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COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 21, 2016

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. ICG ILLINOIS, LLC	Docket No. LAKE 2013-160

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

DECISION

BY: Jordan, Chairman; Young, and Cohen, Commissioners

This proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act" or "Act"). It involves a single citation issued to ICG Illinois, LLC ("ICG") by the Department of Labor's Mine Safety and Health Administration ("MSHA"). The citation alleges that a refuge alternative at ICG's Viper Mine was located 1,110 feet from the nearest working face, in violation of 30 C.F.R. § 75.1506(c)(1).[1] The Judge concluded that a violation had occurred, was significant and substantial ("S&S"), and was the result of moderate negligence.[2] 37 FMSHRC 19, 25-27 (Jan. 2015) (ALJ). The only issue remaining before the Commission is the S&S designation. For the reasons below, we affirm the Judge.

[1] 30 C.F.R. § 75.1506(c)(1) provides in relevant part that "[r]efuge alternatives shall be provided . . . within 1,000 feet from the nearest working face." Refuge alternatives, also called refuge chambers, are "[p]refabricated self-contained units" with "structural, breathable air, air monitoring, and harmful gas removal components." 30 C.F.R. § 75.1506(a)(1).

[2] 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).

I.

Factual and Procedural Background

On September 18, 2012, MSHA Inspector Dennis Baum traveled to ICG's Viper Mine to conduct a spot inspection for methane liberation.[3] At the time, the mine was on a 10-day spot inspection cycle, due to methane liberation of more than 500,000 cubic feet in a 24-hour period.[4] While looking through the mine's examination books, the inspector noticed a report from the previous day indicating that the refuge alternative in the Main West primary escapeway needed to be moved closer to the working face. The issue was not mentioned in the pre-shift examination report for the day of the inspection, so he warned ICG's safety and compliance foreman that a citation would be issued if the refuge alternative was still too far from the face.

Meanwhile, ICG's production supervisor, Gabriel Alderman, had headed underground for his shift. When he arrived on the section, the section foreman informed him that the refuge alternative had to be moved closer to the face. Alderman asked a scoop operator to begin preparing the new area for the relocation. Such preparations included scooping the crosscut, laying down floor dust, and moving signs and lifelines. The inspector and the safety and compliance foreman later traveled down to the refuge alternative, which had not yet been moved, and found that it was 1,110-1,125 feet from the closest working face, 110-125 feet farther than the allowable maximum pursuant to 30 C.F.R. § 75.1506(c)(1). Accordingly, Baum issued Citation No. 8443225. He concluded that the violation was reasonably likely to result in fatalities and designated the citation as S&S.

The fact of the violation was not contested. 37 FMSHRC at 23. The Judge concluded that the violation was S&S, based on an analysis of the steps outlined in *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984). He found that the violation contributed to the hazard of miners being unable to reach the refuge in the event of an emergency, because the extra distance "would result in additional and possibly critical delays accessing the chamber." 37 FMSHRC at 25-26. He noted the mine's history of methane and ignition issues, and the presence of possible ignition sources due to equipment working near the face. He stated that these conditions contributed to the likelihood of an ignition or explosion, which would cause poor visibility and disorientation. He found a reasonable likelihood of fatal injury for the 17 miners on the section. *Id*.

The Judge rejected ICG's contention that the Secretary failed to take the particular facts surrounding the violation into account. In making this claim, ICG pointed to the inspector's testimony that he would find every violation of the cited standard at this mine to be S&S. Tr. 46-47. The Judge stated that the inspector had limited this testimony to violations "at this mine," and also noted the mine's history of ignition and methane problems and the presence of working

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[3] Inspector Baum began working for MSHA in 2007. Prior to this, he had thirty years of experience in underground mines, during which time he ran nearly all types of equipment and conducted examinations. 37 FMSHRC at 23 n.2; Tr. 15-16.

[4] Pursuant to section 103(i) of the Act, any mine that liberates more than 500,000 cubic feet of methane during a 24-hour period is required to have an MSHA inspector inspect the mine "every 10 working days at irregular intervals." 30 U.S.C. § 813(i).

equipment near the face. 37 FMSHRC at 26. The Judge also rejected ICG's claim that the presence of self-contained self-rescuers ("SCSRs") mitigated the gravity. He noted the inspector's testimony that refuge alternatives are only meant for use in extreme situations where escape is impossible, and stated that SCSRs provide only a limited amount of air, do not protect against burns or falling rock, and "could not ensure that disoriented miners would be able to reach a refuge alternative located more than 100 feet beyond the distance they are trained to travel in emergencies." *Id.*

II.

Disposition

The Commission has recognized that a violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *See Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In *Mathies Coal Co.*, 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.

6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); *accord Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria). In conducting the *Mathies* analysis, the focus now generally centers on the interplay between the second and third steps. *Newtown Energy Inc.*, __ FMSHRC __ , slip op. at 5, No. WEVA 2011-283 (Aug. 29, 2016).

The second step of *Mathies* addresses the contribution of the violation to a discrete safety hazard, i.e., the extent to which the violation increases the likelihood of occurrence of the particular hazard against which the mandatory standard is directed. *Newtown*, slip op. at 5, *citing Knox Creek Coal Corp.*, 811 F.3d 148, 162-63 (4th Cir. 2016) (citing *Black Beauty Coal Co.,* 34 FMSHRC 1733, 1741 n. 12 (Aug. 2012)). At this stage, it is essential that the Judge adequately define the particular hazard to which the violation allegedly contributes. A clear description of the hazard at issue provides context when determining the relative likelihood that the violation contributes to a hazard, and will also frame the potential source of injury for purposes of determining gravity in the third step of *Mathies*. The starting point for determining the hazard is the regulation cited by MSHA; the "hazard," for purposes of the *Mathies* analysis, is the danger which the cited safety standard is intended to prevent. *Newtown*, slip op. at 6.

Having clearly defined the hazard, the next task in analyzing the second step of *Mathies* is for the Judge to determine whether the Secretary has proven that the violation contributed to that hazard. That means the second step requires a determination of whether, based upon the

particular facts surrounding the violation, there exists a reasonable likelihood of the occurrence of the hazard against which the mandatory safety standard is directed. *Id.* We recognize that "reasonable likelihood" is not an exact standard measured in percentages, but rather a matter of degree, an evaluation of risk with a particular focus on the facts and circumstances presented.[5] *Id.* at 7.

At this stage, the focus shifts from the violation to the hazard. The third and fourth steps are primarily concerned with gravity, i.e., whether the hazard identified in step two would be reasonably likely to result in serious injury. *See Cumberland Coal Res., LP*, 33 FMSHRC 2357, 2364-66 (Oct. 2011) (citing *Musser Eng'g, Inc. & PBS Coals, Inc.*, 32 FMSHRC 1257, 1281 (Oct. 2010); *Knox Creek*, 811 F.3d at 162. If the Judge concludes, based upon the evidence, that the violation sufficiently contributes to the hazard identified at step two, the Judge then assumes such occurrence and determines at step three whether, based upon the particular facts surrounding the violation, the occurrence of that hazard would be reasonably likely to result in an injury. At step four, the Judge determines whether any resultant injury would be reasonably likely to be reasonably serious.

Whether a particular violation is S&S must be determined "based on the particular facts surrounding the violation, including the nature of the mine involved." *Texasgulf Inc.*, 10 FMSHRC 498, 501 (Apr. 1988). Additionally, the Commission has recognized that emergency standards "are different from other mine safety standards," as they are "intended to apply meaningfully only when an emergency actually occurs." *Cumberland*, 33 FMSHRC at 2367, *aff'd*, 717 F.3d 1020 (D.C. Cir. 2013). Accordingly, when determining whether a violation of an emergency standard is S&S, the violation should be considered in the context of the emergency contemplated by the standard. *Spartan Mining Co.*, 35 FMSHRC 3505, 3508-09 (Dec. 2013). Specifically, the existence of a contemplated emergency should be assumed when defining the hazard contributed to by the violation. *See Cumberland*, 33 FMSHRC at 2364, 2368; *Mill Branch Coal Corp.*, 37 FMSHRC 1383, 1394 (July 2015). The likelihood that the emergency will actually occur is irrelevant to the *Mathies* inquiry. *Black Beauty Coal Co.*, 36 FMSHRC 1121, 1124 (May 2014), *citing Cumberland*, 717 F.3d at 1027. Thus, contrary to ICG's concerns, the inspector was correct to assume a "disaster" or "worst case scenario" when making his S&S determination. Tr. 31-33, 54-55.

However, assuming the existence of an emergency is not the same as assuming that the violation is S&S; emergency standard violations are not per se S&S. As the Commission has made clear, the particular facts surrounding the violation must be considered. Not every violation of an emergency standard is automatically an S&S violation. *Cumberland*, 33 FMSHRC at 2368-69.

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[5] Chairman Jordan and Commissioner Cohen would hold that a violation sufficiently "contributes" if it is at least somewhat likely to result in, or could result in, a safety hazard. *Newtown*, slip op. at 20 (Jordan and Cohen, concurring and dissenting in part), *citing Knox Creek*, 811 F.3d at 162, 163 (the Secretary establishes a "contribution" for the purposes of the second step of *Mathies* when he shows that the violation is "at least somewhat likely to result in harm"); *see also* 30 U.S.C. § 814(d)(1) ("such violation is of such nature as *could* significantly and substantially contribute to the cause and effect of a . . . safety or health hazard") (emphasis added). They conclude that the outcome of this case is the same under either standard.

Refuge alternatives provide a "last resort for miners unable to evacuate the mine during an emergency." 73 Fed. Reg. 80656-01, 80681 (Dec. 2008); Tr. 26-27, 92-93. The inspector testified that emergencies requiring the use of a refuge would include roof falls, bad air, ignitions, or explosions. Tr. 26-27. Refuges increase the likelihood of survival in an "inhospitable post-emergency environment" by providing breathable air, water, food and communications. 73 Fed. Reg. at 80681. As for the specific requirement that refuges be located within 1,000 feet of the working face, the preamble to the final rule notes the "inability of miners on the working section to travel over 1,000 feet through smoke and debris to reach the refuge alternative, especially if injured or exhausted." *Id*. at 80684. The standard at issue is intended to apply in the context of an emergency so severe as to make evacuation impossible, survival outside the refuge unlikely, and travel extremely difficult in the face of smoke, debris, and possible injury.

Accordingly, the S&S analysis under *Mathies* in an emergency context must assume the existence of the emergency because the legislative or regulatory process that developed the standard assumed those conditions would be present at some point and directed that mines prepare for their occurrence. *See Cumberland Coal*, 717 F.3d at 1027-28; *Spartan Mining*, 35 FMSHRC at 3508-09. The questions before the Judge in making his S&S determination were whether, in the context of the type of emergency described above, and based on the particular facts surrounding the violation, the additional distance sufficiently contributed to a discrete safety hazard and whether that hazard was reasonably likely to result in an injury of a reasonably serious nature. The Judge found in the affirmative.[6]

Prior to applying the record facts in this case to the four-step *Mathies* test, we note that we must use the substantial evidence standard of review to evaluate the Judge's factual findings underlying his S&S determination. "Substantial evidence" means "'such relevant evidence as a reasonable mind might accept as adequate to support [the Judge's] conclusion.'" *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Substantial evidence has been found to be more than a scintilla, but less than preponderance. *Dynamic Energy, Inc.*, 32 FMSHRC 1168, 1173 (Sept. 2010) (citing *Richardson v. Perales*, 402 U.S. 389, 401 (1971)); *Consolidated Edison*, 305 U.S. at 2290 (the substantial evidence standard was met where the record was not "wholly barren of evidence" to sustain the Judge's finding). [7]

The Judge properly considered this violation in the context of the kind of emergency contemplated by the standard requiring the presence of an emergency chamber. The Judge found that the violation contributed to a hazard because the added distance would cause "additional and

[6] ICG only explicitly challenges the Judge's findings as to the likelihood and severity of injury. However, because ICG's arguments generally address whether the *additional distance* (the violation) created a danger, we find it appropriate to address the second step of the *Mathies* analysis as well.

[7] As we discuss the separate opinion of our dissenting colleague, we are mindful of the D.C. Circuit's apt characterization of our substantial evidence standard as a "sensibly deferential standard of review" that respects the reasonable conclusions of the trier of fact. *Keystone Coal Mining Corp.*, 151 F.3d 1096, 1105 (D.C. Cir. 1998).

possibly critical delays" in miners reaching the refuge chamber in the event of an emergency such as an explosion, ignition or roof fall.[8] 37 FMSHRC at 25-26. He noted the mine's history of methane and ignition problems and the presence of ignition sources, and found that if an ignition or explosion were to occur, miners could face injury, poor visibility, and disorientation. *Id.* In other words, assuming an emergency significant enough to require a refuge chamber —which, at this mine, would most likely be an ignition or explosion resulting in disorientation, poor visibility and possible injury — the additional distance made it less likely that miners would be able to reach a place of safety. The Judge thus correctly identified the inability to reach the refuge chamber in the event of an emergency as the relevant hazard.

The standard at issue requires refuges within a reachable distance of 1,000 feet "from the nearest working face."[9] 30 C.F.R. § 75.1506(c)(1). Refuges are intended to increase the chance of survival during an emergency. It is part of the undisputed record that the refuge was at least 1,110 feet from the working face, a full 11% over the allowable maximum.[10] The farther a miner has to travel through smoke and injury, the less likely he or she is to reach the refuge. 73 Fed. Reg. at 80681, 80684. Clearly, a violation which interferes with a miner's ability to timely reach a refuge poses a danger of the type contemplated by the relevant standard. *Cf. Small Mine Development*, 37 FMSHRC 1892, 1900-01 (Sept. 2015) (in the context of an emergency that impedes passage, failure to install a refuge chamber "clearly contributes to the hazards posed by miners not having a safe location to await rescue.")[11]

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[8] The Judge stated that the violation "contributes to the possibility" that miners would be incapable of accessing the refuge. 37 FMSHRC at 25. ICG claims that the Judge misapplied *Mathies* by focusing on mere possibilities. However, the choice of language is harmless here. As discussed below, the record indicates that under these particular facts, the violation clearly contributed to the hazard.

[9] Our dissenting colleague faults us for assuming an emergency at the face when analyzing this violation's contribution to the hazard at issue. Slip op. at 12 n. 2. Likewise, he faults the inspector for assuming an emergency at the face, stating, "[s]uch tunnel vision betrays a lack of expertise." Slip op. at 16 n.8. However, while it is true that emergencies may arise outby the face, our colleague ignores the fact—understood by the inspector—that the cited regulation sets forth the maximum distance the refuge shelter can be *from the face.* As noted above, the "hazard" for purposes of the *Mathies* analysis is the danger which the cited safety standard is intended to prevent. The hazard contemplated by 30 C.F.R. § 75.1506(c)(1) is an emergency at the face.

[10] While the dissent characterizes our notation of the 11% variance as "conjured fiction," slip op. at 13, it is simple mathematics applied to the facts of record and the language of section 75.1506(c)(1).

[11] *Small Mine Development* is currently on appeal in the D.C. Circuit. *Small Mine Development v. FMSHRC*, No. 15-1391 (D.C. Cir. Oct. 27, 2015). Commissioner Young dissented and believes the case was wrongly decided. While he therefore disagrees with the use of *Small Mine Development* as an illustration of the premise stated here, he does not disagree with the premise, which in fact seems somewhat tautological.

It is of course impossible to predict the time, location, nature or severity of a mine disaster. In exercising the authority delegated by Congress in Section 315 of the Mine Act, the Secretary should be presumed to have made a reasoned policy choice in establishing the requirements for shelters, including their location. Thus, while a violation of the standard is not S&S per se, and therefore an operator may rebut the Secretary's argument that a particular violation of this standard is S&S, the record in this case supports the Judge's determination and his application of *Mathies.*

We find it significant that when the regulation was first proposed, as 30 C.F.R. § 75.1506(b)(1), it provided that refuge alternatives shall be placed "between 1000 and 2000 feet from the working face . . . ." 73 Fed. Reg. 34140, 34178 (June 2008). However, after extensive public input, MSHA changed the location requirement in the final rule "based on testimony and comments regarding the inability of miners on the working section to travel over 1000 feet through smoke and debris to reach the refuge alternative, especially if injured or exhausted." 73 Fed. Reg. at 80684. If the additional distance of 110 feet was insignificant, MSHA would not have changed the location requirement in the final rule.[12]

Although our dissenting colleague rues the lack of record evidence on points such as ceiling heights, the configuration of exit routes, and the presence of beltlines outby the face, slip op. at 15, the record does support a finding that this violation is at least somewhat likely — indeed, reasonably likely — to contribute to the hazard of miners being unable to reach the refuge. The Secretary's evidence on this point consisted of the inspector's testimony.[13] As a threshold matter, the inspector stated that, in determining whether to designate the violative condition as S&S, he assumed the occurrence of a mine disaster. He did so because refuge alternatives are only intended for use in situations in which escape is impossible, such as roof falls, fires, or explosions. He added that an additional 110 feet of travel is significant in such situations, when visibility is poor and miners may be injured and disoriented. 37 FMSHRC at 25. He noted that this is compounded by the fact that this distance is in addition to the 1,000 feet that would have already been traveled from the face, and agreed that every foot counts in an

[12] Our dissenting colleague devotes many paragraphs to discussing comments in the rulemaking record which allegedly detract from MSHA's conclusion that the refuge shelter may be positioned no more than 1000 feet from the nearest working face. Slip op. at 14-15. This attempted re-weighing of the rulemaking record might have been appropriate in the context of litigation challenging the legitimacy of MSHA's final rule, but it is irrelevant to this case.

[13] The testimony and judgment of the inspector routinely play a significant role in S&S determinations. *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278 (Dec. 1998); *Cumberland Coal*, 33 FMSHRC at 2365. While our dissenting colleague alleges that we "concede" that the inspector's opinion "is the sole reason for [our] affirmance of the S&S designation," slip op. at 15, this is something of an overstatement. Our reliance is on the entire record. The inspector's testimony explained the significance of the facts of record and explained his S&S finding in the context of all of those facts. The Judge found the testimony credible and compelling, and we find no grounds for overturning his determination.

emergency.[14] Tr. 32-33. The inspector also testified as to the mine's specific history of methane and ignition problems, and stated that in the event of a disaster, some miners would likely be injured, unable to walk, unable to see clearly, and unable to reach the refuge at that distance.[15] Tr. 17, 31-32, 47, 54-55, 60; 73 Fed. Reg. at 80684. As the inspector bluntly stated, 1,110 feet is "a long distance to travel if you are in smoke where you can't see . . . a long way to go if you are crawling or dragging an injured guy." Tr. 31-32.

This testimony constitutes substantial evidence supporting the Judge's conclusion that the added distance of 110 feet would cause "additional and possibly critical delays" in miners reaching the refuge chamber in the event of an emergency.[16] 37 FMSHRC at 25-26. Such delays establish the requisite "hazard" under step 2 of *Mathies.*

ICG points to *Rushton Mining* as an instance where the Secretary failed to establish that a violation of an emergency standard contributed to a hazard. 11 FMSHRC 1432 (Aug. 1989). However, the case is clearly distinguishable. *Rushton* involved a violation of 30 C.F.R. § 75.1704-2(a), which requires that escapeways follow the safest direct practical route. Affirming the Judge's non-S&S determination, the Commission found that not only had the Secretary failed to show that any aspects of the cited route posed a hazard, but to the contrary, Rushton had demonstrated that the cited route was particularly safe for travel. *Id.* at 1436-37. Here, there is no counter-evidence that the violation was, in fact, non-hazardous.

As to the third and fourth *Mathies* steps, the Judge concluded that serious or fatal injuries were likely to result for the 17 miners working on the section. 37 FMSHRC at 26. We find that, given the nature of the hazard involved, substantial evidence supports the Judge's finding. The inspector testified that he designated the gravity as fatal because "if they had blown up the section, to me it was unlikely that the guys would have been able to get to . . . the refuge alternative." Tr. 35-36. Assuming the occurrence of a disaster, the disaster would be fatal "if [miners] couldn't get to the refuge alternative." Tr. 54. In essence, the inspector's testimony demonstrated that in worst case scenarios (which at this mine could involve an explosion), the inability to reach a refuge chamber in the event of such an emergency was reasonably likely to

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[14] In this context, the inspector noted that while the refuge chamber was located 1,100 feet from the *nearest* working face, miners working at the other side of the section would be almost 2,000 feet from the refuge chamber. Tr. 32.

[15] ICG notes a lack of documentation regarding a history of methane and ignition problems at the mine. However, the Judge credited the inspector's testimony that the mine did, in fact, have a history of methane and ignition problems. 37 FMSHRC at 26. It is undisputed that the mine was subject to spot inspections for excess methane liberation.

[16] Our dissenting colleague alleges that the "majority does not discuss any distance between 1 foot and 110 feet at which the distance becomes S&S. That failure is significant." Slip op. at 13 n. 3. However, we need not speculate as to what intermediate distance may or may not be S&S. Our decision is constrained by the facts of record, which have established that the shelter was at least 110 feet further than the standard permits from the nearest working face. We reiterate that whether a particular violation is S&S must be determined on a case-by-case basis, considering the particular facts and circumstances established in the record.

result in serious or fatal injury. Since refuge chambers are meant to ensure survival during an emergency which has created inhospitable conditions, then common sense (as well as the history of coal mining disasters) dictates that an inability to reach the refuge chamber threatens miners' survival.

We have previously affirmed S&S findings for violations of emergency standards based on similar evidence and reasoning. In *Big Ridge*, which involved a lifeline violation, we found that the Judge properly relied on the inspector's testimony that it would be difficult to cross a 20 foot gap in the lifeline during smoky conditions, and that during an emergency miners become disoriented such that a directional lifeline is essential to avert disaster. 36 FMSHRC 1115, 1119 (May 2014). The Commission concluded that "[t]he hazard of a delayed escape or no escape at all due to a missing lifeline in an emergency is reasonably likely to result in serious or fatal injuries." *Id.*; *see also Black Beauty*, 36 FMSHRC at 1125. Similarly, here, we find that the Judge properly relied on testimony to the effect that it would be difficult to travel the additional distance to reach the refuge in emergency conditions which create poor visibility and risk of injury, and that reaching the refuge is essential to avert disaster. The hazard of being unable to reach the refuge was reasonably likely to result in serious or fatal injuries. Hence, the Secretary has proven the third and fourth steps of *Mathies.*

ICG has expressed concern regarding the inspector's statement that he would consider any refuge located more than 1000 feet from the face at this mine to be an S&S violation, even if it only exceeded the maximum by one foot. Tr. 46-47. However, the violation before us here was not trivial, and involves an 11% deviation from the allowable maximum distance in a mine with excess methane and working equipment near the face, such that any emergency requiring use of the refuge may well create poor visibility, injury and disorientation. Under these circumstances, we find that substantial evidence supports the Judge's determination that this violation sufficiently contributed to a hazard which was reasonably likely to result in serious injury.

As a final matter, we are unpersuaded by ICG's argument that the presence of SCSRs was a mitigating factor. There were caches of SCSR units within several hundred feet of the working face, all rated for an hour's use. Tr. 90-93. ICG claims they provided enough air for miners to travel the extra 110 feet to the refuge alternative, reducing the likelihood of injury in the event of an emergency. However, the Commission has repeatedly found that redundant safety measures do not mitigate S&S findings for violations of emergency standards. *See Small Mine Development*, 37 FMSHRC at 1900-01, *citing Cumberland Coal Res.*, 33 FMSHRC at 2369, *citing Buck Creek Coal, Inc.*, 52 F.3d at 136. In affirming *Cumberland Coal*, the D.C. Circuit explained that "assuming the existence of an emergency in which a lifeline would be necessary

also assumes an emergency in which all of the redundant safety measures . . . have failed." 717 F.3d at 1028-29. Here, the same principle applies.[17]

III.

Conclusion

For the foregoing reasons, we affirm the Judge's determination that the refuge alternative violation was S&S.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

[17] While the dissent criticizes our reliance on *Buck Creek* and subsequent cases post-*Newtown*, slip op. at 19 n.13, our decision does not rest solely on the law, but also on the facts found by the Judge. As we've noted, slip op. at 3, *citing* 37 FMSHRC at 26, the Judge accepted the inspector's testimony about the limits of the SCSRs, which were not responsive to all of the hazards that would attend the contemplated emergency.

Commissioner Althen, dissenting:

The decision in this case rests upon the testimony of one mine inspector who was not an expert on mine emergencies and who did not testify that he had any expertise in emergencies or, indeed, had any firsthand experience in the real world or laboratory conditions with a mine emergency. That inspector, in turn, did not testify to any conditions in the mine or specific circumstances related to the mine that could cause a 110-foot violation of section 75.1506(c)(1) to be significant and substantial ("S&S"). Instead, the inspector based the citation on his personal, untrained, and non-experiential belief that a refuge chamber located *any* distance beyond 1,000 feet is S&S. The Secretary bears the burden of proof in every case. One inspector's personal, untrained, non-expert opinion in which he testifies that one foot beyond 1,000 feet is automatically S&S, and does not support his testimony with any evidence regarding the conditions at the mine, does not carry the Secretary's burden of proof. Therefore, I respectfully dissent.

DISCUSSION

In cases involving an emergency standard, the Commission assumes the occurrence of the emergency to evaluate whether a violation of an emergency standard is S&S within the mining context of the specific standard. Assuming the occurrence of an emergency does not mean assuming that the hazard at which the standard is directed is reasonably likely to occur or that a violation is automatically S&S. *See Cumberland Coal Res., LP*, 33 FMSHRC 2357, 2367, 2369 (Oct. 2011), *aff'd*, 717 F.3d 1020 (D.C. Cir. 2013). Judges must make the S&S determination through application of the steps identified in the Commission's recent decision in *Newtown Energy, Inc.*, 38 FMSHRC __, slip op. at 4-8, No. WEVA 2011-283 (Aug. 29, 2016).

Newtown effectively revises the four steps set forth in *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984), to identify more precisely each of the four steps involved in making an S&S determination originally set forth in *Mathies*. Under the Commission's newly formulated *Newtown* test, the four steps of the S&S analysis require determinations of whether:

> (1) there has been a violation of a mandatory safety standard;
> (2) based upon the particular facts surrounding the violation, there exists a reasonable likelihood of the occurrence of the hazard against which the mandatory safety standard is directed;
> (3) based upon the particular facts surrounding the violation, the occurrence of that hazard would be reasonably likely to result in an injury; and
> (4) any resultant injury would be reasonably likely to be reasonably serious.

See Newtown, slip op. at 4-8.[18]

[18] Thankfully, *Newtown* ends any confusion over whether we assume the occurrence of a hazard at step two. We do not. The Secretary must prove the likelihood of such an occurrence to (continued…)

Section 75.1506(c)(1) addresses the danger that, in an emergency, a miner might not be able to use escapeways to exit the mine quickly and safely. The section, therefore, aims at providing the miner a place of refuge until the miner is able to exit the mine safely. Thus, the hazard addressed by section 75.1506(c)(1) is that a miner could not reach a refuge chamber in case of an emergency.

Here, the operator did not contest the fact of a violation. Consequently, we move directly to the second step of the *Newtown* test, in which we determine whether, under the particular facts surrounding the violation, the Secretary proved by a preponderance of the evidence that the violation made it reasonably likely that in the event of an emergency a miner could not reach the refuge chamber. It is at this step that the Secretary's case and the majority's analysis falter.

The inspector testified that the mine was subject to section 103(i) of the Mine Act, which requires spot inspections of the subject mine based upon its liberation of methane. Tr. 16. Obviously, the conditions likely to result from the occurrence of an emergency are relevant to the S&S determination. An analysis of those conditions includes, most importantly, the particular context of the mine and the numerous possible emergencies that may occur at that particular mine.[19] However, the possibility of the occurrence of an emergency itself does not bear upon the likelihood of reaching a refuge if an emergency does occur. As my colleagues correctly state, "assuming the existence of an emergency is not the same as assuming the violation is S&S." Slip op. at 4.

[18] (…continued)
the requisite degree of reasonable likelihood. As a result, the long ignored step two factor is now critical in every S&S analysis. The recently articulated *Newtown* test is the metric through which Administrative Law Judges must make step two determinations.

[19] The majority appears to analyze the case from a supposition that the only emergency that could occur at this mine is a face explosion. Therefore, it assumes a miner facing an emergency would have to travel an "extra" 110 feet to reach the shelter. Of course, emergencies may arise from many locations other than the face. Indeed, a specialized research study conducted for the National Institute of Occupational Safety and Health ("NIOSH") in connection with NIOSH's comments on the proposed section 75.1506(b) regulation found that the placement of the refuge is important to many different scenarios. Foster-Miller, Inc., *Report No. NSH-080020-1864, Refuge Alternatives in Underground Coal Mines*, vols. 1, 2 (2008) ("Refuge Chamber Report"). For example, the Darby mine explosion was outby the face and NIOSH's contract researcher found that, at Darby, it would have been preferable for the refuge chamber to have been located 2,000 feet from the face. *Id.* vol. 2, at 92. In emergencies, therefore, a refuge at 1,110 feet from the face actually may be 110 feet closer to the miners. The point here is that non-experts, such as the inspector in this case, have little understanding of the placement of a refuge chamber or the various emergencies that might occur at a given mine, so specific testimony about the actual mining conditions is critical to judicial analysis. Indeed, even this inspector recognized that, tragically but typically, a face explosion fatally injures all miners at the face immediately. Tr. 35-36.

My colleagues and I agree that S&S determinations must be based on the particular circumstances involved in the specific violation. *Id.* The entire Commission, therefore, accepts that the inspector must take into account the particular circumstances at the mine and explain those circumstances in his testimony. Such violations are not per se S&S. Elsewise, the inspector's insensible opinion in this case that 1 foot beyond 1,000 feet is "probably"—that is, presumptively—S&S would become sensible. Tr. 47.[20]

The Secretary did not qualify the inspector as an expert in mine emergencies. Although the inspector had many years of work in mines as an hourly employee, the inspector did not demonstrate or claim to have any experience in real or simulated mine emergencies or to have ever had any instruction, training, or expertise in emergencies. The Secretary does not contend that the inspector had any expertise in mine emergencies. His experience was as an hourly employee operating mining equipment and a few years as a mine inspector.[21]

There is no evidence the inspector encountered an emergency during his mining career. In fact, this is the only time he issued a citation related to the location of a refuge chamber. Tr. 45. Additionally, he did not identify any education, training, or experience in emergencies. His opinion, therefore, does not constitute, and was not offered as, an expert opinion on the location of refuge chambers.[22]

This brings us to the nub of this case. Evidence must prove that, in an emergency, miners would not be reasonably likely to be able to reach the refuge chamber. Notwithstanding the majority's conjured 11% fiction, *see supra* note 3, that proposition cannot be assumed. There is

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[20] The majority does not discuss any distance between 1 foot and 110 feet at which the distance becomes S&S. That failure is significant; it further demonstrates acceptance that the Commission must evaluate the particular facts at the specific mine. Indeed, the majority does not cite any fact about this "particular mine." It finds the violation is not "per se" S&S, but then invents completely out of whole cloth a notion that an eleven percent (11%) overage is S&S. It does this even though, as we will see, safety authorities recommended that if MSHA adopted a requirement for only one refuge near the face, the distance should be 1,500 feet—that is, fifty percent (50%) beyond 1,000 feet. The majority does not provide any basis for 11%. How about 10.9%? Or 11.1%? Or 5%, 10%, or 15%, or the more than 50% an expert study recommended? *See infra* p. 14. Nonetheless, the majority explains the use of 11% as "simple" mathematics. Slip op. at 6 n.10. "Arbitrary" (random choice or personal whim) and "capricious" (given to unaccountable changes) seem far more descriptive.

[21] The fact that the inspector worked for many years running equipment such as a roof bolter or mining machine and then became a federal mine inspector speaks very well for him as an individual. Obviously, it does not qualify him as an expert regarding the placement of refuge chambers.

[22] While inspectors need not be experts to testify knowledgeably, this inspector's lack of expertise, experience, and training regarding the placement of refuge chambers necessarily detracts from the persuasive weight of his testimony.

no reasonable argument that a 110-foot overage is automatically or presumptively S&S. Indeed, governing and leading authorities such as MSHA's regulations, state laws, the rulemaking record for section 75.1506(c)(1), and opinions of National Institute of Occupational Safety and Health ("NIOSH") and expert studies permit and/or suggest placement of refuge chambers at distances further than 1,110 feet from the face. Other MSHA mandatory safety standards and state laws permit placement of refuges substantially beyond 1,110 feet, and respected government experts recommended placement of refuges at distances exceeding 1,110 feet.

For example, 30 C.F.R. § 57.11050(b) requires that refuge chambers in metal/non-metal mines must be within 30 minutes of the working place rather than within a prescribed distance requirement. Such a time requirement permits in underground metal and nonmetal mines placement of refuge chambers more than 1,110 feet from the face. Section 11.09 of Illinois' Coal Mining Act requires chambers within 3,000 feet of each working section of a mine—three times further than the federal regulation. 225 Ill. Comp. Stat. Ann. 705/11.09. The Illinois statute does not undercut the validity of the federal regulation, but it destroys an arbitrary notion that a distance of 110 feet (or 11%) over 1,000 feet is S&S without more facts.

Going further, in a report summarizing research required under section 13 of the Mine Improvement and New Emergency Response ("Miner") Act of 2006, Pub. L. No. 109-236, NIOSH stated,

> [T]he maximum distance from a working section to the refuge chamber or in-place shelter should be based on projected travel time rather than actual travel distance. Unless there is a compelling reason otherwise, the refuge alternative should be located within approximately 30–60 minutes from the face under the expected travel conditions, *assuming smoke-filled entries* and a directional lifeline.

Office of Mine Safety and Health, Dep't of Health and Human Servs., *Research Report on Refuge Alternatives for Underground Coal Mines* 8 (2007) (emphasis added) (footnote omitted); *see also* Nat'l Inst. for Occupational Safety and Health, Comment on Proposed Rule on Refuge Alternatives for Underground Coal Mines (Aug. 18, 2008).

In addition, NIOSH contracted with Foster-Miller, Inc. to perform a comprehensive study of refuge chambers in connection with NIOSH's comments on proposed section 75.1506(b). The contract included an exhaustive review of 42 mine disasters. The study concluded that either there should be two refuge chambers at nominal distances of 1,000 and 2,000 feet from the face (the chamber locations would range from placement at 500 and 1,500 feet to 1,500 and 2,500

feet), or, if only one chamber was required, it should be 1,500 feet from the face—that is, 390 feet farther than 1,110. Refuge Chamber Report vol. 1, 80, 153.[23]

The majority incorrectly asserts that the foregoing discussion constitutes a "re-weighing of the rulemaking record." Slip op. at 7 n.12. Rather than reweighing the rulemaking record, the cited authoritative federal regulations, state laws, NIOSH comments, and expert reports, much of it from the rulemaking record itself, support my agreement with the majority that an excess distance of 110 feet is not a per se violation. Absent an understanding of the clear public record and scientific evidence upon which MSHA, state agencies, and expert authorities accept and/or recommend distances far in excess of 1,110 feet, one might be lulled into the inspector's per se analysis—namely, that 1,001 feet is S&S. The cited rules, statutes, and expert opinions demonstrate that, as the majority agrees, the distance of 1,110 feet is not automatically S&S and that such a finding requires evidence of the particular facts in the specific mine. Therefore, we now turn to the absence of any evidence about the conditions in this mine.

The ultimate question for review is whether a non-expert opinion given by one ordinary inspector who opined that one foot too far is S&S and who did not testify to any particular circumstances at the mine, standing alone, is sufficient to carry the Secretary's burden of proof. The majority concedes that the non-expert, predetermined opinion of the inspector is the sole reason for their affirmance of the S&S designation. Slip op. at 7-8. I find that opinion insufficient.[24]

The inspector provided no testimony relevant to the circumstances at this specific mine. Equally importantly, the inspector implicitly, but clearly, based the S&S finding upon his personal belief that any distance beyond 1,000 feet is an S&S violation. Stated simply, for the

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[23] The majority asserts that MSHA changed the proposed rule to 1,000 feet "after extensive public input." Slip op. at 7. In fact, MSHA received 39 comments. Of those, only three commenters suggested a 1,000-foot minimum: the United Mine Workers of America ("UMWA"), the West Virginia Office of Miners' Health, Safety & Training ("WVOMHST"), and Senator Robert Byrd who simply submitted, but with his enormous political influence, the WVOMHST comment. The UMWA's most specific comment identified the Darby mine explosion as exemplifying the difficulty of moving through smoke and debris. As noted elsewhere, the Darby explosion was outby the face. At Darby, a refuge chamber at 2,000 feet would have been preferred. This does not undercut the validity of the final rule promulgated by the agency. However, it does show that the extra 110 feet at issue in this case cannot be presumptively a significant and substantial violation as in the specific explosion cited by the UMWA, 2,000 feet from the face would have been a preferable location.

[24] The majority states that I "rue"—that is, regret or am concerned about—"the lack of record evidence on points such as ceiling heights, the configuration of exit routes, and the presence of beltlines outby the face." Slip op. at 7. They are correct. I think the lack of any evidence about the particular facts of the mine to support an S&S citation is a problem, a very big problem. Indeed, the absence of evidence is an insurmountable problem.

inspector, any distance beyond 1,000 feet was a per se S&S violation—a position that does not apply the correct standard and that the entire Commission rejects.

The inspector did not testify generally or specifically about operating conditions or operations in the mine before or at the time of his inspection. He did not testify about seam or ceiling heights; floor, rib, or roof conditions; ventilation; any mining being conducted during the relatively brief period of the violation; the straightness of exit routes; any operations outby the 1,000-foot mark; any beltlines, belt transfer points, power stations, etc., outby the face; or any other facts. He did not identify any locations other than the face at which an explosion, fire, or other emergency might occur or, given the composition of the mine, the conditions that would be reasonably likely to exist in the event of emergencies at varying locations.[25] In light of the absolute absence of testimony about the conditions of the mine, likely places for emergencies, or any other particular facts, it simply cannot be said the inspector's opinion demonstrated consideration of the circumstances. Without any evidence related to the conditions in the mine, the inspector's bare opinion underlain by a misunderstanding of the law does not carry the burden of proof.

Essentially, the inspector adopted a per se or presumptive S&S approach and, therefore, applied the wrong standard in issuing an S&S citation. There is no issue of credibility related to the inspector's testimony. Reading the transcript, no one can doubt that the inspector's honest and actual reason for citing the violation as S&S without any testimony regarding operating conditions in the mine was his personal belief that any distance beyond 1,000 feet is S&S. Consequently, the basis for the S&S citation is a personal belief of the inspector that any excess distance, of any dimension, is a per se S&S violation—a position the majority finds legally unacceptable.

As the majority points out, the Judge did seize upon one phrase—"at this mine"—in the inspector's testimony. Slip op. at 2. However, in that passage, it is clear that the reference to "at

[25] In light of the inspector's reference to methane, it appears his concern for even an extra one foot of distance springs from a concern about miners located at the face if an explosion occurs. Of course, emergencies may arise from many locations other than the face. *See supra* note 2. Such tunnel vision betrays a lack of expertise. Non-experts may view face explosions as the only concern with respect to placement of refuge chambers, but face explosions are far from the only consideration in the location of refuge chambers. In refusing to recognize that fact, slip op. at 6 n.9, the majority chooses to ignore tragedies where miners retreated and a reachable refuge would have saved lives.

this mine" was based upon the release of methane in the mine.[26] Therefore, the reference to "at this mine" is a reference to the mine's release of methane and not to the likelihood of reaching a refuge chamber.

Below, I discuss particular parts of the testimony in order to demonstrate the inspector's per se analysis. Reading the transcript, no one can misunderstand the inspector's frank testimony that it was his personal belief that this was a per se violation—that is, any distance beyond 1,000 feet is S&S. The inspector testified that he disagreed with the substance of the regulation, opining that the regulatory standard of 1,000 feet is too far from the face:

> Q. Okay. You think 1,000 feet is too far, correct?
> A. I do, yes.

Tr. 47.

The inspector testified that he would have cited the violation as S&S if the refuge chamber were 1 foot beyond 1,000 feet:

> Q. You would have considered this S and S if it had been 20 feet too far, wouldn't you?
> A. Yes.
> Q. Or ten feet?
> A. Yes.
> Q. Or one foot?
> A. Yes.

Tr. 46-47.

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[26] The passage is:

> Q. Okay. So in this case or any other case, sir, you would consider it to be S and S, wouldn't you?
> A. If it exceeded 1,000 feet, probably.
> Q. Okay.
> A. At this mine. I mean, this mine has a history of methane. They have got a history of ignitions. They have had withdrawal orders issued, 107(a) issued for excess of methane. So this mine has a history.

Tr. 47. Separately, after stating his disagreement with the 1,000-foot standard, the inspector does say that "[e]verything was considered on this violation, not just the distance." Tr. 48. Immediately thereafter, however, he states such considerations were "not just this mine," thereby reinforcing his testimony that he considered any distance over 1,000 feet to be a generic S&S violation and "not just at this mine." *Id.*

Nowhere does the inspector base his opinion upon the particular conditions in this specific mine should an emergency occur. As noted above, and not disputed by my colleagues, the inspector did not provide any evidence about specific conditions in this mine or any conditions causing one foot to be "too far." In the absence of any testimony about the conditions actually present in the mine, a stray comment about the citation being "at this mine" does not provide any factual support for the S&S designation. Indeed, the inspector demonstrates that he did not believe it necessary to take the particular facts at the mine into account in issuing the citation as S&S. He testified:

> Q. Okay. And that has nothing to do with the actual conditions in this mine, it is just your opinion that a violation of this standard is significant and substantial, correct?
> A. In this case.
> Q. Okay. You think 1,000 feet is too far, correct?
> A. I do, yes.
> Q. Okay. So in this case *or any other case*, sir, you would consider it to be S and S, wouldn't you?
> A. If it exceeded 1,000 feet, probably.

Tr. 47 (emphasis added).

The "probably" is without any explanation and is at odds with his testimony that 1 foot over the 1,000 feet is S&S and that the baseline standard of 1,000 feet is too far. This honest inspector testified that he marked the citation S&S because the refuge chamber was more than 1,000 feet from the face without any evidence that he considered any particular factor at the mine at the time of violation.

Here, other than stating his personal, non-expert view that 1,000 feet is "too far" so any foot beyond 1,000 feet is S&S, the inspector did not support the citation with any testimony about the specific conditions at this mine. The inspector frankly testified that the only fact he considered at this mine was that the mine was on a 10-day spot inspection for methane, Tr. 47, which the majority correctly notes is irrelevant to the S&S analysis for this violation. Slip op. at 4.[27]

Based upon the inspector's failure to discuss specific conditions at this mine, his failure to differentiate between this mine and any other mine, and his stated disagreement with the standard as promulgated, the inspector's testimony does not constitute substantial evidence to

[27] Near the end of their opinion, the majority emphasizes, "[w]e reiterate that whether a particular violation is S&S must be determined on a case-by-case basis, considering the particular facts and circumstances established in the record." Slip op. at 8 n.16. I agree. Particular facts must be taken into account. Here, the only fact in the record is a non-per se distance of 110 feet, but the majority upholds a finding that the violation is S&S. The majority's opinion is cognitively dissonant—they juxtapose a repeated emphasis on a need for particular facts with a finding made without particular facts.

support a reasonable likelihood that a miner could not reach the refuge. Because the inspector's lay testimony is the only evidence submitted by the Secretary, substantial evidence does not support the Judge's finding.[28]

[28] The majority attempts to distinguish this case from *Rushton Mining Co.*, 11 FMSHRC 1432 (Aug. 1989), by asserting that "[h]ere, there is no counter-evidence that the violation was, in fact, non-hazardous." Slip op. at 8. In *Rushton Mining*, the Commission concluded, "the Secretary has failed to show that the distance, travel time, or any inherent qualities of the cited route posed a discrete safety hazard." 11 FMSHRC at 1436. It is not the operator's duty to rebut the Secretary case when the Secretary's case fails in the first instance. The majority must not actually intend to relieve the Secretary of the burden of proving violations are S&S. Even hinting at such a notion, however, imperils a most basic principle upon which due process depends.

CONCLUSION

The Commission must base its decisions upon the objective application of the proper legal standard to the case before us rather than applying our own non-expert preferences and/or fears or the predetermined judgment of one non-expert inspector. If the Secretary had provided evidence of conditions in the cited mine sufficient to support a reasonable likelihood that miners at this mine would not have been able to reach the refuge chamber in an emergency during the period of the violation, I would readily concur with my colleagues.[29]

Here, however, the entire "proof" offered by the Secretary is the opinion of one witness who (1) was not offered as an expert on emergencies, (2) did not testify about any of the conditions or operations in the mine that might come into play during an emergency or where emergencies might occur other than the face, (3) disagreed with and disavowed the mandatory standard, and (4) opined he would find a one-foot violation to be S&S. The unsupported, non-specific, predetermined testimony of one non-expert does not carry the Secretary's burden of proof.

I respectfully dissent.[30]

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

[29] I do not find any magic line above 1,000 feet at which the distance either is or is not S&S. I would support a finding that a violation of section 75.1506(b) by any distance is S&S if substantial evidence supported such a finding.

[30] As a final point, I disagree with my colleagues' assertion that judges may not consider safety measures specifically designed to prevent the occurrence of a hazard in evaluating the likelihood of the occurrence of that hazard. *See* slip op. at 9. At step two, the issue is the likelihood of the occurrence of the hazard based upon the particular facts surrounding the violation. At step two, preventative measures may make the occurrence of a hazard less than reasonably likely. Preventative measures may not be dispositive, but we should consider all factors that affect the likelihood of the occurrence of the hazard. Cases cited by the majority relate to step three of the *Newtown* analysis, at which point the Secretary has established the reasonable likelihood of the occurrence of the hazard. The existence of extraneous factors that militate against the occurrence of the hazard at which the standard is directed, for example, water drenched coal accumulations or technical innovations designed to prevent a hazard, are relevant to the likelihood that the hazard will occur.

COMMISSION ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710

October 7, 2016

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	Docket No. WEVA 2009-857 A.C. No. 46-08751-152739
v.	
KINGWOOD MINING COMPANY, LLC	Docket No. WEVA 2009-1131 A.C. No. 46-08751-159510

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On September 26, 2014, the Commission received from Kingwood Mining Company, LLC ("Kingwood") a motion seeking to reopen two penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). Subsequently, the Secretary requested that the Commission grant the operator's motion to reopen in order to facilitate settlement of the assessments.

Having reviewed movant's motion to reopen, we reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Consistent with Rule 28, the Secretary shall file petitions for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28. In order to effectuate the settlement identified as the basis of the unopposed motion to reopen, the parties should promptly file a motion to approve settlement after the Secretary files the petitions for assessment of penalty.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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

Distribution:

Robert H. Beatty, Jr.
Lorna M. Waddell
Dinsmore & Shohl LLP
215 Don Knotts Blvd., Suite 310
Morgantown, West Virginia 26501

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

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

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 19, 2016

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. STREAM CONSTRUCTION	Docket No. CENT 2015-212-M A.C. No. 41-00906-359327

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). The Commission has received a motion from the operator seeking to reopen a penalty assessment which had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 813(a). The Secretary states that he does not oppose the motion.

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

The granting of this motion is not precedential for the consideration of any other motion before the Commission.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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

Distribution:

Chris Hamilton, President
Stream Construction
1814 Holly Road
Corpus Christi, TX 78417

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

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

Melanie Garris
Office of Civil Penalty Compliance
Mine Safety and Health Administration
U.S. Department of Labor
201 12th St. South, Suite 401
Arlington, VA 22202-5450

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 19, 2016

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. BAYER CONSTRUCTION CO.	Docket No. CENT 2015-255-M A.C. No. 14-01666-366206

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). The Commission has received a motion from the operator seeking to reopen a penalty assessment which had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 813(a). The Secretary states that he does not oppose the motion.

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

The granting of this motion is not precedential for the consideration of any other motion before the Commission.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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

Distribution:

Stan Hambright
Safety Manager
Bayer Construction Company, Inc.
P.O. Box 889
Manhattan, Kansas 66505-0889

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

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

Melanie Garris
Office of Civil Penalty Compliance
Mine Safety and Health Administration
U.S. Department of Labor
201 12th St. South, Suite 401
Arlington, VA 22202-5450

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 19, 2016

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), v. CUMBERLAND COAL RESOURCES, LP	Docket No. PENN 2015-101 A.C. No. 36-05018-358678

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On January 8, 2015, the Commission received from Cumberland Coal Resources, LP ("Cumberland") a motion seeking to reopen a penalty assessment that had appeared to become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

MSHA records indicate that the proposed assessment was mailed via United States Postal Service ("USPS") to the operator on August 13, 2014 to the operator's address of record on the legal ID report. Cumberland claims it never received a proposed penalty assessment from the Secretary. USPS did not record a date of delivery but the Secretary estimated that the proposed assessment was delivered on August 16, 2014. On September 15, 2014, the proposed assessment was deemed a final order of the Commission, when it appeared that the operator had not filed a Notice of Contest within 30 days.

The Secretary does not oppose the request to reopen and admits that it has no record confirming delivery of the proposed assessment. In this regard, the USPS online delivery report does not contain either a successful or non-successful delivery notation and the Secretary does not have any record of the proposed assessment being returned undelivered.

Having reviewed Cumberland's request and the Secretary's response, we conclude that the proposed penalty assessment did not become a final order of the Commission because the operator never had an opportunity to timely contest the proposed assessment. Section 105(a) states that if an operator "fails to notify the Secretary that he intends to contest the . . . proposed assessment of penalty . . . the citation and the proposed assessment of penalty shall be deemed a final order of the Commission." 30 U.S.C. § 815(a). Here, there is no evidence that the operator ever received the proposed assessment at issue. This obviates any need to invoke Rule 60(b). Accordingly, the operator's motion to reopen is moot.

We deem the operator's motion a contest of Citation Nos. 7028183, 7023620, 7023621, 7023622, 7027832, 7030058 and 7030059. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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

Distribution:

Patrick W. Dennison, Esq.
Jackson Kelly, PLLC
Three Gateway Center
Suite 1500
401 Liberty Avenue
Pittsburgh, PA 15222

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

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

Melanie Garris
Office of Civil Penalty Compliance
Mine Safety and Health Administration
U.S. Department of Labor
201 12th St. South, Suite 401
Arlington, VA 22202-5450

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 19, 2016

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. SPRAGUE STONE	Docket No. WEST 2015-284-M A.C. No. 05-04013-362626 A9486

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). The Commission has received a motion from the operator seeking to reopen a penalty assessment which had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 813(a). The Secretary states that he does not oppose the motion.

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

The granting of this motion is not precedential for the consideration of any other motion before the Commission.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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

Distribution:

Matthew J. Sprague & Amanda Sprague, Owners
Sprague Stone
116 Sprague Avenue
Berthoud, CO 80513

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

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

Melanie Garris
Office of Civil Penalty Compliance
Mine Safety and Health Administration
U.S. Department of Labor
201 12th St. South, Suite 401
Arlington, VA 22202-5450

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 19, 2016

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	Docket No. WEST 2015-342-M A.C. No. 48-01295-363072
v.	Docket No. WEST 2015-343-M A.C. No. 48-01295-355137
SOLVAY CHEMICALS, INC.[1]	

BEFORE: Jordan, Chairman; Young, Cohen, and Althen, 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. (2012) ("Mine Act"). The Commission has received two motions from the operator seeking to reopen two penalty assessments which had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 813(a). The Secretary states that he does not oppose the motions.

[1] For the limited purpose of addressing these motions to reopen, we hereby consolidate docket numbers WEST 2015-342-M and WEST 2015-343-M involving similar procedural issues. 29 C.F.R. § 2700.12.

Having reviewed movant's unopposed motions to reopen, we reopen these matters and remand them 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. Consistent with Rule 28, the Secretary shall file petitions for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

The granting of these motions is not precedential for the consideration of any other motion before the Commission.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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

Distribution:

Rowdy Heiser, Safety Manager
Solvay Chemicals, Inc.
400 County Road 85
Green River, WY 82935

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

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

Melanie Garris
Office of Civil Penalty Compliance
Mine Safety and Health Administration
U.S. Department of Labor
201 12th St. South, Suite 401
Arlington, VA 22202-5450

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 19, 2016

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. KINGSTON MINING, LLC	Docket No. WEVA 2015-318 A.C. No. 46-08932-361675

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). The Commission has received a motion from the operator seeking to reopen a penalty assessment which had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 813(a). The Secretary states that he does not oppose the motion.

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

The granting of this motion is not precedential for the consideration of any other motion before the Commission.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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

Distribution:

Arthur M. Wolfson, Esq.
Jackson Kelly, PLLC
Three Gateway Center, Suite 1500
401 Liberty Avenue
Pittsburgh, PA 15222

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

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

Melanie Garris
Office of Civil Penalty Compliance
Mine Safety and Health Administration
U.S. Department of Labor
201 12th St. South, Suite 401
Arlington, VA 22202-5450

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 20, 2016

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	
v.	Docket No. CENT 2015-480-M A.C. No. 41-04793-379976
CYPRESS POINTE INC.	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). The Commission has received a motion from the operator seeking to reopen a penalty assessment which had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 813(a). The Secretary states that he does not oppose the motion.

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

The granting of this motion is not precedential for the consideration of any other motion before the Commission.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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

Distribution:

James S. Carter, President
Cypress Pointe Incorporated
1490 Burl Ivy Way
Hemphill, TX 75948

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
201 12th Street South, Suite 401
Arlington, VA 22202-5450

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

Melanie Garris
Office of Civil Penalty Compliance
Mine Safety and Health Administration
U.S. Department of Labor
201 12th Street South, Suite 401
Arlington, VA 22202-5450

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 20, 2016

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

v.

C & H GRAVEL COMPANY

Docket No. LAKE 2015-554-M
A.C. No. 11-02873-376723

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). The Commission has received a motion from the operator seeking to reopen a penalty assessment which had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 813(a). The Secretary states that he does not oppose the motion.

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

The granting of this motion is not precedential for the consideration of any other motion before the Commission.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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

Distribution:

Charles Heuerman, President
C & H Gravel Company
14046 N 1600th Street
Teutopolis, IL 62467

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
201 12th Street South, Suite 401
Arlington, VA 22202-5450

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

Melanie Garris
Office of Civil Penalty Compliance
Mine Safety and Health Administration
U.S. Department of Labor
201 12th Street South, Suite 401
Arlington, VA 22202-5450

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 20, 2016

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	
v.	Docket No. LAKE 2015-588 A.C. No. 12-02388-382364
GIBSON COUNTY COAL, LLC	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). The Commission has received a motion from the operator seeking to reopen a penalty assessment which had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 813(a). The Secretary states that he does not oppose the motion.

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

The granting of this motion is not precedential for the consideration of any other motion before the Commission.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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

Distribution:

Tayler H. Fields, Esq.
Gibson County Coal, LLC
1146 Monarch Street
Lexington, KY 40513

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
201 12th Street South, Suite 401
Arlington, VA 22202-5450

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

Melanie Garris
Office of Civil Penalty Compliance
Mine Safety and Health Administration
U.S. Department of Labor
201 12th Street South, Suite 401
Arlington, VA 22202-5450

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 20, 2016

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

v.

BRODY MINING, LLC

Docket No. WEVA 2015-836
A.C. No. 46-09086-376033

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On June 29, 2015, the Commission received from Brody Mining, LLC ("Brody") a motion to reopen Docket No. WEVA 2015-836. On January 19, 2016, Brody requested to withdraw its motion.

We hereby grant Brody's motion to withdraw in Docket No. WEVA 2015-836. Accordingly, this case is dismissed.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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

Distribution:

Michael T. Cimino, Esq.
Jackson Kelly, PLLC
1600 Laidley Tower
P.O. Box 3553
Charleston, WV 25322

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
201 12th Street South, Suite 401
Arlington, VA 22202-5450

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

Melanie Garris
Office of Civil Penalty Compliance
Mine Safety and Health Administration
U.S. Department of Labor
201 12th Street South, Suite 401
Arlington, VA 22202-5450

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 20, 2016

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	
v.	Docket No. WEVA 2015-844 A.C. No. 46-08637-378080
GATEWAY EAGLE COAL COMPANY, LLC	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On July 7, 2015, the Commission received from Gateway Eagle Coal Company, LLC ("Gateway") a motion to reopen Docket No. WEVA 2015-844. On April 12, 2016, Gateway requested to withdraw its motion.

We hereby grant Gateway's motion to withdraw in Docket No. WEVA 2015-844. Accordingly, this case is dismissed.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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

Distribution:

Katrina N. Bowers, Esq.
Steptoe & Johnson, PLLC
P.O. Box 1588
Charleston, WV 25326-1588

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
201 12th Street South, Suite 401
Arlington, VA 22202-5450

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

Melanie Garris
Office of Civil Penalty Compliance
Mine Safety and Health Administration
U.S. Department of Labor
201 12th Street South, Suite 401
Arlington, VA 22202-5450

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 20, 2016

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	
v.	Docket No. WEVA 2015-900 A.C. No. 46-06843-380721
SALLY ANN COAL COMPANY, INC.	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). The Commission has received a motion from the operator seeking to reopen a penalty assessment which had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 813(a). The Secretary states that he does not oppose the motion.

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

The granting of this motion is not precedential for the consideration of any other motion before the Commission.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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

Distribution:

Melissa M. Robinson, Esq.
Jackson Kelly, Esq., PLLC
1600 Laidley Tower
P.O. Box 553
Charleston, WV 25322

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
201 12th Street South, Suite 401
Arlington, VA 22202-5450

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

Melanie Garris
Office of Civil Penalty Compliance
Mine Safety and Health Administration
U.S. Department of Labor
201 12th Street South, Suite 401
Arlington, VA 22202-5450

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 20, 2016

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	
v.	Docket No. YORK 2015-123-M A.C. No. 19-00598-381455
P.A. LANDERS, INC.	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). The Commission has received a motion from the operator seeking to reopen a penalty assessment which had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 813(a). The Secretary states that he does not oppose the motion.

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

The granting of this motion is not precedential for the consideration of any other motion before the Commission.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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

Distribution:

Patrick W. Dennison, Esq.
Jackson Kelly, PLLC
401 Liberty Avenue
Pittsburgh, PA 15222-1000

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
201 12th Street South, Suite 401
Arlington, VA 22202-5450

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

Melanie Garris
Office of Civil Penalty Compliance
Mine Safety and Health Administration
U.S. Department of Labor
201 12th Street South, Suite 401
Arlington, VA 22202-5450

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 25, 2016

SHAWN HIRT	
v.	Docket No. CENT 2015-598-DM
GARY SERVAES ENTERPRISES	

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

ORDER

BY: Jordan, Chairman; Young and Althen, Commissioners

A petition for discretionary review was filed by Gary Servaes Enterprises ("Servaes") on October 3, 2016. This petition was filed pursuant to section 113(d)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 823(d)(2). That section provides that review of a decision of an Administrative Law Judge may be granted upon specified grounds and upon the affirmative vote of two Commissioners. Such review is discretionary. 30 U.S.C. § 823(d)(2)(A).

A threshold issue in this case is whether the petition was timely filed. Pursuant to 30 U.S.C. § 823(d)(2)(A)(1) and Commission Procedural Rule 70, 29 C.F.R. § 2700.70, a petition for discretionary review must be filed within 30 days after issuance of a Judge's decision. The Judge's decision was issued on August 24, 2016. Any petition for discretionary review was due 30 days thereafter, on September 23, 2016. On September 30, 2016, Servaes filed a motion for leave to file its petition for discretionary review of the Judge's decision and order out of time. Thereafter, on October 3, 2016, the fortieth day after the issuance of the Judge's decision,[1] Servaes filed its petition, and we issued a contingent direction for review, pending consideration of this motion and pending consideration of the merits of the petition.

In its motion, Servaes explains that, after the Judge issued her opinion, it mistakenly filed a petition for review with the United States Court of Appeals for the Tenth Circuit, thereby completely bypassing the Review Commission. It alleges, without any proof, that after filing with the Tenth Circuit, its counsel phoned the Commission's docket office and was told that "the Petition was correctly filed in the Court of Appeals." Mot. at 2-3. It also alleges that no notice of Commission review procedures was attached to the Judge's decision. *Id*. at 2. Servaes further argues, without support, that section 106(a)(1) of the Mine Act, 30 U.S.C. § 816(a)(1), does not reference the need for Commission review prior to filing a petition for review in a court of appeals, and that section 113(d), 30 U.S.C. § 823(d), does not require such a filing with the Commission as a condition precedent to filing in a court of appeals. *Id.* at 3-4.

[1] The decision of an Administrative Law Judge becomes the final decision of the Commission 40 days after its issuance unless within that period the Commission directs review. 30 U.S.C. § 823(d)(1).

The Commission has held that it may consider a late-filed petition for review for good cause shown. *See Duval Corp. v. Donovan*, 650 F.2d 1051, 1054 (9th Cir. 1981); *Kopper Glo Mining, LLC*, 37 FMSHRC 2717, 2717-18 (Dec. 2015); *McCoy v. Crescent Coal Co.*, 2 FMSHRC 1202, 1204 (June 1980). In addition, we note that the United States Supreme Court and the federal courts of appeals often apply the concept of "equitable tolling" to requests to excuse missed deadlines. *See, e.g., Menominee Indian Tribe of Wisconsin v. United States,* 136 S.Ct. 750, 755 (2016) (holding that to be entitled to equitable tolling of a statute of limitations, a litigant must establish that he or she has been pursuing rights diligently and that some extraordinary circumstances stood in the way and prevented timely filing); *cf. Rockmore v. Harrisburg Property*, 501 Fed. Appx. 161, 164 (3rd. Cir. 2012).

Servaes has failed to demonstrate good cause for accepting the late filed petition, and has not set forth adequate grounds for equitable tolling. The attorney filed in the wrong forum, thereby failing to follow the provisions of the Mine Act and the Commission's plainly written procedural rules. Although the attorney sought to correct the error, the filing deadline was missed by ten days. It is unfortunate when a party that desires review loses the opportunity due to a filing mistake. However, attorneys' errors are usually imputable to their clients, and adherence to the Commission's clearly identified requirements for review is essential to the proper functioning of the Commission. We do not find the circumstances in this case warrant relief from the applicable deadlines.

Based on the foregoing, we deny the motion for late filing, and consequently do not reach the merits of the petition for discretionary review. Accordingly, the conditional direction for review is hereby vacated.[2]

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

[2] Commissioner Cohen finds that Gary Servaes Enterprises has established good cause for the late filing of the petition for discretionary review, and would, therefore, grant the motion for late filing. Commissioner Cohen would also grant the petition for discretionary review.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 27, 2016

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	
v.	Docket No. LAKE 2014-0393-M A.C. No. 11-00122-347386
BLUFF CITY MINERALS	

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

ORDER

BY THE COMMISSION:

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

On July 30, 2014, the Chief Administrative Law Judge issued an Order to Show Cause in response to Bluff's failure to answer the Secretary of Labor's April 25, 2014 Petition for Assessment of Civil Penalty. By its terms, the Order to Show Cause was deemed a Default Order on September 2, 2014, when it appeared that the operator had not filed an answer with the Judge within 30 days.

Bluff claims that it timely responded to the Order to Show Cause on August 14, 2014, and filed an answer to the Secretary's petition. The parties then continued to litigate the case until June 15, 2015, when Administrative Law Judge Alan Paez's law clerk informed them that the files showed that the case had been administratively closed. The records also indicated that the citation had been paid. Bluff states that it may have inadvertently paid the penalty in response to a phone call from MSHA informing it that penalties were delinquent.

The Secretary does not oppose the request to reopen and confirms receipt of the timely answer dated August 14, 2014. However, he notes that there is no indication that the operator ever forwarded the answer to the Chief Administrative Law Judge.

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

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

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

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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

Distribution:

Steelman, Guant & Horsefield
Attn: Ryan D. Seelke
901 Pine Street, Suite 110
Rolla, MO 65401

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

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

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 27, 2016

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), v. JESSE CREEK MINING, LLC	Docket No. SE 2015-310 A.C. No. 01-03422-381588

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

ORDER

BY: Jordan, Chairman; Young, and Althen, Commissioners

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On October 14, 2015, the Commission received from Jesse Creek Mining, LLC. ("Jesse Creek") a motion seeking to reopen a penalty assessment proceeding and relieve it from the Default Order entered against it.

On August 26, 2015, the Chief Administrative Law Judge issued an Order to Show Cause in response to Clayton's failure to answer the Secretary of Labor's July 14, 2015 Petition for Assessment of Civil Penalty. By its terms, the Order to Show Cause was deemed a Default Order on September 28, 2015, when it appeared that the operator had not filed an answer with the Judge within 30 days.

Jesse Creek claims that it failed to timely answer the Petition for three reasons: 1) the safety director at the mine was reassigned; 2) an employee inadvertently failed to properly record receipt of the Petition, which caused the operator to inaccurately record the deadline for answering the Petition in a timely manner; and 3) counsel for the operator never received the Petition and has no record of ever receiving it. The Secretary does not oppose the request to reopen. However, he notes that the Petition was clearly mailed and delivered to both the operator and its counsel. He states that his decision not to oppose reopening in this case should not be construed as condoning inadequate office procedures or failure to take Commission procedural rules and orders seriously.

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

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

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

Commissioner Cohen, dissenting:

I dissent from my colleagues' decision because I believe that Jesse Creek Mining, LLC has not established good cause to reopen this civil penalty case.

As grounds to reopen the proceeding, Jesse Creek asserts that the Safety Director at the mine had been reassigned and therefore was not present to process and answer the Petition for Assessment of Civil Penalty received from the Secretary. In addition, the operator stated that an "unidentifiable" office employee improperly failed to record receipt of the Petition upon delivery. Finally, counsel for the operator asserted that she had never received a copy of the Petition. The operator submits that its failure to timely contest the citations at issue in this case was an "inadvertent error" within the meaning of Rule 60(b) of the Federal Rules of Civil Procedure. Operator's Motion to Reopen, at 1.

In my view, Jesse Creek's three contentions that its failure to timely file the form was the result of excusable inadvertence are insufficient, and the operator has not established good cause to reopen the proceeding. The Commission has made it clear that where a failure to contest a proposed assessment results from an inadequate or unreliable internal processing system, the operator has not established grounds for reopening the assessment. *Shelter Creek Capital LLC*, 34 FMSHRC 3053, 3054 (Dec. 2012); *Oak Grove Res., LLC*, 33 FMSHRC 103, 104 (Feb. 2011); *Double Bonus Coal Co.*, 32 FMSHRC 1155, 1156 (Sept. 2010); *Highland Mining Co.*, 31 FMSHRC 1313, 1315 (Nov. 2009); *Pinnacle Mining Co.*, 30 FMSHRC 1066, 1067 (Dec. 2008); *Pinnacle Mining Co.*, 30 FMSHRC 1061, 1062 (Dec. 2008). The same principle applies to an operator's failure to file an answer to a Petition for Assessment of Civil Penalty, as required by Commission Rule 29. 29 C.F.R. § 2700.29. Moreover, in examining the operator's asserted justifications for reopening a particular case, the Commission has also considered whether the operator has demonstrated a pattern of behaviors that are attributable to inadequate or unreliable internal processing systems in other cases. *See Oak Grove Res., LLC*, 33 FMSHRC 2378, 2379-80 (Oct. 2011). In the *Pinnacle* cases, we emphasized that "[r]elief under Rule 60(b) should generally not be accorded to an operator who creates and condones a system which predictably will result in missed deadlines." 30 FMSHRC at 1062; 30 FMSHRC at 1067.

With respect to the Safety Director's absence, the operator's proffered explanation is not adequate. The Safety Director was "reassign[ed] . . . to the workforce." Operator's Motion to Reopen, at 1. Such a reassignment is not an unplanned-for departure, but rather something which should cause a prudent operator to take precautions and make plans. Jesse Creek had contested four S&S citations, and was aware of the fact that the Secretary would file a Petition in the future, which would require an answer pursuant to Commission Rule 29. It had a duty to plan for the Safety Director's reassignment, and to ensure that adequate personnel were in place to handle future documents, including this Petition, received from the Secretary. The operator's motion does not provide any indication of planning by Jesse Creek to ensure the proper processing of penalty Petitions and other MSHA mailings upon the departure of the Safety Director.

In fact, the motion shows that the operator's precautions were so inadequate that the Petition was mislaid by an office employee who cannot even be identified. If any planning had

been done, Jesse Creek would presumably have known the identity of its employees who processed communications from the Secretary only a few months earlier.

Further, this inadequate processing system does not appear to be of short duration. The Secretary sent a copy of its Petition on July 14, 2015 by UPS overnight delivery, and it was never processed by Jesse Creek. Six weeks later on August 26, 2015, Commission Chief Judge Lesnick issued an Order to Show Cause. At no time during the 30-day "show cause" period set forth in the Order did the operator respond. Jesse Creek provided no explanation for its failure to respond to the Judge's Order. Thus, months after the initial Petition was mislaid, the operator was still not properly processing its MSHA-related documents. This provides further indication that the operator's system was legally insufficient.

The operator's assertion that its counsel's law firm did not receive the Petition is not substantiated. The Secretary provided tangible evidence of the delivery of a copy of the Petition in the form of a UPS receipt showing delivery to "Boatman" at the office of operator's counsel. Despite this evidence, the operator provided no reply in support of its assertion that counsel's law firm did not receive the Petition. In light of that unrebutted evidence, it is not appropriate to rely on the operator's assertion with respect to the allegation of non-delivery of the Petition to counsel.

I am further convinced that good cause does not exist to reopen this case because it is not an isolated incident. This is not the only time that Jesse Creek has filed a motion to reopen claiming the same "inadvertence." As noted above, the Secretary's Petition in this case was sent by UPS to Jesse Creek on July 14, 2015. A month and a half later, on September 1, 2015, MSHA mailed Jesse Creek a proposed assessment which covered seven other citations and orders. Jesse Creek failed to timely contest these proposed penalties, and they became final pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). Jesse Creek has filed a motion with the Commission to reopen these penalties, asserting the exact same reason as asserted here – that the reassignment of its Safety Director to the workforce caused a failure to process documents from MSHA. Docket No. SE 2016-43. Hence, the operator's failure to timely answer the instant Petition was not the result of a single, isolated breakdown, but part of a long-running issue with Jesse Creek's internal procedures.

I conclude from Jesse Creek's own submissions and the submissions made by the Secretary that this is not a matter of mere "inadvertence." The operator created and condoned an unreliable internal processing system, and failed to take reasonable precautions in the course of reassigning its Safety Director. Jesse Creek is an above-average sized operator with a large mine and presumably has the resources to ensure that correspondence from the Secretary and the Commission is properly handled. It failed to do so over a substantial period of time. Therefore, I would deny its motion to reopen.

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

Distribution:

Gregory D. Neil
Safety Director
Jesse Creek Mining, LLC
1615 Kent Dairy Rd.
Alabaster, AL 35007

Rebecca J. Oblak
Bowles Rice, LLP
7000 Hampton Center
Morgantown, WV 26505

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

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

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 27, 2016

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), v. CARSON HILL ROCK PRODUCTS	Docket No. WEST 2014-389 A.C. No. 04-04792-335756

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On August 7, 2015, the Commission received from Carson Hill Rock Products ("Carson Hill") a motion seeking to reopen a penalty assessment proceeding and relieve it from the Default Order entered against it.

On June 20, 2014, the Chief Administrative Law Judge issued an Order to Show Cause in response to Clayton's failure to answer the Secretary of Labor's March 18, 2014 Petition for Assessment of Civil Penalty. By its terms, the Order to Show Cause was deemed a Default Order on July 21, 2014, when it appeared that the operator had not filed an answer within 30 days.

Carson Hill claims that it sent a timely answer to the Petition for Assessment of Civil Penalty to the Secretary's Denver Regional Office. The Secretary confirms this but states that there is no indication that the operator copied the Chief Administrative Law Judge on the correspondence. Furthermore, it appears that the operator promptly sought reopening after receiving a delinquency notice dated June 8, 2015. The Secretary does not oppose the request to reopen.

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

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

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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

Distribution:

Nick McTague
Mine Foreman
Carson Hill Rock Products
4795 Hwy 49
Carson Hill, CA 95222

Nick McTague
Mine Foreman
Carson Hill Rock Products
P.O. Box 305
Vallecito, CA 95251

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

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

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

ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
721 19th STREET, SUITE 443
DENVER, COLORADO 80202-2500
TELEPHONE: 303-844-5266 / FAX: 303-844-5268

October 6, 2016

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner, v. TILCON NEW YORK INC, Respondent.	CIVIL PENALTY PROCEEDINGS Docket No. YORK 2016-66 A.C. No. 30-00075-402400 Docket No. YORK 2016-72-M A.C. No. 30-00075-404552 Mine: Haverstraw Quarry & Mill

DECISION AND ORDER

Appearances: Margaret Temple and Suzanne Demitrio Campbell, U.S. Department of Labor, Office of the Solicitor, New York, New York, for Petitioner;

Kevin R. Keating, Oldcastle Law Group, Atlanta, Georgia, for Respondent.

Before: Judge Miller

These cases are before me upon petitions for assessment of civil penalties filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d) ("the Act"). These dockets involve sixteen citations issued pursuant to Section 104(a) of the Act with originally proposed penalties totaling $3,758.00. Prior to hearing, the parties agreed to settle six of the citations from Docket No. YORK 2016-66 and one from Docket No. YORK 2016-72. The Secretary vacated a second citation from YORK 2016-72 just prior to hearing, and the parties settled a third citation from that docket during the hearing. The settlement is addressed below. The parties presented testimony and evidence regarding the remaining seven citations at a hearing held in Poughkeepsie, New York, on July 27, 2016. Based upon the parties' stipulations, my review of the entire record, my observation of the demeanors of the witnesses, and consideration of the parties' legal arguments, I make the following findings and order.

The Haverstraw Quarry and Mill is a surface granite mine in Rockland County, New York, operated by Tilcon New York, Inc. The parties have stipulated that Tilcon is an "operator" as defined in Section 3(d) of the Mine Act, 30 U.S.C. § 803(d), and is subject to the jurisdiction of the Commission. Ex. P-1. Tilcon New York operates four quarries as well as several other plants, and has approximately 275 to 300 employees. The Haverstraw Quarry is one of the company's larger quarries. A history of assessed violations at the mine was admitted as Exhibit P-17.

On December 28, 2015, Inspector Brian Righi traveled to the Haverstraw Quarry to conduct a general inspection. Righi also returned to the mine the following day and on January 5 and 6. Righi has been a mine inspector for four years and estimated that he has conducted 141 inspections. He has attended the required MSHA training. Prior to becoming an inspector, he worked 15 years in the mining industry, including work on crushers, conveyors, and various safety and health matters.

I. APPLICABLE PRINCIPLES OF LAW

The citations issued by Righi have been designated with various levels of negligence and several have been designated as significant and substantial violations. The Secretary has the burden of proof and the mine operator has the burden to prove any defenses it may raise, including the issue of fair notice.

A. Establishing a Violation

To prevail on a penalty petition, the Secretary bears the burden of proving an alleged violation by a preponderance of evidence. *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000), *aff'd* 272 F.3d 590 (D.C. Cir. 2001); *Jim Walter Res., Inc.*, 9 FMSHRC 903, 907 (May 1987). The Secretary may establish a violation by inference in certain situations, but only if the inference is "inherently reasonable" and there is "a rational connection between the evidentiary facts and the ultimate fact inferred." *Garden Creek Pocahontas Co*., 11 FMSHRC 2148, 2152-53 (Nov. 1989).

B. 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)(l). A violation is properly designated S&S "if based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

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

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

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

The second element of the *Mathies* test addresses the likelihood of the occurrence of the hazard the cited standard is designed to prevent. *Newtown Energy, Inc*., 38 FMSHRC __, No. WEVA 2011-283, slip op. at 5 n.8 (Aug. 29, 2016). The Commission has explained that "hazard" refers to the prospective danger the cited safety standard is intended to prevent. *Id.* at 6. In *Newtown*, for instance, for a violation of a standard requiring that equipment be locked out and tagged out while electrical work is being performed, the Commission considered the hazard of a miner working on energized equipment. *Id*. The likelihood of the hazard occurring must be evaluated with respect to "the particular facts surrounding the violation." *Id.*; *see also McCoy Elkhorn Coal Corp*., 36 FMSHRC 1987, 1991-92 (Aug. 2014); *Mathies*, 6 FMSHRC at 4. At the third step, the judge must assess whether the hazard, if it occurred, would be reasonably likely to result in injury. *Newtown*, slip op. at 5. The existence of the hazard is assumed at this step. *Id*.; *Knox Creek Coal Corp. v. Sec'y of Labor,* 811 F.3d 148, 161-62 (4th Cir. 2016). As with the likelihood of occurrence of the hazard, the likelihood of injury should be evaluated with respect to specific conditions in the mine. *Newtown,* slip op. at 7. Finally, the Commission has held that the S&S determination should be made assuming "continued normal mining operations." *McCoy*, 36 FMSHRC at 1990-91.

C. Negligence

The Secretary's regulations categorize negligence into five categories, from "no negligence" to "reckless disregard." 30 C.F.R. § 100.3, Table X. The Commission has emphasized, however, that these regulations apply to the Secretary's proposal of penalties only, and are not binding on the Commission. *Brody Mining, LLC*, 37 FMSHRC 1687, 1701 (Aug. 2015). The Commission instead directs its judges to "evaluate negligence from the starting point of a traditional negligence analysis . . . . Under such an analysis, an operator is negligent if it fails to meet the requisite standard of care—a standard of care that is high under the Mine Act." *Id.* at 1702. In evaluating an operator's negligence, the judge should consider "what actions would have been taken under the same circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation." *Jim Walter Res*., 36 FMSHRC 1972, 1975 (Aug. 2014).

While the Secretary's regulations focus on the presence or absence of mitigating circumstances in determining the level of negligence, 30 C.F.R. § 100.3, the Commission has indicated that Commission judges are not limited to this analysis and "may find 'high negligence' in spite of mitigating circumstances or may find 'moderate' negligence without identifying mitigating circumstances." *Brody*, 37 FMSHRC at 1702-03. High negligence is characterized by "an aggravated lack of care that is more than ordinary negligence." *Id*. at 1703.

D. Fair Notice

Where the language of a regulatory provision is clear, the provision must be enforced as written unless the regulator clearly intended a different meaning, or unless interpreting the language as it is written would lead to absurd results. *Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987); *Island Creek Coal Co*., 20 FMSHRC 14, 18 (Jan. 1998). If, however, the standard is "silent or ambiguous with respect to the specific point at issue," the court must defer to the agency's interpretation of its own regulation "as long as it is reasonable." *Small Mine*

Devel., 37 FMSHRC 1892, 1894 (Sept. 2015) (quoting *Tenet HealthSystems Healthcorp. v. Thompson*, 254 F.3d 238, 248 (D.C. Cir. 2001)); *see also Auer v. Robins*, 519 U.S. 452, 461 (1997) (holding that an agency's interpretation of its own regulation is "controlling unless plainly erroneous or inconsistent with the regulation").

When an agency's interpretation is the basis for imposition of a civil penalty, "a separate inquiry may arise concerning whether the respondent has received 'fair notice' of the interpretation it was fined for violating. '[D]ue process … prevents … deference from validating the application of a regulation that fails to give fair warning of the conduct it prohibits or requires.'" *Island Creek*, 20 FMSRHC at 24 (quoting *Gates & Fox Co. v. OSHRC*, 790 F.2d 154, 156 (D.C. Cir 1986)). In evaluating whether a standard provides fair notice to an operator, the Commission applies the "reasonably prudent person" test: application of a standard to a set of facts is consistent with fair notice if "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, the Commission has taken into account a wide variety of factors, including the text of the regulation, its placement in the overall regulatory scheme, explicit definitions in the regulations or the Act, the regulatory history, the consistency of the agency's enforcement, and whether MSHA has published notices informing the regulated community of its interpretation. *See Hecla Ltd.,* 30 FMSHRC __, No. WEST 2012-760-M (Aug. 30, 2016); *Wolf Run Mining Co*., 32 FMSHRC 1669, 1682 (Dec. 2010); *Island Creek*, 20 FMSHRC at 24-25; *Morton Int'l, Inc*., 18 FMSHRC 533, 539 (Apr. 1996); *Ideal Cement Co*., 12 FMSHRC at 2416. Also relevant is the testimony of the inspector and the operator's employees as to whether they believed the cited condition to be a violation. *Island Creek,* 20 FMSHRC at 24-25. Finally, the Commission has looked to evidence of accepted safety practices in the industry. *See BHP Minerals Int'l Inc.*, 18 FMSHRC 1342, 1345 (Aug. 1996); *Ideal Cement*, 12 FMSHRC at 2416.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The seven citations discussed below remain in dispute and I make the following findings with regard to each.

A. Citation No. 8923674

In the course of his inspection, Inspector Righi observed an elevated highwall roadway leading to an active drilling area. The roadway had a drop-off of approximately 50 feet. It was unbermed for about 200 feet on one side, but orange barrels had been placed at the entrance to the roadway. The barrels were labeled with a warning that the area was unbermed, but the warning was in relatively small type and could not be seen without getting close to the barrels. *See* Exs. R-H, P-2. Although Eric Kechejian, Tilcon's safety director, stated that the barrel cones were heavy, it was possible to move them. Kechejian explained that the mine had been using the barrels in place of berms for many years and that past inspectors had approved.

Righi testified that the roadway became an active drilling area farther down the road. The portion near the barrels was used by drilling, blasting, and maintenance vehicles, but was not heavily traveled. Righi understood that blasting and drilling at the mine were performed by a contractor and were done regularly but not every day. The mine's plant manager, George Lindbloom, testified that the area was being actively mined at the time of the inspection and that berms had been removed where drilling and blasting were going to take place. Righi did not agree that the cited portion of the road was an active mining area.

Righi was concerned that the barrel cones could be easily moved and did not effectively impede entry. He cited the mine for a violation of 30 C.F.R. § 56.9300(d). The Secretary requires that berms or guardrails be provided "on the banks of roadways where a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment." 30 C.F.R. § 56.9300(a). However, if the roadway is "infrequently traveled and used only by service or maintenance vehicles," the mine may instead comply with the standard by providing all of the following alternative safety measures: 1) locked gates at the entrance points of the roadway; 2) signs warning that the roadway is unbermed; 3) delineators along the perimeter of the roadway to indicate the edges and attitude of the roadway; 4) a maximum speed limit posted on the roadway; 5) road surface traction that is not impaired by weather conditions, or corrective measures to improve traction in the event of bad weather conditions. 30 C.F.R. § 56.9300(d). The inspector cited the mine under this alternative subsection.

Tilcon disputes that the roadway was "infrequently travelled," arguing that it was an active mining area. However, Tilcon acknowledges in its post-hearing brief that the area was a "roadway." Resp. Br. at 8. It is clear from the testimony that the area had a drop-off of 50 feet. Thus, regardless of whether the exceptions in § 56.9300(d) were applicable, the area was subject to § 56.9300(a), the general provision requiring berms. Tilcon does not claim to have installed berms. Nor does it claim to have installed locked gates and delineators along the perimeter of the roadway to satisfy the exception in § 56.9300(d). Accordingly, I find that a violation occurred.

Tilcon argues that it was not provided with fair notice of the inspector's interpretation, but I reject this argument. I do not credit the safety director's testimony that the exact configuration had been observed by other inspectors without a citation issued. While inspectors may have been in the area on previous inspections, there is no credible evidence to show that the exact conditions existed and were not cited. Additionally, a reasonable miner would recognize that the barrels that were in place would not keep a miner from driving along the cited area that was not bermed.

The Secretary alleges that the violation was the result of low negligence, that it was unlikely to result in injury, that if injury did occur it would be fatal, and that the violation was not S&S. I agree that the negligence was low, since there was some genuine disagreement about the nature of the road. The testimony and the record support a finding that the violation was much more serious than the inspector indicated and should have been marked as significant and substantial. There is no question that persons travelled near the entrance to this road. They would not have been kept out or warned by the cones with the warning in small lettering. The drillers and blasters who used the area could easily over-travel on the road and drop down a 50-foot

drop-off. For that reason, I find that injury was reasonably likely to occur and the gravity was greater than the citation indicates. I assess a penalty of $1,000.00.

B. Citation No. 8923675

Righi observed loose material extending the length of the 140 bench highwall. There was loose gravel as well as a large boulder at one point on the wall. He did not observe falling material, but observed a residual pile along the base of the wall. Righi also testified that the mine's blasting method involved drilling past what would become the next bench, and that the top edge of the wall was therefore likely fractured. He did not believe the mine had scaled recently, and a miner told him the company did not like to scale.

Lindbloom testified that the material on the highwall was compacted rather than loose and unconsolidated. The highwall is inspected daily, and Lindbloom explained that the miners who work in the area are familiar with the geology, know how to identify unsafe conditions, and are empowered to address them. The wall was scaled to terminate the citation, and miners told Lindbloom they believed the wall was less safe after it was scaled because the rock had been loosened. Lindbloom stated that the boulder was a remnant of an earlier road, was set back about a foot, was angled away from the edge, and was not in danger of falling over the highwall.

Righi observed three miners working in the area around the highwall, hauling material from a muck pile with a loader and haul trucks. The boulder was directly above them. Righi stated that loading out the muck pile involved driving along the base of the highwall. Lindbloom disagreed, saying that the loader operator would actually be at least 30 feet from the bottom of the highwall. He stated that the muck pile was at the base of the highwall and extended six to ten feet, and the loader operator would be loading out of the pile with the scoop end of the loader facing the wall. He stated that the muck pile is against the wall and is intended to keep miners from getting too close to the wall. However, Righi observed a tire track close to the wall. There were no warnings or barricades to keep workers from walking next to the face.

Righi issued Citation No. 8923675 for a violation of 30 C.F.R. § 56.3200, which requires that "Ground conditions that create a hazard to persons shall be taken down or supported before other work or travel is permitted in the affected area." The Commission has explained that the plain language of § 56.3200, when read in conjunction with §§ 56.3130 and 56.3131, requires operators to "maintain highwall stability and correct hazardous conditions before work or travel takes place." *Connolly-Pacific Co.*, 36 FMSHRC 1549, 1553 (June 2014). The preamble to § 56.3200 states that it is a "performance-oriented" standard with "broad application" that applies "wherever such a hazard is present." 51 Fed. Reg. 36,192 (Oct. 8, 1986). In applying broadly worded standards, the Commission uses the reasonably prudent person standard, asking "whether a reasonably prudent person would have ascertained the specific prohibition of the standard and concluded that a hazard existed." *U.S. Steel Mining Co., LLC*, 27 FMSHRC 435, 439 (May 2005).

I credit the testimony and reasoning of Righi and find that the rocks and loose material at the top of the highwall presented a hazard to those working below. An experienced MSHA inspector's opinion that a hazard exists is entitled to substantial weight. *Buck Creek Coal Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999); *Harland Cumberland Coal Co*., 20 FMSHRC 1275,

1278-79 (Dec. 1998). Tilcon offered little evidence of the general condition of the highwall and its methods for controlling it, and I find no reason to doubt the inspector's descriptions. Righi explained that he observed loose material and both large and small rocks. Any freezing of the ground, blasting in the area, or removal of material could easily cause the rocks to fall. A reasonably prudent person would have understood that scaling and berms were necessary. I also credit the inspector's finding that miners were working at the base of the highwall and were exposed to a fall hazard. Even a small rock falling from that height could crash through the windshield of a piece of equipment and injure a miner.

I find further that the violation was significant and substantial. Applying the *Mathies* criteria, there was a violation of a mandatory standard which created the hazard of rock and loose material falling from a height above and hitting someone working below. The hazard was likely to occur because the mine's drilling methods had destabilized the highwall, making a fall likely, and three miners were working at the base. Falling rock or loose material that hit a truck or loader would be likely to crush the top or crash through the windshield, causing death or serious injury. In view of the evidence that the miners had not scaled recently or installed berms, I also accept the designation of moderate negligence. I assess a penalty of $807.00 as proposed.

C. Citation No. 8923680

Inspector Righi issued a number of guarding violations during the inspection. Citation No. 8923680 relates to an area guard for a large cone crusher. The guard is a fence and gate enclosing the crusher, and is intended to protect miners from contact with the V-belts and drive pulleys that operate the cone crusher. Additional guards for the belts and pulleys are not provided inside the fence, so a miner entering through the gate could come in contact with the moving parts. Righi observed that the gate was secured with a nut and bolt and labeled with a "Do Not Enter" sign. However, the nut and bolt were loose and came apart when he touched the gate. Righi believed that the nut and bolt did not adequately secure the area and that a padlock should have been used instead. He explained that the gate was easily defeated and someone could easily enter the area and access the moving parts. However, he did not believe that the condition was likely to cause injury due to the presence of the gate and the "Do Not Enter" sign.

Lindbloom testified that the mine has a policy prohibiting miners from entering areas to work on moving components unless they have been locked out and tagged out. He stated that miners would not enter the area to inspect it, because they conduct inspections from outside the fenced area. He also stated that the mine had been using the guard in this form for 11 or 12 years. Kechejian said that the mine has not been cited for using the nut and bolt in the past.

Righi cited the mine for a violation of § 56.14112(b), which provides that "Guards shall be securely in place while machinery is being operated, except when testing or making adjustments which cannot be performed without removal of the guard." 30 C.F.R. § 56.14112(b). He designated the citation as resulting from low negligence and being unlikely to cause injury, noting that the mine had made attempts to secure the area and that miners were unlikely to enter it.

Tilcon argues that the guarding standards are intended to address inadvertent contact with machine parts, but that in this case, a miner would only contact the parts if he intentionally entered the gated area. However, Righi testified that when he touched the gate, the nut and bolt came apart. The photographs also show that the gate was located at the bottom of a short stairway, so someone could fall into the gate. *See* Exs. P-5, R-B. Righi stated that the moving machine parts were right inside the gate, where someone could contact them.

I find that the gate as observed by Righi was not secure, and therefore a violation has been shown. Tilcon argues that it did not have fair notice of the requirement because past inspectors had permitted the gate in this condition. However, I find that the Secretary's interpretation of the regulation was clear in this instance. A gate that opens when touched is clearly not "securely in place" as required by the plain language of the standard. "[W]hen the meaning of a standard is clear based on its plain language, it follows that the standard provided the operator with adequate notice of its requirements." *Austin Powder Co*., 29 FMSHRC 909, 919 (Nov. 2007) (internal quotations omitted) (quoting *LaFarge Constr. Materials*, 20 FMSHRC 1140, 1144 (Oct. 1998)). An inconsistent enforcement pattern by the Secretary does not change that result. *Id*. at 920.

While I believe this violation was more serious than the inspector indicated, I defer to his assessment that the violation was unlikely to cause injury and was the result of low negligence. Therefore, I assess a $100.00 penalty as proposed by the Secretary.

D. Citation No. 8923683

Citation No. 8923683 also alleges a violation of § 56.14112(b). A guard was provided around the drive pulley for the motor on the Diester scalping screen, which is used to size and sort rock. Righi observed that the guard, a piece of expanded metal, had been pushed up in one location, exposing the belt and pulley. Photographs introduced by the Secretary show the small gap in the guard. Ex. P-6. The exposed area was small, but large enough for someone to fit a hand through. It was located on the top and side of the motor and so not easily accessible. The area would be accessed via a metal walkway to the side of the motor. While Lindbloom pointed out that the general area was roped off with a sign saying "Danger Falling Rocks," the area could be accessed for clean-up, maintenance, or to inspect nearby fire extinguishers.

The witnesses differed on the potential for a person to contact the moving parts. Lindbloom stated that it would be impossible for someone to contact the pulley because the gap in the guard was narrow, it was four to five feet off the ground, and the walkway was two to three feet away from the machine. Righi agreed that he came within two feet of the spot. But he believed it would be possible for someone to trip on a stone on the walkway and put his hand into the gap to catch himself. I credit the testimony of the inspector on this point. The mine also argues that its lock-out/tag-out policy would prevent any person from contacting moving machine parts. Resp. Br. at 5. However, the purpose of guarding standards is to prevent inadvertent contact. *Thompson Bros. Coal Co*., 6 FMSHRC 2094, 2097 (Sept. 1984). Such contact is not fully addressed by a lock-out/tag-out policy.

The photographs show a small unguarded area on the scalping screen. While the spot is not easily accessed, it can be done. Given the falling material around the screen and the need to

access the equipment periodically, the unguarded area presented a hazard. Lindbloom and Kechejian stated that the guard had been in the position observed by Righi for seven or eight years and had never been cited. However, the inspector's photographs show that the guard was at an angle and appears to be out of place. I find therefore that the guard was not "securely in place," and that a violation existed. I reject the fair notice defense raised by the mine based on past inspections that were not substantiated. Since the gap was on top of the motor where it was unlikely to be reached, I agree with the inspector that the violation was unlikely to cause injury. The inspector designated the citation as resulting from moderate negligence because it was open and obvious, and I agree. I assess a $100.00 penalty as proposed by the Secretary.

E. Citation No. 8923686

Citation No. 8923686 involves a head pulley guard on a V-belt, a conveyor used to move stone. Righi observed that a section was missing on the lower part of guard, and no guard was provided on the back side of the pulley drive. Exhibit P-9 includes photographs showing the gaps where there are missing guards. Righi believed that the guards were not adequate to protect miners from coming into contact with moving parts. He believed miners would be in the area to grease and maintain the equipment.

Tilcon's witnesses showed that the pulley was difficult to access: a miner would have to walk across 500 feet of catwalk, pass through a chain, go down a ladder and up another ladder, and go through a waist-high gate secured with a nut and bolt. Lindbloom and Kechejian testified that greasing on the machinery was done remotely and inspections were done from below, so the only reason a miner would be in the area would be for maintenance on the belt, in which case the equipment would be locked out. Righi argued that miners would also need to enter the area for monthly fire extinguisher checks and periodic housekeeping.

Righi cited the mine for a violation of 30 C.F.R. § 56.14107(a), which requires that "Moving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and takeup pulleys, flywheels, couplings, shafts, fan blades, and similar moving parts that can cause injury." Because only a small portion of the pulley was not guarded, Righi determined that the violation was not S&S.

The inspector's testimony and photos indicate that there were moving machine parts that were not completely guarded. However, the Commission has held that for a guarding standard to be applicable there must be a "reasonable possibility of contact and injury." *Thompson Bros*., 6 FMSHRC at 2097. In assessing whether there is a reasonable possibility of contact, judges are instructed to consider "all relevant exposure and injury variables, e.g., accessibility of the machine parts, work areas, ingress and egress, work duties, and … the vagaries of human conduct." *Id*. Here, I credit the statements of Tilcon's witnesses that most maintenance of the belt was done remotely and that it was extremely difficult to access the area. Anyone going into that remote area would de-energize the equipment prior to moving near the small unguarded spot. Accordingly, I find there was no reasonable possibility of a person contacting moving machine parts, and additional guarding was not required. Therefore, this citation is vacated.

F. Citation No. 8923690

Citation No. 8923690 alleges another violation of § 56.14107(a) for inadequate guarding. Righi observed that a section next to the electrical motor on the no.6 crusher was not guarded, exposing the V-belts and pulley. The unguarded section was approximately 2.5 by 12 inches. The area was about four or five feet above the walking area, leading the inspector to believe that someone could slip and fall and contact the moving parts. Lindbloom stated that a second angled guard by the motor would prevent anyone from touching the unguarded spot, and that a person could not contact the motor without intentionally reaching through the guard. The mine produced photographs showing the second angled guard. Ex. R-G. However, Righi stated that the second guard did not prevent him from walking right up to the problem area, and that the photograph was misleading. Lindbloom stated that the crusher stands alone and can only be accessed via a separated platform. He stated that the only time a miner would be in the area while the machine was running would be to view the moving parts or to hose off the platform. For other maintenance, the machine would be locked out.

I credit the inspector's observation and findings and find that there is a violation. Because the unguarded area was small, it may have escaped miners' attention. I therefore find that negligence was low. The violation was unlikely to cause injury due to the size and location of the gap. I assess a $100.00 penalty as proposed by the Secretary.

G. Citation No. 8923694

Citation No. 8923694 concerns a bent step near the left rear engine compartment of a loader. The parties agree that the machine operator had other means of accessing the cab, and the step was not intended for that use. However, Righi believed that a fueler and oiler would use the step daily when servicing the machine. A person using the step could slip and fall since it was not a flat surface. Lindbloom testified that the maintenance crew typically does not use the step anyway because it is too high. Instead, they back the fuel truck directly up to the machine or use a ladder they carry with them. The condition had been reported in a pre-shift examination several months earlier, but the maintenance department determined that the step was safe and did not repair it.

Righi issued Citation No. 8923694 for a violation of 30 C.F.R. § 56.11001, which requires that "Safe means of access shall be provided and maintained to all working places." He designated the citation as S&S and resulting from high negligence.

I find that the engine of the loader was a "working place," for purposes of fueling, oiling, and general maintenance. The step was a means of accessing the engine, and the standard thus required that it be maintained in a safe condition. Exhibit P-14 clearly shows that the step is bent. I agree with Righi that this created a hazard. In the event that a miner was not looking and stepped up onto the slanted step, he would be likely to fall backwards and be injured. I therefore find that a violation has been shown. I find that a reasonable person familiar with the mining industry would have understood that the bent step was not properly "maintained" as required by the standard, and so reject Tilcon's fair notice argument. Resp. Br. at 10-11; *see Ideal Cement Co*., 12 FMSHRC 2409, 2416 (November 1990).

Applying the *Mathies* S&S criteria to this citation, I find that the Secretary has proven a violation of a mandatory standard. The hazard created by the violation is that someone using the step could fall backward onto the ground. I find that this hazard was likely to occur. While Tilcon claims that the maintenance crew used a ladder rather than the step, someone could easily forget and use the step. It had not been removed or flagged in any way. Such a person could easily fall when they stepped on the slanted surface, expecting a flat one. If the hazard occurred, a person falling backward onto the ground from a height of three feet would likely be injured. An injury of broken bones or back or neck injury would be likely, which are reasonably serious in nature. Therefore, I find the violation is S&S.

Given that the condition had been reported to the mine operator but it chose not to repair the step, the negligence is high. I assess the penalty of $1,203.00 as proposed by the Secretary.

III. PENALTIES

The principles governing the authority of Commission Administrative Law Judges to assess civil penalties de novo for violations of the Mine Act are well established. Section 110(i) of the Mine Act delegates to the Commission and its judges "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(i). The duty of proposing penalties is delegated to the Secretary. 30 U.S.C. §§ 815(a), 820(a). 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 judge must consider six statutory penalty criteria: the operator's history of violations, its size, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and whether the violation was abated in good faith. 30 U.S.C. § 820(i). In keeping with this statutory requirement, the Commission has held that judges must make findings of fact on the statutory penalty criteria. *Sellersburg Stone Co*., 5 FMSHRC 287, 292 (Mar. 1983), *aff'd*, 736 F.2d 1147, 1152 (7th Cir. 1984). Once these findings have been made, a judge's penalty assessment for a particular violation is an exercise of discretion "bounded by proper consideration of the statutory criteria and the deterrent purposes underlying the Act's penalty scheme." *Id*. at 294; *see also Cantera Green*, 22 FMSHRC 616, 620 (May 2000).

The history of assessed violations has been admitted into evidence and shows nothing unusual in the history, particularly as it relates to the guards.[1] It shows eight violations in the 15-month period prior to the inspection, including one guarding violation and several equipment violations. The parties agree that the citations were abated in good faith and the mine has raised no defense of ability to pay. The negligence and the gravity have been discussed above with respect to each citation.

IV. PARTIAL SETTLEMENT

The Secretary has filed several motions to approve partial settlement, in which he represents that the parties have agreed to settle nine of the sixteen citations in these dockets. The

[1] The history of violations submitted by the parties omitted a portion of the fifteen month period. Ex. P-17. The court takes judicial notice of the mine's history of violations as indicated on the MSHA website.

Secretary has set forth the factual basis for the proposed modifications. The Respondent has agreed to the proposed changes. The originally assessed amount for the eight settled citations was $1,248.00 and the proposed settlement amount is $1,148.00. The proposed settlement includes:

Citation No.	Originally Proposed Assessment	Settlement Amount	Modification
Docket No. YORK 2016-66			
8923678	$100.00	$100.00	None.
8923681	$243.00	$243.00	Remove S&S designation.
8923684	$100.00	$100.00	Modify negligence from moderate to low.
8923685	$100.00	$100.00	Modify negligence from moderate to low.
8923688	$100.00	$100.00	None.
8923689	$243.00	$243.00	None.
TOTAL	**$886.00**	**$886.00**	
Docket No. YORK 2016-72-M			
8923691	$162.00	$162.00	None.
8923692	$100.00	$100.00	Modify negligence from high to low.
8923693	$100.00	---	Vacate.
TOTAL	**$362.00**	**$262.00**	

I accept the representations and modifications of the Secretary as set forth in the motions to approve settlement. I have considered the representations and documentation submitted, find that the modifications are reasonable, and conclude that the proposed settlement is appropriate under the criteria set forth in Section 110(i) of the Act. The citations listed above as settled are approved. The following chart sets forth the penalty amounts for each of the seven citations that are subject to this decision.

Citation No.	Originally Proposed Assessment	Decision Amount	Modification
Docket No. YORK 2016-66			
8923674	$100.00	$1,000.00	Modify likelihood of injury from unlikely to reasonably likely.
8923675	$807.00	$807.00	None
8923680	$100.00	$100.00	None.
8923683	$100.00	$100.00	None.
8923686	$100.00	---	Vacate.
TOTAL	**$1,207.00**	**$2,007.00**	

Docket No. YORK 2016-72-M			
8923690	$100.00	$100.00	Modify negligence from moderate to low.
8923694	$1,203.00	$1,203.00	
TOTAL	**$1,303.00**	**$1,303.00**	

GRAND TOTAL	**$3,758.00**	**$4,458.00**	

V. ORDER

The Secretary's motions to approve partial settlement are **GRANTED**. The Respondent is ordered to pay an additional $3,310.00 total penalty as detailed in the findings above for the seven contested citations. Respondent is hereby **ORDERED** to pay the Secretary of Labor the sum of $4,458.00 within 30 days of the date of this decision.

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

Distribution: (U.S. First Class Mail)

Terrence Duncan, Margaret Temple, Suzanne Campbell, U.S. Department of Labor, Office of the Solicitor, 201 Varick Street, Room 983, New York, NY 10014

Kevin R. Keating, Oldcastle Law Group, 900 Ashwood Parkway, Suite 600, Atlanta, GA 30338

THE FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVENUE NW, SUITE 520N
WASHINGTON, D.C. 20004

October 7, 2016

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDINGS Docket No. CENT 2015-1-M AC No. 14-01578-361486 Docket No. CENT 2015-157-M AC No. 14-01578-369439
v.	Docket No. CENT 2015-220-M AC No. 14-01578-371826
APAC-KANSAS, INC., Respondent	Mine: Bonner Springs Quarry

DECISION

Appearances: Daniel McIntyre, Esq., U.S. Department of Labor, Office of the Solicitor, Denver, Colorado, for Petitioner;

Kevin Keating, Oldcastle Law Group, Atlanta, Georgia, for Respondent.

Before: Judge Bulluck

These cases are before me upon Petitions for Assessment of Civil Penalty filed by the Secretary of Labor ("Secretary") on behalf of the Mine Safety and Health Administration ("MSHA") against APAC-Kansas, Incorporated, ("APAC"), pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 ("Act"), 30 U.S.C. § 815(d). The Secretary seeks a total penalty of $9,666.00 for 32 alleged violations of his mandatory safety standards.[1]

A hearing was held in Liberty, Missouri. The following issues are before me: (1) whether APAC violated the cited standards; (2) whether the violations were significant and substantial, where alleged; (3) whether the violations were attributable to the level of negligence alleged; and (4) the appropriate penalty. The parties' Post-hearing Briefs are of record.

[1] The parties reached a settlement on 27 of the 32 contested citations/orders. The total civil penalty proposed for the remaining four citations and order adjudicated in this proceeding is $3,070.00.

For the reasons set forth below, I **AFFIRM** four citations and one order, as issued, and assess penalties against Respondent.

I. FACTUAL BACKGROUND

APAC owns and operates the Bonner Springs quarry, a surface limestone mine in Wyandotte County, Kansas. The mine is staffed by approximately nine miners, working one shift per day. Tr. 190, 219. Bryan Lane, operations manager, and Keith Stoker, plant superintendent, were working at the mine during the 2014 inspection at issue. Tr. 162, 197.

APAC's mining process involves drilling and blasting its limestone highwall to form benches. Tr. 28-29. Crushed limestone accumulated at the base of the 42-foot highwall is removed and stockpiled by a front-end loader, then loaded onto haul trucks to be processed into saleable product. Tr. 27-30, 46-47. Between the mine floor and the top of the highwall, a safety or catch bench, approximately 21 feet above ground, prevents material in the upper highwall from falling onto the work area at the toe. Tr. 29-30.

On July 21, 2014, local media reported that an accident had occurred on an APAC mine site. Tr. 162. APAC investigated, and concluded that the accident had actually occurred on an adjacent property outside its control. Tr. 162. APAC management then called MSHA's Topeka field office to explain the inaccurate media report. Tr. 163. Later that night, MSHA supervisory Inspector Sidney Garay called APAC's division president, David Guillaume, to inquire about the incident. Tr. 163.

The following day, MSHA inspectors Garay, Christopher Ewing, and Dustin Crelly began an E01 regular inspection of the Bonner Springs mine that lasted for several weeks, and resulted in numerous citations.[2] Tr. 24-25, 98, 164. Among other violations, Garay cited APAC for failing to maintain two areas of the highwall (Exs. P-2, P-3); failing to guard moving parts on mobile equipment (Ex. P-5); failing to provide site-specific hazard training (Ex. P-4); and failing to conduct adequate workplace examinations (Ex. P-6).

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Citation No. 8760649

Inspector Garay issued 104(a) Citation No. 8760649 on July 22, 2014, alleging a "significant and substantial" violation of section 56.3131 that was "reasonably likely" to result in

[2] APAC characterizes the inspection as retaliatory and a clear abuse of discretion. Tr. 164, 201; Resp't Br. at 2-3, 14. Even if the inaccurate media report sparked the inspection, no citations were issued related to the incident, and there is no record evidence, whatsoever, supporting this contention.

an injury that could reasonably be expected to be "fatal," and was caused by APAC's "moderate" negligence.[3] The "Condition or Practice" is described as follows:

> Operator failed to maintain loose and unconsolidated material on the working face located in the pit at the Argentine ledge high wall. Several rocks measuring approximately 8 inches to 24 inches in diameter, which are located approximately 42 feet from the ground level. The operator of the 992G CO#950 is working in the area on a regular basis. This condition exposes miners to a catastrophic collapse of the high wall, exposing miners to a fall of materials, blunt force, and fatal injuries hazard.

Ex. P-2. The citation was terminated on August 5 after APAC installed a berm at the toe of the highwall approximately 20 to 25 feet from the working face.

1. Fact of Violation

In order to establish a violation of one of his mandatory safety standards, the Secretary must prove that the violation occurred "by a preponderance of the credible evidence." *Keystone Coal Mining Corp.*, 17 FMSHRC 1819, 1838 (Nov. 1995) (citing *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989)).

The Secretary contends that APAC's miners were working directly under loose, unconsolidated material, and that the operator employed no safety measures between the bench and the pit floor where they were working. Sec'y Br. at 6-8. APAC argues that the highwall was not in danger of a catastrophic collapse, and that the front-end loader operator was at least 50 feet away from the highwall - - a distance beyond which a falling rock would have traveled. Resp't Br. at 17-19.

Supervisory Inspector Sidney Garay came to MSHA in 2002, having worked in the mining industry for 21 years, with experience in evaluating highwall safety in a surface mine, and familiarity with MSHA training requirements. Tr. 17-20. He testified that section 56.3131 requires the operator to maintain loose and unconsolidated material in the working face of the highwall, between the bench and the floor, by scaling loose rock, or installing a berm at the mine floor to prevent access to the area where rock may fall. Tr. 57-59. He stated that the highwall displayed significant cracking, that a horseshoe-shaped feature in the bench evidenced a previous rock fall above the work area, that loose material that could fall at any time was located above and below the bench, that 8- to 24-inch diameter loose and unconsolidated material had accumulated on the bench, and that one section of the bench above the work area had been

[3] 30 C.F.R. § 56.3131 provides that "[i]n places where persons work or travel in performing their assigned tasks, loose or unconsolidated material shall be sloped to the angle of repose or stripped back for at least 10 feet from the top of the pit or quarry wall. Other conditions at or near the perimeter of the pit or quarry wall which create a fall-of-material hazard to persons shall be corrected."

blasted away. Tr. 32, 46, 57, 64, 66-67, 138-39; Ex. P-2 at 8, 10-11. He testified that no safety features protecting miners from a fall-of-material hazard were employed between the bench and the pit floor. Tr. 43; Ex. P-2 at 7. Garay also stated that while driving toward the highwall, he observed a front-end loader operating perpendicular and parallel to the highwall from an estimated distance of 12 to 24 feet, loading stone from the muck pile onto haul trucks. Tr. 25, 32-33, 142-45; Ex. P-2 at 8. He opined that the front-end loader operator was exposed to a fall-of-material hazard and potentially fatal injuries because the cab of the loader offered little protection from falling rocks, which generally fall in masses, and that the muck pile, itself, could not constitute a berm. Tr. 65-66, 147; Ex. P-2 at 7.

Plant supervisor Keith Stoker had 29 years of mining experience, and had been working at APAC for four years. Tr. 197-98. Testifying for APAC, he stated that he accompanied Garay and Ewing into the pit, and that the geology of the highwall is loose and unconsolidated, leading to "pieces and parts" that "move and shift," but that a catastrophic collapse of the entire highwall is highly unlikely. Tr. 203-04, 215. Stoker identified a photograph as depicting a muck pile at the foot of the highwall comprised of shot material, and he marked the exhibit to indicate the fall pattern of the rock that Ewing had identified to him as loose and unconsolidated during the inspection. Ex. R-12; Tr. 203-04, 223. Stoker also stated that a front-end loader working the muck pile would leave tracks in the direction in which it is traveling, and that it operates perpendicular to the highwall. Tr. 224. According to Stoker, when the front-end loader's bucket is touching the highwall, the operator's seat is elevated 13.5 feet above ground and its centerline is exactly 28 feet from the highwall. Tr. 207. In his opinion, therefore, the front-end loader operator was not exposed to any fall-of-material hazard because of the "size of the machine, the height of the bench, and loading techniques being perpendicular." Tr. 206.

It is uncontested that the highwall was comprised of loose and unconsolidated material 8 to 24 inches in diameter, above, below, and accumulated on the bench, that one section of the bench above the work area had been blasted away, and that a front-end loader was loading haul trucks with material from the muck pile at its toe when the inspection team arrived at the site. Since a portion of the bench had been blasted away, it no longer provided a layer of protection for the front-end loader operator. Based on the photograph showing tracks both perpendicular and parallel to the working face (Ex. P-2 at 8), corroborating Garay's observation, I find that the front-end loader was operating in both directions, and because APAC failed to challenge Garay's estimation, 12 to 24 feet from the highwall. Furthermore, APAC's reliance on *Lakeview Rock Products, Inc.*, 32 FMSHRC 305 (Mar. 2010) (ALJ), is misplaced. In that case, there was insufficient evidence that rocks in the highwall were loose and, even if they were, it was highly unlikely that they would have traveled 80 feet to where the front-end loader was operating. *Id.* at 308-09. Here, the loader was operating significantly closer to the unscaled highwall than in the circumstances under which *Lakeview* was decided. As a result, I find that the front-end loader operator was exposed to a fall-of-material hazard, especially because the bench above the working face had been compromised, no berm had been constructed, and the front-end loader's cab only provided limited protection. Accordingly, the Secretary has established a violation of section 56.3131.

2. Significant and Substantial

In *Mathies Coal Company*, the Commission set forth four criteria that the Secretary must establish in order to prove that a violation is "significant and substantial" ("S&S") under *Nat'l Gypsum*, 3 FMSHRC 822 (Apr. 1981): 1) the underlying violation of a mandatory safety standard; 2) a discrete safety hazard - - that is, a measure of danger to safety - - contributed to by the violation; 3) a reasonable likelihood that the hazard contributed to will result in an injury; and 4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. 6 FMSHRC 1, 3-4 (Jan. 1984); *see also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'd* 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria).

The Commission has recently explained that the second *Mathies* criterion requires the judge to determine "whether, based upon the particular facts surrounding the violation, there exists a reasonable likelihood of the occurrence of the hazard against which the mandatory safety standard is directed." *Newtown Energy, Inc.*, 38 FMSHRC ___, slip op. at 6, No. WEVA 2011-283 (Aug. 29, 2016). When evaluating the third *Mathies* criterion, the judge is to assume that the hazard identified in step two has been realized, and then consider whether the hazard would be reasonably likely to result in injury in the context of "continued normal mining operations." *Id.* at 13 (citing *Knox Creek Coal Corp. v. Sec'y of Labor*, 811 F.3d 148, 161-62 (4th Cir. 2016); *Peabody Midwest Mining, LLC*, 762 F.3d 611, 616 (7th Cir. 2014); *Buck Creek Coal*, 52 F.3d 133 at 135; *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). Resolution of whether a violation is S&S must be based "on the particular facts surrounding that violation." *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (Apr. 1998); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007, 2011-12 (Dec. 1987). The Secretary need not prove a reasonable likelihood that the violation, itself, will cause injury. *Musser Eng'g, Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010).

The fact of violation has been established and, respecting the second *Mathies* criterion, the hazard against which section 56.3131 is directed is a fall-of-material. A rock fall was reasonably likely given the unconsolidated composition of the highwall, evidence of a previous rock fall, loose 8- to 24-inch diameter material above, below, and accumulated on the bench, the compromised section of the bench above the work area, and the operation of the loader as close as 12 to 24 feet from the highwall. The third *Mathies* criterion has been met, in that falling rock striking the loader's cab with only limited protection to the operator, was reasonably likely to result in an injury; and there is a reasonable likelihood that the operator would suffer serious musculoskeletal to fatal injuries, satisfying the fourth *Mathies* criterion. Therefore, I find that the violation was S&S.

3. Negligence

The Secretary argues that APAC's negligence was moderate, and that the conditions were obvious and subject to regular workplace examinations. Sec'y Br. at 13. In consideration of the obviousness and extensiveness of this violation, and APAC's failure to remediate its removal of the bench above the work area by employing safety measures such as scaling loose material or

sloping the highwall to the angle of repose, I find that APAC was moderately negligent in violating section 56.3131.

B. Citation No. 8760656

Inspector Garay issued 104(a) Citation No. 8760656 on July 22, 2014, alleging a "significant and substantial" violation of section 56.3130 that was "reasonably likely" to result in an injury that could reasonably be expected to be "fatal," and was caused by APAC's "moderate" negligence.[4] The "Condition or Practice" is described as follows:

> Mining methods were not being used to maintain the wall, bank, and slope stability above the Argentine mine area. The north side high wall, at the 2nd bench area, has loose and unconsolidated material that is not sloped to angle of repose or stripped back for at least 10-feet. The exposed area is approximately 40 to 60 feet in length and approximately 15 to 20 feet high from the Argentine bench level. Miners were working below the high wall exposing them to a catastrophic failure, collapse of the high wall, engulfment, blunt force, fatal injury hazard.

Ex. P-3. The citation was terminated on July 23 when the highwall above the bench was scaled.

1. Fact of Violation

The Secretary contends that APAC did not employ any mining methods to maintain the wall, bank, and slope stability of the highwall above the bench where it had been mining. Sec'y Br. at 8-9. On the other hand, APAC argues that the highwall was not in danger of a catastrophic collapse, that no miner was working on the bench level and, again, relying upon *Lakeview*, 32 FMSHRC at 305, that its front-end loader operator was too far from the highwall to be exposed to any fall-of-material hazard. Resp't Br. at 18-20.

Inspector Christopher Ewing joined MSHA in February of 2013 with 18 years of mining experience, and he was a trainee under Garay's supervision at the time of the inspection. Tr. 24, 225-28. Ewing was shown a photograph which he described as depicting the working area on the bench as it existed on the day of the inspection. Ex. P-3 at 4; Tr. 232. He testified that under loose, unconsolidated rock on the highwall edge, he observed tire tracks and windrows on the bench which, he concluded, were caused by a small front-end loader sweeping the bench in preparation for a round of drilling and blasting.[5] Tr. 229, 232-35; Ex. P-2 at 4. Ewing stated that

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[4] 30 C.F.R. § 56.3130 provides that "[m]ining methods shall be used that maintain wall, bank, and slope stability in places where persons work or travel in performing their assigned tasks. When benching is necessary, the width and height shall be based on the type of equipment used for cleaning of benches or for scaling of walls, banks, and slopes."

[5] A windrow is "[a] ridge of soil pushed up by a grader or bulldozer." Am. Geological Institute, *Dictionary of Mining, Mineral, and Related Terms* 628 (2d ed. 1997) ("*DMMRT*").

the bench had not been barricaded to prevent access, that he saw a drill on the bench that was poised to drill the shot "as soon as they got somebody to it," that he did not see a front-end loader or miner on the bench, and that he took a photograph of the drill (not in evidence). Tr. 229-31, 242-43; Ex. R-14. Inspector Garay testified similarly, that there was a drill on the bench, but he believed that a miner was there also, although he testified that he did not take a photograph or make note of either. Tr. 154, 157; Ex. P-3 at 3. Garay and Ewing both testified that loose and unconsolidated material was at risk of falling onto the bench. Tr. 64, 154-56, 233; Ex. P-3 at 4.

Stoker testified that the front-end-loader operator was the only miner in the pit at the time of the inspection, that no one was working on the bench, and that no one was exposed to any fall-of-material hazard. Tr. 210, 212-13. As has already been noted, Stoker opined that a catastrophic collapse of the highwall is highly unlikely, although some rock fragments might shift. Tr. 215.

It is uncontested that the bench had not been barricaded against entry, that a drill was positioned on it, that there was no front-end loader on it at the time of the inspection, and that loose, unconsolidated material was at risk of falling onto it. The credible evidence also establishes that no miner was on the bench at the time of the inspection. Nevertheless, I find that the bench was a work area based on the uncontroverted evidence of track marks and windrows indicating that a front-end loader had been operating there and that, based on the presence of the drill and APAC's mining methods, drilling and blasting were soon to follow. Again, *Lakeview* is not persuasive because, in this case, the bench work area was directly under loose, unconsolidated rock. Therefore, I find that APAC failed to maintain the stability of the highwall above the working area on the bench by scaling the unconsolidated material, and that the Secretary has established a violation of section 56.3130.

2. Significant and Substantial

Relying on *Halfway, Inc.*, 8 FMSHRC 8, 12 (Jan. 1986) (determining that the focus of the S&S reasonable likelihood of injury criterion is the "pendency of the violative condition prior to the citation" and "continued normal mining operations"), the Secretary contends that it is immaterial to the S&S analysis whether a miner was, in fact, present on the bench at the time of the inspection. Sec'y Br. at 12. APAC argues, on the contrary, that since no miners were working on the bench, the violation posed no hazard. Resp't Br. at 19-20.

The fact of violation has been established and, having found that no miner was on the bench, the focus is on the mining activities that preceded and were to follow on the heels of the inspection. Respecting the second *Mathies* criterion, the hazard against which section 56.3130 is directed is a fall-of-material. A rock fall from above the bench was reasonably likely to occur because the upper highwall above the working face had not been scaled of loose, unconsolidated material, and the area had been prepared for impending drilling and blasting. The third *Mathies* criterion has been met, in that falling rock striking an unprotected miner was reasonably likely to result in an injury; and there is a reasonable likelihood that the miner would suffer serious musculoskeletal to fatal injuries, satisfying the fourth *Mathies* criterion. Therefore, I find that the violation was S&S.

3. Negligence

Garay opined that APAC's negligence was moderate because although the unstable highwall was obvious, he found no indication that APAC willfully exposed miners to the hazard. Tr. 60, 67. I find that APAC should have barricaded the affected bench area against entry or scaled down the loose, unconsolidated rock. Accordingly, I conclude that APAC was moderately negligence in violating the standard.

C. Citation No. 8760651

Inspector Garay issued 104(a) Citation No. 8760651 on July 22, 2014, alleging a "significant and substantial" violation of section 56.14107(a) that was "reasonably likely" to result in an injury that could reasonably be expected to be "permanently disabling," and was caused by APAC's "moderate" negligence.[6] The "Condition or Practice" is described as follows:

> The Caterpillar Haul Truck, Model 777, CO#26.660090, the fan belt and pulley assemblies in the engine compartment directly below the operator cab were not guarded to protect persons from contacting fan blades and pulley assemblies and similar moving parts. This condition exposes persons to permanently disabling, entanglement, crushing injury hazards, in that the equipment operators access the area to perform regular maintenance. The exposed area is approximately 10 inches to 20 inches wide and approximately 4 feet from the ground level.

Ex. P-5. The citation was terminated on July 23 when APAC installed a guard.

1. Fact of Violation

The Secretary argues that a haul truck did not have any guard installed in the engine compartment that would protect miners from inadvertently contacting the fan belt and pulleys located in a 30-inch wide work space that was regularly accessed in order to perform maintenance, examinations, and troubleshooting, that the engine is running while the mechanic is troubleshooting, and that a miner could slip, trip, or fall into the unguarded area. Sec'y Br. at 18-20. APAC argues that the engine compartment was equipped with a factory-installed guard that was in place at the time of the inspection, that the fan belt and pulley assemblies could not be inadvertently contacted, and that the moving parts were too far away from any working miner to pose a hazard. Resp't Br. at 9-11.

Both parties cite *Thompson Bros. Coal Co., Inc.*, 6 FMSHRC 2094 (Sept. 1984), for the test set forth by the Commission in analyzing whether moving parts require guarding. Sec'y Br. at 19; Resp't Br. at 9. In *Thompson*, the Commission recognized that the guarding standard

[6] 30 C.F.R. § 56.14107(a) provides that "[m]oving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and takeup pulleys, flywheels, couplings, shafts, fan blades, and similar moving parts that can cause injury."

"imports the concepts of reasonable possibility of contact and injury, including contact stemming from inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness." 6 FMSHRC at 2097. Therefore, all relevant exposure and injury variables must be considered, including "accessibility of the machine parts, work areas, ingress and egress, work duties, and . . . the vagaries of human conduct." *Id.*

Garay testified that the fan belt and pulley assemblies, recessed an estimated 10 to 20 inches inside the haul truck's engine compartment, elevated four feet off the ground, and accessible to miners through a 30-inch gap between the front tire and the truck's body, were not guarded to protect miners against inadvertent contact. Tr. 81-82, 84, 137; Ex. P-5 at 5-7. Referring to his field notes, he stated that while the truck is positioned on uneven ground, miners access the work space daily to lubricate grease points or "Zerks," that mechanics access it to perform visual examinations with the engine running to troubleshoot the fan belt and pulleys, and that the exposed parts move when the engine is running, creating an entanglement hazard. Tr. 86-87, 97, 130, 136; Ex. P-5 at 4-8. He opined that miners could slip, trip, and fall into the unguarded area and that, instinctively, they put their hands out to brace their fall, risking inadvertent contact and entanglement that could result in loss of a limb. Tr. 96, 134, 137. He testified that Caterpillar manufactures a factory-installed guard for the fan belt and pulleys, and that similar haul trucks at the mine were equipped with factory-installed guards. Tr. 90-92. On cross-examination, he was unable to identify whether a photograph of the cited truck depicted a factory-installed guard. Ex. P-5 at 5; Tr. 133-34. Garay also explained that Caterpillar does not install belt and pulley guards on haul trucks intended for use in construction applications, unlike those intended for use in the mining industry; therefore, trucks purchased secondhand by mines may lack appropriate guards. Tr. 90-91.

Bryan Lane, operations manager for APAC since 2010, testifying for APAC, stated that he accompanied Garay during the inspection of the haul truck. Tr. 162, 175. Shown a photograph of the space between the truck body and tire, he opined that it was impossible for miners to inadvertently contact the fan belt and pulleys approximately seven feet off the ground, two to three feet inside the engine compartment, and behind what he identified as a factory-installed pulley guard. Ex. R-1; Tr. 169-71. He acknowledged that equipment operators would perform pre-shift examinations, but denied that a miner would contact moving machine parts. Tr. 172. He testified that the truck was equipped with grease Zerks requiring daily lubrication, which could result in a miner standing in the space between the front tire and body, that the engine would not "normally" be running, and that the miner would be facing away from the engine compartment. Tr. 173-74. He also contended that when maintenance is performed, the truck is shut down. Tr. 172.

The record supports a finding that equipment operators and mechanics routinely access the 30-inch work space between the truck's front tire and body to perform pre-shift examinations, lubrications, and troubleshooting while the engine is running. I also find, based upon the photograph depicting a six-foot tall miner standing in the work space with the engine compartment opening adjacent to his head (Ex. R-1), that the compartment was somewhat less than six feet above ground and, based on the lack of any concrete measurement and conflicting testimony, that the moving parts were recessed 20 to 36 inches within the compartment. I fully

credit Garay's testimony that the cited haul truck's belt and pulleys were not guarded based on a reasonable inference that the truck was acquired by APAC secondhand, and his observation that similar trucks on-site were equipped with factory-installed guards, a contention unchallenged by APAC. APAC's reliance on *Hollow Contracting*, 18 FMSHRC 2044 (Nov. 1996) (ALJ), is misplaced. In that case, the judge vacated a citation alleging a violation of section 56.14107(a) after finding that the unguarded belt was not within seven feet of any walking or working surfaces. *Id.* at 2056. In this case, however, considering all relevant factors, especially the "vagaries of human conduct," I find that it is reasonably possible for a miner of average height, working within the limited work space while the engine is running, to inadvertently contact the moving machine parts, which are entirely reachable although recessed at least 20 inches, through extension of the arms precipitated by a misstep, loss of balance, momentary distraction, or startlement. This finding takes into account the myriad possible human responses to all manner of external stimuli, as well as the protective purpose of the Act. Accordingly, the Secretary has established a violation of section 56.14107(a).

2. Significant and Substantial

The fact of violation has been established and, respecting the second *Mathies* criterion, the hazard against which section 56.14107(a) is directed is contact with moving machine parts. Inadvertent contact with the belt and pulleys was reasonably likely to occur considering that miners frequently performed examinations, lubrications, and troubleshooting on uneven ground, and accessed the space between the truck's tire and the body with the engine running, putting them within the 20- to 36-inch reachable range of the engine's moving parts. The third *Mathies* criterion has been met, in that contact with the moving belt and pulleys was reasonably likely to result in an injury; and there is a reasonable likelihood that the miner would suffer serious disfigurement or loss of a limb, satisfying the fourth *Mathies* criterion. Therefore, I find that the violation was S&S.

3. Negligence

The Secretary argues that APAC's negligence was moderate because the unguarded area was frequently entered and obvious, that APAC had similar equipment on-site that was appropriately guarded, and that Caterpillar manufactures a guard for the haul truck. Sec'y Br. at 21. I find, based on the miners' daily access to the tight work space between the truck's tire and body with the engine running, that the hazard of contacting moving parts within the engine compartment was obvious. Furthermore, based on APAC's use at the mine of similar Caterpillar trucks outfitted with factory-installed guards, I find that APAC knew or should have known that it was required to guard the belt and pulleys so that its miners could perform their tasks safely. Accordingly, I conclude that that APAC was moderately negligent in violating the standard.

D. Order No. 8760689

Inspector Garay issued 104(g)(1) Order No. 8760689 on August 5, 2014, alleging a violation of section 46.11(a) that was "unlikely" to cause an injury that could reasonably be expected to be "permanently disabling," and was caused by APAC's "high" negligence.[7] The "Condition or Practice" is described as follows:

> Twelve Clarkson Construction Company, Over the Road Truck Drivers, Contractor ID# KTL, entering the mine site have not received the required site-specific hazard awareness training, exposing them to mine hazards. The Mine Operator was aware of the training requirements. The mine operator must withdraw the Twelve Clarkson Construction Over the Road Truck Drivers from the mine until they have received the required training. The Federal Mine Safety and Health Act of 1977 states that an untrained miner is a hazard to himself and to others.

Ex. P-4. The citation was terminated when APAC provided MSHA with a photograph of a sign outlining site-specific mining hazards. Tr. 73; Ex. R-6.

1. Fact of Violation

The Secretary points out that the site-specific hazard training requirement may be satisfied by posting warning signs.[8] Sec'y Br. at 15. He makes several contentions in support of establishing the violation: that no signage with the requisite warnings was posted at the tarping area at the time of the inspection; that if it were, the operator would have discussed it with the inspector; that if it were, the operator would not have needed a training video; and that it is irrelevant whether other signs were posted elsewhere on-site because they do not satisfy the standard. Sec'y Br. at 15-17.

APAC argues that from 2010 through the time of the inspection, it had a sign in place at the tarping area that satisfied the site-specific hazard training requirement, and that the Secretary's contention that the sign was installed *after* the inspection to abate the violation is

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[7] 30 C.F.R. § 46.11(a) provides that mine operators "must provide site-specific hazard awareness training before any person specified under this section is exposed to mine hazards."

30 C.F.R. § 46.11(b) requires mine operators to "provide site-specific hazard awareness training, as appropriate, to any person who is not a miner as defined by § 46.2 of this part but is present at a mine site, including: . . . (4) customers, including over-the-road truck drivers."

[8] 30 C.F.R. § 46.11(e) provides that mine operators "may provide site-specific hazard awareness training through the use of written hazard warnings, oral instruction, signs and posted warnings, walkaround training, or other appropriate means that alert persons to site-specific hazards at the mine."

"mistaken or untruthful." Tr. 125; Resp't Br. at 4-5. The operator also contends that the Secretary has not established that the 12 truck drivers lacked site-specific hazard training because the inspector failed to inquire whether the truckers had received any training other than formal training. Resp't Br. at 11-13. In support of this contention, APAC relies on *Apex Quarry*, 36 FMSHRC 211 (Jan. 2014) (ALJ). Resp't Br. at 11-13. In *Apex Quarry*, the judge vacated an order alleging a violation of section 46.11(a) because the inspector only asked the contractors whether they had received site-specific hazard training and, therefore, they may not have understood the "special meaning of the term 'training'" in the context of the cited standard. 36 FMSHRC at 230-31.

Garay testified that section 46.11(a) requires APAC to administer site-specific hazard training to its customers and that, alternatively, it may post adequate warning signs. Tr. 70. Garay also stated that at the beginning of the inspection, APAC's safety manager, Chris Switchman, told him that APAC satisfies the site-specific hazard training requirement by showing anyone who comes to the mine a training video in the scale house or office, and then issuing a card documenting that the training was received. Tr. 68, 71. Ewing testified similarly, but did not name the APAC management employees with whom he spoke. Tr. 236-37. According to Garay, 12 Clarkson employees in the tarping area of the mine told him that they had not received site-specific hazard training, had not viewed the training video, and had not been issued training cards. Tr. 67-69; Ex. R-5. Garay and Ewing both maintained that they looked for signs in the tarping area, but found none satisfying the training requirement, that the sign posted to terminate the citation was not present on the day of the inspection, and that no APAC representative ever raised the idea that a warning sign was posted. Tr. 80-81, 113, 236-38; Exs. R-6, R-15. Garay opined that untrained customers would be unlikely to suffer permanently disabling injuries as a result of being exposed to heavy equipment operation, blasting, or other hazards, because they only travel to limited areas of the mine. Tr. 69.

Lane testified that APAC does not show the training video to customers. Tr. 182-83. He stated that customer truck drivers are trained using signage posted throughout the facility, including the sign used to terminate the citation which, according to him, was in place in the tarping area at the time of the inspection, and had been since 2010. Tr. 180-81; Exs. R-6, R-7, R-8, R-9, R-10, R-11.

The record makes clear that the training video of which the inspectors were advised was not shown to the over-the-road truck drivers, and the parties agree that APAC would have satisfied the site-specific hazard training requirement if appropriate warning signage were posted at the tarping area. See Tr. 78-79; Sec'y Br. at 16. Both inspectors testified that the tarping-area sign was not there, and that they specifically looked for such a sign. APAC's attempt on cross-examination to have Garay identify a zoomed-in object in a photograph as a tarping-area sign was an exercise in futility because the image was so indistinct as to appear ethereal. Interestingly, in its brief, APAC abandoned any argument that the photograph depicted the requisite signage. In consideration of the inspectors' credible testimony, and the fact that no one, including APAC's safety director, showed the inspectors any sign, I find that no warning signage was posted at the tarping area on the day of the inspection. Testimony and exhibits regarding signage elsewhere on-site miss the mark because they do not address the hazards identified in the

tarping area. Furthermore, APAC's reliance on *Apex Quarry* is not persuasive because here, Garay not only questioned the 12 customers and APAC's safety director about the training, but he and Ewing specifically looked for an appropriate warning sign in the tarping area. Accordingly, I find that the Secretary has established a violation of section 46.11(a).

2. Gravity and Negligence

The record establishes that because the untrained customers only accessed limited areas of the mine, they were unlikely to suffer permanently disabling injuries resulting from exposure to heavy equipment operation. The Secretary argues that APAC's negligence was high, however, because it was aware that it needed to provide training, as evidenced by its production of the training video. Sec'y Br. at 18. I find that APAC knew or should have known of the site-specific hazard training requirement and, in failing to train its customers by video or posting appropriate signage at the tarping area, that it was exposing its customers to avoidable hazards. Furthermore, I do not find that signage elsewhere around the mine mitigates APAC's negligence because there is no evidence that they pertain to the hazards specific to the tarping area. Accordingly, I find that APAC was highly negligent in violating the standard.

E. Citation No. 8760690

Inspector Garay issued 104(a) Citation No. 8760690 on August 5, 2014, alleging a "significant and substantial" violation of section 56.18002(a) that was "reasonably likely" to result in an injury that could reasonably be expected to be "permanently disabling," and was caused by APAC's "high" negligence.[9] The "Condition or Practice" is described as follows:

> The mine operators competent persons did not conduct thorough examinations of workplaces at least once each shift for conditions which may adversely affect safety or health, in that the daily workplace examinations reviewed, did not document any of the conditions cited, which adversely affect safety and health of the miners, and attributed to multiple citations and orders issued during the E01 regular inspection.

Ex. P-6.

1. Fact of Violation

The Secretary argues that the obviousness of the cited hazards and the condition of the mine demonstrated that APAC was not conducting adequate workplace examinations. Sec'y Br. at 23. The Secretary also contends that the examination records do not document all working

[9] 30 C.F.R. § 56.18002(a) provides that "[a] competent person designated by the operator shall examine each working place at least once each shift for conditions which may adversely affect safety or health. The operator shall promptly initiate appropriate action to correct such conditions."

areas of the mine, and that testimony that rank-and-file miners also perform examinations should be given no weight because there is no documentation of their competence, or any record of such examinations. Sec'y Br. at 25-28.

APAC contends that a competent person performed adequate examinations of all working areas prior to each shift, and that the number of citations and orders issued is not determinative of the adequacy of those examinations, especially since the inspection was retaliatory, the alleged violations were not obvious, and APAC disagrees with nearly all of them. Resp't Br. at 13-16.

According to Garay, the cited violations were obvious to any competently trained miner and, therefore, should have been discovered and recorded through adequate workplace examinations. Tr. 98-102. He testified that he reviewed Stoker's daily log or diary containing records of APAC's workplace examinations, and concluded that Stoker oversaw operations at the Bonner Springs and Shawnee quarries and that, regarding Bonner Springs, his records failed to identify working areas or hazards, or when they were corrected. Tr. 102-03. Garay opined that a plant superintendent and supervisor are competent persons to conduct workplace examinations within the meaning of section 56.18002(a). Tr. 158.

Lane testified that APAC foreman David Platt and superintendent Stoker, or a competent person designated by them, record a diary of activities that they perform throughout the day, including work areas that they have examined and whether the examination has been completed. Tr. 174, 189, 191; Exs. R-2 (Stoker), R-3 (Platt). Lane testified that Stoker's diary pertains to the Bonner Springs and Shawnee quarries, while Platt's diary covers only Bonner Springs. Tr. 188. Presented with entries in Stoker's and Platt's daily logs for July 8, 2014, Lane was unable to identify any workplace that either miner had examined. Tr. 190-91; Exs. R-2 at 1, R-3 at 1. He offered that another competent person, who he could not identify, may have performed the examination on that day, but that he was unaware of any examination records other than Platt's and Stoker's diaries. Tr. 191-92, 195.

Stoker testified that his log entries demonstrate that he examines and records any area of the mine that he visits, and that properly trained miners examine their work areas and provide him with completed examination record sheets at the end of each shift. Tr. 215-17, 219-21; Ex. R-2. He also stated that he did not conduct an examination of the mine on July 8, 2014. Tr. 221; Ex. R-2.

Stoker's and Platt's diaries rarely address Bonner Springs' working areas or conditions and, when they do, only in cursory fashion. Neither diary records any hazard identified during MSHA's inspection, nor does either record a workplace examination of any area of Bonner Springs on July 8, 2014. It is noteworthy that Stoker's and Platt's diaries begin to state, in routine fashion, that they examined the Bonner Springs plant, pit, and shop only *after* MSHA had begun its inspection. Stoker's testimony, that other competent miners conduct examinations of all working areas and fill out record sheets, is undermined by Lane's testimony that he is unaware of any documentation other than Stoker's and Platt's diaries, by APAC's failure to provide copies of such examination records to Garay during the inspection, and APAC's failure to move for

their admission into the record at the hearing. Accordingly, I find that APAC failed to perform and record adequate examinations of the Bonner Springs workplaces during every shift, and that the Secretary has established a violation of section 56.18002(a).

2. Significant and Substantial

The fact of violation has been established and, respecting the second *Mathies* criterion, the hazard against which section 56.18002(a) is directed is timely detection and correction of workplace hazards. Obvious hazardous conditions were reasonably likely to go undetected and promptly corrected by management based on APAC's failure to conduct adequate workplace examinations on a regular basis, and when they did, the examinations were incomplete and inaccurately recorded. The third and fourth *Mathies* criteria have been met, in that failure to timely identify and remedy unstable material above the working face of the highwall was reasonably likely to result in serious, if not fatal, injuries; likewise, entanglement with unguarded moving machine parts was reasonably likely to result in serious disfigurement or loss of a limb. Therefore, I find that the violation was S&S.

3. Negligence

The Secretary argues that APAC's negligence was high because it was aware that it was required to perform workplace examinations, many hazards were obvious, and its inspection records were incomplete and disorganized. Sec'y Br. at 29-30. APAC contends that the alleged hazards were not obvious, and that it disagrees with nearly all of the citations and orders. Resp't Br. at 14. In consideration of my findings that the highwall and guarding violations were obvious and serious, I find that APAC's failure to conduct adequate workplace examinations of the mine and timely correct identified hazards was the result of high negligence.

III. PENALTIES

While the Secretary has proposed civil penalties totaling $3,070.00, the judge must independently determine the appropriate assessment by proper consideration of the six penalty criteria set forth in section 110(i) of the Act, 30 U.S.C. § 820(i). *See Sellersburg Co.*, 5 FMSHRC 287, 291-92 (Mar. 1983), *aff'd* 736 F.2d 1147 (7th Cir. 1984).

Applying the penalty criteria, and based upon a review of MSHA's online records, I find that APAC is a small operator, with an overall history of violations that is a mitigating factor in assessing appropriate penalties (in the 15 months preceding the inspection, the operator had been cited for violating one standard, unrelated to any at issue in this proceeding). I also find that APAC demonstrated good faith in achieving rapid compliance after notice of the violations. Furthermore, APAC represents that the proposed penalties will not affect its ability to remain in business. Resp't Br. at 21.

The remaining criteria involve consideration of the gravity of the violations, and APAC's negligence in committing them. These factors have been discussed fully, respecting each violation. Therefore, considering my findings as to the six penalty criteria, the penalties are set forth below.

A. Citation No. 8760649

It has been established that this S&S violation of section 56.3131 was reasonably likely to cause an injury that could reasonably be expected to be fatal, that it was caused by APAC's moderate negligence, and that it was timely abated. Based on these factors, and considering the operator's violation history as a mitigating factor, I find that a penalty of $450.00 is appropriate.

B. Citation No. 8760656

It has been established that this S&S violation of section 56.3130 was reasonably likely to cause an injury that could reasonably be expected to be fatal, that it was caused by APAC's moderate negligence, and that it was timely abated. Based on these factors, and considering the operator's violation history as a mitigating factor, I find that a penalty of $450.00 is appropriate.

C. Citation No. 8760651

It has been established that this S&S violation of section 56.14107(a) was reasonably likely to cause an injury that could reasonably be expected to result in permanently disabling injuries, that it was caused by APAC's moderate negligence, and that it was timely abated. Based on these factors, and considering the operator's violation history as a mitigating factor, I find that a penalty of $250.00 is appropriate.

D. Order No. 8760689

It has been established that this violation of section 46.11(a) was unlikely to cause an injury that could reasonably be expected to result in permanently disabling injuries, that it was caused by APAC's high negligence, and that it was timely abated. Based on these factors, and considering the operator's violation history as a mitigating factor, I find that a penalty of $700.00 is appropriate.

E. Citation No. 8760690

It has been established that this S&S violation of section 56.18002(a) was reasonably likely to cause an injury that could reasonably be expected to result in permanently disabling injuries, that it was caused by APAC's high negligence, and that it was timely abated. Based on these factors, and considering the operator's violation history as a mitigating factor, I find that a penalty of $800.00 is appropriate.

IV. APPROVAL OF SETTLEMENT

The parties have filed a Motion to Approve Partial Settlement respecting 27 of the 32 citations/orders involved in these dockets. A reduction in penalty from $6,596.00 to $4,617.00 is

proposed. The citations/orders, initial assessments, and proposed settlement amounts are as follows:

Docket No.	Citation/Order No.	Initial Assessment	Proposed Settlement
CENT 2015-1-M	8760652	$263.00	$263.00
	8760657	$585.00	$969.00
	8760658	$100.00	$100.00
	8760659	$263.00	$0.00
	8760660	$263.00	$0.00
	8760663	$263.00	$263.00
	8760688	$100.00	$100.00
	8760664	$100.00	$100.00
	8760665	$263.00	$263.00
	8760667	$100.00	$0.00
	8760669	$585.00	$0.00
	8760671	$100.00	$100.00
	8760672	$100.00	$100.00
	8760681	$100.00	$100.00
	8760682	$263.00	$0.00
	8760673	$100.00	$100.00
	8760674	$100.00	$100.00
	8760675	$263.00	$263.00
	8760676	$263.00	$0.00
	8760677	$263.00	$263.00
	8760678	$263.00	$263.00
	8760679	$263.00	$0.00
	8760680	$263.00	$0.00
	8760687	$100.00	$100.00
	SUBTOTAL:	**$5,326.00**	**$3,447.00**
CENT 2015-157-M	8760650	$585.00	$585.00
	8760661	$585.00	$585.00
	8760662	$100.00	$0.00
	SUBTOTAL:	**$1,270.00**	**$1,170.00**
	TOTAL:	**$6,596.00**	**$4,617.00**

I have considered the representations and documentation submitted in these matters under section 110(k) of the Act, and I conclude that the proffered settlement is appropriate under section 110(i) of the Act.

ORDER

WHEREFORE, it is **ORDERED** that Citation Nos. 8760659, 8760660, 8760662, 8760667, 8760669, 8760676, 8760679, 8760680, and 8760682 are **VACATED**.

It is further **ORDERED** that Citation Nos. 8760649, 8760650, 8760651, 8760652, 8760656, 8760672, 8760673, 8760674, 8760677, 8760681, 8760690, and Order No. 8760689 are **AFFIRMED**, as issued.

It is further **ORDERED** that the Secretary **MODIFY** Citation Nos. 8760663, 8760671, and 8760687 to reduce the degree of negligence to "low;" Citation Nos. 8760663, 8760665, 8760675, and 8760678 to reduce the level of gravity to "unlikely," and remove the "significant and substantial" designation; Citation No. 8760658 to allege a violation of 30 C.F.R. § 56.14107(a) in the alternative, and Citation No. 8760665 to allege a violation of 30 C.F.R. § 56.14112(a)(1) in the alternative; and Citation Nos. 8760657, 8760658, 8760664, 8760665, 8760675, 8760678, and 8760688 to incorporate the proposed language in the "Condition or Practice;" and that these citations are **AFFIRMED**, as modified.

It is further **ORDERED** that APAC-Kansas, Incorporated, **PAY** a civil penalty of $7,267.00 within thirty (30) days of the date of this Decision.[10] **ACCORDINGLY**, these cases are **DISMISSED**.

/s/ Jacqueline R. Bulluck
Jacqueline R. Bulluck
Administrative Law Judge

Distribution:

Daniel McIntyre, Esq., U.S. Department of Labor, Office of the Solicitor, 1244 Speer Boulevard, Suite 216, Denver, CO 80204

Kevin Keating, Oldcastle Law Group, 900 Ashwood Parkway, Suite 600, Atlanta, GA 30338-4780

/tcp

[10] 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. Please include Docket number and A.C. number.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
7 PARKWAY CENTER, SUITE 290
875 GREENTREE ROAD
PITTSBURGH, PA 15220
TELEPHONE: 412-920-7240 / FAX: 412-928-8689

October 13, 2016

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of J.S.S., Complainant, v. NICHOLAS CONTURA, LLC, Respondent.	TEMPORARY REINSTATEMENT PROCEEDING Docket No. WEVA 2016-615-D MSHA Case No.: HOPE-CD-2016-05 Mine: Jerry Fork Eagle Mine Mine ID: 46-08787

DECISION AND ORDER REINSTATING J.S.S.

Appearances: Pollyanna E.F. Hampton, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, VA, Representing the Secretary of Labor

R. Henry Moore, Esq., Jackson Kelly PLLC, Pittsburgh, PA, Representing Respondent

Before: Judge Steele

On September 16, 2016, pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 (AAct@), 30 U.S.C. '801, *et. seq.,* and 29 C.F.R. '2700.45, the Secretary of Labor (ASecretary@) filed an Application for Temporary Reinstatement of miner James Steven Spencer.[1] ("Complainant, Spencer, or JSS") to his former position with Nicholas Contura, LLC, (ANicholas Contura@ or ARespondent@) at Jerry Fork Eagle Mine pending final hearing and disposition of the case.

[1] In order to preserve the Complainant's privacy regarding health and medical status pursuant to the Health Insurance Portability and Accountability Act of 1996, the miner was referred to by his initials in the pleadings. However, prior to hearing, the Complainant signed an Authorization to Disclose Health Information form authorizing the Department of Labor to disclose and use Complainant's health information for the purpose of litigation or potential litigation. Joint Stipulations, ¶25 ("Stip.").

The application followed a Discrimination Complaint filed by J.S.S. on August 18, 2016, that alleged, in effect, that his termination was motivated by his status as a Part 90 miner.[2] The Secretary represents that this Complaint was not frivolously brought and requests an Order directing Respondent to reinstate J.S.S. to his former position or a comparable position, within the same commuting area and with the same rate of pay and benefits he received prior to his discharge.

Respondent filed a timely motion requesting a hearing regarding this application on September 26, 2016, wherein it summarized its position. A hearing was held in South Charleston, WV, on October 6, 2016, where the Secretary and Respondent each had the opportunity to present witnesses and documentary evidence in support of their positions.[3]

For the reasons set forth below, I grant the application and order Nicholas Contura LLC to temporarily reinstate James Steven Spencer.

Discussion of Relevant Law

Section 105(c) 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 Ato play an active part in the enforcement of the [Mine Act]@ recognizing that, Aif 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).

Congress created the temporary reinstatement as "an essential protection for complaining miners who may not be in the financial position to suffer even a short period of unemployment or reduced income pending the resolution of the discrimination complaint." S. Rep. No. 181, 95th Cong., 1st Sess. 36-37 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong. 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 624-25 (1978).

Temporary Reinstatement is a preliminary proceeding and narrow in scope. As such, neither the judge nor the Commission is to resolve conflicts in testimony at this stage of the case. *Sec=y of Labor on behalf of Albu v. Chicopee Coal Co*., 21 FMSHRC 717, 719 (July 1999). The

[2] 30 C.F.R. Part 90 contains the mandatory health standards for coal miners who have evidence of the development of pneumoconiosis.

[3] Under Commission Rule 45, a Temporary Reinstatement hearing must be held within 10 calendar days of an operator's request. 29 C.F.R. §2700.45(c).

substantial evidence standard applies.[4] *Sec=y of Labor on behalf of Peters v. Thunder Basin Coal Co.*, 15 FMSHRC 2425, 2426 (Dec. 1993). A temporary reinstatement hearing is held for the purpose of determining Awhether the evidence mustered by the miners to date established that their complaints are non-frivolous, not whether there is sufficient evidence of discrimination to justify permanent reinstatement.@ *Jim Walter Resources,* 920 F.2d 738, 744 (11th Cir. 1990).

In adopting section 105(c), Congress indicated that a complaint is not frivolously brought if it Aappears to have merit.@ S. Rep. No. 181, 95th Cong., 1st Sess. 36-37 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong. 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 624-25 (1978). In addition to Congress= Aappears to have merit@ standard, the Commission and federal circuit courts have also equated Anot frivolously brought" to Areasonable cause to believe" and Anot insubstantial." *Sec'y of Labor on behalf of Price v. Jim Walter Res., Inc.*, 9 FMSHRC 1305, 1306 (Aug. 1987), *aff'd*, 920 F.2d 738, 747 & n.9 (11th Cir. 1990). "Courts have recognized that establishing 'reasonable cause to believe' that a violation of the statute has occurred is a 'relatively insubstantial' burden." *Sec'y of Labor on behalf of Ward v. Argus Energy WV, LLC*, 2012 WL 4026641, *3 (Aug. 2012) citing *Schaub v. West Michigan Plumbing & Heating, Inc.*, 250 F.3d 962, 969 (6th Cir. 2001).

In order to establish a *prima facie* case of discrimination under section 105(c) of the Act, a complaining miner must establish (1) that he engaged in protected activity and (2) that there was an adverse action, which was motivated in any part by that activity. *Sec=y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (Oct. 1980), *rev=d on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981); *Sec=y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (April 1981).

In the instant matter, the Secretary and Spencer need not prove a *prima facie* case of discrimination with all of the elements required at the higher evidentiary standard needed for a decision on the merits. Rather, the same analytical framework is followed within the "reasonable cause to believe" standard. Thus, there must be "substantial evidence" of both the applicant=s protected activity and a nexus between the protected activity and the alleged discrimination. To establish the nexus, the Commission has identified these indications of discriminatory intent: (1) hostility or animus toward the protected activity; (2) knowledge of the protected activity; and (3) coincidence in time between the protected activity and the adverse action. *Sec=y of Labor on behalf of Lige Williamson v. CAM Mining, LLC,* 31 FMSHRC 1085, 1089 (Oct. 2009). The Commission has acknowledged that it is often difficult to establish a Amotivational 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). The Commission has further considered disparate treatment of the miner in analyzing the nexus requirement. *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981), *rev=d on other grounds*, 709 F.2d 86 (D.C. Cir. 1983).

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[4] ASubstantial evidence@ means Asuch relevant evidence as a reliable mind might accept as adequate to support [the judge=s] conclusion.@ *Rochester & Pittsburgh Coal Co.,* 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. V. NLRB*, 305 U.S. 197, 229 (1938)).

The Petition for Temporary Reinstatement

On August 18, 2016, Spencer executed a Summary of Discriminatory Action, which was filed with his Discrimination Complaint. In this statement he alleged the following:

> During a company change over I was not hired back due to being a Part 90 miner. I was the only person required to take a physical or breathing test.
>
> I would like to be reinstated to my previous job classification as supply motor operator. I would like to be reimbursed for all back pay, medical bills for my family and I and other expense encurred due to the loss of my job. [sic].

Application for Temporary Reinstatement at Exhibit B, p. 2.

The Secretary also submitted with the Application the September 16, 2016, Declaration of Kelly Acord, a Special Investigator employed by the Mine Safety and Health Administration ("MSHA"). Acord made the following findings and conclusions:

> 2) As part of my responsibilities, I investigate claims of discrimination filed by miners pursuant to Section 105(c) of the Federal Mine Safety and Health Act of 1977 (the "Mine Act"). In this capacity, I have investigated the discrimination claim filed by J.S.S. (the "Complainant") on August 18, 2016. My investigation to date has revealed the following facts:
>
> A. On August 18, 2016, J.S.S. filed a complaint alleging discrimination that commenced July 25, 2016 and resulted in his firing on August 15, 2016, after he had exercised his Part 90 option at the mine.
>
> B. At all relevant times hereinafter mentioned, Nicholas Contura, LLC was a "person" within the meaning of § 105(c) and within the definition of § 3(f) of the Act. 30 U.S.C. § 802(f).
>
> C. The Complainant was employed as a Supply Motor Operator at the mine, and, therefore, is a "miner" within the meaning of § 3(g) of the Act. 30 U.S.C. § 802(g).
>
> D. The Complainant worked for Alex Energy, Inc. (a subsidiary of Alpha Natural Resources, Inc.) at the mine for approximately two years until August 2016. He has approximately 34 years of coal mining experience.
>
> E. On May 4, 2016 the Complainant exercised his Part 90 option under the Mine Act.
>
> F. By the end of May, the Complainant was moved from his position as a continuous miner operator to a less dusty position as a supply motor operator to satisfy the Part 90 requirements. Alex Energy, Inc. started running respirable dust samples on him as required by Part 90. He was still paid the rate of a continuous miner operator, which is typically higher than the rate paid to a supply motor operator.

G. A week or two after moving to the supply motor operator position, the Complainant went on short term disability related to hernia surgery. The Complainant's personal doctor cleared him to return to work by July 25, 2016.

H. At this time mine controller Alpha Natural Resources, Inc. was going through bankruptcy proceedings. By June, it appeared Nicholas Contura, LLC would be purchasing the mine as the company prepared job offer letters for active miners who were working at that mine at that time.

I. A job offer letter dated June 20, 2016 was prepared for the Complainant, however it was never delivered. This letter outlined a process under which all active employees would be retained when Nicholas Contura, LLC took over operation of the mine. Under this process, Nicholas Contura, LLC required any inactive employee on temporary disability to undergo a Functional Capacity Evaluation ("FCE") demonstrating the miner's ability to perform essential functions of the job. Active miners were not required to undergo an FCE.

J. At some point in July, human resources manager Robert Blake asked the Complainant to obtain a drug test at the training center on mine property. The Complainant's drug test came back fine.

K. On July 25, 2016, the day before the mine sale, Blake and Safety Manager Randy Taylor asked to meet with J.S.S. At this meeting Blake and Taylor told the Complainant he needed to take a pulmonary capacity test and warned him he would not be retained by Nicholas Contura, LLC if a physician determined he had complicated coal workers pneumoconiosis. The Complainant responded that they knew he had coal workers pneumoconiosis because he was a Part 90 miner and he accused them of trying to terminate his employment on this basis.

L. At no time was the Complainant required to undergo a FCE related to his hernia injury.

M. On August 4, the Complainant travelled to see the respiratory specialist designated by Nicholas Contura, LLC. A therapist administered a breathing test, but no x-rays were taken and he did not see a doctor.

N. Dr. Charles E. Porterfield issued a letter elated August 12 stating "[Complainant] has complicated pneumoconiosis on chest x-ray/CT scan and should not be further exposed to coal dust." It appears Dr. Porterfield relied on an old chest x-ray in making his diagnosis as no new x-rays were taken.

O. The Complainant had previously been diagnosed with complicated pneumoconiosis. According to Dr. Afzal Ahmed, the Complainant's September 30, 2015 chest x-ray showed small opacities of q/r shape in upper, middle, and lower zones of both lungs with a profusion of 2/1, indicators of complicated pneumoconiosis. This diagnosis was the basis for the Complainant's exercise of his Part 90 rights in May 2016.

P. On August 15, Blake called the Complainant and told him Nicholas Contura, LLC would not be keeping him on at the mine. The following day, an Alpha Natural Resources, Inc. human resources manager called and told the Complainant it was

his last day with Alpha and offered him Cobra insurance and an 80-hour severance package.

Q. Most of the officers under the new management remained the same, including human resources manager Blake and safety manager Taylor. The mine was idled for only one day in order to prepare for the sale. After the mine sale, all active miners were retained to continue to work at the mine. Miners retained their seniority and vacation after the transfer.

3) There is reasonable cause to believe that the Complainant was discharged because he engaged in protected activity when he exercised his Part 90 option under the Mine Act. J.S.S. suffered an adverse action when he was discharged on August 15, 2016.

4) Based on my investigation to this date, I have concluded that there is reasonable cause to believe that the Complainant was discharged because he engaged in the protected activity of exercising his Part 90 option. I have concluded that the complaint filed by Complainant was not frivolous.

Application for Temporary Reinstatement at Exhibit A, p. 1-5. The Secretary cited this declaration as a basis for the formal request for temporary reinstatement. *Application for Temporary Reinstatement* at 2.

Joint Stipulations:

Prior to hearing, the parties submitted the following Joint Stipulations:

1) 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 Federal Mine Safety and Health Act of 1977 ("the Act").

2) Alex Energy, Inc. was an affiliate of Alpha Natural Resources, Inc.

3) Alpha Natural Resources, Inc. and 148 related companies, including Alex Energy, filed a chapter 11 case under Title 11 in the United States Bankruptcy Court for the Eastern District of Virginia (Richmond Division) on August 3, 2015, Bankr. Case No. 15-33896.

4) Alex Energy, Inc. was operator of the Jerry Fork Eagle Mine in Nicholas County, West Virginia, until July 25, 2016.

5) Nicholas Contura began operating the Jerry Fork Eagle Mine on July 26, 2016 and continues to operate this mine.

6) Nicholas Contura is an affiliate of Contura Energy.

7) Contura Energy was formed and acquired certain assets of Alpha Natural Resources, Inc. out of the bankruptcy, including those that constituted the Jerry Fork Eagle Mine.

8) The products or operations of the Jerry Fork Eagle Mine enter or affect commerce, within the meaning and scope of Section 4 of the Act.

9) Jerry Fork Eagle Mine is a mine as that term is defined in 30 U.S.C. 802(h).

10) Nicholas Contura is an "operator" as defined in Section 3(d) of the Act at Jerry Fork Eagle Mine.

11) Operations of Nicholas Contura at the Jerry Fork Eagle Mine are subject to the jurisdiction of the Act.

12) Nicholas Contura is a "person" within the meaning of § 105(c) and within the definition of § 3(f) of the Act. 30 U.S.C. 802(f).

13) As of July 25, 2016, Complainant was employed as a Supply Motor Operator at the Jerry Fork Eagle mine, and, therefore, was a "miner" within the meaning of§ 3(g) of the Act. 30 U.S.C. § 802(g).

14) Complainant worked for Alex Energy, Inc. at Jerry Fork Eagle Mine for approximately two years until August 2016.

15) On May 4, 2016 Complainant exercised his Part 90 option under the Mine Act.

16) By the end of May, Complainant was moved from his position as a continuous miner operator to a position as a supply motor operator to satisfy the Part 90 requirements in part because the respirable dust limit for Part 90 miners would be reduced to 0.5mg/m3 on August 1, 2016 and such new limit would exceed the levels of respirable dust in the continuous miner position.

17) Complainant was off work from June 6, 2016 to July 25, 2016 for nonwork-related hernia surgery.

18) After moving into the supply motor operator position, Complainant was still paid his same rate of $32.78 per hour.

19) Contura Energy prepared a job offer letter dated June 20, 2016 addressed to Complainant, but it was never delivered because he was absent on short term disability while having hernia surgery. Such offer had certain contingencies.

20) Immediately prior to July 25, 2016, Robert Blake worked as Brooks Run North Human Resources Manager for Alex Energy.

21) As of July 26, 2016, Robert Blake became Human Resources Manager for Nicholas Contura, LLC.

22) Immediately prior to July 25, 2016, Randy Taylor worked as Safety Manager for Alex Energy.

23) As of July 26, 2016, Randy Taylor became Safety Manager for Nicholas Contura, LLC.

24) The drug test taken by Complainant at the Nicholas Contura Training Center on July 19, 2016 was negative for the presence of drugs.

25) On September 29, 2016 Complainant signed an Authorization to Disclose Health Information form authorizing the Department of Labor to disclose and use Complainant's health information for the purpose of litigation or potential litigation.

Resp. Prehearing Statement, 2-5.[5]

[5] Hereinafter, the transcript of the proceeding shall be referred to as "Tr." The Secretary's exhibits shall be referred to as "GX" followed by the number. The Respondent's exhibits shall be referred to as "RX" followed by the number.

Summary of Testimony

James Steven Spencer was most recently employed as a supply motor operator at Alex Energy's Jerry Fork Eagle Mine. Tr. 19. He has worked continuously in mining since 1982, first running a cut machine and then became a continuous miner operator. Tr. 20. He worked at Jerry Fork Eagle Mine for the two years prior to the hearing, with all but the last two weeks as a continuous miner operator. Tr. 19. Prior to working at the Jerry Fork Eagle Mine, Spencer had worked for Massey and Alpha Natural Resources since 2001. Tr. 19-20. He has never been formally or informally disciplined and has never been late to work. Tr. 20-21.

Nicholas Contura LLC is a new company that purchased certain mine assets from Alpha Natural Resources' Alex Energy. Tr. 82. The sale from Alpha to Nicholas Contura was scheduled to occur on July 25, 2016, but it was carried over to July 26 due to various complications. Tr. 85. Most of the miners and management working at the mine were transferred to the new company after the bankruptcy. Tr. 60-62. The miners who were transferred over retained their seniority. Tr. 62. The mine was shut down for one day, on July 25, to facilitate the purchase. Tr. 62.

On June 20, 2016, offer letters were prepared to transfer employees from Alex Energy to Nicholas Contura. Tr. 83-84. An offer letter was prepared but never sent to Spencer. Tr. 47, 83; GX-3. In the section labeled "proposed effective date," it states, "if you are away from work due to disability at the time of the closing on the company's purchase of Alpha assets, then your employment will also be contingent upon you presenting a medical release to return to work, passing a functional capacity evaluation (FCE), demonstrating your ability to perform the essential functions of the job, with or without reasonable accommodation." Tr. 48; GX-3. At hearing, Spencer testified that he understood the purpose of the FCE as testing one's ability to perform their job. Tr. 49. Though the offer letter had a provision for miners who were out of work due to disability, it was not sent to those miners. Tr. 91.

Spencer is a Part 90 miner, which means that he must be provided a job that has less dust while maintaining the same rate of pay.[6] Tr. 21. He was diagnosed with complicated pneumoconiosis,[7] which is also known as black lung, in September 2015 by Dr. Afzal Ahmed.[8] Tr. 21-22. Spencer filed for black lung benefits through the State of West Virginia in September 2015, but was not awarded any benefits because he passed his breathing test. Tr. 22-23. He has not filed for federal black lung benefits. Tr. 23.

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[6] Part 90 "establishes the option of miners who are employed at coal mines and who have evidence of the development of pneumoconiosis to work in an area of a mine where the average concentration of respirable dust in the mine atmosphere during each shift is continuously maintained at or below the applicable standard as specified in § 90.100." 30 C.F.R. § 90.1.

[7] Complicated pneumoconiosis occurs when a pattern of dust fills one's lungs and stays there. Tr. 22.

[8] Dr. Ahmed is a B Reader, which is a special class of reader denominated by the government for reading black lung X-rays. Tr. 51.

Spencer told Alex Energy that he filed for state black lung benefits and that he was a Part 90 miner. Tr. 23. On December 10, 2015, Spencer signed a release for HealthSmart to release information regarding his occupational disease to his employer for "purposes related to [his] occupational disease claim only." Tr. 41-43; GX-2. Spencer understood this to mean that his medical information could only be released for purposes of his black lung benefits claim. Tr. 43-44.

After becoming a Part 90 miner, Spencer was transferred to a supply motor operator position, which has less dust exposure than his previous position as a continuous miner operator. Tr. 24. The company transferred Spencer because the dust limit for Part 90 miners was scheduled to be reduced from 1 to .5 milligrams per cubic meter on August 1, 2016. Tr. 53. When Spencer was being sampled for dust before his medical leave, the results were less than half a milligram, but they showed some level of dust exposure. Tr. 54. Spencer agreed that any job at the mine would have some exposure to dust. Tr. 54. Spencer worked as a motorman for two weeks before he took medical leave for hernia surgery.[9] Tr. 25. Though the motorman position typically pays less than the continuous miner position, under Part 90 his pay remained the same. Tr. 25.

Prior to Spencer's hernia surgery, he had taken medical leave for open heart surgery, lower lumbar surgery, knee surgery, and to have a cyst removed from his back. Tr. 26-27. In previous instances, he always returned to work following the surgeries by providing a work release from his doctor. Tr. 27, 64-65. He was never previously required to take a breathing test before returning to work. Tr. 27.

While Spencer was on short-term disability leave, he heard from others at the mine that job offer sheets were being distributed and had to be submitted by July 15, 2016. Tr. 28. Spencer reached out to Alex Energy Mine Superintendent Dave Tharp and Human Resources Manager Robert Blake.[10] Tr. 28. They told Spencer not to worry about submitting paperwork, and "we'll take care of it when you come back. We'll get you fixed up when you come back." Tr. 29. On July 18, Spencer followed up with Tharp and Blake. Tr. 29. He told Tharp that he had an appointment with his personal doctor, Dr. Bandy Mullins, on July 21 and anticipated being released to come back to work. Tr. 29. Tharp told Spencer to call Blake to tell him, and Spencer did so. Tr. 29. Blake told Spencer that he had to have a drug test, and invited Spencer to get it performed at the Britten building on mine property. Tr. 30. Spencer took the drug test on July 19, and passed. Tr. 30, 32.

While on mine property, Spencer ran into Alex Energy safety director Bill Kell, as well as Robert Blake. Tr. 31. Spencer was in the middle of running his preventive dust measures for the motorman job, and Kell asked him if he would be able to return to work on Monday, July

[9] Though Spencer believed that his hernia was likely work-related, he did not file a workers' compensation claim. Tr. 25.

[10] Nicholas Contura human resources manager Robert Blake testified on behalf of the Respondent. Tr. 81-82. Prior to working for Nicholas Contura, Blake worked for Alex Energy and Alpha Natural Resources at the Jerry Fork Mine and Power Mountain Prep Plant in the same capacity. Tr. 82.

25.[11] Tr. 31-32. Spencer responded that he believed he would be released by then. Tr. 31. Kell told Spencer that he would get Spencer's pumps ready for Monday, and said to tell Blake that he would be returning to work then. Tr. 34. Spencer called Blake and told him he would return on Monday, and Blake responded, "Okay, I'll see you Monday," but then before he hung up, said, "Wait, wait, let me run this by higher-ups and make sure all is in order." Tr. 34.

At Spencer's July 21 doctor's appointment, Spencer's personal doctor, Dr. Bandy Mullins, gave Spencer a release to return to work, starting July 25, 2016. Tr. 25-26, 33; GX-1. Spencer testified that after he was released on July 25, he was able to perform the duties of a motorman. Tr. 49.

Blake called Spencer the next morning, Friday July 22, at 9:00 a.m. and told him that he would have to go to a physical. Tr. 35. Spencer believed that the physical would be to test his ability to lift because of his hernia surgery. Tr. 35.

On July 25, Blake called Spencer and told him that he needed to come to the main office at the mine because Kingston Mine safety director Randy Taylor and he needed to talk to Spencer.[12] Tr. 36. At the meeting, Taylor and Blake told Spencer that in order to return to work he would have to have a breathing test. Tr. 36-37. Blake said, "You can't pass that, can you?" Tr. 37. Spencer responded that he had always previously performed well on his breathing test, and asked if there would be additional X-rays. Tr. 37. Blake said that there likely would be, and Spencer responded that an X-ray would show pneumoconiosis. Tr. 37. Blake responded, "You're not complicated, are you?" Blake was aggravated at this question because they were aware that he had complicated pneumoconiosis due to his status as a Part 90 miner. Tr. 37. He believed that the comment was made because he was a Part 90 miner. Tr. 38.

At hearing, Spencer testified that though people don't say anything directly about Part 90 miners, "there is a shadow over Part 90 miners." Tr. 38. Because they require less dust exposure, such miners are often treated as a nuisance. Tr. 38. Spencer felt that they were trying to get rid of him because he was a Part 90 miner. Tr. 38. Blake told Spencer that if the test came back showing that he had complicated pneumoconiosis, he would not be offered a position at Nicholas Contura. Tr. 38. Spencer described the atmosphere at the meeting as "tense" because his experience with Blake led him to believe that "something definitely was…up." Tr. 39.

After the meeting, Taylor told Spencer, "Hey, I hope you go down there and take your test and everything comes back and you're back down there at Jerry Fork on a motor." Tr. 39. Spencer believed that this meant that if he passed the breathing test, he could come back to work. Tr. 39.

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[11] Preventive dust measures are used to check dust levels due to Spencer being a Part 90 miner. Tr. 32.

[12] Nicholas Contura safety manager Randy Taylor testified at hearing on behalf of Respondent. Tr. 94. Prior to working for Nicholas Contura, Taylor was the safety manager for Kingston Mining, which was a subsidiary of Alpha. Tr. 94.

The company directed Spencer to see Dr. Charles Porterfield, and they paid for the appointment. Tr. 40. Spencer went to Dr. Porterfield's office in Beckley, West Virginia, for his FCE and pulmonary capacity test. Tr. 39. Spencer did not see a doctor during this visit, or have an X-ray taken. Tr. 40. He did not bring any medical records or his black lung benefits paperwork to the visit. Tr. 40-41. Instead, he saw a respiratory therapist named Teresa Hughes, who performed the breathing test.[13] Tr. 40. Hughes told Spencer that he did all right on his breathing test. Tr. 40.

Dr. Porterfield faxed a letter to Nicholas Contura LLC on August 10, 2016.[14] GX-5. It states that the pulmonary function studies demonstrates a slight reduction in FVC and FEV1 with normal ratio. Tr. 69. It further states that "Volume studies demonstrate a slight increase in the RV/TLC ratio. Diffusion is normal." GX-5. Special Investigator Kelly Acord testified that he understood this diagnosis to be positive, meaning that Spencer passed his breathing test.[15] Tr. 69-70.

Blake received the August 10 letter from Dr. Porterfield and sent it to management because there was no interpretation in it. Tr. 87-88. Management told Blake to contact Dr. Porterfield's office and "ask for an interpretation," which Blake did. Tr. 88. Blake also provided Dr. Porterfield with certain medical records for Spencer. Tr. 88. Blake could not recall specifically which records he sent, but he believed that he at least sent Dr. Ahmed's diagnosis. Tr. 93. In response, Dr. Porterfield sent a second letter on August 15, 2016, which reads in full, "Mr. James S Spencer has complicated pneumoconiosis on chest x-ray/CT scan and should not be further exposed to coal dust. If you have any further questions feel free to call or write."[16] Tr. 88; GX-5. Blake reported this to management, and testified that as a result there was a decision not to offer Spencer a job. Tr. 88.

Acord interviewed Dr. Porterfield, and Porterfield confirmed that he did not examine Spencer. Tr. 70. Instead, his technician, Teresa Hughes, examined him. Tr. 70. Porterfield said that based on that examination he felt that Spencer could function as a coal miner. Tr. 70. Porterfield said that his second letter was based primarily on the X-ray and CT scan that he received from Blake. Tr. 70. Dr. Porterfield told Acord that he could not recall why the two letters were sent five days apart. Tr. 75.

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[13] No evidence was presented as to the qualifications of Teresa Hughes.

[14] The letter is not dated, but has a facsimile transmission mark that indicates it was sent on August 10, 2016.

[15] District 4 MSHA Special Investigator Kelly Acord was the primary investigator on Spencer's case, while Perry Brown also worked as a special investigator on the case. Tr. 70. Kelly Acord testified for the Secretary at hearing. Tr. 58. He has been employed with MSHA since March 2005, starting as a general inspector for two and a half years before moving to the special investigation department. Tr. 59.

[16] The letter is dated August 12, 2016, but the facsimile transmission mark indicates that it was sent on August 15, 2016.

On August 12, Tharp told Spencer that Nicholas Contura might not have to take anyone back who was on short-term disability. Tr. 44. On or about August 15, Spencer called Blake to find out the results of his breathing test, and Blake said he would check and get back to him. Tr. 45. Blake called Spencer back and told him that due to Dr. Porterfield's findings they did not have a position for him at Nicholas Contura. Tr. 45. The following day, Spencer spoke to Alpha Natural Resources human resources director Kyle Bane, and Bane told him that it was the last day of his insurance with Alpha and offered him a two-week severance package and COBRA insurance. Tr. 45. Bane further told Spencer that he believed it was wrong that he was being fired from the mine. Tr. 46.

Spencer believes that he was discriminated against because he was a Part 90 miner. 49-50. Spencer was aware of one other Part 90 miner at the mine, and Spencer believes that he is currently working for Nicholas Contura. Tr. 51-52. The other Part 90 miner was not on short-term disability, so the company did not have the opportunity to question him about his status or require him to take a functional capacity evaluation. Tr. 57-58, 73. Acord was told that there was one miner who was on workers' compensation for a foot injury that had to take some tests before returning to work. Tr. 71, 84. This miner was sent to Dr. Orr, who is a general practitioner, and only had to perform basic tests involving his leg movement. Tr. 72. He was then sent to Dr. Porterfield for a breathing test and passed. Tr. 72.

Findings and conclusions

The Secretary argues that Spencer engaged in protected activity when he exercised his Part 90 rights, and that the Respondent discriminated against him by firing him for exercising those rights.

The Respondent argues that its decision not to hire Spencer was unrelated to his status as a Part 90 miner, but rather had everything to do with Dr. Porterfield's letter. Because this letter stated that Spencer should not be exposed to any coal dust, and there are no jobs at the mine that meet such restrictions, Spencer was not offered a position. Further, the Respondent argues in its prehearing submissions that Spencer was not "fired," but rather not "hired," indicating that he was not a miner, but rather an applicant who is not entitled to temporary reinstatement under the Act.[17]

Spencer was a Miner Rather than an Applicant for Employment

Section 105(c)(2) of the Mine Act provides, in relevant part:

> *Any miner or applicant for employment or representative of miners* 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…. [I]f the Secretary finds that

[17] Though the parties appear to stipulate that, as of July 25, 2016, Spencer was a "miner" within the meaning of the Act, the Respondent raised this issue in a pre-hearing pleading, so this issue will be addressed. Stip. ¶13.

> such complaint was not frivolously 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…. [Emphases added.]

30 U.S.C. §815(c)(2). The Commission has interpreted the language of this provision as limited to miners, rather than applicants for employment.[18] *Sec'y of Labor, MSHA, on behalf of Piper v. KenAmerican Resources, Inc*., 35 FMSHRC 1969, 1971-72 (July 2013). However, multiple Commission decisions have not looked narrowly at a Complainant's status at the time of the adverse employment action, but rather at his status when he engaged in protected activity or when discriminatory actions were taken against him. *See Piper v. KenAmerican*, 35 FMSHRC 1969 (July 2013), *Sec'y on behalf of Pappas v. CalPortland Co*., 38 FMSHRC 137 (Feb. 2016).

In *Piper*, 35 FMSHRC 1969, the Complainant filed a discrimination complaint as a result of his inclusion in a reduction in force, alleging that it was due to his making a prior safety complaint. The Secretary initially filed an application for temporary reinstatement, but several weeks later filed a motion to dismiss the application after determining that the facts disclosed during the investigation did not support a violation of the Act. However, in the interim, the company began recalling miners, and did not include Piper as one of the recalled miners. As a result, he filed a second discrimination complaint, alleging that he was being discriminated against because he filed the initial discrimination complaint. The Commission affirmed the ALJ's finding that the Complainant was at all times a "miner," rather than an applicant for employment because the "genesis" of the complaint occurred while he was working as a miner. 38 FMSHRC at 1972.

Similarly, in *Pappas*, 38 FMSHRC 137, the Complainant engaged in protected activity, made a discrimination complaint, and was reinstated as part of a settlement when the mine was owned by Martin Marietta. However, when CalPortland began taking steps to purchase the mine it contacted Martin Marietta's human resources manager for advice on hiring decisions. The ALJ concluded that the Complainant, who was not rehired by CalPortland, was a "miner" when he applied for the job, stating:

> Pappas was no stranger off the street applying for a position at the Oro Grande cement plant but had an extensive employment history at the mine. Pappas's discrimination complaint relates back to decisions made while he was still employed at the mine …. CalPortland's structured termination and application process for the Oro Grande workforce does not materially alter Pappas's status as a miner eligible for temporary reinstatement under section 105(c)(2) of the Mine Act.

38 FMSHRC at 140 (quoting ALJ decision). The Commission affirmed the ALJ's findings and noted that "the courts have taken a realistic view of these transactions, and acknowledged that employees caught up in these corporate changes nevertheless may be protected." *Id.* at 143. It is further noted that the transition from the asset seller to the purchaser "was almost seamless. Most

[18] The term "miner" is defined in section 3(g) of the Act, 30 U.S.C. § 802(g), as "any individual working in a coal or other mine."

of the CalPortland employees were working at the same mine, and the same jobs they held when Martin Marietta owned the assets, and the human relations director remained the same." *Id.*

The facts as presented at hearing in the instant case are even more compelling in finding that Spencer was a "miner." Spencer exercised his Part 90 miner rights with Alex Energy on May 4, 2016, prior to the purchase by Nicholas Contura. Tr. 23; Stip. ¶15. As a result, Spencer was moved from his position as a continuous miner operator to a position as a supply motor operator. Stip. ¶16. Spencer then went on short-term disability leave from June 6, 2016, to July 25, 2016, for hernia surgery. Stip. ¶17. On July 26, 2016, Nicholas Contura completed its purchase of the Jerry Fork Eagle Mine and began operating it. Tr. 85; Stip. ¶5. Much of the personnel from Alex Energy, including human resources personnel and miners, continued their positions at the mine under Nicholas Contura, retaining their job titles and seniority. Tr. 60-62; Stip. ¶¶ 20-23. The decisions to make Spencer take a breathing test, and then not offer him employment at Nicholas Contura, was made in significant part by Blake and other human resources personnel that continued from Alex Energy. Tr. 31-40, 44-46. Further, the transfer of assets and personnel was so seamless that the mine was only shut down for one day to facilitate the purchase. Tr. 62.

According to these circumstances, Spencer remained at all times a miner. He had worked at the Jerry Fork Eagle Mine for two years. Tr. 19. Spencer was released to return to work on July 25, 2016, and should have been afforded the opportunity to do so. Instead, he was required to remain off work until such time as the mine purchase was complete, and then not offered employment with the new company.

Spencer Engaged in Protected Activity and Suffered an Adverse Employment Action

The Complainant engaged in protected activity when he exercised his Part 90 rights under the Mine Act. Part 90 provides coal miners who have evidence of the development of pneumoconiosis the option to work in an area of the mine where the average concentration of repirable dust in the mine atmosphere during each shift is continuously maintained at or below .5 milligrams per cubic meter of air. 30 C.F.R. §§ 90.1, 90.100. Spencer exercised his Part 90 rights on May 4, 2016. Stip. ¶15. Part 90 was promulgated pursuant to Mine Act section 101(a), 45 Fed.Reg. 80,760 (1980), and Section 105(c)(1) lists as protected when "such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101." 30 U.S.C. §815(c)(1). Therefore, the exercise of these rights is clearly protected activity under Section 105(c)(1) of the Act.

Further, Spencer suffered an adverse employment action when he was not offered continued employment at the mine.

A Nexus Existed Between the Protected Activity and the Adverse Employment Action

As discussed *supra*, to obtain a temporary reinstatement a miner must raise **a non-frivolous claim** that he engaged in protected activity with a connection, or nexus, to an adverse employment action.

Having concluded that Spencer engaged in protected activities and suffered an adverse employment action, the examination now turns to whether that activity has a connection, or nexus, to the subsequent adverse action. The Commission recognizes that direct proof of discriminatory intent is often not available and that the nexus between protected activity and the alleged discrimination must often be drawn by inference from circumstantial evidence rather than from direct evidence. *Phelps Dodge Corp.*, 3 FMSHRC at 2510. The Commission has identified several circumstantial indicia of discriminatory intent, including: (1) hostility or animus toward the protected activity; (2) knowledge of the protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the complainant. *See*, *e.g.*, *CAM Mining, LLC,* 31 FMSHRC at 1089; *see also*, *Phelps Dodge Corp.*, 3 FMSHRC at 2510.

Knowledge of the protected activity

According to the Commission, "the Secretary need not prove that the operator has knowledge of the complainant's activity in a temporary reinstatement proceeding, only that there is a non-frivolous issue as to knowledge." *CAM Mining, LLC,* 31 FMSHRC at 1090 *citing Chicopee Coal Co.*, 21 FMSHRC at 719. In fact, evidence is sufficient to support a finding of knowledge if an operator erroneously suspects a miner made safety complaints, even if no complaint was made. *See Moses v. Whitley*, 4 FMSHRC at 1478.

In the instant matter there is sufficient evidence of knowledge of the various protected activities to meet the evidentiary threshold. The nature of exercising one's Part 90 rights requires the miner to tell the company that he is exercising those rights. In the instant case, Spencer told personnel at Alex Energy that he filed for state black lung benefits and that he was a Part 90 miner. Tr. 23. Various Alex Energy personnel, including human resources manager Blake and safety manager Taylor, stayed on at Nicholas Contura. In various discussions and meetings with Spencer, these individuals made it clear that they knew of Spencer's status as a Part 90 miner. Therefore, there is no question that the operator had knowledge of Spencer's protected activity.

Coincidence in time between the protected activity and the adverse action

The Commission has accepted substantial gaps between the last protected activity and the adverse employment action. See e.g. *CAM Mining, LLC,* 31 FMSHRC at 1090 (three weeks) and *Sec=y of Labor on behalf of Hyles v. All American Asphalt*, 21 FMSHRC 34 (Jan. 1999) (a 16-month gap existed between the miners= contact with MSHA and the operator=s failure to recall miners from a lay-off; however, only one month separated MSHA=s issuance of a penalty resulting from the miners= notification of a violation and that recall failure). The Commission has stated "We 'appl[y] no hard and fast criteria in determining coincidence in time between protected activity and subsequent adverse action when assessing an illegal motive. Surrounding factors and circumstances may influence the effect to be given to such coincidence in time.'" *All American Asphalt*, 21 FMSHRC 34 at 47 (quoting *Hicks v. Cobra Mining, Inc.*, 13 FMSHRC 523, 531 (Apr. 1991).

In the instant matter, Spencer was only at his Part 90 job transfer for two weeks before he left on short-term disability leave. Another seven weeks elapsed between the beginning of Spencer's June 4 short-term disability leave and his July 25 release to return to work. As a result,

I find that the time span between the protected activities and the adverse action is sufficient to establish a nexus.

Hostility or animus towards the protected activity

The Commission has held, "[h]ostility towards protected activity—sometimes referred to as 'animus'—is another circumstantial factor pointing to discriminatory motivation. The more such animus is specifically directed towards the alleged discriminatee's protected activity, the more probative weight it carries." *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corporation*, 3 FMSHRC 2508, 2511 (Nov. 1981) (citations omitted).

In the instant case, there are a host of actions that could constitute animus towards Spencer's protected activities. In the July 25 meeting Blake evinced a hostile view towards employees who had been diagnosed with pneumoconiosis. Though Blake was aware of Spencer's condition, he insisted on asking him about his pneumoconiosis, "you're not complicated, are you?" Tr. 37. Blake then told Spencer that if the test shows that he had complicated pneumoconiosis he would not be offered a position at Nicholas Contura. Tr. 38. These statements were made prior to Spencer visiting Dr. Porterfield's office, and therefore contradict the Respondent's argument that the only reason it did not offer Spencer his position at the mine was because of Dr. Porterfield's second letter.[19]

In addition to these statements, the operator's requirement that Spencer visit their doctor smacks of animus towards Spencer's status as a Part 90 miner. Nicholas Contura's policy of requiring employees who are out on disability at the time of the closing to receive an evaluation before returning to work is a reasonable means of testing whether the employee has fully recovered from the injury or illness that required him to take leave before returning to work. However, in this instance, Spencer was cleared by his doctor to return to work on July 25, which is one day prior to the closing. Therefore, he should have never been required to pass an FCE. Further, even if he had been required to pass an FCE, it should have been limited to matters related to his hernia surgery. Instead, the only examination Spencer received was to test his breathing. Tr. 40.

Following what appears to be Spencer's passing his breathing test, as memorialized in Dr. Porterfield's August 10 letter, the operator sent Porterfield Spencer's medical records and asked for "an interpretation."[20] Tr. 88. Based on a review of these medical records and whatever

[19] It should further be noted that no evidence was presented at hearing as to the qualifications of Dr. Porterfield—who according to his letterhead is a Doctor of Osteopathic Medicine and a Fellow of the American Academy of Sleep Medicine—in reading and interpreting Spencer's x-ray or CT scan.

[20] Based on the evidence presented at hearing, there are serious questions as to whether the operator was permitted to share Spencer's medical records with Dr. Porterfield. Spencer signed a release with HealthSmart to release his medical records to his employer for "purposes related to [his] occupational disease claim only." Tr. 41-43; GX-2. He did not release the operator to share those records in any way they chose. Further, it is distressing that at hearing Blake could not even recall which medical records he sent to Dr. Porterfield. Tr. 93.

was requested of Dr. Porterfield, he issued a second letter, which in no way appears to be "an interpretation" of the first letter. GX-5. The first letter relates entirely to Spencer's breathing test in somewhat positive terms, whereas the second letter relates to a chest x-ray/CT scan that the company provided to the doctor. Dr. Ahmed took the scans in September 2015 and interpreted them to determine that Spencer had complicated pneumoconiosis. GX-4. However, he never stated that Spencer could not be exposed to any level of coal dust. But Dr. Porterfield, who never met Spencer or took any examinations or scans of his chest, interpreted Dr. Ahmed's scan to draft a single sentence diagnosis that stated that Spencer "should not be further exposed to coal dust." GX-5. Every step in this course of events evinces animus, and combined shows an arguable coordinated attempt to get rid of a Part 90 miner.[21]

Disparate Treatment

"Typical forms of disparate treatment are encountered where employees guilty of the same, or more serious, offenses than the alleged discriminatee escape the disciplinary fate which befalls the latter." *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2512 (Nov. 1981). 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. *Id*. at 2510-2513.

In the instant matter, the Respondent argued that one other Part 90 miner was retained at Nicholas Contura, as well as one miner who was on disability for a foot injury. Tr. 51-52, 71, 84. These miners are not similarly situated to Spencer, as neither was both a Part 90 miner and on short-term disability.

Conclusion

In concluding that Spencer's complaint herein was not frivolously brought, I find that there is reason to believe that Spencer engaged in a variety of protected activity. I further conclude that the Secretary has met its burden in showing that there was a nexus between Spencer's protected activities and the operator's declining to offer him his position at the mine.

ORDER

For the reasons set forth above, it is **ORDERED** that Complainant James Steven Spencer be immediately reinstated by Respondent to his former position, or the equivalent, at the same rate of pay, hours worked, and with all other benefits he was receiving at the time of his discharge, effective the date of this decision.

[21] Indeed, Dr. Porterfield's cursory conclusion that a miner with complicated pneumoconiosis should not be exposed to any coal dust essentially nullifies Part 90 for such miners.

The court retains jurisdiction over this temporary reinstatement proceeding. 29 C.F.R. § 2700.45(e)(4). The Secretary shall complete the investigation of the underlying discrimination complaint *as soon as possible*. Immediately upon completion of the investigation, the Secretary shall notify counsel for Respondent and this court, in writing, whether a violation of Section 105(c) of the Mine Act has occurred. *Id*.

/s/ William S. Steele
William S. Steele
Administrative Law Judge

Distribution (Via E-mail and Certified Mail):

Pollyanna E.F. Hampton, Esq., U.S. Department of Labor, 201 12th Street South, Suite 401, Arlington, VA 22202-5450, hampton.polly@dol.gov

R. Henry Moore, Esq., Jackson Kelly PLLC, Three Gateway Center, 401 Liberty Ave., Suite 1500, Pittsburgh, PA 15222, rhmoore@jacksonkelly.com

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
721 19th STREET, SUITE 443
DENVER, COLORADO 80202-2500
TELEPHONE: 303-844-5266 / FAX: 303-844-5268

October 18, 2016

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner,	CIVIL PENALTY PROCEEDINGS Docket No. CENT 2015-654 A.C. No. 32-00964-391773
v.	Docket No. CENT 2015-655 A.C. No. 32-00964-391773 Docket No. CENT 2016-73 A.C. No. 32-00964-394388 Docket No. CENT 2016-74 A.C. No. 32-00964-394388 Docket No. CENT 2016-243 A.C. No. 32-00964-403208
MEYER AGGREGATE LLC, Respondent.	Mine: Plant 2

DECISION AND ORDER

Appearances: John A. Lauer, Office of the Solicitor, Denver, Colorado, for Petitioner;

Chad Meyer, *pro se*, Dickinson, North Dakota, for Respondent.

Before: Judge Miller

These cases are before me upon a petition for assessment of a civil penalty filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d) ("the Act"). These dockets involve five citations issued pursuant to Section 104(a) of the Mine Act, one citation and one order issued pursuant to Section 104(d), and one order issued pursuant to Section 104(g). The proposed penalties total $4,642.00. The parties presented testimony and evidence regarding these citations at a hearing held in Bismarck, North Dakota, on August 31, 2016. Based upon the parties' stipulations, my review of the entire record, my observation of the demeanors of the witnesses, and consideration of the parties' legal arguments, I make the following findings and order.

Meyer Aggregate's ("Meyer") Plant 2 is a small portable surface sand and gravel mine in Golden Valley County, North Dakota, that normally employs three people. Tr. 15:12-14. The parties have stipulated that Meyer is an "operator" as defined in Section 3(d) of the Mine Act, 30 U.S.C. § 803(d), and is subject to the jurisdiction of the Commission. At Plant 2, Meyer's miners use a dozer to dig up and loosen sand and gravel and transport it to a feeder via a front-

end loader. Tr. 21. From the feeder, the miners move the material into a screener and crusher, which separates and stacks the product to be sold and unloaded. *Id*.

Seven of the citations addressed below were issued by inspector Alan Roberts in August 2015 at the Plant 2. Inspector Roberts worked as a MSHA inspector for 13 years and is now a training specialist. Tr. 18:15-23. Prior to working for MSHA, Roberts worked at Hutchison Salt Mine in Kansas, where he was an underground superintendent and was in charge of up to 100 employees. Tr. 20:11-13. The eighth citation was issued in January 2016 by inspector Robert Lindeman at the Reich Pit. He has been an MSHA inspector for 15 years and has inspected Meyer's portable operations in the past. Tr. 108-110.

I. PRINCIPLES OF LAW

The Secretary has the burden to prove each citation and its elements. The Secretary has designated a number of the violations as Significant and Substantial and two of the violations were designated as an unwarrantable failure to comply with a mandatory standard.

A. Establishing a Violation

To prevail on a penalty petition, the Secretary bears the burden of proving an alleged violation by a preponderance of evidence. *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000), *aff'd* 272 F.3d 590 (D.C. Cir. 2001); *Jim Walter Res., Inc.*, 9 FMSHRC 903, 907 (May 1987). The Secretary may establish a violation by inference in certain situations, but only if the inference is "inherently reasonable" and there is "a rational connection between the evidentiary facts and the ultimate fact inferred." *Garden Creek Pocahontas Co*., 11 FMSHRC 2148, 2152-53 (Nov. 1989).

B. 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)(l). A violation is properly designated S&S "if based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

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

> In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum,* the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard—that is, a measure of danger to safety—contributed to by the violation; (3) a reasonable likelihood that the hazard

contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

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

The second element of the *Mathies* test addresses the likelihood of the occurrence of the hazard the cited standard is designed to prevent. *Newtown Energy, Inc*., 38 FMSHRC __, No. WEVA 2011-283, slip op. at 5 n.8 (Aug. 29, 2016). The Commission has explained that the "hazard" should be defined in terms of the prospective danger the cited safety standard is intended to prevent. *Id.* at 6. The likelihood of the occurrence of the hazard must be evaluated with respect to "the particular facts surrounding the violation." *Id.*; *see also McCoy Elkhorn Coal Corp*., 36 FMSHRC 1987, 1991-92 (Aug. 2014); *Mathies*, 6 FMSHRC at 4. At the third step, the judge must assess whether the hazard, if it occurred, would be reasonably likely to result in injury. *Newtown*, slip op. at 5. The existence of the hazard is assumed at this step. *Id*.; *Knox Creek Coal Corp. v. Sec'y of Labor,* 811 F.3d 148, 161-62 (4th Cir. 2016). As with the likelihood of occurrence of the hazard, the likelihood of injury should be evaluated with respect to specific conditions in the mine. *Newtown,* slip op. at 7. Finally, the Commission has held that the S&S determination should be made assuming "continued normal mining operations." *McCoy*, 36 FMSHRC at 1990-91.

C. Negligence

The Commission has emphasized that the Secretary's regulations apply to the Secretary's proposal of penalties only, and are not binding on the Commission. *Brody Mining, LLC*, 37 FMSHRC 1687, 1701 (Aug. 2015). The Commission instead directs its judges to "evaluate negligence from the starting point of a traditional negligence analysis . . . . Under such an analysis, an operator is negligent if it fails to meet the requisite standard of care—a standard of care that is high under the Mine Act." *Brody*, 37 FMSHRC at 1702. In evaluating an operator's negligence, the judge should consider "what actions would have been taken under the same circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation." *Jim Walter Res*., 36 FMSHRC 1972, 1975 (Aug. 2014).

While the Secretary's regulations focus on the presence or absence of mitigating circumstances in determining the level of negligence, 30 C.F.R. § 100.3, the Commission has indicated that Commission judges are not limited to this analysis and "may find 'high negligence' in spite of mitigating circumstances or may find 'moderate' negligence without identifying mitigating circumstances." *Brody*, 37 FMSHRC at 1702-03. High negligence is characterized by "an aggravated lack of care that is more than ordinary negligence." *Id*. at 1703.

D. Unwarrantable Failure

The unwarrantable failure terminology is taken from Section 104(d) of the Act, 30 U.S.C. § 814(d). The Commission has explained that unwarrantable failure is "aggravated conduct constituting more than ordinary negligence. [It] is characterized by conduct described as 'reckless disregard,' 'intentional misconduct,' 'indifference,' or a 'serious lack of reasonable

care.'" *Consol. Coal Co*., 22 FMSHRC 340, 353 (Mar. 2000) (citations omitted) (quoting *Emery Mining Corp.*, 9 FMSHRC 1997, 2001-04 (Dec. 1987); *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991)). In determining whether a violation is an unwarrantable failure, the Commission has instructed its judges to consider all of the relevant facts and circumstances in the case and determine whether there are any aggravating or mitigating factors. *Id.* Aggravating factors to be considered include:

> the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts were necessary for compliance, the operator's efforts in abating the violative condition, whether the violation was obvious or posed a high degree of danger, and the operator's knowledge of the existence of the violation.

IO Coal Co., 31 FMSHRC 1346, 1352 (Dec. 2009); *see also Consol*., 22 FMSHRC at 353.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Citation No. 8933001 (CENT 2016-74)

On August 12, 2015, Roberts and inspector trainee Danny Cooper visited the Plant 2 Mine near the Kurdna Pit. Tr. 13. Roberts and Cooper examined the product stockpile upon their arrival. Tr. 13, 25:15-17. Meyer had sold the stockpile to Dunn County, North Dakota, and county employees were loading and transporting gravel at the time of the inspection. *See* Tr. 21. The stockpile was approximately 40 feet tall and the inspectors noticed visible cracks, fissures, sheer walls, and undercuts near the vertical face. Ex. G-18, G-19. The material was wet and was drying out and trickling down, and Roberts testified that he could hear the product shifting and moving on the stockpile. Tr. 30-31. He observed an estimated 100-ton portion of the stockpile fall and land approximately 20 feet out from the stockpile and 10 feet from the inspection party. Tr. 35:1-17.

Two county trucks were loading gravel from the stockpile and another truck was parked nearby. Tr. 27-30. The miner removing the material and the truck drivers were Dunn County employees. Tr. 45: 11. Roberts testified that he also observed miners on foot within 50 feet of the stockpile. Tr. 31: 12-18. The loader operator was undercutting the pile and creating an overhang as he removed material. Tr. 28. Furthermore, the tracks on the ground indicated that the loader and the trucks were operating in a dangerous location under the stockpile. Tr. 29:20-30:3. Roberts was concerned that the stockpile could fall and cause fatal crushing injuries, especially during the inspection and walkaround of the truck parked nearby. Tr. 28: 4-10. He cited the mine for a violation of 30 C.F.R. § 56.3130, which requires in part, that:

> Mining methods shall be used that will maintain wall, bank, and slope stability in places where persons work or travel in performing their assigned tasks.

The Secretary alleges that the violation was S&S and the result of Meyer Aggregate's high negligence and unwarrantable failure to comply with the standard. Ex. G-18. The proposed penalty is $2,000.00.

30 C.F.R. § 56.3130 requires mines to maintain the bank and slope stability of stockpiles in areas where miners work and travel. The Commission has determined that the mine operator has a responsibility to maintain an area of unstable ground and remove hazardous conditions before work or travel takes place. *Connolly-Pacific Co.*, 36 FMSHRC 1549, 1553 (June 2014). The standard is a "clear" and "performance-oriented standard" intended to require mining methods that maintain ground stability. *U.S. Silica Co.*, 37 FMSHRC 1736, 1742 (Aug. 2015) (ALJ) (citing *Connolly-Pacific Co.*, 36 FMSHRC 1549, 1553 (June 2014), *Cyprus Tonopah Mining Corp.*, 15 FMSHRC 367, 374 (Mar. 1993)).

It is undisputed that the stockpile was unstable and that individuals were working on it during the inspection. Inspector Roberts's photographs show that the stockpile was sheer at a steep angle and had visible cracks. Ex. G-19. He testified to seeing large amounts of material shift and fall from the pile. Foreman Roger Friedt admitted to Inspector Roberts that he knew that the stockpile was unstable, but Meyer did not barricade the area or take any other steps to reduce or abate the danger prior to allowing county employees to work on the stockpile. Tr. 41.

Meyer argues that it was not responsible for maintaining the stockpile because Dunn County purchased the pile from the mine and only Dunn County employees were working on the stockpile. Tr. 41:20-24. I find that the stockpile was nonetheless a part of Meyer's operation, and that Meyer was liable for maintaining it. Meyer excavated the gravel and placed it in the stockpile and the stockpile was located on the mine site. Tr. 21:17-20, 43:5-11. Both Meyer and Dunn County had a responsibility to proactively maintain its safety and stability under the standard and therefore both entities were properly cited for the violation. Tr. 212; Ex. G-18. I find that the Secretary has demonstrated a violation of 30 C.F.R. § 56.3130.

Inspector Roberts designated the violation S&S. I have determined that Meyer violated the mandatory safety standard, satisfying the first element of the *Mathies* test. The violation also contributed to a discrete safety hazard. Section 56.3130 is designed to prevent persons and equipment from being engulfed by material that sloughs from poorly maintained walls, banks, and slopes. 30 C.F.R. § 56.3130. Meyer's failure to properly maintain the stockpile clearly resulted in the stockpile's cracks and sheer faces that could slough off of the pile and engulf and injure nearby employees. Roberts personally witnessed a 100-ton portion of the stockpile fall and land 10 feet from the inspection party. A miner, whether on foot or in the cab of a piece of equipment, could not escape from the falling material and could be suffocated and killed. Roberts testified that another such fall was reasonably likely and could be fatal. Tr. 36. He based his testimony on three fatalgrams in which similar material falls killed miners, one of which Roberts investigated himself. *See* Tr. 36:23-37:7; Ex. G-21. While Roberts did not know the exact height of the stockpiles in the fatalgrams, he testified that they were not as tall as the Meyer stockpile. Tr. 38. I credit Inspector Roberts's experience and testimony and find the violation to bean S&S violation.

Roberts designated the violation as high negligence. Foreman Friedt acknowledged that the stockpile was dangerous and yet took no action to mitigate or abate the violation until the citation was issued. Tr. 41:20-24. I find that high negligence is appropriate.

I find further that Roberts correctly designated the violation as an unwarrantable failure. The violation existed for at least one shift. Tr. 42:21-24. The Commission has found that the existence of a hazard for a "matter of seconds" may weigh against an unwarrantable failure finding, but that its existence for minutes may support such a finding. *U.S. Silica Co.*, 37 FMSHRC 1736, 1746 (Aug. 2015) (ALJ) (citing *Midwest Material Co.*, 19 FMSHRC 30 (Jan. 1997)). While one shift is not an exceptionally long period of time, the condition of the stockpile exposed miners to the hazard for many hours.

The size and hazardous condition of the stockpile was extensive, obvious, and posed a high degree of danger. The photographs of the stockpile clearly show steep faces and undercuts, and the pile was estimated to be nearly 40 feet high. *See* Tr. 27:19-20; Ex. G-19. The entire east and south side of the stockpile posed a danger to miners. Tr. 43. Meyer admitted to Roberts that it was aware of the danger posed by the stockpile but did not believe it was their responsibility to maintain it. Moreover, Roberts observed an estimated 100 tons of material slough off of the stockpile during the inspection. That amount is more than enough to kill or seriously injure the miners in the vicinity of the stockpile. Meyer was not placed on notice for this or a similar condition and had not been cited for a similar violation. However, Meyer did nothing to abate the condition until after the citation was written, despite the fact that it recognized the danger that the stockpile posed. I therefore find, given the facts and circumstances presented, that the duration, extent, obviousness and high degree of danger of the stockpile constitute an unwarrantable failure. I assess the proposed penalty of $2,000.00.

B. Citation No. 8933002 (CENT 2015-654)

Inspector Roberts next observed that the rear door of a storage van was open and did not have a chain handrail to protect miners when they entered the van to retrieve supplies. Ex. G-1. The opening was 42 inches above the ground. *Id*. Miners normally used a small stairway at the front of the storage van to store and retrieve tools and supplies on a daily basis and only used the rear doors for loading oil barrels. Tr. 56, 60. Roberts noted, however, that one of the two rear doors of the storage van was open and that no loading was taking place. Tr. 60. The supervisor went inside the storage van and closed the door during the inspection and explained that it was not normally left open. Tr. 56:3-6. Roberts testified that other similar vans had handrails, and thus the supervisor knew that this van should have one as well. Tr. 56. He issued Citation No. 8933002 for a violation of section 56.11002, which requires that "Crossovers, elevated walkways, elevated ramps …shall be provided with handrails, and maintained in good condition." Roberts alleges that the violation was the result of moderate negligence and not S&S. The proposed penalty is $100.00.

I find that this part of the van was an elevated walkway and required a handrail or barrier across the rear opening. The photographs clearly show that the rear door was open, the walkway was elevated, and that tools and oil were stored in the back of the storage van next to the doors. *See* Ex. G-2. Miners would have to walk across the storage van from the stairway to access the

stored equipment and could fall through the open door. Meyer argues that its miners normally entered the van through the side and only opened the rear doors to load larger equipment into the storage van. The doors were closed immediately after loading was complete. *See* Tr. 60:3-4, 133-36; Ex. G-2. However, I credit Roberts's testimony that the rear door was open and no loading was in progress during the inspection. Thus, the storage van required a handrail or other stabilizing device to prevent miners from falling to the ground as they walked around the rear of the storage van.

I find that the violation was the result of low negligence because Meyer had placed chain handrails in similar vans but believed it was not necessary here. I credit the testimony that miners usually used the stairway on the front side of the storage van and only opened the rear doors to load large equipment and therefore find that Meyer was only slightly negligent. I assess a penalty of $100.00.

C. Citation No. 8933003 (CENT 2015-654)

Inspector Roberts issued Citation No. 8933003 for an alleged violation 30 C.F.R. § 56.14112(b). A hinged guard door on the crusher was left slightly ajar. *See* Ex. G-4, G-5. Behind the guard are moving parts. Tr. 62:23-63:6. Roberts believed that the guard door had a latch at one time, but that it was missing, and that signs of rust indicate that it had been missing for some time. Tr. 63:24-64:5. Meyer asserts that it secured the guard door with a wire and that the door had probably been opened the day before to remove debris and had not been secured the next morning. Tr. 138:3-5, 155:12-16. The opening was approximately five feet from the ground and 10 square inches in size. Tr. 63:9-13. Section 56.14112(b) provides that "Guards shall be securely in place while machinery is being operated, except when testing or making adjustments which cannot be performed without removal of the guard." The Secretary alleges that the violation was non-S&S and the result of moderate negligence. The proposed penalty is $100.00.

The photographs provided by the Secretary indisputably show that the guard door was open and unsecured. Ex. G-5. The opening was large enough to expose miners to an entanglement hazard. Roberts testified that the machine was in operation on the morning of the inspection, though it was not running when Roberts inspected the guard. Tr. 63:16-20. I credit his testimony and find that the guard door was open while the machine was capable of being operated.

I also find that the open door did not fit into the narrow exception of the standard. Section 56.14112(b) contains a narrow exception for when machinery is operated for testing or adjustments that cannot be performed without removing the guard. *See Hi Valley Crushing Inc.*, 21 FMSHRC 1158, 1160 (Oct. 1999) (ALJ). Miner Arnold Friedt testified that they opened the door to clean out material that had fallen inside the crusher and caused problems with the V-belts. Tr. 137:13-22. The crusher had become clogged the night before and the miners decided not to unclog it until morning. Tr. 153:22-154:6. However, Foreman Roger Friedt testified that he was unsure why the guard door was unsecured, as the miners usually used a different door below the guard to clean out the machine. Tr. 153:13-16. I therefore find that the Secretary has proven the violation as alleged.

Inspector Roberts designated the violation as moderate negligence because workplace exams had been performed on the crusher and screener but that the hazard itself was not easily observable. Tr. 64-65. I agree that the negligence was moderate and assess a penalty of $100.00.

D. Citation No. 8933004 (CENT 2015-655)

Inspector Roberts observed a significant buildup of spilled gravel on two ends of the elevated walkway beside the Cedarapids crusher/screener. Tr. 67:11-14. A supervisor accessed the walkway daily to check the screens. Tr. 70:12-17; 75:24-764. The walkway is a slippery, uneven surface and Roberts believed that a miner could slip, trip, or fall on the gravel and sustain a leg injury, or possibly fall off of the 10-foot high walkway and be killed. Tr. 74:21-24.

Foreman Friedt told Roberts that he was aware that the spill had occurred but did not clean it up immediately. Tr. 73:2-7. Roberts understood Friedt to say that the spillage had been there for a week, but Friedt meant that the crusher had been clogging for the past week. Tr. 73:2-7, 176:1623. Friedt testified that the spillage had actually occurred the night before, and that he intended to clean the spill once the crusher was in working condition and before starting production the next morning. Tr. 166:18-21, 167:12-15. He is trained to keep the walkway clean and recalled that he had been in trouble in the past for failing to do so, and that he did not intend to allow that to happen again. Tr. 167:17-19. Further, Friedt testified that he usually climbed up to one of the other two sides of the walkway, which were clean at the time the citation was issued. Tr. 167:6-11, 178-79. He indicated that he could check the screens from the clean areas without walking over the spillage. Tr. 178-79. Roberts did not take photos of the two clean sides of the walkway, but admitted that they were clean and orderly at hearing. *Id*.

Roberts issued Citation No. 8933004 for a violation of 30 C.F.R. § 56.20003(a), which requires that "At all mining operations[,] [w]orkplaces, passageways, storerooms, and service rooms shall be kept clean and orderly." Inspector Roberts designated the violation as S&S and the result of high negligence, and an unwarrantable failure to comply with the standard. *Id*.

Section 56.20003(a) requires a showing that (1) the cited area is a "workplace" and a "passageway," and (2) the area is not being kept clean and orderly. 30 C.F.R. § 56.20003(a); *See Tim M. Ball, Employed by Mountain Materials, Inc.*, 38 FMSHRC 1799, 1808 (July 2016) (ALJ). It is clear that the walkway qualifies as a "workplace" and as a "passageway" and was not kept clean and orderly. Miners accessed the walkway at least once a shift to check the bolts and the screen. Tr. 178:18-25, 176:6-7. Photographs presented by the Secretary show large amounts of spilled rock on the elevated walkway in two areas, one at each end of the crusher. Ex. G-13. Walking on or crawling over the material put the miner in a position to lose his balance and fall over the handrail. Thus, I find that the Secretary has proven a violation.

In considering Inspector Roberts's S&S designation, I have already determined that Meyer violated the mandatory safety standard by failing to keep the walkway clean and orderly. The violation also constitutes a discrete safety hazard. Keeping the elevated walkway clear of obstructions aims to prevent miners from having to walk or crawl over uneven spillage, where they may lose their balance and fall. Over the course of continuous mining operations, standing, crawling, or walking on the walkway was reasonably likely to result in an injury. The walkway

was nearly 10 feet above the ground and a falling injury could be serious or even fatal. Accordingly, I find that the violation was S&S.

Based upon his conversation with Foreman Friedt, Inspector Roberts designated the violation as the result of high negligence. Friedt knew about the spill and had been instructed to keep the walkway clear in the past. The spill was obvious and covered two ends of the walkway. Friedt elected not to shovel the walkways until the next morning even though he had been trained to keep them clear. Thus, I find that a high negligence designation is appropriate.

However, I find that the violation did not constitute an unwarrantable failure. Inspector Roberts designated the violation as an unwarrantable failure because the hazard was obvious and extensive, covering two areas of the walkway. Tr. 76:6-8, 77:17-19. The violation had not been present for more than one night. Inspector Roberts mistakenly understood Foreman Friedt to say that the spillage had been there for a week when Friedt meant that the crusher had been clogging for the past week. Friedt credibly testified that the spill occurred the previous evening and he intended to clean it up the following morning before resuming operations. He also admitted that he had every intention to keep the walkway clean prior to anyone walking in the area. I have no reason to doubt that Foreman Friedt was honest about the spill, and credit his testimony accordingly.

Additionally, the violative condition was not as extensive as Inspector Roberts alleged. While spillage was obvious on two ends of the walkway, both parties acknowledged that other areas of the walkway were kept clean and orderly. I credit Foreman Friedt's testimony that the side of the walkway, where there was a ladder to access the walkway was used to check the screens and did not contain spillage. Further, Friedt could see the screens from that side, and he did not climb or walk over the material. Tr. 167:6-11.

Meyer was not placed on notice that greater efforts were necessary and received no citations of this nature in the past. Again, I credit Foreman Friedt's testimony that he normally abates the spillage after it occurs, and that on this one occasion waited until the next morning to clear it off before operating the crusher. The violation was obvious but did not pose a high degree of danger because two sides of the walkway were indisputably clear of spillage and allowed Friedt to check the screens without walking over the spill. In weighing the unwarrantable failure factors in this circumstance, the unwarrantable failure designation is vacated. I therefore assess a reduced penalty of $1,200.00.

E. Citation No. 8933005 (CENT 2016-73)

Roberts observed that the windshield wiper on a Case SR200 skid loader did not function. Ex. G-15. The loader operates in areas of foot traffic and in dusty and wet weather. Tr. 80:2-9. Roberts believed that the broken wiper exposed miners in the area to the hazard of being struck by the loader. Tr. 82:3-4. Meyer admits that the wiper did not work at the time of the inspection, but argues that it worked earlier that morning when Foreman Friedt tested the loader. Tr. 169. Meyer changed a blown fuse to abate the citation. *Id*.

Roberts cited the mine for a violation of section 56.14100(b), which provides that "Defects on any equipment, machinery, and tools that affect safety shall be corrected in a timely

manner to prevent the creation of a hazard to persons." He designated the violation non-S&S and the result of moderate negligence. Ex. G-15. The proposed penalty is $100.00.

To establish a violation of § 56.14100(b), the Secretary must prove that there was a defect in the equipment, that the defect affected safety, and that it was not corrected in a timely manner. *See* 30 C.F.R. § 56.14100(b). Here, Meyer does not dispute that the windshield wiper failed to activate when the inspector asked the operator to start it. The defect also clearly affects the safety of the skid loader. The skid loader is used on a daily basis all over the plant, mostly to clean up material spills. Tr. 79:9-17. Lack of a functioning wiper would impede the operator's visibility and create a hazard to the loader operator and other miners working in the area. Tr. 80:10-15.

The main issue regarding the violation here is whether the mine failed to correct the defect "in a timely manner." The Commission addressed the timeliness requirement of § 56.14100(b) in *Lopke Quarries, Inc.*, 23 FMSHRC 705 (July 2001), which involved a lockout device. The Commission determined that "[w]hether the operator failed to correct the defect in a timely manner depends entirely on when the defect occurred and when the operator knew or should have known of its existence." *Id*. at 715. Here, Foreman Friedt admitted that the wiper failed to work during the inspection, but testified that it did work earlier that morning when he checked the skid loader prior to using it. The inspection sheet produced by the operator confirmed that the wiper was working during the pre-shift inspection, and the photograph shows wiper marks on the skid loader's windshield. *See* Ex. G-16. Friedt testified that he had to replace a fuse in order to repair the wiper, indicating that the fuse may have blown after the morning pre-check. I find that Meyer had no reason to know that the wiper was defective and therefore could not have corrected the defect in a timely manner. The citation is therefore vacated.

F. Citation No. 8933006 (CENT 2015-654)

Inspector Roberts examined a Cat D8L Dozer and noted that the vehicle was missing handholds on both sides. Tr. 84:12-15; Ex. G-7. He observed the dozer in use during the inspection, and testified that miners used the dozer throughout the day, sometimes in wet and muddy conditions. Tr. 85:5-19, 86:2-4. Miners stood on the tire and grabbed under the metal areas of the dozer to reach the cab. Tr. 99:14-17. Roberts asserted that miners could slip and fall and sustain broken bones when attempting to climb into the Dozer by standing on one of its tires. Tr. 87:9-88:1.

Roberts cited a violation of section 56.11001, which requires that "Safe means of access shall be provided and maintained to all working places." A "working place" is defined as "any place in or about a mine where work is being performed." 30 C.F.R. § 56.2. He designated the violation as S&S and the result of moderate negligence. Ex. G-7. The Secretary proposed a penalty of $100.00.

Inspector Roberts testified that he issued this citation because the dozer had no handrails or grips for miners to hold while climbing up onto the dozer. Tr. 84:12-15. The dozer cab is clearly a "working place" because Inspector Roberts observed the dozer in operation and testified that it is used often and in all weather conditions. No safe access was provided to the

cab. The photographs indicate that each side of the dozer had a handrail when it was manufactured but that both were missing at the time of the inspection. Tr. 84:12-15; Ex. G-8. Climbing into the cab by standing on the dozer's tire is not a safe means of access. A miner entering or exiting the dozer could slip and fall without the handrails, especially in wet or inclement weather, and could be seriously injured or killed. Meyer argues that the dozer did not have handrails when it was purchased. Even so, the argument does not absolve them of liability because they were required to provide, not merely maintain, safe access to the cab. Since there are no handholds or rails for miners to grab in order to pull themselves up and enter the cab, I hold that Meyer violated the standard.

I further find that the violation is S&S and the result of Meyer's moderate negligence. I have determined that Meyer violated the mandatory safety standard. Section 56.11001 is designed to prevent miners from being injured as they enter a working place. The lack of handrails to hold onto and pull oneself up, indicates that the access was not safe. Failure to provide a safe means to access the dozer cab is reasonably likely to result in a miner slipping and hitting the side of the equipment or falling to the ground. Miners have to face the dozer to get in and out of it and could fall approximately three feet backwards onto the ground, which could be made of rock or other hard material. Further, the dozer is accessed frequently and in all types of weather, and it is likely that such an injury would amount to broken bones or head and back injuries. Therefore, the violation is significant and substantial. Moderate negligence is appropriate because it is clear that the dozer lacked handrails for quite some time. I assess a penalty of $100.00 as proposed.

G. Citation No. 8933007 (CENT 2015-654)

Inspector Roberts observed county employees using a loader to load a truck out of the mine's product stockpile in conjunction with Citation No. 8933001, discussed above. The loader operator was undercutting the stockpile in a dangerous manner and was not properly trained to identify unsafe practices. Tr. 49:11-17. The county employees were working in an area where material may slough off of the stockpile. Tr. 48:7-21. None of the county employees had received site-specific hazard awareness training. *Id*. Roberts issued Citation No. 8933007 for an alleged violation of 30 C.F.R. § 46.11(b), which states:

> You must provide site-specific hazard awareness training, as appropriate, to any person who is not a miner as defined by § 46.2 of this part but is present at a mine site...

The Secretary alleges that the violation was S&S and the result of moderate negligence. Ex. G-10. The proposed penalty is $142.00.

Meyer argues that the county owns the stockpile and therefore Meyer has no authority over county employees. Tr. 157-158. Meyer asserts that the county employees only worked near the stockpile and did not travel into the pit. Tr. 158:11-12. Foreman Friedt testified that the equipment near the stockpile was the property of the county, and that the county drivers and loaders have more experience than many of the miners. *See* Tr. 161:20-162:2, 195:2-6. He explained that they were trained by the county and knew what they were doing when loading the stockpile. Tr. 161:20-162:7.

While Meyer no longer owned the stockpile or the equipment nearby, Meyer is nonetheless responsible for the safety of any non-employee who enters their mine site. The county employees were not directly employed by Meyer, but the stockpile where the men were working was located on the mine site. Section 46.2 defines "mine site" as "an area of the mine where mining operations occur" and the extraction, crushing and screening of the gravel constituted mining operations. *See* 30 C.F.R. § 46.2(f) and (h). Meyer excavated the gravel from the pit and used the stockpile to store the product for sale and transport. Tr. 21:17-20. The stockpile was located on the mine site and near the pit. Tr. 43:5-11. Thus, Meyer was responsible for ensuring the safety and proper training of non-employees that entered the Mine site and therefore, the failure to provide hazard recognition training violated the standard.

The violation is properly designated as S&S and the result of moderate negligence. I have found a violation of a mandatory safety standard. The standard is designed to give persons who are non-employees and not familiar with the mine, a brief overview of the various hazards that may be present on the mine site. Not being trained is a hazard in itself and could result in a serious accident because the county employees would be unable to recognize the dangers posed by the stockpile or the areas and equipment around the stockpile. An untrained person, unfamiliar with the surroundings, is likely to be involved in an accident. Such an accident would be reasonably likely to result in permanently disabling or in fatal injuries. Friedt testified that he was not aware that he should have trained the miners, even though they were working on the mine site near the stockpile. Though Foreman Friedt thought that the county employees were experienced, he still should have required the employees to undergo site-specific training for unloading material from the stockpile and while working around the mine's equipment or travelling through its areas. Thus, I uphold the S&S and moderate negligence violations and assess a penalty of $142.00.

H. Citation No. 8932505 (CENT 2016-243)

On January 13, 2016, Inspector Lindeman visited the Plant 2 Mine near the Reich Pit. Tr. 13. During the inspection, Meyer was preparing to re-locate the Plant. Tr. 110: 10-15. Lindeman observed that the road entering the mine between the pit and the stockpile was not bermed. Tr. 111:3-5. Lindeman testified that the unbermed area was approximately 150 feet long and 22 feet wide with a drop-off of six feet. Tr. 111, 114. The road was the main road to reach the mine equipment. Tr. 120:14-17, 129:11-16. Lindeman was concerned that a person entering the mine coming around the stockpile could drive off the road and into the pit. Tr. 115:8-16. He cited the mine for a violation of 30 C.F.R. § 56.9300(a), which requires that "Berms or guardrails shall be provided and maintained on the banks of roadways where a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment." Lindeman designated the violation not S&S and the result of moderate negligence. Ex. G-22. The Secretary proposed a penalty of $100.00.

The plain language of section 56.9300(a) requires the judge to decide (1) whether 'a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment,' and if so, (2) whether any berms or guardrails exist." *See Lakeview Rock Products, Inc.*, 33 FMSHRC 2985, 2988 (Dec. 2011). Neither the testimony nor the photographic evidence leaves any doubt that no berm existed on the roadway in question. In addition, the witnesses

explained that there was a drop-off sufficient to cause a vehicle to overturn or endanger persons in equipment. The photograph shows that the unbermed section was about 150 feet long with a drop-off of six feet. Were a vehicle to drive too close to the unbermed area, the grade of the drop-off was steep enough to cause a vehicle to roll or endanger the miner operating the vehicle. *See* Tr. 115:8-16.

Meyer argues that the steep grade could not cause a vehicle to overturn because nobody was present at the mine while the work was being completed. Arnold Friedt operates equipment and has worked at the mine for three years. Tr. 123:10-21, 124: 10-12. Friedt was in a dozer doing reclamation work at the end of the pit and knocking down the berm when the inspection began. Tr. 125:12-17. He testified that he was filling in the area below the berm so that there would be no drop-off and was in the process of sloping the area. Tr. 126:13-18. The plan was to finish sloping the area and reset the Plant on the other side before anyone else arrived in the area. Tr. 128:20-23.

However, Mr. Friedt admitted during cross-examination that other miners were due to return to the mine site shortly and that the road would not have been sloped down by the time of their arrival. Tr. 129:17-130: 13. Further, the road at issue was the entrance to the mine site and was elevated. Anyone coming in and out of the mine site used the road. The toilet and fueler were both located off of the road and the miners would have gone back and forth along the road to use these facilities. Tr. 113:3-19. Tire tracks are visible in the photograph and indicate that the road was used frequently and recently. Ex. G-23. While the employees were aware of the missing berm and parked in a safe zone, Meyer did not put up any signs or barricades to prevent anyone unfamiliar with the mine site from entering the property while work was ongoing. Tr. 113:14-17. I find that a violation has been shown.

I also find Lindeman's moderate negligence and non-S&S designations to be appropriate. While no berm was in place and the drop-off could cause a vehicle to overturn or cause danger to equipment, the miner was working on the area and did not expect anyone other than employees to travel the area. The mine was not expecting the fuel man or the toilet cleaner at that time and thus the exposure was limited. I therefore uphold the citation as written and assess the proposed $100.00 penalty.

III. PENALTY

The principles governing the authority of Commission Administrative Law Judges to assess civil penalties de novo for violations of the Mine Act are well established. Section 110(i) of the Mine Act delegates to the Commission and its judges "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(i). The duty of proposing penalties is delegated to the Secretary. 30 U.S.C. §§ 815(a), 820(a). 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 judge must consider six statutory penalty criteria: the operator's history of violations, its size, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and whether the violation was abated in good faith. 30 U.S.C. § 820(i). In keeping with this statutory requirement, the Commission has held that judges must make findings of fact

on the statutory penalty criteria. *Sellersburg Stone Co*., 5 FMSHRC 287, 292 (Mar. 1983), *aff'd*, 736 F.2d 1147, 1152 (7th Cir. 1984). Once these findings have been made, a judge's penalty assessment for a particular violation is an exercise of discretion "bounded by proper consideration of the statutory criteria and the deterrent purposes underlying the Act's penalty scheme." *Id*. at 294; *see also Cantera Green*, 22 FMSHRC 616, 620 (May 2000).

The history of assessed violations has been admitted into evidence and shows nothing unusual in the history, particularly as it relates to the guards. It shows no violations in the 15 month period. The parties agree that the citations were abated in good faith and the mine has raised no defense of ability to pay. The negligence and the gravity have been discussed above with each citation. Based upon my consideration of the penalty criteria, I find the following penalties to be appropriate.

Citation No.	Originally Proposed Assessment	Settlement Amount	Modification
Docket No. CENT 2016-73			
8933005	$100.00	--	Vacate.
Docket No. CENT 2016-74			
8933001	$2,000.00	$2,000.00	None.
Docket No. CENT 2015-654			
8933002	$100.00	$100.00	Modify to low negligence.
8933003	$100.00	$100.00	None.
8933006	$100.00	$100.00	None.
8933007	$142.00	$142.00	None.
Docket No. CENT 2015-655			
8933004	$2,000.00	$1,200.00	Remove Unwarrantable Failure Designation.
Docket No. CENT 2016-243			
8932505	$100.00	$100.00	None.

GRAND TOTAL	**$4,642.00**	**$3,742.00**	

IV. ORDER

Respondent is hereby **ORDERED** to pay the Secretary of Labor the sum of $3,742.00 within 30 days of the date of this decision.

Margaret A. Miller
Margaret A. Miller
Administrative Law Judge

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

John Lauer, Office of the Solicitor, U.S. Department of Labor, 1244 Speer Blvd., Suite 216, Denver, CO 80204

Chad Meyer, Meyer Aggregate, LLC, 944 24th Street West, Dickinson, ND 58601

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
7 PARKWAY CENTER, SUITE 290
875 GREENTREE ROAD
PITTSBURGH, PA 15220
TELEPHONE: 412-920-7240 / FAX: 412-928-8689

October 18, 2016

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	CIVIL PENALTY PROCEEDINGS Docket No. LAKE 2011-701 A.C. No. 11-02752-253416-01
v.	Docket No. LAKE 2011-962 A.C. No. 11-02752-262111-01
	Docket No. LAKE 2012-58 A.C. No. 11-02752-268036-01
THE AMERICAN COAL COMPANY, Respondent.	Mine: New Era Mine

DECISION ON REMAND

Appearances: Courtney Przybylski, Esq., & Ryan L. Pardue, Esq., U.S. Department of Labor, Office of the Solicitor, Denver, CO for the Secretary

Jason W. Hardin, Esq., & Mark Kittrell, Esq., Fabian and Clendenin, Salt Lake City, UT for Respondent

Before: Judge John Kent Lewis

PROCEDURAL HISTORY

On September 20, 2013, the undersigned ALJ issued a decision concerning the above dockets, affirming five citations[1] issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") to the American Coal Company ("Am Coal"), including the significant and substantial ("S&S") designations for each violation. Further, this Court assessed a total penalty of $43,200 for the five violations at issue, rather than the total of $69,600 proposed by MSHA by special assessment. 35 FMSHRC 3077 (Sept. 2013) (ALJ).

[1] Although the caption in the Commission's Remand Decision lists Docket No. LAKE 2011-881, the citations in said docket were settled prior to the within hearing. The originally assessed penalty for these violations was $61,678 and the approved settlement was $29,068. The citations still at issue on remand involve four violations of § 75.202(a) at Docket Nos. LAKE 2011-962 and LAKE 2012-58 and a violation of safeguard, Citation No. 8432052, § 75.1403 at Docket No. LAKE 2011-962.

Am Coal filed a petition for discretionary review on or about October 29, 2013, essentially challenging the propriety of the Secretary's special assessments and this Court's ultimate determination of penalties. The Commission granted Am Coal's request for review onor about October 30, 2013, and held oral argument on April 20, 2016. In a Remand Decision dated August 22, 2016, Commissioners Young, Cohen, and Althen, vacated in part this Court's September 20, 2013, decision, remanding "for further clarification" of this Court's penalty assessments.[2]

SUMMARY OF THE TESTIMONY AND THE FACTUAL RECORD

The ALJ hereby incorporates the summary of testimony as contained in his September 20, 2013, hearing decision and factual background as contained in the Commission's August 26, 2016, remand decision as though fully recited herein. 2016 WL 5868551 (Aug. 26, 2016).

I. Review of Commission Remand Decision (Majority Opinion)

In the "Disposition" section of its remand decision, the Commission explained that a Judge's assessment must be independent and that the Secretary's (penalty) proposal "*is not a baseline or a starting point that the Judge should use (as) a guidepost for his/her assessment."* (RO at 4)[3]. While the Commission held that this Court "did engage in a significant discussion of the evidence," it nonetheless held that the decision "*could be read to indicate,"* that this Court had "used the Secretary's special assessment as a starting point." (RO at 4). Therefore in order to assure the independence of the assessment, the Commission remanded the cases for reconsideration and further explanation. (RO at 4).

In its remand decision (Section A), the Commission reviewed the statutory and regulatory law supporting the Secretary's broad discretion in proposing penalties under the Mine Act. (RO at 4-6). The Commission noted that special assessments are governed by 30 C.F.R. § 100.5 and that this regulation does *not* state conditions warranting a special assessment. (RO at 5). "The decision to issue a special assessment rather than a regular penalty *is wholly within MSHA's discretion*."

The Commission further noted that MSHA's Narrative Findings for a Special Assessment ("Narrative") do not state specific reasons for the decision to issue a special assessment and "provide little or no substantive information." (RO at 4). The Narrative provided only a "cursory and summary statement," of the penalty criteria for each violation. (RO at 4).

In summary the Secretary is not required to explain the basis for his proposed regular or special assessment beyond its establishment of penalty criteria as set forth in Section 110(i) of the Act and Sections 100.3(a) and 100.5(b) of the regulations. (RO at 6). If an operator ultimately disagrees with the Secretary's regular or special assessment, his remedy is to request a hearing before the Commission. (RO at 6).

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[2] Commissioner Nakamura concurred with the remand decision *only* as to the penalty for the safeguard violation. Chairman Jordan dissented as to all five citations / penalties.

[3] Hereinafter "RO" refers to the Commission's August 26, 2016 Decision and Order.

In its remand decision (Section B) the Commission reviewed the statutory and case law upholding its independent authority to assess penalties under the Act. (RO at 6).

The Commission again emphasized that a Judge is bound "neither by the Secretary's proposed penalty nor by the Part 100 regulations governing (the Secretary's) proposed penalty process." (RO at 7). A Judge's discretion is not, however, unlimited: his penalty assessments must reflect proper considerations of § 110(i) criteria and his decision must contain findings of fact under each of the statutory penalty factors. (RO at 7).

In Section C of its remand decision the Commission examined the Secretary's burden for proposed penalties. The Commission noted that the Secretary's authority to issue a special assessment was plenary and that the Secretary was *not* required to explain his reasons for his decisions to specially assess a violation to the commission. (RO at 7). However, the Commission further held that the Secretary did "bear the 'burden' before the Commission of providing evidence sufficient in the Judge's discretionary opinion to support the proposed assessment under the penalty criteria." (RO at 7).

The Commission further held that the Secretary's decision to specially assess the penalty and the rationale supporting that decision "may be relevant if the Judge *appears to rely upon it, expressly or implicitly*." (RO at 8). While a Commission Judge has the right to impose an appropriate penalty based upon his own application of the penalty criteria, he still must explain any substantial divergence between the penalty proposed by MSHA and his own penalty assessment. (RO at 8). Thus, a Commission Judge should fully discuss the evidence bearing upon the appropriate penalty when substantially diverging from the Secretary's proposals. (RO at 9).

The Commission again emphasized that for either regular or special assessments, the Secretary's proposal must not be the "baseline from which the Judge's consideration of the appropriate penalty must start." (RO at 9). Regardless of the Secretary's proposals the Judge's assessment should be made independently, said assessment being based upon the penalty criteria and the record. (RO at 10).

In Section D of its remand opinion, the Commission stated that certain wording in this Court's decision *suggested* that it may have used the Secretary's specially assessed proposed penalties as a benchmark for calculating his ultimate assessments. (RO at 9).

Inter alia, the Commission found that this Court's decision "only summarily addressed the history of violations criterion in a general context as to the roof and rib violations." (RO at 11). Additionally, the Commission found that this Court had failed to make any finding on the violations history relative to the safeguards violations. (RO at 11).

The Commission specifically directed that on remand this court should do the following: explain whether it had relied on the Secretary's specially assessed proposed penalties; provide an adequate explanation for the bases of its assessments in light of the record and its § 110(i) findings; in the event that this Court relied on the Secretary's proposed assessment as a starting point for his assessments, it must specifically address the discrepancies noted in the record pertaining to the operator's history of violations and explain how this criterion was considered in

assessing the penalties; make a specific finding as to the history of violations pertaining to the safeguard violation, Docket No. LAKE 2011-962. (RO at 11).

II. Review of Commissioner Nakamura's Concurring and Dissenting Opinion

In his concurring opinion Commissioner Nakamura agreed with the Commission that a Judge has broad discretion to assess a penalty de novo and is in no way bound by the Secretary's proposed assessment or by the Part 100 regulations governing the penalty proposal process. (RO at 13) (citations omitted).

Commissioner Nakamura observed that historically Commission Judges' discretion in setting the penalty amount was circumscribed by only two legal requirements: (1) making the appropriate findings consistent with § 110(i) of the Mine Act; (2) explaining any substantial deviation from the Secretary's penalty proposal. (RO 14).

Commissioner Nakamura reasoned that the majority had now added an additional requirement, supported neither by statute or Commission precedent, demanding that the Judge be "attentive to the rationale supporting the decision to seek the special assessment and the facts and circumstances supporting that decision." (RO 14).

III. Review of Chairman Jordan's Dissenting Opinion

Chairman Jordan joined in the opinion of Commissioner Nakamura in affirming the four roof control violations. Chairman Jordan further opined that the safeguard violation penalty should also be affirmed and not remanded.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In reaching his own independent penalty assessments, this Court did not use and has not used the Secretary's proposed specially assessed penalties as a baseline or starting point.

As noted *supra*, the Commission's remand in part was grounded in its concern that this Court had used the Secretary's specially assessed penalty proposals as a baseline or starting point in reaching its own penalty assessments. The Commission voiced its apprehension thusly:

> In order to assure fairness, therefore, it is important for us to know whether the Judge made an independent assessment or felt constrained to making his assessment as an adjustment to the Secretary's proposal. In this unique case, if the Judge did rely on the Secretary's specially assessed proposed penalties as a benchmark, the Judge should explain whether and how he also independently arrived at the penalty amounts based on the statutory penalty criteria and the record.

(RO 11).

As further noted *supra* the Commission further directed on remand that *if this Court had relied on the Secretary's proposed assessments as a starting point for his assessment*, it should specifically address the discrepancies noted in the record pertaining to the operator's history of violations and explain how he considered this criterion in assessing the penalties. (RO 11).

This Court regrets that some inartful phrasing in its decision may have created the misapprehension that it had relied upon the Secretary's penalty proposals as a baseline or starting point in determining ultimate penalty amounts.

However, this Court finds itself constrained to point out that it had directly addressed the Commission's expressed remand concerns in its original September 20, 2013 underlying decision.

Specifically, this Court notes its review of "Contentions of Respondent," in which it states the following:

> Special assessments proposed by the Secretary prevent the Commission and its ALJs from assessing civil penalties without the appearance of arbitrariness. (Respondent's Post-Hearing Brief, at pp. 1-6).
>
> The Secretary's change to the special assessment program in 2007 rendered the regulation vague, ambiguous, and undeserving of deference. (Respondent's Post-Hearing Brief, at pp. 6-10).
>
> The Secretary failed to meet his burden of proving, "particularly serious and egregious violations" or "other aggravating circumstances" justifying enhanced penalties. (Respondent's Post-Hearing Brief, pp. 10-19).
>
> In its brief Respondent cites the recent decision of ALJ Zielinski in *American Coal Co*., LAKE 2011-183 et al, slip op., at 51 (June 13, 2013) (ALJ Zielinski); (see also Respondent's Post-Hearing Brief at p. 12). However, although ALJ Zielinski recognized American Coal's concerns about the practical implications of the Secretary's determinations to specially assess violations were well founded, he ultimately concluded that whether the Secretary proposed a regularly or specially assessed penalty *was not relevant to the Commission's determination of a penalty amount*. (American Coal Co., at p. 51).
>
> This Court is of the same opinion.
>
> Regardless of the special assessment arrived at by the Secretary and the methodology, however flawed, used – this Court is guided in its final determinations by the polestar of 30 U.S.C. §820(i) penalty considerations:
>
> > In assessing civil monetary penalties, the Commission 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.
>
> The ALJ has been further guided by Commission case law instructing how §110(i) criteria should be evaluated. *Inter alia*, the undersigned notes: the Commission's holding in *Thunder Basin Coal Co*., 19 FMSHRC 1495, 1503 (Sept. 1997) that all of the statutory criteria must be considered, but not necessarily assigned equal weight; and the Commission's holding in *Musser*

> *Engineering*, 32 FMSHRC at 1289 that, generally speaking, the magnitude of the gravity of the violation and the degree of operator negligence are important factors, especially for more serious violations for which substantial penalties may be imposed.
>
> With reference to the operator's history of previous violations, the ALJ agrees with the Secretary's argument that the imposition of significant penalties is consistent with case law holding repeated violations and notice of heightened scrutiny warrant increased penalties. (see also Secretary's Post-Hearing Brief at pp. 10-11 and cited case law).

(35 FMSHRC at 3109 – 3111.)

This Court believed (in retrospect mistakenly) that it had sufficiently communicated its intention by such decisional language to conduct a de novo determination of the penalties at issue with no reliance on the Secretary's penalty proposals as starting points or baselines and with no feelings of constraint imposed by the proposed special assessments.

This Court does not operate in an epistemological vacuum and was of course aware of the regular and special assessments associated with each citation.[4] This Court further recognizes the Respondent's underlying concerns that, in its Solomonic search for a just and fair penalty amount, this Court had been tempted to merely cut the Secretary's suggested special assessment in half. However, such is simply not the case.

The ALJ also feels compelled to address the Commission's observation that "for most violations," this Court had lowered the penalty by approximately 20% from the Secretary's special proposal. (RO at 10). While this Court's penalty amounts were roughly 20% lower than the Secretary's proposed penalties, this Court did *not* intentionally utilize any uniform across-the-board reduction formula in arriving at its individual penalty conclusions. Each penalty amount discussed within has been arrived at individually—after due consideration of § 110(i) criteria and a traditional negligence analysis pursuant to *Brody Mining, LLC,* 37 FMSHRC 1687, 1701 (AUG. 2015).

To the extent that there were any substantial deviations in this Court's penalty amounts that would require a *Sellersburg* explanation, this Court notes that, on the one hand, it frequently disagreed with the Secretary's negligence assessments.[5] On the other hand this Court gave great weight to the facts that the operator was large in size and able to continue in business despite the penalties imposed. Contrary to Am Coal's speculations, this Court imposed penalties that it felt were large enough to serve as an effective enforcement tool and discourage further violations. (see also *Black Beauty*, 34 FMSHRC at 1862 for similar considerations in considering settlement approval).

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[4] See *inter alia* Am Coal's chart of regular assessments v. proposed special assessments at page 5 of its petition for discretionary review.

[5] See *Sellersburg Stone Co.*, 5 FMSHRC 287, 298 (Mar. 1983), *aff'd* 736 F .2d 1147 (7th Cir. 1984).

Therefore, pursuant to the Commission's remand directive, this Court emphasizes and clarifies that it did not and has not relied upon the Secretary's special assessments *as a baseline or starting point.* Accordingly, there is no need to specifically address the discrepancies noted in the record pertaining to the operator's history of violations and how such criterion was considered in assessing the penalties. (See also Commission remand directives at RO 11).

This Court, however, does find that as a general matter, regardless of possible inconsistencies in the record, this mine operator inarguably had a significant history of violations. This Court specifically rejects Am Coal's apparent arguments that as its violations history was "not extraordinary or extreme," lesser penalties would be warranted. *(see Am Coal's petition for review* at p. 30).

The Mine Act is founded upon what this Court terms, "the Gibraltar" principle, that miners are valued as the most precious resource—not the shifting sands of mine operators' reported assets. In weighing the penalties to be paid this court fully took into account that miners' lives had been put at risk multiple times in the past by this operator.

In reference to the Commission's directive to "provide an adequate explanation for the bases of his (this Court's) assessments, in light of the record evidence and his section 110(i) findings," this Court shall discuss such *seriatim*.

PENALTY ASSESSMENT FOR CITATION NO. 8428508
(DOCKET NO. LAKE 2011-701)

The penalty imposed at this citation was $20,000. In its remand order the Commission noted that this Court did not make an explicit finding in the record of the size of the subject mine. (RO at 9). This Court has, in fact, considered the appropriateness of the penalty to the size of the operator pursuant to § 103.3(b). Taking into account, *inter alia*, that the subject mine tonnage exceeded 6,000,000 tons and the controlling tonnage exceeded 29,000,000 tons, this Court, in reviewing the tables in § 100.3, finds this to be a large mine. (*See also* Exhibit A). The size of Am Coal's operation would call for more than a minimal fine as to all the citations at issue.

This specific citation, as three of the succeeding violations discussed herein, involved § 104(a) S&S violations of 30 C.F.R. 75.202(a).[6]

Here, Inspector Phillip Stanley found 6 rod bolts that were not supporting the immediate mine roof. (This Court's review of the factual record as contained at 35 FMSHRC at 3105-3107 is hereby incorporated without full recitation thereof herein).

Given, *inter alia,* its findings that the injury which reasonably could be expected to result from a violation of the within standard in the cited area would be lost workdays or restricted duty and given, *inter alia*, that the inactive character of the cited area would lessen, in this Court's

[6] 30 C.F.R. § 75.202(a) 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.

opinion, the negligence level of the violative conduct, this Court was persuaded that the penalty should be reduced.[7]

PENALTY ASSESSMENT FOR CITATION NO. 8432118
(DOCKET NO. LAKE 2012-58)

This citation also involved a S&S violation of 30 C.F.R. § 75.202(a). This Court imposed and again imposes a penalty of $7,200.[8]

At hearing, Inspector Law testified that he had observed inadequately supported ribs in the 1st East Tailgate. (Tr. I, 193). The standard § 75.202(a) had been cited 97 times in two years at mine 1102752 (97 to the operator, zero to a contractor).

This Court found that Law's testimony regarding the gravity of the violation was credible. (*See also* Tr. I, 205; 38 FMSHRC at 3114). However this Court further concluded that a rib collapse causing a crushing injury was less likely than that suggested by Law. Given *inter alia* the inactive character of the cited area and other mitigating factors, this Court further reduced the *negligence* level from moderate to low. (35 FMSHRC at 3114).

This Court finds that the $7,200 penalty which it imposed was appropriate given the large size of the business of the operator and that such penalty would not affect the operator's ability to continue in business. (See also § 100.3(a)(1)(i) and § 100.3(a)(1)(vi)). The operator's significant history of past violations further justifies more than a *de minimis* penalty. Further considering the *low* negligence of the operator and its demonstrated good faith in abating the violations, the ALJ again concludes that the $7,200 penalty imposed is appropriate.[9]

PENALTY ASSESSMENT FOR CITATION NO. 8432126
(DOCKET NO. LAKE 2012-58)

This citation again centered on a S&S violation of 30 C.F.R. §75.202(a). This Court had imposed a penalty of $6,100.

At hearing, Inspector Law had testified that he had discovered four damaged roof bolts in the mine's main north travel way, creating 3 different areas of unsupported roof. (Tr. II, 281; S-14).

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[7] All of the Commissioners in their majority, concurring, and dissenting opinions agreed that this Court's explicit findings as to (reduced) negligence or gravity associated with the violations at issue in part explained the ultimate penalty amounts arrived at. (See *inter alia* RO at 9, 16, 18).

[8] This Court again incorporates its review of Citation No. 8432118 as set forth in its decision at 35 FMSHRC at 3112-3115 as though fully recited herein without recitation thereof.

[9] The difference in negligence levels arrived at by the Secretary and this Court essentially constitutes the reason for this Court's divergence from Secretary's proposed penalty.

This Court previously held that the $6,100 penalty was appropriate considering *inter alia* this § 110(i) criteria. The operator had a significant history of previous violations.[10] (See S-13).

The mine operator had a large sized mining operation and would be able to stay in business despite the penalty imposed. The mine operator had demonstrated good faith in attempting to achieve rapid compliance after notifications of the violation.

This Court's divergence in penalty amount was again essentially based upon a finding of low negligence rather than moderate negligence.[11]

PENALTY ASSESSMENT FOR CITATION NO. 8432129
(DOCKET NO. LAKE 2012-58)

This citation was also one of the four violations of 30 C.F.R. § 75.202(a) found by MSHA inspectors.

At hearing, Inspector Law testified he had issued the within citation for inadequate roof bolts. (Tr. II, 361).[12]

This Court imposed a penalty of $6,100 after careful consideration of the above § 110(i) criteria previously discussed as applicable to the foregoing citations. Given considerable mitigating circumstances—including that the cited condition might not have been observable when one was in the crosscut—this Court finds that the mine operator's negligence was low rather than moderate in nature. Any deviation in penalty amounts was principally owing to the reduced negligence finding.

PENALTY ASSESSMENT FOR CITATION NO. 8432052
(DOCKET NO. LAKE 2011-962)

Citation No. 8432052 involved a violation of the mandatory safety standard contained in 30 C.F.R. § 75.1403.[13]

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[10] Notwithstanding Am Coal's arguments to the contrary, this Court finds that Am Coal's history of previous violations—regardless of alleged inconsistencies in the Secretary's assessments—was significant in nature.

[11] This Court again incorporates its analysis as contained at 35 FMSHRC at 3115-3119 as though fully recited herein.

[12] This Court incorporates its analysis of said citation/violation as contained at 35 FMSHRC 3120-3122 as though fully recited herein.

[13] Both Section 314(b) of the Mine Act and 30 C.F.R. § 75.1403 provide: "Other safeguards adequate, in the judgment of an authorized representative of the Secretary, to minimize hazards with respect to transportation of men and materials shall be provided."

In its remand order the three Commissioner majority, also with Commissioner Nakamura concurring, directed that this Court make a specific finding as to the history of violation criterion pertaining to the safeguard violation, Citation No. 8432052. (RO at 11, 15).

In his hearing testimony Inspector Edward Law testified that the original safeguard, Citation No. 3033358, had been issued on January 13, 1988, arising out of an incident in which a ram car struck a miner standing on the back side of a curtain. (Tr. II, 393-394; S-10).

Law estimated that he had cited the instant safeguard less than 5 times in the past. (Tr. II, 416). The 55 citations noted in Citation No. 8432052, issued on January 4, 2011, concerned a multitude of safeguards associated § 75.1403 and not just Citation No. 3033358.[14] (Tr. II, 417; S-9). In recommending the within citation for special assessment, Law considered the number of previous § 75.1403 violations, that the specific violation at issue involved one of the ten "rules to live by," and that it was S&S. (Tr. II, 433).

In the Commission's remand order it was noted that the operator had a history of 19 violations of the same standard. (RO at 9, FN 8). Pursuant to the remand order this Court specifically finds that the mine operator had a history of 19 past violations within *the preceding 15 month period prior to* the present violation. (R-9)[15]

After reevaluating the entire record, including this Court's specific finding regarding the mine operator's history of past violations, this Court again determines that the sum of $3,800 is an appropriate penalty for Am Coal's violative conduct.

In reaching this penalty amount, this Court has *not* used the Secretary's proposed special assessment of $4,800 as a baseline or starting point. However, this Court is further mindful that it must explain any "substantial divergence" between the Secretary's proposed penalty ($4,800) and its own assessment ($3,800). *Sellersburg Stone Co.*, 5 FMSHRC 287, 298 (Mar. 1983), *aff'd* 736 F .2d 1147 (7th Cir. 1984).

This Court initially observes that the relatively small $1,000 differential arguably raises some question as to whether a "substantial divergence" even exists—as Chairman Jordan, in her dissenting opinion, pointedly commented: "I do not find the penalty reduction substantial enough to vacate the Judge's assessment on this basis." (RO at 18, FN 1)

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[14] See also R-36 for various other safeguards cited in connection with § 75.1403 and Respondent's cross examination regarding such at Tr. II, 417-418.

[15] § 100.3(c) provides that:

> An operator's history of previous violations is based on both 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. Only assessed violations that have been paid or finally adjudicated, or have become final orders of the Commission will be included in determining an operator's history. The repeat aspect of the history criterion in paragraph (c)(2) of this section applies only after an operator has received 10 violations or an independent contractor operator has received 6 violations.

Assuming, however, that the result constituted a substantial divergence, the ALJ fully considered the six statutory factors contained in 30 U.S.C § 820(i)[16] in reaching the within penalty assessment, including the operator's above discussed history of previous violations. The ALJ has not given equal weight to all of the above criteria and finds that, under the total case circumstances, more weight should be accorded to the factors of operator's negligence and gravity of the violations. As noted in his original decision, the ALJ found that the illumination of the cited area and miners' general awareness of the transformer's location lessened the degree of negligence and gravity otherwise applicable. (See also 35 FMSHRC 3105). The $3,800 penalty amount was appropriate given the size of the operator's business and given that the amount of the penalty would not affect the operator's ability to stay in business. Further, the operator had demonstrated good faith in abating the violations, lessening the amount of penalty that would have been otherwise warranted. (See also joint stipulation no. 10, Joint Exhibit 1, 35 FMSHRC 3079).

After conducting a de novo assessment based upon his own independent review of the record the ALJ finds that a substantial divergence from the Secretary's proposed penalty is justified and that, given the total case circumstances without reliance upon the Secretary's proposed penalty as a starting point, a penalty of $3,800 is appropriate.

ORDER

This Court makes the following penalty assessments without having used the Secretary's proposed specially assessed penalties as a baseline or starting point.

At Citation No. 8432052 (Docket No. LAKE 2011-962) Am Coal is assessed a penalty of $3,800.

At Citation No. 8432118 (Docket No. LAKE 2012-58) Am Coal is assessed a penalty of $7,200.

At Citation No. 8432126 (Docket No. LAKE 2012-58) Am Coal is assessed a penalty of $6,100.

At Citation No. 8432129 (Docket No. LAKE 2012-58) Am Coal is assessed a penalty of $6,100.

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[16] 30 U.S.C. § 820(i):

> The Commission shall have authority to assess all civil penalties provided in this chapter. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, 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. In proposing civil penalties under this chapter, the Secretary may rely upon a summary review of the information available to him and shall not be required to make findings of fact concerning the above factors. the appropriateness of such penalty to

At Citation No. 8428508 (Docket No. LAKE 2011-701) Am Coal is assessed a penalty of $20,000.

Am Coal is **ORDERED** to pay civil penalties in the total amount of $43,200 within 30 days of the date of this decision.[17]

/s/ John Kent Lewis
John Kent Lewis
Administrative Law Judge

Distribution:

Courtney Przybylski, Esq., & Ryan L. Pardue, Esq., Office of the Solicitor, U.S. Department of Labor, 1244 Speer Blvd., Suite 216, Denver, CO 80204

Jason W. Hardin, Esq., & Mark Kittrell, Esq., Fabian VanCott, 215 South State Street, Suite 1200, Salt Lake City, UT 84111

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, DC 20004
TELEPHONE: 202-434-9933 / FAX: 202-434-9949

October 18, 2016

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. CONSOLIDATION COAL COMPANY, Respondent.	CIVIL PENALTY PROCEEDINGS Docket No. WEVA 2015-651 A.C. No. 46-01433-376507 Docket No. WEVA 2015-762 A.C. No. 46-01466-381152 Mine: Loveridge #22

DECISION

Appearances: Brian P. Krier, Esq., Office of the Solicitor, for the United States Department of Labor

Rebecca J. Oblak, Esq., Bowles Rice LLP, for the Respondent

Before: Judge Moran

Introduction:

These two dockets involve three 104(d)(2) Orders, issued by MSHA Inspector Ronald Postalwait at Consolidation Coal's Loveridge No. 22 Mine, during September and October, 2014. Each order was specially assessed. Involved in WEVA 2015-651 is Order No. 8061842, issued September 5, 2014, alleging a 30 C.F.R. §75.400 accumulations violation at a scoop haulage entry. The Order was specially assessed at $23,800. A regular assessment would have resulted in a $4,810 penalty.

The other docket, WEVA 2015-762, involves two alleged violations: another Section 75.400 accumulations violation, (Order No. 8061991) and a Section 75.360 inadequate preshift examination violation, (Order No. 8061992), which was associated with the accumulations violation. MSHA specially assessed these two orders as well, with the accumulations violation assessed at $30,200 as compared to the $6,115 a regular proposed penalty assessment would have yielded. The preshift violation was specially assessed at $15,900 while a regular assessment would have been $4,000. In sum, MSHA's special assessments for these three alleged violations totaled $69,000.

For the reasons which follow, the Court finds that all three violations were established and, following the Commission's recent decision in *American Coal*, imposes civil penalties in the amount of $9,620.00 for the violation set forth in Order No. 8061842. *Sec'y of Labor v. The Am. Coal Co.*, No. LAKE 2011-701 et al., 2016 WL 5868551 (FMSHRC) (Aug. 26, 2016). For Order No. 8061991, another accumulations violation, again based upon the credible record evidence and the Court's independent consideration of the statutory criteria, the Court imposes a civil penalty in the amount of $18,345. For Order No. 8061992, which was issued for the inadequate preshift examination, following the same approach, the Court imposes the same special assessment figure of $15,900, although it notes that a larger amount could have been justified.

Findings of Fact

Inspector Ronald Postalwait has been an MSHA inspector for 14 years. His career in mining, all of it with coal, began in 1975 at age 18. Tr. 62. Regarding the mine in this litigation, Consolidation Coal's Loveridge No. 22, an underground coal mine which utilizes both longwall and continuous mining, Postalwait believed that during September and October 2014, in terms of working sections, the mine had four continuous miners and one longwall operating, employing about 500 miners. Tr. 70. Shifts at the mine are 8:00 a.m. to 4:00 p.m. for the day shift, 4:00 p.m. to midnight for the afternoon shift and then a midnight shift from 12:00 a.m. until 8:00 a.m. Tr. 73. The mine had MMUs (mechanized mining units). An MMU is one section. The mine had two separate panels, with a section on each one. They also had the mains, where there are two MMUs, again with two separate sections running side by side and the longwall as an MMU. At the time in issue, the mine was on 103(i) five day spot inspections for methane liberation, which is the most frequent level of inspections. Tr. 69-71.

Docket No. WEVA 2015-651; Order No. 8061842

The Secretary's Evidence

On September 4, 2014, Postalwait was at the Loveridge mine for an E01 inspection. Tr. 73-74. The mine was under a (d) order at that time.[1] On that day he planned to inspect the mine's 23D panel. Larry Broadwater, with the company's safety department, and Travis Anderson, the UMWA miners' representative, joined him. Coal mine inspector trainee Jeff Burns also accompanied Postalwait. The 23D was a continuous miner section and it had 3 entries, with the No. 2 entry serving as the intake air course, the track entry and also as the

[1] Inspector Postalwait identified Order No. 8055581 as a violation which he had earlier issued on April 9, 2014, citing 75.360(a)(1). Gov. Ex. 3A. That order was issued for not performing an adequate preshift inspection. The inspector described it as a "perfunctory" preshift exam. Tr. 77. He marked the violation as S&S, high negligence, and an unwarrantable failure. That Order has since become a final order of the Commission. Gov. Ex. 3B. The information was presented at the hearing in order to establish that the orders at issue in this litigation were properly designated as 104(d)(2) orders. During the time after that violation and continuing through the inspector's September 2014 inspection, the mine did not have an intervening clean inspection. Tr. 78. These issues were not challenged by the Respondent.

primary escapeway.[2] The No. 1 was the return course and the No. 3 entry had the belt. Tr. 83-84. The blocks between the No. 2 and No. 3 entry are 137.5 feet, but the block between the No. 1 and No. 2 was 275 feet, because there was a block in the middle between the belt and the track. In other words, under that arrangement there was a long block followed by a short block. Tr. 85-86. The entries, from rib to rib, were 16 feet wide and the mine height around 7 feet. Tr. 86. On September 4, 2014, the last open crosscut[3] was at the 52 block, between the No. 1 and No. 2 entry. Miners reached the face by walking up the No. 2 entry and in so doing they walk through the 46 block intersection. Tr. 87. This is past the 1 to 2 and 2 to 3 crosscuts. Tr. 87-88. In that area, the inspector took various readings for methane, air velocity and oxygen at the faces. Tr. 88-89.

As the inspector was walking up the entry towards the No. 46 crosscut, he saw an accumulation on the floor in the intersection. It extended into the 1 to 2 and the 2 to 3 crosscuts. Tr. 90. Seeing this condition, Inspector Postalwait issued **Order No. 8061842**, alleging a violation of 30 C.F.R. § 75.400. Gov. Ex. 4, Tr. 90. The cited standard provides:

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

30 C.F.R. § 75.400.

The inspector found the accumulation to consist of loose, lumpy coal, fine coal and coal dust. Tr. 91-93. The condition he observed was,

> through the entire area. It was along the rib on the 2-3 crosscut on the inby rib. It was a pile of coal that was pushed up in the 1 to 2 crosscut. And it was -- it measured 27 inches tall. The rest of it where I measured it -- I made different measurements over the area, to find out what the average thickness of the combustible materials was. And the least measurement I could find was 5 inches. And on the floor, through the powdery stuff, it was 10 inches. But the piles was -- was higher. And the main pile, was the one big one, what was along the rib, was just a little bit higher than what was out in the roadway.

Tr. 94.

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[2] As noted, the No. 2 entry is the primary escapeway. The primary is in the intake air split, which leads directly to the surface. The cited accumulation in the primary factored into the inspector's gravity determination, because both the primary and secondary escapeways would be impacted if there was a fire. As the No. 1 entry is a return, if there is smoke it travels back down and out of the mine. Therefore smoke would be in the return air split. Tr. 122.

[3] During the testimony, crosscuts were sometimes referred to as "breaks."

In using the term "coal dust" in his Order, he stated that referred to "real fine coal dust" which he observed over,

> the whole mine floor, almost the entire floor, where the scoop tires -- where they was running the scoop back and forth. It was grounded up. And it's really powdery, fluffy dry. Just walking through it, the dust would spin up from your feet, just as you walked through.

Tr. 95.

The inspector also described the presence of "fine coal" in the Order, by which he meant of a size no more than 1/8 to 1/4 of an inch, making it smaller than "lump coal." He found most of such fine coal "down underneath the fluffy -- the fluffy, powdery, dry stuff was what you seen on top. Underneath of that you have some fine coal. And then in the piles, we had the fine coal and lump coal." *Id.*

Exhibit 5B, reflecting page 29 from his notes, is Postalwait's drawing of what he observed at the 46 block that day. Tr. 96. Augmenting the drawing on that page, further explaining the depiction, the measurements he took of the condition were listed and recorded as five inches to 10 inches deep and 14 feet wide by 120 feet in length, with a pile up to 27 inches deep, shown on the left side of the drawing, in the No. 1 to 2 crosscut.[4] Postalwait stated that he took at least 10 measurements of the accumulation. Tr. 210. The 5 to 10 inches of accumulations he found were on top of the coal bottom. Tr. 211.

The Court would note that the inspector's testimony about the measurements he took was detailed and extensive. The Inspector stated that he showed the dry characteristics of the coal to Broadwater and Burns. Tr. 103. When Broadwater and Burns agreed the coal was dry, the inspector responded to them that it was "powder dry." Tr. 103. Upon cross-examination, the inspector did not waver on the question of whether the road was powder dry. Tr. 144. The inspector also pointed out to those individuals who accompanied him how the coal was being suspended in the air, simply by walking through it. Tr. 103. Being dry, such coal is easier to ignite. Tr. 104. Postalwait stated that, based on his observations, it did not appear that, at the intersection of the 46 block, the two crosscuts had been watered down recently. Tr. 105. While many factors impact the determination of when an area has last been watered down, the inspector stated that an area will not become dry in one shift. That area was required to be watered down because the scoop runs there, as it is a scoop supply haul road. Tr. 105. Any scoop road has to be watered down so that it remains damp. Here, the roadway wasn't damp; it was dry. Tr. 106.

As the inspector explained, the condition, the dry supply road "was generated from the scoop hauling supplies, where it was turned around." Tr. 107. As the section advances, supplies are continually needed and the scoop brings those supplies. The inspector agreed that "the scoops on that section would continue to travel to and from the 46 block to supply the face," as that is

[4] The horizontal part of the drawing is the 46 block, the vertical part represents the No. 2 entry, the left side is the No. 1 to 2 crosscut and the right side represents the No. 2 to 3 crosscut. Tr. 97.

how the section get its supplies. “The supplies are hauled in on flatcars on the rail. And they haul them from the end of the track up to the section with the scoops.” Tr. 108. The 5 to 10 inch accumulation meant that it would take a lot of scoop trips to generate the level of dust he found. Tr. 109.

Speaking generally to the subject of a “coal bottom,” that is, a practice where coal is left on the mine floor, which is referred to as the “bottom,” the inspector explained that such an arrangement is used,

> if the main bottom is soft and you're sinking in and getting hung up, then the mine will leave some coal at the bottom because it makes the bottom stronger and therefore it will support the heavy equipment, so that the equipment can run on that. If they don't do that, some bottoms are so soft that one can’t even mine . . .”

Tr. 111-12.

Loveridge was mining using a coal bottom in the cited section. Tr. 112. The mine had no choice but to employ this technique because the bottom was so soft they couldn’t mine without a coal bottom. Postalwait’s coal work experience included using equipment in coal bottoms. Tr. 112. In fact, his prior employment included being a foreman in a mine utilizing a coal bottom. Maintaining such a bottom requires a lot of work; one has to keep it damp or the bottom will grind up from the equipment traveling over it. Tr. 113. The arrangement also requires “more emphasis on clean up” and more rock dusting. Tr. 114.

Based on the situation he encountered, the inspector concluded that the coal bottom at the 46 block had not been properly maintained because “several inches of combustible material [had been] allowed to accumulate. And if -- if they had kept that [bottom] maintained damp, it wouldn't have been an issue to start with, but it would be compressed down. What dust would have been there would have compressed down to very little.” Tr. 114. Another maintenance requirement when a mine uses a coal bottom is to keep it scooped up, if the bottom breaks while running equipment on it. Also, one must apply a good layer of rock dust after it gets cleaned. Tr. 115.

The inspector identified the hazard pertaining to Order No. 8061842 as fire and smoke. Tr. 118. While he did not observe any ignition sources *at the time* when he issued the order, he explained that when the scoop is running and the area is dry, that creates an ignition source in the area. Tr. 118. Scoop batteries can catch on fire, as can battery plugs, and there are times when a scoop, by simply running, can arc and catch fire. Tr. 119. The inspector marked the gravity as “unlikely” only because the scoop was not running at the time he was there, but under normal mining operations the scoop would resume running, creating the ignition source. Tr. 120. Fourteen miners were listed as the number of persons affected. *Id*.

Further explaining the basis for the hazard those miners would face, he stated,

> Because this is the intake, [it is] the main intake for that section. And if you get smoke in that entry right there, it's going directly to the face. And not only is it

> going to the face, but you'll have some air that will go down the belt. So that air will have smoke in it. And then your return entry, which would be No. 1 entry, it would have smoke in it. So that everything would have smoke in it, except No. 2 entry outby, in that condition.

Tr. 121.

He added that the smoke would travel from the 46 block very quickly. The expected injuries would be smoke inhalation or burns. The inspector listed lost workdays or restricted duty only because the miners had self-contained self-rescuers ("SCSRs"), otherwise he would have listed the expected injuries as more severe. Tr. 122.

The inspector listed the negligence as "high" because he had spoken to the mine about violations under the 75.400 standard before this instance, and therefore they were on notice of this issue, and also because he found no mitigating circumstances. Tr. 123. When the inspector told the section foreman, Glenn Lee, that he was going to issue a citation, Lee protested and told him he had to realize they were running on coal bottom, to which Postalwait replied that the bottom still has to be maintained and one can't permit accumulations to develop. Tr. 123, 193.

As noted, the inspector issued a 104(d) order, finding that it was an unwarrantable failure. That finding was based upon two factors: he had previously put the mine on notice about this and the condition he found was obvious.[5] Tr. 125. The inspector believed that the mine displayed indifference to the problem and a serious lack of reasonable care as well. Tr. 204. The standard invoked, Section 75.400, had been cited 267 times in the past two years, all to the operator.[6] Tr. 126.

Referring to his conclusion that the condition had existed for more than one shift, the inspector stated this was based upon:

> The amount of the fine dust that was -- it was powdery, fluffy dry, 5 to 10 inches deep. And that takes time, a lot of trips and time for it to get that dry. Because if you start out where it's compressed, and then you're running over it, it dries out a

[5] Supporting his view that the condition was obvious, Postalwait stated, "Before I even got up to the crosscut, as I was walking up the walkway, you could see it in -- in the intersection, where they'd been running through it. And then as I walked up to the intersection and looked, you could see it both ways. I mean it was obvious. And it should have been obvious to anybody, but especially an examiner, a foreman. It should have been obvious to them." Tr. 128.

[6] Respondent's counsel made a brief challenge on this issue, asserting that a majority of the previous 75.400 violations were on the belt as opposed to the section. The inspector did not know how many were on the section versus the belt. Tr. 206. The Court notes that, wherever the location, it still involved the same standard and that it remains a large number of citations for that standard.

> little more and a little more each time. So it takes an extended period of time for it to dry out and get to that amount of it.

Tr. 126-27.

The inspector considered the area involved to be extensive, adding,

> Because it was over that large of an area, there was a lot of powdery, fine dust in there. And whenever they cleaned it up, it took seven miners four hours, and it took nine scoop loads, full scoop loads, to clean it up. And that -- that's excessive, extensive."[7]

Tr. 127.

The inspector also concluded that the condition presented a high degree of danger because "miners were working inby it, then in the event you have a fire there, all that smoke is then going to go directly to the face. So that's a high degree of danger to the miners." Tr. 129. Further, all three entries would be affected, but the No. 2 entry would be affected from the point of accumulation in because "the air that ventilates of the belt, it was up to the tailpiece, and some air goes back down the belt. The rest of it goes across the faces, back down to the return." *Id.*

Upon cross-examination it was suggested that the accumulation included rock and dirt, but Postalwait responded that, while there might have been some of such material, it was basically ground up coal. Tr. 138. Although he did not take samples of the material, the Court would comment that there was no reasonable need to do that, as the inspector's long mining experience enabled him to determine the nature of the material in a coal mine.

[7] Each bucket from the scoop represented a significant amount of material. The inspector estimated the bucket size to have a width of 9 to 10 feet, a depth of 5 to 6 feet, and an 18 inch height. Tr. 132. The Respondent asked about the size of the scoops at the mine and the inspector acknowledged that a 620 scoop is "pretty good size." Tr. 148. The point behind that question was the suggestion that the accumulation could have developed in a very short time, challenging the inspector's view about the time it would take for the extent of such conditions to develop. The Court, upon considering the entire record testimony, does not adopt that claim.

Referring again to Gov. Ex. 5B,[8] the inspector's drawing of the accumulation and its location, Postalwait stated that the accumulation is reflected on the dotted lines he drew on that exhibit. Tr. 140. Dealing with nearby areas, the inspector agreed that where the track haulage is depicted, that area was cleaned and dusted. Tr. 141. He stated that after one passes through the crosscut to just inby it, the area started to become clean. Tr. 142. However, that nearby areas did not have an accumulation issue does not diminish the accuracy of the area cited or its extent.

The same observation applies to questions about the source of the accumulations at the end of No. 1 to the No. 2 crosscut where the inspector observed an accumulation of 27 inches. While Counsel for the Respondent suggested that could have occurred from the scoop hauling supplies, the inspector could only respond that something pushed the material up there or that perhaps the scoop dumped it out of its bucket. However, the Court notes that competing claims about the source for the accumulation should not distract from its presence or extent. Tr. 143.

On the issue of the duty to water crosscuts, a matter which was not genuinely in dispute, the inspector stated that one must water that if the scoop is running through such areas. He added that the crosscut is part of a scoop supply haulage road because it's used to turn around. Rock dusting is not an alternative to watering. Tr. 143. When the questioning turned to whether he saw scoops using bolt tubs,[9] the inspector stated that he did not observe any scoops running when he issued the violation. Tr. 145.

With the Respondent challenging the inspector's claim that he had previously put the mine on notice about Section 75.400 violations, the inspector stated that he had informed the mine's Jeremy Devine and Don Jones about such violations. Tr. 150. While the cross-examination belabored this point, it was clear that the inspector supported his statement about prior notice to management people at the mine. Tr. 152. Though he couldn't remember the individual's name, Postalwait stated that it was the next section foreman coming on shift who

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[8] Joint Exhibit 4, is an annotated version of the schematic drawn by the inspector. Accordingly, besides its additional markings, red ink, and enlargement, it is essentially the same drawing as Gov. Ex. 5A at page 29 and Gov. Ex. 5B. The inspector agreed that the drawing looks like a cross and that the face would be in the direction of the top of page for that exhibit. An arrow was marked by Respondent's counsel, pointing to the top of the page. Track haulage is marked at the bottom of the page and the inspector added that is where the track is located. Tr. 213. The left side of the paper depicts where the No 1 & 2 entry is located. Tr. 214. The No. 2 to No. 3 entry is on the right side of the paper. Respondent's counsel added markings in red to signify this information. The inspector noted that his drawing shows ventilation controls; the stopping and the crosscut. The stopping is depicted in the middle of the 2 to 3 crosscut; also a stopping is in the 1 to 2 crosscut, which is the No. 46 block crosscut. Tr. 215. As described by Respondent's counsel, the accumulations are reflected in the drawing as follows: "the little dots that go around the No. 1 to No. 2, go all the way across 120 to No. 2 and No. 3 entry." Tr. 216. In the Court's view, Jt. Ex. 4 provides little additional information.

[9] A bolt tub is a container which holds bolts, plates, and glue to be hauled up to the section. Tr. 145.

informed him as to the number of scoops loads it took to remove the accumulation. Tr. 154-55. Although the Respondent suggested that there was no such exchange between a supervisor and the inspector, Postalwait did not retreat from his assertion, stating that he did speak with the afternoon shift foreman, and also advised that supervisor that he wanted to have a safety talk with all the miners. Tr. 156. The Court finds Postalwait's testimony on these issues credible.

Upon additional cross-examination, the inspector agreed that the accumulation *could have* been from the scoop dropping supplies. Counsel also inquired about the inspector's procedure for taking measurements of an accumulation. The inspector explained his process with detail:

> I walk through the whole area and take it in the whole area, to see what the whole area is, to try to determine the measurements and where it appears to be the least amount. Because my walking stick, like I said, it's got measurements on it, plus I hold my thumb at the top of the material, and pull it up and actually measure. And the ones I actually measure, that's the ones I count. And I was just going through, and if it was between 5 and 10 inches, then I didn't even measure, because I could see on my stick that it was in between that. I measure areas to get the least and the areas to get the most.

Tr. 167.

Although he didn't actually witness a scoop running through the cited accumulation, the inspector drew upon his experience to conclude that was what happened, "The tires from the scoop, as it passes through there, grinds it up." Tr. 169.

The inspector elaborated about the need for the mine to be watching for the 75.400 violations: "the examiners [are] their eyes. So they need to put something in place to prevent this from occurring. They need to talk to their examiners. If it takes cleaning up more, whatever it takes to put in place to prevent this from occurring to reduce their exposure." Tr. 170.

Postalwait reaffirmed the basis for his conclusion that the condition had existed for more than one shift, as follows,

> Based on my experience. And that's what I tried to explain earlier. From the time the scoop road is watered down and it starts drying out, it takes a lot of trips for -- because it's going to be compressed. And then once -- once it dries, it takes a lot of trips to accumulate that much powdery dust. It ain't going to take just one trip or ten trips. It takes a lot of trips for it to do that.

Tr. 172.[10]

[10] Respondent contended that another MSHA inspector, Paul Walters, was on the same exact section the day before and didn't issue any violations, with the same condition. Postalwait had no idea about that assertion and has never spoken with Walters about the issue. Tr. 171. Walters was not a witness in the proceeding.

The inspector did not look at the production report for the day shift on this section but he did look at the preshift report. Tr. 174. Although he didn't see each scoop of material that was removed, he did observe some of them and those scoops were full. Tr. 176.

Explaining how he marked it non-S&S, but was still concerned about fire or smoke going to the face, he stated: "[b]ecause I did not see an ignition source in there *at the time that I was there*. Which I do believe the scoop's ignition source -- and it was in the area, but I didn't see it. So I was being conservative in marking non S and S, based on that." Tr. 176 (emphasis added).

In terms of justifying his high negligence determination, Postalwait related that he told Broadwater and Anderson what he observed about the scoop and the area and asserted that they agreed with his conclusions. Tr. 178. Thus, according to the inspector, Broadwater agreed that the scoop had generated the conditions. Tr. 178. The inspector defined "high negligence" as where an operator knew or should have known and there are no mitigating circumstances. Tr. 178-79. He supported his conclusion on the basis that management had walked through the area. The area had been preshifted and he concluded that the conditions had not just occurred. The preshift would have been done between 5:00 and 8:00 a.m. Tr. 179. The inspector did look at the preshift exam but nothing stood out. Tr. 182. The aim of Respondent's questions was to assert that the condition must have arisen more recently than inspector stated, as he made no note of anything. However, the court would note that it could equally mean that the preshift was inadequate or failed to note that which should have been noted. The Order was issued at the end of the day shift that day.[11]

Respondent's Counsel also suggested it was possible that during the time from 8:00 a.m. until 5:00 p.m. that day, the scoop's usage could've created the conditions Postalwait observed, i.e. that the scoop "could have broken up enough to have left a lot of debris and mess on the -- on the coal bottom." Tr. 185. The inspector agreed that it was "possible" but that he "didn't see any place that showed any signs of it hooving or breaking up like that." *Id*. Despite those efforts to show that the condition developed quickly during the shift in which the inspector found the condition, the inspector refuted that idea, stating "[b]ecause that -- that didn't dry out and get that powdery dry in one shift. There is no way. It can't dry out that quick and run through it and -- it can't go from not being fluffy dry to have that much fluffy dry material." Tr. 189. The Court finds the inspector's view of the origin and duration of the accumulation to be credible.

Continuing with the theme that the condition could have developed quickly, Respondent's counsel also attempted to show that the area could dry out quickly, assuming that the CFM was 65,000. The inspector agreed that would be a high rate of ventilation. Tr. 190.

[11] The inspector thought that the mine employs a "hot seat" procedure, which refers to a miner staying with his equipment until next shift worker arrives to take it over. Tr. 183-84. Later testimony confirmed the mine did use that procedure.

However, he stated that it still wouldn't dry out in one shift.[12] Tr. 191. He added that, while it might start drying out if it was damp, one wouldn't have 5 to 10 inches of fluffy, powdery material created in one shift. Tr. 191.

The inspector also stated that the roof and ribs had been rock dusted but the mine floor was not. Tr. 191. He explained there were no mitigating circumstances, because,

> "if the accumulations [were] there and they had been watered down, then that would be a mitigating circumstance. But you've got agents of the Operator that go [ ] through that area, at least at the beginning and the end of the shift. And most of the time that foreman walks down to the end of the track more than once per shift."

Tr. 192.

Reviewing the inspector's remark in his notes that the operator engaged in "aggravated conduct," Respondent went through the basis for the inspector's conclusion. The inspector wrote: "The listed condition or practice poses a high degree of danger to the miners, because the listed condition is located in the intake air course, primary escapeway for the 23-D section." Tr. 195. Postalwait stated that the hazard was smoke entering the section. He did not feel that marking the order as non-S&S undercut that view. The smoke would derive from a fire, if the fire was allowed to continue, and the originating source would be from the scoop. The second basis for his aggravated conduct conclusion was the obviousness and the extent of the condition or practice. It was plain to him as soon as he entered the cited area. Tr. 195.

Challenging the inspector's contention that an agent of the operator had been through the area, namely the claim that the 23D section foreman walked through the listed area several times on each shift, it was asserted that the foreman would have only traveled through the area in the morning. However, the inspector noted that it would also have been preshifted for the afternoon shift. Tr. 199. The inspector also refuted the claim that, under his interpretation, the mine would have to stop after each turn of the scoop and clean up the area, countering that, if the area is kept damp, as the ventilation plan required, then the scoop's tires would not grind up the coal bottom so rapidly. He explained that it is when the bottom is left dry that it starts breaking down. Tr. 207-08. Thus, the inspector made it clear that one doesn't need to clean it up after every trip, "or ever ten trips" either. Instead, it takes "a lot of trips" for accumulations of this degree to develop. Tr. 209.

In response to a question from the Court regarding the inspector's listing of aggravating factors, Postalwait stated it was his view that the establishment of only one of the factors would

[12] Respondent's counsel also suggested that the inspector embellished his testimony from describing the accumulation as "powder dry" at the deposition to "fluffy material" at the hearing. The Court does not view the "powder dry" versus "fluffy" descriptions, which are nearly synonymous, to constitute a significant difference.

not be sufficient to show aggravated conduct[13] and that, personally, he has always required at least three of the factors for him to deem a violation as aggravated conduct. Tr. 220. The inspector attributed more weight to some of the factors too. For example, among the eight factors he listed, he considered an agent/operator presence in the area as a more significant factor. Tr. 222. The inspector also believed that it was critical to his aggravated conduct determination that an agent of the operator was in the area; "[t]he 23 D section foreman walks through the listed area several times each shift." Tr. 223. Another factor to which he attributed more weight is that he had personally put the operator on notice about the issue of 75.400 violations. Tr. 222.

The Respondent's Evidence

Glenn Lee testified for the Respondent. Tr. 225. He began working in the mines after completing high school, and he has 15 years of mining experience. Tr. 227-28. Presently, he is a section boss at the Loveridge No. 22 Mine, in charge of seven to eight men. Tr. 229. Lee stated he became aware of the order when he got out of the mine that day; he had been working the day shift that day, September 4, 2014, as the section foreman. Although the day ends at 4:00 p.m., one doesn't actually leave until 5:30 p.m. because the mine does, in fact, hot seat. Tr. 230. The mine has three production shifts. (There is no maintenance shift; instead Lee stated they fix things if the equipment needs it, and this includes maintenance.) He confirmed that the mine employs about 500 miners. Tr. 232. Miners ride a rail on the track to the mouth of the section, and from there, they walk to the face. On the day in issue, he arrived at the section around 8:30 to 9:00 a.m. He affirmed that he saw nothing odd, nor any hazardous conditions when he came through that area. Tr. 233. Supplies are at the end of the track. The scoop charger will be a break or two breaks from the end of the track; they are in the crosscut. Tr. 234. In that crosscut he had a bolt tub. The tub holds roof control bolt supplies and rock dust, and roof bolt plates and glue and 3 foot roof bolts. In essence, it is used to bring supplies to the face. Tr. 235. The tub is heavy, 2 tons when empty and he estimated that, when full, it would weigh 8 to 10 tons. Tr. 235.

Lee stated again that he saw nothing unusual; that he looked down the No. 1 & 2 entry and the No. 2 & 3 and in "every crosscut, all the way to the face." Tr. 236. Though he looked at the preshift, he couldn't recall what was on it. However, if there was something on it that stood out he would have corrected it right away. Tr. 237. Lee spends most of his day with his men on the continuous miner section. As for viewing the No. 1 to No. 2 entry or the No. 2 to No. 3 entry or the crosscut, he stated he would have been in those areas "twice, probably, at the most . . . going in … [a]nd then at quit time." Tr. 237. The preshift would've been done by the "outby bosses that fire boss the track and the belt for your section bosses." Tr. 237. Lee stated that he is responsible "from the mouth of that section in." The mouth is where the track starts into the section all the way to the face. Tr. 238.

Lee stated that the scoops that travel in this area are the 620's. They weigh around 30 tons. There are also 488 scoops and they weigh around 20 tons. Tr. 240. With a full load a 488 scoop would weigh around 28 to 30 tons. *Id*.

[13] As it is a legal determination, the ultimate decision of whether conduct is "aggravated" is for the Court.

It is fair to state that Lee did not agree with anything in Postalwait's order. He did not consider the condition to be an "accumulation" because that term applies, in his view, to something you neglect to clean as you mine. There also was no fine coal, he stated. It was only loose coal plowed up by the bolt tub when they scooped it up. Tr. 241-42. Also, he asserted that "none of the haulage was dry that they was running on." Tr. 242. Lee stated what the scoop was running on was wet. Tr. 242. He stated that on his way in that day, he observed it to be wet. Further, his scoop operators know they have to water it before they run on any roadway. Lee stated that the scoops will make 10 to 15 runs during the day with supplies. Tr. 243. There are two scoops and there are times when both will be running. On that day there were a 620 and a 488 scoop operating. Lee did not agree that the mine had been put on notice about the issue either. Tr. 244. In his estimation of the condition, he didn't see "where there was no hazardous condition with that [accumulation]." Tr. 244. Accordingly, Lee and Postalwait presented two very different descriptions of the conditions for this order. The differences continued throughout Lee's testimony, creating a need for the Court to resolve their testimonial conflict.

Directed to Respondent's Exhibits 3a and 3b, a production report for the 23D section, Lee stated that he had seen it and noted that it is dated September 4, 2014. Tr. 245-46. He was the section manager on that day. The report "shows the number of footage you mine. Any delays that keep you from mining. Any maintenance problem. It shows the conditions, and the work you've done on a section." Tr. 246. The report indicates that there were delays that day due to a pre-op, a conveyor belt off, rock dusting, another incident of the conveyor belt down and more rock dusting (for a second and third time). The second page of the report reflects more details of the record of the work shift. Tr. 246-49.

Lee agreed that the report reflects that the entire area was rock dusted and scooped. Tr. 251. He agreed that the area was adequately rock dusted and that no told him there was a problem with the section. Tr. 252. Lee then was directed to Ex 4 and identified it as the preshift that was called out before he went underground that day. The same exhibit reflects the daily and on-shift report for September 4, 2014, and (line) number 7, which states: "shuttle car roadways, Location. The Violation: needed watered. Action taken: watered roadways." Tr. 254.

Lee did not agree with the inspector's assertion about accumulations in the area,

> Well, to start with, at the end of the shift when he found the loose coal, it's where the bolt tub had been scooped up on the coal bottom. And the weight of that bolt tub, it plowed that coal bottom up, and it's piled up around where that bolt tub was. And as far as being dry, you don't water the crosscuts down much, if you're going to travel through them. And it's impossible to travel through [the crosscuts] because there are stoppings there.[14] You just don't do it.

Tr. 255.

[14] The stoppings were marked in red on the exhibit.

Lee stated that scoops don't travel through the stoppings area. At the location where the exhibit lists 27 inches, Lee asserted that was where the bolt tub was located and where it was scooped up. Tr. 256.

There were other fundamental disagreements between Lee and Postalwait. Lee stated that the purpose of rock dusting and watering is to keep the dust down. He also stated that watering will not stop the coal bottom from digging up. Weight, he stated, causes the coal bottom to break up. Rather, he asserted, "Well, water won't, but weight is what causes it, with water." Tr. 256-57. To the suggestion from Respondent's counsel that the bottom will still dig up, regardless of the amount of water, Lee stated: "after a while water, when it settles, it will loosen coal up. But what really gets it is the weight of the piece of equipment running on it. It will bust the coal bottom up after a while." Tr. 257. When the bottom breaks up, Lee asserted that "[a]s soon as you find it, you ask someone to get the scoop and clean it." Tr. 258. Lee also stated that only the scoop operators travel in the area; foremen are not traveling in the crosscuts. Further, the tires of the scoop never go in the crosscut. Tr. 258.

Lee did meet Postalwait at the end of that shift and stated that in that meeting the inspector was "yelling, loud" and "pointing his finger." Tr. 259, 261. Lee described the inspector as "acting crazy" and mad over the matter. Tr. 261. He said, "I'm tired of telling you people. This is unwarrantable." He said, "I've told you and told you." Lee responded, "You ain't told me. I ain't ever seen you before." Tr. 259 Lee also asserted that he told the inspector that the accumulations were from the scoop getting the bolt tub. "Yeah, my scoop operator -- I sent him down here to get a supply tub." I said, "He's done that when he scooped his supply tub up." Tr. 260. Lee also agreed that this was the first time he had been in the cited area since the start of the shift that day. Tr. 261. Under the procedure used, supplies were all brought down to the end of the track, then the scoop picked up those supplies from the end of the track and then took them to the face. Tr. 261. Lee asserted that the scoops are carrying a lot of weight and that it doesn't take long to break up the coal bottom. Tr. 262. Also, the outby foreman normally fire bosses the area and no one ever told him of a problem. Tr. 263.

Lee's explanation for the accumulation was: "That the bolt -- it's the width of the bolt tub had been shoved and plowed the bottom up. You could see the print of it. It was plain as day. Like the coal had been shoved. You could see the width of it and everything." Tr. 263. The tub is pushed to get it loaded on the scoop. Lee asserted that this was the cause of the accumulation because there was no accumulation present at the start of the shift and the tub's imprint also supported his explanation for it. Tr. 264-65. Lee maintained that he told the inspector the condition was caused by the bolt tub, but the inspector just wouldn't listen. Tr. 266. Thus, Lee completely disagreed with the inspector's claim, in the words of Respondent's counsel "that this condition, from the No. 1 to No. 2, and then in the No. 2 and No. 3, the whole area, he said, had accumulations all over it." Instead, Lee maintained that "the only thing I seen at the end of the shift is where the bolt tub had plowed the bottom up. And we had mine inspectors the previous days before, and they walked right through that same area, inspected it and never found a problem or a hazardous condition." Tr. 267.

Again, Lee stated that the areas identified by the Respondent's counsel, the No. 1 to No. 2 and the No. 2 to the No. 3 and in the crosscuts, are not going to be watered, because nothing

travels through there. Lee stated that the scoop's tires never enter the crosscut, because the tub sticks out a bit into the entry. Lee was not involved with the abatement. Tr. 269.

On cross-examination by the Secretary, Lee agreed that it was his testimony that the condition was caused by a single bolt tub being pushed up into a crosscut. Tr. 271. Lee also agreed that, as the section foreman, he is in charge of and responsible for the entire section. He conceded that, in his role as section foreman, he spends most of his production shift down at the faces. Tr. 274. Also, he acknowledged that the mine has three production shifts and no dedicated maintenance shift. On the date of the citation, it was Lee's first day as the section foreman on that shift. *Id*. Lee admitted that on that day the track was in the No. 2 entry and the track ended just outby the 46 block and that, to get to the face from the track, one passes through the 46 block and the No. 2 entry. Lee agreed that one of his duties is to complete the production reports and that one item is called "budget," which Lee defined as "a quota they want you to hit, to be productive." Tr. 277. For a continuous miner, the budget is 120 for a production shift, meaning that he is expected, as the shift foreman, to mine at least 120 feet per shift. *Id*.

In his testimony, Lee acknowledged that there is a section in the production report titled, "Delays" and that there are a number of things that interfere with being able to mine coal:

> The pre-op -- you can't mine when you're pre-opping. When the conveyor belt's off, you can't mine because the coal pile will get too big . . . If the miner breaks down, the bolter on the miner. Just anything. Maintenance, conveyor belts, shuttle cargo down behind the loader, you're unable to mine.

Tr. 278.

Cleaning up part of a section, would also cause a delay, "if one had to stop to scoop, yes." *Id*. Rock dusting also causes delays. In fact, Lee agreed that "[a]ny delay that causes you to stop production on the face must be -- it has to be written down in [the] delay section [of the report]." Tr. 278-79. Therefore, underscoring the importance of production, the testimony of Lee was clear that the reason for any production delay must be documented.

The delays must also note what was being done during that time, but Lee noted that was *to his benefit* to show what was accomplished. "Yes, it stops you from mining. For your benefit, you want it [documented] too. Because if you don't have a delay in there and you didn't mine no coal, it's hard to explain." Tr. 280. The Court notes that it is fair to conclude by this testimony that there was considerable pressure to keep producing, and to fully explain such delays to production.

Directed to Respondent's ("R's") Ex. 3, which has Lee's handwriting on it, Lee stated that he mined 164 feet on that shift. As noted, the goal is 120 feet, so he made his "budget" that day. Tr. 283. Lee agreed that the No. 2 entry was being mined during his shift, and that the continuous miner was at that time just inside the 52 block, where the last opening was. Tr. 283. Lee confirmed that there was no record in his production report of scooping, shoveling or cleaning the 4 block in the No. 2 entry for that shift, stating that when cleaning up the No. 2 entry, it was "[i]n the face itself, inby the last opening, *where we was mining at*." Tr. 284

(emphasis added). Lee agreed that he performed no cleanup of the No. 2 entry any farther outby than the 51 block because it had been previously cleaned. The tailpiece was at the 50 block that day. Tr. 285. Lee didn't rock dust the No. 2 entry any further outby the 50 block during his shift. Tr. 286.

Regarding his on-shift exam duty, Lee stated he is to walk the section every two hours to do the faces, which are all inby the tailpiece. He will also go to the scoop chargers to make sure they are charging. They are located before one gets to the end of the track. Tr. 287. Lee stated that someone else fire bosses from the end of the track at the 46 block outby and from the tailpiece to the belt line. Tr. 288. He could not recall the individual who did that. He reaffirmed that he walked through the 46 block intersection in the No. 2 entry twice that day, at the start and end of his shift. Tr.288. He also repeated that wherever the scoop would run that day, the bottom was wet. Tr. 288-89. Last, he admitted that in R's Ex. 4, under the violations section, item number 7, that record notes, "Shuttle car roadway … needed watered and watered roadways." The shuttle car roadway is inby the tailpiece. Tr. 290. On redirect, Lee stated that scooping, if it was in the 46 block, was within his responsibility and if it needed it, it would have been scooped. Tr. 291.

The Court had some questions of Mr. Lee, directing his attention to Ex. 5B. Lee agreed with the Court's impression that the only area where Lee saw a problem was where the bolt tub had been deposited. Tr. 293. Thus, Lee disagreed with the inspector's drawing showing the area covered 120 feet, and extended all the way across the intersection and the entry. Tr. 293. Thus, Lee saw the only area where there could be a 75.400 issue as the dotted area on the exhibit where the bolt bin was placed by the scoop. Tr. 293. Lee had left the mine when the abatement was being performed. Tr. 293. Asked if he later learned how long it took to abate the accumulation, he answered, "I don't remember." *Tr. 294.* The Court was surprised by that answer and pursued the questioning further, asking: "How would you explain that it would take seven men four hours to clean up this small area that you identified as being the only problem area as depicted on 5B?" *Id*. Lee responded: "Well, to start with, you can't get in a scoop in to clean it. You'd have to use a shovel. And I don't see seven men -- the boss sending seven men to do it. That's another thing. Because you cannot scoop it, because you have a ventilation stopping there. If you scoop towards it, you're going to knock the stopping down." *Id*.

The Court continued, "Let's assume that shoveling is the way it's done. My question to you is: Based upon what you observed as being the only problem in this area, can you explain why it would take seven men shoveling to clean out this one area?" Lee admitted, "No. It would take a couple of hours shoveling to kind of -- . . . [with] [t]wo to three men." Tr. 295.

Despite testimony from Lee suggesting that the coal bottom was ineffective, when the Court inquired further he retreated from that position. The Court expressed that it had

> the impression [from Lee's testimony] that . . . having a coal bottom, as this mine had, is really ineffective. It doesn't last very long when you have a scoop running over it. Even though you have the coal bottom there so that the floor can

withstand that activity, I got the sense from you that it's not very effective in terms of the purpose of it. Is that fair?

Tr. 297.

Lee's response was, "Well, it's effective, because if you don't have it, then you don't mine at all. They tried it before, previous -- they tried to mine in the main bottom, the rock bottom, and the equipment was stuck in water, ceased mining, no production. It was bad." Tr. 297-98.

The Court takes note that Lee and Postalwait presented diametrically opposed descriptions of the conditions, which factual dispute the Court must resolve. However, Lee could not remember how long it took to abate the condition. In contrast, in the Court's view, the inspector presented a more credible recounting, as he did offer specifics and it was acknowledged that he was quite animated about the conditions he found. The Court rejects the claim that the accumulation was solely created by the bolt tub and finds that the failure to water down the area explains why the accumulation developed. That finding, while important, should not cause one to lose sight of the fact that, apart from the source, there was an accumulation and it was extensive.

Jerry Michael Baker then testified for the Respondent. Baker's work for Consol began in 2011, as a section foreman. Tr. 304. Shown R's Ex. 1, Order No. 8061842, Baker stated he was the afternoon shift boss on the 23D panel on September 4, 2014. Tr. 305. He arrived on the section at 4:45 p.m. that day. *Id*. As section foreman, he has to fill out the production report. Tr. 307. As with Lee, Baker stated that the report shows where they mined that day and delays. Tr. 308. His report reflects a stoppage of production, a delay, from 4:50 until 9:20 a.m., a delay of 4 hours and 30 minutes. *Id*. Baker learned of the Order from the safety department, specifically from Larry Broadwater. He could not recall the substance of their conversation. Tr. 309. Nor could Baker recall speaking with the Inspector. After learning of the Order, Baker made arrangements to take care of it. Baker stated that he observed the cited area, but he could not recall what he observed. Tr. 310. The Court finds Baker's testimony uninformative, as he was unable to recall much about the specifics of the cited condition.

Jeremy Devine was also a witness for the Respondent. He began working for Consol, at the Loveridge Mine, in August 2010. Tr. 317. In 2013 he was the safety director and safety supervisor at the mine. Tr. 319. Shown R's Ex. 1, Devine stated he did not agree with the Order. Tr. 321. That said, he did not take issue with the date involved, nor that the 23D panel was the name of the section, or that the 46 block was the crosscut location, and 1 to 2 and 2 to 3, were the crosscuts involved.

Devine did not agree however, with the measurements that were taken and he did not know if it was an "accumulation" or not. Tr. 321. The Court, concerned about the lack of a foundation, interceded with the examination. It then was revealed that Devine never went to the site to see the condition. Tr. 323. His information therefore was based entirely on what others told him. Apart from the particulars of the cited condition, about which Devine had no firsthand knowledge, he stated that he had seen scoops operating in the cited section. Tr. 330. He also was aware of the types of scoops being used and the contents carried by the bolt tubs. Tr. 330-32.

Devine stated that the coal bottom will break up every time scoops drive over it. Further, he stated that watering does not make the bottom less likely to break up. Tr. 333. The bottom, he stated, will still get crushed and crumbled the same way and the purpose of watering is to keep the dust down. Tr. 333-34.

On cross-examination, Devine admitted that he has never been an equipment operator; that before coming to Loveridge he was primarily doing engineering and landscaping. Tr. 334. At the time of this order, Loveridge had no requirement to take notes during safety inspections. Tr. 336. However, while not required, he stated he "encouraged" taking notes. Tr. 336. Devine agreed that Broadwater was the mine's safety department representative accompanying Inspector Postalwait for this matter. Tr. 336. Broadwater took no notes about the matter, communicating only orally to him. It was Devine's understanding that Broadwater assisted the inspector in taking the measurements of the accumulations. Tr. 336. Devine made no notes of his conversation with Broadwater. He stated that his only notes would be in his conference request about the matter. Tr. 337.

The Court asked some questions of Devine. Devine agreed that he spoke with Mr. Lee, Mr. Baker and Mr. Wine about the order. The Court then asked if any of those individuals disagreed with the inspector's assertion that there was an accumulation. Devine's answer was a matter of semantics, his issue being whether it was correct to call the material an "accumulation." As he expressed it,

> All except for the word "accumulation." Whether it's an accumulation or whether it's broken up coal bottom, you know, that's what they were -- they didn't describe it to me as an accumulation. *They described it as there was broken up coal bottom.* This material was pushed in this hump here. The amount of material, the 5 to 10 inches deep, was on the edge of the -- you know, pushed up on the scoop tire tracks. They just didn't use the word "accumulation."

Tr. 339 (emphasis added).

Thus, Devine's recounting of the three employees' description supports the inspector's view of the source of the accumulation.

Discussion of Docket No. WEVA 2015-651; Order No. 8061842

The Court read and fully considered the parties' post-hearing briefs.

As noted by the Commission in *Sec. v. ICG Hazard, Inc.*, 36 FMSHRC 2635, 2641, October 7, 2014, Section 104(d)(1) establishes a "d-chain"[15] framework in which an initial

[15] The "d-chain" refers the Mine Act's graduated enforcement scheme promulgated in section 104(d). Once a Section 104(d)(1) order has been issued, subsequent similar violations at the same mine must be issued as 104(d)(2) orders until such time as an inspection of the mine discloses no similar violations. 30 U.S.C. § 814(d)(2); *see Lodestar Energy, Inc*., 25 FMSHRC 343, 345 (July 2003).

violation that is both S&S and an unwarrantable failure is designated as a section 104(d)(1) citation, and any subsequent unwarrantable failure violation within the next 90 days, even if not S&S, necessarily results in the issuance of a section 104(d)(1) withdrawal order. 30 U.S.C. § 814(d)(1).[16]

The predicate Section 104(d)(1) order having been established and conceded for all three orders in these two dockets, in order to establish the validity of a section 104(d)(2) Order, the Secretary's remaining burden of proof is to show a subsequent violation of a safety or health standard, which violation was also caused by an unwarrantable failure.

The Court notes that the cited accumulation in the primary escapeway factored into the inspector's gravity determination, because both the primary and secondary escapeways would be impacted if there was a fire. The accumulation can only be described as extensive and the inspector's testimony and his drawing, per Gov. Ex. 5B, was detailed, his measurements reliable. Being dry, such coal is easier to ignite. As the inspector noted, smoke would travel from the 46 block very quickly. The Court also agrees with the inspector's designation that the negligence was high. This conclusion is supported by the fact that the condition was obvious and had existed for more than one shift, that he found no mitigating circumstances, and that he had spoken to the mine about violations under the 75.400 standard before this instance and therefore they were on particular notice of this issue. The source of the accumulation was as put forward by the inspector. The bolt tub cannot explain away the extent of the accumulations and, assuming arguendo that it was the cause, the extensive accumulation was present regardless of its origin. The inspector's unwarrantable failure finding was also supportable based, as it was, upon his previously putting the mine on notice about complying with the standard and that the condition he found was obvious, taking seven miners four hours, entailing nine full scoop loads to clean it up. The standard had been invoked 267 times in the past two years, all to the mine operator.

The Court finds that the violation was established and that it was the result of an unwarrantable failure. As the Commission has stated, "Unwarrantable failure is aggravated conduct constituting more than ordinary negligence." *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec. 1987). Unwarrantable failure is characterized by "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co*., 13 FMSHRC 189, 194 (Feb. 1991); see also *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test). Whether the conduct is "aggravated" in the context of unwarrantable failure is determined by looking at all the facts and circumstances of each case, including (1) the extent of the violative condition, (2) the length of time that it has existed, (3) whether the violation posed a high risk of

[16] As expressed by Judge Zielinski in *Sec. v. Tri County Coal,* "For mines without a current history of Section 104(d) violations, a violation must be found to be both S&S and unwarrantable to justify issuance of a citation pursuant to section 104(d)(1) of the Act. If another unwarrantable violation is found within 90 days of such a citation, a withdrawal order is issued pursuant to Section 104(d)(1). Thereafter, any unwarrantable violation results in issuance of a withdrawal order pursuant to Section 104(d)(2) (the 'd-chain'), until a complete inspection of the mine discloses no similar violations (a 'clean' inspection) . . ." 30 U.S.C. §114(d)." 34 FMSHRC 3255, 3283 (Dec. 2012).

danger, (4) whether the violation was obvious, (5) the operator's knowledge of the existence of the violation, (6) the operator's efforts in abating the violative condition, and (7) whether the operator has been placed on notice that greater efforts are necessary for compliance. *See Manalapan Mining Co.*, 35 FMSHRC 289, 293 (Feb. 2013); *10 Coal Co.*, 31 FMSHRC 1346, 1350-57 (Dec. 2009). These factors need to be viewed in the context of the factual circumstances of a particular case. *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 operator's conduct is aggravated or whether mitigating circumstances exist." *Sec. v. Cam Mining* 2016 WL 5594251 *5, August 12, 2016. Among the listed factors, items one, two, and four through seven are consistent with the Court's findings of fact that the violation was an unwarrantable failure.

Penalty Assessment for Order No. 8061842

As noted, **Order No. 8061842** was specially assessed at $23,800 while a regular assessment would have resulted in a $4,810 proposed penalty.

The Commission has recently spoken to the approach the Administrative Law Judge is to take under such circumstances. *Am. Coal Co.*, *supra*. To begin, it noted that

> Commission Judges are not bound by the Secretary's penalty regulations set forth at 30 C.F.R. Part 100 or his special assessments. Their duty is to make a de novo assessment based upon their review of the record. The Commission does require an explanation of any substantial divergence from the penalty proposal of the Secretary. However, the Judge's assessment must be independent, and the Secretary's proposal is not a baseline or starting point that the Judge should use a guidepost for his/her assessment.

Id. at *3.

It goes on to state,

> Penalty assessments must reflect proper consideration of the penalty criteria set forth in section 110(i). The Commission requires a duality in judge's penalty analysis, stating on the one hand, that, essentially, it was "[re]affirming the right and duty of Commission Judges to make assessments independently," while, on the other hand, simultaneously requiring an "explan[ation] [for] any substantial divergence between the penalty proposed by MSHA and the penalty assessed by the Judge.

Id. at *6 (citing *Westmoreland Coal Co.*, 8 FMSHRC 491, 492 (Apr. 1986).

How a judge is to address the special assessment seems to rest upon the oft invoked legal response that "it depends." The Commission noted that the "Secretary [ ] does bear the 'burden' before the Commission of providing evidence sufficient in the Judge's discretionary opinion to support the proposed assessment under the penalty criteria [and that] [w]hen a violation is

specially assessed that obligation may be considerable."[17] *Id*. That said, the Secretary's proposed penalty cannot be glided over, as the Commission also stated,

> "Judges must explain any substantial divergence between the penalty proposed by MSHA and the penalty assessed by the Judge. The rationale was plain and continues to be important. If a sufficient explanation for the divergence is not provided, the credibility of the administrative scheme providing for the increase or lowering of penalties after contest may be jeopardized by an appearance of arbitrariness."

Id. at *7 (citing *Sellersburg Stone Co.*, 5 FMSHRC 287, 293 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984)).

The Commission's reason for requiring an explanation for a substantial divergence between the Secretary's proposed penalty and a Judge's assessed penalty is to maintain the integrity of the assessment process. *See Id.* at 8*; Cantera Green*, 22 FMSHRC at 621..

Accordingly, as this Court reads the Commission's decision in *American Coal*, a judge must, on one hand, consider the Section 110(i) penalty criteria in making a de novo penalty assessment, but in doing so a judge must also explain the basis for agreement with, or any substantial divergence from, the Secretary's proposed penalty. *Id.* at 10. This approach applies to regular or special assessments.[18]

The Secretary's narrative findings for Order 8061842, once past the boilerplate language, provide only a very sparse explanation. Jt. Ex. 2. The findings state, "[t]he gravity was

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[17] The Commission suggested that MSHA's special assessment form "Exhibit A" may, or may not, explain the basis for its proposed penalty, "When MSHA elects to specially assess violations under Section 100.5, its Office of Assessments sends operators a special assessment version of 'Exhibit A' that includes Narrative Findings for a Special Assessment ('Narrative') purportedly to explain the agency's rationale for the proposed special assessment." *Id*. at 5. It added that "[a] lack of explanation or justification for the Secretary's special penalty proposal may fail to provide sufficient notice to the operator of the facts upon which the Secretary relied to specially assess the penalty to prepare its rebuttal." *Id.* at n. 6. It seems fair to conclude that, where the information supporting the special assessment is scant, less attention may be paid to Exhibit A.

[18] "For either regular or special assessments, the Secretary's proposal is not a baseline from which the Judge's consideration of the appropriate penalty must start. The Judge's assessment is made independently and, regardless of the Secretary's proposal, the Judge must support the assessment based on the penalty criteria and the record." *Id*. at 9. Accordingly, "if the Judge did rely on the Secretary's specially assessed proposed penalties as a benchmark, the Judge should explain whether and how he also independently arrived at the penalty amounts based on the statutory penalty criteria and the record. Essentially, we are affirming the right and duty of Commission Judges to make assessments independently. . ." *Id.* at 11.

considered serious." *Id*. After repeating the description of the accumulation, it adds "[i]n the event of sparks from operating equipment [sic] could have propagated a fire and coal dust explosion that could have resulted in serious or fatal injuries." *Id*. The narrative then continues with the assertion that the "violation resulted from the operator's high degree of negligence," citing an inadequate preshift exam in failing to identify the accumulations, and it ends by noting that the cited standard had been cited numerous times at the mine. *Id*.

The Court notes that, while the conditions were extensive, and the negligence was marked as "High," the inspector deemed the violation non-S&S, marking the injury or illness as unlikely and, among the four choices for the reasonably expected injury or illness, listed it as "Lost Workdays Or Restricted Duty," and not either of the two, more serious, categorizations of permanently disabling or fatal.

The Secretary argues that, per Jt. Ex. 2, the Respondent's unwarrantable failure and high negligence indicates the need for greater deterrence than the regular assessment. The Court agrees with the need for greater deterrence, but the Secretary's sparse justification falls short of demonstrating that a nearly five-fold increase is warranted. **Instead, the Court doubles the regular assessment figure and imposes a $9,620.00 penalty for the violation.** Assessing twice the amount yielded under the regular assessment will have the effect of greater deterrence. The assessment also is reasonable in light of the fact that the violation was not deemed to be S&S by the issuing inspector. Properly, the negligence and unwarrantable failure figured prominently in the penalty determination. The other penalty criteria were each duly considered. Good faith by the operator, that the penalty would not affect the ability to continue in business, and that the mine is large and owned by a large operator, were agreed upon. However, as noted, the Court cannot adopt the assertion of the Secretary that the "gravity was serious and the violation posed a *high degree* of danger," given the inspector's evaluation on the order itself and his testimony at the hearing. Sec. Br. at 29 (emphasis added).

Docket WEVA 2015-762 and Order Nos. 8061991 and 8061992.

Inspector Postalwait testified for these Orders as well. He was at the Loveridge Mine again on October 21, 2014. Two 104(d)(2) orders are in issue. Gov. Ex. 6 relates to **Order No. 8061991**, while Gov. Ex. 7 relates to **Order No. 8061992**.[19] The inspector arrived at the mine at 7:40 a.m. that day whereupon he reviewed the preshift examination report for the 24D section, which was conducted for the day shift's benefit and use, which shift began at 8:00 a.m. Tr. 348. That preshift report did not note any hazards. Tr. 349. The report did list one violation, pertaining to an emergency car, which was referred to as an "E" car. Gov. Ex. 9 is the mine's preshift report for the day shift on the 24D for October 21st. That preshift was performed by Justin Tinney, who was the section foreman for the midnight shift. Tr. 349-50. Tinney called out his preshift at 7:10 a.m. The locations and violations section of the report lists, at line 1, that the E car needs wedges and headers and, at line 2, it lists "tailpiece" and, under violations, "[a]ccumulations on tail roller," which was marked as "identified."

[19] Gov. Ex. 8 reflects the inspector's notes for those two orders.

Critically, when asked if that entry, in line 2, in the preshift examination record was present before he went underground that day, the inspector answered "No." Tr. 351. Gov. Ex. 9. Postalwait first saw that entry in the preshift book *after* he returned to the surface at the end of the shift, which was *after* he had issued the two orders in this docket. Tr. 351-52.

Because of the import and potential significance of the inspector's answer, the Court wanted to make sure that it understood the inspector's answer. The inspector confirmed that the information on Line 2 *was not recorded* when he examined the preshift report. Tr. 353. Further questioning from the government underscored this. Directed to the Remarks section at the bottom of Ex. 9, the inspector read that it states: "Area safe at time of exam. . . . except above noted accumulation at tailpiece, air in proper direction and all COs and electrical installation visuals okay." Tr. 353. Asked if any of those remarks were in the preshift examination that he reviewed before going underground that day, the inspector stated that "[t]he only thing I seen that day was the first part where it says: Area safe at time of exam." Tr. 353. Further, asked about the next sentence, which states: "Except above-noted accumulation at tailpiece," the inspector responded that he did not see that statement either at the time before he went underground. Tr. 353. To be clear, the reader should understand that the preshift exam report had been altered at some point after the inspector viewed it that morning. The Respondent does not contend otherwise.

The inspector was then asked about the 24D section, which is also referred to as the 24 West section, and Gov. Ex 10, which is a map of the underground area for 24D.[20] The 24D belt line was a little less than 4 blocks long at that time. The belt line had been installed the day before, as it was running on October 20, 2014. Tr. 357.

Postalwait then went underground with Mike Savasta of the mine's safety department and Frank Cabo, the miners' representative. Tr. 358. The inspector issued the violation at about 8:55 that morning, as they were walking to the section. Tr. 359, Gov. Ex. 8, at page 9. The day shift had not yet started. The inspector saw the midnight crew leaving and the day shift crew arriving. Tr. 360. Postalwait was walking up the No. 2 entry when he observed accumulations and immediately issued a violation. The violation was in the scoop haul supply road, coming up to a crosscut, where the tailpiece was located. Part of the accumulation was inby and part of it was in the crosscut leading to the two entries. He observed Justin Tinney, the section foreman for the midnight shift leaving, passing him just outby of the area that he cited. Tr. 361.

As he was looking at the accumulations he heard the sound of coal grinding in the tailpiece. This was about 80 to 90 feet inby from his location at that time. Tr. 362-63. From his experience, he was familiar with the sound of tail rollers running in accumulations. Tr. 363. He

[20] The inspector confirmed that Ex. 10 is a map of the section where he issued the two orders in this docket, and that it shows the section's development as of October 21, 2014. Tr. 354. 24D is the fourth entry over and it is the area marked in blue, a vertical line, where it lists "24 West," going to the bottom of the page. Tr. 355-56. The numbers seven, eight, nine, and 10 refer to the crosscuts. Tr. 356. The blue line represents the main line conveyor belt. Tr. 357.

stated that Mike Savasta and Frank Cabo agreed they heard the sound too. As he described it,

> When we got down, walked down to the tailpiece, there was a shuttle car sitting on the tailpiece, where it had been dumping coal on it. And we seen that it was gobbed out[21] and there was coal coming out of the sides, from around the roller on the tailpiece. And I don't know if I asked Mike to turn it off or he just turned off the conveyor belt, because it was still running.

Tr. 365.

The belt was running when he observed the condition. Tr. 365. The inspector took photos of the condition that day, October 21, 2014. Tr. 366. Gov. Ex. 11A through 11G. In addition, Gov. Ex. 12A through 12G, are the same photos as Gov. Ex. 11A through 11G, but they are enlarged. Ex. 12A shows the tailpiece gobbed out, with the tail roller and conveyor belt turning in accumulations.[22] Tr. 368. The inspector confirmed that the accumulation he observed was coal. Tr. 371. Parts of the coal accumulations were dry and parts were damp. The tailpiece roller itself is about 5 or 6 feet wide and it was in contact with the coal. The roller is about 6 inches off the mine floor. Tr. 376. The belt itself is about 5 feet wide. Tr. 373.

The inspector stated that the accumulations developed because

> They was using the shuttle car instead of the feeder.[23] Normally you have a coal feeder sitting on the tailpiece, where you dump the whole shuttle car, and the feeder will regulate how much goes onto the belt. So your coal feeder is not there,

[21] "Gobbed out" refers to his seeing spillage and accumulations, with the tailpiece roller turning in the accumulations. Tr. 365.

[22] The inspector added details to the photograph noting, among other things, that in the top right corner of Ex. 12A the grey or brownish object is the end of the shuttle car, sitting where it was dumping onto the tailpiece. Guarding is on the inby end of the tailpiece. Between the inby piece of guarding and the tailpiece, coal had been spilled where they were trying to dump it. Tr. 369. Ex. 12B is additional evidence of the accumulation, with the inspector confirming that, "[i]t shows the same thing, where you can see the coal is around the tail roller. And as the tail roller turns, where the coal is in it and the tail roller is turning in it, it's pushing the coal back. That's the reason that guarding was on an angle, because it's pushing it -- trying to push it away from it." Tr. 370.

[23] A coal feeder, as defined by the inspector, "is what you dump larger amounts of coal into it, and then it's got a choker chain in it to where it regulates what it dumps onto the belt and how much it dumps on the belt." Tr. 459.

so they was dumping it straight out of the shuttle car onto the belt. And that's where those accumulations came from.[24]

Tr. 374.

Postalwait agreed that, in his mining experience he has seen a feeder totally covered up because of a shuttle car operator dumping haphazardly. Tr. 459.

Gov. Ex 11C and the enlarged image at Ex. 12C, shows what was in-between the roller and the guard, on the inby side of the guard. The inspector took the photo facing outby. Tr. 377. There are two black mounds, representing coal spillage where they were dumping, in front of the tailpiece guarding and the tailpiece. Tr. 377-78. Gov. Ex. 11D depicts "part of what was shoveled up, cleaned up, gobbing the conveyor belt, in front of it. The piles in front of it." Tr. 380. The inspector explained that this was done to abate the order, "This is what they done to clean it up. They shoveled it up." *Id.* The middle of the photo shows the accumulation of the coal that they shoveled up. Tr. 381. The accumulations were of a degree that the belt couldn't hold anymore, "[s]o they goosed the belt a little bit, moved it down, and they shoveled more. This is where they goosed it down. This is what was on down the belt. And the other part was on the belt, still up on the tailpiece." Tr. 381. Exhibits 12D and 12E depict the amount of coal that had accumulated. Tr. 381.

Postalwait took six measurements of the accumulations at the tailpiece. Tr. 388. The shallowest area was seven inches and the deepest was 30 inches, inby the tailpiece, as depicted in the right upper quadrant of the photos, per Gov. Ex. 11A and 12A. Tr. 389. The accumulations were six feet in length and 10½ feet wide. Tr. 390. The area measured included under the tailpiece because the accumulations were there as well. As noted above, the accumulations were damp to dry, a determination he made by picking up samples in his hand in "several different places." Tr. 390-91. Though some of it was damp, it was not so damp that it would stick together and some of it was dry and dusty. Tr. 392. He added that, "all the way around, where the belt and the tailpiece was running, it was dry. And it extended back in a little bit, from where the heat would dry it out as it was pushing it back." Tr. 392. His finding that the coal accumulations were dry near the tailpiece roller informed him that it was generating heat from the friction where the tailpiece roller and conveyor belt were turning in those accumulations. Tr. 393. Some of the accumulations were compacted, "inby the tail roller, where it was pushing the tail back this way, to push it away from it as it was turning. Then once it started building up, it started pushing it in tighter." Tr. 394, referencing Gov. Exhibits 11A and 12A; in the center area of those photos between the tailpiece roller and the inby guarding.

Postalwait also found a second accumulation in the belt entry. This one was at the overcast, about a block and a half to two blocks outby the tailpiece. Tr. 395. This accumulation was dry and it appeared to the inspector that it resulted from something being left behind and not initially cleaned up. Tr. 396. This second area of accumulation was cited in the same order. Tr.

[24] A feeder reduces spillage but it is not required to have one. Consequently, when dumping coal directly on the tailpiece more spillage is generated. Tr. 375. As noted, in this instance no feeder was present. Tr. 376.

396; Gov. Exhibits 11F and 12F (photos of this second area of accumulations). Using the same procedure as before, the inspector determined that the accumulations were coal. The accumulations at the overcast were measured by the inspector who found them to be: "20 to 30 inches deep, 5-1/2 feet [wide] from the rib out to the edge of it, and 26 feet in length along the rib." Tr. 402. As mentioned, the inspector concluded that this other accumulation was not due to rib sloughage, nor spillage off of equipment, but that it was simply left behind by not initially cleaning up after the area was mined. Tr. 403.

After seeing the two accumulation areas, the inspector planned to issue a 75.400 violation. Because the entourage could not find any "DTIs" [date/time/initials] marking on a board, nor anywhere else, to show that Justin Tinney had done that preshift, Postalwait wanted to speak with Tinney, the section foreman during the midnight shift, and as such, the person who did the preshift exam for that oncoming day shift crew. Tr. 405. The inspector and the two others with him walked the full length of the 24D belt, including to the point where that belt had the transfer point with the mother belt, but no DTI's were found. Tr. 407. Speaking with foreman Tinney afterwards, Tinney admitted to the inspector that he didn't put DTIs anywhere, as there was no board and, while he contended that he went to the face to get a board, he didn't make it back. Tr. 408.

Compounding this concern, the inspector asked Tinney "if he [had] seen the accumulations at the tailpiece, where the belt was running in it and the tail rollers was running in it." Tinney admitted to Postalwait that he had seen the accumulations while doing his preshift exam, but that he did not call it out in his preshift report, nor did Tinney shut the belt off. Tr. 408-09. Tinney's explanation to Postalwait was that he told the shuttle car operator to clean it up. However, the inspector saw no evidence that any efforts to clean up the accumulation at the tailpiece had been made. Postalwait recorded this information in his daily notes for the day, October 21, 2014. Tr. 409-11 and Gov. Ex. 8 at page 29.

The Court concludes that Postalwait justifiably issued a (d) order on the 75.400 violation because the accumulation was present when Tinney did his pre-shift exam. Tr. 412. For the related violation, citing the preshift obligation under 75.360, his determination for that violation was made after he spoke with Tinney on the telephone. Tr. 412. Of great and understandable concern, when the inspector returned to the surface that day, he looked at the preshift exam for the 24D a second time. This time the exam listed the "accumulations" in the tailpiece. Tr. 412. The inspector also noted that it was not described as "spillage." While spillage refers, in his view, to something that just occurred, it is not synonymous with the term "accumulation," as the latter refers to something that was known, allowed to exist, and not corrected. Tr. 413.

Order No. 8061991 was issued at 10:15 a.m., and marked as reasonably likely and S&S. Tr. 414. Gov. Ex. 6. The reasons for those findings were, "Because the conveyor belts and the tailpiece was running in accumulations. You had the combustible material, and then you also had the friction heat source present. Because it was drying out, and there was an ignition source . . . [and the hazard was] [f]ire, smoke." Tr. 414.

The inspector affirmed his view that a "fire triangle" was present: oxygen, fuel and an ignition source. Tr. 414. He also marked the injury as lost workdays or restricted duty, due to

smoke inhalation or burns from a fire. Upon determining that the air at the tailpiece was going outby on the belt, instead of going through the section, the number affected was later modified downward from eight to two persons - the shuttle car operator and the beltman.[25] Tr. 415. The inspector also marked it as high negligence, because there had been several 75.400 violations at this mine. He saw no mitigating circumstances; Mr. Savasta offered none and he did not view Tinney's statement that he told the shuttle car operator to clean up the accumulation as mitigation, as the belt was not shut down. Tr. 416-17. Further, Postalwait expressed that, as the section foreman is the responsible person, it is insufficient to merely instruct that work or cleanup be done, one must make sure the corrective action is actually then done, especially in this situation where there was a risk of fire. Tr. 418. The inspector believed that the condition occurred during the midnight shift. No coal had been run on the belt until the midnight shift and Tinney admitted to him that the condition existed during the midnight shift. Tr. 419.

The 24D midnight production shift for October 20, 2014, Gov. Ex. 13, reflects that the 24 West belt was in place so that the mine could test run it and train the belt. Tr. 420. There was no indication that the belt was used to deliver coal during the October 20th afternoon shift. Tr. 421. Tinney's production report for the next day, the midnight shift for October 21st, Gov. Ex. 14, reflects that 27 feet of coal, some 108 tons, was mined on that shift. The delay section of the report shows that there were numerous delays and that no coal was running past 5:00 a.m. on that shift. That informed the inspector that the same conditions he found were there from when Tinney's preshift exam was made. Tr. 423. One of the delays, from 6:35 a.m. to 7:00 a.m., reflects cleaning up tailpiece and shuttle car dumping, but the inspector saw no indication that any shoveling had been done. Tr. 425-26.[26]

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[25] The examiner, while in that area, could have been included, but the number affected remained at two.

[26] Upon review of the testimony, the Court adopts the Secretary's position that "according to Mr. Tinney's midnight shift production report, the section had not produced coal from 5:00 a.m. through the end of the midnight shift. There are six entries in the delay section of the production report that cover the entire time between 5:00 a.m. to 8:40 a.m. during which the section did not produce coal (Gov. Ex. 14; Tr. 542-44). The section was not producing coal at the time the Inspector arrived on the section at 8:55 a.m. and no coal was being dumped on the belt when he arrived at the tailpiece at 10:15 a.m. (Tr. 365-66; 471). Further, it defies logic for the section to continue to dump coal on the tailpiece when the belt was down from 5:00 a.m. until 8:40 a.m. because there would be no place for the coal to go. Therefore, it is unlikely that spillage at the tailpiece could have gotten worse after the examination; it is more likely that the accumulation existed in the same condition as the Inspector observed at 10:15 a.m. Although Mr. Tinney testified the tailpiece had been cleaned and that shuttle cars continued to dump coal on the tailpiece after 5:00 a.m., he never actually witnessed this (Tr. 543-44; 565). When asked if he saw anyone cleaning the tailpiece, he responded, "Like I said, it's been so long ago" (Tr. 544). When asked if he may have written the entry in the production report for "cleaning at tailpiece" from 6:35 a.m. to 7:00 a.m. because someone had told him it took place, he said, "Yes, ma'am. Well, I mean I'm not -- I can't remember exactly, but that's usually how it happens" (Tr. 544). Mr. Tinney could not remember when he actually performed the examination between 5:00 a.m.

(continued…)

Returning to his conclusion that both conditions, at the conveyor belt and tail roller as well as at the overcast, were unwarrantable failures, the inspector stated that he considered both accumulations to be extensive. For the overcast area, however, there was no ignition source. Tr. 424. In terms of Postalwait having put the operator on notice for this type of violation, as noted, he stated that previously he had verbally warned the mine about this and had issued violations for 75.400 too. Tr. 425. He considered the conditions cited in Order 8061991 to be obvious – because they could be viewed on either side of the belt and because one could hear the condition. Tr. 426. The inspector believed that the accumulations at the belt posed a high degree of danger due to the friction heat source and the combustible materials, creating a hazard of fire and smoke. He also believed that there was a "good chance" it could catch on fire, if the conditions had been permitted to continue. Further, the operator, through its agent, knew of the condition, because the condition was present when the preshift examiner made his exam, a conclusion the inspector reached based upon the production reports and the admission Tinney made to him. Tr. 427.

Turning to the related preshift violation order, **No. 8061992**, Gov. Ex. 7, the inspector issued that order, citing 30 C.F.R. § 75.360(a)(1). The section from that standard provides,

> Except as provided in paragraph (a)(2) of this section, a certified person designated by the operator must make a preshift examination within 3 hours preceding the beginning of any 8-hour interval during which any person is scheduled to work or travel underground. No person other than certified examiners may enter or remain in any underground area unless a preshift examination has been completed for the established 8-hour interval. The operator must establish 8-hour intervals of time subject to the required preshift examinations.

30 C.F.R. § 75.360(a)(1).

The inspector issued the order at 10:25 a.m., after speaking with Tinney. It references his earlier-issued order, No. 8061991. The inspector affirmed that the conditions cited in Order 8061991 should have been identified in the preshift, resulting in the violation for Order No. 8061992. By failing to so identify the conditions, the oncoming miners would not be alerted to the hazard. Tr. 428. Summarizing the basis for that conclusion, the inspector stated,

> Whenever I talked to him on the phone, he told me that the condition was there. Whenever I reviewed the production reports, it shows me that it was there at that

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[26] (…continued)
and 7:00 a.m. (Tr. 545). Mr. Tinney could not remember which side of the beltline he walked during his examination (Tr. 535). He could not remember what time he instructed the shuttle car operator to clean the tailpiece and what, if anything, the shuttle car said in response (Tr. 560). He could not remember if he walked the beltline again after examination (Tr. 561). One of the few things Mr. Tinney did remember was that he never returned to the tailpiece or followed up with the shuttle car operator to see if the tailpiece had been cleaned (Tr. 561). Mr. Tinney could not reliably account for his whereabouts during the shift, and no other evidence supports that he was in the area of the 24-D beltline." Sec'y Br. 35-36.

> time, based on when that report shows that they mined. And from my experience, it didn't just occur. It was dried out, and it takes a bit of time for it to dry out.

Tr. 429.

Postalwait stated that Tinney, had he acted properly, should have immediately shut down the belt and directed that the accumulation be cleaned up. Tr. 429. Further, on his preshift report, it should have been called out so that the oncoming crew could have dealt with it. His conclusion that it was an S&S violation was based upon his view that, "It's reasonably likely by failing to do the right thing, to do an adequate exam, that this condition is going to create a fire. Because you've got all the – all three triangles [to create a fire are] there." Tr. 430-31. Smoke inhalation and burns were marked as the type of injuries from a fire.[27] Tr. 431. As expressed previously, demonstrating his reasonableness in evaluating the violation, the inspector modified the number of persons affected from 8, as originally marked, down to 2 – the beltman and the shuttle car operator. Tr. 431. He deemed it to be high negligence because, as noted, he had previously put the operator on verbal notice about the accumulations problem and had issued violations for that standard. Nor were any mitigating circumstances presented, as neither Savasta nor Cabo offered any and they agreed there were no DTIs markings along that conveyor belt. Tr. 432. Both those individuals helped Postalwait look for DTIs and Tinney admitted he made none. Tr. 433. Nor did he consider Tinney's assertion that he told the shuttle car operator to clean up the accumulation to be a mitigating factor, because Tinney allowed the belt to continue running and he did not follow up to see that the condition had been corrected. Tr. 433. Adding the condition later on to his preshift exam record was certainly of no help because the next shift had already entered the mine and therefore could not be alerted to the problem. Tr. 434-35.

Regarding Tinney's admission as to not marking any DTIs, the inspector stated again that he asked Tinney if "he put any DTIs on the 24-D conveyor belt" and "he [Tinney] said he did not put on any DTIs." Tr. 449-50. When Respondent's counsel suggested that there is no requirement that DTIs be on the belt, the inspector agreed but added,

> Normally they have them at the tailpiece, at the head drive, and sometimes they're at the discharge roller. …. you have to put them in enough places to show you covered the entire area. But that's where you always see them at. Then you see them -- if it's a longer belt, you'll see them spread out down the belt, every so far, showing that they traveled that whole thing.

Tr. 449-50.

When it was suggested that Tinney saw something different than the inspector, the inspector made his position plain yet again, "I asked him if he seen where the tailpiece and the belt was running in the accumulations, at the tailpiece. And he said yes." Tr. 453. Thus,

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[27] Respondent's cross-examination of Postalwait included an inquiry about whether the area was adequately rock dusted, an attempt to show that the combustibility was diminished and therefore that the risk of hazard occurring was lessened. Tr. 442-48. The Court would comment that rock dusting does not address the accumulation hazard, nor negate the combustibility of the cited condition.

Postalwait made it clear that if Tinney were to assert that he saw nothing turning in coal, the inspector was not about to retreat from his statements about Tinney's admission to him. Tr. 453. Respondent's counsel suggested that only a small amount of spillage, not an accumulation, was the condition that was present and that Tinney's direction to clean up the material was sufficient and reasonable and did not require that he follow up to see that it was done. Tr. 456. However, that focus avoids the issue of the integrity of the belt and the rollers. The Court reaches two conclusions about these issues. First, the questions assumed that it was merely 'spillage' that was involved. Second, assessing the inspector's credibility, the Court was struck by the reasonableness and believability of his testimony on those issues.

The inspector distinguished between mere spillage and a conveyor belt or roller turning in coal. Tr. 460. As he explained, "Where you dump the coal onto the feeder, where it will overflow, that is too far away from the conveyor belt to affect the conveyor belt." Tr. 460. Further distinguishing spillage, the inspector added that one can have spillage, "[b]ut that's what the feeder is made for. If you have spillage around the feeder, then you've got to address it in your cleanup plan how you're going to keep that cleaned up around the feeder." Tr. 461.

Respondent's counsel noted, per Gov. Ex.14, that at the entry for 6:35 to 7:00 a.m. a delay is recorded, and it states, "Dumping in tailpiece, T/P." Tr. 466. The inspector agreed that "T/P" would be shorthand for "tailpiece, and that literally it indicates that they were cleaning the tailpiece during that time. However, the inspector did not buy into the words, adding in his response, "that's what it says."[28] Tr. 467. Drawing the distinction, the inspector emphasized that he was relying on what Tinney told him directly, not the written claim that they were cleaning the tailpiece. Further, the only 'mitigation' that was presented to Postalwait at the time had nothing to do with such a claim; rather it was simply that Tinney had just begun working as a foreman, and the inadequate response was implicitly attributed to his inexperience. Tr. 469. Postalwait reasserted that he knew they had not been running coal because "the shuttle car was sitting there." Tr. 471. The dumping that was going on was directly onto the tailpiece, because they were trying to get the feeder working. Tr. 472.

Revisiting, during the cross-examination, Tinney's failure to put DTIs on the tailpiece, the inspector stated that Tinney told him he didn't have a board, that he went to the section to get one, and that he didn't make it back. Tr. 479. Directed to the inspector's deposition, at page 36,

[28] Further, upon inquiry by the Court, Postalwait stated that, when referring earlier to the delay from 6:35 a.m. to 7:00 a.m. and his remark "that's what it says," the inspector confirmed that his remark suggested that he was skeptical of the explanation for the delay and whether that was really going on. Tr. 503. This, the inspector stated, did not imply that Tinney was lying, but rather that he saw no evidence of anything being cleaned, adding "Nothing. I didn't even see a shovel at the tailpiece. They had to go get one. But there was nothing -- nothing shoveled nowhere. And they -- if they had cleaned at that time, you would have been able to have seen it. And it wouldn't have dried out in that length of time." Tr. 504. To be clear, even though there was an attempt to repair the damage from the inspector's assertion of doubt about the production report, he stated, "Well, I have doubt in that report, based on what I seen." Tr. 505. The inspector clarified that apart from his doubts about that part, he was not asserting that the entirety of the production report was untrue. *Id*.

the inspector acknowledged this was the excuse Tinney offered. However, the inspector added that "But I asked him *about the whole belt, not just at the tailpiece*. . . . [the inspector] asked him if he done the exam on the belt and where his DTIs were . . . [a]nd that's -- *and he said he didn't put any up*." Tr. 481 (emphasis added).

In terms of gravity for Order No. 8061991, Gov. Ex. 6, the inspector repeated that his S&S determination was based upon the triangle of fire presence. Tr. 483. As for his high negligence marking, Postalwait saw no mitigating circumstances because no one presented such information, such as showing that the mine was doing something to prevent, correct or reduce the hazard. Tr. 484. The inspector utilizes summary cards to remind him of the criteria for negligence, aggravated conduct and mitigating circumstances. Regarding mitigation, the inspector read that his card provides,

> May include but are not limited to actions taken by the operator to prevent or correct hazardous conditions or practices [and may include that] [o]perators are required to be on alert for conditions and practices in the mine that affect the safety or health of miners and to take the steps necessary to correct or prevent hazardous conditions and practices.

Tr. 487.

This was the predicate for Respondent's counsel to point out that Tinney told the inspector that he did perform a preshift and direct the shuttle car operator to clean it up. Tr. 488. As noted, Postalwait did not see this as mitigation because he believed that the belt was turning in the accumulations when Tinney did his exam. Tr. 488.

Turning to his unwarrantable failure (UWF) designation, Postalwait again referred to his summary card when contemplating that designation. He considers it an UWF when "on the aggravating conduct. And I look at that chart and go down through it and see if any of that criteria is there." Tr. 489. In a sense, Postalwait viewed it as indifference, not rising to the level of intentional misconduct. He characterized it as indifference because the condition "should have been obvious to anybody. That there should not be no indifference in there. Anybody should have been able to seen it. Even the most prudent miner walking through there should have seen that, not only just an examiner. [Preshift] examiners have a higher standard." Tr. 491.

Postalwait also believed the mine operator displayed a serious lack of reasonable care with regard to Order 8061991, but not reckless disregard, nor intentional misconduct. Tr. 491. For the same reasons, he felt that indifference was present, as the condition was there yet examiner Tinney failed to call it out, failed to put his DTIs up, and failed to shut the belt down. The Court notes that, by this credible testimony, the inspector identified not one, but three failures. Again, citing the same rationale, the inspector believed the mine was guilty of a serious lack of reasonable care regarding 8061992.

On re-direct, the Secretary revisited the inspector's rationale for his determining if there were mitigating circumstances. This occurred because, during cross-examination, the inspector

did not read the entirety of such circumstances. Completing that reading, from R's Ex. 11, the inspector continued,

> Operators are required to be on alert for conditions or 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 mine operator or contractor might withdraw equipment, personnel and/or immediately proceed to correct the violation, but none of these actions taken after they have been cited alters the negligence evaluation made by the inspector when the violation was cited.

Tr. 496.

Thus, the point was made that mitigating efforts does not refer to miners or hourly employees or subordinates taking such steps, but rather to management. Tr. 497. Further, the inspector stated that, new or seasoned, the responsibilities of the preshift examiner are the same. Tr. 498. Accordingly, neither the inspector, nor this Court, viewed Tinney's newness to the position as a mitigating factor. Last, regarding the presence of dust on accumulations, in response to the questions asked by Respondent on that point, the inspector expressed that rock dust on an accumulation shows that it has been there longer. Tr. 498.

Justin Tinney then testified for the Respondent. Tinney, who is now 35 years old, is a 1999 high school graduate. He received his mine foreman's card in 2014 and he has a mine rescue certification. Tr. 510. He has been employed in mining since 2008 and became a section foreman at Loveridge in September 2014. Tr. 512. Tinney informed the Court that he had been a preshift examiner since September 14th and the call from inspector Postalwait to him was made on October 21, 2014. Tr. 516. Tinney stated that the mine had been running coal on his shift that day, which was the midnight shift, on October 21st. Shown the P and D report,[29] which is the production report, Gov. Ex. 14, Tinney identified it as his report. Tr. 517. His October 21, 2014 production report shows that they mined 27 feet, which Tinney described as not being a large amount. Tr. 517. He believed this was the first shift for which the belt line had been in place. Shown his preshift and on-shift exam for that same day, Gov. Ex. 9, he stated that his preshift was performed between 5:00 and 7:00 a.m.

According to Tinney, during his preshift he saw spillage at the tailpiece, where the mine was "using the shuttle car as a feeder, at the tailpiece." Tr. 522. He told the shuttle car operator to clean it up. Tr. 522. Tinney stated that he saw only spillage and no coal turning around the roller. Tr. 523. He heard nothing strange either. Tr. 523. He did not turn off the belt because there was

[29] No witness explained the "D" for that P and D report, but Respondent's counsel offered, without objection that the "D" refers to "delay." Tr.576.

no danger and it only needed some shoveling. Tr. 523. There was only one shuttle car operator at this location.[30]

Tinney stated there was no need to shut down the belt, contrary to Postalwait's assertion, because "there was no imminent danger at that time."[31] Tr. 525-26. He stated he would have shut the belt off if there was an accumulation in the roller. Tr. 526. According to Tinney, he denied to Postalwait that he saw the same conditions as the inspector. Rather, he stated that Postalwait asked about his DTIs. Tinney told the inspector that he did preshift the belt, but that there was no date board at the tailpiece, and he told Postalwait, "I don't know where I put it." Tr. 527. He also told the inspector that he found some "spillage at the tailpiece, where we was dumping." Tr. 527. The inspector asked why he didn't put that in the book, and Tinney responded that it wasn't a violation as "it wasn't rolling in it or anything like that." Tr. 527-28. As to whether the inspector asked him if anything was turning in the tailpiece roller, Tinney answered, "Not that I - - not that I remember."[32] Tr. 528. Tinney also claimed that the inspector stated that he believed Tinney's claim, but advised him that he still had to issue a violation. Tr. 529. However, displaying another inability to recollect, Tinney could not recall if the inspector asked why he did not shut off the belt. Tr. 529. Tinney stated that he told the shuttle car operator "to shovel at the tailpiece." Tr. 530.

Referring to the other area cited, the accumulation of combustible material along the inby rib, inby the 24D overcast, this was also an area that Tinney would have preshifted. One can walk on either side of this area of the belt, but one side, the one next to the rib, is a tight side. Tr. 532. Having another memory issue, Tinney, who, by any measure is still a young man, stated he didn't remember ever seeing the condition. Tr. 532. Shown Gov. Ex. 12G, Tinney expressed that, to him, the picture looked like coal, and that "[w]e rock dusted over [the] accumulation." Tr. 533. As Tinney said that he saw nothing remarkable, ostensibly his opinion of the photo

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[30] Respondent's attorney suggested the following through a leading question: "So you only have one shuttle car operator. Most of the other -- so is it possible that when another shuttle car operator comes to the shuttle car operator that is located -- I'll call it number one -- at the tailpiece, they have to first dump onto that shuttle car." Tinney agreed. Tr. 524. He also agreed there could be spillage from that, "Oh, yeah, you have spillage from the front, if that guy's not, you know -- if he's dumping it and the guy -- because it's got to be -- it's a chain reaction. The guy's that's on the feeder, he's got to be bumping his conveyor, his chain, as that guy's dumping onto him, or it will overflow in the front." Tr. 524-25. In the Court's view, this assertion, offered to support the claim that the accumulation occurred after Tinney's preshift was performed, being based on speculation, is not credible and is also dispelled by the amount of material that was present.

[31] Unless one were to view Tinney's remark as simply misspeaking, his equating the need to shut down the belt only with the presence of an imminent danger represents a serious misunderstanding of the circumstances when there is a need to take action. Viewed in the context of the entirety of his testimony, the Court does not view Tinney's remark as merely misspoken.

[32] From a credibility standpoint, the Court finds Tinney's failure to remember such an important issue surprising.

would be about a condition he never saw during his preshift. Accordingly, his testimony about the photo, being speculation, is of no probative value. This was noted by the Court. Tr. 533-34. Tinney also could not recall which side of the rib he walked. Tr. 535.

Again, Tinney maintained that he didn't note the accumulation in his preshift, Ex. 9, because it wasn't a violation. He then stated that he did put the condition in his on-shift, although the testimony is unclear on this point, as Respondent's counsel's question began with a hypothetical about what Tinney *would* do and then inferentially asked if he actually did put the condition in his on-shift. Tr. 536. The second page of Ex. 9 repeats Tinney's earlier testimony that he told the shuttle operator to clean up the 'spillage.' However, Tinney's reading from that exhibit, refers to a tailpiece accumulation, not spillage, "Location and tailpiece, where you've got haul roads -- which are dry, and actually taking water. Tailpiece *accumulation* under tail roller. And Action Taken, instructed shuttle car operator to clean." Tr. 537 (emphasis added).

Further, at the first page of his preshift report, at item number 2, "Location, Violations and Action Taken, it states: "Tailpiece *accumulation* on tail roller." Tr. 537 (emphasis added). Making matters worse, Tinney admitted he put that descriptive term in his preshift report when he came to the surface. Tr. 537. Tinney also admitted that he added that information *after* speaking with inspector Postalwait. Tr. 538. Jeremy Devine asked Tinney about this and told him, "You know what we got to do." Tr. 538. Devine told him he couldn't put that in his preshift, but if Tinney had told the shuttle operator to clean it up, it was to be noted in Tinney's on-shift. Tr. 538. Tinney asserted this was due to his inexperience. Tr. 538. Further, he agreed that he put the information in both the preshift and the on-shift report. Tr. 538.

Tinney was then asked about the production report, per Gov. Ex. 14, and the delays recorded that day. Regarding the 5:50 to 6:20 notation, Tinney stated that the last shuttle car was loaded at 8:45 a.m. on October 21. Tr. 540-41. Among other items related to the delays, Tinney stated that at 6:35 a.m. to 7:00 a.m. they were cleaning the tailpiece and the shuttle car was still dumping on it at that time, but then it was suggested that he stopped everything in order to clean the tailpiece. Counsel for Respondent suggested, "[s]o someone told you that they were cleaning the tailpiece and then you had to put it in your production report." Tinney responded, "Yes, ma'am. Well, I mean I'm not - - I can't remember exactly, but *that's usually how it happens*." Tr. 544 (emphasis added). Asked, "[d]o you recall them cleaning up the tailpiece?" Tinney responded, "Like I said, it's been so long ago." Tr. 544. He also could not recall when he finished his preshift examination. Tr. 545. Tinney, using the time frame when he would have done his preshift and comparing that to the time the inspector issued the violation, calculated that it was issued some 3 hours and 15 minutes after his preshift, thereby suggesting that the condition could have developed long after his preshift, because dumping was still occurring at the tailpiece. Tr. 545-46.

Tinney stated there was no feeder at this location. Tr. 547. As noted, in situations where there is no feeder, a shuttle car dumps directly onto the tailpiece. Tr. 554. He also affirmed, in response to questions from Respondent's attorney, that accumulations can occur within a matter of seconds and that the skills of shuttle car operators will vary. Tr.

548. In conflict with Postalwait's testimony, Tinney stated that he did put his DTI on the 24D transfer under the main line, but could not recall if he put them at the tailpiece. Tr. 549.

Upon cross-examination, Tinney admitted that he was trained as a section foreman and that his training included how to record information in the preshift records. Tr. 552. Tinney also admitted that he is responsible, in part, for the safety of the oncoming shift and that he is trained to look for accumulations of coal and other combustible materials. Tr. 553.

Tinney continued to distinguish spillage from an accumulation in that the former "just happens" but the later involves something that's been neglected. Tr. 555. Tinney acknowledged that he was responsible for the belt line on the 24D, as a foreman and also as a preshift examiner. Yet, while admitting that he is responsible for both sides of the belt line, he didn't know how long it took to do the preshift that day, how long it took him to walk the line, nor which side of the belt he walked. He also admitted there was coal at the tailpiece roller and underneath it. Tr. 557-58. Tinney could not recall if the spillage was on both sides of the tailpiece. Nor could he state the amount of coal he saw at the tailpiece during his preshift. Tr. 558-59. He could not recall when, during the 5:00 to 7:00 am preshift, he told the shuttle operator to clean up clean up the material nor, as noted, did he follow-up to see if anyone had shoveled the tailpiece. Tr. 560-61. Further, at 7:10 that morning, when he called out his preshift exam to the surface, the only thing he mentioned was the E car needing wedges and headers. Tr. 562. Later, as noted earlier, under Violations, at line 2, he put tailpiece and listed "*Accumulation* at tail roller." Tr. 562 (emphasis added).

Significantly, when it was put to him whether inspector Postalwait asked him if he saw the tailpiece roller turning in the coal accumulations, Tinney responded, "I don't remember." Tr. 565. Tinney admitted that he was disciplined as a result of the inspector's orders being issued, receiving a written warning and lost time. The discipline was for not following up and not checking the tailpiece at the end of his shift. Tr. 566. Upon questioning by the Court, Tinney denied ever seeing any conditions like those depicted in photos, Ex. 12A and 12B. Tr. 567. Upon additional questions by the Court, regarding Gov. Ex. 9, on page 2, item 2, Tinney confirmed that reflects his handwriting where it records, "tailpiece accumulation under tail roller, and that on the first page, and where it also lists "tailpiece accumulation at tail roller. It is noted that while Tinney admitted that he distinguishes between accumulations and spillage, on both those items he recorded the descriptions as an "accumulation," not "spillage." Tr. 571.

However, on re-direct from Respondent's counsel, Tinney stated that, before he spoke with the attorney, he thought of the terms as the same thing. Tr. 572. With that said, Tinney then repeated that what he observed was "coal underneath the belts, or flakes underneath the belts, what we would call it." Tr. 573. Thus, he fell back to his assertion that there was no grinding in the coal. Tr. 574. The Court then asked, if the matter was merely spillage, why he was disciplined. Tinney stated the discipline was for failing to follow-up after he did the preshift, that is, for not checking the tailpiece at the end of the shift. Once the (d) order had been issued, Tinney's shift foreman asked him whether he made sure the material had been shoveled up. Tinney told the shift foreman, "I don't remember." Tr. 575. Still, Tinney maintained that the material could have resulted from somebody else dumping at the end of the shift. Tr. 575.

Michael Savasta also testified for the Respondent. He has worked in mining for 11 years, and has been at the Loveridge Mine since March 5, 2007. Tr. 582-83. He has had foreman's papers since 2014. Tr. 580. In 2014, he also became a salaried employee, as a "safety inspector." Tr. 584. He traveled with Inspector Postalwait on October 21, 2014. They traveled to the 24D section, which was a new section. Savasta stated that he did not hear any grinding or noise until they got to the No. 3 entry, where the tailpiece was located. Tr. 588-89. Savasta acknowledged that the inspector may have mentioned something about hearing noise, but Savasta did not know exactly where they were in the No. 3 entry. Savasta asserted they were about 20 to 30 feet from the tailpiece when the inspector mentioned the noise but that no coal was being mined at that time. Tr. 589-90. The last shift to have mined coal was the midnight shift; this was also the shift where mining started on October 21. Tr. 591. Savasta stated that when the inspector saw the tailpiece, he informed him that he would issue a violation and, after speaking with Tinney, that two orders would be issued. Tr. 592-93.

Savasta also took issue with the inspector's measurements, contending that he didn't "think they [were] 100 percent accurate." Tr. 593. He had doubts about the inspector's use of his walking stick and whether his measurements took into account the soft bottom and he also criticized that only the longest and widest measurements points were taken. Tr. 594. As with Tinney, Savasta asserted that spillage, not an accumulation, was involved. Tr. 597. Savasta also had issues with the second condition listed in the order, the accumulation at the overcast, stating that there wasn't five and a half feet between the rib and the overcast stairs. Tr. 599. Savasta did see material along the rib, but didn't know if the correct term was accumulation or spillage, adding that it was covered up in rock dust and therefore inert. He believed the correct term was spillage for the material at the tailpiece. Tr. 600.

Shown Gov. Ex. 12B, a photo, Savasta stated he had never seen it before, although he asserted that it looked like the conditions at the tailpiece. Tr. 600-01. Savasta described the condition as follows:

> The belt was running, so the roller was turning. I don't know if the entire roller was in contact with the coal. But it was not only coal, there was rock and mud mixed in with it. It was damp to wet. There was nothing hot, there was not smoldering, no smoke.

Tr. 601.

He did not know how long the condition had been present. Tr. 601. He also stated that the material was wet or damp, asserting that he touched it. Tr. 602. Therefore, Savasta's description conflicted with Inspector Postalwait's. Savasta did acknowledge that the inspector was quite unhappy about the condition, admitting, "[h]e was irritated, you know. He said that he had put us on notice and he [was] tired of seeing this condition, you know, in our mine. So he was -- like I said, he was a little irritated." Tr. 603.

Upon cross-examination, Savasta agreed that *he helped the inspector take the measurements* and that he didn't make any measurements of his own. Tr. 609-10. Nor did Savasta take any notes that day, explaining that he was "new" to the safety department. Tr. 610.

As to his doubts about the accuracy of the inspector's measurements, Savasta conceded that the tailpiece and the entire belt sits on the same fire clay, soft bottom, and that equipment was not sinking in mud or anything similar. Tr. 610. *Savasta also admitted that his primary objection was that an order was issued* and less so on the question of whether it was a violation, stating, "you know, *it could have been maybe a valid citation*." Tr. 612 (emphasis added). Savasta also agreed that the coal was in front of the tailpiece, inby the guarding, that it was on both sides of the tailpiece and underneath it to, *and that at least some of it was in contact with the moving tailpiece roller*. Tr. 613. To his mind, Savasta distinguished an accumulation from spillage in that an accumulation exists when material is left there and mining continues without addressing it. Tr. 615. He believed that, in this instance, it had not just been left there and mining was not occurring when they arrived at the site of the condition. Tr. 615. Savasta agreed that no one was cleaning up the material when they arrived at the scene of the violation. Tr. 617.

Shown Exhibits 22A through 22G, photographs, Savasta agreed that he took those photos on October 21, 2014. Tr. 618. Savasta agreed that photo 22A shows the accumulation cited by the inspector at the overcast and he agreed that the accumulation along the inby rib was dry. Tr. 619. However, he added that it had rock dust on it and that the condition could have come from rib sloughage. Tr. 619. Shown 22B, a picture of the cited tailpiece, Savasta stated it depicts the area but *after* it had been shoveled. Tr. 620. This occurred as part of the required abatement. As with Tinney's memory lapses, he could not remember how many men were involved with the clean-up, nor how long it took. Tr. 621. Photo 22D shows the "spillage" that was then shoveled onto the belt. Tr. 622. For photo 22F, he agreed that it depicts the tailpiece roller in contact with the coal, but Savasta again added that rock and mud were in that mix as well. Tr. 623. Exhibit 22G, similarly shows two rounded mounds of material that consisted of coal and rock. Tr. 624. In the face of all those photos, Savasta still maintained that they depicted only spillage. Tr. 625.

Discussion

Both Orders 8061991 and 8061992 are affirmed. The violations were established and they were the result of unwarrantable failures.

Unlike the single order discussed in WEVA 2015-651, No. 8061842, the two orders involved with this docket, WEVA 2015-762, list the alleged violations as "significant and substantial." As recently reiterated by the Commission,

> 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.

Sec'y of Labor v. Cam Mining, LLC, 2016 WL 5594251, *4-5 (FMSHRC) (Aug. 12, 2016) (citing *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984); *accord Buck Creek Coal, Inc. v.*

MSHA, 52 F.3d 133, 135 (7th Cir. 1995), *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988)).

As set forth in the findings of fact, Tinney called out his preshift at 7:10 a.m. When the inspector was first alerted to the condition by the sounds he heard, Savasta and Cabo agreed they heard the sounds too. When they came upon the accumulations, the conveyor belt was running. Savasta then turned the belt off and the inspector took photos of the condition he found; the tailpiece was gobbed out with the tail roller and conveyor belt turning in accumulations. The extent of the accumulations was photographed and measured by the inspector and those accumulations near the tailpiece roller informed him that it was generating heat from the friction where the tailpiece roller and conveyor belt were turning in those accumulations.[33] Thus, there was combustible material, and the friction heat source present. Because it was drying out, and there was an ignition source, the "fire triangle" was present, with the hazard created being fire and smoke.

Tinney saw the accumulations while doing his preshift exam, but that he did not call it out in his preshift report, nor did he shut the belt off. Tinney was part of management; his failures were twofold and both were significant. He did not record DTIs and then fabricated his preshift report after the fact. The accumulation violation was appropriately marked as high negligence, because there were no mitigating circumstances and there had been several 75.400 violations at the mine, with Postalwait having previously verbally warned the mine about this and issuing 75.400 violations.

The semantic jostling about whether the piles of coal should be tabbed as spillage or accumulations is a misdirection.[34] Clearly, there were piles of coal found and documented and,

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[33] Although Postalwait also found a second accumulation in the belt entry, the Court's determination rests primarily on the first area cited at the tailpiece, although the inspector's measurements at the second accumulation show that it was anything but insignificant.

Both sites constituted accumulations. The second accumulation was not due to rib sloughage, but was more likely attributable to material left behind by not initially cleaning up after the area was mined. Regardless of the origin, it was an accumulation for which corrective action was required.

[34] The Court is aware that some cases have drawn a distinction between spillage and an accumulation. "Section 75.400 prohibits accumulations, not mere spillages. *See Old Ben Coal Co.* (*Old Ben II*), 2 FMSHRC 2806, 2808 (Oct. 1980). The Commission stated in *Old Ben* that "we accept that some spillage of combustible materials may be inevitable in mining operations. No bright line differentiates the two terms. Whether a spillage constitutes an accumulation under [30 C.F.R § 75.400] is a question, at least in part, of size and amount." *Id*. An accumulation exists if "a reasonably prudent person, familiar with the mining industry and the protective purpose of the standard, would have recognized the hazardous condition that the regulation seeks to prevent." *Utah Power & Light Co.*, 12 FMSHRC 965, 968 (1990), *aff'd*, *Utah Power & Light*

(continued…)

for one of the two, that coal was turning in tailpiece roller and conveyor belt. As no coal was running past 5:00 a.m. on that shift, the inspector properly concluded that the same conditions he found were there at the time Tinney's preshift exam was made. Thus, the production reports and Tinney's admission to him about the presence of the accumulation also supported the inspector's findings. Further, the conditions cited in the order were obvious because they could be viewed on either side of the belt and the condition generated sound.

A reasonably prudent person familiar with the mining industry and the protective purpose of Section 75.400 would have recognized that the extensive size and amount of float coal dust and loose coal at the tail roller and feeder were accumulations and not mere spillage. Therefore, the Court finds that Section 75.400 was violated.

Postalwait's conclusion that it was an S&S violation, based as it was on the condition and the failure to deal with it properly, made a fire reasonably likely, with smoke inhalation and burns as the expected injuries from a fire.

As for the inspector's unwarrantable failure designation, Postalwait based that on the aggravating conduct involved and the associated indifference to the condition, which he based upon the presence of the condition, and its obviousness. The Court finds Tinney to be less credible than the inspector, both by his words and his deeds. That the inspector was upset by the condition he found demonstrates the reliability of his recounting. People do not often act upset without reason; the inspector's behavior and reaction were consistent with the conditions listed in his order.

Penalty assessments for Orders No. 8061991 and 8061992.

As noted at the outset of this decision, Order No. 8061991, a Section 75.400 accumulations violation, was specially assessed at $30,200, as compared to the $6,115 a regular

[34] (…continued)
Co. v. Sec'y of Labor, 951 F.2d 292 (10th Cir. 1991); *see also Old Ben II, supra*, at 2808 ("[T]hose masses of combustible materials which could cause or propagate a fire or explosion are what Congress intended to proscribe."); *Black Beauty Coal Co. v. FMSHRC*, 703 F.3d 553, 558 (D.C. Cir. 2012). The Commission has expressly rejected the argument that "accumulations of combustible materials may be tolerated for a 'reasonable time.'" *Old Ben Coal Co.* (*Old Ben I*), 1 FMSHRC 1954, 1957-58 (Dec. 1979); *see also Utah Power, supra*, 12 FMSHRC at 968 (Section 75.400 "was directed at preventing accumulations in the first instance, not at cleaning up the materials within a reasonable period of time after they have accumulated") (internal citation omitted); *Black Beauty, supra*, 703 F.3d at 558-59; *Big Ridge*, 35 FMSHRC ___, slip op. at 13, No. LAKE 2009-377 et al. (June 4, 2013). The Tenth Circuit in *Utah Power* similarly stated, "while everyone knows that loose coal is generated by mining in a coal mine, the regulation plainly prohibits permitting it to accumulate; hence it must be cleaned up with reasonable promptness, with all convenient speed." *Utah Power* 951 F.2d at 295, n. 11." *Sec. v. Big Ridge, Inc.*, 35 FMSHRC 3168, 3175-76 (Sept. 2013) (ALJ) (as in *Big Ridge*, both orders in this decision involved accumulations, not mere spillage).

proposed penalty assessment would have yielded. This is virtually a five-fold increase over the regular assessment figure. Order No. 8061992, in a sense the more serious of the two violations for this docket because of the action altering the preshift report, was specially assessed at $15,900, while a regular assessment would have been $4,000. The Court independently concludes that a penalty of $15,900 is fully warranted as to the latter, pre-shift violation because of the serious misconduct involved.

The accumulations violation, however, is a different matter. The Secretary's post-hearing brief urges that the $30,200 specially assessed penalty is justified because the Respondent's high negligence and unwarrantable failure "indicated the need for greater deterrence." Sec'y's Br. 28 (citing Jt. Ex. 2). However, the Court notes that unwarrantable failure and high negligence are contemplated within the regular Part 100 penalty process. In large measure, the special assessment narrative may fairly be described as an echo of the words employed in the inspector's order. Implicitly recognizing this, the Secretary's post-hearing argument was left with the need for "greater deterrence," a claim made without elaboration. *Id*. Upon independently considering the statutory penalty, with a focus, albeit not exclusively, on the gravity and negligence, and upon considering the prior 75.400 violation affirmed in this decision as a part of the mine's violation history, the Court concludes that a penalty of $18,345, a three-fold increase over the regular assessment figure, is warranted. The Court adds that, while the penalties imposed are less than the special assessment amounts sought by the Secretary, there can be no doubt that these constitute significant civil penalties for these violations.

Wherefore, it is **ORDERED** that Consolidation Coal Company pay the Secretary of Labor a civil penalty in the total amount of $43,865.00.

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

Distribution

Brian P. Krier, Esq., Office of the Solicitor, for the United States Department of Labor, 170 S. Independence Mall West, Suite 630E, Philadelphia, PA 19106, krier.brian@dol.gov

Rebecca J. Oblak, Esq., Bowles Rice LLP, for the Respondent, 700 Hampton Center, Morgantown, WV 26505, roblak@bowlesrice.com

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
7 PARKWAY CENTER, SUITE 290
875 GREENTREE ROAD
PITTSBURGH, PA 15220
TELEPHONE: 412-920-7240 / FAX: 412-928-8689

October 21, 2016

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of SHAYNE BUNGARD, Complainant, v. GMS MINE REPAIR & MAINTENANCE, Respondent.	DISCRIMINATION PROCEEDING Docket No. WEVA 2015-793-D MSHA Case No.: MORG-CD-2015-13 Mine: McElroy Mine Mine ID: 46-01437/ MVK

DECISION

Appearances: Jordana L. Greenwald, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, PA, Representing the Secretary of Labor

Sunshine R. Fellows, Esq., The Levicoff Law Firm, P.C., Pittsburgh, PA, Representing the Respondent

Before: Judge Andrews

This case is before me upon a complaint of discrimination brought by Shayne Bungard ("Complainant"), a miner, against GMS Mine Repair & Maintenance, ("Respondent"), pursuant to § 105(c) of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 815(c).

The Secretary of Labor, on behalf of Bungard, alleges that Bungard was discriminated against and his statutory rights were interfered with after asking for safety equipment. A hearing was held in Pittsburgh, PA, on January 4, 2016, at which the parties presented testimony and documentary evidence. After the hearing, the parties submitted Post Hearing Briefs, which have been fully considered.

STIPULATIONS

The parties submitted the stipulations in their respective pre-hearing reports. The following stipulations represent those where there is agreement:

1. The Federal Mine Safety and Health Review Commission has jurisdiction over this action pursuant to Section 113 of the Mine Act, 30 U.S.C. § 823.

2. At all relevant times, GMS was a "person" within the meaning of Sections 3(f) and 105(c) of the Mine Act, 30 U.S.C. §§ 802(f) and 815(c).

3. GMS employed Complainant Shayne Bungard.

4. At all relevant times, Complainant Bungard was a "miner" within the meaning of Section 3(g) of the Mine Act, 30 U.S.C. § 802(g).

See GMS Pre-hearing Report at 4, *and* Sec'y Pre-hearing Report at 8, *and* GMS Post-hearing Brief at 3-4.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The findings of fact are based on the record as a whole and my careful observation of the witnesses during their testimony. In resolving any conflicts in the testimony, I have taken into consideration the interests of the witnesses, or lack thereof, and consistencies, or inconsistencies, in each witness's testimony and between the testimonies of the witnesses. In evaluating the testimony of each witness, I have also relied on his or her demeanor. Any failure to provide detail as to each witness's testimony is not to be deemed a failure on my part to have fully considered it. The fact that some evidence is not discussed does not indicate that it was not considered. *See Craig v. Apfel,* 212 F.3d 433, 436 (8th Cir. 2000)(administrative law judge is not required to discuss all evidence and failure to cite specific evidence does not mean it was not considered).

Shayne Bungard worked as a miner at McElroy Mine for GMS Mine Repair from October 31, 2014, until he was suspended and fired on January 16, 2015. Tr. 34, 35. At the time of the hearing, Shayne Bungard had two years of undergraduate prerequisites to become a Registered Nurse (RN). Tr. 30-31. He had left college and decided to work at the coal mines because it was the best paying job in the area. Tr. 31. In high school, Bungard worked various jobs to support his mother, including work assisting a contractor, work for a lawn care company, work as a lifeguard, and work at a truck stop. Tr. 31-32.

In order to earn an underground coal mine card for West Virginia, Pennsylvania, and Ohio, Bungard attended an 80-hour class in Glen Dale, WV. Tr. 32. At the conclusion of the class, Bungard passed the Red Hat/Apprenticeship Miner test, making him eligible to become a miner. Tr. 32. In this class, Bungard learned that rock dust contains silica, which can clot one's lungs, and can be more harmful than breathing coal dust. Tr. 33. He also learned that miners had to be presented a respirator whenever they needed one. Tr. 34. It was during this class that a recruiter made Bungard aware of available work with GMS Mine Repair. Tr. 32.

Bungard began working as a general laborer on the steel set crew on belt lines at the Blakes Ridge portal of McElroy Mine on October 31, 2014. Tr. 34-35. He typically worked 48 hours per week, at $15 per hour for the first 40 hours and eight hours at overtime pay. Tr. 34-35. On Bungard's first day, he was provided a radio, battery, cap light, and a reflective vest. Tr. 36. He was not provided with a respirator, and he was not told how to procure one. Tr. 38. Bungard was never given direction that if he wanted a dust mask during his shift he was responsible for having it on his person before he went into the mine. Tr. 90. He had heard from word of mouth

that if he wanted a dust mask he had to ask the shift foreman.[1] Tr. 90-91. He was told during the refresher training that he could have a dust mask whenever he wanted one. Tr. 91.

Bungard testified that in his experience, it was a frequent occurrence to get "dusted out" while working underground. Tr. 44. In previous instances of being dusted out, the crew would sit out the event, and the crew leader, Jamie McKelvey, would check dust levels every five to ten minutes. Tr. 44, 105. Bungard's fellow miner, Joseph Gonchoff, testified that one's vision becomes limited when it becomes dusty. Tr. 104. Bungard's crew leader, Jamie McKelvey, testified that in a "dust out" the dust becomes so bad that one cannot see 20 feet in any direction.[2] Tr. 135. Dust was a daily occurrence. Tr. 105.

Gonchoff testified that he experienced a stark difference between how dust is treated in the context of training and how it was treated in the context of work: "Ever since we started getting training for mine, everyone preaches black lung, rock dust is worse than coal dust, and from day one you are preached never work in dust, and then you start working at the mine and it

[1] Mine Site Coordinator Michael Blackburn testified that the protocol for getting safety equipment was that a miner would have to ask for any safety equipment from their shift foreman 15 minutes prior to their shift. Tr. 160. He said that he always recommended to all new miners to always ask for a paper mask before the shift because one can never know when it will become dusty. Tr. 160.

Corporate Safety Director for GMS, Susan Bealko, testified that dust masks were "readily available." Tr. 282. Bealko's department would deliver the dust masks to the coordinators, who put them in their lock boxes, and they give them to their crew leaders to give to employees as needed. Tr. 282-283. If the environment is dusty, and a miner does not wear a dust mask, he would get reprimanded. Tr. 282.

Bealko testified that "there is a remote chance that it is going to get dusty, and you have to know what job you are doing. If you are going to be in a dusty environment, you take your dust mask with you. You should have dust masks with you, and the crew leader should." Tr. 285.

[2] Jamie McKelvey worked for GMS from October 2010 through April 2015. Tr. 130-131. He worked as a laborer for two years and then a crew leader for two years. Tr. 131.He worked primarily at the McElroy Mine, but occasionally worked at other Murray mines. Tr. 131. He described his responsibilities as crew leader "to make sure the work got done and it was done safely." Tr. 131. He has certificates for underground mining. Tr. 132. McKelvey's job with GMS was his first underground mining job. Tr. 132. After being laid off from GMS, McKelvey went on unemployment for one month and then returned to construction work building bridges and maintaining roads. Tr. 132.

seems like it is not that important, that you need to get the job done."[3] Tr. 106. Gonchoff had talked to McKelvey about the dust problems, but did not say anything to the shift foreman, Anthony Brown, because he was afraid of being fired from the job.[4] Tr. 106-107. McKelvey testified that he didn't say anything to Brown, because he feared that Brown would not have listened to him and may have fired him. Tr. 137-138, 142. Gonchoff described the situation as there being a "feeling that if you don't do what you are told, they will find a way to fire you." Tr. 106-107. Gonchoff described GMS as "all about getting your footage all day every day." Tr. 125. Gonchoff listed an employee who was fired for not making his daily footage. Tr. 126. The daily footage was eight feet per day on both sides of the belt for a total of 16 feet. Tr. 127-128. If one worked hard all day, that footage could be completed, but if breaks were required because of dust, it was not possible. Tr. 128.

On January 16, 2015, Bungard worked the afternoon shift, which began at 4:00 pm. Tr. 40. He was working in between crosscut 1404 and the drive, cleaning ribs alongside a Black Hat on the tight side of the belt line.[5] Tr. 39. Their task was to shovel the ribs with handheld tools, such as shovels, pics, matics, jackhammers, and other tools to clean the area. Tr. 41, 104. With him were three other Red Hats (Mitch Tilak, John Glenn Denning, and Joseph Gonchoff), a Black Hat (Jeff Hamstead), his crew leader (Jamie McKelvey), and the coverage foreman (Chuck Hess). Tr. 40, 102-103.

At approximately 8:00 or 8:30 pm, it began getting dusty. Tr. 42, 103, 113. Bungard described the conditions as appearing like "light snow, you can see it coming, you can feel it, basically, in the air." Tr. 42. He described it being difficult to breathe. Tr. 42. Hamstead motioned the crew with his cap light to gather underneath the belt and start heading toward crosscut 1404 because the crew was "going to get dusted out." Tr. 42-43. Everyone from the crew, other than coverage foreman Hess, went into the crosscut. Tr. 43. The coverage foreman stayed on the belt line. Tr. 43-44.

The crew sat in the crosscut until McKelvey determined that the dust had cleared. Tr. 134. They returned to work for approximately half an hour, and then it became dusty again, so the crew returned to the crosscut. Tr. 134. They sat in the crosscut for a little while, until foreman Anthony "Scott" Brown came and asked what they were doing. Tr. 45, 135. McKelvey

[3] Joseph Gonchoff testified at hearing. He worked at the McElroy Mine for GMS from June 2014-January 2015, as an underground miner digging and cleaning the belt lines. Tr. 100-101. At the time of hearing he worked at United Dairy driving a truck. Tr. 100. In January of 2015, Gonchoff was working the afternoon shift on Jamie McKelvey's crew. Tr. 101. Gonchoff left GMS to work for Murray Energy on January 16, 2016. Tr. 113. Gonchoff continued to work at the same mine, but a different portal. Tr. 113. Gonchoff began working for Murray Energy on or about January 20, 2015, after working for GMS. Tr. 102. At Murray, Gonchoff worked as a general inside laborer. Tr. 102. Gonchoff, along with approximately 120 other workers, was laid off at the end of May, 2015. Tr. 102, 113.

[4] Gonchoff testified that the turnover rate at GMS was high, with "people getting fired and brought in every day." Tr. 112.

[5] A Red Hat refers to a new miner. A Black Hat refers to an experienced miner.

responded that it was dusty and they were in the crosscut for fresh air. Tr. 135-136. Brown went to the belt, came back, and told the crew to get back to work because it was "not that bad." Tr. 135-136.

Brown told Bungard and the others that it was not dusty and they were required to return to work. Tr. 45, 105. As the crew walked back to work, Bungard and Gonchoff noticed that it was still dusty.[6] McKelvey described the conditions when they returned as not "as bad, but it was still dusty." Tr. 136. McKelvey testified he would not have made the same decision as Brown because "it was still dusty and you don't want to breathe it." Tr. 136.

Gonchoff testified that many people in the crew were angry about the dust and did not want to return to work in such dusty conditions. Tr. 105. Bungard requested a dust mask because he felt that he needed a dust mask in order to breathe in the conditions they were in. Tr. 46, 47. Bungard also recalls hearing another Red Hat ask Brown for a dust mask, but said that he did not think that Brown heard him. Tr. 46. McKelvey testified that it was reasonable to ask for a dust mask to work in the dusty conditions they encountered. Tr. 138-39. Brown responded to Bungard by making Bungard repeat the request. Tr. 46. When Bungard repeated it, Brown replied that it would require them to walk out to the surface, to which Bungard assented. Tr. 46.

Bungard knew from a former crewmember named Eddie Smith that if he wanted a dust mask he would have to ask for one. Tr. 62. The dust masks were kept in a cabinet in the shower house, and Bungard was never told that he was required to request them at a specific time. Tr. 62-63. The filters for the dust masks would get clogged, and GMS was supposed to provide replacement filters, but Bungard testified that they were often unavailable.[7] Tr. 62-63.

Gonchoff testified that when Bungard asked Brown for a dust mask, Brown told Bungard that it was his responsibility to have a dust mask. Tr. 107. Bungard responded by saying that by asking for one he was fulfilling that responsibility. Tr. 107. Bungard and Brown began arguing, with Bungard on the defensive side, and Gonchoff first assumed they were joking around. Tr. 107, 118. However, as it escalated and Brown told Bungard that he would take him out of the mine, Gonchoff realized that they were not joking. Tr. 107. Brown was pointing, yelling, and appeared visibly angry. Tr. 123.

Brown asked if anyone else wanted a respirator, and one crew member replied that Brown should bring everyone respirators. Tr. 107. Before leaving, Brown told McKelvey to take the crew back to the crosscut and out of the dust, and that if any workers even take off their glasses to clean them they would be written up. Tr. 108. Gonchoff understood that statement to

[6] When asked at hearing to rate the dust levels on a scale of 1-10, Bungard rated the dust levels at five. Tr. 45. Gonchoff rated the dust levels as a seven or eight on a ten-point scale. Tr. 109.

[7] Gonchoff brought his own respirator into the mines until he lost it. Tr. 114-15. He repeatedly asked for one but explained that GMS rarely had enough for all employees. Tr.115. He would usually request the dust mask before or after the shift, whenever he saw Blackburn. Tr. 115. Gonchoff complained orally to Blackburn about the company not having a sufficient number of dust masks. Tr. 116. Blackburn responded that he was trying to get them. Tr. 116.

be borne out of frustration and Bungard being correct, as well as an affirmation of Gonchoff's belief that they could always find a way to fire them if they wanted to. Tr. 108-09.

The crew stayed in the crosscut for approximately 15-20 minutes until the dust cleared out, and then went back to work. Tr. 109. Gonchoff described the dust being at approximately five or six out of a ten-point scale when the crew returned to work. Tr. 109.

Bungard testified that after walking approximately 10 steps with Brown towards the bottom of the belt line, Brown said, "no…never mind, get in the crosscut." Tr. 47. Brown ordered everyone to get into the crosscut. Tr. 47. The crew proceeded into the crosscut, and Bungard heard Brown say something that he could not understand over the noise. Tr. 47. Bungard told Brown that he would do his work, but that he wanted a dust mask, and that he was willing to talk to Mine Site Coordinator Michael Blackburn to get one. Tr. 47. Brown responded by saying that if Bungard wanted to talk to Blackburn, they would go and talk to him right then. Tr. 48. Bungard grabbed his bag and the two of them started to walk. Tr. 48. Bungard testified that Brown's body language and tone of voice indicated that he was upset about having to walk out of the mine for a dust mask. Tr. 48.

Bungard followed Brown approximately 10-15 feet behind him as they walked out of the mine. Tr. 49. Twice during the walk, Brown pointed out dusty belt drives and asked Bungard, "do you see any dusters, he was screaming, do you see any dusters." Tr. 49-50. Bungard responded by shrugging and indicating that he did not see any dusters. Tr. 49. Bungard did not otherwise engage Brown in conversation during the walk. Tr. 49. In the 20 minutes that it took to walk out of the mine, Bungard did not see or speak to any other miners. Tr. 50.

Bungard and Brown exited the mine at approximately 8:30 or 8:45 p.m., which was in the middle of the shift. Tr. 51. The lamp man was in his office when they walked by, but no one else was around. Tr. 51. They proceeded to the GMS office, and Bungard sat down as Brown attempted to call Blackburn. Tr. 51. The first few calls were unsuccessful, but eventually Brown was able to reach Blackburn. Tr. 51.

Brown placed Blackburn on speakerphone so that Bungard could hear the conversation. Tr. 51. Brown told Blackburn that Bungard refused to work and there was dust on the belt line. Tr. 51. Blackburn responded by saying "get him the F out of there."[8] Tr. 52. Bungard tried to interject, but Brown talked over him. Tr. 52. Brown hung up the phone and said, "well, that is that." Tr. 52. Bungard asked what Brown meant, and Brown responded that Bungard was fired. Tr. 52. Bungard asked if he was being fired for asking for a dust mask, and Brown responded that "no, you brought it on yourself, wanting to walk out here." Tr. 52. Bungard told Brown several times that "I am just asking for a dust mask, I will go straight back to work, I don't want to lose my job." Tr. 53. Brown told Bungard that he was the foreman and he determined that there was no dust present. Tr. 53. During this conversation, Bungard was sitting and Brown was standing over him pointing in his face so that Brown's finger was within two inches of Bungard's face. Tr. 53-54.

[8] It is unclear from the testimony whether witness used "F" in lieu of "fuck" out of a desire to not swear during a hearing, or if "F" was used at the mine.

Following this exchange, Bungard said that he would go sit in his car because he had driven a fellow coworker to work that day. Tr. 54-55. He handed his cap light and SCSR back to Brown and said "see you later." Tr. 55. Bungard testified that he was approximately 10 feet away from Brown and did not say this in a threatening way. Tr. 94, 96. Brown responded, "oh, you will see me later," and Bungard said that Brown then became belligerent. Tr. 55. Brown threw his hardhat down, took off his belt, and said, "you will see me right the F now." Tr. 55. Bungard asked Brown what he meant. Brown responded, "if you want to fight me, you will fight me right now." Tr. 55. Brown's face was red, and he was yelling. Tr. 56. Bungard responded, "okay, well, you can hit me right here on my property if you want to, go ahead." Tr. 55. Bungard testified that he said this because he thought a camera might catch the incident. Tr. 55-56. Brown responded that he would not hit Bungard where they were standing, and said they could fight at Brown's truck. Tr. 56.

Brown walked outside and began taunting Bungard saying, "come on, come outside." Tr. 57. Bungard replied that he would not go out and he started to walk towards the break room. Tr. 57. Bungard went to the lamp room to find a phone, and he asked the lamp man if he could use the phone. Tr. 57-58. The lamp man told Bungard to call the supervisor, Michael Blackburn. Tr. 58. Bungard called two to three times and left a message. Tr. 58. He never received a call back. Tr. 58. Bungard proceeded to get his belongings from his locker and went to wait in his car. Tr. 58-59.

After the shift, when the crew was walking out of the mine, one of the union guys by the bus garage told them that they needed to call MSHA's 800 number because Brown had fired Bungard and tried to fight him in the parking lot. Tr. 110. Gonchoff felt that it was odd for a member of the union to offer advice to contractors, because typically union members do not like contractors, and took it as evidence of the truth of what was being said. Tr. 110-11. Gonchoff relayed the message to Bungard. Tr. 126.

Gonchoff and the other crew-members were then told by the crew waiting to go underground that Brown wanted to meet with him in the bathhouse. Tr. 111. Brown told them that he "is not a bad guy," and that he was just going to suspend Bungard. Tr. 111. However because Bungard tried to fight him, Brown had to fire Bungard. Tr. 111. John Glenn Denning spoke up and said that it was wrong for Brown to fire Bungard for asking for a respirator. Tr. 111-12. Gonchoff testified that he and the rest of the crew were in agreement with Glenn Denning. Tr. 112. Gonchoff stated that this incident with Bungard made him feel that no one cared about his safety. Tr. 112.

After Bungard waited for approximately one to two hours for his coworker in the car, he went to the shower house and talked to his crew. Tr. 59. Several crew members told him that Brown told them in the shower house that Bungard refused to work, and there was no dust present. Tr. 59-60.

When Bungard left the mine, he understood that he had been fired. Tr. 62. Some time later, Bungard was contacted for an exit interview by a woman from GMS. Tr. 63. She told Bungard that he was being discharged for insubordination and trying to start a fight with a foreman, which he denied. Tr. 63.

GMS Mine Site Coordinator Michael Blackburn testified at the hearing.[9] His understanding of what transpired on January 16, 2015, came exclusively from Brown. Tr. 152-53. Brown left a note for Blackburn that explained that he came across McKelvey's crew in a crosscut and told them to get back to work because the dust had cleared.[10] Tr. 153. The note explained that Bungard told Brown that it was still too dusty and he needed a dust mask. Tr. 153. Brown wrote that he took Bungard outside, and Bungard tried to provoke a fight with him. Tr.153-54. Brown wrote that he told Bungard to "go ahead and hit me, I know there is cameras here, I know you want to hit me, go ahead and hit me." Tr. 153-54. Brown then collected Bungard's equipment and told Bungard to go home. Tr. 154.

At approximately 8:30 am the next morning, after Blackburn read Brown's note, Brown called Blackburn on the phone. Tr. 154, 172. This was the first time that Blackburn recalled Brown contacting him about the matter. Tr. 172. Brown also told Blackburn that one of the shift foremen said Blackburn wanted a union representative. Tr. 155. Blackburn did not speak to any of the shift foremen or anyone from Bungard's crew about the incident. Tr. 172-73. He spoke with McKelvey and Jeff Hamstead the following day. Tr. 173. McKelvey told Blackburn that the crew had to take a break because of the dust, until Brown told them that the dust had cleared and they had to return to work. Tr. 191. Blackburn testified that McKelvey told him that the dust levels were "good enough for us to go back to work." Tr. 191.

Blackburn testified that neither he nor Brown had the authority to fire Bungard. Tr. 157. Human Resources Director Terry Jackson or General Counsel Mike Thomas had the final say on whether to fire someone. Tr. 157, 202. Blackburn filled out the paperwork for a suspension pending HR review and a payroll change form, and submitted the forms to Derek Jackson in the HR department. Tr. 156, 170. Blackburn testified that he decided to suspend Bungard because provoking a fight with a superior constituted insubordination. Tr. 157-158.

Blackburn testified that he and Brown probably told Jackson about Bungard's provocations and about Bungard requesting a union representative, but not about any issues regarding Brown being upset about being asked for a dust mask.[11] Tr. 158-159. Blackburn said

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[9] Michael Blackburn was a truck driver for Super Service at the time of hearing. Tr. 148. He worked for GMS from January 2012, through July 2015, as a mine site coordinator. Tr. 148-49. Blackburn was in charge of the 270 people that GMS employed at the mine, and was responsible for making sure they were present at work and performed their jobs. Tr. 149. Blackburn also had to submit three to four reports per week to the mine customer that detailed every GMS employee's position at the mine, as well as lists of individuals that were terminated. Tr. 149-50.

Blackburn was laid off from GMS for lack of work. Tr. 149.

[10] Blackburn testified that he did not know what became of the note. Tr. 154, 167-68. Blackburn did not provide the note to MSHA inspectors or to company officials. Tr. 169.

[11] Derek Jackson testified that getting the union involved in a matter would not be a violation of GMS policy because the union was not a customer. Tr. 255-56.

that Bungard jeopardized up to 270 people's jobs by asking to speak to a union representative. Tr. 159.

Derek Jackson testified at hearing that he made the final decision to terminate Bungard.[12] He had never received training concerning discrimination under the Mine Act and was unaware of Section 105(c) of the Act. Tr. 231-233. Tr. 211. GMS did not have a policy in place for how to investigate discrimination or harassment. Tr. 245. Jackson reviewed the information that Blackburn presented to him. Tr. 211-212. Jackson testified that Bungard had requested a dust mask and was brought out by Brown in order to get him a dust mask. Tr. 212. Then, Bungard became combative and tried to start an altercation with Brown, and refused to return to work. Tr. 212. Jackson testified that he tried to reach out to Bungard, but was unable to get a hold of him. Tr. 212. Jackson did not speak to anyone on Bungard's crew or Brown before deciding to terminate him. Tr. 244-245.

Jackson testified that he did not interview any of the people present when Bungard asked for the dust mask because he did not believe it was not relevant to the termination. Tr. 246. Jackson did not know if Brown provided the dust mask to Bungard or if he tried to send him back underground without a dust mask. Tr. 246-247.

Jackson spoke with Bungard after he made the decision to fire Bungard. Tr. 212. Bungard told Jackson that it was Brown who became aggressive towards him, and that all Bungard wanted was a dust mask. Tr. 212.

Jackson testified that he was faced with a choice as to whether to believe Blackburn or Bungard. Tr. 212-13. Blackburn had been with the company for several years, and Jackson had "faith in the information he was providing me." Tr. 213. Jackson testified that because Bungard did not have proof of the veracity of his claims, he chose not to believe him. Tr. 213. Jackson asked Bungard, without offering, if Bungard would be interested in a potential transfer, and Bungard declined. Tr. 213. Jackson explained that he asked Bungard about transfer simply to satisfy his own curiosity. Tr. 213-14. Jackson described the conversation as "very brief." Tr. 213. He told Bungard that a letter was sent to him, which Bungard had already received, for an exit interview. Tr. 213. Jackson sent a letter on January 20, 2015 to the HR Administrator Emily Hale, explaining that he had called Bungard and told him that he was moving forward with the termination. Tr. 215-216; RX-4.

Jackson did not speak to anyone besides Blackburn before making a decision concerning Bungard's termination. Tr. 219. He testified that the information he received from Blackburn was "clear-cut," and he didn't have any contradictory information. Tr. 220. Jackson testified that

[12] At the time of hearing, Derek Jackson was the Human Resources Director for GMS. Tr. 201. He had held this position for approximately two and a half years, and was responsible for employee relations, benefits, recruitment, and terminations. Tr. 201. Jackson had a total of over 15 years of Human Resources experience, but his job with GMS was his first job in a mine. Tr. 208, 231. He had an undergraduate degree in business management and marketing, and a Master's degree in industrialization of Human Resources. Tr. 208-09. Additionally he had two professional Human Resources certifications. Tr. 209.

in other instances he has decided not to follow a front-line manager's recommendation of termination. Tr. 221. At the time Jackson made the decision to terminate Bungard, he had not yet spoken to Bungard, so all the information that resulted in the termination came from Blackburn. Tr. 221. Jackson testified that if he had had the opportunity to talk with Bungard and discuss the matter further with Blackburn, such conversations may have made a difference in the ultimate decision. Tr. 221-22.

GMS has a policy regarding probationary employees that evaluations are performed at 30 days, 45 days, 90 days, six months, and one year.[13] Tr. 152. The probationary period is 90 days.[14] Tr. 152. Bungard was still in the probationary period. Tr. 152.

Prior to this incident, Bungard had never been subjected to any discipline at the mine.[15] Tr. 60. Bungard did not have any issues with Brown or Blackburn prior to the January 16, 2015, incident. Tr. 90. He has never been in trouble in any job for fighting, and has never been in a verbal altercation with a superior prior to that incident. Tr. 97. Bungard was often chosen by his crew leader to accompany him for special tasks. Tr. 61. Bungard felt that the job had been going well up until the dust mask incident, and had already interviewed with Murray Energy for a job with the mine. Tr. 60-61. He was told that due to the contract between Murray and GMS, they were unable to hire him at the time, but that he should continue working with GMS for another three months and try again when he was eligible for employment with Murray. Tr. 68. Bungard's career plan prior to his termination was to remain a coal miner at GMS until he could get hired at Murray. Tr. 73.

Bungard had never previously been fired from a job, and he testified that it created a great deal of stress for him. Tr. 72-73. After being terminated Bungard performed odd jobs for family to make money. Tr. 66. He purchased a lawnmower, blower, and leaf eater for approximately $500 for these jobs. Tr. 66. Bungard earned approximately $125 per week mowing lawns during this period. Tr. 66-67. Bungard testified that he did not apply for jobs in the mining industry because he thought he might be blacklisted, and unable to get a job after his

[13] Bungard's personnel folder did not include evaluations for 30 or 45 days, and Blackburn testified that it was likely they were not performed on time. Tr. 166-167. Blackburn could not recall if these evaluations were performed for Bungard. Tr. 167.

[14] The GMS Employee Policy Manual holds that all new employees are under a 90-day probationary period. Tr. 203. If, during this period, it is determined that the employee is not fit for the position, the company can fire them. Tr. 203. The Manual further lists 20 actions that can result in disciplinary action up to and including termination. Tr. 204. Some result in progressive discipline, and some like insubordination or violation of safety rules can result in immediate termination. Tr. 204-205. Under the policy, management can take into account all facts of a situation to determine what level of discipline is appropriate. Tr. 206-207. Any action that requires more than a verbal warning requires the involvement of Human Resources. Tr. 207.

[15] Bungard testified about one incident wherein he complained about having to carry the bag of water for the crew for four days in a row. Tr. 61.

termination.[16] Tr. 67. Between January and some time in the late summer of 2015, Bungard did not make efforts to seek employment beyond the casual employment he was engaged in. Tr. 86.

Bungard applied for approximately six to eight jobs, mostly as a general laborer, before he got his current job. Tr. 69. His first job after being terminated from GMS was at Mineral Lab Company, where he worked full time for $10.50 per hour. Tr. 69-70. Bungard worked there for approximately one month before he began working at his current job on November 16, 2015, in water transfer, where he makes $13 per hour. Tr. 70-71, 85. He worked approximately 40 hours per week in the slow period, and expected to work as many as 100 hours per week in the normal rotations. Tr. 71. Bungard's work hours were determined by the rise and fall of gas costs. Tr. 71.

Bungard was living in a house with two roommates when he was working for GMS. Tr. 72. After he was fired, he could not pay rent and had to move in with his mother. Tr. 72. At the time of hearing, he was living with his father, and helping to take care of him following a stroke. Tr. 72.

Between March and April of 2015, GMS laid off approximately 230-240 people. Tr. 161. This was a mixture of black hats and red hats. Tr. 161-62. Blackburn had a meeting with Jackson and John Mattingly to decide who was being transferred and who was being laid off. Tr. 180. Blackburn created a spreadsheet for each miner. Tr. 183. He did not use any criteria provided by Human Resources, but rather his own experiences and information provided by subordinates about each employee. Tr. 182. No one that Blackburn recommended for lay off or transfer was overruled by Mattingly or Jackson. Tr. 180.

Some employees were offered transfers to other locations. Tr. 162. These were all Consol mines in Pennsylvania, such as Bailey Mine, Enlow Mine, Emerald Mine, Cumberland Mine, and BMX. Tr. 162. Blackburn made all decisions concerning who would be offered transfers in lieu of layoffs. Tr. 161. First he chose 26 crew leaders for 26 crews. Tr. 162-163. Then he made offers to all the Black Hats that wanted the transfer. Tr. 163. Some Black Hats declined the transfer because of the pay cut and increased travel. Tr. 163. Then he made offers to some Red Hats. Tr. 163. He testified that he based these decisions on attendance, work ethic, and performance. Tr. 161. A few dozen miners were also recalled at Marshall County locations. Tr. 163.

McKelvey and three other afternoon shift employees were laid off and never returned to work. Tr. 181-82; GX-2. Twenty-one afternoon shift employees were transferred or later returned to work. Tr. 182; GX-2.

Jackson's involvement with the April 2015 layoffs was to meet with the staff and help receive their equipment, explain unemployment benefits, and discuss transfers. Tr. 222-23. He did not have any responsibility for deciding who would be offered a transfer or job recall. Tr. 223. Those decisions were made by the CONSOL operations with input from Blackburn or Mattingly. Tr. 223.

[16] Bungard took his coal mine test again so that he could return to working in the coal mines. Tr. 71.

There was no policy in place at GMS or written criteria to determine who would be transferred instead of laid off. Tr. 242-43. Jackson believed that the field managers like Blackburn and Mattingly based their decisions on criteria such as attendance, job performance, and ability to lead. Tr. 257. He believed this because he described it as "common sense" and the factors that the field managers talked about often. Tr. 257.

GMS continued to hire after Bungard's termination, and at the time of hearing had numerous job listings for experienced and inexperienced miners. Tr. 254-55. GMS has also held numerous job fairs and open interview sessions since Bungard was terminated. Tr. 254.

CONTENTIONS OF THE PARTIES

Following the hearing, the Complainant and Respondent submitted briefs and reply briefs in support of their respective positions. The Secretary brings both discrimination and interference claims on behalf of Bungard, arguing that Bungard engaged in protected activity by requesting a dust mask, discussing the issue with Brown, and attempting to involve a representative of miners. The Secretary further argues that if Bungard's actions are treated as a work refusal, that too would constitute a protected activity. The employment actions of suspension and termination were motivated at least in part by these protected activities. As a result, it argues that Bungard suffered both discrimination and interference.

The Respondent argues that both the discrimination and the interference claims should be dismissed. With respect to interference, the Respondent argues that its procedures for obtaining a dust mask in no way interfered with Bungard's rights. With respect to discrimination, the Respondent concedes that Bungard engaged in protected activity when he requested a dust mask, and that he suffered an adverse employment action when he was discharged. Resp. Brief at 20. Respondent argues that there was no causal connection between the protected activity and the discharge, and focuses primarily on animus and disparate treatment. Further, Respondent argues that even if this court finds that its actions were in some manner motivated by Bungard's protected activity, it would have taken the same actions based on unprotected activity alone. *Id.* at 25.

Respondent argues that even if this Court finds that Bungard was discriminated against, he is not eligible for backpay because he did not properly mitigate. Further, he would have been laid off for economic reasons in the spring of 2015. The Respondent also encourages the Court to summarily reject the Secretary proposed penalties of $25,000.00.

ANALYSIS

The Secretary has alleged that the operator's conduct constitutes both standard discrimination and interference, and I will address each in turn.

1) Discrimination:

Section 105(c)(1) of the Mine Act provides that a miner cannot be discharged, discriminated against, or otherwise interfered with in the exercise of his statutory rights because

he "has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine," or "because of the exercise by such miner…of any statutory right afforded by this Act." 30 U.S.C. 815(c)(1).

In order to establish a prima facie case of discrimination under Section 105(c)(1), the Secretary on behalf of a complaining miner must produce evidence sufficient to support a conclusion that (1) he engaged in protected activity, (2) he suffered an adverse action, and (3) the adverse action was motivated at least partially by that activity. *See Turner v. Nat* 7 *Cement Co. of California,* 33 FMSHRC 1059, 1064 (May 2011); *Sec'y of Labor on behalf of Pasula v. Consol Coal Co.,* 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds* 663 F.2d 1211 (3d Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.,* 3 FMSHRC 803, 817-18 (Apr. 1981).

The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by the protected activity. *Driessen v. Nev. Goldfields, Inc.,* 20 FMSHRC 324, 328-29 (Apr. 1998); *Robinette,* 3 FMSHRC at 818 n.20. The operator may also defend affirmatively by proving that the adverse action was in part motivated by unprotected activity of the miner, and that it would have taken the adverse action based on the unprotected activity alone. *Driessen,* 20 FMSHRC at 328-29 (citing *Robinette,* 3 FMSHRC at 817; *Pasula,* 2 FMSHRC at 2799-2800). The operator bears the burden of proof for the affirmative defense. *Pasula,* 2 FMSHRC at 2800.

A. Protected Activity:

The Respondent concedes that Bungard engaged in protected activity by requesting a dust mask. Resp. Brief at 20. The Secretary argues that not only was Bungard's initial request for a dust mask protected, but each step he took in furtherance of obtaining a dust mask was also protected activity. Sec'y Brief at 13.

This Court agrees that Bungard's protected activity did not conclude after the initial request for a dust mask. His actions towards procuring a dust mask, from the initial request to the attempts to talk with his supervisor, Michael Blackburn, constitute a singular chain of events that are protected under the Mine Act. The walk out of the mine with Brown was taken because GMS kept the dust masks in a locked cabinet at the surface. Tr. 62-63. That the action took so long was the result of GMS's inefficient and cumbersome protocols for keeping and retrieving dust masks. I find GMS Corporate Safety Director Bealko's testimony concerning the availability of dust masks to be self-serving and non-credible. Her assurances that the GMS procedures for retrieving dust masks allowed miners to obtain them when necessary was contradicted by every miner that testified. Tr. 282-285. Further, her testimony concerning the company's policy of reprimanding miners for not wearing dust masks when the environment was dusty, illustrates that she had no sense of the facts on the ground. Tr. 285. The bulk of the credible testimony at hearing illustrated an environment where miners were dissuaded from requesting safety equipment, even when dust was prevalent and made it impossible to work without such equipment.

B. Adverse Action:

The Respondent concedes that Bungard suffered an adverse employment action when he was discharged by Jackson on January 20, 2015. Resp. Brief at 20. However, Bungard testified that Brown fired him on January 16, immediately following the conversation with Blackburn. Tr. 52. No contrary evidence was presented at hearing as to the exchange between Bungard and Brown, and this court credits Bungard's testimony of the events at issue. Bungard was sent home on January 16 by Brown, and he never returned to work. Brown told the other crew members that he had fired Bungard. Tr. 111-12. The Respondent presented evidence that only Jackson was authorized to officially terminate Bungard's employment. Tr. 157, 202. However, for purposes of finding an adverse employment action under the Act, whether Brown suspended Bungard or fired him is immaterial; both acts are examples of adverse employment actions. Therefore, I find that Bungard suffered an adverse employment action that began when Brown told him he was fired on January 16, 2015 to the point when Jackson officially terminated his employment on January 20.

C. Discriminatory Motive:

The Commission has acknowledged that it is often difficult to establish a Amotivational 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). To establish the nexus, the Commission has identified the following indicia of discriminatory intent: (1) hostility or animus toward the protected activity; (2) knowledge of the protected activity; and (3) coincidence in time between the protected activity and the adverse action. *Sec=y of Labor on behalf of Lige Williamson v. CAM Mining, LLC,* 31 FMSHRC 1085, 1089 (Oct. 2009). The Commission has further considered the disparate treatment of the miner in analyzing the nexus requirement. *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981), *rev=d on other grounds*, 709 F.2d 86 (D.C. Cir. 1983). It is not necessary, however, to establish all four indications of discriminatory intent. For example, where there is knowledge of the protected activity and coincidence in time between the protected activity and the adverse action, a causal connection is supported. *Sec'y of Labor, on behalf of Yero Pack v. Cimbar Performance Minerals*, 2012 WL 7659706, *4 (ALJ)(Dec. 2012).

"Hostility towards protected activity—sometimes referred to as 'animus'—is another circumstantial factor pointing to discriminatory motivation. The more such animus is specifically directed towards the alleged discriminatee's protected activity, the more probative weight it carries." *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corporation*, 2 FMSHRC 2508, 2511 (Nov. 1981)(citations omitted). In the instant case, there is ample evidence of hostility or animus towards the protected activity. As soon as Bungard made a request for a dust mask from Brown, Brown became agitated with Bungard. Tr. 48, 107, 118, 123. Brown then misreported to Blackburn that Bungard refused to work, to which Blackburn responded, "get him the F out of here." Tr. 52. Brown told Bungard that he brought his termination onto himself by wanting to

walk out of the mine to get a dust mask.[17] Tr. 52. Brown then taunted Bungard and attempted to engage him physically. Tr. 55-57. Brown then told the rest of the crew that he was planning on suspending Bungard for asking for a dust mask, but he fired him for trying to fight him. Tr. 111-12.

Jackson's understanding of the events on January 16 came exclusively from Blackburn, and Blackburn's understanding came exclusively from Brown. Tr. 152-53, 211-12, 244-45. Blackburn and Jackson were aware that Bungard requested a dust mask prior to what transpired between Bungard and Brown. Tr. 152-53, 212. Blackburn chose to believe Brown without first speaking with Bungard, anyone else in the crew, or engaging in any reasonable investigation. Tr. 172-73. Similarly, Jackson chose to accept Blackburn's one-sided second-hand account of what transpired, and did not engage in any investigation.

Jackson had a graduate degree and 15 years of Human Resources experience, with two and a half years as the Director of Human Resources at the mine, but he somehow knew nothing about the Mine Act's protections of protected activity and its prohibitions against discrimination. Tr. 201, 208-09, 231-33. Indeed, it appears that Jackson was not alone in his ignorance towards miners' rights. Neither Blackburn nor Brown—both of whom served in supervisory capacities—appeared to have any knowledge of the protections provided by Section 105(c). Had any supervisor at GMS had knowledge or training in miners' rights, then Bungard's request for safety equipment, followed closely by a suspension, would have immediately raised red flags, such that an investigation would have been conducted. But GMS, which provides services to numerous mines, did not even have a policy in place concerning the investigation of discrimination or harassment. Tr. 231-33, 245.

GMS cannot claim some sort of safe harbor based on Jackson's ignorance of the actual events when that ignorance was a result of Jackson choosing not to investigate the incident prior to firing Bungard. Jackson may not have evinced animus towards the protected activity, but by choosing to adopt whole cloth Blackburn's second-hand account of Brown's, the hostility that Brown displayed towards the protected activity can be ascribed to Jackson. Respondent has essentially requested a benefit for its personnel deciding to engage in purposeful ignorance of the law and the facts on the ground. Because each person up the chain of command made the conscious decision to blindly adopt the account of the person beneath them, without performing any investigation, then they also adopted the animus of the person beneath them. Therefore, I

[17] There were only two witnesses—Bungard and Brown—to most of the interactions between Bungard and Brown. Bungard appeared to be a credible and forthright witness at hearing, and as he was the only one of these two to testify at hearing, I fully credit his account of what transpired between them.

find that animus towards the protected activity was a motivating factor in the decision to fire Bungard.[18]

With respect to the second factor of knowledge of the protected activity, both Blackburn and Jackson testified that they were aware that Bungard requested a dust mask on January 16. Tr. 152-53, 212. Therefore, they both had knowledge of the protected activity.

With respect to coincidence in time between the protected activity and the adverse action, the Commission has noted, A[a] three week span can be sufficiently close in time@, especially when there is evidence of intervening hostility, animus or disparate treatment. *CAM Mining, LLC,* 31 FMSHRC at 1090. Likewise, in *All American Asphalt*, a 16-month gap existed between the miners= contact with MSHA and the operator=s failure to recall miners from a layoff; however, only one month separated MSHA=s issuance of a penalty resulting from the miners= notification of a violation and that recall failure. *Sec=y of Labor on behalf of Hyles v. All American Asphalt*, 21 FMSHRC 34 (Jan. 1999). Similarly, in *Pamela Bridge Pero v. Cyprus Plateau Mining Corp.*, the Commission found a five-month gap to constitute close temporal proximity between the protected activity and the adverse employment action. 22 FMSHRC 1361, 1365 (Dec. 2000). The Commission stated AWe >appl[y] no hard and fast criteria in determining coincidence in time between protected activity and subsequent adverse action when assessing an illegal motive. Surrounding factors and circumstances may influence the effect to be given to such coincidence in time.=@ *Sec=y of Labor on behalf of Hyles v. All American Asphalt*, 21 FMSHRC at 47 (quoting *Hicks v. Cobra Mining, Inc.*, 13 FMSHRC 523, 531 (Apr. 1991)). In the instant case, Bungard was sent home within the same shift of his requesting a dust mask. He was officially terminated by Jackson four days later. This close time frame weighs in favor of finding a nexus between the protected activity and the adverse employment action.

In the instant case, no evidence was presented with respect to disparate treatment. However, weighing the other indicia, I find that the Respondent's adverse employment actions were motivated in significant part by Bungard's protected activity.

D. Affirmative Defenses

Respondent argues that it would have taken the same actions that it took with regards to Bungard's termination based on unprotected activity alone. Resp. Brief at 25-27. The unprotected activity that it cites in this regard is insubordination towards Brown. *Id.* In raising this argument, the Respondent bears the burden of production and proof with regards to each element of the defense. *Schulte v. Lizza Indus., Inc*., 6 FMSHRC 8, 15 (Jan. 1984).

[18] Further, I find the Respondent's argument that Brown had no authority to fire Bungard problematic. Brown told Bungard and the rest of the crew that Bungard was fired. Bungard left work understanding that he had been fired. Blackburn and Jackson engaged in no independent investigation or review of the events, and their actions with respect to proceeding with the termination appeared merely ministerial. Therefore, in effect, Brown was the decision-maker with respect to Bungard's termination.

The problem with Respondent's defense is that they provided no credible evidence that Bungard was insubordinate towards Brown. I find that Bungard's testimony concerning the events was credible. Jackson may well have based his decision to terminate Bungard based on Blackburn's account, which was based solely on Brown's account. As there was no investigation into the matter by Blackburn or Jackson, their testimony represents hearsay and hearsay upon hearsay. Their decisions to rubber-stamp Brown's account of the situation in no way compels this court to affix a rubber-stamp upon their rubber-stamp. The judge's role is not to "pass on the wisdom or fairness of such asserted business justifications, but rather only to 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). However, in this instance, the Respondent had no policy for how to deal with issues involving protected activities or discrimination, and every decisionmaker chose to actively remain ignorant of whether Brown's account was truthful or whether a miner was being discriminated against. The decision to fire Bungard was not a reasonable business decision because statutorily protected activities were implicated and no investigation was conducted as to whether they were the cause for the termination. Respondent alleges that Bungard was insubordinate and that he tried to engage Brown in a fight, but the only credible evidence presented at hearing showed that Bungard asked for a dust mask and Brown tried to engage him in a fight. Therefore, I find that Respondent's "proferred reasons had no basis in fact." *Turner v. Nat. Cement Co. of California*, 33 FMSHRC 1059, 1073 (May 2011). Effectively, the Respondent's conduct makes it impossible to determine whether unprotected activities played *any* role in its decision, because there is no proof that any unprotected activities actually occurred.

2) **Interference**:

A miner may also bring a complaint "for unjustified interference with the exercise of protected rights which is separate from the more usual intentional discrimination claims evaluated under the *Pasula-Robinette* framework." *UMWA on behalf of Franks and Hoy v. Emerald Coal Res., LP*, 36 FMSHRC 2088, 2103 n.22 (Aug. 2014) (Young & Cohen, Comm'rs), *vacated*, 620 Fed. Appx. 127 (3d Cir. 2015); *id.* at 2105-07 (Jordan & Nakamura, Comm'rs).

> To make out a claim of discrimination under the *Pasula-Robinette* framework, an employee must prove that he engaged in protected activity and suffered an adverse employment action motivated at least in part by the protected activity. *Turner v. Nat'l Cement Co. of Cal.*, 33 FMSHRC 1059, 1064 (May 2011); *Sec'y of Labor on behalf of Pasula v. Consol. Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds sub nom. Consol. Coal Co. v. Marshall,* 663 F.2d 1211 (3d Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981). In contrast, in interference cases, the Commission has accepted claims where the complainant did not actually engage in protected activity or where the conduct complained of was verbal harassment rather than a classic adverse employment action. *See Sec'y of Labor on behalf of Gray v. N. Star Mining, Inc.*, 27 FMSHRC 1 (Jan. 2005); *Moses v. Whitley Dev. Corp.*, 4 FMSHRC 1475 (Aug. 1982), *aff'd*, 770 F.2d 168 (6th Cir. 1985). In these cases, the Commission has focused not on the employer's motive, but rather on whether the conduct would "chill the exercise of protected rights," either by the

directly affected miner or by others at the mine. *Gray*, 27 FMSHRC at 8; *Moses*, 4 FMSHRC at 1478-79.

Sec'y Of Labor on behalf of Greathouse v. Monongalia County Coal Co., 38 FMSHRC 941, 947 (May 2016)(ALJ).

In the *Franks* case, two Commissioners provided a framework for analyzing interference claims based upon its prior precedent in *Gray* and *Moses*, and recently, a majority in the Commission affirmed the use of this test.[19] According to this test, an interference violation occurs if:

1) A person's action can be reasonably viewed, from the perspective of members of the protected class and under the totality of the circumstances, as tending to interfere with the exercise of protected rights, and

2) The person fails to justify the action with a legitimate and substantial reason whose importance outweighs the harm caused to the exercise of protected rights.

UMWA on behalf of Franks and Hoy v. Emerald Coal Resources, 36 FMSHRC at 2108. According to this analysis "proof of the operator's intent to interfere with the miner's statutory rights is not required." *Id.* at 2112-2113.

Applying this test to the instant case, I find that the Respondent interfered with Bungard's statutory rights. Bungard had a right under the Mine Act to request safety equipment, such as a dust mask. When Bungard exercised that right, Brown told Bungard in front of the crew that it was his responsibility to have a dust mask. Tr. 107. Brown began pointing and yelling at Bungard, and displayed visible anger. Tr. 123. Brown then tried to engage in a fight with Bungard, and subsequently fired him. Tr. 51-57, 110. Brown told the rest of the crew that he planned on suspending Bungard for requesting a dust mask, but fired him because he tried to fight with him. Tr. 111. Bungard, Gonchoff, Glenn Denning, and others in the crew believed that Bungard was fired for asking for a dust mask. Tr. 111-12. A reasonable person in Bungard's position would understand Respondent's conduct to mean that one risked losing his job if he requested safety equipment.

Under the second prong of the test, the Respondent argues that it had a legitimate reason for firing Bungard because Bungard was insubordinate and tried to fight with Brown. The problem with this argument, as described *supra*, is that there is no credible evidence that

[19] Several ALJs have adopted this test. *See Sec'y Of Labor on behalf of Greathouse v. Monongalia County Coal Co.* , 38 FMSHRC 941 (May 2016)(ALJ); *Sec'y of Labor on behalf of McGary v. Marshall Cty. Coal Co.*, 37 FMSHRC 2597, 2603-04 (Nov. 2015) (ALJ); *McGlothlin v. Dominion Coal Corp.*, 37 FMSHRC 1256, 1264-65 (June 2015) (ALJ); *Pendley v. Highland Mining Co.*, 37 FMSHRC 301, 309-11 (Feb. 2015) (ALJ). The Commission has recently decided that a judge did not err when she applied the *Franks* test in an interference test. *Sec'y of Labor on behalf of McGary v. The Marshall County Coal Co.l*, WEVA 2015-583-D (Aug. 26, 2016).

Bungard was insubordinate or tried to fight with Brown. All the evidence presented at hearing from those that were present for any part of the interaction described a chain of events where the reverse occurred. I discount Blackburn and Jackson's testimony to the contrary because they chose not to investigate the incident, and their entire understanding of the events stemmed solely from Brown.[20] Accordingly, I find that there was no legitimate and substantial reason for Respondent's actions that outweigh the harm caused to the exercise of protected rights.

3) Damages and Penalty

A successful complainant is entitled to be made whole for the entire period of his unemployment, plus interest. *See Local Union 2274,District 28, UMWA v. Clinchfield Coal Co.*, 10 FMSHRC 1493 (Nov. 1988)(" *Local 2274")*. However, the Commission has held that

> A backpay award "may be reduced in appropriate circumstances where an employee incurs a 'willful loss of earnings."' 21 FMSHRC at 284 (quoting *Secretary of Labor on behalf of Dunmire v. Northern Coal Co.,* 4 FMSHRC 126, 144 (Feb. 1982)) (other citations omitted). Under the duty to mitigate damages from discrimination, "a discriminatee is not entitled to back pay to the extent that he fails to remain in the labor market, refuses to accept *substantially equivalent employment,* fails diligently to search for alternative work, or voluntarily quits without good reason." *NLRB v. Madison Courier, Inc.,* 472 F.2d 1307, 1317 (D.C. Cir. 1972) (citations omitted) (emphasis in original).

Secretary of Labor, on behalf of Walter Jackson v. Mountain Top Trucking Company, Inc., 21 FMSHRC 1207, 1212 (Nov. 1999).

In the instant case, Bungard typically worked 48 hours per week for GMS at $15 per hour for the first 40 hours and $22.50 overtime. Tr. 34-35. Bungard was fired on January 16, 2015 and gained full time employment on October 19, 2015. However, Bungard did not make efforts to find employment (aside from casual employment he engaged in) until the late summer. Tr. 86. Bungard's belief that he was blacklisted from mining, while sincere, was based on no objective evidence. Furthermore, his stress following the termination does not warrant him not searching for employment for months. I find that had Bungard been diligent in searching for employment, he would have found a comparable position to the one he held with GMS within 6 months of his termination.

Respondent argues that Bungard's damages should be cut off when GMS engaged in a large reduction of force in April 2015. The Commission has recognized that a bona fide reduction in force can toll a miner's right to back pay, and the burden in showing that work is no longer available for the complainant lies with the employer. *Sec'y of Labor, on behalf of Gatlin v. KenAmerican Res., Inc*., 31 FMSHRC 1050, 1054-55 (Oct. 2009). The Respondent must make this showing by a preponderance of the evidence. *Sec'y of Labor, on behalf of C.R. Meyer and Sons Co.*, 35 FMSHRC 1183, 1188 (2013). I find that the Respondent has not met this burden.

[20] The only other person present for the January 16 incident, Brown, did not testify at hearing.

GMS argues that it laid off between 230-240 workers in April of 2015, and that Bungard, as a red hat, would not have been retained as an employee or offered a transfer. Tr. 161-63, 253, 270-271. However, GMS appeared to use no objective criteria in making the decision concerning which miners would be laid off, which retained, and which offered transfer. Tr. 242-43. Blackburn had a meeting with Jackson and regional manager John Mattingly before creating a spreadsheet. Tr. 183. He did not use any criteria provided by Human Resources, but testified that he used his own experiences and information provided by subordinates. Tr. 182. GMS employment records indicate that red hat miners remained at the mine or were recalled. GX-2, GX-3. Furthermore, GMS has continued to recruit and hire new employees, holding job fairs and interview sessions. Tr. 254-55. Indeed, their online advertisements state that they are "constantly expanding operations and constantly in need of good employees." Tr. 254. Without anything more than an *ad hoc* system for determining layoffs and transfers, I cannot find that Bungard would have been laid off during the spring reduction in force, or that he would not have been offered a recall.

Accordingly, Bungard is entitled to 26 weeks of backpay at a rate of $780.00 per week, plus pre-judgment interest calculated on the federal rate designated by the Internal Revenue Service for the underpayment of taxes. *See Local 2274*, 10 FMSHRC at 1505. Additionally, Respondent must expunge Bungard's employment records of all references to his unlawful termination, and must inform the Mine that Bungard was unlawfully terminated.

The Secretary proposed a penalty of $25,000.00 for Respondent's violations. The principles governing the authority of Commission Administrative Law Judges to assess civil penalties de novo for violations of the Mine Act are well established. Section 110(i) of the Mine Act delegates to the Commission and its judges "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(i). The duty of proposing penalties is delegated to the Secretary. 30 U.S.C. §§ 815(a), 820(a). 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 court's assessment here is independent, and the Secretary's proposal "is not a baseline or starting point," that the court has used in its assessment. *Sec'y of Labor, MSHA v. The American Coal Co.*, LAKE 2011-701. The Act requires that in assessing civil monetary penalties, the judge must consider six statutory penalty criteria: the operator's history of violations; its size; whether the operator was negligent; the effect on the operator's ability to continue in business; the gravity of the violation; and whether the violation was abated in good faith. 30 U.S.C. § 820(i). In keeping with this statutory requirement, the Commission has held that judges must make findings of fact on the statutory penalty criteria. *Sellersburg Stone Co.*, 5 FMSHRC 287, 292 (Mar. 1983), *aff'd*, 736 F.2d 1147, 1152 (7th Cir. 1984). Once these findings have been made, a judge's penalty assessment for a particular violation is an exercise of discretion "bounded by proper consideration of the statutory criteria and the deterrent purposes underlying the Act's penalty scheme." *Id.* at 294; *see also Cantera Green*, 22 FMSHRC 616, 620 (May 2000).

In the instant case, the only factor weighing in GMS's favor is that it does not have an extensive history of Section 105(c) violations. However, the other factors weigh strongly against the Respondent. GMS is a large contractor for penalty purposes. The gravity of the matter is exceptionally serious, as miners should not be demeaned, disciplined, or fired for reasonably

requesting safety equipment. GMS's handling of the entire situation, from creating a difficult process to procure safety equipment, to not training any of its management in miners' rights, to failing to conduct any sort of investigation, exhibits not just a high level, but very high level, of negligence. GMS did not make any good faith effort to rectify, investigate, or even acknowledge Bungard's allegations. GMS has presented no evidence that the proposed penalty will impact its ability to continue in business. Considering all of the factors, I find that a $35,000.00 penalty is appropriate.

CONCLUSION AND ORDER

Based on the foregoing, I find that Respondent violated §105(c) of the Act by discriminating against Bungard for engaging in protected activity and interfering with his statutory rights.

Respondent is **ORDERED** to pay Bungard for 26 weeks of backpay, at $780.00 per week, plus interest.[21] Further, Respondent shall expunge Bungard's employment records of all references to his unlawful termination, and must inform the Mine that Bungard was unlawfully terminated.

It is further **ORDERED** that Respondent pay a civil penalty of $35,000.00 within 40 days of this decision to the Secretary of Labor.[22]

/s/ Kenneth R. Andrews
Kenneth R. Andrews
Administrative Law Judge

[21] The interest should be calculated using the *Arkansas-Carbona/Clinchfield Coal Co.* method, which provides that the amount of interest equals the quarter's net back pay multiplied by the number of accrued days of interest multiplied by the short-term federal underpayment rate. *Sec'y of Labor on behalf of Bailey v. Arkansas-Carbona Co.*, 5 FMSHRC 2042, 2052 (Dec. 1983), *as modified by Clinchfield Coal Co*., 10 FMSHRC 1493, 1505-06 (Nov. 1988).

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

Distribution: (U.S. Certified Mail)

Jordana L. Greenwald, Esq., Office of the Solicitor, U. S. Department of Labor, The Curtis Center, Suite 630 East, 170 South Independence Mall West, Philadelphia, PA 19106-3306

Sunshine R. Fellows, Esq., The Levicoff Law Firm, P.C., Center City Tower, Suite 1900, 650 Smithfield Street, Pittsburgh, PA 15222

Shayne Bungard, 2002 4th Street, Moundsville, WV 26041

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
721 19th STREET, SUITE 443
DENVER, CO 80202-2536
303-844-3577/FAX 303-844-5268

October 24, 2016

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDINGS Docket No. LAKE 2009-412 A.C. No. 11-03060-179547-02 Riola Mine Complex-Vermillion Grove
v.	Docket No. LAKE 2009-413 A.C. No. 12-02010-179550-01
BLACK BEAUTY COAL COMPANY, Respondent	Docket No. LAKE 2009-414 A.C. No. 12-02010-179550-02 Air Quality #1 Mine

DECISION APPROVING SETTLEMENT UPON REMAND

Before: Judge Manning

On March 10, 2014, I issued a decision after hearing in the above dockets.[1] *Black Beauty Coal Co.*, 36 FMSHRC 1821 (Mar. 2014 published July 2014) (ALJ). The Commission granted cross- petitions for discretionary review and issued its decision on June 16, 2016. 38 FMSHRC 1307 (June 2016). In its decision, the Commission remanded several issues to me in light of its decision. These issues are: (1) whether the violations set forth in Citation Nos. 8414910 & 6680994 and Order Nos. 8414938 & 8414939 significantly and substantially contributed to the cause and effect of a coal mine safety or health hazard (S&S); and (2) whether the violations set forth in Order Nos. 8414938 & 8414939 were the result of Black Beauty's unwarrantable failure to comply with section 75.400.

The Commission held that "the Judge's determination that the violations in these [citations and] orders were not S&S may have been flawed due to consideration of redundant safety measures." 38 FMSHRC at 1315. It further concluded that "the Judge's non-S&S findings might have influenced his view of the degree of danger, and consequently his unwarrantable failure determinations for these orders." *Id.* (footnote omitted). The Commission then remanded "the Judge's S&S and unwarrantable failure findings at issue for reconsideration in light of [its] decision." 38 FMSHRC at 1316.

[1] My decision also included dockets LAKE 2009-410 and LAKE 2009-415 which are not at issue on remand.

I encouraged the parties to settle the S&S and unwarrantable failure issues in a manner that was consistent with the Commission's decision. The parties reached a settlement and filed a motion to approve settlement on October 20, 2016. The terms of the settlement are as follows:

1. **Citation No. 8414910, LAKE 2009-414**.

This citation, issued under section 104(a) of the Mine Act, states that the approved ventilation plan was not being complied with in the No. 1 active section in violation of section 75.370(a)(1). Specifically, the citation states that a Joy continuous mining machine being operated in the No. 7 entry was not being supplied with adequate ventilation to dilute, render harmless, and carry away flammable and explosive gasses, dust, and fumes while mining. The plan required 7,000 CFM of air and the velocity at the inby end of the wing curtain was about 4,982 CFM. The issuing inspector determined that an injury or illness was reasonably likely as a result of the violation and that permanently disabling injuries could reasonably be expected. He determined that the violation was S&S, that four people would be affected, and that the violation was the result of the operator's moderate negligence. The Secretary proposed a penalty of $3,996. In my decision I affirmed the violation but reduced the gravity, vacated the S&S determination, and assessed a penalty of $2,000. 36 FMSHRC at 1850-51.

Black Beauty has agreed to accept this citation as originally written by the MSHA inspector and will accept the Secretary's proposed penalty of $3,996.

2. Citation No. 6680994, LAKE 2009-412.

This citation, issued under section 104(a) of the Mine Act, states that oil, oil saturated coal fines, and brake fluid were present on a mantrip on Unit #1 in violation of section 75.400. The citation states that the accumulations were in the transmission compartment, brake caliper compartment, and the muffler compartment. The issuing inspector determined that an injury or illness was reasonably likely as a result of the violation and that lost workdays or restricted duty could reasonably be expected. He determined that the violation was S&S, that 14 people would be affected, and that the violation was the result of the operator's moderate negligence. The Secretary proposed a penalty of $23,229. In my decision, I affirmed the violation but vacated the S&S determination and assessed a penalty of $12,000. 36 FMSHRC at 1826-28.

The parties propose to modify the citation to delete the inspector's S&S determination. The proposed settlement is based, in part, upon the representation that the temperature of the engine and transmission housing does not exceed 215 degrees Fahrenheit but the flash point for oil and coal dust was significantly higher than 300 degrees Fahrenheit. As a consequence, the violation was unlikely to contribute to an injury or illness. The parties agree that I should assess a penalty of $12,000 for this violation.

3. Order No. 8414938, LAKE 2009-413.

This order, issued under section 104(d)(2) of the Mine Act, states that combustible material was allowed to accumulate in the last three crosscuts of the south slope belt in violation of section 75.400. The order further states that the accumulations consisted of float coal dust

deposited on rock dusted surfaces from rib to rib. The accumulations were distinctively black in color and ranged from a thin coating to approximately one quarter inch in depth. This dust was also found on timbers and belt structure. The issuing inspector determined that an injury or illness was reasonably likely as a result of the violation and that lost workdays or restricted duty could reasonably be expected. He determined that the violation was S&S, that two people would be affected, and that the violation was the result of the operator's high negligence. The Secretary proposed a penalty of $10,705. In my decision, I affirmed the violation but vacated the S&S and unwarrantable failure determinations and assessed a penalty of $8,000. 36 FMSHRC at 1832-35.

The parties propose to modify this order to a section 104(a) citation, thereby removing the unwarrantable failure determination made by the MSHA inspector. The MSHA inspector's S&S and high negligence determinations remain. The proposed settlement is based, in part, upon the representation that significant accumulations were not present during the previous examination conducted by the operator. As a consequence, the violation was not caused by an unwarrantable failure of the operator to comply with the safety standard. The parties agree that I should assess a penalty of $8,000 for this violation.

4. Order No. 8414939, LAKE 2009-413.

This order, issued under section 104(d)(2) of the Mine Act, states that combustible material was allowed to accumulate upon the energized main south belt from head to tail in violation of section 75.400. The order further states that the accumulations consisted of a thin coating of float coal dust on rock dusted surfaces that was distinctively black in color. The accumulations also extended into two crosscuts. The issuing inspector determined that an injury or illness was reasonably likely as a result of the violation and that lost workdays or restricted duty could reasonably be expected. He determined that the violation was S&S, that two people would be affected, and that the violation was the result of the operator's high negligence. The Secretary proposed a penalty of $10,705. In my decision, I affirmed the violation but vacated the S&S and unwarrantable failure determinations and assessed a penalty of $8,000. 36 FMSHRC at 1836-38.

The parties propose to modify this order to a section 104(a) non-S&S citation. Thus, they are proposing to remove both the unwarrantable failure and S&S determinations made by the MSHA inspector. The MSHA inspector's high negligence determination remains unchanged but the likelihood that the violation would contribute to an injury or illness is reduced to "unlikely." The proposed settlement is based, in part, upon a representation that the accumulations were not as extensive as set forth in the inspector's order and the rollers for the belt were not hot. As a consequence, the violation was unlikely to contribute to an injury or illness and it was not caused by an unwarrantable failure of the operator to comply with the safety standard. The parties agree that I should assess a penalty of $8,000 for this violation.

ORDER

I have considered the representations and documentation submitted and I conclude that the proposed settlement is appropriate under the criteria set forth in section 110(i) of the Act. The motion to approve the settlement of the remanded citations and orders is **GRANTED** and Black Beauty Coal Company or its successor is **ORDERED TO PAY** the Secretary of Labor the sum of $1,996 within 30 days of the date of this decision.[2]

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

Distribution:

Emily L.B. Hays, Esq., Office of the Solicitor, U.S. Department of Labor, 1244 Speer Blvd., Suite 216, Denver, CO 80204-3598

Arthur Wolfson, Esq., Jackson Kelly, 3 Gateway Center, Suite 1500, 401 Liberty Ave., Pittsburgh, PA 15222-1009

RWM

[2] Following my March 10, 2014, decision on the merits, Black Beauty paid the $30,000 penalty I assessed for the four violations. (Motion to Approve Settlement at 2). The $1,996 due now reflects the difference between the total owed by Black Beauty in this Decision Approving Settlement on Remand and the amount previously paid. Payment should be sent to the Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 26, 2016

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. PREMIER ELKHORN COAL COMPANY, Respondent.	CIVIL PENALTY PROCEEDING Docket No. KENT 2011-827 A.C. No. 15-17360-248539 Mine: PE Southern Pike Co.

DECISION APPROVING SETTLEMENT ON REMAND
AND
ORDER TO PAY

Before: Judge Feldman

This civil penalty proceeding involves two citations issued to Premier Elkhorn Coal Company ("Premier") in connection with a fatal coal truck accident. Citation No. 8230316 alleges a violation of 30 C.F.R. § 77.1607(b), which requires that "[m]obile equipment operators shall have full control of the equipment while it is in motion." Specifically, Citation No. 8230316 provides:

> A fatal accident occurred on December 12, 2009, when the driver of the 2006 red International Paystar coal haulage truck, owned by Trivette Trucking (Q080), VIN 1HTXHAPTX63J233337, failed to maintain control of the loaded truck as it was descending the mine haul road. Overloading of the truck was a factor in the driver losing control. The estimated weight of the truck was 37,600 pounds over the GVWR recommended by the manufacturer. Premier Elkhorn was aware that the trucks were routinely overloaded and did nothing to stop this practice. This truck operates on mine roads as well as public highways. This condition is an unwarrantable failure to comply with a mandatory safety standard.

Relatedly, Citation No. 8230317 alleges a violation of 30 C.F.R. § 77.1605(b), which requires that "[m]obile equipment shall be equipped with adequate brakes, and all trucks and front-end loaders shall also be equipped with parking brakes." Specifically, Citation No. 8230317 provides:

> The red International Paystar model 5600I haul truck, Vehicle ID 1HTXHAPTX63J233337, was not equipped with adequate brakes. This truck was involved in a fatal accident on December 12, 2009. The operator of this mine did

not assure that the above listed truck being operated by a contractor was equipped with adequate brakes. A mechanical evaluation conducted during the fatal accident investigation revealed the following conditions were present: 1. Both the left and right side brake drums on the steering axel had deposits of dried grease on the drum lining friction surface. These conditions compromise the braking activity. 2. The right side brake on the rear tandem axel did not function when tested. 3. Wear on the brake drums in excess of maximum allowable diameter was found on the right front tandem and both the left and right side on the rear tandems. 4. Bluing was found on the right side drum on the front tandem and the left side drum on the rear axle. Bluing indicates excessive heat. These conditions compromise the braking capacity. This truck operates on mine roads as well as public highways.

I. Procedural History

After a hearing on the merits, Administrative Law Judge Jeffrey Tureck vacated both citations, finding that the Secretary failed to demonstrate that the subject haul truck was hauling an unsafe amount of coal, and that the accident was more likely attributable to a steering problem that caused the brakes and steering to simultaneously fail. 35 FMSHRC 150, 164 (Jan. 2013) (ALJ). The Secretary filed a petition for discretionary review, which was granted by the Commission.[1]

On review, regarding Citation No. 8230317, the Commission concluded that Judge Tureck's finding that the condition of the haul truck's brakes did not cause the fatal accident was supported by substantial evidence. As such, the Commission affirmed the vacation of Citation No. 8230317. 38 FMSHRC 1587, 1595 (July 2016).

However, the Commission reversed Judge Tureck's vacation of Citation No. 8230316 based on his finding that Premier was not responsible for loss of control of the truck because the Secretary failed to establish that the truck was loaded in excess of the manufacturer's gross vehicle weight rating. *Id.* at 1593. In so doing, the Commission relied on *Clintwood Elkhorn Mining Co.*, 35 FMSHRC 365, 370 (Feb. 2013), which held that the Secretary is not required to prove "a causal or contributing factor for the loss of control" to establish a violation of section 77.1607(b), but rather only must demonstrate that the truck driver lost control of his vehicle. 38 FMSHRC at 1591. Here, the Commission determined that the truck driver lost control of his vehicle and that this violation, given its fatal consequences, was properly designated as significant and substantial (S&S). *Id.* at 1591-92.

The Commission's *Clintwood Elkhorn* decision narrowly held that the Secretary did not have to demonstrate that a truck was overloaded to establish the fact of a violation of section 77.1607(b). However, whether such a truck is overloaded is relevant, if not determinative, in resolving whether the accident is attributable to an unwarrantable failure. Here, as the subject truck overturned, the Mine Safety and Health Administration ("MSHA") could not determine

[1] As Judge Tureck is no longer with the Commission, this matter was assigned to the undersigned on remand on July 12, 2016.

how much coal the truck was carrying prior to the accident. *Id.* at 1597 (Commissioner Cohen, dissenting). However, the inability to determine the load of an overturned truck, as a consequence of a truck operator's loss of control, should not inure to the benefit of the mine operator.

The Commission's majority opinion concluded that the evidence that the truck was overloaded is "at best, circumstantial." *Id.* at 1592. The Secretary may satisfy his burden of proof, with respect to the issue of unwarrantable failure, by relying on reasonable inferences drawn from indirect (circumstantial) evidence, provided that such inferences are inherently reasonable and bear a rational connection between the evidentiary facts and the ultimate fact to be inferred. *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2153 (Nov. 1989). I agree with the dissenting opinion of Commissioner Cohen that the record, consisting of weight tickets showing a pattern of overloading trucks in close temporal proximity to the accident, and a relevant manufactures' truck manual providing relevant gross vehicle weight ratings, demonstrates that ample circumstantial evidence warrants the inference that the truck was overloaded.[2] *See* 38 FMSHRC at 1590-91. Premier does not deny that overloading a truck in excess of the gross vehicle weight rating could cause "component failure, result[ing] in property damage, personal injury, or death." *Id.* at 1589.

Nevertheless, the Commission's majority decision held that Citation No. 8230316 was not a result of an unwarrantable failure. *Id.* at 1592. Consequently, the Commission now has remanded Citation No. 8230316 for a determination of the appropriate civil penalty. *Id.* at 1595.

II. Settlement Agreement

On remand, the parties have now filed a motion to approve settlement and dismiss this matter. The parties have agreed on a reduction of the proposed civil penalty for Citation No. 8230316 from $70,000.00 to $7,500.00, based on the Commission's deletion of the unwarrantable failure designation. As noted above, although I believe that there is significant evidence reflecting that the violation may have been attributable to an unwarrantable failure, I am constrained to approve the parties' settlement motion given the Commission's majority decision to the contrary.

[2] Although Judge Tureck denied admission of this documentary evidence, the Commission noted that the judge permitted the Secretary's witnesses to testify with respect to the information therein. 38 FMSHRC at 1591 n.10.

Consistent with the above discussion, I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act. **WHEREFORE**, the motion to approve settlement **IS GRANTED**, and pursuant to the parties' agreement, Premier Elkhorn Coal Company **IS ORDERED** to pay the $7,500.00 civil penalty within 30 days of this Order in satisfaction of the single citation remaining at issue on remand.[3] Upon receipt of timely payment, the captioned matter **IS DISMISSED**.

/s/ Jerold Feldman
Jerold Feldman
Administrative Law Judge

Distribution:

Matt S. Shepherd, Esq., U.S. Department of Labor, Office of the Solicitor, 618 Church Street, Suite 230, Nashville, TN 37219

Melanie Kilpatrick, Esq., Rajkovich, Williams, Kilpatrick & True, PLLC, 3151 Beaumont Centre Circle, Suite 375, Lexington, KY 40513

/acp

[3] Payment should be sent to the Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390. Please include the Docket No. and A.C. No. noted in the above caption on the check.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
721 19th STREET, SUITE 443
DENVER, CO 80202-2536
TELEPHONE: 303-844-5266 / FAX: 303-844-5268

October 27, 2016

SECRETARY OF LABOR, MSHA, On behalf of **THOMAS MCGARY** and **RON BOWERSOX**, Complainants, v. THE MARSHALL COUNTY COAL CO., MCELROY COAL COMPANY, MURRAY AMERICAN ENERGY, INC., AND MURRAY ENERGY CORPORATION, Respondent.	INTERFERENCE PROCEEDING Docket No. WEVA 2015-583-D MORG-CD 2014-15 Marshall County Mine Mine ID: 46-01437
SECRETARY OF LABOR, MSHA, On behalf of **RICK BAKER** and **RON** **BOWERSOX**, Complainants, v. OHIO COUNTY COAL CO., CONSOLIDATION COAL COMPANY, MURRAY AMERICAN ENERGY, INC., AND MURRAY ENERGY CORPORATION, Respondent.	INTERFERENCE PROCEEDING Docket No. WEVA 2015-584-D MORG-CD 2014-16 Ohio County Mine Mine ID: 46-01436
SECRETARY OF LABOR, MSHA, On behalf of **ANN MARTIN** and **RON** **BOWERSOX**, Complainants, v.	INTERFERENCE PROCEEDING Docket No. WEVA 2015-585-D MORG-CD 2014-17

HARRISON COUNTY COAL CO., CONSOLIDATION COAL COMPANY, MURRAY AMERICAN ENERGY, INC., AND MURRAY ENERGY CORPORATION, Respondent.	Harrison County Mine Mine ID: 46-01318
SECRETARY OF LABOR, MSHA, On behalf of **RAYMOND COPELAND** and **RON BOWERSOX**, Complainants, v.	INTERFERENCE PROCEEDING Docket No. WEVA 2015-586-D MORG-CD 2014-18
MONONGALIA COUNTY COAL CO., CONSOLIDATION COAL COMPANY, MURRAY AMERICAN ENERGY, INC., AND MURRAY ENERGY CORPORATION, Respondent.	Monongalia County Mine Mine ID: 46-01968
SECRETARY OF LABOR, MSHA, On behalf of **MICHAEL PAYTON** and **RON BOWERSOX,** Complainants, v.	INTERFERENCE PROCEEDING Docket No. WEVA 2015-587-D MORG-CD 2014-19
MARION COUNTY COAL CO., CONSOLIDATION COAL COMPANY, MURRAY AMERICAN ENERGY, INC., AND MURRAY ENERGY CORPORATION, Respondent.	Marion County Mine Mine ID: 46-01433

DECISION ON REMAND

Appearances: Charles Lord, Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Complainants;

Laura Carr, UMWA, Washington, D.C., for the Complainants;

Thomas Smock and Philip Kontul, Ogletree, Deakins, Nash, Smoak & Stewart, P.C., Pittsburgh, Pennsylvania, for the Respondents.

Before: Judge Miller

These cases are before me based upon complaints of interference brought by a number of employees at five mines owned and operated by Murray Energy Corporation ("Murray Energy"). The cases were brought pursuant to the interference provisions of Section 105(c) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815(c) ("the Act"). The parties presented evidence on the claims at hearing and a decision was issued on November 16, 2015. *Sec'y of Labor on behalf of McGary v. Marshall Cty. Coal Co*., 37 FMSHRC 2597 (Nov. 2015) (ALJ). The Commission issued a decision after review on August 26, 2016. *Sec'y of Labor on behalf of McGary v. Marshall Cty. Coal Co*., 38 FMSHRC __, No. WEVA 2015-583-D (Aug. 26, 2016). The Commission remanded two issues to me, and I address them here. *See id.*, slip op. at 21.

At issue in each of the cases is a mandatory "awareness meeting" that was held at each of the mines, in which the CEO of Murray Energy, Robert Murray, discussed complaints that had been made by miners to the Mine Safety and Health Administration ("MSHA"). The parties appeared at a hearing beginning on Tuesday, September 21, 2015, in Pittsburgh, Pennsylvania. Although the parties stipulated to many of the facts and documents to be admitted in the case, each side also provided a list of potential witnesses for the hearing. Just prior to the hearing, Murray Energy filed a complaint in federal district court that named one of the witnesses as a party and included the deposition testimony of two other witnesses from this case in the body of the complaint. As a result, the three witnesses did not want to testify. None of the parties presented testimony, but they did present documents, stipulations and arguments. The parties were also given the opportunity on remand to present additional briefs in support of their positions.

The hearing and evidence addressed in the original decision focused on whether Murray Energy had interfered with the Complainants' rights to make a complaint to MSHA pursuant to Section 103(g) of the Act and therefore violated the interference provision of Section 105(c)(1) of the Act. I determined that Murray Energy and the five mines did violate Section 105(c) by interfering with the miners' rights to make anonymous complaints to MSHA pursuant to Section 103(g) of the Mine Act. 37 FMSHRC at 2605-08. I also addressed the relief sought by the Secretary and the six proposed penalties of $20,000.00 each. 37 FMSHRC at 2608-10. I assessed five of the six proposed penalties, but increased the amounts from $20,000.00 to $30,000.00 for each of the five violations.

Both the Secretary and Respondents appealed the decision to the Commission. The Commission agreed that the operators' actions at all five mines impermissibly interfered with the rights of miners to make anonymous 103(g) complaints to the Secretary. *McGary*, slip op. at 13 (Aug. 26, 2016). The majority also agreed that the sixth claim against the mine was correctly dismissed as being duplicative of the five others. *Id.* at 16-17. Thereafter, the Commission addressed the penalties and specifically directed that the basis for the increased penalty be adequately provided. *Id.* at 17-20. The Commission also suggested that the relief regarding

posting of a notice and reading a notice to miners be clarified. *Id*. at 20-21. The issues for remand, then, are the appropriate penalty amount for five interference claims along with a clarification of the statement that the Court ordered to be read at the five mines regarding the interference with the right to make a complaint to MSHA.

For purposes of this decision regarding the penalty and the statement to be made by Murray management, I incorporate the facts and findings as set forth in the original decision. I rely on no further facts but have reviewed the briefs and information that the parties have provided to address these two issues on remand. As discussed in that first decision, an interference claim requires proof that the operator's conduct interfered with "the exercise of protected rights." 37 FMSHRC at 2604 (quoting *Sec'y of Labor on behalf of Gray v. N. Star Mining, Inc.,* 27 FMSHRC 1, 8 (Jan. 2005); *Moses v. Whitely Dev. Corp.*, 4 FMSHRC 1475, 1478-79 (Aug. 1982), *aff'd*, 770 F.2d 168 (6th Cir. 1985)). Here, the right at issue is the right of miners and their representatives to make health and safety complaints directly to MSHA. Under Section 103(g) of the Mine Act, a miner who has reasonable grounds to believe that a violation of the Act or a safety or health standard exists at the mine "shall have a right to obtain an immediate inspection" upon giving notice to the Secretary. 30 U.S.C. § 813(g)(1). The legislative history of the Act explains that this provision was included because of "the Committee's firm belief that mine safety and health will generally improve to the extent that miners themselves are aware of mining hazards and play an integral part in the enforcement of the mine safety and health standards." S. Rep. No. 95-181, at 30 (1977). Confidentiality is crucial to the exercise of the 103(g) right. *See UMWA on behalf of Franks v. Emerald Coal Res., LP*, 36 FMSHRC 2088, 2109-11 (Aug. 2014). I found that the right to make complaints is fundamental and that interfering with that right is a serious matter. 37 FMSHRC at 2610.

In the original decision, I raised the penalty amount from the $20,000.00 per incident sought by the Secretary to $30,000.00 each. *Id.* I did so based in part on the seriousness of the interference as well as the mine's filing of a complaint against the UMWA based upon information learned during depositions prior to the hearing, thereby chilling the willingness of witnesses to testify. *Id.* at 2609-10. Prior to hearing in this case, the parties presented a list of witnesses and exhibits. Three of the six complainants, Ron Bowersox, Michael Payton and Ann Martin, were named as witnesses for the Secretary. On the Friday prior to the hearing scheduled for Tuesday, September 22, 2015, Respondents filed a complaint in the U.S. District Court against the UMWA and Bowersox. Excerpts from the deposition testimony of Bowersox, Martin and Payton in this case were quoted in the complaint and were part of the basis of that complaint. The case in the district court was subsequently dismissed but was addressed in the Commission decision on appeal. The Commission found that the district court complaint was properly admitted into evidence in this case, but that it was best addressed in a separate case as a separate instance of interference and should not be considered in assessing the penalty in this case. *McGary*, slip op. at 20 (Aug. 26, 2016).

Penalty.

The Secretary has proposed a penalty of $20,000.00 for each of the five penalties assessed in this case. In its brief after remand, the Secretary argues that the $20,000.00 as

proposed should be assessed. The mine operator argues primarily that there is no basis in the record to raise the penalty above the proposed amount.

The principles governing the authority of Commission administrative law judges to assess civil penalties de novo for violations of the Mine Act are well established. Section 110(i) of the Mine Act delegates to the Commission and its judges "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(i). The duty of proposing penalties is delegated to the Secretary. 30 U.S.C. §§ 815(a), 820(a). 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 judge must consider six statutory penalty criteria: the operator's history of violations; its size; whether the operator was negligent; the effect on the operator's ability to continue in business; the gravity of the violation; and whether the violation was abated in good faith. 30 U.S.C. § 820(i). In keeping with this statutory requirement, the Commission has held that judges must make findings of fact on the statutory penalty criteria. *Sellersburg Stone Co.*, 5 FMSHRC 287, 292 (Mar. 1983), *aff'd*, 736 F.2d 1147, 1152 (7th Cir. 1984). Once these findings have been made, a judge's penalty assessment for a particular violation is an exercise of discretion "bounded by proper consideration of the statutory criteria and the deterrent purposes underlying the Act's penalty scheme." *Id*. at 294; *see also Cantera Green*, 22 FMSHRC 616, 620 (May 2000).

The history of assessed violations was admitted into evidence. The mines have no history of interference violations. The mines and the Murray entities are large operators. The parties have stipulated that the penalties as proposed will not affect Respondents' ability to continue in business. Jt. Stips. ¶¶ 34, 35. With regard to good faith abatement, as of the date of the hearing, the mine had not investigated or disciplined any miners for violating the reporting policy. However, there is no evidence that the mine had taken any steps to rescind the policy, either. I find the gravity of the violation to be serious because a high-ranking official announced the policy in a mandatory meeting, regarding complaints that miners have every right to make. The policy, as addressed in the meetings, carried a number of statements that could be understood as threats to the miners' employment. I also find the negligence to be a factor in the penalty given all of the facts that came to light in this case, including the nature of the interference and the manner in which the policy was presented to the miners. Both the negligence and gravity are discussed throughout the original decision. I find no basis to modify the proposed penalties and therefore, I assess $20,000.00 per violation as proposed by the Secretary.

Posting and Other Relief.

The Secretary asks the court to order the mine to cease and desist from violating Section 105(c), rescind its rule requiring notice to management about 103(g) complaints, and reverse any disciplinary actions issued as a result of the rule or policy. In addition, the Secretary seeks an order requiring a Murray Energy corporate officer to read a notice to all miners regarding the violations and requiring that the notice be mailed to all of the miners and posted at the mine for a period of one year.

Section 105(c)(2) authorizes the Commission to require a person who has committed a violation of Section 105(c)(1) "to take such affirmative action to abate the violation as the Commission deems appropriate." 30 U.S.C. § 815(c)(2). In cases involving statutory rights under the National Labor Relations Act, courts have found that it is appropriate to order a management official to read a remedial notice to employees when there is a "particularized need." *Federated Logistics & Operations v. NLRB*, 400 F.3d 920, 929-30 (D.C. Cir. 2005).

On appeal, the Commission discussed the relief granted and noted that the only remaining issues involved "the details of the prepared and approved statement CEO Murray is required to read to miners." *McGary*, slip op. at 21 (Aug. 26, 2016). The Commission further agreed that the Secretary should clarify its position on the manner in which the statement is to be prepared and approved.

The parties addressed the issue in their briefs. The Secretary proposed language for the notice to be read by Murray, and also asked to have the notice that has been posted, changed. The Secretary's position was supported by the UMWA. Respondents commented on the Secretary's suggestions, indicated that they had posted a notice with input from the Secretary but chose not to propose any language to include in the notice that Mr. Murray will read to the miners.

The mine operator and the Secretary agree that the company did draft and post a notice. However, the original notice was posted without input from the Secretary. The Secretary, upon learning of the notice, advised Murray Energy that the notice did not meet his minimum requirements. Shortly after, Murray drafted and posted a new notice that minimally met the requirements suggested by the Secretary. The Secretary seeks to have that notice amended. However, the Secretary agrees that the posted notice meets the minimal requirements of the order. Therefore, while I find the notice to be different than contemplated by the original order, the notice has been posted and should remain posted for the term of one year in a conspicuous location. However, the statement to be read by Robert Murray is not the same as that posted, and the original order required that it be approved by all parties. Since the parties have not been able to agree on such language, the original order is modified so that the statement that is required to be read is drafted and set forth below. The statement to be read by Mr. Murray to all miners at the five mines is as follows:

> The Federal Mine Safety and Health Review Commission has found that the Murray Energy Corporation and its West Virginia subsidiaries have violated the Federal Mine Safety and Health Act and has ordered me to read and abide by this notice. In an awareness meeting between April and July 2014, I outlined a policy requiring that any safety complaint made to MSHA also be made to management. That policy is rescinded. You have every right to make a complaint to MSHA without notifying any person at the mine.
>
> Section 103(g) of the Federal Mine Act gives you the right to request that the Mine Safety and Health Administration conduct

> an immediate inspection of a condition or practice that you reasonably believe is an imminent danger or a violation of the Mine Act or its standards. Murray does not, and will not, require that you make the same safety or health complaints to management when you make complaints or reports to MSHA. You have a right, under section 103(g) of the Mine Act, to make those reports anonymously and confidentially.
>
> Murray and its mines will not retaliate against or take any adverse action against any miner or other person because they have made an anonymous or confidential complaint to MSHA. All miners have a right to make a complaint to MSHA and all miners are protected from retaliation or adverse action for making a Section 103(g) complaint.
>
> Section 105(c) of the Federal Mine Safety and Health Act prohibits Murray and any other mine operator from discriminating against its miners and from interfering with their rights under the Act, including the right to make anonymous complaints to MSHA. If any interference or discrimination or adverse action occurs related to your right to make an anonymous complaint, or any other action protected by the Mine Act, you have the right to immediately file a discrimination or interference complaint with MSHA.

Accordingly, and as set forth in the original decision of November, 2015, Respondents are **ORDERED TO CEASE AND DESIST** from violating Section 105(c)(1) and rescind the rule announced at the awareness meetings requiring miners to give notice to management of 103(g) complaints. In the event that any miner has been disciplined or subject to any adverse action as a result of that rule, that action is **ORDERED** to be rescinded immediately. Robert Murray is **ORDERED** to hold a meeting at each mine within 40 days of the date of this decision in which he shall read the statement set forth above, without comment or elaboration. The statement to be read by Murray shall be sent to each mine and posted along with the notice that is attached as the Secretary's Appendix A for a period of six months. Murray may read the

statement through a video conference in lieu of traveling to each mine. All portions of the order contained in the November 2015 decision not addressed here remain as originally ordered.

I assess a penalty of $20,000.00 for each of the five violations as proposed by the Secretary. Each of the five mines is hereby **ORDERED** to pay the sum of $20,000.00 to the Secretary of Labor within 40 days of the date of this order.

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

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

Samuel Lord, U.S. Department of Labor, Office of the Solicitor, 1100 Wilson Boulevard, 22nd Floor, Arlington, VA 22209

Philip Mayor, U.S. Department of Labor, Office of the Solicitor, 201 12TH Street South, Suite 401, Arlington, VA 22202

Philip K. Kontul, Thomas A. Smock, Ogletree, Deakins, Nash, Smoak & Stewart, P.C., One PPG Place, Suite 1900, Pittsburgh, PA 15222

Laura Karr, United Mine Workers of America, 18354 Quantico Gateway Drive, Suite 200, Triangle, VA 22172

ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9956 / FAX: 202-434-9949

October 7, 2016

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDINGS Docket No. WEVA 2015-230 A.C. No. 46-01433-366908
v.	Docket No. WEVA 2015-440 A.C. No. 46-01433-372811
CONSOLIDATION COAL COMPANY, Respondent	Mine: Loveridge #22

ORDER DENYING MOTION TO STRIKE

This case is before me under section 105(d) of the Federal Mine Safety and Health Act of 1977, as amended ("the Mine Act"), 30 U.S.C. § 815(d), upon two petitions for assessment of civil penalties filed by the Secretary of Labor ("the Secretary") against Consolidation Coal Company ("the Respondent"). The case is scheduled for hearing on October 19-20, 2016.

The Secretary has proposed "specially assessed" penalties for the violations at issue in Docket No. WEVA 2015-440. The Respondent has filed a "Motion to Strike, and Motion in Limine to Exclude, the Secretary's Proposed Special Assessment Amount in WEVA 2015-440."

Legal Framework

The Commission holds the authority to assess all civil penalties for violations of the Mine Act, but the Secretary may make proposals as to the penalty amount. 30 U.S.C. § 820(i). The Secretary has promulgated regulations governing penalty proposals at 30 C.F.R. Part 100. Normally, MSHA applies the Secretary's "regular assessment" formula set forth in 30 C.F.R. § 100.3 to calculate the amount of a proposed penalty. However, the Secretary permits MSHA to waive the regular assessment process if MSHA "determines that conditions warrant a special assessment." 30 C.F.R. § 100.5(a), (b). MSHA calculates special assessments by applying what it refers to as the "General Procedures," a method and formula published on its webpage. *See* Respondent's Motion, Ex. B.

The Commission has repeatedly emphasized – most recently in *American Coal Company*, 38 FMSHRC _, Nos. LAKE 2011-701 et al., slip op. at 7 (Aug. 26, 2016) – that its administrative law judges assess penalties *de novo* and are not bound by the Secretary's proposed penalties or by the regulations in 30 C.F.R. Part 100. However, substantial deviations from the Secretary's proposed penalties must be explained. *Sellersburg Stone Co.*, 5 FMSHRC 287, 293 (Mar. 1983) (reaffirmed in *Am. Coal Co.*, slip op. at 8).

Parties' Positions

The Respondent contends that MSHA's General Procedures substantively amend 30 C.F.R. Part 100 in that they add binding rules that narrowly constrain MSHA's discretion by implementing a points formula which is very similar to the regular assessment formula, but which was not subjected to notice-and-comment procedures despite involving larger amounts of money, rendering it invalid under the Administrative Procedure Act (APA), 5 U.S.C. §§ 551 et seq. Because the special assessment amounts at issue in this case were calculated pursuant to the General Procedures, the Respondent argues they should be stricken from the record, citing *Drummond Company*, 14 FMSHRC 661 (May 1992). The Respondent further argues that the proposed penalty amounts are irrelevant to the judge's *de novo* penalty determination and are therefore inadmissible. To the extent that judges need a baseline penalty in order to explain substantial divergences under *Sellersburg*, *supra*, the Respondent contends that the regular assessment formula should be used. Alternatively, the Respondent suggests that the case should be remanded so MSHA can properly explain the proposed penalty.

The Secretary requests permission to respond to the Motion to Strike in his post-hearing brief. He contends that the issue presented in the Motion is non-dispositive and premature because, as a matter of course, issues pertaining to penalties are addressed after hearing.

Discussion

As noted above, Commission administrative law judges possess independent authority to assess all contested penalties *de novo* pursuant to section 110(i) of the Mine Act. 30 U.S.C. § 820(i); *Am. Coal Co.*, slip op. at 6. Issues pertaining to penalties are best considered and addressed when the judge is determining the appropriate penalty amount based on the evidence and the criteria set forth in section 110(i) after the case has been heard. Accordingly, I agree with the Secretary that the issues presented in the Respondent's Motion to Strike are not dispositive and need not be decided at this stage.

The Respondent relies on *Drummond* to support its argument that I should strike the proposed penalty amounts or remand them to MSHA for recalculation. In *Drummond*, the Commission remanded to MSHA a proposed penalty that had been calculated pursuant to a Program Policy Letter (PPL) that added a new category of violations to the violation history to enhance certain penalties. 14 FMSHRC at 668. This was an interim rule that had not yet been subjected to notice-and-comment rulemaking, and its method of calculating penalties conflicted with the method set forth in the Secretary's existing regulations. *Id.* at 691 ("We conclude that the civil penalties proposed in this matter are inconsistent with the existing Part 100 regulations, and constitute arbitrary enforcement action.").

By contrast, the Secretary now uses 30 C.F.R. § 100.5 as the sole basis for calculating special assessments. Section 100.5 was promulgated through notice-and-comment rulemaking in accordance with the APA. The provision is broad and leaves discretion to MSHA, but this is as Congress intended. *See* 30 U.S.C. § 820(i); *Am. Coal Co.*, slip op. at 4-6 (describing Secretary's plenary discretion in proposing penalties). The only requirements for special assessments are that a narrative must accompany the special assessment and the Secretary must justify the

increased penalty at trial. 30 C.F.R. § 100.5(b); *Am. Coal Co.*, slip op. at 7. Although the special assessment is not binding, *Sellersburg* renders it relevant. I will not use the special assessment as a baseline and will consider all of the parties' arguments as to the appropriate penalty, but if my independent penalty calculation deviates substantially from the Secretary's proposal, I must and will explain why pursuant to *Sellersburg*.

For the reasons discussed above, the Respondent's Motion to Strike is **DENIED**. The parties are free to revisit the pertinent issues raised in the Motion at hearing and in their post-hearing briefs.

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

Distribution:

John R. Slattery, Esq., U.S. Department of Labor, Office of the Regional Solicitor, The Curtis Center, 170 S. Independence Mall West, Suite 630E, Philadelphia, PA 19106

Christopher D. Pence, Esq., Hardy Pence PLLC, P.O. Box 2548, Charleston, WV 25329

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9956 / FAX: 202-434-9949

October 17, 2016

JOSHUA A. FRANKS, Complainant v. D&L WELD and TRILLIUM CONSTRUCTION SERVICES, Respondents	DISCRIMINATION PROCEEDING Docket No. PENN 2016-261-DM MSHA Case No. NE-MD-16-04 Mine: Nazareth Plant 1 Mine ID: 36-00190 Contractor ID: T5E (D&L), Z824 (Trillium)

ORDER AMENDING CAPTION OF CASE
ORDER DENYING MOTION TO DISMISS
ORDER REQUESTING COPY OF ORIGINAL COMPLAINT

This case is before me upon a complaint of discrimination filed by Joshua A. Franks against mine operators D&L Weld and Trillium Construction Services, (collectively, "the Respondents"), pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, as amended ("the Mine Act"), 30 U.S.C. § 815(c)(3), and upon D&L Weld's Motion to Dismiss.

As a preliminary matter, it is **ORDERED** that the caption of this case is **AMENDED** to change the listed Respondents from "D&L WILD & TRILLIUM CONSTRUCTION, Respondent" to "D&L WELD and TRILLIUM CONSTRUCTION SERVICES, Respondents."

Procedural Background

Franks filed his initial discrimination complaint with the Secretary of Labor on February 25, 2016. After conducting an investigation pursuant to section 105(c)(2) of the Mine Act, the Secretary notified Franks by letter dated June 9, 2016 that he had determined there was insufficient evidence to find a violation of section 105(c) and that MSHA (the Mine Safety and Health Administration) would not be pursuing the case before the Commission on Franks' behalf.[1]

On July 6, 2016, Franks sent the Commission an email requesting appeal of the Secretary's determination, thereby initiating this discrimination proceeding pursuant to section 105(c)(3). Franks did not attach a copy of his initial February 2016 complaint to his email. The Commission immediately sent Franks a letter acknowledging that his case had been docketed and directing him to deliver his complaint to the Respondents by certified mail, return receipt

[1] Franks has submitted a copy of this letter which is date-stamped June 9, 2016 and appears authentic. D&L Weld has submitted a copy which is missing the headers at the top of the page showing MSHA's and D&L Weld's addresses, and which bears a blurry, illegible date stamp that has been crossed out and replaced with the handwritten notation "Apr. 22." I accept Franks' proffered copy of the letter as authentic.

requested. On August 9, 2016, Franks mailed a letter to both Respondents stating, "I am sending this letter to inform you that I disagree with MSHA's determination and have sought legal representation with a labor lawyer." He did not attach copies of his initial February 2016 complaint. Neither of the Respondents filed an answer, so the Commission issued a show cause order on October 5, 2016.

On October 12, 2016, Respondent D&L Weld filed an "Answer to Order to Show Cause and Motion to Dismiss." In support of the motion to dismiss, D&L Weld argues that (1) Franks did not file for review before the Commission within 30 days of receiving notification of the Secretary's determination not to pursue the case, in violation of 30 U.S.C. § 815(c)(3); (2) Franks' complaint does not include a short and plain statement of facts setting forth the alleged discrimination; and (3) Franks failed to properly notice D&L Weld of the initiation of this proceeding.

Discussion

Section 105(c) of the Mine Act provides that after receiving a discrimination complaint, the Secretary shall promptly investigate the complaint and notify the complainant of his determination as to whether a violation has occurred. 30 U.S.C. § 815(c)(3). If the Secretary determines that 105(c) has not been violated, "the complainant shall have a right, within 30 days['] notice of the Secretary's determination, to file an action in his own behalf before the Commission." *Id.* The Commission has repeatedly held that the time limits to file Mine Act cases, including the time limits set forth in 105(c)(3), are not jurisdictional and that failure to meet them should not result in dismissal absent a showing of material legal prejudice. *See, e.g.*, *Morgan v. Arch of Illinois*, 21 FMSHRC 1381, 1386-87 (Dec. 1999); *Sec'y on behalf of Nantz v. Nally & Hamilton Enters.*, 16 FMSHRC 2208, 2215 (Nov. 1994); *see generally Long Branch Energy*, 34 FMSHRC 1984 (Aug. 2012) (discussing prejudice).

In this case, Franks' appeal request was timely filed with the Commission within the 30-day time limit set forth in section 105(c)(3). It was received via email on July 6, 2016, less than 30 days after the Secretary sent his June 9, 2016 letter notifying Franks of his decision not to pursue the claim.

Regarding notice, although Franks' August 9, 2016 letter notifying D&L Weld of his intent to appeal does not specifically say that he filed a case with the Commission, I find that D&L had notice of the initiation of this proceeding within a reasonable amount of time. D&L was given the opportunity to contest the claim, which it has now done. Even to the extent D&L was not placed on notice of the claim within the time limits contemplated in the Act, the motion to dismiss has not been justified by a showing of material legal prejudice. It is true that Franks' August 9, 2016 letter does not recite the factual basis for his complaint or include a copy of the original February 2016 complaint, which may not be in his possession if he sent his only copy to MSHA. However, these deficiencies can be remedied by asking Franks to obtain a copy of the original complaint and file it with the Commission rather than by taking the drastic measure of dismissal. *See Ribble v. T&M Development*, 22 FMSHRC 593, 594-95 (May 2000) (making it clear that motions to dismiss for failure to state a claim are disfavored, especially when pro se parties are involved); *Perry v. Phelps Dodge Morenci, Inc.*, 18 FMSHRC 1918, 1920 (Nov.

1996) (same). In addition, D&L Weld is likely already aware of the general factual allegations underpinning Franks' discrimination claim, as the motion to dismiss includes a redacted copy of the original complaint and a copy of the position statement D&L sent to MSHA disputing the factual basis for the claim.

For the reasons discussed above, I find that Franks substantially complied with section 105(c)(3). Accordingly, Respondent D&L Weld's motion to dismiss is **DENIED**.

Joshua Franks is **ORDERED** to send the Commission and both Respondents a legible, non-redacted copy of his original February 2016 complaint **within ten (10) days of receiving this Order**. If he does not have a legible, non-redacted copy of the complaint, he should contact MSHA to obtain one.

Franks is also directed to provide my office with his current telephone number and email address, if he uses email. This information should be provided to my clerk, Elizabeth Katona, at 202-434-9956 or ekatona@fmshrc.gov.

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

Distribution:

Joshua A. Franks, 13203 Polly Road, Pleasanton, KS 66075

Rebecca J. Oblak, Esq., Bowles Rice, LLP, 7000 Hampton Center, Morgantown, WV 26505

Kevin McCarthy, Esq., General Counsel, Trillium Construction Services, 5555 Gull Road, Kalamazoo, MI 49048

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9933 / FAX: 202-434-9949

October 25, 2016

DANIEL B. LOWE, Complainant, v. VERIS GOLD USA, INC., and JERRITT CANYON GOLD, LLC, Respondents.	DISCRIMINATION PROCEEDING Docket No. WEST 2014-614-DM WE-MD 14-04 Mine: Jerritt Canyon Mill Mine ID: 26-01621

ORDER OF DISMISSAL

Jerritt Canyon Gold, LLC ("JCG") (FKA WBVG, LLC) filed a motion to reopen bankruptcy proceedings related to the Veris Gold USA, Inc. case for the purpose of enforcing the sale order and related injunction and seeking sanctions. Three attorneys appeared before bankruptcy court Judge Gregg W. Zive on August 11, 2016 in support of the motion.[1] The motion also sought to shorten the time for the Mine Safety and Health Act ("Mine Act") discriminatees Daniel Lowe and Matthew Varady to respond to the motion. The motion to shorten the response time was filed on August 4, 2015 and granted the following day by Judge Zive. A proceeding before Judge Zive ensued on August 11, 2016; the Judge expressed at the

[1] Local counsel appeared for JCG, as did an attorney with Dorsey& Whitney, out of Salt Lake City, and a third attorney with Fennemore Craig PC, out of Phoenix, on behalf of Wbox 2014-1 LTD, opposing the two pro se non-attorney complainants in the Mine Act discrimination proceedings, Mr. Daniel Lowe and Matthew A. Varady. Mr. Lowe's Mine Act docket number is listed in the caption. Mr. Varady's Mine Act discrimination docket number is WEST 2014-307. A separate order will be issued, mirroring this one, but substituting Mr. Varady's name and the docket number for his case.

outset that he was greatly concerned that there were proceedings being conducted in another administrative forum that were violative of Section 362(a) of the bankruptcy code.[2] Motion Tr. 4.

As noted, in its motion, Jerritt Canyon also sought sanctions against the Mine Act Complainants. Judge Zive announced near the end of the hearing that he was not going to sanction Lowe and Varady, but he then warned, "But you've got to stop. . . . No. You're stopping. You're not going to go anymore. You're not going to go before Judge Moran or any other - - you're stopping regarding any attempt against successor liability, because it's not allowed pursuant to the order that's final." Motion Tr. 45-46. After acknowledging that he would not tell any Administrative Law Judge what to do and that it would be inappropriate to do so, the Judge distinguished his authority over Lowe and Varady, stating that he does have jurisdiction over them, and adding "**You will not do anything more. If you do, than I [i.e. Judge Zive] would have to consider monetary sanctions because now I've put you on notice**."[3] Tr. 46 (emphasis added).

With the threat of imposing sanctions if Lowe and Varady continued to pursue damages for the acts of discrimination by Veris, and potential successor Jerritt Canyon Gold, this Court cannot put the pro se, non-attorney Complainants in financial jeopardy. Therefore, it is dismissing their claims and hopes, but does not order, that neither Lowe nor Varady appeal this

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[2] 11 U.S.C. §362 is the automatic stay provision of the Bankruptcy Act. As the case had been closed, there was no existing automatic stay. Therefore, the case first had to be reopened by the bankruptcy court. In relevant part, §362 provides, "(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of — (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title." 11 U.S.C. §362(a).

[3] Judge Zive's warning that he would consider imposing monetary sanctions against Lowe and Varady are of concern because, apart from the automatic stay provision, the Court does not know of the Judge's authority to effectively stop a proceeding in another tribunal. The Judge even seemed to contradict himself, telling Lowe and Varady that if they think, "the orders that are entered as a result of today's hearing are incorrect, you have a remedy. You can ask a court to review them. I am not the final word. I can, and often do, make mistakes. But you don't get to go to the [Mine Review] [C]omission. You need to exercise the remedies that are provided by the Bankruptcy Code and the appellate rules statutes." Tr. 46-47. Yet, later he acknowledged that the decision in *Gruntz*, "indicated that parties may request a state court or other forum to make a determination if there has been a violation of the stay, but they run the risk of the state court getting it wrong. And if the state court gets it wrong or administrative law judge gets it wrong, all the proceedings and any orders entered are void." Tr. 9. Per, n. 12, *infra* the Judge's reference to "*Gruntz"* was likely a cite to 202 F.3d 1074 (9th Cir. 2000). Ironically, although the dicta in *Gruntz* certainly supports the Judge, the state court got it right that the automatic stay did not void its criminal judgment. *Id.* at 1088.

Court's dismissal. The Complainants' determination of whether to bring an appeal is strictly theirs to make.

This Court's Order of Dismissal does not necessarily mean that Lowe's and Varady's Mine Act cases are terminated, because the Commission may, pursuant to 29 C.F.R. §2700.71, review this Court's decision on its own motion.[4] In the event that the Commission opts to review this dismissal, Lowe and Varady could not be held accountable or subject to the threat of monetary sanctions being imposed by Judge Zive.

The August 11, 2016 Hearing Before Judge Zive

At the outset of the hearing, Judge Zive noted that Veris sought bankruptcy protection in a Canadian court on June 9, 2014, under Chapter 15 of the United States Bankruptcy Code. Tr. 4. On May 22, 2015, a Motion for entry of an order to recognize and enforce the Canadian sale order was made. Tr. 15. The sale was pursuant to Section 363 of the Code and the Judge remarked that provision has all of the due process protections as section 1141 of the Code.[5] The Judge assumed that the financier, "got some money together, formed this entity, and bought it," adding that none of the creditors, secured and unsecured, got paid. Tr. 16. Thus, the Judge stated that if Lowe and Varady had a judgment they would not have been paid.[6] Tr. 16.

On May 29, 2015 the Judge entered a sale order. The Judge stated he was aware that there was a Section 364 first position lien to the debtor in possession ("DIP") lender, (variously referred to as "WB," "Whitebox," "Wbox 2014-1"), meaning that the DIP had priority over any other secured interests. The Judge noted that Whitebox advanced $15 million and created an entity known as WBVG, Inc. LLC, which then, on June 5, 2015, changed its name to Jerritt Canyon Gold, Inc., and the transaction closed on June 24, 2015. Tr. 19. Eighty percent (80%) of

[4] The section provides: "At any time within 30 days after the issuance of a Judge's decision, the Commission may, by the affirmative vote of at least two of the Commissioners present and voting, direct the case for review on its own motion. Review shall be directed only upon the ground that the decision may be contrary to law or Commission policy or that a novel question of policy has been presented. The Commission shall state in such direction for review the specific issue of law, Commission policy, or novel question of policy to be reviewed. Review shall be limited to the issues specified in such direction for review." 20 C.F.R. 2700.71

[5] Not everyone agrees with the Judge's view that the due process protections under section 363 are the same as section 1141. *See* this Court's Order on Complainant's motion to amend, 38 FMSHRC 565, 578, n. 9 (citing George W. Kuney, "Misinterpreting Bankruptcy Code Section 363(f) and Undermining the Chapter 11 Process," 76 Am. Bankr. L.J. (2002), and "Why Successor Liability Claims are not 'Interests in Property' under Section 363(f)," 18 Am. Bankr. Inst. L. Rev. 697 (2010)).

[6] The Judge's remark that Lowe and Varady "would not have been paid" implicitly refers to Veris. That is most certainly true, but the Mine Act's successorship law would inquire whether Jerritt Canyon could be held accountable. For that entity, the Judge invoked his ruling that no successor would be liable.

the interest in Jerritt Canyon Gold was transferred to Canadian billionaire[7] Eric Sprott. Tr. 19. The DIP, Wbox 2014-1, had the remaining 20% interest in the mine. Continuing with his recounting of the events, Judge Zive stated that the Canadian sale order occurred on May 28 [2015] and that he issued his order on June 4th [2015]. Tr. 19. The Judge stated that those orders clearly provided there would be no successor liability.[8] Tr. 19. The Judge stated that, on June 18th, a motion to stay was filed by Lowe, Varady and others but that, as judgment had been entered for the Respondent on September 9, 2014, this was "well after" the complaints filed by Lowe and Varady and therefore their complaints were pre-petition. Tr. 20.

The Judge found that there was neither a legal nor a factual basis for a stay of the U.S. sale order and that Lowe and Varady had not complied with the proper procedure and that they had failed to provide any authority for the relief they sought. Tr. 22. On September 2, 2015 the case was closed. The Judge stated that in a liquidating Chapter 11 there is no discharge and that Lowe and Varady's claims can't be satisfied by the "purchaser or anybody subsequent because the injunction found in the sale order, which is a final order entered in the bankruptcy case when it was open, precludes it." Tr. 24.

Addressing this Court's comment about the appearance of fairness in allowing Lowe and Varady, to determine through discovery the status of Jerritt Canyon as a successor, the Judge stated,

> [w]ell, a couple points. Jerritt Canyon was the buyer, the successor. The point is it was the purchaser. What did it purchase? Their assets. But even if it is, it is of no legal significance because there's no successor liability."

Tr. 27.

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[7] Marianne Kobak McKown, *Going Private: Canadian billionaire buys Jerritt Canyon*, ELKO DAILY FREE PRESS, June 26, 2015, *available at* http://elkodaily.com/mining/canadian-billionaire-buys-jerritt-canyon/article_605d9414-8871-5695-878c-4c430c230929.html.

[8] The Judge, who stated that he had "some experience with mining," added, "I will confess now. When I was a lawyer many, many years ago, I actually did work for Dee Gold and for Barrick -- no, I didn't do -- but for Newmont," and expressed an upside to the sale as it "allow[ed] this operation to go forward, which protected the jobs of the miners and, of course, provided related economic benefit in the communities near the mine site." Tr. 41, 6. This suggested that the gold at Jerritt Canyon might otherwise be left unmined, an unlikely event. Further, the multiple discrimination complaints filed against Veris were equally important to "protecting the jobs of the miners." Around the time of those discrimination complaints, Veris was also being reviewed to determine if it should be subject to a pattern of violations charge by the Secretary of Labor.

The Judge continued that, as for this Court's suggestion to Lowe and Varady in advance of their appearance before the Judge, that they be allowed to have full discovery regarding the principal stock holding officers of these various entities,

> there's no point to that. Even if it was appropriate, and it's not, there's no successor liability. There's no point to let the proceeding before the Federal Mine Safety and Health Review Commission to continue to determine if Jerritt is the successor because once again, there's no successor liability.[9]

Tr. 27- 28.

The Judge stated that,

> [y]our choice is not to do anything or to ask the bankruptcy court to get relief from the stay so that you can proceed with your claim, and then the court would look at your pleadings and any opposition and make a decision. Happens all the time in bankruptcy cases, where we will allow folks that have been injured in automobile accidents or states or counties that have suffered environmental damage.

Tr. 31-32.

The Judge continued,

> Then I would have made a decision. Unfortunately, it probably wouldn't have made much economic difference to you -- and this is what I'm really trying to get across – because there is -- and none of the other debtors had any ability to satisfy your claim. I'm not saying that you weren't discriminated again. That's not what I'm saying at all. What I'm saying is that even if you were able to get some type of damages, that you couldn't collect it from the debtors. There is no money. That's why Wbox 214 [sic] made a credit bid and Deutsche Bank didn't overbid. That's why there were millions and millions and millions of dollars lost in this enterprise and lost forever. And there's also a provision under 363 of the Code that allows sales of asset to occur if that's in the best interest of both the creditors and the debtor. And that was the findings (sic) made by both the Canadian judge and me. You're being treated exactly the same as every other unsecured creditor in this case.

Tr. 32-33.

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[9] With discovery on the issue of successorship barred, the Judge's determination means that the financial relationships, if any, between those who had interests in Veris Gold and Jerritt Canyon Gold will never be known and inquiry into the monitor's acknowledgement that "[w]hile the DIP Lender's lack of support for the various EOIs might be perceived as a potential conflict of interest, the Monitor remains of the view that the Credit Bid Transaction is the appropriate course of action at this late stage of the proceedings," will similarly not be known. *Id*. at para. 39; 2016 WL 4158375 at *7. The Court is unaware of any on the record discussion by the bankruptcy court inquiring into the potential conflict of interest alluded to by the Monitor.

The Judge acknowledged that Lowe had a judgment but that, "it's void - - it may be void ab initio as a result of a violation of Section 362 of the Bankruptcy Code." Tr. 36. The Judge did allow that "[t]he United States Courts of Appeal say the bankruptcy courts make that, and you… the Gruntz case, which dealt with a state court action, said the state court judgment entered its opinion, but if the state court judge gets it wrong, the parties are at their own peril." Tr. 36. The Judge offered that, "you [Lowe and Varady] probably should have got stay relief." Tr. 37. The Judge also remarked, "But every other creditor in this case didn't get paid, and you're in exactly the same position. . . . And they didn't do anything wrong either." Tr. 39. The Judge also remarked,

> if you want to proceed in another forum, in another place, and there's no exception to the stay, which I believe there isn't in this case -- and I understand there may be some disagreement with that, that's fine. But then you need to seek relief from this court. And the prudent measure -- and the Ninth Circuit has -- . . . has indicated that whenever there is even a doubt whether or not you need to seek relief, seek relief from the stay.

Tr. 40.

The Judge continued,

> My point is this. When those cases were filed, everybody was given the same notice you were given. And claims can be discharged, and if there's a sale of assets, it generally does not allow successor liability, which is allowed pursuant to Section 363 of the code. And there are lots of cases dealing with discrimination -- TWA was a discrimination case, if I remember correctly. . . . And those were flight attendants, I think. . . . And those claims went away. And that's the result. People lose their pensions in bankruptcy court. It's no -- one takes no pleasure in that, but that is how Congress has written the statute for policy reasons that it believes are paramount, and I don't get to wave a magic wand and ignore them, and the United States Supreme Court Law v. Siegel case about a year and a half, two years ago made that clear. . . . Everybody says the bankruptcy court is a court of equity. In a sense we are, but that doesn't mean we just get to say, well, this would be fair, and therefore I get to do it.

Tr. 41-42.

And still later, the Judge told Lowe and Varady, "if you think I'm wrong and you want to go to another court and tell the other court your position -- . . . you can do that. . . . And that's what you -- what I'm really trying to tell you is that's what you should have done last June." Tr. 47.

Following those remarks, the Judge stated,

> I'm granting the motion to reopen. I'm going to grant the motion to enforce my sale order. And I'm going to make it clear if it wasn't clear in the order itself. There's an injunction against any attempt to proceed regarding successor liability because successor liability is specifically prohibited by the terms of the sale order. And I'm going to instruct counsel for Jerritt Canyon to provide written findings

> and conclusions...What it means is I've reopened the bankruptcy case. . . . That's why we have two motions. . . . first, I have to open the case. If I don't reopen the case, then I can't enter the order to enforce my earlier sale order. So I'm granting the motion to reopen under Section 350, and I find good cause exists. Then I'm granting the motion to enforce the order no success liability and injunction precluding, preventing, stopping [Varady] and Mr. Lowe from proceeding in any other forum regarding successor liability.

Tr. 58-59.

He concluded, "I put Mr. Lowe and Mr. Varady on notice that if they violate my order, I will enforce it with monetary sanctions." Tr. 60.

Following the August 11, 2016 hearing, on September 2, 2016, Judge Zive issued his order affirming his remarks at that hearing.[10]

Accordingly, as discussed above, the Court feels it has no option but to dismiss this proceeding. Despite the outcome, the Court believes that further discussion is warranted.

Discussion

Judge Zive noted at the outset of the proceeding that he was aware of the discrimination complaints brought by Lowe, Varady and others. However, he then proceeded to state that he would "make the record now, Administrative Judge Moran had telephoned [him] while the case was pending, asking if [he] was aware of these [discrimination] claims." Motion Tr. 5.[11] The Judge[12] couldn't remember exactly what he told Judge Moran, nor did he take any notes, but he "remembered distinctly" telling this Court that he could not provide any legal advice, that it would be inappropriate to do so and that the discrimination complainants should obtain legal counsel, but that "[a]pparently that advice was not heeded." *Id.*

[10] The Judge's order, at his direction, was created by counsel for Veris/JCG and adopted by the Judge who inserted his signature.

[11] To be clear, the references are to Judge Zive's statements during his August 11, 2016 motion hearing.

[12] All references to the "Judge" in this Order of Dismissal refer to Judge Zive. References to the "Court" refer to the undersigned author of this Order, Judge William Moran.

The problem with Judge Zive's multiple references to speaking with this Court in the transcript of his proceeding on Jerritt Canyon's motion is that such conversations *never* occurred.[13]

Upon reading the transcript and Judge Zive's multiple references to alleged conversations with this Court, it was necessary, on August 16, 2016, for the Court to send the Judge a letter calling attention to his multiple, egregious factual errors in asserting that there had been such communication. This Court informed the Judge that there had *never* been *any* sort of communication between Judge Zive and this Court. The letter advised,

> Judge Zive, you are mistaken. I have never called you, never spoken with you and never emailed you. Perhaps you spoke on some prior occasion with another administrative law judge, on that I can only speculate, but there has never been any conversation or any form of communication between us and, in the name of accuracy, I call upon you to correct the record on this score.[14]

Judge Zive recounted that he presided at the hearing to recognize the sale order, which had been approved by the Canadian court, and that he inquired of counsel for the debtor if they were aware of the discrimination claims and that he was "told yes and they were being handled." *Id.* Noting that those discrimination complaints were brought by individuals and not by "any governmental body or regulatory agency," the Judge stated that the automatic stay provision at Section 362(b)(4) appeared inapplicable.[15] *Id*. at 5-6. The Judge then noted that the bankruptcy

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[13] The Judge made several other references during his hearing, claiming to have spoken with Judge Moran. Among those errors at transcript page 12, the Judge states: "or Judge Moran - - I think that's how he's referred to is Administrative Judge Moran - - who I already indicated that I talked to, seems like a very nice man - - responded to Mr. Lowe on August 8th." Tr. 12. Later, the Judge remarked in the context of advice, "And that's why I told Judge Moran he should tell you folks to get a lawyer." Tr. 14. "And that's why when Judge Moran called me some time ago, I - - as I do in every one of these cases, without exception, I strongly urged him to advise you, if that's what he was going to do - -." Tr. 34. As noted, the Judge never spoke with this Court at any time before his August 11, 2016 hearing and the *only* communication *after* that hearing was the Judge calling this Court to apologize for his errors.

[14] To his credit, Judge Zive called this Court, twice, the same day the letter was sent to him. He apologized for his errors and advised that the record in his case would reflect his errors and include this Court's letter to him. Judge Zive's errors were not limited to knowing whom he spoke with, as he twice referenced that "*the solicitor general of the United States* disagrees with [Lowe's] position" about miners being the most precious resource and that the bankruptcy court disregards the Mine Act. Tr. 33 (emphasis added). It is the Solicitor of Labor that took issue with this Court's view, not the Solicitor General of the United States.

[15] Though not providing any specific case citations, the Judge stated, "there are a number of cases finding that dealing with asbestos cases, dealing with SEC cases, dealing with complaints regarding remediation of environmental hazards," in support of his statement that the automatic stay provision was applicable. Motion Tr. 6.

court retains jurisdiction to determine if the automatic stay provision applies.[16] *Id.* at 6. Upon review of all the pleadings, the Judge concluded, "there was no money and [he] was satisfied that that was the situation and obviously so was the judge in Canada." *Id.* at 6-7.

Judge Zive then noted that the "sale order that was entered clearly provides that there will be no successor liability for the purchaser," and that a "new entity was formed before the transaction closed on June 24th." *Id.* at 7. The Judge then added that no request to seek relief to allow the discrimination claims to proceed in the administrative forum was made and that, apart from whatever the merits may be, it was the process that was not followed. *Id*. Judge Zive then continued that,

> astoundingly, it would appear that the failure to follow that process was being advocated by an administrative law judge who, so far as [the Judge] [could] determine, has an obligation to be fair and impartial, and yet is clearly providing legal advice to at least two of the claimants, notwithstanding the disclaimer that he was not doing so. [The Judge didn't] know how anyone who could be opposed or on the other side of the discrimination claims could believe that they were going to get a fair hearing when [one] read[s] emails indicating that the

[16] The Judge stated this was not new law, and noted without specific citation, that one "can go back to 2002 and look at the Gruntz case." Motion Tr. at 6. The Judge was apparently referring to *In re Gruntz*, 202 F.3d 1074 (9th Cir. 2000), in which the Ninth Circuit addressed "(1) whether a state court modification of the bankruptcy automatic stay binds federal courts; and (2) whether the automatic stay enjoins a criminal prosecution for the willful failure to pay child support. We hold that federal courts are not bound by state court modifications of the automatic stay, but that the automatic stay does not enjoin state criminal prosecutions." Id. at 1077. Judge Zive's expression of the holding in *Gruntz* is that "parties may request a state court or other forum to make a determination if there has been a violation of the stay, but they run the risk of the state court getting it wrong. And if the state court gets it wrong or *administrative law judge gets it wrong*, all the proceedings and any orders entered are void." *Id.* at 9 (emphasis added). Ultimately the Judge may be correct but this Court is not aware of any decision by a federal district or bankruptcy court holding *that Mine Act discrimination proceedings*, with its unique anti-discrimination provisions, are subject to the automatic stay.

> administrative law judge is providing advice and - - to those claimants that are before him and telling them how to proceed in this [Judge Zive's] court.[17]

Id. at 7-8.

It is difficult to know where to begin with Judge Zive's comments. First, fair hearings *on the issue of liability* had occurred; the decisions upholding the discrimination complaints of Mr. Lowe and Mr. Varady had long ago been decided by this Court: October 15, 2015 in the case of Mr. Lowe, 2015 WL 6447553, and September 2, 2015, in the case of Mr. Varady, 2015 WL 5307780. In the Varady matter, defense counsel hired by Veris appeared before this Court. When the evidence at that hearing made it plain to all that Varady was the victim of discrimination, Veris folded its tent and its counsel withdrew. The same counsel then announced at the outset of the Lowe discrimination complaint the week following the Varady hearing, that it was withdrawing any defense to the Lowe matter as well. However, the damages phase has never occurred for either complaint. Consequently, *no* amount of damages has been determined for either complainant.

As to the Judge's assertion that this Court was "clearly providing legal advice to at least two of the claimants, notwithstanding the disclaimer that [it] was not doing so," there are two points to be made. The Court made it plain when communicating with the non-attorney *pro se* complainants, Lowe and Varady, about the motion they faced by Veris to reopen the bankruptcy case, that its comments were in response to Mr. Lowe's communication to this Court upon being informed of the Veris motion before the bankruptcy court. Far from providing legal advice, the Court noted:

> If [the Court] were in [Lowe's] position, when eventually before the Bankruptcy Court, [the Court] would make the following points before that Court, ***all as expressed in the various orders/decisions this Court has issued in your discrimination proceeding before the Federal Mine Safety and Health Review Commission***. You should not view the points which follow as restricting the contentions that you may make at the Bankruptcy Court hearing, as you may have other arguments to present before that court. I would also provide the Bankruptcy

[17] The Judge apparently believed that this Court's guidance to the pro se, non-attorneys Lowe and Varady, demonstrated unfairness. "I don't know who would want to go now in front of, frankly, Judge Moran once he's provided the assistance to you he's provided to you. I would hate to be sitting on that other side of the table, representing somebody else against you folks at this point, candidly. That's why I was surprised when I saw those emails." Tr. 28. The Judge apparently forgot that liability had already been decided in both cases, with Varady's case decided after a full and fair hearing with Veris' counsel conducting extensive discovery and full participation in the Varady hearing and then quitting participation on the eve of the Lowe hearing. Further, the Court's emails, *all* sent to both sides, informed that no determination had been made on the successorship question, nor had damages of any amount been determined. Full participation would have been provided by the Court on the issues of successorship and damages. Further, while Lowe and Varady offered preliminary thoughts about their claimed damages, this Court has never ruled on those issues and noted that some of those claims were not cognizable under the Mine Act. Those issues remain undecided even today.

> Court with copies of all orders/decisions issued by this Court as well as those issued by Mine Act Judge David P. Simonton and the related Mine Review Commission's issuances.

August 8, 2016 email to Mr. Lowe, which email also copied the various Veris/Jarrett Canyon attorneys (emphasis added).

That the Court referenced its prior orders to the pro se complainants to assist them before the daunting prospect of facing multiple lawyers for Veris, Jerritt Canyon Gold, and Wbox 2014-1 LTD did not amount to providing legal advice. The Court considers it as its duty, in fact views it as part of its responsibility that essential justice be provided, to provide a pro se litigant with clarification on the significance of its decisions and the nature of the proceedings they face. Every person has a fundamental right to access justice through a fair, impartial, and meaningful hearing, regardless of whether they are represented by counsel. In particular, judges have an ethical duty to be both impartial and fair. Model Code of Judicial Conduct Canon 2 (1997) (hereinafter MCJC). Pro se litigants often find it particularly difficult to navigate complex legal and procedural issues while attempting to obtain a full hearing on the merits of their dispute. Therefore, judges have the power to make reasonable accommodations in the courtroom to ensure that pro se litigants are not unfairly hindered in exercising their Constitutional right to a fair hearing. The MCJC was revised in 2007 to clarify, "it is not a violation of [the canon of impartiality] for a judge to make reasonable accommodations to ensure pro se litigants the opportunity to have their matters fairly heard." Comment 4 to MCJC.

There is not yet comprehensive guidance on what specific accommodations are "reasonable," or what accommodations are prohibited. Jona Goldschmidt, Judicial Assistance to Self-Represented Litigants, 17 Mich. St. J. Int'l L. 601, 608 (2009). When confronted with this issue, the Supreme Court of West Virginia held,

> The fundamental tenet that the rules of procedure should work to do substantial justice . . . commands that judges painstakingly strive to insure that no person's cause or defense is defeated solely by reason of their unfamiliarity with procedural or evidentiary rules. . . . Cases should be decided on the merits, and to that end, justice is served by reasonably accommodating all parties, whether represented by counsel or not. This "reasonable accommodation" is purposed upon protecting the meaningful exercise of a litigant's constitutional right of access to the courts.

Blair v. Maynard, 324 S.E.2d 391 (West Virginia 1984).

The Court considers it no less than a judicial obligation to provide pro se parties with reasonable assistance. Needless to say, "this requires a balancing of the rights of both parties." The Role of the Judge in Pro Se Litigation, 10 No. 6 Divorce Litigation 115 (1998). There is an important difference between judicial neutrality and judicial passivity, especially in the pro se context when justice occasionally demands judicial engagement, in service of true neutrality, to balance out the disadvantages of only one party having the benefit of counsel. Richard Zorza, Esq., The Disconnect Between the Requirements of Judicial Neutrality and Those of the Appearance of Neutrality When Parties Appear Pro Se: Causes, Solutions, Recommendations, and Implications, 17 Geo. J. Legal Ethics 423 (2004). The Court's task of balancing the judge's

function as an impartial arbiter against the "necessity that the pro se litigant's case be fully and competently presented" is sometimes a difficult one. ABA Standards, Commission on Standards of Judicial Administration, Trial Courts § 2.23 at 45-47 (1976).[18]

Judge Zive then proceeded to note that the discriminated former employees of Veris had been before him earlier when seeking to stay the sale order, and that they were creditors and that their claims existed prior to the bankruptcy petition, citing the definition of a creditor as an "entity - -and that includes an individual[19] - - that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor." *Id*. at 8.

The Court certainly respects the jurisdictional expressions made by Judge Zive, but it does not believe that this Court's perspective is as unsound as the Judge asserted. That the subject of discrimination claims and their interface with bankruptcy protection is a thorny issue has been recognized by others:

> Bankruptcy courts, facing a surge in claims stemming from employment discrimination, are slowly exploring the impact of this area of law on case administration. An inherent conflict exists between the policies underlying employment discrimination and bankruptcy laws. On the one hand, employment discrimination laws seek to protect employees by making them whole for losses suffered, while at the same time deterring management from discriminating again. Conversely, the bankruptcy reorganization process stresses rehabilitation of the debtor and equality of distribution among the claimants. Although the Bankruptcy Code (the "Code") affords some protection to victims of discrimination, their claims are not afforded special treatment under the bankruptcy laws. Low dollar distributions on discrimination claims eviscerates the rehabilitative and deterrent goals of Title VII of the Civil Rights Act of 1964 and state discrimination statutes. The swelling tide of insolvencies involving parties to discrimination lawsuits warrants an analysis of both the treatment of employment discrimination claims in bankruptcy and the impact of these claims on the bankruptcy process… and the ability to exempt employment discrimination claims in bankruptcy.

Joanne Gelfand, *The Treatment of Employment Discrimination Claims in Bankruptcy: Priority Status, Stay Relief, Dischargeability and Exemptions,* 56 U. Miami L. Rev. 601, 602 (April 2002).

Although the *Discrimination Claims in Bankruptcy* article refers to the automatic stay provision, 11 U.S.C. §362 and acknowledges that it does not apply "to stay the

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[18] See also, *A Full and Fair Hearing: The Role of the ALJ in Assisting the Pro Se Litigant*, 27 J. Nat'l Ass'n Admin. L. Judiciary 447, Fall 2007.

[19] 11 U.S.C § 101, provides, at section (10) that the term "creditor" means — (A) entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor;(B) entity that has a claim against the estate of a kind specified in section 348(d), 502(f), 502(g), 502(h) or 502(i) of this title; or (C) entity that has a community claim. Section (15) provides that the term "entity" includes person, estate, trust, governmental unit, and United States trustee.

commencement or continuation of proceedings by governmental units to enforce their police or regulatory power or to enforce nonmonetary judgments," this Court finds it difficult to distinguish a Section 105(c)(3) proceeding from a Section 105(c)(2) proceeding, simply because the government launches the latter.

This view arises because Congress did not establish a (c)(3) action as a lesser claim and by providing such an action for an individual to pursue it was effectively enforcing the governmental regulatory power through the individual. Congress foresaw that the agency may get it wrong and therefore created the alternative, but equal, avenue for relief against acts of discrimination against miners. In that respect the Section 105(c)(3) action is arguably unique among discrimination claims and can be viewed as indistinguishable by Congress' inclusion of the provision.

In addition, Veris proceeded to defend against Mr. Varady in the hearing before this Court. It was only when it was beyond cavil that Veris would not prevail that it packed up and left the Varady proceeding and quickly thereafter bailed from the Lowe discrimination complaint.

Conclusion

For the reasons set forth above, the Court hereby **DISMISSES** the discrimination claim brought by Daniel B. Lowe.

SO ORDERED.

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

Distribution:

Danielle B. Lowe, P.O. Box 2609, Elko, NV 89801, danny.lowe@icloud.com

Matthew A. Varady, 701 S. 5th Street, #6, Elko, NV 89801, Urandonk406@gmail.com

Mark Kaster, Esq., Dorsey & Whitney, LLP, 1500 South 6th Street Minneapolis, MN 55402, Kaster.mark@dorsey.com

Annette Jarvis, Esq., 136 South Main Street, Suite 1000, Salt Lake City, UT 84101, Jarvis.annette@dorsey.com

Cathy L. Reece, Esq., Fennemore Craig, P.C. 2394 East Camelback Road, Suite 600 Phoenix, AZ 85016, creece@fclaw.com

Shaun Heinrichs, Veris Gold, 688 West Hastings Street, Suite 900, Vancouver, BC V6B 1P1, Canada

Tevia Jeffries Dentons, Canada LLP, 250 Howe Street, 20th Fl. Vancouver, BC V6C 3R8, Canada

Brad J. Mantel, Esq. Office of the Solicitor, U.S. Department of Labor 201 12th Street, South, Suite 401 Arlington, VA 22202-5450, mantel.brad@dol.gov

W. Christian Schumann, Esq., Office of the Solicitor, U.S. Department of Labor, 201 12th Street, South, Suite 401, Arlington, VA 22202-5450

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9933 / FAX: 202-434-9949

October 28, 2016

MATTHEW A. VARADY, Complainant, v. VERIS GOLD USA, INC., and JERRITT CANYON GOLD, LLC, Respondents.	DISCRIMINATION PROCEEDING Docket No. WEST 2014-0307-DM WE-MD 14-03 Mine: Jerritt Canyon Mill Mine ID: 26-01621

ORDER OF DISMISSAL

Jerritt Canyon Gold, LLC ("JCG") (FKA WBVG, LLC) filed a motion to reopen bankruptcy proceedings related to the Veris Gold USA, Inc. case for the purpose of enforcing the sale order and related injunction and seeking sanctions. Three attorneys appeared before bankruptcy court Judge Gregg W. Zive on August 11, 2016 in support of the motion.[1] The motion also sought to shorten the time for the Mine Safety and Health Act ("Mine Act") discriminatees Matthew Varady and Daniel Lowe to respond to the motion. The motion to shorten the response time was filed on August 4, 2015 and granted the following day by Judge Zive. A proceeding before Judge Zive ensued on August 11, 2016; the Judge expressed at the

[1] Local counsel appeared for JCG, as did an attorney with Dorsey & Whitney, out of Salt Lake City, and a third attorney with Fennemore Craig PC, out of Phoenix, on behalf of Wbox 2014-1 LTD, opposing the two pro se non-attorney complainants in the Mine Act discrimination proceedings, Mr. Daniel Lowe and Matthew A. Varady. Mr. Varady's docket number is listed in the caption above. Mr. Lowe's Mine Act discrimination docket number is WEST 2014-0614. The October 25, 2016 Order of Dismissal in Lowe's case stated that a separate order would be issued, mirroring the Lowe Order, but substituting Varady's name. This is the promised Order. Apart from the particulars of the acts of discrimination committed against Lowe and Varady, the issues addressed in this Order of Dismissal are identical.

outset that he was greatly concerned that there were proceedings being conducted in another administrative forum that were violative of Section 362(a) of the bankruptcy code.[2] Motion Tr. 4.

As noted, in its motion, Jerritt Canyon also sought sanctions against the Mine Act Complainants. Judge Zive announced near the end of the hearing that he was not going to sanction Varady and Lowe, but he then warned, "But you've got to stop. . . . No. You're stopping. You're not going to go anymore. You're not going to go before Judge Moran or any other - - you're stopping regarding any attempt against successor liability, because it's not allowed pursuant to the order that's final." Motion Tr. 45-46. After acknowledging that he would not tell any Administrative Law Judge what to do and that it would be inappropriate to do so, the Judge distinguished his authority over Varady and Lowe, stating that he does have jurisdiction over them, and adding "**You will not do anything more. If you do, than I [i.e. Judge Zive] would have to consider monetary sanctions because now I've put you on notice**."[3] Tr. 46 (emphasis added).

With the threat of imposing sanctions if Varady and Lowe continued to pursue damages for the acts of discrimination by Veris, and potential successor Jerritt Canyon Gold, this Court cannot put the pro se, non-attorney Complainants in financial jeopardy. Therefore, it is dismissing their claims and hopes, but does not order, that neither Varady nor Lowe appeal this

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[2] 11 U.S.C. §362 is the automatic stay provision of the Bankruptcy Act. As the case had been closed, there was no existing automatic stay. Therefore, the case first had to be reopened by the bankruptcy court. In relevant part, §362 provides, "(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of — (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title." 11 U.S.C. §362(a).

[3] Judge Zive's warning that he would consider imposing monetary sanctions against Varady and Lowe are of concern because, apart from the automatic stay provision, the Court does not know of the Judge's authority to effectively stop a proceeding in another tribunal. The Judge even seemed to contradict himself, telling Varady and Lowe that if they think, "the orders that are entered as a result of today's hearing are incorrect, you have a remedy. You can ask a court to review them. I am not the final word. I can, and often do, make mistakes. But you don't get to go to the [Mine Review] [C]omission. You need to exercise the remedies that are provided by the Bankruptcy Code and the appellate rules statutes." Tr. 46-47. Yet, later he acknowledged that the decision in *Gruntz*, "indicated that parties may request a state court or other forum to make a determination if there has been a violation of the stay, but they run the risk of the state court getting it wrong. And if the state court gets it wrong or administrative law judge gets it wrong, all the proceedings and any orders entered are void." Tr. 9. Per, n. 12, *infra* the Judge's reference to "*Gruntz"* was likely a cite to 202 F.3d 1074 (9th Cir. 2000). Ironically, although the dicta in *Gruntz* certainly supports the Judge, the state court got it right that the automatic stay did not void its criminal judgment. *Id.* at 1088.

Court's dismissal. The Complainants' determination of whether to bring an appeal is strictly theirs to make.

This Court's Order of Dismissal does not necessarily mean that Varady's and Lowe's Mine Act cases are terminated, because the Commission may, pursuant to 29 C.F.R. §2700.71, review this Court's decision on its own motion.[4] In the event that the Commission opts to review this dismissal, Varady and Lowe could not be held accountable or subject to the threat of monetary sanctions being imposed by Judge Zive.

The August 11, 2016 Hearing Before Judge Zive

At the outset of the hearing, Judge Zive noted that Veris sought bankruptcy protection in a Canadian court on June 9, 2014, under Chapter 15 of the United States Bankruptcy Code. Tr. 4. On May 22, 2015, a Motion for entry of an order to recognize and enforce the Canadian sale order was made. Tr. 15. The sale was pursuant to Section 363 of the Code and the Judge remarked that provision has all of the due process protections as section 1141 of the Code.[5] The Judge assumed that the financier, "got some money together, formed this entity, and bought it," adding that none of the creditors, secured and unsecured, got paid. Tr. 16. Thus, the Judge stated that if Varady and Lowe had a judgment they would not have been paid.[6] Tr. 16.

On May 29, 2015 the Judge entered a sale order. The Judge stated he was aware that there was a Section 364 first position lien to the debtor in possession ("DIP") lender, (variously referred to as "WB," "Whitebox," "Wbox 2014-1"), meaning that the DIP had priority over any other secured interests. The Judge noted that Whitebox advanced $15 million and created an entity known as WBVG, Inc. LLC, which then, on June 5, 2015, changed its name to Jerritt Canyon Gold, Inc., and the transaction closed on June 24, 2015. Tr. 19. Eighty percent (80%) of

[4] The section provides: "At any time within 30 days after the issuance of a Judge's decision, the Commission may, by the affirmative vote of at least two of the Commissioners present and voting, direct the case for review on its own motion. Review shall be directed only upon the ground that the decision may be contrary to law or Commission policy or that a novel question of policy has been presented. The Commission shall state in such direction for review the specific issue of law, Commission policy, or novel question of policy to be reviewed. Review shall be limited to the issues specified in such direction for review." 20 C.F.R. 2700.71

[5] Not everyone agrees with the Judge's view that the due process protections under section 363 are the same as section 1141. *See* this Court's Order on Complainant's motion to amend, 38 FMSHRC 565, 578, n. 9 (citing George W. Kuney, "Misinterpreting Bankruptcy Code Section 363(f) and Undermining the Chapter 11 Process," 76 Am. Bankr. L.J. (2002), and "Why Successor Liability Claims are not 'Interests in Property' under Section 363(f)," 18 Am. Bankr. Inst. L. Rev. 697 (2010)).

[6] The Judge's remark that Varady and Lowe "would not have been paid" implicitly refers to Veris. That is most certainly true, but the Mine Act's successorship law would inquire whether Jerritt Canyon could be held accountable. For that entity, the Judge invoked his ruling that no successor would be liable.

the interest in Jerritt Canyon Gold was transferred to Canadian billionaire[7] Eric Sprott. Tr. 19. The DIP, Wbox 2014-1, had the remaining 20% interest in the mine. Continuing with his recounting of the events, Judge Zive stated that the Canadian sale order occurred on May 28 [2015] and that he issued his order on June 4th [2015]. Tr. 19. The Judge stated that those orders clearly provided there would be no successor liability.[8] Tr. 19. The Judge stated that, on June 18th, a motion to stay was filed by Lowe, Varady and others but that, as judgment had been entered for the Respondent on September 9, 2014, this was "well after" the complaints filed by Varady and Lowe and therefore their complaints were pre-petition. Tr. 20.

The Judge found that there was neither a legal nor a factual basis for a stay of the U.S. sale order and that Varady and Lowe had not complied with the proper procedure and that they had failed to provide any authority for the relief they sought. Tr. 22. On September 2, 2015 the case was closed. The Judge stated that in a liquidating Chapter 11 there is no discharge and that Varady and Lowe's claims can't be satisfied by the "purchaser or anybody subsequent because the injunction found in the sale order, which is a final order entered in the bankruptcy case when it was open, precludes it." Tr. 24.

Addressing this Court's comment about the appearance of fairness in allowing Varady and Lowe to determine, through discovery, the status of Jerritt Canyon as a successor, the Judge stated,

> [w]ell, a couple points. Jerritt Canyon was the buyer, the successor. The point is it was the purchaser. What did it purchase? Their assets. But even if it is, it is of no legal significance because there's no successor liability."

Tr. 27.

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[7] Marianne Kobak McKown, *Going Private: Canadian billionaire buys Jerritt Canyon*, ELKO DAILY FREE PRESS, June 26, 2015, *available at* http://elkodaily.com/mining/canadian-billionaire-buys-jerritt-canyon/article_605d9414-8871-5695-878c-4c430c230929.html.

[8] The Judge, who stated that he had "some experience with mining," added, "I will confess now. When I was a lawyer many, many years ago, I actually did work for Dee Gold and for Barrick -- no, I didn't do -- but for Newmont," and expressed an upside to the sale as it "allow[ed] this operation to go forward, which protected the jobs of the miners and, of course, provided related economic benefit in the communities near the mine site." Tr. 41, 6. This suggested that the gold at Jerritt Canyon might otherwise be left unmined, an unlikely event. Further, the multiple discrimination complaints filed against Veris were equally important to "protecting the jobs of the miners." Around the time of those discrimination complaints, Veris was also being reviewed to determine if it should be subject to a pattern of violations charge by the Secretary of Labor.

The Judge continued that, as for this Court's suggestion to Varady and Lowe in advance of their appearance before the Judge, that they be allowed to have full discovery regarding the principal stock holding officers of these various entities,

> there's no point to that. Even if it was appropriate, and it's not, there's no successor liability. There's no point to let the proceeding before the Federal Mine Safety and Health Review Commission to continue to determine if Jerritt is the successor because once again, there's no successor liability.[9]

Tr. 27- 28.

The Judge stated that,

> [y]our choice is not to do anything or to ask the bankruptcy court to get relief from the stay so that you can proceed with your claim, and then the court would look at your pleadings and any opposition and make a decision. Happens all the time in bankruptcy cases, where we will allow folks that have been injured in automobile accidents or states or counties that have suffered environmental damage.

Tr. 31-32.

The Judge continued,

> Then I would have made a decision. Unfortunately, it probably wouldn't have made much economic difference to you -- and this is what I'm really trying to get across – because there is -- and none of the other debtors had any ability to satisfy your claim. I'm not saying that you weren't discriminated again. That's not what I'm saying at all. What I'm saying is that even if you were able to get some type of damages, that you couldn't collect it from the debtors. There is no money. That's why Wbox 214 [sic] made a credit bid and Deutsche Bank didn't overbid. That's why there were millions and millions and millions of dollars lost in this enterprise and lost forever. And there's also a provision under 363 of the Code that allows sales of asset to occur if that's in the best interest of both the creditors and the debtor. And that was the findings (sic) made by both the Canadian judge and me. You're being treated exactly the same as every other unsecured creditor in this case.

Tr. 32-33.

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[9] With discovery on the issue of successorship barred, the Judge's determination means that the financial relationships, if any, between those who had interests in Veris Gold and Jerritt Canyon Gold will never be known and inquiry into the monitor's acknowledgement that "[w]hile the DIP Lender's lack of support for the various EOIs might be perceived as a potential conflict of interest, the Monitor remains of the view that the Credit Bid Transaction is the appropriate course of action at this late stage of the proceedings," will similarly not be known. *Id*. at para. 39; 2016 WL 4158375 at *7. The Court is unaware of any on the record discussion by the bankruptcy court inquiring into the potential conflict of interest alluded to by the Monitor.

The Judge acknowledged that Lowe had a judgment but that, "it's void - - it may be void ab initio as a result of a violation of Section 362 of the Bankruptcy Code." Tr. 36. The Judge did allow that "[t]he United States Courts of Appeal say the bankruptcy courts make that, and you… the Gruntz case, which dealt with a state court action, said the state court judgment entered its opinion, but if the state court judge gets it wrong, the parties are at their own peril." Tr. 36. The Judge offered that, "you [Varady and Lowe] probably should have got stay relief." Tr. 37. The Judge also remarked, "But every other creditor in this case didn't get paid, and you're in exactly the same position. . . . And they didn't do anything wrong either." Tr. 39. The Judge also remarked,

> if you want to proceed in another forum, in another place, and there's no exception to the stay, which I believe there isn't in this case -- and I understand there may be some disagreement with that, that's fine. But then you need to seek relief from this court. And the prudent measure -- and the Ninth Circuit has -- . . . has indicated that whenever there is even a doubt whether or not you need to seek relief, seek relief from the stay.

Tr. 40.

The Judge continued,

> My point is this. When those cases were filed, everybody was given the same notice you were given. And claims can be discharged, and if there's a sale of assets, it generally does not allow successor liability, which is allowed pursuant to Section 363 of the code. And there are lots of cases dealing with discrimination -- TWA was a discrimination case, if I remember correctly. . . . And those were flight attendants, I think. . . . And those claims went away. And that's the result. People lose their pensions in bankruptcy court. It's no -- one takes no pleasure in that, but that is how Congress has written the statute for policy reasons that it believes are paramount, and I don't get to wave a magic wand and ignore them, and the United States Supreme Court Law v. Siegel case about a year and a half, two years ago made that clear. . . . Everybody says the bankruptcy court is a court of equity. In a sense we are, but that doesn't mean we just get to say, well, this would be fair, and therefore I get to do it.

Tr. 41-42.

And still later, the Judge told Varady and Lowe, "if you think I'm wrong and you want to go to another court and tell the other court your position -- . . . you can do that. . . . And that's what you -- what I'm really trying to tell you is that's what you should have done last June." Tr. 47.

Following those remarks, the Judge stated,

> I'm granting the motion to reopen. I'm going to grant the motion to enforce my sale order. And I'm going to make it clear if it wasn't clear in the order itself. There's an injunction against any attempt to proceed regarding successor liability because successor liability is specifically prohibited by the terms of the sale order. And I'm going to instruct counsel for Jerritt Canyon to provide written findings

> and conclusions...What it means is I've reopened the bankruptcy case. . . . That's why we have two motions. . . . first, I have to open the case. If I don't reopen the case, then I can't enter the order to enforce my earlier sale order. So I'm granting the motion to reopen under Section 350, and I find good cause exists. Then I'm granting the motion to enforce the order no success liability and injunction precluding, preventing, stopping [Varady] and Mr. Lowe from proceeding in any other forum regarding successor liability.

Tr. 58-59.

He concluded, "I put Mr. Lowe and Mr. Varady on notice that if they violate my order, I will enforce it with monetary sanctions." Tr. 60.

Following the August 11, 2016 hearing, on September 2, 2016, Judge Zive issued his order affirming his remarks at that hearing.[10]

Accordingly, as discussed above, the Court feels it has no option but to dismiss this proceeding. Despite the outcome, the Court believes that further discussion is warranted.

Discussion

Judge Zive noted at the outset of the proceeding that he was aware of the discrimination complaints brought by Lowe, Varady and others. However, he then proceeded to state that he would "make the record now, Administrative Judge Moran had telephoned [him] while the case was pending, asking if [he] was aware of these [discrimination] claims." Motion Tr. 5.[11] The Judge[12] couldn't remember exactly what he told Judge Moran, nor did he take any notes, but he "remembered distinctly" telling this Court that he could not provide any legal advice, that it would be inappropriate to do so and that the discrimination complainants should obtain legal counsel, but that "[a]pparently that advice was not heeded." *Id.*

[10] The Judge's order, at his direction, was created by counsel for Veris/JCG and adopted by the Judge who inserted his signature.

[11] To be clear, the references are to Judge Zive's statements during his August 11, 2016 motion hearing.

[12] All references to the "Judge" in this Order of Dismissal refer to Judge Zive. References to the "Court" refer to the undersigned author of this Order, Judge William Moran.

The problem with Judge Zive's multiple references to speaking with this Court in the transcript of his proceeding on Jerritt Canyon's motion is that such conversations *never* occurred.[13]

Upon reading the transcript and Judge Zive's multiple references to alleged conversations with this Court, it was necessary, on August 16, 2016, for the Court to send the Judge a letter calling attention to his multiple, egregious factual errors in asserting that there had been such communication. This Court informed the Judge that there had *never* been *any* sort of communication between Judge Zive and this Court. The letter advised,

> Judge Zive, you are mistaken. I have never called you, never spoken with you and never emailed you. Perhaps you spoke on some prior occasion with another administrative law judge, on that I can only speculate, but there has never been any conversation or any form of communication between us and, in the name of accuracy, I call upon you to correct the record on this score.[14]

Judge Zive recounted that he presided at the hearing to recognize the sale order, which had been approved by the Canadian court, and that he inquired of counsel for the debtor if they were aware of the discrimination claims and that he was "told yes and they were being handled." *Id.* Noting that those discrimination complaints were brought by individuals and not by "any governmental body or regulatory agency," the Judge stated that the automatic stay provision at Section 362(b)(4) appeared inapplicable.[15] *Id*. at 5-6. The Judge then noted that the bankruptcy

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[13] The Judge made several other references during his hearing, claiming to have spoken with Judge Moran. Among those errors at transcript page 12, the Judge states: "or Judge Moran - - I think that's how he's referred to is Administrative Judge Moran - - who I already indicated that I talked to, seems like a very nice man - - responded to Mr. Lowe on August 8th." Tr. 12. Later, the Judge remarked in the context of advice, "And that's why I told Judge Moran he should tell you folks to get a lawyer." Tr. 14. "And that's why when Judge Moran called me some time ago, I - - as I do in every one of these cases, without exception, I strongly urged him to advise you, if that's what he was going to do - -." Tr. 34. As noted, the Judge never spoke with this Court at any time before his August 11, 2016 hearing and the *only* communication *after* that hearing was the Judge calling this Court to apologize for his errors.

[14] To his credit, Judge Zive called this Court, twice, the same day the letter was sent to him. He apologized for his errors and advised that the record in his case would reflect his errors and include this Court's letter to him. Judge Zive's errors were not limited to knowing whom he spoke with, as he twice referenced that "*the solicitor general of the United States* disagrees with [Lowe's] position" about miners being the most precious resource and that the bankruptcy court disregards the Mine Act. Tr. 33 (emphasis added). It is the Solicitor of Labor that took issue with this Court's view, not the Solicitor General of the United States.

[15] Though not providing any specific case citations, the Judge stated, "there are a number of cases finding that dealing with asbestos cases, dealing with SEC cases, dealing with complaints regarding remediation of environmental hazards," in support of his statement that the automatic stay provision was applicable. Motion Tr. 6.

court retains jurisdiction to determine if the automatic stay provision applies.[16] *Id.* at 6. Upon review of all the pleadings, the Judge concluded, "there was no money and [he] was satisfied that that was the situation and obviously so was the judge in Canada." *Id.* at 6-7.

Judge Zive then noted that the "sale order that was entered clearly provides that there will be no successor liability for the purchaser," and that a "new entity was formed before the transaction closed on June 24th." *Id.* at 7. The Judge then added that no request to seek relief to allow the discrimination claims to proceed in the administrative forum was made and that, apart from whatever the merits may be, it was the process that was not followed. *Id*. Judge Zive then continued that,

> astoundingly, it would appear that the failure to follow that process was being advocated by an administrative law judge who, so far as [the Judge] [could] determine, has an obligation to be fair and impartial, and yet is clearly providing legal advice to at least two of the claimants, notwithstanding the disclaimer that he was not doing so. [The Judge didn't] know how anyone who could be opposed or on the other side of the discrimination claims could believe that they were going to get a fair hearing when [one] read[s] emails indicating that the

[16] The Judge stated this was not new law, and noted without specific citation, that one "can go back to 2002 and look at the Gruntz case." Motion Tr. at 6. The Judge was apparently referring to *In re Gruntz*, 202 F.3d 1074 (9th Cir. 2000), in which the Ninth Circuit addressed "(1) whether a state court modification of the bankruptcy automatic stay binds federal courts; and (2) whether the automatic stay enjoins a criminal prosecution for the willful failure to pay child support. We hold that federal courts are not bound by state court modifications of the automatic stay, but that the automatic stay does not enjoin state criminal prosecutions." Id. at 1077. Judge Zive's expression of the holding in *Gruntz* is that "parties may request a state court or other forum to make a determination if there has been a violation of the stay, but they run the risk of the state court getting it wrong. And if the state court gets it wrong or *administrative law judge gets it wrong*, all the proceedings and any orders entered are void." *Id.* at 9 (emphasis added). Ultimately the Judge may be correct but this Court is not aware of any decision by a federal district or bankruptcy court holding *that Mine Act discrimination proceedings*, with its unique anti-discrimination provisions, are subject to the automatic stay.

> administrative law judge is providing advice and - - to those claimants that are before him and telling them how to proceed in this [Judge Zive's] court.[17]

Id. at 7-8.

It is difficult to know where to begin with Judge Zive's comments. First, fair hearings *on the issue of liability* had occurred; the decisions upholding the discrimination complaints of Mr. Lowe and Mr. Varady had long ago been decided by this Court: October 15, 2015 in the case of Mr. Lowe, 2015 WL 6447553, and September 2, 2015, in the case of Mr. Varady, 2015 WL 5307780. In the Varady matter, defense counsel hired by Veris appeared before this Court. When the evidence at that hearing made it plain to all that Varady was the victim of discrimination, Veris folded its tent and its counsel withdrew. The same counsel then announced at the outset of the Lowe discrimination complaint the week following the Varady hearing, that it was withdrawing any defense to the Lowe matter as well. However, the damages phase has never occurred for either complaint. Consequently, *no* amount of damages has been determined for either complainant.

As to the Judge's assertion that this Court was "clearly providing legal advice to at least two of the claimants, notwithstanding the disclaimer that [it] was not doing so," there are two points to be made. The Court made it plain when communicating with the non-attorney *pro se* complainants, Varady and Lowe, about the motion they faced by Veris to reopen the bankruptcy case, that its comments were in response to Mr. Lowe's communication to this Court upon being informed of the Veris motion before the bankruptcy court. Far from providing legal advice, the Court noted:

> If [the Court] were in [Lowe's] position, when eventually before the Bankruptcy Court, [the Court] would make the following points before that Court, ***all as expressed in the various orders/decisions this Court has issued in your discrimination proceeding before the Federal Mine Safety and Health Review Commission***. You should not view the points which follow as restricting the contentions that you may make at the Bankruptcy Court hearing, as you may have other arguments to present before that court. I would also provide the Bankruptcy

[17] The Judge apparently believed that this Court's guidance to the pro se, non-attorneys Varady and Lowe, demonstrated unfairness. "I don't know who would want to go now in front of, frankly, Judge Moran once he's provided the assistance to you he's provided to you. I would hate to be sitting on that other side of the table, representing somebody else against you folks at this point, candidly. That's why I was surprised when I saw those emails." Tr. 28. The Judge apparently forgot that liability had already been decided in both cases, with Varady's case decided after a full and fair hearing with Veris' counsel conducting extensive discovery and full participation in the Varady hearing and then quitting participation on the eve of the Lowe hearing. Further, the Court's emails, *all* sent to both sides, informed that no determination had been made on the successorship question, nor had damages of any amount been determined. Full participation would have been provided by the Court on the issues of successorship and damages. Further, while Varady and Lowe offered preliminary thoughts about their claimed damages, this Court has never ruled on those issues and noted that some of those claims were not cognizable under the Mine Act. Those issues remain undecided even today.

> Court with copies of all orders/decisions issued by this Court as well as those issued by Mine Act Judge David P. Simonton and the related Mine Review Commission's issuances.

August 8, 2016 email to Mr. Lowe, which email also copied the various Veris/Jarrett Canyon attorneys (emphasis added).

That the Court referenced its prior orders to the pro se complainants to assist them before the daunting prospect of facing multiple lawyers for Veris, Jerritt Canyon Gold, and Wbox 2014-1 LTD did not amount to providing legal advice. The Court considers it as its duty, in fact views it as part of its responsibility that essential justice be provided, to provide a pro se litigant with clarification on the significance of its decisions and the nature of the proceedings they face. Every person has a fundamental right to access justice through a fair, impartial, and meaningful hearing, regardless of whether they are represented by counsel. In particular, judges have an ethical duty to be both impartial and fair. Model Code of Judicial Conduct Canon 2 (1997) (hereinafter MCJC). Pro se litigants often find it particularly difficult to navigate complex legal and procedural issues while attempting to obtain a full hearing on the merits of their dispute. Therefore, judges have the power to make reasonable accommodations in the courtroom to ensure that pro se litigants are not unfairly hindered in exercising their Constitutional right to a fair hearing. The MCJC was revised in 2007 to clarify, "it is not a violation of [the canon of impartiality] for a judge to make reasonable accommodations to ensure pro se litigants the opportunity to have their matters fairly heard." Comment 4 to MCJC.

There is not yet comprehensive guidance on what specific accommodations are "reasonable," or what accommodations are prohibited. Jona Goldschmidt, Judicial Assistance to Self-Represented Litigants, 17 Mich. St. J. Int'l L. 601, 608 (2009). When confronted with this issue, the Supreme Court of West Virginia held,

> The fundamental tenet that the rules of procedure should work to do substantial justice . . . commands that judges painstakingly strive to insure that no person's cause or defense is defeated solely by reason of their unfamiliarity with procedural or evidentiary rules. . . . Cases should be decided on the merits, and to that end, justice is served by reasonably accommodating all parties, whether represented by counsel or not. This "reasonable accommodation" is purposed upon protecting the meaningful exercise of a litigant's constitutional right of access to the courts.

Blair v. Maynard, 324 S.E.2d 391 (West Virginia 1984).

The Court considers it no less than a judicial obligation to provide pro se parties with reasonable assistance. Needless to say, "this requires a balancing of the rights of both parties." The Role of the Judge in Pro Se Litigation, 10 No. 6 Divorce Litigation 115 (1998). There is an important difference between judicial neutrality and judicial passivity, especially in the pro se context when justice occasionally demands judicial engagement, in service of true neutrality, to balance out the disadvantages of only one party having the benefit of counsel. Richard Zorza, Esq., The Disconnect Between the Requirements of Judicial Neutrality and Those of the Appearance of Neutrality When Parties Appear Pro Se: Causes, Solutions, Recommendations, and Implications, 17 Geo. J. Legal Ethics 423 (2004). The Court's task of balancing the judge's

function as an impartial arbiter against the "necessity that the pro se litigant's case be fully and competently presented" is sometimes a difficult one. ABA Standards, Commission on Standards of Judicial Administration, Trial Courts § 2.23 at 45-47 (1976).[18]

Judge Zive then proceeded to note that the discriminated former employees of Veris had been before him earlier when seeking to stay the sale order, and that they were creditors and that their claims existed prior to the bankruptcy petition, citing the definition of a creditor as an "entity - -and that includes an individual[19] - - that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor." *Id*. at 8.

The Court certainly respects the jurisdictional expressions made by Judge Zive, but it does not believe that this Court's perspective is as unsound as the Judge asserted. That the subject of discrimination claims and their interface with bankruptcy protection is a thorny issue has been recognized by others:

> Bankruptcy courts, facing a surge in claims stemming from employment discrimination, are slowly exploring the impact of this area of law on case administration. An inherent conflict exists between the policies underlying employment discrimination and bankruptcy laws. On the one hand, employment discrimination laws seek to protect employees by making them whole for losses suffered, while at the same time deterring management from discriminating again. Conversely, the bankruptcy reorganization process stresses rehabilitation of the debtor and equality of distribution among the claimants. Although the Bankruptcy Code (the "Code") affords some protection to victims of discrimination, their claims are not afforded special treatment under the bankruptcy laws. Low dollar distributions on discrimination claims eviscerates the rehabilitative and deterrent goals of Title VII of the Civil Rights Act of 1964 and state discrimination statutes. The swelling tide of insolvencies involving parties to discrimination lawsuits warrants an analysis of both the treatment of employment discrimination claims in bankruptcy and the impact of these claims on the bankruptcy process… and the ability to exempt employment discrimination claims in bankruptcy.

Joanne Gelfand, *The Treatment of Employment Discrimination Claims in Bankruptcy: Priority Status, Stay Relief, Dischargeability and Exemptions,* 56 U. Miami L. Rev. 601, 602 (April 2002).

Although the *Discrimination Claims in Bankruptcy* article refers to the automatic stay provision, 11 U.S.C. §362 and acknowledges that it does not apply "to stay the

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[18] See also, *A Full and Fair Hearing: The Role of the ALJ in Assisting the Pro Se Litigant*, 27 J. Nat'l Ass'n Admin. L. Judiciary 447, Fall 2007.

[19] 11 U.S.C § 101, provides, at section (10) that the term "creditor" means — (A) entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor;(B) entity that has a claim against the estate of a kind specified in section 348(d), 502(f), 502(g), 502(h) or 502(i) of this title; or (C) entity that has a community claim. Section (15) provides that the term "entity" includes person, estate, trust, governmental unit, and United States trustee.

commencement or continuation of proceedings by governmental units to enforce their police or regulatory power or to enforce nonmonetary judgments," this Court finds it difficult to distinguish a Section 105(c)(3) proceeding from a Section 105(c)(2) proceeding, simply because the government launches the latter.

This view arises because Congress did not establish a (c)(3) action as a lesser claim and by providing such an action for an individual to pursue it was effectively enforcing the governmental regulatory power through the individual. Congress foresaw that the agency may get it wrong and therefore created the alternative, but equal, avenue for relief against acts of discrimination against miners. In that respect the Section 105(c)(3) action is arguably unique among discrimination claims and can be viewed as indistinguishable by Congress' inclusion of the provision.

In addition, Veris proceeded to defend against Mr. Varady in the hearing before this Court. It was only when it was beyond cavil that Veris would not prevail that it packed up and left the Varady proceeding and quickly thereafter bailed from the Lowe discrimination complaint.

Conclusion

For the reasons set forth above, the Court hereby **DISMISSES** the discrimination claim brought by Matthew A. Varady.

SO ORDERED.

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

Distribution:
Matthew A. Varady, 701 S. 5th Street, #6, Elko, NV 89801, Urandonk406@gmail.com

Danielle B. Lowe, P.O. Box 2609, Elko, NV 89801, danny.lowe@icloud.com

Mark Kaster, Esq., Dorsey & Whitney, LLP, 1500 South 6th Street Minneapolis, MN 55402, Kaster.mark@dorsey.com

Annette Jarvis, Esq., 136 South Main Street, Suite 1000, Salt Lake City, UT 84101, Jarvis.annette@dorsey.com

Cathy L. Reece, Esq., Fennemore Craig, P.C. 2394 East Camelback Road, Suite 600 Phoenix, AZ 85016, creece@fclaw.com

Shaun Heinrichs, Veris Gold, 688 West Hastings Street, Suite 900, Vancouver, BC V6B 1P1, Canada

Tevia Jeffries Dentons, Canada LLP, 250 Howe Street, 20th Fl. Vancouver, BC V6C 3R8, Canada

Brad J. Mantel, Esq. Office of the Solicitor, U.S. Department of Labor 201 12th Street, South, Suite 401 Arlington, VA 22202-5450, mantel.brad@dol.gov

W. Christian Schumann, Esq., Office of the Solicitor, U.S. Department of Labor, 201 12th Street, South, Suite 401, Arlington, VA 22202-5450