No. 9061133. Tr. II-100-01. Based upon my consideration of the Section 110(i) penalty criteria and the deterrent purposes of the Act, I assess a penalty of $2,000.

C. The June 15, 2015 Inspection: The Tracking System Violation, Order No. 9061162

On June 15, 2015, Morgan arrived at Mine No. 7 at 10:05 a.m. to continue his E01 inspection. Tr. I-227-28. McGuire informed Morgan that he had discovered a roof fall in the mine earlier that morning and production had been shut down. Tr. I-228; *see also* P. Ex. 29 at 1. Morgan immediately required McGuire to contact MSHA to report the fall, and McGuire did so. Tr. I-232; *see also* P. Ex. 29 at 1.

The roof fall occurred in the No. 1 entry of the left air course return. The fallen roof section was about twenty feet long, twenty feet wide, and 34 feet high. P. Ex. 29 at 1.

Shortly after McGuire notified MSHA of the reportable fall, one of MSHA's roof control specialists called the mine to issue a verbal 103(j) order.[18] Thereafter, Morgan spoke with the MSHA representative, and modified the 103(j) order to a 103(k) order.[19]

While Morgan was in the mine office, he noticed that the interface terminal display for the electronic underground tracking system indicated that approximately fifty percent of the tag readers were out of service. Tr. I-249, 252; P. Ex. 15 at 28; *see also* P. Ex. 16 at B-1. The tracking system interface terminal, installed in the mine office, displays a mine map showing the corresponding locations of the tag readers and any miners in the immediate area of a reader. Tr. I-243-44, 252. The indicator lights on the display are green when the tag readers are working properly and gray when the tag readers are out of service. Tr. II-174. The lights flash red when miners activate an emergency button on their individual identifying tags. Tr. II-174.

The tracking system consists of underground radio frequency identification tag readers placed at intervals within the mine. Tr. I-242-43; *see also* P. Ex. 16 at B-1. Although Morgan did not count the precise number of tag readers at Mine No. 7, he testified that a mine of that size would likely have three readers on the working section inby the section loading point, where miners must be tracked within 200 feet, and two to three tag readers outby the section loading point, where miners are required to be tracked within 2,000 feet. Tr. I-248-49; P. Ex. 16 at B-1. Miners wear identifying tags that are scanned by each tag reader as they travel throughout the mine. A tracking system interface terminal installed in the mine office displays a mine map showing the corresponding locations of the tag readers and any miners in the immediate area of a reader. Tr. I-243-44, 252. The data gathered by the tag readers should be accessible at any time to determine the current location of any miner wearing a tag. The system also stores the tracking data history for each miner for the past two weeks. Tr. I-243-44; P. Ex. 16 at B-2.

After Morgan noticed the gray tag readers on the interface terminal, he asked Caleb Cline, the tracking system operator, if there was a problem with the tracking system. Cline replied that a problem with the electronic tracking system had started the night before. Tr. I-243. Morgan then asked if Cline was keeping a manual log, as required by the ERP in the event of a

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[18] Section 103(j) of the Mine Act allows the Secretary's authorized representatives, in the event of an accident "where rescue and recovery work is necessary," to "take whatever action [they] deem[] appropriate . . . [to] supervise and direct the rescue and recovery activities." 30 U.S.C. § 813(j).

[19] Section 103(k) allows the Secretary's authorized representatives who are physically present at coal mines to issue "such orders as [they] deem[] appropriate to insure the safety of any person" in the event of an accident. 30 U.S.C. § 813(k).

tracking system failure. Tr. I-243; P. Ex. 16.[20] In response, Cline showed Morgan the manual log that he had begun that morning, which contained the following single entry: "Ricky McGuire and section crew traveled underground." Tr. I-243; P. Ex. 15 at 17. Morgan informed Cline that his log was inadequate because it did not contain specific notations indicating the names of the underground miners, the precise time they entered the mine, when they arrived at the working sections, when they left the section, where they were going, and what time they returned to the section. Tr. I-243, 250, 256. Cline's manual log also did not contain any entries that reflected McGuire's entry into or exit from the mine when he traveled underground to conduct work related to the roof fall that had occurred that morning. Tr. I-243, 251; *see also* P. Ex. 15 at 14-15.

Morgan asked Cline to pull up several days' worth of system tracking logs for section foreman Jason Darnell. For the prior ten days, from June 5 through June 15, the system indicated

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[20] Mine No. 7's ERP provides, in relevant part:

> Tracking systems will be maintained in a functional manner when miners are underground. To continue mining operations, the mine will establish and follow a procedure to provide tracking *(written log)* during system or component failures in the event that an accident occurs before the failure can be corrected.
>
> . . .
>
> The infrastructure will be examined to verify on a weekly basis that the electronic tracking system is maintained in proper operating condition. A record of the examination will be kept and made available to an authorized representative of the Secretary and miners.
>
> . . .
>
> If the tracking system or a component of the system fails, appropriate corrective actions will begin immediately and continue until it is repaired, and the back-up tracking system will be instituted immediately in the affected area. Tracking system failures or component system failures will be recorded in a record book for MSHA's inspection along with other examinations conducted. The record book will, at minimum, identify the date and time of system failure, the date and time the system was restored to full operational capacity, the nature of the failure, the extent of the system affected by the failure, and the manner in which the failure was corrected.
>
> The MSHA Hotline will be notified of system failures that extend longer than 12 consecutive hours. A system failure is not a failure of one individual node or reader but is when an entire entry or section is without tracking.

P. Ex. 16 at B-3 (emphasis in original). In addition, the ERP requires that the mine maintain a printer that "can be immediately connected to the tracking system to provide a printed record of the location of all miners underground in the event of an emergency." P. Ex. 16 at B-1.

that Darnell's tag had been picked up only by a single outby tag reader at the No. 4 belt, as he entered the mine at the beginning of his shift and exited the mine at the end of his shift. Consequently, Morgan determined that all but one of the tracking system's underground tag readers, including all of the readers on the working section, had not been functioning since June 4, 2015. Tr. I-244-45; P. Ex. 15 at 19. The last section tag reader to record Darnell on the section was at 1:30 p.m. on June 4, 2015. P. Ex. 15 at 20.

In an effort to double check the system's failure, Morgan asked Cline to pull the system's logs for Marty Davis, the continuous miner operator, who would have been traveling from the surface to the working face each day. Tr. I-246. Davis' log, like Darnell's, showed only the same No. 4 belt reader entries. Tr. I-247; P. Ex. 15 at 20. Morgan asked Cline to print out the tracking system history, but Cline was unable to do so because the printer was out of paper. Tr. I-264.[21]

Morgan also inspected the tracking system examination records for Ralph Steele, the chief electrician, who conducted an exam on June 10, 2015, and purportedly found no problems with the system. When Morgan reviewed the electronic tracking records for June 10, 2015, he discovered that only the single outby tag reader at the No. 4 belt had recorded any data. Tr. I-256-58; *see also* P. Ex. 14. Morgan then spoke with Steele, who told Morgan that he conducted his examination of the tracking system by riding by the underground tag readers and ensuring that their power lights were on. Steele's examination procedures did not include checking the interface terminal display in the mine office. Tr. I-258; P. Ex. 15 at 22; *see also* Ex. P-16 at B-3.

After Morgan's review of the tracking system examination records, Cline and Steele told Morgan that they had worked on the tracking system several times during the preceding week. P. Ex. 15 at 23. Cline had worked on the terminal interface computer in the office. Tr. II-176. Steele had worked underground with the individual components, such as the tag readers. Tr. II-185. In addition, two different contractors also performed work on the tracking system. Tr. II-184, 219.

Morgan required Cline to update the manual tracking log by radioing into the mine to determine the location of each miner underground. Tr. I-249. Morgan also required Cline to call in the tracking system outage to MSHA, as required by the ERP. P. Ex. 29 at 2.

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[21] McGuire testified that he had printed out the electronic tracking log that Morgan had requested from Cline, but that he declined to turn over the tracking logs to Morgan without proof that the Secretary's regulations required operators to produce records to authorized representatives, upon demand. Tr. II-163-65. At the time of the hearing, Respondent was unable to produce copies of the electronic tracking logs. Tr. I-36, II-202. Accordingly, I decline to credit McGuire's testimony. I also note that Section 103(h) of the Mine Act provides that "every operator of a coal or other mine shall establish and maintain such records, make such reports, and provide such information, as the Secretary or the Secretary of Health, Education, and Welfare, may reasonably require from time to time to enable him to perform his functions under the Act." 30 U.S.C. § 813(h).

Morgan then issued 104(d)(1) Order No. 9061162 alleging a violation of section 316(b) of the Mine Act for failure to follow the MSHA-approved ERP for Mine No. 7. The Order alleges:

> The operator has failed to follow the approved ERP [emergency response plan] plan for the tracking system. When checked the tracking system had not been operating properly. The readers located in the outby areas and on the section were not working. None of the readers had been reading on the section since 6/4/2015. The operated failed to manually track the miners while underground and failed to report it to the MSHA hotline in the required time. Page # B-3 of the approved plan under the Maintenance header states: #1, Tracking systems will be maintained in a functional manner when miners are underground. To continue mining operations, the mine will establish and follow a procedure to provide tracking (written log) during system or component failures in the event that an accident occurs before the failure can be corrected. #2, If the tracking system or a component fails, appropriate corrective actions will begin immediately and continue until it is repaired, and the back-up tracking system will be initiated immediately in the affected area. #3, The MSHA hotline will be notified of system failures that extend longer than 12 consecutive hours. A system failure is not a failure of one individual node or reader but is when an entire entry or section is without tracking. This violation is an unwarrantable failure to comply with a mandatory standard.

P. Ex. 14.

Later that same day, Morgan modified the Order to include the following:

> The electrician that conducted and recorded the exam of the tracking system on 6-10-2015 recorded that the system was working and no problems found. When the history for 6-10-2015 was checked the system was not working as recorded. No readers were working on the section and numerous readers were not working outby.

P. Ex. 14.

The Secretary alleges that the violation was S&S, reasonably likely to contribute to a hazard that would result in fatal injuries to eight miners, and the result of Respondent's high negligence and unwarrantable failure. *Id*. The Secretary has proposed a specially-assessed penalty of $17,300.

Morgan based his unwarrantable failure designation in part on citations issued earlier in his E01 inspection. Tr. I-278. For example, Citation No. 9061125, issued on April 22, 2015, alleged that all three section readers were not functioning and that Respondent had failed to initiate manual tracking of underground miners. The violation was designated as S&S and the result of Respondent's moderate negligence. Citation No. 9061125 was abated when the tracking system's functionality was restored. P. Ex. 26. The citation was contested and assigned to Docket No. WEVA 2015-0888. I issued a Decision Approving Settlement disposing of that citation on March 31, 2016. In addition, Citation No. 9061128, which issued on April 23, 2015, alleged that

Respondent failed to notify MSHA when the tracking system had gone down for more than 12 hours. The citation was abated when Respondent notified MSHA of the system failure and began tracking miners with a manual log. P. Ex. 27. Per MSHA's records, Respondent did not contest Citation No. 9061128. *See* Mine Safety and Health Administration, *Mine Data Retrieval System*, http://arlweb.msha.gov/drs/drshome.htm (last accessed Oct. 21, 2016).

1. The Violation in Order No 9061162 was S&S

Respondent stipulated to the fact of the violation. Stip. Fact No. 10, Jt. Ex. 1.

I next identify the discrete safety hazard contributed to by the violation. *Newtown Energy,* 38 FMSHRC at 2037. Without a functioning tracking system or an accurate manual log, miners could not be located underground in the event of an emergency or accident. Tr. I-266. Based on Morgan's review of Cline's inadequate manual log, which was required under Respondent's ERP, I find that this hazard was more than just reasonably likely to occur; the hazard did occur on June 15, 2015, when Cline failed to record McGuire's additional trip into the mine to perform work related to the roof fall that morning. Respondent, therefore, had no reliable record documenting the identity or location of miners working underground. Tr. I-243, 251.

The hazard of not being able to locate miners underground in the event of an emergency is reasonably likely to result in a serious injury. In the event of an emergency, lack of information regarding the location of the miners underground will impede rescue efforts. Tr. I-266-67. Minutes can make the difference between life or death in a mine emergency rescue effort. Morgan credibly testified that lack of tracking would put every miner underground at risk during an emergency. Tr. I-271. I therefore find that Order No. 9061162 was appropriately designated as S&S because the violation contributed to an inability to track miners during an emergency, such as a fire, explosion, or water inundation, which is reasonably likely to result in fatal injuries for the eight miners working underground.

2. Order No. 9061162 was the Result of Respondent's High Negligence

Considering the totality of circumstances regarding the tracking system failure, I find that Order No. 9061162 was the result of Respondent's high negligence. Although Steele indicated in his June 10 examination records that the tracking system was properly functioning, both Steele and Cline told Morgan on June 15 that they were aware of the system failure and had been working on the system for about a week. P. Ex. 30; P. Ex. 15 at 23. Despite the work that Steele and Cline had performed, the system was still not functioning properly at the time of Morgan's inspection, and the tracking system's electronic records indicated that the system had been out for eleven days. Tr. I-244-45; P. Ex. 15 at 19. Respondent continued active mining operations during this period. A reasonably prudent operator with knowledge that the tracking system could not accurately track miners underground should not have continued active mining operations until the system was fixed or an accurate manual log was maintained. I therefore affirm the Secretary's high negligence designation for Order No. 9061162.

3. Order No. 9061162 was an Unwarrantable Failure to Comply with Section 316(b) of the Act

Unwarrantable failure designations, like S&S designations, may only be applied to alleged violations of the Secretary's mandatory health and safety standards. *See* 30 U.S.C. § 814(d)(1); *see also Wolf Run Mining Co. v. Fed. Mine Safety & Health Rev. Comm'n*, 659 F.3d 1197 (D.C. Cir. 2011). *Wolf Run* addressed the issue of whether a violation of a safeguard promulgated under Section 314(b) of the Mine Act was a violation of the Secretary's mandatory safety standards, and consequently eligible for designation as S&S. The D.C. Circuit, relying on a plain language review of the Mine Act's statutory text, noted that the Act defines "mandatory health or safety standards" as "the interim mandatory health or safety standards established by titles II and III of this Act, and standards promulgated pursuant to title I of this Act." 30 U.S.C. § 802(l). The court determined that since Section 314(b) was an interim mandatory health and safety standard established by Title III, it fell squarely within the Act's plain language definition of a mandatory health and safety standard. *Wolf Run*, 659 F.3d at 1232-33.

Like Section 314(b), Section 316(b) was also promulgated pursuant to title III, and is likewise an interim mandatory health and safety standard. Section 316(b), which requires each mine to follow an approved ERP, therefore also falls clearly within the Act's definition of "mandatory health and safety standards." Alleged violations of Section 316(b) may thus properly be designated as unwarrantable failures. *See* 30 U.S.C. §316(b).

Based on the aggravating facts and circumstances surrounding Respondent's failure to comply with its MSHA-approved ERP, I find that the violation is an unwarrantable failure to comply with Section 316(b) of the Act. The ERP requires Respondent to report tracking system failures that exist for longer than 12 hours. Morgan determined that the failure leading to the issuance of Order No. 9061162 lasted for a duration of 11 days. Tr. I-244-45. In addition, the failure was extensive, as the unrebutted record evidence indicates that all of the section tags readers, and all but one of the outby tag readers, were not working during that outage. Tr. I-244-45.

I find that Citations Nos. 9061125 and 9061128, issued less than a month prior to Order No. 9061162, put Respondent on notice that greater efforts were necessary in order to comply with the ERP. P. Ex. 26, 27. Both of those citations directly involved violations of the same provisions of the ERP at issue in Order No. 9061162. Morgan issued Citation No. 9061125 for Respondent's failure to manually track miners during a system failure of the tag readers on the working section. Similarly, Citation No. 9061128 was issued for Respondent's failure to notify MSHA of a tracking system failure lasting more than 12 hours, and it was abated when Respondent notified MSHA of the failure and began keeping a manual log of the underground movements of miners. I therefore find that the particular violations in Citation Nos. 9061125 and 9061128 put Respondent on notice that greater efforts were necessary to comply with the ERP.

I also find that Respondent had knowledge of the violation and demonstrated high negligence and a serious lack of care for the safety of its underground miners should an

emergency occur underground while the violation was left unabated. Both Steele, Respondent's chief electrician, and Cline, one of the owner's sons, knew that the tracking system had not been functioning properly, as indicated by their attempts to resolve the problem in the week prior to the issuance of Order No. 9061162. P. Ex. 15 at 23. The 11-day duration of the violation, combined with Respondent's inadequate efforts to manually track the miners underground, indicates that despite Respondent's knowledge of the violation, Respondent failed to take adequate steps to fix the tracking system so that miners could be located in the event of an emergency. Tr. I-244-45. In fact, examination records indicated that the tracking system and its components were functioning properly, while in actuality, they were not. I find that the failure to record the problems with the tracking system and its components was a deliberate omission that would mislead miners and MSHA.

The violation appeared to be obvious, even to the inspector. The system's terminal interface was equipped with lights that change to gray to indicate problems with individual underground tag readers. It was these gray lights that Morgan noticed shortly after arriving in the mine office on June 15, 2015. Tr. I-249, 252, II-174. In addition, had Cline chosen to check the electronic system log, it would have been immediately apparent that the system had not been working for the past 11 days.

The tracking system failure posed a high degree of danger. As noted above, lack of information regarding the location of the miners underground would impede rescue efforts during an emergency where minutes can mean the difference between life or death. Tr. I-266-67, 270, 272.

Based on the above analysis of the aggravating facts and circumstances surrounding Respondent's failure to comply with its ERP, I affirm the unwarrantable failure designation for Order No. 9061162.

d. Penalty Assessment

The Secretary proposed a specially assessed penalty of $17,300 for Order No. 9061162. In its recent *American Coal* decision, the Commission majority (Commissioners Young, Cohen and Althen) observed that

> [f]or either regular or special assessments, the Secretary's proposal is not a baseline from which the Judge's consideration of the appropriate penalty must start. The Judge's assessment is made independently, and, regardless of the Secretary's proposal, the Judge must support the assessment based on the penalty criteria and the record.

38 FMSHRC 1987, 1995 (Aug. 2016). In *American Coal*, MSHA issued a special assessment without explaining the basis in its Narrative Findings. *Id.* at 1996. The majority noted that the Secretary bears the burden of "providing evidence sufficient in the Judge's discretionary opinion to support the proposed assessment under the penalty criteria." *Id*. at 1993. "When a violation is specially assessed, that obligation may be considerable." *Id*. While the Secretary may provide an explanatory narrative to support the special assessment sought, Judges must "be attentive to the

rationale and facts and circumstances supporting the decision to seek a special assessment, so that the ultimate assessed penalty conforms to the Judge's findings and conclusions." *Id*.

I consider the specially assessed penalty of $17,300 as a proposal. Because the Secretary has proposed a penalty substantially higher than would have been proposed under the regular assessment system, I look to the record to determine whether the Secretary introduced evidence to support an elevated assessment under the Secretary's regulations. I then assess the penalty independently based on the record evidence of Section 110(i) criteria and the deterrent purposes of the Act.

According to the Secretary's narrative findings for the special assessment of Order No. 9061162, the operator's unwarrantable failure to comply with the Secretary's mandatory health and safety standards, combined with the operator's high negligence, indicate "the need for greater deterrence than the regular assessment can provide." Narrative Findings for a Special Assessment, *Petition for the Assessment of Civil Penalties*, Docket No. WEVA 2016-0084. The gravity of the violation was "serious" because "at least eight underground miners were not being tracked." *Id*. The narrative findings also note that the violation resulted from the operator's high negligence, and indicate that Respondent's practice of failing to comply with the ERP "could be the result of intentional conduct on the part of management:"

> [M]anagement was aware of the requirements to maintain fully functional communication and tracking systems where miners are underground. The operator knew that the system was inoperative but failed to track the employees manually. The obvious tracking system failure existed for an extended period of time. Examination records indicated that the tracking system was functioning properly, while in actuality, it was not. Management failed to ensure a safe work place was provided to the miners.

Id.

I have affirmed the Secretary's gravity and negligence findings, and find that the Secretary's special assessment rationale, as contained in the narrative findings, is consistent with record and the evidence introduced at hearing. In addition, I have affirmed that the violation in Order No. 9061162 was the result of Respondent's unwarrantable failure to comply with Section 316(b). Although the examination records indicated no issues with the tracking system, both Cline and Steele knew that system components were not, in fact, properly functioning, and I have found that the failure to record the problems with the tracking system and its components was a deliberate omission that would mislead MSHA and miners actively working underground. The parties have stipulated that Respondent produced 598 tons of coal in 2015. Although Respondent had a total of only 10 violations in the 15 months preceding the issuance of Order No. 9061162, *see* Stip. Fact. No. 9, Jt. Ex. 1; Ex. A, *Petition for the Assessment of Civil Penalties*, Docket No. WEVA 2016-0084, two of those violations involved the same standard, indicating that Respondent was not getting the message that it needed to comply with the tracking system provisions of its ERP. Specifically, Citations Nos. 9061125 and 9061128, issued less than a month prior to Order No. 9061162, put Respondent on notice that greater efforts were necessary in order to comply with the ERP. P. Exs. 26, 27. Both of those citations directly involved violations of the same provisions of the ERP at issue in Order No. 9061162.

Morgan issued Citation No. 9061125 for Respondent's failure to manually track miners during a system failure of the tag readers on the working section. Similarly, Citation No. 9061128 was issued for Respondent's failure to notify MSHA of a tracking system failure lasting more than 12 hours. The parties stipulated that the proposed, specially assessed penalty will not affect Respondent's ability to remain in business. Stip. Fact. No. 6, Jt. Ex. 1. According to MSHA's Mine Data Retrieval System, Order No. 9061162 has not been terminated and is still in effect. MSHA Mine Data Retrieval System, http://arlweb.msha.gov/drs/ASP/MineAction.asp (last accessed Nov. 17, 2016); *see also* Stip. Fact No. 8, Jt. Ex. 1. Based upon my consideration of the Section 110(i) penalty criteria and the deterrent purposes of the Act, I assess a penalty of $17,300.

IV. ORDER

For the reasons set forth above,

Citation No. 9061132 is **AFFIRMED**, as written;

Order No. 9061133 is **AFFIRMED**, as written;

Citation No. 9061479 is **AFFIRMED**, as written;

Citation No. 9061120 is **AFFIRMED**, as written;

Citation No. 9061131 is **AFFIRMED**, as written; and

Order No. 9061162 is **AFFIRMED**, as written.

Respondent, Rock N Roll, is **ORDERED** to pay a total civil penalty of $29,613 within thirty days of the date of this Decision and Order.[22]

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

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

Distribution:

Thomas F. McLoughlin, Tri-State Geologic & Mining Service, LLC, 741 Park Avenue NE, Norton, VA 24273

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/ccc

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

November 22, 2016

SECRETARY OF LABOR, MSHA, on behalf of RAYMOND MCKINNEY, JR., v. BLACK RIVER COAL, LLC, Respondent.	TEMPORARY REINSTATEMENT PROCEEDING Docket No. VA 2015-261-D NORT-CD 2015-02 Mine ID No.: 44-06859

ORDER TERMINATING TEMPORARY REINSTATEMENT
AND
DISMISSAL ORDER

Before: Judge Feldman

This matter is before me on the Secretary of Labor's Application for Temporary Reinstatement filed on behalf of Raymond McKinney, Jr. pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815(c)(2) ("the Act"). On June 22, 2015, McKinney filed a discrimination complaint with the Mine Safety and Health Administration ("MSHA"). On July 15, 2015, the Secretary filed an Application pursuant to section 105(c)(2) seeking McKinney's temporary reinstatement to his former position with Black River Coal, LLC, ("Black River") pending completion of MSHA's investigation of McKinney's underlying discrimination complaint. On August 21, 2015, I issued an order requiring McKinney's temporary reinstatement following receipt of the parties' Amended Joint Motion for Approval of Settlement Agreement and Motion for Order Granting Temporary Reinstatement, which was filed the same day.

On October 20, 2016, Black River filed a Motion to Toll Temporary Reinstatement Order, asserting that temporary reinstatement should be suspended as Black River had ceased all operations at the War Creek No. 1 mine, with no plans for future operations at the mine site. The Secretary has not opposed Black River's motion to suspend. As McKinney was temporarily reinstated, rather than economically reinstated, I assume his temporary reinstatement was suspended upon the cessation of mining operations at the War Creek No. 1 facility.

Shortly thereafter, on November 9, 2016, the Secretary advised the undersigned via email that he has declined to bring a section 105(c)(2) discrimination complaint on behalf of McKinney. Consequently, Black River has moved via email for dissolution of McKinney's temporary reinstatement.

It is well-settled that an order of temporary reinstatement terminates after the Secretary, upon investigation, concludes that a violation of the anti-discrimination provisions of section 105(c) has not occurred. *North Fork Coal Corp. v. FMSHRC*, 691 F.3d 735 (6th Cir. 2012), *rev'g Sec'y o/b/o Gray v. North Fork Coal Corp.*, 33 FMSHRC 27 (Jan. 2011); *Vulcan Constr. Materials*, 700 F.3d 297 (7th Cir. 2012). Accordingly, as the Secretary has declined to bring a section 105(c)(2) proceeding on behalf of McKinney, the August 21, 2015, Order of Temporary Reinstatement shall be terminated.

ORDER

In view of the above, **IT IS ORDERED** that the August 21, 2015, Order granting the temporary reinstatement of McKinney as of August 10, 2015, **IS TERMINATED** effective as of the date of this Order. **IT IS FURTHER ORDERED** that the captioned temporary reinstatement proceeding **IS DISMISSED**.

/s/ Jerold Feldman
Jerold Feldman
Administrative Law Judge

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