OCTOBER 2012

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COMMISSION DECISIONS AND ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 1, 2012

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket Nos. WEVA 2011-227, et al.
v.	:	
POCAHONTAS COAL COMPANY, et al.	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

These cases, which were consolidated for purposes of interlocutory review by the Commission, involve civil penalty proceedings arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act" or "Act"). On March 15, 2012, the Commission issued an order directing for interlocutory review those dockets listed in Appendix A to the order. Each of those dockets was subject to the order that Chief Judge Lesnick had issued on January 25, 2012, in Docket No. WEVA 2011-227. That order denied the operator's motion to dismiss and accepted the Secretary's late-filed petition for assessment of penalty in each of the subject cases, and was subsequently certified for interlocutory review by the Chief Judge. In directing review pursuant to Rule 76, 29 C.F.R. § 2700.76, we stayed briefing pending further order of the Commission.

The Chief Judge's original order was based on the Commission's decision in *Salt Lake County Road Department*, 3 FMSHRC 1714 (July 1981) ("*Salt Lake*"). Recently, the Commission issued a decision in *Long Branch Energy*, 34 FMSHRC ____, Nos. WEVA 2009-1492-R, et al. (Aug. 30, 2012) ("*Long Branch*").[1] There, we clarified *Salt Lake* with regard to the circumstances under which the Commission's judges should accept or reject a penalty

[1] The Commission's decision can be found at http://www.fmshrc.gov/decisions/commission/COMM.08302012-WEVA2009-1492d.htm.

petition that has been filed by the Secretary beyond the 45-day time limit imposed by Rule 28(a), 29 C.F.R. § 2700.28(a). Specifically, we held in *Long Branch* that while

> the Secretary may not, on a "mere caprice," ignore the Commission's procedural rule regarding deadlines for filing penalty petitions . . . . , regardless of how important procedural regularity may be, it is subservient to the substantive purpose of the Mine Act in protecting miners' health and safety. . . . We therefore must balance concerns for procedural regularity against the severe impact of a dismissal on the Mine Act's penalty scheme.
>
> In order to achieve this balance, we clarify that "adequate cause" may be found to exist where the Secretary provides a non-frivolous explanation for the delay. The Secretary's excuse may not be facially implausible, and should be supported by evidence sufficient to establish that the delay did not result from "mere caprice" or through willful delay, intentional misconduct, or bad faith. . . .
>
> Once the Secretary meets her burden in this regard, an operator must show at least some actual prejudice arising from the delay in order to secure a dismissal of a penalty proceeding due to a late-filed petition. Mere allegations of potential prejudice or inherent prejudice should be rejected.

Long Branch, 34 FMSHRC at ____, slip op. at 8.

In light of the *Long Branch* decision, we hereby vacate our order directing interlocutory review of the consolidated cases and remand the cases to the Chief Judge for further proceedings under the Mine Act. In each of the cases the operator will have the opportunity, should it wish, to renew its motion to dismiss. The Chief Judge or the judge subsequently assigned to the case should then apply our decision in *Long Branch*.[2]

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

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

[2] In certain of the cases, there were pending issues regarding the extent to which the case was stayed during interlocutory review. This order renders those issues moot.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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October 25, 2012

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket Nos. CENT 2012-247-M
v.	:	CENT 2012-313-M
THE DOE RUN COMPANY	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

These matters arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On October 2, 2012, the Commission received from The Doe Run Company ("Doe Run") two petitions for discretionary review seeking to reopen two penalty assessment proceedings and relieve it from the orders of default entered against it.

On August 1 and 3, 2012, Chief Administrative Law Judge Robert J. Lesnick issued two orders to show cause, which by their terms, became orders of default if the operator did not file its answers within 30 days. These show cause orders were issued in response to Doe Run's failure to answer the Secretary's January 10 and February 13, 2012, Petitions for Assessment of Civil Penalty. Because the operator did not file its answers within 30 days, both show cause orders became default orders on September 4, 2012.

Doe Run asserts that its safety director mistakenly believed that her informal settlement discussions with the Mine Safety and Health Administration's ("MSHA") Conference and Litigation Representative ("CLR") were an adequate substitute to filing an answer. The safety director further declares that she received the show cause orders, but did not review them and was unaware of their import. The Secretary does not oppose the requests to reopen, based solely on the fact that they were filed within a short time of discovering the default orders. The Secretary notes, however, that Doe Run has another motion to reopen pending before the Commission. In Docket No. CENT 2012-698-M, the safety director failed to timely mail the contest form due to an increase in her work assignments. The Secretary cautions that she may oppose future motions to reopen penalty assessments that are not timely contested.

The judge's jurisdiction in these matters terminated when the defaults 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).

We have observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995). Having reviewed Doe Run's requests and the Secretary's responses, in the interest of justice, we hereby reopen the proceedings and vacate the default orders. Accordingly, these cases are remanded to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

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

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
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(202) 434-9933

October 2, 2012

BLEDSOE COAL CORPORATION,	:	CIVIL PENALTY PROCEEDINGS
	:	
Contestant	:	DOCKET Numbers:
	:	
	:	KENT 2011-835
	:	A.C. No 15-19132-249627
v.	:	
	:	KENT 2011-1162
HILDA L. SOLIS, Secretary,	:	A.C. No. 15-19132-252276-02
of Labor, United States	:	
Department of Labor, MSHA	:	KENT 2012-34
	:	A.C. No. 15-19132-266095
	:	
Respondent	:	MINE: Abner Branch Rider

DECISION

Appearances: Mary Beth Zamer, Esq., Mary Sue Taylor, Esq., U.S. Department of Labor, Nashville, Tennessee for the Petitioner
Marco M. Rajkovich, Esq., John Williams, Esq., Williams, Kilpatrick & True, PLLC, Lexington, Kentucky, for Respondent

Before: Judge Moran

I. Introduction: On November 18, 2010, Bledsoe Coal's Abner Branch mine was notified that it was under a potential pattern of violations. To avoid the designation of having, not simply a *potential* pattern, but to be identified as having a pattern of significant and substantial ("S&S") violations, Bledsoe was advised by MSHA that it had to achieve a certain maximum rate of such violations in its next inspection. It failed to achieve that rate, as MSHA found 18 violations that it designated as having the S&S attribute. Bledsoe challenged both the legitimacy of the pattern regulations and the findings that the 18 citations were in fact properly denominated as being "of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard."

A hearing was held in London, Kentucky from September 5 - 7, 2012 on the issues of the validity of those 18 citations and their designation as "S&S." The parties stipulated that, under

application of the pattern regulations, MSHA needed to prove that at least 9 of the 18 citations were validly issued and were S&S.

Upon the conclusion of the hearing, the parties, having first waived closing arguments and the filing of post-hearing briefs, the Court then announced its finding that all 18 of the citations were affirmed as violations and that fifteen (15) of those citations were S&S, while three (3) did not have the significant and substantial attribute. Accordingly, for the reasons which follow, the Court upholds MSHA's determination, placing Bledsoe Coal's Abner Branch Mine under the pattern of violation designation, as provided by Section 104(e) of the Mine Act, and imposes civil penalties for them.

II. PRELIMINARY MATTERS

Understanding "Significant and substantial" violations and the Pattern Provision under the Mine Act

Section 104(e) pattern violations placed in perspective.

Although in place since the Federal Mine Safety and Health Act of 1977, a period now of nearly 35 years having since passed, the pattern of violations provision has not be used as an active enforcement tool until recently. In that sense, because it has now left its previously dormant state, it is "new" to the mining community. While this has caused commotion within that community, the provision, when examined from a calm perspective, is not especially remarkable in the context of the enforcement of the citations and orders provisions Congress designed under the Mine Act.

Congress provided a thoughtful enforcement scheme under the Mine Act and when that overall scheme is examined, it is clear that the pattern provision is not draconian in any sense. An examination of the operative provision, section 104 of the Act, demonstrates this. Where, upon inspections or investigations, violations are found, Section 104 provides an ordered approach to dealing with them. Broadly stated, but without distortion, under section 104(a), when a citation is issued for a violation, a time is then set for its abatement. If the violation is not abated within the permitted time, a withdrawal order, pertaining to the extent of the area affected by it, is issued and miners are prohibited from that area until the violation is corrected.

However, Congress, in its wisdom and from its experience with mining tragedies, knew that an effective enforcement scheme required more than the tool of section 104(a). Based upon that recognition, it included two enhanced enforcement provisions to deal with two specialized compliance problems. These appear in section 104(d) and section 104(e) of the Mine Act. Both of these provisions were present when the 1977 Mine Act came into existence, in November of that year. The thrust of section 104(d) is to deal with a violation with two specialized attributes not called out in section 104(a). The "(d) provision" addresses a violation which is "of such nature as could significantly and substantially contribute to the cause and

effect of a [mine] safety or health hazard" and which violations also were caused by an unwarrantable failure[1] by the mine to comply with those standards. When those two attributes coincide, a (d)(1) notice is issued but the potential for enhanced enforcement is also triggered because if, in the ensuing 90 days, there is another violation found and such violation is also caused by an unwarrantable failure, all miners in the area affected by that violation must be withdrawn until the matter is abated. Once that occurs, what is referred to as the "(d) chain" comes into effect. That is, a mine is then faced with one withdrawal order after another each time another unwarrantable failure violation occurs and that withdrawal order consequence continues until an inspection of the mine finds no unwarrantable failure violations. This is known as a "clean" inspection, so described because it is free of more unwarrantable failure violations. The Court of Appeals has described this as a powerful enforcement tool, which is directed chiefly at unwarrantable failure violations. *UMWA v. FMSHRC and Kitt Energy Corp.*, 768 F.2d 1477 at 1478-79 (D.C. Cir. 1985). Thus, without oversimplifying it, section 104(d) is primarily focused upon violations which occur in association with an unwarrantable failures to comply with safety and health standards.

Understanding that this is the thrust of section 104(d), with its focus on unwarrantable failures to comply with the law, makes it easier to appreciate the different focus of the enforcement aim provided by section 104(e) "pattern" violations. While the emphasis of section 104(d) is upon unwarrantable failures to comply with the law, section 104(e) is particularly concerned with the situation where there has been a pattern of "significant and substantial" violations. This S&S pattern provision makes no reference to the degree of negligence or unwarrantability associated with a given violation; it only addresses situations where there has been a pattern of violations whose nature could significantly and substantially contribute to the cause and effect of mine health or safety hazards.

If the two elements are present - S&S violations for which there is a pattern of their occurrence - Congress enacted a prescription which follows the same, well-known, enforcement scheme that applies for unwarrantable failures. Accordingly, when a pattern of S&S violations

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[1] Describing "Unwarrantable failure" to mean aggravated conduct constituting more than ordinary negligence produces a result in harmony with the Mine Act's statutory enforcement scheme of providing increasingly severe sanctions for increasingly serious mine operator behavior. Under section 104(d) an unwarrantable failure finding serves to trigger the application of yet more rigorous sanctions. As the U.S. Court of Appeals for the District of Columbia Circuit has explained: An "unwarrantable failure" citation commences a probationary period: If a second violation resulting from an "unwarrantable failure" is found within 90 days, the Secretary must issue a "withdrawal order" requiring the mine operator to remove all persons from the area until the violation has been abated. Once a withdrawal order has been issued, any subsequent unwarrantable failure results in another such order. This "chain" of withdrawal order liability remains in effect until broken by an intervening "clean" inspection. That is, "an inspection of such mine [which] discloses no similar violations. *UMWA v. FMSHRC and Kitt Energy Corp*., 768 F.2d at 1477, at 1478-79 (D.C. Cir. 1985) (emphasis in original).

has been identified, the mine receives a notice from the Secretary of the pattern's presence. Then, as with the Act's treatment of unwarrantable failures, if in the 90 day period following the pattern notice a subsequent inspection finds another S&S violation, a withdrawal order will be issued for the area affected by that subsequently-found S&S violation. The withdrawal order, just as with the section 104(d) unwarrantable failure circumstance, is lifted only after the new S&S violation has been abated. That process, a withdrawal order for each subsequent S&S violation continues until an inspection of the entire mine reveals no more S&S violations. Such a "S&S -free" or "clean" inspection releases a mine from its former pattern status, just as a clean inspection releases a mine from an unwarrantable failure (d) chain.

Thus, Congress was concerned not only with the circumstances where unwarrantable failures to comply with the law occur but it also had an independent and distinct concern when S&S violations occur as a pattern. In other words, apart from any measure of the culpability involved, the focus of unwarrantable violations, Congress also intended to deal forcefully with the presence of a pattern of S&S violations. Consequently, despite the reaction expressed over the pattern provision, it addresses Congress' express concern with significant and substantial violations and it employs the familiar and well-established enforcement progression found in section 104(d). As in circumstances when unwarrantable failures reoccur, and the 90 day provision and clean inspection are implemented under section 104(d), essentially the same procedures are employed when S&S violations occur in a pattern. Though mine operators obviously want to avoid the 104(d) designation and the chain which may ensue, the community understands and copes with the reality of the provision's presence. The Court expects that, in time, mine operators will adjust to the activation of this long-existing provision which deals with a pattern of those more serious transgressions designated as "significant and substantial" violations.

Significant and Substantial Violations

The foundation for the S&S analysis, at least in terms of case law, comes from two decisions: *National Gypsum,* 3 FMSHRC 822, 825 (Apr. 1981) and *Mathies Coal*, 6 FMSHRC 1 (Jan. 1984). *Mathies* built upon *National Gypsum* by identifying four elements needed for a violation to be considered S&S. Expressed in a bare bones fashion, those four elements are: 1. a violation of a standard *or* a violation of the Mine Act itself; 2. the identification of a "discrete safety hazard," which the Commission has equated with a "measure of danger to safety; 3. a reasonable likelihood that an injury will result; and 4. an injury which would be a reasonably serious one.

The Commission and the Courts have added to this brief explanation, some highlights of which will be related here. The first requirement, a violation of a standard *or* a violation of the Mine Act itself, is straightforward. Inclusion of violations of the Act itself, not simply safety and health standards promulgated under it, makes sense because the Act has its own safety and health provisions established in its text.

The second requirement, the identification of a discrete safety hazard, means that there is a measure of danger to safety contributed to by the violation. For each violation alleged to be "significant and substantial," the relevant hazard associated with the violation must be identified. Accordingly, to provide a few illustrative examples, in a case involving a violation for the lack of berms on a roadway, the judge cited the hazard of a vehicle veering off the roadway and rolling or falling down the incline. *Black Beauty Coal,* 2012 WL 3255590, (Aug. 2012). So too, in *Cumberland Coal*, 33 FMSHRC 2357, 2366 (Oct. 2011), the Commission held that an operator's failure to install lifelines that could not be used effectively contributed to *the hazard* of miners not being able to escape quickly.[2] Thus, it is not the absence of a berm or the improper positioning of hooks along a lifeline that is the focus. Rather, for the second element, it is *the hazard* associated with the absence of those devices that is the subject for this part of the S&S analysis.[3]

As for the third element, the Mine Act itself requires only that the violation of a standard make a significant and substantial *contribution* to the cause and effect of the identified mine hazard. It therefore may be thought of as a violation which has the effect of advancing matters towards the creation of a hazard and therefore moving events towards a hazard's emergence.[4]

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[2] Accordingly, in *Cumberland Coal* the Commission made a point of emphasizing that the Secretary need not show a reasonable likelihood *that the violation itself will cause injury*. Therefore, one does not analyze whether *the violation* will cause injury, because the violation is distinct from the hazard. This means that one is to determine if there is a reasonable likelihood that the hazard would cause injury. As applied in that case, that meant that an analysis of the likelihood of a mine emergency actually occurring is not part of the analytical equation.

[3] Thus, an inspector, in determining if a matter is S&S, would, upon finding a violation, identify the hazard associated with that violation by articulating the underlying hazard that was the genesis for the standard's creation and then inquire whether there is a *reasonable* likelihood, given the violation's contribution to the risk, that the hazard will occur and cause injury and, if so, whether it would be a reasonably serious injury. The Commission and courts have observed that an experienced MSHA inspector's opinion that a violation is significant and substantial is entitled to substantial weight. *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-79 (Dec. 1998); *Buck Creek Coal Inc. v. MSHA,* 52 F.3d. 133, 135-136 (7th Cr. 1995).

[4] As relevant here, that section provides: "(d)(1) If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, *such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard*, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this chapter." 30 U.S.C. § 814(d)(1). Thus, the words of the statute make it clear that the violation must only *contribute* in a significant and substantial

(continued...)

U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (Aug. 1984). While this third element, that there be a reasonable likelihood that the hazard contributed to will result in an injury seems, in practice, to be the most difficult to apply, the applicable test, that there be "a reasonable likelihood" that an injury will result, is not as complex as it seems. It also may be helpful to understand this when viewed from the perspective of what is not required. Thus, the test does not require that it be demonstrated that it is more probable than not that an injury will result. Instead, only a *reasonable* likelihood is required to be shown. Whether that reasonable likelihood of an injury occurring has been shown is evaluated in the context of assuming continued normal mining operations. *U.S. Steel Mining Co.,* 7 FMSHRC 1125, 1130 (Aug. 1985).[5]

Finally, the fourth element, that the injury must be a reasonably serious one, has not been difficult to apply.[6] Another way to express this is that negligible mining mishaps, such as

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[4](...continued)
manner to a hazard, a very distinct, and less onerous, requirement than a violation *causing* a hazard. Although the Commission has not literally employed such language to explain S&S violations, the D.C. Circuit has expressed that only "violations posing no risk of injury at all, that is to say, purely technical violations, and violations posing a source of any injury which has only a remote or speculative chance of coming to fruition" are outside of the reach of an S&S designation. This expression is consistent with the concept of a violation which advances matters in a real way towards a hazard's emergence.

[5] From experience in Mine Act hearings, the Court has found that mine inspectors as well as mine management personnel often express vague and variant understandings of what satisfies the third S&S element. In the Court's view posing the following questions may help in determining whether the third element of *Mathies* is present: Does the violation advance matters, that is, does the violation move matters closer towards a discrete safety hazard's emergence? Restated, one may ask, if it is reasonable or unreasonable to conclude that a hazard would be more likely to occur by virtue of the violation? That is, does the violation, so to speak, *move matters down the road, or advance matters* toward the likely occurrence of a serious injury? In mining as well as in other life circumstances, the occurrence of a serious injury requires several factors coming together. For example, excessive speed, inadequate brakes, inattentiveness, and adverse weather conditions, are among a host of factors that could contribute to a car accident. Similarly, in mining, any one factor can viewed as realistically contributing to the recipe for a serious injury occurring. Therefore, the inquiry can include asking what, besides the presence of the violation, would need to occur before the reasonably serious injury was realized? Reversing the analytical perspective, another way to pose the question is to ask whether the violation only plays a negligible, or insignificant, role in the risk of an injury's occurrence?

[6] As noted in *Topper Coal* there may be circumstances when it is impossible to determine the particular hazard contributed to by the violation. *Sec. v. Topper Coal* 20 FMSHRC 344, 1998 WL 210949 (1998). *Topper* focused on the applicability of an S&S finding (continued...)

bumps, bruises and small cuts, do not constitute reasonably serious injuries. It's important to appreciate that when a standard is violated, the absence of an injury producing event actually occurring does not mean that the violation was not S&S. Restated, no injury need occur for the violation to be S&S. *Elk Run Coal Co.*, 27 FMSHRC 899, 906 (Dec. 2005)

III. Analysis of the Citations in issue.

Docket No. KENT 2011 1162

Citation No. 8405309

Inspector Grady D. Russell issued this citation on January 26, 2011, invoking 30 C.F.R. § 75.1720(a), upon observing a miner plastering a brattice without suitable eye protection. Gov. Ex. 1 ("GX 1"). The relevant portion of the cited standard provides that: "each miner regularly employed in the active workings of an underground coal mine shall be required to wear the following protective clothing and devices: (a) Protective clothing or equipment and face-shields or goggles when welding, cutting, or working with molten metal or when other hazards to the eyes exist from flying particles."

There is no dispute that the miner was not wearing goggles. In fact, upon the citation being issued, the miner retrieved his nearby goggles and donned them, whereupon the violation was abated. The Respondent disputes the S&S characterization of the violation on the basis that the consistency of the plaster made it unlikely that the miner would be subjected to "flying" material. The Court does not agree.

As noted, the violation itself was established. The discrete hazard was an eye injury; the measure of danger to safety contributed to by the violation was, by not wearing goggles, no protective barrier was present and the miner was subjected to the plastering material contacting his eyes as he plastered the brattice. Certainly, the absence of goggles contributed to the cause

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[6](...continued)
in the context of an MSHA spot inspection where mine management alerted a working section that the inspectors were present. Thus, one could not tell, because of the warning, what violations the inspectors might have uncovered had there been no advance warning given. It is noted that although three Commissioners agreed that the violation was S&S, only two of them did so on a "presumption theory," that is to say, some violations may be deemed "presumptively" S&S. Those two Commissioners then cited other examples in which such a presumption had previously been applied in S&S matters. For example, those Commissioners noted that all violations of the respirable dust standard are presumed to be S&S, *Consolidation Coal Co.,* 8 FMSHRC 890 (June 1986) *aff'd,* 824 F.2d 1071 (D.C. Cir. 1987) and that an S&S presumption has been applied to the preshift standard. *Manalapan Mining Co.,* 18 FMSHRC 1375, 1394-95 (Aug. 1996).

and effect of a safety or health hazard. Only one other ingredient would be needed for the hazard to come to fruition: the plaster contacting the goggle-less miner's unprotected eyes. It was the Inspector's view that this was a reasonably likely occurrence. Inspector Russell, in addition to his considerable mine experience, has an industrial hygiene degree. Therefore, from both the areas of Inspector Russell's education and his experience, the Court places weight up upon his opinion that the event was reasonably likely to occur and that it, if it did result, the injury would be reasonably serious, as lost workdays or restricted duty could be reasonably expected.

That is not all. As reflected in Gov. Ex. 2, in the material safety data sheet ("MSDS") for the type of plaster being used that day, the "Hazards Identification" section of that MSDS warns that "[d]ue to the [product's] alkalinity, [it] can be irritating to eyes . . . [and that] [e]ye contact can cause tearing, redness, and severe irritation." Further, if such eye contact were to occur, one is to "[i]mmediately flush with water for fifteen minutes holding eyelids apart [and] . . . Seek medical attention immediately." GX 2 (emphasis in exhibit). In addition, contrary to suggestions that flying material would be unlikely and, beyond the Inspector's viewpoint about such an event, it is noted that the product is sufficiently non-viscous that it can be stirred. That the manufacturer recognizes the risk of eye contact is obvious from the MSDS, as it advises wearing "chemical safety goggles." Last, it may be noticed that this work was not being performed in a laboratory, surgical or "white room" setting. Instead, the work consisted of smearing the product on the brattice. Clearly, it is supportable to conclude, for the reasons articulated above, along with the first two *Mathies* elements, that the twin likelihood elements of the Mathies' analysis were present.

Accordingly, the Court finds that the violation was S&S and imposes a civil penalty of $499.00.

Docket No. KENT 2012 34

Citation No. 8352926

Inspector John Sizemore issued Citation No. 8352926 on January 20, 2011, citing the mine for a violation of 30 C.F.R. § 75.220(a)(1). That standard provides: (a)(1) "Each mine operator shall develop and follow a roof control plan, approved by the District Manager, that is suitable to the prevailing geological conditions, and the mining system to be used at the mine. Additional measures shall be taken to protect persons if unusual hazards are encountered."

The Condition or Practice section of the Citation issued here states that the: "operator had not followed the approved roof control plan [in two respects] 1. The distance from the last row of corner bolts to the rib support measured from 54 to 58 inches for a distance of 11 ft. This area is located on the outby side of the 1st intersection outby the # 8 belt tail piece on the return side of the entry. 2. The distance measured between the pillars located between the 1st and 2nd crosscuts outby the # 8 belt tail piece measured from 25 ft. to 29 ft. in width. The maximum entry width in this location (allowed by the approved roof control plan) is 20 ft. Standard 75.220(a)(1) was

cited 17 times in two years at [the Abner Branch Rider] [ ] mine (17 to the operator, 0 to a contractor)." GX 3.

The two cited conditions involved the same pillar of coal. Tr. 10. The Inspector stated that each cited condition, independently, was an S&S violation, though they were cited together as a single citation. Tr. 11, Vol. 2.

There is no dispute over the fact of this violation for failing to comply with the approved roof control plan. Although too much time was spent at the hearing regarding the undisputed fact that the maximum widths under the plan may be exceeded by an additional 12 inches, such exceedances can only exist for a maximum of five (5) feet. In the two instances cited for excessive widths, one continued for 11 feet, while the other was beyond the additional 12 inches allowed for short distances, as 25 to 29 foot widths were present and the plan permits a maximum entry width of 20 feet. Timbering and steel jacks were required to abate the condition to bring it back into compliance with the plan's minimum requirements.[7]

Respondent's Mine Superintendent, Mr. Oliver, was traveling with Inspector Sizemore on that day, January 20, 2011. Vol 3. Tr. 12. Oliver stated that "this area [they] had pulled, this was an outby area on the # 8 belt. This was at crosscut #50 right where the drive was set to turn right and the tailpiece was there. And the right rib had sloughed off and when we had moved back there and set up, we had put up a row of five-foot bolts in pizza pans and respotted that [ ] areas. And there were some timbers set on the sheer in the break . . ." Vol. 3 Tr. 13. The sheer was there to make it wide where one turns a crosscut. However, he noted that it had sloughed all the way down that pillar but that it had been cleaned up and rebolted. Vol 3. Tr. 14. The "pizza pans" are 18 inch square metal pieces used to control draw rock. R's Exhibit R 2, a photograph, shows the area about which the citation was issued. Noting that the photo depicts an area where it sloughed off, he stated that the bolts had been added after that occurred. Vol. 3 Tr. 16. Oliver contended that when he arrived at the area with Sizemore, there were timbers in place. Vol. 3 Tr. 16. This was done because of the corner being wide. He added that more jacks had to be added in the area to abate the citation. Vol.3 Tr. 18.

Oliver was next shown Exhibit R 3, another photo of an area that was cited. This photo shows what was done to abate the citation. This shows, among other things, a new jack, that is in the picture's foreground and it has no rock dust on it. Vol 3 Tr. 19-20. In the background is another jack which jack has rock dust on it. He could not recall how many jacks had to be set in order to terminate the citation. Vol. 3 Tr. 21. He twice noted that the roof in this area was

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[7] The Court credits Inspector Sizemore's statement that he saw no timbers or jacks in the area cited and accordingly it does not credit assertions made at the hearing to the contrary. Besides, even assuming for a moment that some timbers and jacks were present, there is no claim that additional timbering and jacks were not installed after the citation was issued. The need for such support, even if some such support *were* present, establishes that any such support as *may* have been present was insufficient.

sandstone. Vol. 3 Tr. 20. The point of this observation was to assert that it is a real solid, hard, roof and therefore that the roof presents "no problem . . . at all." Vol. 3 Tr. 22. Nor did Oliver believe there was any issue with the condition of the ribs. He also added that the roof is not high in this location, another factor he considered making it safer. One does not need to bolt ribs where a roof is under eight feet high. Vol. 3 Tr. 23. Nor did he believe that the jack or timbers that were already present were taking any weight. Vol. 3 Tr. 23.

Oliver conceded that he took no issue with the measurements taken by the Inspector. Vol 3 Tr. 25. He also agreed that, per Respondent's own exhibits, R 2 and R 3, someone decided that supplemental support was in fact needed in the cited area. Vol. 3 Tr. 25. Pizza pans are added to a roof to control draw rock only, that is to say, to deal with the immediate roof. Vol. 3 Tr. 26. Oliver also agreed that the wide part was more than just on the corner but also went into the entry. Vol. 3 Tr. 29. Although he then did not agree that more conventional support was needed to deal with the sloughage into the entry, suggesting that an extra row of bolts would suffice, he admitted that such a remedy is not part of the ground control plan for this mine and that it was not acceptable for this mine's geology. Vol. 3 Tr. 29.

Regarding the mine's use of pizza pans, Mr. Oliver agreed that their use was based on its concern that the roof bolt and plate needed that additional protection from draw rock. Vol. 3. Tr. 32. This concern existed despite the presence of the sandstone roof. Vol. 3. Tr. 32.

The Court finds that, in the single citation, the standard was violated, that it was violated in two separate and independent manners and that each cited condition, independently, was significant and substantial, though the twin problems were viewed as a single violation. The discrete hazard is, rather obviously, roof falls. With lost work days or restricted duty being a very reasonable assessment of the type of injury that could be expected, the likelihood of such an injury occurring was the only matter left in dispute. Here, the Court finds that it would be reasonably likely to occur. This conclusion is supported by the Inspector's view of that likelihood.[8] As with Inspector Russell's background, Inspector Sizemore also has a breadth of experience in mining, both in the private sector and in his time with MSHA, with the latter having begun in 1991. Inspector Sizemore informed that had he found either of the two conditions present, he would have marked each as S&S. That is, the conditions did not have to exist in tandem for his S&S finding. The basis for his conclusion rested upon more than one consideration. He noted that roof control plans provide for the *minimum* control measures to be implemented. The Court can take notice of the fact that roof falls remain a leading cause of coal mining deaths in the United States. Inspector Sizemore also testified, and the Court credits his testimony on this violation, that he observed stress on the pillars in the cited area and that he saw loose ribs. When widths exceed the maximum allowed under the roof control plan, it is

[8] As noted earlier, the Commission and courts have observed that an experienced MSHA inspector's opinion that a violation is significant and substantial is entitled to substantial weight. *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-79 (Dec. 1998); *Buck Creek Coal Inc. v. MSHA,* 52 F.3d. 133, 135-136 (7th Cr. 1995).

axiomatic that the roof support is decreased from that which is needed and required as the minimum requirements. Pillars, when widths are excessive, necessarily take increased pressure on them and such increased pressure can cause ribs to pop out.[9] Thus, Inspector Sizemore's opinion about the likelihood of an injury was reasonable and augmented by his visual observations.[10] Exposure to the excessive width conditions would exist for the belt examiners as well as those doing repairs or maintenance in the area.

Accordingly, the Court finds that the violation was S&S and assesses a civil penalty of $1,700.00 for the violation.

Docket No. KENT 2012 1162

Citation No. 8352931

In this instance, Inspector Sizemore cited Bledsoe for a violation of 30 C.F.R. 75.202(a). Entitled, "Protection from falls of roof, face and ribs." That standard provides: "The roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts."

The condition or practice section of the Citation stated: "Two of the three cribs installed under a stress crack, in the 2nd left cross cut inby, the portal, in the track entry, were not secured

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[9] The Court rejects the implication that, by Inspector Sizemore having MSHA supervisory personnel present during the inspection, it can be inferred that S&S findings were a foregone conclusion. It can equally be concluded that such presence was to ensure that any such findings were supportable and that the Agency got it right with such determinations. Further, the basis for the presence of MSHA supervisors is not limited to those two reasons. At the end of the day the Court's conclusions rested upon its evaluation of the credible testimony.

[10] The Court considered, but rejects, claims that the measurements taken were inaccurate, owing to the staggered nature of the entries. The Inspector explained how the measurements were made and the Court finds that he recorded the shortest widths before concluding that those widths were excessive under the plan. When Respondent's witness, Mr. Jerry B. Oliver, mine superintendent at the Abner Branch Mine, testified, he admitted having no issue with the Inspector's measurements. Further, assertions that other safety aspects should be weighed are, per the Commission, not part of the *Mathies* analysis. For example, the Respondent raised the contention that pillars have a "safety factor" built-in to their required size. That may be true, but it ignores that the roof control plan sets *the minimum* roof control requirements. The plan provides its minimum requirements and does not express that those minimums may be less upon consideration of any safety factors. Similarly, the Respondent's point that the roof was sandstone in the cited area ignores that the roof control plan did not call for greater widths in that location. The maximum allowable width, even given the limited 5 foot exceedance enforcement forbearance, is the requirement.

against the roof. The cribs, headers and cap boards were loose and moved freely when examined." Gov. Ex. 6.

Sizemore stated that all miners were exposed to this condition as they pass the area on the way to the working section. The area is also required to be preshifted. The entry is also used as an escapeway. The cribs were not installed for decor. There were, and it is not denied, cracks in the roof running across the tracks at the location of the cribs. While miners traveling on a "rail runner" to the working section were in a covered vehicle, that covering was not a ROPS[11] type structure.

The cribs were installed to provide additional roof support to address the crack or break in the roof, running across the tracks. However, while they were present, there was no claim that the cribs could perform their support role if not secured snugly against the roof. Although the gap was narrow, any gap means that the cribs are not providing roof support. The cribs provided no additional support for the roof when they could be moved about freely. Thus, the cribs cited were only holding up air, not roof. While the roof did not show sagging when the Inspector found the problem, he noted that had that been the case he would have marked the gravity as being "highly likely," instead of "reasonably likely" to occur. To be deemed S&S, the required finding is "reasonably likely," not "highly likely."

Although Respondent's witness Oliver testified about the citation, he only observed the problem *after* cribs had been tightened so that they could resume their roof support function. Thus, he was not present on the day the cribs were cited. Further, he agreed that there was a stress crack present across the entry. While he considered the crack to be a "minimal" one, that characterization sidesteps the fact that the cribs were installed in the first place for the purpose of dealing with the stress crack. Thus, there was no assertion that the cribs were not in fact necessary or not needed. Vol. 3. Tr. 34-35. Still, he described that crack as "hairline" and not as much a concern as a hillseam, which is an open joint, would present. He acknowledged that the cribs had been installed because the crack is on a track entry and because the mine was envisioned as "a long term mine." Vol. 3. Tr. 35. As it existed in the track entry, people will ride and pass under it, but he did not believe that miners had any reason to be walking in that area. Vol. 3. Tr. 37. As mentioned, those riding the track are not on equipment with ROPS or at least Mr. Oliver did not know what the covers on the mantrips using that entry could withstand, nor what the ratings were for such covers. Vol. 3. Tr. 42. This entry is also an escapeway and in such an event miners would be walking under that area. Vol. 3. Tr. 42. Over time, the cribs will shrink, and Oliver informed that "*you've got to go back and retighten along, you know, as they loosen up."* Vol. 3 Tr. 36 (emphasis added). That did not happen here.

The mine's general manager, Mr. Osborne, also testified about the cribs issue, stating that they were quite old. He did not know how old they were however. Tr. 338. In the Court's view,

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[11] A "ROPS" refers to a roll over protective structure. They are designed to protect those within mine equipment from certain hazards.

accurate or not, the age of the cribs is beside the point. The issue is whether they were performing their role by providing support. The evidence is that they were not functioning for that task, as they were able to move freely. Consequently, old or newly installed, they were not providing the support determined to be needed in that area.

Therefore, for this Citation too, there was no claim that the roof did not need the cribs. In fact, their presence attested to their need. The problem was that cribs which can be moved around freely, by definition, are not supporting any roof. That is why proper installation includes the cribs, cap boards and headers, which all work in concert to make sure that the cribs *are* tight against the roof and thereby providing support to it.

Accordingly, the violation was undeniably established as the roof where persons traveled was not adequately supported to protect persons from hazards related to falls of the roof. The violation having been proven, the S&S analysis continues with second element, the discrete safety hazard, the risk of a roof fall. Absent effective cribs, the roof could not provide the level of support deemed necessary by their installation. The risk of a roof fall was increased once the cribs stopped providing their support function. The notion that the cribs had been there a long time and yet there had been no roof fall establishes nothing because it is unknown how long the cribs had stopped their function of roof support. The Court takes notice that roof falls can occur suddenly and without warning. Given the Inspector's view that there was a reasonable likelihood that an injury would result, when coupled with the absence of effective cribs, the Inspector's viewpoint is sound and the Court makes the finding that the absence of the effective cribs did present such a reasonable likelihood and the third element of *Mathies* was established. Further, by their nature, it is reasonable to assume that should a roof fall occur and some roof strike a miner, lost workdays or restricted duty, and therefore a reasonably serious injury, would be the likely result.

Accordingly, the Court finds that the violation was S&S and assesses a civil penalty of $499.00 for the violation.

Docket No. KENT 2011 835

Citation No. 8352936

On February 1, 2011, Inspector Sizemore cited Bledsoe under 30 C.F.R. § 75.202(a) on the basis of observing a "loose ended dropped down piece of sandstone roof measuring 32 inches in width by 51 inches in length by 1 inch to 6 inches in thickness [ ] in the 1st cross cut outby the last open break in the # 2 entry on the 001 section." In his citation, he noted, "The loose rock was pulled down with little effort." Gov. Ex. 9. Later, the Inspector was instructed to add an additional condition he observed in the same section, this time noting there was "[u]nsupported loose ended coal measuring 6 inches in thickness by 16 ft in length by 3 ft in width [which] was

observed loose ended and dropped down from the roof in the last open cross cut between the #3 and #4 entries on the 001 section."[12] Gov. Ex. 9, continuation sheet, Citation No. 8352936-01.

Thus, two roof control hazards were cited on the same MMU. Mining was actively proceeding at the time the conditions were cited. Accordingly, exposure was present for all miners traveling in the cited areas, in the course of moving equipment, doing examinations, rock dusting and scooping. The twin-cited conditions were a crosscut apart from each other. For the loose-ended sandstone, Sizemore estimated that the material taken down would weigh several hundred pounds, while the unsupported loose-ended coal would weigh at least 150 pounds. Given those weight estimates, it is understandable that the Inspector concluded that one who was hit by such materials, in either instance, would be seriously injured. The Court adopts this conclusion.

As noted, the cited provision, entitled, "Protection from falls of roof, face and ribs," provides: "The roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts." Inspector Sizemore stated that there would be foot travel in the cited area and that persons would travel in both crosscuts. He added that exposure would occur 2 to 3 times during the course of a shift and that all miners in the section were exposed to the cited hazards.

Respondent's witness, Mr. Oliver, principally challenged the amount of cap coal that fell, but otherwise his testimony, in the Court's estimation, did little to contest the circumstances that were present, as presented through the Inspector. Mr. Oliver stated that he was not right with Inspector Sizemore when they found that "piece of rock." His presence was *after* they had pried the rock down. Vol. 3. Tr. 57. However, he was present for the second condition found by the Inspector. This second condition involved what Oliver describes as "cap coal." For this condition, he agreed it six inches thick by three feet in width and it was out from the rib by three feet. Vol. 3. Tr. 60.

Clearly, the violation was established; each of the two conditions cited on the 001 section independently constituted violations of the cited provision. They separately presented a roof fall hazard and the materials came down easily in abating the problems. Inspector Sizemore determined that each condition, independently, constituted significant and substantial violations. The Court agrees. The discrete safety hazard was the risk of a roof fall. Given the ease with which the materials came down, and the exposure Sizemore identified, there was, demonstrably,

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[12] The second condition, pertaining to the unsupported loose ended coal the Inspector observed, had originally been cited as a separate citation, Citation No. 8352937. After being added to Citation No. 8352936, Citation No. 8352937 was vacated. The policy decision to add a second Section 75.202(a) condition is of no moment to the citation under consideration. Instead, the added condition meant that two, not simply one, violative condition was cited in Citation No. 8352936.

a reasonable likelihood that an injury would result. Given the amount of the inadequately supported materials present in each cited condition, there can be no doubt that any injury, should one occur, would be a reasonably serious one.

On the basis of the foregoing, the Court concludes that the standard was clearly violated, for each of the two separate and independent conditions observed, and that each was a significant and substantial violation. Given the twin conditions, albeit expressed in a single citation, the Court imposes a civil penalty of $800.00 for this violation.

Docket No. KENT 2011 1162

Citation No. 8352932

On February 1, 2011 Inspector Sizemore cited the mine for another violation of 30 C.F.R. § 75.202(a).[13] It will be recalled that the cited provision entitled, "Protection from falls of roof, face and ribs," provides: "The roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts."

In this instance, the Inspector noted in the condition or practice section of his citation that "[n]ine (9) bearing plates provided for the roof bolts installed in the roof located in the 3rd cross cut inby the portal, in the belt side cross cut, in the track entry, were not touching the roof. The draw rock had fallen out around the bolts, leaving the bearing plates loose." Gov. Ex. 8. Citation No. 8352932.

The Inspector found the loose plates one crosscut, or "one break" inby the from the area where he had earlier cited the mine for the loose cribs, per Citation No. 8352931. There were two areas affected by the loose bearing plates, one 7 foot by 8 foot area and another area, measuring 8 feet by 20 feet. The Inspector stated that he observed draw rock on the mine floor. When draw rock has come out, the integrity of the "beam" provided by the roof bolt is

[13] In a continuation sheet to this citation, Citation 8352932-01, the section listed was changed to cite 30 C.F.R. § 75.204(c). That section speaks more directly to roof bolting with the particular section providing, in relevant part, "(c)(1) A bearing plate shall be firmly installed with each roof bolt. (2) Bearing plates used directly against the mine roof shall be at least 6 inches square or the equivalent, except that where the mine roof is firm and not susceptible to sloughing, bearing plates 5 inches square or the equivalent may be used." As the Citation was modified to cite § 75.204(c), the Court finds that standard was established as being violated. However, the Court also finds that the original section cited, § 75.202(a), was also demonstrated. In a given situation there can be instances where two standards can apply and therefore are not mutually exclusive. This is such an instance.

diminished. This is because the bearing plate and the roof bolt operate in tandem.[14] One cannot install a roof bolt without a bearing plate. Additional draw rock is more likely to fall out when the bearing plate is no longer flush and some draw rock has already fallen. The Inspector estimated that additional pieces which could fall would be in the range of some 7 to 9 inches in thickness, and therefore enough to hurt someone. Inspector Sizemore stated that all miners pass through this area and that he has observed miners in the area as well. Exposure would be both from those walking through the area and those riding the "rail runner" mine transport.

Respondent's Mr. Oliver did not see this condition until after cribs had been built in the area of the loose plates. Vol. 3 Tr. 45. He did not dispute that there were loose plates. However, he did not agree that this was an area where people travel. Tr. 45. Oliver stated that there was no reason to be over in that crosscut. Noting that cribs were at the mouth of this crosscut, Oliver believed that the loose bearing plates must have been some 5 or 10 feet in from there. Vol. 3, Tr. 47. If one had to fix a brattice there, Oliver stated it could be fixed from the belt line side. Vol. 3 Tr. 48. However he agreed that the pressure side of the brattice is on the track side and therefore that is the side that would need good plastering. Vol. 3 Tr. 50. He maintained that one would not need to go into that crosscut to rock dust, because it is sprayed into that area.

Oliver informed that this is an old mine which was rehabilitated. In that process they had cut height and rebolted the track entry. In doing that, Oliver stated, they removed the old bolts, cut new height and then rebolted. Yet he advised that the crosscuts had not been rebolted. Vol. 3. Tr. 53-54. They did not take those steps for the crosscuts adjacent to that track on the basis that the area "looked good" and the plates there were good at that time. Vol. 3 Tr. 55.

Implicitly, Oliver agreed, or at least he did not challenge that there were loose bearing plates, as cited by the Inspector. Instead, the focus of his testimony was that there was no exposure to the hazard. However, he conceded that one *could* go into the cited area to perform rock dusting or to work on a brattice. The Court, upon consideration of the conflicting testimony as to exposure, credits the testimony of the Inspector on the issue of exposure.

As with the other matters in this proceeding, there is no real challenge to the first two elements of the S&S *Mathies* analysis. The violation was present and the discrete safety hazard is the risk of a roof fall. Here, at some point, draw rock had fallen from the area around the loose bearing plates, so a roof fall of some degree had occurred. The situation had become worse once the draw rock had fallen from around the nine plates because the design of the support was no longer performing, as intended, with the plates and bolts working in concert. The unsecure plates therefore contributed to the cause and effect of the mine hazard of a further roof fall. Given the exposure, it was reasonably likely that an injury would result. Considering the nature

[14] Accordingly, upon consideration of the contention that it's really just the roof bolt that provides support, the Court rejects that claim. Mines do not install bearing plates for decorative reasons; they are part and parcel of the mine support roof bolting system.

of the hazard, roof falls, a reasonably serious injury would be the likely result if a miner were struck by draw rock. Such an injury would be likely to cause lost work days or restricted duty, and with the inherent unpredictability of the occurrence of a roof fall, a more serious injury could also occur. The size of the two areas affected, which were relatively large in the Court's view, also plays a part in the analysis that an injury would be reasonably likely and that, should one occur, it would be reasonably serious.

Accordingly, upon consideration of the testimony, the Court affirms the violation and the S&S finding and imposes a civil penalty of $499.00.

Docket No. KENT 2011 1162

Citation No. 8352943

In this instance Inspector Sizemore cited Bledsoe for another violation of 30 C.F.R. § 75.202(a). It will be recalled that this provision titled "Protection from falls of roof, face and ribs," provides that: "The roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts."

The Inspector's citation provided that "[a] section of roof between the 32nd and 33rd cross cut on the return side of the #8 belt conveyor measured from 53 inches to 6 ft from the edge of the pillar to the last row of permanent supports for a distance of 23 ft."

Just as he did with Citation Number 8352926 Inspector Sizemore cited the Respondent for a wide area. The maximum allowable width was 48 inches and, as with the other excessive width citation, the 5 foot distance, allowing an exceedance of 12 inches over the 48 inches, is limited to five feet. Here, the wide area, running some 23 feet, far exceeded the five foot absolution from the 48 inch requirement. Gov. Ex. 10. Sizemore expressed that there would be exposure to the belt shovelers in this area and that they would need to shovel *both* sides of the belt.

Respondent's witness, Mr. Oliver, agreed that there were some wide bolts. However, it was his contention that the roof and ribs looked good. Still, he admitted there was some sloughing. Although he expressed that the condition was not plainly obvious, he conceded that it is the examiner's responsibility to look for such problems. He also agreed that the mine examiner is supposed to note things like this, such as rib sloughing and areas that are too wide. Vol. 3 Tr. 67.

Here, Oliver did see the condition cited and, as noted, he agreed that the rib had sloughed off and that there were also some wide bolts. Vol. 3 Tr. 63. He felt the top looked good but there was the issue with the rib sloughage. Vol. 3 Tr. 64. This condition, he advised, went for 23 feet, which is about 5 rows of bolts. Vol. 3 Tr. 64. To deal with the problem, they had to set

four timbers. Vol 3 Tr 65. He conceded that when there is rib sloughage, there will be coal on the floor from that and that the belt examiner will be there every working shift to see this. Vol. 3 Tr. 68.

The violation was established and the discrete safety hazard is the increased risk, that is, the measure of danger contributed to the risk of a roof fall, by the excessive widths. Here, far beyond the 5 foot allowance for a width to run beyond the 4 foot width called for in the plan, the excessive width continued for an additional 18 feet, with the result that the excessive width continued for 23 feet.

The Inspector's opinion that it was reasonably likely that an injury would result is supported by the fact that the failure to follow the plan was extensively exceeded. One must not lose sight of the fact that the plan's requirement provides for a *maximum* width of 4 feet from the edge of the pillar to the last row of permanent supports. Those requirements are not arbitrary; they are mandated to provide sufficient roof support for the conditions at a given mine. It is axiomatic that the mine's roof support was diminished by the excessive width.

That a reasonably serious injury would result was established by the Inspector's testimony that examiners and those required to work on the belt would be exposed to the insufficient support in that area. Further, as Inspector Sizemore noted, miners have to be able to travel on *both* sides of the belt and the belt lines are to be on-shifted.

Accordingly, based on the foregoing remarks about the evidence, the Court upholds the citation, finds that the violation was S&S and imposes a civil penalty of $499.00.

Docket No. KENT 2011 1162

Citation No. 8352920 [15]

On January 13, 2011, Inspector Sizemore cited Bledsoe for a violation of 30 C.F.R. § 75.400. That standard entitled, "Accumulation of combustible materials," provides: "Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible

[15] Although each citation is separately discussed, Exhibit 11 and Citation Numbers 8352921 (Gov. Ex. 13) and 8352922 (Government Exhibit 14) are all related to one another in important regards. All were issued on the same day and at approximately the same time and all relate to hazards identified along the # 1 belt conveyor. While each violation is found herein to stand on its own and each is found, again on its own terms, to be S&S, one cannot ignore, in any honest assessment of the problems, the relationship between the three violations. Therefore, the S&S analysis for each must consider the other two citations, as the presence of each condition made the others, in context, worse.

materials, shall be cleaned up and not be permitted to accumulate in active workings, or on diesel-powered and electric equipment therein."

The Citation was detailed, with the Inspector noting four separate accumulations of combustible materials. It recorded the following accumulations: "1. Float coal dust, black in color was observed deposited on the roof, ribs, and floor along the entire length of the # 1 belt conveyor, including back into the cross cuts to the stopping lines. 2. Plastic bottles, water jugs, food wrappers, pieces of conveyor trimmings, paper boxes and other combustible garbage was observed strewn under and along the mine floor along the # 1 conveyor. 3. Loose coal measuring from 1 inch to 14 inches in thickness was observed at different locations along the #1 belt, including around and under the # 1 belt tail piece, requiring the belt to run in a compaction of loose coal and float coal dust. 4. Dried strings of 'cloth like material' torn from the edges of the conveyor belt were twisted in 'fist full' amounts around the bearing location of the rollers (top and bottom). Note: The operator took the belt out of service until all conditions could be corrected. Note: The operator is 'Put on Notice' if this hazard continues to be allowed to exist, this type of citation will be considered for 'High Negligence; and Knowing and Willful assessment." Gov. Ex 11.[16]

Inspector Sizemore felt that the float coal dust had been present for "quite a while."[17] While there was testimony from the Respondent that rock dusting was present and that shovelers were working on the items listed in the Citation, the Inspector stated that he did not observe either. Accepting that, as the Inspector stated, the float coal had been present for some time, and considering the multiple categories of combustible materials and further considering that the problems were extensive and not limited to a small area, whether some work was in progress at the time the citation was issued is not relevant to either the fact of violation, nor to the significant and substantial designation. In fact, given the Inspector's comment in his Citation that the situation was sufficiently flagrant so as to warrant a warning that the next time he would mark such a violation as "high negligence," it is fair to state that he was lenient in his assessment of the negligence involved here.

Regarding the coal dust accumulations and whether there was any risk of the roller igniting those, the Inspector believed there was such a potential. He also factored the "bird's nest" effect he observed. Tr. 288. The "bird's nest" referred to the fraying on the edge of the

[16] Gov. Ex 12 reflects the Inspector's notes related to this citation and those notes also pertain to the citations relating to Government Exhibits 13 and 14, which are discussed herein.

[17] Much was attempted to be made about the fact that the Inspector took a sample of the coal dust but that, because the sample protocol was not followed, it could not be used. While that is true, that is, that the sample was invalid, that shortcoming does not undercut any of the four categories of combustible material, as enumerated in the Inspector's Citation.

belt around some of the rollers. Tr. 290-291. This fraying was present around all three rollers. [18] The belt was running. Tr. 294.

The Inspector stated that the float coal dust had been there "quite a while." The extent that he observed plus his experience informed him in reaching that conclusion. Tr. 314. It would have taken more than several shifts for these problems to develop.[19] Tr. 314.

It is noted that the float coal dust problem was along the entire belt. Tr. 303. In contrast, the trash he found was more towards the surface. Tr. 303. The loose coal was along the entire belt. Tr. 304. So too, the "birds nest" issue was present along the entire belt. Tr. 303.

The Court takes notice that Mr. Osborne testified about this Citation, per Gov. Ex. 11, and the two related violations, per Government Exhibits 13 and 14. Mr. Osborne is presently the mine's general manager and he has held a number of other important positions at Bledsoe over the years. There was a conflict in the testimony concerning the amount of trash, with Mr. Osborne describing it as only enough to fill a small store plastic bag and Inspector Sizemore describing it as much more than that. The Court credits the Inspector on this conflict.[20]

While Mr. Osborne did see some accumulations, he contended that people were shoveling in the cited area at the "V plow" but when questioned about the presence of accumulations along *the entire belt*, as noted by the Inspector, Mr. Osborne could only say that he didn't see that. Tr. 333. Thus, there was no complete denial of the full extent of the problem. Mr. Osborne also agreed that there was some "bird's nest" present around rollers and thereby confirmed item number 4 in the Citation. Tr. 334.

Upon consideration of the record evidence, the Court concludes that all four bases listed in the Citation for combustible material were established and that each, independently, constituted a violation of the cited provision. Thus, in truth, there were four violations of the combustible material prohibition along the # 1 belt. That there was a measure of danger contributed to by the violations is obvious; combustible material of the types noted in the citation in a coal mine is anathema to safe operation. All that is needed is an ignition source for the

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[18] Although the Inspector did not find that things had gotten hot when he observed the problem, in the Court's view, had that been the case, the issue then would have elevated to whether an imminent danger was present.

[19] The Inspector did observe that his notes listed it as having existed for two shifts. As mentioned, the Inspector pointed out that in his citation he warned the mine that if this hazard continued to exist he would consider any future violations as "high negligence" and as a willful violation. Tr. 318.

[20] Accordingly, the Court does not adopt Mr. Osborne's recollection as the more accurate recounting in which he only saw accumulations at the drift mouth, the V plow, and the tailpiece, and that miners were working on cleaning those areas. Tr. 333.

problem to come to fruition. For the float coal dust problem, only an ignition would be needed to create a present hazard. Tr. 307. The same is true for the other associated problems found along this belt line; only an ignition would be needed. Tr. 307. i.e. to ripen into a present problem, only an ignition would be needed to occur. Tr. 309. Certainly it cannot be disputed that there is a reasonable likelihood that the hazard to which the violations contributed would cause an injury. Any time there is a fire in a coal mine, there is a reasonable likelihood that a reasonably serious injury will result. This may be as a result of smoke inhalation, CO exposure, or worse, to those working in the mine as well as to those who would be called to deal with a fire.

With all four elements present, the violation is S&S. The Court imposes a civil penalty of $1,203.00 for this.

Docket No. KENT 2011 1162

Citation No. 8352921

Inspector Sizemore issued Citation No. 8352921 on January 13, 2011. In doing so, he invoked 30 C.F.R. § 75.1731(a) as being violated. That standard, entitled "Maintenance of belt conveyors and belt conveyor entries," provides "Damaged rollers, or other damaged belt conveyor components, which pose a fire hazard must be immediately repaired or replaced. All other damaged rollers, or other damaged belt conveyor components, must be repaired or replaced."

The condition or Practice section of the Citation stated: "[t]hree top belt rollers, with the bearings wallowed out (resulting in the rollers turning metal to metal), were observed along the #1 belt conveyor. Note; A separate citation # 835292[0] [21] was issued for the accumulations of combustible material along the # 1 belt conveyor providing a fuel source for this evident ignition source, and was a factor in the S&S classification of this citation.[22] Note: The operator took the belt out of service until all conditions could be corrected." Gov. Ex. 13.

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[21] Inspector Sizemore's original Citation for 8352921 incorrectly listed the citation which he believed was related to it. Therefore, he issued a modification to correctly note the other citation he was referencing, Citation No. 8352920.

[22] The legislative history of the Act points to Congress' concern with hazards associated with belt lines, noting that "[m]any fires occur along belt conveyors as a result of defective electric wiring, overheated bearings, and friction; and therefore, an examination of belt conveyors is necessary." S. Rep. No. 91-411, at 57 (1969), reprinted in Senate Subcomm. on Labor, Comm. on Labor and Public Welfare, Part I Legislative History of the Federal Coal Mine Health and Safety Act of 1969, at 183 (1975) (emphasis added).

The Inspector did not know how long it would take for the wallowed[23] rollers to create sufficient heat to cause an ignition. Tr. 289.

As to this Citation, Mr. Osborne did confirm that he also heard the screeching noise of the defective rollers. Although he testified that he accompanied the Inspector on that day, upon finding the first roller problem, he thereafter scooted ahead of the Inspector, finding the other roller problems. It was Mr. Osborne's position that the screeching rollers, with their bad bearings, were failing, but had not yet failed. Upon finding the two additional problematic rollers, Mr. Osborne decided to shut down the belt. Thus, he conceded that the problems he found were serious enough that he decided to shut down the belt. Tr. 356.

The violation was established and was properly designated as S&S. In making this determination the Court took into account the testimony of Mr. Osborne but arrived at conclusions contrary to his view of the matter. The discrete safety hazard was a mine fire. The damaged rollers, with their defective bearings, could become hot. When coupled with the related problems identified by Inspector Sizemore in Exhibit 11 (*supra*) and Exhibit 14 (*infra*), the third element of *Mathies* was established. Should a mine fire develop in these circumstances a reasonably serious injury would be expected.

A civil penalty of $634.00 is imposed for this S&S violation.

Docket No. KENT 2011 1162

Citation No. 8352922

In this, the last of the three citations that Inspector Sizemore viewed as appropriate to be considered together,[24] he issued Citation No. 8352922 on January 13, 2011, citing 30 C.F.R. § 75.1731(b) this time. That standard, again entitled, "Maintenance of belt conveyors and belt conveyor entries," provides at subsection (b) that "Conveyor belts must be properly aligned to prevent the moving belt from rubbing against the structure or components."

In the Condition or Practice section for this citation, the Inspector stated that "[t]he # 1 belt conveyor is not being maintained in proper alignment. The bottom belt was observed in three locations cutting[25] into the metal structure of the belt conveyor. Note; A separate citation #

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[23] In using the term "wallowed out" to describe the defective roller bearings, the Inspector meant that the bearings stopped functioning. Tr. 300.

[24] The Court too views it appropriate and necessary to consider these violations together in evaluating the S&S issue.

[25] In using the word "cutting" the Inspector explained that he was really conveying "rubbing" of the belt against the metal structure. Tr. 308-309. Regardless, the key point is that

(continued...)

835292[0][26] was issued for the accumulations of combustible material along the # 1 belt conveyor providing a fuel source, for this evident, friction type ignition source, and was a factor in the S&S classification of this citation. Note: The operator took the belt out of service until all conditions could be corrected." Gov. Ex. 14.

In this belt misalignment issue, which the Inspector described as "cutting" into the frame, it would be more accurate to state that the Inspector actually meant "rubbing" of the belt structure. Tr. 296. It is worth noting that Mr. Osborne admitted that he "know[s] what it takes to make a belt fire. If you don't take care of your belts, keep them in maintaining condition, they will." Tr. 369. He added that he had no idea how long a roller would have to run without having bearings in it to start an ignition or get hot enough to start a belt fire. Tr. 369.

Respondent used Exhibit R 5 to illustrate how the rubbing belt appeared at the time of the citation's issuance. However, after some hesitation, Mr. Osborne admitted that the belt, as pictured in R 5, was *not* aligned. Tr. 351. In making this determination the Court also took into account the testimony of Mr. Osborne but arrived at conclusions contrary to his view of the matter.

The violation was established and was properly designated as S&S. The earlier S&S analyses for the other two related violations for the # 1 belt conveyor are incorporated here. **A civil penalty of $634.00 is imposed.**

Docket No. KENT 2011 1162

Citation No. 8352917

For this citation, Inspector Sizemore cited 30 C.F.R. § 75.809,[27] which is entitled, "Identification of circuit breakers and disconnecting switches." It concisely provides: "Circuit

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[25](...continued)
the Respondent conceded, through its witness, that the roller was rubbing and out of alignment.

[26] As with Citation No. 8352921 (Gov. Ex. 13) (see footnote 10, above), Inspector Sizemore's original Citation for 8352922 incorrectly listed the citation which he believed was related to it. Therefore, he issued a modification to correctly note the other citation he was referencing, Citation No. 8352920.

[27] It is noted that the Secretary filed a motion to amend the standard cited for this violation to 30 C.F.R. § 75.904. The apparent distinction, based upon their respective statutory references to the same issue, is that § 75.809 applies to high voltage cables but that the cable and breaker involved here was a low to medium voltage cable. The motion was unopposed and it is granted. However, whether one is concerned about high voltage or with medium to low voltage circumstances, both Congress and the standards speak with a single theme, circuit breakers must be identified and the cited breaker here was not so identified.

breakers and disconnecting switches underground shall be marked for identification." It is important to note that this standard also appears as a statutory provision in the Mine Act itself at 30 U.S.C. 868(j), Section 308 (j), where it provides *the identical language* contained in the safety standard. To state the obvious, Congress, considered this provision to be serious and grave enough to express the safety provision in the Mine Act, even though, by design of the statute, it knew that the Secretary could, and did, also express it as safety standard.

Here, on January 11, 2011, Inspector Sizemore noted in the Condition or Practice section of his Citation that: "[n]either the receptacle or the breaker (observed on the 001 section power center) providing power to the (energized) # 9 belt drive was marked to show which equipment the receptacle or breaker controlled." Gov. Ex. 20. The Respondent does not contend that the standard was not violated, but does challenge the S&S designation. To abate the violation, the receptacle and breaker were marked. The hazard the standard is directed at is the risk of electrocution or electrical burns. Tr. 29 Vol 2.

Inspector Sizemore, who is a "certified electrician," but not an electrical inspector, stated in his testimony that the # 9 belt was plugged into the receptacle and that the belt was energized at the time he examined the power center. He did not know whether the belt was actually running at that moment. Being under "load" it was drawing power.[28] While the "cat head," (technically identified as a "cable coupler" Vol 2. Tr. 103) which is essentially a very large plug, was labeled, neither the receptacle nor the breaker were labeled to show the equipment it

[28] Though being under "load" may be generally understood, Inspector Lewis informed that it refers to a piece of equipment that is running. As a down-to-earth example of the hazard, if one had an electric fan in a house and the fan was running, that is, the fan's blades were moving, if one were to simply yank the plug out of the socket, without shutting the fan off first, an arc will result. Accordingly, pulling out a cat head, which connects via a cable, to a running piece of equipment could have the same effect. The Court acknowledges that testimony was presented explaining differences between a fan plug and a cat head's removal. That said, one should not forget that a piece of mining equipment, such as involved here, runs on much higher voltage. Whereas a home uses 110 volts, such mine equipment typically will be using 480 or 995 volts. Vol. 2 Tr. 68-69. Inspector Lewis knew of an instance from his personal experience where, having pulled a cat head out while it was under load, that act caused the contact tips to become "fried" together. He thought he had knocked the breaker but when he pulled the cat head an arc occurred and he was thrown several feet. Inspector Lewis concurred with Inspector Sizemore's view that such an accident would be likely to occur. Vol. 2, Tr. 69. He also agreed with Sizemore's statement that the emergency stop or "E stop" is no panacea. When one pulls the E stop, thereby shutting down all the equipment in a section, such a sudden stoppage may expose the various operators of such equipment to hazards as well.

controlled.[29] Absent such labeling, in the event of an emergency, which by definition is a time when action must be taken swiftly, a miner would not be able to identify how to deenergize the # 9 belt.[30] Even in a non-emergency, knowing which device is being unplugged would seem to be a fundamental practice. Congress thought so too. Many pieces of equipment are typically plugged into the 001 Section power center: the joy miner, front bridge, middle bridge, back carrier, and two bolter machines. Sizemore anticipated that electrocution or burns could result from the items not being marked. Succinctly, the Inspector stated the hazard was that "in the event of an emergency [ ] a miner wouldn't be able to readily identify how to de-energize the No. 9 belt." Tr. 17, Vol. 2.

The Respondent's defenses involved two aspects.[31] One was that the Cat Head itself was marked. The other was that one can hit the red button and shut down all the power at the power center. Tr. 36-38. Vol 2. Neither of these, in the Court's view, affect the S&S designation. Respondent asserted that, in pulling out a Cat Head, by its design, when one pulls it out from the receptacle, even if one has flipped the wrong breaker switch, the ground wire monitor becomes disengaged first and therefore no danger can occur. This hypothetical assumed that the belt drive has first been shut off and would not have a load on it.

The Inspector did not agree with the hypothetical's assumption because one must always knock the breaker first. Tr.41 Vol. 2. Counsel and Inspector Sizemore parried over when there is a load present. All agreed that if the equipment is operating, then it is under load. If the breaker has been "knocked," that is, switched off, it was the Inspector's view that there is still power on the cable. He believed that if one knocks the breaker where the power connects to the equipment, there is still power going to that breaker. Tr. 43. Vol 2. The Respondent's

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[29]According to the Respondent's witness, Mr. Lawson, only the word "spare" appeared next to the subject receptacle and breaker, and there was no contention that this amounted to marking them for identification.

[30] While the Respondent tried to present a picture that the matter was not as serious as the government contended because one could always shut down the entire power station via the emergency switch, that approach runs counter to both the intent of the standard and Congress' provision in the Mine Act specifically requiring that such breakers and switches be marked for identification.

[31] A lesser contention raised by the Respondent was whether Inspector Sizemore always denotes a violation of this standard as S&S. While there was some attempt to paint Inspector Sizemore as unreasonable by virtue of his response that he has written all or nearly all such violations as S&S, that is not something that is relevant here. All the Court has to decide is whether, under the facts present on this record, the violation was properly designated as S&S. Accordingly the Court need not and does not make a grand statement about the S&S nature of all section 75.809 violations. Sizemore's proclivity in this regard is interesting but ultimately irrelevant, as the Court must determine if a given violation, based on the facts in the record, was or was not S&S.

contention was that when one pulls out a cable it has to unlatch first and that action breaks the ground monitor. The Inspector agreed that the power is then off at the cable but that power remains on the power center. However, the Inspector added that if he saw someone do that, he would cite them for improperly de-energizing equipment. Tr. 44 Vol. 2.

The Court then inquired why, assuming one followed the steps outlined by the Respondent's Counsel, the matter would still be S&S. The Inspector responded that one is to knock the breaker *before* doing anything with the cat head. He added that anyone is allowed to knock a breaker in an emergency; it is not limited to electricians. Tr. 47. Vol 2. Thus, in an emergency, one is running up and trying to de-energize a piece of equipment and take the power off it. In that situation it is critical to be able to recognize the breaker that controls the cat head for the particular piece of equipment. Tr. 48. Vol. 2. One needs to be able to find the correct breaker immediately and knock the power for the piece of equipment. Hitting the "E Stop" as Respondents suggested is problematic too because other equipment may be under load, or operating or energized; in such circumstances, knocking the power runs the risk of an arc or fire because the equipment is running. Tr. 50 Vol 2. MSHA electrical Inspector Lewis (see *infra*) agreed with this view that the E stop is not without risk. Vol. 2, Tr. 72. He explained that it is similar to pulling a plug out from an operating home appliance. Tr. 51. Vol. 2. While that arc or spark would occur inside the box, the Inspector's point was that one should not be hitting the E Stop if anything is under load. Tr. 54. Vol. 2. As Inspector Sizemore clarified, "the law intends for the person to be able to look at that breaker and know exactly which one to knock and also to look at the receptacle and make sure that its plugged into the right one, and for the cat head to be marked to make sure that it's plugged into the right one." Tr. 53. Vol 2.

As just alluded to, MSHA Inspector Randall Lewis also testified about this citation. Inspector Lewis is an electrical supervisor and well-qualified by virtue of education and experience to testify about such matters. He has been a certified electrician since 1980. Gov. Ex. 26, Inspector Lewis' resume. Inspector Lewis made it clear that he would have a concern where a power center did not have the receptacle and breaker marked, even if the cat head was marked. Tr. 63. Vol. 2. He echoed the concern expressed by Inspector Sizemore that a person that wanted to knock the power to the belt drive would not necessarily know what was the proper breaker to knock to remove the power to that system. Tr. 63 Vol 2. It is not simply about emergencies that this concern arises. Any time one wants to do electrical work, such as work on the belt drive, one needs to remove the power before starting such work. Tr. 63 Vol 2. Without labeling, one will not be sure which breaker to pull. If one guesses incorrectly, there is the risk of an electrical arc occurring upon pulling a cat head out, if the receptacle is still energized. Tr. 64. Vol 2. Inspector Lewis noted that there have been instances when an individual has done just that, pulled out a cat head under load and receiving burns. Tr. 64. Vol 2.

Pulling a cat head out when it is under load is a very hazardous thing because the arc can be injurious putting one at risk for second to third degree burns. Tr. 68-69. Vol. 2. Inspector Lewis knows of such instances when miners have received burns from such an event. Vol. 2 Tr. 69. He agreed with the Inspector's view that it was "reasonably likely" that an accident could occur. Vol 2, Tr. 69. Though challenged that he did not say it was likely to get an arc when

pulling out a Cat head, Lewis clarified that he meant it was only unlikely if it was not under a load. Vol. 2 Tr. 74.

As noted, the Respondent contended that the locking feature of the Cat head makes it unlikely that an arc would occur because, in unlocking it, that breaks the monitor circuit. Inspector Lewis agreed with that only if it is *not* under load. Vol 2. Tr. 76-77.

The Respondent called Lawrence Lawson on this matter. Lawson is the mine's chief electrician. He testified that if one unplugs the Cat Head when it is under load, the pilot ground check will be the first part of that plug to disconnect. Thus, he contended that, because of this way that a Cat Head disconnects, there will be no arc. Vol. 2 Tr. 98-99.

Lawson admitted that the power box for the receptacle was only labeled "spare." Tr. 102. Further, he stated that if one were to shut off the wrong breaker, and then went to unplug the Cat Head, the ground check would break and cause the breaker to knock. However, in doing that, there would be an arc inside of that breaker. Tr. 111. He maintained this is designed for such an arc and that particular arc is much less powerful than an arc occurring in the power center.

To abate the Citation, Lawson advised, a label was placed on the receptacle, stating "number 9 drive." Tr. 117. He also stated that this power center had seven to eight similar receptacles on it, so one would see that number of similar items along with the receptacle that was not labeled. Tr. 118.

Lawson also advised that breakers will trip in the mine on a daily basis. When that happens, no one records that a breaker has tripped. He added that whenever a breaker trips, there will be an arc, though contained, within such breaker. Tr. 119. This arcing is not without consequence however, as such arcing affects the life of that breaker. Manufacturers of such breakers guarantee them for only one break. Tr. 120. He also agreed that there are lots of things that can wrong with breakers. Tr. 123. Though he felt it was unlikely to happen, he did agree that if one pulled out a plug and the breaker was faulty, there would be an arc. Tr. 123. Accordingly, while there was a conflict between Inspector Lewis and Mr. Lawson, with the latter asserting that there would only be arcing if one had a defective breaker, it developed that Inspector Lewis did agree that one would need a defective breaker for this to occur. Still, it is sobering to realize that a breaker is only guaranteed for one trip. Tr. 129.

As mentioned, Lawson believed there was no danger because in disconnecting a cat head the last prong to disengage from it is the ground load, that is, the ground pin. Therefore one is protected by a ground. He maintained that with a ground check system it is impossible to have arcing. Vol. 2. Tr. 110.

However, Lawson stated that if he wanted to disengage the power from the cat head, he would first knock the breaker right above it. Vol 2 Tr. 116-117. But that is exactly the problem, as neither was labeled. In fact, Mr. Lawson's own testimony demonstrates the problem. In

describing the receptacles and breakers on the power box, he first identified where the receptacle for the continuous miner would be located. Then, he stopped, stating "Let me back up. *I told you wrong.* Directly to the right of this was the carrier circuit, which is another receptacle *identical* to this one." Vol. 2. Tr. 116-117 (emphasis added). Thus, even as Mr. Lawson tried to describe the various hookups on the power box at the hearing, *he* got mixed up about identifying the correct receptacle. Typically, Lawson informed, there will be "seven to eight" such receptacles on the power center. Vol 2. Tr. 128.

Further underscoring the obvious importance of labeling circuits, Mr. Lawson noted next that the adjacent receptacle was for the carrier and, in his words, "it was *correctly* labeled." Vol. 2 Tr. 118 (emphasis added). Another problem for the Respondent is that it admitted if one wanted, for example, to cut off the cat head in issue here, one would first "knock the breaker." Vol. 2. Tr. 121. However, that would be the breaker that was not labeled. If one knocked the wrong breaker, as stated before, it was Bledsoe's fall back position that the ground check lug would break first as one pulled out the cat head and that would cause the breaker to knock. Vol. 2, Tr. 122. He admitted that there will be arcing in such a circumstance but that it will be contained inside of the breaker which is inside the power center. Vol. 2. Tr. 123-124, 129-130.

Lawson admitted that a breaker is guaranteed to work properly by the manufacturer for only *one* break. Vol. 2, Tr. 132. Nowadays, he advised, breakers simply "will not stand up to the industry. They just go bad . . ." Vol. 2, Tr. 133. Accordingly, the mine ends up changing out breakers on a weekly, if not daily, basis. Vol. 2, Tr. 131. He then conceded that if one had such a faulty breaker and one then pulled out a cat head under load, one "could possibly have an arc if you pulled one out of a faulty breaker under load." Vol. 2. Tr. 135.

While there was some conflict initially about the risk of arcing occurring, ultimately it became clear to the Court that arcing could in fact occur if the breaker was defective. Breakers, it turns out, are guaranteed to work once. The mine conceded that it's practice is to replace its breakers after one such use because of their lack of repetitive reliability. That is, the mine conceded they can depend on them only once and then must be replaced. Although there was much stated about the presence of the "E stop" button, that is not the subject of the standard. While one of the Respondent's questions assumed that the belt drive would first have been shut down, the standard does not limit itself to such situations and the concern expressed by MSHA at the hearing was over what could occur in the context of an emergency. Even then, Inspector Sizemore stated, one would still need to pull (i.e. disconnect) the breaker first and that it is a rule to disconnect the breaker before pulling a cat head. Tr. 33. The essential problem, Inspector Sizemore related, in terms of his S&S marking, was that one has to knock, that is disconnect the breaker, before one does anything like removing a cat head. As it may be anyone who arrives at the power center in the event of an emergency to knock the breaker, that is, there is no requirement that one must be an electrician to knock the breaker, a miner may not know which breaker to knock. Tr. 39. Thus, one will not be able to know which breaker controls the cat

head for a particular piece of equipment.[32] Sizemore stated that this provision was written in blood, and that because of a history of injuries related to the lack of being able to identify the correct piece of equipment, the law requires that one arriving at the power center needs to be able to look at the breaker and *know exactly* which one to knock and also to be able to look at the receptacle and know that it is the correct one for the cat head. Tr. 44.

A fundamental problem with the Respondent's argument that the violation is not S&S is that it relies upon other problems not arising. For example, the Respondent has argued that the way the Cat Head is connected to the receptacle makes it unlikely, as one removes it, that an arc would occur. This ignores the lack of identification that is critical and basic; as Congress and MSHA have stated in the Act and the safety standards, one has to know what one is disconnecting from the power center.

Another critical aspect is that the breaker has to be effectively knocked. Identification of correct breaker would seem to be essential to that. While there was another suggestion that if one is wearing electrical gloves, something that could certainly not be assured each time a Cat Head were to be removed, such gloves would offer absolute protection from shock. Inspector Lewis informed otherwise, advising that when an arc occurs, one is putting molten metal in the air. Molten metal is about 20 times the temperature it takes to melt steel. One near such an arc can inhale this. One can also get flash burns from the arc on the face and areas of arms not covered by gloves. Vol. 2 Tr. 81-82. As to the E Stop, an arc will occur if that is hit and it is under load. Although it is not likely that the arc will go outside of the power box, it can occur. Vol. 2 Tr. 49-50.

The Court concludes that the violation, which was virtually conceded, was S&S. The discrete safety hazard, effectively identified by Congress through its inclusion of the provision, is an electrical injury. In answering the critical question of whether the lack of identification on underground circuit breakers or disconnecting switches contributes to the cause and effect of a mine hazard, there is no doubt that it does and the testimony of Inspector Lewis supports that conclusion. There was also a reasonable likelihood that any such injury would be a reasonably serious one, a conclusion also supported by the testimony from Inspector Lewis informing about such injuries.

Based on the foregoing, the Court finds that the violation was S&S and imposes a civil penalty in the sum of $499.00.

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[32] Simply going to the back of the power center and hitting the E stop button can create its own set of problems because all equipment would then lose power and some of those pieces of equipment may be under load. The E stop, as the Inspector understood it, is to be used only when one is sure no equipment remains under load. Absent that, in such a case there is risk of an arc and a fire. Tr. 42,45. Such a spark, if things are still under load, would occur inside the power center box. Tr. 45.

Docket No. KENT 2011 1162

Citation No. 8352918.

In this instance, Inspector Sizemore cited 30 C.F.R. § 75.514, which is entitled "Electrical connections or splices; suitability," and provides: "All electrical connections or splices in conductors shall be mechanically and electrically efficient, and suitable connectors shall be used. All electrical connections or splices in insulated wire shall be reinsulated at least to the same degree of protection as the remainder of the wire."[33]

The Inspector's statement in the Condition or Practice section of the Citation related that "[t]he outer jacket of a splice observed in the 480 volt cable, providing power to the Co # 2 Fletcher [roof] bolter, observed in service on the 001 section,[34] was torn into exposing the insulated leads that had only black electrical tape providing insulation." Gov. Ex. 22. To abate the condition, the splice was reinsulated. This correction was accomplished in 11 minutes.

The "gap," that is to say, the area where the insulated leads were only covered by electrical tape, was found by the Inspector found to be only 1/8th of an inch. It was found near the take-up reel end of the cable, about 25 feet from that terminus and the testimony revealed that it was likely that the splice was intentionally created with the intention that it would give way there, if the cable were pulled beyond its length. The area where the gap was located on the cable was such that it would be off the reel nearly every time the bolter is in use.[35] The testimony informed that if a cable breaks at the reel itself, such a repair is time consuming. On the other hand if the cable were to break at the point of the temporary splice, it could be quickly fixed. However, the fact that this was apparently intentional does not mean that it was an appropriate or safe thing to do. It was not, as such a connection is not "suitable." Clearly the cable was not reinsulated to at least the same degree of protection as the remainder of the wire.

Sizemore, elaborating upon his observations, recalled that the splice was torn loose and that there was coal dust in the area where it had torn loose and the insulated leads were present. Tr. 132. In concluding that it was S&S, he expressed that, once the outer insulation is gone, a miner is then exposed to the insulated leads, but those insulated leads are not intended to be

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[33] The Court realizes that this is also a statutory provision. However, while by that fact it is noted to be of particular concern to Congress, that doesn't mean that each violation is automatically S&S. The particular circumstances, as the Commission has noted, must be evaluated in making that special finding.

[34] The bolter was in a position such that it was ready to be used.

[35] This is not hard to understand. It is desirable to have the bolter continue its work as far as the power cable will permit. Once that length has reached its maximum, the power center needs to be moved up as mining progresses.

exposed, nor are they to be handled. Tr. 134. The problem is that such insulated leads provide insufficient protection as they are not designed to withstand the rigors of mining. Tr. 133. Cables are not treated gently in the mining process; they are pulled around ribs, strewn down entries and reeled back up quickly. In short, mining is rough on cables. Tr. 135. Though not exposed to as much stress where a tear is close to the reel end, the cable would still be exposed to some of the rigors of mining. Tr. 136. If a miner were to come into contact with a *bare* lead, and remembering that only insulation remained on the leads, the 480 volt cable would cause burns or even electrocution. Tr. 136. However, here, while not compliant with the cited standard, the gap did have insulated leads intact and there was electrical tape also wrapped around those insulated leads. Tr. 136.

Although there is no question that the standard was violated, the Court does not believe that the circumstances warranted the S&S designation. Inspector Sizemore advised that he may have had to bend the cable to find the break in the splice. There was testimony that, in the normal course of events, the cable would not be bent in the fashion such as the Inspector did here. While the discrete hazard is the risk of a shock or electrocution and clearly and if one were to contact the bare wire, a reasonably serious injury would result, the evidence did not establish a reasonable likelihood that an injury would result under continued normal mining operations. Given the small gap, and that, while insufficient, the leads were covered by electrical tape and further that the leads themselves still had insulation around them, the third element was not established.

Accordingly, the Court finds that, the third *Mathies* element not having been established on this record, the violation was not S&S.

Upon consideration of all the penalty factors, although the government sought a penalty of $450.00, the Court imposes a penalty of $250.00.

Docket No. KENT 2011 1162

Citation No. 8352919.

In this instance Inspector Sizemore cited 30 C.F.R. § 75.517. That provision, which is also a statutory provision, is entitled "Power wires and cables; insulation and protection," and it provides that: "Power wires and cables, except trolley wires, trolley feeder wires, and bare signal wires, shall be insulated adequately and fully protected."

The Inspector stated in the Condition or Practice section of the Citation that: "[t]wo areas in the 480 volt cable providing power to the co # 1 Fletcher Roof Bolter observed in use on the 001 section were not reinsulated adequately or fully protected. One area of the cable [on] the outer jacket had been torn away leaving an approx. 6 inch area of exposed insulated leads with only [a] thin layer of electrical tape used to reinsulate. Another area of the cable had been cut

exposing [ ] an insulated lead."[36] Gov. Ex. 23. The areas were not close to the reel end, nor were they right up to the bolter, but rather between those two extremes. Tr. 25. Vol. 2. (See also, Gov. Ex. 21, Inspector Sizemore's notes, at page 10.) Thirteen minutes after the condition was cited, it had been abated. It appeared to the Inspector as if one had cut a gap out of the cable. While electrical tape had been wound around it, that too had been torn away. The second cut was about 50 feet away from the other cut. In that situation, there was a nick in the cable about ½ of an inch and one could see the insulated inner leads there.

MSHA's Inspector Lewis and Bledsoe's Mr. Lawson also testified about this citation. Mr. Lawson agreed that there were two areas that were cut, although he maintained that one couldn't see the leads. For one he agreed there was a "flap" that was some 6 inches long. If one pulled back the flap, one could visualize the insulated leads, but Lawson did state that they were intact. Lawson also conceded that the repairs were not proper in that tape was only used, instead of the proper the correction through the use of a "cable wrap." A cable wrap, as demonstrated through demonstrative evidence at the hearing, is far more substantial than electric tape.

Because the Court finds that the third element of *Mathies* was not established by the Secretary, the S&S finding of the Inspector cannot be sustained. However, given the fact that there were two problematic areas along the same cable and that the mine operator was aware of this problem as evidenced by the temporary and inadequate repairs to the cable, the negligence of the operator must be deemed to be more than moderate. Mr. Lawson admitted that the repairs were not done correctly.

When considered with the other statutory factors, the Court imposes a civil penalty of $600.00 for this violation.[37]

Docket No. KENT 2011 835

Citation No. 8352934.

For this Citation, Inspector Sizemore again invoked 30 C.F.R. § 75.517, applying to power wires and cables and its requirement for insulation and protection. As just noted, it provides that: "Power wires and cables, except trolley wires, trolley feeder wires, and bare signal wires, shall be insulated adequately and fully protected." Here, the Inspector recorded in the Condition or Practice section of the Citation that: "[t]he insulation was torn loose exposing bare copper wires, on the cable providing power to the Twin Head Fletcher Roof Bolter observed bolting roof on the 001 section." Gov. Ex. 24. The roof bolter was in use at the time he observed the bare wire.

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[36] The other was much smaller, about a half an inch wide.

[37] This violation was assessed at a proposed penalty amount of $499.00.

Inspector Sizemore stated that the condition was reasonably likely to cause a fatality because of the exposed copper wires. Vol. 2. Tr. 269. He expressed that it would not matter if the bare wire was a ground or phase wire because the wire "will become energized in the event of a fault, or in the insulation of the inner leads, that's what it's for, is to pick up current." Vol. 2. Tr. 269-270. Thus, exposure of the bare copper wires inside of a cable is enough. As the cable is handled by miners on a daily basis, there would be exposure. Vol. 2. Tr. 270. The electric cable was easy to see; the Inspector saw the problem immediately. Vol. 2. Tr. 273. Sizemore did point out that his notes reflect that he saw bare copper wire***s*** and therefore more than one bare copper wire was visualized by him. Vol. 2. Tr. 275-276. Gov. Ex. 7 at page 10.

When compared with the other electrical wire related violations in this proceeding, this admitted violation is of a different order, because the wiring had deteriorated to the next, and final level, as bare wire was exposed. Thus, the last insulation barrier for the electric wires was gone.

This violation is clearly S&S. Obviously, the discrete safety hazard is the risk of shock, including electrocution. Either event would result in a serious injury, with death being one of the possible outcomes. With no barrier over the bare electric wire, the only other ingredient would be contact by a miner or some conduit of contact with the wire and then to a miner. The contribution of the absence of the insulation over the wire is plain.

The Court assesses a civil penalty of $1,657.00 for this serious violation.

Docket No. KENT 2011 1162

Citation No. 8352939.

Again, citing 30 C.F.R. § 75.517,[38]), Inspector Sizemore noted in the Condition or Practice section of this Citation that "[a] splice provided in the 995 volt cable providing power to the continuous miner on the 001 section was not fully protected or insulated. The splice had pulled apart exposing the insulated leads." Fifteen minutes after the citation was issued the cable was repaired. Gov. Ex. 25.

Some distinctions from the other like violations are noted. Here, the cut was on a section of the cable that was inby the last open crosscut, meaning that it was relatively close to the continuous miner. However, here a splice was present, not simply electrical tape, but it had pulled apart. There was testimony that this splice or "boot" had slipped off and therefore there was no intentional disregard of the standard's requirements. So too, while not a substitute for compliance, the leads were insulated. No bare wire was exposed.

Mr. Oliver testified about this matter. He was with Inspector Sizemore at the time that citation was issued. He stated that there was a splice on that cable but that the boot had slipped

[38] See citation, next above, for which the same section was cited.

off a little and one could see the shielded leads of the cable. Vol. 3 Tr. 97-103. He did agree that the matter needed to be attended to right away. Vol. 3. Tr. 105.

Upon consideration of all the evidence, the Secretary failed to establish the third *Mathies* element. Therefore, the violation was not S&S. **A civil penalty of $200.00 is imposed.**

Docket No. KENT 2011 835

Citation No. 8352924.

On January 20, 2011, Inspector Sizemore cited Bledsoe for a violation of 30 C.F.R. § 75.400. As noted *supra*, that section deals with the accumulation of combustible materials, and requires that coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on diesel-powered and electric equipment therein.

In this instance, the Citation, in the Condition or Practice section stated there were "[a]ccumulations of combustible material including; 1. Float coal dust, black in color was observed deposited on the roof, ribs, and floor, was observed in an area beginning at the end of the track and extending three cross cuts outby. 2. Empty paper boxes and rock dust bags, empty open ended oil cans, discarded wooden pallets, and other combustible garbage was observed deposited in an area beginning at the end of the track and extending two cross cuts up the primary escapeway toward 001 section and extending three cross cuts outby the end of the track." Gov. Ex. 15.

Inspector Sizemore stated that the area he cited was where the mine would load and unload supplies and that the entire section would travel through the area. Vol.2, Tr. 305-306. The affected area began at the end of the track and extended three crosscuts outby. Tr. 307. The amount of garbage he observed was estimated by him to be "knee high or better." Tr. 308. Thus, these were accumulations and they were of combustible material. This presented a danger of fire. Electrical cables, for example, are in that area. Tr. 308. Damage to those cables and a spark from that, would be enough to create the hazard. Tr. 309. Smoke inhalation or burns would be the expected result. Tr. 310. The materials were found at the end of the track to the 001 section. Tr. 311. The Inspector stated that he did not view all such accumulations as S&S.[39] Tr. 313. His notes related to this Citation are in Ex. 4 at page 5. There, he wrote: "[the area has] a diesel mantrip, rail runners and other equipment observed in use in the area, electric cables observed in area and the garbage and float coal dust and the various ignition sources." Tr. 314. Sizemore acknowledged that he did not find anything awry with the condition of the mantrip or the rail runner or with any other equipment. Tr. 316.

[39] As mentioned earlier, the issue is not about an inspector's proclivities. The issue is whether the facts *in this instance* support the inspector's conclusion about the S&S determination.

Although Respondent's Counsel challenged the Inspector's view of whether it was reasonably likely that a cable would become damaged, the Court believes this is not the proper S&S inquiry. First, it is noted that the Inspector believed "that the cable [could become] damaged, because you had equipment operating in that area, you had - - that's where your scoop is operating at that loads supplies on and off the width, and you have your diesel mantrip, your rail runner, and you have all that equipment in there, so it could reasonably likely be damaged." Tr. 318-319.

In the Court's view, apart from whether the cable would become damaged, the real focus should be upon the conditions cited. The hazard from the accumulation of combustible material is that such material could ignite. Having that material present provides an essential ingredient for the matter to ripen into a full blown problem, needing only an ignition source. Such ignition sources were identified by the Inspector. By the Respondent's attempt to add a further element, that is, that the cable or some other piece of equipment needs to be found to be defective, that adds an event which is not needed for this S&S determination. Such an approach effectively would negate the presence of the combustible material itself and, under such an approach, if followed to its logical conclusion, even a defective cable would not be sufficient, unless one could show that the defective cable could then ignite the combustibles. But the whole idea of an S&S finding is to arrest matters before they reach such a critical state. That type of approach essentially confuses imminent danger situations from findings where a violation moves matters, in a meaningful way, towards the development of a hazard's presence. By focusing on *other matters*, and not the violation and the role that violation plays in contributing to the cause and effect of a mine health or safety hazard, it muddies the S&S analysis.

The float coal dust and various combustible garbage observed by the Inspector had accumulated in the active workings. This violated the standard and such material created a fire hazard. Obviously, such conditions contributed to the cause and effect of the hazard. As this was in an active area, by the nature of the equipment used there, that equipment's operation presented a source for an ignition of the combustibles. This meets the 3rd *Mathies* element as there was a *reasonable* likelihood of an injury would result. Last, should such an ignition occur, reasonably serious injuries could be expected to result.

The violation and the S&S characteristic having been established, the Court assesses a civil penalty of $1,203.00.

Docket No. KENT 2011 1162

Citation No. 8352940.

On February 1, 2011, Inspector Sizemore issued this Citation, stating in the Condition or Practice section of that Citation that: "[l]oose coal measuring from 1 inch to 6 inches in depth was observed deposited along the mine floor on the track side of the # 8 belt conveyor, and into the cross cuts on both sides along the entire length of the # 8 conveyor. On February 8, 2011, the Inspector issued a "Subsequent Action 1a Continuation," extending the abatement time to February 14, 2011. That subsequent action was provided as the Inspector stated that "the

operator will require additional time to complete the clean up operations along the # 8 belt conveyor." The # 8 belt conveyor was cleaned and dusted, with the citation being terminated on February 28, 2011. GX 16[40] and GX 7, page 26. Vol 2. Tr. 323.

This is the same # 8 conveyor cited by the Inspector in an earlier-discussed citation but it involved a different day. Sizemore stated that the accumulations were "black in color and . . . spread out over the mine floor." Tr. 325. He measured the depths recorded in his citation. At least some amount of accumulation was present everywhere, with the 6 inch depth representing the maximum amount he found.[41] Tr. 326. He determined that the accumulations had been there for "quite a while." Tr. 326. The accumulations were on the track side of the belt and the belt examiner and those required to work on the belt would be on that side. A belt examiner would travel this area once each working shift.

Viewing this, the Inspector "foresaw a mine fire because we had the accumulations of loose coal, and we also had another citation along this belt line for the bottom belt . . . [and] another citation that was issued for the belt running out of line and cutting [i.e. rubbing] into the metal structure, providing an ignition source." Vol 2. Tr. 327. Sizemore believed these conditions had existed "[a]t least several shifts." Vol 2 Tr. 327. In connection with these findings, the Inspector checked the belt inspection books. Gov. Ex. 19, belt examiner records for January 29 and 30, 2011. That report notes the mine adjusted a couple of the bottom rollers and that the belt was tipping stand a little and pulled loose rib . .. at break 24 and working on structure . . . [with] zero percent CH4." Gov. Ex. 19. Similar information appeared for January 30th with the report noting "belt pulled loose rock at break 30, adjusted roller at break 17, belt rubbing stand, working on structure, 0 percent CH4." Vol 2 Tr. 330.

Mr. Oliver also testified on this matter and the related matter of Gov. Exhibit 17. Regarding the matter described in Exhibit 16, the loose coal ranging from one to six inches in depth, along the belt line, he stated that the belt was clean underneath it and well rock dusted and that they had cleaned under the belt with a "rake," which is a low track with a blade on it. Vol. 3 Tr. 73. However, he conceded that the rake can't reach all the way under and that there was loose coal on the rib, though nothing around the rollers. He did not agree that the condition continued along the entire length of the belt. Vol. 3 Tr. 73. The "worst part" of it, he stated, was "the upper end" of the belt. Though he agreed that this needed to be cleaned up, he added that it was up against the rib. This material was on the narrow, that is, the non-walkway side. Then shown R's Ex. R 4, a photograph, Oliver used this to show that the belt was clean underneath, that there was no coal around rollers and that it was rock dusted. However, when asked if he knew when that photo was taken, he answered, "No, not exactly." Vol 3 Tr. 75. Oliver was then

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[40] Because of their relationship, Government Exhibits 16 and 17 are analyzed together.

[41] On cross-examination, the Inspector could not specify with any exactitude how much of the accumulations were of the 1 inch height nor how much of it was of the 6 inch amounts. Vol 2. Tr. 350. It simply varied.

shown Respondent's Exhibit R 9, another photo of the # 8 belt line.[42] Here too, Mr. Oliver used the photo to show that there was only a small amount of accumulations on the mine floor and that the area was well rock dusted. However, he conceded that they did have to clean up the accumulations, including those which were on the narrow side.

Oliver agreed that the rake device can only reach "so far" and then one must use a shovel to complete the job. Further, he admitted that shoveling should have been done and that such coal needs to be cleaned up. Vol. 3 Tr. 82-83. He also conceded that this problem "had been there a while, yes." Vol. 3 Tr. 84. While he stated that there was some rock dusting on top of the accumulations, he acknowledged that new coal was evident on top of that rock dusting, as noted by the little black dots in one of the Respondent's photographs. However, Oliver did not consider that to be "accumulations," as they were not a "pile of coal." Still, he then agreed that even an inch of such coal is an "accumulation." Vol 3 Tr. 85. He also agreed that the belt examiner should be looking for such things and looking on *both sides* of the belt for that.

He also admitted that, as to the belt rubbing which was cited in the related Citation, noted pre Exhibit 17, that one doesn't want things to get hot from such rubbing and that, when rubbing is occurring, things can get hot. Vol. 3 Tr. 87. Referred to Gov Ex 19, the belt examiner's book, for January 29th, for the # 8 belt, he agreed that a problem with that belt had been recorded as the belt was tipping (i.e. rubbing) the stand, requiring some rollers which needed to be adjusted. Vol. 3 Tr. 89.

The violation was established. The Court finds that the Inspector's Citation accurately described the conditions which existed. The hazard is the risk of mine fire. Certainly, coal accumulations of this order contributes in a significant and substantial manner to that discrete hazard, creating a reasonable likelihood that an injury will result. Were a fire to develop, there is a reasonable likelihood that those exposed to the problem would sustain reasonably serious injuries of at least lost workdays or restricted duty.

This violation was S&S and is assessed at $1,026.00

Docket No. KENT 2011 1162

Citation No. 8352941.

On February 1, 2011, Inspector Sizemore also issued another Citation pertaining to the # 8 conveyor, stating that it was "not being maintained in proper alignment. The bottom belt was observed cutting into the metal structure of the belt conveyor in several locations. Note; a

[42] The Court inquired further of Mr. Oliver regarding the photographs in R 4 and R 9. Oliver affirmed that he did not know when or by whom the pictures were taken. Vol. 3 Tr. 94. Also, he agreed that the two photos are just that, two areas of a belt that was some 3,000 feet long. Vol. 3 Tr. 95. The photos only show some 40 feet in total of that 3,000 foot length. Tr. 96.

separate citation # 8352940 was issued for the accumulations of combustible material along the [# 8 conveyor][43] providing a fuel source for this evident, friction type ignition source, and was a factor in the S&S classification of this citation." Gov. Ex. 17. Upon the belt being aligned, the citation was terminated.

The cited standard, 30 CFR § 75.1731 is entitled, "Maintenance of belt conveyors and belt conveyor entries." The Inspector cited subsection (b) of that provision, which provides, "Conveyor belts must be properly aligned to prevent the moving belt from rubbing against the structure or components."

The Inspector saw the belt rubbing into the metal structure. As distinct from his other citation wherein he referred to cutting, on this occasion Inspector Sizemore did literally mean that the belt was *cutting*, not simply rubbing, into the bottom structure. He observed the belt running at a high rate of speed. Vol 2. Tr. 334. For both Exhibits 16 and 17, Inspector Sizemore identified the same hazard – the risk of a fire – as he noted the fuel source, the combustible material, the loose coal and the ignition source of the belt cutting into the stand. Vol. 2. Tr. 335. His concern was an initial ignition from the belt rubbing against the stand and from that the concern that some of that material could drop off the structure onto the floor, with the risk that the coal could be set on fire. Vol. 2. Tr. 336.

Inspector Sizemore affirmed that the violations he found, as reflected in Gov Ex. 16 and 17 were made worse because they existed together. Vol. 2, Tr. 346. That is, it would be improper to consider the two violations in isolation because they are related. One dealt with loose coal and the other with alignment but together they made each situation worse. Vol. 2. Tr. 346. By omitting problems in the books, the work force addressing the problems has inadequate information. The books alert them to things that need attention. It is that failure to so note problems that contributed to the cause and effect of a mine hazard. Vol 2 Tr. 348.

On cross-examination, he reiterated that the concern was the belt rubbing the structure. He agreed that his concern was a heated up belt structure and the risk of hot pieces falling into the accumulations, which accumulations he observed as present. Vol. 2. Tr. 359. He added that as the belt was cutting into the stand, that wears off the fire resistance and creates a source of heat. Vol. 2. Tr. 360. While the Inspector stated that one scenario, which he considered to be reasonably likely, would be a belt stand heating up from the belt rubbing which could then come down and come in contact with the accumulations. He added that there is combustible material on the stands themselves. One example is float coal dust. Vol. 2 Tr. 363-365. The Inspector agreed that he wrote this violation as S&S because of it being an ignition source for the accumulations that he saw. Vol. 2 Tr. 367.

Mr. Oliver also testified about this matter. He acknowledged seeing the belt rubbing the stand, admitting that this was present in two locations. Vol. 3 Tr. 80. He then shut down the

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[43] The Inspector mistakenly wrote "the # 1 belt conveyor" when he meant "the # 8 conveyor," as that citation shows.

belt, made adjustments and restarted it. The belt was not hot. This belt is also wet, as water is used to keep the float coal dust down. Vol. 3 Tr. 81. He saw no indication of any belt fraying.

The violation was established and was S&S. The hazard, plainly, is the risk of a mine fire. It is obvious that such friction along the belt presented a measure of danger to safety, contributing to the cause and effect of that hazard. A reasonable likelihood that an injury would result was established. As noted, this violation must be considered along with Citation No. 8352941. However, the violation's S&S quality was present even apart from the aggravating conditions established in that other citation. Friction along a belt carrying coal presents an inherently dangerous recipe, apart from the other fuel sources identified by the Inspector. With any mine fire which could result from an ignition, there is a reasonable likelihood that a reasonably serious injury would be a consequence.

Accordingly, the violation and its S&S nature having been established, a civil penalty of $634.00 is assessed.

Docket No. KENT 2011 1162

Citation No. 8352945.

On February 1, 2011, Inspector Sizemore also issued a Citation for a violation of 30 C.F.R. § 75.362(b). Entitled, "On-shift examination," the provision cited at that time provided: "(b) During each shift that coal is produced, a certified person shall examine for hazardous conditions along each belt conveyor haulageway where a belt conveyor is operated. This examination may be conducted at the same time as the preshift examination of belt conveyors and belt conveyor haulageways, if the examination is conducted within 3 hours before the oncoming shift."[44]

This citation is related to Citation No. 8352941, Gov. Ex. 17, in that, after finding the conditions identified for that Citation, Inspector Sizemore examined the belt book. This included the relevant on-shift reports. They recorded problems with the bottom belt; that it was rubbing. This is the same condition that the Inspector cited in this citation, Citation No. 8352945. The basis for the Inspector's citation was that the on-shift didn't note the loose coal. Thus, only part of the problems he found were listed in the on-shift. One is required to note accumulations of combustible material in the books. Vol 2. Tr. 340-342. In marking it as S&S,

[44] Subsequent to the issuance of this citation, this provision has been modified, with an effective date of August 6, 2012. (b) During each shift that coal is produced, a certified person shall examine for hazardous conditions and violations of the mandatory health or safety standards referenced in paragraph (a)(3) of this section along each belt conveyor haulageway where a belt conveyor is operated. This examination may be conducted at the same time as the preshift examination of belt conveyors and belt conveyor haulageways, if the examination is conducted within 3 hours before the oncoming shift.

the Inspector was concerned about the risk of a fire, with the combustible material and the belt running out of alignment.

On cross-examination, Inspector Sizemore stated that the onshift exam for the 31st was insufficient. Vol 2. Tr. 369. In this regard, he cited section 75.362(b). Counsel for the Respondent then had the Inspector agree that a certified person *did* perform such an exam for the # 8 belt. Vol. 2. Tr. 370. The Inspector paused after his initial agreement, adding that the problem was the failure to record all the problems that should have been noted. Vol. 2. Tr. 372. At that point, the Court stepped in, noting that the case law is clear that the standard requires that an *adequate exam* be performed. The Court noted that any other construction would produce ludicrous results, as a mine could pick a sightless person and assign that individual to perform the examination for hazardous conditions along a belt line. Vol. 2. Tr. 373. Counsel for the Respondent then suggested that a different standard is to be cited for recording of hazards: section 75.363. The Court then noted that the Secretary can also move to amend the standard cited as section 75.363, should they elect to do so. Vol. 2. Tr. 375. The government then moved to amend the violation to cite section 75.363. Vol 2 Tr. 379.

For this kerfuffle, the Court finds that both 75.362(b) and 75.363 apply to the situation recorded by Inspector Sizemore for this Citation. The former applies on the basis of the reasoning articulated by the Court at the hearing. Section 75.363, while it places more emphasis on the duty to *record* hazards found by expressly requiring a record be made of them, is an alternative source to address the implicit requirement of 75.362(b). Accordingly, while both could be utilized, the Court accepts the Secretary's motion to amend the standard violated.

Regarding the Inspector's citing the rubbing of the stands for January 31st, Sizemore agreed that this rubbing was recorded in the book. The Inspector's stance was that such a hazard, belt rubbing, is not simply to be recorded, but must be corrected. Vol. 2 Tr. 377. As the other condition noted by the Inspector in this Citation was not noted, the violation was established.[45]

By failing to note the conditions identified in Exhibit 16, the standard was violated. The hazard in this instance was the risk of a mine fire. It is plain that the failure to record such problems undercuts the prophylactic intent of the standard and therefore such failure contributes to the cause and effect of that mine hazard's development, creating a reasonable likelihood that

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[45] The Court asked some questions concerning Exhibits 16 & 17, as they are related to Exhibit 18. The Inspector stated that a combustion source remained, namely the loose coal under the belt, which was not rock dusted. Vol. 2 Tr. 380. The Inspector added that his expression that the belt would need to collapse in order for the violation to be S&S was only one possible scenario. Vol 2 Tr. 381. The Inspector clarified that it is not the belt stand but the belt that would collapse and present a hazard. Vol 2. Tr. 381. Another scenario for the problem he cited in Exhibit 17 pertains to "when the belt cuts into a stand like that or when it rubs into a stand, it rubs the flame retardant off the edges." Vol. 2 Tr. 383. Sizemore noted that this has happened at this mine, as he found the string around the rollers.

an injury will result from it. As noted *supra*, should a mine fire ensue, there is a reasonable likelihood that a reasonably serious injury would result in lost workdays, restricted duty, or worse.

Accordingly, the violation and the S&S designation are affirmed. **A civil penalty of $540.00 is assessed.**

SUMMARY

The Court has upheld each of the violations and, except for three citations, finds that the remaining, as per the discussion above, were each significant and substantial, as that term is applied under the Mine Act. All penalties were based upon due consideration of the statutory criteria. The "R 17," the assessed violation history report, was not used in a manner to increase or decrease the penalties imposed. All violations were deemed to have been abated in good faith.

Docket No. KENT 2011 1162
Citation No. 8405309 $499.00

Docket No. KENT 2012 34
Citation No. 8352926 $1,700.00

Docket No. KENT 2012 1162
Citation No. 8352931 $499.00

Docket No. KENT 2011 835
Citation No. 8352936 $800.00

Docket No. KENT 2011 1162
Citation No. 8352932 $499.00

Docket No. KENT 2011 1162
Citation No. 8352943 $499.00

Docket No. KENT 2011 1162
Citation No. 8352920 $1,203.00

Docket No. KENT 2011 1162
Citation No. 8352921 $634.00

Docket No. KENT 2011 1162
Citation No. 8352922 $634.00

Docket No. KENT 2011 1162
Citation No. 8352917 $499.00

Docket No. KENT 2011 1162
Citation No. 8352918 $250.00

Docket No. KENT 2011 1162
Citation No. 8352919. $600.00

Docket No. KENT 2011 835
Citation No. 8352934. $1,657.00

Docket No. KENT 2011 1162
Citation No. 8352939 $200.00

Docket No. KENT 2011 835
Citation No. 8352924 $1,203.00

Docket No. KENT 2011 1162
Citation No. 8352940 $1,026.00

Docket No. KENT 2011 1162
Citation No. 8352941 $634.00

Docket No. KENT 2011 1162
Citation No. 8352945 $540.00

ORDER

Based on the foregoing discussion and findings, the Respondents are **ORDERED** to pay the assessed civil penalties for the violations, as set forth above, within thirty (30) days.

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

Distribution: (E-mail and Certified Mail)

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October 4, 2012

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	CIVIL PENALTY PROCEEDINGS Docket No. KENT 2009-1582
Petitioner,	:	A.C. No. 15-02709-196588
v.	:	Docket No. KENT 2009-1583 A.C. No. 15-02709-196588
HIGHLAND MINING COMPANY, LLC, Respondent.	:	Mine: Highland 9 Mine

DECISION

Appearances: Neil A. Morholt, Esq., and Laura Manson, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, TN, on behalf of the Petitioner;
Jeffrey K. Phillips, Esq., Steptoe & Johnson, PLLC, Lexington, KY; on behalf of the Respondent.

Before: Judge Rae

This case is before me upon two Petitions for Civil Penalty filed by the Secretary of Labor (Secretary) on behalf of her Mine Safety and Health Administration (MSHA) against Highland Mining Company, LLC (Highland) pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 (the "Act"). 30 U.S.C. §801, et seq. The Secretary alleges that Highland violated mandatory safety standards for underground coal mines at its Highland 9 Mine, a bituminous coal mine located in Waverly, Kentucky. In addition to making allegations regarding the gravity and negligence of each of the violations, the Secretary alleges that each was a significant and substantial contribution to a mine safety hazard (S&S), and several were an unwarrantable failure to comply with the mandatory standard. The Secretary proposes assessing Highland a total of $ 80,744.00 for the violations. Highland admits to nine of the thirteen violations but contests each of the S&S and the unwarrantable failure designations. For the reasons detailed below, I affirm one citation as written, modify nine and vacate three.

I. STATEMENT OF THE CASE

Upon motion by the Secretary, the two dockets were consolidated for hearing. Pursuant to an order directing the parties to confer, counsel reached a settlement with respect to 13 violations contained in Docket No. KENT 2009-1583. I approved that settlement on October 12, 2011.

Hearings were held in Evansville, IN to address the remaining eleven citations in KENT 2009-1583 in addition to one order and one citation contained in Docket No. KENT 2009-1582. Post-hearing briefs were submitted by both sides following the final hearing.

The parties entered into the following stipulations: (1) the proposed penalty assessments will not affect Respondent's ability to continue in business; (2) that Highland Mining Company, LLC is engaged in the mining and selling of coal in the United States and its mining operations affect interstate commerce; (3) that Highland Mining Company, LLC is subject to the Federal Mine Safety and Health Act of 1977 (the Act); (4) the administrative law judge has the jurisdiction to hear and decide this matter; (5) all of the citations and the one order at issue in these two dockets were properly served by a duly authorized representative of the Secretary upon an agent of Highland Mining, on the dates stated herein; and (6) that the operator demonstrated good faith in abating the violations.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Law and Regulations

Significant and Substantial (S&S)

An S&S violation is a violation "of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard." 30 U.S.C. § 814(d). A violation is properly designated S&S, "if, based upon the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.,* 3 FMSHRC 822, 825 (Apr. 1981). As is well recognized, in order to establish the S&S nature of a violation, the Secretary must prove: (1) the underlying violation; (2) a discrete safety hazard – that is, a measure of danger to safety – contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury will be of a reasonably serious nature. *Mathies Coal Co*., 6 FMSHRC 3-4 (Jan. 1984); accord *Buck Creek Coal Co., Inc.* 52 F. 3rd 133, 135 (7th Cir. 1995); *Austin Power Co., Inc. v, Sec'y of Labor*, 861 F. 2d 99,103 (5th Cir. 1988) (approving *Mathies* criteria).

It is the third element of the S&S criteria that is the source of most controversies regarding S&S findings. The element is established only if the Secretary proves "a reasonable likelihood the hazard contributed to will result in an event in which there is an injury." *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985). An S&S determination must be based on the particular facts surrounding the violation and must be made in the context of continued normal mining operations. *Texasgulf, Inc*., 10 FMSHRC 1125 (Aug. 1985); *U.S. Steel*, 7 FMSHRC at 1130.

The S&S nature of a violation and the gravity of a violation are not synonymous. The Commission has pointed out that the "focus of the seriousness of the violation is not necessarily on the reasonable likelihood of serious injury, which is the focus of the S&S inquiry, but rather on the effect of the hazard if it occurs." *Consolidation Coal Co*., 18 FMSHRC 1541, 1550 (Sept. 1996).

Accumulations/fire/ignitions

Several violations charged against Highland involve accumulations of combustible materials which were assessed as S&S posing a likelihood of fire and/or ignition. When evaluating whether violations charging accumulations are S&S, the Commission has stated:

When evaluating the reasonable likelihood of a fire, ignition, or explosion, the Commission has examined whether a 'confluence of factors' was present based on the particular facts surrounding the violation. Texasgulf, Inc. 10 FMSHRC 498, 501 (April 1988). Some of the factors include the extent of the accumulations, possible ignition sources, the presence of methane, and the type of equipment in the area. Utah Power & Light Co., 12 FMSHRC 965, 970-71 (May 1990)('UP&L'); Texasgulf, 10 FMSHRC at 500-03.

Enlow Fork Mining Co., 19 FMSHRC 5, 9 (Jan. 1997).

Unwarrantable Failure

In *Lopke Quarries, Inc*., 23 FMSHRC 705, 711 (July 2001), the Commission reiterated the law applicable to determining whether a violation was 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).

Whether conduct is "aggravated" in the context of unwarrantable failure is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist, such as the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator's efforts in abating the violative condition, whether the violation is obvious or poses a high degree of danger, and the operator's knowledge of the existence of the violation. See *Consolidation Coal Co*., 22 FMSHRC 340, 353 (Mar. 2000); *Cyprus Emerald Res. Corp*., 20 FMSHRC 790, 813 (Aug. 1998), *rev'd on other grounds*, 195 F.3d 42 (D.C. Cir. 1999); *Midwest Material Co*., 19 FMSHRC 30, 34 (Jan. 1997); *Mullins & Sons Coal Co*., 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co*., 14 FMSHRC 1258, 1261

(Aug. 1992); *BethEnergy Mines, Inc.,* 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Quinland Coals, Inc*., 10 FMSHRC 705, 709 (June 1988). All of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether mitigating circumstances exist. *Consol*, 22 FMSHRC at 353. 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. *REB*, 20 FMSHRC 203, 225 (Mar. 1998).

The Violations

Docket KENT 2009-1582

1. Citation No. 8494791

This citation states that:

> The roof and ribs where men regularly work and travel along the 1st North belt at crosscuts 28 to 31 are not being controlled to protect persons from the hazards related to falls of roof or ribs and rock or coal bursts. A roof fall has previous (sic) taken place from crosscut 28 ½ to 30 ½. The roof in this area is approximately 12 to 14 feet high. Coal and rock had fallen between crosscuts 28 and 29 in an area approximately 11 feet long by 10 feet high. Loose rock has fallen between crosscut 30 and 31 approximately 4 feet high by 11 feet long. Loose rock was observed along the brows from crosscut 28 ½ to 30 ½. This hazardous condition was recorded in the belt book from 7/16/2009 until 7/18/2009 and no corrective actions were taken. Several areas of loose coal and rock were observed in this area. The mine operator has engaged in aggravated conduct constituting more than ordinary negligence. This is an unwarrantable failure to comply with a mandatory standard.

Ex. G-14.

In addition to being assessed as an unwarrantable failure, this violation was also designated as having the reasonable likelihood of resulting in an injury to one person causing lost workdays or restricted duty, S&S and the result of high negligence. The proposed penalty is specially assessed at $14,700.

The cited standard, 30 C.F.R. 75.202(a), requires that the roof and ribs in areas where persons work or travel be supported or controlled to protect them from hazards related to roof, face or rib falls and rock bursts.

George Yates worked as a miner for 33 years performing an array of jobs including general laborer, equipment operator and certified foreman in three states. He is experienced in conducting examinations of roof and rib conditions. (Tr. 204-210.) He began his MSHA career as an inspector in November 2006 and has inspected Highland several times beginning in late 2008. (Tr. 211-13.)

On July 20 2009, Yates began his second day of inspecting Highland at 8:20 am. (Tr. 218.) Upon review of the on-shift book and belt books, he noticed that on July 16th a rock was reported in the travelway of crosscut 28 to 31 in the 1st North belt. (Ex. G-13 at pg. 23.) The area had been dangered

off with tape. (Tr. 218-21.) The entries in the belt book also noted the same hazard for the following two days, indicating that the hazard had not been corrected during either of the two production shifts run each day. (Tr. 222-23.) The belt examiner on each shift is tasked with checking for any hazards in the belt area and noting them in the book so that the foreman will be made aware of them thus ensuring corrective action is taken promptly. (Tr. 224-27.) In this instance, several mine foremen had countersigned the notations in the belt book and had failed to note any corrective action. (Tr. 228.) After having reviewed the books, Yates then traveled to the area with company and union representatives where he saw red danger ribbon hanging from roof bolt plates. He traveled inby the ribbons to determine what sort of hazard they warned against. He found the conditions as listed in the narrative portion of the citation and drawn in his notes, in addition to cracks and loose ribs. (Tr. 232-37; Ex G-13 at pp. 5 and 22.) He was told by Highland examiner, Bob Perry, that the cited areas were too dangerous to travel. (T. 246.) Yates testified that the area in which he found these conditions was the walkway side of the entry where miners travel to examine the belts. (Tr. 236, 238.) All belts in the mine dump coal onto this particular belt located in the main north entry. (Tr. 220.) When Yates touched the belt hangers in the area, they were extremely hot to the bare hand. (Tr. 239.) Once the belt was realigned, Yates and his two companions crossed under the belt to the return side where he found similarly dangerous conditions as set forth in the citation and no footprints to evidence an examiner having been in the area. A sign was posted in that area that read "examine belt from other side of the entry." There was a guard installed nearby to allow passage underneath the belt. (Tr. 240-41.) There had been a roof fall in the area in the past and timbers were set to provide supplemental support to the brows. (Tr. 243.) Yates stated that the roof control plan for Highland specifies, however, that supplemental roof support shall be added to control adverse conditions such as these; it does not allow for simply flagging off the area. (Tr. 243-44.)

Based upon the numerous areas of adverse roof conditions, the misaligned belt causing a source of friction and the lack of remedial efforts, Yates made the decision to issue this Section 104(d) citation and an accompanying order discussed below. (Tr. 245.)

Highland presented evidence that they had taken measures to support the roof and ribs in the area. Alan Thomas testified that he sprayed gunnite in the belt entry, however that was six months prior to this inspection. (Tr. 324.) They also presented evidence that any rock falls were remote in time and scaling had been done just prior to the inspection. Troy Cowan's deposition was entered into evidence in which he stated that he was present during this inspection.[1] It was his observation that there were no obvious loose rocks or dangerous conditions as Yates found and it took a good deal of effort for him to scale the rock Yates believed was loose. (Cowan dep at 17.) In order to abate the citation eight days after its issuance, Highland installed arches from crosscuts 28 to 31. (Cowan Dep. At 22; Ex. G-14.)

In addition to refuting the existence of the hazardous roof and rib conditions, Highland maintains that the language of the regulation requiring roof and ribs be supported or **otherwise controlled** where persons **work or travel** was not violated. (Emphasis added.) Because the area was dangered off it no longer was an area where persons work or travel. Furthermore, dangering off the area is a form of roof control thus satisfying the intent of the standard. (Res. Post-Hearing Memo. at pg. 14-

[1] Troy Cowan was Highland's ventilation coordinator. He was responsible for ventilation, roof control and belt laying operations at Highland. He holds underground foreman, EMT and mine emergency technician and underground instructor's certifications and has been in the field since 1988. (Cowan Dep. At 6-10.)

15.) Highland relies on *Cyprus Empire Corporation*, 12 FMSHRC 911 (May 1990) to support its position. In that case, the Commission determined that where the operator dangered off the area affected by poor roof conditions, the area was no longer a place where persons worked or traveled vacating the citation and penalty imposed by the ALJ. The Commission said that "[T]he Secretary also did not prove that, while the area was dangered off, the job duties of any miners required them to enter the affected area. Thus, the record establishes that the operator acted appropriately in dangering-off the area of bad roof and that no miners worked, traveled or were required to enter into the area at issue." *Cyprus* at 917. The dissenting opinion, however, points out that the majority clearly ignored the fact that ventilation examiners as well as other miners would need to access the area while the condition remained unabated. Moreover, the dissent underscores the fact that the regulatory obligation to protect miners from roof and rib dangers goes beyond merely cordoning off the area; the roof must be supported or controlled. To hold otherwise would immunize the operator from MSHA's enforcement of this mandatory standard by simply putting danger tape around an affected area.

I find that Highland's reliance on *Cyprus* is not applicable here. Here, the area in question is a very active part of the mine - the main belt entry. The condition was allowed to exist for at least three days spanning eight shifts. Under continued normal mining conditions, miners would be required to enter the area to perform mandatory tasks such as rock dusting, cleaning of accumulations, realigning the belt and adjusting and replacing rollers. In fact, Highland's own evidence documents that on July 17th, scaling was done from crosscuts 13 to 38 proving that persons were entering the posted area. (Ex. R-23.) Yates testified that he observed areas in need of rock dusting and the belt required realignment. (Tr. 248, 239.)

I also find that the conditions were as hazardous as Yates testified supported by the fact that Highland's own witnesses confirmed that numerous prior attempts to control the roof had been made and failed leading to attempting to cordon off the area. Perry's statement that the conditions were far too dangerous to allow travel along the entry sufficiently corroborates Yates' assessment. I find the Secretary has met her burden of proof establishing the mandatory standard has been violated.

S&S

Inspector Yates testified that the hazard he was concerned about was a roof or rib fall caused by the largely unsupported top and badly cracked ribs and roof. (Tr. 248.) He found the loose rock and ribs to be extensive and obvious in the cited area and the condition was continuing to deteriorate. In his 30 years of mining experience, Yates was aware of a falling rib or rock causing fatal injuries. (Tr. 249.) At the very least, the nature of any injuries would be broken bones and bruises. (Tr. 250.) He was aware of roof bolter operators at Highland Mine being cut and scraped from falling rock.(*Id*.) I find Yates' testimony, based upon his years of experience in mining and as an MSHA inspector to be credible.

Highland refutes the S&S designation under the same theory that it disputes violating the standard. No one was exposed to the hazard because the area was taped off. (Rep's Post-Hearing Memo.) This argument, however, ignores the fact that one must evaluate the likelihood of the hazard causing an injury in the context of continued mining operations. *Texasgulf, Inc*., 10 FMSHRC 1125 (Aug. 1985); *U.S. Steel*, 7 FMSHRC at 1130. As stated above, because the cited area was the main belt line which was crucial to processing coal, under continued normal mining operations miners would have had to enter the cited area to align the belt, service rollers, clean up accumulations and rock dust, etc.

This argument also ignores the fact that miners had entered the area at least once on July 17, 2000 to perform scaling in the affected crosscuts. Persons were exposed to this hazard.

The conditions Yates cited violated the mandatory standard. The inadequately supported ribs and roof contributed substantially to the likelihood of a rock or rib fall. There had been a roof fall in the cited area in the past. The remedial measures taken failed and conditions had worsened causing at least one miner to refuse to enter the area and management to post danger warnings. The conditions were such that another roof or rib fall was reasonably likely to occur, which in turn would be reasonably likely to cause a reasonably serious injury to a miner. The elements of *Mathies* have been met.

Negligence/unwarrantable Failure to Comply

This violation was assessed as an unwarrantable failure to comply with the mandatory standard, being the result of high negligence. (Ex. G-14.) Yates based his high negligence and unwarrantable failure designations on the same facts. That is, the poor condition of the roof and ribs was extensive and obvious. It was noted in the belt book since July 16th and Highland had done nothing to correct the condition. The foreman was well aware of the situation as proven by his countersignature on the belt book entries. Management should have at least come up with a plan to eliminate the danger but had not done so. (Tr. 252-53.)

On direct examination Yates stated that had Highland done enough scaling to eliminate the hazard making travel in the entry safe, he would not have issued the unwarrantable failure citation. (Tr. 254.) On cross-examination, he confirmed that in his earlier deposition when asked the question "[w]ould scaling have been enough corrective action" his response was "[m]aybe not enough to eliminate the citation but to do away with the D." Highland also elicited from Yates that the cited area was re-bolted after a roof fall one to two years earlier and it was then timbered. (Tr. 282.) He did believe the rocks that he saw on the mine floor were the result of some recent activity as they did not have rock dust on them and were black in color. He could determine whether they were the result of a fall or scaling. (Tr. 248, 283.)

Yates' statement that he would not have issued a 104(d) violation if he had noticed that scaling was done on July 17th is irrelevant at this point. Whether this violation was an unwarrantable failure is a legal conclusion properly left to the ALJ at the hearing level. Addressing the factors enunciated by the Commission in *Consolidaton Coal, Supra,* I find that the condition was obvious and posed a very high degree of danger to miners examining and performing maintenance in the belt entry. It existed for at least three days in an area that is the core of the mining operation. Highland was well aware of the poor roof conditions in this area from the roof fall more than one year earlier with continually deteriorating conditions henceforth as documented in the examination book and countersigned by the foremen despite supplemental bolting and timbering efforts. The requirement to perform preshift and on-shift examinations continued with Highland operating two production shifts every day exposing miners to grave injury. Despite their claims that the examiners were making the belt entry from the crosscuts there is sufficient evidence to find that miners were still entering the area. Their attempt to "control" the main belt entry by putting up danger flags was a feeble attempt to rectify the situation. It was decidedly apparent to Highland that immediate and greater measures were necessary to correct the condition but they had not so much as developed a plan to implement such measures when Yates issued the violation.

Based upon the facts and circumstances presented, Highland's actions displayed a reckless disregard for safety constituting more than ordinary negligence. I affirm the assessment of an unwarrantable failure to comply with the cited standard.

2. Order No. 8494792

This order was issued by Inspector Yates in conjunction with citation number 8494791 discussed above when examining the 1st North Belt on July 20, 2009. The narrative portion reads as follows:

> The 1st North Belt is not being maintained in safe operating condition. There are 3 hot bottom roller hangers located at crosscut 29. The bottom belt is out of alignment and rubbing the hangers. Hazardous roof and ribs are present in this area and the examiners have not been traveling this area when examining the belt. The rollers were very hot to the touch when touched with the hand. The mine operator engaged in aggravated conduct by not correcting the hazardous roof and rib conditions allowing the examiner to safely examine this area. This violation is an unwarrantable failure to comply with a mandatory standard.

Ex. G-15.

The gravity of this violation is assessed as reasonably likely to result in an injury causing lost workdays or restricted duty to one person. The negligence is marked as high and S&S in addition to being an unwarrantable failure. The order was terminated the following day when the belt was realigned and the hangers cooled down. Ex. G-15. The Secretary seeks a specially assessed penalty of $13,600.

The cited standard requires that conveyor belts be properly aligned to prevent the moving belt from rubbing against the structure or the components. 30 C.F.R. §75.1731(b).

As previously stated, Yates found three rollers at crosscut 29 that were hot where the bottom belt was out of alignment and rubbing the frame. The area in question was approximately twenty feet in length. (Tr. 238-39.) Highland does not contest the existence of the violation.

S&S

Yates testified that there was a danger of fire and smoke because the hot hangers created an ignition source should coal fall on the belt. (Tr. 257-58.) Because the conditions were such that the examiners were not making proper examinations of the belt, the hazard would not have been discovered before the belt was shut down for the day some twelve hours later. (Tr. 262.) During that period of time, given the roof conditions, it was reasonably likely that accumulations would have been produced or coal could have fallen on the belt causing a fire exposing miners to the danger of burns and smoke inhalation. (Tr. 250, 258, 260.) The Secretary argues that loose coal, considered accumulations, was found along the belt entry providing the fuel for a fire making it reasonably likely to occur.

Yates testified to several additional facts and opinions on cross-examination. There were no accumulations or belt shavings beneath the belt line. (Tr. 285.) He had no idea how long the condition had existed but it had probably occurred sometime during that shift which had commenced four hours earlier. (Tr. 261.) There was no notation of the misaligned hanger in the examination book. (Tr. 284.)

He had no idea how long the belt would need to run before it would catch on fire or whether the belt could catch on fire. (Tr. 287.) The belt travels approximately 11,200 feet in one complete rotation. Any one section of the belt passing over the misaligned hanger would cool along this expanse before it came in contact with the misaligned hanger again. (Tr. 312-13.) The entry was 20 feet wide. The belt was approximately 10 feet from the end of the crosscut where the examinations were being conducted. (Tr. 230, 284-85.) Highland's contention that the violation was not reasonably likely to result in a serious injury is based upon these additional considerations.

The crux of the Secretary's theory is that should a rib rash or roof fall occur where the misaligned belt was located, the condition would go undiscovered due to Highland not conducting examinations of the belt. As a result, this accumulation over the course of time would be reasonably likely to ignite given the heat source created by the friction from the misaligned belt rubbing on the hangers. (Sec's Post-Hearing Brief, Tr. 267.) However, I do not find sufficient evidence of record to reach the same conclusion. As more fully discussed below, the uncontroverted evidence is that Highland was making the on-shift examinations of the entry from the crosscuts. Yates was made aware of this fact during his inspection by Troy Cowan. (Cowan dep. at 20.) After being made aware of this fact, Yates allowed the belt to continue operations and allowed this practice to continue until the arches were installed several days later. (Tr. 294-95.) The on-shift examination book indicates several items were documented during the three days in question such as loose rocks in the entry and scaling of the roof. (Ex. R-23.) Yates estimated the condition had existed only since the beginning of the shift and that although hazards were being recorded in the examination book, the misaligned belt was not noted. I conclude from this evidence that the Secretary's assertions that the condition would go undiscovered due to inadequate examinations are unsupported by record evidence.

With regard to the heat source present, Yates could not say how long it would take for the roller hangers to become sufficiently hot to cause a belt fire, or even if a belt fire would occur. (Tr. 286, 313.) On the other hand, Cowan who was with Yates during the inspection, testified at his deposition that after Yates felt the roller hanger, Cowan removed his glove to feel the roller hanger as well. He found it to be warm to the touch but not warm enough to raise a concern. He also observed the belt running over the hanger and found the belt was only occasionally rubbing on the hanger. Cowan also scaled the rock that concerned Yates and had a difficult time prying it loose. (Cowan dep. at pp. 17-20.) There was no evidence of methane or electrical equipment in the entry. This evidence is not sufficiently convincing to support the proposition that it was reasonably likely that the misaligned belt would result in an ignition, should coal or other accumulations fall on the belt, under continued normal mining conditions.

For the reasons set forth herein, I find this violation was not properly designated S&S and modify it to non-significant and substantial.

Unwarrantable Failure/Negligence

The Secretary supports the assessment of high negligence and an unwarrantable failure to comply with the mandatory standard based upon the same factors discussed above. The belt was improperly examined and the condition existed for "some time." (Tr. 261-62, Sec's Post-Hearing Brief.) Highland asserts that the negligence should be assessed as moderate or low but provided no supporting argument in its post-hearing brief.

I find the violation was not the result of an unwarrantable failure to comply with the standard for the same reasons I find it is not significant and substantial. As discussed more fully below, Highland was conducting on-shift examinations and recording hazardous conditions in the examination book. Remedial work such as scaling had been done in the area during the time period in question evidencing the fact that conducting the examinations from the crosscuts did afford the examiners a safe yet adequate vantage point from which to see a hazard. Yates provided an estimate that the condition had existed since the start of the shift four hours earlier. He based this on his opinion that the hangers were very hot to the touch. However, Cowan, also touched the rollers and described them as warm but not hot. (Cowan dep. At 19.) Regardless of whether the belt had been misaligned for four hours or some lesser amount of time, I do not find that amount of time the condition existed was great nor was the condition extensive. I further find that there is no evidence from which to draw the conclusion that the condition was obvious or posed a high degree of danger. There is also no evidence to suggest that management was aware of the condition or was placed on notice that greater efforts were needed for compliance. In essence there are no aggravating factors upon which to find the violation was the result more than ordinary negligence.

I find the negligence is properly assessed as moderate. The Secretary did not offer evidence that management was aware of the condition and based upon my finding that Highland was conducting examinations; the condition would have likely been discovered during the next shift at the latest.

Docket KENT 2009-1583

1. Citation No. 8494793

Upon review of his inspections notes from the previous day, George Yates issued this citation on July 21, 2009, pursuant to 30 C.F.R. §75.362(b) after his inspection of the 1st North Belt the preceding day. The citation alleges the following violation:

> An inadequate examination of the 1st North Belt at crosscuts 28 to 31 was performed on 7/16/2009, 7/17/2009 and 7/18/2009. Adverse roof and rib conditions were present in this area and recorded in the belt book for these dates. The area had been dangered off (flagged out) on 7/16/2009 and the examiners were doing a visual examination from the crosscuts. When inspected by MSHA on 7/20/2009, the bottom belt was rubbing and 3 hot bottom roller hangers were present at crosscut 29. The hangers were too hot to lay your hand against.

Ex. G-17.

The citation was marked at S&S, affecting one person and reasonably likely to result in lost workdays or restricted duty and the result of moderate negligence. (Ex. G-17.) The proposed penalty is $807.00. The citation was abated on July 27, 2009 when arches were installed in the belt entry to improve the roof conditions. (Ex. G-17.)

The standard, applicable to on-shift examinations, provides: "[d]uring each shift that coal is produced, a certified person shall examine for hazardous conditions along each belt conveyor

haulageway were a belt conveyor is operated. This examination may be conducted at the same time as the preshift examination of the belt conveyors and belt conveyor haulageways, if the examination is conducted within 3 hours before the oncoming shift." 30 C.F.R. §75.362(b).

The belt examiners at Highland typically made their examination of the belt while riding along the belt in a golf cart. (Tr. 267.) It was not uncommon, however, for them to make part of the belt on foot either in the entry or from the crosscuts when the entry was too narrow for a golf cart to pass through or where there were hazardous conditions preventing going into the entry. (Tr. 329, 351.) Two of Highland's highly experienced belt examiners, Scisney and Courtney,[2] testified that when a portion of the belt line is dangered off, they make their examination of the belt from entering each of the crosscuts and looking up and down the belt for a distance of 15 feet in either direction. The belt is approximately two feet away from the end of the crosscut in most places and as much as ten feet away in others. (Tr. 362.) Regardless of whether a portion of the belt line is dangered off, they still conduct a thorough examination of the belt, noting any hazards in the belt book. Hazards requiring immediate attention are attended to on the spot, while others such as damaged rollers are tagged and noted in the book for regular maintenance and repair. (Tr. 331-32, 358.) Both belt examiners testified, based upon their considerable experience, that they can conduct adequate examinations of the belt from the crosscuts. (Tr. 329, 352-53.) Courtney further testified that MSHA was aware of this practice and had never indicated any problem with it in the past. (Tr. 329.)

In contrast to the testimony of Highland's highly experienced belt examiners, I find several points with regards to the Secretary's evidence lacking. First, Yates testified that after he issued the citations for the dangerous roof conditions and the hot rollers the previous day, he determined that an adequate on-shift examination of the belt could not have been made from the 16th through the last production shift on the 18th between cross cuts 28 and 31 when that area was dangered off. He based this on the fact that the examiners had informed him that they were making the belt examination from the crosscuts and from his finding the hot rollers and a rib roll which he opined would not have occurred had adequate examinations been conducted. (Tr. 266-68, 270.) He acknowledged, however, that the examiners were continuing to make entries in the belt book based upon the visual examinations they were conducting which, in fact, indicated several hazards from the 16th to the 18th. For instance, on July 16, the day the danger tape was put in place, it was noted that there was rock in the travelway from crosscut 28 to 31 and build up at 13 to 38. On July 17, scaling was done from 28 to 31 on the first shift and rock in walkway was noted between 28 and 31 on the second shift. A rib roll, accumulations and rocks from 28 to 31 and a bad bottom roller at 28 were noted of the 18th. (Tr. 270, 279-81; R-23.)

Secondly, Yates also conceded that during his inspection on the 20th, he spoke to Bob Perry, one of the belt examiners on the Main North belt. When Perry told him they were making the belt from the

[2] Casey Courtney testified that he has been a belt examiner since 1982 while Guy Scisney has been an examiner for 34 years. He has received special recognition for never having had an accident in his 42 year mining career. (Tr. 465.) Based upon my observations of their demeanor and comportment during trial, I find they are credible witnesses despite their employment with Highland.

crosscuts, Yates never bothered to ask Perry if he could see the rollers, accumulations or roof conditions from the crosscuts. (Tr. 292.) He also did not travel to the ends of the crosscuts to see for himself whether the examiners could make an adequate examination of the belt from that vantage point. (Tr. 291.) When making the belt in a golf cart, Yates conceded, the examiners were not stopping at each roller or crosscut and they were moving more quickly through the area than they were when making the examination on foot from the crosscuts. (Tr. 292-93.) And while other provisions of the cited mandatory standard set forth a specific location from which testing must be done such as for methane, Yates could not identify any language in the section he cited that directs from what distance a belt examiner must be to conduct the examination. (Tr. 293.)

Finally, after he issued this citation on the 21st and until the violation was abated on the 27th, Yates continued to allow the belt inspectors to make the examination essentially as they had done before. He testified as follows:

> Yates: I required them to go into the belt line and to not pass into an area where there was (sic.) hazardous conditions.
>
> Resp.: So you required – let me make sure I understand this. This area is still dangered off, right?
>
> Yates: Yes, sir.
>
> Resp.: You required mine examiners to enter a dangered off area?
>
> Yates: Yes, after I instructed them to scale what loose top they could and for them not to go into anything that would put them in harm's way.

(Tr. 294-95.)

The violation was not abated until a significant number of arches were installed to support the roof as all other forms of roof control including bolts, sprayed gunnite and timbers had been ineffective. Under these circumstances Yates could not have believed that scaling would have rendered the roof safe for travel by the examiners in view of his previously issued roof control violation. This essentially left the examiners to make the belt from the crosscuts in the interim or be placed in peril by entering into an area where there were unwarrantably dangerous roof conditions. Yates was therefore aware Highland was continuing to make its examinations from the end of the crosscuts and tacitly condoned it.

In sum, the Secretary has failed to prove the method by which the examiners were making the belt was inadequate. She has failed to prove even by a scintilla that the examiners could not adequately see the conditions present from crosscut 28 to 31 as Yates neither asked the examiner, nor made his own visual inspection of, what could be seen from that vantage point. His conclusions were not based upon any supporting observations. On the contrary, the two highly experienced examiners testified that it was not uncommon to conduct the examination on foot from the crosscuts and they were easily able to see 15 feet in either direction along the belt located approximately two feet in front of them. Whether the

examination was being done from a golf cart in the entry or from the end of the crosscuts, the examination was a visual one, not a tactile one making the distance from which it is done adequate as long as the conditions could readily be seen. It stands to reason that observing the conditions while on foot would be more effective than passing by in a golf cart without stopping at each of the rollers or crosscuts for a closer look. Moreover, the entries in the belt book indicate that the examiners were able to see the conditions along the belt line and they were properly recording them in the belt book for maintenance purposes. Had this practice been so alarming, it is inconceivable that the inspector would have allowed Highland to continue its production along this belt line while essentially allowing the examiners to continue making the belt from the crosscuts.

The mandatory standard does not provide a specified distance from which the examination must be made to be considered adequate. Yates admitted as much at the hearing. There is also no legal authority provided by the Secretary to support this contention nor have I found any upon researching the issue. The germane question is whether the manner in which the examination was conducted was reasonable under the circumstances and adequate to observe, note and correct hazards. Based upon the evidence presented here, the answer is that it was. Highland's dangering off the area to avoid putting the examiners in greater peril of making the examinations under bad top was reasonable behavior considering the fact that they were able to make the examinations from the crosscuts.[3] No standard under the Mine Act is designed to jeopardize the safety of the examiners.

I therefore VACATE this citation.

2. Citation No. 8497131

This citation was written by Paul Hargrove on August 3, 2009 for a violation of 30 C.F.R. §75.400. The condition or practice portion of the citation alleges:

> The company #10 roof bolter, located on the #5 unit, mmu-065-0 and mmu-066-0 has an accumulation of oil, fine coal, oil soaked fine coal in the cable reel compartment, on the cable reel, cable reel electrical junction box and the 480 volt a.c. cable. The area measured 38 inches in length and 37 inches in width and is a fine layer of oil and coal. Also the operator boom on both sides of the roof bolter has an accumulation oil (sic), fine coal and oil soaked fine coal, on and around the hydraulic valve bank and control levers.

Ex. G-2.

The violation is designated as a safety hazard reasonably likely to result in an injury causing lost workdays or restricted duty to two persons. It is charged as significant and substantial and the result of moderate negligence. The proposed penalty is $1944.00

[3] That is not to say that dangering off the entry was adequate to protect miners from rib and roof falls as cited in Citation No. 8494791.

The relevant portion of 30 C.F.R. §76.400 provides "loose coal, and other combustible materials shall be cleaned up and not be permitted to accumulate in active workings, or on diesel-powered and electric equipment therein."

Highland admits to the violation but contends that the condition was not likely to cause a serious injury.

S&S

Inspector Hargrove worked for 22 years in the mining industry as an equipment operator, mechanic, belt examiner, electrician and foreman. He became an MSHA inspector in 2006 and received his AR card in March 2007. Highland 9 mine has been one of his regular inspection sites since that time. (Tr. 20-25.) On the date of this inspection, he met with a member of the company's safety department, Jack Willingham, and traveled underground to the No. 5 unit where the MMU-065 and MMU-066 were working. (Tr. 29.) Upon inspection of the roof bolter #10, he wrote this citation.

Hargrove testified that he designated the violation as S&S because he believed that oil and fine coal posed a danger of causing an injury to the two roof bolters. Referring to a diagram he drew of the roof bolting machine, Hargrove described the cable reel compartment as being at the rear of the machine which contains the cable reel from which the 480 AC cable (trailing cable) exits the machine and hooks up to the transformer. (Tr. 36-37, diagram Ex. G-3.) The cable reel maintains the tension in the cable as the bolter moves forwards or backwards to avoid running over the cable. As the cable wraps around the reel, it gets hot enough in some cases to crystalize the cable. In this instance, he found the cable reel had turned in the fine coal so much that it has pulverized it into a powder. (Tr. 40.) He also found oil "dribbled" on the cable behind the bolter and coal and oil soaked coal inside the cable reel compartment. (Tr. 37-38.) There were several heat sources present in this area being the energized cable itself, friction from the cable reel turning in coal and an electrical panel located inside the reel. (Tr. 41.) Hargrove testified that the cable was hot to the touch wearing leather gloves which was an indication that it was a heat source for a fire. (Tr. 41-42.) Hargrove assumed that with the combination of accumulations and heat sources, which he assumed would continue to exist, a fire would be reasonably likely. (Tr. 43.)

In addition to the hazard of a fire, Hargrove testified that he was worried about a "slip, trip or fall." (Id.) There is a fire suppression nozzle located on the cable reel box. (Tr. 38.) The control levers are located on the outer edge of each boom. The operator controls the bolter from a position standing beside the boom at this location. (*Id*.) On and around the valve banks was an accumulation of what Hargrove testified was oil and oil soaked fine coal which caused him concern of an operator losing control of the bolter or a spark or arc falling on the coal. The valve banks become hot during operation over extended use. (Tr. 38-39.)

Upon cross-examination Hargrove confirmed that the concern for a fire or trip and fall was not contained in the notes he took contemporaneously with the inspection. (Tr. 50.) He conceded that the accumulation upon which he was concerned a miner might trip or fall was not on the ground but several

feet above it. (Tr. 51.) The controls the operators used which he felt posed a slipping potential were likewise about one half a foot or more away from the cited accumulation on the boom. (Tr. 64.)

In addressing the fire hazard, questioned by Respondent, he admitted that at a prior deposition he testified that he did not see the cable reel moving in accumulations. He saw, rather, an imprint of the cable in the coal which was not reflected in his notes. (Tr.54.) He went on to say that when the cable was pulled off the reel at his request, he saw the reel turn in coal, but the bolter was not moving. (Tr. 55.) This cable reel, he testified had turned in coal to the point that pulverized the coal. (Tr. 40.) This observation was not contained in his notes or the citation. (Ex. G-1 and G-2.) Hargrove also admitted that he had never seen or heard of a fire starting from a cable reel rotating in combustible material. (Tr. 55-56.) He clarified that the accumulation of fluid was hydraulic fluid, and not oil as he originally stated, and that he was unaware of the flash point for hydraulic fluid. Similarly, he was unaware of the ignition temperature for coal or coal dust. He did not measure the temperature of the bolter in the areas of the accumulations. (Tr. 55-56, 59, 84.)

Highland presented testimony from Travis Little, safety manager, that the MSDS sheet for the Conoco hydraulic fluid used in the bolters is listed as having a "slight" flammability rating. (Tr. 155, Ex. R-3.) Under fire and explosion hazards it is reported that it may burn but will not ignite readily and has a flash point of 365 degrees Fahrenheit and is not considered a fire hazard. (Tr. 155-56, Ex. R-3.)[4] Little also measured the temperature of a roof bolter at 11:00 AM, the same time of day this inspection took place, at different points including the cable, the cable reel compartment, the reel and the valve banks after the machine had been running for several hours. The cable when wound on the reel, was 86 degrees, the hydraulic motor was 173 degrees, the oil filter was 168 degrees, the valve bank was 120 degrees and the cable reel was 73 degrees.[5] (Tr. 156-58.) Little also testified that the presence of coal, coal dust and float coal dust will not cause any part of the machinery to become hotter during operations. (Tr. 166.)

[4] An internet search confirms this information at www.technologylubricants.com/MSDS/conoco.

[5] The Secretary argued in her post-hearing brief that this evidence was irrelevant as it was taken at a later date on a different but identical bolting machine and that Mr. Little was not present when Hargrove made his findings. There is no evidence produced by the Secretary, however, that these temperatures would be appreciably different from the ones on the #10 bolter on the day of the inspection which took place at 10:47 AM. I find these readings to be relevant and probative of the temperatures that would have been found on the #10 bolter had the inspector measured them. It is also immaterial who took the measurements. As the Secretary pointed out during the hearing, the safety department representative who was present at the inspection was deceased at the time of the hearing. Additionally the Secretary intimates that because Little did not bring his notes he took while performing his testing to the hearing, his findings are not credible. Having just taken the measurements prior to trial, it is plausible that Little did not need to refresh his recollection with notes. The Secretary, who has the burden of proof on this issue, offered no evidence to refute Little's testimony.

I find the numerous discrepancies between the inspector's notes, his deposition testimony and his testimony at trial leads me to the conclusion that his recollection of the events at the time of trial was unclear. His notes, which were made contemporaneously with the inspection, are the most reliable of the three.

The evidence presented by Highland was credible and unchallenged. I find that there was no reasonable likelihood that the hydraulic fluid and coal could have caused smoke or burns or been ignited. The Secretary presented no evidence to establish at what temperature the fine coal could be ignited. The hydraulic fluid has a very low potential for ignition and a high flash point at 356 degrees. The temperatures taken on the bolter at all of the locations which Hargrove identified as a potential heat source measured at most 173 degrees, most were considerably lower, after hours of continuous operation. There was no evidence presented by the Secretary to establish that the temperatures would increase with continued use, contrary to Little's opinion that they would not. Additionally, all the electrical components, the trailing cable and the junction box were in good condition (Tr. 56-57.) The fire suppression system located at the reel box was in working order also. (Tr. 61.) There was no evidence of methane present.

Hargrove's assumption that there would be a potential for a fire, assuming the condition would continue to exist for an undetermined period of time, is insufficient to increase the likelihood of an injury producing event in view of the evidence produced by Highland. *Amax Coal Company*, 18 FMSHRC 1355 (Aug. 1996); the passage of time, standing alone, does not increase the likelihood of an injury-producing event required by the third Mathies element.

With respect to the trip and fall hazard, this potential hazard was not one even contemplated by Hargrove when he wrote the citation as evidenced by its omission in his notes and on the written citation. (Ex. G-1 and 2.) It is difficult to imagine how a thin layer of fluid three feet above the ground and six to eight inches below the control levers could be reasonably likely to cause a miner to trip or fall. At best, the Secretary's evidence was if the operator got oil on his gloves, he could slip on the levers and could lose control of the boom which could cause him to be struck by the machine leading to cuts and contusions. (Tr. 62.) I find the chain of events to be far too speculative to conclude that a reasonable likelihood of an injury causing event existed. This violation is not properly designated as S&S and is of moderate gravity.

I recognize that the Commission has held the opinion of the inspector that a violation is S&S is entitled to substantial weight. *Harlan Cumberland Coal Co*., 20 FMSHRC 175, 178-79 (Dec. 1998); *see also Buck Creek Coal Inc. v. MSHA*, 52 F.3d 133, 135-36 (7th Cir. 1995). I have considered the evidence of record carefully in reaching the conclusion that this violation is not S&S.

Negligence

Inspector Hargrove assessed the negligence as moderate. In his notes he documented that the condition had existed for an unknown length of time and it was unknown as to who knew the violation existed, however it was an obvious condition that should have been discovered. (Ex. G-1 pg. 7.) In his

opinion, it had existed since the second shift on the previous day. His explanation for this was that Highland rock dusts on the third shift and when he inspected the equipment on first shift the next day, there was rock dust that had settled on top of machine but not on top of the cited accumulations. (Tr. 58-59.) Hargrove's notes indicate that the company representative questioned whether the presence of rock dust would be a mitigating factor. Hargrove responded that it would not because there was coal dust on top of the rock dust at which the company representative told him to go ahead and write the citation, "it wouldn't break the company." (Ex. G-1 pg. 10.) Highland did not contest the negligence assessed in its *Post-Hearing Memorandum.* I agree with Inspector Hargrove's assessment of moderate negligence.

3. Citation No. 8497132

This citation was also issued by Inspector Hargrove under mandatory standard 30 C.F.R. §75.400 regarding accumulations of combustible materials on the #9 roof bolter. The narrative portion of the citation states the same conditions as found on the #10 bolter except that the accumulations on the operator's deck measured up to 2 ¼ inches deep. The gravity and negligence is identical, and it is assessed as S&S. (Ex. G-4.) The proposed penalty is $1944.00.

Highland concedes the violation but refutes the S&S designation.

S&S

Inspector Hargrove designated this violation as S&S because he felt there was a potential for a fire from a drill hitting stone creating an arc that could fall on the accumulations and set it on fire. (Tr. 69.) Another source of heat would be the valve decks or the operator's deck which has electrical components. (Tr. 73-74.) These hazards were not mentioned in his notes or apparently contemplated by him until trial. (Tr. 88.) The operating temperature of the machine was measured by Little as stated above, the electrical components were in good condition and Hargrove could not give an opinion as to the ignition temperature of the coal or fluid. There was no explanation given by the inspector as to how it was reasonably likely that a spark could remain lit while falling from the drill to the accumulations located some distance below to ignite a substance with a low ignition potential.

Hargrove was also concerned that a miner could trip or slip on the levers on the operator's deck or boom and lose control of the machine, although the fluid was not on the levers themselves. (Tr. 72-74.) Hargrove stated on direct examination that he saw a miner with oil on his boots but later stated that he saw no oil on the floor and he could not be certain from where this spot of oil had come. (Tr. 72, 82.) He also checked the miners' gloves and found no fluid on them. (Tr. 86.) Another hazard was that a miner could get oil on his clothing or gloves which, if saturated in oil, could become flammable. (Tr. 86.) Again, the fluid was called oil but was actually hydraulic fluid which has a very low flammability rating and high flash point. There was no explanation as to how likely it was that a miner's clothing or gloves would become saturated with fluid from the thin layer of fluid found on the miner or how it would be ignited. Hargrove also confirmed that a miner's gloves become wet with oil from inserting bolts in the normal course of the day and that does not seem to raise a concern. (Tr. 86.)

For the same reasons set forth in the preceding citation, I find that an injury causing event, taking into consideration the confluence of existing factors, was not reasonably likely. The violation is not S&S and is of moderate gravity.

Negligence

The condition on this bolter existed since the second production shift the day preceding the inspection and Hargrove believed it would continue to exist until the next maintenance shift that night, as explained previously. It was obvious and located in a place that the foreman and the bolters should have seen it and taken action to eliminate the hazard. Hargrove assigned moderate negligence for that reason although he testified that had he considered this violation cumulatively with the prior one, he would have designated it as high. I am in agreement that the negligence was moderate. I cannot justify adding together two moderate negligence violations that occurred simultaneously to arrive at a sum of high negligence.

4. Citation No. 8497135

The mandatory standard cited in this violation requires mobile and stationary machinery and equipment be maintained in safe operating condition or, otherwise be removed from service. 30 C.F.R. §57.1725(a). Inspector Hargrove found during his inspection on August 4, 2009, that the #17 coal hauler, serial number SV1749, on the #5 unit had two canopy posts that were bent with cracked welds on two of the supports.

This violation was assessed as S&S with a reasonable likelihood of resulting in a lost workday or restricted duty type of injury, and the result of moderate negligence affecting one person. (Ex. G-8.) The proposed penalty is $1026.00.

Highland contests the violation on the grounds that the Secretary has not proven that the canopy in its stated condition was structurally unsound. Highland contends that the welds were not compromised by the cracks, the legs were substantially welded to the base, there were no problems with any of the top welds on any of the posts, and the posts were functioning properly in holding the canopy in place, and they were securely attached to the hauler. Hargrove did nothing to test the strength of the canopy to determine whether it would support the weight of a roof fall or the originally approved weight of 18.000 lbs. in accordance with 30 C.F.R. §75. 1710-1(d)(1).[6] Highland on the opinion in a very similar case in which he found an apparent tilt in the top of a canopy and broken welds did not rendered a shuttle car unsafe under this standard. *Shannopin Mining*, 14 FMSHRC 1178 (July 1992)(ALJ).

The Secretary's evidence consisted of Inspector Hargrove's testimony that he made a visual inspection of the ram car during which he saw a bend in two canopy posts and cracks in two welds. The two front posts were leaning forward towards the operator's station and the welds were on the left front and left back posts that support the canopy. (Tr. 112, 119-21.) He stated that he did not use any method,

[6] 30 C.F.R. §75.1710-1(d)(1) requires that all self-propelled diesel-powered or electrical-powered equipment shall be equipped with substantially constructed canopies or cabs to protect the operator from roof, face and rib falls and face rolls which is certified by a registered engineer to possess the minimum structural capacity to support elastically a dead weight load of 18,000 pounds.

including grabbing or shaking the supports, to test the strength of the supports; he stated he had no way of testing this. (Tr. 119.) He also confirmed that he did not measure the bend in the supports but did measure one crack in the welds at 2" long although he said neither went around the circumference of the support. (Tr. 120-21.) He also confirmed that the supports sit inside support holders which are attached to the frame of the car. These support holders were securely attached to the frame and did not slide. Where the posts sit in the holders, a bolt runs through the one side of the holder through the support post and then through the other side of the holder. These bolts were also intact. (Tr. 123.) The top welds securing the posts to the top of the canopy were intact. (Tr. 120.) Admittedly, not being an engineer, he confirmed that he had no idea what amount of force it would take to collapse the canopy. (Tr. 125.) He also had no idea how the damage he observed had occurred. (Tr. 126.) He opined, however, that if whatever incident caused the damage were to happen again, it would be reasonably likely that the operator would be seriously injured. (Tr. 113.) Hargrove testified that the top of the canopy stands five feet tall and the height of the mine roof is at least six feet where the car operates. (Tr. 123.) His sole reason for determining that this ram car was unsafe was based upon this visual observation that the canopy would be unable to support the weight of a roof or rib fall because it was not in its originally approved condition. (Tr. 113.) Section 75.1710-1 requires the canopy to be in a specified condition when installed. It is required that the condition be maintained in that condition, according to Hargrove. The bend in the legs indicated that it had not been. (Tr. 115-16.)

Travis Little, safety director for Highland, testified that he accompanied Hargrove on this inspection. He described the condition of the posts as one being slightly bent and there being two small cracks in the welds none of which affected the structural integrity of the canopy to withstand a roof or rib fall. (Tr. 169.) He corroborated Hargrove's testimony that the post holders were securely welded to the frame of the car, the bolts holding the posts in the holders were intact and the posts were not loose. (Tr. 169-70.) He also confirmed the height of the mine roof where this equipment operated was 6 ½ to 7 feet high. The damage on the car was mostly from normal wear and tear and an occasional bump against a rib. (Tr. 170-72.)

The correct test in determining whether a condition is unsafe in violation of the cited standard is set forth is *Alabama By-Products*, 4 FMSHRC 2129 (Dec. 1982) which is "whether a reasonably prudent person familiar with the factual circumstances surrounding the alleged hazardous condition, including any fact peculiar to the mining industry, would recognize a hazard warranting corrective action within the purview of the applicable regulation."

In reviewing the factual circumstances surrounding the alleged hazard here, I find they would not lead a reasonably prudent person familiar with those circumstances to conclude that the canopy was unsafe and should have been immediately removed from service. The bend in the leg (or legs) was not identified by Hargrove to be in a place that compromised the integrity of the weld between the top and the legs, the legs to the holders or the holders to the frame. The bolts securely held the legs in the holders near the frame. The welds between the top and the legs were not damaged and the holders were secured to the frame. The supports did not slide and were not loose. No testing, shaking, pushing, pulling etc. was done to determine the amount of impact or weight the canopy, welds or legs could withstand. In fact, the evidence is that the inspector had no idea whether the canopy could withstand a dead weight load of 18,000 lbs. or a roof or rib fall. Evidence to the contrary was introduced by Highland that neither the welds nor the bend had any effect on the structural soundness of the canopy.

Little, while not an engineer, was very familiar with this equipment and the circumstances under which it was used in the mine. His opinion is therefore credible.

I conclude and find that a violation of section 75.1725(a), has not been established and that the contested citation is VACATED.

5. Citation No. 8797136

Inspector Hargrove issued this alleged violation of section 75.512 on August 5, 2009 for the following condition:

> The disconnect for the 5B charger connected to the T 64 transformer is not being maintained in a safe operating condition. The disconnect for the 5-B charger is not latched to the receptacle of the T-64 transformer. The disconnect was removed from service by a company official.

(Ex. G-11.)

The gravity was assessed as S&S, reasonably likely to result in lost workdays or restricted duty-type of injuries to one person and the result of moderate negligence. The proposed penalty is $946.00.

The standard states "[a]ll electrical equipment shall be frequently examined, tested, and properly maintained by a qualified person to assure safe operating conditions. When a potentially dangerous condition is found on electrical equipment, such equipment shall be removed from service until such condition is corrected. A record of such examinations shall be kept and made available to an authorized representative of the Secretary and to the miners in such mine." 30 C.F.R. §75.512.

When Hargrove was in the main east travelway, he observed that the electrical disconnect (the "cathead") for the 5B 480 volt charger was not fully latched to the underside of the 7,200 AC volt transformer. The transformer is the power source for several battery chargers. (Tr. 129-31.)

Highland concedes the violation but contests the S&S and negligence assessments.

S&S

The violation has been established satisfying the first element of Mathies. I find that the violation contributed to a discrete safety hazard of an electrical accident and that if such an accident could occur, the results would be electrical burns to electrocution, satisfying the second and fourth element of *Mathies*.

The salient question in this case concerns the third element of *Mathies*. In the context of continued normal mining conditions, could any confluence of factors have come together, the reasonably likelihood of which would be an injury causing event?

As was explained by the inspector, the purpose of the bottom latch is to ensure the cable is not disconnected while under load. [7] (Tr. 136-37.) The way in which the cathead is secured to the transformer is by first attaching a hook-shaped mechanical latch over a wire at the top of the transformer receptacle, then pressing down on the cathead to plug in the prongs and then securing the bottom latch underneath. (Tr. 177-78.) When it is properly secured, the cathead will be level and parallel to the ground. Hargrove stated that should the cathead be unintentionally pulled while it is still fully energized, it will cause a "big arc with a big splash of fire." (Tr. 136.)

Hargrove testified that he found the top latch of the cathead was properly hooked into the receptacle, and the Miller plug was also secured. However, looking at the cathead he could see that it sat in the receptacle at an angle rather than being parallel, which made it obvious to him that the bottom latch was not properly connected. (Tr. 135.) After examining it from underneath with a mirror to confirm his suspicions, he pulled up on the cathead and it came straight up without unlatching at the bottom. (Tr. 136-37, 144-45.) He believed that the area where the transformer was located was a high traffic area.[8] (Tr. 139-40.) This was a battery charging station so he concluded miners would be in the area several times per shift. (Tr. 140.) Because of the foot traffic in the area, he felt that it would be easy for someone to trip over the cable causing it to disconnect under load which would produce the arcing he explained earlier. However, he did confirm that someone would need to be within a distance of two or three feet of the cathead to be injured by this arcing and splash of fire. (Tr. 137-38, 140, 147.) Hargrove testified that the violation was abated by simply plugging in the cathead correctly. (Tr. 142.)

Highland disagrees with this "arc and fire" scenario based upon several factors. First, they assert that mine personnel are trained to trip the circuit breaker which is located on the transformer no more than one foot away from the receptacle before engaging or disengaging the cathead. This information was provided by Terry Adamson,[9] Highland's maintenance foreman, and conceded by Hargrove as well. (Tr. 179, 144.)

Secondly, Adamson testified that the cathead cannot be knocked out through jostling or kicking due to the way the prongs go into the receptacle even if the bottom latch has not been secured. The only way to physically remove the cathead from the receptacle is to pull it up. (Tr. 179.) Hargrove admitted on cross-examination that he did not know if kicking the cable would cause the cathead to pull out

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[7] Hargrove is a certified electrician with 22 years of mining experience prior to joining MSHA as an inspector. (Tr. 20-21.)

[8] To establish that this was a high traffic area, counsel for the Secretary asked why miners generally congregate around power boxes and Hargrove explained that they are often warm, well-lit and have a phone to the surface. He was not asked, nor did he say, that he was aware that this was the case at Highland. (Tr. 140-41.) By contrast, Hargrove later testified that the only persons ordinarily in the vicinity of this transformer would be the person performing the weekly examination or the battery maintenance man. (Tr. 146.)

[9] Adamson has 20 years of mining experience. He was the maintenance foreman responsible for overseeing permissibility, preventative maintenance and general repairs of underground equipment. (Tr. 175.) He holds state and federal electrical certifications as well as foreman papers. (Tr. 176.)

although he has seen it done but could not say whether it was under the same circumstances as the situation found here. (Tr. 147-48.)

Third, the transformer is not located in a high traffic area. According to Adamson, it is in a fairly remote location and is only accessed by the fire boss making his examinations or when there is a problem requiring maintenance. The electrical cables connected to the transformer lead to car charging stations which are located at a minimum of one cross-cut (70 feet) away and up to 200 feet away from the transformer. While it is common for miners to be in close contact with the car chargers, they do not have a reason to be near the transformer. (Tr. 177, 199-201.)

Lastly, and most significantly, Adamson testified that the arc and fire that Hargrove claimed would occur if the cathead were inadvertently pulled out is not possible due to the presence of a ground monitoring system, referred to as the Miller plug, attached to the cathead. He described this system as having three phases. There are two monitor pins making contact in the center, a ground wire on top and a monitor wire that attaches to the bottom of the plug. As the cathead lifts, the first thing that happens is the bottom wire breaks and knocks out the power at the breaker securing the power source before arcing could occur. The way the prongs are designed to fit into the receptacle, there is no other way to disengage the cathead aside from physically pulling it up causing the bottom sensor wire to trip the power. (Tr. 178-79.) While Adamson has heard of a monitoring system failure, he has never known one to fail to secure the power, only to fail to restore it once it had been tripped. (Tr. 183.)

I find Adamson's testimony to be credible and persuasive based upon his experience as an electrician and his familiarity with Highland's equipment, including its location and the safety monitoring system installed on the cathead. I accept his testimony that the transformer was not in a heavily trafficked location but was in a crosscut at least 70 feet away from the battery charging stations where miners would be in contact with the cable. Hargrove conceded that only the battery maintenance man and the weekly examiner would be in the vicinity of the transformer as a rule. (Tr. 146)

I do not find there was any evidence presented by the Secretary that a miner would trip over the cable or that, if one did, it could disengage the cathead located 70 feet away. Hargrove confirmed that he had no idea if kicking the cable would be able to disengage the cathead connected as it was during this inspection. Adamson testified that it was not possible to do so. There was also no reason given by Hargrove why it would be more likely that a miner would trip over the cable when the bottom latch was not secured as opposed to when it was properly latched. He did not issue a trip and fall citation based upon the location of the cable which indicates to me that he did not believe it posed a tripping hazard. The evidence indicates that the position of the transformer in the crosscut feeding power to the battery charging stations located at least 70 feet and up to 200 feet away was the standard practice at the mine. All of them were done in the identical fashion, according to Adamson. (Tr. 200-01.)

Additionally, it is not reasonably likely that should the cathead become disengaged, a miner standing 70 feet away would be injured by an arc or burst of fire near the transformer. Miners did not congregate in the area three to four foot from the cathead where they would be in the strike zone of this arc and fire identified by Hargrove. While a maintenance person, foreman or a permissibility examiner may be in contact with the transformer on a more regular basis, I also find it unlikely that an injury causing event would occur affecting those individuals. They are trained to secure the power at the circuit breaker before making any contact with the transformer. They would also be looking for such

conditions and making corrections to them. Given the grounding system installed on the cathead, it is also unlikely that an injury causing event would affect anyone near the cathead in the event it was unintentionally dislodged. Adamson credibly described how the bottom sensor would cut the power at the breaker before the cathead could be disengaged from the receptacle. The only way the cathead could be physically removed from the receptacle is by pulling it up which would trigger the circuit to break before the prongs came out of the receptacle or the top unlatched. In contrast to this detailed and explicit testimony by Adamson, the Secretary asked Hargrove: "Now, would the fact that there was a Miller plug there have any effect on whether or not if the cat head was removed while under load – either removed or fell out under load?" The response was, "No, it would not." (Tr. 143.) Assuming the question was meant to be whether he believed the Miller plug would de-energize the cathead if it was removed or fell out, the lack of any explanation from Hargrove as to why it would not leaves me no choice but to find Hargrove's answer unpersuasive in contrast to Adamson's detailed testimony.

I find this violation was not proven to be S&S and modify it accordingly. I find it to be of relatively modest gravity.

Negligence

Hargrove testified that he assigned a moderate level of negligence because he felt an inexperienced person plugged in the cathead; a qualified electrician would have installed it correctly. (Tr. 141.) He stated that the mine foreman and unit bosses would not usually be in this area to observe the condition although the maintenance foreman and the section foreman would be. (Tr. 141.) The examiner or outby foreman would be in the area once per shift. In his opinion, it had existed for one shift. (Ex. G-10.) The citation was abated in very short order by a safety department member plugging it in correctly. (Tr. 142.)

I find that this violation had existed for a relatively short period of time and was unknown to management. The examination required on this transformer is done on a weekly basis. (Tr. 146.) It was last done two days prior to the inspection and no problems or hazards were noted. (Tr. 194-95; Ex. R-7.) It was obvious to Hargrove that an untrained person made this connection. Neither the receptacle nor the cathead was obviously broken and it was not confirmed by Hargrove to be unlatched on the bottom until he inspected it with a mirror trained under the cathead. The misaligned cathead would undoubtedly have been discovered and rectified at the next permissible examination when a mirror would be used to examine the underside of the connection. Hargrove's notes confirm that it could not be established that management was aware the violation existed. (Ex. S- 10, p. 4.) Because there is a foreman who is present during each shift, Highland should have known of the condition during this shift.

I find that Highland's use of the Miller plug, their proper training of all miners to shut off the circuit breaker before handling the cathead and the fact that some untrained person unbeknownst to management, rather than a certified miner, made this connection are sufficiently mitigating to establish a moderate level of negligence with respect to this citation.

6. Citation No. 8497007

On July 29, 2009, Anthony Fazzolare made an inspection of the 3C belt line based upon an anonymous hazard complaint called into MSHA that day for an accumulation of material under the belt line at 3A, 3B, and 3C. (Ex. G-18.) Under "Condition or Practice" he wrote:

> Starting at the outby end of the low framing and extending to the head roller, approximately 45 crosscuts long, there were accumulations of coal and float coal dust under the belt line the accumulations measured approximately 1 inch to 6 inches deep and were black in color. There was also a rib roll at XC 35 and at XC 15 in the walkway, at the take-up there was trash in the form of cardboard and paper piled against the walkway rib and rocks and an oil can in the walkway.

Ex. G-19.

This condition was assessed as S&S, affecting 10 persons, resulting from high negligence and reasonably likely to result in lost workdays or restricted duty. The proposed penalty is $23,229.00.

Highland does not contest the violation but does the high negligence and S&S designation.[10]

S&S

The violation has been conceded by Highland. There is no question that should a belt fire occur, reasonably serious injuries would result. The issue here is whether the Secretary has established the third *Mathies* element. Fazzolare described the accumulations, the possible ignition sources and the events he found reasonably likely to occur as a result. The Secretary maintains that this confluence of factors substantiates a finding that an injury causing event would be reasonably likely to occur should normal mining operations continue. Highland, however, argues that the Secretary has not proven the third element of *Mathies* because there was no potential for ignition under the circumstances presented.

Applying the Enlow Fork factors as cited above, I make the following findings.

1. Accumulations/Combustible Materials

Inspector Fazzolare began his inspection on July 29, 2009 at 0730. (Ex. G-18.) He began by inspecting the pre-shift, on-shift and belt books for reported conditions on the 3A, 3B and 3C belts. (Tr. 371.) He determined based upon his review that a hazardous condition of dirt and spills was recorded since July 23, 2009 until the date of the inspection. Based upon his experience as a miner and MSHA inspector, he interpreted this information to mean that there was float coal dust and coal spills that had existed for six days. (Tr. 371, 376.)

After inspecting the belt books, Fazzolare's notes indicate that while accompanied by several mine representatives, he entered the mine via the slope car and traveled to the bottom of the mine to the 3C belt at the low framing area which is the last inby section of the belt. He testified that Highland employs a unique haulage system that he had never seen before. Attached to the continuous miner is a

[10] Highland incorrectly referred to this citation as No. 8494707 in its Pos-hearing Memorandum.

flexible conveyor train, or FTC, which moves back and forth with the miner which puts the coal onto the low framing where the main belt then carries the coal out of the mine. (Tr. 369-70.) The 3C belt is supported by stands on the mine floor. (Tr. 374.) As he began his inspection at the FTC area, he observed an accumulation of coal measuring one to six inches deep. Although Fazzolare had no independent recollection of the condition, based upon the written citation, he testified that the accumulation was either under the belt line or right next to it. (Tr. 404, 374.) The height of the belt from the floor varies greatly from one inch to as much as twelve inches, although Fazzolare did not state, or record in his notes, the height of the frame where he found dexcribed accumulations. (Tr. 374, Ex. G-18.) He described the material he saw as black and dry. He confirmed on cross-examination that contrary to his written citation, his notes indicated that he did not find any significant amount of float coal dust accumulations. This is significant because only float coal dust in suspension posed an ignition hazard. (Tr. 375-76.)

The next condition that he found hazardous was a rib roll in the walkway at crosscuts 35 and 15. Again, there was no evidence presented as to how far away from the belt this was located. (Tr. 377.) There was also cardboard piled up in the walkway against the ribs within the takeup, or first crosscut or two. (Tr. 378.) There was also a stuck roller found in the takeup areas but Fazzolare confirmed that the roller was not located near the trash and there were no accumulations near the belt. (Tr. 412.)

When asked what distance the accumulations spanned, Fazzolare testified that based upon the wording of his citation, the material covered the entire length of the belt which is 3000 feet in length. (Tr. 374-75.) His notes did not indicate that he found accumulations along the entire belt line, however, nor does his citation specifically say they were continuous as opposed to located at specific isolated locations along the 45 crosscuts. (Ex. G-18.) In fact, on cross-examination, he admitted that there were no accumulations located where he found a stuck roller at the intake area of the belt or at crosscut 37 where he found the belt rubbing on the metal frame. (Tr.405, 412.) Additionally, he stated that he verbally issued this citation shortly after he arrived at the low framing area at 0855 hours for accumulations existing as far as 3000 feet away and then rode in a golf cart down the rest of the 3000 feet of belt line. (Tr. 403.) His notes do not indicate that he took any other measurements of spills or made any specific notations of locations of spills along the way after having issued the verbal citation at the inby end of the belt. (Ex. G-18.)

Highland's second shift belt examiner, Guy Scisney, testified that the areas where accumulations are normally located are at the area called the "last pull" and under the rollers, not along the entire belt line. The "last pull" is the area where the FTC was before it was moved. The belt may be moved as many as two times per day depending upon the rate of production on any given day. (Tr. 470-83.) Casey Courtney, another Highland belt examiner confirmed this statement and added that when the belt is moved, it leaves behind an area where the floor is dug up leaving behind a mixture of clay, coal, dust, mud and water. (Tr. 419.) This conglomeration of material is what is referred to in the belt book as "dirty." (Id.) Foreman Danny Thorpe [11]testified that when a notation in the belt book indicates an area between several crosscuts is "dirty," it does not indicate that the entire distance from the first to the last crosscut mentioned is dirty; it means that the area under the roller at those crosscuts has accumulations. The areas under the rollers and at the head and tail of the belt are the most common areas for

[11] Thorpe has been a miner since 1975. In 1993 he transferred into a management position as a face boss and then became a mine foreman. He worked as a belt mechanic among other jobs as a miner.

accumulations to be found. He also stated that the pull can be moved as often as three times per day when production is up. (Tr. 509-11.)

Taking together that fact that Fazzolare had no independent recollection of the conditions that day, that his notes do not specifically indicate accumulations at every point along the belt line and that this citation is very loosely worded, it has not been established that the accumulations were as extensive as alleged. I also find that the evidence produced by the Secretary establishes that the accumulations were not close to, or in contact with, bottom rollers or the belt.

2. Ignition Sources

Inspector Fazzolare identified as one potential source of ignition the belt being out of alignment with the bottom belt rubbing against the metal frame at crosscut 37. When he measured it from one inch away, the belt was 148 degrees Fahrenheit. A company representative took the temperature on a different type of instrument which registered 180 degrees. (Tr. 379-80.) When the belt was stopped, a 142-foot long strip of cut belt material was removed before it was realigned. It could not be determined, however, where or how the belt was cut. (Tr. 380, 407.) He also acknowledged that there were no accumulations at this location mentioned in his notes. He reasoned that, although he normally would have recorded that fact as it would be an important detail, since the misaligned belt was within the 45 crosscuts, there must have been accumulations at the cited location. (Tr. 405-06.) He confirmed that the belt was made of fire resistant material and Highland had never had a belt fire in its history. (Tr. 405, 368.)

A second ignition source Fazzolare identified was in the take-up area where he found a stuck roller posing a potential source of friction. While acknowledging that the stuck roller was not near or in the accumulations, Fazzolare generalized that it was in "the same area where the trash and the cardboard was, but it wasn't in the take-up. It was in that area." (Tr. 381.) The hazard he identified from these conditions would be a belt fire which he opined was reasonably likely. As he explained: "I'm going to have to assume it's going to continue like that. Continued mining operations, (sic.) the heat is going to continue to build up. The coal accumulations are going to get more, and at some point it will catch fire. (Tr. 383.) He testified that he made these assumptions based upon the belt books and the hot line complaint but then retracted this statement and said it was not based upon the hot line complaint. (Tr. 393-395.) The books, however, reported a hazardous condition since July 23, 2009 for a period of six days. (Tr. 371.)

Fazzolare's explanation of how the misaligned belt and a stuck roller would be reasonably likely to cause an ignition when there was no source of fuel nearby was rather vague. When I asked him to clarify his opinion, the following exchange ensued:

ALJ: What specifically did you identify as the ignition sources along the belt line?

Inspector: The belt rubbing the bottom framing was one of them. The stuck roller was another one.

ALJ: And, if there was an ignition, what specifically would ignite?

Inspector: The coal or coal dust.

ALJ: So the belt does not have to ignite to have a fire in the belt line?

Inspector: Correct. The belt is fire-resistant.

ALJ: Right. And the friction that's caused by this stuck roller, can it cause a spark? Is that how it ignites?

Inspector: It causes the roller to wear down to where there are sharp edges on the roller and it will cut the belt, causing more accumulations.

Inspector: As the belt continues to drag over the roller, it would make that metal real thin and could cause a hole or sharp edges that could cut the belt, causing more spillage, or accumulations.

ALJ: And if when you took the measurement of the temperature it was 180 – between 160 and 180 degrees, and the belt had been running for some period of time already –

ALJ: So assuming it was 180 degrees at that moment, if it kept running in the very same condition, is it likely to become hotter for some reason?
Inspector: Yes.

ALJ: Why?

Inspector: It would continue to cut into that metal framing causing the metal to melt and drip down onto the coal accumulations in the belt line.

(Tr. 414-16.)

MSHA Inspector Coburn testified that in his 22 years of mining experience, he has never heard of a belt frame melting from a belt misalignment. The only time he has ever heard of metal melting was the result of a mine fire, not from a belt ignition. (Tr. 568-70.) Highland's foreman, Danny Thorpe, has been a miner since 1975. He has worked as a belt mechanic, miner operator, and a face boss prior to his current position. He also testified that he has never heard of a belt rubbing to the extent that the metal framing melts. (Tr. 488.)

Fazzolare's description of the dripping melting metal igniting accumulations below the belt is highly speculative.[12] His assumption that a metal frame could melt and drip despite a highly experienced miner and an MSHA inspector never having heard of such an event under similar circumstances is neither reasonable nor likely. He further did not explain how it would be reasonably

[12] The melting point of stainless steel is known to be 2750 degrees Fahrenheit and 2600-2800 degrees for carbon steel. (See www.EngineeringToolBox.com.)

likely under the circumstances found at Highland, taking into consideration continued mining operations, that these potential ignition sources would ignite a relatively thin layer of accumulations located somewhere along the belt line. There was no evidence presented by the Secretary as to how close the accumulations were to these heat sources. Fazzolare could only testify that his notes indicated they were in the general vicinity but not in contact with the belt or the rollers. Applying rather circular logic, he assumed accumulations were near the belt because it was within the 45 crosscuts of the belt line and his citation stated that there were accumulations along the 45 crosscut-long belt line. It is not clear from his notes or testimony at what point within the 45 crosscuts the material was seen. His notes indicate that he measured the accumulations at the low framing area where he began his inspection and issued this citation. This area is notably not one in which he identified an ignition source. He then continued outby to crosscut 37 and the take-up area afterwards but there is no mention of any other measurements or specific descriptions of materials by the belt except for trash against the ribs in the walkway at the take-up area near crosscut two. The only clearly established fact is that neither of the ignition sources he identified – the misaligned belt or the stuck bottom roller - was in contact with any accumulations of combustible material. Even assuming continued mining conditions, there was no evidence presented other than the unlikely melting and dripping metal scenario to explain how the accumulations would be reasonably likely to ignite.

3. Methane

The Secretary presented no evidence with respect to this citation that there was any methane present in the 3C belt line.

4. Equipment

There was no equipment, other than the belt, in the area.

In summation, while it is admitted that there were accumulations present at various points along the 3C belt line, they were relatively thin and not in contact with the two identified ignition sources. The only point at which the accumulations were measured was approximately 36 and 40 crosscuts away, respectively, from the two identified possible ignition sources. There was no float coal dust or methane in suspension or electrical equipment in the area. While an inspector's opinion on whether a violation is S&S is entitled to substantial deference and weight, Fazzolare's opinion that he if he were to assume the conditions were to continue, the belt would catch on fire is not supported by the circumstances surrounding this violation. The passage of time alone cannot satisfy the requirements of either the substantial evidence test or the third *Mathies* element. (*Amax Coal Company, Supra*.)

Considering all the *Enlow Fork* factors, this violation is not S&S. The Secretary has not proven by a preponderance of the evidence considering the particular facts as they existed at Highland, surrounding this violation, that there was a reasonable likelihood of a belt fire or ignition.

This finding is consistent with other cases decided by the Commission and its Administrative Law Judges. *See Cumberland Resources, LP*, 31 FMSHRC 137 (Jan. 2009)(ALJ)(accumulations were not particularly extensive, very little methane was present with only one location where the belt was

rubbing on the stand not in contact with the accumulations, held not S&S); *Solid Energy Mining Co.*, 30 FMSHRC 823 (July 2008)(ALJ) (accumulations not S&S where there was no loose coal, no ignition sources in the vicinity of the dust and no methane in the area although the mine liberated 250,000 cubic feet of methane in a 24-hour period); *Amax Coal Co*., 19 FMSHRC 846 (May 1997)(S&S finding affirmed where accumulations were 6 inches to 3 feet deep, accumulations were covered with float coal dust and the belt was running for 15 feet on dry, packed coal and loose coal).

Negligence

The high negligence assessment was predicated upon several factors. First, Fazzolare believed the condition had existed for six days according to the belt books and he assumed it would have continued absent his intervention. Second, Highland had done very little in the way of cleaning the belt to mitigate the condition and, third, management was well aware of the condition as evidenced by the foreman's signature in the belt books. Highland disagrees with this position and maintains that the accumulations did not span the entire 3000 feet of the belt entry, as Fazzolare claimed, and they engaged in daily cleaning of the areas where accumulations were normally deposited – at the head and the "last pull." They advance the position that the negligence should be low or moderate at most because their cleaning of the troublesome areas is a mitigating factor that was not adequately considered.

Fazzolare's "assumption" that the conditions he observed would continue because he saw the same "hazardous" condition noted in the belt book for six days is not entirely supported by the evidence. To begin with, Fazzolare stated he made this inspection because MSHA had received a hot line complaint about accumulations on the 3A, 3B and 3C belt lines. He offered nothing further to clarify what information he had regarding only the 3C belt line. He was asked the question at trial "according to your review, what did the belt books show about the conditions of the 3A, 3B and 3C belts?" (Emphasis added.) He responded by saying "they had been entered into the books as a hazardous condition since July 23rd of 2009." The conditions described were "dirty and spills." (Tr. 371.) Again, there was no evidence presented that any one hazardous condition reported for six days was on the 3C belt line as opposed to being on the A and/or B belt line. Fazzolare never identified by page number or specific entry in the belt book which conditions were noted for the 3C belt consecutively for six days that were left uncorrected. He did not copy the pages from the belt book or record it in his notes. (Tr. 385-86.) The Secretary in her post-hearing brief provides no further specificity with regard to which hazards posted in the belt books she alleges were not addressed for six days prior to the inspection. (See Sec. Post-Hearing Brief at pg. 18.) In attempting to clarify exactly what uncorrected condition Fazzolare saw in the belt book between July 23 and 29, the following exchange occurred between the Respondent's counsel and the inspector:

Q. Now, you believe this condition existed from July 23 through July 29 and that's the basis for the high negligence finding, correct:

A. Which condition are you talking about?

Q. Well, the accumulation, I guess, the violation 8497007.

A. Yes. That's what I have in my notes.

Q. But when you testified for Mr. Morholt here and you talked about the condition, that's what you're talking about, what you allege was accumulation in that area 3C from July 23rd through July 27th, right?

A. Yes.

Q. All right. And it's your belief for the basis of this high negligence finding that the accumulation ran, what was it, 45 breaks?

A. Yes.

Q. But that's your contention that this "condition," being 1 to 6 inches of accumulation, were for 45 breaks from July 23 until July 29; is that right?

A. That's what I have in my notes, yes.

Q. But, it's your belief that the belt books are going to corroborate that there was accumulation through that entire area, the 45 breaks, from July 23 to July 29?

A. I can go by what I have in my notes.

A. I have in my notes that the accumulations were there, and in the belt books that the 3C belt was dirty and had coal spills on it, starting from July 23rd.

(Tr. 393-94.)

The Secretary attempted to supplement this vague and evasive testimony through Highland's witness, Danny Thorpe. Thorpe stated on cross-examination that there was a notation in the belt book from July 25th through the 29th that indicated a spill at the header and under the rollers at crosscuts 5 to 12 and no corrective action was noted. (Ex. R-23, Tr. 513.) This condition, however, was recorded on later dates from those Fazzolare testified he relied upon in reaching his conclusions. It also indicated specific isolated locations under the rollers, not along the entire span of the entry from one crosscut to another, where Scisney testified accumulations would normally be found. (Tr. 374-75.) It cannot be concluded that the entire 3000 feet (45 crosscuts) was recorded in the belt book as being dirty from Thorpe's testimony. It is also difficult to extrapolate from this evidence that Highland was inattentive to hazardous conditions and would have allowed this cited condition to exist sufficiently long for a belt to melt had Fazzolare not intervened. The testimony from Highland's witness does not satisfy the Secretary's burden of proving the assertions made by Fazzolare that accumulations existed along the 3C belt.

What is important to note is the fact that the belt book for the 3C belt on July 23rd documents a spill at the head and last pull areas. The second shift entry for that day indicates that those two areas were cleaned. The following day, the same condition was reported on the day shift and reported as cleaned on the first shift. On the 24th the last pull was listed as dirty and cleaned on the 2nd shift.[13] The corrections listed from July 25th through July 29th for the 3C belt include cleaning the header and tail and last pull, cleaning from crosscut 13 through 15, header, low framing, and replacing a roller. (Ex. R-23.) In short, the belt examiners noted spills and dirty areas found along the belt during every examination and recorded corrections on the maintenance shift as well as on other shifts. The entries going back as far as July 13, 2009 establish that the header, tail and "last pull" areas were those most often recorded as being dirty and in need of clean up as confirmed by Guy Scisney, Casey Courtney and Thorpe. They are noted to have been cleaned almost daily. A roller was noted as having been replaced just prior to the inspection, dusting was done frequently, and spills under rollers were cleaned as well. (Ex. R-23.)

As Scisney testified when he examines the belt line, he looks for hazardous conditions such as poor roof conditions and spillage and identifies areas in need of rock dusting. (Tr. 467.) He annotates in the belt book rollers that need replacing, dirty belts, the condition of the roof, floor and ribs as well as any slip and fall hazards. (Tr. 467-68.) If he finds a condition that poses an immediate safety hazard, he will correct it himself on the spot. (Tr. 468.) Casey and Thorpe testified that the "last pull" area is not only different every day but there can be as many as two or three moves in one day when production is up. (Tr. 469-72, 498-99.) The header and the last pull areas are where accumulations are most commonly found. Both areas are cleaned with regularity as is the remainder of the belt. (Tr. 500-07.) Fazzolare stated on cross-examination that he would expect build-up to occur where the last pull had been located as it advances. (Tr. 397.) He found it "surprising" that they don't clean it up. (*id*.) A careful examination of the belt books during the cited period of time does reveal, however, that Highland did clean the area of the last pull daily. The fact that it is noted as being in need of cleaning daily is not indicative of a condition that was being ignored for days at a time.

The Secretary has attempted to establish that the entire belt line was dirty and therefore the only cleanup done by Highland was concentrated on certain areas, which was insufficient. As discussed above, I find the accumulations were not sufficiently proven to exist across the entire belt line. It was neither recorded in the belt book nor in the inspector's notes. Nor was it proven by a preponderance of the evidence that there were any notations in the belt examination books of any hazardous condition that has existed without amelioration from July 23rd to July 29th in the 3C belt line. I also find that Highland did engage in fairly comprehensive cleaning of the belt line on a regular basis in mitigation of the high negligence assessment. There was an area, however, between crosscuts 5 and 12 where accumulations had been noted in the belt book under the rollers that had not been attended to in a timely manner. The accumulations Fazzolare did see during his inspection most likely had been present for at least one shift

[13] The Secretary took the position that all corrective action was done on the 3rd shift only. Therefore, if there was not a "corrections" page from the third shift, the condition noted on the day shifts was not cleaned. The belt book, however, indicates that cleaning was performed on the day shifts as well.

and Highland must have known of them and failed to clean them. I find the credible testimony of Highland's witnesses, taken together with an examination of the belt book indicates that the high negligence assessment is inappropriate. I find the level of negligence to be properly assessed as moderate.

7. Citation No. 8497008

This citation was written in conjunction with citations 8497007 and 8497009 during the inspection of the 3C belt line on July 29, 2009. The condition cites was the misaligned belt located at crosscut 37. The narrative section of the citation states:

> The "3C" beltline was out of alignment and the bottom roller was rubbing the framing at XC 37. A temperature reading taken with a hand held laser thermometer, with a D/S ratio of 1:1 and used according to manufactures (sic.) recommendations, recorded a reading of 148 degrees Farinheit (sic.) within 30 seconds after the belt started up, approximately 142 feet of belt had been cut from the belt due to this being out of alignment.

(Ex. G-20.)

This violation, similar to the preceding one, is marked as S&S with injuries resulting in lost workdays or restricted duty being reasonably likely, high negligence affecting 10 persons on the unit. The proposed penalty is $10,437.

The cited standard requires that conveyor belts be properly aligned to prevent the moving belt from rubbing against the structure or components. 30 C.F.R. §75.1731(b).

Highland contests the gravity and negligence assessment of this violation. [14]

S&S

The facts surrounding this violation are set forth in the discussion of the preceding violation. Fazzolare measured the temperature of the belt at 148 degrees Fahrenheit while a company representative measured it at a slightly higher one. A sizeable section of the belt had been cut away from the belt. (Tr. 380.) The bottom belt was rubbing the metal framing causing a frictional heat source. (Tr. 386.) In the inspector's opinion, if the belt continued to run while out of alignment, it could cut the belt and spill coal. It would become "worse" if left uncorrected causing a belt fire resulting in smoke inhalation injuries to the 10 persons on the unit. (Tr. 387-88.) The condition was abated within five minutes by realigning the belt. (Tr. 387.)

The Secretary's position is that the three violations issued by Fazzolare for the accumulations, misaligned belt and stuck roller, must be viewed in conjunction with one another in order to conclude that a belt fire was reasonably likely to occur. She makes the same argument for this violation as for the accumulation violation – based upon Fazzolare's assessment that accumulations had been allowed to

[14] Highland incorrectly refers to this citation in its brief as number 8494708.

exist along the entire belt line for six days and would be allowed to continue to exist in the presence of ignition sources. (Sec's Post-Hearing Brief.)

Using the same analysis of the *Enlow Fork* factors as set forth in greater detail in the discussion above, I do not find this violation to be S&S. Accumulations were not as extensive as Fazzolare stated. None of the accumulations were in contact with any of the potential heat sources; there was no evidence of methane present or faulty equipment. An ignition was not reasonably likely to occur.

Negligence

The violation was assessed as high because the mine had been cited eleven previous times under the same standard since March 19, 2009. The condition was found to have existed for more than one shift since the previous afternoon. (Tr. 388-89.) Fazzolare conceded, however, that the misalignment could have occurred after the belt examination had been done. (Tr. 411.) He granted that there was nothing in the belt books to put management on notice that this belt was misaligned before the inspection took place. (Tr. 410.) With respect to the number of previous violations under this commonly cited standard, Fazzolare confirmed that although the standard had been cited eleven times since March 2009, these were the only such violations in the preceding two years. He had no specific knowledge of the circumstances under which the previously issued citations occurred as he gained the information from the "history" link on the MSHA web page. (Tr. 410-11.)

This inspection began at 0730 on the morning of July 29, 2009. There is no evidence that the on-shift belt examination for that day had been conducted yet. It is entirely possible under the facts as presented that the misalignment occurred after the previous examination and would have been discovered during the next examination on the morning shift. In the meantime, there was no evidence that management knew of the condition before it was cited. It existed for a relatively short period of time. The twelve prior violations of a commonly cited standard in twenty-four months against a large mine with belts over one half mile each in length is insufficient evidence to establish management was on notice of a need for greater compliance. I therefore find the negligence is properly assessed as low.

8. Citation No. 8497009

This is the last of the trilogy of citations written by Inspector Fazzolare while inspecting the belt line. It was cited when he found a stuck roller at the take-up area in crosscut 2. The cited mandatory standard requires that damaged rollers or other belt components which pose a fire hazard be immediately repaired or replaced. All other damaged rollers, or components must also be repaired or replace. 30 C.F.R. §75.1731(a).

The citation is designated as S&S with a reasonable likelihood of an injury resulting in lost workdays or restricted duty, affecting 10 persons and the result of moderate negligence. The proposed penalty is $3,143. (Ex. G-21.)

There is no disagreement that this mandatory standard was violated. Highland again challenges the S&S and moderate negligence assessments.[15]

[15] Highland incorrectly refers to this citation in its brief as No. 849709.

S&S

The stuck roller was in the take-up area where the inspector found trash against the rib. The gravity is the same as the previous two citations for the same reasons. Fazzolare confirmed neither the trash in the walkway nor the coal accumulations were directly next to or under this roller. Based upon my discussion of the *Enlow Fork* factors above, I find this violation was not. S&S.

Negligence

Fazzolare assessed the negligence as moderate because "the operator knew or should have known that there was (sic.) mitigating circumstances." (Tr. 392.) He found it was entirely possible that the stuck roller was overlooked during the examination of the belt. (*id*.) The condition was thought to have existed for at least one shift due to the wear on the roller. The inspector stated when the belt is dragging it makes a shiny spot on the belt which was the basis for his opinion. (Tr. 392.) Highland presented evidence through Thorpe that while a roller was replaced in this area just prior to the inspection, there was nothing noted in the belt books about another stuck roller in the take-up area putting management on notice of the condition. (Tr. 497.)

Because the inspector was able to articulate a basis for his belief that the condition had existed for at least one shift, I find that Highland should have discovered the condition. However, as discussed above, I also find Highland did replace a roller in the same area just prior to the inspection and they did engage in a fairly comprehensive cleaning program. I find the negligence is moderate.

9. Citation No. 8494460

This citation was written by Inspector Archie Coburn on July 21, 2009. The cited condition was:

> The approved ventilation, methane and dust control plan in affect at this time was not being complied with on the No. 3 (063-0) MMU. The air lock across the belt line was not being maintained. The air lock was not fully across the entry. The air lock was 5 feet 4 inches off of the right rib allowing air to flow out by along the belt entry.

Ex. G-23.

Coburn designated the violation as S&S, reasonably likely to result in lost workdays or restricted duty to four persons and the result of moderate negligence. The Secretary seeks a penalty of $1944.00.

The mandatory standard provides that the mine shall develop a ventilation plan that is approved by the district manager that controls methane and respirable dust suitable to the conditions and mining system at the mine. 30 C.F.R. §75.370(a)(1). Highland's ventilation plan provides that air lock curtains be installed across the entry and fastened to the roof and ribs. (Ex. G-25 pg 4.)

Highland does not argue with the existence of the violation, but contests the S&S designation and the level of negligence. I find the evidence presented established the violation of the mine's ventilation plan.

S&S

Coburn had been employed as a MSHA inspector for over 22 years at the time of this inspection. Prior to his current position, he had worked in the mines as an equipment operator, unit mechanic, and a face boss. He holds a foreman's and electrician's certification. (Tr. 521-23.)

On the day in question, Coburn was at Highland to conduct an EO2 spot inspection required every 10 days as the mine liberates over 500,000 cubic feet of methane in a 24 hour period. (Tr. 528.) While accompanied by a Highland representative, and a miner's representative, he traveled towards the number 3 unit when he observed that an air lock curtain in the number 5 belt entry was not properly installed. (Tr. 531.) The right side of the curtain was folded back along the right rib leaving a gap of 5'4" between the rib and the end of the curtain. (Tr. 532.) The purpose of the air lock which runs across the belt entry is to prevent the belt air from reaching the face. When testing the air with a smoke tube for a distance of ten crosscuts, Coburn determined that the air was, in fact, moving outby. (Tr. 533-34.) However, Highland's ventilation plan provides that the air is to move inby to a regulator which then sweeps the air into the return.

Coburn determined that this violation was significant and substantial because if the curtain remained as it was with continued mining operations, should a fire occur in the belt entry, the smoke would be carried outby. The entry serves as the secondary escapeway for the unit working at the face. Should the miners attempt to evacuate the mine in the event of a fire, using the belt entry, they would not be aware of the hazard until they were overcome by smoke. In this scenario, Coburn felt it reasonably likely that miners would suffer injuries from smoke inhalation and burns causing lost workdays and restricted duty. (Tr. 541-43.)

Highland proposes that the scenario described by Coburn is highly unlikely for two reasons. First, the miners are trained to use the primary escape intake evacuation route in the event of an emergency. Second, there was no likelihood of a fire. Coburn has been inspecting the 9 Mine since it was put into production and in all of that time he has never gotten a reading for methane in the belt entry and there were no other potential ignition sources present such as accumulations, misaligned belt sections, stuck rollers or equipment violations. He acknowledged that although the mine is on a methane liberation spot inspection, the methane is not expected to be present in the belt entry. (Tr. 549-51; 560-61.)

I am not persuaded by Highland's first point of contention. It is not at all unlikely that miners would panic in the face of a fire and travel the secondary evacuation route rather than the primary. Furthermore, the rescue breathers were located near the belt entry which would make the use of the belt entry even more likely in the event of an emergency. However, with respect to their second point, the same analysis must be applied in the discussion of Citation No. 8497007 above.

In the evaluation of whether a fire, explosion or ignition, is likely a 'confluence of factors' must be present based on the particular facts surrounding the violation such as the presence of accumulations, methane, equipment violations and other ignition sources. *Texasgulf, Inc., Supra; Utah Power & Light Co*., *Supra; Texasgulf, Supra; and Enlow Fork Mining Co., Supra.* Coburn readily admitted that there were none of these factors present in the belt entry and there was no testimony presented by the Secretary from which to draw the conclusion that there would be assuming continued normal mining

conditions. Under these circumstances, I find the Secretary has not established that this violation was properly designated as S&S.

Negligence

The existence of this condition was attributed to a moderate degree of negligence on the part of mine management. It was an obvious condition and was estimated to have existed for approximately 1 ½ hours from the time the belt line was pre-shifted until Coburn arrived on the scene. (Tr. 544.) In Coburn's opinion, the pre-shift examiner should have seen the condition and reported it in the examination book. The fire boss and the section foreman, both responsible for monitoring the conditions along the entries, should have seen it. The FTC boss would have been able to see the curtain if he had looked back towards the belt before he began production as well. (Tr. 545.) On cross-examination, Coburn stated that the FTC boss was located near the face about 700 feet from the air lock when he made the inspection and the fire boss had made his pre-shift inspection hours before the inspection took place. It was not possible to determine exactly how long the curtain had been in the condition in which he found it; it could have happened minutes before his arrival. (Tr. 556-58.)

Highland's fire boss, Steven Orange, testified that on the day of the inspection, he examined the belt entry at 4 am and found no discrepancies with the curtain. The pre-shift examination book confirms no hazards were noted on the belt entry in question although there were notations pertaining to other areas needing attention. Additionally, his recorded air readings would have indicated a variance of 10% or more between the intake and return in the belt entry had the air lock been misaligned. His recordings do not indicate any variance to suggest this at the time he made his examination. (Tr. 623-29; Ex. R-27.)

As Coburn testified, there was no one in close proximity to the curtain when he cited it. He did not observe any equipment moving through the area either. It appears that the curtain had more than likely been in the same condition for more than a few minutes before the inspector arrived. It was an obvious condition and should have been discovered by the section foreman or the fire boss. I find this is a moderately serious violation. However, the still relatively short length of time the condition existed after production had started that morning is a mitigating factor and I find moderate negligence is appropriate.

10. Citation No. 8494461

This violation was written in conjunction with the previous one based upon the same set of facts and cited under the same mandatory standard. It is distinguished from the previous citation, according to Coburn, because it violates a different section of the mine ventilation plan. Highland's approved plan specified that belt entry air was to travel inby until it reaches the air lock curtain and then through a regulator which directs it into the return. Instead, the air was traveling outby. (Tr. 535, 538-39; Ex. G-25 pgs. 27-30.) Prior to determining that the air was actually traveling outby, Coburn assessed the danger as belt air, diesel fumes, carbon monoxide and the like reaching the active workings at the face. (Tr. 540-41.) With the air traveling in the wrong direction, as he discovered, his concerns were the same as they were for the previous citation – miners evacuating through the belt entry in case of a fire without being able to detect smoke coming from the entry. (Tr. 541.) He assigned the same degree of gravity and negligence to the violation as well. (Ex. G-24.)

Highland objects to the issuance of this citation as being duplicative with the previously issued citation. They rely on *Secretary v. Western Fuels-Utah, Inc*., 19 FMSHRC 994 (June 1997) and *Secretary v. Cyprus Tonopah Mining Corp.*, 15 FMSHRC 367 (March 1993) in support of their position that this citation should be vacated. (Highland's Post-Hearing Memorandum.)

In *Western Fuels-Utah* the Commission affirmed the ALJ's findings that two citations were duplicative. The Commission reasoned that citations are not duplicative so long as the cited standards imposed separate and distinct duties upon the operator. Of the two cited standards, however, one broadly required the installation of the dry chemical fire suppression system while the other specified the nozzle and reservoir components by which to accomplish it. The overall duty was to maintain an effective fire suppression system which was a single duty imposed upon the operator. The Commission in *Cyprus Tonopath,* by contrast, found the two standards involved imposed separate and distinct duties on the operator and were not duplicative. One standard imposed the duty to employ a method of mining to maintain ground stability while the other imposed a duty to correct existing hazardous ground conditions and prevent miners from working in such areas until corrected.

The Secretary counters Highland's position by stating that had the air been traveling inby towards the units in accordance with their ventilation plan, the air would have traveled through the gap in the improperly installed curtain and gone to the face. This would have constituted a separate and distinct violation of the use of belt air to ventilate the face. (Sec's Post-Hearing Brief at 29.) However, the inspector did not testify that the air would certainly have reached the face; he said: "I would check my smoke tube. I would trace the smoke. Once it got up to --if it wasn't actually being dumped into the last open crosscut, I would have issued a citation using belt air at the face." (Tr. 572.)

The issue is not whether another violation could have been cited under a different standard if the air was traveling in a different direction and the belt air had reached the face because of the gap in the air lock. The issue is whether the two citations issued and now before me are duplicative. The duty imposed upon the operator in both citations before me was to comply with the ventilation plan approved by the district manager. The purpose of the plan is to control methane and respirable dust. The air lock curtain is the approved means by which Highland controlled methane, dust and noxious fumes taking them away from the working unit at the face. It does this by channeling the air flow inby through the regulator and out the return. When the curtain was improperly hung, it created a situation where the air was flowing outby instead of inby. When the curtain was properly attached to the rib, the air flow was restored in the proper direction abating both citations. (Tr. 549-50.) Unlike in *Western Fuels-Utah* and *Cyprus Tonopath*, the two citations in the instant case were issued under the same provision of the same standard, the narrative portion of both citations identify the improperly hung air lock as the basis for the violation and both were abated by the single action of attaching the curtain to the rib. This presents far less room for a finding that the citations are not duplicative. I cannot conclude that two separate and distinct duties were violated in this case. It is apparent the Secretary was also hard pressed to do so in her proposing a hypothetical scenario in which a separate and distinct violation imposing a different duty upon the operator might have occurred as the basis for their position.

I therefore vacate this citation.

11. Citation No. 4565952

This citation was written by Carl Baker, an MSHA inspector since April 2006. Prior to his MSHA experience, Baker was a miner for 16 years serving in positions as an equipment operator, equipment foreman, electrician and repairman.[16](Baker Dep. 14-15.) He received ventilation training at the Mine Academy and gained practical experience during his time as a foreman. (Baker Dep. 16.) In April 2008, he became a health specialist which included running respirable dust surveys. He has been a team member of the "National Dust Emphasis Team" since January 2009, focusing on inspecting mines with dust issues. He was acting in that capacity on July 14, 2009 when he inspected Highland 9 Mine. (Baker Dep. 12-13.) He wrote the following citation in violation of 30 C.F.R. §75.370(a)(1) pertaining to the mine's ventilation plan:

> The approved ventilation plan is not being followed on the 061 MMU #1 unit. While extracting coal out of the #1 unit, #5 entry, with the scrubber operating, 4055 CFM was taken and recorded by an approved MSHA Anemometer at the inby end of the brattice line area (blowing face ventilation) A minimum of 6500 CFM is required by the plan to be delivered to the inby end of the brattice line curtain with the scrubber operating. This condition exposes miner to hazards related to breathing respirable dust such as lung diseases.

The citation was designated as S&S with a reasonably likelihood of an injury of a permanently disabling nature to one person with a moderate degree of negligence. (Ex. G-27.) The Secretary seeks a penalty of $1944.00.

Baker established that a violation had occurred and that it contributed to a discrete safety hazard through his testimony. When he went to the face of the number 5 unit, he found a curtain flapping back and forth. It lead him to the conclusion that there was a problem with the air flow in the entry. Upon testing with an anemometer, he discovered that there was only 4055 cubic feet of air per minute flowing over the scrubber on the continuous miner while it was in operation. The ventilation plan required a minimum of 6500 cfm. (Tr. 19-20, 34.)

Highland concedes the violation.

S&S

Baker explained that the scrubber on the continuous mining machine is designed to pull respirable dust into the screen removing it from the air and thus limiting miners' exposure to it. He believed from his training and information published by NIOSH that when there is an insufficient amount of air flowing over the scrubber, it does not operate properly, and dust will be recirculated in the air where a miner is working. (Tr. 20, 42.) The hauler operator in particular would be exposed to the dust if the scrubber is not doing its job. Although the condition had existed for about ten minutes when he found it, he felt it likely that it would continue to exist until the cut was completed in about another

[16] The parties submitted MSHA inspector Baker's testimony by way of a deposition taken on January 11, 2011 which has been marked as Ex. G-28 and will be referred to as "Baker Dep.(page number)."

twenty minutes. (Tr. 43.) In his opinion, the violation was S&S because it was reasonably likely that with this continued exposure to respirable dust, a miner would develop a lung disease such as black lung. (Baker Dep. 42-45.)

Highland introduced evidence that during an eight hour period on the day of the inspection, Baker had the miner operator wear a respirable dust pump. The pump is designed to capture the same air the miners are exposed to during their work shift. The sample from the pump is then sent to the MSHA laboratory where it is analyzed for the concentration of respirable dust contained therein. Highland's face boss, Carroll Browning, and Randy Duncan from Highland's safety department both testified that the air samples taken on July 21, 2009 in the cited unit where below the 2.2mg/mg3 exposure limit set by MSHA according to the results published on the MSHA web site. (Tr. 588-90; 615.) It is their position, therefore, that this violation should not have been S&S as there was no reasonable likelihood of a health risk to the miners. (Res. Post-Hearing Memo.)

The Secretary countered with the argument that the samples' being within acceptable standards is irrelevant since this was not a violation of the respirable dust standard. (Sec's Post-Hearing Brief.) I find to the contrary, however. The level of dust found in the air is relevant to the issue of whether an injury or illness was reasonably likely to occur from this violation. Inspector Baker found the health risk involved in this violation was the contraction of lung disease from inhalation of respirable dust. He also opined that any amount of dust going into someone's lungs is serious. This was the basis of his opinion that the violation was S&S. (Baker Dep. 42-45.)

The Commission has addressed this very issue of designating violations involving respirable dust as S&S in *Consolidation Coal Co*., 8 FMSHRC 890 (June 1986) *aff'd* 824 F.2d. 1071 (D.C. Cir. 1987). The violation charged in *Consolidation* fell under the respirable dust standard, unlike here. However, the discussion in the decision regarding the legislative history of the respirable dust standard and the likelihood of coal miner's pneumoconiosis ("CWP") resulting from exposure to varying levels of respirable dust is applicable to the S&S analysis here. The Commission stated that the essence of the Mine Act is to protect miners against airborne substances. Respirable dust poses a unique situation and a health issue fundamental to the purpose of the Act. (Id. at 896.) Violations of the mandatory dust standard are presumed to be significant and substantial as a measure by which to effectuate Congress' intent to prevent CWP regardless of the length of exposure time. This is especially true because medical science is not advanced enough to predict one individual's susceptibility to CWP or to pinpoint when overexposure occurs and CWP is contracted. Therefore, the standard protects against incremental health hazards and each exposure is presumed to be significant and substantial. (Id. at 899-900.) However, Congress also recognized that in a dust environment below approximately 2.2mg/mg3 there would be virtually no probability of a miner contracting CWP even after as much as 35 years of exposure. (citing *H.Rep.No 563, reprinted in 1969 Legis. Hist. 1048; 1969 Legis. Hist. 1197-98*.) Recognizing a level at which respirable dust does not pose a health risk, the standard set 2.2mg/mg3 as the limit above which overexposure is presumed to be S&S. Even at that level, the presumption of S&S is rebuttable by a showing by the operator that miners were not exposed to excessive concentrations.

Analogous to the facts here, the operator presented evidence that the concentration of respirable dust did not register at the critical level of 2.2mg/mg3. Therefore even prolonged exposure in excess of the 30 minutes Baker contemplated would not have had a reasonable likelihood of resulting in CWP as he believed. There were no other facts or theories presented by the Secretary upon which to find this

violation posed a significant and substantial health risk to a miner. She has failed to prove by a preponderance of the evidence that the violation was significant and substantial.

Negligence

Baker determined that the curtain was not in its proper position due to a piece of equipment having been trammed through it. It had run over the bottom of the curtain lifting it up off the mine floor causing it to flutter. The face boss had admitted as much to him on the scene. (Baker Dep. 35, 38.) The condition had existed for approximately ten minutes and was abated when the curtain was reattached to the floor. (Baker Dep. 38-39.) Baker felt if he had not discovered the condition, it would have continued to exist until mining was completed approximately 20 minutes later. (Baker Dep. 43.) The section foreman is ultimately responsible for the section and therefore he listed the negligence as moderate. (Baker Dep. 45-46.) He found that the violation was likely inadvertent and that Highland trains its miners to use an anemometer when conducting its examinations. (Baker Dep. 42, 45.)

Highland's face boss, Browning, testified that he took an anemometer reading before cutting began and he obtained a reading of over 5000 cfm on the scrubber when it was not running. (Tr. 582.) It was his conclusion that a hauler had torn down the tail of the curtain when moving coal from the face area. (Tr. 583, 586.) After the condition was brought to his attention, he checked the other entries and found another curtain had been torn down and had it rehung. (Tr. 593.) Browning testified that as soon as the hauler tore down the curtain, it was hung back up. (Tr. 598.) (That clearly was not the case as Baker found it ten minutes later and no one was in the process of hanging it back up.)

The face boss and the section foreman were not aware of this condition although they should have been. It existed for a relatively short period of time but it appears from Browning's comments that he was aware of the hauler tramming through the curtain and neither he nor the section foreman were ensuring the curtains were not compromised in so doing. The curtain serves an important function in the ventilation of the mine by providing proper ventilation to the face and maintaining the proper volume of air to the scrubber to protect the miners working behind it. I find any violation of the ventilation plan to be serious. In mitigation of the violation I have considered the fact that the condition had existed and would have continued to exist for a short period of time, it was inadvertent and not result of unsafe practices by management, the miners are trained to use anemometers to test the air volumes before making any cuts and the dust level was below dangerous levels. The level of negligence is appropriately designated as moderate.

III. PENALITES

Under Section 110(i) of the Act, the Commission and its judges must consider the following factors in assessing a civil penalty: the history of the violations, the negligence of the operator in committing the violation, the size of the operator, the gravity of the violation, whether the violation was abated in good faith and whether the penalties would affect the operator's ability to continue in business. The parties have stipulated that the mine is a large mine and that the proposed penalties would not affect the operator's ability to continue in business. There is no dispute that the conditions were abated in good faith or that the mine has a significant history of violations. The findings with regard to the gravity and negligence involved in each citation are set forth above. I find that the following penalties are appropriate:

Docket KENT 2009-1582		
Citation No.	8494791	$14,700
Order No.	8494792	$1800
Docket KENT 2009-1583		
Citation No.	8494793	VACATED
Citation No.	8497131	$900
Citation No.	8497132	$900
Citation No.	8497135	VACATED
Citation No.	8797136	$500
Citation No.	8497007	$1800
Citation No.	8497008	$1000
Citation No.	8497009	$1800
Citation No.	8494460	$900
Citation No.	8494461	VACATED
Citation No.	456952	$900

IV. ORDER

Citation Numbers 8494793, 8497135 and 8494461 are VACATED; Citation Number 8494791 is affirmed as written with the penalty proposed by the Secretary; Order No. 8494792 is modified to non-S&S and non-unwarrantable failure with a reduction in negligence to moderate with a penalty of $1800.00; Citation Numbers 8497131, 8497132, 8494460 and 4565952 are been modified to non-S&S with moderate negligence and a penalty of $900.00 each; Citation No. 8797136 is modified to non-S&S with moderate negligence with a penalty of $500.00; Citation No. 8497007 is modified to non-S&S with negligence lowered to moderate with a penalty of $1800.00; Citation No. 8497008 is modified to non-S&S with negligence modified to low with a penalty of $1000.00; Citation No. 8497009 is modified to non-significant and substantial with moderate negligence with an assessed penalty of $1800.00. It is hereby ORDERED that Respondent pay penalties on the citations and order adjudicated herein in the amount of $25,200.00 within 30 days of this order.

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

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October 4, 2012

GENWAL RESOURCES, INC., and	:	CONTEST PROCEEDINGS
UTAH AMERICAN ENERGY, INC.	:	
Contestants	:	Docket No. WEST 2008-1422-R
	:	Order No. 7697001; 07/24/2008
	:	
	:	Docket No. WEST 2008-1423-R
	:	Order No. 7697002; 07/24/2008
	:	
	:	Docket No. WEST 2008-1424-R
	:	Order No. 7697003; 07/24/2008
	:	
	:	Docket No. WEST 2008-1425-R
	:	Order No. 7697004; 07/24/2008
	:	
	:	Docket No. WEST 2008-1426-R
	:	Order No. 7697005; 07/24/2008
	:	
	:	Docket No. WEST 2008-1427-R
v.	:	Order No. 7697006; 07/24/2008
	:	
	:	Docket No. WEST 2008-1428-R
	:	Order No. 7697007; 07/24/2008
	:	
	:	Docket No. WEST 2008-1429-R
	:	Order No. 7697008; 07/24/2008
	:	
	:	Docket No. WEST 2008-1430-R
	:	Citation No. 7697011; 07/24/2008
	:	
	:	Docket No. WEST 2008-1431-R
	:	Citation No. 7697012; 07/24/2008
	:	
	:	Docket No. WEST 2008-1432-R
	:	Order No. 7018222; 07/24/2008
	:	
SECRETARY OF LABOR,	:	Docket No. WEST 2008-1433-R
MINE SAFETY AND HEALTH	:	Citation No. 7018224; 07/24/2008
ADMINISTRATION (MSHA),	:	
Respondent	:	Docket No. WEST 2008-1434-R

	:	Citation No. 7018225; 07/24/2008
	:	
	:	Docket No. WEST 2008-1435-R
	:	Citation No. 7018226; 07/24/2008
	:	
	:	Docket No. WEST 2008-1436-R
	:	Order No. 7018227; 07/24/2008
	:	
	:	Docket No. WEST 2008-1437-R
	:	Order No. 7018228; 07/24/2008
	:	
	:	Docket No. WEST 2008-1438-R
	:	Citation No. 7018229; 07/24/2008
	:	
	:	Crandall Canyon Mine
	:	Mine ID 42-01715
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2008-1475
Petitioner	:	A.C. No. 42-01715-159798-01
	:	
v.	:	Docket No. WEST 2008-1476
	:	A.C. No. 42-01715-159798-02
GENWAL RESOURCES, INC., and	:	
UTAH AMERICAN ENERGY, INC.	:	
Respondent	:	Crandall Canyon Mine
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2009-86
Petitioner	:	A.C. No. 42-02028-164100-01
	:	
	:	Docket No. WEST 2009-87
	:	A.C. No. 42-02028-164100-02
v.	:	
	:	Docket No. WEST 2009-145
	:	A.C. No. 42-02028-167616-02
	:	
	:	Docket No. WEST 2009-147
	:	A.C. No. 42-02028-167044-02
ANDALEX RESOURCES, INC.,	:	
Respondent	:	Aberdeen Mine

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2011-1482
Petitioner	:	A.C. No. 42-02241-263701
	:	
v.	:	Docket No. WEST 2012-97
	:	A.C. No. 42-02241-266768
UTAH AMERICAN ENERGY, INC.,	:	
Respondent	:	Lila Canyon Mine

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2011-1062
Petitioner	:	A.C. No. 42-02233-254745
	:	
	:	Docket No. WEST 2011-1223
	:	A.C. No. 42-02233-257835
	:	
	:	Docket No. WEST 2011-1312
	:	A.C. No. 42-02233-260425
	:	
	:	Docket No. WEST 2011-1479
	:	A.C. No. 42-02233-263445
	:	
	:	Docket No. WEST 2012-94
v.	:	A.C. No. 42-02233-266525-01
	:	
	:	Docket No. WEST 2012-95
	:	A.C. No. 42-02233-266525-02
	:	
	:	Docket No. WEST 2012-234
	:	A.C. No. 42-02233-269203
	:	
	:	Docket No. WEST 2012-326
	:	A.C. No. 42-02233-272063
	:	
	:	Docket No. WEST 2012-490
	:	A.C. No. 42-02233-277776
	:	
	:	Docket No. WEST 2012-651
	:	A.C. No. 42-02233-280469
	:	

	:	Docket No. WEST 2012-704
	:	A.C. No. 42-02233-283085
	:	
	:	Docket No. WEST 2012-901
	:	A.C. No. 42-02233-286086
	:	
WEST RIDGE RESOURCES, INC.,	:	Docket No. WEST 2012-1039
Respondent	:	A.C. No. 42-02233-289173
	:	
	:	Docket No. WEST 2012-1070
	:	A.C. No. 42-02233-291876-01
	:	
	:	Docket No. WEST 2012-1071
	:	A.C. No. 42-02233-291876-02
	:	
	:	West Ridge Mine

ORDER TO MODIFY
DECISION APPROVING SETTLEMENT
ORDER TO PAY PENALTIES

Before: Judge Manning

These cases are before me upon notices of contest and petitions for assessment of civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977 (the "Mine Act"). These proceedings concern dockets arising from the fatal accidents which occurred at the Crandall Canyon Mine in August of 2007, as well other dockets that involve citations and orders that the parties have resolved as a result of their negotiations.

The Secretary has filed a motion to approve settlement of all of the pending citations and order in the above-captioned dockets (40 violations). The motion to approve settlement specifies the factual bases for the modifications to the citations and orders and support for the changes in the originally proposed amounts for these violations.

The Secretary represents that, after careful consideration of the penalty criteria set forth in section 110(i) of the Mine Act, she has concluded that the modifications to the citations and orders and the amended penalties proposed in the settlement motion are in the public interest and adequately promote the purposes of the Mine Act, including the deterrence of future violations. The mine operators that were charged with the violations have admitted, for purposes of proceedings under the Mine Act, that they violated the Mine Act, the Secretary's regulations, or the Secretary's safety standards as set forth in the motion to approve settlement and as summarized in this decision approving the settlement.

The parties agree that Andalex Resources, Inc. should be substituted for Utah American Energy, Inc., for all purposes in contest Docket Nos. WEST 2008-1422-R through WEST 2008-1438-R and in penalty Docket Nos. WEST 2008-1475 and WEST 2008-1476. Genwal Resources, Inc. was and continues to be a wholly owned subsidiary of Andalex Resources, Inc.

I have considered the representations and documentation submitted in these cases, and I conclude that the proffered settlement is appropriate under all six of the criteria set forth in section 110(i) of the Mine Act.[1] 30 U.S.C. § 820(i). The Secretary agrees to make the modifications to the citations and orders as reflected in the motion and as shown below:

[1] In the motion, the parties apparently reached agreement as to whether seven of the accident-related violations were "contributory" or "non-contributory." In this regard, the parties agreed to modify the language in the body of two orders. I have not considered these designations in reviewing the motion to approve settlement and, by granting the motion, I am not signifying my agreement with or approval of these designations.

TABLE 1

Penalty Docket	Citation/ Order	Type of Violation			
		Standard	**Characterizations**	**Proposed Penalty**	**Amended Penalty**
WEST 2008-1475	7018222	75.220(a)	104(d)(2), Occurred, S&S, Reckless Disregard, Flagrant	$220,000	$207,000
`	7018224	50.20(a)	Vacated	$60,000	0
	7018225	50.20(a)	104(a), No Likelihood, Non-S&S, High Negligence	$60,000	$5,000
	7018226	50.20(a)	104(a), No Likelihood, Non-S&S, Moderate negligence	$25,000	$2,500
	7018227	75.220(a)	104(a), Highly Likely, S&S Moderate negligence	$60,000	$28,500
	7018228	75.220(a)	104(a), Highly Likely, S&S, Moderate negligence	$60,000	$28,500
	7018229	75.223(b)	104(a), Unlikely, Non-S&S, Moderate negligence	$25,000	$2,500
	7697001	50.10	Vacated	$220,000	0
	7697002	50.10	104(d)(2), Occurred, S&S, Reckless Disregard, Flagrant	$220,000	$207,000
	7697003	50.10	104(d)(2), Occurred, S&S High negligence, Not Flagrant	$220,000	$60,000
	7697004	75.223(a)	Vacated	$60,000	0
	7697005	75.223(a)	104(a), Occurred, S&S, Moderate negligence	$60,000	$60,000
	7697006	75.223(a)	104(d)(2), Occurred, S&S, Reckless Disregard, Flagrant	$220,000	$220,000
	7697007	75.203(a)	104(d)(2), Occurred, S&S, High negligence	$60,000	$60,000
	7697008	75.203(a)	104(d)(2), Occurred, S&S, High negligence	$60,000	$60,000
	7697011	50.10	104(a), Unlikely, Non-S&S, Low negligence	$5,000	$5,000
	7697012	§ 316(b)	104(a), S&S, Low negligence	$4,000	$3,000
Total Docket Penalty				$1,639,000	$949,000
WEST 2008-1476	**Citation**	**Standard**	**Gravity and Negligence**	**Proposed Penalty**	**Amended Penalty**
	7018230	75.364(h)	104(a), Unlikely, Non-S&S, Moderate negligence	$117	$117
	7018231	75.364(h)	104(a), Unlikely, Non-S&S, Moderate negligence	$117	$117
	7018232	75.364(h)	104(a), Unlikely, Non-S&S, Moderate negligence	$117	$117
Total Docket Penalty				$351	$351
Total Penalties				$1,639,351	$949,351

OTHER SETTLED DOCKETS

TABLE 2

Penalty Docket	Citation/Order	Proposed Penalty	Amended Penalty
WEST 2009-86	7288432	$8,421	$5,565
	7288435	$9,122	$6,025
	8454006	$1,657	$1,100
	8454007	$2,473	$1,635
Total Docket Penalty		$21,673	$14,325

TABLE 3

Penalty Docket	Citation/Order	Proposed Penalty	Amended Penalty
WEST 2009-87	8454003	$334	$225
	8454005	$334	$225
	8454008	$190	$125
	8454013	$263	$180
Total Docket Penalty		$1,121	$755

TABLE 4

Penalty Docket	Citation/Order	Proposed Penalty	Amended Penalty
WEST 2009-145	7636839	$2,515	$1,665
Total Docket Penalty		$2,515	$1,665

TABLE 5

Penalty Docket	Citation/Order	Proposed Penalty	Amended Penalty
WEST 2009-147	6686481	$1,026	$680
	7288325	$585	$390
Total Docket Penalty		$1,611	$1,070

TABLE 6

Penalty Docket	Citation/Order	Proposed Penalty	Amended Penalty
WEST 2011-1062	8461506	$1,412	$935
	8461456	$1,304	$870
	8461511	$807	$535
	8461512	$2,901	$1,915
	8461514	$460	$310
	8458756	$687	$455
	8461515	$5,080	$3,355
	8459017	$1,111	$735
Total Docket Penalty		$13,762	$9,110

TABLE 7

Penalty Docket	Citation/Order	Proposed Penalty	Amended Penalty
WEST 2011-1223	8459020	$460	$305
	8458759	$807	$535
	8461068	$263	$175
	8461069	$263	$175
	8461465	$807	$535
	8461466	$807	$535
	8461467	$3,996	$2,640
	8459204	$2,106	$1,390
	8459205	$425	$280
	8459206	$190	$125
	8461533	$873	$580
	8461534	$138	$90
Total Docket Penalty		$11,135	$7,365

TABLE 8

Penalty Docket	Citation/Order	Proposed Penalty	Amended Penalty
WEST 2011-1312	8461535	$873	$580
	8465080	$2,678	$1,770
	8461537	$873	$580
	8461070	$207	$140
	8461539	$1,530	$1,010
	8461542	$138	$90
	8461547	$5,080	$3,360
	8461548	$5,080	$3,360
	8461549	$687	$460
	8461550	$687	$460
Total Docket Penalty		$17,833	$11,810

TABLE 9

Penalty Docket	Citation/Order	Proposed Penalty	Amended Penalty
WEST 2011-1479	8461528	$11,306	$7,460
	7289401	$585	$390
	8461552	$873	$579
	8461554	$1,026	$680
	7289405	$2,901	$1,915
	7289406	$585	$386
	8461558	$873	$576
	8461560	$873	$576
	8458299	$3,689	$2,435
	8458300	$499	$330
	6688635	$1,657	$1,095
	6688636	$1,795	$1,185
	6688640	$585	$386
	6688641	$687	$455
	8461683	$873	$576
	8459304	$873	$576
	8459422	$1,203	$795
	8461613	$946	$625
Total Docket Penalty		$31,829	$21,020

TABLE 10

Penalty Docket	Citation/Order	Proposed Penalty	Amended Penalty
WEST 2011-1482	8460982	$1,200	$800
Total Docket Penalty		$1,200	$800

TABLE 11

Penalty Docket	Citation/Order	Proposed Penalty	Amended Penalty
WEST 2012-94	8458987	$2,473	$1,640
	8458988	$2,473	$1,640
	8458990	$2,473	$1,640
	8458991	$2,473	$1,640
Total Docket Penalty		$9,892	$6,560

TABLE 12

Penalty Docket	Citation/Order	Proposed Penalty	Amended Penalty
WEST 2012-95	8461541	$1,304	$860
	8461543	$1,203	$800
	8461555	$1,203	$800
	8461692	$946	$630
	8461696	$540	$360
	8461697	$585	$390
	8461698	$4,329	$2,860
Total Docket Penalty		$10,110	$6,700

TABLE 13

Penalty Docket	Citation/Order	Proposed Penalty	Amended Penalty
WEST 2012-97	8458986	$807	$540
Total Docket Penalty		$807	$540

TABLE 14

Penalty Docket	Citation/Order	Proposed Penalty	Amended Penalty
WEST 2012-234	8461702	$585	$390
	8461703	$4,329	$2,860
	8461704	$807	$540
	8459309	$362	$240
	8459310	$1,203	$800
	8461706	$585	$390
	8461707	$873	$580
	8461708	$585	$390
	8461709	$499	$330
	8461710	$499	$330
	8461711	$499	$330
Total Docket Penalty		$10,826	$7,180

TABLE 15

Penalty Docket	Citation/Order	Proposed Penalty	Amended Penalty
WEST 2012-326	8461532	$1,304	$860
	8461715	$6,458	$4,265
	8461716	$6,458	$4,265
	8461717	$6,458	$4,265
	8461718	$1,111	$740
	8461720	$873	$575
	8461763	$873	$575
	8461764	$1,026	$680
	8461767	$1,026	$680
	8458389	$946	$630
	8458391	$634	$420
	8459325	$1,304	$860
	8461768	$873	$575
	8461769	$873	$575
	8461770	$873	$575
	8461771	$873	$575
Total Docket Penalty		$31,963	$21,115

TABLE 16

Penalty Docket	Citation/Order	Proposed Penalty	Amended Penalty
WEST 2012-490	8459704	$745	$495
	8461679	$1,412	$935
	8461680	$1,412	$935
	8461419	$634	$420
	8461421	$3,405	$2,250
	8461423	$807	$535
	8461424	$946	$625
	8461426	$308	$209
	8459560	$2,106	$1,390
	8461427	$873	$580
	8461428	$745	$495
	8461430	$1,530	$1,010
Total Docket Penalty		$14,923	$9,879

TABLE 17

Penalty Docket	Citation/Order	Proposed Penalty	Amended Penalty
WEST 2012-651	8461691	$1,304	$860
	8461283	$807	$535
	8461699	$425	$280
	8459432	$807	$535
	8461714	$585	$390
	8459544	$5,961	$3,935
	8461631	$1,203	$795
	8459552	$1,795	$1,185
	8459556	$1,657	$1,095
	8461425	$1,304	$860
	8461847	$634	$420
	8461433	$687	$455
	8461435	$1,026	$680
	8461741	$585	$390
	8461436	$1,026	$680
	8461782	$946	$625
	8461783	$946	$625
	8459227	$1,111	$735
	8459789	$425	$280
Total Docket Penalty		$23,234	$15,360

TABLE 18

Penalty Docket	Citation/Order	Proposed Penalty	Amended Penalty
WEST 2012-704	8461882	$873	$580
	8459796	$1,657	$1,095
	8459716	$1,026	$680
	8461888	$873	$580
	8461889	$16,867	$11,135
	8461890	$2,473	$1,635
	8460956	$3,689	$2,435
	8460958	$3,689	$2,435
Total Docket Penalty		$31,147	$20,575

TABLE 19

Penalty Docket	Citation/Order	Proposed Penalty	Amended Penalty
WEST 2012-901	8460955	$1,111	$735
	8460959	$873	$580
	8461858	$873	$580
	8459719	$1,111	$735
	8459722	$1,026	$680
	8461892	$873	$580
	8461921	$2,678	$1,770
	8461963	$873	$580
	8461893	$3,689	$2,435
	8459803	$873	$580
	8461964	$873	$580
	8461965	$873	$580
Total Docket Penalty		$15,726	$10,415

TABLE 20

Penalty Docket	Citation/Order	Proposed Penalty	Amended Penalty
WEST 2012-1039	8461968	$873	$580
	8461789	$585	$390
	8461970	$1,026	$680
	8461759	$9,634	$6,360
	8461760	$9,634	$6,360
	8461861	$9,634	$6,360
	8461903	$190	$125
	8461862	$2,106	$1,390
Total Docket Penalty		$33,682	$22,245

TABLE 21

Penalty Docket	Citation/Order	Proposed Penalty	Amended Penalty
WEST 2012-1070	8461891	$11,000	$7,260
Total Docket Penalty		$11,000	$7,260

TABLE 22

Penalty Docket	Citation/Order	Proposed Penalty	Amended Penalty
WEST 2012-1071	8465214	$1,026	$680
	8459732	$1,530	$1,010
	8459733	$687	$455
	8459805	$946	$625
	8459740	$1,530	$1,010
	8482001	$745	$495
	8461867	$946	$625
Total Docket Penalty		$7,410	$4,900

ORDER

For good cause shown, the motion to approve settlement is **GRANTED.** The citations and orders are hereby **AFFIRMED**, **MODIFIED**, or **VACATED** as summarized above. It is **ORDERED** that Andalex Resources, Inc., and Genwal Resources, Inc., pay a penalty of $949,351.00, that Andalex Resources, Inc., pay a further penalty of $17,815.00, that West Ridge Resources, Inc., pay a penalty of $181,494.00, and that UtahAmerican Energy, Inc., pay a penalty of $1,340.00. Each of these payments shall be made within 30 days of the date of this decision.[2] The contest proceedings are hereby **DISMISSED**.

/s/ Richard W. Manning
Richard W. Manning
Administrative Law Judge

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/atc

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
601 New Jersey Avenue, N.W., Suite 9500
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October 5, 2012

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	: : : :	CIVIL PENALTY PROCEEDING Docket No. LAKE 2011-716 A.C. No. 11-03054-253140-01
v.	: :	
BIG RIDGE, INCORPORATED, Respondent	: :	Mine Name: Willow Lake Portal

DECISION

Appearances: Tyler P. McLeod, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, on behalf of the Secretary of Labor;
Arthur M. Wolfson, Esq., Jackson Kelly PLLC, Pittsburgh, Pennsylvania, for Big Ridge Incorporated.

Before: Judge Zielinski

This case is before me on a Petition for Assessment of Penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). The petition alleges that Big Ridge, Incorporated, is liable for eleven violations of the Secretary's Mandatory Safety and Health Standards for Underground Coal Mines,[1] and proposes the imposition of civil penalties in the total amount of $359,400.00. The parties propose to settle four of the citations and that settlement will be approved herein. A hearing was held in Evansville, Indiana, on the seven remaining citations for which a total of $274,500.00 in penalties were assessed. The parties filed post-hearing briefs following receipt of the transcript. For the reasons that follow, I find that Big Ridge committed six of the violations, but that in many cases gravity and negligence were lower than alleged, and impose civil penalties in the total amount of $16,500.00.

Findings of Fact - Conclusions of Law

Background

Big Ridge's Willow Lake Portal Mine ("WLPM") is a large underground coal mine located in Saline County, near Eldorado, Illinois. The immediate roof in many areas of the WLPM is composed of shale, a relatively soft, laminated layered rock. Unlike harder, more solid rock, e.g., limestone, it deteriorates or "weathers" when exposed to varying atmospheric conditions in a mine. It expands when it absorbs humidity and contracts when exposed to dryer

[1] 30 C.F.R. Part 75.

air. As a result, layers of shale, or draw rock, loosen and fall. The stability of rock in a mine roof can be assigned a numerical rating pursuant to a coal mine roof rating system. A high rating of 65 would describe roof rock that was extremely stable, e.g., limestone, which may not require any roof support. A low rating of 35 would describe unstable rock, susceptible to deterioration and pieces falling from the immediate mine roof, which would indicate that some sort of "skin control" should be employed. The rock comprising the roof at the WLPM had a rating of 40, which, in the opinion of one inspector, indicated that skin control measures should be considered.[2] MSHA has not issued any guidelines or requirements for roof control measures based upon specific mine roof ratings. Tr. 455.

The WLPM has had a history of roof falls. The Secretary introduced an exhibit summarizing reported accidents involving roof falls and reported injuries resulting from roof falls at the WLPM from December 1, 2008 to December 17, 2010. Ex. G-3. Accidents involving roof falls include unplanned roof falls at or above the anchorage zone of roof bolts or that impair ventilation or impede passage and falls that result in an injury to an individual that causes death or has a reasonable potential to cause death.[3] An injury to a miner must be reported if it results in medical treatment being administered, death or loss of consciousness, inability to perform all job duties on any day after an injury, temporary reassignment to other job duties, or transfer to another job.[4] Of the 45 incidents reported during the subject period, 33 were accidents where falls originated above the anchorage point of roof bolts. None of them resulted in an injury to a miner. It appears that there has never been a fatality suffered in any such roof fall at the WLPM. Tr. 279. Twelve other falls involved smaller rocks striking and injuring miners, typically resulting in lost work days. Six of those involved roof bolters who were in the process of supporting the roof. Six others involved miners in other situations.

The Secretary argues that WLPM's history of roof falls is significant and is relevant to gravity and negligence determinations. However, it is important to distinguish situations involving potential falls of the main mine roof from those involving potential falls of smaller rocks from the immediate mine roof, i.e., "skin control" issues. Most of the litigated violations involve the latter. As Anthony Fazzolare, an experienced MSHA inspector, explained when discussing Citation No. 8428617, which alleged a failure to control loose rocks in the immediate mine roof, WLPM's history of accidents involving roof falls had "nothing to do with the citation." Tr. 54. He also believed that Big Ridge could not "control [the roof] falling above the

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[2] The roof rating system was briefly described by Chad Lampley, a relatively new inspector who had assisted, for a "short period of time" in an MSHA roof control department. He did not know what factors were considered by mining engineers in applying the rating system. Tr. 374, 401-03

[3] 30 C.F.R. § 50.2(h).

[4] 30 C.F.R. § 50.2(e).

anchor zone." [5] Tr. 54-55. Fazzolare was concerned about the injury reports, because he believed that those may have been avoided if there had been more aggressive scaling of the roof. Tr. 55.

The "Rules to Live By" program

Under the Act, underground coal mines must be inspected four times each year.[6] Two MSHA inspectors work continuously throughout the three-month periods to complete the inspections at the WLPM. At the end of the quarterly inspection, the lead inspector typically prepares a close-out report, and meets with mine managers to discuss the results of the inspection, including the identification of items that appear to require more attention, and areas where improvement was demonstrated. The WLPM is also subject to 5-day spot inspections because it liberates over one million cubic feet of methane in a 24-hour period.[7]

In March 2010, MSHA implemented a program entitled "Rules To Live By" ("RTLB"), which was designed to improve the prevention of fatalities in the mining industry. MSHA sought to further reduce mining fatalities, which in 2009 had fallen to an all-time low for the second straight year. Special emphasis was placed on 24 mandatory safety standards that had been frequently cited in 589 fatal accident investigations in calendar years 2000 through 2008. Ex. G-2. MSHA intended to focus attention on the subject standards through outreach and education, followed by enhanced enforcement. Eleven standards were identified for coal mines, including two addressed to roof control, 30 C.F.R. § 75.202(a), which requires that mine roofs and ribs be controlled in areas where persons work or travel, and 30 C.F.R. § 75.220(a)(1), which requires that mine operators develop and follow an approved roof control plan.

The launch of the program was preceded by the mailing of a flyer to mine operators and meetings between MSHA officials and mine managers. Ex. G-1, G-2. Enhanced enforcement began in mid-March 2010. The alleged violations at issue here occurred during the quarterly inspection that was conducted from October 1 to December 31, 2010. While they allege high negligence by the operator, they were issued pursuant to section 104(a) of the Act, rather than section 104(b), which addresses more serious unwarrantable failure violations. All of the contested citations allege violations of the roof control standards that were subjects of the RTLB program, and each of them was specially assessed, resulting in substantially higher proposed penalties. If civil penalties for the seven contested violations had been assessed using the regular assessment process itemized in the Secretary's regulations, a total of $81,957.00 in penalties

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[5] The vast majority of roof falls above the anchorage zone of roof bolts have occurred in intersections. Big Ridge typically installs 12-foot cable bolts in intersection to address the problem. Tr. 365-70.

[6] 30 U.S.C. § 813(a).

[7] 30 U.S.C. § 813(i).

would have been proposed.[8] The special assessment process resulted in proposed penalties totaling $274,500.00.

Negligence – Prior Notice

As noted above, all of the litigated citations include allegations that Big Ridge's negligence was high. A major factor in the Secretary's arguments in support of the high negligence designations is that Big Ridge had been put on notice of a need for greater efforts to comply with the roof control standards because of MSHA's emphasis on such violations under the RTLB program, a need for better compliance with roof control standards expressed during close-out conferences for recent quarterly inspections, and the fact that as many as 140 violations of the standard had been issued at the mine in the past two years. Tr. 153-54.

While the RTLB program placed increased emphasis on the standards that were subjects of the program, the roof control standards at issue were only 2 of the 11 standards that were the subjects of that program for underground coal mines. Standing alone, the fact that section 75.202(a), one of the most frequently cited standards, was included in the RTLB program, is of limited significance as a prior notice factor. The fact that the standard had been cited 140 times in the past two years at the WLPM, is of greater significance. The Commission has recognized that the incidence of repeat violations may indicate that "an operator had prior knowledge of the specific safety or heath standard cited." *Cantera Green*, 22 FMSHRC 616, 624 May 2000), *Peabody Coal Co.*, 14 FMSHRC 1258, 1263-64 (Aug. 1992). Here the size and general roof conditions in the mine, soft shale that was subject to weathering, could provide some explanation for the significant number of violations of the general roof control standard that had been issued over the preceding two-year period, and there is essentially no evidence as to the qualitative nature of that information.[9] As discussed in the penalty portion of this decision, penalty assessment forms for roof control violations typically show that five penalty points were assessed for Big Ridge's history of repeat violations. While that is a relatively modest level on

[8] The Secretary's regulations provide a formula for determining proposed civil penalties based on the assignment of points for various penalty factors. 30 C.F.R., Part 100, Criteria and Procedures for Proposed Assessment of Civil Penalties. The Secretary has reserved to MSHA the right to waive the regular assessment process if it determines that conditions warrant a special assessment. 30 C.F.R. § 100.5(a).

[9] Contrast the bare fact of the number of violations issued, with the evidence presented in *Centre Crown Mining, L.L.C.*, 33 FMSHRC 428, 444 (Feb. 2011) (ALJ), a case cited by the Secretary, where the inspector testified that the subject mine "had one of the highest incidents of roof falls with injuries in the district at the time of this violation." Evidence of a qualitative nature as to issued violations would be more probative on the prior notice issue. *See Sec'y of Labor on behalf of Hannah v. Consolidation Coal Co.*, 20 FMSHRC 1293, 1305 n. 14 (Dec. 1998).

that factor's scale of 0 to 20 points, it produced substantial increases (up to 50%) in penalty assessments.

The evidence regarding the close-out conferences for the last three quarters of fiscal year 2010, the quarters immediately preceding the quarter in which the litigated violations were issued, is considerably more significant. While the reports for March and June 2010 contained a general notation of a need for better focus on RTLB standards, the close-out report for the final quarter of fiscal year 2010, which was issued in September 2010, immediately prior to the inspection during which the litigated violations were issued, made specific reference to increased roof control violations and the need for increased attention to roof control issues, stating:

> Roof and Ribs – roof control violations are high here. Problems need to be addressed before we have to take care of them. Keep an eye on the ribs, most of the time they are secured but do not take them for granted. Watch entry widths.

Ex. G-7.

In addition, MSHA inspectors typically discuss violations with management officials when they are issued. Tr. 50-51, 549-50. Considering the number of roof control violations, there would have been numerous discussions of that subject in the months preceding the inspection that began on October 1, 2010, and throughout that quarter.

The cumulative effect of the prior notice evidence, especially the specific warning in the September 2010 inspection close-out report and related discussions with mine management, put Big Ridge on notice that increased efforts to comply with the roof control standards were needed. Prior notice is a significant factor in the evaluation of Big Ridge's negligence with respect to the litigated violations.

Big Ridge timely contested the penalties assessed for the violations, which prompted the filing of the petition. The alleged violations are discussed below.

Citation No. 8424063

Citation No. 8424063 was issued by MSHA inspector Anthony Fazzolare at 10:05 a.m., on October 1, 2010, pursuant to section 104(a) of the Act.[10] It alleges a violation of 30 C.F.R. § 75.202(a) which requires that: "The roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the

[10] Fazzolare began working in the coal mining industry in 1984 and has worked at a variety of positions, including laborer, roof bolter, and examiner. He has been an MSHA inspector for more than 13 years, and has inspected the WLPM hundreds of times since 2008. He was the lead inspector for the first quarter of fiscal year 2011, which began on October 1, 2010.

roof, face or ribs and coal or rock bursts." The violation was described in the "Condition and Practice" section of the citation as follows:

> Entry #1, tag 5+60 minus 30 feet, there was a damaged roof bolt, the [plate] was loose and not supporting the top.
>
> A piece of mobile equipment had hit the permanent roof support rendering it useless as roof support. The unsupported top measured approximately 7 feet 5 inches by 8 feet or 59.33 [square feet]. There was draw rock in the entry [where] the bolt was located.
>
> Standard 75.202(a) was cited 140 times in two years at mine 1103054 (140 to the operator, 0 to a contractor).

Ex. G-8.

Fazzolare determined that it was reasonably likely that the violation would result in an injury necessitating lost work days or restricted duty, that the violation was significant and substantial ("S&S"), that one person was affected, and that the operator's negligence was high. A specially assessed civil penalty in the amount of $18,700.00 was proposed for this violation.

The Violation

The damaged bolt was located in entry #1 of Unit 5. That unit consisted of eleven entries divided into two working sections, or MMU's. The entries were numbered from right to left facing inby. Intake air coursed through a middle entry, and was split and directed toward two returns, entries # 1 and #11, such that each MMU could operate separately. Entry #1 was on the right side MMU, which was idle when Fazzolare inspected it. No mining had been done in that MMU on the day shift. Production reports confirmed that all mining on the day shift had been done on the left side MMU, in entries #10 and #11. Tr. 166-69; Ex. R-8.

Big Ridge does not challenge the fact of the violation. Daniel Bishop, a safety compliance supervisor at the mine, traveled with Fazzolare and confirmed that the bolt was damaged, most likely because it had been struck by a piece of mobile equipment. Tr. 173-74. He also confirmed that the plate was loose and that there was draw rock in the area. Tr. 173. Big Ridge challenges the gravity and negligence determinations, and the amount of the penalty assessed.

Significant and Substantial

The Commission reviewed and reaffirmed the familiar *Mathies*[11] framework for determining whether a violation is S&S in *Cumberland Coal Res.*, 33 FMSHRC 2357, 2363-65 (Oct. 2011):

> The S&S terminology is taken from section 104(d) of the Mine Act, 30 U.S.C. § 814(d), and refers to more serious violations. A violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *See Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In *Mathies*, 6 FMSHRC 1, the Commission further explained:
>
> > In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.
>
> *Id*. at 3-4 (footnote omitted); *accord Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria). An evaluation of the reasonable likelihood of injury should be made assuming continued normal mining operations. *See U.S. Steel Mining Co.*, 6 FMSHRC 1824, 1836 (Aug. 1984).
>
> . . . .
> . . . .
>
> The Commission recently discussed the third element of the *Mathies* test in *Musser Engineering, Inc. and PBS Coals, Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010) ("*PBS*") (affirming an S&S violation for using an inaccurate mine map). The Commission held that the "test under the third element is whether there is a reasonable likelihood that the hazard contributed to by the violation, i.e., [in that case] the danger of breakthrough and resulting inundation, will cause injury." *Id*. at 1281. Importantly, we clarified that the "Secretary need not prove a reasonable likelihood that the violation itself will cause injury." *Id*. The Commission also emphasized the well-established precedent that "the absence of an injury-producing event when a cited practice has occurred does not preclude a

[11] *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984) .

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)).

The fact of the violation has been established. The damaged bolt contributed to a discrete safety hazard, a miner being struck by a piece of draw rock falling from the inadequately supported roof.[12] An injury caused by a sizable rock falling from the roof would likely involve broken bones or lost work days, and would be reasonably serious. Whether the violation was S&S turns on whether the hazard was reasonably likely to result in an injury causing event.

Fazzolare initially determined that the damaged roof bolt had been rendered "useless as roof support." Tr. 144; Ex. G-8. However, he later clarified that the resin bolt continued to provide beam support for the main roof and that his concern was "skin control," or control of the immediate roof where he observed the presence of draw rock.[13] Tr. 160. Bishop, who also made notes of his observations during the inspection, confirmed that there was draw rock in the area. However, he characterized the draw rock as thin layers of shale that did not pose a hazard. Tr. 183-85. He recorded in his notes that the roof in the area was in good condition, and that there were no slips or cracks indicating that a piece of rock was likely to fall. Tr. 172. Fazzolare did not note the presence of any fallen roof material in the area of the bolt. Tr. 145. No material had to be scaled down to abate the violation, which was accomplished by the installation of two roof bolts. Ex. G-8.

The damaged bolt was located outby the last open crosscut, i.e., outby the area where most active mining activities would take place. Fazzolare determined that the person most likely to be affected would have been a preshift or on-shift examiner.[14] Tr. 148. Since no mining had occurred on the right side on the day shift and no one was working in the area, an on-shift examination did not have to be conducted during that shift as of the time the citation was issued. Tr. 156-57. Where the primary person potentially affected by a violation such as this one is a

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[12] In *Cumberland*, the Commission emphasized that the "clear identification" of a discrete safety hazard contributed to by a violation is a critical step in the S&S analysis, because it is the hazard contributed to, rather than the violation, that must be found reasonably likely to result in a reasonably serious injury. 33 FMSHRC at 2368.

[13] Fazzolare also was aware that the mine map showed that adverse roof conditions might be encountered in the area, and that the unit had gone through bad top several times. Tr. 147. He apparently did not conclude that there were particularly adverse roof conditions in the immediate area of the violation.

[14] He also opined that miners might pass through the area in an emergency on their way to a rescue chamber. Tr. 148-49. However, he later conceded that he did not know what route miners would take to a rescue chamber, and that there was nothing to indicate that an emergency situation was likely. Tr. 157. Bishop testified that there was no rescue chamber in the #1 return entry. Rather it was in the #3 or #4 entry. Tr. 175.

preshift or on-shift examiner who travels the area little more than once per shift and who is charged with the responsibility of identifying such conditions, which an inspector has deemed to be obvious, it is difficult to conclude that an injury causing event is reasonably likely to occur under continued normal mining conditions.

Given that the condition had existed only since the latter part of the previous shift, that there was most likely very limited exposure of miners on that shift and virtually no exposure of miners on the day shift, that a preshift or on-shift examiner would have been the first person to have traveled the area before mining activity would have commenced, and that the condition of the mine roof in the immediate area of the damaged bolt was not particularly bad, I find that the hazard contributed to was unlikely to result in an injury, and that the violation was not S&S.

The Commission and courts have observed that the opinion of an experienced MSHA inspector that a violation is S&S is entitled to substantial weight. *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-79 (Dec. 1998); *Buck Creek Coal, Inc., v. MSHA*, 52 F.3d 133, 135-36 (7th Cir. 1995). Fazzolare certainly qualifies as an experienced MSHA inspector. However, I find that the Secretary has failed to carry her burden of proving that it was reasonably likely that an injury producing event would occur. *See Amax Coal Co.*, 18 FMSHRC 1355, 1358-59 (Aug. 1996) (to prove S&S nature of violation Secretary must prove that it is reasonably likely that an injury producing event *will* occur, not that one *could* occur).

Negligence

Fazzolare determined that Big Ridge's negligence with respect to the violation was high because he believed that the damaged bolt should have been observed and noted during the preshift examination conducted prior to the start of the day shift.[15] Tr. 149-52, 161. He believed that any such examiner should have been paying particular attention to possible roof control violations because of MSHA's emphasis on such violations under the RTLB program, the fact that violations of the standard had been issued 140 times at the mine in the past two years, and had been emphasized during close-out conferences for recent quarterly inspections. Tr. 153-54.

Since no equipment had yet been operated during the day shift in the right-side MMU, Fazzolare concluded that the bolt must have been damaged prior to the start of the shift, most likely prior to the previous midnight shift because that shift was typically devoted to maintenance. The report of the most recent preshift examination, done between 3:30 a.m. and 6:30 a.m., no more than 6 hours and 35 minutes before the citation was issued, did not note the damaged bolt. Tr. 149-50; Ex. G-10.

[15] Preshift examinations must be conducted within three hours of the beginning of any shift in areas where any person is scheduled to work or travel underground. 30 C.F.R. § 75.360.

To the extent that Fazzolare's determination was based upon a belief that no mining had been done on the midnight shift, it proved to be erroneous. The midnight shift, which started at 11:00 p.m. on September 30 and ended at 7:00 a.m. on October 1, took one cut of coal in the #1 entry. Tr. 170-71; Ex. R-7. Typically, that cut would have been taken toward the end of the shift, after all maintenance tasks had been completed. Tr. 171. It may well have been taken after the subject preshift examination had been done. The report of the preshift examination shows that it was done between 3:30 a.m. and 6:30 a.m., and that, in addition to the preshift exam, numerous seals were examined. Ex. G-10. Bishop explained that preshift examinations are generally conducted early in the allowable preshift exam window, and that the examination of the seals, the results of which were listed after the results of the preshift examination, evidence that the preshift examination was conducted closer to 3:30 a.m. Consequently, the examination could easily have been done before the cutting of coal in the #1 entry, which would have involved the operation of equipment in the location of the damaged bolt. Tr. 171, 175, 182; Ex. G-10.

Neither Fazzolare nor Bishop knew exactly when the preshift examination had been done, or when the cut of coal had been taken in the #1 entry. Tr. 158, 182. Fazzolare had noted that there were sufficient notations of dates/times/initials ("d/t/i") made by preshift examiners to show that the examinations had been conducted, but he had not recorded the times that the area had been examined. Tr. 158; Ex. G-9.

Had coal not been cut in the #1 entry within hours of the issuance of the citation, it would have been reasonable to conclude that the bolt had been damaged more than one shift earlier, and that it should have been identified in the preshift examination. However, it is at least as likely, if not more likely, that the cut of coal and damage to the bolt occurred after the preshift examination had been conducted. Having been put on notice that increased efforts were necessary to comply with the cited standard, examiners should have exercised enhanced awareness of such conditions. However, since it is unclear that the area was examined while the condition existed, the Secretary's prior notice evidence is of considerably diminished significance.

I find that the Secretary has failed to prove, by a preponderance of the evidence, that Respondent's negligence with respect to the violation was high. I find that its negligence was moderate.

Citation No. 8428617

Citation No. 8428617 was issued by Fazzolare at 10:00 a.m., on November 17, 2010, pursuant to section 104(a) of the Act, and also alleges a violation of 30 C.F.R. § 75.202(a). The violation was described in the "Condition and Practice" section of the citation as follows:

> The operator has failed to support or otherwise control the top in Unit number 2 (MMU 002-0 and MMU 012-0). There was loose rocks in all ten entries starting at a line from the unit feeder and

> extending to the faces. Standard 75.202(a) was cited 143 times in two years at Mine 1103054 (143 to the operator, 0 to a contractor).

Ex. G-11.

Fazzolare determined that it was reasonably likely that the violation would result in an injury necessitating lost work days or restricted duty, that the violation was S&S, that 14 persons were affected, and that the operator's negligence was high.[16] A specially assessed civil penalty, in the amount of $63,000.00 was proposed for this violation.

The Violation

An unintentional roof fall that blocked the flow of return air had occurred outby on Unit #2 on November 15, 2010. As a result of the fall, MSHA issued an order pursuant to section 103(k) of the Act, prohibiting access to the area, except for certain remedial activities. Ex. R-19. The return air was re-routed and, on November 16, Fazzolare inspected the unit to determine if air flow was sufficient to allow lifting of the order. He traveled on foot up the middle entry, and proceeded across the last open crosscut to all 11 entries.[17] Finding conditions acceptable, he terminated the order at 2:25 p.m. that afternoon. He did not identify any violations or issue any citations or orders as a result of his inspection.[18] Tr. 63-64. Fazzolare returned to Unit #2 the following morning, to continue the regular quarterly inspection. He identified loose material in the roof that he determined needed to be scaled and, at 10:00 a.m., issued the subject citation.

Big Ridge mounted a vigorous defense to the alleged violation. After the 103(k) order had been lifted on November 16, a partial crew was assigned to Unit #2 for the afternoon shift, to prepare it to return to production. Curt McClusky, the shift leader of that crew, testified that they first installed new bolts near a loose bolt that had been noted on the preshift report, and then spent four hours scaling the roof and ribs. Tr. 93-95; Ex. R-15. One miner operated a scoop, cleaning the areas of the unit that had been scaled. The balance of the shift was spent rock

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[16] The parties stipulated that the number of persons affected was two rather than 14, and a joint motion to amend the citation to reflect that change was granted. Tr. 62.

[17] Fazzolare initially stated that there were 10 entries on the unit, and so stated in the citation. Tr. 30. He later explained that that was an oversight and confirmed that there were 11 entries on the unit. Tr. 63-64.

[18] Big Ridge argues that the fact that Fazzolare did not identify any violations when he vacated the 103(k) order cannot be reconciled with his finding obvious violations less than 24 hours later. Resp. Br. at 14-15. Fazzolare explained that he was doing an imminent danger run to check the ventilation rather than a thorough inspection. Tr. 33, 65. The point is of little significance. Any violative roof control conditions that may have existed when he made the run would not have been included in the citation issued the following day because, as explained *infra*, Big Ridge made a substantial effort to scale the entire unit after the order had been lifted.

dusting the unit. The mechanical duster broke down late in the shift, and the remaining two entries were dusted by hand. Tr. 95-96. Zack Gibbons, a miner in McClusky's crew, related the same description of their efforts. Tr. 106-07; Ex. R-17. McClusky and Gibbons testified that at the end of that shift the unit looked good, the roof was safe, and there was nothing more that could or should have been done. Tr. 96, 108.

A belt move was then conducted on the midnight shift. Tr. 115. For the day shift on November 17, a crew of ten miners was assigned to the unit to continue to prepare it for the resumption of production. Chris Stephenson, the foreman of that crew, testified that he was charged with installing 12-foot cable bolts in intersections and wherever else they were needed, and trimming a brow on an overcast. Tr. 113-16. When he arrived at the section, Stephenson checked the tailpiece and traveled through the last open crosscut checking the faces. He carried a scaling bar with him, and scaled down "a couple pieces of slate" as he traveled. Tr. 117. In his opinion, the mine roof looked fine and the unit was in good condition, except for some spillage of coal in a couple of crosscuts. Tr. 118. Just before he had finished making the faces, Stephenson was informed that Fazzolare had issued the roof control citation, and some scaling needed to be done. One location that was identified as needing to be scaled was two crosscuts back from the face, in the area of entry #8. Tr. 119. Stephenson also scaled down a small piece of slate, approximately two inches by two inches and one inch thick, in the #10 entry. Tr. 119. Stephenson assigned two roof bolters to scale down whatever was required to abate the citation, and they scaled "maybe two or three pieces of small stuff." Tr. 119.

Robert Clarida, a Big Ridge safety compliance officer, traveled with Fazzolare, and was present when the citation was issued. He thought that the roof was in good condition. He didn't see anything wrong with it, and believed that the condition of the roof would not typically have warranted a citation. Tr. 127-29. He did not believe that the inspection party traveled all of the entries, and stated that Fazzolare identified only three to four places that needed scaling of small pieces of draw rock. Tr. 138.

When McClusky and Gibbons reported for their afternoon shift on the 17th and learned that the roof control citation had been issued, they were surprised and upset. Tr. 97, 108. They felt that the citation amounted to unjust criticism of how they had performed their jobs, and were concerned that impression would be conveyed to management. Tr. 98, 108. McClusky went to the mine manager, and plead his case. He was informed that the manager had spoken to other persons who had been in the unit, who told him that the unit was in good condition, and that he was in no trouble. Tr. 98. Clarida talked to McClusky and Gibbons, and realized that they were upset about the citation. He asked that they reduce their complaints to writing, which they did. Ex. R-15, R-17.

In *Canon Coal, Co.*, 9 FMSHRC 667, 668 (April 1987) (cited in *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1277 (Dec. 1998)), the Commission held that:

> Questions of liability for alleged violations of this broad aspect of this standard [the precursor to the present section 75.202(a)] are to be resolved by reference to whether a reasonably prudent person, familiar with the mining industry and the protective purpose of the standard, would have recognized that hazardous condition that the standard seeks to prevent. Specifically, the adequacy of particular roof support or other control must be measured against the test of whether the support or control is what a reasonably prudent person, familiar with the mining industry and protective purpose of the standard, would have provided in order to meet the protection intended by the standard. We emphasize that the reasonably prudent person test contemplates an objective – not subjective – analysis of all the surrounding circumstances, factors, and considerations bearing on the inquiry in issue. (citations omitted)

Here, the roof control measure at issue was the degree to which Respondent scaled draw rock in the unit so as to remove loose pieces that could fall and injure a miner working or traveling in the area.[19] Fazzolare did not believe that WLPM had been sufficiently aggressive in scaling, such that hazardous pieces of draw rock were present when he inspected the unit. He estimated that they had existed for more than one shift "due to the extent" of the condition. Tr. 36-37. Big Ridge counters that it had done aggressive scaling on the afternoon shift the previous day, additional scaling at the beginning of the day shift on the 17th, and would have continued to scale loose material as needed. Whether Big Ridge's efforts to control draw rock in the unit satisfied the reasonably prudent person test is a close question on the facts of this case.

On the one hand, an experienced MSHA inspector recorded in his notes and the citation that there were loose rocks in all of the unit's entries. On the other hand, there is credible evidence that extensive scaling had been done throughout the unit on the evening of November 16, after the section 103(k) order had been lifted. That scaling was completed approximately 14 hours before the citation was issued. The report of the preshift examination done before the start of the day shift on November 17 did not indicate problems with the roof. Tr. 54-55; Ex. G-14. Stephenson, who had 23 years of mining experience, did some scaling as he made the faces of the unit at the beginning of the day shift. He and Clarida, who had 40 years of mining experience, testified that, in their opinion, the roof was in good condition and that no violative conditions existed. They also testified that the citation was terminated after only a few small pieces of slate were scaled down.

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[19] The Secretary does not contend that other roof control measures should have been employed, and there is no indication that MSHA has ever questioned the adequacy of Big Ridge's roof control plan as applied to the area in question.

The mine roof in the area in question was composed of a layer of draw rock, or laminated slate, typical for the WLPM. Because of the ongoing process of weathering, at practically any point in time one could find small pieces of slate that could be dislodged with a scaling bar. As Fazzolare stated, "That top is bad all the time." Tr. 51. Gibbons expressed essentially the same opinion, stating that with "top like that you can pick at it 24/7," i.e., there would always be small pieces that could be pried down. Tr. 111. Obviously, as McClusky stated in response to a question by the Secretary's counsel, when scaling there is a certain degree of judgment as to what you are going to pry down. Tr. 103.

The fact that Fazzolare, who may have been in an enhanced enforcement mind set, identified pieces of rock that he determined were loose and could be pried down is not surprising.[20] However, it does not necessarily follow that Big Ridge failed to control loose rock when measured by the reasonably prudent person standard. Stephenson scaled loose rock as he examined the faces, and he and Clarida testified that only a few small pieces of rock were scaled down to abate the citation, and that the roof was in good condition. The Secretary was hard pressed to counter that evidence. Fazzolare had no recollection of the cited condition, and was unable to provide any information as to the number, sizes, or locations of the loose pieces of rock. Tr. 31, 81. His notes add nothing to the description in the citation, and no photographs of the allegedly violative condition were taken.[21]

In an enforcement proceeding under the Act, the Secretary has the burden of proving all elements of an alleged violation by a preponderance of the evidence. *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995), *aff'd, Sec'y of Labor v. Keystone Coal Mining Corp.,* 151 F.3d 1096 (D.C. Cir. 1998); *ASARCO Mining Co*., 15 FMSHRC 1303, 1307 (July 1993); *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989); *Jim Walter Resources, Inc.*, 9 FMSHRC 903, 907 (May 1987).

On the facts of this case, I find that the Secretary has failed to prove by a preponderance of the evidence that Big Ridge's efforts to scale loose pieces of draw rock were inadequate under the objective, reasonably prudent person test, i.e, that Big Ridge violated the standard.

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[20] Fazzolare felt that "before [Big Ridge] resumed production, they should have checked to make sure the top was in good condition, all the loose rock pulled down." Tr. 34. Big Ridge had not resumed production. Tr. 114, 128. Stephenson's crew was continuing to prepare the unit to resume production after lifting of the 103(k) order. Tr. 115.

[21] Fazzolare's notes included a statement that Big Ridge personnel "apologized for the condition of #2 unit and belt." Ex. G-12. At first blush, this appeared to be a telling entry of Big Ridge's acknowledgment of the bad roof conditions. However, Fazzolare had issued several citations and he could not clarify which condition or conditions the apology had been addressed to. Tr. 84-86. Under the circumstances, it was unlikely that it was a reference to the condition of the roof.

Citation No. 8428407

Citation No. 8428407 was issued by MSHA inspector Keith Jeralds, at 9:07 a.m., on November 19, 2010, pursuant to section 104(a) of the Act. It alleges a violation of 30 C.F.R. § 75.202(a), which was described in the "Condition and Practice" section of the citation as follows:

> An area of unsupported mine roof existed between the Number 46 and Number 47 crosscut along the 5A travelway which is the alternate escapeway. There were three loose roof bolt plates hanging from the mine roof in this area. The area measured approximately 8 feet wide by 8 feet long. The plates of the 6-foot roof bolts measured 12 inches to 18 inches from solid roof. The roof was broken with draw rock and visible cracks and when sound tested the top sounded drummy. This area is routinely traveled by management and examiners. The affected area was flagged off.
>
> Standard 75.202(a) was cited 142 times in two years at mine 1103054 (142 to the operator, 0 to a contractor).

Ex. G-15.

Jeralds determined that it was reasonably likely that the violation would result in a fatal injury, that the violation was S&S, that one person was affected, and that the operator's negligence was high. A specially assessed civil penalty in the amount of $53,800.00 was proposed for this violation.

The Violation

Fully grouted roof bolts were used at the WLPM. Unlike tensioned bolts, they form a passive roof support system. They provide support to the main roof by creating a beam effect. Plates installed on the heads of the bolts, typically 8 inches square, provide "skin" control, supporting the surface of the immediate roof, at least in the area of the plate. The weathering effect on the laminated shale roof results in small pieces of rock falling from between the roof bolt plates. The shale in contact with the plates does not fall, nor do the layers immediately above it. They are supported by the plate, and remain glued to the bolt by the resin placed into the roof bolt hole at the time of installation. As the roof material between bolts recedes, in this case from 12 to 18 inches, a column of rock remains on the plate, sometimes becoming smaller as it rises above the plate. This produces an effect known as a "chandelier" or "chandeliering." Jeralds took a photograph of the cited condition which depicts the subject bolts, at least one of which presents a classic chandelier effect. Tr. 254-55; Ex. G-17A.

Big Ridge apparently installs new roof bolts and plates in areas where the chandelier effect has proceeded beyond what it regards as permissible. The limits or conditions that would

prompt Big Ridge to re-bolt such an area were not specified, aside from testimony that the area would be re-bolted if the plates were loose. Tr. 324. While not addressed solely to chandeliering, Big Ridge has a diesel roof bolter on each production shift specifically designated to address travelway roof conditions noted by examiners. When it responds to a location, a number of bolts are typically installed. Tr. 343-44. MSHA has not sought to specify when a chandelier condition would become a violation. Tr. 275. Neither party introduced evidence that specific roof control measures to address chandeliering have been proposed by Big Ridge or MSHA for inclusion in Big Ridge's approved roof control plan.[22]

On November 19, 2010, Jeralds, a relatively new MSHA inspector who had considerable coal mining experience, was traveling inby on the 5A travelway on his way to Unit 5 to conduct a spot ventilation inspection.[23] He was riding in an open man trip, i.e., the ride had no canopy, and passed under an area where considerable weathering of the roof had occurred, creating a chandelier effect on three roof bolts. He had the man trip operator stop, and he walked back to the location, where he determined that there was an area of unsupported roof that measured 8 by 8 feet in the left center of the travelway approximately 6 feet from the rib.[24] It was described in a sketch Jeralds made in his notes. Tr. 251-52 ; Ex. G-16. The plates of the three chandeliered bolts were 12-18 inches from the mine roof, and appeared to be loose. He did not attempt to move or spin the plates, but observed cracks and broken rock in the chandelier column, which led him to conclude that the plates were loose. He also observed cracks and broken top in between the bolts.

Jeralds believed that the integrity of the three bolts was compromised to the extent that they could be considered "missing," and that a "regular roof fall" could occur. Tr. 260. He also was concerned that "fairly significant chunks" of the cracked and drummy sounding draw rock could fall out. Tr. 260. As an MSHA trainee, he had attended quarterly close-out conferences at the WLPM, and was aware that there had been reportable roof falls in the area, i.e., falls of rock above the anchorage zone of the roof bolts. Tr. 263-64, 267. His assessment that a fatal injury

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[22] Operators are required to propose revisions to roof control plans if conditions, including accidents and injuries, indicate that the plan is no longer suitable, and MSHA must review plans every six months, taking into account roof falls and the adequacy of roof support systems in use at the mine. 30 C.F.R. § 75.223.

[23] Jeralds became an MSHA inspector in November of 2009, and had inspected the WLPM as a trainee. He has 34 years of experience in the coal industry, 16 of those as an underground examiner.

[24] Jeralds believed that a properly installed roof bolt provided support for half of the 4-foot distance between such a bolt and a defective bolt. Tr. 289-90. Because there were defective bolts in the same row and in an adjoining row, he determined that the unsupported distance was 8 feet of the total 12 feet between good bolts. Other inspectors have determined that the entire distance between good bolts is unsupported, i.e., the entire 12 feet between good bolts, where bolts are on 4-foot centers and there are two adjoining defective bolts.

was reasonably likely was based upon the overall condition, the compromised integrity of the three bolts, and the size of the area he deemed unsupported, which made a larger fall more likely. Tr. 260, 287.

The chandelier effect certainly compromised the integrity of the roof bolts' support of the main mine roof. Here, the six-foot bolts were no longer providing six feet of beam support. However, they were providing 4.5 to 5 feet of beam support. Jeralds did not know what length of roof bolt was required by the WLPM roof control plan. Tr. 277. In fact the plan required only 3-foot bolts. Tr. 335. Consequently, the chandeliered bolts continued to provide main roof support that substantially exceeded the requirement of the plan. In addition, the bolts were spaced 4 feet apart, closer than the 4.5 foot minimum specified in the plan. Tr. 335.

I find that the bolts continued to provide adequate support for the main mine roof, and that the standard was not violated in that respect. What remains for determination is whether the columns of material on the bolts and/or the material in the immediate roof between the bolts was adequately supported.

Jeralds believed that the plates of the chandeliered bolts were loose and that the material resting on the plates was not adequately supported. His determination that the plates were loose was based entirely upon a visual examination, and his observation of what he believed were small gaps in broken rock in the columns. Tr. 379. He did not attempt to move the plates or tap them with his sounding rod. Todd Grounds, Big Ridge's compliance manager, did not personally observe the condition. He agreed that if a bolt plate was loose, or rock had fallen from around the bolt such that the bolt itself was visible, roof support would be inadequate and the area should be flagged off and repaired. He concluded that whether the plates were loose or not could not be determined solely from the photograph. Tr. 345. However, based upon his review of the photograph and Jeralds' notes, he believed that the rock forming the chandeliers appeared to be solid, the bolts were not visible, and the condition did not present a hazard.[25] Tr. 350-51. Jeralds confirmed that the bolts had not been exposed. Tr. 257. Grounds further testified that the only way to determine conclusively if a plate was loose was to attempt to spin it. Tr. 337.

James Felty, a Big Ridge maintenance foreman with 42 years of mining experience, traveled with Jeralds and observed the condition, which he agreed was accurately depicted in the photograph taken by Jeralds. Tr. 310; Ex. G-17A. In his opinion, the condition was not hazardous. It was a condition that resulted from normal weathering, and was not a violation as long as the roof material was secure, and he believed it was. Tr. 312-13, 323-24. He hung the flags on the bolts, as depicted in the photograph, evidencing that he sincerely believed that the condition was not hazardous by walking under it and tying the flags directly on the chandeliered bolts. Tr. 313. Jeralds did not see Felty hang the flags. He indicated that the flags should have

[25] Jeralds' notes do not indicate that the plates were loose, only that they were 12 to 16 or 18 inches from "solid roof." Ex. G-16.

been hung on good bolts around the perimeter of the area, and opined that whoever had hung the flags on the chandeliered bolts did not recognize that he was in a hazardous place. Tr. 283, 292.

As to the condition of the roof in the area, Jeralds observed cracks in the immediate roof between bolts. He tapped the roof with his sounding rod. Tr. 260-61. He believed that it sounded hollow, or "drummy," which indicated that there were more cracks above, that the layers were not laminated together, and that rock was apt to fall. Tr. 261.

Grounds opined that as material weathered out, the remaining roof was typically solid. Unless there were fractures or material that needed to be pried down, the immediate roof was adequately supported and the plates continued to provide the same "skin" control as when they were first installed. Tr. 351. He concluded from his review of Jeralds' photograph, that the immediate mine roof between the bolts was not cracked and that there did not appear to be any loose material that needed to be pried down. Tr. 351, 354. As to the "drummy" sound, Grounds testified that that was not unexpected for a shale roof that had been mined 4 years earlier. Tr. 353. He conceded that a "drummy" sound might indicate that "maybe layers have done some separating," and that a close visual examination would be in order to determine if there were any cracks or other evidence of loose material. Tr. 354. However, he reiterated that, from his examination of the photograph, there did not appear to be any cracks or loose material in the cited area. Tr. 354.

I place little weight in Grounds evaluation of the condition. He was not present when the citation was issued, and did not observe the conditions first hand. His testimony and conclusions were based solely upon his review of Jeralds' photograph and notes. The photograph, while helpful in gaining an understanding of the overall condition, provides very little detail as to the specific condition of the chandeliered columns, and even less detail on the condition of the roof. Felty obviously did not believe that the condition of the chandeliered columns or the immediate roof presented a hazardous condition. However, he expressed some tolerance for falling draw rock, and considered the conditions similar to others in the mine.

While Jeralds' focus was on what he considered to be lack of support for the main roof, he was also concerned about falls of draw rock that would be of sufficient size to result in broken bones or lost time injuries. Tr. 285. It is not clear that the plates of the bolts were loose. Two of the plates appear to have significant columns of material on them, and do not give the appearance of being loose. The more classic chandelier-shaped column, gives the appearance of being less stable, and I find that the plate on that bolt was loose. I also find that the immediate roof in the area was, as Jeralds described it, broken and cracked. While I agree with Grounds and Felty that the "drummy" sound of the slate was not remarkable, I find that the broken and cracked material of the roof was not adequately supported in violation of the standard.

S&S

The fact of the violation has been established. The inadequately supported roof contributed to a discrete safety hazard, a miner being struck by a piece of falling rock. Sizable rocks falling from between the chandeliered bolts could easily result in broken bones or lost work day injuries, injuries that would be reasonably serious.[26] Whether the violation was S&S turns, as it often does, on whether the hazard was reasonably likely to result in an injury causing event.

The 5A travelway was the only route to the Number 5 section. Mining crews and supervisors traveled the road, as did grader operators, mechanics, mine examiners, and others. It was also an alternate escapeway which would have been used in the event of an emergency if the primary escapeway was rendered unavailable. While mining crews routinely traveled in man trips with canopies that lessened the possibility of serious injuries from falling draw rock, mine examiners and others traveled in open vehicles. Tr. 280, 288, 316-17.

Based upon the foregoing, I find that it was reasonably likely that the hazard contributed to by the violation would result in a reasonably serious injury, and that the violation was S&S.

Negligence

Jeralds' determination of high negligence was based upon his belief that the condition was obvious, had existed for a substantial length of time, and that numerous mine examiners would have traveled and inspected the area, none of whom identified it as a hazard. Tr. 267. He also knew that roof falls had been discussed in closeout meetings with mine managers, and believed that they should have had a heightened awareness of potential falls. As noted above, however, the WLPM's history of accidents involving roof falls is largely irrelevant to violations involving skin control issues.

The chandelier effect certainly would have been obvious. Witnesses generally agreed that a significant chandelier effect takes some time, e.g., days, months or even years to develop. Tr. 199 (Fazzolare, several days or months), 225 (Clarida, over the years), 264-65 (Jeralds, fairly long time), 311(Felty, deteriorates over years), 340 (Grounds, weathers as seasons change). The 12-18 inch columns in the 5A travelway had most likely developed over the 4-year period since the entry was mined in 2006. Numerous state and federal mine inspectors, as well as Big Ridge examiners, would have observed that condition at various stages of its development. Obviously, it had not been previously identified as a violation because it continued to exist.

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[26] I find that the hazard contributed to was unlikely to result in a fatality. Jeralds' belief that a fatality would result was largely predicated on his belief that the main mine roof was essentially unsupported over the 64 square-foot area and that a fall of the main roof would result. However, the bolts continued to supply beam support consistent with the roof control plan.

However, the chandelier effect does not, in itself, indicate that the mine roof is inadequately supported. If the portion of the roof bolts remaining imbedded securely in the mine roof meets or exceeds the requirements of the roof control plan, the main mine roof would continue to be adequately supported. The immediate mine roof, or skin, also would not pose a hazard, unless bolt plates were loose and/or there was broken draw rock that had become loose and was ready to fall.

Jeralds appeared to have been focused upon what he perceived to be inadequately supported main mine roof over a 64 square-foot area. As noted above, however, the bolts continued to provide support for the main mine roof in excess of that required in the roof control plan. The cavity, ranging from 12 to 18 inches in height, certainly was obvious, and had been present for a considerable length of time. However, that condition did not pose a hazard. Rather it was the cracked and broken material in the immediate roof, and potentially loose material on one chandeliered bolt, that posed a hazard. Those conditions were far less obvious than the chandeliered bolts. While there was considerable testimony that the chandeliered bolts were the product of months or years of weathering, there is virtually no evidence as to how long the loose material in the top had existed, or when the material on the chandeliered bolt became loose.

Many of the "managers" that passed through the area were foremen or similarly situated individuals that traveled with work crews on mantrips. Those vehicles had canopies that significantly compromised the ability of occupants to observe the mine roof as they traveled. Two days before the citation was issued, an MSHA inspector had made at least four trips past the area, most likely in a canopied mantrip, and did not identify it as a hazard. Tr. 346-477. Mine examiners, however, typically rode in open vehicles. Tr. 288. They, no doubt, observed the recessed roof and knew that the condition had developed over the years. In light of the prior notice they should have given it a closer inspection. However, the actual violative condition was considerably less obvious than the general condition of the chandeliered bolts, and there is no evidence that the roof was cracked and broken or that the bolt plate was loose when the examinations were or should have been made.

On the facts of this case, I find that Respondent's negligence with respect to this violation was moderate, but on the high end of the moderate range.

Citation No. 8428626

Citation No. 8428626 was issued by Fazzolare at 12:10 p.m., on November 26, 2010, pursuant to section 104(a) of the Act. It alleges a violation of 30 C.F.R. § 75.202(a), which was described in the "Condition and Practice" section of the citation as follows:

> Draw rock had fallen from around two permanent roof supports at XC 1 Permanent Battery Charging Station on the Main North Travelway. The unsupported top in this area measured approximately 10 foot by 10 foot or approximately 100 feet squared.

> There was ram car parked in this cross cut with the batteries under the unsupported top.
>
> Standard 75.202(a) was cited 146 times in two years at mine 1103054 (146 to the operator, 0 to a contractor).

Ex. G-19.

Fazzolare determined that it was reasonably likely that the violation would result in an injury necessitating lost work days or restricted duty, that the violation was S&S, that one person was affected, and that the operator's negligence was high. A specially assessed civil penalty in the amount of $17,300.00 was proposed for this violation.

The Violation

A permanent battery charging station was located in crosscut #1, at the bottom of the slope entrance to the mine. Ram cars would be backed into the crosscut, so that their batteries would be close to the charger. Operators would exit the car and cut the power, unplug the batteries, plug the charger into the batteries, and turn the charger on. Tr. 220-21; Ex. G-36. When Fazzolare issued the citation, there was a ram car parked at the charging station, and its batteries were underneath the subject roof bolts, which were located close to the right rib of the crosscut when facing the charger. Fazzolare prepared a rough sketch of the area, depicting the charging station, the ram car and the subject bolts. Tr. 190-91; Ex. G-36. Draw rock had fallen from between the bolts, creating a chandelier effect. The distance from the roof bolt plates to solid roof was approximately 8-9 inches. A small column of broken rock remained around the bolts, resting on the plates and tapering in as it rose to the mine roof. At least some of the smaller pieces of rock continued to be bonded to the bolts by the resin used in the original installation. The area of the recessed roof was approximately 10 by 10 feet. Fazzolare did not believe that the bolts were damaged. He did not make any notations to that effect in his notes, and believes that he would have, if they had been damaged. Tr. 241-43.

Big Ridge does not challenge the fact of violation. Clarida traveled with Fazzolare and confirmed that draw rock had fallen from around the bolts, and that broken rock continued to rest on the plates in a chandelier configuration. Tr. 236-37. He testified that the bolts were damaged and the plates were loose, and speculated that the ram car's batteries may have struck the bolts when the car was backed into the charging station. Tr. 217. Big Ridge challenges the gravity and negligence determinations, and the amount of the penalty assessed.

S&S

As with the previously discussed violation, Citation No. 8428407 which also involved chandeliered bolts, the fact of the violation has been established. The inadequately supported roof contributed to a discrete safety hazard, a miner being struck by a piece of falling rock. Rocks falling from the chandeliered bolts, or from between the bolts, could easily result in broken bones or lost work injuries, injuries that would be reasonably serious. Whether the violation was S&S turns on whether the hazard was reasonably likely to result in an injury causing event.

Fazzorlare believed that the support provided by the bolts had been compromised by about 20%, because 8 to 9 inches of the 48-inch-long bolts were no longer imbedded in solid rock. Tr. 193-94. Nevertheless, he was not concerned about a major roof fall. Tr. 204. He was concerned that more draw rock would fall, causing a broken bone and resulting in a lost work days or restricted duty injury. Tr. 198-99. As he explained, the issue was "skin control," i.e., control of the immediate roof surface, and he was concerned that more draw rock might "dribble" out from between the bolts since the plates were no longer providing support to the immediate roof. Tr. 195, 203-04.

He believed that miners were exposed to the condition because operators of ram cars frequently used the charger, preshift examiners inspected the crosscut every shift, and electrical examiners inspected the charger weekly. Tr. 195. While the operator of the ram car that was parked in the crosscut would not have traveled under the cited condition because the operator's compartment and battery connections were on the left side of the car,[27] he believed that other ram cars, made by different manufacturers, had operator's compartments and battery connections on the opposite side of the car, and that operators of those cars would park on the left side of the crosscut and would travel under the cited condition. Tr. 190, 195-96, 206, 212-13.

Clarida testified that all of the WLPM's ram cars were configured the same as the one that was parked at the charging station when the citation was issued. He indicated, by drawing on Fazzolare's sketch, that the operator's compartment and battery connections were on the left side. Tr. 219-21; Ex. G-36. Consequently, the operators would all back the car in so that the right side was closer to the rib, such that the car would be under the subject bolts, and the operators would not travel under them.

[27] Left and right, when used in describing the car and scene, refer to directions while facing inby, i.e., toward the back of the crosscut where the charging station was located. Since the car had been backed into the crosscut, the operator's compartment and battery connections were on the side of the car that would more commonly have been referred to as the right side.

Clarida re-visited the area shortly before the hearing to confirm his recollection of the scene.[28] As to the examiners, he stated that the center and left side of the crosscut were higher than the right, and that they would most likely not travel under the lower, 4.5-foot-high roof, where the bolts were located, because they would have to hunch over. Tr. 219. The "dti" board used by the preshift examiners was also on the left side of the crosscut, as he indicated on the sketch. Tr. 222; Ex. G-36. The electrical examiners had no need to travel under the bolts, which were some 20 feet from the charger. Tr. 231. Fazzolare, whose recollection of the inspection was admittedly virtually non-existent, believed that the mine roof was too high for the bolts to have been struck by a piece of equipment, and had no recollection as to whether the height of the roof in the crosscut varied. Tr. 242-43.

Fazzolare's S&S assessment was based, in part, on his assumption that the operator compartments and battery connections of some of the WLPM ram cars were located on the right side of the cars, and that the operators of such cars would travel under the cited condition. That assumption was incorrect. In fact, the operator compartments and battery connections were all located on the left sides of the ram cars, and it is highly unlikely that the operators would have been exposed to the cited condition. The examiners, likewise, were not likely to travel under the condition. They most likely would have traveled on the center and left side of the crosscut, where the roof was higher, and where the "dti" board was located. Moreover, as examiners, they should have identified and avoided any dangerous or questionable conditions.

There is limited evidence as to the size and nature of loose material associated with the bolts. Fazzolare could not relate the size of the loose material he was concerned about. Tr. 198-99. He did not identify any cracks or other instability in the roof between the bolts. Clarida opined, as he had recorded in his report, that aside from the chandelier formations on the two loose plates the rest of the mine roof looked good. Tr. 225; Ex. R-56.

The loose rock consisted of relatively small pieces of draw rock, resting on the loose plates of the two bolts. It was highly unlikely that miners would be exposed to the condition, because there was no reason that anyone would travel under it. I find that the hazard contributed to by the violation was unlikely to result in an injury causing event, and that the violation was not S&S.

Negligence

Fazzolare determined that Big Ridge's negligence with respect to the violation was high, because he believed that the condition was obvious and was attributable to the weathering of draw rock that occurred over the course of "several days or months." Tr. 199-200. The area was examined every shift and during weekly electrical examinations of the charging station. Tr. 197.

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[28] The violation was abated by the installation of timbers, which remained in place through the time of the hearing. Clarida testified that when he visited the scene it was exactly as they had left it. Tr. 237.

The condition had not been reported on the most recent preshift examination. Tr. 210; Ex. G-21. He also believed that mine management should have been particularly concerned about roof control violations because of MSHA's RTLB program, the fact that he had issued other roof control violations in that quarter, that violations of the standard had been issued 146 times at the mine in the past two years, and roof control violations had been the focus of close-out inspection reports. Tr. 198-99.

Big Ridge counters that its negligence should be low, because it was "most probable that the condition," which it viewed as loose plates on damaged chandeliered bolts, "occurred at the end of the last shift when the ram car was parked at the charging station, which would have occurred after the preshift examination took place." Resp. Br. at 51. Clarida testified that his recollection that the bolts were damaged, i.e., had been struck by a piece of mobile equipment, had been confirmed during his recent examination of the area. Tr. 226, 237. He surmised that they had been struck when the ram car that was parked in the crosscut was backed into the charging station because the roof on that side of the crosscut was about one foot lower than the 5.5 to 6 foot roof height in the main part of the crosscut, and the batteries of the ram car could move up as it articulated. Tr. 217-19, 226. Fazzolare testified that he did not recall whether the bolts were damaged, but believed that if they had been, he would have recorded that fact in the citation and/or his notes. Tr. 208, 241-43. He also believed that the mine roof was higher than 4.5 feet, which would have made it unlikely that the bolts would have been struck by a piece of mobile equipment. Tr. 243.

At the completion of the inspection, Clarida wrote a brief report on the issuance of the citation. Tr. 225, Ex. R-56. Nowhere in that report did he mention damage to the bolts, or the reduced height of the entry on the right side. He explained that he did not put that information in the report because he was more concerned about the S&S designation. Tr. 236. He also agreed that, if the ram car had recently struck the bolts, that any loose rock that had fallen should have been on the ram car. No observations of loose or fallen rock were noted by either Fazzolare or Clarida. Tr. 196; Ex. G-19, G-20, R-56. Clarida also agreed with Fazzolare that extensive chandeliering of bolts is a condition that develops over years due to draw rock being scaled down or falling out piece by piece. Tr. 225.

Big Ridge's speculation that the bolts had been damaged at the end of the prior shift when they were struck by the ram car is rejected. While Fazzolare did not notice any damage to the bolts, the plates apparently were loose, a condition that Big Ridge has acknowledged did not provide adequate roof support. That condition could not have been obvious, because Fazzolare failed to note it. There is no indication as to when that condition occurred, other than the rejected theory advanced by Big Ridge.

As discussed with respect to Citation No. 8428407, the recessed roof in the area of the chandeliered bolts was a condition that developed over a lengthy period and was not hazardous in itself. It would have been obvious, and would have been observed by Big Ridge's preshift and electrical examiners, as well as state and federal mine inspectors, for a considerable period of time up to the time of the inspection. Yet, it had never been identified as a hazardous

condition. There is no evidence that the hazardous condition, the loose plates on the bolts, existed for any appreciable length of time prior to the issuance of the citation, and that condition was far from obvious.

I find that Big Ridge's negligence with respect to the violation was moderate.

Citation No. 8428049

Citation No. 8428049 was issued by MSHA inspector Chad Lampley at 8:20 a.m., on December 1, 2010, pursuant to section 104(a) of the Act.[29] It alleges a violation of 30 C.F.R. § 75.220(a)(1) which requires that mine operators develop and follow a roof control plan approved by the MSHA district manager. The violation was described in the "Condition and Practice" section of the citation as follows:

> The operator's approved roof control plan was not being followed on working Unit #1, MMU -011. The spacing of permanent support roof bolts, row to row, as shown on pages 7 and 8 of the approved roof control plan was exceeded. The spacing ranged from 5 feet 8 inches to 4 feet 11 inches, affecting two rows of permanent support roof bolts. A damaged support roof bolt was also present, making an affected area that measured 7 feet 10 inches by 9 feet 10 inches. The condition was present in entry #8, inby the last open crosscut S.S. 8+50. The affected area was flagged off by the operator, after the condition was observed, to prevent miners from traveling the area.

Ex. G-22.

Lampley determined that it was reasonably likely that the violation would result in a fatal injury, that the violation was S&S, that two persons were affected, and that the operator's negligence was high. A specially assessed civil penalty in the amount of $50,700.00 was proposed for this violation.

The Violation

Lampley was conducting a spot ventilation inspection when he traveled to Unit #1 the working section of the mine, and observed, in entry #8, a damaged roof bolt and a row of bolts some of which exceeded the four and one-half foot maximum spacing specified in the WLPM approved roof control plan. He measured the affected area surrounding the damaged bolt at

[29] Lampley had limited experience, both in the mining industry and as an inspector. He worked at a large underground coal mine for "slightly less than two years" prior to joining MSHA, and graduated from MSHA's training academy in 2008. Tr. 373-75.

7 feet, 10 inches by 9 feet, 10 inches, and diagramed the condition in his notes. Tr. 385-90; Ex. G-24. Tom Patterson, a WLPM safety supervisor, accompanied Lampley and confirmed the presence of the damaged bolt and the excessive spacing. Tr. 512-16. Big Ridge does not contest the fact of the violation. It challenges the gravity and negligence determinations, and the amount of the penalty assessed.

S&S

Lampley's S&S determination was based upon three factors; the number of miners exposed to the condition, the number of non-conforming bolts in the small area, and the gray shale roof conditions. Tr. 404. The affected area was in the face of the #8 entry, an active working section, and numerous miners traveled in the area, including the continuous miner operator, roof bolters, ram car drivers, scoop operators, utility men hanging curtains, foremen, shift leaders, and examiners. Tr. 399. One row of bolts had been installed at an angle to the adjoining row, such that four of the five bolts were more than the maximum allowable 4.5 feet from the corresponding bolt in the adjoining row. One of those bolts was damaged. The roof was gray shale, which indicated that it had a relatively high clay content, making it more susceptible to weathering. Tr. 397-98. While there were no cracks or adverse roof conditions, Lampley believed that weathering of the shale sufficient to result in falls of material could occur "not long" after it was exposed by being mined. Tr. 397-98, 403, 461. He also believed that the larger spacing between bolts could result in falls of larger pieces of material such that a fatality was reasonably likely. Tr. 399, 404.

Big Ridge's Roof Control Plan specified that a minimum of four bolts be installed in each row, no more than 4.5 feet apart and no further than 4 feet from each rib. Rows of bolts were required to be no more than 4.5 feet apart. Big Ridge installed five bolts in each row spanning the entry, rather than the four bolts required in its plan.[30] Lampley's diagram depicts the bolts in question. The bolts on the left side (facing inby) were in compliance with the four and one-half foot spacing requirement, as interpreted by MSHA.[31] The second bolt from the left in the slanted row was 4 feet, 10 inches from the corresponding bolt in the next most inby row; four inches greater than permitted in the plan. The gap widened as the bolts approached the right rib,

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[30] The change was made because miner operators were being struck by pieces of rock falling from the roof, primarily along the right rib. Adding the additional bolt, which reduced the space between the bolts and the rib, virtually eliminated such incidents. Tr. 522-24.

[31] MSHA's Procedural Instruction Letter No. 110-V-4, effective March 9, 2010, specified that "an occassional inadvertent deviation that slightly increases the spacing of roof bolts but does not detrimentally affect support performance may not constitute a violation. Typically roof bolt spacings that occasionally exceed the approved spacing pattern by less than 6 inches at intermittent locations and do not create a specific hazard should not be cited." Ex. G-26. Lamply explained that the deviations at issue exceeded 6 inches, were neither occasional nor intermittent, and detrimentally affected support performance. Tr. 391-95.

measuring 5 feet, 4 inches; 5 feet, 6 inches and 5 feet, 8 inches. The largest gap was between the bolts nearest the right rib.

There is no dispute that there was excessive spacing between the rows of bolts. However, because the bolts in each row were closer together than required by the plan, it is not apparent that a significant reduction in roof support resulted. The plan required a maximum of 4.5 feet between the required four bolts and a maximum of 4 feet between a bolt and a rib. Big Ridge installed 5 bolts which, if evenly spaced across a 20-foot wide entry, would have been 3.3 feet apart and 3.3 feet from each rib. No one measured the distances between bolts, or between the bolts and the rib. Nevertheless, it would appear that the closer spacing of the bolts would have provided support over and above that required by the plan, and that the compromise of that support attributable to the excessive spacing between rows of bolts may not have reduced the support significantly below that required by the plan.

The area of a square encompassed by 4 bolts installed to the plan's specifications, 4.5 feet apart in rows 4.5 feet apart, would be 20.25 square feet. The distance from the center of the square to a bolt, the point of the roof farthest from a bolt, would be 3.2 feet (half of the diagonal of the square). If bolts were spaced only 3.3 feet apart, however, the area of the rectangle encompassed by 4 bolts in rows 4.5 feet apart would be 14.9 square feet. The distance from the center of the rectangle to a bolt, the point of the roof farthest from a bolt, would be 2.8 feet – both figures significantly lower than those for bolts installed according to the plan. If the spacing between rows were extended to 5 feet, the rectangle formed by four bolts 3.3 feet apart would be 16.5 square feet, and the farthest point of roof from a bolt would be 3 feet – both still less than comparable numbers for bolts installed in compliance with the plan. At 3.3 foot bolt spacing, rows would have to be 5.4 feet apart to yield an area of support and farthest distance to a bolt comparable to those provided under the plan.

The above figures are purely geometrical calculations, and there is nothing to establish that bolts spaced 3.3 feet apart in rows 5.4 feet apart would provide main roof support and skin control equivalent to bolts spaced 4.5 feet apart in rows 4.5 feet apart. However, it seems apparent that the additional bolts installed by Big Ridge provided greater roof support than was required under its plan. It is also apparent that increasing the spacing between rows beyond 4.5 feet provided less support than if that spacing had been maintained. What is not clear is whether, or to what extent, the excessive spacing between rows compromised roof support beyond that required by the plan.[32]

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[32] Lampley designated a larger "affected area" attributable to the damaged bolt. However, the damage to that bolt was minimal. The bearing plate was not loose and remained flush against the roof. Tr. 450, 498, 515. The bolt continued to provide beam support for the main roof, and Lampley was primarily concerned about skin control, i.e., rock falling between bolts due to the weathering effect and the excessive spacing of that number of bolts in a small area. Tr. 388, 397, 404. Since the plate remained tight against the roof, the skin control issues

(continued...)

Similar considerations apply to the bolts adjacent to the right rib, which were 5 feet, 8 inches apart, 14 inches more than permitted in the plan. Those bolts supported, in addition to the areas between adjacent bolts, a rectangular area encompassed by the bolts and the rib, which provided a continuous line of support at the edge of the entry. Had those bolts been 4 feet away from the rib, as permitted by the plan, exceeding the spacing by 14 inches would have significantly expanded the area being supported by the two bolts and the rib. However, those bolts were most likely closer to the rib than 4 feet, because five, rather than four bolts were used in each row. Lampley did not measure the distance from the bolts to the rib, but agreed that they should have been closer than 4 feet. Tr. 443. He also agreed that, depending on the amount of the deviation and the type of top, that excessive spacing closer to a rib might not be as much of a problem as a similar condition away from the rib.[33] Tr. 453-54.

Lampley's S&S determination was also based upon his belief that weathering of the shale top would start immediately upon its exposure to the atmosphere and that significant falls of material between bolts could occur rather quickly, i.e., before the section advanced a break or two and the frequency of miners traveling in the area of the excessive spacing would be significantly reduced. He did not specify a time line for the expected deterioration, but it is apparent that he considered falls of significant pieces of roof material imminent. However, the roof was in good condition and he conceded that there were no cracks or other adverse conditions. Tr. 461. The process of weathering, absorption of moisture by shale exposed by mining and subsequent drying, no doubt starts when the shale is exposed to the mine atmosphere. However, it was generally agreed by most witnesses that significant effects of weathering would occur over a fairly lengthy period, e.g., days or months.[34] While it is possible that material would fall while miners were still working in the area, the section would have continued to advance, and in a matter of days the frequency of miners traveling in the area of excessive spacing would have been substantially reduced. Considering the uncertain degree to which the excessive spacing between rows actually compromised roof support, and the admittedly good condition of the roof, it is questionable whether weathering of the roof would have resulted in significant falls of material while the area remained an active working section.

Based upon the foregoing, I find that the Secretary has failed to prove that the hazard contributed to by the violation was reasonably likely to result in an injury causing event. I

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[32](...continued)
related to the damaged bolt were essentially those related to the excessive spacing.

[33] The figures for the area supported and farthest distance to a bolt are comparable for the rectangles created by bolts 4 feet from a rib spaced 4.5 feet apart and bolts 3.3 feet from the rib spaced 5.75 feet apart.

[34] Tr. 199, 225, 264-65, 311, 340.

further find that the violation was not S&S, and that it was unlikely to result in an injury requiring lost work days or restricted duty.[35]

Negligence

The Secretary maintains that Big Ridge's negligence was high because the condition was obvious, preshift and on-shift examiners had failed to identify and correct it, and Big Ridge had been put on notice of the need to exercise greater care in following its roof control plan because of the RTLB program and discussions in quarterly close-out conferences. Lampley noted that small deviations from bolt spacing requirements can be hard to detect, but that when the deviation was over one foot, as it was for the bolts nearest the rib, it should have been obvious. Tr. 410-11. Patterson, and other Big Ridge witnesses disagreed. Patterson testified that Lampley had gone to the #8 face, and discovered the damaged bolt as he was leaving. He then measured the area affected by the damaged bolt and noticed and measured the excessive spacing. Tr. 514-16. He and other witnesses testified that the fact that the area had been machine rock dusted, giving it an overall white appearance, made it difficult to detect bolt spacing errors. Tr. 516, 486, 498.

On the previous shift, there had been a cut of coal taken in the #8 entry. Thereafter, production was curtailed because the belts were down. Bolting and rock dusting were done in the interim, and the foreman, Larry Perry, conducted the preshift examination for the oncoming shift. Tr. 478-83. When the belts became functional toward the end of the shift, another cut of coal was taken in the #8 entry. Lampley surmised that the bolt could have been damaged when the miner was backed out of the entry after making the last cut. Tr. 391, 414. Although it is possible that the excessively spaced bolts were installed after Perry had conducted his preshift examination, some bolting had been done, and the excessive spacing, but not the damaged bolt, would most likely have been present when Perry did his preshift examination. Tr. 481–84, 487-88. Randy Meadows, Jr., a shift leader on the day shift, was on duty when Lampley issued the citation. He had conducted his on-shift examination in the #8 entry prior to issuance of the citation, and had not detected the damaged bolt or the excessive spacing. Tr. 495, 498. He explained that the plate of the damaged bolt was tight to the roof, not dangling. Because of the low top his head was bent over as he walked through, and the area had been rock dusted making it harder to see such defects. Tr. 498.

Given the overall conditions, the limited damage to the bolt, the fact that the mis-aligned row of bolts was nearly straight, not crooked so as to stand out, and the fact that the area had been rock dusted, it is understandable that a person might not have noticed them when walking through the area. In fact, Lampley may not have noticed the spacing deviations until his

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[35] Lampley also referred to an incident that occurred on October 30, 2000, where a miner was killed by a roof fall attributed to excessive bolt spacing. Tr. 406-09; Ex. G-32. The fatality is of limited relevance because the conditions under which it occurred were significantly different, including the fact that there were 35 excessively spaced bolts. See, Resp. Br. at 59-60.

attention was drawn to the area by the damage to the bolt. Nevertheless, as Meadows conceded, an examiner is trained to, and should, identify conditions that are hazardous or not in conformance with the roof control plan, whether or not the area had been rock dusted. Tr. 502. This is doubly true since Big Ridge had been put on notice that greater efforts were required to comply with roof control standards. Here, Perry most likely failed to notice the spacing deviations and Meadows failed to notice the damaged bolt and the spacing deviations. I find that Big Ridge's negligence with respect to this violation was high.

Citation No. 8428050

Citation No. 8428050 was issued by Lampley at 8:35 a.m., on December 1, 2010, pursuant to section 104(a) of the Act. It also alleges non-compliance with the roof control plan, a violation of 30 C.F.R. § 75.220(a)(1). The violation was described in the "Condition and Practice" section of the citation as follows:

> The operator's approved roof control plan was not being followed on working Unit #1, MMU -011. The spacing of permanent support roof bolts, row to row, as shown on pages 7 and 8 of the approved roof control plan was exceeded. The spacing was 5 feet along the brow approaching the 4-way intersection in the #5 entry. This condition was present between entries #5 and #6, in the last open crosscut, S.S. 8+25. Miners were present in the affected area when this condition was observed. The affected area was flagged off by the operator, after the condition was observed, to prevent miners from traveling the area.

Ex. G-23.

Lampley determined that it was reasonably likely that the violation would result in a fatal injury, that the violation was S&S, that two persons were affected, and that the operator's negligence was high. A specially assessed civil penalty in the amount of $50,700.00 was proposed for this violation.

The Violation

This citation was issued only 15 minutes after the previously discussed violation. It also involved excessive bolt spacing, here in the last open crosscut adjacent to entry #5. A cut had been taken in the crosscut on the other side of the entry, and the miner had been backed out, across entry #5, and was parked under the excessively spaced rows of bolts. When the crosscut had been driven into the entry, it was at a slightly lower height than the roof in the entry, which left a "relatively small brow," or deviation in roof height at that location. Tr. 422. The condition is depicted in a sketch made by Lampley in his notes. Tr.417-22 ; Ex. G-24. The distance between the row of bolts in the crosscut immediately adjacent to the brow and the next row of

bolts in the crosscut was 5 feet, which is 6 inches longer than the maximum spacing specified in the roof control plan.

As with Citation No. 8428049, Big Ridge does not contest the fact of the violation, but challenges the gravity and negligence determinations, and the amount of the penalty.

S&S

Lampley's S&S determination was based upon factors similar to those considered with the previous citation, the presence of miners on an active working section, the hazard of rock falling from between bolts or a major roof fall made more likely by the shale roof, and the presence of the brow which made the roof more susceptible to weathering. Big Ridge again points to the fact that it installed five bolts per row, rather than the four required by the plan, that six bolts had been installed in the row of bolts adjacent to the brow, that the roof was in good condition, and that the small brow was not an unusual condition since driving a crosscut into an entry at a slightly lower height helped prevent damage to the bolts in the entry.

The brow was between a row of bolts in the intersection of the crosscut and the entry and the first row of bolts in the crosscut. Those rows of bolts had been installed in compliance with the plan, i.e., no more than 4.5 feet apart. It was the second row of bolts in the crosscut that was 5 feet away from the first row of bolts. As noted in the discussion of Citation No. 8428049, I find that Big Ridge's installation of five or six bolts, rather than the required four bolts, in each row provided support over and above that required in the plan, and that the Secretary has not established that the diminution in support attributable to the excessive spacing between the rows of bolts resulted in main roof support or skin control at a level below, or at least appreciably below, that required by the plan. As previously noted, if the bolts in the five and six-bolt rows were spaced equally, the rectangular area encompassed by four bolts in rows 5 feet apart would have been significantly smaller than the area encompassed by bolts installed in compliance with the plan. The farthest distance from a point of the roof within the area to a bolt would also have been smaller than the distance for bolts installed in conformance with the plan.

Lampley explained that he was more concerned about the brow than the 6 inch spacing error because the brow made the roof more susceptible to weathering – the shale layers would absorb moisture more readily, "like the side of a deck of cards." Tr. 420-22. However, the brow was between rows of bolts that had been installed in conformance with the plan. The row of bolts immediately adjacent to the brow contained six bolts, rather than the required four, which

substantially reduced the distance between bolts, and plates, in that row.[36] Tr. 522, 528. I accept Lampley's assessment that the brow made the layered shale more susceptible to weathering, and that activity in the area would have continued for a considerable period of time. Tr. 422, 424-28. However, the row of bolts adjacent to the brow in the crosscut provided considerably more support than required by the plan, and there is no evidence that the increased support was taken into account in the S&S assessment.

Upon consideration of the above, including the factors discussed with respect to the previous citation, I find that the Secretary has failed to establish that the hazard contributed to by the violation was reasonably likely to result in an injury. I find that the violation was unlikely to result in a lost work days or limited duty injury and that it was not S&S.

Negligence

The Secretary argues that Big Ridge's negligence was high because the condition was obvious and Meadows, the shift leader, had admitted that he had conducted his on-shift examination and had failed to identify the excessive spacing. However, as Big Ridge points out, the deviation involved was six inches, not over a foot as with citation 049, and there was nothing to call attention to it, e.g., a crooked or diagonal row of bolts. The area had been rock dusted, which made it harder to precisely identify the location of bolts, and the continuous miner was parked under the rows of bolts. In addition, it is not clear that Meadows had completed his on-shift examination. He had begun his examination in the #8 entry, where citation 049 was issued. However, his examination was interrupted by his involvement in efforts to abate citations issued by Lampley, who had arrived on the section shortly after Meadows. Tr. 491-96, 499. Meadows could not recall whether he had examined the crosscut prior to issuance of the citation. Tr. 499, 505.

Upon consideration of the above, and factors discussed with respect to Citation No. 8428049, I find that Big Ridge's negligence with respect to this violation was moderate.

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[36] The maximum spacing between bolts specified in the plan was 4.5 feet, and the distance between the edges of 8 inch square plates installed on those bolts would be 46 inches. The distance between six bolts equally spaced across a 20-foot wide crosscut would have been 2.86 feet, and the distance between the edges of plates installed on such bolts would have been 26 inches.

Citation No. 8428066

Citation No. 8428066 was issued by Lampley at 9:55 a.m., on December 17, 2010, pursuant to section 104(a) of the Act. It alleges a violation of 30 C.F.R. § 75.202(a). The violation was described in the "Condition and Practice" section of the citation as follows:

> The roof was not adequately supported in entries #1 and #3 of the Unit #3 (MMU-003) working section. Three unsupported kettle bottoms were present in the # - entry, inby the last open crosscut S.S. 1+30. The kettle bottoms measured approximately 20 to 14 inches in diameter. Other smaller kettle bottoms are also present in the entry that need additional support. A continuous miner and battery hauler were parked at the affected area. Two kettle bottoms were present in the #3 entry that measured approximately 3.5 feet in diameter. These kettle bottoms were partially supported, additional support is needed in this area. The affected areas were flagged off by the operator, after the conditions were found, to prevent miners from traveling the areas. Standard 75.202(a) was cited 148 times in two years at mine 1103054 (148 to the operator, 0 to a contractor).

Ex. G-33.

Lampley determined that it was reasonably likely that the violation would result in an injury requiring lost work days or restricted duty, that the violation was S&S, that one person was affected, and that the operator's negligence was high. A specially assessed civil penalty in the amount of $20,300.00 was proposed for this violation.

The Violation

Lampley inspected Unit #3 of the WLPM on the date in question. He was accompanied by Donald Hughes, a belt coordinator for the WLPM who had 34 years of experience in coal mining and frequently accompanied inspectors. They first went to the left side of the unit, where Lampley found and cited a roof control plan violation for a pillar that was too narrow. He then traveled to the right side of the split unit, MMU-003, and found unsupported kettle bottoms in entry #1 and partially supported kettle bottoms in entry #3. Kettle bottoms are typically round or spherically shaped rock formations that are not incorporated into the layered shale roof. They abut the top of the coal seam and, when it is removed, may fall out of the roof if disturbed, e.g., hit by a piece of equipment, or if there is significant weathering of the supporting shale around them. Kettle bottoms should be either pried from the roof, or supported by roof bolts. Bolts can be installed directly through a kettle bottom, or on its sides such that the plates installed with the bolt extend under it. Lampley found three unsupported kettle bottoms in entry #1, which ranged from 14 to 20 inches in diameter. Other smaller kettle bottoms were also present that needed

additional support. In entry #3 he found two, 3.5 foot diameter kettle bottoms that were partially supported. One had two roof bolts installed adjacent to it, with plates overlapping the edges of the kettle bottom. The other had a bolt installed through its edge. Big Ridge does not challenge the fact of the violation, but contests the S&S and negligence determinations, as well as the amount of the penalty.[37]

S&S

The fact of the violation has been established. The inadequately supported kettle bottoms contributed to a discrete safety hazard, a miner being struck by a falling kettle bottom. Any injury caused by a falling sphere of rock 14 to 20 inches in diameter could easily result in broken bones or lost work days, injuries that would be reasonably serious. Whether the violation was S&S turns on whether the hazard was reasonably likely to result in an injury causing event.

When Lampley found the kettle bottoms in entry #1, the area had been cut, bolted, cleaned and rock dusted, and the continuous miner was parked under the three unsupported kettle bottoms. Tr. 540-41. A ram car was also present. Lampley included a sketch of the entry, the kettle bottoms, the miner, and ram car in his notes. Tr. 539-40; Ex. G-29. The miner was positioned inby the last open crosscut, in a position to start the next cut, or mining cycle. Lampley determined that it was reasonably likely that a kettle bottom, most likely one of the unsupported kettle bottoms in the #1 entry, would fall and strike a miner, resulting in a lost work days or limited duty injury. The area was an active working section, and several miners would be working under the kettle bottoms. Tr. 543. He was less concerned about the partially supported kettle bottoms in entry #3. Tr. 542. There was broken and unconsolidated shale on the right side of the unit, although not, apparently, in the immediate area of the kettle bottoms, that he believed made it more likely that they would fall. Tr. 544. Big Ridge's roof control plan also contained a "site specific roof support plan" that noted that adverse roof conditions might be encountered in the area, and that supplemental support should be "installed in cycle along with primary support installation." Tr. 551-52; Ex. G-25.

Big Ridge's primary defense to the S&S and high negligence allegations rests on the testimony of Rodney Wenzel, the shift leader in charge of the section that day. Wenzel was supervising a partial crew of five to six miners, who were preparing the unit for production. They were working on the left side of the unit, and performed a "hot seat" shift change with the miners on the previous shift. Wenzel left to conduct his on-shift examination of the right side of the unit, where he noticed the kettle bottoms later cited by Lampley. He got one of the miners

[37] Hughes recollection was that the kettle bottoms in both entries were partially supported. Tr. 574-75. However, Lampley's notes and diagram specifically identify three unsupported kettle bottoms in entry #1. His notes also indicate that there were other kettle bottoms in the entry that needed additional support. Ex. G-29. Hughes' recollection of partially supported kettle bottoms in entry #1 appears to have been a reference to the "other" kettle bottoms.

from the left side and began to scale them down, but was called back to the left side of the unit to abate the narrow pillar citation. Tr. 569, 595. That involved ordering timbers and supplies for building cribs, and installing those items when they were delivered. He took the helping miner with him. In the meantime, Lampley and Hughes traveled to the right side of the unit, where Lampley found the kettle bottoms. No one was working on that side of the unit at the time. Tr. 570, 596.

Big Ridge contends that Wenzel was in the process of scaling down or properly supporting the kettle bottoms, and had assured that none of the miners on the section would be on the right side until that work was done. Consequently, it contends that there was limited exposure to the kettle bottoms, which would have been rendered unhazardous in the course of continued normal mining, and that the violation was not S&S. Wenzel testified that he discussed his efforts and intentions with Lampley. Lampley acknowledged that "there probably was some type of conversation there," but he simply did not recall it. Tr. 604-05. He also noted that even if Wenzel was going to take care of the kettle bottoms, that the miner had been parked under them, and miners had obviously been exposed to the condition. He also noted that the area had not been flagged-off, which he felt should have been done. Tr. 605. He did not record Wenzel's explanation in his notes, and stated that he "would like to think" that he would have mentioned that as a mitigating circumstance. Tr. 605.

The kettle bottoms in the #1 entry were left unsupported when the roof was bolted. Thereafter, the bolter was moved out, the area may have been cleaned and dusted, and the miner and ram car were returned to the entry and parked there. It is difficult to credit Wenzel's testimony, especially as to his claimed conversation with Lampley, because Lampley would most likely have mentioned it in his notes.[38] However, even if Wenzel would have remedied the violation before additional miners were exposed to it, another mining cycle was about to begin, and the miners who moved the bolter out, moved the miner and ram car in, and took other actions in the entry had been exposed to the unsupported kettle bottoms. Kettle bottoms, by their nature, present hazardous conditions and must be supported. Some of the smaller ones were simply scaled down with a bar, which suggests that they may have been in a condition to fall with minimum disturbance or weathering of the surrounding roof.

I find that the hazard contributed to was reasonably likely to result in a reasonably serious injury and that the violation was S&S.

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[38] It should be noted that the Secretary questioned Wenzel's account, noting that he did not note the presence of the kettle bottoms in his on-shift report, and that the pry bar he claimed to have used was located in entry #2, whereas the kettle bottoms were in entries #1 and #3. Wenzel explained that he did not record the kettle bottoms in his report because he intended to take care of them.

Negligence

Lampley's assessment of high negligence was premised upon his determination that a face boss, who had the responsibility to make sure miners properly supported kettle bottoms, would have been in the area of the working section "continually throughout the day." Tr. 549. He also had spoken to other inspectors who had advised that they had written numerous roof control and roof control plan violations such that Big Ridge should have been on notice that greater attention needed to be paid to such violations, and that higher negligence would be considered for future violations. Tr. 549-50. The Secretary also relies upon the "prior notice" evidenced previously discussed.

It may well be that a face boss could have been in the area and negligently failed to assure that roof bolters properly supported the kettle bottoms. However, the presumed presence and knowledge of a face boss, an agent of the operator, is too slender a thread to saddle Big Ridge with high negligence. Such a "continuous presence" presumption would have the effect of attributing to the operator virtually any act of negligence of a rank and file miner. In order to take advantage of the full force of the prior notice evidence, it should be demonstrated that an agent of the operator, typically an on-shift or preshift examiner, examined the area of the violation and failed to note and correct it. However, there is virtually no evidence as to exactly when the condition came into existence, i.e., when the inadequate roof bolting had been done – more importantly, whether it was prior to a preshift or on-shift examination by a duly qualified and certified person charged with the responsibility of identifying and correcting hazardous conditions.

When questioned about an entry in his notes, Lampley clarified that the most he could say about the length of time that the condition existed was "that likely it would have had to have been there since the previous shift," because no mining had yet been done on the right side on the day shift. Tr. 559. He also did not know when the on-shift examinations would have been made. Tr. 559. The inadequate roof bolting that failed to make safe the kettle bottoms, the latter part of the mining cycle, had presumably been done toward the end of the previous shift. As such, a preshift examination, conducted within three hours of the beginning of the next shift, might well have been conducted before the roof bolting was done.

Upon consideration of above, I find that Big Ridge's negligence with respect to this violation was moderate.

The Appropriate Civil Penalties

As the Commission recently reiterated in *Mize Granite Quarries, Inc.*, 34 FMSHRC ___ (Aug. 7, 2012) (slip op. at 4-5):

> Section 110(i) of the Mine Act grants the Commission the authority to assess all civil penalties provided under the Act. 30 U.S.C. § 820(i). It further directs that the Commission, in determining penalty amounts, shall consider:
>
> > the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.
>
> 30 U.S.C. § 820(i).
>
> Under this clear statutory language, 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 . . . we find no basis upon which to conclude that [MSHA's Part 100 penalty regulations] also govern the Commission."). While there is no presumption of validity given to the Secretary's proposed assessments, we have 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*, 5 FMSHRC at 293; *Hubb Corp*., 22 FMSHRC 606, 612 (May 2000); *Cantera Green*, 22 FMSHRC at 620-21 (citations omitted). 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 622. In addition to considering the statutory criteria, the judge must also set forth a discernible path that allows the Commission to perform its review function. *See, e.g., Martin Co. Coal Corp.*, 28 FMSHRC 247, 261 (May 2006).

Good Faith - Operator Size - Ability to Continue in Business

The parties stipulated that Big Ridge is a large operator and that the proposed penalties would not affect its ability to remain in business. Ex. Jt-1. The parties did not enter into a stipulation as to Respondent's good faith in abating the violations. However, the evidence reflects that the violations were abated promptly in good faith. Forms reflecting calculations of penalty proposals, which are discussed below, also reflect an appropriate credit for good faith abatement. I find that Big Ridge abated the violations promptly and in good faith when called to its attention.

History of Violations

Big Ridge's history of violations is reflected in two reports from MSHA's database. The first report shows all citations issued at the WLPM from October 1, 2008 to December 17, 2010. Ex. G-4. A "summary" of the report states that 165 section 75.202(a) violations and 40 section 75.220(a) violations were issued during that period. Approximately 45% of those violations were listed as being "in contest," or had otherwise not become final. Those totals closely correspond to the computer generated numbers of violations of the cited standards noted in the citations. The second report, referred to as an "R-17" lists violations issued at the WLPM that had a "Final Order Date" between "9/17/2009" and "12/16/2010." Ex. G-34. It apparently reflects that 905 violations became final during the covered date range, including citations that were issued as early as "7/27/2007." It lists 38 section 75.202 violations and 17 section 75.220 violations. I accept the figures reflected in the reports as accurate. However, the overall violation history set forth in the exhibits is deficient in that it provides no qualitative assessment, i.e., whether the number of violations is high, moderate or low. *See Cantera Green,* 22 FMSHRC at 623-24.

Some qualitative violations' history information can be found on MSHA's "Special Assessment Narrative Form" ("SANF"), which sets forth penalty proposals calculated by both the regular and special assessment formulas. SANFs for each of the violations at issue were provided to Big Ridge during discovery and, by agreement of the parties, were submitted as part of the record as an appendix to Big Ridge's post hearing brief. Tr. 610-11, Resp. Br. app. I. As reflected on the SANFs, the Secretary's Part 100 regulations for regular penalty assessments take into account two aspects of an operator's violation history, the "total number of violations and the number of repeat violations of the same citable provision of a standard in a preceding 15-month period." 30 C.F.R. § 100.3(c). Only violations that have become final are used in the calculations. For total violation history, points used in the penalty calculation are assigned on the basis of the number of violations per inspection day. The SANFs for six of the violations reflect an assessment of eight points for overall violation history, and one form reflects 10 points. Those numbers correspond to a moderate to low history of total violations, on the regulatory scale of 0 - 25 points.

Limiting the consideration to violations that have become final can present a skewed picture of an operator's actual compliance with health and safety standards during the 15 months

preceding a violation. Operators may have contested large numbers of violations, delaying finality for substantial periods of time. As a result, considering violations by final order date can be misleading. For example, in *Thueson Const. Co.*, 34 FMSHRC ___ (Aug. 20, 2012) (ALJ), a small operator that had received only three citations in the 15 month period, had settled contests of 12 previous violations in that time frame, which, under the Secretary's Part 100 penalty formula, "obscured the fact that the Respondent's fifteen-month violation history was relatively benign." *Id.* slip op. at 11-12.

The opposite effect could be produced where an operator has contested significant numbers of violations, thereby excluding them from MSHA's calculations. Here, Big Ridge was cited for approximately 1,150 violations during the period September 17, 2009 through December 16, 2010. Ex. G-4. During that same period 905 violations, with issue dates ranging from July 27, 2007 to October 2, 2010, became final. That the WLPM is a large mine, at which a large number of violations are issued, most likely accounts for the fact that its "final" violations' history is not dramatically different from its "issued" violations' history during the pertinent time period.

I find that Big Ridge's overall history of violations, as relevant to these violations, was moderate, and essentially a neutral factor in the penalty assessment process.

Repeat Violations

The legislative history of the Mine Act placed special emphasis on an operator's repeated violations of the same standard in determining the amount of a penalty.

> In evaluating the history of the operator's violations in assessing penalties, it is the intent of the Committee that repeated violations of the same standard, particularly within a matter of a few inspections, should result in the substantial increase in the amount of the penalty to be assessed.

S. Rep. No 181, 95th Cong., 1st Sess. 43 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 631 (1978). The SANFs indicate that, under the history of violations component of the assessment formula, 5 or 6 points were added as "Repeat Violation History Points" for the section 75.202(a) violations, and 2 points were added for the section 75.220(a) violations. These are relatively modest enhancements on the Secretary's 0-20 point scale for repeat violations history, which takes into consideration only violations that have become final. Nevertheless, for the section 75.202(a) violations, those points resulted in approximately a 50% increase in the penalty calculated under a regular assessment, and a 33% increase in the penalty range calculated under the special assessment. More modest increases of approximately 17% and 14% respectively, resulted for the section 75.220(a) violations.

Big Ridge's history of violations may also be considered in determining the degree of an operator's negligence, because the incidence of repeat violations may indicate that "an operator had prior knowledge of the specific safety or heath standard cited." *Cantera Green*, 22 FMSHRC at 624, *Peabody*, 14 FMSHRC at 1263-64. In evaluating negligence, repeat violations that are close in time to the subject violation are more relevant, and non-final violations may be considered on the issue of whether an operator has been put on notice of a need for increased compliance efforts with respect to a particular standard. *Enlow Fork Mining Co.*, 19 FMSHRC 5, 12 (Jan. 1997) (on remand, judge should evaluate as evidence of prior warnings three citations issued approximately one month prior to the violation at issue). As noted in the discussion of prior notice, Big Ridge's repeated violations of the roof control standards were taken into account in determining the degree of negligence, in that Big Ridge had been put on notice of a need for greater compliance efforts.

Citation No. 8428063 is affirmed as a violation. However, it was found to be unlikely to result in a lost work days injury and was not S&S. In addition, Big Ridge's negligence was found to be moderate, rather than high. A specially assessed civil penalty in the amount of $18,700.00 was proposed for this violation. As evidenced by the SANF for this violation, reductions to the likelihood of injury and negligence determinations would have produced substantial adjustments, reductions of 35 penalty points, to both the regular and special assessments. As Big Ridge points out in its brief, those reductions would have most likely resulted in a regular assessment of $335.00 and a special assessment in the range of $1,140.00. Considering the factors itemized in section 110(i), and the diminished likelihood that a special assessment would have been deemed appropriate for the violation as modified, I impose a penalty of $1,000.00 for this violation.

Citation No. 8428407 is affirmed as a violation. It was found to be S&S. However, the severity of injury was found to be lost work days, rather than fatal. In addition, Big Ridge's negligence was found to be moderate, rather than high. A specially assessed civil penalty in the amount of $53,800.00 was proposed for this violation. As evidenced by the SANF for this violation, reductions to the severity of expected injury and negligence determinations would have produced substantial adjustments, reductions of 30 penalty points, to both the regular and special assessments. Those reductions would have resulted in a regular assessment in the range of $1,530.00 and a special assessment in the range of $5,211.00. Considering the factors itemized in section 110(i), including the fact that the gravity of the violation remained serious and that Big Ridge's negligence was on the high side of the moderate range, I impose a penalty of $5,000.00 for this violation.

Citation No. 8428626 is affirmed as a violation. However, it was found to be unlikely to result in a lost work days injury and was not S&S. In addition, Big Ridge's negligence was found to be moderate, rather than high. A specially assessed civil penalty in the amount of $17,300.00 was proposed for this violation. As evidenced by the SANF for this violation, reductions to the likelihood of injury and negligence determinations would have produced substantial adjustments, reductions of 35 penalty points, to both the regular and special

assessments. Those reductions would have resulted in a regular assessment in the range of $310.00 and a special assessment in the range of $1,052.00. Considering the factors itemized in section 110(i), and the diminished likelihood that a special assessment would have been deemed appropriate for the violation as modified, I impose a penalty of $1,000.00 for this violation.

Citation No. 8428049 is affirmed as a violation. However, it was found to be unlikely to result in a lost work days injury and was not S&S. In addition, although Big Ridge's negligence was found to be high, it was just barely so. A specially assessed civil penalty in the amount of $50,700.00 was proposed for this violation. As evidenced by the SANF for this violation, reductions to the likelihood and severity of expected injury would have produced substantial adjustments, reductions of 30 penalty points, to both the regular and special assessments. Those reductions would have resulted in a regular assessment in the range of $874.00 and a special assessment in the range of $3,224.00. This violation could have been cited as a roof control violation. However, it was cited under the less frequently cited roof control plan standard, which resulted in a lower allocation of repeat violation points than if it had been cited under section 75.202(a). Considering the factors itemized in section 110(i), including the fact that Big Ridge's negligence remained high, I impose a penalty of $3,500.00 for this violation.

Citation No. 8428050 is affirmed as a violation. However, it was found to be unlikely to result in a lost work days injury and was not S&S. In addition, Big Ridge's negligence was found to be moderate, rather than high. A specially assessed civil penalty in the amount of $50,700.00 was proposed for this violation. As evidenced by the SANF for this violation, reductions to the likelihood and severity of expected injury and the degree of negligence would have produced substantial adjustments, reductions of 50 penalty points, to both the regular and special assessments. Those reductions would have resulted in a regular assessment in the range of $264.00 and a special assessment in the range of $971.00. As with Citation No. 8428049, this could have been cited as a roof control violation, but it was cited under the roof control plan standard, which resulted in a lower allocation of repeat violation points. Considering the factors itemized in section 110(i), I impose a penalty of $1,000.00 for this violation.

Citation No. 8428066 is affirmed as an S&S violation. However, Big Ridge's negligence was found to be moderate, rather than high. A specially assessed civil penalty in the amount of $20,300.00 was proposed for this violation. As evidenced by the SANF for this violation, a reduction to the degree of negligence determination would have produced significant adjustments, reductions of 15 penalty points, to both the regular and special assessments. Those reductions would have resulted in a regular assessment in the range of $1,795.00 and a special assessment in the range of $6,115.00. Considering the factors itemized in section 110(i), and the diminished likelihood that a special assessment would have been deemed appropriate for the violation as modified, I impose a penalty of $5,000.00 for this violation.

The penalties imposed above, which total $16,500.00 are substantially lower than the $211,500.00 in penalties assessed for the violations for which Big Ridge was found liable. The substantial reductions are the result of findings of lesser gravity and/or lower negligence, which

would have produced substantially lower assessments under the Secretary's penalty formulas, both for regular and special assessments, as explained above with respect to each violation.[39]

THE SETTLEMENT

As set forth in Joint Exhibit 2, the parties agreed to settle Citation Nos. 8424183, 8428613, 8428619 and 8428065. The total of the penalties assessed for those violations is $84,900.00 and the proposed penalties for settlement total $36,500.00. The factual bases for the compromises are set forth in the exhibit. I have considered the representations and evidence submitted and conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act. Accordingly the settlement will be approved and Respondent will be ordered to pay civil penalties in the amount of $36,500.00 for the settled citations.

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[39] Explaining deviations from penalties assessed pursuant to the Part 100 formula can be a relatively simple task, because the formula establishes qualitative weightings for each of the penalty factors. Where findings differ from those upon which the penalty assessment was calculated, reference to the tables can provide useful guidance on whether and/or how much the penalty imposed should differ from that assessed. Of course, consideration of other factors may justify imposition of a penalty that diverges significantly from any such suggested adjustment. As the Commission explained in *Cantera Green*, "a finding that . . . negligence and gravity were as great or even greater than the Secretary originally alleged does not preclude the judge from assessing lower penalties based on consideration of other statutory criteria and the evidence adduced during the adjudicative process." 22 FMSHRC at 622.

Where, as here, proposed penalties are specially assessed, explanations for divergences become more difficult. The Secretary's regulations do not set forth any criteria that MSHA is to apply in determining whether to specially assess a violation, and the narrative notifications of the special assessments typically shed little light on the rationale for specially assessing the violations, simply referring to the same factors that are taken into account in the regular assessment process. The situation is compounded by the fact that the Secretary typically declines to disclose why a particular violation was specially assessed. Here, the Secretary objected to production of Special Assessment Review Forms for the violations at issue on grounds of relevance and asserted the deliberative process privilege. On Big Ridge's motion to compel production, the forms were reviewed *in camera*, and the Secretary was ordered to produce the forms, with the comments of the reviewing officials redacted. The redacted forms were introduced into evidence over the Secretary's objections.

ORDER

Upon consideration of the above, the motion for approval of settlement is **GRANTED**, and it is **ORDERED** that the citations are modified as proposed, and that Big Ridge, Inc., pay penalties in the amount of $36,500.00 for the settled violations.

Citation No. 8428617 is **VACATED**. Citation Nos. 8428063, 8428407, 8428626, 8428049, 8428050 and 8428066 are **AFFIRMED, as modified.** Respondent, Big Ridge Inc., is ordered to pay civil penalties in the amount of $16,500.00 for the litigated violations.

Civil penalties in the total amount of $53,000.00 shall be paid within 45 days.[40]

/s/ Michael E. Zielinski
Michael E. Zielinski
Senior Administrative Law Judge

Distribution (Certified Mail):

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[40] 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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Telephone No.: 202-434-9950
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October 5, 2012

SEAN P. TADLOCK,	:	**DISCRIMINATION PROCEEDING**
Complainant,	:	
	:	Docket No. LAKE 2012-663-D
	:	VINC-CD 2012-01
v.	:	
	:	
BIG RIDGE INC.,	:	Mine: Willow Lake Portal
Respondent.	:	Mine ID: 11-03054
	:	

AMENDED ORDER OF DISMISSAL

This matter is before me on a Complaint of Discrimination filed by Sean Tadlock pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977. 30 U.S.C. § 815(c)(3). As detailed below, Complainant has consistently failed to fulfill his obligations as a litigant, including failures to participate in communications with this Office which were intended to clarify and explain the litigation process and his obligations as a party, failures which continue despite recent communications.

Pursuant to an Application for Temporary Reinstatement filed on Tadlock's behalf by the Secretary of Labor, he was reinstated to his position by order dated May 16, 2012.[1] Subsequently, the Secretary completed her investigation of Tadlock's complaint of discrimination filed with her Mine Safety and Health Administration, and determined that Tadlock's discharge was not in violation of the Act. Tadlock then elected to pursue the claim on his own behalf before the Commission. His complaint, pursuant to section 105(c)(3) of the Act, was filed on June 6, 2012. Big Ridge answered the complaint, and moved to expedite proceedings. On June 21, 2012, a Scheduling Order was entered, directing the parties to confer and attempt to reach agreement on a schedule for litigation of the case. Respondent, by e-mail, proposed a schedule to Complainant, including a proposed hearing date of August 27, 2012. Complainant did not respond. A conference call was arranged for July 16, 2012, in order to discuss scheduling. Complainant failed to participate in the call. A hearing date of September 27, 2012, was established, and a Notice of Hearing was entered on July 30, 2012.

[1] *Sec'y of Labor on behalf of Tadlock v. Big Ridge, Inc.*, Docket No. LAKE 2012-511-D. The Order of Temporary Reinstatement was vacated on August 31, 2012, on Respondent's motion based upon the Sixth Circuit's decision in *North Fork Coal Corp. v. FMSHRC*, No 11-3398, 2012 WL 3289806 (6th Cir. Aug. 14, 2012). The Secretary has filed a Petition for Discretionary Review of that ruling.

Respondent initiated discovery on July 2, by serving Interrogatories and Requests for Production of Documents on Complainant. When he failed to timely respond, a motion to compel was filed and, by Order dated August 20, 2012, Complainant was directed to serve responses to the discovery requests on or before August 24, 2012. He has, to date, failed to respond to Respondent's discovery requests.[2] On August 27, 2012, Respondent moved for the imposition of sanctions, requesting that the complaint be dismissed on grounds of Complainant's failure to comply with the order and failure to cooperate in discovery.

As noted above, Complainant has failed, despite repeated requests and directives, to maintain acceptable contact with this forum. He maintained an e-mail address and phone number, but only sporadically responded to messages and virtually could not be contacted by phone.[3] The following description of an attempt to hold a telephonic status conference is illustrative of the failures of communication. On August 24, in response to previous messages, Complainant inquired by e-mail what times for a conference call would be good for the Court. That date, a response was sent that that day or the following Monday, "virtually any time between 8:00 and 4:00" would be acceptable, and conference line numbers were provided. On August 27 Complainant responded that he was "available . . . whenever Mr. Wolff is available." No time was proposed for the call. On August 29, the Court proposed, by e-mail, a conference call at 3:00 p.m. that date, or alternatively at 10:00 a.m. on August 31. No communication regarding those proposals was received from Complainant. At both proposed times, counsel for Respondent and the Court called the conference line, but were not joined by Complainant.

The failed communication of August 31, 2012, resulted in entry of an Order Directing Complainant to Fulfill Litigation Obligations on Pain of Dismissal. Complainant was directed to establish a reliable means of communicating with Respondent's counsel and the Court; to personally speak to counsel for Respondent regarding outstanding discovery, the scheduling of his deposition, and other matters; and, to comply with the requirements of the Notice of Hearing. Complaint was advised that failure to comply with the order, or to otherwise fulfill his obligations as a litigant would result in dismissal of his complaint.

By September 6, 2012, there was no indication that Complaint had made any effort to comply with the August 31 Order. Complainant had not complied with the directive to communicate with Respondent's counsel and, as a result, there was little indication that Complaint's deposition, tentatively scheduled for September 11, could be taken. Complainant's

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[2] By recent e-mails, Complainant has expressed an apparent intention to submit responses to discovery. Those electronic communications, and others related to the case, are hereby made a part of the record.

[3] By copy of an e-mail to the Secretary's counsel in the Temporary Reinstatment Proceeding, Complainant advised, on September 10, that he did not "have internet and have to borrow a computer when i can," and that he had no phone. On October 3, again by copy of a response to counsel for the Secretary, he advised that he had a way to check his e-mail regularly.

failures had frustrated Respondent's attempts at discovery and preparation for the hearing, some twenty-one days away.

On September 6, 2012, an Order Continuing Hearing and Order to Show Cause was entered, directing Complainant to:

> show cause why the complaint should not be dismissed for his repeated failures to respond to communications attempted by this office and Respondent's counsel, his failure provide discovery responses as obligated by Commission Rules and the August 20, order compelling him to provide such responses; and his failure to comply with the Order of August 31, 2012. Complainant's response to this order shall be made in writing, certified under oath, and shall be filed on or before September 21, 2012. Failure to timely respond to this order, and the demonstrate good cause for the itemized failures will result in dismissal of the complaint.

That order was served on the parties by electronic mail, first class mail, and certified mail. Tracking information indicates that notice of the certified mailing to Complaint was left on September 13, and that delivery occurred on September 17, 2012. Recent communications indicate that Complaint has maintained his e-mail address, and there is no indication that the electronically mailed copy of the order and the copy mailed first class were not timely received. Complainant failed to respond to the order to show cause.

On September 24, Respondent requested, by e-mail, that the complaint be dismissed. Because it was unclear at that time whether a timely response to the order had been filed, no action was then taken. On September 27, at 3:40 p.m., Complainant e-mailed a response apparently acknowledging that his responses to discovery remained outstanding, and inquiring whether he was obligated to appear for the hearing, which had been scheduled to commence some six hours earlier. On October 3, Complainant sent an e-mail apparently stating again that he intended to submit his responses to discovery.

While Complainant has recently acknowledged that discovery remains outstanding, the fact remains that he has failed to comply with the initial scheduling order; failed to timely respond to Respondent's discovery; failed to respond to Respondent's motion to compel and subsequent motion to dismiss; failed to comply with the order directing him to fulfill litigation responsibilities; and, failed to comply or make any attempt to respond to the order to show cause. Moreover, he has failed to respond to numerous attempts at communications intended to address outstanding matters.

Based upon the foregoing, it is **ORDERED**: that the complaint is hereby **DISMISSED.**

/s/ Michael E. Zielinski
Michael E. Zielinski
Senior Administrative Law Judge

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October 12, 2012

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner,	:	CIVIL PENALTY PROCEEDINGS Docket No. WEST 2011-1252-M A.C. No. 26-00827-252573 Y12
v.	:	Docket No. WEST 2012-676-M A.C. No. 26-00827-281166 Y12
BOART LONGYEAR COMPANY, Respondent.	:	Mine: Barrick Cortez, Inc.

DECISION

Appearances: Bryan Kaufman, Office of the Solicitor, U.S. Dept. of Labor, Denver, Colorado for Petitioner;
Dana Svendsen, Jackson Kelly PLLC, Denver, Colorado for the Respondent.

Before: Judge Miller

These cases are before me on petitions for assessment of civil penalty filed by the Secretary of Labor ("Secretary"), acting through the Mine Safety and Health Administration ("MSHA"), against Boart Longyear Company ("Boart") pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Mine Act"). These dockets include one violation issued by MSHA under section 104(d)(2) and two violations issued under section 104(d)(1) of the Mine Act to Boart. The parties presented testimony and documentary evidence at a hearing held on August 8, 2012, in Salt Lake City, Utah.

Boart operated as an independent contractor at the Barrick Cortez mine, a large gold mine, located in Lander County, Nevada. The parties agree that Boart is an operator as defined by the Act, and is subject to the provisions of the Mine Safety and Health Act. Boart provides drilling services to various mines and maintains a general office in Elko, Nevada. The history of assessed violations is admitted as Sec'y Ex. 1. There are three citations and orders at issue in these two dockets, all of which are related to the drilling rig.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

a. Order No. 8555555

On September 16, 2010, Inspector David Reynolds issued Order No. 8555555, pursuant to section 104(d)(2) of the Mine Act, to Boart for a violation of Section 56.14100(c) of the Secretary's regulations. Subsequently, the Secretary moved to plead Section 56.14100(b) in the

alternative. The Secretary's motion was granted. The two alternative standards that have been pled require the following.

> (b) Defects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons.
>
> (c) When defects make continued operation hazardous to persons, the defective items including self-propelled mobile equipment shall be taken out of service and placed in a designated area posted for that purpose, or a tag or other effective method of marking the defective items shall be used to prohibit further use until the defects are corrected.

30 C.F.R. § 56.14100(b) and (c). The citation described the alleged violative condition as follows:

> The brake lights located on the Ford flatbed pipe truck #-64, were not being maintained. The brake lights failed to function when tested. This condition has been reported since 09-11-10, on the driver's pre use inspection. Joel Nalley, Driller in charge was aware that the brake lights were not working at the start of the shift, and failed to remove the truck from service, or tag the truck out of service to prevent further use until the brake lights were repaired. Joel Nalley engaged in aggravated conduct by his failure to take action of a known hazard. This violation is an unwarrantable failure to comply with a mandatory standard.

Reynolds determined that a fatal injury was reasonably likely to occur, that the violation was significant and substantial, that one employee was affected, and that the negligence was high. He designated the alleged violation as an unwarrantable failure. Pursuant to 30 C.F.R. § 100.3, the Secretary proposed a civil penalty in the amount of $8,421.00 for this violation.

Mine Inspector David Reynolds has been with MSHA for twelve years and, prior to becoming a mine inspector, worked for eight years in the gold mining industry. (Tr. 78-79). Reynolds has been trained to conduct accident investigations and is a MSHA special investigator. (Tr. 79). On September 16, 2010 Reynolds was at the Barrick Cortez mine to conduct a regular inspection. (Tr. 82). Reynolds traveled to the active pit area, where mining was taking place and trucks were being loaded.

As a part of his routine inspection, Reynolds checked the trucks used at the mine site, including the Boart truck located in the pit area. (Tr. 81). There were three or four Boart employees present in the pit. (Tr. 84, 100). The employees were supervised by Joel Nalley, the driller. (Tr. 85-86). The cited truck, the No. 64 flatbed truck, is primarily used to transport pipes but is also used to hold water. Sec'y Ex.12; (Tr. 84, 87). The truck was not tagged out or removed from service, and was ready for operation. (Tr. 86, 88). When Reynolds, with the

assistance of Nalley, tested the brake lights on the truck, the lights failed to function. (Tr. 87, 102). The flatbed truck was located in an area of the pit where other vehicles were operating, including large haul trucks that carry 300 tons of ore. (Tr. 88, 98). Reynolds testified that the large haul trucks have a number of blind spots, and are difficult to stop thereby creating a dangerous situation. (Tr. 88-89).

Reynolds testified that he spoke with Nalley about the faulty brake lights and recorded the conversation in his notes. (Tr. 90). Reynolds explained that, on the day of the inspection, he learned that the operator had been having a problem with the brakes on the truck. Namely, the lights had been repaired twice after it was discovered during a pre-operational check that they were not working. (Tr. 91, 100). Nalley confirmed during his testimony that he that he had repaired the lights on at least two occasions prior to the issuance of the citation. Reynolds testified that he asked to see the preshift inspection reports and, based on such, determined that the brakes were not working on September 15th or 16th. (Tr. 102). Nevertheless, the truck was used on the15th, and, on the 16th the truck was loaded with equipment while the mine prepared to move the rig to another spot. (Tr. 91-92, 98). Reynolds confirmed this understanding on cross examination. Reynolds reviewed the maintenance book for the truck and observed that the pre-use examination on the day of the inspection, September 16th, indicated the lights were not working. (Tr. 93). Reynolds testified that Nalley had knowledge of the non-operational status of the lights on that day. (Tr. 93). According to Reynolds, Nalley was prepared to use the truck in spite of the non-operational brake lights. Moreover, Reynolds explained that the brake problem had been recorded in the mine books since September 11th. (Tr. 91).

Reynolds testified that his fear was that, without the brake lights being operational, any vehicle following the flatbed truck or traveling behind it would not be aware that the truck was stopping. If the flatbed truck stopped in front of a haul truck without the brake lights working, the haul truck would have a difficult time stopping and could collide with the smaller flatbed truck. (Tr. 94). If such a collision occurred, the flatbed truck would be crushed, resulting in a fatal accident. (Tr. 94-95).

Joel Nalley, has worked for four years as a driller and has been with Boart for a total of nine years. (Tr. 109). His recollection of the truck incident is very different from that of Reynolds. Nalley testified that he did not conduct a preoperational inspection of the No. 64 truck on September 16th, as alleged by Reynolds, and he was not aware of the non-working brake lights. (Tr. 112). Nalley was present when Reynolds tested and observed that the brake lights on the flatbed truck were not functioning. He explained that this vehicle is used as a water truck and to haul pipe. (Tr. 120). Nalley testified that, beginning on September 11, 2010, the truck had problems with its brake lights. (Tr. 115). When the defect was discovered on September 11th, the truck was tagged out and he replaced the bulbs and entire tail light assembly. (Tr. 115, 125). Nalley did not inspect or operate the flatbed truck on the 12th. (Tr. 116). However, when he conducted a preoperational test of the truck on the 13th, he again found that the brake lights were defective. (Tr. 116). It took Nalley approximately two hours to repair the brake lights on that day. (Tr. 118). In both instances Nalley noted in the pre-op book that he had repaired the brake lights. Nalley explained that, although Reynolds reviewed the book, the mine destroyed the preoperational book, as it is allowed to do, without producing pertinent pages related to this

violation. While Nalley had previously made the repairs to the brake lights on his own, he called a mechanic to make the repair after the citation was issued. (Tr. 132).

Nalley testified that he did not operate the truck on the 14th or 15th and, therefore, he did not conduct a preoperational inspection on either day. (Tr. 119-120). He further testified that he did not tell Reynolds he used the truck on the 15th. (Tr. 120). Moreover, Nalley denies that he told Reynolds he had completed his check of the truck for the shift on September 16th and, further, denies that he was aware of any defects. Nalley agreed that Boart was in the process of moving the rig out of the pit that day and that the No. 64 flatbed truck was next in line to move. (Tr. 125). However, Nalley testified that he had not completed the preoperational check, which he would have conducted prior to moving the truck. (Tr. 124).

Finally, Nalley testified that it was unlikely that this flatbed truck would be in the area of the haul trucks. Boart normally has a pilot car behind the flatbed truck to provide support when moving a vehicle as large as the truck. (Tr. 126). The purpose of the pilot car is to watch for items falling off of the truck. (Tr. 127). Additionally the mine planned to use a spotter vehicle when moving the truck that day. (Tr. 129). Nalley testified that this part of the mine had berms that separated the area where Boart was working from the road driven by the haul trucks. (Tr. 128-129). However, on cross examination, Nalley conceded that haul trucks do use the pit area and the roads crossing it, which includes the roads that the flatbed truck traveled. (Tr. 138). He also agreed that the non-functioning brake light affected the safety of the truck, that the truck could be hit from behind, and that the result would be a serious accident and accompanying injuries. (Tr. 139-140).

i. Fact of Violation

There is an obvious discrepancy in the testimonies of the MSHA inspector and Nalley. Reynolds took notes, Sec'y Ex. 13, pp. 36 and 37, which support his testimony and his memory of the conversations and observations at the time the order was issued. For the most part, Nalley responded "yes" or "no" to answers suggested in the leading questions asked by Respondent's counsel. Also, Nalley answered questions in a very narrow manner, referring only to his actions and not to those of others working in the area or who had driven the truck. Notably, two things are missing from the transcript and evidence for this proceeding: (1) the pre-op reports that are in dispute, and (2) the testimony of Seward, who was operating the truck without a working brake light on the shift just prior to Nalley's arrival. After responding on direct examination that the truck is not driven often, Nalley agreed on cross examination that he was told by the inspector that the truck was driven with the inoperable brake lights prior to Nalley's arrival on the day of the citation. Nalley had no notes, and the preoperational book was destroyed. Yet, in response to leading, controlled questions, Nalley remembered details from two years ago. Moreover, Nalley's testimony was contradictory. On one hand he said he did not tell Reynolds he had conducted a pre-op of the truck, but, on cross-examination, when asked if he spoke with Reynolds about the brake lights, he stated that he spoke with Reynolds "[a]fter [he] did [his] pre-ops., yes." (Tr. 141). Nalley also explained that he learned from Reynolds that the truck was observed operating without the brake lights on the night of the 15th. (Tr. 149).

After carefully observing the witnesses and evaluating their demeanor and testimony, and given the fact that Nalley's testimony was almost exclusively leading, I credit the testimony of Inspector Reynolds in determining the facts related to this violation. I find that, based upon the testimony of Inspector Reynolds, the brake lights had been tested, were not operational, the truck was not tagged out, and that the mine was prepared to move the flatbed truck to a new location. The inoperable brake lights clearly affect the safety of the truck, as any vehicle traveling behind the large truck would not realize that it was coming to a stop and would easily hit the back of the truck. Hence, I find a violation of 30 C.F.R. § 56.14100(b).[1]

ii. Gravity

The Secretary has agreed to amend the order and change the likelihood of occurrence such that the order is now a non-S&S violation. (Tr. 14-15). The S&S nature of a violation and the gravity of a violation are not synonymous. The Commission has pointed out that the "focus of the seriousness of the violation is not necessarily on the reasonable likelihood of serious injury, which is the focus of the S&S inquiry, but rather on the effect of the hazard if it occurs." *Consolidation Coal Co.*, 18 FMSHRC 1541, 1550 (Sept. 1996). I find that, even though the Secretary has modified the citation to "unlikely", the violation remains a serious one. This flatbed truck traveled on the roadway with large haul trucks. The roadway was the only way in and out of the pit. (Tr. 94). Given that there are large haul trucks on the mine site, and that the haul trucks may cross paths with, or drive behind, the flatbed truck that was cited, there may well be an accident due to the inoperable brake lights. When the accident occurs, it will be serious and the resulting injury will be serious or fatal. As Reynolds explained, he has investigated accidents that involved haul trucks and the result was a great deal of damage to the smaller truck. (Tr. 97). I find that the gravity warrants a higher penalty, even if it is not designated as S&S.

iii. Negligence and Unwarrantable Failure

Reynolds found this violation to be the result of high negligence and designated it as an unwarrantable failure. In *Lopke Quarries, Inc.*, 23 FMSHRC 705, 711 (July 2001), the Commission restated 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*");

[1] The Secretary moved to plead in the alternative to include section (b) of this standard. The motion was granted prior to hearing.

> see also *Buck Creek Coal*, *Inc.*, 52 F.3d at 136 (approving Commission's unwarrantable failure test).
>
> 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, such as the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator's efforts in abating the violative condition, whether the violation is obvious or poses a high degree of danger, and the operator's knowledge of the existence of the violation. *See Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000); *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev'd on other grounds*, 195 F.3d 42 (D.C. Cir. 1999) . . . All of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether mitigating circumstances exist. *Consol*, 22 FMSHRC at 353. 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. *REB Enters., Inc.*, 20 FMSHRC 203, 225 (Mar. 1998).

The unwarrantable designation in this case turns primarily on the supposition that Nalley had and would operate the flatbed with faulty brake lights. When Reynolds approached Nalley about the inoperable brake lights, Nalley produced the pre-operation examination book and went through it with the inspector who, in turn, took notes. Boart destroyed the book prior to giving a copy to MSHA for purposes of the hearing and, presumably, took no other notes. The notes made by Reynolds make it clear that Reynolds asked Nalley if the brakes were working at the time and the response was "no." Reynolds notes also show that he asked if the brakes were working the night before the inspection and Nalley responded "no." Nalley now says that he had not conducted the pre-operation examination prior to Reynolds arrival on the day of the inspection, and that he intended to do so prior to operating the truck. Nalley also denies that there was a problem with the brakes on the shift just prior to his. I credit Reynolds testimony in this regard and find that Nalley had conducted a pre-op check and found the brake lights to be inoperable, yet failed to tag out the equipment or take it out of service. Again, I credit Reynolds, based upon the facts presented, the notes that Reynolds kept, and the fact that Nalley's testimony was very limited and controlled by leading questions.

With regard to factors needed to be addressed in the context of an unwarrantable failure analysis, I find that the Secretary has not met her burden. While I believe that Reynolds account of September 16th is accurate, there is still an element of misunderstanding in his conversation with Nalley. It is likely that the condition of the brake lights existed for at least the shift prior to Nalley's, and Reynolds believed that Nalley would have operated the truck without the brake lights if the citation had not been issued. Nalley denies that he would have operated the flatbed

truck with faulty brakes. That statement has some basis in the fact since the mine had been making efforts, albeit ineffective, to find a permanent solution to the brake light problem.

The Secretary argues that the violation is unwarrantable because it had lasted since September 11, the time of the first repair, and that the flatbed had been used during that time period. (Sec'y Br. 17) The argument fails to convince me that the violation was unwarrantable because there is no evidence that the truck was driven with faulty brake lights during that time frame. The inspector could not say that the brake lights remained inoperable from September 11 until the shift just prior to Nalley's. Further, the Secretary fails in her argument that the mine had been placed on notice since September 11 that extra efforts were needed. Instead, Nalley believed that the brake lights had been repaired each time they were found defective. While I agree with Reynolds that Nalley knew of the defective brake lights on September 16th, there is no evidence that he had the time, or refused, to repair the defect. Nalley had conducted a pre-op and observed the non-working brake lights when Reynolds arrived and there is no explanation as to why the truck was not tagged out, but I cannot assume it would have been operated without repair. While the violation was obvious and the operator had knowledge of the existence of the violation, there are mitigating circumstances in this case, given that the mine attempted a number of repairs on the brake lights in the days leading up to the citation. (Tr. 101). Consequently, I find that the violation was not the result of the operator's unwarrantable failure to comply and the violation is more properly designated as a 104(a) citation. However, I do find that Boart exhibited high negligence and, accordingly, I assess a penalty of $8,000.00.

b. Citation No. 8564140

On August 5, 2010, Inspector Gerald Killion issued Citation No. 8564140, pursuant to section 104(d)(1) of the Mine Act, to Boart for a violation of Section 56.11002 of the Secretary's regulations. The cited standard requires that "[c]rossovers, elevated walkways, elevated ramps, and stairways shall be of substantial construction provided with handrails, and maintained in good condition. Where necessary, toe boards shall be provided." 30 C.F.R. § 56.11002. The citation described the alleged violative condition as follows:

> Their (sic) were not handrails provided on the Drill Platform, to keep miners from falling off. The Drill Platform is accessed daily to make an inspection. The Drill Platform is 59 1/2 inches from the ground. In the event that a miner would fall from the Drill Platform, an accident with serious fatal injuries could occur. The supervisor stated that he has told management, about 2-3 weeks ago, that handrails needed to be put on the Drill Platform. Management engaged in aggravated conduct constituting more than ordinary negligence in that they were aware that handrails needed to be installed on the Drill Platform. This violation is an unwarrantable failure to comply with a mandatory standard.

Killion determined that a fatal injury was reasonably likely to occur, that the violation was significant and substantial, that one employee was affected, and that the negligence was high. He designated the alleged violation as an unwarrantable failure. Pursuant to 30 C.F.R. § 100.5

the Secretary specially assessed a civil penalty in the amount of $20,900.00 for this alleged violation. At the hearing the Secretary moved to plead in the alternative to allege a violation of 30 C.F.R 56.11027. The motion was granted but the decision is based upon the standard originally cited.

Inspector Gerald Killion has worked for MSHA since 1999. (Tr. 22). Prior to becoming a mine inspector, Killion worked for 24 years in the mining industry, including at a Newmont gold operation. (Tr. 24). On August 5, 2010, in response to a complaint received by MSHA concerning the Boart drilling operation, Inspector Killion traveled to the Barrick Cortez mine to conduct an inspection of the Boart operation. (Tr. 24-26). During the course of the inspection, Killion issued several citations and orders, including Citation No. 8564140 for not having handrails on the drill rig walkway, and a second citation on the same drill rig, discussed *infra*, for a lack of safe access to the platform. Both the Barrick mine and the Boart operation at the mine were operating at the time of the inspection, and Boart had miners working at the site. (Tr. 26).

Upon arriving at the drill platform[2] Killion noticed an area along the side of the raised area, approximately 50 to 60 feet long that appeared to be a walkway. (Tr. 38-39, 68). Killion learned from Guadalupe Jacobo, the supervisor for Boart, that miners walked the area to conduct preshift examinations, perform maintenance, and make repairs on the drill rig. (Tr. 27, 31). Jacobo explained to Killion that there is a preshift inspection once each shift, that Boart operates two twelve hour shifts, and that, as a result, the area is walked at least twice every 24 hours. (Tr. 31, 34-35). Nothing on the drill rig was locked or tagged out. (Tr. 28). It was obvious to Killion that anyone could access the rig and walk along the sides of the rig, until turning to the mechanical components in the center.

Killion testified regarding Sec'y Ex. 4, which consists of three photographs of the drill rig, including the area along the side of the platform, the drill, and the mechanical components of the drill in the center of the platform. (Tr. 31-32, 38). The second photograph shows that the area where miners walked was roughly 61 inches above the ground. Sec'y Ex. 4 p. 2.; (Tr. 32). Killion testified that he observed footprints, traveling in both directions, in the subject area. (Tr. 31, 33-34). While there was a working platform surrounded by handrails for the operator of the drill at one end of the platform, the subject area described by Killion did not have guards or handrails to prevent a miner from falling from that area. (Tr. 40, 71). Killion stated that there was nothing to hold onto along the entire length of this raised area, and the cited area was exposed to rain and other elements. (Tr. 33). Moreover, Killion explained that there were no caution signs or barricades to keep miners off of the elevated area. (Tr. 36). Notably, Boart had another rig in the area which did have handrails around the perimeter. (Tr. 37).

Killion testified that Jacobo explained to him that he had discussed the need for handrails with Dan Kohlman, Jacobo's supervisor, two to three weeks prior to the date of this inspection.

[2] I use the term "platform," which was used by the Secretary, to describe the cited area. The area was described in various terms throughout the course of the hearing. The drill is mounted on this large platform, and the drill and platform together are referred to as the drill rig. I do not find this to be a "working platform".

(Tr. 31, 35-36). Killion took notes regarding his dialogue with Jacobo and, at hearing, was very clear about the nature of the conversation. (Tr. 35).

Killion testified that he feared that someone walking along the edge of the platform would lose their footing and fall the approximately five feet to the ground. (Tr. 32). He explained that a falling miner would land on the hard ground, or on an object on the ground, resulting in severe injuries, including broken bones. (Tr. 53). Killion understood that the mine was prepared to put railings on the walkway, but had decided to wait and do so when the rig was moved back to the shop in two or three weeks. Killion has no doubt that the violations were obvious. (Tr. 55). It was clear that persons had been walking along the edge of the platform and there was no handrail or other guard to prevent the miners from falling. (Tr. 55).

Jacobo, a rig supervisor, has worked for Boart for sixteen years and has worked on and off at the Barrick site for the past fifteen years. (Tr. 153, 156). Jacobo had a different recollection of his conversation with Inspector Killion. He explained that, although he discussed installing handrails with a supervisor, as he told Killion, he did not believe the handrails were necessary because the area was not a walkway and the men working in the area were trained where to walk and how to access the drill. (Tr. 171, 182). However, he was told by Barrick that handrails may be necessary along the edge of the platform. (Tr. 178). Jacobo stated that the drill rig has been used at various mine locations and it had not been cited by MSHA in the past. (Tr. 159). This drill rig had been on this Barrick site for four weeks prior to the citation in August, 2010. (Tr. 162-163). He explained that the drill rig is brought to mine sites on a large trailer, and then moved off of the trailer and set on jacks. (Tr. 160-161). The rig remains until the job is complete.

Jacobo testified that the walking surface on the drivetrain portion, the area that the inspector refers to as the drill rig, is a non-skid steel deck. Jacobo explained that he regularly refers to the MSHA standards and it is his belief that handrails were not necessary because the rig was not six feet or more above the ground[3]. (Tr. 163, 167-168). Jacobo emphasized that Boart was in compliance because the area along the sides of the platform was not a walkway. Instead, he explained, the miners climb up from a ladder on either side of the platform, go directly to the center of the rig to conduct checks and perform maintenance, and they have no need to walk along the edge. (Tr, 169).

Jacobo disagreed with Killion's assessment that miners would fall and, instead, testified that no one would fall and there would be no serious injuries. (Tr. 168). He explained that the miners are well-trained, know where they can safely walk, and know the correct route to follow to reach the drill to perform the checks and maintenance. (Tr. 168-170). He has never known anyone to fall off the drivetrain portion of the drill rig, nor has he heard of anyone being injured while accessing the drivetrain area. (Tr. 169-170, 194). Jacobo asserted that miners don't regularly work on the drivetrain portion and, instead, mostly work on the work platform located at the end of the rig. (Tr. 168-169). However, Jacobo agreed that miners do preshift

[3] The six foot measurement is an OSHA requirement or guideline.

maintenance, grease drivelines, and check the oil on the large drill located on this platform. (Tr. 169). The miners access the raised bed by ladder and on one side, step over the pumps and cables to reach the machines in the middle. In his view, this is the only area on the platform that is traveled.

Dan Kohlman, the operations manager for Boart, works out of the company's Elko office and testified that Boart has owned the rig since 1992. (Tr. 196). While Kohlman has been the operations manager for the past 11 years, he has been with Boart for over 20 years. (Tr. 196). As operations manager, he supervises 8 individual including Jacobo. (Tr. 198). Kohlman's testimony generally mirrored that of Jacobo, but Kohlman had less knowledge of the rig given that his office is in Elko near the shop and not at the mine site. (Tr. 199). The testimony of both witnesses was in the form of one syllable responses to leading questions. Accordingly, I do not find Jacobo's or Kohlman's testimony particularly credible.

Kohlman agreed that, roughly a week after the rig went to Barrick Cortez, he had a discussion with Jacobo about the need for handrails. (Tr. 205). Kohlman and Jacobo discussed that there was no need for the handrail, but they were told that MSHA was unreasonably citing operators for failure to have such rails, so they determined that the parts, which are not normally stocked, would be ordered and the rails installed when the drill was returned to the shop. (Tr. 179, 205). At the time the citation was issued, the parts for the rail had arrived. (Tr. 205-206).

i. Fact of Violation

I find that the cited area is a walkway and the lack of handrails is a violation of the cited standard. While the Secretary's regulations do not define "walkway," the regulations do define "travelway," which has been equated with a "walkway." The Secretary defines "travelway" as a "passage, walk, or way regularly used and designated for persons to go from one place to another." 30 C.F.R. § 56.2. When determining whether an area is a travelway under the standard, the Commission has held that "the relevant question is whether the areas in question were used, or intended to be used, for walking." *Alan Lee Good*, 23 FMSHRC 995, 1000 (Sept. 2001). While Jacobo denies that the area is a walkway, the evidence demonstrates that it is used as such. Killion observed footprints in the area along the edge of the platform. He was also told that miners access the area and use it to travel the length of the drill rig during the preshift examination. The area is also used as a walkway as miners access the platform from either side by way of a ladder, and walk along the edge until turning in to the center of the platform to perform checks and maintenance on the drill and motors. I credit the testimony of Killion that, upon observing the area, it was obvious that miners walk along the edge and side of the platform to conduct inspections and to reach other areas of the drill rig. There were not handrails, signs, barricades or guards to prevent someone from slipping and falling off of the platform while walking along its length.

Boart argues that since the drill rig has been used for many years and was not previously cited, it did not have fair notice of the handrail requirement. This particular piece of equipment is unique in that it is moved from mine to mine, and, given the time it was scheduled to be at this mine, it may be moved as often as every few weeks. Even so, Jacobo recalls that no other inspector has taken issue with the lack of rails on the platform. However, there is no evidence

that an inspector observed the rig while at a mine or that an inspector noticed the missing handrails and moved on without issuing a citation. Instead, this drill rig is moved from location to location and may be set up for only a few weeks at time, making it difficult for an inspector to locate and inspect.

In *Alan Lee Good*, 23 FMSHRC 995, 1004-1005 (Sept. 2001) the Commission stated the following:

> When "a violation of a regulation subjects private parties to criminal or civil sanctions, a regulation cannot be construed to mean what an agency intended but did not adequately express." *Phelps Dodge Corp. v. FMSHRC*, 681 F.2d 1189, 1193 (9th Cir. 1982), *quoting Diamond Roofing Co. v. OSHRC*, 528 F.2d 645, 649 (5th Cir. 1976). To determine whether an operator received fair notice of the agency's interpretation, the Commission asks "whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard." *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990). . . .
>
> In applying the reasonably prudent person standard to a notice question, the Commission has taken into account a wide variety of factors, including the text of a regulation, its placement in the overall regulatory scheme, its regulatory history, the consistency of the agency's enforcement, and whether MSHA has published notices informing the regulated community with ""ascertainable certainty" of its interpretation of the standard in question. *See Island Creek Coal Co.*, 20 FMSHRC at 24-25; *Morton Int'l, Inc*., 18 FMSHRC 533, 539 (Apr. 1996); *Ideal Cement Co.*, 12 FMSHRC at 2416; *U.S. Steel Mining Co.*, 10 FMSHRC 1138, 1141, 1142 (Sept. 1988); *Al. By-Prods. Corp.*, 4 FMSHRC 2128, 2131-32 (Dec. 1982). Also relevant is the testimony of the inspector and the operator's employees as to whether certain practices affected safety. *Ideal Cement Co.*, 12 FMSHRC at 2416. Finally, we have looked to accepted safety standards in the field, considerations unique to the mining industry, and the circumstances at the operator's mine. [FN1] *Island Creek Coal Co.*, 20 FMSHRC at 24-25; *BHP Minerals*, 18 FMSHRC at 1345, *citing U.S. Steel Corp*., 5 FMSHRC 3, 5 (Jan. 1983).

Of all of the factors listed above, the operator relies most heavily on the lack of prior enforcement of this regulation. While Jacobo testified that the lack of handrails had never been cited, he was not able to be more specific. Kohlman could only say that he was not aware of any citations that were issued for the lack of handrails. No witness for the operator could explain if an inspector had inspected the rig, had seen footprints, questioned Boart about the walkway, and had determined that there was no violation.

As the above-cited cases indicate, prior inconsistent enforcement is only one of several factors that the Commission considers in evaluating whether an operator has received fair notice of the Secretary's interpretation of an ambiguous regulation. Guarding is traditionally the standard in which the "fair notice" defense is raised and has been discussed at length in Commission decisions and other industry documents. The lack of handrails on a walkway is similar to a guarding violation and also has been discussed at length. In fact, based upon Jacobo's testimony, Boart learned through conversations with Barrick that the drill rig should have handrails and, in fact, other rigs owned by Boart do have rails along the sides where miners can and do easily travel the length of the rig. The need for rails was obvious. Even if the walkway was not used regularly, it was used at least once per shift according to Killion and the danger was obvious. Based on such findings, I have determined that a reasonably prudent person familiar with the mining industry and the protective purpose of the standard would have understood that a handrail was required along the walkway on the rig. Given my above analysis, I find that the Secretary has established a violation of the cited standard.

ii. Significant and Substantial

Given the fall hazard associated with this violation, Killion designated it as significant and substantial. A significant and substantial ("S&S") violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(1). A violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). The Commission has explained that:

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

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

The Commission has long held that an S&S designation must be based on the particular facts surrounding the violation, and viewed in the context of continued mining operation. *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985). The Commission and courts have also observed that an experienced MSHA inspector's opinion that a violation is significant and substantial is entitled to substantial weight.

Harland Cumberland Coal Co., 20 FMSHRC, 1275, 1278-79 (Dec. 1998); *Buck Creek Coal Inc.*, 52 F.3d 133, 135 (7th Cir. 1995).

I have found that there is a violation of a mandatory standard and that the violation created a discrete safety hazard, that of falling from a platform five feet above the ground and striking the ground or a hard object on the ground. A fall would lead to a serious injury, including broken bones or a head injury. The question then becomes, given the circumstances, is it reasonably likely that the lack of handrails will result in a fall and a subsequent injury. The mine operator argues that the miners are trained to not walk along the edge of the platform, and, instead, to walk to the center between two machines to conduct checks and maintenance. The Secretary, on the other hand, argues that miners do a preshift examination and walk along the edge of the platform in accessing other areas of the drill rig. Further, she argues, the subject area is open to the elements, may become wet and slippery, and there are cables and other obstacles to avoid when walking along this area. Killion reasoned, that given his experience and background, that if a miner were to fall, they would suffer serious injuries, including broken bones.

As in the case of guarding violations, the normal actions of miners must be considered in determining whether a violation is S&S. In discussing the injuries related to guarding in *Thompson Bros. Coal Co.*, 6 FMSHRC 2094, 2097 (Sept. 1984), the Commission took into account "inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness" and explained that "in related contexts, we have emphasized that the constructions of mandatory safety standards involving miners behavior cannot ignore the vagaries of human conduct." *See, e.g., Great Western Electric*, 5 FMSHRC 840, 842 (May 1983); *Lone Star Industries, Inc.*, 3 FMSHRC 2526, 2531 (Nov. 1981). Applying this test requires taking into consideration all relevant exposure and injury variables, *e.g.*, accessibility of the miners to the walkway, the work areas, ingress and egress, work duties, and, as noted, the vagaries of human conduct.

I find that the lack of a handrail along a fifty to sixty foot walkway, where miners travel in all types of weather, at least once per shift, is a significant and substantial violation. It is reasonably likely that, given that this condition would remain uncorrected for the remainder of the job, a miner walking along the area would stumble and fall off of the platform. Given the daily exposure, the accessibility to the walkway, and the various work duties required on the platform, it is reasonably likely that the violation would lead to an injury and that the injury would be serious. Accordingly, I find that the violation was S&S.

iii. Negligence and Unwarrantable Failure

Killion determined that the failure to provide handrails was the result of Boart's high negligence and unwarrantable failure to comply with the mandatory standard. Killion explained that the primary reason he determined that the violation was unwarrantable was because management knew of the problem and failed to remedy it. He understood from Jacobo that Jacobo had discussed the need for handrails with Kohlman several weeks prior to the citation, and the materials to provide the rails were at the shop, yet the handrails had not been installed. (Tr. 170-172). Jacobo denies that he told the inspector that he was aware of the need for handrails and instead testified that he told Killion that they had discussed handrails and had a

plan in place to install them. (Tr. 172-175). Kohlman indicated that, since Boart didn't believe they needed the handrails, the installation could wait for several weeks until the job was complete and the drill rig was returned to the shop where it was easier to install the handrails. However, Kohlman had little knowledge about the actual worksite and he was not aware that there was another rig at the location that did have handrails. Nevertheless, he did explain that other rigs, including truck rigs, are higher off of the ground and, for that reason, those pieces of equipment have handrails. (Tr. 212-213).

I find that the mine was aware of the need for handrails, that the violation had existed for several weeks, and that, although Boart had ordered the parts, it did not follow through and, therefore, made little effort to abate the violation. 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. *REB Enters., Inc.*, 20 FMSHRC 203, 225 (Mar. 1998) (Commissioner Marks concurring in part and dissenting in part).

Killion also relied upon the fact that the violation was obvious, that it would lead to a serious injury and that it had existed since the rig was brought to the property four weeks prior to the citation. (Tr. 55). Killion testified that he observed the violation immediately upon his arrival to the Boart working area at the mine. The violation was also obvious to Barrick, who, through conversations, informed Boart that handrails were needed along the walkway at the edge of the platform. While there is no discussion about Boart having been put on notice that greater efforts were necessary for compliance with regard to this violation, the other aggravating factors have clearly been demonstrated and, therefore, I find the violation to be unwarrantable and the result of high negligence. I assess the proposed penalty of $20,900.00.

c. Order No. 8564141

On August 5, 2010, Inspector Killion issued Order No. 8564141, under section 104(d)(1) of the Mine Act, to Boart for a violation of Section 56.11001 of the Secretary's regulations, which requires that"[s]afe means of access shall be provided and maintained to all working places." 30 C.F.R. § 56.11001. The citation described the alleged violative condition as follows:

> A safe means of access was not being provided on the Drill Platform. Miners have to access the platform by stepping over hoses, pipes, lines, etc., causing slip, trip and fall injuries. Miners access this area daily to make an inspection. In the event that a miner slips, trips, or falls, an accident with injuries such as sprains, strains, contusions, lacerations and/or broken bones could occur. The supervisor stated that he has told management 2-3 weeks ago that a safe access needs to be provided in this area. Management engaged in aggravated conduct constituting more than ordinary negligence in that they were aware that a safe access needed to be provided. This violation is an unwarrantable failure to comply with a mandatory standard.

Killion determined that an injury was reasonably likely to be sustained and that such an injury could reasonably be expected to result in lost workdays or restricted duty, that the violation was significant and substantial, that one employee was affected, and that the negligence was high. He designated the alleged violation as an unwarrantable failure. Pursuant to 30 C.F.R. § 100.5 the Secretary specially assessed a civil penalty in the amount of $7,300.00 for this alleged violation.

After viewing the walkway described above, Killion traveled to the other side of the drill rig and observed a ladder that was used to access the drill rig from that side. (Tr. 42). At the top of the ladder he observed a pathway that was used by miners to access the equipment and conduct maintenance on that side of the rig. (Tr. 42-43). The path required miners to step over hoses, metal pipes, and grids to make their way to the middle of the platform to service the equipment. (Tr. 42-43). Killion testified that photographs included in Sec'y Ex. 7 accurately depict the area both before and after the condition was corrected. (Tr. 42-43). The photos in the exhibit show exhaust pipes that are hot to the touch that must be navigated to reach the machines. (Tr. 45). There are few handholds to use while negotiating the gauntlet of pipes and hoses. (Tr. 45). Killion asked Boart personnel how they conduct the preoperational inspections and one of the miners, as well as Mr. Jacobo, indicated to Killion that they travel the path across the pipes, tubes and hoses. (Tr. 46, 69-70). Footprints on the hoses confirmed that someone had been walking in the area. (Tr. 45). Killion believed that walking over pipes and hoses did not constitute a safe access to the machines that were regularly serviced and repaired. The third photo of Sec'y Ex. 7 depicts the area after the condition was abated by placing a flat grid walking surface over the obstructions, thereby providing a much safer means of access. (Tr. 43). Based on his observations, Killion issued Order No. 8564141 as a 104(d)(1) order for unsafe access.

Jacobo testified that it was his belief that the access was not unsafe. He explained that, when miners climb up the ladder and on to the rig, he tells them to watch out for hoses, hot surfaces and other tripping hazards. (Tr. 176, 188-189). They are trained and instructed to walk carefully and he believes that there are things to hold onto as they "position themselves." (Tr. 176). He agrees that miners could possibly grab a hot area and there are some pieces of metal they could come in contact with, but he denies that any of those objects are sharp. (Tr. 190). In Jacobo's view, given the thorough training and the constant reminders, there is no problem with the access.

i. Fact of the Violation

I find Killion to be a credible and experienced witness who was more than capable of determining when an access is or is not safe. Given his testimony, supported by the photographs he took, I agree that there was not safe access to the engines and equipment that must be reached by employees on a regular basis. Jacobo's and Kohlman's testimonies were controlled by leading questions, and I do not find them to be credible. I am not convinced by their notion that training and instructing miners how to walk over and through hot pipes is a substitute for safe access to equipment that requires regular attention. Although the mine asserts that the only reasons to travel in the area shown in Sec'y Ex. 7 p. 1 is to repair machinery, conduct maintenance, or to get to the center of the machine, there has been no evidence or testimony

presented to indicate that maintenance was being performed, and therefore access required, in any other manner than as described by Inspector Killion. An employee had to travel on the narrow area, over hoses, metal pipes and between hot exhaust tubes, often while carrying tools. Miners access the area each time a preoperational check is performed, which may be each day. Therefore, I find that Boart did not provide safe access to the working place and accordingly, I find that the Secretary established a violation of Section 56.11001.

ii. Significant and Substantial

Killion designated the violation as S&S. He observed many areas where miners could easily slip, trip, fall, and hit their head or other body parts while traversing the area needed to reach the machines and equipment on the drilling platform. (Tr. 46). Killion observed footprints on the hoses and pipes and he was told by Jacobo that miners do walk through the area to conduct preshift inspections and to reach the engines and equipment that require service and repair. (Tr. 46). In Killion's view, miners would easily trip and fall while traversing this route. The result of a fall would be strains, lacerations, burns, and head injuries resulting in lost workdays or restricted duty. (Tr. 46). Killion also learned that the miners were instructed to walk carefully between the two exhaust system pipes to reach an area that required greasing. (Tr. 47). The entire length of those pipes is hot and the area to walk in is not very wide. (Tr. 47-48).

Boart asserts that it is unlikely that any miner would be injured climbing the ladder and making their way to the machines in the center of the platform. According to Boart, the miners are well trained, and are often reminded of the correct path to take through the hoses and pipes. The mine also asserts that the area is not often accessed. Yet, Killion observed foot prints on the pipes and was told by a Boart worker that they are required to climb up and work their way across the various obstacles on the floor to reach the machines that need regular maintenance and repair. In fact, the operator agrees that the route described by Killion is the one used by the miners to access the machines.

I have found that there is a violation of the mandatory standard as alleged, and I find that the violation presents a discrete safety hazard, that of slipping, falling or contacting hot pipes. Each of possible hazardous outcomes would result in an injury of a serious nature. Given that the miners are required to walk across the pipes, tubes, cords and hoses to make repairs, maintain and grease the equipment, and conduct inspections, it is reasonably likely that one of them will trip, slip, or fall while doing so. Moreover a miner who did trip, slip or fall would suffer injuries of serious injuries, including strains, lacerations, burns, and head injuries. The photographs taken by the inspector convince me that the area is dangerous to traverse and that it is very likely that someone will trip, slip and fall. I credit the testimony of Killion that, in spite of any training, the access way must be safe for those who travel the area. The Commission and courts have observed that an experienced MSHA inspector's opinion that a violation is significant and substantial is entitled to substantial weight. *Harland Cumberland Coal Co.*, 20 FMSHRC, 1275, 1278-79 (Dec. 1998); *Buck Creek Coal Inc.*, 52 F.3d 133, 135 (7th Cir. 1995). For the reasons discussed above, I find that the violation is S&S.

iii. Negligence and Unwarrantable Failure

Killion determined that the violation was the result Boart's high negligence and unwarrantable failure to comply with the mandatory standard. Killion reviewed the violation history and inspection records and determined that there was no intervening clean inspection and, therefore, it was appropriate to issue the order pursuant to Section 104(d)(2) of the Act (Tr. 59-67).

I conclude that the violation was caused by Boart's unwarrantable failure to comply with the standard. Boart demonstrated a serious lack of reasonable care in allowing this unsafe access to a working area to continue to exist. The Secretary established that the pipes, hot exhaust tubes, hoses, and the other obstacles blocked the way for miners. These obstacles had existed for some time prior to inspection, and at least as long as the period of time since the rig was set up at the Barrick mine, several weeks prior to the inspection. Jacobo was aware of the conditions for some time, yet he took no action to correct or to eliminate the hazards. Instead, he instructed the miners to walk carefully. Further, the hazards posed by the conditions were serious, and Jacobo's failure in the face of his knowledge of the conditions represented a serious lack of reasonable care. I find that Jacobo's failure to correct the conditions, or to otherwise eliminate the hazards they posed, represented a grievous failure to meet the standard of care required of him as the supervisor. He was, as the Secretary rightly charges, highly negligent, and his negligence is attributable to the company. As mentioned above in the context of the handrail violation, given that 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. *REB Enters., Inc.*, 20 FMSHRC 203, 225 (Mar. 1998) (Commissioner Marks concurring in part and dissenting in part).

The cited conditions were obvious, not only to the inspector, but to the workers at the mine. The pipes, hoses and tubes were plainly visible before one would ever reach the top of the access ladder. Jacobo was aware of the hazard, but, rather than correct the condition, he instructed the miners how to walk through the many obstacles in order to reach the working area. As to the extent of the violation, the inspector's testimony is undisputed that the area was completely covered in obstacles and miners had to be trained to navigate through those obstacles. The miners frequently accessed the area in order to reach the engines and machinery in the middle of the platform to conduct maintenance, repairs and inspections. Further, the violation posed a high degree of danger, given the immediate slip, trip and fall hazard that would cause miners to end up on top of, or among, hot exhaust pipes. Boart should have had a heightened awareness that a flat surface, covering the pipes, cords, tubes and obstacles, was necessary to secure safe access. Given the high degree of danger, extent, and obviousness of the violation, along with the duration and Jacobo's knowledge of the obviously violative condition, I find that a serious lack of care has been demonstrated. I find that the violation was the result of high negligence and an unwarrantable failure to comply. Accordingly, I assess a penalty of $10,000.00.

II. PENALTY

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

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

30 U.S.C. § 820(i). The history of assessed violations, Sec'y Ex. 1, shows that Boart has been cited for similar violations. Boart is a medium sized operator and the mine has not alleged that payment of the penalty as assessed will inhibit its ability to remain in business. The gravity and negligence of each violation is discussed above and each violation was abated in good faith. I therefore, assess the penalties as described above, and summarized below:

WEST 2011-1252-M	
Order No. 8555555	$8,000.00 modify to 104(a) citation.
WEST 2012-676-M	
Citation No. 8564140	$20,900.00
Order No. 8564141	$10,000.00

III. ORDER

The three citations and orders included in this decision are affirmed or modified as discussed herein. Boart Longyear is hereby **ORDERED** to pay the Secretary of Labor the sum of $38,900.00 within 30 days of the date of this decision.

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

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October 15, 2012

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 2011-283
Petitioner	:	A.C. No. 36-08138-248896-01
	:	
v.	:	Docket No. PENN 2011-415
	:	A.C. No. 36-08138-257541-01
ROSEBUD MINING COMPANY,	:	
Respondent	:	Mine: Dutch Run Coal Preparation Plant

DECISION

Appearances: Rebecca Simon-Pearson, Esq., U.S. Department of Labor, Office of the Solicitor, Philadelphia, PA, for Petitioner;
Joseph A. Yuhas, Esq., Rosebud Mining Company, Northern Cambria, PA, for Respondent.

Before: Judge Andrews

These cases are before me on petition for assessment of civil penalties filed by the Secretary of Labor, ("Secretary" or "Petitioner") acting through the Mine Safety and Health Administration, ("MSHA") against Rosebud Mining Company, ("Rosebud" or "Respondent") at it's Dutch Run Coal Preparation Plant ("Dutch Run"), pursuant to Sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815, 820 (the "Mine Act" or "Act"). These dockets involve two citations and three orders issued pursuant to the Act with assessed penalties totaling $21,618.00. The parties presented testimony and documentary evidence at the hearing held in Pittsburgh PA, on May 16 and 17, 2012.

Common Facts and Law

The parties agreed to the following stipulations at the hearing:[1]

1. Respondent was an "operator" as defined in § 3(d) of the Federal Mine Safety and Health Act of 1977, as amended (hereinafter "the Mine Act"), 30 U.S.C. § 803(d), at the coal preparation Plant, or other mine at which the orders at issue in this proceeding were issued.

[1] The numbered paragraphs correspond to those in the Secretary's Pre-Hearing Report.

2. 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.

3. The subject citations/orders were properly served by a duly authorized representative of the Secretary of Labor upon an agent of the Respondent at the dates, times, and places states therein, and may be admitted into evidence for the purpose of establishing their issuance, and not for the truthfulness or relevancy of any statements therein.

4. The penalties that have been proposed for the citation and orders in this proceeding will not affect Respondent's ability to continue in business.

5. Rosebud Mining's Dutch Run Coal Preparation Plant (Dutch Run) demonstrated good faith in the abatement of the citation and orders.

6. The parties stipulate to the authenticity of their exhibits, but not to the relevance, nor to the truth of the matters asserted therein.

7. MSHA's Data Retrieval System, publicly available at http://www.msha.gov/drs/drshome.htm, accurately sets forth:

a. the size of Dutch Run Coal Preparation Plant, in production tons or hours worked per year;
b. the size, in production tons or hours worked per year, of the coal or other mine at which the citation and orders at issue in this proceeding were issued;
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 herein.[2]

8. Any computer printouts from MSHA's Data Retrieval System are considered authentic copies and may be admitted as business records of the Mine Safety Health Administration.

9. Respondent's operations at the mine at which the citation and orders at issue in this proceeding were issued are subject to the jurisdiction of the Mine Act.

[2] This stipulation was modified at the hearing to specify time limits for this data for Docket 2011-283 as between January 1, 2011 and January 13, 2011, and for Docket 2011-415 as between January 1, 2011 and April 11, 2011, plus April 21, 2011. Tr. 8.

10. Joe Smiley (Smiley) was employed as a Plant Operator at Dutch Run on January 13, 2011 and was assigned by management to conduct daily examinations in accordance with 30 C.F.R. § 77.1713(a).

11. On January 13, 2011, Smiley was an agent of Rosebud Mining Company consistent with the definition provided in § 110(c) of the Federal Mine Safety and Health Act of 1977.

12. On January 13, 2011, at 5:40 a.m., Smiley made an entry in the official examination book that stated, "Found everything in good working condition at the time of the inspection. Found 0.0% methane in tunnel."

13. On January 13, 2011, Citation No. 7061996 was issued at 6:25 a.m.

14. On January 13, 2011, Dutch Run's draw-off tunnel belt conveyor was energized at 6:10 a.m.

18. No daily examinations were recorded in the official examination book for the afternoon shift on January 10, 2011, January 11, 2011, and January 12, 2011.

19. Miners were working in the plant on the afternoon shift of January 10, 2011, January 11, 2011, January 12, 2011, and January 13, 2011.

20. On April 11, 2011 the welding rod holder clamp of the Arc Welder referenced in Order No. 8008680 was clamped to an energized bare area of the Wire Fed Welder.

23. On April 11, 2011, both welders referenced in Order No, 8008680 were energized.

24. This bare, non-insulated connection was created by assistant superintendent and certified electrician, Kevin Kijowski.

25. Kevin Kijowski routinely makes the same bare, non-insulated connection referenced in Order No. 8008680.

27. Miners at Dutch Run routinely use water hoses to clean up accumulations of materials in the plant.

Tr. 8-9.

Other facts common to the citations and orders

In addition to the jurisdiction, fact-specific and assessed violation data set forth in the joint stipulations, above, there are other facts common to the alleged violations. For all five, the number of persons affected was listed as one, each was determined to be the result of unwarrantable failure (UWF), and all were abated satisfactorily and terminated. All five were designated Significant and Substantial (S&S), but one order was modified to a non-S&S citation. The citations and orders of January 13, 2011 were modified to show a change in ownership from T.J.S. Mining, Inc., to Rosebud Mining Company effective January 1, 2011. G-7, 9, 10, 13, 21.[3]

The citation and orders were all issued by MSHA Inspector Kevin Deel ("Deel" or "Inspector"), a Health Supervisor for a District Office since January 2012. He has worked in the mining industry since 1976, with the first six years as a machine operator, shuttle car operator, mine operator, and roof bolt operator. He then worked for two years as a mine examiner beginning in 1980, followed by two years as an assistant mine foreman. He then worked 21 years as general assistant mine foreman in various locations, which included taking charge of six underground mine units. Tr. 16-18. Deel has worked for MSHA since 2005, first as a trainee at the Ruff Creek office for a year, then at the Kittaning office as an underground inspector until June 2007, and then as a surface specialist. He received his AR card and has served as an Authorized Representative of the Secretary since his first year at MSHA. Tr. 16-18.[4]

Deel conducted inspections at Dutch Run approximately four or five times from 2007 to January 2011.[5] Tr.18. During this time, it was a small, one-shift operation, three to five days a week, with only four to six workers. Tr. 19. Deel testified that Rosebud personnel told him in January 2011, after the company took over operation of the plant, that the intent was to increase production to three shifts, six to seven days a week, by the end of January 2011. Tr. 18-20. On January 11, 2011, the first day of his January 2011 inspection, Deel learned that Stan White had come to the facility as the Plant Superintendent. Tr. 21. However, a check of the training records revealed that Mr. White and one other worker did not have the proper hazard training. Tr. 21. The former superintendent, Mike Rearick, was now the Plant Manager. Tr. 21. Deel

[3] All exhibits were marked and offered by the Secretary, and numbered from G-1 to G-10 for Docket 2011-283, and G-11 to G-21 for Docket 2011-415. All were admitted into the record, but exhibits G-3 through G-6 were admitted over objections to annotations that had been superimposed on the images by the Inspector. Tr. 32-36.

[4] An AR card is the card carried by Authorized Representatives of the Secretary, usually inspectors, authorized by the Secretary to enter mines, perform inspections, and issue citations and/or orders. Each AR card has a five-digit identification number. See *Master Glossary of Mining, MSHA/MSIS and IT Terms, MSIS User Manual*.

[5] These inspections were conducted while the Dutch Run plant was under the ownership of TJS Mining. Tr. 18-21.

was also at the plant the next day, and again returned to Dutch Run on Thursday, January 13, 2011. Tr. 22.

Applicable legal principals

The orders and one citation discussed below were designated as **S&S**. S&S is described in section 104(d)(1) of the Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(1). A violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

As is well recognized, in order to establish the S&S nature of a violation, the Secretary must prove: "(1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard – that is, a measure of danger to safety – contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury will be of a reasonably serious nature." *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984); *accord Buck Creek Coal Co., Inc.*, 52 F. 3rd. 133, 135 (7th Cir. 1995); *Austin Power Co., Inc. v, Sec'y of Labor*, 861 F. 2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria).

It is the third element of the S&S criteria that is the source of most controversies regarding S&S findings. The element is established only if the Secretary proves "a reasonable likelihood the hazard contributed to will result in an event in which there is an injury." *U.S. Steel Mining Co., Inc.,* 7 FMSHRC 1125, 1129 (Aug. 1985). An S&S determination must be based on the particular facts surrounding the violation and must be made in the context of continued normal mining operations. *Texasgulf, Inc.,* 10 FMSHRC 498, 500 (Apr. 1988) (quoting *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984)). The Commission has provided additional guidance:

> We have emphasized that, in accordance with the language of section 104(d)(1), it is the *contribution* of a violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1866, 1868 (August 1984); *U.S. Steel Mining Co., Inc*., 6 FMSHRC 1573, 1574-75 (July 1984).

Further, "The Secretary need not prove a reasonable likelihood that the violation itself will cause injury." and "the absence of an injury-producing event when a cited practice has occurred does not preclude a determination of S&S" *Cumberland Coal Resources, LP*, 33 FMSHRC 2357, 2365 (Oct. 2011) (citing *Musser Engineering, Inc. and PBS Coals, Inc.,* 32 FMSHRC 1257, 1280-81 (Oct. 2010); *Elk Run Coal Co.,* 27 FMSHRC 899, 906 (Dec. 2005); and *Blue Bayou Sand & Gravel, Inc*., 18 FMSHRC 853, 857 (June 1996)).

The S&S nature of a violation and the *gravity* of a violation are not synonymous. The Commission has pointed out that the "focus of the *seriousness* of the violation is not necessarily

on the reasonable likelihood of serious injury, which is the focus of the S&S inquiry, but rather on the effect of the hazard if it occurs." *Consolidation Coal Co.*, 18 FMSHRC 1541, 1550 (Sept. 1996) *emphasis added*.

By definition, **negligence** is:

> conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm. Under the Mine Act, an operator is held to a high standard of care. A mine operator is required to be on the alert for conditions and practices in the mine that affect the safety or health of miners and to take steps necessary to correct or prevent hazardous conditions or practices. The failure to exercise a high standard of care constitutes negligence.

The categories and definitions of the negligence criterion are as follows:

> **No negligence** is where the operator exercised diligence and could not have known of the violative condition or practice;
> **Low negligence** is where the operator knew or should have known of the violative condition or practice, but there are considerable mitigating circumstances;
> **Moderate negligence** is where the operator knew or should have known of the violative condition or practice, but there are mitigating circumstances;
> **High negligence** is where the operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances; and
> **Reckless disregard** is where the operator displayed conduct which exhibits the absence of the slightest degree of care.

30 C.F.R. §100.3(d).

The orders and citations were all designated as **unwarrantable failure**. The UWF terminology is taken from section 104(d)(1) of the Act, which establishes more severe sanctions for any violation that is caused by "an unwarrantable failure of [an] operator to comply with…mandatory health or safety standards." 30 U.S.C. § 814(d)(1).

The term "unwarrantable failure" is defined as aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (Dec. 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or the "serious lack of reasonable care." *Id*. at 2004; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189,193-94 (Feb. 1991). Aggravating factors include the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts were necessary for compliance, the operator's efforts in abating the violative condition, whether the violation was obvious or posed a high degree of danger and the operator's knowledge of the existence of the violation. *See Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000); *Mullins & Sons Coal Co*., 16 FMSHRC 192, 195 (Feb. 1994); *Windsor Coal Co.*, 21 FMSHRC 997, 1000 (Sept. 1999); *Consolidation Coal Co.*, 23

FMSHRC 588, 593 (June 2001). All of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether mitigating circumstances exist. *Consol*, 22 FMSHRC at 353.

The provisions of the Mine Act cited are as follows:

> § 104(d)(1) If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.
> (2) If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) until such time as an inspection of such mine discloses no similar violations. Following an inspection of such mine which discloses no similar violations, the provisions of paragraph (1) shall again be applicable to that mine.

30 U.S.C. § 814(d).

> 104. (a) If, upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a coal or other mine subject to this Act has violated this Act, or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to this Act, he shall, with reasonable promptness, issue a citation to the operator. Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the Act, standard, rule, regulation, or order alleged to have been violated. In addition, the citation shall fix a reasonable time for the abatement of the violation. The requirement for the issuance of a citation with reasonable promptness shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act.

30 U.S.C. § 814(a).

Findings and Conclusions

Docket No. PENN 2011-283

Inspector Deel returned to Dutch Run on January 13, 2011 in order to conduct a noise survey. Tr. 21-22. At 5:30 a.m. he found no entries in the examination record book. Tr. 22. After handing out dosimeters he discovered that an entry had been made in the record book at 5:40 am.[6] Tr. 23, 24. The entry pertained to the examination of the Dutch Run Prep Plant open pit mine and, as relevant, read:

> Found everything in a good working condition at the time of the inspection, found 0.0% methane in tunnel…

The entry was not signed, but was initialed by Mike Rearick.[7] Tr. 22-24, Ex. G-1.

Deel began his inspection in the draw-off tunnel. The draw-off tunnel is a fully lined concrete tunnel that runs 80 feet or more on a downward vertical slope from the surface. Tr. 26, 95.[8] The bottom has a flat concrete floor with a sump pump for drainage and is about 30 to 35 feet underground. Tr. 26, 29. The tunnel is 12 feet wide by 6 to 7 feet high and houses a 3 foot wide conveyor belt with walkways on each side of the belt structure. Tr. 82, 94, 95. The clearance side walkway is approximately 6 feet wide. Tr. 81. The conveyor belt is used to bring coal from surface storage down to a belt running to the cleaning plant. Tr. 27, 29. There is a separate, smaller escapeway tunnel from the bottom of the draw-off tunnel to the surface where a fan pulls air up through the escapeway for ventilation of both tunnels. Tr. 28, 29.

At 0625 hours Deel issued 104(d)(1) Citation No. 7061996 to Plant Supervisor Mike Rearick, citing 30 C.F.R. § 77.1713(a) for the following condition or practice:

> An adequate examination has not been conducted of the draw-off tunnel and draw-off tunnel belt conveyor. An examination was conducted and recorded in a book approved by the Secretary of the draw-off tunnel at 0540 hours on 1-13-2011. The draw-off belt conveyor was started at approximately 0610 hours.

---

[6] A noise survey (or noise exposure survey) is conducted by an individual wearing a personal noise dosimeter for an entire shift to determine the full shift noise exposure. See MSHA, How a Noise Survey is Conducted, presentation available at http://www.msha.gov/S&HINFO/NoiseToolBoxes/HearingLossToolboxtalks.asp.

[7] Smiley was the assigned examiner. Stip. #10.

[8] Deel originally testified that he believed the tunnel to be 200-300 feet long, Tr. 26, but further information provided at the hearing suggested that it was approximately 80 feet long. Tr. 94, 95.

> There were no hazards recorded in the daily exam book. Combustible material, such as fine coal and coal dust, has accumulated under the tail roller of the draw-off tunnel belt conveyor with the belt and roller running in the fine coal accumulations. When measured the accumulations measure approximately 40 to 50 inches in width by 36 inches in length by 10 to 16 inches in depth. These accumulations are from coal run on the conveyor dayshift on 1-12-2011. By not recognizing these combustible accumulations as a hazard and recording the hazard in an examination book the operator has engaged in aggravated conduct constituting more than ordinary negligence. This is an unwarrantable failure to comply with a mandatory standard.

The Inspector determined injury or illness was reasonably likely and could reasonably be expected to be fatal. The citation was designated S&S, affecting one person, with high negligence. The penalty assessed was $5,503.00. Ex. G-9.

The citation was terminated at 0930 hours that day after an adequate examination was conducted and recorded in the daily examination book, including the recording of any hazardous conditions found and the action taken to correct the hazardous conditions. Ex-G-2, G-9.

The safety standard cited reads:

> **Daily inspection of surface coal mine; certified person; reports of inspection.**
>
> (a) At least once during each working shift, or more often if necessary for safety, each active working area and each active surface installation shall be examined by a certified person designated by the operator to conduct such examinations for hazardous conditions and any hazardous conditions noted during such examinations shall be reported to the operator and shall be corrected by the operator.
>
> (b) If any hazardous condition noted during an examination conducted in accordance with paragraph (a) of this section creates an imminent danger, the person conducting such examination shall notify the operator and the operator shall withdraw all persons from the area affected, except those persons referred to in section 104(d) of the Act, until the danger is abated.
>
> (c) After each examination conducted in accordance with the provisions of paragraph (a) of this section, each certified person who conducted all or any part of the examination required shall enter with ink or indelible pencil in a book approved by the Secretary the date and a report of the condition of the mine or any area of the mine which he has inspected together with a report of the nature and location of any hazardous condition found to be present at the mine. The book in which such entries are made shall be kept in an area at the mine designated by the operator to minimize the danger of destruction by fire or other hazard.

(d) All examination reports recorded in accordance with the provisions of paragraph (c) of this section shall include a report of the action taken to abate hazardous conditions and shall be signed or countersigned each day by at least one of the following persons:

(1) The surface mine foreman;

(2) The assistant superintendent of the mine;

(3) The superintendent of the mine; or,

(4) The person designated by the operator as responsible for health and safety at the mine.

30 C.F.R. § 77.1713.

Just minutes later, at 0635 hours, the Inspector issued 104(d)(1) Order No. 7061997, also to Mike Rearick, citing 30 C.F.R. § 77.1104, for the following condition or practice:

> Combustible material, such as fine coal and coal dust, has accumulated under the tail roller of the draw-off tunnel belt conveyor with the belt and roller running in the fine coal accumulations. When measured the accumulations measured approximately 40 to 50 inches in width by 36 inches in length by 10 to 16 inches in depth. The accumulations are dry in consistency. These accumulations are from coal run on the conveyor on 1-12-2011. An examination has been conducted of this draw-off tunnel and draw-off tunnel belt conveyor at 0540 hours on 1-13-2011. No action was taken to correct the condition prior to starting and running this belt conveyor. By taking no action to correct this condition prior to starting and running the conveyor with the belt and roller running in these accumulations, the operator has engaged in aggravated conduct constituting more than ordinary negligence. This is an unwarrantable failure to comply with a mandatory standard.

Ex. G-7.

The Inspector determined that injury or illness was reasonably likely and could reasonably be expected to be fatal. The order was designated S&S, the number of persons affected was one, and negligence was high. The penalty assessed was $6,115.00.

The initial action identified for this 104(d)(1) Order was Citation No. 7061996, discussed above, issued ten minutes before. The Order was terminated at 0730 hours after the accumulations were removed from under the belt and tail roller. Ex. G-2, G-7.

The safety standard cited, § 77.1104 reads:

> **Accumulations of combustible materials.**
>
> Combustible materials, grease, lubricants, paints, or flammable liquids shall not be allowed to accumulate where they can create a fire hazard.

30 C.F.R. § 77.1104.

About four hours after the above citation and order were issued, Inspector Deel also issued 104(d)(1) Order No. 8008603 to Mike Rearick, again citing 30 C.F.R. § 77.1713(a) for the following condition or practice:

> No daily examinations for hazardous conditions, by a certified person, have been conducted for the afternoon shift at the Dutch Run Coal Preparation Plant on 1-10-2011, 1-11-2011 and 1-12-2011.
> The plant manager stated that this site has had men working afternoon starting on 1-10-2011. There were various conditions observed and cited on 1-13-2011 that were present on 1-12-2011. If the daily examinations were being conducted the operator would have had reason to know of these conditions. By not conducting the daily examination for hazardous conditions when men are working the operator has engaged in aggravated conduct constituting more than ordinary negligence. This is an unwarrantable failure to comply with a mandatory standard.

Ex. G-10.

The Inspector determined that injury or illness was reasonably likely and could reasonably be expected to result in lost workdays or restricted duty. The order was designated S&S, affecting one person, with high negligence. The penalty assessed was $2,000.00. Ex. G-10.

The initial action listed was Citation No. 7061996, issued that day and discussed above, which cited the same safety standard, § 77.1713(a). The operator designated a certified person to conduct the daily examinations for the afternoon shift, and the order was terminated that day. G-2, G-10.

The safety standard cited, 30 C.F.R. § 77.1713(a), is set forth above.

Testimony of Inspector Kevin Deel

Deel testified that the main equipment in the draw-off tunnel is a conveyor belt that brings coal from the surface storage facility down to a conveyor to the cleaning plant. Tr. 27. This material would not have been cleaned, and could contain rock, ash, or other materials. Tr. 74, 75.[9] There is a separate, smaller adjacent tunnel from the bottom, used for ventilation and for a possible secondary means of escape. Tr. 28. Walking down the draw-off tunnel Deel

[9] It should be noted that there is nothing in the record to indicate what percentage of the material was rock or ash.

observed spillage of loose and fine coal and coal dust[10] under the running tail roller and belt that had been ground up in the tail roller and was very powdery and very dry.[11] Tr. 29, 30. The conveyor was rubbing the coal and lifting the belt up, with the belt running in the coal. Tr. 29-30. The width of the accumulation was such that it was necessary to walk around the coal to get to the bottom of the tunnel. Tr. 29, 30, 32.

Deel had just looked at the exam record book, and saw that it had been signed, indicating that the examination had been done. Tr. 41, 44. Deel spoke with Joe Smiley who told him that the full examination had been completed. Tr. 44, 97, 98. Smiley also said that he had not done examinations for at least a year and a half, had just started on Monday of that week, and was not sure what he was doing. Tr. 41-42, 44, 45. The record book also contained entries for January 11th and 12th by Smiley, which were identical to the entry on January 13th. Tr. 48-50; G-8. Deel had been at the plant on those days as well, and had issued four citations for accumulations. Tr. 41, 48-50, 57. During the examinations on the 11th and 12th, the examiner missed the accumulations and the ignition sources, which created the conditions necessary for a fire or explosion. Tr. 53. This resulted in a situation where if a fire occurred, a person would have to exit through toxic smoke and heat, thus leading to burns and respiratory damage. Tr. 54, 55.

The examination was recorded in the book just 20 minutes before Deel found the hazard. Tr. 56, Ex. G-2. Deel testified that an examination covers the entire facility, a complete examination of the site for hazards of all kinds, which would entail traveling to all areas where men were going to work that day including all five floors of the cleaning plant, the draw-off tunnel, all belts, the truck dump and any electrical buildings. Tr. 45, 46, 53, 54. He estimated that the examination would take approximately an hour to an hour and a half to complete, assuming that the examiner found no hazards that he had to take care of, and would be countersigned by a foreman or superintendent. Tr. 46. If the examiner found a hazard, then in addition to recording the hazard in the book, he must also record what was being done to take care of the hazard. Tr. 104. The accumulations had to have been seen by the examiner passing by them, shortly before Deel found them, but no hazard was entered in the book and no action was taken to correct the hazard. Tr. 56, 57, 76.

Deel also testified that the accumulations measured 40-50 inches wide, 36 inches long, 10-16 inches deep and were very visible since they came out from under the belt into the walkway. Tr. 30. The width was measured with a tape measure. Tr. 86. The accumulations were highly apparent and could not be missed since a passerby would have to step around them. Tr. 30, 43. The particle size of the accumulations ranged from one-fourth inch to powder. Tr. 103. Deel described what was shown by the four photographs he took and annotated.[12] Tr. 31,

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[10] "Coal dust means particles of coal that pass a No. 20 sieve. It is this fraction of the coal that participates in the dust explosion reaction. Loose coal means coal fragments larger in size than those passing a No. 20 sieve." *MSHA Program Policy Manual*, Vol. 5, Subpart E, § 75.400.

[11] The belt was energized at 0610 hours. stip. #14, Ex. G-9.

[12] With regards to exhibits G-3, G-4, G-5 and G-6, the annotations superimposed on the images constitute alterations of the images. The annotations may also be viewed as opinions and (continued...)

32. Exhibit G-3 shows the spillage building up directly under the bottom belt of the conveyor, with the belt actually rubbing on the top of the spillage, and the tail roller in the distance. The area is almost at the bottom of the draw-off tunnel, and the coal is out into the walkway. Tr. 32. Exhibit G-4 shows the tight side of the tail roller, and how far the spillage had come out from underneath the belt to the right of the guarding and on the walkway around the tailpiece. Tr. 33, 34. Exhibit G-5 was another photograph showing the extent of the coal rubbing the belt and spread clear out onto the walkway side. Tr. 35, 36. Exhibit G-6 is a photograph taken from the perspective of the area between the top and bottom belt at the tail roller and shows the coal spanning the entire width of the bottom belt and actually coming up and over the bottom belt where it was running in the coal. Tr. 37, 85-87.

Deel further testified that all the elements were present to make it reasonably likely that a fire or ignition would occur and result in an injury. Tr. 39. He testified that the accumulations were extensive, creating a prime fuel source, and that electrical components such as the sump pump and shaker motors could serve as ignition sources. Tr. 39, 40, 102. Furthermore, if a fire occurred, the service people and examiners that traveled in this area would be put in direct risk of serious injury. Tr. 39, 40, 91.

Deel pointed out that fine coal dust can ignite, even when there is rock in it. Tr. 91, 101. He described some of the factors that could lead to an explosion or fire. Methane is inherent in coal, and can be explosive. Tr. 88-90. The tunnel was not wet. Tr. 84. An explosion caused by fire or ignition combined with the fine coal dust would create toxic smoke, leading to injuries that could be fatal. Tr. 40. He observed no dust in suspension. Tr. 94. He acknowledged that the time required to exit could be a factor. Tr. 78. In a non-emergency it would take less than five minutes to walk out of the tunnel. Tr. 93. However, in an emergency situation where smoke was present, an individual would be required to travel on his hands and knees, thereby extending the exit time to ten to fifteen minutes. Tr. 80, 81. Deel testified that the accumulations were present from at least the previous day shift, but could have been present for the three days that Smiley had been the examiner. Tr. 43, 44, 50, 51.

Deel continued his inspection throughout the coal yard and issued additional citations for accumulations. Tr. 60. When he returned to discuss the citations, he learned there was also an afternoon shift, but the daily examination record did not have examinations for the afternoon shift. Tr. 61, 62. Stan White told Deel that he forgot to assign anybody to conduct examinations on the afternoon shift for the three days of that week. Tr. 69-70. Injuries were deemed reasonably likely due to the presence of construction workers throughout the plant and other workers starting a subsequent shift who would not be aware of a number of possible hazards. Tr. 63-66. Workers rely on the exam books to identify possible hazards, and no examinations had been conducted where men were working for three days. Tr. 67-69. The plant was not processing coal on those days. Tr. 100.

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[12] (...continued)

statements about the images, whereas the images should stand on their own. Also, the annotations block portions of each image and these portions could be helpful in interpreting the content of the photographs. It is the original, unaltered image that is preferred as an exhibit. Accordingly, the annotations will be disregarded in favor of explanatory testimony.

Testimony of Examiner Joseph Smiley

Joseph Smiley testified that at the time of the hearing he was unemployed, but he had spent the majority of his life in the mining industry. Tr. 108-109. After 13 years at PMC mining, he retrained for an electrical certification, and then worked as a maintenance electrician for about 2 years. Tr. 109. He then worked at a coal cleaning plant for 2 to 3 years, and in 1995 returned to his original employer until 2000. Tr. 110. He worked at a tipple operation before working for periods of time for both TJS and Rosebud. Tr. 111. Most of his experience was around cleaning plants and outside jobs such as clean up, running various types of equipment, and performing some electrical work. Tr. 111. He did examinations in the 1970s, then again when first employed by Rosebud for 10 months, and in January 2011. Tr. 112-113. His certifications include methane, surface, foreman, and electrical. Tr. 113.

On January 13, 2011, Smiley went directly to the tunnel for a gas check "and more or less looked around in the tunnel" before the belts were started. Tr. 113-114. He described the conditions in the tunnel as "looking pretty good to me that I could see." Tr. 117. In performing the gas check, he described how he would watch the methanometer while walking down through the tunnel to the bottom, where he would take a reading as high as he could reach.[13] Tr. 119. The methane check was his first and main priority, as well as trying to observe anything that would be a hazard. Tr. 121, 122. He testified that at that time he did not notice any hazardous conditions in the draw-off tunnel. Tr. 124. He then checked the catwalk, walking and looking through the plant, before signing the book attesting that he found everything to be in good working condition. Tr. 123, 124. Inspector Deel approached and asked if he had been in the tunnel, or checked it, and Smiley responded, "Yes, I was up there." Tr. 114. Smiley also testified that he did not complete his examination that day, but he believed that Mike Rearick would finish it. Tr. 125. When asked, he opined that in the event of an emergency, it would take less than one-half a minute for a "real excited" guy to get out of the tunnel. Tr. 116.

Testimony of Plant Operator David Popich

David Popich also testified for the Respondent. Popich has five or six years in the mining industry, and was last employed by Rosebud for over a year. Tr. 126. He has worked underground running equipment, including a scoop and a roof bolter, outside as a utility man and heavy equipment operator, and currently is a plant operator. Tr. 126-127. His certifications include gas cards, EMT, and Supervisor. Tr. 127. His experience includes above ground pre-shift examinations for over two years. Tr. 127, 128.

On January 10, 11, and 12, Popich worked on the afternoon shift with two contract workers on the bottom floor of the cleaning plant changing out pipes in the sumps. Tr. 129, 130. He also testified that, although not assigned to conduct an examination of the second shift, he did examine the bottom floor on those days to make sure everything would be in safe working condition. Tr. 130-133. He further testified that since he did not conduct an examination of the

[13] A methanometer is "an instrument for determining the methane content in mine air." *Dictionary of Mining, Mineral, and Related Terms*, 2d Ed., American Geological Institute (1997). 30 C.F.R. §§ 27.20 – 27.32 cover rules associated with methane testing.

entire plant, and the plant was not producing, he did not write his examinations in the book. Tr. 131-134. After the citation was issued, Stan White told him he had to start writing in the book that he did an examination. Tr. 134.

Discussion and Analysis

Citation No. 7061996

Contentions

The Respondent's primary argument is that the citation was issued prematurely. It is not denied that Smiley did not complete the required examinations at the time the citation was issued, but it is argued that Smiley had until the end of the work day, 2:59 p.m., if his shift ended at 3:00 p.m., to complete the examination. Further, since the examination would require approximately one and a half hours, and Smiley typically continues his exams throughout the day, he had ample time to complete the examination prior to the end of his shift.

The Respondent also argues in the alternative that the citation was improperly issued because there was no hazardous material in the tunnel, no need to record the presence of the material, and therefore no violation. The Respondent argues that the belt was not a possible ignition source, and supports this position through testimony by Deel and Smiley that neither of them had ever personally witnessed a fire caused by a belt. Furthermore, Respondent looks to *Mach Mining, LLC*, where the Judge found under a different set of conditions that "it was unlikely that the belt would generate enough heat to ignite the accumulation." 33 FMSHRC 763, 773 (ALJ) (March 2011). Similarly relying on *Mach Mining*, Respondent argues that without evidence of defect, the electrical pump in the sump and the electric shakers were not possible ignition sources.

Beyond lacking an ignition source, Respondent argues that the accumulation was not a likely fuel source because it was located near the back of the tunnel, and there was no evidence of methane or dust in suspension present. Respondent argues that the S&S designation was in error because the tunnel was only 80 feet long, and could be exited in a matter of seconds, and since examiners and service people entered the tunnel infrequently, the likelihood of injury in an explosion was remote.

The Secretary argues that there was an extensive and obvious accumulation of dry coal and coal dust in contact with the energized belt in the draw-off tunnel that would have been impossible to miss, even while taking a methane reading. The Secretary argues that Smiley's use of the term "everything," when he wrote in the exam book that he "[f]ound everything in good working condition," indicates that he had completed his entire daily examinations, meaning that the citation was not issued prematurely. Further, the Secretary argues that Smiley's admission that he did not know how what he was doing indicates that there would have been no proper examination on that day, and that it was unlikely that one was conducted on previous days. The Secretary states that the accumulation of combustible material combined with several possible ignition sources, including contact with the roller and belt, constituted a confluence of factors.

The Secretary further argues that there should be a presumption of S&S in instances where the operator fails to conduct a daily examination. The prophylactic nature of such examinations, the Secretary asserts, places the requirement in a unique category that does not fit well within the *Mathies* framework. The Secretary reasons that the purpose of the daily examinations is to find possible hazards, so the S&S analysis should focus on the mine at the time the examination did not occur, rather than by the results.

Findings of Fact and Conclusions

How Smiley could have missed the easily visible accumulations that were under and in the tail roller, and under the bottom belt of the conveyor at such a height that they were lifting up the belt, if in fact he did conduct an examination of the draw-off tunnel on January 13 as he testified, Tr. 114-124, defies credible explanation. Smiley's admission to Deel that he began as an examiner on Monday of that week, but was not sure what he was doing, rings hollow in light of his statement to Deel (and testimony at hearing), that he had conducted examinations only a year and a half before. Tr. 42, 44, 45; Ex. G-2, pp. 6, 7. Smiley had also made and signed entries on the 11th and 12th which were essentially the same as the entry on the 13th, that everything was in good working condition. Ex. G-1, G-8, Stip. #12. Deel reported in his testimony he had issued four citations for accumulations on the 11th and 12th. Tr. 41, 48-50, 57. The fact that citations for hazards were issued on days when Smiley recorded no hazards in the book renders his testimony of a complete examination of the tunnel and the plant on Thursday the 13th less than credible. Tr. 123, 124.

Deel observed that the accumulations spilled out into the walkway beside the conveyor, and it was necessary to walk around them to reach the bottom of the tunnel. Tr. 29, 30, 32; Ex. G-3. Yet only minutes before, Smiley had purportedly walked down the tunnel to the bottom, Tr. 119, but testified that he did not notice any hazardous conditions. Tr. 122, 124. I am unable to accord credibility to the testimony of Smiley in the face of the quick discovery of the hazardous accumulations by the Inspector. Ex. G-2, pp. 4, 5, C/13. Further, Smiley's testimony was inconsistent; he said he did examine the tunnel or catwalk, and that he walked through the plant, Tr. 123, 124, and told Deel a full examination had been done, Tr. 41, 44, 97, 98. However, he also testified that he did not "complete" the examination. Tr. 125.

Respondent contends, in part, that there was no obvious hazard to be recorded in the examination book. But the presence of the accumulations and the hazard presented is well established and will be discussed further below with respect to the order issued minutes later. Further, Respondent's attempt to justify an inadequate examination by arguing, after the fact, that it was only a partial examination to be completed later that day, must fail. While it is true that more than one examination per shift may be conducted, the standard also specifies that an examination must be of "each active working area and each active surface installation" § 77.1713(a). The examination book entry form is consistent with this requirement and reads in pertinent part as follows:

> I have personally examined the *Dutch Run Prep Plant* open pit mine located in *Plum Creek* Township *Armstrong* County under Mining Permit No. *3608138*…

Ex. G-1, G-8 (emphasis indicates handwritten entries).

When the form is filled out by the examiner, with no notation indicating that only a particular area was examined, it is essentially his certification that the entire facility where men were working had been examined. The standard further requires that *any* hazardous condition must be reported and corrected. 30 C.F.R. § 77.1713(a). The accumulations in the tunnel on the 13th, and the accumulations cited on the 11th and 12th, were not recorded in the examination book. Ex. G-1, G-8. The credible evidence clearly shows the examination on January 13, 2011, recorded at 0540 hours failed to disclose a hazardous condition and was inadequate. Ex. G-2, pp. 5, C/13. Accordingly, 104(d)(1) Citation #7061996 was validly issued.

The Respondent's reliance on *Mach Mining* for the propositions that the belt rubbing against the accumulations was unlikely to create enough heat to ignite them, and that without proof of defect in the electrical equipment they were not possible ignition sources, is inapposite. The facts involved in *Mach Mining* were significantly different, making the case easily distinguishable. In Mach Mining, the Judge found that the accumulations in question were not present during the pre-shift examination, and collected quickly. 33 FMSHRC 763, 773 (ALJ) (March 2011). Furthermore, the Judge found that the material was wet and the rollers were no longer in use. *Id.* These conditions are significantly different than the ones present in the instant case. The conditions at Dutch Run appear more like those described in *AMAX Coal Co.*, where the Commission found an accumulation violation to be S&S when a motor belt was running on packed dry coal. 19 FMSHRC 846 (May 1997).

The citation was correctly designated as S&S. A violation will be found to be S&S under 104(d)(1) if "there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Secretary v. Mathies Coal Co.*, 6 FMSHRC 1, 3 (Jan. 1984). To establish this, the Secretary must show:

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

Id. at 3-4. *see also*, *Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995);"*Austin Power, Inc.* v. *Secretary*, 861 F.2d 99, 103-4 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria). The evaluation is made in terms of "continued normal mining operations." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984).

The conveyor in the draw-off tunnel had been energized at 0610 hours. Tr. 52. Deel observed the bottom belt lifted up by the accumulation and rubbing the fine coal and coal dust, as well as the tail roller running in the built up spillage with coal ground down to a powdery consistency. Tr. 29, 30. Ex. G-2, p. 4. There were various friction sources, including the roller, the roller bearings, and the moving belt, which were all in direct contact with the coal dust and powder. Tr. 29-30. In addition, there was present other electrical equipment in the tunnel as well, including a sump pump and electric shakers. Tr. 39-40. Deel testified that these conditions created the chance of fire or explosion. Tr. 53-54; Ex. G-2, p. C/7. Elements one and

two of the *Mathies* criteria are satisfied. There was a violation of the applicable safety standard—a demonstrably inadequate examination—and a measure of danger to safety contributed to by the violation—the failure to find and report an obvious hazard and therefore fail to give notice to others, including management.

When analyzing the third element of the *Mathies* test, the Commission has provided the following guidance:

> When evaluating the reasonable likelihood of a fire, ignition, or explosion, the Commission has examined whether a "confluence of factors" was present based on the particular facts surrounding the violation. Some of the factors include the extent of the accumulations, possible ignition sources, the presence of methane, and the type of equipment in the area.

Enlow Fork Mining Co., 19 FMSHRC 5, 9 (Jan. 1997) (citations omitted).

According to this analysis, elements three and four are established here since other miners and management would not be aware of a condition that could result in a fire, leading to a reasonable likelihood of an injury and a reasonable likelihood that the injury would be of a reasonably serious nature. As noted by Deel in his testimony, a fire would be accompanied by toxic smoke and fumes, which would result in attendant respiratory damage, and heat, flames and burns from an individual's proximity to fire. Tr. 54, 55. These types of injuries could also be fatal to the unwary miner in the area. Ex. G-2, p. C/7.

In making this determination, the undersigned is not unmindful that no methane was shown to be present at the time. Ex. G-1. Yet there was the confluence of factors, combustible material and ignition sources, to support the S&S designation. *See Enlow Fork Mining Co.*, 19 FMSHRC 5; see also *Secretary of Labor, MSHA v. Texasgulf, Inc.*, 10 FMSHRC 498, 501 (April 1988). The Inspector also correctly found high negligence, because the dangerous accumulations should have been discovered and reported, and there were no mitigating circumstances. 30 C.F.R. § 100.3(d).

The citation was correctly found to be UWF. 30 U.S.C. § 814(d). Unwarrantable failure is "aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act." *Emery Mining*, 9 FMSHRC 1997, 2004 (Dec. 1987). Based on the legislative histories of the Coal Act and the Mine Act and on Commission precedent, the Commission has characterized unwarrantable failure as conduct marked by, "'indifference,' …'lack of due diligence,' and "lack of reasonable care'" *Emery Mining*, 9 FMSHRC at 2003.

In the instant case, there was at least an indifference to the clear meaning of the regulatory standard as well as a serious lack of reasonable care in the conduct of the required examination. For three days in a row, citations were issued for accumulations, but for each day the examination was recorded as everything being in good working condition at the plant, with no indication of any hazard present until after the instant citation was issued. Ex. G-1, G-8. This inadequate examination was part and parcel of a series of violations of the mandatory

examination requirement over an extended period of time. The lack of recorded information about hazardous conditions that would be obvious to any experienced miner posed a high degree of danger to persons entering the facility unaware that such conditions were present. No effort was made over at least the three-day period, including January 13th, to insure full and complete examinations were conducted and recorded. This failure was, and became, obvious through the lack of reporting of hazards in the examination book, and mine management should have been aware of the situation because of the issuance of citations for conditions not recorded in the book on the two days prior to the issuance of the instant citation. These factors are sufficient to establish aggravated conduct constituting more than ordinary negligence. I find that the UWF designation was proper.

Therefore, I find Citation #7061996 to be correct as issued, and it is **affirmed**.

Order No. 7061997

Contentions

Respondent does not deny that accumulations were present, which violated 30 C.F.R. § 77.1104. Rather Respondent argues that the violation was not S&S and that it was not the result of an unwarrantable failure. Respondent argues that there was no confluence of factors such that there was a reasonable likelihood that the hazard would result in an injury of a reasonably serious nature. Respondent asserts that there was no ignition source present. Respondent concedes that the accumulation of coal may have been touching the belt, but argues that neither the belt nor the rollers were hot, making ignition unlikely. Citing *Mach Mining*, and Deel's and Smiley's testimonies that they had never personally witnessed a fire caused by a belt running over coal, Respondent argues that such an ignition is highly unlikely. Respondent adds that without methane or dust in suspension present, it was unlikely that an explosion would occur.

If a fire or explosion were to occur, Respondent contends that it would be unlikely that anyone would be in the tunnel because only service people and examiners entered the tunnel. Additionally, the accumulations were in the back of the tunnel and Respondent notes that the tunnel was not 200-300 feet long as the inspector believed when he issued the citation, but approximately 80 feet long.

Respondent argues that the presence of the coal accumulations was not the result of high negligence or Rosebud's unwarrantable failure because the record shows that the accumulations were present for only one production shift, it was not extensive, and the operator was not on notice that greater efforts were needed to comply. As a mitigating factor, Respondent notes that Smiley was conducting a methane examination, which required him to hold the methane detector above his head and monitor it as he walked through the tunnel. The implication is that Smiley would have been looking up, and therefore would not have been able to view the accumulations that were on the ground.

The Secretary argues that there was an extensive and obvious accumulation of dry coal, loose coal, and coal dust in contact with the energized belt and tail roller in the draw-off tunnel. In addition to the possibility of ignition from the contact between the coal and the tail roller, the

pump in the sump and shaker motors constituted additional possible ignition sources. The Secretary notes that the accumulations existed for *at least* one shift, but possibly up to three days, and that they were so large that they would have been visible even to a casual observer. These conditions, the Secretary contends, provided the necessary confluence of factors—including oxygen, fuel, and ignition necessary for an explosion or fire—to sustain a designation of S&S.

The Secretary argues that Rosebud displayed high negligence because the operator knew or should have known about the accumulations, and there were no mitigating circumstances present. Furthermore, the Secretary argues that the accumulations were the result of an unwarrantable failure on the part of Rosebud, and that several aggravating factors were present. These included the length of time that the accumulations existed (between one and three days); the extent of the accumulations (approximately 40-50 inches wide by 36 inches long by 16 inches deep of fine loose dry coal); the operator's notice (by a citation for violation of § 77.1104 for accumulations two days prior); the operator's lack of effort to abate the condition prior to the citation; the obvious and dangerous nature of the accumulations (they were spilling out into the walkway); the operator's knowledge (the accumulations were present and apparent when Smiley conducted his examination of the tunnel); and the operator's failure to supervise its inspectors.

Findings of Fact and Conclusions

It appears that Smiley's main goal on the morning of January 13, 2011 was to measure for methane in the draw-off tunnel so he could start the tunnel conveyor belt. Tr. 114, 121, Ex. G-2, p. 7. In his testimony he described taking the methane reading by walking down to the bottom of the tunnel and holding the meter as high as he could reach. Tr. 119. He also testified that he looked around in the tunnel trying to observe anything that would be a hazard, but he did not notice a hazard and the conditions looked pretty good to him. Tr. 114, 117, 122, 124.

In discussing Smiley's inadequate examination, above, in the context of this related citation, the undersigned was unable to accord credibility to his testimony. Here, there are equally incredible aspects of Smiley's testimony. It is credible that he went into the tunnel for a methane check so the belt could be started, but not credible that he looked around the tunnel and did not see the clearly visible, obviously extensive accumulations that had built up under the bottom conveyor belt and into the tail roller. Ex. G-2, p. 4. The accumulations had even spilled out beyond the width of the conveyor, and in order to reach the bottom of the tunnel, Smiley would have to have walked around the material spilled out into the walkway. Tr. 30. The accumulations Smiley missed could have been present for the two prior days that he recorded in the examination book that he performed examinations. Ex. G-8. I credit the Inspector's observation that the accumulations could not have been missed in the tunnel that morning. Tr. 30.

Although the photographs of the scene are somewhat blocked by the annotations superimposed by the Inspector and are not sharp, clear images, they are sufficient to visualize the accumulations of coal under the tail roller that do appear in contact with the bottom belt, and also appear to extend out beyond the belt structure into the walkway.[14] Ex. G-3, 4, 5, 6. Beyond these

[14] For the undersigned's treatment of the annotations, see note 11, *supra*.

general observations, I rely on Deel's testimony, notes, and the Order. This evidence reasonably establishes that the accumulations consisted of loose and fine coal, coal dust, and powdery dry coal ground up in the tail roller. Tr. 29, 43, 103. The accumulations measured 40 to 50 inches wide, 36 inches long, and 10 to 16 inches deep. Tr. 30. Deel testified that the materials came up and over the bottom belt, which was running in the coal. Tr. 37, 85-87, Ex. G-2, p. 4. He pointed out that fine coal dust could ignite, even when there is rock in it.[15] Tr. 91, 101. Further, Deel testified the tunnel was not wet. Tr. 84. The draw off tunnel is a confined area. Ex G-2, p. C/7. The evidence found credible establishes an accumulation of combustible materials under conditions that could create a fire hazard. Accordingly, the undersigned finds that Order No. 7061997 was validly issued.

The four elements of the *Mathies* analytical framework are satisfied. There was a violation of a mandatory safety standard, as set forth above, and a measure of danger to safety contributed to by the violation, since the accumulations were combustible due to their consistency and lack of moisture content. In the presence of an ignition source, dry fine and powdery coal is combustible and can produce fire and even an explosion. Miners in the area would be exposed to injury. The moving belt rubbing the accumulations, and the moving tail roller actually in and grinding up the accumulations, provided the necessary friction that could have served as an ignition source. There was a confluence of factors constituting a serious risk to miners. *Enlow Fork Mining Co.*, 19 FMSHRC 5; see also *Texasgulf, Inc.*, 10 FMSHRC 498. This contribution to a hazard satisfies the third element, and the fourth element is also shown since the type of injuries that could have occurred would have been of a reasonably serious nature. With flames, heat, toxic smoke and fumes, there exists the potential for burns and respiratory damage, with either type of physical injury being severe enough to result in death. *Mathies Coal Co.*, 6 FMSHRC 1. In addition to S&S, the finding of high negligence is also correct. 30 C.F.R. §100.3(d). The operator should have known of these conditions, through an adequate daily examination, which the record indicates did not occur. Furthermore, there are no credible mitigating circumstances, such as any attempts to clean up the accumulations prior to the order being issued. Ex. G-2, pp. C/5, C/6, C/13.

I also find conduct constituting more than ordinary negligence. Although Inspector Deel was unable to conclude that the accumulations had been present for more than a day, the record reflects he issued citations for three successive days for accumulations that had not been reported and corrected. While this raises the possibility the accumulations were in the tunnel beyond the prior day shift on the 12th, it is enough for this analysis that they were not cleaned up prior to the shift beginning on the morning of January 13, 2011. The accumulations were certainly obvious and extensive, since they had built up to a height of 16 inches and were into the bottom belt and tail roller. This condition posed a high degree of danger of friction igniting the coal dust and powdered coal. Tr. 76. Electrical ignition sources were also in the environment. This established a confluence of factors constituting a serious risk to miners, as set forth above.

In responding to the contention that Respondent was not on notice more effort was required for compliance with the safety standard, under the circumstances presented here this

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[15] The material had not yet been cleaned and may have contained rock and ash. Tr. 74-75.

factor in the analysis is considered less important than those discussed above. *IO Coal Company,* 31 FMSHRC at 1351. That said, accumulations cited the previous two days should have alerted management of an ongoing failure to clean up spilled material, and actual notice as to these particular accumulations was not necessary. Further, a reasonably prudent person familiar with the mining industry would recognize that such accumulations are a well known hazard to the safety of miners and prohibited by the standard cited. It follows that the violation was properly designated as UWF. *Emery Mining*, 9 FMSHRC 1997.

I find Order #7061997 to be properly issued as written, and it is **affirmed**.

Order No. 8008603

Contentions

Respondent argues that Popich conducted proper examinations on January 10, 11, and 12, 2011 of the first floor of the plant as required by § 77.1713(a). Respondent also argues that Popich was a supervisor and a certified examiner, fully authorized to conduct examinations. Respondent contends that the regulation only required an inspection where people work and travel, and since the plant was not producing, the regulation only covered the first floor of the plant. Respondent further argues that the inspector reached the conclusion on January 13th that examinations had not been performed on the three preceding days based on conditions in the yard and inclined walkway, both areas that did not require inspection. The areas where inspections were conducted, the Respondent asserts, did not contain any hazards.

The Secretary argues that the plant was running an afternoon shift and had miners working, cutting, torching, welding, and replacing pipes in the plant. The Secretary argues that Popich did not conduct a proper examination as required by the regulations because he did not record a methane reading, even though torches were in use, and he did not examine the belts. The Secretary argues that the violation is S&S because Rosebud management failed to designate a certified examiner for three days; that by not conducting examinations, miners were exposed to potential hazards that would have been discovered by examinations; that oncoming shifts rely on examination books to prepare for hazards, and unrecorded hazards would reasonably result in injury; and the miners were exposed to potential shocks or burns, crushing injuries, loss of extremities or amputation, smoke inhalation, burns, contusions, abrasions, broken bones, strains, sprains, and other serious injuries. The Secretary further argues that in addition to the specific hazards in this case, there should be a presumption of S&S for failing to conduct proper daily examinations.

The Secretary further argues that Rosebud's failure to designate someone to conduct the required examinations for over three days displayed high negligence. The Secretary focuses on the prophylactic nature of examinations and the length of time the operator failed to perform them or designate someone to perform them. Further, the Secretary argues that if Popich was the designated examiner, then he was an agent of the operator and that he committed an unwarrantable failure in not conducting the examinations, which should be imputed to Rosebud.

Findings of Fact and Conclusions

There were miners working in the plant each afternoon shift from Monday, January 10, 2011, through Thursday, January 13, 2011, yet no daily examinations were recorded in the official book for that shift on Monday, Tuesday, or Wednesday. Stip. # 18, 19. After the order was issued, a person was designated to conduct the required examination for the afternoon shift. Ex. G-2, G-10. Plant Operator David Popich was working in the cleaning plant on the afternoon shift each of those days. Tr. 129, 130. He has over two years experience as an above ground shift examiner. Tr. 127, 128. At that time he was not assigned to conduct examinations, and did not write in the official book. But he testified that he did examine the bottom floor of the plant each day to make sure everything would be in safe working condition. Tr. 130-134.

Respondent's assertion that the plant was not processing coal on the days at issue, when no examinations meeting the safety standard were conducted, is irrelevant. Nowhere in 30 C.F.R. §77.1713 is there an exception for periods when a plant is not actually producing products. Inspector Deel noted that here were construction workers throughout the plant on the 13th, and other workers would enter on the next shift. Further, Deel had discovered and cited various conditions that had been present since the day before, which, had an examination been conducted, could have been corrected. Tr. 63-66, Ex. G-2, pp. 13, C/56-C/59. It follows that the informal, uncommunicated look around by Popich cannot satisfy the standard.

The matter of an *inadequate* examination has been discussed above, and here there was a *complete failure* to meet the mandatory safety standard for *days* before the instant order was issued. Accordingly, the undersigned finds that Order No. 8008603 was validly issued. Ex. G-10.

The designation of S&S was found correct for the inadequate examination the morning of January 13, 2011, as discussed above, and it is even more applicable here where there was a failure to conduct, properly record, and complete official examinations for several days. There was a violation of § 77.1713, a safety hazard contributed to by the violation, a reasonable likelihood that the hazard contributed to would result in injury and a reasonable likelihood that the injury would be of a reasonably serious nature. *Mathies Coal Co.*, 6 FMSHRC 1. Each day, men entered the work area unaware of hazards, despite the fact that a number of citations had been issued during the week. On this record, the only thing that alerted mine management and personnel to hazards was the presence of the MSHA Inspector and his observations and the citations and orders he issued. The miners were not alerted in advance, and were unnecessarily exposed to danger. I also find as proper the determination that an injury to an unwary miner could reasonably be expected to result in lost workdays or restricted duty. Because I find S&S present in this instance, it is not necessary for me to address the Secretary's argument that there should exist a presumption of S&S for failure to perform adequate examinations.

Reckless Disregard is defined as operator conduct, which exhibits the absence of the slightest degree of care. 30 C.F.R. § 100.3(d). This criterion may apply where no required examination was conducted for days. Mine managers told Inspector Deel that they simply forgot to assign someone to do the daily examination on the afternoon shift. Tr. 61, 62, 70, Ex. G-2, pp. 13, C/55, C/56. In the opinion of the undersigned, daily examinations are much too important to

the health and safety of miners to be overlooked. Yet, in this instance, when considering whether there was reckless disregard, I will accept the excuse offered mainly because the afternoon shift had so recently come into effect. I do affirm the finding of high negligence, since management *should have known* of the mandatory requirement. Indeed, examinations, however inadequate, were being recorded in the book for the early shift.

While stopping short of finding reckless disregard, I do find that there was a serious lack of reasonable care in "overlooking" the mandatory examination of the afternoon shift. The same aggravating factors that established UWF in the inadequate examination citation discussed above are also shown in this order, except that the violative condition lasted even longer and hence posed a higher degree of danger to miners. It was certainly obvious by the lack of recordings in the examination book regarding the afternoon shift. A reasonably prudent person familiar with the mining industry would know that examinations are mandatory. Nothing was done until Deel called the violation to the attention of management. There are no mitigating circumstances; this was a complete failure, and the standard of aggravated conduct constituting more than ordinary negligence has been met.

I find that Order No. 8008603 was properly issued as written, and it is **affirmed**.

Docket No. PENN 2011-415

Three months later, on April 11, 2011 at 1115 hours MSHA Inspector Kevin Deel issued 104(d)(2) Order No. 8008680 to Assistant Superintendent Kevin Kijowski citing 30 C.F.R. § 77.504 for the condition or practice as follows:

> The power connection for the Lincoln LN25 Wire Feed Welder is not mechanically and electrically efficient and is not made with suitable conductors on the third floor of the Dutch Run Coal Preparation Plant. A welder cable from a Lincoln Arc 1115 480 volt Welder is clamped on to the power cable of the wire fed welder using the welding rod holder clamp to supply power to the wire fed welder. There are bare power leads exposed. The power on both welders is energized. By not making a mechanically and electrically efficient power connection the operator has engaged in aggravated conduct constituting more than ordinary negligence. This is an unwarrantable failure to comply with a mandatory standard.

The Inspector determined that injury or illness was reasonably likely and could reasonably be expected to be fatal. The order was designated S&S, affecting one person, with high negligence. The penalty assessed was $4,000.00.

The initial action was listed as Order No. 7061997 dated January 13, 2011 involving accumulations and discussed above in Docket PENN 2011-283.

This order was terminated 15 minutes later, at 1130 hours, when the power connection between the two welders was disconnected. On April 21, 2011 the order was modified to show that injury expected was lost workdays or restricted duty, instead of fatal, because the voltage present at the bare connection was reported to be between 36 and 40 volts.

The safety standard cited is as follows:

> **Electrical connections or splices; suitability.**
>
> Electrical connections or splices in electric conductors shall be mechanically and electrically efficient, and suitable connectors shall be used. All electrical connections or splices in insulated wire shall be reinsulated at least to the same degree of protection as the remainder of the wire.

30 C.F.R § 77.504.

On the date the above order was modified, April 21, 2011, at 1100 hours Inspector Deel also issued 104(d)(2) Order No. 8008631 to Superintendent Stan White, citing 30 C.F.R. § 77.215(h), for the condition or practice as follows:

> The operator is not compacting the refuse material at the Dutch Run Coal Preparation Plant Refuse site No. 00384-02, in 2 foot thick layers. The operator is hauling more refuse material to the refuse site than can be spread and compacted with the equipment and man power available. The operator is spreading the refuse material, without compacting the material to, make room to dump more refuse material.
>
> The operator is aware that the refuse material is being spread without being compacted in 2 foot layers.
> By taking no action to correct this condition the operator has engaged in aggravated conduct constituting more than ordinary negligence.
>
> This is an unwarrantable failure to comply with a mandatory standard.

At the time, the Inspector determined that injury or illness was reasonably likely, and could reasonably be expected to be fatal. The order was designated S&S, the number of persons affected was one, with high negligence.

The order was later modified to reduce injury or illness to unlikely, because the hazard would not occur until future layers of refuse were added. The injury expected was reduced to permanently disabling because the most likely hazard would be toxic smoke and fumes from fire that could cause lung and respiratory injuries. Since injury or illness was modified to unlikely, the order was also modified to a non S&S citation.

On June 8, 2011, the citation was terminated when stored filter cake material was removed, the existing refuse was compacted, and all new refuse was being compacted as it was brought to the refuse site. The penalty assessed was $4,000.00.

The standard cited, § 77.215, is as follows:

Refuse piles; construction requirements.

> (a) Refuse deposited on a pile shall be spread in layers and compacted in such a manner so as to minimize the flow of air through the pile.
>
> (b) Refuse shall not be deposited on a burning pile except for the purpose of controlling or extinguishing a fire.
>
> (c) Clay or other sealants shall be used to seal the surface of any refuse pile in which a spontaneous ignition has occurred.
>
> (d) Surface seals shall be kept intact and protected from erosion by drainage facilities.
>
> (e) Refuse piles shall not be constructed so as to impede drainage or impound water.
>
> (f) Refuse piles shall be constructed in such a manner as to prevent accidental sliding and shifting of materials.
>
> (g) No extraneous combustible material shall be deposited on refuse piles.
>
> (h) After October 31, 1975 new refuse piles and additions to existing refuse piles, shall be constructed in compacted layers not exceeding 2 feet in thickness and shall not have any slope exceeding 2 horizontal to 1 vertical (approximately 27°) except that the District Manager may approve construction of a refuse pile in compacted layers exceeding 2 feet in thickness and with slopes exceeding 27° where engineering data substantiates that a minimum safety factor of 1.5 for the refuse pile will be attained.
>
> (i) Foundations for new refuse piles and additions to existing refuse piles shall be cleared of all vegetation and undesirable material that according to current, prudent engineering practices would adversely affect the stability of the refuse pile.
>
> (j) All fires in refuse piles shall be extinguished, and the method used shall be in accordance with a plan approved by the District Manager. The plan shall contain as a minimum, provisions to ensure that only those persons authorized by the operator, and who have an understanding of the procedure to be used, shall be involved in the extinguishing operation.

Testimony of Inspector Kevin Deel

On 4/11/2011 Deel was opening an inspection at Dutch Run in the second half of the inspection year. Tr. 143, 144. After inspecting a new construction site, he went to the prep plant to meet with assistant superintendent, Kevin Kijowski, in order to discuss the inspection and to look at the record books. Tr. 146, 147. While performing his inspection on the third floor, Deel came upon a cart where a welding cable from a Lincoln arc welder was connected to a short

power cable of a wire fed welder by an uninsulated clamp onto a three inch section of uninsulated copper. Tr. 147, 148. The power on both welders was on. Tr. 149. He described the photograph he took as showing the bare copper sticking out of a black power lead and the clamp as part of a live welder cable. Tr. 150. The cart was in an area where men were traveling. Tr. 152. He determined that Kevin Kijowski was the electrician who had made the connection, and that this was his normal way of doing it since he had done it this way for years. Tr. 154, 156. This was a bare power connection that could energize the metal cart, a metal gas cylinder, and the metal floor. Tr. 157, 158. Deel witnessed men walking past the cart, and determined that they were put at risk. Tr. 157. He observed one man walk right past the cart, within one or two feet of it. Tr. 206, 207. It was later determined that there was only 32 volts in the cable from the arc welder. Tr. 153. In rebuttal testimony, Deel stated that in the four years of inspections at Dutch Run, he had never seen a bare uninsulated connection on that welder. Tr. 247.

Deel returned to Dutch Run on April 21, 2011, and at the refuse site he observed no compaction being done. Tr. 163. The dozer operator was pushing five-to-six foot layers short distances in order to clear the way for more refuse to be brought to the site. Tr. 164. The dozer in use was a D7, and another dozer, not running, was parked off to the side. Tr. 248. The site measured about 280 feet wide by 600 feet in length. Tr. 164. The refuse was being pushed to the side without compacting it because the plant was running three shifts a day, five or six days a week, and three to four times the amount of material was being brought in as in previous years. Tr. 167, 168. The dozer operator, Ken Hoffman, told Deel that he had known for a month he would not be able to keep up with the amount of material coming in, that he had told Stan White he did not have the equipment or manpower needed, and that White told him to spread the material without compacting. Tr. 169, 185-190.

Filter cake was also being stored on the site, to be run through the cleaning plant. Tr. 167. Filter cake is a clay, similar to black mud, whereas refuse is in larger particles the size of gravel or larger rock. Tr. 180, 181, 195, 196. Deel took a series of photographs that day and explained that they showed an area that had been compacted, very flat with dozer tracks, and also with a roadway leading to the filter cake storage dump. The compacted area had two mounds of uncompacted refuse and, Deel observed very deep ruts caused by dozer tracks. There was also a two to three acre area of refuse material in five to six foot layers partially surrounding the filter cake. This material was not compacted and not level, and this was being pushed out to make room for more refuse. Tr. 165-181. Deel further testified that his concern was for the future: should compacted layers be added on top of uncompacted material, there would be a danger of friction and instability. Tr. 164, 182, 183, 191, 192. He spoke with company personnel that day, and there was an agreement that they did not have the manpower or equipment to properly handle the amount of material. Deel decided that the 104(d) order would be issued to stop material coming to the site until there was a plan to remedy the situation. Tr. 188. In rebuttal testimony, he was of the opinion that coarse refuse material could be compacted regardless of weather conditions with enough manpower and equipment. Tr. 249.

Testimony of Assistant Supervisor Kevin Kijowski

Kijowski has worked for Rosebud for over a year, but also at Dutch Run under the former owner intermittently for fifteen years. Tr. 210. He has a total of approximately twenty

five years experience in the mining industry. Tr. 210. His jobs have included mechanical, welding and fabricating, and he has all three electrical certifications and a gas card. Tr. 211. On April 11, 2011, he was an Assistant Supervisor at Dutch Run. Tr. 211. Kijowski made the connection on the welder that was cited that day, which he considered to be suitable since it was only an extension of a welding rod. Tr. 212. He was emphatic that the connection had been seen by several inspectors over the last five years and nobody ever commented on it, including Inspector Deel. Tr. 213, 214, 216. He did not consider the crimped connection to be hazardous since it had very little voltage and it was not fatal. Tr. 214, 215. He pointed out that no current runs through the connection until you strike an arc.[16] Tr. 224. He admitted that the standard requires the connection to be insulated, and that the connection could have been insulated with a coupling boot. Tr. 220.

Testimony of Ken Hoffman

Hoffman had been employed by Rosebud since February 2011, and had forty five years in the mining industry working for four companies as a dozer operator. Tr. 227. Before Rosebud took over, there were 3 or 4 shifts a week, while after the transfer there were about 15 shifts a week. Tr. 234.

On April 21, 2011, Hoffman was maintaining the Dutch Run refuse site, where he had worked for fifteen years. Tr. 230. The weather had been nasty for over six months, with rain, freezing and thawing. Tr. 233. Due to the freeze and thaw cycles, the increased amount of material coming in started to become an issue. The material was being pushed to the side and stored in piles, to be brought up later, spread and compacted. Tr. 230, 232, 233. Hoffman testified that he spoke with Stan White about the conditions, and in the following days two rock trucks, two D7 dozers and a compactor were added to the D5 dozer at the site. Tr. 233. On April 21st, Hoffman was operating one of the newly obtained, larger D7 dozers. The other additional equipment was added after the order was issued. Tr. 235, 236. With the added equipment the issue of the amount of material was resolved in two and a half weeks. Tr. 233.

Testimony of James J. Szalankiewicz

Szalankiewicz is a self-employed consulting engineer who has Associates degrees in Mining Technology and in Surveying Technology. Tr. 238. He is a Registered Professional Engineer and a Professional Land Surveyor in the Commonwealth of Pennsylvania. Tr. 238, 239. He has over 40 years experience in the mining industry as a mine surveyor, mine planning engineer, and co-owner, operator and chief engineer of numerous mines in two Pennsylvania counties. Tr. 238-239. In 2007 he sold his interest in that company and started his small consulting firm Tr. 239.

[16] In arc welding, "intense heat is generated by a high amperage electric arc between an electrode and the metal pieces to be joined." When the electrode touches the work, the welding current starts. This is referred to as "striking an arc." *See Sand, Gravel, and Crushed Stone On-The-Job Training Modules*, Module 7 "Welding and Cutting," MSHA (Aug. 2000).

Szalankiewicz designed the original refuse pile at Dutch Run. Tr. 239, 240. On April 21, 2011, he was called to the site by a Rosebud employee. Tr. 240, 241. At the site he observed very severe wet weather conditions. Tr. 241. On the compacted areas, there was a large amount of filter cake, and there was a large area of uncompacted material being stored to be redistributed and compacted as required when the weather was proper. Tr. 241. He pointed out that you cannot compact anything in wet, muddy and sloppy conditions, because the moisture content has to be correct. Tr. 241. He recalled that in the past when weather conditions were unsuitable, the material was stockpiled on the site and then redistributed and compacted when the weather changed and the moisture decreased. Tr. 245. The site was overwhelmed because of the weather conditions. Tr. 244. He further testified that in his experience at Dutch Run there has never been a time when material was compacted in more than two-foot layers. Tr. 243. He also stated that, considering the weather conditions on April 21, 2011, additional machines would not have lessened the extent of the uncompacted material at the site. Tr. 243-244.

Order No. 8008680

Contentions

The Respondent argues that the citation was not properly issued because it was not on notice that this practice would be cited as a safety hazard. The Respondent asserts that Kijowski, who has 31 years of mine experience and is presumably a reasonably prudent person, was not aware that the connection violated § 77.504. Furthermore, Kijowski had been using the same connection for approximately five years, during which time MSHA had conducted ten complete inspections. Respondent asserts that during this time, "this connection had been observed and accepted by several MSHA inspectors." Resp. Brief 10. Without providing advance notice of how MSHA was interpreting its regulations, it could not assess a civil penalty for apparent violations.

The Respondent also argues that it did not violate § 77.504 because the connection employed was suitable. The Respondent contends that the inspector conflated the various parts of the regulation, and that there is no requirement that the connection be insulated. All that is required is that the connection be "mechanically and electrically efficient." 30 C.F.R. § 77.504.

Respondent argues that if there was a violation, it was not S&S because there was no reasonable likelihood that the cited condition would result in a serious injury. The Respondent notes that the potential electrical current in the uninsulated connection was between 12 and 30 volts, that it was located on the third floor (of six) of the plant, and that there was generally only one person present in the plant at any time. Furthermore, anyone present would have been accompanied by a certified person who would have proper training such that risk of shock would be minimal. The Respondent argues that this scenario did not present the appropriate confluence of factors to find S&S.

Furthermore, the Respondent argues that, that if there was a violation it was not due to high negligence or unwarrantable failure. Respondent argues that the condition never posed a high degree of danger and it was abated in a timely manner. Respondent asserts that Kijowski's firm belief in the appropriateness of the connection should be counted as a mitigating factor.

The Secretary argues that the citation was properly issued because the plain language of § 77.504 requires that electrical connections in insulated wire be re-insulated to the same degree as the wire. In this instance there was a 3-inch uninsulated piece of copper conductor exposed, which should have been covered by a coupling boot. The Secretary also argues that the violation was S&S because the voltage running through the connection would lead to electrical shock if touched. The Secretary asserts that it was reasonably likely that such electrical shockwould occur and that it would result in injury because the uninsulated condition was located in an area where miners frequently work and travel, in a plant with wet conditions. Furthermore, the Secretary argues that the cart could have become energized, which would have sent electricity to the metal floor or the compressed air cylinder, all of which would have led to injury to a miner, even if the miner was trained. Lastly, the Secretary argues that the possible electric shock could have resulted in burns or death, making it of a reasonably serious nature.

The Secretary contends that the violation was due to high negligence and unwarrantable failure. The Secretary cites the length of time that the uninsulated connection was used (two to three hours); the extent of the violation in that it was reasonably likely to energize the cart, cylinder, and floor; that the operator was on notice because the regulation's meaning was clear; that there were no attempts to abate the condition; that the violation was obvious and known to the operator; and that Kijowski should be held to a higher standard of care because he was a supervisor.

Findings of Fact and Conclusions

This order was modified on April 21, 2011 to reduce the expected injury from fatal to lost workdays or restricted duty. Ex. G-13, p.2. As will be discussed below, I find that this modification was inadequate; information available to MSHA after the order was issued shows that the gravity was overstated.

The safety standard states:

> Electrical connections or splices in electric conductors shall be mechanically and electrically efficient, and suitable connectors shall be used. All electrical connections or splices in insulated wire shall be reinsulated at least to the same degree of protection as the remainder of the wire.

30 C.F.R. § 77.504.

This standard concerns the suitability of electrical connections or splices. The first sentence requires that suitable connectors be used that are mechanically and electrically efficient. The second sentence adds that connections or splices in insulated wires must also be insulated, "reinsulated", to afford the same degree of protection provided by the insulated wires being

connected together. Respondent contends, in effect, that the standard applies only to the wire that is already insulated. But the plain meaning of the two sentences, read together and as pertinent here, is that the entire course of an electrical lead, including any splice or connection anywhere in that lead, must be properly insulated. *Falkirk Mining Co.,* 19 FMSHRC 149 (Jan. 13, 1997) (ALJ). Simply put, this means no bare wire splices or bare metal connectors between insulated wires.

Respondent's argument leads to an absurd result, as is evident in this case. The safety standard seeks to protect individuals from the risk of shock. One cannot subvert the clear intent of the regulation by simply using wire that had not previously been insulated, and then claim that the regulation only concerns reinsulation.

The connection found by Inspector Deel on April 11, 2011 consisted of a metal clamp on a three inch piece of solid copper metal protruding from the insulated boot of one of the electrical cables.[17] Stip. # 20. The photograph Deel took illustrates the connection well. Ex. G-12. Assistant Superintendent and electrician Kevin Kijowski made the connection to extend a welding rod. Stip. # 24, Tr. 212. Kijowski testified that that the same connection had been made for the last five years and had been seen by several inspectors on various occasions. Tr. 213. Kijowski testified that nobody, including Inspector Deel, ever commented on the connection, or remarked that there was anything wrong with it. Tr. 213, 214, 216. He also stated that there was very little voltage and no current running through the connection. Tr. 214, 215, 224. He did admit that the connection could have been insulated using a coupling boot. Tr. 220. In his testimony, Deel denied ever seeing such a connection at Dutch Run, Tr. 247, but we do not need resolve this conflict in testimony. It is sufficient that the connection was openly visible for many years and never cited.

The Condition or Practice written by Deel in the citation is only partially correct. Though the citation states that the issue was the mechanical and electrical efficiency of the welder, this issue was not addressed at hearing by either party. It has not been established on this record that the connection was or was not mechanically and electrically efficient. The fact that it had been used in welding operations at the plant for many years speaks to the general efficiency of the connection. Further, close expert examination of the components of the connection and their assembly would be required to determine mechanical efficiency or inefficiency, and no evidence of such examination has been submitted. In order to determine electrical efficiency, expert measurement with appropriate instruments across the connection would be required. This type of evidence is not available in this record.

The issue here is the bare connection, and whether it must be protected, or insulated. Ex. G-12. Even though the welder was a 480-volt arc welder, such high voltage was not present at the connection. The modification made on 4/21/2011 was to reduce the voltage to between 36 and 40 volts, Ex. G-13, but Deel conceded in his testimony that only 32 volts were present. Tr. 153. As Kijowski noted, there was no current flowing in the wire. Tr. 224.

[17] The type of clamp used appears similar those found on common car battery jumper cables.

However, the undersigned finds that the following parts of the Condition or Practice were recorded correctly:

> The connection was not made with suitable conductors (e.g. insulated);
> Bare power leads were exposed; and
> Both welders were powered on. *See* Stip. # 23.

Had Deel limited the narrative in this manner, his credibility would not have been impacted.

Since there was some degree of shock hazard present, the safety standard was violated by the bare connection between insulated wires. Furthermore, the undersigned finds that the operator was on notice of the regulation and its meaning. The Commission has looked at a variety of factors in analyzing whether an operator had fair notice of the Secretary's interpretation of a regulation, including "the text of the regulation, its placement in the overall regulatory scheme, its regulatory history, the consistency of the agency's enforcement, whether MSHA has published notices informing the regulated community with 'ascertainable certainty' of its interpretation of the standard in question, and whether the practice at issue affected safety." *Secretary v. Weirich Brothers, Inc.*, 28 FMSHRC 66, 68-69 (Feb. 2006) (ALJ), citing *Island Creek Coal Co.*, 20 FMSHRC 14, 24-25 (Jan. 1998). In this instance, the regulation's clear meaning combined with the publicly available FMSHRC decisions interpreting it in accordance with the Secretary's current interpretation, such as *Falkirk Mining Co.*, speak overwhelmingly to the satisfaction of the fair notice requirement. Furthermore, the regulation at issue here was safety related, and its violation produced at least some safety risk for those in the vicinity.

Having found that the mandatory safety standard was violated, and there was a measure of danger and some degree of shock hazard, which were contributed to by the violation, the first two elements of the *Mathies* analysis are present. Electrical shocks can result in injury, and can also be serious in nature. In this case, however, with only 32 volts and no current present at the bare connection, it has not been shown that contact would result in such a shock injury that it would be of *a reasonably serious nature*. Accordingly, absent satisfaction of the fourth *Mathies* element, I find that S&S is not established.

Inspector Deel's assessment of high negligence was not modified, but should have been, upon learning that the true number of volts present in the lead was not 480, but rather 32. The fact that this was not dangerous high voltage presented an entirely different level of gravity, which was not adequately addressed with the single modification on April 21, 2011. At most, this was moderate negligence based on the mitigating circumstances ascertained on review. 30 C.F.R. §100.3(d).

The inconsistencies between Deel's notes and the citation and testimony are revealing. In his notes he wrote that the area was constantly wet, Ex. G-11, p. C/5, and it was stipulated that clean up with water hoses is routine. Stip. # 27. But he did not report wet conditions in the citation, and the photograph shows no visible moisture at all. Ex. G-12. Deel also wrote that numerous contractors traveled past the connection, EX. G-11, p. 12, but in the citation listed the

number of persons affected as one. Deel's testimony regarding the level of gravity, presented at a time when he had learned only 32 volts were present at the connection, is not credible. I do largely credit the testimony of electrician Kijowski; he candidly admitted that the connection could have been insulated, but did not consider the connection to be fatally hazardous. He was correct on both counts. In the opinion of the undersigned, issuing a 104(d) (2) withdrawal order was not appropriate. However, the operator is now on notice that any use of uninsulated electrical cable connections in the future will no doubt bring increased scrutiny and potential penalties.

The connection did not pose a high degree of danger and was not extensive, being isolated to one welding cart. The bare connection was obvious, but the fact that Kijowski used this type of connection for years without a citation being written supports a finding that the operator was not on notice that more needed to be done. From this discussion, it follows that I find this violation not to be the result of UWF. In conclusion, the citation is further **modified**.

Order No. 8008631

Contentions

The Respondent argues that the citation for violation of § 77.215(h) was issued prematurely, as there is nothing in the record to indicate that refuse piles were in excess of the allowable limit. The Respondent also argues that the regulation does not provide a time period within which the refuse must be compacted, and Deel cited the operator for possible future violations. It is asserted that the material was being compacted in two-foot lifts, but adverse weather conditions made compaction impossible, even if additional machinery and manpower were added.

The Respondent further argues that if there was a violation, it was not S&S or due to an unwarrantable failure because the refuse remained uncompacted due to weather conditions. The wet conditions at the refuse piles made compaction impossible because it is critical for the material to have a specific range of moisture content prior to compaction.

The Secretary argues that the operator was not compacting refuse into two-foot layers, thereby creating a risk of fire or instability. The Secretary argues that the uncompacted piles were approximately 10-15 feet high and 280 feet wide by 600 feet long, which would make them well above the limit allowed by the regulations. Furthermore, the operator did not stop adding to these piles, but rather shifted them around as more refuse was brought in. The Secretary argues that though there is no specific time allowance in the regulations, MSHA has consistently imputed a reasonable amount of time for compliance in the absence of statutorily imposed time limits. In this instance, the Secretary argues that the month-long presence of uncompacted refuse was unreasonable.

Findings of Fact and Conclusions

The record reveals that Inspector Deel issued the 104(d)(2) withdrawal order based on a concern for the future, fearing that compacted material would be added on top of uncompacted

material, ultimately leading to instability of the pile. Tr. 164, 182, 185, 191, 192. However, this is not what he wrote in the order at 11 am on April 21, 2011, not long after he arrived at the site. He first wrote that the operator was not compacting refuse material in 2 foot thick layers. He also wrote that the material was being spread without being compacted, and that the operator was taking no action to correct that condition. Ex. G-21. However, there is no evidence that the compacted layers at the pile exceeded the two-foot thickness limitation. Material was being spread for future compacting, and this procedure is not in apparent conflict with the regulation. Far from taking no action, the operator had already begun to remedy the situation with the addition of a larger D7 dozer. Tr. 233. On the day of the inspection it was true that more refuse was being hauled to the site than could be handled by one person.

Deel has inspected surface refuse piles for about 4 years, but he has no experience actually working on a refuse pile or as a dozer operator. Tr. 203. Ken Hoffman has operated a dozer for 45 years. Engineer James Szalankewiecz actually designed the original pile at Dutch Run and had been a co-owner, operator and Chief Engineer of numerous mines. Tr. 238, 239. Both of these witnesses have much more experience with refuse piles than Deel. The testimony and opinions of Szalankewiecz, by virtue of his education, knowledge, expertise and experience, are found to be highly credible regarding the conditions on April 21, 2011. In his several years of experience at Dutch Run, there had never been material compacted in more than two-foot layers. Tr. 243. He pointed out that material cannot be compacted in wet, muddy and sloppy conditions because the moisture content must be correct. Tr. 241. He further testified that in the past at Dutch Run, when the weather was unsuitable, material was stockpiled and then redistributed and compacted when the moisture was decreased. Tr. 245. In his opinion, additional machines or manpower would not have reduced the extent of uncompacted material on April 21, 2011, since the site was overwhelmed as a result of the weather. Tr. 244. Since I find Szalankewiecz to be a credible witness, I therefore find Deel's testimony to the effect that compacting can take place regardless of weather conditions not credible. Tr. 249.

In his notes, Deel recorded information about his meeting with Dozer operator Hoffman, Engineer Szalankewiecz, and Plant Superintendent Stan White. Hoffman stated to Deel that more refuse was coming than could be spread in one shift. Szalankewiecz said that the site ran out of space due to the storage of filter cake, and Stan White told him that the refuse material would be compacted but, due to the weather, the filter cake had been too wet to move. Ex G-11, 4/21/2011, pp. 3, 6, 7-8.

While meeting with White and the engineers on that day, Deel also learned that they were working out a plan to remedy the situation at the site. Ex. G-11, 4/21/2011, pp. 9-10. They were going to immediately move part of the filter cake, start compacting on the outer lip of the site, bring in a second large D7 dozer, run additional shifts as needed, and start a new layer of the pile on the northern end of the site. In addition, a written plan would be submitted to MSHA. Ex. G-11, 4/21/2011, pp. 9, 10. Yet Deel wrote in the order that the operator was taking no action to correct the condition. Ex. G-21.

On April 27, 2011, only days after the citation was issued, Deel modified the order to a non-S&S citation, with injury unlikely but expected to be permanently disabling. Ex. G-21. On

June 8, 2011, Deel traveled to the refuse site and found that all the filter cake and refuse had been spread and compacted, and he terminated order number 8008631. Ex. G-11, 6/8/11, p. 1.

Nothing in the inspection notes or testimony indicates that any refuse had been compacted on top of uncompacted or improperly compacted refuse. In fact, Deel testified that the material *under* the uncompacted material *had* been compacted. Tr. 250. Deel also acknowledged that there was a very flat compacted area with a roadway and dozer tracks, and he was aware that filter cake was just being stored for further processing. Tr. 172-174. In his conversations on April 21, 2011, Deel learned that: management was already aware of the situation, a large, D7 dozer had already been added to the site, filter cake would immediately be moved to facilitate existing compaction, a new layer for compacting would be started in another area, and additional shifts of personnel would be added as needed. Ex. G-11, 4/21/11, pp. 9-11; Tr. 197. Despite this information, Deel issued the withdrawal order, which in the opinion of the undersigned was inconsistent with the standard cited and hence unnecessary.

When compared to the refuse safety standard, set forth above, it becomes clear that the order was issued in error. The standard does not limit the amount of uncompacted refuse stored at a pile. The standard does not prohibit storing and spreading refuse, and compacting it at a later time.[18] *See e.g. Secretary v. Power Operating Company*, 17 FMSHRC 421 (Mar. 1995) (ALJ) (holding that an operator waiting several days to compact as the refuse dried complied with regulation). Nothing in the standard requires compaction within a certain amount of time after refuse arrives at a site. And, the standard does not require that compaction take place regardless of adverse weather conditions.

Even a cursory reading reveals § 77.215(h) to be a results-oriented regulatory provision. It speaks directly to the construction of a refuse pile in compacted layers not exceeding two feet in thickness, along with certain slope requirements. The process, methods, timing and other factors that go into achieving the mandated result are not addressed. It can only be concluded in this context that the process is left up to the operator, so long as it is within a reasonable timeframe. Here, the undersigned credits Szalankewiecz's testimony that the weather served as a hindrance to immediate compaction, Tr. 241, and therefore finds the timeframe reasonable. Deel did not discover compacted material on top of uncompacted refuse. There was no fire or burning material noted. Therefore, there is no evidence of instability or a toxic inhalation or burn injury hazard. A hazard warranting corrective action within the purview of Section 77.215(h) was not present. *Alabama By-Products,* 4 FMSHRC 2129 (Dec. 1982).

In the days that followed, mine management followed the plan communicated to Deel. Tr. 233. A second D7 dozer was added, for a total of three dozers on site. Rock trucks and a compaction machine were added, and manpower increased three fold with multiple shifts as needed. Tr. 197, 233, 248. The plan was successful; by June 8, 2011, all refuse was being compacted and the citation was terminated. Ex. G-11, 6/8/11, p. 1.

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[18] Other parts of the regulation impliedly assume that piles will not be compacted immediately. For example, subsection (a) states that "Refuse deposited on a pile shall be spread in layers and compacted in such a manner so as to minimize the flow of air through the pile." 30 C.F.R. § 77.215(a).

Although modified, the order should have been vacated because the standard cited was not violated. Given all of the facts and circumstances surrounding the Dutch Run refuse site from April 21, 2011, through June 8, 2011, the operator should have been commended for recognizing a challenging situation and taking action to insure the proper construction of the pile. Instead, the operator was cited and fined. Since I am unable to find this order to have been validly issued, it is **vacated**.

Civil Penalties

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

> [1] the operator's history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] the effect of the operator's ability to continue in business, [5] the gravity of the violation, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.
>
> 30 U.S.C. § 820(i).

The undersigned affirms Citation No. 7061996 as issued, and finds the inadequate examination of the Dutch Run plant to have been a violation of 30 C.F.R. § 77.1713(a). The citation was correctly designated as being S&S, resulting from high negligence and an unwarrantable failure. The citation and penalty of $5,503.00 were correct as issued and are affirmed.

The undersigned also affirms Order No. 7061997 as issued, and finds the accumulations of combustible materials, as they were, to have been a violation of 30 C.F.R. § 77.1104. The citation was correctly designated as being S&S, resulting from high negligence and an unwarrantable failure. The citation and penalty of $6,115.00 were correct as issued and are affirmed.

The undersigned also affirms Order No. 8008603 as issued and finds the lack of daily examinations for hazardous conditions to have been a violation of 30 C.F.R. § 77.1713(a). The citation was correctly designated as being S&S, resulting from high negligence and an unwarrantable failure. The citation and penalty of $2,000.00 were correct as issued and are affirmed.

Order No. 8008680 was issued for a violation of 30 C.F.R. § 77.504 for an uninsulated connection on a welder. The violation was modified by the Inspector to non-S&S, but was designated as resulting from high negligence and an unwarrantable failure, and a penalty of $4,000.00 was assessed. For the reasons articulated above, the undersigned modifies the order to a 104(a) citation, non-S&S, non-UWF and resulting from moderate negligence. Accordingly, the penalty amount will be reduced. The Act requires, that in assessing civil monetary penalties, the Commission [ALJ] shall consider the six statutory penalty criteria outlined in §110(i).

The undersigned has fully considered all six statutory penalty criteria and assesses a civil penalty in the amount of $500.00. The operator stipulated that the higher penalty amount proposed by the Secretary would not affect its ability to continue in business, so it follows that this reduced penalty will similarly not affect the operator's ability to continue in business. Stip. #4. Although the Dutch Run plant has a history of violations in the 15-month period preceding the issuance of the instant citation, Stip. #7, Rosebud had only operated this plant since January 1, 2011. There was only moderate negligence. The undersigned further notes that there was rapid good faith compliance. Stip #5.

Finally, the undersigned vacates Order No. 8008631, issued for alleged violation of 30 C.F.R. § 77.215(h) with the assessed penalty of $4,000.00. As articulated more fully above, the citation was incorrectly issued, as there was no evidence that the operator was not complying with the regulation by compacting the refuse material in a reasonable manner and within a reasonable timeframe.

In summary:

Violation #	**Original Assessment**	**Penalty Determined**
7061996	$5,503	$5,503
7061997	$6,115	$6,115
8008603	$2,000	$2,000
8008680	$4,000	$500
8008631	$4,000	$0 (Vacated)
Total	$21,618	

The reduction in the total penalty to $14,118.00 is reasonable considering the operator's negligence, the gravity of the violations and the demonstrated good faith in attempting to achieve rapid compliance.

Considering the stipulation that the penalty of $21,618.00 originally charged would not affect the operator's ability to continue to in business, Stip. #4, and also regarding the size and history of Dutch Run, Stip. #7, the total penalty as assessed herein is reasonable.

ORDER

For the reasons set forth above, the citations are **AFFIRMED**, **MODIFIED**, or **VACATED** as indicated. Rosebud Mining Company is **ORDERED TO PAY** the Secretary of Labor the sum of $14,118.00 within 40 days of the date of this decision.[19]

/s/ Kenneth R. Andrews
Kenneth R. Andrews
Administrative Law Judge

Distribution: (Certified Mail)

Joseph A. Yuhas, Esq., Rosebud Mining Company, P.O. Box 1025, Northern Cambria, PA 15714

Rebecca Simon-Pearson, Esq., U.S. Department of Labor, Office of the Solicitor, 170 S. Independence Mall West, Suite 700 East, Philadelphia, PA 19106

[19] 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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October 17, 2012

	:	CONTEST PROCEEDINGS
	:	
SHAMOKIN FILLER COMPANY,	:	Docket No. PENN 2009-736-R
INC.,	:	Citation No. 7011691; 08/12/09
Contestant,	:	
	:	Docket No. PENN 2009-737-R
	:	Citation No. 7011692; 08/12/09
	:	
	:	Docket No. PENN 2009-738-R
	:	Citation No. 7011693; 08/13/09
	:	
	:	Docket No. PENN 2009-739-R
	:	Citation No. 7010952; 08/20/09
	:	
	:	Docket No. PENN 2009-740-R
	:	Citation No. 7011695; 08/25/09
	:	
	:	Docket No. PENN 2009-741-R
v.	:	Citation No. 7011696; 08/25/09
	:	
	:	Docket No. PENN 2009-742-R
	:	Citation No. 7011697; 08/25/09
	:	
	:	Docket No. PENN 2009-763-R
	:	Citation No. 7011699; 08/27/09
	:	
	:	Docket No. PENN 2009-776-R
	:	Citation No. 7011700; 08/31/09
	:	
	:	Docket No. PENN 2009-777-R
SECRETARY OF LABOR	:	Citation No. 7011781; 08/12/09
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 2009-778-R
Respondent.	:	Citation No. 7011782; 08/31/09
	:	
	:	Docket No. PENN 2009-779-R
	:	Citation No. 7011783; 08/31/09

	:	Docket No. PENN 2009-780-R
	:	Citation No. 7011784; 09/01/09
	:	
SHAMOKIN FILLER COMPANY,	:	Docket No. PENN 2010-59-R
INC.,	:	Order No. 7011795; 10/21/09
Contestant,	:	
	:	Docket No. PENN 2010-60-R
	:	Order No. 7011796; 10/21/09
	:	
	:	Docket No. PENN 2010-146-RM
	:	Citation No. 7009795; 11/17/09
	:	
	:	Docket No. PENN 2010-147-RM
	:	Citation No. 7009796; 11/17/09
	:	
	:	Docket No. PENN 2010-354-R
	:	Citation No. 7000087; 03/04/10
	:	
	:	Docket No. PENN 2010-377-R
v.	:	Citation No. 7012104; 03/08/10
	:	
	:	Docket No. PENN 2010-387-R
	:	Citation No. 7012105; 03/09/10
	:	
	:	Docket No. PENN 2010-577-R
	:	Citation No. 7012685; 06/21/10
	:	
	:	Docket No. PENN 2010-589-R
	:	Citation No. 7012687; 06/23/10
	:	
	:	Docket No. PENN 2010-650-R
	:	Citation No. 7012120; 07/15/10
	:	
	:	Docket No. PENN 2010-651-R
SECRETARY OF LABOR	:	Citation No. 7012441: 07/15/10
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 2010-652-R
Respondent.	:	Citation No. 7012442; 07/15/10
	:	
	:	Docket No. PENN 2010-653-R
	:	Citation No. 7012443; 07/15/10

SHAMOKIN FILLER COMPANY, INC., Contestant,	:	Docket No. PENN 2010-654-R
	:	Citation No. 7012669; 07/15/10
	:	
	:	Docket No. PENN 2010-655-R
	:	Citation No. 7012670; 07/15/10
	:	
v.	:	Docket No. PENN 2010-656-R
	:	Citation No. 7012671; 07/15/10
	:	
	:	Docket No. PENN 2010-657-R
	:	Citation No. 7012672; 07/15/10
SECRETARY OF LABOR	:	
MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent.	:	Docket No. PENN 2010-658-R
	:	Citation No. 7012673; 07/16/10
	:	
	:	Docket No. PENN 2010-669-R
	:	Citation No. 7012674; 07/16/10
	:	
	:	Mine ID: 36-02945
	:	Mine: Carbon Plant
	:	
	:	
SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA), Petitioner,	:	Docket No. PENN 2009-825
	:	A.C. No. 36-02945-197364
	:	
	:	Docket No. PENN 2009-775
	:	A.C. No. 36-02945-194224
	:	
v.	:	Docket No. PENN 2010-63
	:	A.C. No. 36-02945-200482
	:	
	:	Docket No. PENN 2010-191
	:	A.C. No. 36-02945-206331
SHAMOKIN FILLER COMPANY,	:	
INC.,	:	Docket No. PENN 2010-275-M
Respondent.	:	A.C. No. 36-02945-208680
	:	
	:	Docket No. PENN 2010-291
	:	A.C. No. 36-02945-209018

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	:	Docket No. PENN 2010-381 A.C. No. 36-02945-213119 Docket No. PENN 2010-465 A.C. No. 36-02945-216876 Docket No. PENN 2010-515 A.C. No. 36-02945-219682 Docket No. PENN 2010-745 A.C. No. 36-02945-229176
v.	:	Docket No. PENN 2011-16 A.C. No. 36-02945-232342 Docket No. PENN 2011-104 A.C. No. 36-02945-238543 Docket No. PENN 2011-189 A.C. No. 36-02945-244057
SHAMOKIN FILLER COMPANY, INC., Respondent.	:	Mine: Carbon Plant
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	:	CIVIL PENALTY PROCEEDING Docket No. PENN 2011-129 A.C. No. 36-02945-241465-A
v.	:	
WILLIAM ROSINI, employed by SHAMOKIN FILLER COMPANY, INC., Respondent.	:	Mine: Carbon Plant

FINAL DECISION AND ORDER

Appearances: Jessica R. Brown, Esq., Office of the Solicitor, Department of Labor, Suite 630E, The Curtis Center, 170 S. Independence Mall West, Philadelphia, Pennsylvania for the Petitioner

Adele L. Abrams, Esq., CMSP, and Diana R. Schroeher, Esq., Law Office of Adele L. Abrams, P.C., 4740 Corridor Place, Suite D, Beltsville, Maryland for Respondent

Before: Judge Lewis

Pursuant to the Parties' Joint Motion for Final Decision in the above captioned matter, the undersigned Administrative Law Judge hereby enters the following Final Decision and Order.

Respondent has requested a hearing on the citations, orders and associated civil penalties contained in these dockets in accordance with the provisions of section 105(d) 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*. Respondent's central objection to the citations is that the Mine Safety and Health Administration ("MSHA") lacks jurisdiction over Respondent's Carbon Plant in Shamokin, Pennsylvania.

On October 27 and 28, 2010, the undersigned held an evidentiary hearing limited to the issue of jurisdiction and concluded that MSHA has jurisdiction over the Carbon Plant. The undersigned also granted the Secretary's motion *in limine* and denied Respondent's motion to compel evidence related to other facilities that Respondent claimed were similar to its Carbon Plant and that is asserted MSHA and the Solicitor's Office had determined were not mines subject to regulation under the Mine Act.

Respondent filed an interlocutory appeal with the Commission urging the Commission to reverse the jurisdictional and evidentiary determinations, and the Commission granted interlocutory review. On August 28, 2012, the Commission affirmed the jurisdictional and evidentiary rulings and remanded the case for a hearing in accordance with its decision.

On remand, the parties agree that the remaining issues related to each citation can be addressed through stipulations. The stipulations allow for a final agency order to be issued so that Respondent can seek judicial review of the Commission's interlocutory decision in the Court of Appeals.

I have reviewed the stipulations and explanations of the parties and agree that the modifications and proposed penalties contained in the stipulations are an appropriate basis for issuing a final decision in these cases. Pending judicial review of the Commission's determination that MSHA has jurisdiction over Respondent's Carbon Plant, the gravity, negligence and penalty amounts of the following citations are stipulated to by the parties as follows:

PENN 2009-775

Citation No.	Gravity	Negligence	Proposed Penalty	Penalty/Rationale
7011370 104(a) § 71.208(a)	Non-S&S, Unlikely, No Lost Workdays	Moderate	$100.00	Remains as issued and assessed.
1 Citation, $100.00 as initially issued				**1 Citation, $100.00**

PENN 2009-825

Citation No.	Gravity	Negligence	Proposed Penalty	Penalty/Rationale
7011691 104(a) § 77.204	S&S, Reasonably Likely, Permanently Disabling	Moderate	$946.00	Remains as issued, penalty reduced to $760.00 *Respondent offered evidence that the location of the cited starter box was such that the miners were infrequently in the area where the box was located, thus reducing the likelihood of injury.

7011692 104(a) § 77.1103(d)	Non-S&S, Unlikely, Lost Workdays or Restricted Duty	Moderate	$127.00	Modify to low negligence, penalty reduced to $100.00 *Respondent offered evidence that the weeks, grass and underbrush surrounding the gasoline storage tank and nature gas service line were not significantly overgrown, thus reducing its negligence in failing to keep the cited area free of weeds, grass and underbrush.
7011693 104(a) § 77.1605(b)	Non-S&S, Unlikely, Lost Workdays	Moderate	$127.00	Remains as issued and assessed.
3 Citations, $1,200.00 as initially issued.				**3 Citations, $987.00, as modified.**

PENN 2010-63

Citation No.	Gravity	Negligence	Proposed Penalty	Penalty/Rationale
7001013 104(a) § 77.505	Non-S&S, Unlikely, No Lost Workdays	Moderate	$100.00	Remains as issued and assessed.
7001014 104(a) § 77.502	Non-S&S, Unlikely, Lost Workdays or Restricted Duty	Moderate	$585.00	Remains as issued and assessed

7001015 104(a) § 77.516	Non-S&S, Unlikely, No Lost Workdays	Moderate	$334.00	Modify to low negligence, penalty reduced to $154.00 *Respondent offered evidence that the conduit which was cited for not being in the breaker box had fallen out after the last electrical examination, thus reducing its negligence.
7001016 104(a) § 77.502	Non-S&S, Unlikely, No Lost Workdays	Moderate	$392.00	Remains as issued and assessed.
7001017 104(a) § 77.701	Non-S&S, Unlikely, Lost Workdays or Restricted Duty	Low	$100.00	Remains as issued and assessed.
7001018 104(a) § 77.502	Non-S&S, Unlikely, Lost Workdays or Restricted Duty	Moderate	$585.00	Modify to low negligence, penalty reduced to $270.00 *Respondent offered evidence that the exposed leads in the cited plug were not exposed at the time of the last electrical examination, thus reducing its negligence.
7001019 104(a) § 77.505	Non-S&S, Unlikely, Lost Workdays or Restricted Duty	Moderate	$127.00	Remains as issued and assessed.
7001020 104(a) § 77.502	Non-S&S, Unlikely, Lost Workdays or Restricted Duty	Moderate	$585.00	Modify to low negligence, penalty reduced to $270.00 *Respondent offered evidence that the cited cord was not damaged at the time of the last electrical examination, thus reducing its negligence.

7011981 104(a) § 77.516	Non-S&S, Unlikely, No Lost Workdays	Moderate	$334.00	Remains as issued, penalty reduced to $234.00 *This reduction is warranted on the grounds that the negligence was somewhat less than initially determined as the cited opening was only 3/4" in size.
7010952 104(a) § 77.208(a)	Non-S&S, Unlikely, No Lost Workdays	Moderate	$308.00	Remains as issued, penalty reduced to $262.00 *This reduction is warranted on the grounds that the dust sample was invalid for failure to properly complete the sampling process not for exceeding the respirable dust exposure limits.
7011695 104(a) § 77.205(a)	S&S, Reasonably Likely, Lost Workdays or Restricted Duty	Moderate	$634.00	Remains as issued and assessed.
7011696 104(a) § 77.207	S&S, Reasonably Likely, Lost Workdays or Restricted Duty	Moderate	$2,106.00	Remains as issued, penalty reduced to $1,791.00 *This reduction is warranted on the grounds that the negligence was somewhat less than initially determined as the poor lighting in the area was a recent development.
7011697 104(a) § 77.400(d)	S&S, Reasonably Likely, Permanently Disabling	Moderate	$946.00	Remains as issued, penalty reduced to $757.00 *This reduction is warranted on the grounds that the negligence was somewhat less than initially determined as there was no evidence that management personnel were in the area of the dryer at the time the gate was found open.

7011699 104(a) § 77.400(a)	S&S, Reasonably Likely, Lost Workdays or Restricted Duty	Moderate	$2,106.00	Remains as issued, penalty reduced to $1,700.00 *This reduction is warranted on the grounds that the negligence was somewhat less than initially determined as the unguarded screw conveyor had only been constructed one week prior to the inspection.
7011700 104(a) § 77.207	S&S, Reasonably Likely, Lost Workdays or Restricted Duty	Moderate	$2,106.00	Modify to low negligence, penalty reduced to $971.00 *Respondent offered evidence that the cited light bulb worked during the previous shift, thus reducing its negligence
7011781 104(a) § 77.207	Non-S&S, Unlikely, Lost Workdays or Restricted Duty	Moderate	$425.00	Remains as issued and assessed.
7011782 104(a) § 77.207	Non-S&S, Unlikely, Lost Workdays or Restricted Duty	Moderate	$425.00	Remains as issued and assessed
7011783 104(a) § 77.207	Non-S&S, Unlikely, Lost Workdays or Restricted Duty	Moderate	$425.00	Modify to low negligence, penalty reduced to $212.00 *Respondent offered evidence that the cited light worked during the previous shift, thus reducing its negligence.
7011784 104(a) § 77.1713	Non-S&S, No Likelihood, No Lost Workdays	Moderate	$100.00	Remains as issued and assessed.

19 Citations, $12,723.00, as initially issued.				**19 Citations, $9,509.00, as modified.**

PENN 2010-191

Citation/ Order No.	Gravity	Negligence	Proposed Penalty	Penalty/Rationale
7009791 104(a) § 41.12	Non-S&S, No Likelihood, No Lost Workdays	High	$100.00	Modify to moderate negligence, penalty remains as issued *Respondent offered evidence that since the day to day management of the Carbon Plant has not changed, it did not realize there was an obligation to notify MSHA in writing of the change in mine ownership.
7012003 104(a) § 77.207	S&S, Reasonably Likely, Lost Workdays or Restricted Duty	Moderate	$224.00	Remains as issued and assessed.
7009792 104(g)(1) Order § 48.25(a)	S&S, Reasonably Likely, Fatal	High	$2,341.00	Modify to permanently disabling, penalty reduced to $1,052.00 *Respondent offered evidence that the lack of new miner training was more likely to result in a permanently disabling injury than a fatal accident, thus reducing the injury or illness reasonably expected.

7009793 104(g)(1) Order § 48.25(a)	S&S, Reasonably Likely, Fatal	High	$4,099	Modify to permanently disabling, penalty reduced to $1,842.00 *Respondent offered evidence that the lack of complete adequate training was more likely to result in a permanently disabling injury than a fatal accident, thus reducing the injury or illness reasonably expected.
7009794 104(a) § 48.24(b)	S&S, Reasonably Likely, Lost Workdays or Restricted Duty	High	$1,111.00	Remains as issued and assessed.
3 Citations and 2 Orders, $7,875.00, as initially issued.				**3 Citations and 2 Orders, $4,329.00, as modified.**

PENN 2010-275

Citation No.	Gravity	Negligence	Proposed Penalty	Penalty/Rationale
7009795 104(a) § 50.20(a)	Non-S&S, No Likelihood, No Lost Workdays	High	$100.00	Remains as issued and assessed.
7009796 104(a) § 50.20(a)	Non-S&S, No Likelihood, No Lost Workdays	High	$100.00	Remains as issued and assessed.

2 Citations, $200.00, as initially issued.				**2 Citations, $200.00.**

PENN 2010-291

Citation/ Order No.	Gravity	Negligence	Proposed Penalty	Penalty/Rationale
7011792 104(d)(1) Citation § 71.202(a)	S&S, Reasonably Likely, Permanently Disabling	Reckless Disregard	$16,867.00	Remains as issued, penalty reduced to $11,807 *This reduction is warranted on the grounds that the likelihood of injury was somewhat less than initially determined as all tests for respirable dust during this time period were within permissible limits.
7011795 104(d)(1) Order § 71.205(b)	S&S, Reasonably Likely, Permanently Disabling	Reckless Disregard	$18,742.00	Remains as issued, penalty reduced to $9,731.00 *This reduction is warranted on the grounds that the likelihood of injury was somewhat less than initially determined as all tests for respirable dust during this time period were within permissible limits.
7011796 104(d)(1) Order § 71.205(c)	S&S, Reasonably Likely, Permanently Disabling	Reckless Disregard	$18,742.00	Remains as issued, penalty reduced to $9,371.00 *This reduction is warranted on the grounds that the likelihood of injury was somewhat less than initially determined as all tests for respirable dust during this time period were within permissible limits.

7011797 104(d)(1) Order § 71.204(d)	S&S, Reasonably Likely, Permanently Disabling	Reckless Disregard	$18,742.00	Remains as issued, penalty reduced to $12,930.00 *This reduction is warranted on the grounds that the likelihood of injury was somewhat less than initially determined as all tests for respirable dust during this time period were within permissible limits.
1 Citation and 3 Orders, $73,093.00, as initially issued.				**1 Citation and 3 Orders, $43,479.00, as modified.**

PENN 2010-381

Order No.	Gravity	Negligence	Proposed Penalty	Penalty/Rationale
7011793 104(d)(1) Order § 71.209(c)	Non-S&S, No Likelihood, No Lost Workdays	Reckless Disregard	$2,200.00	Remains as issued and assessed.
7011794 104(d)(1) Order § 71.209(a)	Non-S&S, No Likelihood, No Lost Workdays	Reckless Disregard	$2,200.00	Remains as issued and assessed.
2 Orders, $4,400.00, as initially issued.				**2 Orders, $4,400.00.**

PENN 2010-465

Citation No.	Gravity	Negligence	Proposed Penalty	Penalty/Rationale
7000081 104(a) § 71.100	S&S, Reasonably Likely, Permanently Disabling	Moderate	$207.00	Remains as issued and assessed
7012104 104(a) § 77.400(a)	S&S, Reasonably Likely, Permanently Disabling	Moderate	$190.00	Remains as issued and assessed.
7012105 104(a) § 77.502	Non-S&S, Unlikely, Fatal	Moderate	$190.00	Modify to low negligence, penalty reduced to $100.00 *Respondent will offer evidence that the damaged junction box was in an isolated area reducing the likelihood that the damage would be observed and, therefore, reducing its negligence.
3 Citations, $597.00, as initially issued.				**3 Citations, $497.00, as modified.**

PENN 2010-515

Citation No.	Gravity	Negligence	Proposed Penalty	Penalty/Rationale
7012106 104(a) § 77.310(b)	Non-S&S, Unlikely, No Lost Workdays	Moderate	$100.00	Remains as issued and assessed.

7012107 104(a) § 77.310(d)	Non-S&S, Unlikely, Lost Workdays or Restricted Duty	Moderate	$100.00	Remains as issued and assessed.
2 Citations, $200.00, as initially issued.				**2 Citations, $200.00.**

PENN 2010-745

Citation No.	Gravity	Negligence	Proposed Penalty	Penalty/Rationale
7012685 104(a) § 77.501-2	Non-S&S, Unlikely, No Lost Workdays	Moderate	$100.00	Remains as issued and assessed.
7012687 104(a) § 77.502	S&S, Reasonably Likely, Fatal	Moderate	$285.00	Remains as issued and assessed.
7012669 104(a) § 77.207	Non-S&S, Unlikely, Lost Workdays or Restricted Duty	Moderate	$100.00	Remains as issued and assessed.
7012670 104(a) § 77.516	Non-S&S, Unlikely, No Lost Workdays	Low	$100.00	Remains as issued and assessed.

7012671 104(a) § 77.516	Non-S&S, Unlikely, Lost Workdays or Restricted Duty	Moderate	$100.00	Remains as issued and assessed.
7012120 104(a) § 77.410(c)	S&S, Reasonably Likely, Permanently Disabling	Moderate	$127.00	Modify to low negligence, penalty reduced to $100.00. *Respondent offered evidence that the forklift had just begun operating on the day it was cited, and the backup alarm worked when it was last operated, thus reducing its negligence.
7012441 104(a) § 77.1606(a)	S&S, Reasonably Likely, Permanently Disabling	Moderate	$127.00	Remains as issued and assessed.
7012442 104(a) § 77.505	Non-S&S, Unlikely, Fatal	Moderate	$100.00	Remains as issued and assessed.
7012443 104(a) § 77.502	Non-S&S, Unlikely, Fatal	Moderate	$100.00	Remains as issued and assessed.
7012672 104(a) § 77.502	S&S, Reasonably Likely, Fatal	Moderate	$285.00	Remains as issued and assessed.
7012673 104(a) § 77.207	Non-S&S, Unlikely, Lost Workdays or Restricted Duty	Moderate	$100.00	Remains as issued and assessed.

7012674 104(a) § 77.502	Non-S&S, Unlikely, Lost Workdays or Restricted Duty	Moderate	$100.00	Remains as issued and assessed.
12 Citations, $1,624.00, as initially issued.				**12 Citations, $1,597.00, as modified.**

PENN 2011-16

Citation No.	Gravity	Negligence	Proposed Penalty	Penalty/Rationale
7012445 104(a) § 77.400(a)	Non-S&S, Unlikely, Permanently Disabling	Moderate	$100.00	Remains as issued and assessed.
7012444 104(a) § 77.312	Non-S&S, Unlikely, Permanently Disabling	Moderate	$100.00	Remains as issued and assessed.
2 Citations, $200.00, as initially issued.				**2 Citations, $200.00.**

PENN 2011-104

Citation No.	Gravity	Negligence	Proposed Penalty	Penalty/Rationale
7007198 104(a) § 77.1605(d)	S&S, Reasonably Likely, Lost Workdays or Restricted Duty	Moderate	$100.00	Remains as issued and assessed.
1 Citation, $100.00, as initially issued.				**1 Citation, $100.00.**

PENN 2011-189

Citation No.	Gravity	Negligence	Proposed Penalty	Penalty/Rationale
7007528 104(a) § 77.100	S&S, Reasonably Likely, Permanently Disabling	Moderate	$138.00	Remains as issued and assessed.
1 Citation, $138.00, as initially issued.				**1 Citation, $138.00**

PENN 2011-129, *Secretary v. William Rosini, employed by Shamokin Filler Company*

Citation/ Order No.	Gravity	Negligence	Proposed Penalty	Penalty/Rationale
7011792 104(d)(1) Citation § 71.202(a)	S&S, Reasonably Likely, Permanently Disabling	Reckless Disregard	$3,100.00	Remains as issued, penalty reduced to $1,456.00 *This reduction is warranted on the grounds that the likelihood of injury was somewhat less than initially determined as all tests for respirable dust during this time were within permissible limits and taking into account the lack of prior 110(c) penalties assessed against William Rosini.
7011795 104(d)(1) Order § 71.205(b)	S&S, Reasonably Likely, Permanently Disabling	Reckless Disregard	$3,500.00	Remains as issued, penalty reduced to $1,036.00 *This reduction is warranted on the grounds that the likelihood of injury was somewhat less than initially determined as all tests for respirable dust during this time were within permissible limits and taking into account the lack of prior 110(c) penalties assessed against William Rosini.
7011796 104(d)(1) Order § 71.205(c)	S&S, Reasonably Likely, Permanently Disabling	Reckless Disregard	$3,300.00	Remains as issued, penalty reduced to $1,000.00 *This reduction is warranted on the grounds that the likelihood of injury was somewhat less than initially determined as all tests for respirable dust during this time were within permissible limits and taking into account the lack of prior 110(c) penalties assessed against William Rosini.

7011797 104(d)(1) Order § 71.204(d)	S&S, Reasonably Likely, Permanently Disabling	Reckless Disregard	$3,500.00	Remains as issued, penalty reduced to $1,672.00 *This reduction is warranted on the grounds that the likelihood of injury was somewhat less than initially determined as all tests for respirable dust during this time were within permissible limits and taking into account the lack of prior 110(c) penalties assessed against William Rosini.
4 penalties pursuant to § 110(c), $13,400.00, as initially issued.				**4 penalties pursuant to § 110(c), $5,164.00, as modified.**

I accept the Secretary's proposed modifications to the citations, orders and proposed penalties and issue this decision based upon the parties' stipulations. I have considered the representations and documentation submitted and find that the modifications are reasonable and that the penalties proposed are appropriate under the criteria set forth in section 110(i) of the Mine Act. My decision reflects and incorporates the Commission's August 29, 2012, interlocutory decision holding that MSHA has jurisdiction over Respondent's Carbon Plant.

The parties have agreed that the penalties shall be stayed pending exhaustion of all appeals and final resolution of the jurisdictional issue. The parties have also agreed to bear their own attorney's fees, costs and other expenses incurred within any stage of the above-referenced proceeding, including, but not limited to, attorney's fees and costs which may be available under the Equal Access to Justice Act, as amended.

ORDER

The total amount assessed for the citations at issue in these dockets is $70,900.00. I affirm each citation as set forth above. Shamokin Filler Company, Inc., is hereby **ORDERED** to **PAY** the Secretary of Labor the sum of $70,900.00 for the sixty-one violations listed above.[1] In accordance with the parties' agreement, this Order shall be **STAYED** pending exhaustion of all appeals and final resolution of the jurisdictional issue.

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

Distribution:

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Adele L. Abrams, Esq., Law Office of Adele L. Abrams, P.C., 4740 Corridor Place, Suite D, Beltsville, MD 20705

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1331 Pennsylvania Ave., Suite 520N
Washington, DC 20004-1710
Telephone No.: 202-434-9900
Telecopier No.: 202-434-9954

October 22, 2012

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. CENT 2010-1003-M A.C. No. 23-02341-222957
v.	:	
EAGLE WINGS CONSTRUCTION, LLC, Respondent	:	MINE: Doniphan Ready Mix

DECISION

Appearances: Susan J. Willer, Esq., Office of the Solicitor, U.S. Department of Labor, Kansas City, Missouri, on behalf of the Secretary of Labor;
Elton G. Bates, Doniphan, Missouri, for Eagle Wings Construction, LLC.

Before: Judge Zielinski

This case is before me on a Petition for Assessment of Penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). The petition alleges that Eagle Wings Construction, LLC, is liable for two violations of the Secretary's Safety and Health Standards for Surface Metal and Nonmetal Mines,[1] and proposes the imposition of civil penalties in the total amount of $4,000.00. A hearing was held in St. Louis, Missouri, and the parties filed post-hearing briefs following receipt of the transcript. For the reasons that follow, I find that Eagle Wings committed the violations, and impose civil penalties in the total amount of $4,000.00.

Findings of Fact - Conclusions of Law

Eagle Wings Construction, LLC, has owned and operated a surface sand and gravel mine known as Doniphan Ready Mix since September 14, 2006. Elton Bates is the self-employed managing member and owner of Eagle Wings. At all pertinent times, the mine was located in Ripley County, Missouri, adjacent to a ready mix plant also owned and operated by Eagle Wings. The ready mix plant is not a mine and is not under MSHA's jurisdiction. Immediately prior to the April 2010 inspection that prompted this proceeding, the sand and gravel operation had been moved from a previous location. The move occurred from November 2009 to March 2010. At the new location, the screens, conveyors and other associated machinery were mounted on steel structural members attached to concrete piers. Respondent introduced photographs of

[1] 30 C.F.R. Part 56.

the plant. Ex. R-16. The piers were approximately 36 inches in diameter and rose from a concrete pad. On March 17, 2010, as the installation was nearing completion, Bates called the local MSHA district field office in an attempt to schedule a compliance assistant visit ("CAV"). Tr. 175; Ex-R-5. When able to do so, MSHA will visit a facility about to go into production and conduct a CAV. Rather than issue citations for which civil penalties would be assessed, the operator would be notified of potential violations and afforded an opportunity to correct hazardous conditions before beginning production. Robert Seelke, MSHA's supervisory inspector at the Rolla-South field office, acknowledged receipt of Bates' request, but explained that the press of other events precluded returning his call or conducting a CAV.[2]

The mine began to operate in late March 2010. Three persons typically worked at the mine. Jason Moreland conducted a workplace examination at the beginning of the day, greased bearings, and started the plant. Thereafter, he operated a loader and fed material into the plant. Two other miners were involved in removing raw material from a pit located some distance from the plant. One ran an excavator, and the other operated a dump truck, transporting material from the pit to a location about 50 yards from the plant. Jeff Friday operated the ready-mix facility. However, on days when Moreland was not present, he performed the functions that Moreland typically performed.

On April 22, 2010, Allen Govero, an MSHA inspector, inspected the sand and gravel facility. He determined that certain conditions violated mandatory standards and cited the violations. Eagle Wings timely contested the civil penalties assessed for the two violations at issue here.

Citation No. 6565367

Citation No. 6565367 was issued at 10:51 a.m., on April 22, 2010, pursuant to section 104(d)(1) of the Act.[3] It alleges a violation of 30 C.F.R. § 56.14107(a), which requires that

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[2] The field office had experienced three underground fires involving equipment, one in which three men were trapped. An extensive effort to inspect all underground equipment was launched, an effort that precluded the conduct of regular inspections for approximately one month. Tr. 122, 126-27. Respondent protests that its inability to obtain a CAV resulted in the violations being issued. While the hazards would most likely have been identified and corrected if MSHA had been able to conduct a CAV, its inability to provide such an inspection is no defense to the violations.

[3] Section 104(d)(1) of the Act provides:

> (d)(1) If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he

(continued...)

"Moving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and takeup pulleys, flywheels, couplings, shafts, fan blades, and similar moving parts that can cause injury." The violation was described in the "Condition and Practice" section of the citation as follows:

> The tail pulley section of the Concrete Rock Stacker conveyor was not provided with guarding of any kind. The tail pulley is about 69 inches above a concrete slab that supports the conveyor and the shaker screens. About 29 inches from this tail pulley is also a separate conveyor tail pulley on the Pea Gravel Belt line also un-guarded. One miner accesses a stair case about 20 to 25 yards away to start or stop the plant components from an elevated motor control room. The Mine Foreman (Jason Moreland) stated when questioned that he was aware that the tailpulleys had not yet been guarded and was aware of the standard's requirement. When ask[ed] if the Owner (Elton Bates) was also aware of this condition Jason said yes. The plant has been in production since about March 29, 2010. Normally two other miners work on this mine site. This creates a hazard. Foreman Moreland engaged in aggravated conduct constituting more than ordinary negligence in

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[3](...continued)

> also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

30 U.S.C. § 814(d)(1).

> that he was aware the tail pulley was not guarded. This violation is an unwarrantable failure to comply with a mandatory standard.

Ex. G-1.

Govero determined that it was reasonably likely that the violation would result in a permanently disabling injury, that the violation was significant and substantial ("S&S"), that three persons were affected, that the operator's negligence was high, and that the violation was the result of the operator's unwarrantable failure to comply with the mandatory standard. A civil penalty in the amount of $2,000.00 was assessed for this violation.

Order No. 6565368

Order No. 6565368 was issued at 10:56 a.m., on April 22, 2010, pursuant to section 104(d)(1) of the Act. It also alleged a S&S and unwarrantable failure violation of 30 C.F.R. § 56.14107(a), and in all pertinent respects repeats that same allegations as in Citation No. 6565367, except that the condition cited was the missing guard on the Pea Gravel Belt. Ex. G-4.

Guvero made the same special findings as in the citation, except that he determined that the violation was alleged to have been the result of the operator's reckless disregard of the standard's requirements. A civil penalty, in the amount of $2,000.00 was assessed for this violation.

The Violations

The finned tail pulleys on the two conveyors were not guarded. Moreland admitted to Govero that he knew the pulleys had to be guarded, and explained that he had simply not gotten around to installing guards. Tr. 23-25. The pulleys run at relatively high speeds, and the pinch points created by the belts' engagement with the fins of the pulleys, were approximately 60 inches above the concrete pad forming the foundation of the plant. Govero measured the distance from the pad to the shaft of the pulleys at 69 inches. Tr. 92. The pinch points were approximately 9 inches lower, where the bottom-returning belt began to contact the spinning pulley. The pulleys were moving machine parts and are specifically itemized in the standard. Miners could walk in the area, which was not barricaded or isolated in any way. Entanglement with one of the pulleys would result in a severe, possibly fatal, injury. The standard specifies that guards are not required where the exposed moving machine parts are at least 7 feet away from walking or working surfaces. These pulleys were well within the 7-foot distance. The conditions cited in the citation and order clearly violated the standard.[4]

[4] As addressed more fully in the S&S discussion, Eagle Wings contends that the equipment was being adjusted frequently. Section 56.14112(b) provides that guards must be securely in place while machinery is being operated, "except when testing or making adjustments which cannot be performed without removal of the guard." Eagle Wings does not (continued...)

Eagle Wings questioned whether the two conditions should have been considered to be one violation because they were only 29 inches apart. MSHA's Program Policy Manual ("PPM") provides that multiple violations of the same standard on the same piece of equipment or in the same area of a mine should be treated as one violation. PPM, Vol. I, section 104 (1996) Ex. R-3. Govero explained that, since the two conveyors were separate pieces of equipment, two violations were appropriately cited. Tr. 86, 194; Ex. R-3. The nature of the violations was not related to an area of the mine, and, consistent with the example in the PPM, it appears that the separate citing of the conditions was proper under MSHA's procedures. The violations are not duplicative, and Respondent points to no other legal impediment to their having been cited separately.

Significant and Substantial

The Commission recently reviewed and reaffirmed the familiar *Mathies*[5] framework for determining whether a violation is S&S. As explained in *Cumberland Coal Res.*, 33 FMSHRC 2357, 2363-65 (Oct. 2011):

> The S&S terminology is taken from section 104(d) of the Mine Act, 30 U.S.C. § 814(d), and refers to more serious violations. A violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *See Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In *Mathies*, 6 FMSHRC 1, the Commission further explained:
>
> > In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

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[4](...continued)
argue that whatever tests or adjustments were being done could not have been performed with guards in place. In fact, adjustments were made while the machinery was shut down. Tr. 164.

[5] *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984) .

> *Id*. at 3-4 (footnote omitted); *accord Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria). An evaluation of the reasonable likelihood of injury should be made assuming continued normal mining operations. *See U.S. Steel Mining Co.*, 6 FMSHRC 1824, 1836 (Aug. 1984).
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> The Commission recently discussed the third element of the *Mathies* test in *Musser Engineering, Inc. and PBS Coals, Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010) ("*PBS*") (affirming an S&S violation for using an inaccurate mine map). The Commission held that the "test under the third element is whether there is a reasonable likelihood that the hazard contributed to by the violation, i.e., [in that case] the danger of breakthrough and resulting inundation, will cause injury." *Id*. at 1281. Importantly, we clarified that the "Secretary need not prove a reasonable likelihood that the violation itself will cause injury." *Id*. The Commission also emphasized the well-established precedent 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)).

The fact of the violations have been established. The unguarded tail pulleys contributed to discrete safety hazards, entanglement of a miner or a miner's clothing in the spinning pulleys.[6] Any injury resulting from such entanglement would be serious. Whether the violations were S&S turns, as it often does, on whether the hazards were reasonably likely to result in an injury causing event.

In general, the likelihood of a safety hazard resulting in a reasonably serious injury is largely dependent upon the nature of the hazard and the degree of miners' exposure to it. A highly dangerous condition could present a high probability of a fatal or permanently disabling injury if even one miner encountered it. A more benign condition might be safely encountered

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[6] In *Cumberland*, the Commission emphasized that the "clear identification" of a discrete safety hazard contributed to by a violation is a critical step in the S&S analysis, because it is the hazard contributed to, rather than the violation, that must be found reasonably likely to result in a reasonably serious injury. 33 FMSHRC at 2368.

by a miner taking appropriate precautions, or it might produce a relatively minor injury to one less cautious. Here, the unguarded tail pulleys presented highly dangerous conditions that would almost certainly have inflicted very serious, or even fatal, injuries on any miner that encountered them.

The conditions had existed for approximately one month at the time of the inspection, by which time the plant was being operated on a more-or-less continuous basis. Moreland told Govero, on April 22, that they had been operating about one month. Tr. 21. Govero, who had 20 years of mining experience, including work on conveyors, and 12 years of experience as an inspector, observed stockpiles of material that were sizable, indicating that the mine had been producing material and had not been operated only to test and adjust components. Tr. 51, 80, 97. Bates stated that the plant produced material as mechanical breakdowns permitted. Tr. 134. Govero did not make any assumptions about when the hazards would have been eliminated under continued normal mining operations. Tr. 204-05. His S&S analysis was based on an understanding that they would have existed indefinitely. Tr. 198-99. From the evidence of record, there were no plans to fabricate and install guards on the tail pulleys. As Bates' health permitted, he would most likely have visited the plant reasonably soon after the inspection was conducted, and would have assured that the pulleys were guarded. Tr. 182.

During normal mining operations, it is unlikely that a miner would have traveled in close proximity to the tail pulleys. Govero determined that three persons were affected by the violations.[7] However, while three persons worked at the plant, only one of them would have potentially been in the vicinity of the pulleys. The excavator operator worked in the pit, some distance removed from the plant, and the truck driver moved material from the pit to a stockpile about 50 yards from the plant. Tr. 151. Neither of those persons was realistically exposed to the hazards. The plant operator, Moreland, greased pulleys and checked the area before starting the plant from the control room, which he accessed by climbing stairs some 20 yards away from the pulleys. He then would spend the vast majority of his time operating a loader, feeding the plant from the stockpile. The surface of the concrete pad was accessible to persons who might want to walk in the area of the pulleys. However, it would have been unlikely that anyone would have had occasion to travel in the area. Moreover, when in operation, water and small pieces of material showered down, and it is unlikely that anyone would have chosen to walk in the area while the plant was running unless compelled to do so.[8]

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[7] The number of persons affected by a violation represents the number of persons that would suffer an injury if an injury causing event were to occur. 30 C.F.R. § 100.3(e). It is highly unlikely that more than one person would suffer an injury by encountering the tail pulleys. Consequently, the number of persons affected by each violation should have been one.

[8] The Secretary argues that there is no basis for Respondent's claim that miners would avoid the area because of falling water and pebbles. Sec'y. Rp. Br. at 3. However, there is ample evidence of record that, while in operation, water and pebbles showered down on the area.
(continued...)

However, the area was most likely traveled much more frequently during the subject time period. As Friday explained, there were ongoing efforts to adjust conveyors, hoppers, and other components of the newly set up plant. Tr. 147, 164-66. In order to determine whether components are properly aligned, material must be run through the system. Persons must get relatively close to the machinery in order to assess whether it is working properly, or, if not, what adjustments might be needed. Tr. 200-02, 211-13. Actual adjustments were performed after the machinery had been shut down. However, the process of making adjustments apparently continued through the time of the inspection. Consequently, miners, most likely Moreland and Friday, would have been exposed to the hazards with some frequency. While they would not have knowingly encountered them, they may have inadvertantly contacted one of the pulleys and suffered an injury.[9]

Considering the length of time that the hazards existed, and would have continued to exist under continued normal mining operations, the fact that they posed a high degree of danger to miners, and the fact that miners were most likely in the area with some frequency while the pulleys were in operation, I find that the violations were S&S.[10]

Unwarrantable Failure - Negligence

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

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[8](...continued)

Tr. 154-60, 178. Govero, himself, confirmed that water and material would fall on the area when the plant was in operation. Tr. 199-200.

[9] In evaluating the risk of injury, the vagaries of human conduct cannot be ignored. *See, e.g., Thompson Bros. Coal Co.*, 6 FMSHRC 2094, 2097 (Sept. 1984).

[10] The Commission has held that the opinion of an experienced MSHA inspector that a violation is S&S is entitled to substantial weight. *See, e.g., Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-79 (Dec. 1998). Govero is an experienced inspector. However, his S&S analysis may have placed undue weight on the severity of potential injury. Tr. 40, 43, 198-99.

"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).

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, such as the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator's efforts in abating the violative condition, whether the violation is obvious or poses a high degree of danger, and the operator's knowledge of the existence of the violation. *See Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000) . . . ; *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev'd on other grounds*, 195 F.3d 42 (D.C. Cir. 1999); *Midwest Material Co.*, 19 FMSHRC 30, 34 (Jan. 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *BethEnergy Mines, Inc*., 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988). All of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether mitigating circumstances exist. *Consol*, 22 FMSHRC at 353. 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. *REB Enters., Inc.*, 20 FMSHRC 203, 225 (Mar. 1998).

The Secretary argues that the violations were the result of Eagle Wings' unwarrantable failure because Moreland was an agent of Eagle Wings, and, as the miner in charge of the plant, was well aware of the violative conditions and took no steps to remedy the hazards.

Operator's knowledge

Bates was dealing with serious health issues during the time that the plant was being put back into operation. Tr. 132-33; Ex. R- 4. He had not been at the facility for several weeks before the inspection, and was not present during the inspection. Moreland, who was operating the plant, certainly knew of the violative conditions, and had not taken any steps to address them. Whether Moreland's knowledge and inaction are imputable to Eagle Wings depends upon whether or not he was its agent.

As stated in *Nelson Quarries, Inc.*, 31 FMSHRC 318, 328-29 (March 2009):

> Section 3(e) of the Mine Act defines an "agent" as "any person charged with responsibility for the operation of all or part of a . . . mine or the supervision of the miners in a . . . mine. 30 U.S.C. § 802(e). The Commission has recognized that the negligence of an operator's "agent" is imputable to the operator for penalty assessment and unwarrantable failure purposes. *Whayne Supply Co.*, 19 FMSHRC 447, 451 (Mar. 1997); *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194-97 (Feb. 1991) ("*R&P*"); *Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1463-64 (Aug. 1982) ("*SOCCO*"). In contrast, the negligence of a rank-and-file miner is not imputable to the operator for the purposes of penalty assessment or unwarrantable failure determinations. *Whayne*, 19 FMSHRC at 451, 453; *Fort Scott Fertilizer-Cullor, Inc.*, 17 FMSHRC 1112, 1116 (July 1995); *SOCCO*, 4 FMSHRC at 1463-64.
>
> In considering whether an employee is an operator's agent, the Commission has "relied not upon the job title or the qualifications of the miner, but upon his function, [and whether it] was crucial to the mine's operation and involved a level of responsibility normally delegated to management personnel." *Ambrosia Coal & Constr. Co.*, 18 FMSHRC 1552, 1560 (Sept. 1996) (quoting *U.S. Coal Inc.*, 17 FMSHRC 1684, 1688 (Oct. 1995)) (alteration in original). We consider factors such as the ability of the employee to direct the workforce, whether the employee holds himself out as a person with supervisory responsibilities and is so regarded by other miners, and whether the actions of the employee in directing the workforce have an impact on health and safety at the mine. *Ambrosia*, 18 FMSHRC at 1553-54, 1560-61; *Sec'y of Labor on behalf of Hyles v. All American Asphalt*, 21 FMSHRC 119, 130 (Feb. 1999) (holding that leadmen who acted in a supervisory capacity and were in a position to affect safety were agents of the operator to whom employees would logically voice their complaints). We are mindful that the term, "agent," must be interpreted in light of the overall purpose of the Mine Act to protect the health and safety of miners. *See RNS Servs., Inc., v Sec'y of Labor*, 115 F.3d 182, 187 (3rd Cir. 1997) (Construing Mine Act provision broadly to effectuate statutory purpose of protecting miner safety); *Rock of Ages Corp. v. Sec'y of Labor*, 170 F.3d 148, 155 (2d Cir. 1999) (same).

Bates confirmed that Moreland was "in charge" of and "ran the mine." Tr 133-34. He was "actually the operator of the mine," and on a typical day, started it, operated the loader to feed the plant, stopped the plant for lunch, re-started it and shut it down at the end of the day. Tr. 133-34. He would have conducted daily workplace exams, and greased the equipment, before starting the plant at the beginning of the day. Tr. 140. During the month that the mine operated prior to the inspection, it was producing product, "as mechanical failures would permit." Tr. 134. Although the duties of the three miners that worked at the plant were somewhat fixed, Moreland apparently was responsible for directing the work force and use of equipment as necessary. He accompanied Govero, represented the mine during the safety inspection, and was responsible for abatement of the violations.

In carrying out required examination duties for an operator, an examiner may be appropriately viewed as being charged with responsibility for the operation of part of a mine. *R&P*, 13 FMSHRC at 194; *see also Pocahontas Fuel Co. v. Andrus*, 590 F.2d 95 (4th Cir. 1979) (holding that preshift examiner's knowledge was imputable to the operator for unwarrantable failure purposes under principles of respondeat superior); *Ambrosia*, 18 FMSHRC at 1561 (finding relevant that employee made required daily examinations and entered findings in an examination book).

I find that Moreland was an agent of Eagle Wings, and that his negligence, which I find to have been high with respect to each violation, is imputable to Respondent.

Obviousness -Danger to miners

The violations were obvious. They also posed a high degree of danger to miners.

Length of time violations existed

The conditions had existed for approximately one month, while the plant was in operation. While it was not operated continuously every work day, I find that the plant was operated on a more-or-less continuous basis for one month prior to the inspection. The conditions would have continued to exist for some period of time under continued normal mining operations. From the evidence of record, there were no plans to fabricate and install guards on the tail pulleys. As Bates' health permitted, he would most likely have visited the plant reasonably soon after the inspection was conducted, and would have assured that the pulleys were guarded.

Extensiveness - Notice of need for additional compliance efforts - Abatement efforts

The violations were not extensive and there is no indication that Eagle Wings was on notice of a need for greater efforts to comply with the standard. The parties stipulated that Respondent demonstrated good faith in promptly abating the violations.

Conclusion

The most significant factors weighing in favor of a finding of unwarrantable failure are that Respondent's agent knew of the violative conditions, but had taken no affirmative steps to correct them. The conditions were obvious and posed a high degree of danger to miners. They had been allowed to exist for one month, and would have continued to exist for some time had the inspection not occurred. On the facts of this case, extensiveness is essentially a neutral factor. Weighing slightly against a finding of unwarrantable failure is the fact that Respondent had not been put on notice of a need for greater compliance efforts, and that it had demonstrated good faith in abating the violations.

Based upon the foregoing, and considering all the pertinent factors, I find that the violations were the result of Eagle Wings' unwarrantable failures to comply with the standard, and that its negligence was high. This finding is based upon Moreland's actions in failing to guard the pulleys. There is no credible evidence that Bates had any knowledge of the conditions. If he had been physically able to more closely supervise the set-up of the plant at the new location, it is unlikely that the conditions would have been allowed to exist.[11]

The Appropriate Civil Penalties

Section 110(i) of the Act provides, that in assessing civil penalties, the Commission must consider the operator's history of previous violations, the appropriateness of the penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. 30 U.S.C. § 820(i). The determination of the proper civil penalty is committed to the Administrative Law Judge's discretion, which is bounded by the statutory criteria of section 110(i) of the Mine Act as well as the deterrent purpose of the Mine Act's penalty assessment scheme. *Mize Granite Quarries, Inc.*, 34 FMSHRC ___ (Aug. 7, 2012).

The penalties assessed by the Secretary for the violations at issue were minimum penalties specified in the Mine Act. In 2006, following disasters that resulted in the deaths of numerous miners, Congress passed the Mine Improvement and New Emergency Response Act ("MINER Act"). The MINER Act amended section 110(a) of the Mine Act, by adding the following provisions:

> (2) The operator of a coal or other mine who fails to provide timely notification [of an accident] to the Secretary as required under section 103(j) relating to the 15 minute requirement) shall be assessed a civil penalty by the Secretary of not less

[11] Govero acknowledged that Bates appeared to be an operator who cared about his employees, and ran a "pretty tight ship." Tr. 75-77.

than $5,000 and not more than $60,000.
(3)(A) The minimum penalty for any citation or order issued under section 104(d)(1) shall be $2000.
(B) The minimum penalty for any order issued under section 104(d)(2) shall be $4,000.
(4) Nothing in the subsection shall be construed to prevent an operator from obtaining a review, in accordance with section 106, of an order imposing a penalty described in this subsection. If a court, in making such review, sustains the order, the court shall apply at least the minimum penalties required under this subsection.

30 U.S.C. § 820(a)(2) - (4).

The Secretary argues that the above provisions limit the general authority of the Commission to set the amount of a civil penalty for violations issued under section 104(d) of the Act. She further argues that the statutory language is not ambiguous, but if were found ambiguous that her interpretation is reasonable and is entitled to deference.[12] In *E.S. Stone & Structure, Inc.*, 33 FMSHRC 515 (Jan. 2011) (ALJ), it was held that the language of section 110(a)(2) was directed solely to the Secretary's assessment process and did not limit the Commission's discretion under section 110(i). The Judge there contrasted the language of section 110(a)(2) with the more direct language of sections 110(a)(3) and (4), but ultimately concluded that section 110(a)(4) applied "only to Federal appellate review in a circuit court and does not clarify the differences in the statutory language between [sections 110(a)(2) and 110(a)(3)(A) and (B)]." *Id.* at 520, n. 2.

I find, as the Secretary argues, that the statutory language of section 110(a)(3)(A) is clear and unambiguous. It mandates that the minimum penalty imposed for a violation under section 104(d)(1) shall be $2,000.00. While it appears that section 110(a)(4) is directed at Federal appellate courts, it would be incongruous to hold that a reviewing circuit court was compelled to impose at least the statutory minimum penalty, but that the Commission was not so constrained.

Eagle Wings is a small mine. The Secretary's report on its history of violations identifies only four, relatively minor violations issued more than two years prior to the inspection. Ex. G-14. Respondent does not contend that payment of the proposed penalties would affect its ability to continue in business. The parties stipulated that Respondent demonstrated good faith in promptly abating the violations. The negligence and gravity factors have been addressed in the discussion of the violations.

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[12] The Secretary also argues that the Act's penalty provisions are reconcilable, in that the Commission's discretion is limited in only a limited class of cases. Consequently, both provisions should be given effect. In the event that the provisions are found to be irreconcilable, the more specific provisions governing penalties for section 104(d) violations take precedence over the more general provisions of section 110(i).

Citation No. 6565367 and Order No. 6565368 are affirmed as S&S violations which were the result of Eagle Wings' unwarrantable failure. Considering the factors itemized in section 110(i), I would impose penalties of $1,000.00 for each violation. However, I am constrained by the Mine Act to impose penalties of at least $2,000.00. The penalties assessed were the statutory minimums. I certainly find no reason to increase them. Accordingly, I impose a penalty in the amount of $2,000.00 for each of the violations.

ORDER

Citation No. 6565367 and Order No. 6565368 are **AFFIRMED.** Respondent, Eagle Wings Construction, LLC, is ordered to pay civil penalties in the total amount of $4,000.00 within 45 days.

/s/ Michael E. Zielinski
Michael E. Zielinski
Senior Administrative Law Judge

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October 29, 2012

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of NELSON GREGORY BRADLEY, Applicant	:	TEMPORARY REINSTATEMENT PROCEEDING
	:	Docket No. WEST 2013-27-DM
	:	MSHA No. RM-MD-12-11
v.	:	Henderson Mine
CLIMAX MOLYBDENUM COMPANY, Respondent	:	Mine I.D. 05-00790

DECISION AND ORDER GRANTING APPLICATION FOR TEMPORARY REINSTATEMENT

Appearances: Francesca Cheroutes, Esq., Office of the Solicitor, U. S. Department of Labor, Denver, Colorado, for Applicant;
Kristin R.B. White, Esq., and Michelle C. Witter, Esq., Jackson Kelly, PLLC, Denver, Colorado, for Respondent.

Before: Judge Manning

This case is before me on an application for temporary reinstatement brought by the Secretary of Labor on behalf of Nelson Gregory Bradley ("Bradley") against Climax Molybdenum Company ("Climax") under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2) (the "Mine Act"). The application was filed by the Secretary on or about October 4, 2012, and Climax requested a hearing within 10 days of receipt of the application. The application alleges that Climax[1] discriminated against Bradley when he was demoted and then terminated from his employment because he engaged in protected activities by reporting a supervisor who failed to immediately correct or report hazardous conditions and for counseling a miner who violated one of the mine's safety rules. Bradley was demoted from a supervisory position to an hourly miner on February 21, 2012, and he was terminated from his employment on June 25, 2012. The application states that the Secretary has determined that the underlying discrimination complaint filed by Bradley was not frivolously brought. An evidentiary hearing in this temporary reinstatement proceeding was held in Denver, Colorado, and the parties presented oral argument in lieu of filing briefs. For the reasons set forth below, I find that the application for temporary reinstatement must be granted.

[1] Climax is currently a subsidiary of Freeport-McMoRan Copper & Gold Inc. ("Freeport").

I. SUMMARY OF THE EVIDENCE

The parties entered into eight stipulations as follows:

1. Respondent is an operator within the meaning of the Federal Mine Safety and Health Act of 1977 (the "Mine Act"), 30 U.S.C. § 801 et seq.

2. Climax Molybdenum Company; Henderson Mine; Mine I.D. No. 05-00790, is subject to the jurisdiction of the Mine Act.

3. At all times relevant to this proceeding, Complainant, Nelson Gregory Bradley, was a "miner" within the meaning of §§ 3(g) and 105(c) of the Mine Act, 30 U.S.C.§§ 802(g) and 815(c).

4. The administrative law judge has jurisdiction in this matter to decide whether the complaint of discrimination filed by Nelson Gregory Bradley pursuant to § 105(c)(2) of the Mine Act was frivolously brought.

5. On February 21, 2012, Nelson Gregory Bradley was demoted from his salaried position as a front line supervisor in the development department to an hourly miner assigned to the road crew.

6. On May 4, 2012, Nelson Gregory Bradley called the Freeport McMoRan Compliance Line.

7. By letter dated June 25, 2012, the Mine indicated Nelson Gregory Bradley's employment was terminated.

8. On or about June 26, 2012, Nelson Gregory Bradley filed a discrimination complaint with MSHA pursuant to § 105(c) of the Mine Act, MSHA case No. RM-MD-12-11.

Bradley was employed by Climax between 1978 and 1982 and then again in 1995 until June 2012, with a few gaps in his employment. (Tr. 17). On or about June 25, 2012, Bradley was terminated from his employment. The stated reason for his termination was his refusal to take a drug test. On May 4, 2012, Bradley called the Freeport compliance hotline to raise issues about a demotion he was given in February 2012. As described in more detail below, during the company's investigation into whether his demotion was justified, an hourly miner advised a management employee and a human resources department ("HR") employee that he had reason to believe that Bradley and another Climax employee had been smoking marijuana underground at work. A drug test was ordered for Bradley and the other employee. Both employees refused to take the drug test. Because this refusal was in violation of Freeport's "Guiding Principles,"

they were terminated from their employment. (Ex. R-3, p. 26). Climax maintains that it has an absolute right to terminate an employee who is using drugs or alcohol at work or who refuses to take a drug test. Because Freeport has a strict drug and alcohol-free policy and all employees who fail a drug test or who refuse to take a drug test are terminated for violating this policy, it had the right to terminate Bradley. Climax also maintains that Bradley did not engage in conduct protected by the Mine Act and that his demotion and termination were not motivated in any part by his protected activity. It contends that the complaint of discrimination was frivolously brought in this case.

CHRONOLOGY OF EVENTS

1. **November 11, 2011** - In 2011, Bradley was a front line supervisor in the development department at the Henderson Mine. On November 11, he called Albert Archuleta, a safety specialist in the Climax safety department, to raise a concern about Joe Hatrick. (Tr. 22). Joe Hatrick was the superintendent of the development department at the mine. Bradley told Archuleta that Hatrick was coming underground, visiting the work sites, and observing safety hazards, but not reporting these hazards to anyone until two to three hours later. *Id.* Bradley testified that he was trained to address safety hazards immediately or barricade the affected area until the hazards could be corrected. Bradley testified that on November 11, Hatrick called a senior supervisor on the section about two to three hours after he visited the area with instructions to tell Bradley to "write up certain individuals for violations." *Id.* Joe Hatrick's actions angered Bradley for several reasons. First, it left alleged safety hazards uncorrected for several hours. (Tr. 22, 81). Bradley believes that when Joe Hatrick came underground, he should have immediately pointed out any safety hazards to him so that they could be corrected at that time. Second, he also believed that Joe Hatrick's actions undercut his authority as a front line supervisor. As the miners' immediate supervisor, Bradley believed that he should determine how serious any safety infraction is and whether the miner responsible should be formally disciplined or just coached. Bradley testified that he talked to the safety department because he believed that Joe Hatrick's actions perpetuated safety hazards and created an unsafe and hostile work environment.

2. **November 16, 2011** - The following Monday, Joe Hatrick spoke to Bradley and told him that Rick Sinclair, Bradley's immediate supervisor, wanted to talk to him. Bradley then briefly met with Hatrick, Sinclair, and Dave Smith, another senior supervisor.[2] Bradley testified that Sinclair asked him who he had been talking to. (Tr. 23). When Bradley told Sinclair that he had talked to Archuleta, Sinclair asked what it was all about. Bradley testified that after he responded to Sinclair's question, Hatrick leaned forward in an agitated manner and told Bradley that it was "[your] job to manage the stress levels underground, no matter what; and that if [you] could not manage the stress levels underground, that [you] might ought to seek opportunities elsewhere." (Tr. 24). After Hatrick left the area, Sinclair assured Bradley that he had the authority to manage his crew but that, in effect, he needed to learn how to deal with Hatrick.

[2] Sinclair and Smith report directly to Joe Hatrick.

3. **January 31, 2012** - Will Hatrick, Joe Hatrick's son, was an hourly miner on Bradley's crew. It was reported to Bradley that Will committed a safety infraction. (Tr. 25). There was a safety rule at the mine that prohibited operators of concrete transports from backing past a safety cone until that operator had "positive and clear communications from the workers in the area." *Id.* Apparently there had recently been an accident in which a concrete transport backed up to a shotcrete rig and bumped against a miner. Lenny Juull, an hourly lead man on the crew, told Bradley that Will Hatrick started backing up while he and another miner were working in the area without first communicating with them. (Tr. 27). At the end of the shift, Bradley asked Will Hatrick why he had backed up past a safety cone. (Tr. 29). Bradley testified that Will immediately became agitated and said that he had been sitting there a long time and he was just backing up around a corner so he would be in direct line of sight of the workers. *Id.* Bradley told Will that backing up beyond a safety cone can put miners in danger unless they know that you will be doing so.[3] He told Will Hatrick that he should have set the emergency brake, chocked the tires, walked over to the miners to see if they needed any help, and then communicated with miners in the area before he started backing up. (Tr. 29-30).

According to Bradley, Will Hatrick said that he was being treated unfairly and wanted to know when he could schedule the EMT class he wanted to take. (Tr. 30, 86-87). Bradley testified that he did not issue any formal discipline to Will Hatrick because he was "a little nervous about issuing the superintendent's son more strict discipline." *Id.* Bradley testified that if Will were not Joe's son, he might have issued a written disciplinary notice. (Tr. 89). Bradley believed that Will's actions created a safety hazard. (Tr. 88). Bradley believed that Will was trying to advance too quickly and he was always asking to receive training on other pieces of equipment.[4]

Will Hatrick also testified about the events of that day. (Tr. 158-61). He testified that, because the area had been set up incorrectly with the concrete transport around a corner, he backed the concrete transport up just enough so he could see the area where he was to dump the concrete. He said that the back of his transport only passed the safety cone a short distance, but that Juull started yelling at him. (Tr. 158). Will testified that Bradley agreed with him that the area had been set up poorly by Juull because it required Will to back around a blind corner when it was time to dump the concrete. (Tr. 159).

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[3] Bradley said that he told Will that miners get so immune to hearing backup alarms that they could be kneeling down mending a hose and not know that they were in danger.

[4] Will Hatrick has a bachelor of science in mine engineering from the Colorado School of Mines. (Tr. 112, 157). As a consequence, he did not intend to be an hourly miner for a long period of time and, presumably, was trying to obtain as much underground experience as he could. (Tr. 112).

Will testified that when he talked to Bradley at the end of the shift, Bradley did not talk about the incident underground but started giving Will a hard time because he was getting special treatment and that he should not be taking EMT training on his days off because it was "bad morale for the crew." (Tr. 161). Will testified that every time he sought additional training, Bradley would respond that "you have to crawl before you can walk." (Tr. 162-63).

4. **Late January 2012** - David Long, another senior supervisor in the development department who reported to Joe Hatrick, testified that David Smith approached him in late January 2012 and said that an hourly employee came to him and complained about a "hostile work environment." (Tr. 165). After he talked to Tom Green, an investigation into this allegation was started. They talked to six or seven hourly employees in development, including Will Hatrick. Long testified that it was clear that many employees on Bradley's crew were upset and complained that he was not fair with them. (Tr. 167). Long testified that the miners told him that Bradley hollered at them to such an extent that they "didn't want to come to work." (Tr. 167). Long also testified that the miners told him that Bradley spent a lot of his time operating equipment. Long testified that supervisors should not be operating equipment because you cannot be both a supervisor and an equipment operator. (Tr. 168). The miners also complained that Bradley would not give them time to eat lunch or get a drink of water.

5. **February 17, 2012** - While Bradley was in North Dakota attending his father-in-law's funeral, he received a phone message on his voice mail from David Smith saying that he had been reported for harassment and mismanagement, and that he was to report to the mine on February 21 for a hearing. Bradley suspected that Will Hatrick complained about him and that this complaint was the reason why he had to attend a hearing on this issue. (Tr. 34).

6. **February 21, 2012** - Bradley attended the hearing, which was more in the nature of a meeting, to discuss the matter. Dave Long, HR specialist Matt Stones, and Dave Smith attended the meeting. Long started the meeting by listing the allegations against Bradley. It was reported that he had screamed at an employee for getting a concrete truck stuck in a ditch. (Tr. 35). It was reported that he told an employee that he had to "crawl before he could walk" and he was making it difficult for this employee to obtain EMT training. Bradley testified that he attempted to address each of the allegations. The truck incident involved Will Hatrick. Bradley testified that Will was driving a concrete truck and he got a flat tire. Rather than calling the shop so that someone could come and fix it, he continued driving with the tire totally flat, which caused the accident that damaged the truck. (Tr. 36). Bradley testified that when he found out about the accident, he asked Will how the accident happened and Will replied that Tim Cork told him to drive the truck to the shop despite the flat. Bradley testified that he did not yell at Will but simply told him that sometimes he should make his own decisions when things were not working out. (Tr. 37). The incident involving the EMT training also concerned Will Hatrick.

At the meeting, there was also a discussion about Bradley spending too much time operating equipment. (Tr. 83, 167-68). He also admitted that he would sometimes talk to his crew in an "elevated tone," but he said that he never screamed at them. (Tr. 84). The meeting lasted about 15 minutes. Bradley was told to leave the room and when he returned he was

advised that he was being demoted to an hourly position on the road crew. (Tr. 38). His direct supervisor, Rick Sinclair, was in Canada at the time of the meeting.

Long testified that Bradley was asked a lot of questions at the meeting about the allegations that the miners had raised. (Tr. 169). Bradley admitted that he operated equipment. When the EMT course that Will Hatrick wanted to take came up, Long testified that Bradley said that he told Will that he might not give him vacation time to take the EMT course. After Bradley left the room, his situation was discussed and several options were considered including terminating Bradley, giving him a written warning, and giving him additional training. (Tr. 171). Long testified that he recommended that Bradley be offered an hourly position in a different department where he could run equipment. (Tr. 171, 173).

7. **February 21 through March 22, 2012** - Bradley met with several managers and HR employees to discuss his demotion to try to get the decision reversed. The managers he discussed it with included Tom Green, Craig Filkins, and Matt Stones. Bradley believed that the demotion was not made in good faith and that it related to his complaints about Joe and Will Hatrick relating to safety issues. (Tr. 46-47).

8. **March 23, 2012** - Bradley met with Lee Fronapfel, the Henderson Mine Manager, to discuss his demotion. He was accompanied by Mike Aguilar, his immediate supervisor at that time, and Matt Stones. Bradley testified that Fronapfel told Bradley that if he did not stop trying to get his supervisory position back, he was "going down another road," which Bradley interpreted to mean he would be fired. (Tr. 43, 94). Fronapfel indicated that he was demoted because he had an intimidating management style and he could not handle the stress of being a front line supervisor. (Tr. 98-99; Ex. R-4). At the reinstatement hearing, Bradley testified that he could deal with the pressure of meeting production and safety goals and that any stress in the work environment was a result of Joe Hatrick's management style. *Id.* He also stated that he had never been previously counseled concerning his communication skills or his management style since he became a front line supervisor in 2005 or 2006. (Tr. 21).

9. **May 4, 2012** - Bradley called the Freeport compliance hotline to complain about his demotion. After Bradley made this call, he talked to Fred Menzer, who he described as the vice-president of Climax Molybdenum North America. (Tr. 45). Menzer said that he had just received the hot line complaint. His complaint caused Freeport to start an investigation of the demotion.

10. **June 4, 2012** - On or about June 4, 2012, Bradley was placed on investigatory leave with pay so he would not "influence the interviews." (Tr. 49).

11. **May and June 2012** - In order to avoid the appearance of impropriety, Erich Bower, the manager of the Henderson Mill, conducted the investigation. As the mill manager, Bower

did not generally interact with the miners or supervisors of the development or road crews at the Henderson Mine or their supervisors.[5]

Bower interviewed about 20 people during his investigation, both management and hourly, including Bradley. (Tr. 116, 153). During his interview on June 8, Bradley was asked about specific incidents. Bradley described the interview as follows:

> They asked me about some of the statements being made. They asked me about some ear plugs being pulled out of Will's ears in the training process. And there was some line of questions more about me, about screaming until I was red in the face, and there were other issues. And about half that interview seemed like they were investigating me instead of my compliance hot line report.

(Tr. 51). He also described his problems with Joe Hatrick. Bradley provided a written statement to Bower, as well. (Tr. 96; Ex. R-4).

Erich Bower testified that he understood that the complaint was that Bradley had been verbally harassed and unjustly demoted. (Tr. 109). Bradley told him that Joe Hatrick and other senior managers in the development department would come underground on a "witch hunt" and it was causing the miners to "look over their shoulder and therefore [they were] not able to work safely." (Tr. 110). Bradley was also concerned about nepotism in the development department. He felt that Will was getting special treatment, that he was "untouchable," and he could not properly supervise him. (Tr. 111). Bradley also told him that Will was asking to operate a lot of different pieces of equipment and Bradley felt that he was being moved along too quickly. (Tr. 86, 112).

The last person Bower interviewed was an hourly miner on the development crew who was not identified at the hearing.[6] Tom Green was present during this interview. (Tr. 138). At the end of the interview, Bower asked the miner if he would like to add anything. (Tr. 119). The miner hesitated and then said that he believed that Bradley and Lenny Juull had been using marijuana underground at the mine while on duty. *Id.* Bower testified that this miner told him that "he had actually seen [Lenny Juull] smoke marijuana and said [he] believes Greg [Bradley] is involved in it as well." (Tr. 119). When Bower asked why he thought Bradley was involved,

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[5] The mine is on the eastern side of the continental divide and the mill is on the western side. A conveyor belt transports mined ore from the mine to the mill under the continental divide. The travel time by car or truck between the two locations is about one and a half hours. (Tr. 107).

[6] Counsel advised me that the miner asked that his identity be kept confidential because he was afraid of reprisal. Many of the miners live in Idaho Springs, Colorado, and counsel for the Secretary said that he had some concerns about his personal safety. Bower testified that Will Hatrick was not the unidentified miner. (Tr. 121).

Bower testified that the miner said that Bradley and "Lenny would go down the drift and there would be a distinct smell and they would return with markedly changed demeanor, were his words, a mood shift from aggressive and agitated to mellow and relaxed, is what he said." (Tr. 119-20). The unidentified miner did not report that he actually saw Bradley smoking marijuana. (Tr. 128). Bower testified that he pushed this miner because Bradley has worked at the mine a long time and the company has a random drug testing policy. Bower believed it was a stretch that they would be smoking marijuana at the mine. In response, Bower testified that the unidentified miner told him that he "actually saw Lenny Juull carrying a clean urine sample and that is how they passed the tests." (Tr. 120).

Bower said that after the unidentified miner mentioned the clean urine sample, Bower "hit the brakes on everything" and asked HR to schedule a drug test for both Bradley and Juull. (Tr. 120-21). Bower testified that he had no choice but to order that these employees be given direct observation drug tests. *Id.* Green also testified that a direct observation drug test was absolutely necessary in this instance "because there was a credible safety concern that the employee had raised." (Tr. 139-41). Green testified that the fact that Bradley had phoned the compliance hotline did not have any bearing on his decision to order the drug test. (Tr. 146). Bower testified that he would have ordered the same type of drug test for any miner if it were reported that the miner had been using marijuana at the mine. (Tr. 122). Joe Hatrick did not play any role in requesting a drug test. (Tr. 131). He also testified that Bradley would still be working at the mine if he had taken the drug test and passed. (Tr. 122). Green's testimony with respect to this interview was consistent with Bower's. (Tr. 153-55).

At the conclusion of the investigation, Bower determined that Bradley's demotion was justified. Although he determined that Bradley was a good miner, he did not "fit the mold of a supervisor and . . . he was not performing those tasks well." (Tr. 118). Bower's investigation concluded that when senior supervisors discovered safety infractions, Bradley would often not write miners up for the infractions because he believed that these supervisors should have done so. (Tr. 132). Bower said that this was a red flag for him. He concluded that Bradley's complaint about Joe Hatrick was not a safety complaint, it was a "management style complaint given to the safety department." (Tr. 133).

12. **June 21, 2012** - Bradley received a message at home to call Tom Green. When he returned the call, he was advised to report to the mine on June 22 at 1:30 p.m.

13. **June 22, 2012** - When Bradley arrived at the mine, he was told by Tom Green that it had been reported that he was a drug user. (Tr. 53). The tests were to be performed at the mine offices by an independent alcohol and drug testing company. The test was to be performed using a guideline established by the Substance Abuse and Mental Health Services Administration of the Department of Health and Human Services. (Tr. 136-37; Ex. R-3, p. 24). Climax first inspected his locker. (Tr. 141). No prohibited substances were found in his locker. There were, however, about eleven alligator clips in Bradley's locker. (Tr. 65). Bradley testified that these clips were used when performing electrical work, but he admitted that he did not perform any electrical work at the mine. He also admitted that alligator clips can be used when smoking

marijuana. He was asked to take a breathalyser test and he did not object. The results were negative. Green told Bradley that he was going to be given a standard DOT drug test (Direct Observations Test) in the men's room. Green asked him to lift up his shirt and to drop his pants to his knees. (Tr. 54). He was also advised that Green would observe him when he provided a urine sample. Green offered him water to drink. (Tr. 67). Bradley testified that he was stunned by this and had never heard of that kind of test being conducted at the mine. (Tr. 55). He did not take the drug test and said that he "needed representation." (Tr. 57)

Bradley testified that he did not take the drug test because he did not trust management's motive for conducting the test, he felt uncomfortable performing the test, he viewed the test as management's way of trying to getting rid of him, and he had a tape recorder taped to his stomach. (Tr. 56). He told Green that the test was unfounded and the report must have come from the investigation of his complaint to the compliance hot line. After telling Green that he needed representation, Bradley walked out of the mine office to get in his truck. At Bradley's truck Green asked him if he knew what this means and Bradley handed Green his security gate card/identification badge and left the property. (Tr. 57, 68-69, 143-44).

14. **June 26-27, 2012** - Bradley received a letter of termination from Climax dated June 25, 2012. (Tr. 58; Ex. R-7). He filed his complaint of discrimination with MSHA on June 26, 2012. (Tr. 77; Ex. G-1). Bradley testified that on June 26, 2012, he went to an independent lab and obtained a drug test and the results were negative.

II. BRIEF SUMMARY OF THE PARTIES' ARGUMENTS

A. Secretary of Labor and Nelson Gregory Bradley

Temporary reinstatement hearings before this Commission impose a low burden of proof and the Secretary must only show that "things could possibly have happened in the way that the claimant claims." (Tr. 177). Conflicts of testimony are not to be resolved in a temporary reinstatement hearing. (Tr. 180).

Bradley participated in protected activity under the Mine Act on November 11, 2011 when he complained to the safety department that Joe Hatrick would wait several hours to address safety violations. (Tr. 178). Protected activity, under the Act, is "very broadly defined . . . on purpose" to protect miners. (Tr. 194). Moreover, Bradley's coaching of Will Hatrick to enforce a rule that had already injured another miner was an attempt to enforce the safety rules of the Mine Act. *Id*.

On November 16, Joe Hatrick, Rick Sinclair and Dave Smith held a "coaching session"[7] with Bradley where they told him that he should bring his complaints to someone within the

[7] The parties often used the term "coaching session" when an issue was discussed with an employee but the discussion was not considered to be a form of discipline.

developmental department and not to the safety department. (Tr. 178). These managers informed Bradley that if he disagreed with airing grievances within the department, he could "look for other employment, or might seek hourly employment." *Id*. In addition to showing animus on the part of Climax Mine management toward safety complaints, the proximity in time between Bradley's complaint and the "coaching session" exhibits a nexus in time. *Id*.

On January 31, 2012, Bradley coached Will Hatrick after Will broke a safety rule by backing behind a cone. (Tr. 179). On February 17, Bradley was supposedly demoted for mismanagement or for having an aggressive and harassing management style, despite the fact that he had always received exemplary evaluations. *Id*. Once again, these events show a nexus in time between Bradley's actions concerning safety and management acting retributively against Bradley.

Any delay Bradley took in filing his discrimination complaint with MSHA was justified. Throughout the month subsequent to February 17, Bradley continued to complain about his demotion and the "retaliatory action that he believes he was subjected to." (Tr. 179). On March 23, two members of Climax management threatened Bradley that he would be fired if he did not cease his complaints. *Id*. Climax knew that Bradley continued to question the legitimacy of his demotion and management was not happy that Bradley did so; they also "threatened additional adverse action if he continued" to do so. *Id*. Any delay in filing on Bradley's part stemmed from the threatening actions of Climax management.

On May 4, Bradley called the Freeport compliance hotline. On June 4 he was placed on investigatory leave. Eighteen days later he was asked to take a drug test and was terminated when he refused. (Tr. 180).

Although refusing a drug test is usually legitimate grounds for termination, in this situation the drug test was the final act by a management that had escalated its adverse actions against Bradley in hopes that he would quit since they could not legally terminate his employment. (Tr. 181). The cases cited by Respondent where miners were rightfully terminated for refusing a drug test are not applicable in this situation. (Tr. 195). In both the *Maynes*[8] and *Perry*[9] cases, the miners in question were endangering themselves and other miners with their drug use by being intoxicated while working. *Id*. Even if Bradley were taking drugs at the time of the test, he could not possibly have endangered anyone because he was on investigatory leave. (Tr. 196). This test was not done to protect miner safety, but rather was a form of retaliation for Bradley's safety complaints. *Id*.

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[8] *See Richard R. Maynes v. Phelps Dodge Morenci*, 12 FMSHRC 2486, 2490 (Nov. 1990) (ALJ).

[9] *See Perry v. Phelps Dodge Morenci*, 18 FMSHRC 1918, 1919 (Nov. 1996).

The drug test represented another escalated step in a saga of threats and actions toward Bradley on the part of management. Climax management's goal with these efforts was to make Bradley's work environment intolerable enough for him to quit his job and abandon his safety complaints. (Tr. 197). The question of constructive discharge, whether a reasonable person would feel compelled to resign under the circumstances, is a question for the trier of fact and is therefore not appropriate to decide in this temporary reinstatement case. *Id*. That determination, however, does involve the cumulative effect that conditions have on a reasonable employee according to the Commission. *Id*. In *Ramsey,*[10] the Commission held that a finding of constructive discharge can be based upon "aggravating factors such as a continuous pattern of discriminatory treatment."

Climax has clear animosity toward safety complaints and a nexus in time exists between Bradley's complaints and his refusal to take a retaliatory drug test. (Tr. 197). Bradley should immediately be reinstated as a front-line supervisor. (Tr. 198). If necessary, the Secretary is amenable to economic reinstatement. (Tr.181).

B. Climax Molybdenum Company

The Secretary did not meet her burden of showing that a causal nexus existed between protected activity cited by Bradley and his subsequent termination by Climax. When legitimate reasons to discharge an employee exist at the same time as protected activity, an inference that a termination occurred due to the protected activity "should not necessarily be drawn." (Tr. 183). While pursuing an investigation begun at Bradley's request, Bower and Green testified that they ordered a drug test to be performed on Bradley because an unidentified hourly miner indicated that Bradley and Lenny Juull had been using drugs underground and carrying clean urine to pass drug tests. *Id*. For the sake of safety, Climax management had no other choice before them except to order the test. (Tr. 184). A direct observation test was necessary due to the hourly miner's allegation that he had seen Juull carrying clean urine. (Tr. 183-184). A miner violates the drug policy by having drugs in his system at any time, regardless of how long ago those drugs were taken. (Tr. 185). The allegations made by an hourly miner, not management hostility toward safety complaints, necessitated Climax to perform a drug test on Bradley and Juull. (Tr. 187).

Once Bradley refused the direct observation test permitted by the drug and alcohol policy, the company's Guiding Principles required that Bradley be terminated. (Tr. 185). Bradley was aware that the drug policy was a condition of his employment and he had signed the drug policy. (Tr. 185-186). If the test had been negative, Bradley would have returned to work. (Tr. 185). The company followed its drug policy which, including the administration of a direct observation drug test, is in accordance with federal guidelines. (Tr. 186). Bradley was aware that refusing a drug test would result in termination and he and Juull were both terminated. (Tr.

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[10] *Harry Ramsey v. Industrial Constructors Corporation,* 12 FMSHRC 1587, 1593 (Aug. 1990).

187). Bradley chose not to take the test, which resulted in his termination; there was no nexus between Bradley's complaints and his termination.

Furthermore, Bradley did not engage in protected activity because his grievances were not safety complaints, but rather personnel complaints. Bradley's complaints that Joe Hatrick searched for safety problems in the mine is a complaint about management style and actually stems from the fact that Joe Hatrick was tougher on enforcing safety issues than Bradley was. (Tr. 189). Complaining about a demotion is also clearly a personnel issue. *Id*. As for Bradley's coaching of Will Hatrick, the incident is not documented and amounts to a supervisor performing a normal task and is not protected activity. (Tr. 189-190). Bradley did not participate in protected activity under the Mine Act.

Dave Long testified that Joe Hatrick was not involved in Bradley's demotion and that Bradley's complaint about Joe Hatrick in November had nothing to do with his demotion. (Tr. 190). Dave Long did not even know of the complaint. (Tr. 191). The complaint and subsequent demotion, furthermore, have no nexus in time; as one judge has stated in *Oasis Contracting*,[11] "two and a half months is too far removed" to provide a nexus. (Tr. 190). A demotion, moreover, does not allow for the remedy of temporary reinstatement. (Tr. 191).

Lastly, the demotion is time-barred under the 60-day time limit. (Tr. 191). Bradley was not intimidated by management to drop his complaints, but rather chose other remedies besides filing a complaint with MSHA. *Id*. He filed a hotline complaint and approached the company's VP of operations. (Tr. 192). When Bradley was finally terminated, it was not a culmination of a chain of events linked to his demotion, but simply the result of his own choice to refuse a drug test. *Id*. The first priority of the Mine Act is the health and safety of miners. Allowing a miner who refused or failed a drug test to return to work is repugnant to the Mine Act.

III. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

Section 105(c)(2) of the Mine Act prohibits discrimination against miners for exercising any protected right under the Mine Act. The purpose of the protection is to encourage miners "to play an active part in the enforcement of the [Mine] Act" recognizing that, "if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation." S. Rep. No. 181, 95th Cong., 1st Sess. 35 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977* at 623 (1978) ("*Legis. Hist.*")*.*

Section 105(c)(2) provides, in pertinent part, that the Secretary shall investigate each complaint of discrimination "and if the Secretary finds that such complaint was not frivolously

[11] *Anthony Williams v. Oasis Contracting Inc.*, 21 FMSHRC 1225, 1229 (Nov. 1999) (ALJ)..

brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint." The Commission established a procedure for making this determination at 29 C.F.R. § 2700.45, which provides in subsection (d) that the "scope of a hearing on an application for temporary reinstatement is limited to a determination as to whether the miner's complaint was frivolously brought."

"The scope of a temporary reinstatement proceeding is narrow, being limited to a determination by the judge as to whether a miner's discrimination complaint is frivolously brought." *Secretary of Labor on behalf of Price v. Jim Walter Resources, Inc.*, 9 FMSHRC 1305, 1306 (Aug. 1987), *aff'd sub nom. Jim Walter Resources Inc. v. FMSHRC*, 920 F.2d 738 (11th Cir. 1990). Courts and the Commission have equated the "not frivolously brought" standard contained in section 105(c)(2) of the Mine Act with the "reasonable cause to believe standard" at issue in *Brock v. Roadway Express, Inc.*, 481 U.S. 252 (1987). It has also been equated with "not insubstantial." *Jim Walter Resources*, 920 F.2d at 747. Congress indicated that a complaint is not frivolously brought if it "appears to have merit." (*Legis. Hist.* at 624-25). The Commission has held that the judge should not undertake to resolve disputes of fact or credibility that arise in a temporary reinstatement hearing. *Sec'y of Labor on behalf of Albu v. Chicopee Coal Co.*, 21 FMSHRC 717,719 (July 1999); *Sec'y of Labor on behalf of Stahl v. A & K Earth Movers, Inc.*, 22 FMSHRC 323, 325-26 (2000).

Although an applicant for temporary reinstatement need not prove a prima facie case of discrimination, I must consider the elements of a discrimination claim. In order to establish prima facie case in a discrimination proceeding, a complaining miner bears the burden of establishing (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. Sec'y of Labor on behalf of *Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (Oct. 1980), *rev'd on other grounds*, 663 F.2d 1211 (3rd Cir. 1981). The Commission has frequently acknowledged that it is often difficult to establish a "motivational nexus between protected activity and the adverse action that is the subject of the complaint." *Sec'y of Labor on behalf of Baier v. Durango Gravel*, 21 FMSHRC 953, 957 (Sept. 1999).

I find that Bradley's contention that he engaged in protected activity was not frivolously brought. When Bradley talked to safety specialist Archuleta on November 11, 2011, about the failure of Joe Hatrick to take steps to immediately correct the safety problems he found, Bradley was engaging in an activity protected under section 105(c) of the Mine Act. He was concerned that Hatrick was leaving uncorrected, for a period of at least an hour, conditions that affect the safety of miners on his shift. Climax disputes Bradley's motivation for "reporting" Hatrick. That Bradley had other concerns about Hatrick's method of managing the development section does not negate the fact that he also raised safety concerns. He also engaged in protected activity when he spoke to Will Hatrick about his failure to adhere to the policy about backing up the concrete truck beyond the safety cones. Will Hatrick, however, disputed Bradley's description of what happened on January 31. The Commission has held that it is "not the judge's duty, nor is it the Commission's, to resolve the conflict in testimony at the preliminary stage of the

proceedings." *Sec'y of Labor on behalf of Williamson v. CAM Mining, LLC*, 31 FMSHRC 1085, 1088 (Oct. 2009) (citation omitted). For purposes of this temporary reinstatement case, I will accept Bradley's description of the events that occurred in November 2011 and on January 31, 2012.

There is no question that Bradley suffered two adverse actions. He was demoted on February 21 and he was terminated on June 25. In a temporary reinstatement case, the Secretary is not required to establish a causal nexus between the protected activity and the adverse action. She needs only to establish that there is a non-frivolous issue as to the causal nexus. To put it another way, she must simply demonstrate that evidence was presented to show that the adverse actions could have been motivated at least in part by the protected activity.

Climax argues that Bradley's complaint about his demotion is time-barred because more than 60 days passed before he filed his discrimination complaint with MSHA. I disagree. The 60-day time limit is not jurisdictional and I hold that justifiable circumstances may excuse a miner's delay in filing a discrimination complaint. "[A] miner's reasonable fear of retaliation may be considered in determining whether there are justifiable circumstances for the late filing of a discrimination complaint." *Holden v. Ross Island Sand & Gravel Co*., 27 FMSHRC 400, 405 (April 2005) (ALJ). I find that the evidence establishes that Bradley believed he was being threatened with retaliation for raising safety concerns with mine management. The record also shows that his fear of retaliation was not entirely frivolous. Although he continued to try to get his demotion reversed, filing a complaint with MSHA would have raised the entire issue to a much higher level. There has been no showing that Climax has been prejudiced by the delay. Moreover, he filed his complaint of discrimination within a few days after he was fired.

I find that, although the Applicant did not establish that Bradley's demotion was a direct result of his protected activity, his protected activity could have been one of the motivating factors that led to his demotion, for purposes of this temporary reinstatement proceeding. Climax management had knowledge of his protected activities. Indeed, one of his protected activities was directed to his immediate supervisor. There was hostility displayed by management when he complained to the safety department about what he considered to be Joe Hatrick's unsafe actions. There was also some coincidence in time between his protected activities and his demotion. His first protected activity occurred on November 11 and his other protected activity occurred on January 31 the following year. Bradley was on leave in North Dakota for two weeks between January 31 and the date of his demotion on February 21. Bradley testified that he believes that his demotion was "direct revenge for the January 31 infraction and everything that happened before that." (Tr. 47). He felt that the safety concerns he raised were interrelated, in part, because they involved a supervisor and his supervisor's son. Joe Hatrick did not testify at the hearing. I find that a non-frivolous link was established between Bradley's safety activities and his demotion. More would be required to establish this nexus in a discrimination case.

The fundamental issue in this case is whether there is reasonable cause to believe that Bradley was terminated for his protected activities or, to put it another way, does the complaint

concerning the termination appear to have merit. I hold that if a mine operator orders an employee to undergo a drug test in retaliation for making a safety complaint, such an action would be a form of harassment that must be taken into consideration when evaluating the merits of a discrimination complaint. On the other hand, if an operator has a reasonable, good faith belief that an employee is using drugs, ordering him to take a drug test would generally not be considered harassment even if the employee had engaged in protected activities.

The circumstances under which Bradley was ordered to take a drug test are not entirely clear. Bower testified that an unidentified miner said that he observed Juull smoke marijuana. As detailed above, the unidentified miner did not tell Bower that he observed Bradley smoking marijuana; he only saw him leave the work area and come back in a more mellow mood. Bower also testified that the miner told him that there was a "distinct smell." (Tr. 119). Bower testified that this unidentified miner saw Juull carrying a clean urine sample but he did not observe Bradley doing so. The evidence presented at the hearing as to Bradley's use of marijuana is circumstantial and it is based entirely on Bower's hearsay testimony. The unidentified miner may have been confused as to what he observed or he could have been less than totally honest during the interview.[12]

As stated above, the Applicant must demonstrate that his complaint "appears to have merit." It appears that Climax has a reasonable basis to order Bradley to take a drug test because a miner on his crew alleged that he may have been were using drugs while at work. The evidence presented by Applicant shows, however, that Climax may have had other motives for giving him a direct observation drug test. The unidentified miner did not tell Bower or Green that he observed Bradley with a clean urine sample, yet a direct observation test was ordered for Bradley. Bradley was on investigative leave on June 22, the date of the drug test, and he had been on such leave since June 4. Thus, Bradley was not working at the mine operating equipment and he had no reason to believe that he would be given a drug test when he was told to come to the mine on June 22. Consequently, Climax could not have had any reasonable expectation that Bradley would be carrying a clean urine sample when he arrived at the mine on the afternoon of June 22.

Even though he was not working at the time, Bradley was an employee of Climax when he was ordered to take the drug test. Climax witnesses testified that anyone who tests positive for drugs or alcohol or who refuses to take a drug or alcohol test is automatically terminated from his employment. Freeport's Guiding Principles, however, simply state that possession or use of drugs on company premises will subject an employee to "disciplinary action up to and including discharge." (Ex. R-3, p. 24). It also provides, however, that any employee who refuses to submit to or cooperate fully with the administration of a drug test will be discharged. *Id.* at 26. It is clear that Bradley was aware of these policies. At the hearing, Bradley admitted that he was terminated for not taking the drug test:

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[12] The parties stipulated that the unidentified miner was not Will Hatrick.

Q Mr. Bradley, do you agree that you were discharged because you refused to take the drug test?

A Yes.

(Tr. 70).

Whether the complaint was frivolously brought with respect to the termination is the pivotal issue in this case. As stated above, courts and the Commission have equated the "not frivolously brought" standard with the "reasonable cause to believe" standard set forth in *Brock v. Roadway Express, Inc.*, 481 U.S. 252 (1987). Based on the evidence presented at the hearing, I hold that non-frivolous issues exist regarding the reasons why a direct observation drug test was ordered. Bradley testified that he did not take the drug test because, in part, he did not trust management's motive for the test, he felt uncomfortable performing the test in the manner mandated by Climax, and he viewed the test as a continuation of the acts of harassment that were being directed at him for his protected activities including his efforts to reverse his demotion.

The Commission recently held that a judge may not weigh "the operator's rebuttal or affirmative defense evidence against the Secretary's evidence of a prima facie case." *CAM Mining*, 31 FMSHRC at 1091. The Commission stated that if a judge does so, he errs "by assigning a greater burden of proof than is required."[13] *Id.*

The issue here is very close, but it is also very narrow. Based on the record evidence, I am unable to hold that Bradley's claim with respect to his termination is entirely frivolous or without any merit. I recognize that Bradley refused to take a drug test and he acknowledged that he was terminated for that refusal. Nevertheless, Applicant presented evidence that Climax had knowledge of the protected activities and exhibited some degree of hostility toward the protected activities. Although there was no close coincidence in time between Bradley's protected activities and his termination, he was continuing to press the issue of his demotion with management. Applicant presented evidence that his demotion bore some relationship to his protected activities. He was terminated during the investigation into his compliance hotline complaint. I find that there is some circumstantial evidence that one of the reasons Bradley may have been ordered to take the direct observation drug test was to harass him for his protected activities and his efforts to reverse the demotion that resulted, in part, from those activities. I recognize that this evidence is rather tenuous at this point and such evidence would be insufficient to establish such motivation in a discrimination case.

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[13] The Commission's decision in *CAM Mining* can be read to restrict a judge from considering virtually any evidence presented by a mine operator in a temporary reinstatement case because the evidence operators are in a position to offer would almost always be in the nature of rebuttal or affirmative defense evidence. Under the Commission's rules of procedure, however, a mine operator is permitted to "present testimony and documentary evidence in support of its position that the complaint was frivolously brought." 29 C.F.R. § 2700.45(d).

In *Sec'y of Labor on behalf of Price and Vacha v. Jim Walter Resources, Inc.,* the Commission, by a three-to-two vote, upheld the temporary reinstatement of two miners who would not take a drug test. 9 FMSHRC 1305 (Aug. 1987). In upholding the temporary reinstatement, the Commission reasoned:

> Evidence has been introduced tending to show that the complainants were active safety committeemen who had filed numerous safety complaints; that there may have been some hostility on the part of some JWR management officials towards that protected activity; and that the manner of testing the complainants and their resultant discharge may have been tainted by discriminatorily disparate treatment, retaliation, or interference. We make no determination at this point as to the ultimate merits of a case of discrimination on this evidence.

Id. at 1306. The present case has some similarities with that case.

I reach this result with a great deal of trepidation because a mine operator has a legitimate safety reason to employ only those miners who are alcohol and drug free. The only way a mine operator can attain this goal is to have a drug and alcohol testing program in place and to consistently enforce the program. Under the facts of this case, however, Bradley was not working at the mine and was, therefore, not in a position to endanger his fellow miners. In addition, the unidentified miner's report of drug use related back to a time before Bradley was demoted in February.

Although Climax's evidence shows that it may be able to present a convincing defense to Bradley's complaint in the underlying discrimination case, the purpose of a temporary reinstatement proceeding is to determine whether the evidence presented establishes that the discrimination complaint is not frivolous. It was not demonstrated "that things could not have happened the way the [applicant] alleges that they did. . . ." *Sec'y of Labor on behalf of Stahl v. A & K Earth Movers Inc*., 22 FMSHRC 233, 237 (Feb. 2000); *aff'd* 22 FMSHRC 323 (March 2000).

IV. ORDER

For the reasons set forth above, Climax Molybdenum Company is hereby **ORDERED** to immediately reinstate Nelson Gregory Bradley to the position he held immediately prior to the time he was demoted on February 22, 2012, at the same rate of pay and benefits for that position, or to a similar position at the same rate of pay and benefits.[14] Economic reinstatement would also comply with the terms of this order.

I retain jurisdiction over this temporary reinstatement proceeding. 29 C.F.R § 2700.45(e)(4). The Secretary **SHALL COMPLETE** her investigation of the underlying discrimination complaint as quickly as possible, if she has not already done so. On or before **November 9, 2012**, counsel for the Secretary shall advise me and counsel for Climax, in writing, whether the Secretary has determined that Climax violated section 105(c) of the Mine Act.[15]

/s/ Richard W. Manning
Richard W. Manning
Administrative Law Judge

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RWM

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[14] Climax retains the right to subject Bradley to a drug and alcohol test before he returns to the workforce in accordance with the Freeport Guiding Principles. If Bradley refuses to take such tests or he fails any of these tests, this order of temporary reinstatement will be dissolved upon motion by Climax.

[15] Under section 105(c)(3), the Secretary is required to complete her investigation within 90 days of receipt of the complaint of discrimination. The 90 day period expired on or about **September 24, 2012**.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, D.C. 20004

October 31, 2012

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. LAKE 2009-373
Petitioner,	:	A.C. No. 12-02374-177012
	:	Mine: Shamrock Mine
	:	
	:	Docket No. LAKE 2010-774
v.	:	A.C. No. 12-01616-219593
	:	Mine: Solar Sources #2
	:	
	:	Docket No. LAKE 2010-902
SOLAR SOURCES, INC.,	:	A.C. No. 12-01732-225916
Respondent.	:	Mine: Craney Mine

DECISION ON CROSS-MOTIONS FOR SUMMARY DECISION

Appearances: Beau Ellis, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for the Petitioner;
Mary M. Runnells, Esq., Solar Sources, Inc., Bloomington, Indiana, for the Respondent.

Before: Judge Paez

This case is before me upon the Secretary's filing of her Petitions for Assessment of Civil Penalty against Solar Sources, Inc. ("Solar Sources," "the company," or "Respondent"), pursuant to section 105 of the Federal Mine Safety and Health Act of 1977 ("the Mine Act" or "the Act"), 30 U.S.C. § 815. Respondent timely filed its answers to the petitions, and these three dockets were assigned to me for disposition. I approved a partial settlement on March 23, 2011, for two violations contained in Docket No. LAKE 2010-902. Each docket now contains one citation.

I. STATEMENT OF THE CASE

The parties filed a Joint Motion to Consolidate the above-captioned dockets and stated in their motion that none of the three alleged violations at issue in these three dockets involve a factual dispute and that they wished to resolve the matter through summary disposition. I issued a Consolidation Order and Briefing Order, which consolidated the above-captioned proceedings and directed the parties to confer with each other, and to file any motions or briefs in support of their positions on the alleged violations. I also permitted the parties to file a response to any

initial motion or brief. The parties subsequently filed simultaneous cross-motions for summary decision, and Respondent filed a response to the Secretary's motion.

The Secretary filed her Motion for Summary Decision, arguing that no genuine issue exists as to any material fact and that she is entitled to summary decision as a matter of law.[1] Respondent timely filed its Brief on Summary Judgment, arguing the same, and subsequently filed its Reply Brief on Summary Judgment fifteen days later, arguing that all three citations at issue should be vacated.[2]

II. ISSUES

A. Secretary's Arguments

The Secretary issued one citation to Respondent, arguing that failure to provide a portable fire extinguisher on the third level of the coal preparation plant is a violation of 30 C.F.R. § 77.1109(a).[3] She argues that the presence of waterlines, outlet valves, and a fire hose does not excuse Respondent from its responsibility to maintain the fire extinguisher. The Secretary also issued two other citations to Respondent, arguing that a wheeled water pump is mobile equipment and, therefore, was required to be equipped with a portable fire extinguisher pursuant to 30 C.F.R. § 77.1109(c)(1).[4]

B. Respondent's Arguments

Respondent argues the first citation should be vacated because its reading of section 77.1109(a) does not require a fire extinguisher on the third level of its coal preparation plant. It argues it complied with the regulation by having a portable fire extinguisher within the structure

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[1] For the purposes of this decision, references to the Secretary of Labor's Motion for Summary Decision and the exhibits attached thereto are abbreviated as "Sec'y Mot." and "Sec'y Mot., Ex. #" respectively.

[2] For purposes of this decision, Respondent's Brief on Summary Judgment, and the exhibits attached thereto, as well as Respondent's Reply Brief on Summary Judgment, and the exhibits attached thereto, are referenced as "Resp't Mot.", "Resp't Mot., Ex. #", "Resp't Reply", and "Resp't Reply, Ex. #", respectively.

[3] Section 77.1109(a) states: "Each structure presenting a fire hazard shall be provided with portable fire extinguishers commensurate with the potential fire hazard at the structure in accordance with the recommendations of the National Fire Protection Association."

[4] Section 77.1109(c)(1) states: "Mobile equipment, including trucks, front-end loaders, bulldozers, portable welding units, and augers, shall be equipped with at least one portable fire extinguisher."

cited by the Secretary. With regard to the two other citations, Respondent argues that portable fire extinguishers are not required on its water pumps, inasmuch as the water pumps should be deemed auxiliary equipment rather than mobile equipment under section 77.1109(c)(1).

To be entitled to summary decision, a party must establish by motion that there exists no genuine issue as to any material fact and that the party's evidence is legally sufficient as a matter of law. 29 C.F.R. Part 2700.67; *see Lakeview Rock Products, Inc.*, 33 FMSHRC 2985, 2987 (Dec. 2011). Here, the parties have filed their cross-motions and have stipulated to the material facts. Thus, the only questions before me concern matters of law.

The issues before me are as follows: (1) whether Respondent violated mandatory safety standard 30 C.F.R. § 77.1109(a) when it did not have a fire extinguisher located on the third level of the Shamrock Mine's Preparation Plant; (2) whether Respondent violated mandatory safety standard 30 C.F.R. § 77.1109(c) when it did not have a fire extinguisher on water pumps located at Solar Sources #2 or Craney Mine; and, (3) if any violation of a standard is found, whether the proposed penalty is appropriate under section 110(i) of the Mine Act.

For the reasons that follow, the Secretary's motion for summary decision is GRANTED, and Respondent's motion for summary decision is DENIED.

II. FINDINGS OF FACT

The relevant facts are uncontested and contain no genuine issues as to any material fact. They arise from three separate safety inspections, which were conducted at three separate Solar Sources mines: Shamrock Mine, Solar Sources #2, and Craney Mine. The mines at issue are all bituminous coal surface mines located in Dubois County, Indiana; Pike County, Indiana; and Daviess County, Indiana, respectively. (Sec'y Mot., Ex. A.)

A. LAKE 2009-373 (Shamrock Mine)

Citation No. 6682604, contained in Docket No. LAKE 2009-373 was issued by Inspector Jason VandenBrook at the Shamrock Mine on December 15, 2008. (Sec'y Mot., Ex. B at 1; Resp't Mot., Ex. 1.) This section 104(a) citation was issued pursuant to 30 C.F.R. § 77.1109(a). (*Id*.) The citation was served on Stephen Edwards, Safety Director, alleging the following:

> The 3rd level of the preparation plant has no fire extinguisher provided. Each structure presenting a fire hazard shall be provided with portable fire extinguishers commensurate with the potential fire hazard at the structure in accordance with the recommendations of the National Fire Protection Association.

(*Id*.) The inspector determined that an injury was unlikely to occur, that if injury were to result it could reasonably be expected to be fatal, that the violation was not significant and substantial

("S&S")[5], that one person was affected, and that Respondent's negligence was moderate. (*Id.*) The Secretary proposes a penalty in the amount of $1,944.00 for the alleged violation. (Sec'y Mot. at 11.)

The citation states further that the violation was terminated after the operator placed a fire extinguisher on the third level of the preparation plant that same day. (Sec'y Mot., Ex. B at 1; Resp't Mot., Ex. 1.) The inspector mentions in his field notes that the mine had an escapeway and a fire hose. (Sec'y Mot., Ex. B at 3.) Also present at the preparation plant were waterlines and outlet valves. (Sec'y Mot. at 5.) In his affidavit, Stephen R. Edwards, Safety Director for Solar Sources, Inc., states that there was no combustible material on the third level, and that the coal which was present in other parts of the structure was sprayed with water as it entered the preparation plant and remained wet throughout the process. (Resp't Reply, Ex. 2.) Respondent asserts that the preparation plant did not contain any dry coal. (*Id.*)

B. LAKE 2010-774 (Solar Sources #2)

Citation No. 8425618, contained in Docket No. LAKE 2010-774, was issued by Inspector William Faulkner at the Solar Sources #2 mine on March 23, 2010. (Sec'y Mot., Ex. D at 1; Resp't Mot., Ex. 2.) This section 104(a) citation was issued pursuant to 30 C.F.R. § 77.1109(c)(1). (*Id.*) The citation was served on Troy Fields, Safety Director for Solar Sources Underground, LLC, and alleges the following verbatim:

> Mobile equipment shall be equipped with at least one portable fire extinguisher. Located in pit #003, on the north end is a 6 inch water pump, company #1596. This water pump has no fire extinguisher provided.

(Sec'y Mot., Ex. D at 1; Resp't Mot., Ex. 2.; Resp't Reply, Ex. 3.) The inspector found that an injury was unlikely to occur, that if injury were to result it could reasonably be expected to result in lost workdays or restricted duty, that the violation was non-S&S, that one person was affected, and that Respondent's negligence was moderate. (*Id.*) The Secretary proposes a penalty in the amount of $100.00 for the alleged violation. (Sec'y Mot. at 11-12.) The citation states further that the violation was terminated after the operator placed a new fire extinguisher on the water pump. (Sec'y Mot., Ex. D at 1; Resp't Mot., Ex. 2.)

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

In his affidavit, Keith Lutgring, Vice President of Mining Operations, states that, "Portable water pumps are used to facilitate mining by removing water from operating areas and to fill water trucks with water that is used for such purposes as to control dust on mine roads."

(Resp't Reply, Ex. 1.) He states further that the engine's only purpose is to pump water, and that miners' only work near the pump to turn it on or off as it is self-operational. (*Id*.)

The parties agree that the water pump is not self-propelled but that it contains wheels and is capable of being towed from one place to another. (Sec'y Mot. at 4, 9-10; Resp't Mot. at 3.) In his affidavit, Safety Director Fields states that the water pump is located within 100 feet of two fuel tanks, each of which contains fire extinguishers. (Resp't Reply, Ex. 3.)

C. LAKE 2010-902 (Craney Mine)

Citation No. 8425664, contained in Docket No. LAKE 2010-902, was issued by Inspector William Faulkner at the Craney Mine on June 7, 2010. (Sec'y Mot., Ex. E at 1; Resp't Mot., Ex. 3.) This section 104(a) citation was issued pursuant to 30 C.F.R. § 77.1109(c)(1). (*Id*.) The citation was served on Safety Director Edwards and alleges the following verbatim:

> Mobile equipment shall be equipped with at least one portable fire extinguisher. A 4 inch water pump, company No.1606 has no fire extinguisher at the time of inspection. This violation was observed at the water truck loading area, in the Midway Pit area.

(*Id*.) The inspector found that an injury was unlikely to occur, that if injury were to result it could reasonably be expected to result in lost workdays or restricted duty, that the violation was non-S&S, that one person was affected, and that Respondent's negligence was moderate. (*Id*.) The Secretary proposes a penalty in the amount of $392.00 for the alleged violation. (Sec'y Mot. at 11-12.) The citation states further that the violation was terminated after a fire extinguisher was examined and placed on the water pump. (Sec'y Ex. E at 1; Resp't Ex. 3.) The Inspector recorded in his field notes that the operator disagreed that a fire extinguisher was required on the water pump. (Sec'y Mot., Ex. E at 3.)

This water pump and the facts surrounding it are substantially similar to the facts related to the water pump located at the Solar Sources #2 mine. *See* discussion *infra*, Part III.B.

III. PRINCIPLES OF LAW

Commission Rule 67 sets forth the guidelines for granting summary decision:

> (b) A motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows:
> (1) That there is no genuine issue as to any material fact; and
> (2) That the moving party is entitled to summary decision as a matter of law.

29 C.F.R. § 2700.67(b).

The Commission "has long recognized that [] '[s]ummary decision is an extraordinary procedure,"' and has analogized it to Rule 56 of the Federal Rules of Civil Procedure, under which "the Supreme Court has indicated that summary judgment is authorized only 'upon proper showings of the lack of a genuine, triable issue of material fact."' *Energy West Mining Co.*, 16 FMSHRC 1414, 1419 (July 1994) (quoting *Missouri Gravel Co.*, 3 FMSHRC 2470, 2471 (Nov. 1981) and *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986)). *See also Lakeview Rock Products, Inc.*, 33 FMSHRC 2985, 2987–88 (Dec. 2011) (reiterating the Commission's summary decision rules).

In reviewing a record on summary decision, the Court must evaluate the evidence "'in the light most favorable to . . . the party opposing the motion,' and [] 'the inferences to be drawn from the underlying facts contained in [the] materials [supporting the motion] must be viewed in the light most favorable to the party opposing the motion.'" *Hanson Aggregates New York, Inc.*, 29 FMSHRC 4, 9 (Jan. 2007) (quoting *Poller v. Columbia Broadcasting Sys., Inc.*, 368 U.S. 464, 473 (1962) and *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)).

IV. LEGAL ANALYSIS AND CONCLUSIONS OF LAW

A. LAKE 2009-373

1. Violation of 30 C.F.R. § 77.1109(a)

Citation No. 6682604 was issued to Respondent pursuant to section 77.1109(a). The Secretary argues that the citation was properly issued because of Respondent's failure to provide a portable fire extinguisher on the third level of its coal preparation plant. Respondent counters that a fire extinguisher is not required pursuant to the safety standard, and that the citation was improperly issued.

Section 77.1109(a) provides in pertinent part:

> Preparation plants, dryer plants, tipples, drawoff tunnels, shops, and other surface installations shall be equipped with the following firefighting equipment.
> (a) Each structure presenting a fire hazard shall be provided with portable fire extinguishers commensurate with the potential fire hazard at the structure in accordance with the recommendations of the National Fire Protection Association.

30 C.F.R. § 77.1109(a).

MSHA's Program Policy Manual ("PPM") provides insight into the Secretary's interpretation of the applicable mandatory safety standard. The PPM states in pertinent part:

> When questions arise concerning paragraph (a) [of section 77.1109], the standards presented in National Fire Protection Code No. 10 shall be used as a guide. Generally, a minimum of one extinguisher having a rating no less than 2A8B or 2A8BC where electrical installations are present *shall be provided on each floor or level in the structure*. At least one extinguisher shall be provided for each 3,000 square feet of floor space.
>
> Where the floor space exceeds 3,000 square feet, and more than one extinguisher is required, they shall be no more than 75 feet apart. If the area protected contains permanent electrical installations, the maximum distance between extinguishers shall be no more than 50 feet.

V MSHA, U.S. Dep't of Labor, *Program Policy Manual* ("PPM"), Part 77, at 199 (2003) (emphasis added).

Inspector VandenBrook issued Citation No. 6682604 because a fire extinguisher was not present on the third floor of the preparation plant. The Secretary asserts that preparation plants, such as the structure in question, innately present a fire hazard. (Sec'y Mot., Ex. F at 3.) In his second affidavit, Inspector Faulkner states that, while he did not issue Citation No. 6682604, he has personally conducted inspections at the preparation plant in question and is very familiar with the common function and design of preparation plants. (*Id*.) He further states that preparation plants contain a variety of combustible materials such as coal, conveyor belts, lubricants, and electrical installations, which all present fire hazards. (*Id*.)

Respondent contends that "[n]either the citation itself nor the inspector's field notes . . . identify anything on the 3rd level of the preparation plant that presents a fire hazard." (Resp't

Reply at 1.) Respondent further contends that Inspector Faulkner's second affidavit is short on specifics, with regard to the preparation plant, and speaks only in generalities. (*Id*. at 2.)

Respondent's contention that a fire hazard was not present on the third level at the time of the inspection, thereby rendering the issued citation unwarranted, is mistaken. The mandatory safety standard requires that a structure, which presents a fire hazard, must have portable fire extinguishers commensurate with the potential fire hazard at the structure. 30 C.F.R. § 77.1109(a). The Secretary reasonably interpreted this regulation to require each floor or level to maintain a minimum of at least one fire extinguisher. PPM, Part 77, at 199.

Respondent focuses on the "commensurate" language of the regulation and concludes a fire extinguisher is not required on each floor of the preparation plant because a potential fire hazard is not present on each floor. (Resp't Reply at 2.) To accept this conclusion would be to ignore the reality that fires are capable of starting in a number of manners, and of spreading.

Respondent explains that all of the coal in the preparation plant remained wet throughout the process. This truth does not mean, however, that the coal has lost its ability to combust. The Commission has recognized that even wet coal "can dry out, ignite, and propagate [a] fire." *Black Diamond Coal Mining Co.*, 7 FMSHRC 1117, 1121 (Aug. 1985). Such a fire, or any number of fires, could spread throughout the preparation plant and cause substantial harm or even death to miners. Consequently, the Secretary's interpretation and proposed enforcement of this provision, as published to the public in MSHA's PPM, is reasonable.

I am mindful that Respondent maintains a fire hose, waterlines, outlet valves, and an escapeway on the third level of the preparation plant, which could prove invaluable in the event of a fire emergency. (Sec'y Mot., Ex. B at 3; Sec'y Mot. at 5.) However, I am also mindful that water is not the best extinguishing agent for all fires. *See* Sec'y Mot., Ex. F at 3; *see also Nats Creek Mining Co.*, 17 FMSHRC 115, 129 (Feb. 1995) (ALJ) (examining a regulation requiring battery charging stations to be located in noncombustible structures or areas equipped with fire suppression systems and noting that "water on an electrical fire would only compound the problem."); *LeBlanc's Concrete & Mortar Sand Co.*, 11 FMSHRC 660, 677 (April 1989) (ALJ) (observing that water fire extinguishers might create an electrical hazard). Moreover, according to the Secretary's interpretation of the regulation, fire extinguishers are required regardless of the presence of any fixed fire suppression system. *See* PPM, Part 77, at 199 (making no mention of fire hoses, waterlines, outlet valves, escapeways or other fire suppression equipment as an alternative method of complying with the regulation). Respondent's maintenance of a fire hose, waterlines, outlet valves, and an escapeway on the third level of the preparation plant was a good faith attempt to adhere to the safety standards related to fire safety. Yet, the PPM reveals Respondent's interpretation of the regulation to have been incorrect, even though Respondent believed having a fire extinguisher in the building was commensurate with the fire hazard presented. Accordingly, I conclude as a matter of law that Respondent violated section 77.1109(a). Citation No. 6682604 is therefore **AFFIRMED** as written.

2. Penalty Amount

Under section 110(i) of the Mine Act, a Commission Judge must consider six criteria in assessing a civil penalty, including the operator's history of previous violations, the appropriateness of the penalty relative to the size of the operator's business, the operator's negligence, the penalty's effect on the operator's ability to continue in business, the violation's gravity, and the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of a violation. 30 U.S.C. § 820(i).

Considering the factors enumerated in section 110(i) of the Mine Act, I agree that an injury was unlikely to occur, but that if injury were to result it could reasonably be expected to be fatal. I agree that the operator's degree of negligence is moderate. I have also considered Respondent's history of violations and its demonstrated good faith in achieving rapid compliance after issuance of the citation, as well as the penalty's effect, if any, on the operator's ability to continue in business. Indeed, the operator obtained a portable fire extinguisher and quickly abated the violation, as the inspector's notes indicate that for abatement such a fire extinguisher was eventually located on the third floor within a couple hours of his issuing the citation. Thus, I determine that a penalty in the amount of $1,944.00 is appropriate for this violation.

B. LAKE 2010-774 & LAKE 2010-902

1. Violations of 30 C.F.R. § 77.1109(c)(1)

Citation Nos. 8425618 and 8425664 were issued to Respondent pursuant to 30 C.F.R. § 77.1109(c)(1). The Secretary argues that these citations were properly issued because of Respondent's failure to provide portable fire extinguishers on water pumps located on mine property. Respondent counters that fire extinguishers are not required pursuant to the safety standard, and thus these two citations were not properly issued and should be vacated.

Section 77.1109(c)(1), entitled "Quantity and location of firefighting equipment," provides that, "Mobile equipment, including trucks, front-end loaders, bulldozers, portable welding units, and augers, shall be equipped with at least one portable fire extinguisher." However, this safety standard does not provide an exhaustive definition of "mobile equipment." Something that is "mobile" is defined as "capable of moving or being moved." *Webster's Ninth New Collegiate Dictionary*, 762 (1986). In addition, the term "mobile equipment" is defined in Part 56, which is applicable to surface operations at metal/non-metal mines. *See Nat'l Cement Co. of Cal.*, 27 FMSHRC 721, 733 (Nov. 2005). Section 56.2 provides in part, "Mobile equipment means *wheeled*, skid-mounted, track-mounted, or rail-mounted equipment capable of moving or being moved." 30 C.F.R. § 56.2 (emphasis added). This term is applied broadly to cover "every conceivable vehicle capable of being operated" on the roadway. *Nat'l Cement*, 27 FMSHRC at 733.

Moreover, the Commission has held that an operator's failure to equip mobile equipment with a fire extinguisher was a non-S&S violation of section 77.1109(c)(1). *Manalapan Mining Co.*, 18 FMSHRC 1375, 1381 (Aug. 1996). Further, where an operator failed to equip a forklift with a fire extinguisher and the operator argued that the forklift was "auxiliary equipment," the Secretary's citation issued under section 77.1109(c)(1) was nonetheless upheld. *Pittsburg & Midway Coal Mining Co.*, 6 FMSHRC 2141, 2145 (Sept. 1984) (ALJ).

The pertinent facts in these cases provide that these particular water pumps at issue contain wheels, and thus are capable of being towed from one place to another. (Sec'y Mot. at 4, 9-10.) In applying Commission precedent to determine whether the term "mobile equipment" encompasses the water pumps at issue here, I conclude that the water pumps are mobile equipment as their wheels make it possible for them to be moved from one place to another. *See Manalapan Mining*, 18 FMSHRC at 1381; *see also Nat'l Cement*, 27 FMSHRC at 733; 30 C.F.R. § 56.2. Because these water pumps are capable of traversing roadways and are thus mobile, additional facts related to the water pumps' engine designs, abilities to self-operate, and so on, are of no import. Consequently, the water pumps are required to have fire extinguishers on them under this mandatory safety standard.

Respondent submits that the Secretary's argument regarding "mobile equipment" is overbroad and that the Secretary should not have cited Respondent under section 77.1109(c)(1), which requires mobile equipment to be equipped with a fire extinguisher. (Resp't Reply at 4.) Rather, Respondent believes the equipment should be regarded as "auxiliary equipment" and, because of its proximity to two fuel tanks (each of which contains fire extinguishers), it should be found in compliance with section 77.1109(c)(3). (*Id*.; Resp't Reply, Ex. 3.)

Respondent's argument is not without reason. Part 77 does not provide an exhaustive definition of "auxiliary equipment," nor has the Commission issued a decision which provides for an exhaustive definition of auxiliary equipment, informing how to distinguish auxiliary equipment from mobile equipment. Instead, section 77.1109(c)(3) enumerates examples of auxiliary equipment subject to the safety standard. Examples of auxiliary equipment listed in this section include the following: portable drills, sweepers, and scrapers. 30 C.F.R. § 77.1109(c)(3).

While the Commission has not thoroughly addressed the topic of auxiliary equipment, it has from time to time dealt with examples of equipment listed in section 77.1109(c)(3). On the basis of Commission precedent, I note that an overlap exists between the two forms of equipment, i.e., some types of auxiliary equipment may also be regarded as mobile equipment. For example, the Commission treated a pan scraper as mobile equipment even though the safety standard regards it as auxiliary equipment. *Twentymile Coal Co.*, 27 FMSHRC 260 (Mar. 2005) (examining a case where the inspector cited a pan scraper for a violation of section 77.404, which applies to mobile equipment).

Although I am sensitive to Respondent's argument, it is the Secretary who has the ultimate authority to issue citations when she believes that a violation of a mandatory health or

safety standard has occurred. 30 U.S.C. § 814(a). I will not review whether the Secretary would have better exercised her discretion by applying section 77.1109(c)(3), as opposed to section 77.1109(c)(1), as Respondent would have me do. That decision is hers alone; it should be made on the basis of her knowledge and expertise, inasmuch as an administrative agency's decision not to prosecute a particular regulatory provision is a decision committed to its absolute discretion. *See Heckler v. Chaney*, 470 U.S. 821, 831 (1985). An agency's decision not to enforce a particular regulation involves a number of factors, which are peculiarly within its expertise. *Id*. at 831. Indeed, the Commission has held that the Secretary has virtually unreviewable discretion in making decisions not to take particular enforcement action relating to its statutory or regulatory authority. *Mechanicsville Concrete, Inc.*, 18 FMSHRC 877, 879 (June 1996) (citing *Heckler*, 470 U.S. at 831-832). Consequently, I decline Respondent's invitation to second guess the Secretary's choice of regulations to enforce. My decision here rests solely on whether Respondent violated section 77.1109(c)(1), the provision under which the Secretary issued the citation.

I determine that the two water pumps are mobile equipment and thus each was properly cited under section 77.1109(c)(1) for failing to be equipped with a portable fire extinguisher. Accordingly, I conclude as a matter of law that Respondent committed two violations of section 77.1109(c)(1) when it failed to equip the water pumps at both its Solar Sources #2 Mine and Craney Mine with portable fire extinguishers, and Citation Nos. 8425618 and 8425664 are **AFFIRMED** as written.

2. Penalty Amount

I have considered the six factors previously discussed above and enumerated in section 110(i) of the Mine Act, *see* discussion *supra*, Part IV.A.2, including Respondent's history of violations and its demonstrated good faith in achieving rapid compliance after issuance of the citation. Moreover, I agree with the inspector that any injuries at these two mines were unlikely to occur as a result of these violations, and that if injuries were to result they could reasonably be expected to result in lost workdays or restricted duty. I also agree that Respondent's negligence was moderate. I determine an appropriate penalty to be $100.00 for Citation No. 8425618 and $392.00 for Citation No. 8425664.

V. ORDER

In light of the foregoing, **IT IS ORDERED** that the Secretary's motion for summary decision **IS GRANTED** and Respondent's motion for summary decision is **DENIED**.

Citation No. is hereby **MODIFIED** to "low" negligence with a penalty of $500.00.

Citation Nos. 6682604, 8425618, and 8425664, are hereby **AFFIRMED** as issued with penalties of $1,944.00, $100.00, and $392.00, respectively.

WHEREFORE, Respondent Solar Sources, Inc., is **ORDERED** to **PAY** a penalty in the amount of $2,436.00 within 40 days of this decision.[1]

/s/ Alan G. Paez
Alan G. Paez
Administrative Law Judge

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October 31, 2012

TODD DESCUTNER, Complainant,	:	DISCRIMINATION PROCEEDING:
	:	Docket No. WEST 2011-523-DM
v.	:	No. WE-MD-2010-18
	:	
NEWMONT USA, Respondent.	:	Mine: Leeville Mine Mine ID: 26-02512

DECISION

Appearances:

Larson A. Welsh, Esq., Cogburn Law Offices, Henderson, NV, on behalf of Todd Descutner

Kristin R. White, Esq. and Karen L. Johnston, Esq., Jackson Kelly PLLC, Denver, CO, on behalf of Newmont USA

Before: Judge David F. Barbour

This case is before me upon a complaint of discrimination brought by Todd Descutner ("Descutner"), a miner, against Newmont ("Newmont" or "the company"), pursuant to §105(c)(3) of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 815(c).

Complainant Descutner contends that he was unlawfully discharged by Respondent Newmont on June 9, 2010. Descutner alleges that his termination was motivated by discriminatory animus toward his protected activities, which consisted of reporting various safety issues regarding Newmont's facility. Newmont answers by denying Descutner's allegation of unlawful discrimination, and by asserting instead that Descutner was discharged under Newmont's progressive discipline policy for damaging Newmont's property and for insubordination.[1]

[1] Generally under the policy, the first offense results in a warning, the second offense results in a suspension, and continued offenses may result in termination. Only offenses that occur within a year prior to the adverse action are used to determine the level of discipline that is imposed. Resp't. Ex. 27. The policy is explained more fully *infra*.

PROCEDURAL BACKGROUND

On or about September 28, 2010, Descutner filed a discrimination complaint with the Mine Safety and Health Administration ("MSHA") pursuant to §105(c)(2) of the Act.[2] Resp't. Br. 2. The complaint was investigated by MSHA, and MSHA determined that no discrimination had occurred. On January 13, 2011, Descutner filed a discrimination complaint on his own behalf with the Federal Mine Safety and Health Review Commission pursuant to §105(c)(3) of the Mine Act.[3] A hearing was held on June 5, 2012 in Elko, Nevada. Subsequent to the hearing both parties submitted briefs.

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[2] §105(c)(2) of the Mine Act states, in relevant part:

> Any miner . . . who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall forward a copy of the complaint to the respondent and shall cause such investigation to be made as he deems appropriate.

[3] §105(c)(3) of the Mine Act states, in relevant part:

> Within 90 days of the receipt of a complaint filed under [§105(c)(2)], the Secretary shall notify, in writing, the miner . . . of his determination whether a violation has occurred. If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 30 days notice of the Secretary's determination, to file an action in his own behalf before the Commission, charging discrimination or interference in violation of [§105(c)(1)]. The Commission shall afford an opportunity for a hearing . . . and thereafter shall issue an order, based upon findings of fact, dismissing or sustaining the complainant's charges and, if the charges are sustained, granting such relief as it deems appropriate, including, but not limited to, an order requiring the rehiring or reinstatement of the miner of his former position with back pay and interest or such remedy as may be appropriate. Such order shall become final 30 days after its issuance. Whenever an order is issued sustaining the complainant's charges under this subsection, a sum equal to the aggregate amount of all costs and expenses (including attorney's fees) as determined by the Commission to have been reasonably incurred by the miner . . . for, or in connection with, the institution and prosecution of such proceedings shall be assessed against the person committing such violation.

In his brief, Descutner continues to assert that he was terminated because of various safety complaints made to Gus Friesen, his acting supervisor, in 2010. Descutner alleges that he made three safety complaints in 2010 and that later in the year he was involved in a safety-related incident. Compl. Br. 3-7. The first complaint was made between January and February 2010 when he reported an open ground safety hazard to a loader operator. The second complaint was made between March and April 2010 when he reported an open ground safety hazard at the wash bay directly to Friesen. The third complaint was made between May and June 2, 2010, when he informed Friesen that some haul truck drivers were not following proper pre-shift inspection procedures to which Friesen allegedly responded by telling him to mind his own business. The safety-related incident occurred on June 2, 2010, when Descutner went to the lube bay to fix a leak in his haul truck and Friesen became angry at him upon learning the low number of loads Descutner had completed that day. Compl. Br. 3-7.

The incident which directly led to Descutner's termination occurred on June 3, 2010. On that day, Descutner backed his haul truck into a lay-down where he inadvertently parked on some supplies (roof bolts).[4] Friesen approached Descutner and scolded him for parking in the lay-down on the roof bolts. Descutner responded by swearing. Tr. 418. On June 7, 2010, Descutner met with upper management to discuss the situation. Tr. 426-427. On June 9, 2010, Descutner was terminated. Tr. 377. In its brief, Newmont continues to deny the allegation of unlawful discrimination, instead asserting that Descutner was discharged in accordance with its progressive discipline policy for property damage and insubordination. Resp't. Ex. 27, Tr. 440, 464.

THE STIPULATIONS

At the start of the hearing, counsel for Newmont read the following joint stipulations into the record:

> 1. [Newmont] is an operator within the meaning of the Mine Act.
>
> 2. [Newmont's Leeville Mine] is subject to the jurisdiction of the Mine Act.
>
> 3. At all times relevant to this proceeding, Descutner was a miner within the meaning of §§ 3(g) and 105(c) of the Mine Act.
>
> 4. The administrative law judge has jurisdiction over this matter.

Tr. 15-16.

[4] A lay-down is an area used to store supplies and equipment for use in the mine. Tr. 163.

FACTUAL BACKGROUND

THE MINE AND DESCUTNER'S JOBS

Descutner worked for Newmont from May 2006 until June 2010. Tr. 22. He was first employed at Newmont's Deep Post Mine. Tr. 23. In January 2010 he was transferred to Newmont's Leeville Mine after the Deep Post mine closed. Tr. 34. The Deep Post mine was an underground gold mine as is the Leeville mine. Tr. 279, 366. At the times relevant to this matter, five general foremen oversaw the Leeville Mine operations department and maintenance department. Tr. 367. The operations department consisted of three sub-departments - production, development and support. Tr. 367. Thayne Church was the general foreman for the production sub-department. Tr. 368. The production sub-department consisted of four crews of approximately 100 underground miners in total. Tr. 368. Each crew had its own supervisor, known as the salaried foreman. Tr.157, 369. Gus Friesen was the salaried foreman for Crew 4 and supervised approximately 40 underground miners. Tr. 195. Twelve haul trucks were operated in the Leeville Mine in 2010. Tr. 195. Descutner worked as a haul truck driver for Crew 4 between January and February 2010 and between May and June 2010. He rotated 12 hour shifts from 7a.m. to 7p.m. Tr. 35. During March and April 2010, Descutner briefly left Crew 4 to work at the wash bay where he cleaned haul trucks and other equipment. Tr. 45.

PROGRESSIVE DISCIPLINE POLICY

Under Newmont's written progressive discipline policy, Newmont has the right to issue an adverse employment action for repeated offenses of misconduct or poor performance, as long as such offenses occur within a year of the adverse employment action. Resp't. Ex. 27, Tr. 31, Tr. 433. Under the policy, first offenses are punished by a written warning, and repeated offenses are punished by suspension for unspecified periods and eventually termination. The policy does not specify when repeated offenses will be punished by termination, *i.e.,* whether three offenses by an employee within a year will result in a suspension or termination. Resp't. Ex. 27. Newmont and Descutner interpret the policy differently. Newmont alleges that under the policy, a third offense by an employee within a year is punished by termination. Tr. 440, 464. With regard to Descutner, Newmont contends that the first offense in a relevant time span occurred in February 2010 (inadequate work performance), and the second and third offenses occurred on June 3, 2010 (property damage and insubordination). Tr. 440, 464. Descutner alleges that under the policy, a third offense by an employee within a year is punished by a three day suspension. Tr. 31-32.

The policy also states that even if an employee has not received prior discipline, he can be terminated at any time when the seriousness of the offense requires termination. Resp't. Ex. 27. The policy lists numerous examples of offenses warranting discipline including sleeping on company time, improper or inadequate job performance, violation of health or safety rules and regulations, carelessness, damage to the property of the company, insubordination, and use of profane language to another person. Resp't. Ex. 27.

PRIOR DAMAGE TO COMPANY PROPERTY IN AUGUST 2007

While Descutner was at Newmont's Deep Post mine in 2007, he was disciplined on three different occasions for causing damage to Newmont's property. Tr. 23-30. Since these incidents occurred in 2007, they did not occur within a year of his termination on June 9, 2010, and are irrelevant under Newmont policy for calculating progressive discipline for the June 3, 2010 incident. Tr. 31, Tr. 433. However, these incidents in 2007 are relevant as an indicator of the level of discipline Newmont previously handed down to Descutner for damage to company property. On August 2, 2007, Descutner drove his haul truck into a retaining wall knocking it down. As a result he received a written warning. Tr. 23-25. On August 8, 2007, Descutner's haul truck became stuck underground damaging Newmont property. As a result he received a three day suspension. Tr. 26. On August 30, 2007, Descutner drove away from a fuel bay with the wiggins still attached to his haul truck. [5] This mishap caused a fuel spill that damaged Newmont property. As a result, Descutner received a five day suspension. Tr. 28-29.

INADEQUATE WORK PERFORMANCE IN FEBRUARY 2010

In February 2010 Descutner was given a three day disciplinary layoff. Tr. 41-42. This layoff was based on an incident on February 6, 2010, where Friesen alleged that Descutner slept in his truck. On that day, Friesen concluded that Descutner was sleeping since Descutner had not answered his radio, and since Friesen saw Descutner resting his head on the steering wheel of his truck. However, Friesen admitted that he did not specifically call for Descutner to respond on the radio instead generally calling for truck drivers to respond, and that Descutner opened his truck door before Friesen arrived at his truck. Tr. 252-253. Descutner denied that he was sleeping and instead claimed that he had simply laid his head down to rest a kink in his neck. Descutner testified as follows:

> I had a kink in my neck. I put my head on the steering wheel to kind of rest it because I have a head lamp on and a hat … I then had my eyes open, I was listening to the radio. I saw some lights coming around my [truck] bed. I lifted up my head, looked at the door. They saw me lift my head and said I was sleeping, and that's what I was written up for.
>
> Tr. 42.

He appealed the discipline which resulted in a reduction to a one day suspension for inadequate job performance. Tr. 41-43.

[5] A wiggins is a type of fuel nozzle. It connects the diesel fuel hose to the haul truck. Tr. 28.

FIRST 2010 SAFETY COMPLAINT

Between January and February 2010 Descutner, who was driving a haul truck, reported a safety concern to the loader operator under whom he was working regarding an open ground safety hazard. Descutner testified as follows:

> We were being loaded at a heading, and I noticed some open ground over where we were getting loaded. And open ground would be like where there's . . . bolts and there's steel mesh, steel strung, steel fence that protects the falling rock. I went to the loader operator . . . He made a call and Gus [Friesen] showed up. Inspected the heading with the loader operator. Then the loader operator came back and said he felt . . . that it was okay to go ahead and keep loading there.

Tr. 40-41.

Descutner alleges that following this incident, he altered his working route to avoid the open unsafe ground, and his new working route resulted in lower production numbers. Tr. 41.

SECOND 2010 SAFETY COMPLAINT

After the allegation of sleeping in February 2010 Descutner requested and was granted a transfer to the wash-bay. Tr. 44-45. While working at the wash-bay between March and April 2010 Descutner reported directly to Friesen a safety concern regarding an open ground hazard at the wash bay. Tr. 46-47. Descutner testified that at the end of a shift in the wash bay, he noticed "two or three feet of open ground that was dropping rocks about 15 feet or so to where miners walked." Tr. 46. Descutner admitted that after he reported this condition to Friesen, Friesen took care of the problem. Tr. 47, 140. Friesen testified that he was not upset with Descutner for bringing this situation to his attention, and that the problem did not take long to fix. Tr. 193.

THIRD 2010 SAFETY COMPLAINT

Between May and June 2, 2010, Friesen held a meeting with Crew 4 regarding start-up and shut-down times. Descutner alleged he made a safety complaint to Friesen after this meeting. Tr. 200-201. During the meeting, Friesen stated certain miners were not getting enough loads done each day since some haul truck drivers were arriving at their headings later than others. Friesen testified as follows:

> [P]art of the purpose of dispatch is to record the number of tons and number of feet of development coming out of different areas in the mine. So we'll typically ask dispatch to track start-up times for the equipment . . . and shut-down times . . . So we can just keep an eye [on] when the [equipment is started] and when the equipment

> is shutting down. [T]ypically the problem of either late start-ups or early shut-downs is what we're trying to address.
> So we asked dispatch to . . . track the previous three or four shifts of when the start-up times and when the shut-down times were, and we noticed the start-up times were . . . gradually getting longer and longer than they probably should have been, and the shut-down times, is typically your biggest problem, because it's the end of shift. Guys are wanting to get home, so they'll park their truck early to get to the shaft station early . . . And if those times are getting a little farther away than we think they should, then yeah, we'll address the crew and let them know . . . we want them to work the whole shift.

Tr. 201-202.

In response to a question regarding what he meant when he said that start-up was longer than it should be, Friesen testified:

> So typical pre-inspections on haul trucks would take anywhere from 15 to 20, 25 minutes. If there's any issues, like . . . the batteries would go dead, trucks wouldn't start . . . but . . . those issues are typically called in to dispatch to let us know that here's an issue. Here's why . . . our start-up times are long.

Tr. 202.

After this meeting, Descutner testified that he approached Friesen and told him that the truck drivers who were arriving earlier at their headings than other drivers were probably able to do so because they were not following proper pre-shift inspection procedures. Tr. 57-58. Descutner testified as follows:

> I explained to [Friesen] that a lot of times when you're doing your pre-shift inspection and you're doing it right by the Company rules, that it takes a little bit of time. And that he should probably look a little bit more towards the guys that are getting there so early, as they're not probably doing their inspection properly . . . [Friesen] didn't have much to say. He pretty much said that I should probably just . . . worry about . . . myself.

Tr. 58.

Friesen denied that this conversation occurred. Tr. 204, 206.[6] In response to a question asking whether Descutner had ever raised the issue of pre-shift exams to him, Friesen testified "To my memory, he never raised it." Friesen implied that because cutting short pre-shift exams was a serious matter, he would have recalled this discussion if it had occurred. Tr. 206. Friesen also stated that if Descutner had told him some drivers were failing to do proper pre-shift inspections, he would have acted upon it. He stated:

> Like I [said], it's . . . addressed . . . in safety meetings . . . Doing proper heading inspections and proper equipment inspections . . . they go hand in hand. It's just important to maintain safety to the operators as well as everyone else around them, right? And if that was a concern of certain individuals, we'd audit them. We have mobile leadmen throughout the mine, and there's three underground shifters, foremen, salaried foremen for operations alone, that we can audit processes and do inspections . . . to make sure that inspection process is done correctly.

Tr. 204-205.

2010 SAFETY-RELATED INCIDENT

On or around June 2, 2010, Descutner was notified that his haul truck was leaking hydraulic fluid and so he took his truck to the lube bay for further inspection. Tr. 59-60. While he was at the lube bay, Friesen approached Descutner about the number of loads Descutner had hauled that night. Upon hearing that Descutner had completed a low number of loads, Friesen responded by stating that such a small number of loads was "ridiculous" for that time of night. Tr. 60.

DAMAGE TO COMPANY PROPERTY ON JUNE 3, 2010

On June 3, 2010, Descutner, while operating a haul truck, backed into a lay-down and ran over some roof bolts lying on the ground. As Friesen passed by, he saw Descutner's truck in the lay-down. Friesen stopped his vehicle, got out and walked to Descutner's truck. Friesen asked Descutner to get out of the truck. Once Descutner exited the truck, Friesen "asked him . . . if he knew he was parked on the top of supplies in the lay-down, and he indicated he didn't know." Tr. 165. Friesen then informed Descutner that the event qualified as a reportable incident and therefore, both a statement and a drug and alcohol test would be necessary. Tr. 166. At some point during the conversation, Descutner began cursing. Friesen testified that:

[6] Foreman Thayne Church may have been present at the pre-shift meeting. However, Church could not remember if he was present and testified that he could not rule out the possibility that the conversation between Friesen and Descutner occurred. Tr. 409-410.

> When I indicated that he'd have to fill out a statement, do a drug and alcohol exam, and report it as an incident, he . . . became angry at [me]. He began cussing at me. He said that I was f***** up, and he said that I wasn't doing my job. He said that he thought I was here to look out for the miners, and to help . . . the working man out, but [he said that] I was just one of the good ol boys. He said that the nipper operator should have gotten in trouble.[7] It was bull**** that he was getting in trouble because the nipper operator didn't do his job by putting the bolts on the ground in that [lay-down].[8]

Tr. 166.

Friesen and Descutner then walked to Friesen's tractor. While they were waiting at Friesen's tractor to go above ground for the drug and alcohol test, Friesen asked Descutner if he had inspected the lay-down before backing into it. Tr. 169. Descutner told him that he had opened his door and shined his cap lamp from the operator's seat into the lay-down. Tr. 63, 112-113. While they were talking, Jordan Duke, another member of Crew 4, came to borrow a flashlight from Friesen. Tr. 278. While Duke did not hear all the words being said, he concluded from Descutner's gestures and body language that Descutner was aggravated. Tr. 288.

Descutner and Friesen then proceeded to the shaft station on Friesen's tractor. Once they arrived on the surface, Descutner took a drug and alcohol test in the presence of Friesen and another foreman, James Wild. The test came back negative. Tr. 174. Friesen then telephoned the general foreman for production, Thayne Church, and informed him of the incident. Friesen and Church decided that Descutner would remain on the surface and fill out a statement, and then he would be suspended pending the company's investigation of the incident. Tr. 173-175. Friesen then conducted the initial investigation of the incident, obtaining statements from himself, Descutner, Wild, and Duke, and taking photographs and measurements of the lay-down at issue. Tr. 175-176. Newmont alleges that Friesen did not make any recommendation to Church regarding the level of discipline Descutner should receive. Tr. 188. However, Friesen conceded that he told Church that he believed Descutner should receive some type of discipline. Tr. 244.

INSUBORDINATION ON JUNE 3, 2010

As stated above, after allegedly damaging the roof bolts on June 3, 2010, Descutner became involved in a heated discussion with Friesen. Descutner admitted that he cursed during this conversation, but alleges that he swore generally (*i.e.* "the situation's f***** up"). Tr. 115.

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[7] A nipper operator drives a flat-bed truck that hauls material from the shaft station to the lay-down areas that are located throughout the mine. The nipper operator is responsible for placing material in the lay-downs. Tr. 167.

[8] Descutner maintained that the nipper operator should have leaned the roof bolts against the rib, not put them on the mine floor. Tr. 64.

He denies swearing at Friesen (*i.e.* "you're f***** up"). Tr. 115. Descutner also alleges that he swore only after being provoked by Friesen. Descutner claims Friesen over-reacted by yelling at him for endangering people's lives. Descutner testified,"I do remember . . . I was on some bolts – and I admitted that, but all of a sudden the accusations started to getting to where I could have killed somebody." Tr. 67.

Friesen stated that Descutner swore at him directly, telling him that he, Friesen, was "f***** up." Tr. 166. Friesen testified that while underground miners have used profanity in conversations with him before, Descutner's profanity was different since it was targeted at Friesen. Friesen stated, "Profanity is used . . . not really directed to anybody. [W]hat was different [about Descutner's profanity] is it was directed at me. It wasn't about a situation, it was directed at myself." Tr. 190.

DUE DILIGENCE MEETING AND TERMINATION

Descutner then attended a due diligence meeting on June 7, 2010. Tr. 426-427, Resp't. Ex. 24. According to Church, a due diligence meeting is when "we meet with the employee, and his representative if he has one, and we'll sit down and go through his statement and go back through the incident. See . . . anything else come of it." Tr. 377. Thayne Church (the general foreman for production), Dennis Zimmerman (the Human Resources representative) and some other supervisors represented management at this meeting. Tr. 425-426, 429.

On June 9, 2010, during a meeting with Church, Zimmerman and another supervisor, Descutner was informed that he was being terminated. Tr. 438-439. Gus Friesen was not present at either the due diligence meeting or the termination meeting. Tr. 425-426, 438-439. Zimmerman testified that Descutner was terminated under the progressive discipline policy for damage to company property and insubordination. Tr. 418. Church testified that the termination decision was heavily based on the statements of various witnesses, photographs, and diagrams of the lay-down, all of which were compiled by Friesen. Tr. 374-376, 381-382. Church specifically testified that he did not independently interview any other witnesses to the incident, thus confirming his heavy reliance on the witness statements collected by Friesen during his investigation. Tr. 390.

Church also stated that he believed Descutner had been insubordinate to Friesen partially because of Descutner's attitude at the due diligence meeting. Church testified, "You couldn't get a straight answer. It was a pretty rough interview." Tr. 382. Descutner countered by stating that he felt the management representatives treated him aggressively since "they'd ask me a question, I'd answer it, and their next question would accuse me again." Descutner alleges that he learnt for the first time that he was being accused of insubordination at the due diligence meeting. Tr. 78-79.

THE LAW

In order to establish a prima facie case of discrimination under §105(c)(1) of the Mine Act, a miner must demonstrate by a preponderance of the evidence "(1) that [the miner] engaged in a protected activity, and (2) that the adverse action of which the miner complains was motivated in any part by the protected activity." *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.,* 2 FMSHRC 2786, 2799-2800 (Oct. 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981). Under §105(c)(1) safety complaints are specifically mentioned as activity that warrants protection. 30 U.S.C. §820(c)(1). Generally, an adverse action is an act or omission by the operator that subjects the affected miner to a detriment in his employment relationship or to discipline. *Sec'y of Labor on behalf of Jenkins v. Hecla-Day Mines Corp.*, 6 FMSHRC 1842, 1847-1848 (Aug. 1984). Adverse actions include discharge, suspension, demotion, coercive interrogation and harassment over the exercise of protected rights. *Moses v. Whitley Dev. Corp.,* 4 FMSHRC 1475, 1478 (Aug. 1982), *aff'd,* 770 F.2d 168 (6th Cir. 1985).

The Commission has noted that "direct evidence of motivation is rarely encountered; more typically, the only available evidence is indirect." *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981), *rev. on other grounds sub nom. Donovan v. Phelps Dodge Corp.,* 709 F.2d 86 (D.C. Cir. 1983). Circumstantial evidence may include: (1) coincidence in time between the protected activity and the adverse action, (2) knowledge of protected activity, (3) hostility or animus toward the protected activity, and (4) disparate treatment. *Chacon*, 3 FMSHRC at 2510. The more hostility or animus is specifically directed toward the protected activity, the more probative it is of discriminatory intent. *Id.*

Once the complainant has established a prima facie case of discrimination "[t]he operator may attempt to rebut [the] prima facie case by showing either that the complainant did not engage in protected activity or that the adverse action was in no part motivated by protected activity." *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 825 n.20 (Apr. 1981). The operator may also affirmatively defend by proving by a preponderance of the evidence that he was motivated by both the miner's protected and unprotected activities and would have taken the adverse action for the unprotected activity alone. *Robinette*, 3 FMSHRC at 818.

For the reasons that follow, I find that Descutner has successfully established a prima facie case of discrimination, and that Newmont has failed to either rebut the prima facie case or prove an affirmative defense to the discrimination complaint. Therefore, I grant Descutner's complaint and find that he is entitled to relief.

COMPLAINANT'S PRIMA FACIE CASE

PROTECTED ACTIVITY

The parties agree that the first two safety complaints made by Descutner in 2010 constitute protected activity under the Mine Act, but disagree regarding Friesen's reaction to these safety complaints. The first safety complaint concerned Descutner reporting an open ground hazard to a loader operator between January and February 2010. Tr. 40-41. The second safety complaint concerned Descutner reporting an open ground hazard in the wash bay to Friesen between March and April 2010. Tr. 46-47.

The parties unequivocally disagree regarding the occurrence of the third safety complaint. As previously noted, Descutner claims that between May and June 2010 he told Friesen that some of the haul truck drivers were failing to conduct proper pre-shift inspections. Descutner testified that Friesen was displeased and told him to mind his own business. Tr. 57-58. Friesen testified that this conversation never occurred, and if Descutner had brought such a safety complaint to him, he would have immediately responded to the complaint since pre-shift inspections are a serious matter.[9] Tr. 204.

The Commission has held that "credibility determinations reside in the province of the administrative law judge's discretion, are subject to review only for abuse of that discretion, and cannot be overturned lightly" *Dynamic Energy, Inc.*, 32 FMSHRC 1168 (Sept. 2010). Whether the conversation occurred depends on whether one believes Friesen or Descutner regarding this matter. I believe that the conversation occurred.[10] I have come to this conclusion because I find

[9] Newmont also argues that this conversation never occurred because Descutner admitted that neither Friesen nor any other supervisor ever promoted unsafe activity such as skipping pre-shift inspections in order for truck drivers to arrive earlier at their headings. Tr. 138-139. However, I find that this admission by Descutner fails to prove that the conversation between him and Friesen did not occur since while a supervisor may not explicitly espouse unsafe activity, he still may implicitly ignore safety violations and be displeased when they are brought to his attention.

[10] A side issue is whether Descutner directly talked to other truck drivers about their failure to conduct proper pre-shift inspections. Descutner claims that he talked to at least two other drivers, Patrick Cary and Jason Watkins, about their failure to conduct proper pre-shift inspections, and talked to several other drivers about safety issues. Tr. 130-136. Newmont alleges that Descutner never talked to other drivers about their failure to conduct proper pre-shift inspections. Resp't. Br. 18. If Newmont's allegation were true, Descutner's credibility would be impeached. The testimony of Cary, however, reveals that while he does not remember talking to Descutner about pre-shift inspections, he can not rule out the possibility that such a conversation occurred. Tr. 355. And Watkins, while he did not recall Descutner talking to him about pre-shift inspections, testified that Descutner did talk to him about other safety issues such as travel speeds of trucks. Tr. 362. Despite Newmont's allegations, I find that the testimony of Cary and Watkins did not impeach Descutner's credibility regarding his conversation with Friesen.

Friesen less credible than Descutner after Friesen's credibility was directly impeached during trial on a separate material issue.

In an earlier statement e-mailed by Friesen to Thayne Church on June 6, 2010 (three days after the incident), Friesen stated that he got out of his tractor, started walking to Descutner's truck to ask him why he was parked in a lay-down, and only while walking did he notice that the truck was parked over some roof bolts. Resp't. Ex. 20. In essence, Friesen decided to confront Descutner before noticing that the truck was parked over the bolts. In the earlier e-mail Friesen stated that:

> As I drove by the Lay-Down I noticed haul truck #55 (driven by Todd Discutner) parked in the Lay-Down. I parked my tractor and I approached the operator's door to ask the operator why he was parked in the Lay Down. I then noticed that the haul truck had run over an entire bundle of … bolts and was still parked on top of the bolts.

Resp't. Ex. 20.

However, during the trial on June 5, 2012, Friesen stated that he saw that Descutner's truck was parked over some bolts while he drove past the truck, and then decided to walk to Descutner's truck. Tr. 270-273. In essence, Friesen decided to confront Descutner after noticing the truck was parked over bolts. Friesen maintained this position, even after being shown the contradiction between his earlier e-mail and his later testimony. Tr. 270-273. In regard to his earlier e-mail Friesen testified "Yeah . . . this [earlier e-mail] would be incorrect. I did see him on top of the bolts when I approached . . . yeah, it doesn't . . . say that here [referring to earlier e-mail]." Tr. 273.

These two statements concern a material fact- whether Friesen bore animus towards Descutner, possibly due to Descutner's protected activities. When two statements given by a witness on a material issue are inconsistent, the witness is impeached and his credibility is damaged. Under the earlier statement (e-mailed to Church on June 6, 2010), since Friesen decided to confront Descutner before noticing the damage to company property, such property damage could not have been Friesen's reason for confronting Descutner. Resp't. Ex. 20. The e-mail further indicated that Friesen's reason for walking to Descutner's truck was to scold him for backing into a lay-down. Resp't. Ex. 20. However, backing into a lay-down is accepted practice, as conceded by Friesen who testified that it was not against Newmont policy to park in a lay-down, and as attested to by Duke, another of Newmont's witnesses. Tr. 272, 311. Therefore, if Friesen intended to confront Descutner about an accepted practice, a reasonable implication is that Friesen unjustifiably intended to harass Descutner, which suggests that Friesen bore animus towards Descutner.

Under the later statement (given during trial on June 5, 2012), since Friesen decided to confront Descutner after noticing the damage to company property, such property damage could have been Friesen's reason for confronting Descutner Tr. 273. Damage to company property, unlike backing into a lay-down, is a legitimate reason for a supervisor to confront an employee, and does not suggest animus. Resp't. Ex. 27. Friesen's impeachment on a material fact severely damages his credibility especially since he continued to adhere to the later statement given at trial, two years after the incident, instead of the earlier statement, given three days after the incident. Therefore, I choose to believe Descutner over Friesen on the issue of whether the conversation regarding pre-shift inspection procedures occurred.

The safety-related incident raised by Descutner concerns his allegation that Friesen was hostile to him on around June 2, 2010, when he pulled into the lube bay to repair a leakage in his truck. Tr. 59-60. Descutner testified that Friesen asked him how many loads he had dumped that day. After Descutner stated his number of loads, Friesen expressed displeasure at the low number of loads. Descutner alleges that his number of loads was low due to the leakage. Tr. 59-60. Newmont does not address this allegation.

Given the above, I find that Descutner engaged in protected activity between January and February 2010 when he reported an open ground hazard to a loader operator, between March and April 2010 when he reported an open ground hazard to Friesen, between May and June 2010 when he conversed with Friesen about pre-shift inspections, and in June 2010 when he sought to repaid a leakage in his truck. Given this finding, I must consider whether the adverse action he suffered (termination) was motivated by any of his protected activity.

ADVERSE ACTION MOTIVATED BY PROTECTED ACTIVITY

Since there is no direct evidence of discriminatory intent, I must assess whether there is circumstantial evidence suggesting Newmont discriminatorily terminated Descutner due to his protected activities. Circumstantial evidence may include close temporal proximity between the protected activity and the adverse action, the operator's knowledge of the employee's protected activity, the operator's animus towards the employee's protected activity, and disparate treatment by the operator. *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981), *rev. on other grounds sub nom. Donovan v. Phelps Dodge Corp.,* 709 F.2d 86 (D.C. Cir. 1983). Descutner alleges that he was terminated due to Friesen's hostility towards three safety complaints and one safety-related incident, all of which occurred in 2010. While I conclude that the first two safety complaints and the safety-related incident fail to suggest discriminatory intent, I reach the opposite conclusion with regard to the third safety complaint.

First Safety Complaint of 2010

The first safety complaint occurred between January and February 2010 when Descutner complained to a loader operator about an open ground safety hazard. Tr. 40-41. In *Chacon,* the Commission held that an adverse action which occurred one and a half months after the protected activity is sufficiently coincidental, when combined with the other indicia of knowledge and animus, to support a finding of discriminatory motive. *Id*. In the case at bar, the

safety complaint occurred at the latest in February 2010, four months prior to Descutner's termination on June 9, 2010. Tr. 40-41. It is unclear as to whether an adverse action that occurred four months after the protected activity is sufficiently coincidental to the protected activity. However, this issue need not be resolved since there is no evidence of animus towards Descutner because of his first safety complaint.

Regarding the first safety complaint, Newmont had knowledge of the protected activity because Descutner complained to a loader operator who repeated the complaint to Friesen. However, there is no evidence of animus towards Descutner due to the first safety complaint. Following the complaint, Descutner did not immediately suffer any adverse action. Tr. 40-41. In addition, the individual whom Descutner alleges bore animus towards him due to his protected activities and was instrumental in his termination, Gus Friesen, did not interact directly with Descutner at the time. Tr. 40-41. Instead, the loader operator served as an intermediary who reported the complaint to Friesen who then inspected the area. There is also no evidence that Friesen was even aware that it was Descutner who initially raised the issue. Tr. 40-41. Thus, there is no evidence to support a finding of animus towards Descutner due to the first complaint.

Second Safety Complaint of 2010

The second safety complaint occurred between March and April 2010 when Descutner complained directly to Friesen about an open ground safety hazard in the wash bay. The complaint occurred at the latest in April 2010, two months prior to Descutner's termination. Tr. 46-48. However, as with the first safety complaint, I find that the issue of temporal proximity need not be decided since the other indicia of causation are not met. While Friesen had knowledge of the protected activity since the complaint was made to him directly, there is no evidence that he was upset about the complaint. At trial, Friesen testified that he was not upset, and that the problem was quickly fixed. Tr. 193. Descutner also testified that Friesen merely told him to stay out of the dangerous area for the rest of the day. Tr. 48. Descutner did testify that Friesen seemed irritated, but I conclude that this testimony is too tenuous to support a finding of animus towards Descutner due to the second safety complaint. Tr. 47-48.

Third Safety Complaint of 2010

The third safety complaint occurred between May and June 2010, when Descutner told Friesen that some of the truck drivers were reaching their headings earlier because they were failing to conduct proper pre-shift inspections. Tr. 57-58. I have determined that this incident occurred despite Friesen's denials. The complaint occurred at the earliest in May 2010, about a month prior to Descutner's termination, but may have even occurred in June 2010, a week before his termination.[11] Tr. 57-58. As stated above, an adverse action which occurs one and a half months after the protected activity is sufficiently coincidental in time to support a finding of a

[11] It is unclear whether Descutner made this complaint in May or June 2010. Descutner testified that the meeting was held in May. Tr. 57. However, Friesen testified that the meeting was held in June. Tr. 200. In his brief, Descutner refers to the incident as occurring between May and June. Compl. Br. 6. Therefore, due to the uncertainty regarding the timing, I have held that the complaint occurred between May and June.

discriminatory motive. *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981), *rev. on other grounds sub nom.* The Commission has also held that a discharge approximately two weeks after the protected activity is sufficiently coincidental in time to support a finding of a discriminatory motive. *Secretary of Labor on behalf of Clay Baier v. Durango Gravel*, 21 FMSHRC 953 (Sept. 1999). Therefore, since this conversation took place at most only a month prior to the termination, there was a close temporal proximity between Descutner's third safety complaint and his termination.

Moreover, the operator had knowledge of the protected activity through Gus Friesen, Descutner's immediate supervisor, who heard Descutner's safety complaint. Tr. 57-58. I recognize that Newmont alleges that the decision-makers who terminated Descutner (Church, Zimmerman, and other supervisors not including Friesen) lacked knowledge of Descutner's protected activity. Tr. 386-387. I also recognize that Friesen, the only supervisor who had knowledge of Descutner's protected activity, failed to participate in either the due diligence meeting or the termination meeting. Tr. 425-426, 438-439. However, the Commission has previously held that "an operator may not escape responsibility by pleading ignorance due to the division of company personnel functions." *Secretary of Labor v. Metric Constructors,* 6 FMSHRC 226 (Feb. 1984).

In the case at bar, Friesen, who had knowledge of Descutner's protected activity, himself reported both violations of property damage and insubordination on June 3, 2010, and none of the decision-makers had independent knowledge of either violation. Tr. 173-175. In addition, Church and Zimmerman relied heavily on Friesen's initial investigation. Church testified that he relied exclusively on statements of different witnesses collected by Friesen, and did not seek to independently interview any witnesses. Tr. 390. Church and Zimmerman also believed Friesen over Descutner on the issue of whether Descutner had sworn generally or at Friesen. Tr. 475-476. Church and Zimmerman's heavy reliance on the reports by Friesen, who had knowledge of Descutner's protected activity, precludes Newmont from disclaiming knowledge of Descutner's protected activity.

There is also evidence that Newmont, through Friesen, bore animus towards Descutner due to his protected activity. Descutner credibly testified that after the conversation with Friesen regarding the failure of some truck drivers to do proper pre-shift inspections, rather than address the complaint, Friesen told him to mind his own business. Thus, I conclude that Friesen held animus towards Descutner due to his protected activity. Tr. 57-58.

Therefore, with regard to the third safety complaint of 2010, the close temporal proximity of the protected activity to the adverse action, the operator's knowledge of protected activity, and the operator's animus towards protected activity suggest a causal link between Descutner's protected activity and his termination. While there is no evidence of disparate treatment (other employees receiving lesser punishment for the same or more serious misconduct), the Commission has previously held that evidence of disparate treatment is not necessary to prove a prima facie claim of discrimination when the other indicia of discriminatory intent are present. *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981). For these reasons, I hold that Descutner has successfully proved a prima facie case of discriminatory termination.

Safety-Related Incident of 2010

The safety-related issue occurred around June 2, 2010, when Descutner pulled into the lube bay to repair a leakage in his truck. Tr. 59-60. Since this issue occurred on around June 2, 2010, it is very close in time to Descutner's termination. Descutner testified that Friesen responded angrily after hearing the low number of loads Descutner had hauled that day. However, there is no evidence that Friesen was upset that Descutner was fixing a safety issue on his truck. Tr. 59-50. Descutner's testimony simply demonstrates that Friesen was angry at Descutner for completing a low number of loads, not that Friesen demanded that Descutner work in an unsafe truck. Tr. 59-60. Friesen could have been unhappy that Descutner completed a low number of loads prior to the leakage, or he could have simply not heard Descutner's explanation that the leakage in his truck was the reason he was unable to complete many loads. Either way, I conclude that the record is insufficient to support Descutner's allegation that Friesen demonstrated animus towards his protected activity of fixing a safety issue in his truck. Tr. 59-60.

RESPONDENT'S REBUTTAL AND AFFIRMATIVE DEFENSE

REBUTTAL

Descutner has successfully proved a prima facie case of discrimination based on protected activity. Newmont has failed to rebut Descutner's prima facie case by proving there was no protected activity, or that Descutner's termination was not at all motivated by his protected activity. Therefore, I now consider whether Newmont has provided enough evidence to constitute an affirmative defense.

AFFIRMATIVE DEFENSE

To establish an affirmative defense, Newmont must prove that despite Descutner's termination being motivated in part by protected activity, Descutner would nonetheless have been terminated for his unprotected activity alone. The Commission has explained that an affirmative defense should not be "examined superficially or be approved automatically once offered." *Haro v. Magma Copper Co.*, 4 FMSHRC 1935, 1938 (Nov. 1982). In reviewing affirmative defenses, the judge must "determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed." *Bradley v. Belva Coal Co.*, 4 FMSHRC 982, 993 (June 1982). The Commission has held that "pretext may be found . . .where the asserted justification is weak, implausible, or out of line with the operator's normal business practices." *Sec'y of Labor on behalf of Price v. Jim Walter Res., Inc.,* 12 FMSHRC 1521, 1534 (Aug. 1990). However, the Commission has also held that "our judges should not substitute for the operator's business judgment our views of "good" business practice." *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981)

In *Jayson Turner v. National Cement Company of California*, 33 FMSHRC 1059 (May 2011), the Commission listed ways in which the complainant may show that the operator's affirmative defense is not credible. First, the complainant may establish that the operator's

proffered reasons have no basis in fact, *i.e.* are factually false. Second, the complainant may show that the proffered reasons did not actually motivate the discharge, *i.e.* the complainant admits the factual basis underlying the employer's proffered reasons, and that such conduct could motivate dismissal, but attacks the credibility of the proffered reasons indirectly by showing circumstance which tend to prove that an illegal motivation was more likely than the legitimate business reasons proffered by the employer. Third, the complainant may show that the employer's proffered reasons were insufficient to motivate termination *i.e.* other employees were not terminated even though they engaged in substantially similar conduct which was the basis of the complainant's termination. The first and third approaches directly attack the credibility of the employer's proffered motivation, while the second approach indirectly attacks the credibility of the employer's proffered motivation. *Id.*

Here Descutner seeks to use the first and second *Turner* approaches to prove pretext.[12] *Jayson Turner v. National Cement Company of California*, 33 FMSHRC 1059 (May 2011). Newmont alleges that it terminated Descutner for three reasons- damage to company property and insubordination on June 3, 2010, and the progressive discipline policy. Tr. 418. Under the first *Turner* approach Descutner seeks to show that one of Newmont's reasons for terminating him was factually false, specifically the allegation of insubordination.[13] Tr. 115. Under the second *Turner* approach, Descutner seeks to show that even assuming he had committed insubordination, the sheer weight of circumstantial evidence makes it more likely than not that the employer's reasons for dismissal are pre-textual. *Id.* Since I hold that Descutner succeeds in proving pretext under the first *Turner* approach, I need not reach the issue of whether Descutner would also succeed in proving pretext under the second *Turner* approach. However, for the sake of clarification, I have briefly discussed how I would rule on Descutner's attempt to use the second *Turner* approach.

First *Turner* Approach

The testimony of Zimmerman, Newmont's HR representative, indicates that the three grounds for termination were cumulative rather than alternative and independent. Zimmerman does not suggest that any of the three grounds, by itself, would be sufficient to credibly warrant termination.[14] Under *Secretary of Labor on behalf of Lawrence L. Pendley v. Highland Mining*

[12] Descutner does not seek to use the third *Turner* approach since he failed to introduce evidence that other employees were not terminated even though they engaged in substantially similar conduct.

[13] Descutner concedes that he should have received some type of discipline for damaging company property on June 3, 2010 (but disputes that he should have been terminated). Tr. 110. He also concedes that he had received prior discipline for an offense in February 2010, which was considered by Newmont in determining his progressive discipline. Tr. 42.

[14] Newmont repeatedly emphasized at trial that Descutner was terminated for three reasons - property damage, insubordination, and the progressive discipline policy. At trial,
(continued…)

Company, 2012 WL 4026647 (Aug. 2012)*,* when the reasons proffered by the operator are cumulative and the judge disbelieves one of the reasons, the judge can not hold that the other reasons are sufficient by themselves to support the adverse action. I hold below that I disbelieve one of Newmont's proffered reasons for Descutner's termination and find that it is not credible (allegation of insubordination). Therefore, I find that Newmont's justification in its entirety is not credible, and that Newmont has failed to prove an affirmative defense.

In the case at bar, the official policy prohibited all profanity, (Resp't. Ex. 27) but while general profanity was implicitly tolerated, profanity towards a supervisor was not tolerated.[15] Descutner admits that he cursed during his conversation with Friesen on June 3, 2010 but argues that he swore generally (*i.e.,* "the situation's f***** up"). Tr. 115. Friesen testified that Descutner swore at him, telling him that he, Friesen, was "f***** up." Tr. 166. I hold that Descutner's version of the cursing incident is more credible. Since this is a close issue, I find it probative that Friesen's credibility has been impeached on a separate material issue. As detailed earlier, Friesen at trial directly contradicted an earlier statement he had made in an e-mail to Church. Resp't Ex. 20.

In addition, I find it probative that Descutner, after being accused of inadequate work performance in February 2010, requested and was granted a transfer to the wash bay by March 2010. Tr. 45. Descutner's un-contradicted testimony was as follows, "I felt that, after they accused me of sleeping, and then . . . accused me of being inadequate in my job, that I was putting myself in a lot of harm's way if I kept that job [haul truck driver]. So I just asked them if I could get a job [in the wash bay] because it was a lot less exposure." Tr. 45. The fact that Descutner requested a transfer between February and March 2010 indicates that Descutner was apprehensive of Friesen. This apprehension was probably heightened by Friesen's reaction to Descutner's safety complaint between May and June 2010 regarding pre-shift inspections. Tr. 57-58. After he made this complaint to Friesen, Descutner credibly testified that Friesen told

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[14] (…continued)
Zimmerman listed only these three reasons for Descutner's termination. Tr. 418. Zimmerman testified that he told Descutner that he was being terminated for these three reasons. Tr. 440-441. Zimmerman also testified that he listed the reasons for Descutner's termination as insubordination and property damage in an internal document. Resp't. Ex. 11, Tr. 441-442. Finally, Zimmerman stated that the reason Descutner was terminated was, "Because of where he was at in his progressive discipline, which was a one-day suspension . . . and then the fact that there were two other violations here. One was damage to Company property, and the second was the insubordinate conduct towards his supervisor" Tr. 464. The repeated statements by Zimmerman, Newmont's HR representative, establish two facts. First, they establish that failure to conduct a proper lay-down inspection was not a ground for Descutner's termination. Second, they establish that Zimmerman, and by extension Newmont, viewed the grounds for termination as cumulative rather than independent since they repeatedly stressed that Descutner was terminated for three reasons.

[15] Friesen testified that this was the first time an underground miner had sworn at him as opposed to swearing generally during a conversation. Tr. 190. Two other employees of Newmont also indicated that swearing at a supervisor is inappropriate. Tr. 332, 344.

him to mind his own business. Tr. 57-58. Since Descutner could have predicted he would be terminated if he cursed at a supervisor whom he believed was hostile towards him, I find it unlikely that Descutner would have sworn directly at Friesen. Instead, I find it more probable that Descutner swore generally by stating that "the situation's f***** up." And since such cursing would fall under general profanity, which is implicitly tolerated at Newmont, I find that Descutner was not insubordinate to Friesen.

I fail to find probative the choice of Church, the general foreman, and Zimmerman, the HR representative, to believe Friesen's version of the cursing incident over Descutner's. Tr. 382, 476. Church and Zimmerman claim that they believed Friesen's version over Descutner's based on a history of working through other situations with Descutner, such as prior grievance hearings, and on Descutner's argumentative approach at the due diligence meeting. Tr. 382, 476. Descutner alleges that management representatives at the due diligence meeting treated him aggressively and unfairly and refused to accept his explanations for the incidents on June 3, 2010. Tr. 78-79. Since there is no indication as to which party's version of the events that occurred at the due diligence meeting is accurate, the probative value of Zimmerman's testimony regarding the due diligence meeting is minimal.

Second *Turner* Approach

Under the second *Turner* approach, Descutner may use circumstantial evidence to prove that the legitimate business reasons proffered by the employer were a pretext for illegal discrimination. *Jayson Turner v. National Cement Company of California*, 33 FMSHRC 1059 (May 2011). In *Bradley v. Belva Coal Co.,* 4 FMSHRC 982 (June 1982), the Commission listed four factors that can be used to determine whether an affirmative defense is credible, and would have motivated the operator as claimed. The first is whether the miner had an unsatisfactory past work record.[16] The second is whether there was a policy forbidding the conduct in question. The third is whether the miner was given prior warnings for the same conduct. The fourth is whether there was past discipline consistent with that meted out to the alleged discriminatee. *Id.* In *Cooley v. Ottawa Silica,* 6 FMSHRC 516 (March 1984), the Commission adapted the *Bradley* factors to situations involving profanity, which resulted in three *Cooley* factors. The first is whether there was an official policy against swearing at a supervisor. The second is whether the complainant was previously warned about swearing at a supervisor. The third is how other miners were previously punished for swearing. *Id.*

After applying the *Bradley* factors to the three grounds for termination in the case at bar, I find that these three grounds, when combined, would not have credibly motivated Descutner's termination. *Bradley v. Belva Coal Co.,* 4 FMSHRC 982 (June 1982). First, regarding property damage, there was a clear policy against damaging company property and Descutner had received prior warnings and discipline for damaging Newmont's property in 2007. Resp't. Ex. 27), Tr. 24-30. However, Descutner's 2007 incidents suggest that property damage is not

[16] Since Newmont failed at trial to allege that Descutner had an unsatisfactory past work record or that Descutner was terminated due to his unsatisfactory past work record, I conclude that the first factor is not applicable. However, as will be seen below, the other three factors do apply to the case at bar.

weighed heavily in a termination decision. In August 2007, Descutner drove his truck into a retaining wall that was knocked down, became stuck underground in his truck, and caused a fuel spill when he drove away from a fuel bay with the wiggins nozzle still attached. Tr. 24-30. These three instances of property damage in a single month resulted in a written warning, a three day suspension, and a five day suspension respectively. Tr. 24-30. This indicates that even repeated instances of arguably more serious property damage generally result in a suspension. Therefore, I find that while property damage was a ground for termination, it was not weighed heavily in Descutner's termination decision.

Second, regarding insubordination (which is analyzed under the *Cooley* factors), while Newmont policy prohibited profanity at a supervisor, there is no evidence that Descutner had ever received prior warnings for cursing or other insubordination. *Cooley v. Ottawa Silica,* 6 FMSHRC 516 (March 1984). In addition, the lack of evidence of other employees who were terminated in part for cursing suggests that cursing is not weighed heavily in a termination decision. Zimmerman testified that two employees were previously terminated for cursing, but he failed to provide any details regarding these miners' situations such as their past disciplinary record, work history or the nature of their alleged offenses. Tr. 450-451. Zimmerman also conceded that he lacked personal knowledge regarding at least one of these two terminations, instead relying solely on scant notes prepared by another individual. Tr. 451. Therefore, I find that while insubordination was a ground for termination, it was not weighed heavily in Descutner's termination decision.

Third, regarding the progressive discipline policy, the evidence suggests that Newmont lacked a clear policy specifying that three offenses by an employee within a year of the adverse action would result in termination. Under Newmont's progressive discipline policy, first offenses are punished by a written warning and repeated offenses are punished by suspension for unspecified periods and eventually termination. Resp't. Ex. 27. The policy is ambiguous as to the number of repeated similar offenses that will result in termination stating as follows: "initial discipline for most offenses will normally be a written warning, followed by suspension and finally discharge for recurrence of the same or similar offenses." *Id.* Under the policy, it is unclear whether an initial suspension will immediately be followed by termination, or whether an initial suspension will be followed by increasingly longer periods of suspension, and then eventually termination. This indicates that the progressive discipline policy is not weighed heavily in a termination decision predicated on three offenses.

Moreover, there is no evidence that Descutner had previously been warned that committing three offenses within a year could lead to his termination. At trial, Zimmerman testified that his understanding of the policy was that first offenses are punished by a written warning, second offenses are punished by suspension, and third offenses are punished by termination. Tr. 440, 464. Since in the case at bar Descutner committed three offenses within a year, under Zimmerman's interpretation of the policy, termination is clearly warranted. Tr. 464. However, Newmont failed to introduce evidence that Descutner had previously been warned that employees could be terminated for committing three offenses within a year. Instead, under Descutner's understanding of the progressive discipline policy, first offenses are usually punished by a written warning, second offenses are usually punished by a one day suspension, third offenses are usually punished by a three day suspension, fourth offenses are usually

punished by a five day suspension, and fifth offenses are punished by termination. Tr. 31-32. Descutner's understanding was based on his prior discipline for three separate and fairly serious instances of property damage in August 2007. Tr. 23-30. The third instance of property damage in that month merely resulted in a five day suspension, even though all three instances of property damage are arguably more serious than the property damage at bar. Tr. 29.

Finally, Newmont has failed to offer any evidence of another employee who was terminated for committing three offenses within a year. Such evidence, if it exists, would have been damaging for Descutner, and the fact that Newmont failed to offer such evidence suggests that it does not exist, *i.e.* that there is no instance of an employee being terminated for committing three offenses within a year. Therefore, I find that while progressive discipline was a ground for termination, it was not weighed heavily in Descutner's termination decision.

All of the above leads me to hold that Newmont has failed to credibly demonstrate that even in the absence of protected activity, it would have terminated Descutner for his unprotected activity.

PROVOCATION

The issue of whether Descutner was provoked will not be reached. In complainant's brief, Descutner argues that even if he swore at Friesen (instead of swearing generally), his cursing was provoked by Friesen's overreaction to backing into a lay-down and damaging company property. Compl. Br. 25. Descutner testified that Friesen overreacted by telling him he was endangering lives and could have killed someone. Tr. 67. Friesen did not admit nor deny telling Descutner he could have killed someone.

The Commission has previously held than an employee's swearing may be excused and not be considered a ground for termination when the employee was provoked. *Secretary of Labor, on behalf of Leonard Bernardyn v. Reading Anthracite,* 22 FMSHRC 298 (March 2000). In *Reading Anthracite,* the Commission cited a case, *NLRB v. Steinerfilm*, 669 F.2d 845 (1st Cir. 1982), where the employee's swearing was found to be excusable when it was in reaction to an unjustified warning. *Id.* However, the case at bar presents a more complex issue. Since Descutner admits he damaged company property and some discipline was warranted, he does not dispute that some level of scolding was warranted. Instead, he argues that the level of scolding (specifically the statement by Friesen that Descutner could have killed someone) was unwarranted. Since I have found that Newmont has failed to prove an affirmative defense, the issue of whether an overreaction to damage of company property constitutes sufficient provocation for swearing need not be decided.

CONCLUSION

I find that Descutner has successfully made out a prima facie case of discrimination under § 105(c)(3) of the Mine Act. I also find that Newmont has failed to either rebut Descutner's prima facie case, or establish any affirmative defense to Descutner's discrimination claim. Therefore, Descutner is entitled to relief.

DAMAGES

Pursuant to the statutory relief provided at 30 C.F.R. § 815(c), Descutner is entitled to "rehiring or reinstatement" to his former position of haul truck driver at Newmont's Leeville Mine.

DUTY TO MITIGATE

The Mine Act provides that a miner who has been discharged is required to mitigate his damages by making reasonable efforts to find employment. *Sec. of Labor v. Gabel Stone Co.,* 23 FMSHRC 1222 (2001), *aff'd Gabel Stone Co. v. FMSHRC,* 307 F.3d 691 (8th Cir. 2002). A discharged worker's efforts at reemployment, however, are not to be judged by the "highest standard of diligence." *Id*. Failure to mitigate damages is an affirmative defense. *Id.* At trial, Descutner credibly described his good faith efforts to mitigate his damages. Three months after his discharge, Descutner secured employment as a car salesman in September 2010, in which capacity he has since been employed. Tr. 105. Newmont failed to present any evidence alleging that Descutner did not use good faith efforts to mitigate his damages. [17]

[17] In *Secretary of Labor on behalf of McClain v. Misty Mountain Mining,* 28 FMSHRC 303 (June 2006), the Commission distinguished a complainant's failure to accept an offer of reinstatement, from a complainant's failure to seek temporary reinstatement. In the former situation, a complainant fails to mitigate his damages. Therefore, he is not entitled to reinstatement and his accumulation of back-pay is tolled starting from the date the operator made the reinstatement offer. In the latter situation, however, a complainant does not fail to mitigate his damages since the Commission has held that he is not required, under the Mine Act, to seek temporary reinstatement. *Secretary of Labor on behalf of Dunmire & Estle v. Northern Coal Co.,* 4 FMSHRC 126 (Feb. 1982). Therefore, in the latter situation, the complainant is entitled to reinstatement, and his accumulation of back-pay is not tolled. In the case at bar, Descutner clearly falls into the latter situation. Descutner was never offered reinstatement by Newmont. However, Descutner had previously informed an MSHA investigator that he did not seek temporary reinstatement, though he sought permanent reinstatement in his discrimination complaint to MSHA. Tr. 144-146, 153. Under *Dunmire & Estle,* since Descutner was not required to seek temporary reinstatement as long as he otherwise mitigated his damages by finding alternative employment, Descutner is entitled to the full amount of back-pay. *Id.*

OTHER DAMAGES

§ 105 (c)(3) provides that when a discrimination complainant's claim is granted, the Administrative Law Judge may grant "such relief as it deems appropriate."

Given the above findings that Descutner was discharged for unlawful discriminatory reasons, Newmont is ordered to expunge and/or purge any negative personnel file references regarding Descutner's discrimination complaint. Newmont is further ordered to post a notice at the Leeville Mine that it will not violate § 105(c)(1) of the Act.

BACK PAY AND INTEREST

Pursuant to § 105(c)(3), I find that as further relief Descutner is entitled to "back pay and interest" since June 9, 2010. I further find that Newmont is entitled to deduct Descutner's interim net wages received from other employment since June 9, 2010 from the gross pay that Descutner would have otherwise received from Newmont.

The parties did not reach the issue of the actual gross amount that Descutner would have received from Newmont since June 9, 2010. While an Administrative Law Judge has broad discretion in fashioning an appropriate remedy so as to make the discriminatee "whole," the record is insufficient as to the issue of Descutner's outstanding gross pay since June 9, 2010. I therefore retain jurisdiction of this matter for purpose of establishing the amount of monetary damages, including back-pay and interest, owed to Descutner.

If the parties cannot reach an agreement as to such, I shall hold further proceedings, including an evidentiary hearing, if necessary, to determine an appropriate remedial amount.

ORDER

It is hereby ordered that Todd Descutner's discrimination claim under §§ 105(c)(3) is granted.

It is ordered that Todd Descutner be reinstated by Newmont to his former position of haul truck driver at Newmont's Leeville Mine with full pay and benefits.

It is ordered that Newmont expunge from its personnel and company records any reference to Todd Descutner's termination on June 9, 2010, the circumstances surrounding his termination, and his discrimination action.

It is ordered that Newmont post a notice at its Leeville Mine that it will not violate § 105(c)(3) of the Mine Act.

I find that Todd Descutner has met his duty to mitigate damages. Because the record is insufficient as to the gross pay that Descutner would have earned from Newmont since his

discriminatory termination on June 9, 2010, I will maintain jurisdiction of this matter for the purpose of establishing the actual amount of monetary damages, including back pay and interest, for which Newmont is now liable. With reference to back pay and interest, Newmont is entitled to deduct the actual net interim earnings received by Descutner from other employers since June 9, 2010. With reference to other specific relief, Descutner is also entitled to all costs and expenses (including attorney's fees) that he has reasonably incurred.

Counsels are **ORDERED** to confer within 30 days of the date of this decision for the purpose of arriving at a settlement of the specific actions and monetary amounts that Newmont will undertake to carry out the remedies and relief set out above. If an agreement cannot be reached, the parties are **FURTHER ORDERED** to submit their respective positions, concerning those issues on which they cannot agree, with supporting arguments, case citations and references to the record, within 30 days of the date of this decision. For those areas involving monetary damages and relief on which the parties disagree, they shall submit specific proposed dollar amounts for each category of relief. If a further hearing is required on the remedial aspects of this case the parties should so state.

I will retain jurisdiction in this matter until the specific remedies Mr. Descutner is entitled to are resolved and finalized. Accordingly, this decision will not become final until an order granting specific relief and awarding monetary damages has been entered. Finally, pursuant to 29 C.F.R. § 2700.44(b), the Office of the Solicitor of the U.S. Department of Labor has been added to the distribution list of this decision.

/s/ David F. Barbour
David F. Barbour
Administrative Law Judge

Distribution: (Certified Mail)

Larson A. Welsh, Attorney at Law, Cogburn Law Office, 2879 St. Rose Parkway, Suite 200, Henderson, Nevada 89052

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Jay Mattos, Director, MSHA, Office of Assessments, U.S. Department of Labor, 1100 Wilson Blvd., 25th Floor, Arlington, VA 22209

ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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TELEPHONE: 202-434-9958 / FAX: 202-434-9949

October 15, 2012

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	: : : :	CIVIL PENALTY PROCEEDING Docket No. CENT 2011-49-M A.C. No. 34-00353-233829
v.	:	
BONHAM CONCRETE, INC., Respondent	: :	Mine: Hope Sand & Gravel

ORDER GRANTING PETITIONER'S REQUEST FOR SUBPOENA DUCES TECUM

Before: Judge McCarthy

This case is before me upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). On October 5, 2012, a conference call was held between the parties and the undersigned to discuss the status of settlement negotiations and to schedule a hearing date for the above-captioned case. During the call, the Secretary requested that a subpoena duces tecum be issued to Respondent's accountant, Steve Mohundro, for the purpose of obtaining documents relating to Respondent's alleged inability to pay the propose penalty of $23,857. The Secretary has requested that Mohundro produce the following documents:

1. complete copies of federal tax returns for Bonham Concrete, Inc. and its subsidiaries, from 2007 to present, including all schedules, worksheets, and forms;

2. copies of all audited or unaudited financial reports or statements for Bonham Concrete, Inc. and its subsidiaries from 2007 to the present;

3. copies of documents provided by Bonham Concrete, Inc. and its subsidiaries, for the purpose of preparing tax returns from 2007 to the present;

4. copies of documents provided by Bonham Concrete, Inc. and its subsidiaries, that reflect sales made and income from sales from 2007 to the present. This request specifically includes, but is not limited to, sales of products sold and the sale of any subsidiary of Bonham Concrete (and any of its assets);

5. copies of documents provided by Bonham Concrete, Inc. and its subsidiaries, that reflect or identify assets owned by Bonham Concrete, including, but not limited to, cash, notes, accounts receivable, securities, inventories, items of ownership convertible into cash, goodwill, fixtures, machinery, and/or real estate;

6. copies of documents provided by Bonham Concrete, Inc. and its subsidiaries that reflect any debts, accounts receivables or accounts payables;

7. copies of documents provided by Bonham Concrete, Inc. and its subsidiaries, indicating that Bonham Concrete, Inc. and its subsidiaries secured for any type of loan or financing during the past five years;

8. copies of corporate books and minutes for Bonham Concrete, Inc. and its subsidiaries from 2007 to the present;

9. copies of any bills of sales, sales agreements, and/or documents related to any sale of Bonham Concrete Inc. and its subsidiaries; and

10. copies of any bills of sales, sales agreements, and/or documents related to the sale of any entity, land or tangible or intangible property owned by Bonham Concrete, Inc. and its subsidiaries.

Commission Rule 2700.60(a) specifically authorizes an ALJ to issue a subpoena for the production of physical evidence on his own motion or on the oral or written application of a party. Rule 60(a) places no limit on the types of parties (i.e. individuals, parties, non-parties, etc.) to which a subpoena may be issued. Further, Federal Rule of Procedure 34(c), explicitly allows for the issuance of a subpoena to a non-party for the production of "documents and tangible things." The Commission's procedural rules provide that on questions of procedure not regulated by the Act, the Commission's Rules, or the Administrative Procedure Act, 5 U.S.C. § 551 *et seq*., the Commission and its Judges shall be guided buy the Federal Rules of Civil Procedure so far as "practicable." 29 C.F.R. § 2700.1(b).

Accordingly, the Secretary's motion is **GRANTED**. A subpoena will be issued under separate cover to be served on Mr. Mohundro by the Secretary.

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

Distribution:

Lauren McDougal, Esq., Office of the Solicitor, U.S. Department of Labor, 1999 Broadway, Suite 800, Denver, CO 80202-5710

Gerald Hope, Bonham Concrete, Inc., 805 W. Sam Rayburn Drive, Bonham, TX 75418

/tjr

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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October 15, 2012

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	: : : :	CIVIL PENALTY PROCEEDING Docket No. VA 2012-397 A.C. No. 44-06864-286093-01
v.	:	
DICKENSON-RUSSELL COAL COMPANY, LLC, Respondent	: : :	Mine: Cherokee Mine

ORDER REJECTING SETTLEMENT MOTION

Before: Judge McCarthy

This case is before me upon a Petition for Assessment of Civil Penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). The Secretary has filed a motion pursuant to Commission Rule 31, 29 C.F.R. § 2700.31, seeking approval of the proposed settlement.[1] The Solicitor has requested that Citation No. 8190957 be modified to delete the significant and substantial designation[2] and to reduce the proposed penalty from $971.00 to $500.00.

[1] Section 110(k) of the Mine Act states that: "no proposed penalty which has been contested before the Commission under section 815(a) of this title shall be compromised, mitigated, or settled except with the approval of the Commission." 30 U.S.C. § 820(k).

[2] The Secretary does not request that the gravity or likelihood be modified, but requests that the S&S designation be removed. As such, the citation would remain reasonably likely to cause an injury resulting in lost workdays or restricted duties. The Secretary provides no reasoning as to why the proposed modification does not comport with well-established Commission precedent that would require a corresponding reduction in the likelihood that the hazard contributed to will result in an injury or the seriousness of injury reasonably likely to occur. *See Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984) (establishing that a finding of S&S requires: (1) that the underlying violation of a mandatory safety standard; (2) that the violation contributed to a discrete safety hazard (3) that it is reasonably likely that the hazard contributed to will result in an injury; and (4) that it is reasonably likely that the injury in question will be of a reasonably serious nature).

The motion submitted by the Solicitor, however, fails to predicate the modifications upon any factual support. Commission Rule 31(b)(1), 29 C.F.R. § 2700.31(b)(1), mandates that for each violation, the "motion to approve a penalty settlement" must include "facts in support of the penalty agreed to by the parties." The Commission has long held that "settlements are committed to the 'sound discretion' of the Commission and its judges" and that judges are not "bound to endorse all proposed settlements." *See*, *e.g.*, *Madison Branch Management*, 17 FMSHRC 859, 864 (June 1995) (*quoting Knox County Stone Co.*, 3 FMSHRC 2478, 2480 (November 1981)). In the exercise of such discretion, judges must be provided with enough facts to make a reasonably informed decision.[3]

The Arlington Solicitor's Office has long been on notice of the Commission's requirements regarding the necessity of providing a factual basis for each and every settlement. Yet despite clear instruction from both the undersigned and the Commission, the Secretary has chosen to remain intransigent and has wasted the limited resources of Commission ALJs by periodically refusing to comply with Rule 31(b)(1). *See Rock N Roll Coal Co.*, 34 FMSHRC 319 (Jan. 2012) (ALJ) (Order Denying Petitioner's Motion for Reconsideration of Order Rejecting Settlement); *Black Beauty Coal Company*, 34 FMSHRC ___, slip op. (LAKE 2008-327, LAKE 2008-590, & LAKE 2009-2240) (Aug. 20, 2012) (unanimously finding that Commission judges are authorized to require parties to submit factual support necessary for the proper review of proposed settlements of contested civil penalties).

Most recently, in a civil penalty proceeding before Judge Rae, Docket No. WEVA 2010-1585, the Secretary's representative at the Arlington Solicitor's Office similarly refused to provide a factual basis for the modification of the single citation at issue. Following a conference call in which Judge Rae ordered the Secretary to file an amended settlement, the Secretary acquiesced and provided an amended settlement in accordance with the judge's request. The Secretary, however, maintained in her proposed settlement order:

> It is the Secretary's position that although Section 110(i) and (k) of the Mine Act require the Commission and its administrative law judges to review and approve the penalty aspects of settlements, substantive modifications to citations and orders are within the prosecutorial and enforcement discretion of the Secretary. The Secretary is voluntarily providing additional information in support of her

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[3] In the Motion to Approve Settlement, the Secretary states that she has "considered the criteria set forth at Section 110(i) of the Act and has determined that the agreed upon penalty is appropriate in light of these criteria and promotes the purposes of the Act." Section 110(i), however, expressly grants the Commission the exclusive authority to access all civil penalties under the Act. It is the therefore the Commission, not the Secretary, that is tasked with weighing the criteria set forth in Section 110(i) in light of record evidence, and assessing an appropriate penalty.

> Motion to Approve Settlement in this case at the request of the administrative law judge, but preserves her right to argue in other cases that neither the Act nor applicable legal principles related to the enforcement authority of a government agency require such information to be provided.

Proposed Consent Order Approving Settlement at 2, *Double Bonus Coal Co.*, Unpublished Decision Approving Settlement (Oct. 2, 2012).

Judge Rae and I are not alone in having to needlessly exhaust the resources of the Commission to address this ongoing problem. The Secretary may not continue to act in blatant disregard of the Mine Act, Commission Rules, and previous orders unless an appeals court overturns the well-established principles set forth in the Commission's *Black Beauty* decision. To continue to do so may serve as grounds for referring the Secretary's representatives to the Commission for disciplinary proceedings.[4]

In this case, the Settlement Motion fails to provide the required information, inasmuch as no facts have been provided in support of the S&S modification proposed to justify the penalty reduction agreed to by the parties. Therefore, the Motion to Approve Settlement is **REJECTED**. Pursuant to Commission Rule 51, 29 C.F.R. § 2700.51 a hearing is scheduled for November 15, 2012 under separate cover.

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

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Cameron S. Bell, Esq., Penn Stuart, P.O. Box 2288, Abingdon, VA 24212

/tjr

[4] Under Commission Rule 80, a judge may refer any individual practicing before the Commission for disciplinary proceedings on the grounds that such person "has failed to comply with [the Commission's] rules or an order of the Commission or its Judges."

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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October 17, 2012

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. VA 2012-227 A.C. No. 44-07220-000278305
v.	:	
DOMINION COAL CORPORATION, Respondent	:	Mine: Mine No. 44

ORDER REJECTING SETTLEMENT MOTION AND NOTICE OF HEARING

Before: Judge Rae

This case is before me upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). The Secretary filed a motion pursuant to Commission Rule 31, 29 C.F.R. § 2700.31, seeking approval of the proposed settlement.[1] The Solicitor has requested that Citation No. 8194686 be modified to reduce the type of injury that could reasonably be expected to occur to "permanently disabling," and reduce the penalty from $1,111.00 to $777.70.

The motion submitted by the Solicitor, however, fails to predicate the modifications upon any factual support. Commission Rule 31(b)(1), 29 C.F.R. § 2700.31(b)(1), mandates that the motion to approve settlement must include "facts in support of the penalty agreed to by the parties" for each violation. The Arlington Solicitor's Office has been on notice of the Commission's clear instructions to provide a factual basis for each and every settlement. *Black Beauty Coal Company*, 34 FMSHRC ___, slip op. (LAKE 2008-327, LAKE 2008-590, & LAKE 2009-2240) (Aug. 20, 2012) (unanimously finding that Commission judges are authorized to require parties to submit factual support necessary for the proper review of proposed settlements of contested civil penalties). The Secretary may not continue to act in blatant disregard of the Mine Act, Commission Rules, and previous orders unless an appeals court overturns the well-established principles set forth in the Commission's *Black Beauty* decision.

The settlement documents were filed on October 3, 2012. Immediately thereafter, the solicitor was sent an email informing him that a revised Motion and Order were needed

[1] Section 110(k) of the Mine Act states that: "no proposed penalty which has been contested before the Commission under Section 815(a) of this title shall be compromised, mitigated, or settled except with the approval of the Commission." 30 C.F.R. § 820(k).

including a factual basis for the modifications. No revision has been received.[2] The Secretary is acting in direct contravention of my Order as well as recently issued Commission decisions and obstructing the judge's authority and responsibility to enforce the intent and purpose of the Mine Act.

Therefore, the Motion to Approve Settlement is **REJECTED** and the parties are **ORDERED** to appear for a hearing on the merits of the case on November 8, 2012.

NOTICE OF HEARING/
NOTICE OF HEARING SITE

In accordance with Section 105(d) of the Federal Mine Safety and Health Act of 1977, the "Act," 30 U.S.C. §§ 801, et seq., this case is set for hearing on November 8, 2012, commencing at 8:30a.m. The location is:

Southwest Virginia Higher Education Center
One Partnership Circle
Abingdon, VA 24210
Conference Room 228

The hearing will be conducted in accordance with the Mine Act and the Commission's Procedural Rules addressing the subject, as set forth at 29 C.F.R. Part 2700, Subpart G. The issues to be resolved are whether the Respondent violated the Act and the cited regulatory standards, and if so, the level of gravity and degree of negligence of those violations which are proved, as well as the appropriate civil penalty to be imposed.

The parties are reminded to comply with the terms of my Prehearing Order previously issued. It is further ordered that any party intending to offer exhibits at the hearing shall submit, five (5) days prior to the commencement of the hearing, a marked copy of all exhibits to the opposing party and the judge. The Secretary's exhibits shall be designated "S-#" and Respondent's exhibits shall

[2] As set forth in Judge McCarthy's recent Order rejecting settlement, the Arlington Office has repeatedly submitted settlement documents lacking any factual information. In a recent revised Order and Motion submitted in Docket No. WEVA 2010-1585, pursuant to my Order to submit the factual basis for the proposed settlement, the Solicitor included in his Order the following: "The Secretary is voluntarily providing additional information in support of her Motion to Approve Settlement in this case at the request of the administrative law judge, but preserves her right to argue in other cases that neither the Act nor the applicable legal principles require such information to be provided." It is clear from this course of conduct that the solicitors involved in these matters have no intention of following the rulings of this Commission, the orders of its Administrative Law Judges.

be designated “R-#." Exhibits shall be clearly marked and numbered seriatim. If opposing counsel has an objection to the admission of any exhibit, they shall state the grounds for the objection in writing and submit it to the judge and opposing counsel at least three (3) days prior to the commencement of the hearing.

A list of witnesses (including experts) and a statement as to their expected testimony (and copy of any report prepared by an expert) shall also be exchanged by the parties with a copy submitted to the judge five (5) business days prior to the commencement of the hearing.

Any stipulations agreed upon by the parties shall be submitted to the judge three (3) days prior to the commencement of the hearing.

Any person planning on attending the hearing who requires special accessibility features and/or any auxiliary aids (such as sign language interpreters) must request those sufficiently in advance of the hearing to allow accommodation, subject to the limitations set forth in 29 C.F.R. §2706.150(a) and § 2706.160(d).

If a settlement is reached after November 5, 2012, the parties are directed to appear at the hearing. In the event of a settlement reached before this date, the Secretary is directed to contact my law clerk, Maggie Palmer, at 202-233-4015 or at mpalmer@fmshrc.gov immediately. Unless a written Order is issued upon my direction removing the matter from the docket, the parties are directed to appear at the time and place designated for hearing.

No continuances will be granted.
If you have any questions or concerns, please contact Ms. Palmer.

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

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