October 2017

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Review was granted in the following case during the month of October 2017:

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Review was denied in the following cases during the month of October 2017:

Secretary of Labor obo Larry Groves v. Con-Ag, Inc., Docket No. LAKE 2017-117 DM (Judge Miller, September 6, 2017)

Secretary of Labor obo Jeffery Reel v. The Monongalia County Coal Company, Docket No. WEVA 2017-259 D (Judge Lewis, July 6, 2017) (Interlocutory Review)

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 5, 2017

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. CONSOL PENNSYLVANIA COAL COMPANY	Docket No. PENN 2013-385

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

DECISION

BY THE COMMISSION:

This proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). It involves a citation and order issued to Consol Pennsylvania Coal Company ("Consol") by the Department of Labor's Mine Safety and Health Administration ("MSHA"). The citation alleges a "significant and substantial" ("S&S")[1] violation of the safety standard in 30 C.F.R. § 75.370(a)(1)[2] because the operator failed to comply with its approved mine ventilation plan's directive to maintain the bleeders safe for travel.[3] The order alleges an S&S violation of the safety standard in 30 C.F.R. § 75.364(h)[4] for the failure to note hazardous accumulations of water in the record book. Both violations were alleged to be highly likely to

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

[2] 30 C.F.R. § 75.370(a)(1) provides that "[t]he operator shall develop and follow a ventilation plan approved by the district manager. The plan shall be designed to control methane and respirable dust and shall be suitable to the conditions and mining system at the mine."

[3] Page 4, Line AA, of the operator's approved mine ventilation plan states that "[t]he means for maintaining the bleeder safe for travel will include compressed air lines routed underground, used in conjunction with air pumps to remove water as necessary to permit safe travel through the perimeter of the bleeder system." Gov't Ex. 3 at 000009.

[4] 30 C.F.R. § 75.364(h) provides that "[a]t the completion of any shift during which a portion of a weekly examination is conducted, a record of the results of each weekly examination, including a record of hazardous conditions . . . found during each examination and their locations, the corrective action taken . . . shall be made."

result in fatal injury, the result of the operator's high negligence, and an unwarrantable failure[5] to comply with the cited standard.

After a hearing, the Judge affirmed both violations and upheld the S&S, gravity, high negligence, and unwarrantable failure designations. 37 FMSHRC 1616 (July 2015) (ALJ). The Commission granted the operator's petition for discretionary review challenging these findings.

The Commission:

1. Unanimously affirms the determination that the citation involved an S&S violation.

2. Remands by a majority vote the determinations of gravity, negligence, and unwarrantable failure for the citation, the determinations of gravity and unwarrantable failure for the order, and the penalty assessments for both violations.[6] While Commissioner Cohen joins the Acting Chairman and Commissioner Young in remanding these issues, he writes separately on negligence for the citation and unwarrantable failure for both the citation and the order.

3. Is evenly divided on the S&S and negligence determinations for the order. The Acting Chairman and Commissioner Young would reverse the S&S determination and remand the negligence determination for the order, while Commissioner Cohen joins Commissioner Jordan in affirming both the S&S and negligence determinations. Therefore, because there is no majority on these issues, the Judge's determinations shall stand as if affirmed. *Pennsylvania Elec. Co.*, 12 FMSHRC 1562, 1563 (Aug. 1990), *aff'd on other grounds*, 969 F.2d 1501 (3d Cir. 1992).

The following opinion, by all four Commissioners, sets forth the factual and procedural background and a single portion of the disposition where all four Commissioners unanimously affirm that the citation involved an S&S violation.

Following this opinion, the Acting Chairman and Commissioner Young set forth their separate opinion on the remaining issues, i.e., gravity, negligence and unwarrantable failure for the citation, and S&S, gravity, negligence and unwarrantable failure for the order.

Following their opinion, Commissioner Jordan sets forth her separate opinion on the issues of gravity, negligence, and unwarrantable failure for the citation, and S&S, gravity, negligence and unwarrantable failure for the order.

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[5] The unwarrantable failure terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which establishes more severe sanctions for any violation that is caused by "an unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards."

[6] The Judge who issued the decision has retired.

Following her opinion, Commissioner Cohen sets forth his separate opinion indicating where he joins the Acting Chairman and Commissioner Young, where he joins Commissioner Jordan, and where he writes separately from each Commissioner.

I.

Factual and Procedural Background

A. General Background

Consol operates the Enlow Fork Mine, a large underground coal mine in western Pennsylvania. The mine is divided into numerous districts of longwall panels identified by letter and subdivided by the numbered panels within that district. Each longwall panel runs east to west for approximately two miles while the longwall face is approximately 1000 feet across.

The E-district bleeder system ventilates the mined-out E-15 to E-22 longwall panels.[7] In accordance with 30 C.F.R. § 75.364(a), the system must be examined weekly. During a bleeder exam, an examiner is required to check the ventilation at designated evaluation points throughout the bleeder. At the time of the violations herein, examiners walked the bleeders alone.[8] 37 FMSHRC at 1619.

The ventilation plan required that the examiner be able to pass safely throughout the bleeder without being exposed to excessive accumulations of water. Water is cleared from the bleeders by pumps. The operator's ventilation plan permitted a system of 18-23 air pumps to reroute water accumulations in the bleeders. These air pumps dumped water into a sump that was 10 to 11 feet deep. Two discharge lines transferred water from the sump to an underground retaining pool.[9] *Id.* at 1619-20. The operator also had a backup surface sump pump, which was not included in the ventilation plan and which was used only during emergencies such as when air pumps malfunctioned. Originally, the operator was required to activate the sump pump manually, but a bubbler system later was installed to activate the pump automatically when water reached a set level. The surface sump pump transferred water to three outdoor tanks with a total combined capacity of 63,000-64,000 gallons. When the tanks were full, trucks would unload them. *Id.* at 1621.

On November 20, 2012, MSHA Inspector Walter Young issued a citation to Consol after he observed accumulations of water in the E bleeder district more than 36 inches deep in some

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[7] "Bleeder entries" are defined as "panel entries driven on a perimeter of a block of coal being mined and maintained as exhaust airways to remove methane promptly from the working faces to prevent buildup of high concentrations either at the face or in the main intake airways." Am. Geological Institute, *Dictionary of Mining, Mineral, and Related Terms* 55 (2d ed. 1997).

[8] By the time of the hearing, a company-wide policy required bleeder examiners to travel in pairs.

[9] Historically, most water accumulations in the bleeder system have been clear, though some could be cloudy, orange, and murky from magnetite and sulfur. Tr. 488-89.

areas. Gov't Ex. 7. On December 10, 2012, Inspector Young again cited the operator for accumulations of water in the E bleeder district; the depth of the water exceeded 24 inches in certain areas. Gov't Ex. 8. The inspector designated both violations as reasonably likely to result in lost workdays and/or restricted duty. In the latter citation, the inspector informed the operator that similar violations in the future might lead to greater enforcement action by MSHA. Gov't Ex. 8.

After the December 10 citation, Consol conducted additional exams in the bleeder. It also installed a monitoring system for the surface sump pump. The computer monitors showed air pressure in the bubbler rather than inches of water in the bleeders, and displayed visual alarms when the sump pump was activated or when the surface tanks were full. 37 FMSHRC at 1624. However, the monitoring system failed to work consistently, due in part to equipment failures. For example, a power outage in the mine on February 1, 2013 might have caused the air pumps to malfunction. The surface pump malfunctioned before February 5, 2013, the date of the citation at issue, due to a hole in its bubbler tubing.

B. Events of February 5-6, 2013

Sometime before 4:00 a.m. on February 5, 2013, Dan Stalnaker, a certified examiner, entered the E-15 side of the bleeder district.[10] Stalnaker encountered an accumulation of water near the E-15 sump; the water contained debris, gridlocks, and pieces of wood but was otherwise relatively clear. Stalnaker donned chest waders that had been left in the mine, and attempted to continue his examination. In total, he was able to take ventilation readings at three evaluation points. He tried to bypass the water by traveling through a man door that was three feet high. However, water poured into his waders when he bent over trying to pass through the doorway, and his methane detector became wet. Stalnaker left the bleeder district between 4:00 and 4:30 a.m. and informed shift foreman Robert Price and mine foreman Mike Giavonelli that he could not complete his bleeder exam because of the wet gas detector. 37 FMSHRC at 1630.

After Stalnaker reported the problem with the bleeder, Price and Giavonelli took separate actions. Giavonelli sent a miner to check whether the surface sump pump was functioning properly. The miner discovered that the surface pump was not running, and at approximately 5:05 a.m. he bypassed the bubbler, solving the problem. Meanwhile, Price instructed another examiner, Kevin Saunders, to complete the bleeder exam by starting from the opposite direction of the bleeders as Stalnaker. *Id.* at 1630-31.

Saunders entered the E-22 side of the bleeder district and traveled through water up to three feet deep between E-21 and E-19. At 10:00 a.m., Saunders encountered waist-deep water near the E-15 sump area that Stalnaker had intended to examine, and retreated before he could complete the exam. *Id.* at 1631.

Stalnaker and Saunders combined to inspect all but two of the ventilation evaluation points in the E bleeder district — the E tailgate overcast and the E tailgate #2 entry (which were near the E-15 sump). Gov't Ex. 3 at 000045; 37 FMSHRC at 1637. The entries in the record

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[10] Stalnaker was conducting the exam in place of Jamie Greene, the regular examiner for the E bleeder district. 37 FMSHRC at 1629-30.

book for the overcast and #2 entry in the E tailgate were left blank. Despite this deficiency, Foreman Giavonelli countersigned the record book. While Giavonelli was aware of the hazard from a conversation with Stalnaker, it is undisputed that neither Giavonelli nor Stalnaker nor Saunders noted the existence of hazardous water accumulations in the record book. 37 FMSHRC at 1658-59.[11]

At around 10:00 a.m. on February 5, MSHA received a section 103(g)[12] complaint regarding water accumulation in the E bleeder district. Gov't Ex. 3 at 000011. MSHA Inspector William Gross, who was performing a regular quarterly inspection of the mine, was informed of the complaint and began an inspection of the bleeders around E-15 through E-22 in the E bleeder district sometime after 11:30 a.m. Gross and Consol employee John Brottish entered the bleeder from the E-15 side. Gross found water ranging from 12 to 42 inches in depth, observing that it was murky and obscured the walkway in some areas. He also noted that the area near the E-15 sump was completely flooded.[13] Gross finished his inspection between 8:30 and 9:00 p.m. that day. 37 FMSHRC at 1626-27. During Inspector Gross' examination he walked with Brottish virtually the entire length of the bleeder before eventually withdrawing as a result of deep water at the E-15 sump area that Stalnaker had sought to inspect. During this inspection, Inspector Gross and Brottish passed through and beyond the area of 36 inch water through which Saunders had walked previously in the E-19 to E-21 area.

Inspector Young arrived at about 9 p.m. to relieve Gross and complete the inspection. Young had previously cited similar violations in this area of the mine in November and December of 2012. He testified that his policy was to cite the bleeder for hazardous accumulations of water only when one of the following conditions was met: (1) water was taller than his 18-inch boots, (2) water extended over a large area, (3) water was discolored, or (4) water contained tripping hazards. *Id.* at 1624.

At around 11:00 p.m., Inspector Young spoke to Stalnaker and Saunders about their examinations. Young entered the bleeder at about 2:00 a.m. on February 6. Young observed the E-15 area but did not continue to the opposite side of the bleeder district; therefore, Young did not observe the conditions in E-19 through E-22. Tr. 118. At E-15, Young checked the man door

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[11] The ventilation plan required a weekly examination of the bleeder. Therefore, the operator had until midnight on February 5 to complete the examination.

[12] Section 103(g) of the Mine Act provides that "[w]henever . . . a miner . . . has reasonable grounds to believe that a violation of . . . a mandatory health or safety standard exists . . . such miner . . . shall have a right to obtain an immediate inspection by giving notice to the Secretary . . . of such violation." 30 U.S.C § 813(g). The section 103(g) complaint stated as follows: "I overheard firebosses saying that the E-15 bleeders [were] flooded today. Can this cause ventilation problems and blow up the mine? Please look into this[.] [T]hanks." Gov't Ex. 3 at 000011.

[13] As the Judge noted, Gross testified that if he had been alone, he would not have entered the water because no one could have helped him if he fell. Later, after returning to the MSHA office, Gross was verbally reprimanded by the assistant district manager for entering water that deep.

Stalnaker had attempted to use on February 5 and found that the water was two feet deep, even though the pump had been running for 20 hours by that time. After inspecting the E-15 area, Inspector Young issued Citation No. 7024068 and Order No. 7024069 to the operator.[14] 37 FMSHRC at 1628-39. Young believed that the root cause of the water accumulations in the E bleeder district was Consol's failure to check the bleeder entries and equipment after the 12-hour power outage earlier in the week. *Id.* at 1632. He was not aware, however, that Consol examiner Greene had examined the bleeder the day before (February 4), and that the water had accumulated after that examination. *Id.* at 1651.

The citation alleged a violation of 30 C.F.R. § 75.370(a)(1) for failure to comply with the mine's approved mine ventilation plan. The citation alleged that the bleeders were not maintained for safe travel because there were accumulations of water from 12 to 42 inches in depth, for a total distance of 2350 feet.[15] Moreover, the citation noted that the mine floor in this area could be irregular and contained rib sloughage and other tripping hazards. Gov't Ex. 1; 37 FMSHRC at 1628-34. The order alleged a violation of 30 C.F.R. § 75.364(h) in that the operator's agents had failed to note the hazardous water accumulations in the record book.

Inspector Young designated both the citation and order as being S&S, highly likely to cause two fatal injuries, and a result of the operator's high negligence and unwarrantable failure to comply with the cited standards. Tr. 126. MSHA proposed a penalty of $14,373 for the citation and $14,743 for the order. 37 FMSHRC at 1661-62.

C. The Judge's Decision

The Judge found that both the citation and order were S&S, highly likely to result in two fatal injuries, and a result of the operator's high negligence and unwarrantable failure. Consol does not contest either finding of violation; it does contest the negligence, gravity, S&S, unwarrantable, and penalty determinations.

The Judge found that the citation was properly designated as S&S and likely to result in fatal injuries because a miner traveling alone might trip or stumble and drown in the deep water. The Judge found that the citation was a result of high negligence because the operator knowingly exposed examiners to the cited hazard. With regard to unwarrantable failure the Judge determined that the cited hazard was extensive, obvious and posed a high degree of danger; that the operator knew of the violation prior to Saunders' exam; that the operator was on notice that greater efforts were needed for compliance; and that the violation was a result of high negligence. *Id.* at 1642-1654.

Regarding the order, the Judge determined it was properly designated as S&S and highly likely to result in fatal injury because the failure to record the hazard made it likely that more

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[14] Sometime after Young arrived at the mine, Andy Yablonsky, an employee of the operator, finished the ventilation exam including inspecting the two bleeder evaluation points that neither Stalnaker nor Saunders were able to inspect. Therefore, Inspector Young did not cite the operator for failing to complete a ventilation exam. 37 FMSHRC at 1638.

[15] The distance was later amended from 2350 feet to 2250 feet. Gov't Ex. 1 at 4.

miners would be exposed to the conditions described in the citation. The Judge affirmed high negligence for the order because three examiners and foremen, who were aware of the hazard, failed to note it in the record book. She affirmed the unwarrantable failure findings because the citation was the result of an unwarrantable failure, and the relevant facts for the order were identical. *Id.* at 1654-61.

II.

Disposition

A. Citation No. 7024068

Significant and Substantial

Substantial evidence supports the Judge's finding that the violation was significant and substantial. A violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *See Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984), the Commission further explained:

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

Id. at 3-4 (footnote omitted); *accord Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria).

Consol does not contest the finding that the accumulations of water violated the ventilation plan's requirement that the bleeders be maintained safe for travel, thus satisfying the first element of the *Mathies* test.

The second element of the test, whether the violation contributed to a discrete safety hazard, is also supported by substantial evidence. The bleeder district contained deep water with various tripping hazards, including uneven floor and debris. Tr. 723-24. Stalnaker and Saunders were exposed to these water accumulations. 37 FMSHRC at 1630. In walking through the water, they both became extremely wet, and Stalnaker had his methane detector get wet and fail when he attempted to climb through a mandoor. *Id.* Some of the water accumulations were so murky that a miner would not be able to see his feet or tripping hazards as he walked through the water. Tr. 121, 172, 312, 348, 354-56, 392-95, 411-12. Hence, it was reasonably likely that a miner could trip and fall while walking through the water. Tr. 121-22, 143, 230.

Consol argues that the "hazard" identified in the second element of the *Mathies* test must be a hazard contemplated by the standard, and that 30 C.F.R. § 75.370(a)(1) is directed at ventilation issues, not tripping hazards.[16] However, the determination of adequate ventilation in the bleeder requires examinations on a weekly basis. Examinations presuppose that the examiners will be able to safely travel to the places within the mine where the examinations must be conducted. Thus, Paragraph AA of the Enlow Fork Mine's approved ventilation plan requires that the walkways in the bleeder entries be maintained in a manner safe for travel. Tr. 56; Gov't Ex. 1. The requirement of a safe travelway is inextricably intertwined with the ventilation plan requirements of section 75.370.

As to the third element of the *Mathies* test, substantial evidence supports the finding of a reasonable likelihood that the hazard contributed to would result in injury. The Judge credited competent testimony that a miner who tripped and fell was, at a minimum, reasonably likely to suffer reasonably serious injuries such as broken bones. Tr. 121-22.

A reasonable likelihood of broken bones satisfies the fourth element of *Mathies.* The Commission has long recognized that broken bones and other injuries likely to result from a trip-and-fall accident are sufficiently serious in nature to support an S&S designation. *See, e.g., Maple Creek Mining, Inc.*, 27 FMSHRC 555, 562-63 (Aug. 2005) (affirming a Judge's conclusion that serious injuries such as leg or back injuries would arise from the failure to maintain an escapeway in a safe condition); *Buffalo Crushed Stone Inc.*, 19 FMSHRC 231, 238 n.9 (Feb. 1997) (concluding that slipping on a walkway would result in reasonably serious injuries such as a finger or a wrist fracture); *S. Ohio Coal Co.*, 13 FMSHRC 912, 918 (June 1991) (affirming a Judge's conclusion that a trip-and-fall accident would result in reasonably serious injuries such as "sprains, strains, or fractures"). A trip-and-fall accident resulting in broken bones was especially serious here, where the bleeder examiner walked long distances by himself over rough terrain, with no communications link to the surface or to any other miner. Tr. 36-39, 705-06; *see* 37 FMSHRC at 1622.

Consol notes an absence of previous injuries, the fact that only careful examiners entered the area, and its rapid action to abate the condition. These facts, however, do not refute the Judge's S&S finding. The Commission has noted that "[t]he fact that injury has been avoided in the past or in connection with a particular violation may be 'fortunate, but not determinative'" of the question of whether a violation was S&S. *U.S. Steel Mining Co.*, 18 FMSHRC 862, 867 (June 1996) (quoting *Ozark-Mahoning Co.*, 8 FMSHRC 190, 192 (Feb. 1986)). Further, the exercise of caution is not an element in determining the likelihood of injury once the reasonable likelihood of the occurrence of the hazard is established, because "[w]hile miners should, of course, work cautiously, that admonition does not lessen the responsibility of operators, under the Mine Act, to prevent unsafe working conditions." *Eagle Nest, Inc.*, 14 FMSHRC 1119, 1123

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[16] Consol relies on an ALJ decision in *Oak Grove Resources*, 34 FMSHRC 594 (Mar. 2012) (ALJ), but acknowledges that other Commission Judges have held to the contrary. *See Consolidation Coal Co.*, 15 FMSHRC 1408, 1413-15 (July 1993) (ALJ); *Oak Grove Res.*, 35 FMSHRC 3039, 3052 (Sept. 2013) (ALJ).

(July 1992).[17] Finally, when determining whether a violation is S&S, abatement after the violation is cited should not be considered. *Crimson Stone v. FMSHRC*, 198 F.App'x. 846, 851 (11th Cir. 2006).

Substantial evidence and sound legal authority support the Judge's conclusions. Therefore, we affirm the finding that the violation was S&S.

/s/ William I. Althen
William I. Althen, Acting Chairman

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

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

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

[17] We have consistently emphasized that, in evaluating the risk of injury, the vagaries of human conduct cannot be ignored. *See Great W. Elec. Co.*, 5 FMSHRC 840, 842 (May 1983); *Lone Star Indus.*, 3 FMSHRC 2526, 2531 (Nov. 1981); *Thompson Bros. Coal Co.*, 6 FMSHRC 2094, 2097 (Sept. 1984).

Opinion of Acting Chairman Althen and Commissioner Young:

A. Citation No. 7024068

Gravity

We remand the gravity determination for a re-assessment of gravity. In doing so, we find that substantial evidence does not support a finding of a high likelihood of a fatality. We do not otherwise express an opinion on the assessment of gravity.

The Judge determined that the violation was highly likely to result in two fatal injuries, agreeing with Inspector Young's designation as to both likelihood and degree of injury. 37 FMSHRC 1616, 1662 (July 2015) (ALJ). In determining the gravity of a violation, Judges are not bound to apply the tables in 30 C.F.R. Part 100, which the Secretary of Labor uses to propose penalties based on a system of points for a multitude of factors. Rather, Judges must assess penalties considering the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i). Instead of narrowly parsing gravity determinations, we consider gravity holistically, considering "factors such as the likelihood of injury, the severity of an injury if it occurs, and the number of miners potentially affected." *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2049 (Aug. 2016).

The finding of a high likelihood of two fatalities rests upon the testimony of Inspector Young, who testified that a miner walking alone in water with tripping hazards and a depth of 36 inches or more in this bleeder was highly likely to fall, hit his head or otherwise become incapacitated, and drown. Because two miners entered the water separately and from different ends of the bleeder, the inspector asserted two miners would be potentially affected.

The Department of Labor's Mine Safety and Health Administration ("MSHA") allows individual miners to examine bleeders. Every day individual miners examine bleeders by themselves. Additionally, bleeders are generally wet. 37 FMSHRC at 1620. In fact, the operator's ventilation plan recognizes that water will accumulate in the bleeder, and only requires its removal to the extent that water would prevent safe travel or affect ventilation. Gov't Ex. 3 at 000009. Only examiners who are experienced at going through bleeders perform the weekly examinations. Except for repair work, no other miner may enter or has reason to enter a bleeder.

At the same time, there is always the possibility that a miner walking in any part of a mine will trip and fall. Without doubt, therefore, it is possible that a miner walking in a bleeder with water in it could trip and fall. A fall in water by oneself without an ability to communicate with others increases the danger from a fall.

On November 20, 2012 and December 10, 2012, Inspector Young cited the operator for accumulations of water in this E-tailgate bleeder system. The citations noted that in certain areas the depth of the water was as much as 36 inches in one citation and 24 inches in the other. The water contained various tripping hazards. Gov't Ex. 7. The inspector designated the violations as significant and substantial ("S&S"). In those instances, however, Inspector Young marked the gravity as reasonably likely to result in lost workdays and/or restricted duty. *Id.* Thus, these

citations were for the same bleeder and for similar (with the exception of the depth of the water on December 10, 2012) conditions as the conditions on February 5.

The inspector issued the November 20 citation as low negligence, the December 12 citation as moderate negligence, and the citation in contest here as high negligence. Clearly, the inspector responded to the repetition of the condition. The inspector did not distinguish the danger in November and December from February 5.

Further, Inspector Young testified that MSHA permits miners examining bleeders to walk in up to at least 18 inches of water. Tr. 46. As a matter of MSHA policy, therefore, an individual miner examining a bleeder is considered safe when walking through 18 inches of water. Of course, a miner knocked unconscious from a fall in the permissible 18 inches of water also would be likely to drown. In light of the enforcement policy on 18 inches of water, it was incumbent upon MSHA to explain why a miner is safe from drowning in 18 inches of water but highly likely to drown in deeper water.

During his testimony, Inspector Young explained the possibility of a miner tripping in a bleeder. He testified about objects in the water of the travelways such as pump lines and crib blocks, and spoke of a trip and fall resulting in an examiner hitting his head. Tr. 121-23. Further, Dan Stalnaker was wearing waders, which would have increased the difficulty of returning to a standing position if a fall into water fills the waders.

Inspector Young testified that he had sought support for his gravity determination in MSHA's records. His research revealed only one drowning incident in a bleeder. MSHA, Report of Investigation, Underground Coal Mine, Other (Drowning) Accident (2000). In that instance, the cause of death was "drowning due to occlusive coronary artery disease." The miner either fell into a sump due to his condition or accidentally fell and was unable to get out due to the heart condition. That sole incident, while tragic, does not support the notion that it is "highly likely" a miner — let alone two miners — who are presumed safe in 18 inches of water, will drown in the circumstances of this case.

Other than Inspector Young's testimony, the Secretary did not present any evidence that a miner is highly likely to drown in a bleeder. The inspector's prior actions in not citing any likelihood of a fatality from water in this bleeder appear inconsistent with his assertion of a high likelihood of two fatalities from the February 5 violation. On the other hand, he did testify about tripping hazards, the absence of communications, and the danger of being alone.

Accordingly, we have determined that substantial evidence does not support the Judge's determination of a "high likelihood" of fatal injuries to either or both examiners under the facts presented in this case. Otherwise, as manifest from the foregoing discussion, the record is mixed. The Judge's findings do not satisfy her obligation to provide, in the gravity portion of the decision, a reasoned basis from the totality of the record for the conclusion of a degree of injury which could range from broken bones to a reasonable likelihood of a fatality. We therefore remand for a determination of the gravity of the citation.

Negligence

As in the determination of gravity, the Commission and its Judges are not bound or even significantly guided by the Secretary's definitions of "negligence" in the penalty regulations set forth in 30 C.F.R. Part 100. We thus reject the operator's contention that a Commission Judge may not find high negligence where the operator provides any mitigating circumstances for that violation. *See Mach Mining, LLC*, 809 F.3d 1259 (D.C. Cir. 2016); *Brody Mining, LLC*, 37 FMSHRC 1687, 1701-03 (Aug. 2015) ("Commission Judges are not bound by the definitions in Part 100 when considering an operator's negligence . . . [and] may find 'high negligence' in spite of mitigating circumstances . . . ."). Of course, we also reject any notion that the Judge must find high negligence if he does not find a "mitigating" circumstance. Indeed, the Commission has moved completely away from usage of the Part 100 definitions of negligence or any use of the nebulous notion of "mitigation." We employ "a traditional negligence analysis." *Mach Mining*, 809 F.3d at 1264; *American Coal Co.*, 39 FMSHRC 8, 14 (Jan. 2017). In assessing negligence, the Judge must consider "what actions would have been taken under the same circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation." *Brody Mining*, 37 FMSHRC at 1702.

Applying a traditional and holistic "reasonable person" negligence analysis to the case before us, Consol Pennsylvania Coal Company ("Consol") had "a duty of care to avoid violations of mandatory standards, and the failure to do so can lead to a finding of negligence when a violation occurs." *Leeco, Inc.*, 38 FMSHRC 1634, 1637 (July 2016)[1] (citing *A.H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983)). Because negligence relates to an operator's duty of care to avoid a violation, the "negligence inquiry [is] circumscribed by [the] scope of duties imposed by [the] regulation violated." *Brody Mining*, 37 FMSHRC at 1702 (citing *Spartan Mining Co*., 30 FMSHRC 699, 708 (Aug. 2008)). When determining the level of negligence for a violation of a ventilation plan provision, as is the case here, a "Judge must consider the actions that a reasonably prudent operator would or would not have taken, under the circumstances presented that are relevant to an operator's obligation to comply with the ventilation plan provisions in question." *Id.* at 1703.

The Secretary proves negligence if he proves by a preponderance of the evidence that the operator failed to act under the circumstances as a reasonably prudent operator familiar with the mining industry, the relevant facts, and the protective purpose of the regulation.[2] In this case, that means the Secretary must prove that the actions taken by the operator after the prior

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[1] *Leeco* involved a fatality. The Commission found the operator was not negligent because it had met the standard of care — that is, had acted as a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation.

[2] The Commission requires the Secretary carry the burden of proving its allegations against an operator holding, "[t]he burden of establishing an operator's negligence under section 110(i), 30 U.S.C. § 820(i), rests on the Secretary." *U.S. Steel Mining Co.*, 8 FMSHRC 1284, 1290 (Sept. 1986); *see also Jim Walter Res., Inc.*, 30 FMSHRC 872, 878 (Aug. 2008) (ALJ) ("The Secretary's burden is to prove the violations and related allegations, e.g., gravity and negligence, by a preponderance of the evidence.").

citations — installation of an automatic secondary pumping system with a bubbler, increased examinations, installation of a monitoring system, etc., *see infra*, slip op. at 18 (discussing efforts) — were insufficient to constitute the actions of a prudent operator. Of course, in a negligence context, the Judge also must look at the reasonably foreseeable consequences of the operator's actions because the foreseeable consequences affect the duty of care.

If negligence exists, the Judge must deal with the degree of negligence. Here, again, the Commission is not bound by the MSHA definitions and, certainly, not by definitions in Section 100.3. For example, the Commission finds high negligence when there is an "aggravated lack of care that is more than ordinary negligence." 37 FMSHRC at 1703 (*quoting Topper Coal Co.*, 20 FMSHRC 344, 350 (Apr. 1998)). To prove high negligence, the Secretary must prove that the operator's actions after the prior citations demonstrate a level of negligence appreciably greater than ordinary negligence — that is, aggravated misconduct. *See Leeco*, 38 FMSHRC at 1637-38; *Jim Walter Res., Inc.*, 36 FMSHRC 1972, 1976-77 (Aug. 2014); *A.H. Smith Stone*, 5 FMSHRC at 15-16.[3] In reviewing the Judge's determination, therefore, we must determine whether substantial evidence[4] supports a finding that the accumulation of water in the bleeder on February 5 resulted from an aggravated lack of care, taking into account all of the facts and circumstances.

The Judge's finding of high negligence rests at least in part on her finding that the violation was highly likely to result in fatal injuries. As explained above, substantial evidence does not support a high likelihood of fatalities. Furthermore, the Judge erred by not properly considering evidence of the operator's efforts to address the known propensity for water buildups prior to February 5 — the date of this violation. Despite these errors, we do not find it appropriate for us, at the Commission level, to designate the degree of negligence. We therefore vacate and remand the negligence issue for reconsideration by the Judge in accordance with this opinion.

First, regarding the role of the Judge's gravity determination in the negligence determination, we have long held that operators must address highly dangerous situations "with a degree of care commensurate with that danger." *A.H. Smith Stone*, 3 FMSHRC at 15. Certainly, therefore, an operator must exercise a very high degree of care to avoid a violation that is highly likely to result in one or more fatalities. However, as we have explained, substantial evidence

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[3] The use of "mitigation" essentially drops from the analysis under the reasonably prudent person standard. Of course, actions that might constitute "mitigation" will play into the reasonable person analysis, but negligence is not a question of whether the operator mitigated negligence. The standard is what a reasonably prudent person would have done. If the operator was negligent, then a question may arise whether the evidence demonstrates an aggravated lack of care. Of course, the Secretary bears the burden of proof throughout the hearing. Even under the Secretary's definitions, the operator does not bear a burden of proving mitigation.

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

does not support the Judge's conclusion of a high likelihood of two fatalities. Inspector Young's prior citations put Consol on notice of a reasonable likelihood of broken bones, and we accept the conclusion that there was a reasonable likelihood of a reasonably serious injury arising from the hazard contributed to by the violation. However, "reasonable likelihood" is a term of art that does not amount to a finding that the injury is "likely" in the standard sense, let alone "highly likely."

"Highly likely" demands evidence of probability exceeding even that used to demonstrate that a condition constituted an imminent danger, or arose from a flagrant violation of a mandatory standard. *See* 30 U.S.C. § 802(j) (imminent danger exists where death or serious physical harm "could reasonably be expected" before abatement); 30 U.S.C. § 820(b)(1) (flagrant violation requires violation to cause or reasonably be expected to cause death or serious bodily injury).

Moreover, a reasonable likelihood of broken bones is significantly different from the foreseeability of a likelihood of death. Thus, it was error for the Judge to premise a finding of high negligence on her erroneous conclusion that it was highly likely that the violation would result in two fatalities. At the same time, the violation was serious, and the negligence attributed to the operator must take into account any reasonable foreseeability that miners would be exposed to the hazard created by the water before the condition could be corrected. If an operator willfully exposes its miners to a known hazard, a finding of high negligence is likely appropriate, regardless of the prior efforts to prevent the hazard.

In this case, Stalnaker and Saunders unnecessarily exposed themselves to danger by entering the water on February 5, 2013. 37 FMSHRC at 1630-31. Of course, reasonably foreseeable consequences of one's actions, including reasonably foreseeable injuries, play a role in a negligence analysis. Therefore, if Consol should have reasonably foreseen the entry of examiners into the water and the nature of any reasonably foreseeable injuries of such action, it would be appropriate to take into account Stalnaker's and Saunders' entry into the water in considering negligence of the operator in the buildup of the water. At the same time, for the reasons set forth in the gravity discussion above, there was no reason for the operator to foresee a "high likelihood" of fatalities — a type of injury that the very same inspector in recent citations had not associated with high water in the bleeder.[5]

It is undisputed that Price, who received Stalnaker's report in the early morning of February 5, was aware of the hazardous water in E-15 prior to Saunders' exam. However, Stalnaker had only inspected the E-15 area. There is no basis for holding that Price knew there were violative water accumulations in the opposite side of the E bleeder district, in E-22, the place where Price instructed Saunders to begin his exam. The evidence therefore suggests that Price did not instruct Saunders to travel through excessive water, but to complete the ventilation exam using an alternate route which, to Price's knowledge, did not contain excessive water, and the Judge's finding that a miner was exposed to a known hazard is not supported by substantial evidence.

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[5] We need not decide at this point what, if any, role Inspector Gross' voluntary walk through the water may or should play in the reasonable foreseeability analysis.

Additionally, while the Judge did mention actions taken by Consol to address the issue of water buildups after the prior citations and before February 5, she erred in rejecting outright any importance of such actions in terms of reasonably prudent actions by a reasonably prudent operator in response to the prior violations.[6] The Judge should have analyzed the effect of the operator's pre-violation preventive efforts, the equipment failures that plagued the pumping system, and abatement efforts following the discovery of the hazard.

Here, the Judge found significant actions by the operator after the prior citations and before February 5. It is clear that the bubbler and the bubbler monitor at the surface pump were actually operational before February 5 and that subsequent damage to tubes prevented them from working effectively. Greene testified that "[t]he buffer [bubbler] system was an upgrade" installed prior to February 5th (Greene was responding to a question about upgrades installed before the remote monitoring system in the foreman's office, which was installed shortly after February 5). Tr. 521-22. William Batton, who worked for MVI, the contractor who serviced the surface pump, agreed that on February 5, a gauge on the bubbler system would tell the depth of water. Tr. 542. He also testified that, when called to the scene on the 5th, he found that the bubbler tubes had been damaged from going down the borehole. He returned and installed new tubes on the 7th. Tr. 534-35.

Further, the operator did not rely solely upon mechanical improvements. It also ordered increased inspections of the bleeder for which only one inspection per week was required by the standard. These extra inspections must be considered in the calculation of negligence. Indeed, the Judge found that the regular bleeder inspector looked at the bleeder after the power outage and did not find a presence of water. Based upon that finding, it appears that if the bubbler tube had not developed holes, it presumably would have alerted the operator that the water level in the sump was getting too high because (1) the readings on the monitor would have been accurate and (2) the sump pump would have automatically activated.[7]

We agree with our colleague, Commissioner Cohen, that Stalnaker and Saunders entering the water is essentially irrelevant to the determination of whether Consol's effort to prevent the accumulation of water was reasonable. Slip op. at 39. Stalnaker's decision to enter the water is only relevant to the evaluation of the foreseeability of an injury if evidence in the record demonstrates it was foreseeable that a miner would enter more than 18 inches of water in an effort to perform the required bleeder inspection. The Judge must evaluate the prudence of the

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[6] The Judge utilized the Part 100 standard of negligence and, therefore, considered the operator's actions in terms of "mitigation." Of course, as we have said, the reasonably prudent person test is holistic. Under that standard, rather than thinking in terms of "mitigation," adjudicators should think in terms of steps a reasonably prudent person would take under the same or similar circumstances.

[7] Preventive efforts included additional exams of the E bleeder district and a remote monitoring system. Equipment failures included a power outage on February 1 that could have shut down various air pumps and a surface pump hole in the bubbler line that caused the surface pump to malfunction on February 5. Abatement efforts included Ciapetta fixing the surface sump pump at 5:00 a.m. and trucks hauling away water from the mine starting at 7:00 a.m.

operator's efforts to prevent an additional water accumulation in light of such foreseeability, if any. We do not prejudge the Judge's decision on remand.

The fact that water built up tells us that the operator's efforts failed to prevent another violation after the December citation; it does not tell us whether the efforts by the operator were commensurate with what a reasonable person would have done in light of reasonably foreseeable consequences or how far off the mark they were. The negligence question is whether the actions of installing the bubbler, the bubbler monitoring systems, and increasing inspections suffice as measures a prudent operator would have taken under the circumstances, i.e., with two prior citations for water accumulations that might have resulted in lost workdays. Assuming Consol was negligent, the next question would be whether the bubbler and monitoring systems and increased inspections were so inadequate as to demonstrate an aggravated lack of care warranting a finding of high negligence.

Unwarrantable Failure

The unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d). We have held that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec. 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id*. at 2002-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); *see also Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test).

Whether the conduct is "aggravated" in the context of unwarrantable failure is determined by looking at all the facts and circumstances of each case, including (1) the extent of the violative condition, (2) the length of time that it has existed, (3) whether the violation posed a high risk of danger, (4) whether the violation was obvious, (5) the operator's knowledge of the existence of the violation, (6) the operator's efforts in abating the violative condition, and (7) whether the operator has been placed on notice that greater efforts are necessary for compliance. *Consolidation Coal Co.*, 35 FMSHRC 2326, 2330 (Aug. 2013); *IO Coal Co.*, 31 FMSHRC 1346, 1350-57 (Dec. 2009). These factors must be viewed in the context of the factual circumstances of each case. *Consolidation Coal Co.*, 22 FMSRHC 340, 353 (Mar. 2000). A Judge may determine, in his or her discretion, that some factors are not relevant or may determine that some factors are less important than other factors under the circumstances. *Brody Mining*, 37 FMSHRC at 1692.

Although a separate analysis, the determination of unwarrantable failure essentially embodies a combined analysis of gravity and negligence considerations. For example, when evaluating whether the violation posed a high risk of danger, the Judge must consider whether the Secretary demonstrated it was reasonably foreseeable that miners would enter deeper water. Further, the Judge did not sufficiently consider the broken discharge lines, the malfunctioning bubbler, or the mine's efforts to prevent the flooding through additional inspections, and she discounted the operator's prior efforts to deal with water and the various apparently

unanticipated mechanical failures. *See* 37 FMSHRC at 1650. The Judge lost sight of the ultimate aim of the unwarrantable failure designation. As the Commission has said:

> We conclude that the judge erred in finding unwarrantable failure based on the operator's "failure to leave any stone unturned" and take "every conceivable step" in attempting to eliminate the violations. The judge, after referring to the proper standard for unwarrantable failure set forth in Commission precedent, failed to apply it. In effect, he imposed a standard for unwarrantable failure close to one of strict liability.

Peabody Coal Co., 18 FMSHRC 494, 498 (Apr. 1996) (citation omitted).

The Commission has stated that "a judge's factual findings are often colored by the legal standard applied." *Dolan v. F & E Erection Co.*, 22 FMSHRC 171, 180 n.10 (Feb. 2000). This is borne out by consideration of the seven factors underlying the Judge's unwarrantable failure analysis in this case.

a. Degree of danger

The Judge found that the degree of danger was a high likelihood of two fatalities. 37 FMSHRC at 1651-52. For the reasons set forth above in the gravity discussion, substantial evidence does not support a high likelihood of two fatalities. Consequently, the Judge's unwarrantable failure analysis significantly overstates the degree of danger. This error, standing alone, dictates remand.[8]

b. Length of Time

Under the Commission's unwarrantable failure legal standard, "a Judge may determine, in his or her discretion, 'that some factors are not relevant, or may determine that some factors are much less important than other factors under the circumstances,'" as long as the Judge considers all of the factors. *Brody Mining*, 37 FMSHRC at 1692 (quoting *IO Coal Co.*, 31 FMSHRC at 1351). The Judge found that "the accumulation likely occurred sometime after Greene's last examination, which was less than 48 hours from the time the citation was written." 37 FMSHRC at 1651.

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[8] We are greatly concerned by the incaution exercised by the Secretary and the Judge in designating these violations as "highly likely" to result in a fatal injury. Overcharging and hyperbole in this context breed disrespect for the law and skew the perspective one must employ in discerning merely serious violations from those where the specter of death was truly clear and present. Violations that should have been reasonably foreseen as creating a grave and imminent risk of death or serious bodily injury must be dealt with severely to deter similar transgressions. In such cases, the operator is under a duty to take timely and aggressive actions to prevent miners from being exposed to a deadly hazard caused or contributed to by the violation. It is apparent that the misperception of the danger here infected the Judge's evaluation of the operator's culpability.

Based upon the Judge's findings, the violation arose after Greene's last examination, and the operator learned of the violation when Stalnaker found water deeper than 18 inches. On remand, the Judge must consider the length of time the violation existed as part of her unwarrantable failure analysis.

c. Extent

The Judge found that the water stretched for 400 feet at the 47 crosscut (at a depth of 12 to 42 inches) and from 1,800 feet (at a depth of 12 to 36 inches) between E-19 and E-21. 37 FMSHRC at 1651. However, the Judge also noted that the water in some locations was only a few inches deep. *Id.* The Judge erred by taking into account the entire length of the bleeder because in doing so, she considered non-violative areas.[9]

d. Notice that Greater Efforts Were Necessary

The Commission has recognized that past violations and discussions with MSHA about a problem are relevant to whether an operator was on notice that greater efforts were necessary to comply with a standard. *IO Coal*, 31 FMSHRC at 1353. Without question, the operator was on notice due to its prior citations for the same condition and Inspector Young's explicit notice. 37 FMSHRC 1652-53. The operator presented evidence of increased efforts, but the Judge stated that "[w]hile it is true that at some point, efforts made after notice should 'restart the clock' on notice, the inadequate efforts made by Respondent were not sufficient to do so in this case." *Id.* at 1653. The Judge referred to her prior discussion of the monitoring system, in which she held that "[a]ctions are not mitigation when they are inadequate to the task of preventing, correcting, or limiting exposure." *Id.* at 1650.

The Judge cited two decisions by other Judges for that proposition, each of which was decided under different circumstances. Further, the Judge failed to consider the reasonableness of the preventive measures in light of the fact that the bubbler line encountered a leak preventing it from being effective.

Here, the mine installed an automatic secondary pumping system and a bubbler. It began daily monitoring of the water level through the bubbler's readout, but the bubbler gave false readings because a hole in the bubbler's hose prevented accurate measurement of the water level. The recurrence of a violation in which the operator, despite notice, did nothing is not the same as

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[9] The Judge's factual finding underlying her conclusion was wrong, as Commissioner Cohen acknowledges. Slip op. at 41 n.7. But her analysis also misapprehends the relevance of the extent of the water to a finding on the question of unwarrantable failure, i.e., whether the extent of the water gave Consol more reason to have discovered it or reflects on the reasonableness of its actions in attempting to prevent the accumulation. The Judge found that the accumulation occurred less than 48 hours before citation was issued. 37 FMSHRC at 1651. More importantly, the evidence is positive that Consol had met or exceeded inspection requirements during the week preceding the accumulation. Therefore, we think that a reasonable Judge could find that the extensiveness of the water accumulation is of little, if any assistance in determining whether Consol's violation — namely, the buildup of water in the bleeder — was the result of an unwarrantable failure to comply with the requirement to keep the bleeders safe for travel.

the recurrence of a violation after significant remedial efforts by the operator. The sufficiency of the remedial efforts bears upon evaluation of the notice factor in the unwarrantable failure determination and must be considered.

Efforts by Consol before February 5 to prevent water accumulations are relevant to whether it had notice of a need for even greater efforts to prevent violations from occurring. In other words, what notice did Consol have of a need to do more than the actions mentioned above? After being cited in December, Consol took those efforts. This raises the issue of how Consol was on notice that greater efforts than even those were required. The Judge dismissed that question out of hand because those efforts failed. It is incorrect, however, to assume, as the Judge did, that the efforts the operator took are irrelevant to the question of whether the operator was on notice that greater efforts were necessary.

e. Pre-citation efforts to abate

Where an operator has notice of an accumulation problem, the level of priority that the operator places on the abatement of the problem is relevant. *Enlow Fork*, 19 FMSHRC at 17. The focus on the operator's abatement efforts is on efforts made prior to the issuance of a citation or order. *Id.* Thus, an operator's efforts in cleaning up accumulations before and during an inspection may support a finding that a violation of a standard requiring that an escapeway be "maintained to insure passage at all times of any person" was not caused by unwarrantable failure. *Utah Power & Light Co*., 11 FMSHRC 1926, 1934 (Oct. 1989).

The Judge found that the operator acted to abate the violation immediately after discovery of the condition and well before any inspector arrived on the scene. 37 FMSHRC at 1653. Stalnaker informed Price about the water between 4:00 and 4:30 a.m. Price then called the surface to have someone ensure that the surface pump was running. 37 FMSHRC at 1630. At approximately 5:00 a.m., Russ Ciapetta began working to bypass the malfunctioning bubbler system, after which the pump resumed operation. *Id.* The operator started removing water from the tanks at 7:00 a.m. 37 FMSHRC at 1630 n.24; Tr. 624.

The operator called Mon Valley Integration at 10:00 a.m. to discover why the bubbler malfunctioned. 37 FMSHRC at 1632; Tr. 527. However, the Judge essentially gave the abatement efforts little to no weight, stating that there is "no reason to believe that abatement after miners are exposed to a hazard alone makes an unwarrantable failure determination inappropriate." *Id.* at 1654. However, the issue is not whether such efforts, standing alone, preclude an unwarrantable failure finding. The issue is the extent to which the Judge should consider such efforts when balancing unwarrantable failure factors. With the understanding that the violation was not highly likely to cause a fatality, the Judge should consider the immediate efforts to abate the violation before the arrival of any inspector and without any knowledge that MSHA would or had received a section 103(g) complaint.

f. Obviousness

The Judge found that the accumulations of water were "massive and [that] the examiner had to travel through them to complete the examination." *Id.* at 1652. Had the newly installed bubbler monitoring system not failed due to a hole in the line, management would have been alerted earlier to the problem and, indeed, ancillary pumping would have started earlier. However, due to that unknown equipment defect, the accumulation only became obvious when the Stalnaker inspection began and there was no reason to know of the accumulation before that point. Here, the operator could not know of a water buildup until Stalnaker arrived on the scene. Then, it acted immediately to abate the violation.

Given that one part of the unwarrantable failure analysis is to determine whether a mine operator engaged in aggravated conduct constituting more than ordinary negligence, if a violation is obvious only after it is discovered, and there is no reason it should have been discovered earlier, then the condition's obviousness once discovered provides little or no assistance in making a determination of aggravated conduct.[10]

g. Knowledge

The Judge also misapplied the aspect of knowledge. The Judge found that the operator's knowledge of the violation was an aggravating factor because despite that knowledge, "miners were willfully exposed to the condition." *Id.* at 1654. Thus, the Judge stated, "the preponderance of the evidence shows that Stalnaker knew about the condition when he encountered it in the bleeder." *Id.* Similar to the Judge's finding of obviousness, when the operator could not have known or have been reasonably required to have known of the violation until it is discovered, the knowledge factor may not be indicative of aggravated conduct.

Therefore, we would remand her finding of unwarrantable failure.

B. Order No. 7024069

<u>Significant and Substantial</u>

Order No. 7024069 was issued because Consol did not record the accumulations of water in the examination book before Giavonelli countersigned it. 37 FMSHRC at 1656. The Judge found, and our colleagues affirm, that the failure to record the accumulations contributed significantly and substantially to a hazard of tripping and falling in the water of the E bleeder district. They reach this conclusion for two reasons. First, they assert that failing to record the hazard "made it more likely that miners . . . would enter the bleeder with the mistaken belief that it was free of hazards, contributing to the reasonable likelihood of the danger of falling." Slip op.

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[10] We disagree with the Judge, and Commissioner Cohen, *see* slip op. at 41 n.10, that the entrance of Stalnaker and Saunders into deep water bears upon the "obvious" element of whether the violation (the accumulation of water) was an unwarrantable failure. MSHA did not cite Consol for the entry into the water, but for the accumulation that existed. If critiquing Consol's actions after the violation (water buildup) occurred bears upon other elements of unwarrantable failure, it has no relevance as to whether the violation was "obvious" before it was discovered and abatement was started.

at 30. Second, they also assert that the failure to record the hazard meant that Consol and MSHA would not have a record of its occurrence, which increased the likelihood of future exposure of miners to hazardous water. *Id.* Consistent with the Commission's decision in *Newtown*, we disagree with their assessment.

In *Newtown*, the Commission directed use of "a 'reasonable likelihood' analysis for determining whether a violation significantly and substantially 'contributes' to a hazard." 38 FMSHRC at 2038. When framing the question, we made it clear that not only must the hazard be reasonably likely, but the violation must *sufficiently* contribute to the causation of the hazard, saying: "[T]he question under step two is whether, under these particular circumstances, the violation (the failure to remove the key from the lock) was reasonably likely *to result* in the restoration of power to the shuttle car cables while the inspection group was working on it." *Id.* (emphasis added). In the context of this case, therefore, the question under step two is whether, under these particular circumstances, the violation (the failure to record the hazard) was reasonably likely to result in miners entering deep water to the point of encountering trip-and-fall hazards. In other words, did the violation sufficiently, i.e., meaningfully or "significantly and substantially," contribute to the occurrence of the hazard.

Illustrating this inquiry, in *Secretary of Labor v. Federal Mine Safety and Health Review Commission*, 111 F.3d 913 (D.C. Cir. 1997), the D.C. Circuit affirmed a finding that a violation did not sufficiently contribute to the hazard of a fire, and, therefore, the violation was not significant and substantial. In that case, a pile of trash was located partially in active and partially in inactive portions of the mine. *Id.* at 916. Only a small part of the pile was located in the active portion of the mine, and thus only a small amount of trash was violative. *Id.*

Although the Secretary introduced evidence that the larger nonviolative portion of the trash pile, the mine's history of methane ignitions and fires, and the trash's combustibility all contributed to the hazard of a fire occurring, the court did not consider those when reviewing the violation's contribution to the hazard. *Id.* at 918. First, the court stated that "[t]he statute requires a decision maker, having found a violation, to make two additional findings: whether there is a 'hazard' to which the violation might contribute; and, if so, whether the violation 'significantly and substantially' contributes to that 'hazard.'" *Id.* at 917. "When evaluating the first question," the court continued, "the Commission does consider surrounding conditions." *Id.* However, "when the Commission analyzes whether a particular violation 'significantly and substantially' contributes to the 'hazard,' it considers, as it did here, only the particular violation's contribution." *Id.* at 917-18. Quoting the Commission, the court then specified that "[i]t is the *contribution* of a violation to the cause and effect of a hazard that must be significant and substantial." *Id.* at 918 (quoting *Texasgulf, Inc.*, 10 FMHSRC 498, 500 (Apr. 1988)). Accordingly, the court concluded, "[a]lthough the Secretary's evidence may suggest that the [nonviolative] trash enhanced the danger of fire, a reasonable factfinder could have concluded that the record contained insufficient evidence that this danger was *markedly increased* by the few additional [violative] items." *Id.* (emphasis added).

Applying the reasoning of the D.C. Circuit, the foreman's failure to record the deep water before signing the examination book did not sufficiently contribute to a hazard of miners tripping and falling in deep water to make the failure an S&S violation. First, abatement was occurring before Giavonelli signed the book, and no miners other than a bleeder examiner were even permitted to enter the area. This active abatement started well before MSHA was even notified

and included calling a contractor, Burns Trucking, that began emptying water from the above-ground tank at 7:00 a.m. 37 FMSHRC at 1630 n.24; Tr. 624. The failure to record the accumulations on February 5 did not contribute in any way to any danger of Stalnaker or Saunders tripping and falling in the water. They entered the water as part of the examination process before Giavonelli signed the report. As the Judge found, the water was obvious, and Stalnaker and Saunders had already encountered and reported the water when Brottish entered the water with MSHA Inspector Gross. The failure to record had no effect on Brottish's or Gross's actions, either.

This is not a situation in which multiple miners could be exposed to a surprising hazard. It is apparent, therefore, that the blank examination page did not contribute to, much less significantly and substantially contribute to, a hazard of a bleeder examiner walking into the water accumulation that resulted in the citation under section 75.370(a)(1). There is no logic to a finding that the failure to record the presence of the water made it reasonably likely that a miner would enter the water. Obviously, a miner could not accidentally enter deep water based upon the absence of a report of deep water.[11]

Second, the failure to record does not sufficiently contribute to a "hazard" that, without a written record, MSHA and Consol would not be aware of water accumulations in the bleeder, thus making it reasonably likely that future examiners would encounter and walk into deep water. Again, it is unclear how failure to record this accumulation would meaningfully contribute to or markedly increase the likelihood of miners entering deep water when they would know they were entering deep water with or without the report. Going further, the absence of a notation of water from the examination record certainly did not mean that Consol was unaware of the accumulation. Indeed, Consol had been aware of the condition for hours before the signing of the record book. From an operational standpoint, Consol had more compelling records of the occurrence beyond the examination book, including increased expenditures for water removal by Burns Trucking.[12] Regarding MSHA's awareness of the hazard, not only did the Secretary not

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[11] Our colleagues assert that the absence of the notation that day made it reasonably likely that Greene, a regular and experienced bleeder examiner, "would enter the bleeder with the mistaken belief that it was free of hazards" at some point in the future. Slip op. at 30. Of course, only bleeder inspectors may walk in the bleeder, and part of their purpose in doing so is to identify hazards that they encounter. The violation in this very case arises from the failure to record hazards found by an examiner. It defies logic and common sense to suggest that Greene, the regular and experienced bleeder examiner, would walk into and through deep water without knowing he was in the water or without knowing it might present a hazard.

[12] Notation of the accumulation would not have provided information beyond that clear to the examiners who encountered the water. Water in the bleeders was not an uncommon occurrence and was not even considered to be a violation up to 18 inches in depth. The examiners could not have provided more detailed information, so that its absence would be material to the reasonable likelihood of injury, without entering the water — an aggravation of the violation, in the eyes of the Judge. Furthermore, one cannot simultaneously maintain that the accumulation was obviously violative to the examiners *and* that it required a record notation to avert serious injury or death of examiners who should have known better than to enter the water when they encountered it.

present evidence that MSHA was reasonably likely to review the book, but it is also entirely speculative to conclude that MSHA not seeing a report of deep water would make the future entry of miners into deep water reasonably likely.[13]

Finally, it is illogical to suggest that examiners would be surprised to encounter the water. Water is common in bleeders, and it is not an insidiously hidden hazard — an examiner would see it before entering it. The problem was the decision to enter the water, not the fact that there was water there, and especially not the fact that the water was not recorded after it had already been encountered.[14]

We do not condone the failure to record a hazard even though the hazard was undergoing abatement. Stalnaker, Saunders, or Giavonelli should have recorded the water, and MSHA appropriately issued an order for Consol's failure to record. Under the circumstances of this case, the absence of the water notation did not meaningfully increase the likelihood of any injury from the current violation or from any future hazard sufficiently to make this violation S&S. The connection between this violation and the occurrence of the identified hazard is too attenuated to survive step two, and for that reason, we conclude that this violation is not significant and substantial.[15]

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[13] Consol already had increased inspections of the bleeder and of the surface pump. Further, although the Judge did not opine definitively on whether additional long term mechanical abatement measures had been installed on February 5, the evidence demonstrated that solutions were in process, including installation of an electronic remote monitoring system on the Surface Pump and storage tanks, Tr. 737 (Yoho); Tr. 572, 577 (Demidovich); Consol Ex. P; Consol Ex. O, and installation of an alarm system on the surface storage tanks, Tr. 737, 738 (Yoho); Tr. 208 (Young).

[14] The operator's attempts to abate the accumulation were well underway before the record book was signed. While attempting abatement of the problem at its source, the operator continued to attempt to fulfill its responsibilities under the ventilation plan by sending Saunders into the bleeder to take measurements of methane. The nature of the violation here — the failure to record known accumulations whose abatement was already underway — is distinct from the examiners' and MSHA inspectors' decisions to enter the water.

[15] Our colleagues forecast dire, wide-ranging results if our opinion is followed to its logical conclusion. We stress that this is one case drawn from a specific set of facts and circumstances. We arrive at our conclusion by applying established legal principles to the facts of this case, and the applicability of this case to one we may consider in the future depends entirely on the existence of facts that similarly fail to establish a reasonable likelihood of harm arising from the future violation's contribution to a specified hazard.

Gravity

The Judge determined that the violation underlying the order was highly likely to result in fatal injury. 37 FMSHRC at 1662. The order involved the same underlying hazard in the same area as the citation — a trip and fall hazard because of water accumulations in the E bleeder district. We thus vacate the gravity determination and remand for the same reasons, and with the same direction, as the citation.

Negligence

The Judge found that Giavonelli signed the exam book knowing that deep water was present yet not listed in the book. While the operator argued below that it did not have to complete the examination at the time the citation was issued, and therefore it did not have to complete the record, *id.* at 1660, it also conceded the fact of violation. *Id.* at 1656. The operator's arguments below — that Giavonelli was merely signing to say that he saw the sheet and that the time to complete the examination had not yet run — do not offset a negligence finding in this case.

We most certainly do not condone or excuse signing an inspection book at a time when a known hazard has not been listed on the assumption that the condition will be corrected before the time to complete the inspection has elapsed. Here, however, certain factors not considered by the Judge could lead to a finding of ordinary negligence. The Judge should review such factors so that the determination is a full and fair decision based upon all relevant considerations.

First, the Respondent was actively working on the issues omitted from the book, and, given that the area was not an area where miners worked or traveled, it was highly unlikely that any miner not working on and knowledgeable of the issue would enter the bleeder area before the sufficient diminishment of the water. In reality, therefore, the examination book under these especially unique factors played no role in alerting fellow miners of a hazard.

Second, the book did not indicate that Respondent had completed the inspection at the two inspection points that the book omitted. In other words, the book did not represent that a complete inspection had been made at all safety checkpoints. Any knowledgeable person looking at the book would have seen that readings had not been taken at all required checkpoints.

Without prejudging the result in any way, but only to permit a full discussion of all issues bearing upon the degree of negligence, we would remand the determination for review by a Judge in the first instance.

Unwarrantable Failure

As to this issue, the Judge simply stated that the facts and arguments regarding each were "identical" and incorporated her findings for the citation by reference in order to reach the same conclusion. *Id.* at 1661. We find that this cursory analysis was legally deficient and requires remand.

The relevant facts for each violation are not identical. The operator's duties to prevent the water accumulation and to record the same require different conduct by the operator, and the relevance of facts can only be determined in light of that required conduct. For example, regarding the citation, the operator was cited for the same violation on November 20, 2012, and December 10, 2012. The latter citation also informed the operator that similar violations in the future might lead to greater enforcement efforts by MSHA. Gov't Ex. 8. In contrast, there is no evidence that the operator had ever been previously cited for a recordkeeping violation.[16]

We cannot discern how the Judge balanced the factors. We therefore vacate and remand this issue for reconsideration.

/s/ William I. Althen
William I. Althen, Acting Chairman

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

[16] We note that some of the other *IO Coal* factors may also be analyzed differently for the order than for the citation. On remand, the Judge is free to reach any reasonable conclusion supported by the facts for each factor. These findings are exclusively within the province of the Judge below. Although Commissioner Cohen remands on unwarrantable failure to obtain an analysis by an Administrative Law Judge, he essentially opines on each unwarrantable failure element. The Judge upon remand need not accord any weight whatsoever to Commissioner Cohen's premature statement of his personal view of factual issues.

Opinion by Commissioner Jordan:

This case involves a mine operator who permitted water to accumulate to dangerous levels in its mine, despite multiple warnings from the Department of Labor's Mine Safety and Health Administration ("MSHA"). It involves an agent of the operator, a certified mine examiner, who upon observing the large accumulations of water, nevertheless attempted to wade through it. I join my colleagues in affirming the Judge's determination that the violation was appropriately designated significant and substantial ("S&S"). However, for the reasons set forth below, I would affirm the Judge's finding that the violation constituted an unwarrantable failure, and would uphold the penalty assessed by the Judge as one that appropriately applied the statutory criteria of negligence and gravity.

I also would affirm the Judge's decision regarding the related violation alleging that the operator failed to properly record the existence of the water hazard in the weekly examination book, and would affirm the penalty.

A. Citation No. 7024068

As is the case in many underground mines, Consol Pennsylvania Coal Company ("Consol") had to regularly pump out its bleeders so as to avoid dangerous accumulations of water. Indeed, the approved ventilation plan specified certain means "to remove water as necessary to permit safe travel through the perimeter bleeder system."[1]

Despite this requirement, it is uncontested that on February 5, 2013 the MSHA inspector was confronted with bleeder sections that contained large accumulations of water. In one section water stretched 600-700 feet and ranged in depth from 12-42 inches. In another area it stretched 1,800 feet and ranged in depth from 12-36 inches. 37 FMSHRC 1616, 1640 (July 2015) (ALJ). Three days of pumping in a difficult-to-reach area were required in order to fix the problems and get the water out. *Id.*; Tr. 153-54, 233. The water was murky, cold, contained debris and tripping hazards, and constituted a hazard to miners traveling in the area, leading the Judge to conclude that "[r]espondent's system was wholly inadequate to the challenge of keeping water out of the bleeder." 37 FMSHRC at 1650. In fact, Consol did not contest the Secretary of Labor's determination that it had violated its ventilation plan.

This was not the first enforcement action MSHA had taken against this operator for such a violation. Approximately two months prior to the inspection at issue, MSHA cited Consol after

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[1] Specifically, the mine's ventilation plan stated in relevant part:

> The means for maintaining the bleeder safe for travel will include compressed air lines routed underground, used in conjunction with air pumps to remove water as necessary to permit safe travel through the perimeter bleeder system. . . . Ditches, bridges and natural drainage are used to maintain the bleeder entries free from standing water that affects ventilation and prevent safe travel.

Gov't Ex. 3 at 1.

the inspector observed more than 36 inches of dark, murky water (which covered numerous tripping hazards lying beneath). Gov't Ex. 7. Less than three weeks after that, MSHA issued a second citation because Consol had allowed an accumulation of more than 18 inches of dark, murky water to occur at the sump, as well as permitting more than 24 inches of water to accumulate in another area of the mine. Gov't Ex. 8. Consol maintains that after receiving those citations it took additional steps to control the water and that the accumulations present on February 5 were due to unforeseen circumstances of which the operator could not reasonably be expected to have been aware.

Regardless of whether the presence of the water accumulations on February 5 reflected a failure on the part of Consol to exercise reasonable care, we must consider the Judge's finding that Mine Examiner Dan Stalnaker's decision to proceed through the dangerous water accumulation constituted negligent behavior on his part. Moreover, because Stalnaker was a supervisory employee, the Judge imputed Stalnaker's negligence to the operator for purposes of determining whether the violation resulted from Consol's unwarrantable failure, and for the purpose of determining a penalty that took into account the operator's negligence, as required by section 110(i) of the Mine Act, 30 U.S.C. § 820(i).

Longstanding Commission precedent recognizes that the negligence of an operator's agent is imputed to the operator for purposes of determining an appropriate penalty and for reviewing the Secretary's unwarrantable failure determinations. *See Whayne Supply Co.*, 19 FMSHRC 447, 451 (Mar. 1997); *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194-97 (Feb. 1991) ("*R&P*"); *S. Ohio Coal Co*., 4 FMSHRC 1459, 1463-64 (Aug. 1982). We have held that "in carrying out . . . required examination duties for an operator, an examiner . . . may appropriately be viewed as being 'charged with responsibility for the operation of . . . part of a mine,' and therefore, the examiner constitutes the operator's agent for that purpose." *R&P*, 13 FMSHRC at 194.

Here, instead of retreating and reporting that water had accumulated, Stalnaker proceeded into it to conduct his examination. In doing so, he was well aware that the accumulation posed a danger. Indeed, as the Judge noted, Stalnaker himself testified that he would not have let miners work in the amount of water he encountered at the bleeders. 37 FMSHRC at 1629; Tr. 310-11. Before entering the water to conduct his exam, an inspection I note that was done alone and in an isolated area of the mine, Stalnaker made a dangerous situation even more risky by donning illegal chest waders. The chest waders available to Stalnaker lacked flotation devices. Because such waders can fill with water and drag miners under the surface, they increase the risk of drowning and are not permitted. 37 FMSHRC at 1646; Tr. 455, 500, 704. In fact, in this case water did enter Stalnaker's waders and broke his gas detector, causing him to terminate his examination.[2]

In assessing the level of danger and negligence involved, the Judge noted that the water accumulation posed a risk to miners, outside the risk of drowning. She found that Inspector Young credibly testified that the murky water was full of chemicals and bacteria and posed a risk

[2] Stalnaker found the illegal waders located in the East tailgate area where he began his examination. Members of management claimed they had no knowledge how the illegal waders got there. 37 FMSHRC at 1629.

of cellulitis and MRSA (staph bacteria) as a result of these substances. 37 FMSHRC at 1646; Tr. 68-69. Indeed, the water that Stalnaker entered had to be trucked away and processed before it could be released into the environment. 37 FMSHRC at 1646; Tr. 761. A fall that resulted in a cut to the skin could therefore pose more than the usual danger given the contaminated nature of the water. There is testimony that the area in question contained plenty of pipes, supports, and other debris that either could be the cause of or could be struck in a fall. 37 FMSHRC at 1646; Tr. 123. Furthermore, the cold temperature of the water increased the chances that a miner who suffered injury could go into shock. 37 FMSHRC at 1646.

The Judge upheld the designation of the violation as unwarrantable. The Commission has equated unwarrantable with "aggravated conduct" and has affirmed unwarrantable findings where, as here, a supervisory person intentionally engages in behavior violative of a mandatory standard.

The ventilation plan required the bleeder be maintained for safe travel. A bleeder, or section thereof, that cannot be safely traveled should not be traversed by any miner, but particularly should not be traveled by a supervisory employee, well aware of the dangerous nature of the condition.[3] There was no mitigating circumstance present: for example, Stalnaker was not exposing himself to danger to rescue a fellow miner. He was simply trying to carry out the weekly exam in a timely fashion. Stalnaker should have retreated, reported the condition, and waited until sufficient water was pumped out so that the exam could be conducted safely. His decision to continue this dangerous journey constitutes substantial evidence supporting a finding of aggravated conduct. Thus, I would affirm the Judge's finding that the violation was the result of the operator's unwarrantable failure.

Regarding the Judge's gravity finding, I conclude that substantial evidence supports a finding of serious or high gravity, based on the testimony the Judge utilized in supporting her S&S determination, both in regard to tripping hazards, 37 FMSHRC at 1643, and potential injuries, *id.* at 1646. This included the inspector's statements that the bleeder entry contained deep water with various tripping hazards, including uneven floor and debris, that miners who tripped could suffer broken bones or head injuries, that the cited area had pipes, supports and other debris that could be struck in a fall, that cold water increased the chances that a miner could go into shock, and that there was a risk of drowning. *Id*. at 1643-46.

The operator also challenges the Judge's penalty assessment, but the same facts that allowed the Judge to reasonably conclude the conduct at issue supported the Secretary's decision

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[3] The fact that an MSHA inspector subsequently entered the area traversed by Stalnaker does not undermine the Judge's unwarrantable designation. Significantly, the inspector was subsequently chastised by his supervisors for exposing himself to a dangerous condition. Tr. 349-50. Moreover, I note that the fact the inspector was not traversing the bleeder alone in itself lessened the dangerous aspect of the activity.

to designate the violation as resulting from an unwarrantable failure to comply, also support the Judge's determination that the penalty should reflect a high degree of negligence.[4]

B. Order No. 7024069

The underlying facts regarding this order are not in dispute. Stalnaker informed the mine foreman, Mike Giavonelli, that he was not able to complete the examination of the bleeder due to the high water. Giavonelli spoke with the shift foreman, who told Giavonelli that Foreman and Mine Examiner Kevin Saunders had been sent into the bleeder to complete the weekly examination. Tr. 703. Saunders thereafter informed Giavonelli that he also was unable to complete the examination because of the water. Although the hazards were not noted and the examination was incomplete, Giavonelli countersigned the examination book.

Substantial evidence[5] supports the Judge's determination that the recordkeeping violation was S&S, pursuant to the standards set forth by the Commission in *Mathies Coal Co.*, 6 FMSHRC 1, 3 (Jan. 1984) (footnote omitted):

> 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.

An evaluation of the reasonable likelihood of injury should be made assuming continued normal mining operations. *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985) (quoting *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984)).

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[4] The operator relies on *Nacco Mining Co.*, 3 FMSHRC 848, 850 (Apr. 1981), arguing that the negligence of agents is not imputable to an operator if they expose only themselves to hazards. This argument is unavailing, as in *Capitol Cement Corp*., 21 FMSHRC 883, 893-94, (Aug. 1999), we held that the *Nacco* defense is not available when a violation is the result of unwarrantable failure. Moreover, Consol failed to raise this argument before the Judge. *See* section 113(d)(2)(A)(iii) of the Act, 30 U.S.C. § 823(d)(2)(A)(iii) ("Except for good cause shown, no assignment of error by any party shall rely on any question of fact or law upon which the administrative law judge had not been afforded an opportunity to pass.").

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

The order alleges that Consol failed to record obvious and extensive hazardous conditions found during the weekly examination. As the Judge found, four of Consol's foremen — Stalnaker, Saunders, Price and Giavonelli — knew about the water in the bleeder, that it was a hazard, and that it should have been recorded in the book. However, the hazardous water was not noted in the book when Giavonelli signed it. 37 FMSHRC at 1656. The operator does not dispute that the violation occurred, and thus the first *Mathies* element was met.

As to the second *Mathies* step, substantial evidence supports the Judge's finding that the violation was reasonably likely to contribute to the danger of tripping and falling. The record includes evidence of deep water accumulations obscuring an uneven floor and debris. The erroneous recording gave the false impression that the bleeder was entirely free of hazardous conditions contributing to the likelihood that miners may enter the bleeders unaware or unprepared to encounter the tripping hazards. As the Judge correctly noted, the fact that some miners and managers knew about the conditions was immaterial, because without the examination record, other miners had to rely entirely on word-of-mouth. For instance, as the Judge observed, Jamie Greene, the regular examiner, would have had to rely on an informal conversation with Stalnaker to learn about the extremely hazardous condition. *Id.* at 1657. Hence, the absence of a written record of the hazards made it more likely that miners — such as Greene — would enter the bleeder with the mistaken belief that it was free of hazards, contributing to the reasonable likelihood of the danger of falling.

Moreover, as the Judge pointed out, because the water accumulations were not recorded in the examination book, Consol would have had no record of them. Inspector Young testified about the importance of a written record:

> Mike [Giavonelli] is pretty much the guy, whoever is acting as the mine foreman is who controls who works back in the bleeders, he is the one that gives permission, he is the one that tells the shift foreman, let whomever go back and do this. If is not recorded in the books and something happens to Mike . . . and he doesn't come to work . . . who is to say that that isn't going to get forgot about.
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> . . . .
>
> [W]hen [the mine foreman] signs that weekly book, he is to look at that weekly book, he is to do a basic check from one week to the next. . . . He is the person . . . responsible as far as the underground workings of that mine, and that is the only way he knows if it is proper, without doing it himself, is by looking at those record books.

Tr. 140, 142.

Since the operator would not have had a written record that its efforts to keep water out of the bleeder were inadequate, the likelihood of it quickly and effectively resolving the problem was reduced and the likelihood of additional flooding — and additional exposure of miners to the hazardous water — would have been increased. 37 FMSHRC at 1658.

Importantly, the failure to record the hazards means that MSHA inspectors would not realize that the condition existed, and that hazards might continue to occur in the bleeder without

MSHA's knowledge. In fact, without the section 103(g) (30 U.S.C. § 813(g)) complaint, MSHA never would have known about the water in the bleeder.

Substantial evidence also supports the Judge's determination that the Secretary satisfied the third *Mathies* factor — the danger of tripping and falling was reasonably likely to result in injury. If miners tripped and fell in the bleeder the record supports a reasonable likelihood that an injury would occur such as bruising or fractures, or a cut and resulting infection. Tr. 68-69, 121-22, 143. The Judge's finding that such an injury would be "of a reasonably serious nature" is also supported by substantial evidence. The occurrence of such an injury, potentially miles away from the surface, suffered alone without means of contacting assistance, only exacerbates its seriousness.

The operator again claims that the violation was not reasonably likely to cause reasonably serious injury because only trained, cautious examiners ventured into the E bleeder district, and there is no evidence of any past injuries in this area. As noted *supra* (slip op. at 8-9), the absence of prior injury in the relevant area and the exercise of caution by examiners are irrelevant to the S&S analysis for this recordkeeping violation. *U.S. Steel Mining Co.*, 18 FMSHRC 862, 867 (June 1996); *Eagle Nest, Inc.*, 14 FMSHRC 1119, 1123 (July 1992). Moreover, Stalnaker and Saunders deliberately went into the water, and thus were exposed to the hazards.

An additional hazard contributed to by this violation (the failure to record the water in the exam book) is that some mine managers would be unaware of conditions that could adversely affect the mine's ventilation system, and thus would not correct them.[6] As the Secretary stated in his post-hearing brief: "Failing to properly record an examination puts miners traveling to an area at risk because they could be unaware of hazards, *and with respect to a bleeder system, puts an entire mine at risk.*" S. Post-Hr'g Br. at 28 (emphasis added). As the Secretary cogently argued on appeal, "Inspector Young believed that the recording violation was S&S not only because it exposed miners to further hazardous water accumulations, but also because it was inconsistent with assuring remedial action in order to prevent accumulating water from resulting in potentially catastrophic ventilation starvation, which was the primary concern of the MSHA inspectors' Section 103(g) investigation in the first place." S. Br. at 30. Inspector Young articulated this concern at trial:

> If this violation wasn't corrected, if the pumping wasn't done, not saying that they didn't because they started the pump, but say, the pumping wasn't adequate, it could affect the ventilation over a period of another week as much water as was back here.

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[6] In *Oak Grove Resources, LLC v. Secretary of Labor*, 520 F.App'x. 1, 2013 WL 1729514 (D.C. Cir. 2013) (unpublished), the Court held that a Judge's determination that a violation of 30 C.F.R. § 75.364(b)(2) for failure to conduct a weekly examination was S&S was supported by substantial evidence. In that case, the examiner was precluded from finishing his inspection because of high water levels. The Court reasoned that the record indicated that a compromised ventilation fan, if undetected by inspection, might allow methane and other potentially lethal gasses to build up in the mine.

> It did not affect the ventilation when we were there on the investigation, but if left unattended, it most certainly could have.

Tr. 143. Inspector Gross also testified that he "was concerned about the gas." Tr. 399.

In reversing the Judge, the Chairman and Commissioner Young rely on the fact that the operator was making efforts to remedy the water problem before Giavonelli signed the book. That such activity had commenced is hardly persuasive evidence, especially considering that the water problem was not entirely abated until three days later. 37 FMSHRC at 1657. Similarly, their reliance on the fact that some examiners had personal knowledge of the water problem, slip op. at 22, ignores the requirement that the S&S analysis be applied considering "continued normal mining conditions," and thus must take into account the hazards to other examiners who might not know about the water. Also, although my colleagues are confident that miners would realize they were entering deep water even though the examination report was deficient, they would not necessarily be aware of some of the tripping hazards, including the uneven floor and debris. Slip op. at 7-8; Tr. 724.

Taken to its logical conclusion, my colleagues' position seems to indicate that a failure to record violation involving an obvious hazard that can be avoided by a miner cannot be S&S.[7] Thus, if a mine examiner failed to report a guard missing from a conveyor belt, and it would be obvious to a miner that the belt was not guarded, (and he or she could stay away from the unguarded part of the equipment) the violation would not be S&S because the miner would realize that the belt lacked a guard "with or without the report." Slip op. at 22. I am reluctant to endorse such a concept, as it removes an important enforcement tool needed to ensure compliance with examination requirements.

In sum, under the deferential substantial evidence standard of review, I conclude that the evidence above is such that a reasonable person might accept it as adequate to support the Judge's conclusion that the examination violation was S&S.

The next issue is whether substantial evidence supports the Judge's finding that this conduct constitutes unwarrantable behavior. I would find that it does.

Despite the fact that neither of the two examiners had noted the hazard of dark, murky water and tripping hazards in the bleeder, that Saunders had not signed the book, and that the examination was not complete, Giavonelli countersigned the examination book. 37 FMSHRC at 1637; Tr. 659, 666, 671-72, 682, 717. He knew the examination had not been completed but claimed he signed the book only to signify that he had read it and knew there was a problem. Tr. 671-72, 681-82.

Only later that day, after he discovered that MSHA knew about the water in the bleeder and was likely to issue citations, did he add a note in the examination book to explain what had occurred. Tr. 677-79, 717.

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[7] My colleagues' position would also lead to the conclusion that even if the water had been so deep that it reached the roof, the failure to record this hazard would not be considered significant and substantial.

As for Stalnaker and Saunders, they told the inspector that they forgot to fill out the examination book. 37 FMSHRC at 1637; Tr. 100. Saunders also acknowledged that he was complacent because the area often had water accumulations and he was not surprised to find water there. 37 FMSHRC at 1638; Tr. 311. Saunders stated that he did not believe the water was a hazard despite the fact that it was cold, murky, contained tripping hazards and was so deep that he did not complete his exam. 37 FMSHRC at 1659.

The importance of the examination requirement cannot be overstated. Here, the operator had a duty to ensure that the water hazards were recorded so that miners and MSHA inspectors would be alerted to the dangers of tripping and falling in the water before being exposed. Recording the hazard would also have provided notice that additional efforts were needed to keep the bleeder clear. *Id.* This information was vital to miner safety.

The inspector's testimony on this subject was stark and direct:

> [T]his is a vast volume of water back here. I mean, it needs to be documented, people need to know. It is required by law. What they are doing to correct it is required by law and the actions that they are taking [are] required by law to correct the condition. It is just not something that you keep two sets of records or you take a mental note on. It is a requirement.

Tr. 140-41.

As the Judge correctly noted, "This was not a mere paperwork error, rather this went to the heart of miner safety in the bleeder. . . . In fact, by creating a false impression about the area, the countersigned record book exacerbated the problem." 37 FMSHRC at 1659-60. The violation involved the failure to record the presence of extensive deep water in an area of the mine where miners had to travel alone, possibly without timely aid if they were injured.[8]

In fact, had the 103(g) complaint not been made and the examination book subsequently updated and corrected to reflect the water hazard, MSHA might never have had access to important historical information that a problem had existed — a problem for which the operator had previously been cited on more than one occasion. MSHA recognized the importance of such documentation when, during the promulgation of the standard, it rejected suggestions that the rule should only require the examiner to record uncorrected hazardous conditions. 61 Fed. Reg. 9764, 9805 (Mar. 11, 1996). In the preamble to the final rule, MSHA emphasized that the examination record serves the important function of noting the history of the types of conditions that can be expected in the mine. MSHA explained that when the records are correctly completed and reviewed, mine managers can use them to ascertain whether the same hazardous conditions are occurring and if effective corrective actions are in place. MSHA also stated that a record that includes all hazardous conditions found and the actions taken to correct them, permits mine management, MSHA inspectors and miners' representatives to more efficiently focus their attention during examinations and inspections. *Id*.

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[8] The failure to note and correct the water accumulations violations could also affect the mine ventilation system. Tr. 143.

Central to my conclusion that this violation is unwarrantable is the fact that it involves conduct by the highest underground mine official, Mine Foreman Mike Giavonelli, as well as by other mine foremen. Consol unabashedly conceded that "[t]he mine foreman [Giavonelli] countersigned the partially complete book while it still had blank entries." PDR at 2. He countersigned the book knowing of the hazardous conditions created by the water and knowing that those conditions were not listed in the book. Moreover, when Stalnaker, the mine examiner, was asked whether he considered putting the location of the water accumulations in the book, he testified that "the date board where proof that I had visited that area was in the water. . . . So I guess looking back on it, yes, I should have put it in the book." Tr. 307.

As mentioned above, pursuant to longstanding Commission precedent, the fact that the conduct at issue involved actions of mine management is a significant aggravating factor supporting a finding that a violation is unwarrantable. *See Lopke Quarries, Inc.*, 23 FMSHRC 705, 711 (July 2001) (recognizing that because supervisors are held to a high standard of care, the involvement of a supervisor in a violation is an important factor supporting an unwarrantable failure); *Midwest Material Co*., 19 FMSHRC 30, 35 (Jan. 1997) (reversing a Judge's finding that a violation was not due to the operator's unwarrantable failure in part due to the Judge's failure to recognize that the violation took place in the presence of a foreman, who, under Commission precedent, is held to a high standard of care); *Lion Mining Co.*, 19 FMSHRC 1774, 1778 (Nov. 1997) (holding that the foreman's observation of the violative condition was a factor tending to establish an unwarrantable failure); *S&H Mining, Inc.*, 17 FMSHRC 1918, 1923 (Nov. 1995) (stating that in unwarrantable failure analysis, heightened standard of care is required of section foreman and mine superintendent). As supervisors, the Consol foremen were "entrusted with augmented safety responsibility and [were] obligated to act as a role model." *Capitol Cement Corp.*, 21 FMSHRC 883, 893 (Aug. 1999).

I thus conclude that under the substantial evidence standard, where the inquiry is whether there is "such relevant evidence as a reasonable mind might accept as adequate to support [the Judge's] conclusion," there is more than enough in this record to sustain the Judge's finding that Consol's violation exhibited "aggravated conduct." *See* note 5, *supra.*

Regarding the penalty, the Judge assessed the $14,743 penalty proposed by the Secretary. Consol challenges this penalty determination.

I would affirm the penalty. Under the Commission's deferential standard of review, only penalty assessments "lacking record support, infected by plain error, or otherwise constituting an abuse of discretion" are subject to reversal. *Lopke Quarries*, 23 FMSHRC at 713; *U.S. Steel Corp*., 6 FMSHRC 1423, 1432 (June 1984).

The Judge's penalty determination easily meets this standard. She properly considered all of the relevant statutory factors under section 110(i) of the Mine Act. 37 FMSHRC at 1661-62. She noted that Consol's actions constituted an unwarrantable failure to comply. *Id*. at 1662 (a finding which, as discussed earlier, I would find is supported by substantial evidence). She clearly gave great weight to her finding of high negligence. This was based on the fact that Giavonelli signed the exam book knowing that water was present and not listed as a hazard. *Id.*

at 1658-61.[9] The Judge also emphasized her gravity finding. *Id*. at 1662.[10] Finally, she noted that Consol had a history of water accumulations in the particular bleeder at issue, and had been cited several times for that condition. *Id.*

Our case law is clear that Judges have discretion to assign different weight to the various statutory factors, according to the circumstances of the case. *See Lopke Quarries*, 23 FMSHRC at 713. Here, the Judge gave significant weight to negligent gravity, as our precedent permitted her to do.

In sum, I find that in upholding the penalty proposed by the Secretary for the order, the Judge did not abuse her discretion. For the reasons set forth above, I would affirm the decision of the Judge.

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

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[9] I would affirm the Judge's finding of high negligence based on the same analysis I use to affirm the finding that the violation was the result of the operator's unwarrantable failure.

[10] The Judge affirmed the inspector's high gravity designation, concluding that it was supported by a preponderance of the evidence. 37 FMSHRC at 1656 (listing the danger as "highly likely" to result in "fatal" injuries). She found that because the conditions listed in the ventilation plan citation (the uneven mine floor and the deep water) were not listed in the examination book, miners would not be aware of them. *Id*. at 1657. Thus, the failure to record the deep water in the book exacerbated its danger because examiners sent to the area would lack knowledge of the nature and extent of the hazard. *Id*. at 1657-58. As the inspector testified, "[i]f somebody was to go back there unknowingly, the water wasn't pumped . . . [s]omebody can fall and somebody can hit their head." Tr. 143.

The Judge also held that if miners entered the area, injuries such as a fracture, bacterial infection, or death by drowning were highly likely to occur. 37 FMSHRC at 1657; Tr. 68-69, 121-22, 143. Because I find that the Judge's analysis is supported by substantial evidence in the record, I would affirm her gravity decision.

Opinion by Commissioner Cohen:

My assessment of the conditions at the Enlow Fork Mine which gave rise to Citation No. 7024068 and Order No. 7024069 is quite similar to that of Commissioner Jordan.

Despite two recent citations by the Department of Labor's Mine Safety and Health Administration ("MSHA") and a specific warning contained in the second of those citations, Consol Pennsylvania Coal Company ("Consol") failed to prevent the waters in the E-15 to E-22 bleeder system from accumulating to dangerous levels. The cold, murky water ranged up to 42 inches in depth in one extensive area and up to 36 inches in depth in another extensive area, for a total of 2350 feet. The mine floor below the water was irregular and contained numerous tripping hazards which could not be seen. The water was so extensive that it took three days after the issuance of the citation and order to be pumped out. The water in the bleeder system clearly constituted a violation of the provision in Consol's ventilation plan which required that the bleeder system be maintained "safe for travel". This was the basis for the issuance of Citation No. 7024068.

Despite the hazards, the water was entered by two Consol examiners — Dan Stalnaker and Kevin Saunders, both of whom were foremen — on February 5, 2013 in an unsuccessful attempt to complete the weekly examination of the bleeder system required by 30 C.F.R. § 75.364. Stalnaker even put on chest waders, which were improper to use because they lacked flotation devices.[1] Stalnaker did not retreat from the high waters until his multi-gas detector was damaged when water poured into his waders while he attempted to go through a 3-foot high mandoor between entries. Consol's practice at that time (it has since been changed) was to have its examiners examine the bleeders alone. Moreover, there was no communications system in the Enlow Fork bleeders. From the point of entering the bleeder system to exiting the system, miners had no way to call for assistance.

Upon the completion of their respective attempts, both Stalnaker and Saunders made entries in the record book for the evaluation points they were able to access, as required by 30 C.F.R. § 75.364(h). Despite the conditions they had encountered, neither of them recorded any "hazardous conditions", as required by the regulation. Two other Consol supervisors — Shift Foreman Robert Price and Mine Foreman Michael Giavonelli — knew about the water and made no effort to make sure that this hazardous condition was recorded. Indeed, Giavonelli signed the record book as Mine Foreman without indicating any hazardous condition. The failure of the four foremen to make a record of the hazardous water was the basis for the issuance of Order No. 7024069.

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[1] It is against both MSHA policy and Consol policy to use chest waders which lack a flotation device. Tr. 419-20, 455, 499-500, 704. Mine Foreman Michael Giavonelli testified that he does not allow miners to wear waders because it is against Pennsylvania state law. Tr. 704. Shift Foreman Robert Price testified that if they get filled with water, it is "tough to get up". Tr. 455. Bleeder examiner Jamie Greene was more explicit — "You could go over water so far, water goes down in, you drown". Tr. 500.

However, I cannot agree with Commissioner Jordan that all of the Judge's conclusions should be affirmed. As described below, the Judge's analysis was insufficient on the issues of gravity, negligence and unwarrantable failure with regard to Citation No. 7024068, and was insufficient on the issues of gravity and unwarrantable failure with regard to Order No. 7024069. Thus, I would remand on those five issues, and affirm the Judge's decision on the issue of significant and substantial ("S&S") with regard to the citation and on the issues of S&S and negligence with regard to the order.

A. Citation No. 7024068

S&S

With regard to S&S, I join the unanimous Commission opinion.

Gravity

With regard to gravity, I join the opinion of Acting Chairman Althen and Commissioner Young. It appears to me that the Judge became entangled in the distinctions between "highly likely" and "reasonably likely" contained in Table XI referenced in 30 C.F.R. § 100.3(e). In analyzing the gravity of the citation, the Judge found that it was "highly likely" that an injury such as broken bones would result from a slip and fall in the bleeders, then said (three times) that it was "reasonably likely" that a fatal injury (i.e., drowning) would occur, and then inexplicably concluded that the conditions described in the Citation were "Highly Likely to result in Fatal injuries to two miners." 37 FMSHRC 1616, 1643, 1646-47 (July 2015) (ALJ). In making determinations of gravity, Commission Judges should consider the evidence holistically, and not feel bound by the distinctions made by the tables in Part 100. *American Coal Co*., 39 FMSHRC 8, 20 (Jan. 2017). I join Acting Chairman Althen and Commissioner Young in concluding that: (1) the evidence does not support a high likelihood of injuries, and that (2) on remand the Judge should determine the reasonable likelihood of injuries ranging from broken bones to a fatality.[2]

Negligence

The Judge concluded that Consol demonstrated a high degree of negligence when it failed to comply with its ventilation plan because it: (1) "knew or should have known" of the accumulated water in the bleeders and (2) failed to demonstrate any mitigating circumstances. 37 FMSHRC at 1648. I agree with Acting Chairman Althen and Commissioner Young that the Judge's decision should be remanded, but I do not agree with their rationale.

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[2] With regard to gravity, Commissioner Jordan states that "substantial evidence supports a finding of serious or high gravity". Slip op. at 28. I agree with her. I think it is proper for Commission Judges to make findings as to gravity using terms such as "serious" or "high" while discussing "factors such as the likelihood of injury, the severity of an injury if it occurs, and the number of miners potentially affected." *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2049 (Aug. 2016). If the Judge here had made a finding of "serious" or "high" gravity for the citation, I would have joined Commissioner Jordan in affirming the citation. But the Judge stated her conclusion as a "high likelihood" of injuries, a conclusion which, as stated in the opinion of Acting Chairman Althen and Commissioner Young, is not supported by substantial evidence.

In large part, the Judge's analysis of negligence was well reasoned and supported by substantial evidence. For example, she recognized the significance of the fact that the bleeder system was prone to flooding, and that MSHA had previously warned Consol in December 2012 that more effort was needed to control the water level in the bleeder. *Id.* at 1649-50. She correctly determined that since Stalnaker and Saunders were members of management, their knowledge of the high water levels was imputable to Consol. *Id.* at 1648. She correctly found that Stalnaker and Saunders "willfully traveled through the hazards." *Id.* at 1650.[3] Moreover, substantial evidence supports her determination that Consol's system for keeping water out of the bleeder was "wholly inadequate". *Id.* However, in my view, the Judge committed three fundamental errors of analysis which make it impossible to affirm her ultimate conclusion on the issue of negligence.

First, the Judge applied the definitions of levels of negligence found in Table X referenced in 30 C.F.R. § 100.3(d), under which high negligence may be found only if there is a total absence of mitigating conditions. 37 FMSHRC at 1618. Thus, she organized her analysis around the alleged mitigating circumstances asserted by Consol, and concluded that "[a]s none of the actions presented by Respondent constituted mitigating circumstances, the 'High Negligence' designation is appropriate." *Id.* at 1648-50. However, as Acting Chairman Althen and Commissioner Young point out, slip op. at 12-13, the Commission has rejected, in general, reliance on the Part 100 definitions in determining degrees of negligence, and, specifically, the legal principle that the finding of any mitigating circumstance precludes a conclusion of high negligence. Instead, Commission Judges evaluate negligence using a traditional and holistic "reasonable person" analysis of the evidence. Thus, a violation may be found to be "high negligence" even if mitigating circumstances exist. *Brody Mining, LLC*, 37 FMSHRC 1687, 1701-04 (Aug. 2015) ("[A] Commission Judge may find 'high negligence' in spite of mitigating circumstances."). In this case, the Judge's use of the Part 100 definitions, by itself, would not necessarily require remand. However, her reliance on the parameters of the Secretary's Part 100 regulations resulted in a distortion of her analysis which gave rise to two reversible errors.[4]

Second, the Judge did not properly evaluate the fact that, as part of its efforts following MSHA's admonition in the citation for excessive water in the bleeder issued on December 10, 2012, Consol conducted additional monitoring in the area, including examining the bleeder

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[3] Acting Chairman Althen and Commissioner Young make reference to "Inspector Gross' voluntary walk through the water", slip op. at 14 n.5. However, Gross was accompanied by Consol representative John Brottish, and testified that if he had been alone, he would not have entered the water because no one could have helped him if he fell. Tr. 348-49, 398-99.

[4] My impression is that the Judge had a gut sense that the ventilation plan violation was characterized by high negligence — which may be entirely reasonable — and then, because the Part 100 definition of "high negligence" requires the absence of any mitigating circumstance, she fit the evidence into a conclusion that there were no mitigating circumstances. Thus, the use of the Part 100 definitions of the degrees of negligence caused an analytic strait jacket in considering whether allegedly mitigating circumstances are actually mitigating.

system more frequently than once a week.[5] The Judge rejected these efforts as mitigating negligence for two reasons. First, the Judge said that the efforts were "in vain" because, subsequently, Stalnaker and Saunders willfully traveled through the hazards. Second, she found that the efforts were "grossly inadequate" because the actions did not give Consol any indication that water was collecting in the area at dangerous levels. 37 FMSHRC at 1650.

Neither of the Judge's reasons constitutes a basis for rejecting the efforts as mitigation. The fact that Stalnaker and Saunders willfully entered the hazardous water is essentially irrelevant to the fact that Consol was making some effort to monitor the water. The Judge's finding that the efforts were "grossly inadequate" overlooks the fact, as the Judge found in her unwarrantable failure analysis, that in the last examination which Jamie Greene conducted less than 48 hours from the time the citation was written, the water level was not excessive. *Id.* at 1651. Hence, I conclude that the Judge erred in rejecting Consol's efforts to monitor water levels in the bleeder system as a mitigating circumstance. These efforts may not be sufficient to offset the facts described by Commissioner Jordan as constituting high negligence, slip op. at 26-28, but they do represent an effort by Consol to monitor the water levels, and should be considered as a mitigating factor on remand.

Third, the Judge erred in her evaluation of Shift Foreman Price's actions on February 5, 2013. After Stalnaker returned from his unsuccessful attempt to complete the examination of all of the evaluation points, Price directed Saunders to attempt to complete the examination, starting from the E-22 side of the bleeder system. 37 FMSHRC at 1631. The Judge characterized Price's action as "willful exposure [of Saunders] to the hazard" of the dangerous excessive water. *Id.* at 1649.

The record does not indicate that Price knew that Saunders would encounter *hazardous* accumulations of water when attempting to finish the examination from the opposite end of the system. Price's knowledge of the water conditions in the bleeder came from Stalnaker, who previously had only attempted to examine from paths available on the E-15 side. Although Price assumed that Saunders would also encounter some water when walking from the opposite side, this belief does not represent a willful disregard of a hazard as it is permissible, at least according to Inspector Young, for examiners to walk in up to 18 inches of water. Tr. 46, 450, 458. Moreover, the record does not indicate that Price directed Saunders to walk through hazardous water to complete the examination, as is suggested by the Judge's finding of "willful exposure".

I conclude that Price acted reasonably when he assigned Saunders to begin an examination from the opposite end of the bleeders. Price acted in a manner that was consistent with Consol's obligation to conduct a weekly examination and to check for dangerous methane accumulations that may have built up in the bleeders. *See* 30 C.F.R. § 75.364(a). Price understood that Saunders was familiar with the area, and thus capable of navigating alternative

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[5] Jamie Greene, the regular examiner of the bleeder system, testified that he walked the area several times in the days before Stalnaker performed the examination and tended to pumps that were down so that Stalnaker (who substituted for Greene on the day at issue) would not have to walk through hazardous levels of water. Greene testified that he did not see excessive water. Tr. 495-96, 519-20. The Judge credited Greene's testimony. 37 FMSHRC at 1651.

routes in the E bleeder system to potentially access the evaluation points. *See* Tr. 458. Accordingly, I conclude that Price should not have been identified as being responsible for the "willful exposure" of Saunders to the hazards of the excessive water.

The Judge's characterization of Price's actions was not inconsequential in the Judge's overall evaluation of Consol's negligence. The Judge rejected the operator's installation of a bubbler system to monitor water levels in the bleeder system as a mitigating circumstance because of "the willfully negligent actions of Stalnaker, Price and Saunders." 37 FMSHRC at 1649-50. On remand, Price's actions should not be considered as "willfully negligent".

I cannot agree with Commissioner Jordan's analysis of negligence because it focuses entirely on the previous citations for excessive water and the actions of Stalnaker and Saunders in entering the water, without considering Consol's efforts between December 10, 2012 and February 5, 2013. At the same time, I cannot join the analysis of negligence by Acting Chairman Althen and Commissioner Young because it places too much emphasis on the Judge's error in finding that an injury was "highly likely" with respect to gravity. Moreover, their opinion does not fully consider the actions of Stalnaker and Saunders in entering the water, and — with respect to Stalnaker — the fact that he improperly donned chest waders in entering the water.[6]

A principal difference between my view and that of Acting Chairman Althen and Commissioner Young is in how we regard the actions of Stalnaker and Saunders. I see the actions of Stalnaker and Saunders in entering the hazardous water in the bleeders as relevant to the violation. In contrast, my colleagues focus exclusively on the accumulation of the water, and regard the actions of Stalnaker and Saunders as relevant only insofar as their entering the water was foreseeable to other members of Consol's management. *See* slip op. at 14.[7]

Consol's ventilation plan requires that the bleeders be "safe for travel". Gov't Ex. 3. If the bleeders are unsafe (because of, for instance, an accumulation of water), and they are traveled while unsafe, then the fact that the unsafe travel occurred exacerbates the negligence of the operator. The foreseeability of the travel would be an issue if those who did the traveling were only rank-and-file miners. But here, Stalnaker and Saunders were — as the Judge found —

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[6] This is particularly relevant to their consideration of unwarrantable failure, as discussed below.

[7] Acting Chairman Althen and Commissioner Young correctly observe that MSHA did not specifically cite Consol for the actions of Stalnaker and Saunders in entering the hazardous water. *See* slip op. at 20 n.10. However, the Judge included their actions in her evaluation of both negligence and unwarrantable failure. 37 FMSHRC at 1648-50, 1654. It is the Judge's decision, and not the MSHA citation, which the Commission reviews on appeal. Moreover, Consol has not argued on appeal that the Judge erred in considering the actions of Stalnaker and Saunders as relevant to the operator's negligence and alleged unwarrantable failure. Rather Consol's argument is that Stalnaker and Saunders did not act in a negligent manner because they believed that they were not exposing themselves to a hazard. PDR at 21. According to Consol, Stalnaker and Saunders acted upon a reasonable good faith belief, and even if the belief was not reasonable, the operator should not be held responsible because the agents' conduct was somehow "idiosyncratic". *Id.*

members of the management of the Enlow Fork Mine. 37 FMSHRC at 1648. As such, their negligence is directly imputed to Consol. *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194-96 (Feb. 1991) (holding that negligence of mine examiner is imputed to operator for purposes of determination of unwarrantable failure). Hence, the foreseeability of the actual unsafe travel is not an issue here.

In summary, I would remand the case on the issue of negligence in order for the Judge to consider the issue holistically, without regard to the Part 100 definitions of the degrees of negligence. The Judge should consider both (1) the actions of Consol in dealing with the problem of flooding in the bleeders in light of the two previous citations and the explicit warning by MSHA, and (2) the actions of Consol agents Stalnaker and Saunders in willfully entering the hazardous water. The Judge may, but need not, reach the conclusion that the violation of the ventilation plan was characterized by high negligence.

Unwarrantable Failure

The Judge's decision contains a lengthy discussion of unwarrantable failure, and looks at all of the factors which the Commission has identified as relevant in *IO Coal Co.*, 31 FMSHRC 1346, 1350-57 (Dec. 2009). *See* 37 FMSHRC at 1651-54. Her analysis is, for the most part, well-reasoned and supported by substantial evidence. Contrary to the opinion of Acting Chairman Althen and Commissioner Young, I find no reversible error in the Judge's discussion of the extent of the violative condition,[8] the length of time the violation existed,[9] whether the violation was obvious,[10] Consol's knowledge of the existence of the violation,[11] and whether Consol had been put on notice of the need for greater efforts for compliance.

However, I believe that errors made by the Judge in her analysis of the factors of danger and Consol's efforts to achieve compliance require remand for reconsideration.

With respect to the factor of danger, the Judge's consideration was necessarily informed by her previous determination that the violation produced a high likelihood of fatal injuries. As

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[8] Even if the water itself did not extend for as much as half a mile, it was unquestionably an extensive flooding in two separate areas of the bleeder system. Such error as the Judge made in saying "the water stretched for nearly half a mile", 37 FMSHRC at 1651, is trivial and harmless. The accumulation of water took three days to be abated. Tr. 153-54, 233; 37 FMSHRC at 1636.

[9] Crediting the testimony of Greene, the Judge reasonably concluded that the violation occurred less than 48 hours from the time the citation was written. 37 FMSHRC at 1651.

[10] My colleagues fault the Judge for finding the violation to be obvious since it was not known until Stalnaker entered it. They ignore the fact that after it became known, both Stalnaker and Saunders entered the deep water. Since Stalnaker and Saunders were agents of Consol, their actions in entering the hazardous water is a proper context for considering the obviousness of the violation, which is what the Judge did.

[11] *See* note 8, *supra*.

discussed *supra*, the determination of high likelihood is not supported by substantial evidence. This undercuts the Judge's findings as to danger with respect to unwarrantable failure. On remand, the Judge should revisit her findings as to danger in light of her reconsidered findings with respect to gravity.

With respect to Consol's efforts to abate the violative condition, the Judge focused on the fact that miners were exposed to the hazards of the excessive waters before abatement efforts became effective. 37 FMSHRC at 1654. She should have also considered Consol's efforts to control and monitor water in the bleeder system before Stalnaker entered the water, and the extent to which those efforts were sufficient to the task. Additionally, the fact that efforts were made after miners were exposed to the hazard does not render them meaningless for purposes of unwarrantable failure analysis.

Just as the Judge may well find high negligence on remand, she may also find that the violation was characterized by unwarrantable failure. But she must first reconsider her findings as to the factors of danger and efforts at abatement, and then weigh all of the unwarrantable failure factors together.

B. Order No. 7024069

With respect to the separate recording violation, the Judge concluded that Consol demonstrated high negligence, citing management's knowledge of the hazards, the multiple failures to record the hazards, and the mine's general history of failing to address water accumulations. The Judge found that Giavonelli's decision to sign a record with two obvious deficiencies — (1) a failure to list known hazards and (2) a failure to record air measurements for two of the evaluation points — was aggravating conduct. The Judge reasoned that a miner looking at the record would erroneously assume that the bleeder was safe for travel. In addition, the Judge found that any efforts the operator took to correct the underlying conditions were irrelevant to the negligence associated with the failure to record those conditions. 37 FMSHRC at 1658-61.

S&S

With regard to S&S, I would affirm the Judge's Decision, and join the opinion of Commissioner Jordan.

Gravity

With regard to gravity, I join the opinion of Acting Chairman Althen and Commissioner Young. The Judge's finding of a high likelihood of fatalities is not supported by substantial evidence. On remand the Judge should determine the severity of injury (ranging from broken bones to fatality) which was reasonably likely to have occurred as a result of the hazard contributed to by the violation.

Negligence

I would affirm the Judge's conclusion that Consol's failure to identify hazards in the weekly examination record book should be characterized as high negligence. In this regard, I fully join the opinion of Commissioner Jordan, slip op. at 32-34, 34 n.9, insofar as it applies to the negligence issue.

In contrast, my colleagues Acting Chairman Althen and Commissioner Young would vacate and remand the Judge's negligence analysis, unpersuaded that a knowing violation by mine management constitutes aggravated conduct. They would direct the Judge to reconsider two specific arguments.

First, they assert that the Judge should consider Consol's efforts to abate the water accumulations as relevant, despite the Judge's initial conclusion that those efforts were irrelevant to the recording violation. 37 FMSHRC at 1660 ("This is completely irrelevant to the issue. The dangers associated with an inadequate examination are not completely eliminated by correcting the underlying condition.") I disagree with my colleagues. Even if Consol had completely removed the water after the examinations by Stalnaker and Saunders, its duty to record the hazards observed during the examination would not be altered. Accordingly, I conclude that the Judge was correct in her determination that abatement efforts were not relevant.

Second, my colleagues suggest that Mine Foreman Giavonelli's signing of an incomplete exam report may not demonstrate aggravated conduct. They believe that any person viewing the examination record would have understood that it was incomplete. My colleagues miss the point. Giavonelli signed the examination report with blank spaces by the evaluation points, without any indication on its face that the spaces were blank or the examination incomplete at the time he signed it. This practice invites an examiner to complete the examination without having to approach the mine foreman again. As a result, the circumstances allow the examination report to be subsequently modified without indication on the face of the document. More importantly, in this case, Giavonelli knew that he was signing an examination report that was not completed because the examiners were prevented from accessing evaluation points because of hazardous conditions *that weren't listed on the examination report.* Only the section 103(g) complaint and the arrival of MSHA inspectors caused the discovery that the examination record was

incomplete. The Judge was correct in concluding that Giavonelli's signature on an incomplete examination record, together with the failure to record the hazardous conditions, indicates an aggravated lack of care.

Unwarrantable Failure

The Judge's analysis of unwarrantable failure comprises one paragraph in which she states: "The facts and arguments of the parties regarding the unwarrantable failure designation in Order No. 7204069 are identical to those in Citation No. 7204068. Therefore the findings regarding Citation No. 7204068 are incorporated here by reference." 37 FMSHRC at 1661 (citation omitted). However, as noted by Acting Chairman Althen and Commissioner Young, with whose opinion I agree on this issue, the facts and issues regarding unwarrantable failure in the order, while overlapping in many respects with the citation, are not congruent with the citation.

The analysis of the factor of whether Consol had been put on notice of the need for greater efforts for compliance is certainly different for the order. Unlike the citation, where MSHA had issued two recent citations for excessive water in the bleeder system and had specifically warned Consol to improve its compliance with the "safe for travel" provision of the ventilation plan, no such citations or warnings had been issued that Consol needed to improve its recording of weekly examinations.

The issues of knowledge and obviousness are also different for the order. With the citation, knowledge and obviousness relate to flooding in the bleeder system. With the order, knowledge and obviousness relate to what Consol officials put in the record book. Clearly, they had knowledge, and the violation was (or should have been) obvious.

As to abatement, the citation involves the question of how the Consol officials addressed a known problem of flooding in the bleeder system, both before and after the immediate problem was discovered on February 5, 2013. As described *supra,* this is a complex issue. However, with the order, the issue of abatement is quite clear. Consol not only failed to abate the violation, but compounded it when Mine Foreman Giavonelli signed the book, attesting that it was correct and accurate.

The issues of the extent and duration of the violation were relevant in the context of the citation, but probably are not relevant in the context of the order.

Therefore, the issue of whether the failure to record hazardous conditions in the weekly examination record book was an unwarrantable failure must be remanded to the Judge for reconsideration.[12]

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

[12] My colleagues Acting Chairman Althen and Commissioner Young take me to task for "essentially opin[ing] on each unwarrantable failure element", and instruct the Judge on remand that she "need not accord any weight whatsoever to Commissioner Cohen's premature statement of his personal view of factual issues." *See* slip op. at 25 n.16. What I have said here about the knowledge and obviousness of the recording violation should be manifest even to my colleagues in that Stalnaker and Saunders had each personally viewed, and entered, the accumulations of water before they recorded in the record book that there were no hazardous conditions in the bleeder system. What I have said here about the issue of abatement flows directly from what I said *supra* with regard to Mine Foreman Giavonelli's signature on an incomplete examination record constituting aggravated lack of care. The Judge on remand is, of course, not bound to accept my view of Giavonelli's negligence (in that the finding of high negligence regarding Order No. 7024069 is being affirmed in result without a Commission majority), but probably can figure that out without my colleagues' help.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
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October 19, 2017

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	
v.	Docket Nos. KENT 2012-749 KENT 2012-904 KENT 2012-1085
NALLY & HAMILTON ENTERPRISES, INC.	

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

DECISION

BY THE COMMISSION:

These proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et. seq. (2012) for violations of 30 C.F.R § 77.1001 and 30 C.F.R. § 77.1713(a). At issue is whether substantial evidence supports determinations made by the Judge in overturning "significant and substantial" ("S&S") designations accompanying a citation and order issued to Nally & Hamilton Enterprises, Inc. by the Department of Labor's Mine Safety and Health Administration.

Acting Chairman Althen and Commissioner Young vote to affirm the Judge's decision, while Commissioner Jordan and Commissioner Cohen vote to reverse the Judge's decision. The effect of the split decision is to allow the Judge's decision to stand as if affirmed. *Pennsylvania Elec. Co.*, 12 FMSHRC 1562 (Aug. 1990), *aff'd on other grounds*, 969 F.2d 1501 (3d Cir. 1992).

/s/ William I. Althen
William I. Althen, Acting Chairman

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

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

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

COMMISSION ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 10, 2017

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	Docket No. VA 2014-243
	Docket No. VA 2014-244
	Docket No. VA 2014-364
v.	Docket No. VA 2014-365
	Docket No. VA 2014-383
A & G Coal Corporation	

DIRECTION FOR REVIEW AND ORDER

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 16, 2017, after a representative of A & G Coal Corporation ("A & G") failed to appear for a previously scheduled conference call, a Commission Administrative Law Judge issued an Order to Show Cause directing the operator to respond by August 28, 2017, or risk being held in default. On August 30, 2017, not having received a response from A & G, the Judge issued an Order of Default dismissing the civil penalty proceedings.

On September 29, 2017, the Commission received a Petition for Discretionary Review from A & G seeking to set aside the Judge's Order of Default and remand the matter to the Judge for a hearing. PDR at 1. A & G's petition implicates several questions, including whether the Order to Show Cause was appropriate in this matter, whether procedural defects existed with the show cause order, and whether the process the Judge followed complied with the due process requirements of the Constitution. Foremost, although the Judge received confirmation that the show cause order was received and signed for,[1] Order of Default at 1–2, in an affidavit supporting A & G's petition, a representative for the operator avers that he did not receive the Judge's August 16 show cause order and could not find anyone in the company's offices who had received the order. Aff. of Patrick Graham at 3. A & G asserts that it only learned of the show cause order when the operator received the Judge's default order. PDR at 4. The representative acknowledges that he failed to appear at the conference call, and he avers that he

[1] The record contains a certified mail delivery receipt showing a signature by Leslie Wells.

had intended to contact A & G's legal counsel to advise him of the call but failed to do so. Aff. of Patrick Graham at 2.[2]

Under the Mine Act and the Commission's procedural rules, relief from a Judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2)(A)(i); 29 C.F.R. § 2700.70(a). We hereby grant A & G's timely filed petition for discretionary review.

In evaluating requests for relief from orders of default, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure and has granted relief on the basis of mistake, inadvertence, excusable neglect, or another 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, 787 (May 1993). We also have observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

A & G alleges that it did not timely respond to the Judge's Order to Show Cause because the official representing the operator in this matter did not receive the order. The present record is not clear as to what happened to the show cause order after it was delivered and signed for.[3]

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[2] We appreciate our colleague's views, but agree with him that it is premature to rule on the issues he raises in his separate opinion. No inference relevant to the merits of this case should be drawn from our decision to neither join nor rebut his suggestions on those issues.

[3] According to the Commission's records, both the show cause order and the subsequent default order were sent to Southern Coal Corporation at an address in Roanoke, VA. It appears that, at least at one time, Southern Coal Corporation was affiliated with A & G. Aff. of Patrick Graham at 2. Although this address does not otherwise appear in the record, A & G acknowledges receiving the Order of Default, but not the Order to Show Cause.

Having reviewed A & G's request, in the interest of justice, we remand this matter to the Judge to determine whether relief from the default is warranted and for further proceedings as appropriate pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

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

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

Acting Chairman Althen, concurring:

In order to form a unanimous decision, I join in the Commission's remand. I write separately to note that the present order pretermits the path I would have preferred. I would have granted review of whether the Judge abused his discretion in issuing a default order for $321,000 in a factually contested proceeding with the parties engaged in settlement discussions as a sanction for missing a telephone conference on whether to extend a stay.[1] A fully articulated decision by the Commission would have provided guidance for future considerations of default.

Because we have not granted review of that issue and the parties have not briefed it, it would be premature to opine on the outcome of such a review. Nonetheless, for purposes of the Judge's reconsideration and for use in other default proceedings, I find it useful to discuss basic default principles. Of course, I write only my understanding of default principles.

All Commissioners agree that default is a harsh remedy. It is not an action for a Judge to take merely because he/she has the power to do so. Declaring a default in an ongoing contested action requires a careful analysis and explanation of the basis for such harsh action.

Indeed, along with us, federal courts have emphasized the harshness of default and their strong disfavor of defaults of contested cases.[2] The D.C. Circuit has stated: "Default judgments are not favored by modern courts, perhaps because it seems inherently unfair to use the court's power to enter and enforce judgments as a penalty for delays in filing. Modern courts are also reluctant to enter and enforce judgments unwarranted by the facts." *Jackson v. Beech*, 636 F.2d 831, 835 (D.C. Cir. 1980). If a party is seeking relief from a default, "all doubts are resolved in favor of the party seeking relief." *Id.* at 836. In *E.F. Hutton & Co., Inc. v. Moffatt*, the Fifth Circuit opined that "[t]he entry of judgment by default is a drastic remedy and should be resorted to only in extreme situations." 460 F.2d 284, 285 (5th Cir. 1972). Much more recently, in *Drone Technologies, Inc. v. Parrot S.A., Parrot Inc.*, the Federal Circuit examined the Third Circuit's standards and found the following:

> A dismissal or default is a "drastic" sanction, *Poulis*, 747 F.2d at 867, which is why the Third Circuit has "established [a] strong presumption against sanctions that decide the issues of a case," *Ali*, 788 F.2d at 958. Accordingly, a dismissal or default sanction is "disfavored absent the most egregious circumstances." *United States v. $8,221,877.16 in U.S. Currency*, 330 F.3d 141, 161 (3d Cir. 2003).

838 F.3d 1283, 1301 (Fed. Cir. 2016).

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[1] Our resolution also avoids possible sua sponte discussion of whether, upon default, a Judge may assess the penalty sought by MSHA without evidence on, or consideration of, the penalty factors the Mine Act requires the Commission itself to consider in assessing penalties. Notably, the Commission's procedural rules require Judges entering default orders to assess "appropriate penalties," not simply those proposed by the Secretary. 29 C.F.R. § 2700.66(c).

[2] This is not a case where the operator failed to contest the citation or penalty.

In deciding default issues, the Third Circuit developed a six factor test of: (1) the extent of the party's personal responsibility; (2) whether the party had a history of dilatoriness; (3) whether the conduct of the party or the attorney was willful or in bad faith; (4) the meritoriousness of claims or defenses; (5) the prejudice to the adversary caused by the party's conduct; and (6) the effectiveness of sanctions other than dismissal or default. *Poulis v. State Farm Fire & Cas. Co.*, 747 F.2d 863, 868 (3d Cir. 1984). Separately, courts within the District of Columbia Circuit "must consider whether '(1) the default was willful, (2) a set-aside would prejudice plaintiff, and (3) the alleged defense was meritorious.'" *Gray v. Staley*, 310 F.R.D. 32, 35 (D.D.C. 2015) (quoting *Keegel v. Key West & Caribbean Trading Co., Inc.*, 627 F.2d 372, 373 (D.C. Cir. 1980)).

Summarized, these tests provide a consistent basis for considering default. Analysis starts with the premise that default is a drastic sanction warranted only by egregious circumstances. With that premise, a party's actions warrant default when, on balance, the party is acting willfully for a nefarious purpose such as deliberate delay or avoidance of discovery, the other party suffers prejudice, the defaulter does not have a reasonable contested case, and lesser sanctions would not satisfy the ends of justice.

The Judge must evaluate whether a failure is a willful action, taking into account prior conduct during the proceeding. Here, this factor would require an analysis of whether the failure to be on the scheduling conference call indicated a willful action—that is, an action tantamount to expression of a desire not to contest the case or an attempt to subvert proper prosecution of the case.

In this respect, it is notable, as my colleagues point out, that the record involves ambiguities.[3] Importantly, my colleagues note that Patrick Graham filed an affidavit stating that he had intended to notify the operator's legal counsel of the scheduling of the status conference but did not do so. This highlights that the operator had notified the Judge of a substitution of counsel and provided the name, address, and email of the new lawyer. Notice of Withdrawal and Substitution of Counsel, filed January 27, 2017.

That lawyer failed to enter a formal notice of appearance, as he should have. However, after the prior representative withdrew and notified the court of the name and address of new counsel, the Judge was aware that the party had designated a new legal counsel. Either the court failed to note the substitution of counsel or did not accept it prior to a formal entry of appearance. In either event, the Judge sent neither the notice of the telephone conference to discuss the stay nor the Order to Show Cause to the attorney designated by the operator as its representative. The Fifth Circuit has held that "[t]he plaintiff should not be punished for his

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[3] The emailed Order to Show Cause did not go through. The show cause order apparently was mailed to an address that was not the address of record. The corporate addressee on the show cause order was Southern Coal Corporation rather than A&G Coal. Apparently, the person addressed, Patrick Graham, had not entered an appearance as a representative of the party. A person named Leslie Wells signed for the mailed notice of the show cause order, but the Judge addressed the notice to Southern Coal Corporation, and it is not clear who employed Wells. Now, Graham swears that he did not receive the show cause order.

attorney's mistake absent a clear record of delay, willful contempt or contumacious conduct." *Blois v. Friday*, 612 F.2d 938, 940 (5th Cir. 1980). A Judge must be mindful that "[d]efault judgments were not designed as a means of disciplining the bar at the expense of the litigants' day in court." *Jackson*, 636 F.2d at 837.

As a second factor in a default case, a Judge must consider whether the other party has suffered any meaningful prejudice from the missed action. Here, that action is a missed telephone conference on whether to extend an already lengthy and agreed to stay. Meanwhile, it appears the parties were actively discussing settlement.

Another factor is the merits of the party's positon—that is, is the matter a contested action in which the party advances a substantive position. Here, because the Judge had stayed this case, it is not clear whether there was a basis in the record to evaluate the merits of the case. However, the Secretary had not sought summary judgment. Further, given the occurrence of settlement discussions, there obviously were disputed facts. Indeed, the occurrence of settlement discussions suggests the Secretary may have been amenable to resolving all matters for a lesser penalty than MSHA's original assessment. The missed conference call was on a non-substantive issue rather than a matter such as refusing discovery or a motion for summary judgment.

Another consideration is whether a lesser sanction than default could effectively remediate the party's failure. Here, for example, the Judge might have considered whether ending the stay and setting the case for hearing would have effectively sanctioned the operator for missing the telephone conference on that scheduling matter while permitting the contest of the $321,000 penalty to continue.

In short, using this case as an example, the bottom-line question is whether the failure to join a telephone conference call to discuss lifting the stay and setting a hearing date in a $321,000 case with contested facts, ongoing discussions of settlement, and the attorney desired by the operator not contacted warranted a default and immediate imposition of the MSHA-assessed $321,000 penalty. As noted at the outset, the parties have not briefed that question. I specifically do not express any opinion on whether I would have found an abuse of discretion.

/s/ William I. Althen
William I. Althen, Acting Chairman

ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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October 3, 2017

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. CONSOLIDATION COAL CO. now THE OHIO COUNTY COAL CO., Respondent.	CIVIL PENALTY PROCEEDING Docket No. WEVA 2016-0123 A.C. No. 46-01436-396817 Mine: Shoemaker Mine

DECISION APPROVING SECOND SETTLEMENT MOTION
ORDER TO PAY

Before: Judge Moran

This case is before the Court upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977. On January 19, 2017, the Secretary filed his first motion to approve settlement. The originally assessed total amount was $72,500.00 and the proposed settlement was for $39,875.00. The Secretary also requested that two citations be modified, as indicated below. On June 21, 2017, the Court issued a decision denying the settlement motion because there was insufficient information to justify the reduced penalty amounts and modifications. The Secretary then filed a Motion for Reconsideration along with an amended settlement motion on June 29, 2017.

Regarding Citation No. 9083151, which alleged a violation of 30 C.F.R. § 75.202(a), in the original motion, the rationale presented for the proposed penalty reduction stated only, "Though there was visible deterioration to the ribs, Respondent presented evidence that this condition did not exist for an extended period of time. In consideration of this evidence, which slightly mitigates negligence, and the risks inherent in proceeding to a hearing, the Secretary agreed to reduce the penalty." Secretary's January 19, 2017 Motion to Approve Settlement at 3.

As the Court stated in its June 21, 2017 Order, it "does not consider an unadorned assertion that the "*Respondent presented evidence* that this condition did not exist for an extended period of time," standing alone, as useful information ... if section 110(k) is to be meaningful, it is patently insufficient for the Secretary to merely state that the Respondent presented evidence that this condition did not exist for an extended period of time. Some basis for the Respondent's claim must accompany such an assertion." June 21, 2017 Decision Denying Settlement Motion at 4-5; n. 3 (emphasis in original).

As noted, following the Court's denial of the settlement motion, on June 29, 2017, the Secretary filed a motion for reconsideration, along with an amended settlement motion. In the amended motion the Secretary presented the following regarding Citation No. 9083151:

> This citation was issued in August 2015 due to visible deterioration of the ribs. On June 10, 2015, the Operator issued a companywide safety memo instructing miners to install additional rib bolts in the mains and on every corner. The Operator was taking measures to address the poor rib conditions. However, the state of this particular coal seam was such that the ribs were well-supported for an extended period of time even without rib bolts, but due to abutment pressure from longwall mining, the ribs could deteriorate quickly. The penalty under the regular assessment criteria would have been $2,282.00. Therefore, the Secretary believes Respondent's negligence, while moderate, was somewhat less than the special assessment markup and that a reduction in penalty in this instant case is consistent with his enforcement responsibility of the Mine Act.

Secretary's Amended Motion for Decision and Order Approving Settlement at 3.

In light of this information, the Secretary proposes a settlement amount of $6,513.00, rather than the initially proposed penalty of $11,500.00, with no modifications to the citation.

Regarding Citation No. 9083289, which alleged a violation of 30 C.F.R. § 75.202(a), in the Secretary's original motion the rationale presented for the proposed penalty reduction for that citation stated only, "Respondent presented evidence that, based on their size, consistency, and location, the cited ribs would not have caused fatal injuries. In consideration of this evidence and the risks inherent in proceeding to a hearing, the Secretary agreed to modify the type of injury and reduce the penalty." Secretary's January 19, 2017 Motion to Approve Settlement at 3.

In the amended motion the Secretary presented the following regarding Citation No. 9083289:

> The ribs cited in this citation were in a highly traveled area however, they were located on the belt side, thus miners would rarely be exposed to the conditions. Due to the location of the rib with respect to the belt, miners would not be directly exposed to the full rib should it fall. The belt would take the brunt of the rib fall. The penalty under the regular assessment criteria would have been $2,282.00. Therefore, the Secretary believes Respondent's injury designation should be modified, the corresponding special assessment penalty markup reduced, and that the modification and reduction in penalty are consistent with his enforcement responsibility of the Mine Act.

Secretary's Amended Motion for Decision and Order Approving Settlement at 3-4.

The Secretary also requested that the gravity of this citation be modified from "fatal" to "permanently disabling." In light of this information, the Secretary proposed a settlement amount of $3,225.00, rather than the initially proposed penalty of $12,900.00.

Regarding Citation No. 9083153, which alleged a violation of 30 C.F.R. § 75.202(a), in the Secretary's original motion the rationale presented for the proposed penalty reduction for that citation stated only

> [t]hough the cited condition was in a traveled area, Respondent presented evidence that this condition did not exist for an extended period of time. In consideration of this evidence, which slightly mitigates the negligence, and the risks inherent in proceeding to a hearing, the Secretary agreed to reduce the penalty.

Secretary's January 19, 2017 Motion to Approve Settlement at 3.

In the amended motion the Secretary presented the following regarding Citation No. 9083153:

> This citation was issued in August 2015 due to visible deterioration of the ribs. On June 10, 2015, the Operator issued a companywide safety memo instructing miners to install additional rib bolts in the mains and on every corner. The Operator was taking measures to address the poor rib conditions. However, the state of this particular coal seam was such that the ribs were well-supported for an extended period of time even without rib bolts, but due to abutment pressure from longwall mining, the ribs could deteriorate quickly. The penalty under the regular assessment criteria would have been $2,282.00. Therefore, the Secretary believes Respondent's negligence, while moderate, was somewhat less than the special assessment markup and that a reduction in penalty in this instant case is consistent with his enforcement responsibility of the Mine Act.

Secretary's Amended Motion for Decision and Order Approving Settlement at 4.

In conjunction with this new information, the Secretary proposed a settlement amount of $6,513.00, rather than the initially proposed penalty of $11,500.00.

Regarding Citation No. 9083292, which alleged a violation of 30 C.F.R. § 75.202(a), in the Secretary's original motion the rationale presented for the proposed penalty reduction for that citation stated only:

> Respondent presented evidence that, based on its size and consistency, the cited rib would not have caused fatal injuries. Respondent also presented evidence that this condition did not exist for an extended period of time. In consideration of this evidence and the risk inherent in proceeding to a hearing, the Secretary agreed to modify the type of injury and reduce the penalty.

Secretary's January 19, 2017 Motion to Approve Settlement at 4.

In the amended motion the Secretary presented the following regarding Citation No. 9083292:

> The rib was scaled down above the already sloughed out area, thus the rib fell on top of sloughed out area, where miners would not travel. In addition, this area was preshifted and the rib conditions did not exist during the preshift examination. The state of this particular coal seam was such that the ribs would appear well supported without rib bolts for an extended period of time, but as the longwall advanced, the ribs could deteriorate quickly, often within a few hours of mining. The condition of this rib deteriorated quickly due to longwall abutment pressure. The penalty under the regular assessment criteria would have been $2,282.00. Therefore, the Secretary believes Respondent's injury designation should be modified and the corresponding special assessment penalty markup reduced. The Secretary also believes that Respondent's negligence, while moderate, was somewhat less than the special assessment markup and that the modification and reduction in penalty are consistent with his enforcement responsibility of the Mine Act.

Secretary's Amended Motion for Decision and Order Approving Settlement at 5.

The Secretary also requested that the gravity of this citation be modified from "fatal" to "permanently disabling." In light of this information, the Secretary proposed a settlement amount of $4,324.00, rather than the initially proposed penalty of $17,300.00.

Regarding Citation No. 9083154, the Respondent has agreed to pay the full proposed penalty of $19,300.00, with no modifications. That citation alleged a violation of 30 C.F.R. § 75.223(a).

In further support of the Secretary's Motion for Reconsideration, he also stated,

> As indicated in Exhibit B, the parties reached a settlement agreement two days before a hearing on the matter was set to commence. In reaching the settlement, the undersigned reviewed the Citations and inspectors notes, and engaged in extensive discovery with the Operator. The undersigned also spoke to the issuing inspectors at length and discussed the citations with the Operator during course of settlement negotiations.

Secretary's June 29 Motion for Reconsideration at 2.

Conclusion

As detailed above, the amended motion now provides significantly more factual information in support of the proposed penalty amounts and modifications.[1] Based upon the factual support offered in the amended motion to approve settlement, the Court has considered the representations submitted in this case and concludes that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act.

The settlement amounts are as follows:

Citation No.	Proposed Penalty	Settlement Amount
9083151	$11,500.00	$6,513.00
9083289	$12,900.00	$3,225.00
9083153	$11,500.00	$6,513.00
9083154	$19,300.00	$19,300.00
9083292	$17,300.00	$4,324.00
TOTAL:	**$72,500.00**	**$39,875.00**

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

It is **ORDERED** that Citation Nos. 9083289 and 9083292 be **MODIFIED** to from fatal to permanently disabling.

The Respondent is **ORDERED TO PAY** a penalty of **$39,875.00** within 30 days of this decision.[2]

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

[1] Under Commission Procedural Rule 31(b), a motion to approve settlement must "include . . . facts in support of the amount of penalty agreed to in settlement." 29 C.F.R. § 2700.31(b)(1).

[2] 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:

Jane Hwang, Office of the Solicitor, U.S. Department of Labor, Suite 630E, The Curtis Center, 170 S. Independence Mall West, Philadelphia, Pennsylvania, 19106

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/KP

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October 3, 2017

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. ARGUS ENERGY WV, LLC, Respondent.	CIVIL PENALTY PROCEEDING Docket No. WEVA 2017-0158 A.C. No. 46-07809-426807 Mine: Kiah Creek Preparation Plant

DECISION GRANTING MOTION TO WITHDRAW NOTICE OF CONTEST, FOLLOWING COURT'S REJECTION OF INADEQUATE SETTLEMENT MOTION ORDER OF DISMISSAL

Before: Judge Moran

This case is before the Court upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977. At issue is one section 104(a) citation, alleging a violation of 30 C.F.R. § 77.1606(a). This standard is titled "Loading and haulage equipment; inspection and maintenance," and provides in relevant part "[m]obile loading and haulage equipment shall be inspected by a competent person before such equipment is placed in operation. Equipment defects affecting safety shall be recorded and reported to the mine operator." 30 C.F.R. § 77.1606(a). The citation alleged:

> The spot mirror was busted out on the Komatsu HD785 Haulage Truck Co. No. 137. Equipment defects affecting safety shall be recorded and reported to the mine operator. There was no pre-operational record completed and reported to the mine operator on this date for this piece of mobile equipment. This truck was being operated to haul overburden on mine property.

Citation No. 8128099.

The inspector marked this alleged violation as S&S, reasonably likely to lead to an illness or injury, likely to lead to a fatal injury, affecting one person, and as moderate negligence. *Id*. The alleged violation was abated with the installation of a new spot mirror, and the Secretary proposed a civil penalty of $666.00. Secretary's Petition, Ex. A.

Procedural History

Docket No. WEVA 2017-0158 was assigned to this court on April 19, 2017. On June 26, 2017, the Secretary filed a motion to approve settlement. The initial motion contained boilerplate from the Secretary that, as the Court has previously noted, contravenes Congress' command in section 110(k) of the Mine Act that "no proposed penalty which has been contested before the

Commission… shall be compromised, mitigated, or settled *except with the approval of the Commission*."[1] 30 U.S.C. § 820(k) (emphasis added).

Accordingly, on June 28, 2017, the Court issued an order denying the settlement motion, on the basis that the motion contained no factual information pertaining to the violation itself. Rather, the Secretary pronounced that *he*,

> has determined that the S&S and gravity determinations in the citation at issue shall be modified as discussed above. Substantive modifications to citations and orders, including the S&S designation, are within the prosecutorial discretion of the Secretary. *Mechanicsville Concrete Inc*., 18 FMSHRC 877 (1996)" The Commission's review of settlement proposals involving such substantive modifications is limited to whether the agreed-upon penalty amount is consistent with the agreed-upon substantive modification. Here, a $134.00 reduction in the penalty from $666.00 to $532.00 is appropriate and supported by the reduction in the gravity findings."

Secretary's June 26, 2017 Motion at 2-3.

As previously discussed by this court, the Secretary's reference to *Mechanicsville* reveals a mistaken conflation of his prosecutorial discretion to vacate citations with the claim that he has unbounded discretion to determine what information must be provided in the context of settlements. *Argus Energy WV, LLC*, 39 FMSHRC 1317, 1320 n. 5 (June 28, 2017) (ALJ Moran). The Court further noted that if it accepted the Secretary's claims, the Secretary could present identical boilerplate language for any proposed modification, untethered from any case-specific facts. *Id*. at 1321.

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[1] The motion included the Secretary's oft-stated language that, "In reaching this settlement, the Secretary has evaluated the value of the compromise, the likelihood of obtaining a better settlement, and the prospects of coming out better or worse after a trial. In deciding that such a compromise is appropriate, the Secretary has not given weight to the costs of going to trial as compared to the possible monetary results that would flow from securing a higher penalty. He has, however, considered the fact that he is maximizing his prosecutorial impact in settling this case on appropriate terms and in litigating other cases in which settlement is not appropriate. The Secretary believes that maximizing his prosecutorial impact in such a manner serves a valid enforcement purpose. Even if the Secretary were to substantially prevail at trial, and to obtain a monetary judgment similar to or even exceeding the amount of the settlement, it would not necessarily be a better outcome from the enforcement perspective than the settlement, in which the alleged violation is resolved and can be used as a basis for future enforcement actions. A resolution of this matter in which the violation is resolved is of significant value to the Secretary and advances the purposes of the Act." Secretary's June 26, 2017 Motion to Approve Settlement at 2. As noted herein, this language provides no useful section 110(k) information to the Commission and, if accepted, would equate the Secretary's presently unfettered authority to vacate citations with his asserted scope of authority in the realm of settlements.

On July 7, 2017, the Secretary filed a motion to certify for interlocutory review the Court's order denying settlement. The motion sought certification of two questions:

1. Whether the ALJ erred in rejecting the Secretary's interpretation of the term "approval" in Section 110(k) of the Mine Act (30 U.S.C. § 820(k)), and instead adopting a standard of review that fails to recognize that the Secretary is exercising his statutory enforcement discretion when he proposes a settlement agreement?
2. Whether the ALJ erred in rejecting the Secretary's position that modifications to the gravity findings of an enforcement action, including whether a violation is significant and substantial ("S&S"), are within the unreviewable enforcement and prosecutorial discretion of the Secretary?

Secretary's July 7, 2017 Motion to Certify and to Stay Proceedings at 1-2.

The Court denied the motion to certify on July 11, 2017, on the basis that immediate review would not materially advance final disposition of the proceedings.

Shortly afterwards, the Court scheduled a conference call with the parties to set a date for hearing. That call was canceled upon notification from the parties that the Respondent planned to withdraw its contest and pay the proposed penalty, with no modifications to the single citation.

Subsequently, on August 4, 2017, the Respondent filed the instant submission, titled "Notice of Withdrawal of Notice of Contest and Parties Joint Request That This Proceeding Be Dismissed." ("Notice")[2] The motion states that the Respondent has agreed to pay the originally assessed amount of $666.00 in full, seeking "that its notice of contest of Citation Number 8128099 and the related penalty assessed for this violation be withdrawn, and that an order be issued affirming this violation and assessing the proposed penalty of $666. … the Secretary is in agreement with this withdrawal and with the proposed assessment of $666." Notice at 1.

Discussion

Under Commission Rule 11 "[a] party may withdraw a pleading at any stage of a proceeding with the approval of the Judge or the Commission." 29 C.F.R. § 2700.11, *Sec. v. Performance Coal* 34 FMSHRC 587, 592 (Mar. 2012) (Chief Judge Lesnick and Judge Miller). As Administrative Law Judge David F. Barbour noted in *Sec. v. Consolidation Coal,* 1993 WL 396898 (Feb. 1993), "[h]aving withdrawn its contest, there remains no challenge to the Secretary's civil penalty petition, and it too is GRANTED." *Id*. Administrative Law Judge Thomas P. McCarthy observed, a Respondent's withdrawal of contest makes a current civil penalty proceeding moot and the "matter reverts back to the status quo ante prior to said contest," with the effect that the penalty as originally proposed by the Secretary is imposed. *Dickenson-Russell Coal Co., LLC*, 35 FMSHRC 698 (Mar. 2013) (ALJ McCarthy).

[2] The Court construes the Respondent's notice as a motion and it will be referred to as such in this decision.

The Court views the events, as recounted above, as yet another example of the importance of the Commission's role in the review of settlements, per the direction of Congress under section 110(k) of the Mine Act.

The Court has considered the Respondent's notice to withdraw its notice of contest and the related penalty for the one citation in this matter and the request that an order be issued affirming the violation and assessing the proposed penalty of $666 and the parties' joint request that the proceeding be dismissed. The Respondent's notice of withdrawal is recognized and the parties' request that this proceeding be dismissed is GRANTED.

WHEREFORE, the motion to withdraw is **GRANTED**.

It is **ORDERED** that Respondent pay a penalty of $666.00 within 30 days of this order.[3]

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

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/JM

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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October 19, 2017

HEATHER MULFORD, Complainant, v. ROBINSON NEVADA MINING COMPANY, Respondent.	DISCRIMINATION PROCEEDING Docket No. WEST 2017-0135-DM MSHA Case No. WE-MD-2016-16 Mine: Robinson Operation Mine ID: 26-01916

DECISION AND ORDER

Appearances: Heather Mulford, Ely, Nevada, pro se for the Complainant

Robert Delong, Esq., Reno, Nevada, for the Respondent

Before: Judge Moran

This case is before the Court upon a complaint of discrimination under Section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(3) ("the Act"). A hearing was held July 25-26, 2017, in Elko, Nevada. To establish a prima facie case of discrimination under section 105(c)(1), a complainant must show that he/she engaged in a protected activity and that the adverse action complained of was motivated, at least in part, by that activity. For the reasons which follow, the Court finds that, while Heather Mulford engaged in protected activity by asserting certain safety and health concerns in her MSHA complaint, those claims were without any substance whatsoever and that the decision to terminate her employment was not attributable to her making those claims. Thus, while Robinson terminated Mulford, that adverse action was not motivated in any part by her protected activity.

A Preliminary Matter

At the outset of the hearing, the Court revisited its July 10, 2017 Order, precluding the introduction of Respondent's proposed exhibits, Nos. 4 through 15. Tr. 8-20. The Court then announced at the hearing that it was reaffirming its earlier determination precluding those exhibits. See July 25, 2017 Order Regarding Robinson's Response to Order Precluding Introduction, Reference, and Use of Respondent's Proposed Exhibits Nos. 4 through 15. In essence, the Order found that the Report amounted to trying Ms. Mulford based on conclusions and actions taken by a state court prior to Mulford's employment by Robinson, which had no relevance at all to this discrimination action.

Ms. Heather Mulford's MSHA Discrimination Complaint

Mulford's discrimination complaint before MSHA alleges two cognizable grounds of protected activity.[1] First, she alleged that Robinson Mine's safety manager, Mark Langston, may have been drunk on the job several times. She claimed that Langston would come to work smelling like booze, walking unsteadily, and acting erratically. Mulford reported Langston's possible intoxication to Respondent's Human Resources Manager, Mr. Kim Kammerer. Second, she alleged that Robinson employee Patrice Dunn may have been covering up positive drug test results of an employee. This allegation arose from Mulford's claim that Dunn's daughter had failed two drug tests.

Mulford gave a statement to MSHA special investigator Cory Owens on October 4, 2016 concerning her discrimination complaint. She was asked by MSHA on that date "[w]hat was your protected activity?" Mulford Statement to MSHA at 3. Her response, in full, informed:

> I still believe that it is an outside influence on Mark Langston and then a secondary issue that happened towards the end of August. The issue in August was positive drug test that came along with a workers comp claim. He really came after me after I turned in the positive drug test to the state. This employee had two positive drug tests in four months and filed two workers comp claims. The drug test was about a week before the hearing aid issue came up. Then I wanted to discuss it with HR who is Kim Kammerer. I told him about the drug tests, then told him about Langston coming unglued on me about the hearing aids and I also told him that Langston comes in the morning smelling like fresh booze. Langston also sways down the hallway and in office.

Id.

In her October 4, 2016 statement, Mulford was also asked, in effect, what was the adverse action against her. The first question on this issue was "[w]hy do you feel that the company is retaliating against you?" Statement at 3-4.

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[1] Mulford's discrimination complaint, reflected in her "Discrimination Report" before MSHA, and her statement and interview with MSHA included claims outside of protected activity. These involved allegations that Mark Langston was upset with her hearing deficit and the amount of time it was taking for her to obtain hearing aids, and that Langston was "disrespectful" to her from the start of her employment with Robinson Mine. Mulford's complaint also asserted that "the discrimination & disrespectful behavior from Langston cold be from outside source from Reno, NV. In Reno [I] had been harassed & my employment discriminated for 2 years. Please question Langston because it is not usual to mistreat total strangers without outside influences." Mulford Discrimination Report at 3. The Respondent's mine is in Ruth, Nevada. Tr. 271. The Court takes judicial notice that Reno, Nevada is more than 305 miles from Ruth.

Mulford answered,

> *I don't feel that it is the company*; I feel that it is Langston and Patrice Dunn. Patrice used to take care of the workers comp claims but I took it over because I'm a licensed nurse. Her daughter is the worker with the two failed drug tests and workers comp claims, I feel that she was defrauding the State of Nevada by covering up the positive drug test on the last comp claim.

Id. (italics added).

The second question on the issue inquired, "[h]ow did Mark Langston retaliate against you?" Mulford October 4, 2016 Statement to MSHA at page 4. Mulford's response was,

> [b]esides the constant bull with the hearing and communication. My job description was never realized[;] he switched me over to industrial hygienist which I don't have a degree in and have never done in my life. He ignored me like [I] was invisible, I could not add suggestions to the safety team. He was a bully, he micromanaged everybody's job description and I was not allowed any autonomy. He would talk to me like you would talk to your dog, he would give orders rather than talking to [a] human being. Then the final was the letter that I received from HR forcing [me] to take time off.

Id.

Before receiving testimony, as Ms. Mulford is a pro se complainant, the Court briefly reviewed the necessary elements to establish discrimination under section 105(c) of the Mine Act. It noted that "to prevail in such a case the complainant is required to show that he or she engaged in protected activity, and that the adverse action taken was motivated at least in part by that activity." Tr. 23. The Court also spoke to the Respondent's ability to rebut a Complainant's prima facie case, "by showing that there was no protected activity which occurred, or that the adverse action was not motivated in any part by that protected activity." Tr. 24. It added that a Respondent can also still defend "affirmatively . . . by proving that even if they were motivated by the miner's activity, they were also motivated by the miner's unprotected activity and they would have fired or taken the adverse action against that individual in any event." Tr. 24-25.

The importance of *Hatfield v. Colquest Energy, Inc*., 13 FMSHRC 544 (Apr. 1991) ("*Hatfield*").

In *Hatfield*, the Commission recognized that a miner cannot expand his pro se claim by alleging matters not within the scope of the initial complaint and never investigated by MSHA. 13 FMSHRC at 546. In *Sec. v. Hopkins County Coal, LLC*, 38 FMSHRC 1317, June 24, 2016, the Commission expounded upon its *Hatfield* decision, stating that "the miner's complaint establishes the contours for subsequent action." *Hopkins* at 1340. It noted in *Hopkins* that "Hatfield's original complaint was general in nature and contained no indication of the new matters apparently alleged for the first time in the amended complaint." *Id*. at 1341 (citing *Hatfield at 546)*. The Commission held that the initial complaint formed the basis of MSHA's

investigation. *Id*. After MSHA refused to act on that initial complaint, the miner *could not expand his pro se claim by alleging matters not within the scope of the initial complaint and never investigated by MSHA*. *Hopkins* at 1342 (emphasis added). The key element in these matters is that the determination of the scope of the complaint is not constrained entirely by the four corners of the miner's complaint, but is also informed by MSHA's ensuing investigation:

> The Commission has previously held that 'the Secretary's decision to proceed with a complaint to the Commission, as well as the content of that complaint, is based on the Secretary's investigation of the initiating complaint to [him], and not merely on the initiating complaint itself.' *Sec'y o/b/o Callahan v. Hubb Corp*., 20 FMSHRC 832, 837 (Aug. 1998); see *Sec'y o/b/o Dixon v. Pontiki Coal Corp*, 19 FMSHRC 1009, 1017 (June 1997); *Hatfield*, 13 FMSHRC at 546. If the content of a discrimination complaint filed with the Commission is based on that which is uncovered during the Secretary's investigation, then it follows that the Secretary's authority to investigate in the first instance cannot be circumscribed by the early and often uninformed statements made by a miner in his charging complaint.

Id. at 1326, n.15.

Accordingly, this Court considered the text of Mulford's discrimination complaint before MSHA as well as MSHA's investigation interview of October 4, 2016.

At the outset of the hearing the Court spoke to the particulars of the Complainant's case. The purpose of this was to explain that some aspects of Ms. Mulford's complaint were not cognizable under the Mine Act. The Court had explained this before the hearing during conference calls with the parties, but thought it would be useful to revisit the matter again. Therefore, the Court noted that the Complainant could testify "about [her] experiences with Mr. Langston, the safety manager regarding [her] claim that he showed evidence of being intoxicated or having alcohol issues on the job." Tr. 25. The Court noted that she "need not prove that he was, in fact, intoxicated, however, but only that [she] raised this concern to management at Robinson mining." Tr. 25. The Court also noted that there is a safety standard pertaining to alcohol at a mine site: 30 CFR § 56.20001. Tr. 26. The Court explained further that Mulford could testify about "any bullying, hostility or micromanaging carried out by Mr. Langston or others after [she] raised [her] safety concern about Mr. Langston." *Id*.

The Court also noted that the Complainant could testify about her "experience with Patrice Dunn regarding whether she was covering up positive drug tests for certain employees and the basis for [her] claim in that regard." Tr. 26-27. Last, the Court took note that Mulford's complaint includes two adverse actions allegedly taken against her. One was being reclassified as an industrial hygienist, and the other her employment termination. Tr. 28. In this regard, the Court emphasized that if the Complainant's testimony strayed beyond things that she presented to MSHA in her complaint, and in the investigation and the interview that she had with the MSHA special investigator, then she would have gone outside of the four corners of her complaint and that such matters could not be considered because that is prohibited by the Commission's *Hatfield* decision. The Court explained that the reason for that limitation is that MSHA "has to have an opportunity to investigate complaints of discrimination in the first

instance. So it's only what [a complainant brings] to [MSHA's] attention for them to investigate that can be brought up in the subsequent hearing unless you brought another discrimination complaint and filed new charges." Tr. 29.

Findings of Fact

Testimony began with the Complainant, Heather Ann Mulford. Ms. Mulford is a registered nurse. Tr. 42. She became a nurse in 1985 and is presently licensed as such. *Id.* She applied for employment as an occupational health nurse at Robinson Nevada's mine in Ely, Nevada, in the spring of 2016. Tr. 44. Complainant's Exhibit 1C, is the job announcement for the position for which Mulford was hired. Tr. 46-47. Respondent's Ex. R 18-2, is the same document. Mulford learned of the job opening on the internet. Tr. 47. Mulford stated she was hired as an occupational health nurse. Tr. 49. Also introduced was Respondent's letter, dated May 12, 2016, offering her the job. Ex. C 2; Tr. 51. Respondent's Ex. R 23, is the same document. The Court noted that exhibit C 2, describes the job offered as "Occupational Health Nurse." Tr. 52. Mulford accepted the job immediately and began work on June 6, 2016. However, she stated that when she appeared for her first day on the job, her job was listed as industrial hygienist and occupational nurse, with the hygienist position listed first. Tr. 54. Complainant's Ex. 17 C. That exhibit lists the position title as "industrial hygienist/nurse." *Id*.

Mulford agreed that on her first day at work with the Respondent, June 6, 2016, she was informed that her job was as an industrial hygienist/occupational nurse.[2] Tr. 60. She viewed the description as different from the position for which she was hired. That is to say, in her view, the title, "industrial hygienist and occupational nurse," is not the same as "occupational health nurse." *Id*. Mulford expressed her view that the industrial hygienist job usually requires at least certification, and often a separate degree, and that she possessed neither. Tr. 60-61. She was qualified only to be an occupational nurse. However, she did not immediately voice her concern about this issue to Robinson. Instead, around mid-June, when her office email was being set up, and her title was again listed as "industrial health/occupational health nurse," she informed Shane Anderson that could not work, as she lacked the degree or certification for that title. Tr. 62 and C's Ex. C 3. According to Mulford, Anderson told her that Mark Langston wanted her to

[2] The Court notes that, while for the sake of completeness, it has recounted Mulford's testimony regarding the occupational nurse and hygienist issue, this was not protected activity. In addition, Respondent's Exhibit R 18, a two page exhibit which pertained to the job announcement and the job description, was admitted into the record. Tr.299-301. Respondent's Counsel noted and Mulford agreed that the exhibit included, under the responsibilities/ job description, "[p]erform health risk assessments, industrial sampling, ergonomic surveys throughout the mine site." Tr. 302. However, Mulford added that it was "not the job *title*." Tr. 302 (emphasis added). She acknowledged that those tasks were "discussed [ ] in our interviews that I would help and learn how to do this [,adding] [b]ut it wasn't a change job [*sic*]." Tr. 302. Further, Mulford's objection to the industrial hygienist tasks was "[b]ecause it wasn't [her] degree or [her] certification." Tr. 304. In the Court's estimation, Mulford erroneously conflated the non-existent requirement for a degree or certification to perform hygienist duties with her objection to including those duties in her job or more particularly, in her job *title*. Regardless, this was not one of the grounds advanced in her claim of protected activity.

do that hygienist work. Tr. 64. Although Anderson informed Mulford that the mine would be teaching her how to perform that work, she responded that was insufficient, as it was not equivalent to possessing a degree. *Id.*

Returning to her testimony regarding the events associated with her being hired by Robinson Mining, Mulford stated that she first had a telephone interview conducted by Mr. Kim Kammerer, Shane Anderson, Mark Langston, and Tyler Wright. That was followed about a month later by an in-person interview which occurred in Ely, Nevada. The same individuals interviewed her as in her telephone interview, with Kammerer and Anderson leading the interview team. Tr. 69. At the time of the second interview, the Complainant had no hearing aids or other hearing assistance devices, nor did she possess any such devices. Tr. 70. It was not until September 2016, that the Complainant acquired hearing aids. Tr. 71. During her in-person interview, Mulford stated that she did not have significant hearing problems, although at times she asked an individual to repeat himself. Tr. 72. No issue of her hearing ability was raised by Respondent at the in-person interview. *Id.*

Robinson hired Mulford and, after about two weeks on the job, she was working as a regular employee in her occupational health nurse role. Tr. 73. She stated that her work was going well and there were no issues with her performance. Tr. 75. Her work involved workers' compensation and HIPAA[3] issues among other duties.

Mulford's employment with Robinson ended on October 13, 2016, when she was terminated. Tr. 79. While her employment began on about June 15, 2016 and ended as noted above, she was laid off with full pay for all of September 2016 because she was directed to obtain hearing aids before returning to work. Tr. 80-81. Effectively then, Mulford did not perform work as an occupational nurse for Robinson after August 31st. Tr. 81.

It should be noted that there is no dispute that Ms. Mulford has some hearing loss, and that the loss is of a degree requiring the use of hearing aids. Tr. 87. However, more importantly, Mulford's use of hearing aids and her hearing deficit, requiring their use, forms no part of her discrimination claims and therefore it is not part of this case.

During the period of her work as an occupational nurse, that is, from June through the end of August, Mulford maintained that she got along and interacted well with employees and supervisors at the Robinson mine, except for one person, Mr. Mark Langston, the safety manager. Tr. 90-91. As noted, Langston participated in both of Mulford's interviews with Robinson. Tr. 91. Mulford contended that her difficulties with Langston began with her *first day* on the job, claiming that Langston did not want to establish an office for her right away. Tr. 92.

Regarding her claim that Langston had alcohol abuse issues, Mulford stated that in late July she began to smell alcohol when around him. Tr. 92-93. Mulford also asserted that she observed other indications that Langston was using alcohol at work, alleging that there were

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[3] "HIPAA," is the acronym for the Health Insurance Portability and Accountability Act of 1996 and it pertains to patient privacy rights.

times late "in the afternoon in his office, [when] he kind of swayed across the office. And also sometimes down the hallway." Tr. 94. She could not be sure if the swaying was due to a physical issue. Rather, her conclusion ultimately rested upon the odor of alcohol about him. *Id*. She stated that she made these observations on more than one occasion, estimating that it was "[p]robably two or three times." Tr. 95. It was also her view that Langston displayed "extreme forgetfulness," an opinion resting upon his use of a notebook to jot down things that "most people can remember if it's important. I mean, we might forget small details, but if -- it was like he was lost without his notes all the time." *Id*. Upon questioning by the Court, Mulford conceded that the notebook use could be attributable to reasons other than alcohol use. Tr. 95-96. She also admitted that she never observed any slurring of speech on Langston's part. Tr. 96.

When asked if she ever expressed her concerns about Langston and alcohol use to others, Mulford stated that she raised the issue to Kammerer in the latter part of August, talking with him privately in his office. Tr. 97. This was done after she had observed those indicia of alcohol use on two or three occasions. *Id*. Kammerer inquired whether the odor could simply be from alcohol use the night before, but Mulford rejected that suggestion, as she claimed that it smelled fresh. Tr. 99. She maintained that nothing ensued from her raising the issue with Kammerer, stating that "it was pretty much just dropped" and she did not raise the issue again. *Id*. Further, she never filed any official remark to Kammerer or anyone else at Robinson about her contention. The assertion was made on paper only at the time Mulford filed her discrimination complaint. Tr. 98.

The Court then inquired about the second cognizable discrimination claim raised by the Complaint, involving Patrice Dunn, Ms. Dunn's daughter, Kaci Nardi, and a workers' compensation claim brought by Ms. Nardi. This was Mulford's assertion of a drug abuse cover up associated with a positive drug test result for Nardi. Tr. 100. Mulford believed that her becoming involved with this issue was within her responsibilities as an occupational health nurse, expressing that it was part of her job description, which included workers' compensation matters. Tr. 101. She stated that her responsibilities included all the documentation and that she "was to go to follow-up appointments to doctors and hospitals with the injured people." Tr. 101. Mulford gave as an example of her duties that, if someone got hurt at work, she would go to the mine and then to the hospital with the person. Tr. 102.

Telling her story about this issue, Mulford stated that Ms. Dunn used to be on the safety team, then stopped performing that role for several weeks. Beyond that, Mulford asserted that Dunn's primary job is as a secretary at the mine. Tr. 103. Later, around August 16th, Dunn returned to the safety team and became the on-call person again. Tr. 104. Around August 16th Dunn was called, as there has been an injury at the mine involving her daughter. Apparently, Ms. Nardi twisted her knee. Tr. 105. Nardi filed for workers' compensation and Dunn then gave then the paperwork relating to the incident to Mulford. Tr. 106.

It is a critical element of Mulford's claim on this issue that within that paperwork was a finding that Nardi tested positive for drugs. Tr. 108. Mulford alleged that the paperwork revealed

that Nardi tested positive for "Benzos."[4] Tr. 109. Such drugs, Mulford stated, are used for anxiety or to help one sleep. *Id*.

When the Court expressed concern about Mulford's positive benzos claim regarding Nardi, expressing that the use of medication, such as tranquilizers, is not inherently a problem, Mulford acknowledged that is true, but responded, "*if* she didn't have a prescription for it, which I didn't have -- I don't know. That's not a safe -- that's an unsafe factor." Tr. 110 (italics added). Upon further questioning by the Court, Mulford agreed that if one needed a drug for anxiety that is very different from a positive drug result showing the presence of cocaine, marijuana or PCP. Tr. 111. Again, Mulford expressed that her concern was only *if* the employee did not have a prescription and she had no information on that score. She added, "But I didn't raise any concerns. I did not express anything. I sent the paperwork to workers' comp." *Id*.

Mulford tried to bolster her position on this issue by asserting "there was a prior problem[, as the employee] had had a positive incident in March or April." Tr. 112. The Court noted, and Mulford acknowledged, that this prior incident was *before* she was employed by Robinson. *Id*. The Court, dismayed at the grounds Mulford presented for this claim, summed up that it "hear[d] nothing from [Mulford] that justifie[d] [her] being concerned about either positive result at least through August of 2016." *Ms. Mulford agreed with the Court's characterization*. Tr. 113.

However, Mulford persisted that her concern was still present because the employee tried to elude Mulford's efforts to join her follow-up medical appointments. When Mulford eventually learned of an appointment, she was a half-hour late and *the hospital nurse*, who was not an employee of Robinson, at the employee's request, did not allow Mulford to join the patient when she was being evaluated by the hospital. Tr. 114; 121. Nor did Mulford ever learn about lab test results from that visit, nor did she request those results, apparently because Mulford's termination was underway. Tr. 114-15. In fact, the Court expressed that it was

> having a hard time understanding that there was any legitimate concern on [her] part, because [its] impression was that there was [an effort to try] to hide some drug abuse, but that doesn't seem to be the case at all. You have nothing to support the idea that there was drug abuse on the part of Ms. Nardi.

Tr. 118.

Mulford conceded her only support was "just because there was a prior positive." *Id.*

The Court advised that it failed to see the merits of Mulford's claim on this subject. Tr. 115. After cross-examination on the subject of the positive benzos test for Ms. Nardi, and Ms. Mulford's inability to explain the significance of that test result, the Court advised Counsel for the Respondent that it "will tell you, counsel, if it helps you that [it is the Court's] view that Ms.

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[4] Here, Mulford used an abbreviation of the word "benzodiazepines," which refers to a category of drugs commonly used as tranquilizers. "Benzodiazepine," Merriam-Webster Dictionary (2017).

Mulford did not advance her case on the subject of the workman's comp and the drug-related issues. [The Court] listened closely to what she had to say, [and] asked her some questions if you recall, and it's [the Court's] view that [on] that issue, at least, she did not advance her claim of discrimination on that topic." Tr. 306-08.

Following up on that comment, the Court, speaking to Ms. Mulford, added, "Benzos, that you [Ms. Mulford] told me that you could legitimately legally have benzo in your system and it's of no moment because you might have -- it might have been prescribed for you." Tr. 309. Mulford responded, "Yes." Tr. 309. This remains the Court's conclusion; Mulford's drug test claim is without any validity.

Turning to the issue of Mulford's hearing deficit which, it should be kept in mind, was not part of her discrimination complaint, and is recounted here only for the sake of completeness, Mulford agreed that the first time Langston voiced a problem about that was during August. Tr. 116. However, she maintained that the complaints about her hearing ability intensified at the same time she was pursuing her workers' compensation/ positive drug test issue with Nardi. Tr. 122.

At that point in her testimony, Mulford agreed that she had presented the "safety-related issues that [she had] vis-à-vis Robinson that [she] also raised to the MSHA investigator when [she] made [her] complaint." Tr. 123. The Court inquired, "[h]ave we covered the issues?" *Id*. Mulford responded, "It was just alcohol [and she acknowledged] Yes, we have covered them." *Id*.

Mulford then agreed that she was on paid leave for five weeks, following Robinson's direction that she was to obtain hearing aids. After that, her employment ended, as Robinson decided to terminate their employment relationship. Tr. 123-25. She was then advised to vacate her company-provided housing and Kammerer informed her by letter that he was authorized to offer her $3,000.00, upon her leaving the mine provided housing within four days. Tr. 125.

Upon cross-examination,[5] Mulford contended that, after she complained, expressing her view that Langston had alcohol on his breath while at work, and informed Kammerer about it, "that's when everything blew up. Along with the Nardi situation, with mentioning that she had a positive test." Tr. 154. Mulford alleged that the ensuing "harassment and angry behavior" constituted discrimination against her. Tr. 155. She asserted that it was present during August and that it also spiked during August, after her assertion about detecting alcohol on Langston's breath, behavior which prompted her to raise the issues with human resources. Tr. 155-56. The harassment took the form, she stated, in the way Langston spoke to her, essentially ignoring her, behavior which she described as "very traumatizing to a person, especially a professional

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[5] Just as, in the exercise of the Court's discretion, this decision's recounting of the direct testimony from Ms. Mulford avoids discussion of testimony deemed by the Court as irrelevant or immaterial, and at times involving outlandish claims, the recounting of her testimony upon the cross-examination takes the same approach. Transcript pages 253 through 259 provide one example of the outlandish assertions that Mulford made which the Court has elected to avoid including in this decision.

person." Tr. 155. Mulford conceded that she never documented the days when she smelled alcohol on Langston breath, and could not give exact dates, but that it "was always at safety meetings." Tr. 157. She characterized it as after three events of such alleged detection by her, "that's when I – three strikes, and I had to attack. I had to at least say something, make a point." Tr. 158.

Mulford also agreed that the harassment escalated following the "Patrice Dunn incident in mid-August." Tr. 159. The latter event, of course, refers to Mulford's Dunn/Nardi positive drug test claim, discussed above. Ultimately, it was Mulford's view that both events, the alcohol and the Patrice Dunn matters, coincided with the harassment escalation. Tr. 160.

Mulford was then questioned about an August 27, 2016 voicemail, in which voicemail it was represented that she made a complaint regarding Ms. Nardi to Mr. Langston. Tr. 166. Mulford agreed that she did leave a voicemail for Kammerer on the morning of August 27th and that it was about the local sheriff and her assertion that she was being harassed. Tr. 169. Mulford acknowledged that she complained about Langston to Kammerer at that time but that it involved a bill that had not been paid by the Respondent. Tr. 170. She then stated that she could not determine if that issue was harassment or whether it was attributable to Langston having "memory loss" about paying the bill. *Id*.

The cross-examination then turned to Mulford's claim that one aspect of her alleged discrimination was the change in her job title to industrial hygienist. Tr. 171. As the Court has noted, *under the circumstances here*, this is not a cognizable basis for a discrimination complaint.

It was Mulford's contention that there was also harassment which escalated after the Nardi incident and her complaint that she had to use great efforts to get Langston's attention on subjects of her concern, a problem she described as constant. Tr. 171-72. She believed Langston was intentionally ignoring her. Tr. 173. When she finally would get his attention, he would have a gruff demeanor towards her. Tr. 174. Directed to Respondent's Exhibit R 9, at page 13, Mulford agreed that she wrote the document at that page, identifying it as her complaint to MSHA. Tr. 176. That document identifies her various complaints but she conceded they were never triggered by any report she gave to anybody at Robinson. Tr. 177.

Continuing with Respondent's review of Mulford's written complaint to MSHA, per R's Exhibit 9, Mulford agreed that on August 25, 2016, she was complaining about Langston asking about her hearing aids, which she did not have yet, and her contention that Langston became upset about that. Tr. 178. She also had an issue with a matter on September 6th, involving Langston being "disrespectful" to her in that she did not yet have hearing aids. Tr. 179.

Turning to an issue within Exhibit 9, dated September 19th, Mulford described this as "[m]ore discrimination." Tr. 179. However, the Court intervened to clarify the nature of Mulford's complaint regarding the September 19th claim, noting that it reflects that "[Mulford] then told Kammerer that Langston is unsafe and comes to work smelling like booze and is forgetful." Tr. 179. Of concern to the Court, and revealing that Mulford's claim was clouded with unsubstantiated suspicions about motivations behind her claims, she acknowledged that it

was "a possible issue" that "*the discrimination and disrespectful behavior from Langston could be from outside sources from Reno, Nevada*." Tr. 180 (emphasis added). She also acknowledged her view that it was possible that "*the entire time that Mark Langston was harassing [her] because other people were causing him to do it*[.]" Tr. 180 (emphasis added).

Mulford admitted that she didn't know whether Langston *was being paid to discriminate against her*, but she considered it to be a possibility, stating she "assumed that it possibly could be gratuitous sabotage." Tr. 181. Mulford further agreed that she alleged,

> [o]utside sources of influence provided Mark Langston's harassment and discrimination to me, illegally. The outside sources are biased and paid Langston to deliberately destroy my job from the start.

Tr. 182; Ex. R 9.

To make it clear, it was Mulford's view that Langston was paid to destroy her job from the start. Tr. 182. Mulford's claims regarding Langston are without any merit and may fairly be described as outlandish suspicions. Mulford acknowledged that not a single other person at Robinson was treating her poorly. Tr. 182. Respondent's attorney aptly noted that when Mulford made her complaint she did not describe it merely possible or highly possible, but rather she wrote in her complaint that *was* what happened. Tr.183. *Mulford also wrote that she believed MSHA's determination not to refer her case to the Secretary for representation was "coerced" and that she believed someone was influencing the MSHA investigation.* Tr. 184.

Mulford also believed that when she was put on leave, initially for three weeks and as later extended to five weeks, this was discrimination because it was "a major hours and scheduling change." Tr. 185. The reader should recall that this was no part of Mulford's discrimination claim before MSHA and therefore was not part of its investigation of her claim.

On a separate note, Mulford conceded that Respondent's Ex. R 26 is a letter stating that Mulford was to receive three weeks paid leave so that she could obtain hearing aids. Tr. 186. The same letter also stated that the Respondent would be investigating her discrimination complaints. Tr. 187.

Mulford was directed to Exhibit R 14 which, she acknowledged, was an email she sent to Respondent's Counsel on June 30, 2017 and which reflects her responses to Respondent's interrogatories. Tr. 249-50. Mulford conceded that, per her responses, she believed that *Langston was paid to discriminate against her*. Tr. 250. Counsel pointed out that at the hearing Mulford stepped back from her interrogatory response, by then describing it as "very possible [that Langston was paid] because it's unusual behavior." Tr. 250. Mulford also contended that Langston did not treat her as a professional from the first day of her employment at Robinson. Tr. 251. She based this view upon contrasting the welcoming attitude of everyone else at Robinson, except for Langston. Tr. 252. It was her view that Langston didn't want to get her an office and matters further deteriorated when her job title changed. Tr. 252.

Mulford's testimony became more bizarre when she asserted that there were connections between the Church of Scientology cult, asserting that "[t]he discriminating situation is from outside sources of influence from the Scientology cult. I have been attacked and discriminated against them for years." Tr. 260. In response to the Court's question, Mulford agreed that her opinions were based just on her suspicions. Tr. 261.

Perhaps most revealing to Ms. Mulford's discrimination complaint was the following exchange, when Respondent's Counsel asked, "what made you have suspicions about connections between Scientology and the Robinson mine in late July or August?" Tr. 261. Mulford responded, "It isn't Robinson mine. It's Mark Langston. *Robinson mine has nothing to do with my discrimination or anything else*. There is one individual." Tr. 261 (emphasis added). Appropriately, Respondent's Counsel then asked, "This is a case against Robinson mine, you understand that; right?" *Id*. Mulford replied, "I do." *Id*. When pressed further, that the case was not against Langston, Mulford answered, "Well, it should have been Mark Langston, but I understand the situation. It has to be with the corporation." Tr. 261-62. Of significance, Mulford agreed that her suspicions about Langford and the Church of Scientology all arose *prior* to her claims that Langston was using alcohol while on the job and the "Ms. Nardi situation regarding drug tests." Tr. 263.

As Mulford expressed it, per R's Ex. 9, "[t]he outside sources are biased and paid Langston to deliberately destroy my job from the start." Tr. 270. Perplexed by her assertions, the Court inquired of Mulford, "[w]hen you say, 'the outside sources are biased and paid Langston to deliberately destroy [your] job,'" Mulford interjected, "[c]orrect." Tr. 271. When informed by Mulford that the outside sources were from Reno, which the Court noted, is a significant distance from Ely, Nevada, the Court informed her that it was "at a loss to appreciate the basis for [her] concluding that these people in Reno would even find, let alone pay Mr. Langston to harass you. I mean, let's say I am living in Reno. Why wouldn't I pick . . . Mr. Kammerer to do the harassing? What is your thinking as to why they would single out Mr. Langston?" Mulford responded, "I have no idea."[6] Tr. 271-72.

The Court tried to summarize the grounds for Mulford's view, asking, "[s]o you just figured, if I understand your thinking . . . Your thinking was well, I am being mistreated, I did have this trouble in Reno, there must be a connection between the two; is that fair?" Tr. 273. Mulford answered, "[i]t -- it's fair, yes." Tr. 273.

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[6] The Court concludes that Mulford's theory behind her claim of harassment was beyond speculative and is completely groundless. As another example, Mulford informed that her claim was connected with a temporary protective order ("TPO") issued against her, out of Reno. A local sheriff, near the Robinson mine, served the TPO on Mulford at the apartment that Robinson Mine had provided her. Mulford admitted the TPO service was not done by Robinson Mine, nor by Mark Langston. Tr. 267. The only thing Mulford could point to in support of her suspicion that Langston and the sheriff's office were collaborating was that she was served the TPO on the same or next day after she was urged by Langston not to go into work on a Sunday. Tr. 268. Mulford believed that Langston wanted her to be at home so that she would be served with the TPO. Tr. 269.

Mulford filed her MSHA discrimination complaint on September 19th, but it was date stamped September 23rd. Tr. 277. Her interview with Ms. Jepson was after that, on September 26th. *Id*. It was her testimony that, at the conclusion of the Jepson interview, she told them she had filed a complaint with MSHA. Tr. 278. It is fair to say that Mulford had a number of people whom she believed could be outside influences on the Robinson Mine. Tr. 278-87. Suffice it to say that she never established credible evidence to support her beliefs and that they remained pure speculation on her part.

Counsel for the Respondent also called to Mulford's attention an email she sent to Julie Whiffen-Peters on October 15, 2016.[7] Tr. 253; R's Ex. R-4. Respondent's Counsel noted that in that email the Complainant asserted, "'[t]he cult deliberately infiltrates businesses and corporations all over the world to destroy individuals who seek their arrests and prosecution for their crimes. I know — ' not guess, not suspect, 'I know who my real attackers are and the mining employees involved were just their tools of discrimination/harassment for money.'" Tr. 289. Mulford responded, "That's correct." Tr. 289.

Mulford then concluded her case and in response to the Court's inquiry if she believed that the Court listened to her and gave her a fair opportunity to present her side of the story, she responded, "I agree." Tr. 315.

Shane Anderson testified for the Respondent. Anderson is the Senior Safety Coordinator at the Robinson Mine. Tr. 191. He has known Mark Langston for a considerable period of time. Tr. 192-94. Anderson is also familiar with the Complainant, as he participated in the interviews for the position Mulford ultimately was offered. Tr. 194. Anderson maintained that the interview described the job as applying to both the "IH" (industrial hygienist) job and as an occupational nurse. Tr. 177; 195. However, he admitted being unable to recall if the job description included both roles. Tr. 195.[8] Per Respondent's Ex. 18-2, industrial hygienist duties were included in the description as it provided: "Perform health risk assessments. [ ] Industrial hygiene sampling and ergonomic surveys throughout the mine site." Tr. 196. More significantly, Anderson asserted that one does not need certification to perform industrial hygienist duties. Tr. 198. However, certification is available for that job. Tr. 199.

Anderson was asked about the Respondent's practice regarding hearing tests, advising that all new employees are so tested. This gives the mine a baseline and he asserted that MSHA requires such testing within six months of employment. Tr. 199. Shown Ex 5 C, Mulford's hearing test results, Anderson stated that the test revealed moderate to severe hearing loss on both sides. Tr. 203-04. This test served as a baseline for Mulford's hearing at the time she began her employment for Robinson. Tr. 208. However, he conceded that there was no determination

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[7] Asked why Mulford sent an email to Whiffen-Peters in the first place, as she had no prior contact with her, she simply advised that she looked up the name at the website for the mine, selecting her as one of the corporate people. Tr. 291.

[8] Again, it is reminded that this testimony is recounted only for the sake of completeness. The modification of Mulford's job duties was never claimed as part of her protected activity, nor in context could it be so claimed.

that Mulford needed hearing aids following those test results. Tr. 209. Anderson claimed that in subsequent work interactions with Mulford, he noticed that she seemed to have some difficulty hearing during conversations, but he admitted this was surmise and that it could've reflected not understanding tasks for which he was providing training. Tr. 212.

Again, the Court takes note that Robinson's practice of conducting hearing tests for new employees was not part of Mulford's claimed protected activity.

Anderson stated that he attended numerous safety meetings with Langston and Mulford being present. Tr. 212. He asserted that, at times, he sat next to Langston but never smelled or perceived alcohol use by Langston. Tr. 213. He maintained that he never had any reason to believe that Langston was using alcohol during work hours or immediately prior to work. Tr. 213. All employees at the Robinson Mine are subject to its drug and alcohol policy and there is random testing. Tr. 213. Langston, Anderson stated, has been tested, per the policy and his test result was negative. Tr. 214. Nor, Anderson maintained, do any employees, other than HR employees, know when the random testing will be done. Tr. 216. Upon questioning by the Court, Anderson stated that he would have from four to eight hours of contact with Langston during the course of a week. Tr. 217-18.

Anderson also maintained that he never observed Langston raise his voice to Mulford, nor treat her any differently from other employees. Tr. 227. He asserted that Langston treated all employees in a respectful manner. Tr. 227.

Speaking to the Complainant's issue regarding a lack of access to the employee at the hospital, he stated that there was a meeting at a hospital in Ely, Nevada, which the Complainant also attended, along with Anderson and Langston. Tr. 229. The meeting occurred in the third or fourth month of Mulford's employment with Robinson. The issue was to determine an efficient manner to decide if an injured employee should be placed on lost time or restricted duty. Tr. 229. According to Anderson, later in that meeting Mulford brought up a topic which had already been addressed, which surprised the other participants. Tr. 232. Anderson concluded that the reason could've been attributable to Mulford not hearing the earlier discussion about the issue. Tr. 233. However, Anderson never discussed the need for Mulford to obtain hearing aids with any Robinson employees, nor to Mulford herself. Tr. 233-38.

On cross-examination by Mulford, Anderson agreed that, per Exhibit 2 C, her job at Robinson was described as on that May 12, 2016 document as "full time occupational nurse." Tr. 240. Per Exhibit 17 C, the position was described as "Industrial hygienist nurse." *Id*. Exhibit 3 C lists the job as "Industrial Hygienist/Occupational Nurse." *Id*.

The Court considered Anderson and his testimony to have been a credible.

The Respondent called Mark Langston. Tr. 332. Langston has been a safety manager for about 13 years. *Id*. Prior to that occupation, he had 22 years of service with the U.S. Navy. *Id*. Langston was involved in the creation of the job description for the position Mulford was hired. Initially the position was posted as an industrial hygienist, and then amended to include an occupational nurse, a modification that he and others considered to be an enhancement for

Robinson employees. Tr. 334. He stated that neither Nevada nor the federal government require one to have a degree or certification to be an industrial hygienist. Tr. 335. It was Langston's understanding that Mulford was hired to perform work as an industrial hygienist *and* as an occupational nurse. *Id*. During the relevant time, Langston had three people that reported to him: Shane Anderson, Tyler Wright and Heather Mulford.

As the mine did not complete the necessary steps for Mulford to fully perform her occupational nurse duties, steps which require her to work under medical direction, in order for her to treat employees and provide vaccinations, the initial focus was to have her learn the industrial hygiene duties. Tr. 336- 41. To that end, Langston had Anderson mentor and coach her in the performance of those hygienist duties. Tr. 341. He denied that, in his interactions with Mulford, that he treated her differently from others. *Id*. He was aware that Mulford might have hearing issues during her interview and, following her pre-employment physical, this was identified as a concern and he and Kammerer discussed the issue. Tr. 342. Langston also explained that there was no nefarious reason for the Complainant having her hearing capabilities tested twice in a short period of time, stating,

> [b]ecause sometimes when you do the hearing tests at the clinic with the medical facility they don't always follow the best practices on administering the test. So there is a potential for there to be an error in the test. So we like to run our own to confirm that we have a good baseline.

Tr. 343.

He affirmed this was a standard procedure for the mine. *Id*.

Langston also stated that it became apparent that Mulford was not hearing all of the discussion during meetings. Tr. 343-44. Thus, there were communication problems and he discussed the matter with Kammerer and others. Tr. 344. Several months after the second hearing test,[9] Mulford was referred to see an audiologist and it was learned that hearing aids would be in the offing. Tr. 344-46. Langston agreed that, while Mulford's hearing was an issue, it was not deemed an urgent problem and for that reason the appointment with an audiologist was scheduled some months later. Tr. 347. However, he added that the problem became progressive and he concluded that his expectations of her were not being met, a problem he attributed to her hearing issue. *Id*. Still, he could not recall if he ever sent an email to others at Robinson about this issue. Tr. 348. Langston agreed that Mulford was hired on June 6, 2016. Tr. 349; R's Ex. 1 C.

Langston acknowledged that, through Kammerer, he became aware that Mulford had made complaints about him. The complaints involved two issues: that she believed he had

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[9] The Court determined that Anderson's explanation for Robinson conducting two hearing tests for Mulford within a short period of time, was plausible, and therefore not nefarious. Tr. 243. Again, it needs to be noted that this was not part of Mulford's discrimination claim; she did not assert that her hearing deficit was part of her discrimination claim.

discriminated against her because he felt she needed hearing aids and she also accused him of coming to work under the influence of alcohol. Tr. 350. Langston was offended by Mulford's claims. *Id*.

Langston stated that supervisors and management were also subject to random drug testing. Tr. 351. He has been randomly tested and his results were negative. Tr. 352-53. Further undercutting Mulford's suspicions, Langston informed that he has never had a DUI, never had a field sobriety test, and never been disciplined for alcohol or drug abuse at any time during his mining career. When asked if he drinks before going to work, he responded, "No. In my profession as a safety manager that kind of conduct is career ending. It is. I mean, I would never get another job as a safety manager." Tr. 353.

The Court considered Langston and his testimony to have been credible in all regards.

Mr. Kim Kammerer testified for the Respondent.[10] He was the company representative at the hearing. He is presently the Human Resources Manager at Robinson. Tr. 392. Kammerer confirmed that, consistent with the testimony of prior witnesses during the hearing, that he believed hiring an occupational nurse would be a good addition for the mine. Tr. 393. It was his intention that the person filling that position would also perform industrial hygienist duties. Tr. 393, 395 and Exhibit 18-1 and 18-2 (the job posting and job announcement). Kammerer confirmed that one did not need a certificate or a degree to work as an industrial hygienist. Tr. 395-396.

Kammerer conducted the job interviews for Mulford and he noticed early on that Mulford had hearing problems. Tr. 397. Despite awareness of the Complainant's hearing issue, Kammerer believed they would be able to accommodate the difficulty and therefore did not consider it as a barrier to hiring her. Tr. 398. He also confirmed that the decision to conduct a second hearing test came about because they wanted to be sure they had a good baseline for her. Tr. 399. The practice of a second baseline test is done for all new employees. Tr. 400. After she had been on the job for a few weeks or so, he asked her to be seen "by a medical professional to see if there is something that could be done to help her with her hearing, possibl[y] hearing aids." Tr. 401. Kammerer stated that Mulford was receptive to his suggestion. Tr. 402. Subsequently Langston told Kammerer that Mulford's hearing continued to be an issue and he asked Kammerer to follow-up with her. He advised Mulford that the mine would give her time off from work to

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[10] Prior to Kammerer's testimony, Amanda Hilton was called as witness for the Respondent. Ms. Hilton has been an employee at Robinson for nearly 13 years. Tr. 380. Her jobs during that time included accounting and the manager of administration. Presently she is the manager of mine maintenance and supply chain. *Id*. Hilton agreed that her contact with Mulford during the time Mulford worked at Robinson was infrequent, brief and not substantive. Tr. 382. Her involvement with Mulford pertained to her participation with the committee regarding Mulford's continued employment. Tr. 382. Hilton's testimony was of no value to the matter before the Court, as she agreed that 99 percent of her participation rested upon the recommendations of the Jepson Report. Hilton conceded that the committee adopted the Jepson Report with no reservations about any of it. Tr. 386. Her testimony is noted here only for the sake of completeness.

obtain hearing aids. Tr. 403. Following that, in late August, Mulford advised Kammerer that, upon seeing an audiologist, it was recommended that she obtain hearing aids. Tr. 403-04. Unsure whether money was an issue for her, Robinson, acting through Kammerer, provided unrequired additional funding so that Mulford could afford to purchase hearing aids. Tr. 405.

Kammerer related that, around the 29th of August, Mulford met with him and at that time alleged that she was being harassed and discriminated against by Langston. Tr. 408. As he recalled, Mulford had not raised any charges about Langston using alcohol on the job until that meeting. Tr. 409. Regarding Mulford's claim of Langston being under the influence of alcohol at work, Kammerer placed this allegation as having been made around August 29th. Tr. 420. This was made at the same time she alleged discrimination and harassment by Langston towards her. Tr. 420. This was based, Kammerer stated, on Mulford's assertions about the manner in which Langston spoke to her. Tr. 421.

Based in part on the credible testimony of Kammerer regarding Mulford's claim that Patrice Dunn was covering up a "positive" drug test, the Court finds that there is no evidence to support that claim. See, Tr. 421-26. It should be particularly noted that, in the first instance, before any witness for the Respondent testified, Mulford herself did not establish any credible evidence for her cover-up claim. Thus, Respondent would have prevailed on this issue, even if it had not offered any rebuttal evidence at all.

On the separate allegation of Langston using alcohol on the job, Kammerer confirmed that, apart from Mulford, there have been no other such claims against Langston. Tr. 429. Kammerer added that when Mulford raised the issue with him, she informed that the alleged alcohol use occurred "on previous days, other times. Not that day." Tr. 429-30. He informed Mulford that "unless [she] can tell [him] the day it happens there is not a whole lot [the mine] can do to go for testing." Tr. 431. Further, though her complaint about Langston was untimely, Kammerer still inquired of Wright and Anderson as to whether they ever had ever observed Langston "staggering around like he had been drinking or smelled alcohol on him or any of that?" Tr. 430. Both informed Kammerer that they had never seen Langston exhibiting such symptoms. *Id*.

Kammerer was asked about Mulford's allegation of harassment. From his point of view, this amounted to her complaint about "the way [Langston] talked to her" and that claim only referred to one instance raised by Mulford. Tr. 436. There was some substance to this claim of Mulford, that Langston could be blunt, but Kammerer stated it was born out of Langston's frustration about the length of time it was taking for her to obtain hearing aids. *Id*. Further, as it regarded his specific interactions with Mulford, Kammerer stated that she never made any claim to him that Langston was harassing her the entire time of her employment at Robinson, nor that it had escalated. Tr. 437. Kammerer also related an instance when Mulford left him a voicemail, advising that the local sheriff's department was coming to her house and her belief that Langston had instigated that. Tr. 437-41. Even when later developments demonstrated that Langston had nothing to do with the sheriff's department visiting Mulford, she was unable to concede that her suspicions were not confirmed. Tr. 449.

In terms of appreciating the context of Robinson's treatment of Mulford, it is noted that the Respondent went to some lengths to help Mulford with her hearing deficit issues. It did this, through Kammerer, by Robinson providing her with paid time off so that she could obtain the hearing aids and, as mentioned before, by providing some funds to help pay for the hearing aids. Tr.452-56. Mulford misinterpreted the additional funds for hearing aids as an indication that she was being fired. Tr. 458. However, Kammerer stated that, as of September 8th, there had not been a decision to terminate Mulford. Tr. 457. Thinking that she was to be fired, Mulford then accused the mine of discrimination. Tr. 459; Ex. 20.

The Court concludes that Kammerer was a credible witness.

Christina Jepson testified for the Respondent.[11] Jepson is an attorney in the same firm as Respondent's Counsel, Mr. DeLong. Tr. 491. Her specialty is employment law. Tr. 492. Jepson's initial involvement in this matter arose when Kammerer contacted her regarding Mulford's discrimination complaint. Tr. 492-93. It was not long after September 8th that Jepson began an investigation on Robinson's behalf into the suitability of Mulford's employment at the mine. Tr. 461-62. Jepson came to the mine around September 21st and conducted interviews with various employees, including Mulford. Mulford accused Robinson Mine, during her interview with Jepson, of the mine discriminating against her. Tr. 463. Following Jepson's interviews, she prepared a report and presented it to a committee for the mine. Tr. 465. The Committee then determined that Mulford's employment at Robinson should be terminated. Tr. 466; R's Ex. 2. The termination letter, dated October 13th, advised that the mine had "determined that [Mulford was] not able to carry out the necessary required functions of [her] job." Tr. 472. This conclusion rested upon the information contained in the Jepson report. Tr. 474.

The Court had previously ruled that most of Jepson's report, resulting from her investigation of Mulford's issues, was not admissible. Her testimony was not useful to the Court because nearly all of it involved a recounting of the scope of her investigation of Mulford's complaints and a retelling of what individuals told her about those matters during the one day Jepson spent at the mine. The "report" which resulted from Jepson's investigation was seriously flawed by its lack of impartiality and objectivity and by its consideration of extraneous matters. In short, the obvious purpose of the "report" was to support Mulford's termination.

In contrast to Jepson's retelling of what she learned, the Court had the direct testimony of the individuals themselves. Essentially, Jepson's "report" was the Respondent's attempt to have its own findings of fact about Mulford's complaint. That role, at least for Mulford's Mine Act discrimination complaint is reserved to the Court. Accordingly, and for a host of other reasons

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[11] In the spirit of completeness, it is briefly noted that Sara Wright testified for the Respondent. She is an employee with Robinson, working in human resources with the title of "coordinator," working under Kammerer. Tr. 482-83. Wright stated that she had contact with Langston "[d]aily, multiple times a day." Tr. 483. She stated that, while she never saw Langston get upset with anyone and never witnessed him raising his voice at people, he was naturally a loud person. Tr. 484. Nor did she ever observe him treat Mulford differently. *Id*. She never observed any indication that he had been abusing alcohol while working. Tr. 486.

articulated by the Court during the course of this litigation, Respondent's Exhibit R 1 was not allowed into the record. Tr. 508.

While the Court rejected the "report," it has determined, based on the exhibits entered into the record, and the testimony of witnesses, that Mulford's claim has no merit and that Robinson was fully justified in terminating her employment.

Mine Act Discrimination Claims

This discrimination complaint was brought under section 105(c)(3) of the Mine Act, alleging a violation of section 105(c)(1), which states, in relevant part:

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner [or] representative of miners . . . because such miner [or] representative of miners . . . has filed or made a complaint under or related to this chapter, including a complaint notifying the operator or the operator's agent at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine.

30 U.S.C. § 815(c).

Where, as in this case, the Secretary has decided not to bring case on behalf of the miner, Section 105(c)(3) of the Mine Act provides that if the Secretary of Labor determines that a violation of section 105(c)(1) has not occurred, "the complainant shall have the right . . . to file an action in his own behalf before the Commission, charging discrimination." 30 U.S.C. § 815(c)(3).

As the Commission stated in *Jaxun v. Asarco*, "[t]he Mine Act, the Administrative Procedure Act ('APA'), and the Commission's Procedural Rules permit a Complainant to proceed with an action under section 105(c)(3) of the Mine Act without representation." *Jaxun v. Asarco, LLC*, 20 FMSHRC 616, 620 (Aug. 2007).

The legal framework for assessing discrimination claims brought under the Act is well-established and clear. A complainant may establish a prima facie case by showing "(1) that he engaged in protected activity, and (2) that he thereafter suffered adverse employment action that was motivated in any part by that protected activity." *Pendley v. FMSHRC*, 601 F.3d 416, 423 (6th Cir. 2010). The complainant bears the ultimate burden of proving these elements by a preponderance of the evidence. *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 (Apr. 1981).

Protected activity often takes the form of complaints made to the operator or its agent of an "alleged danger or safety or health violation. 30 USC § 815(c)(1). Often, the Court will be called upon to consider indirect evidence of a discriminatory motivation for the adverse action.

The Commission has stated that "[d]irect evidence of motivation is rarely encountered; more typically, the only available evidence is indirect." *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983). Where direct evidence of motivation is unavailable, the Commission has identified several indicia of discriminatory intent, including, but not limited to: "(1) knowledge of the protected activity; (2) hostility towards the protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the complainant." *Turner v. Nat'l Cement Co. of Cal.*, 33 FMSHRC 1059, 1066 (May 2011) (citing *Chacon*, 3 FMSHRC at 2510). When considering indirect evidence, the Court may draw reasonable inferences from the facts. *Id.*

An adverse action is any "act of commission or omission by the operator subjecting the affected miner to discipline or a detriment in his employment relationship." *Sec'y of Labor on behalf of Jenkins v. Hecla-Day Mines Corp.*, 6 FMSHRC 1842, 1847-48 (Aug. 1984). An adverse action must be material, meaning that the harm is significant rather than trivial. In determining whether adverse action has occurred, the Commission applies the test articulated in *Burlington North v. White*. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006); *see also Sec'y of Labor on behalf of Pendley v. Highland Mining Co.*, 34 FMSHRC 1919, 1931 (Aug. 2012).

If a complainant establishes the required elements, the burden shifts to the operator to rebut the prima facie case by showing "either that no protected activity occurred or that the adverse action was in no part motived by protected activity." *Driessen v. Nev. Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998).

An operator who cannot rebut the prima facie case may still raise an affirmative "mixed motive" defense by proving that the adverse action was motivated only in part by protected activity, and it "would have taken the adverse action for the unprotected activity alone. *Haro v. Magma Copper Co*., 4 FMSHRC 1935 (Nov. 1982). The operator must prove this defense by a preponderance of the evidence. *Id*., *see also Pasula*, 2 FMSHRC at 2799-800. When evaluating an affirmative defense, the Court follows the two-step analysis outlined by the Commission in *Chacon v. Phelps Dodge*. *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508 (Nov. 1981). The first step of the *Chacon* analysis directs the Court to determine whether "the justification is so weak, so implausible, or so out of line with normal practice that it was a mere pretext seized upon to cloak discriminatory motive." 3 FMSHRC at 2516. If the Court finds that the justification is *not* pretextual, it then moves to the second step, which is a "*limited* examination" of the justification's substantiality, and assesses the narrow question of "whether the reason was enough to have legitimately moved that operator" to engage in the adverse action." *Id*. at 2516-17.

Discussion

In evaluating the evidence of record, the Court fully considered the parties' post-hearing briefs. Ms. Mulford's brief contends she established a prima facie case by "showing: (1) her job title was changed after hiring and relocation. (2) her hours of work were changed due to the job title change. (3) she was retaliated against for filing a discrimination complaint and that Robinson Mining Company then proceeded to use false mental health disability against her." Mulford Br. at 1.

With the findings of fact in mind, the Court notes that items (1) and (2) were not part of her discrimination complaint. As to item (3), the Court finds that the evidence does not support Mulford's claim that Robinson retaliated against her for filing a discrimination complaint. Indeed, the credible evidence establishes that Robinson went out of its way to help Mulford with her hearing deficit issue by providing financial assistance towards the purchase of the hearing aids, something it was under no obligation to do.

In contrast, the Court agrees with Robinson's remark in its post-hearing brief that "the evidence before the Court demonstrated that Robinson's determination to terminate Ms. Mulford was in no way motivated by discriminatory intent." Respondent's Br. at 2-3. Robinson goes on to contend that Mulford's,

> claims [were] entirely unsupported by the record before this Court, and demonstrate that Mulford is willing to make outlandish allegations without any factual support for the claims. The credible evidence before this Court—offered by Robinson employees—establishes that Robinson attempted to assist Mulford with her hearing issues (Hearing Ex. R26), treated her fairly during her employment, and did not take any action based upon Mulford's unfounded claims that Mr. Langston was allegedly abusing alcohol while working at the mine.

Respondent's Br. at 3.

"In addition, Mulford cannot establish a prima facie violation because her testimony was not credible and could not be corroborated by any evidence that was presented to this Court." *Id*. at 4.

The Court strongly agrees with Robinson's view, finding that the evidence supports its contentions.

Conclusions of Law

In conclusion, Ms. Mulford failed to establish a prima facie case of discrimination under section 105(c)(3) of the Mine Act. Robinson's reasons for discharging her were valid, and were based upon a fundamental incompatibility of her continued employment with the Respondent. Further, as there was no merit whatsoever to Mulford's claims, Robinson could have elected to terminate her employment without the need to provide a reason, at least as far as this Mine Act discrimination proceeding is concerned. Accordingly, the Court finds that Mulford utterly failed to prove, by a preponderance of the evidence, that Robinson discriminatorily terminated her in

violation of section 105(c) of the Act. Further, the Court finds that the adverse action, Mulford's termination, was in no part motived by protected activity.

ORDER

Ms. Heather Mulford's complaint and this proceeding are **DIMISSED.**

Within the Commission's procedural rules, 29 CFR § 2700.70, titled "Petitions for discretionary review," provides, in relevant part, "(a) Procedure. **Any person adversely affected or aggrieved by a Judge's decision or order may file with the Commission a petition for discretionary review within 30 days after issuance of the decision or order.** Filing of a petition for discretionary review is effective upon receipt." Subsection (c), within the same section, informs the grounds upon which such petitions may be filed as follows:

> Petitions for discretionary review shall be filed only upon one or more of the following grounds: (1) A finding or conclusion of material fact is not supported by substantial evidence; (2) A necessary legal conclusion is erroneous; (3) The decision is contrary to law or to the duly promulgated rules or decisions of the Commission; (4) A substantial question of law, policy, or discretion is involved; or (5) A prejudicial error of procedure was committed.

29 CFR § 2700.70 (emphasis added).

Accordingly, the Complainant is advised that she may appeal this matter to the Commission within 30 days of the date of this order.

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

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October 31, 2017

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), and JONATHAN HOLSKEY, Complainants	TEMPORARY REINSTATEMENT PROCEEDING Docket No. KENT 2018-0004-D MSHA Case No. MADI-CD-2017-05
v.	
PENNYRILE ENERGY, LLC, Respondent	Mine: Riveredge Mine Mine ID: 15-19424

AMENDED DECISION AND ORDER[1]
REINSTATING JONATHAN HOLSKEY

Appearances: Thomas Motzny, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, Representing the Secretary of Labor

Tony Oppegard, Esq., Lexington, KY, Representing Complainant Jonathan Holskey

Mark E. Heath, Esq., Spilman, Thomas & Battle, PLLC, Charleston, West Virginia, Representing Pennyrile Energy, LLC

Before: Judge Andrews

Pursuant to Section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 ("Mine Act" or "Act"), 30 U.S.C. §801, *et. seq.*, and 29 C.F.R. §2700.45, the Secretary of Labor ("Secretary") on September 27, 2017, filed an Application for Temporary Reinstatement of miner Jonathan Holskey ("Holskey" or "Complainant") to his former position with Respondent Pennyrile Energy LLC, ("Pennyrile" or "Respondent") at the Riveredge Mine pending final hearing and disposition of the case.

According to Commission Rule 45, a request for hearing must be filed within 10 days following receipt of the Secretary's application for temporary reinstatement. 29 C.F.R. §2700.45(c). A timely request for hearing was filed on October 12, 2017, and a hearing was held on October 19, 2017, in Madisonville, Kentucky. The parties had the opportunity to present witnesses, documentary evidence, and arguments in support of their positions.

[1] A pagination error in the original Decision has been corrected.

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 "to play an active part in the enforcement of the [Mine Act]" recognizing that, "if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation." S. Rep. No. 181, 95th Cong., 1 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." *Id.* at 624-25.

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 substantial evidence standard applies.[2] *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 "whether 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 "appears to have merit." S. Rep. No. 181, 95th Cong., 1st Sess. 36-37 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong. 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 624-25 (1978). In addition to Congress' "appears to have merit" standard, the Commission and federal circuit courts have also equated "not frivolously brought" to "reasonable cause to believe" and "not insubstantial." *Sec'y of Labor on behalf of Price v. Jim Walter Res., Inc.*, 9 FMSHRC 1305, 1306 (Aug. 1987), *aff'd*, 920 F.2d 738, 747 & n.9 (11th Cir. 1990). "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*

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[2] "Substantial evidence" means "such 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)).

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 Holskey 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 "motivational nexus between protected activity and the adverse action that is the subject of the complaint." *Sec'y of Labor on behalf of Baier v. Durango Gravel,* 21 FMSHRC 953, 957 (Sept.1999). 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).

Evidence

On July 31, 2017, Holskey executed a Summary of Discriminatory Action, which was filed with his Discrimination Complaint. In this statement, he alleged the following:

> I am an experienced coal miner. I was employed at Pennyrile Energy, Riveredge Mine until I was discharged on 6/2/2017. I suffered an at [sic] work accident on 05/15/17 causing injury to my right leg and ankle. I reported the accident this same night 5/15/17. The brakes on the green car on #1 unit did not set up properly. When I got out of the car it rolled back about two feet. I reported this safety hazard. I worked on 05/16/2017 although in extreme pain and discomfort. When I came out of the mine that morning I insisted on filling out an accident report and going to the doctor. When I got outside after the shift I filled out the accident report. On June 2, 2017, I was given a letter stating I was terminated effective June 2, 2017. I am requesting my job back, all lost pay, bonuses, health insurance, etc., that I would have otherwise earned.

Application for Temporary Reinstatement, Exhibit B.

The Declaration of Special Investigator James Jordan was also filed with the Application for Temporary Reinstatement, and in pertinent part is as follows:

1. I am a special investigator employed by the Mine Safety and Health Administration, United States Department of Labor. I am assigned to the Coal District 10 Office in Madisonville, Kentucky.

2. As part of my responsibilities, I investigate claims of discrimination filed under Section 105(c) of the Mine Act. In this capacity, I have reviewed and gathered information as part of an ongoing investigation arising from a complaint filed by Jonathan Holskey against Pennyrile Energy, LLC ("Pennyrile"). My findings as a result of the investigation disclosed the following:

    a. Jonathan Holskey was previously employed by Pennyrile at the Riveredge Mine in McClean [sic] County, Kentucky. Holskey began working at Riveredge as an employee of Pennyrile on or about March 15, 2017. Previously, he had worked at that mine as a contract employee. At the time of his discharge on June 2, 2017, Holskey worked on the third shift.

    b. Holskey was injured at the Riveredge mine on or about May 15, 2017. When Holskey exited a ram car, the parking brake failed, and the car rolled over his foot and leg. He reported this injury and complained about the ineffective ram car brakes to Tommy Boyd, the lead man on the third shift.

    c. Holskey returned to work the next day, May 16, 2017. Holskey was told by lead man Tommy Boyd to take it easy because of the injury he received the night before. Near the end of the shift, Boyd asked Holskey to finish the dust parameter checks on the section and sign the board indicating that the examination had been completed. Holskey told Boyd that he did not know how to do the "pitot tube" reading on the continuous miner, so he felt uncomfortable performing the examination and signing off on the board. Holskey also asked Boyd to fill out an accident report form during that shift for the accident which occurred on the previous shift. After that shift, Holskey and Boyd met with Susan Dixon, a person in human resources, and Kris Maddox, the underground superintendent, where Holskey's injury was discussed.

    d. Holskey had also made previous complaints to Boyd and others about Pennyrile mining coal on the third shift without the proper belt examinations being done during the shift, as required by 30 C.F.R. § 75.362(a)(1).

    e. Due to the injury sustained on May 15th, Holskey missed approximately two weeks of work. When he returned to work, on or about May 30, 2017, Holskey worked two additional days. After clocking in on the evening of June 1, 2017, Holskey was told to go home and return on the morning of June 2, 2017. When he returned the next morning, Holskey was terminated, allegedly because he was a probationary employee.

3. Based upon my investigation of these matters, I have concluded that Holskey's complaint of discrimination was not frivolously brought.

Application for Temporary Reinstatement, Exhibit A.

Summary of Testimony

Jonathan Holskey has approximately 14 years of coal mining experience. Tr. 14. He has worked as a roof bolter, continuous mine operator, face boss, second shift mine foreman, and lead man. Tr. 15. Holskey has Kentucky and West Virginia face bossing papers, MSHA dust certification, and explosive blasting certification. Tr. 15.

Holskey began working at Pennyrile's Riveredge Mine in late November of 2016.[3] Tr. 15-16. He first worked through GMS for roughly four months as a contractor as a continuous miner operator and scoop man. Tr.16.

On March 15, 2017, Holskey was hired by Pennyrile as a continuous miner operator. Tr. 16-17, 46-47. When hired, Holskey signed a two-sentence document, which stated: "I understand that if Pennyrile Energy, LLC employs me, it is on a 90-day trial period (this means 90 working days). If at any time during this 90 working day period either party is dissatisfied, employment will be terminated." Tr. 49; RX-1. Until May 1, 2017, he worked on a rotating shift, where he would work two weeks on the dayshift and then two weeks on the second shift.[4] Tr. 16-17, 44-45. On May 1, Superintendent Kris Maddox asked Holskey to transfer to third shift, and Holskey agreed to do so.[5] Tr. 17, 44-45.

The third shift is a "dead shift," meaning that it is used for maintenance, rock dusting, and setting up equipment. Tr. 18. The third shift lasts from 11 pm to 7 am, and is responsible for setting up the unit for the day shift. The third shift has approximately seven people, with two mechanics at the greaser, a lead man, and three setup guys. Tr. 109. The third shift does some production when "early coal" comes in at 5 am.[6] Tr. 19. Holskey testified that he was originally supposed to be lead man, making $28 per hour.[7] Tr. 17. The lead man is the responsible person

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[3] The Pennyrile Mine is nonunion. Tr. 39.

[4] Holskey misstated the date early in the hearing as June. Tr. 16-17.

[5] Kris Maddox testified at hearing on behalf of the Respondent. Maddox worked as the superintendent of Riveredge Mine until a week before hearing. Tr. 102-103. At the time of hearing, he was general manager of the mine. Tr. 102-103. As superintendent, Maddox's duties included daily operations of the mine, mine planning, and workforce. Tr. 103.

[6] According to Holskey, "early coal" usually started at 5 am, but it could start a few hours earlier or later. Tr. 86-87.

[7] Maddox described Holskey's job as a third shift utility job, with responsibilities to help get the unit ready for the day shift by scooping, rock dusting, and helping move power. Tr. 108. Maddox testified that he never told Holskey that he would be the supervisor on that section, and that no one else would have the authority to assign him to be the lead man. Tr. 109. Similarly, no one besides Maddox could establish Holskey's rate of pay. Tr. 110. The difference in pay between a miner operator and utility man is $1.50 per hour, and miners who have papers receive an extra 25 cents per hour. Tr. 110.

on the unit; he sets up the unit, gets it ready for the day shift to run coal. Tr. 18. As the lead man, Holskey "took care of the miners," by setting bits, cleaning out ductwork, and setting up in a fresh cut. Tr. 18.

Holskey had two issues concerning his job on the third shift. Tr. 20. His first issue was that he was supposed to be a face boss, but instead was doing the work of a laborer. Tr. 20. He was originally told by his face boss, Matt Allen, that he would be taking the position as third shift face boss making $28 per hour.[8] Tr. 81. His second issue was that the shift was ordered to run early coal when the belts had not yet been examined and the dust parameters were not done correctly. Tr. 20. Holskey complained about the problems concerning belt exams and dust parameters every day to his face boss, Tommy Boyd. Tr. 20, 88. Boyd responded that they were going to do what they were instructed to do. Tr. 21.

On the night of May 15—when Holskey's accident occurred—Holskey had arrived at the unit and found the green ram car was located right behind the shack, one break outby the feeder.[9] Tr. 21, 50. Holskey began by hauling rock dust from bottom to the unit using the ram car. [10] Tr. 21, 23, 50. This entails getting a ram car and going to the bottom of the slope where the rock dust hole was located, loading it, and bring it to the unit. Tr. 21.

When Holskey went to park the ram car, he hit the panic bar, which "knocked the breaker on the car," and engaged an emergency disconnect that locks the car up and shuts it down completely. Tr. 21, 51-54. Holskey turned around in his seat, and was getting out, when the brakes failed and the ram car backed over top of him. Tr. 21-22. The car backed over him approximately one foot, dragging him under the cab of the car. Tr. 22. Holskey sustained a

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[8] Holskey testified that at the mine, the terms "face boss" and "lead man" were used interchangeably. Tr. 82.

[9] The "shack" is where the power box is located, and it serves as a gathering place. Tr. 39. It is a physical structure, with a bench where people will sit. Tr. 39.

[10] The height in the mine is five feet. Tr. 22. The ram car is approximately 30 feet long, and has a bed like a pickup truck, which pivots in the middle, with the batteries that power the car on the other end of the vehicle. Tr. 22. The operator lays down in the compartment, with the controls to each side of him. Tr. 22. There is a chain on the car that goes from tire to tire, which smooths out the road as one is traveling back and forth. Tr. 24.

crushing injury to his right foot, a deep bruise on his Achilles' heel, a bruise on his back, and a puncture hole in the back of his neck.[11] Tr. 23, 40.

Holskey dragged himself out from under the ram car, and walked around the back to the shack. Tr. 22-23. Holskey saw his face boss, Tommy Boyd, at the shack, sitting at the feeder, marking up chain hangers. Tr. 23. Holskey felt nauseous, so he could not talk to Boyd, and instead he walked back to the shack and sat down. Tr. 23. A few minutes later, after Holskey had gathered his composure, he flagged Boyd down. Tr. 23. Holskey told Boyd what happed, how the brakes had failed and that the car backed over his foot and back and slammed him to the ground. Tr. 23-24. Holskey specifically complained that the brakes on the ram car failed. Tr. 24. Boyd responded, "Well, let's go check it out." Tr. 23. They went back to where the incident occurred, and it was visible where the chain on the car shifted back, with Holskey's feet and handprints from his attempts at escape. Tr. 23-24. Boyd said, "It's all right, Holskey. Let's go to the shack and sit down and take it easy for the rest of the shift." Tr. 23.

Back at the shack, Holskey took off his boot and showed Boyd the swelling. Tr. 24. Boyd said, "Sit here for the rest of the shift and take it easy." Tr. 24. Boyd sat in the shack for the remainder of that shift. Tr. 24.

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[11] Nicky Stevens testified at hearing on behalf of the Respondent. Stevens worked in maintenance in the third shift at Riveredge Mine. Tr. 147. He has worked in the mines for approximately 40 years, and worked for Pennyrile for approximately two years. Tr. 157. He was working at the Sebree Mine when Ricky Thorpe got crushed to death. Tr. 157.

On May 14, the second shift called out that "the brakes were spongy" on the green ram car, so Chris Pettus and Stevens worked on it. Tr. 148-149. They worked on the car for approximately two to three hours. Tr. 151. Stevens testified that he did not witness the incident with Holskey and the ram car. Tr. 152.

Stevens tested all the breaking methods in the blue ram car and they worked. Tr. 154. Stevens testified that there was no way that Holskey could have been driving the green car. Tr. 155-156. Stevens had told others at the mine that he did not know how Holskey could have been run over by a ram car, and doubted the facts of the accident. Tr. 158. Stevens testified that he did not like to be around Holskey because he complains, and he could not remember if he told an MSHA representative that he did not like Holskey personally. Tr. 167.

Stevens reported to Danny Young and Greg Bowser that he did not find anything wrong with the car Holskey was driving. Tr. 170-171.

Greg Badertscher also testified at hearing on behalf of Respondent. Badertscher was the maintenance chief at the Riveredge Mine responsible for all underground maintenance, repair, and upkeep of the cars and equipment. Tr. 172-173. Badertscher further cast doubt on Holskey's account of the accident. Tr. 172-183.

The next day, Holskey came into work, but could not work. Tr. 25. Boyd told Holskey, "Just come on, you can sit at the shack and take it easy." Tr. 25. So, on the night of May 16, Holskey sat in the shack and did not do anything until 5 am. Tr. 25. At that time, Boyd had to leave work, and Holskey assumed the responsibilities of the face boss. Tr. 25. These included the pre-shift examinations and dust parameters. Tr. 25. Holskey told Boyd and third shift mine foreman Matt Greer that he wasn't comfortable with the dust parameters because he had never been trained or performed a Pitot reading.[12] Tr. 25, 40. Greer responded that Holskey should just do the best he could. Tr. 25.

At approximately 6:55 am, Holskey went outside and saw that Boyd was still there. Tr. 26. Holskey went to retrieve an accident report, and testified that he "[caught] grief" from Superintendent Kris Maddox and Susan Dixon from HR. Tr. 26-27. They did not want Holskey to fill out the accident report or go to his doctor. Tr. 41. At first, they refused to show Holskey where the accident reports were located, but eventually they showed him. Tr. 41. Holskey asked Boyd to sign it, but Boyd said that he would fill it out while Boyd talked to the MSHA inspector.[13] Tr. 27. Holskey had to sign it quickly because Boyd was in a rush to leave to his daughter's graduation. Tr. 61. Holskey testified that he did not have an opportunity to review the accident report. Tr. 61. Holskey then went to Maddox and Dixon to discuss which doctor Holskey would see. Tr. 27. They wanted Holskey to see a doctor in Madisonville, and Holskey wanted to see a doctor in the same facility closer to his house in Owensboro. Tr. 27.

After the conversation with Maddox and Dixon, Holskey went straight to the urgent care clinic, where the doctor put Holskey in an orthopedic boot, took x-rays, explained his injuries, and sent him home. Tr. 29. The doctor told Holskey to continue to wear the boot, and that the more he walked on it the better he'd work it out. Tr. 29.

When Holskey went to work that night, a safety man called "Slick" Burnet met him at the time clock and asked Holskey for his papers. Tr. 29. Holskey handed them to Burnet, and Burnet said, "Well, I got to call Keith [Whitehouse] because you got some restrictions." Tr. 29. Whitehouse said that because of Holskey's restrictions, he couldn't work that night, so Holskey went home. Tr. 30.

The next morning, Holskey went back to the doctor to try to get some of the safety restrictions lifted. Tr. 30. Holskey continued going to the doctor every third day, because he felt that his injuries were getting better. Tr. 31. On Friday, the doctor told Holskey that if he wanted to be released to go back to work Sunday night, he would sign the release. Tr. 31. On Sunday night, Holskey was preparing to go back to work, but his foot was still giving him some issues,

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[12] The dust parameters were required under the mine's ventilation plan. Tr. 26. The Pitot reading is necessary because there must be a certain amount of air going through the scrubber for the dust parameter in order to mine coal. Tr. 40. The scrubber is the exhausting system for the continuous miner that gathers dust out of the atmosphere. Tr. 40.

[13] On that day's day shift MSHA had two dust samplers coming in to run dust. Tr. 26.

so he went back to the doctor on Monday and the doctor placed Holskey back on the restrictions.[14] Tr. 31.

Approximately one week after the injury, Holskey was released back to work, but he was not able to perform work because he still had to wear the boot and elevate his foot with ice. Tr. 32. Holskey's foot was so swollen that the doctor was considering lancing it open in order to relieve the swelling. Tr. 33.

On May 30, Holskey was released to work a second time. Tr. 33-34. When he returned, he was taken off the unit and put on rock dusting. Tr. 34. It was unusual for Holskey to perform this type of work, because the entire time he worked at the mine he worked with the miner. Tr. 34.

Holskey worked two shifts. Tr. 35. When he arrived for his third shift following his release back to work, Matt Greer, the third shift foreman met Holskey at his basket and told him to go home and come in the next day at 10 am. Tr. 35.

The following day, Holskey arrived to the mine at 10 am, and went to Kris Maddox's office, where Maddox, Dixon, day shift mine foreman Wyatt Oates, and maybe Whitehouse were sitting. Tr. 35-36. No one said anything to Holskey, but instead slid a paper across the desk to him. Tr. 36; GX-1. Holskey picked up the paper and read it, and asked Maddox, "Is this because of the accident?" Tr. 36. Maddox replied, "No." Tr. 36.

The letter stated in pertinent part, "Effective 6/2/2017, your employment with Pennyrile Energy is terminated. The basis for your termination is the established policy of the Probationary Period Clause."[15] Tr. 37; GX-1. Holskey was not provided an explanation for the termination by anyone in the room. Tr. 37. Holskey said, "Okay," and left to clean out his basket. Tr. 36. Holskey was not provided any further reasons for the termination or any further information about the probationary period. Tr. 38. Maddox testified that he told Holskey, "that it wasn't working out with us and it wasn't working out with him, so I was just going to let him go due to the probationary period." Tr. 119-120.

Maddox was involved in both the hiring and firing processes. Tr. 103. Maddox testified that no subordinates had authority to assign people positions or pay. Tr. 103. When employees

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[14] During this time period, Holskey wore the boot intermittently because the doctor said that Holskey needed to walk on his foot, and said he should wear the boot on an as-needed basis. Tr. 65.

[15] Maddox told Dixon that Holskey was being terminated because he "could not perform his job duties, cuts a bunch of cables, and can't get along with others," and she typed the termination letter. Tr. 132. Nothing in the termination letter mentions these reasons. Tr. 133.

are hired, they are placed on a 90-day trial or probationary period.[16] Tr. 104. Maddox testified that the policy is explained to new employees during orientation. Tr. 105. Maddox testified that he has terminated approximately four or five other probationary employees. Tr. 114-115.

Maddox testified that Holskey's performance while he was at GMS was "very good." Tr. 105. However, when he was hired full time by Pennyrile, "his work performance laxed." Tr. 105. Maddox testified that Holskey began "getting a lot of miner cables," and that he was sometimes absent from his miner. Tr. 106. This information came from Holskey's direct supervisor, Matt Allen. Tr. 106. Maddox testified that Holskey was moved to third shift around May 1 because Allen told Oates that "he was tired of chasing Holskey around the unit to get him to his job." Tr. 107. Additionally, Maddox testified that Holskey had asked Maddox to be moved to third shift. Tr. 107. Maddox stated that he did not terminate Holskey's employment at that time because "you want to give somebody a chance to be put in another position so they maybe excel better at that position." Tr. 107.

Maddox testified that on Holskey's second night on the third shift he received complaints that Holskey "was acting like the mine foreman." Tr. 110. Maddox testified that he had a conversation with Holskey to tell him that Boyd was the boss.[17] Tr. 110. Maddox further testified that Holskey had a conversation with Maddox stating that he wanted to run coal early, and that he would pre-shift the belts.[18] Tr. 111. Maddox replied, "No. I don't want—I don't want that. I want the unit set up ready to go at 7:00, and we can start loading. I don't want early coal." Tr. 111. Maddox said this because he wants "to give the third shift the opportunity to make sure everything is right."[19] Tr. 112. Maddox testified coal production usually starts at approximately 7:00 am. Tr. 111. Third shift stays for approximately 30 minutes until dayshift gets there. Tr. 111-112.

Pennyrile sometimes issues written warnings, and has an employee handbook. Tr. 125. They also sometimes reduce oral warnings to writing. Tr. 126. Holskey was never written up for allegedly cutting the miner cable, but Maddox testified that he was "talked to." Tr. 126. Similarly, he was not written up for being absent from the miner, but he was "talked to." Tr. 126. Similarly, he was not written up for "acting like a boss," but Maddox testified that he was "talked to." Tr. 127. Maddox testified that "everybody" was coming into his office complaining about Holskey. Tr. 129. However, when asked to name any miners who complained about Holskey, Maddox could only remember Boyd. Tr. 129. Maddox had no written documentation or recollection of anyone complaining about not working well with Holskey, other than Boyd. Tr. 128-130. There was also no documentation for any of the previous problems of Holskey's that

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[16] Maddox testified that during the probationary period, an employee can be fired for any reason or no reason at all. Tr. 137. Maddox also testified that after the probationary period an employee can be fired for any reason or no reason at all. Tr. 137.

[17] Holskey denied that such a conversation took place. Tr. 90.

[18] Holskey denied that such a conversation took place. Tr. 89-90.

[19] Holskey denied that such a conversation took place. Tr. 89-90.

Maddox described. Tr. 128. Maddox never told Holskey that he would be discharged or terminated for any of his conduct. Tr. 130-131. There are no written warnings or documentation of any problems in Holskey's personnel file. Tr. 131.

Maddox testified that he had discussions with Oates on May 12 about Holskey, and that they were "probably going to let Mr. Holskey go." Tr. 114. His decision was also based on discussions with Boyd, Allen, Whitehouse, and Greer. Tr. 125. The decision to fire Holskey was "because of the cables, poor work performance, not working well with the others." Tr. 114. Maddox testified that he never heard about any safety complaints from Holskey, and that the accident report did not factor into his decision to fire Holskey.[20] Tr. 120. Maddox testified that Holskey was not physically on the property on May 12, and that when he terminates the employment of someone during the probationary period, "I have to make sure that he's on property." Tr. 114. On cross examination, Maddox admitted that nothing prevented him from firing Holskey during the three-week period between May 12 and June 2. Tr. 121-122.

Maddox testified that he did not want to fire Holskey on May 15 because Holskey had filled out an accident report that day, but the accident report was not filled out until a few hours into Maddox's shift. Tr. 123. Maddox did not have a reason for not terminating Holskey on May 16, when Holskey came into work. Tr. 124. Maddox testified that he did not fire Holskey when he returned to work two more shifts starting on May 30, because he "just tried to let him work to finish the week out." Tr. 124. When it was pointed out to Maddox that those two shifts fell on a Tuesday and Wednesday, and asked "how is that finishing the week out?" Maddox simply responded, "I don't know." Tr. 124.

Contentions

The Complainant, through the Secretary and private counsel, argue that Holskey has met his burden of establishing that his complaints are non-frivolous, and as a result he should be temporarily reinstated. The Complainant highlights his protected activities of daily complaints concerning walking the belts on the third shift, his accident report, complaints about the brakes on the ram car, and his complaint that he did not know how to do the required Pitot readings. Holskey's termination followed shortly after these protected activities, and the Complainant argues there was knowledge and animus towards the protected activities.

Respondent Pennyrile argues that Holskey was terminated because he cut the cables too often, had poor work performance, and was not working well with others. The Respondent argues that the 90-day probation policy permitted the operator to fire Holskey for any reason.

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[20] Maddox testified that Pennyrile's policy on reporting accidents at the mine are to report them immediately to the direct supervisor. Tr. 115. He testified that approximately 30 accidents reported by employees, and that none of these employees were fired. Tr. 115, 121. He further pointed out that Holskey was not fired after filling out his accident report in March. Tr. 120-121.

Analysis

The scope of this proceeding is narrow. Credibility determinations are not made; conflicts in testimony are not resolved. It is well recognized by the Courts that the Secretary's burden is "relatively insubstantial". For example, beyond the scope of the hearing is testimony and/or documentary evidence that the adverse action was justified by unprotected activity alone or was also motivated by unprotected activity or other non-discriminatory grounds. For the reasons set forth below, I find that the record presents a reasonable cause to believe the instant Discrimination Complaint was not frivolously brought.

Holskey Engaged in Protected Activity

The record contains evidence of multiple complaints and actions over a short time period that each constituted protected activities. First, after Holskey was transferred to the third shift on May 1, 2017, he began complaining daily to his face boss, Tommy Boyd, that the belts had not yet been examined and the dust parameters were not performed correctly as required by the ventilation plan. Tr. 20, 88. There is no question that such safety complaints constitute protected activity under the Mine Act. Indeed, Section 105(c)(1) explicitly states that a miner shall not be discriminated against because such miner "has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent…of an alleged danger or safety or health violation in a coal or other mine." 30 USC §815(c)(1). Holskey's daily complaints concerned health and safety matters that he believed were a violation of the Act.

Second, after being crushed by the ram car on the night of May 15, Holskey reported the accident and injury to Boyd. The Commission has held that the act of reporting an injury is a protected activity under §105(c), and explained that such reporting is integral to the proper functioning of the Act. *See Swift, Snyder, and Cunningham v. Consolidation Coal Co*., 16 FMSHRC 201, 205 (Feb. 14, 1994).[21] Third, Holskey signed an accident report and submitted it to management. Tr. 27, 61.

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[21] In *Swift*, the Commission stated:

> We affirm the judge's conclusion that a miner's reporting of injuries to an operator constitutes protected activity. Section 2(e) of the Act provides that "operators of ... mines with the assistance of the miners have the primary responsibility to prevent the existence of [unsafe and unhealthful] conditions and practices in such mines." 30 U.S.C. § 801(e). In order to carry out this responsibility, mine operators need to know about unsafe conditions that cause accidents and injuries. Further, accurate information must be gathered by operators in order to comply with the Secretary's regulations at 30 C.F.R. Part 50 (1993), requiring operators to file with MSHA reports of all accidents and injuries that occur at mines. Operators can be fully informed about accidents and injuries only with the cooperation of miners. Therefore, taking adverse actions against miners for their

(continued…)

Fourth, after the accident, Holskey complained to Boyd that the brakes on the ram car failed. Tr. 24. This safety complaint constituted a protected activity under the Act.

Fifth, on May 16, 2017, when Holskey was ordered to perform the dust parameters, he told Boyd and Greer that he was not comfortable performing the Pitot readings because he had never been trained on how to do them. Tr. 25-26, 40. This statement constituted a health and safety complaint. It is unclear from the record if Holskey ended up performing the Pitot readings, but if he refused to do work that he considered unsafe, then it also constituted a protected work refusal.

Each of these safety complaints and accident reports constituted protected activities under the Act. 30 U.S.C. §815(c)(1).

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[21] (… continued)

reporting of injuries would restrict the free flow of information and compromise accurate reporting and mine safety.

We reject the operators' contention that the act of reporting a personal injury would qualify as protected activity only if the report contains a safety complaint; this approach takes too narrow a view of such reports. The legislative history of the Act makes clear the intent of Congress that protected rights are to be construed expansively. See S. Rep. No. 181, 95th Cong., 1st Sess. 36 (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 (1978) ("Legis. Hist.").

The right to report injuries, however, carries with it a corresponding responsibility that miners report injuries and accidents. The legislative history of the Act shows that Congress provided protection to miners against discrimination in order to encourage their active role in enhancing mine safety:

> If our national mine safety and health program is to be truly effective, miners will have to play an active part in the enforcement of the Act.... [I]f 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.

Legis. Hist. at 623.

Swift, Snyder, and Cunningham v. Consolidation Coal Co., 16 FMSHRC 201, 205 (Feb. 14, 1994).

Holskey Suffered an Adverse Employment Action

On June 2, 2017, Holskey went to Maddox's office, and met with Maddox, Dixon, Oates, and perhaps Whitehouse. Tr. 35-36. Nothing was said to Holskey, but he was handed a letter that terminated his employment. Tr. 36; GX-1. The basis for the termination, as explained in the letter, was "the established policy of the Probationary Period Clause." GX-1. Holskey was not provided any other reason for his termination. Tr. 38. The Act clearly states that a discharge is an adverse employment action. 30 USC §815(c)(1).

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 Holskey engaged in protected activities and suffered an adverse employment action, the examination now turns to whether those activities have 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.

<u>Knowledge of the protected activity</u>

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 the instant matter, there is sufficient evidence of knowledge by Pennyrile of the various protected activities to meet the evidentiary threshold.

Holskey's daily complaints about the dust parameters, not walking the belts for the third shift, the faulty brakes on the ram car, the accident, and his lack of training on the Pitot readings were made to his face boss, Tommy Boyd. Tr. Tr. 20-21, 23-24, 25, 27. Furthermore, Holskey asked Maddox and Dixon for a blank accident report to fill out. Tr. 26-27. Maddox testified that he was aware of the accident report as soon as it had been filled out. Tr. 123. Therefore, the Respondent had knowledge about each of Holskey's protected activities.

<u>Coincidence in time between the protected activity and the adverse action</u>

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, extremely close proximity in time between the protected activities and the adverse actions greatly favors a finding that a nexus existed between the protected activities and the adverse actions. The protected activities at issue here began on May 1, with Holskey's daily complaints to Boyd about the dust parameters and belt. Tr. 20. The other protected activities surrounding the accident all occurred on May 15 and May 16. Holskey was terminated on June 2. Tr. 35-36. Therefore, the timespan between the termination and the protected activities ranged from 17 to 32 days.

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).

Although a single instance, even circumstantial in nature would suffice, here there are several indications of animus. Boyd repeatedly disregarded Holskey's health and safety complaints in a manner that bordered on contempt. In response to Holskey's daily complaints about the dust parameters and belt examinations, Boyd told Holskey to simply do what they were instructed to do. Tr. 20-21. Following Holskey's accident with the ram car, where Holskey had his foot crushed, his heel and back bruised, and a puncture hole in the back of his neck, Boyd simply told Holskey to "sit down and take it easy for the rest of the shift." Tr. 23, 40. When Holskey complained to Boyd and Greer that he felt uncomfortable doing the Pitot readings because he had not been trained, Greer responded that Holskey should just do the best he can. Tr. 26. Furthermore, when Holskey asked Maddox and Dixon for a blank accident report in order to report his ram car accident, they initially refused to tell Holskey where they were kept. Tr. 41. These responses to Holskey's complaints and accident reports evidence animus towards Holskey's protected activities.[22]

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[22] The Respondent's presentation of Nicky Stevens and Greg Badertscher further illustrate animus towards Holskey's protected activity of making an accident report. These witnesses had no relevant information to offer concerning any argument or defense by Respondent, but instead simply insinuated that Holskey's accident report was untrue. Respondent's defense that Holskey's termination was wholly unrelated to the accident or accident report was belied by the presentation of these witnesses.

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.

Maddox testified that approximately 30 employees that made safety complaints were not fired, and that Holskey was not fired after his accident report in March. Tr. 115, 120-121. These statements, without more information in terms of the nature of the other safety complaints, or other employees who made complaints that were fired, is not sufficient to make a determination on disparate treatment.

The Respondent's Reliance on the Probation Policy is Misplaced

The Respondent's central argument was that because the signed probationary policy states that they were permitted to terminate a new employee's employment for any or no reason within 90 days, the termination of Holskey was permissible. Pennyrile's Riveredge Mine is a non-union mine, and all employees are at-will. Tr. 39. Maddox testified that all miners at Pennyrile, whether in the probationary period or not, may be fired for any reason or no reason. Tr. 137. Respondent's counsel further argued that as a matter of employment law, probationary employees have fewer rights than permanent employees. Tr. 192-196.

While Pennyrile may be able to fire any at-will or probationary employee for any *legal* reason, it cannot rely on a signed policy to terminate an employee for reasons impermissible by law. A host of labor, employment, civil right, health and safety, whistleblower, and other laws protect employees in the workplace, and no policy or signed agreement can permit the company to violate those laws. The probationary policy does not and cannot negate any provision of the Mine Act, and the company may not force employees to sign away any rights under the Mine Act as a condition of employment. Therefore, any reading of the probation policy that includes protected activities is impermissible.

The Respondent's reliance on the probationary policy is misplaced. The Respondent may be permitted to terminate the employment of employees for any legal reason, but it cannot use the policy to terminate employment for illegal reasons. Therefore, the argument by Maddox and by Respondent's counsel that Holskey was fired because of the probationary policy does not negate the necessity of an inquiry as to whether Holskey has made a non-frivolous complaint of discrimination under §105(c) of the Act.

Conclusion

In concluding that Holskey's complaint herein was not frivolously brought, I find that there is reason to believe he engaged in protected activities, and that there was a nexus between

the protected activities and his termination. Miner Jonathan Holskey is entitled to Temporary Reinstatement under the provisions of Section 105(c) of the Act.

ORDER

It is hereby **ORDERED** that **Jonathan Holskey** be immediately **TEMPORARILY REINSTATED** to his former job with Pennyrile Energy at the Riveredge Mine at his former rate of pay, overtime, and all benefits he was receiving at the time of his termination.

This Order **SHALL** remain in effect until such time as there is a final determination in this matter by hearing and decision, approval of settlement, or other order of this court or the Commission.

I retain jurisdiction over this temporary reinstatement proceeding. 29 C.F.R. § 2700.45(e)(4). The Secretary **SHALL** provide a report on the status of the underlying discrimination complaint **as soon as possible**. Counsel for the Secretary **SHALL** also **immediately** notify my office of any settlement or of any determination that Respondents did not violate Section 105(c) of the Act.

/s/ Kenneth R. Andrews
Kenneth R. Andrews
Administrative Law Judge

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ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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October 16, 2017

SECRETARY OF LABOR, MSHA on behalf of **LOUIS SILVA JR.**, Complainant v. AGGREGATE INDUSTRIES WRC, INC., Respondent	DISCRIMINATION PROCEEDING Docket No. WEST 2017-0482-DM RM-MD-17-05 Mine: Morrison Plant Mine ID: 05-00864

ORDER HOLDING THAT SUBJECT EMAIL IS NOT PROTECED BY THE ATTORNEY-CLIENT PRIVILEGE

This matter is before me on a complaint of discrimination filed by the Secretary of Labor ("Secretary") on behalf of Louis Silva, Jr. pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 815(c)(2), against Aggregate Industries WRC, Inc. ("Aggregate Industries"). Silva was terminated from his position as a Quality Control Technician at the Morrison Plant on or about January 19, 2017.

During a deposition of Al Quist, taken on or about September 29, 2017, counsel for the Secretary presented the witness with a copy of an email Quist sent on March 2, 2017, in response to an email sent to him on March 1 by William Doran of the law firm of Ogletree Deakins. Quist is the safety manager at the Morrison Plant. The emails were sent in response to the Secretary's Application for Temporary Reinstatement that had been filed with the Commission on or about February 28, 2017, Docket No. WEST 2017-265-DM.[1] Doran, who is an attorney for Aggregate Industries, attached a copy of the Application for Temporary Reinstatement to the email he sent to Quist. The emails were provided to counsel for the Secretary by Aggregate Industries during discovery in the present discrimination case.

Matthew Linton, also with Ogletree Deakins, represented Aggregate Industries at the deposition. When Linton saw the email, he objected to its use on the basis that it was inadvertently disclosed to the Secretary during discovery. He stated that the email was protected by the attorney-client privilege and noted that it stated, in a large font at the top of the email, "Privileged and Confidential – Attorney Work Product." Linton told counsel for the Secretary and David Lichtenstein, counsel for Silva, that he wanted the email destroyed or returned to him. He relied upon Rule 502(b) of the Federal Rules of Evidence. Counsel for Complainant agreed to sequester the email during the course of the deposition.

[1] The temporary reinstatement case was resolved when I granted the parties' joint motion to approve the terms of their agreement on economic reinstatement by order dated March 20, 2017.

The parties were not able to resolve the dispute concerning the email in the week or so following the deposition. Counsel asked that I hold a conference call during which they could present their argument to me with the understanding that I would resolve the issues surrounding the email. They stated that they needed a quick resolution because additional depositions are scheduled for October 17 and 19.[2]

Two issues were presented to me during the conference call, as follows: (1) is the email sent by Quist dated March 1, 2017 protected by attorney-client privilege and, if so, (2) was the privilege waived when the email was provided to the Secretary during discovery? Issues of waiver are governed by Rule 502(b) of the Federal Rules of Evidence and Rule 26(b)(5)(B) of the Federal Rules of Civil Procedure. Although these rules are not binding on the Commission, they codify generally accepted evidentiary and procedural principles.

Attorney-Client Privilege

For the reasons set forth below, I find that the email in question is not protected by the attorney-client privilege.[3] The portion of the email that is the subject of the dispute is not Doran's email to Quist, but Quist's response. The email sets forth Quist's opinion that Aggregate Industries should "fight" the temporary reinstatement case and, presumably, the underlying discrimination case. It was not a confidential communication from Quist to Doran or any other attorney directing him to pursue the case and it does not discuss strategy for litigating the issues. It does contain Quist's opinions about Silva's discrimination complaint.

I reach this conclusion for a number of reasons. The email was sent to nine individuals, most of whom were not attorneys. It was presented as "news" from Doran. It was addressed, "Dear All." Doran was not listed in the "To:" line of the email but in the "Cc:" line. Quist sent the subject email to management officials, including two in-house counsel, stating that the company should fight Silva's claims. A document is not protected by the privilege just because one or more attorneys are listed as recipients of a document. This email was not directed to counsel for the company in confidence with instructions or information about the litigation but was an email notifying management of the litigation and asking them to read the attached Application for Temporary Reinstatement. The email was an *announcement* telling management that the Secretary filed an application for temporary reinstatement; it was not a *confidential communication* between Aggregate Industries and its attorneys. The fact that the top of the email contained language asserting that it is privileged and confidential is not controlling. In reaching

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[2] The description of the events at the deposition of Quist was provided to me during the conference call held on October 13, 2017. The parties also presented oral argument on the legal issues raised herein.

[3] At my request, a copy of the email was provided to me by Linton for my in-camera review. I placed this email under seal and it remains under seal in the event Aggregate Industries wishes to file a petition for interlocutory review of this order under 29 C.F.R. § 2700.76. Such review is not a matter of right. I also had a recording made of the conference call which shall also remain confidential.

this conclusion, I reject Aggregate Industries' argument that the email was a protected communication between Quist and Aggregate Industries' in-house and outside counsel.

The email does not include legal advice, an attorney's impressions of the case, or a discussion of confidential facts or strategy from the client. Commission Judge Margaret Miller, in *BHP Copper, Inc.,* 38 FMSHRC 893, 897-99 (April 2016), discussed the eligibility requirements that the Commission has relied upon in analyzing attorney-client communication issues. I relied upon these eligibility requirements in finding that the document is not protected. To be protected, the communication must relate to a "fact of which the attorney was informed (a) by his client, (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal service or (iii) assistance in some legal proceeding." *Id.* (citations omitted). Although a corporate client is not just one person, I find that, upon review of its wide distribution to lower level Morrison Plant supervisors as well as its contents, the email in question does not meet this requirement. This email was not sent for the purpose of obtaining an opinion of law, legal advice, or retaining the services of the law firm of Ogletree Deakins.

In addition, as Judge Miller stated, although a client may not be compelled to answer the question, "What did you say or write to your attorney?" he may not refuse to disclose relevant facts within his knowledge merely because he incorporated a statement of such fact into his communication with his attorney, whether in-house or outside counsel. *Id.* at 898. I hold that the email was not protected by the attorney-client privilege but, if it was, Quist could still be required to answer deposition questions about his knowledge of facts regarding Silva's discrimination complaint, and his state of mind at the time of Silva's termination and at the time the Secretary filed the temporary reinstatement application and complaint of discrimination. Other deposition witnesses can be asked these questions as well.

Because I find that the email in question is not protected by the attorney-client privilege, I need not reach the issue whether the email should be destroyed or returned under Fed. R. Evid. 502(b) and Fed. R, Civ. P. 26(b)(5)(B).

ORDER

Based on information and argument provided during the conference call held with counsel and my in-camera review of the disputed email, I hold that the email in question is not protected by the attorney-client privilege. Nevertheless, given the importance of the attorney-client privilege, the email shall remain sequestered to give Aggregate Industries an opportunity to file a petition for interlocutory review, if it so desires. If it seeks such review, it shall do so as quickly as possible.

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

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RWM

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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October 24, 2017

SECRETARY OF LABOR, U.S. DEPARTMENT OF LABOR on behalf of STACEY WAYNE PUCKETT, Complainant	TEMPORARY REINSTATEMENT PROCEEDING Docket No. WEVA 2017-426
v.	
PANTHER CREEK MINING, LLC, Respondent	Mine: American Eagle Mine Mine ID: 46-05437

ORDER DISSOLVING
GRANT OF TEMPORARY REINSTATEMENT

Before: Judge Feldman

This temporary reinstatement proceeding is based on an application for temporary reinstatement filed on June 7, 2017, pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2) ("Act" or "Mine Act"), by the Secretary of Labor ("Secretary") on behalf of Stacey Wayne Puckett against Panther Creek Mining, LLC ("Panther Creek"). Under section 105(c)(2), "if the Secretary finds that [the underlying discrimination] complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the reinstatement of the miner pending final order on the complaint." 30 U.S.C. § 815(c)(2).

The Secretary's temporary reinstatement application was supported by a sworn affidavit by a Mine Safety and Health Administration ("MSHA") Special Investigator that Puckett was terminated shortly after he was questioned regarding a section 110(c) investigation at the American Eagle Mine. Panther Creek did not deny that the subject interaction with the Special Investigator had occurred, arguing instead that it was unaware of any communication between Puckett and the MSHA investigator. The Secretary's reinstatement application was summarily granted on July 12, 2017. *Sec'y of Labor on behalf of Puckett v. Panther Creek Mining, LLC*, 39 FMSHRC 1406 (July 2017). The Order of Temporary Reinstatement was subsequently modified by the grant of economic reinstatement as agreed upon by the parties. Amendment of Order of Temporary Reinstatement, 39 FMSHRC ___ (Aug. 22, 2017). The modified order noted that continued economic reinstatement was contingent on the Secretary's prosecution, pursuant to section 105(c)(2) of the Mine Act, of Puckett's discrimination complaint. *Id.*

Panther Creek has now filed an October 19, 2017, motion to vacate Puckett's economic reinstatement based on correspondence dated October 12, 2017, in which MSHA advised Puckett that MSHA's investigation failed to reveal "sufficient evidence to establish, by a preponderance of the evidence[,] that a violation of Section 105(c) occurred." Panther Creek Mot. to Vacate Order of Temporary Reinstatement, Ex. A at 1. Consequently, Puckett was advised that the Secretary had declined to bring a discrimination complaint on Puckett's behalf. *Id.*

An order temporarily reinstating a miner cannot survive the Secretary of Labor's decision not to proceed with the miner's discrimination complaint under section 105(c)(2). *Sec'y of Labor on behalf of Dunne v. Vulcan Constr. Materials, L.P.*, 34 FMSHRC 3070 (Dec. 2012) (citing 700 F.3d 297 (7th Cir. 2012)); *see also North Fork Coal Corp. v. FMSHRC*, 691 F.3d 735, 744 (6th Cir. 2012). Consequently, the grant of the Secretary's application for temporary reinstatement that awarded economic reinstatement shall be dissolved.

ORDER

In view of the above, **IT IS ORDERED** that Panther Creek's October 19, 2017, Motion to Vacate Order of Temporary Reinstatement **IS GRANTED**. Consequently, **IT IS FURTHER ORDERED** that the underlying July 12, 2017, Order Granting Temporary Reinstatement **IS DISSOLVED** effective as of the date of this Order.[1] Nothing herein shall bar the filing by Puckett of a discrimination complaint on his own behalf pursuant to section 105(c)(3) of the Mine Act. 30 U.S.C. § 815(c)(3).

/s/ Jerold Feldman
Jerold Feldman
Administrative Law Judge

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[1] This Order dissolving Puckett's temporary reinstatement has been served on the parties by electronic and certified mail.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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October 26, 2017

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. CONSOL PENNSYLVANIA COAL COMPANY LLC, Respondent.	CIVIL PENALTY PROCEEDING Docket No. PENN 2017-0222 A.C. No. 36-10045-442362 Docket No. PENN 2017-0223 A.C. No. 36-10045-442362 Mine: Harvey Mine

ORDER GRANTING MOTION TO CONSOLIDATE

Before: Judge Moran

The Secretary has filed a motion to consolidate these dockets.[1] Respondent, Consolidation Pennsylvania Coal Company LLC, ("Consol Penn"), has filed a response in partial objection. PENN 2017-222 involves two matters; a section 104(d)(1) citation and a section 104(d)(1) order. The first matter, Citation, No. 9076279, alleges an inadequate preshift examination under 30 C.F.R. §75.360(b).[2] That citation was issued on May 15, 2017 at Consol Penn's Harvey Mine, by MSHA inspector Bryan Yates. In the body of that citation, the inspector states that the hazardous conditions constituting the basis for the inadequate preshift examination are referenced in Citation numbers 9076271, 9076272, 9076273, 9076274, 9076278, and Order number 9076280.

That last identified alleged violation, Order number 9076280, is the second matter within PENN 2017-222. It is a section 104(d)(1) order, citing 30 C.F.R. § 75.400. That standard, titled "Accumulation of combustible materials," provides that "Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on diesel-powered and electric

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[1] It is **DETERMINED** that the CLR is accepted to represent the Secretary in accordance with his notice of appearance, filed September 11, 2017. *Cyprus Emerald Res. Corp.*, 16 FMSHRC 2359 (Nov. 1994).

[2] 30 C.F.R. §75.360 identifies the locations where "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." Subsection (b) then lists 10 locations which are to be examined and an 11th provision within that subsection lists a number of standards that are to be included in making the preshift examination of the identified locations.

equipment therein." 30 C.F.R. § 75.400. Inspector Yates issued the alleged violation identified in Order No. 9076280, the same day, May 15, 2017, as he issued the (d)(1) citation, No. 9076279.

The Secretary's Motion states that "[s]everal of the citations in PENN 2017-223 are referenced and directly related to the citations within [docket no. PENN 2017-222]." Motion at 1. The Respondent's Response concedes that five of the citations in PENN 2017-223 "either relate to the allegations in the Citation and Order in Docket No. PENN 2017-222, or were issued on the same date." Response at 1. The five related citations are identified by the Respondent as Citation Nos. 9076271, 9076272, 9076274, 9076276, and 9076278. *Id*.

However, Respondent contends that "the remaining citations in Docket No. PENN 2017-223 (Citation Nos. 9076258, 9076263, 9076269, 9076268, 9076270, and 9075864) involve different dates, witnesses, facts and events which will distract from the issues in PENN 2017-222 and hamper the presentation of evidence as to the May 15, 2017 inspection." *Id*.

Discussion

All of the citations and the one order involved in these two dockets were issued to Consol Penn's Harvey Mine. In addition, all of the alleged violations were issued between May 8 and May 18, 2017, an 11 day span of time. Further, save one, all of the citations and the one order were issued by Inspector Yates and even for the one citation not issued by Yates, Citation No. 9075864, the termination of that citation, was issued by Yates.

As Administrative Law Judge Thomas P. McCarthy noted in *Shemwell v. Armstrong Coal*, "[g]iven the likelihood that these cases will involve similar or overlapping issues, witnesses, and evidence, . . . consolidation . . . would further the interests of judicial economy and efficiency." *Shemwell v. Armstrong Coal Co., Inc.*, 36 FMSHRC 2352, 2353 (Aug. 2014) (ALJ McCarthy); 2014 WL 4273431, at *1 (FMSHRC August 20, 2014). He further noted that "Commission Rule 12 states that '[t]he Commission and its judges may at any time, upon their own motion or a party's motion, order the consolidation of proceedings that involve similar issues.'" *Id*., citing 29 C.F.R. § 2700.12. The Commission has held that "[a] determination to consolidate lies in the sound discretion of the trial judge." *Id*., citing *Pennsylvania Electric Company*, 12 FMSHRC 1562, 1565 (Aug. 1990).

The same principles apply in this matter. There will be no distraction or hampering of the issues because, although the two dockets will be scheduled to be heard together, they will be taken seriatim, beginning with PENN 2017-0223 and followed by PENN 2017-0222. A conference call will be held soon to set the hearing dates for these dockets.

Accordingly, upon consideration of the motion to consolidate and the response thereto, and in the interest of judicial economy and efficiency in resolving these dockets, it is **ORDERED** that the above-captioned dockets be **CONSOLIDATED**.

SO ORDERED.

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

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/KP

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 26, 2017

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	CIVIL PENALTY PROCEEDINGS
v.	
KEITH MILLER, employed by OAK GROVE RESOURCES,	Docket No. SE 2017-0092 A.C. No. 01-00851-428926 A
and	
CHASE GUIN, formerly employed by OAK GROVE RESOURCES,	Docket No. SE 2017-0093 A.C. No. 01-00851-428927 A
and	
WILLIAM EDWARDS, employed by OAK GROVE RESOURCES, Respondents.	Docket No. SE 2017-0094 A.C. No. 01-00851-428928 A
	Mine: Oak Grove Mine

DISMISSAL ORDER

Before: Judge Feldman

These personal liability matters, brought pursuant to section 110(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(c) ("Mine Act" or "Act"), concern 104(d)(1) Citation No. 8520686 and 104(d)(1) Order No. 8520687 issued on April 26, 2013, at the Oak Grove Mine for impermissible coal dust accumulations and inadequate preshift examinations in violation of the Secretary's mandatory safety standards in sections 75.400 and 75.360(a)(1), respectively.[1] 30 C.F.R. §§ 75.400, 75.360(a)(1).

During the discovery phase of this proceeding, the Respondents sought to depose a Mine Safety and Health Administration ("MSHA") official familiar with MSHA's investigative procedures at its Technical Compliance and Investigation Office ("TCIO") to determine the

[1] 104(d)(1) Citation No. 8520686 and 104(d)(1) Order No. 8520687, issued to Oak Grove Resources, were resolved by means of a Decision Approving Settlement issued on March 22, 2016. Docket Nos. SE 2014-147, SE 2014-231.

reason for the approximate four year interval between the issuance of the underlying citations and the filing of the subject civil penalty petitions on April 13, 2017. In so doing, the Respondents sought to obtain relevant evidence on whether the subject petitions for civil penalty were filed within a "reasonable time" after issuance of a citation or termination of a relevant inspection or investigation, as contemplated by section 105(a) of the Act.[2] 30 U.S.C. § 815(a).

On June 20, 2017, the Secretary filed a Motion for Protective Order seeking to preclude such discovery, arguing that the information was irrelevant and/or protected by privilege. The Secretary's request for a protective order was denied. Order Denying Secretary's Motion for Protective Order, 39 FMSHRC ___ (Sept. 13, 2017).

On October 4, 2017, the Secretary filed a Notice Vacating Violations and Agreement of the Parties, that I construe as a motion to dismiss. Specifically, the Secretary has represented that he wishes to vacate 104(d)(1) Citation No. 8520686 and 104(d)(1) Order No. 8520687 with respect to each of the captioned respondents, and that each party agrees to bear its own fees and other expenses incurred in these matters.

ORDER

Accordingly, **IT IS ORDERED** that the Secretary's request for dismissal **IS GRANTED**. Consequently, the captioned matters **ARE DISMISSED**.

/s/ Jerold Feldman
Jerold Feldman
Administrative Law Judge

[2] Although section 105(a) addresses the timeframe for filing petitions for civil penalties filed against mine operators under section 104(a), a number of ALJ's have found it appropriate to apply the "reasonable time" provision in section 105(a) to personal liability civil penalties proposed pursuant to section 110(c). *See, e.g., White*, 38 FMSHRC 1881 (July 2016) (ALJ); *Dushane*, 38 FMSHRC 1834 (July 2016) (ALJ); *Trujillo*, 35 FMSHRC 1485 (May 2013) (ALJ); *Dyno Nobel East-Central Region*, 35 FMSHRC 265 (Jan. 2013) (ALJ).

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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October 30, 2017

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	CIVIL PENALTY PROCEEDINGS Docket No. VA 2014-243 A.C. No. 44-04534-346270 Docket No. VA 2014-244 A.C. No. 44-04534-346286
v.	Docket No. VA 2014-364 A.C. No. 44-04534-352768 Docket No. VA 2014-365 A.C. No. 44-04534-353549 Docket No. VA 2014-383 A.C. No. 44-04534-353996
A&G COAL CORPORATION, Respondent.	Mine: Prep Plant #2

ORDER IN RESPONSE TO REMAND

These consolidated cases are before me on remand from the Commission. *See A&G Coal Corp.*, 39 FMSHRC __, slip op. No. VA 2014-243 *et al*. (Oct. 2017). On August 16, 2017, I issued an Order to Show Cause to A&G Coal Corporation ("A&G" or "Respondent") because its representative failed to appear for a scheduled conference call to discuss lifting a stay and setting these dockets for hearing. Unpublished Order dated August 16, 2017. The Order gave A&G until August 28, 2017 to show good cause. A&G did not respond to the order and as a result I issued an Order of Default on August 30, 2017. On September 29, A&G filed a petition for discretionary review requesting relief from the default order, in which it argued it did not receive the show cause order and only discovered its issuance when A&G received the order of default. *See* A&G Coal Corporation Petition for Discretionary Review ("PDR") at 3-4.

On review, the Commission noted a lack of clarity regarding the communication issues in the record and remanded the case "to determine whether relief from the default is warranted and for further proceedings as appropriate pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700." 39 FMSHRC __, slip op. at 3 (Oct. 2017).

Default is a harsh remedy, and relief may be granted and the case reopened on the basis of mistake, inadvertence, excusable neglect, or another reason justifying relief. *See* 29 C.F.R. § 2700.1(b); *Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995); *Jim Walter Res., Inc.*, 15 FMSHRC 782, 787 (May 1993). Issuance of such an order by the court is never done lightly

without much thought and deliberation and certainly never with the intent of abusing discretion. In fact, this is the first time in my five year tenure with the agency and fifteen year career as a judge that I recall ever finding it necessary to issue a default order. I do, however, agree that certain aspects of A&G's communicative deficiencies in these cases remain unclear and will take this opportunity to address some of the ambiguities within the record noted by the Commission. In addition, I will set the dockets for a hearing on the merits as well as on the issue of default, and order A&G to remedy its communicative deficiencies as specified below.

I first address the perceived ambiguity regarding who represented A&G throughout the procedural history of these matters. The cases had been stayed since 2015 pending a 110(c) investigation, and until early 2017, Mr. James Bowman served as A&G's representative. On January 27, 2017, Mr. Bowman filed a notice of withdrawal and substitution of counsel that identified Mr. Billy Shelton as the Respondent's new representative and provided his contact information. Notice of Withdrawal and Substitution of Counsel, filed January 27, 2017. Mr. Shelton did not file a formal entry of appearance as required by my prehearing order and 29 C.F.R. § 2700.3(c). *See* 39 FMSHRC __, slip op. at 5 (Althen, Comm'r, concurring).

The court was aware of the withdrawal notice at the time of its filing and initially assumed that Mr. Shelton was representing A&G in these matters. The court copied Mr. Shelton along with representatives for the Solicitor on at least one email requesting a status update on the cases. *See* Court Email to A&G and Solicitor, sent March 20, 2017. On March 20, 2017, the representatives for the Solicitor notified the court that they had instead been working with Mr. Patrick Graham, who, according to the email, was currently representing A&G in these matters. Solicitor's Email to A&G and Court, dated March 24, 2017. In step with their explanation, the Solicitor copied Mr. Graham's email address to the correspondence instead of Mr. Shelton's. *Id*. Mr. Graham did not object or redirect the court to Mr. Shelton at that time, and Mr. Shelton never responded to the court's initial email. Given that no A&G representative had filed a formal entry of appearance or responded to the status emails, the court believed, consistent with the Solicitor's email, that Mr. Graham was now acting as A&G's representative at that time.

What followed were several months of intermittent emails regarding the status of these dockets and the accompanying 110(c) investigation. Correspondences on March 27, June 30, and August 4 were all sent to the Solicitor and Graham. Mr. Graham did not respond to those emails, nor did either party indicate that Mr. Shelton was involved in the cases. On August 7, the Solicitor requested a conference call with the court and Graham to discuss whether the stay should be lifted and a hearing date should be selected. Solicitor's Email to Court and A&G, dated August 7. The court's clerk scheduled the conference call for August 14, 2017 and explicitly instructed Mr. Graham to contact the court within the week prior to the call if he wished to reschedule. Court Email to A&G and Solicitor, dated Aug. 7, 2017. Mr. Graham did not respond, and so the court concluded that the appointment time was acceptable to the parties.

The court decided that a show cause order was necessary when A&G did not appear for the August 14 conference call. Mr. Graham later stated that he was underground at the time of the conference call, which accounts for why he did not answer the attempts by the court and Solicitor to contact him while on the line for the conference call. *See* Aff. of Patrick Graham at 2. Mr. Graham admitted that he was aware of the scheduled conference call and failed to appear or

to notify Mr. Shelton to attend. *Id*. Graham therefore had the opportunity to contact the court on a number of occasions. He could have notified the court prior to the conference call that he would be unable to appear and requested to reschedule. He could have directed the court to contact Mr. Shelton at this point or any point over the past three months during which he was copied on the status emails, or he could have contacted Mr. Shelton himself to ask him to appear for the call or otherwise contact the court. He also could have contacted the court after missing the call to explain the situation. He did none of these things.

In the court's view, A&G had multiple opportunities to adequately maintain communications with the court and continually failed to do so. Pursuant to the court's prehearing order, it is the parties' responsibility to maintain communications with the court, including properly filing entries of appearances, ensuring the court has the proper contact information and following up on any missed calls or emails. The failure to answer emails or follow up in any way on the missed conference call thus prompted the court to issue the Order to Show Cause.[1]

I next address the service of the Order to Show Cause. A&G asserted in its Petition for Discretionary Review that Graham was unaware of the show cause order until the response deadline had lapsed and he received the default order. *See* PDR at 2. Mr. Graham's unawareness remains unexplained.

The Court maintains that it used the proper mailing address on record to serve the show cause order to A&G. Graham stated that A&G has an office in Roanoke, and the address used, 302 South Jefferson Street, Roanoke, VA 24011, is listed on the Virginia Secretary of State's website as A&G's principal office. *See* Aff. of Patrick Graham at 3; 2017 Commonwealth of Virginia State Corporation Commission, *Business Entity Details*, https://sccefile.scc.virginia.gov/Business/0364069 (last visited Oct. 20, 2017). Graham also stated that he received the default order at that same address in early September. Aff. of Patrick Graham at 2. The proof of service shows that both Orders were signed for by Ms. Leslie Wells. *See* Proof of Service – OSC, dated August 16, 2017; Proof of Service – Default Order, dated August 30, 2017. [2]

A&G has not been able to explain why it only received the default Order when both documents were served to the same address and signed for by the same employee. Regardless of

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[1] The Commission's concurrence suggests that the court could have lifted the stay and set the cases for hearing as a lesser alternative sanction. *See* 39 FMSHRC __, slip op. at 6 (Althen, Comm'r, concurring). However, the court did not consider that option a sanction in that lifting the stay and setting the dockets for hearing were in fact, the objectives of the conference call nor, in my view, would it have adequately addressed A&G's repeated failures to communicate with the court.

[2] The court acknowledges that the show cause order bounced back via email, consistent with Graham's assertion that he switched email addresses at some point in August. *See* Aff. of Patrick Graham at 2. As noted above, however, Mr. Graham knew of the conference call and failed to follow up with the court, at which time he could have also informed the court that he was changing email addresses or was unable to access his email. *Id*.

the reasons, the discrepancy stresses the importance for the operator to ensure it will timely receive and respond to all correspondence from the court. The court orders the Respondent to address these communicative deficiencies as specified below, whether they represent a systemic problem within the A&G office that resulted in misplacement of the show cause order, or indicate that the provided address is no longer appropriate for correspondence from the court.

It is lamentable that a simple email or phone call from the operator could have prevented this sequence of events. Nonetheless, I agree with the Commission that in all circumstances default is a harsh remedy and that the record is not yet entirely clear as to A&G's repeated failures to communicate with the court and receive the show cause order. I therefore reserve the issue of default to be addressed at hearing, which will also encompass a hearing on the merits of the citations at issue, and will be scheduled per a separate hearing order. At the hearing, the court expects A&G to fully address for the record good cause explanations for (1) its failure to enter an appearance or in any way communicate with the court after it's representative, Mr. Bowman, withdrew from the proceedings, (2) its failure to participate in the conference call and follow up with the court, and (3) the reasons behind its failure to receive and respond to the show cause order. I expect Mr. Graham, Ms. Leslie Wells, and any other witness that A&G deems necessary to testify under oath to these issues. If a subpoena for Mr. Graham or Ms. Wells is required, A&G must notify the court no later than November 30, 2017.

Accordingly, legal counsel for A&G in these matters, be it Mr. Shelton or another, is **ORDERED** to file a formal Entry of Appearance within 5 days of the issuance of this Order as required by 29 C.F.R. § 2700.3(c) and my prehearing order. Furthermore, A&G or its legal counsel is **ORDERED** to provide written confirmation of A&G's principal mailing address and whether there is an additional address at which A&G will timely and efficiently receive the court's Orders.

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

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