October 2020

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COMMISSION ORDERS

ADMINISTRATIVE LAW JUDGE DECISIONS

No review was granted or denied during the month of October 2020.

COMMISSION ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVE., N.W., SUITE 520N
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October 2, 2020

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	Docket No. KENT 2018-0276 A.C. No. 15-15215-462060
v.	
BEE B&B, LLC	Docket No. KENT 2018-0327 A.C. No. 15-15215-466282
and	
RELIANT CONTRACTING, LLC	Docket No. KENT 2018-0334 A.C. No. 15-16855-583
and	
PASCO SERVICES, LLC	Docket No. VA 2018-0142 A.C. No. 44-03088-467377

BEFORE: Rajkovich, Chairman; Althen and Traynor, Commissioners

ORDER

BY THE COMMISSION:

A representative of Blackjewel, LLC ("Blackjewel") has filed motions to reopen four penalty assessment proceedings and to relieve the operators in those proceedings from Default Orders issued to Bee B&B, LLC ("Bee B&B") (KENT 2018-0276 and 2018-0327), Reliant Contracting, LLC ("Reliant")(KENT 2018-0334), and Pasco Services, LLC ("Pasco")(VA 2018-0142)[1] in the above-captioned case.

Between September 18 and October 16, 2018, the Chief Administrative Law Judge issued Orders to Show Cause in response the operators' perceived failure to answer the Secretary of Labor's Petitions for Assessment of Civil Penalty in these four dockets. By their terms, the Orders to Show Cause were deemed Default Orders between October 19 and December 4, 2018, when it appeared that the operators had not filed answers within 15 days.

As a threshold matter, the motions do not make clear the relationship between Blackjewel, its representative, Mr. Jacobs, and the three operators whose motions are addressed

[1] The four motions addressed in this order were filed by the same operator and rely upon the same rationale and common facts as a basis for re-opening. For the limited purpose of addressing these motions to reopen, we hereby consolidate these four dockets, which involve similar procedural issues. 29 C.F.R. §2700.12.

in this order. If Mr. Jacobs is an owner, partner, officer, or employee of the operators, he is permitted to represent them pursuant to Commission Procedural Rule 3(b)(3). If not, he may be permitted to represent the operators with the permission of the Commission, pursuant to Commission Procedural Rule 3(b)(4).

The Secretary has not opposed reopening, and the context suggests there may be an ongoing relationship among these parties, Mr. Jacobs, and Blackjewel. But we were given no facts supporting that relationship when the motions were filed. We therefore grant the motions to reopen conditionally, and we direct either Mr. Jacobs or the parties themselves to file a motion explaining the relationship between Mr. Jacobs and the operators named in this order and seeking permission to have Mr. Jacobs represent the operators in reopening the motions.[2]

Permission shall be granted retroactively to the dates the original motions were filed, unless the Secretary objects and he demonstrates that permitting said representation would be improper.[3] If the motion directed by this order is not filed within 30 days, our conditional grant will lapse and these motions to reopen will be deemed denied with prejudice.[4]

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

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

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

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[2] If Mr. Jacobs is an owner, officer, partner, or employee of any or all of the operators, a simple explanation of that relationship will be sufficient, without a motion for permission to represent any operators he would be permitted to represent under Commission Procedural Rule 3.

[3] There is an additional problem in KENT 2018-0276. Bee B&B paid the penalty in that docket in full on the same day the motion to reopen it was filed. Any motion made in response to this order must thus explain why this motion is not moot.

[4] Because more than one year has elapsed since the orders in these matters became final, a new or amended motion that does not address the representation issue will be denied as timely. *See* Fed. R. Civ. P. 60(c)(1).

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October 2, 2020

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. BLACKJEWEL, LLC	Docket No. KENT 2018-0316 A.C. No. 000475063

BEFORE: Rajkovich, Chairman; Althen and Traynor, Commissioners

ORDER

BY THE COMMISSION:

These matters arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act").[1] On January 16, 2019, the Commission received from Blackjewel, LLC ("Blackjewel") a "request to reopen" a penalty assessment proceeding and relieve it from the Default Order entered against it. Similar motions were filed in the other 13 dockets subject to this order.

Default was entered against the operator in each of these dockets after the Chief Administrative Law Judge issued an Order to Show Cause in response to Blackjewel's perceived failure to answer the Secretary of Labor's Petition for Assessment of Civil Penalty. By their terms, each of the Orders to Show Cause was deemed a Default Order when it appeared that the operator had not filed an answer within 15 days.[2]

Blackjewel's motions assert that it had failed to answer the Secretary's petitions or to timely respond to the Show Cause Orders because an employee abruptly left the company. The operator's representative states that he was working on a global settlement agreement of many other matters with representatives of the Secretary on March 28 and 29, 2019, when the Secretary's personnel informed him that several of the company's dockets were in default.[3] The

[1] This operator filed a similar motion, relying upon the same reason as a basis for re-opening and stating other common facts, in nine other dockets. For the limited purpose of addressing these motions to reopen, we hereby consolidate docket numbers KENT 2018-0316 and VA 2018-0109, -0130, -0150, -0147, -0151,-0153,-0154,-0155, and -0162, involving similar procedural issues. 29 C.F.R. §2700.12.

[2] The operator did file an untimely answer to the penalty petition in the lead, captioned case on November 23, 2018, after the effective date of default imposed by the Chief ALJ's Show Cause Order.

[3] Each motion to reopen a docket subject to this order recites the same general factual circumstances.

representative promptly filed separate motions to reopen each of the cases between April 4 and 8, 2019.

The Secretary has filed with the Commission a response to each of the operator's motions and does not oppose the operator's motion to reopen any of the cases addressed by this order.

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

The operator filed promptly after the operator became aware of the defaults. The operator asserts a single, common excuse for all of these defaults.[4] Having considered the operator's motion and the Secretary's response not opposing reopening , we find the general excuse sufficient to establish excusable neglect. In the interest of justice, we therefore reopen these 13 dockets and remand them to the Chief Administrative Law Judge for assignment. However, the operator should be aware that failure to attend to its responsibilities under the Act or to explain them more thoroughly in the future may result in denial of subsequent motions.

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

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

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

[4]The operator has two additional pending defaults, KENT 2018-0354 and VA 2018-0019, that vary factually and procedurally from the issues in this case, and are therefore being addressed in separate Commission orders. The operator's representative also filed four motions on behalf of three other operators, each reciting the same basis for re-opening. Those are also being addressed in separate orders.

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October 14, 2020

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	
v.	Docket No. CENT 2019-0270-M A.C. No. 23-02324-486389
BEDROCK QUARRY, LLC	

BEFORE: Rajkovich, Chairman; Althen and Traynor, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). The Commission has received a motion from the operator seeking to reopen a penalty assessment which had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). The Secretary of Labor states that he does not oppose the motion.

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

/s/ Marco M. Rajkovich, Jr.
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October 14, 2020

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. ARCELORMITTAL MINORCA MINE INC.	Docket No. LAKE 2020-0006-M A.C. No. 21-02449-494501

BEFORE: Rajkovich, Chairman; Althen and Traynor, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). The Commission has received a motion from the operator seeking to reopen a penalty assessment which had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). The Secretary of Labor states that he does not oppose the motion.

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

/s/ Marco M. Rajkovich, Jr.
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October 14, 2020

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. A-POSITIVE ELECTRIC CO., INC.	Docket No. PENN 2019-0105 A.C. No. 36-07416-491552-MFH

BEFORE: Rajkovich, Chairman; Althen and Traynor, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). On September 30, 2019, the Commission received from A-Positive Electric Co., Inc. ("A-Positive") a motion seeking to reopen a penalty assessment proceeding and relieve it from the Default Order entered against it.

On August 28, 2019, the then-Acting Chief Administrative Law Judge issued an Order to Show Cause in response to A-Positive's perceived failure to answer the Secretary of Labor's June 27, 2019 Petition for Assessment of Civil Penalty. By its terms, the Order to Show Cause was deemed a Default Order on September 18, 2019, when it appeared that the operator had not filed an answer within 20 days.

A-Positive asserts that it responded to the Order to Show Cause but its response was returned to it due to an incorrect address. The Secretary does not oppose the request to reopen, but requests that A-Positive, having contested the penalty at issue, take its further obligations seriously.

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

In evaluating requests to reopen final orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which the Commission may relieve a party from a final order of the Commission on the basis of mistake, inadvertence, excusable neglect, or other reason justifying relief. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall

be guided so far as practicable by the Federal Rules of Civil Procedure"); *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993). We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits will be permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Having reviewed A-Positive's request and the Secretary's response, we find that A-Positive's request to reopen so soon after the due date to respond to the Order to Show Cause merits reopening of the case. In the interest of justice, we hereby reopen the proceeding and vacate the Default Order. Accordingly, this case is remanded to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

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

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

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

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October 14, 2020

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	
v.	Docket No. WEST 2019-0353 A.C. No. 04-04674-491494
AMES CONSTRUCTION, INC.	

BEFORE: Rajkovich, Chairman; Althen and Traynor, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). On November 4, 2019, the Commission received from Ames Construction, Inc. ("Ames") a motion seeking to reopen a penalty assessment proceeding and relieve it from the Default Order entered against it.

On October 8, 2019, the Chief Administrative Law Judge issued an Order to Show Cause in response to Ames' perceived failure to answer the Secretary of Labor's July 15, 2019 Petition for Assessment of Civil Penalty. By its terms, the Order to Show Cause was deemed a Default Order on October 29, 2019, when it appeared that the operator had not filed an answer within 20 days.

Ames asserts that it never received the Order to Show Cause. The Secretary does not oppose the request to reopen, but requests that Ames, having contested the penalty at issue, take its further obligations seriously.

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

In evaluating requests to reopen final orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which the Commission may relieve a party from a final order of the Commission on the basis of mistake, inadvertence, excusable neglect, or other reason justifying relief. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993). We have also observed that default is a harsh remedy and

that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits will be permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Having reviewed Ames' request and the Secretary's response, we find that Ames' request to reopen so soon after the due date to respond to the Order to Show Cause merits reopening of the case. In the interest of justice, we hereby reopen the proceeding and vacate the Default Order. Accordingly, this case is remanded to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

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

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

/s/ Arthur R. Traynor, III
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October 14, 2020

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. BARRICK CORTEZ INC.	Docket No. WEST 2020-0080-M A.C. No. 26-00827-498902

BEFORE: Rajkovich, Chairman; Althen and Traynor, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). The Commission has received a motion from the operator seeking to reopen a penalty assessment which had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). The Secretary of Labor states that he does not oppose the motion.

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

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

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

/s/ Arthur R. Traynor, III
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October 14, 2020

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. AMERICAN ROCK SALT COMPANY LLC	Docket No. YORK 2019-0068-M A.C. No. 30-03255-484824

BEFORE: Rajkovich, Chairman; Althen and Traynor, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). The Commission has received a motion from the operator seeking to reopen a penalty assessment which had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). The Secretary of Labor states that he does not oppose the motion.

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

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

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

/s/ Arthur R. Traynor, III
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October 19, 2020

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	
v.	Docket No. LAKE 2019-0256 A.C. No. 11-00098-482588
MID-ILLINOIS QUARRY, LLC	

BEFORE: Rajkovich, Chairman; Althen and Traynor, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On May 21, 2019, the Commission received from Mid-Illinois Quarry ("Mid-Illinois") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on February 8, 2019, and became a final order of the Commission on March 11, 2019. Mid-Illinois asserts that the notice of contest was timely sent on March 3, 2019. (Although the operator has not provided proof of mailing, records show that MSHA processed payment for the uncontested citations in the same assessment a few days later on March 8, 2019.) However, the operator received a delinquency notification on May 14, 2019, indicating that MSHA had not received the notice of contest. After

contacting the phone number provided on the delinquency letter, Mid-Illinois filed a motion to reopen on May 21, 2019. Mid-Illinois posits that MSHA did not receive the initial notice of contest due to postal service delays, noting that the delinquency letter (dated April 25) had taken over two weeks to arrive. The Secretary does not oppose the request to reopen, but urges the operator to take steps to ensure that future penalty contests are timely filed.

Having reviewed Mid-Illinois' motion and the Secretary's response, we find that the operator has sufficiently explained its failure to timely contest the citations at issue as the result of inadvertence, mistake, and excusable neglect. Mid-Illinois apparently attempted to timely file the notice of contest, and filed a motion to reopen within a week of learning that the notice of contest had not been received. We note that this is a pro se operator with no history of defaults or motions to reopen in the past 24 months, and that the Secretary does not oppose reopening or dispute the explanation offered by the operator.

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

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

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

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October 19, 2020

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. MILESTONE MATERIALS DIVISION OF MATHY CONSTRUCTION	Docket No. LAKE 2019-0360 A.C. No. 47-03449-497534

BEFORE: Rajkovich, Chairman; Althen and Traynor, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On April 16, 2020, the Commission received from Milestone Materials Division of Mathy Construction ("Milestone") a motion seeking to reopen a penalty assessment proceeding and relieve it from the Default Order entered against it.

On December 9, 2019, the Chief Administrative Law Judge issued an Order to Show Cause in response to Milestone's perceived failure to answer the Secretary of Labor's October 8, 2019, Petition for Assessment of Civil Penalty. By its terms, the Order to Show Cause was deemed a Default Order on December 30, 2019, when it appeared that the operator had not filed an answer within 30 days.

Milestone filed an answer one day after the Order became final. Milestone asserts that the answer was inadvertently filed late because counsel was out of the office for the two weeks following the issuance of the Show Cause Order. Counsel became aware of the Order upon his return to the office on December 31, and promptly filed an answer.[1] The Secretary does not oppose the request to reopen, but urges the operator to take all steps necessary to ensure that future penalty assessments the operator wishes to contest are contested in a timely manner, and that such contests are properly filed.

[1] Milestone alternatively asserts that the penalty contest was timely filed, noting that the Order to Show Cause was sent by certified mail and that "[w]hen a party serves a pleading by a method of delivery resulting in other than same-day service, the due date for party action in response is extended 5 additional calendar days." 29 C.F.R. § 2700.8(b). However, as indicated by the plain language, this extension applies only to responses to party filings, not responses to orders issued by Commission Judges.

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

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

Having reviewed Milestone's request and the Secretary's response, we find the operator's answer was untimely due to an internal delay in processing the Order to Show Cause, i.e., an administrative mistake. To prevent repetition of such a mistake, however, procedures should be put in place to ensure that future orders are timely received and processed even when counsel of record is unavailable.

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

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

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

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

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October 19, 2020

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. MOUNTAIN COAL COMPANY, LLC	Docket No. WEST 2019-0339 A.C. No. 05-03672-486546

BEFORE: Rajkovich, Chairman; Althen and Traynor, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On June 3, 2019, the Commission received from Mountain Coal Company ("Mountain Coal") a motion to reopen the above-captioned case. Mountain Coal thereafter requested to withdraw its motion.

We hereby grant Mountain Coal Company's motion to withdraw in Docket No. WEST 2019-0339. Accordingly, this case is dismissed.

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

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

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

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October 19, 2020

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	
v.	Docket No. WEVA 2019-0392 A.C. No. 46-09028-481238
METTIKI COAL WV, LLC	

BEFORE: Rajkovich, Chairman; Althen and Traynor, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On April 12, 2019, the Commission received from Mettiki Coal WV, LLC ("Mettiki") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on January 15, 2019, and became a final order of the Commission on February 14, 2019. Mettiki asserts that the operator's safety director, who had only recently taken on the position, sent the notice of contest to Mettiki's parent company on or about January 17, 2019. He assumed that the notice of contest

would be forwarded to MSHA, and was unaware that the parent company required authorization to act on Mettiki's behalf. The safety director learned that the notice of contest had not been properly filed upon receiving a delinquency notice, on or about April 8, 2019. Mettiki asserts that steps have been taken to ensure that such an error will not recur. The Secretary does not oppose the request to reopen, but urges the operator to take steps to ensure that future penalty contests are timely filed.

Having reviewed Mettiki's request and the Secretary's response, we find that the mistake in this instance was the result of a new safety director's unfamiliarity with internal protocols, and is unlikely to be repeated. In the interest of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

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

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

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

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October 19, 2020

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	
v.	Docket No. WEVA 2020-0057-M A.C. No. 46-04694-486291
MEADOWS STONE & PAVING, INC.	

BEFORE: Rajkovich, Chairman; Althen and Traynor, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On October 18, 2019, the Commission received from Meadows Stone & Paving, Inc. ("Meadows Stone") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on April 10, 2019, and became a final order of the Commission on May 10, 2019. Meadows Stone asserts that the notice of contest was timely mailed on April 24, 2019, but was not received by MSHA's Civil Penalty and Compliance Office in Arlington, Virginia. A check for payment of the uncontested penalties was mailed at the same time to MSHA's address for payment processing in St. Louis, Missouri. The

Secretary's records indicate that the notice of contest was improperly mailed with the check to the St. Louis address, rather than the Civil Penalty and Compliance Office.[1] The Secretary does not oppose the request to reopen, but urges the operator to take steps to ensure that future penalty contests are timely filed, and are sent to MSHA's Civil Penalty Compliance Office at the address stated in the proposed penalty assessment.

Having reviewed Meadows Stone's motion and the Secretary's response, we find that the delay in this instance arose from a mistake in mailing the notice of contest to the wrong address. In the interest of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

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

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

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

[1] Meadows Stone counters that MSHA must have misplaced the penalty contest, asserting that it could not have been improperly mailed to the St. Louis address because the operator did not have that address until September. However, the operator successfully mailed the check to the St. Louis address in April, at the same time the notice of contest was mailed.

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October 19, 2020

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	Docket No. WEVA 2020-0195 A.C. No. 46-09091-503553
v.	Docket No. WEVA 2020-0205 A.C. No. 46-09212-503556
MARFORK COAL COMPANY, LLC	Docket No. WEVA 2020-0206 A.C. No. 46-09550-503558

BEFORE: Rajkovich, Chairman; Althen and Traynor, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On January 9 and 10, 2020, the Commission received from Marfork Coal Company ("Marfork") motions seeking to reopen penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).[1]

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

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

[1] For the limited purpose of addressing these motions to reopen, we hereby consolidate docket numbers WEVA 2020-0195, WEVA 2020-0205 and WEVA 2020-0206 involving similar procedural issues. 29 C.F.R. § 2700.12.

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessments were delivered on November 13, 2019, and became final orders of the Commission on December 13, 2019. Marfork asserts that the employee responsible for processing the notices of contest missed the mailing deadline because she was out of the office in early December due to an unforeseen medical issue. Upon her return to work, she realized the notices had not been timely filed and contacted counsel. Motions to reopen the captioned dockets were then filed within 30 days. The Secretary does not oppose the request to reopen, but urges the operator to take steps to ensure that future penalty contests are timely filed.

Having reviewed Marfork's request and the Secretary's response, we find that the delay in this instance was an excusable mistake arising from unforeseen circumstances. To prevent such a mistake from recurring, however, we urge the operator to enact procedures that will ensure penalty contests are timely processed even when the normally responsible individual is unavailable.

In the interest of justice, we hereby reopen these matters and remand them to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

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

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

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

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October 20, 2020

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. AMERICAN SAND CO. LLC	Docket No. SE 2019-0207 A.C. No. 40-00798-494965

BEFORE: Rajkovich, Chairman; Althen and Traynor, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On December 20, 2019, the Commission received from American Sand Co. LLC ("American Sand") a motion seeking to reopen a penalty assessment proceeding and relieve it from the Default Order entered against it.

On October 24, 2019, the Chief Administrative Law Judge issued an Order to Show Cause in response to American Sand's perceived failure to answer the Secretary of Labor's August 23, 2019, Petition for Assessment of Civil Penalty. By its terms, the Order to Show Cause was deemed a Default Order on December 16, 2019, when it appeared that the operator had not filed an answer within 20 days.

American Sand asserts that it did not receive the Order to Show Cause because it was sent to the wrong address. The Secretary does not oppose the request to reopen. His response recites two addresses which might have been proper places of service for the operator's representative, but neither of those is the incorrect address shown on the Order to Show Cause as the service address for the order.[1] There is no proof of delivery in the record.

[1] The incorrect address appears to be the result of a typographical error.

Having reviewed American Sand's request, the Secretary's response, and the record in this case, we find that the Order to Show Cause did not result in a final order of default because it was never served on the operator. Thus, the operator has not been properly found to be in default. Accordingly, the operator's motion is denied as moot. This case remains open, and is remanded to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

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

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

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

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October 20, 2020

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	
v.	Docket No. SE 2020-0143 A.C. No. 01-01247-503726
WARRIOR MET COAL MINING, LLC	Docket No. SE 220-0144 A.C. No. 01-01401-503727

BEFORE: Rajkovich, Chairman; Althen and Traynor, Commissioners

ORDER

BY THE COMMISSION:

These matters arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On February 28, 2020, the Commission received from Warrior Met Coal Mining, LLC ("WMCM") two motions seeking to reopen penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).[1]

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

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

[1] The two motions addressed in this order rely upon the same rationale and common facts as a basis for re-opening. For the limited purpose of addressing these motions to reopen, we hereby consolidate these dockets, which involve similar procedural issues. 29 C.F.R. §2700.12.

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment in SE 2020-0144 was delivered on November 16, 2019, and became a final order of the Commission on December 18, 2019. MSHA's records show that the proposed assessment in SE 2020-0143 was delivered on November 18, 2019, and became a final order on December 18, 2019.

The operator's motions state that it mistakenly mailed the notices of contest in both cases to MSHA's St. Louis office, along with its payment of uncontested penalties, instead of to the Civil Penalty Compliance Office.

MSHA sent the operator delinquency notices for both assessments on January 31, 2020. The operator filed its motions to reopen on February 28. The Secretary does not oppose the requests to reopen, but urges the operator to take steps to ensure that future penalty contests are timely filed with the proper office.

Having reviewed WMCM's requests and the Secretary's responses, we find that the operator has explained its failure to timely contest the citations at issue as the result of inadvertence, mistake, and excusable neglect. The motions were filed promptly after MSHA notified the operator of its delinquencies. However, we agree with the Secretary that the operator should show greater care in filing contests to citations and orders. In addition to the two motions addressed in this order, the operator has filed seven other motions to reopen final orders in the past 24 months. The Secretary suggests that he may oppose future motions. Likewise, the Commission may deny future motions seeking extraordinary relief from motions that have become final.

In the interest of justice, we hereby reopen these matters and remand them to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

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

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

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

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October 20, 2020

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. VICTORY ROCK TEXAS, LLC	Docket No. WEST 2020-0090-M A.C. No. 41-05101-486904

BEFORE: Rajkovich, Chairman; Althen and Traynor, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On November 19, 2019, the Commission received from Victory Rock Texas, LLC, ("Victory Rock") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on April 19, 2019, and became a final order of the Commission on May 19, 2019. Victory Rock's motion says that the proposed assessment in this matter was delivered after it believed it had successfully contested the citation.

It says it mistakenly paid the penalty, believing it was due in another case, after receiving MSHA's July 5, 2019, delinquency notice to the operator.

The motion includes completed contest and remittance forms, and states that the operator's check for the uncontested penalties was mailed at the same time as its notice of contest and was deposited by MSHA. However, the operator does not provide proof of delivery of the notice of contest. The Secretary does not oppose the requests to reopen, but urges the operator to take steps to ensure that future penalty contests are timely filed.

Having reviewed Victory Rock's request and the Secretary's response, we find that the operator has sufficiently explained its failure to timely contest the citations at issue as the result of inadvertence, mistake, and excusable neglect. The operator states that it was confused about the status of its contest, and provides facts that support this contention. This is a pro se operator with one other pending motion to reopen and no history of other defaults or motions to reopen in the past 24 months.

In the interest of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

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

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

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

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October 20, 2020

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	Docket No. WEVA 2020-0162 A.C. No. 46-0957-503864
v.	
RAW COAL MINING CO., INC.	Docket No. WEVA 2020-0163 A.C. No. 46-06265-503849

BEFORE: Rajkovich, Chairman; Althen and Traynor, Commissioners

ORDER

BY THE COMMISSION:

These matters arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On December 26, 2019, the Commission received from Raw Coal Mining Co., Inc., ("Raw Coal") two motions seeking to reopen penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).[1]

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

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

[1] The two motions addressed in this order rely upon the same rationale and common facts as a basis for re-opening. For the limited purpose of addressing these motions to reopen, we hereby consolidate these dockets, which involve similar procedural issues. 29 C.F.R. §2700.12.

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on November 18, 2019, and became a final order of the Commission on December 19, 2019. The motions say that the contests of the proposed assessments in these matters were both prepared and mailed by regular mail in the same envelope on November 21, 2019. The representative says in his motion that he discovered that neither case had been recorded as "contested" during a routine search of MSHA's database, and he filed the instant motions to re-open on Dec. 26 – one week after both of these assessments had become final orders of the Commission.[2]

The Secretary does not oppose the requests to reopen, but he rightly characterizes the representative's office procedures as "inadequate," and urges the operator to take steps to ensure that future penalty contests are timely filed.

Having reviewed Raw Coal's requests and the Secretary's responses, we find that the operator has moved promptly for relief. The motion is well-documented and has candidly explains the failure to timely contest the citations at issue. The representative is appropriately contrite in admitting his error. In light of the pro-active discovery of the error, the swift action once the default was noted, the operator's demonstrated good faith in paying the uncontested penalties promptly, and the Secretary's non-opposition, we find that the motion has demonstrated good cause for reopening. However, the operator should heed the Secretary's admonition against the carelessness reflected in this case[3] and take seriously its responsibilities under the Act, or future motions relying on a similar excuse may be denied.

[2] In support of his motion, the representative also notes that the operator paid part of the penalties due in WEVA-2020-0163. MSHA's records reflect that this payment of $1351 was received on November 21, within the 30-day contest period.

[3] The operator's representative said he decided not to use certified mail "due to the low penalties in the two contested cases." Leaving aside the fact that a client's legal matters, once entrusted to a party's representative, are *all* important and deserving of professional management, the penalties in these two dockets totaled more than $7,000.

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

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

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

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

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October 20, 2020

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. MARION COUNTY COAL COMPANY	Docket No. WEVA 2020-0178 A.C. No. 46-01433-500733

BEFORE: Rajkovich, Chairman; Althen and Traynor, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On December 9, 2019, the Commission received from Marion County Coal Company ("Marion County Coal") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on October 8, 2019, and became a final order of the Commission on November 8, 2019. Marion County Coal's motion says that it mailed an amended notice of contest to MSHA's payment office in St. Louis, along with the payment of uncontested penalties, on October 24.[1] It contacted MSHA on November 19 and was told the amended notice of contest had not been accepted because it had been mailed to St. Louis. The operator immediately mailed the notice of contest to MSHA's Civil Penalty Compliance Office. MSHA sent the operator a delinquency notice on December 23, and the operator filed its motion to reopen on January 2, 2020.

The Secretary does not oppose the request to reopen. The Secretary's response notes that the operator's motion claims to have sent notices of contest to St. Louis routinely for 18 months, and that the forms were accepted, but he notes that "the proposed assessment clearly provides instructions to mail any contest forms to the Civil Penalty Compliance Office, in Arlington, VA, for processing." He urges the operator to take steps to ensure that future assessments are timely contested by mailing the forms to the address provided.

Having reviewed Marion County Coal's request and the Secretary's response, we find that the operator has sufficiently explained its failure to timely contest the citations at issue as the result of mistake, inadvertence, and excusable neglect. We therefore find it unnecessary to address the operator's suggestion that submitting the amended contest form to MSHA might be sufficient to confer jurisdiction upon the Commission.[2]

[1] The operator's motion says that the initial notice of contest was also mailed to St. Louis, on October 16, and that MSHA nevertheless accepted the form and noted the contest. The amended notice added citations and orders to those originally contested in the accepted notice.

[2] While the proposed assessment form does clearly instruct operators to send contest-related documents to Arlington, and payments to St. Louis, the mistake the operator made in this case is unfortunately common. It is not unreasonable to question whether there might be an alternate way of administering the contest and payment process that is less likely to repeatedly result in many filers making this same error.

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

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

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

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

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October 23, 2020

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. VICTORY ROCK TEXAS, LLC	Docket No. CENT 2020-0105-M A.C. No. 42-02633-501717

BEFORE: Rajkovich, Chairman; Althen and Traynor, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On March 23, 2020, the Commission received from Victory Rock Texas, LLC, ("Victory Rock") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).[1]

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

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

[1] The motion is dated February 4, but the Commission's Docket Office did not receive it until March 23, 2020. There is no explanation for the discrepancy. We take note of the fact that the motion was prepared and filed at about the time the pandemic began to emerge as a generally disruptive force.

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on October 15, 2019, and became a final order of the Commission on November 15, 2019. Victory Rock's motion says that the proposed assessment in this matter was delivered while it was awaiting word from MSHA about a requested conference of the citations. Victory Rock claims that it returned its notice of contest "quickly," but has provided no proof of mailing or delivery.

MSHA sent the operator a delinquency notice on December 30, 2019. On January 9, 2020, the operator contacted MSHA to question the status of its contest. The operator says it was told that MSHA had not received a notice of contest, and that MSHA advised it to file a motion to reopen. The Secretary does not oppose the requests to reopen, but urges the operator to take steps to ensure that future penalty contests are timely filed.

Having reviewed Victory Rock's requests and the Secretary's responses, we find that the operator has sufficiently explained its failure to timely contest the citations at issue as the result of inadvertence, mistake, and excusable neglect. This is a pro se operator with no history of defaults or motions to reopen in the past 24 months. The operator's motion was not filed with the Commission until March 23 – more than 30 days after the operator says it learned from MSHA that no contest had been filed. However, the motion is dated February 4. While the discrepancy is unexplained, there is no indication of bad faith on the operator's part, and the Secretary does not oppose reopening or dispute the facts asserted in the operator's motion. While we excuse this pro se operator's failure to explain why the motion was not filed within 30 days of discovery of its default in this case, the operator must ensure that future motions to reopen are filed promptly, or that the failure to do so is adequately explained.

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

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

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

/s/ Arthur R. Traynor, III
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October 23, 2020

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	Docket No. WEST 2019-0516 A.C. No. 02-01049-000490002
v.	Docket No. WEST 2019-0535 A.C. No. 02-01049-000491992
PINTO VALLEY MINING CORP.	

BEFORE: Rajkovich, Chairman; Althen and Traynor, Commissioners

ORDER

BY THE COMMISSION:

These matters arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On September 9 and September 13, 2019, the Commission received from Pinto Valley Mining Corp. ("Pinto Valley") motions seeking to reopen penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).[1]

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

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

[1] The two motions addressed in this order rely upon the same rationale and common facts as a basis for re-opening. For the limited purpose of addressing these motions to reopen, we hereby consolidate these dockets, which involve similar procedural issues. 29 C.F.R. §2700.12.

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment in WEST 2019-0516 was delivered on May 13, 2019, and became a final order of the Commission on June 13, 2019. MSHA's records show that the proposed assessment in WEST 2019-0535 was delivered on June 4, 2019, and became a final order on July 5, 2019. In both motions to reopen, Pinto Valley says that it followed a reliable procedure to contest citations and orders by certified mail, return receipt requested.

Affidavits by the mine's interim safety superintendent state that the notices of contest were timely filed in both cases. In WEST 2019-0516, the affidavit states that the operator made a partial payment of $328, which it sent with the notice of contest on May 14. The affidavit submitted in WEST 2019-0535 states that the completed notice of contest was mailed on June 4. The affidavit in this case also states that a partial payment was made, of $9219.[2] Both motions include copies of the proposed assessments and completed contest forms. They do not include copies of the certified mail receipts, but the affidavits claim that it is common not to receive these forms for MSHA filings.

MSHA sent the operator delinquency notices, on August 19 for WEST 2019-0535, and on August 26 for WEST 2019-0516. The operator filed its motions to reopen on September 9 and September 16. The Secretary does not oppose the requests to reopen, but urges the operator to take steps to ensure that future penalty contests are timely filed.

Having reviewed Pinto Valley's requests and the Secretary's responses, we find that the operator has sufficiently explained its failure to timely contest the citations at issue as the result of inadvertence, mistake, and excusable neglect. The motions were filed promptly after MSHA notified the operator of its delinquencies, and in both cases the operator states that it timely mailed the notices of contest, but did not receive a receipt for delivery. The agency received partial payment for both dockets. Both motions are well-supported by affidavits and documentation.

[2] MSHA's response to each motion acknowledges receipt of the payments submitted by the operator on July 25, 2019. The assessments in both cases had become final by that date.

In the interest of justice, we hereby reopen these matters and remand them to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

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

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

/s/ Arthur R. Traynor, III
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October 23, 2020

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	
v.	Docket No. WEVA 2019-0479 A.C. No. 46-08610-484227
ROCKWELL MINING, LLC	

BEFORE: Rajkovich, Chairman; Althen and Traynor, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On December 9, 2019, the Commission received from Rockwell Mining, LLC, ("Rockwell") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on March 4, 2019, and became a final order of the Commission on April 4, 2019. Rockwell's motions say that it had contested the citation at issue in this case, but inadvertently paid the penalty when the proposed assessment was delivered. It learned of its mistake on April 29 and filed a motion to reopen on May 29, 2019.

The Secretary does not oppose the requests to reopen, but urges the operator to take steps to ensure that future assessments are timely contested.

Having reviewed Rockwell's requests and the Secretary's responses, we find that the operator has sufficiently explained its failure to timely contest the citations at issue as the result of excusable neglect. However, we do note that this is the fifth motion to reopen filed by the operator in the past 24 months.[1] The operator should heed the Secretary's admonition and take seriously its responsibilities under the Act and should be aware that future motions relying on a similar excuse may be denied.

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

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

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

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

[1] The third and fourth motions to reopen are pending before the Commission. These motions rely on different facts and a different rationale for reopening, and the operator is represented by a different law firm in those motions, which are being consolidated and addressed in another order.

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October 23, 2020

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. ROCKWELL MINING, LLC	Docket No. WEVA 2020-0150 A.C. No. 46-09152-000500943 Docket No. WEVA 2020-0151 A.C. No. 46-09427-000500948

BEFORE: Rajkovich, Chairman; Althen and Traynor, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On December 9, 2019, the Commission received from Rockwell Mining, LLC, ("Rockwell") two motions seeking to reopen penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).[1]

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

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

[1] The two motions addressed in this order rely upon the same rationale and common facts as a basis for re-opening. For the limited purpose of addressing these motions to reopen, we hereby consolidate these dockets, which involve similar procedural issues. 29 C.F.R. §2700.12.

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on October 7, 2019, and became a final order of the Commission on November 7, 2019. Rockwell's motions say that the proposed assessments in this matter were delivered while its safety manager – the person responsible for processing assessments for action by the corporate safety director – was on vacation. On his return, the safety manager was "overwhelmed" and had difficulty catching up. He marked the citations that he believed should be contested and forwarded the contest forms to the safety director during the first week in November.

While the safety director sent the forms to MSHA on November 7, MSHA did not receive them until November 13, six days after the proposed assessments had become final decisions of the Commission. The Secretary does not oppose the requests to reopen, but urges the operator to take steps to ensure that future penalty contests are timely filed.

Having reviewed Rockwell's requests and the Secretary's responses, we find that the operator has moved promptly for relief and has sufficiently explained its failure to timely contest the citations at issue as the result of excusable neglect. However, we do note that these are the third and fourth motions to reopen filed by the operator in the past 24 months.[2] The operator should heed the Secretary's admonition and take seriously its responsibilities under the Act and should be aware that future motions relying on a similar excuse may be denied.

[2] The operator has another motion to reopen pending before the Commission, but it relies on different facts and a different rationale for reopening.

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

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

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

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 26, 2020

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. PROSPECT MINING AND DEVELOPMENT COMPANY, INC.	Docket No. SE 2016-0193 A.C. No. 01-03389-405410

BEFORE: Rajkovich, Chairman; Althen and Traynor, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). On August 6, 2019, the Commission received from Prospect Mining and Development Company, Inc., ("Prospect") a motion to reopen the above-captioned case. Prospect thereafter informed the Commission that it no longer had any desire to reopen this matter.

Accordingly, this case is dismissed.

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

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

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

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

October 29, 2020

THEODORE OESAU v. ROGERS GROUP, INC.	Docket No. CENT 2019-0276-DM

BEFORE: Rajkovich, Chairman; Althen and Traynor, Commissioners

ORDER

BY THE COMMISSION:

This discrimination proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). On September 3, 2020, Theodore Oesau, by counsel, filed a petition for discretionary review challenging a decision by a Commission Administrative Law Judge issued on August 4, 2020, dismissing the complaint of discrimination brought by Mr. Oesau. 42 FMSHRC 625 (Aug. 2020) (ALJ).

In his decision, the Judge noted that the Commission would not be monitoring incoming physical mail or facsimile transmissions and that parties were encouraged to submit all filings through the agency's electronic filing system. *Id.* at 640 n.10. The Judge further noted that if a party was unable to file through the Commission's electronic filing system, the party should email a copy, and the Commission would file the copy. *Id.* Contrary to the Judge's instructions, Oesau's counsel filed the petition by facsimile transmission only.

The judge's jurisdiction over this case terminated when he issued his decision on August 4. 29 C.F.R. § 2700.69(b). 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); 29 C.F.R. § 2700.70(a). The Commission's procedural rules do permit filing by facsimile transmission. 29 C.F.R. § 2700.5(c)(2). Thus, we find good cause for treating Oesau's petition as timely filed. *See generally McCoy v. Crescent Coal Co.*, 2 FMSHRC 1202, 1204 (June 1980).

Due to exigencies created by the COVID-19 pandemic, the Commission has not been monitoring incoming mail and facsimile transmissions and did not act on the petition within the statutory period for considering requests for discretionary review. 85 Fed. Reg. 50825 (Aug. 18, 2020). The Judge's decision became a final order of the Commission 40 days after its issuance by operation of section 113(d)(1) of the Mine Act, 30 U.S.C. § 823(d)(1).

Relief from a final Commission judgment or order is available to a party under Fed. R. Civ. P. 60(b)(1) in circumstances such as mistake, inadvertence, or excusable neglect. 29 C.F.R. § 2700.1(b) (Federal Rules of Civil Procedure apply "so far as practicable" in the absence of applicable Commission rules); *e.g., Lloyd Logging, Inc.,* 13 FMSHRC 781, 782 (May 1991). In the interest of justice, we reopen this proceeding and consider the merits of the petition. *See North Star Contractors, Inc.,* 17 FMSHRC 886, 887 (June 1995).

Section 113(d)(2) of the Mine Act, 30 U.S.C. § 823(d)(2), provides that review of a decision of an Administrative Law Judge may be granted upon specified grounds and upon the affirmative vote of two Commissioners. Such review is discretionary. 30 U.S.C. § 823(d)(2)(A). However, after consideration by the Commissioners, no two Commissioners voted to grant Oesau's petition. Accordingly, this order reopening the case and denying relief on the merits now constitutes the Commission's final order. The right to obtain review of Commission decisions in a United States court of appeals is set forth in 30 U.S.C. § 816(a)(1).

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

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

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

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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October 20, 2020

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDINGS Docket No. SE 2019-0075 A.C. No. 01-02901-481428
v.	Docket No. SE 2019-0146 A.C. No. 01-02901-487211
PEABODY SOUTHEAST MINING, LLC, Respondent	Shoal Creek Mine

DECISION

Appearances: Emily Roberts, Esq., and Christopher Smith, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Petitioner;

Arthur Wolfson, Esq., Fisher & Phillips, LLC, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Bulluck

These cases are before me upon Petitions for Assessment of Civil Penalty filed by the Secretary of Labor ("Secretary"), on behalf of the Mine Safety and Health Administration ("MSHA"), against Peabody Southeast Mining, LLC ("Peabody"), pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 815(d). The Secretary seeks a total civil penalty of $76,061.00 for three violations of his mandatory safety standards.

A hearing was held in Birmingham, Alabama. The following issues are before me: (1) whether Peabody violated the standards; (2) whether the violations were attributable to the level of gravity alleged; (3) whether the violations were attributable to the degree of negligence alleged; (4) whether the violations were attributable to unwarrantable failures to comply with the standards; and (5) the appropriate penalties. The parties' Post-hearing Briefs are of record.

For the reasons set forth below, I **AFFIRM** one citation and two orders, as issued, and assess penalties against Respondent.

I. Joint Stipulations

The parties have stipulated as follows:

1. Peabody Southeast Mining, LLC, is an operator, as defined in section 3(d) of the Federal Mine Safety and Health Act of 1977, as amended, hereinafter, the Mine Act, 30 U.S.C.

§ 802(d), at the mine at which the citation and orders at issue in this proceeding were issued.

2. Shoal Creek Mine, Mine ID: 01-02901, is a mine, as defined in section 3(h) of the Mine Act. 30 U.S.C. § 802(h).

3. Operations of Peabody, at the mine at which the citation and orders were issued, are subject to the jurisdiction of the Mine Act.

4. This proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judge, pursuant to sections 105 and 113 of the Mine Act.

5. Shoal Creek Mine is operated by Respondent.

6. Payment of the total proposed penalty in this matter will not affect Peabody's ability to continue in business.

7. The individuals whose names appear in Block 22 of the citation and orders were acting in an official capacity, as authorized representatives of the Secretary of Labor, when the citation and orders were issued.

8. The citation and orders were issued and served by a duly authorized representative of the Secretary of Labor upon an agent of Peabody at the date, time, and place stated in the citation and orders, as required by the Act.

9. Exhibit A, attached to the Secretary's Petition in Docket Numbers SE 2019-0075 and SE 2019-0146, contains authentic copies of the citation and orders, with all modifications or abatements, if any.

Tr. 18-20.

II. Factual Background

Peabody operates the Shoal Creek Mine ("mine"), an underground coal mine in Adger, Jefferson County, Alabama.[1] The mine runs two continuous miner sections and two longwall sections over three shifts a day: owl from 11:00 p.m. to 7:00 a.m.; day from 7:00 a.m. to 3:00 p.m.; and evening from 3:00 p.m. to 11:00 p.m. Tr. 280, 289. Mining at Shoal Creek is a wet process, the mine is located near a river, which further contributes to the wet conditions, and it is a gassy mine subject to five-day spot inspections. Tr. 37-38, 150, 176, 192-93.

[1] Drummond Company, Incorporated, ("Drummond") owned and operated Shoal Creek Mine until December 4, 2018, when Peabody Energy took over ownership, and Peabody Southeast Mining, LLC, took over operations. Ex. P–16 at 1, 19.

On December 11, 2018, at 1:05 p.m., as the H-2 longwall section was actively mining, a sizable tear occurred in the H-2 belt, causing coal to spill and belt strings to wrap around belt rollers. Tr. 208-09, 213-16. The belt was shut down, the accumulations were cleared from underneath the belt and moved to the walkway, and the belt was running coal again by 5:15 p.m. Tr. 217-24. At some time after the belt had torn, an anonymous hazard complaint was called in to MSHA, reporting "gobbed out" rollers turning in coal in the H-2 belt entry takeup area. Tr. 37-38. Consequently, on the morning of December 12, MSHA Birmingham field office supervisor Thomas Chatham arrived at the mine to conduct an inspection of the H-2 belt, in addition to the regularly scheduled five-day spot inspection. Tr. 30-31, 37-38. The inspection party included safety supervisor Matt Selman and UMWA representative Steve Miller and, when it reached the takeup area of the H-2 belt entry, the belt was running, accumulations were observed around the takeup, and the belt was shut down and the take up guarding removed. Tr. 48-55, 72, 109; Ex. P–1. Thereafter, when Chatham observed that the accumulations were in contact with the belt and rollers, and that belt strings were wrapped around rollers, bearings, and the takeup frame, he issued an unwarrantable failure citation to Peabody for accumulations of combustible materials. Tr. 49-56, 72-76. Miners were immediately assigned to clean the area and, ultimately, the accumulations were removed from the mine by December 17. Tr. 235-238, Ex. P–1.

On February 19, 2019, MSHA Inspector Darryl Allen conducted an E01 inspection at Shoal Creek. Tr. 277, 284. Before entering the mine, he reviewed the examination books and identified potential hazards in the West Main No. 4 belt entry, the alternate escapeway for the H-2 and H-3 longwall sections. Tr. 286-93, 300-01. The inspection party included Allen's supervisor Thomas Chatham, safety supervisors Brett Clements and Matt Selman, and miners' representative Tim Wise. Tr. 312-13, 459-60. At the beginning of the inspection, Clements drove the mantrip to the West Main No. 4 entry and dropped off the inspection party at crosscut 84, then entered the escapeway at crosscut 81 where he had parked. Tr. 460-62. The others, walking outby crosscut 84, came upon holes, filled with muck and water, between crosscuts 83 and 82 and met Clements around crosscut 83, and Allen issued a withdrawal order to Peabody for failure to maintain the alternate escapeway in passable condition. Tr. 315-19, 345, 461-63, 480-82; Ex. P–6. The crew was removed immediately from the affected area, miners were assigned to scoop the muck and fill the holes with road mix and gravel, and the order was terminated at 12:35 p.m. that afternoon. Tr. 341-43, 466, 490-91; Ex. P–6.

On March 11, 2019, Inspector Allen returned to Shoal Creek to continue his quarterly inspection and, upon arrival, reviewed the examination books and identified accumulations in the North Main No. 1 belt entry. Tr. 511-13, 518-39; Ex. P–11 at 1. The inspection party included Allen's supervisor Thomas Chatham, foreman Mike Earl, and miners' representative Morris Studdard. Tr. 545; Ex. P–11 at 1. At the start of the inspection, Allen observed a seized roller near crosscut 10, Earl shut down the belt, Allen observed seven more seized rollers while continuing inby and issued a citation for the eight seized rollers between crosscuts 10 and 22 ½, and he issued another citation for two nonfunctional fire hose outlets. Tr. 541-47, 664-65; Ex. P–14(a), (b). Thereafter, upon observing accumulations in the tail area, Allen issued a withdrawal order to Peabody for accumulations of combustible materials. Tr. 548-51, 672-73; Ex. P–10. The crew was withdrawn immediately from the affected area, miners were assigned to remove the coal fines and coal muck from under the tailpiece, walkway, and full width of the entry, and the order was terminated the next day. Tr. 587-92; Ex. P–10.

III. Findings of Fact and Conclusions of Law

1. Citation No. 9136082

Inspector Thomas Chatham issued 104(d)(1) Citation No. 9136082 on December 12, 2018, alleging an "S&S" violation of section 75.400 that was "reasonably likely" to cause an injury that could reasonably be expected to result in "lost workdays or restricted duty," and was caused by Peabody's "high" negligence and unwarrantable failure to comply with the standard.[2] The "Condition or Practice" is described as follows:

> Accumulations of combustible material in the form of loose coal and coal fines were allowed to accumulate in the H-2 belt entry. Upon inspection of the H-2 belt, accumulations of loose coal and coal fines were observed in the belt take up. The coal accumulation measured up to 30 inches deep in the take up. The accumulations were in contact with turning rollers and the moving H-2 belt. The accumulations were also observed in the walkways on the walkway and off-walkway side of the belt for the length of the take up. The accumulations measured approximately 120 feet long, 21 feet wide, and up to 30 inches in depth. Also numerous rollers in the take up had accumulations of belt string around the end of the roller. The belt string had accumulations of loose coal, coal fines, and float coal dust in and on the strings. The strings were tightly wrapped around the bearing and the belt roller frame. It is reasonably likely that miners would receive injuries from smoke inhalation that would result in lost work days or restricted duty. The air in the H-2 belt entry is used to ventilate the active H-2 longwall face. The H-2 belt entry is also the alternate escape way for the active H-2 long wall. Standard 75.400 was cited 121 times in two years at mine 0102901 (121 to the operator, 0 to a contractor). This violation is an unwarrantable failure to comply with a mandatory standard.

Ex. P–1. The citation was terminated on December 17, after the operator had removed the accumulations from the mine, and rock dusted the area. Ex. P–1.

A. Fact of Violation

In order to establish a violation of one of his mandatory safety standards, the Secretary must prove that the violation occurred "by a preponderance of the credible evidence." *Keystone*

[2] 30 C.F.R. § 75.400 provides that "[c]oal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on diesel-powered and electric equipment therein."

Coal Mining Corp., 17 FMSHRC 1819, 1838 (Nov. 1995) (citing *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152) (Nov. 1989)).

The Secretary maintains that Peabody violated section 75.400, and that longwall outby supervisor Joe Bell and fire boss Lee Esch admitted that the cited accumulations created a fire hazard. Sec'y Br. at 14. Peabody argues that the cited material was spillage, and that it had a "reasonable time" to clean it up. Resp't Br. at 6-8.

1. Summary of Testimony

a. Thomas Chatham

Inspector Thomas Chatham testified for the Secretary that early on December 12, 2018, he was notified of an anonymous hazard complaint that rollers were "gobbed out" and turning in coal in the H-2 belt entry takeup area at Shoal Creek, that he expanded his spot inspection to include that area, and that the mine was on a five-day spot inspection cycle for methane. Tr. 36-38. Chatham explained that the H-2 belt entry served as an alternate escapeway for the active H-2 longwall, that it ventilated the H-2 longwall working face and that, if a fire were to occur, miners at the face or utilizing the escapeway would be exposed to smoke. Tr. 70-71, 75-76, 100. He testified that he reviewed three consecutive pre-shift reports after the belt tear had occurred, and that none noted accumulations or cleanup in the H-2 belt takeup area. Tr. 76, 81-83; Ex. P–5 at 2-5.[3] Chatham stated that when he arrived at the takeup area, he smelled burning rubber, observed accumulations of loose coal and coal fines on the walkway and off-walkway sides of the H-2 belt, and that no one was working in the area. Tr. 49-55, 71-72, 109. He stated that the belt was turned off and the takeup guards removed, that he observed under the takeup accumulations in contact with every takeup roller and the belt, and that belt strings, covered with loose coal, coal fines and coal dust, were wrapped around a number of rollers, bearings, and the takeup frame. Tr. 49-55, 73, 85-87. By his measurements, the accumulations approximated 120 feet long, 21 feet wide, and 12 to 30 inches deep. Tr. 71-72. He explained that the belt is coated with fire resistant material, that when it is unaligned, the coating can wear off and expose fabric strings, and that they gather around rollers and collect coal dust. Tr. 85-86. He also explained that non-permissible belt drive motors in the area could cause internal sparks, but acknowledged that he did not inspect the motors' cables, and that methane was only produced outby the cited area. Tr. 54, 92, 97. While he noted that a lot of water was present, he stated that the accumulations felt dry in a few places and that, based on his observations, he thought that a fire was likely to occur. Tr. 58-61, 74. He stated that he spoke to longwall outby supervisor Joe Bell and longwall coordinator Randy Deavours about the belt tear, and ascertained that cleaning had begun on December 11, but neither mentioned that any cleaning had taken place on December 12. Tr. 77, 100-06, 111-12; Ex. P–3. He also described the depictions in the photographs that he had taken of the H-2 belt takeup area before and after termination of the citation. Tr. 57-68; Ex. P–4. In his opinion, spraying is a common cleaning method at Shoal Creek, but not effective, and he admitted that he had no personal experience with it or knowledge of whether it had been

[3] Chatham cited Peabody for an inadequate pre-shift examination of the H-2 belt takeup area on December 12, and Peabody subsequently withdrew its contest of that citation. Tr. 80-82; Ex. P–2.

employed to address this condition. Tr. 78-79, 88-89, 103, 106, 113. Additionally, he stated that if cleaning had been scheduled beyond December 11, the belt should have been stopped and the takeup guards removed, although he acknowledged that the mine was not required to shut the belt down to clean. Tr. 106, 113. He explained that based on the condition and his conversation with management about its cleaning efforts, he issued an unwarrantable failure citation, noting that the accumulations were the most extensive that he had cited at Shoal Creek during that quarter. Tr. 104, 107.

b. Lee Esch

Owl shift fire boss Lee Esch testified for the Secretary that the H-2 belt entry was the secondary escapeway for the H-2 longwall, that it provided clean air to the working face and that, during owl shift on December 12, he conducted his pre-shift examination of the H-2 belt takeup area specifically looking for combustible materials in contact with frictional heating sources that can dry out wet materials, noting that, previously, he had seen fires in the mine. Tr. 117-19, 139. He stated that he finished his examination between 5:30 and 6 a.m., and that the takeup area was examined around 4 a.m. Tr. 127-29, 138. He explained that he examined the takeup from the walkway side, with the guards in place obstructing his view, and that he did not record any hazards in the H-2 belt entry; customarily, according to him, examiners did not record hazards if they were being worked on, but this practice was scrapped after the inspection. Tr. 123-26, 140-41. Esch admitted that he had no independent memory of examining the area beyond reviewing his notes, that he was not present when Chatham took photographs nor did he dispute their authenticity, and that the conditions depicted in them needed to be addressed because they could cause a fire. Tr. 124, 135-36.

c. Joe Bell

Day shift longwall outby supervisor Joe Bell testified for Peabody that he had worked at Shoal Creek for about 10 years, and that his team was responsible for cleaning areas outby the longwall face, including the H-2 belt takeup area. Tr. 145-49. He explained that longwall mining at Shoal Creek is a wet process, and that the H-2 belt takeup is particularly wet due to its location in the mine and the belt shortening as the longwall advances, all of which make the area prone to accumulations. Tr. 150, 191-92, 224. According to Bell, the belt tear on December 11 created "[a] mess . . . the pieces got wound up in a lot of rollers . . . . So there was a lot of things wrapped around stuff and then on top of that, the material," and it took "all hands on deck" to clean and repair the belt, with the "mindset . . . to get [the belt] running," because accumulations cannot be pumped onto the belt when it is shut down. Tr. 154-58, 217. He stated that in order to clean the spill and get the belt running, the takeup guarding was removed, seven to eight miners shoveled the accumulations from under the belt onto the walkway, and the belt was repaired; most of the accumulations had been moved onto the walkway by the time that he left, around 4 p.m. Tr. 157-61. He estimated that, given the extensiveness of the spill and the slow cleaning process, it would have taken a few shifts to finish the job. Tr. 196-202.

By Bell's account, on December 12, between 7:30 and 8:30 a.m., the H-2 belt was running and, with the takeup guards in place obstructing his view while he was working, he did not have an opportunity to inspect the takeup, and he observed material and a piece of discarded

belt in the walkway. Tr. 163-65, 187-89. He stated that his crew washed the takeup area for approximately a half hour, explaining that when the guards are up, shoveling can clear some of the accumulations and hosing cleans the rest, and that his crew had planned to pump the material onto the belt. Tr. 163-66, 189-91. Thereafter, he stated, longwall coordinator Randy Deavours called, assigning him and two miners to attend to a fuel cell hazard elsewhere and, before leaving the area, the belt was still running, and he turned off the pump because there was no one to run it. Tr. 166-68, 193-94. Bell testified that when he returned to resume cleaning in about an hour, the inspection party was there, and he observed the condition at the takeup for the first time; he qualified his testimony by stating that he had not looked closely at it earlier because he had been focused on clearing material from the walkway, but then admitted that, generally, he had seen it earlier in the shift. Tr. 168-74, 193-96. In his opinion, the material on the walkway had washed back under the takeup due to the wetness of the area. Tr. 176. Bell agreed with Chatham's narrative of the condition on the face of the citation, and testified to the accuracy of Chatham's photographs, noting that it would be dangerous to run the belt in that condition. Tr. 177-88. His testimony as to the photographs of the belt strings was inconsistent, however; he acknowledged the depictions as what he had seen upon his departure on December 11 and arrival on December 12, then denied having seen them at all on December 11, and not until he was with Chatham on December 12. Tr. 182-84, 187, 194-96.

d. Randy Deavours

Day shift longwall coordinator Randy Deavours testified for Peabody that he oversees production and outby supervisors, and that he had worked at Shoal Creek for two years and four months. Tr. 204-05. He stated that air from the H-2 belt entry and the primary escapeway combined to ventilate the longwall face, and that the primary escapeway provided the majority of the fresh air. Tr. 206-08. By his account, the H-2 belt tore at 1:05 p.m., and he immediately went to the belt takeup, finding a tear of approximately 30 feet, and an extensive spill of wet coal. Tr. 209, 213-16. He explained that accumulations cannot be pumped when the belt is off because it is needed to carry them out of the mine. Tr. 216-19. He stated that after the belt tore, approximately six miners shoveled the accumulations from under the belt onto the walkway, finishing around 5:00 p.m., and that the belt was repaired. Tr. 216-19. Deavours testified that the belt was restarted at 5:15 p.m., that the longwall made 4 ½ passes during evening shift and 2 during owl shift, and that production continued into the morning. Tr. 220-24, 238-40; Ex. P–5 at 22-24, 36. He also testified that cleaning continued from day into evening and owl shifts and that, once the belt was running, accumulations were pumped onto it, as well as loaded onto wheelbarrows and skid steers and dumped onto it. Tr. 218-24; Ex. P–5 at 22-24, 36. According to Deavours, at the beginning of December 12 day shift, he had instructed Bell's crew to continue cleaning the walkway at the belt takeup and that, shortly thereafter, he reassigned them to move a fuel cell located too close to a high voltage cable in another area. Tr. 225-29. He explained that by the time that Bell's men arrived at the fuel cell, he had also found accumulations in contact with a roller around crosscuts 8 to 10, and that he had assigned another outby man to address it. Tr. 227-31. He continued, testifying that he then received a call that MSHA had shut down the H-2 belt because of accumulations at the takeup, and that he traveled there and observed extensive wet accumulations, acknowledging that he did not touch them. Tr. 230-34, 241, 243-46. He explained that the area was prone to accumulations, that cleaning in that area occurred almost every day and that, based on his experience, he believed that the cited

condition was caused by the material left in the walkway washing back under the belt and takeup. Tr. 231-34, 241. He opined that the belt should not have been running in that condition, and explained that in order to terminate the citation, 10 to 13 man crews, over at least three shifts, used wheelbarrows and skid steers to load the belt, that the belt was "bumped" so that it could be loaded, and that pumping was not possible because the belt was not running. Tr. 235-40.

e. James Barnett

Evening shift utility miner connection and certified examiner James Barnett testified for Peabody that he performed examinations once or twice a week and that, on December 11, he conducted a pre-shift examination of the H-2 belt entry around 8 p.m., and that the guards were in place and the belt, carrying a lot of water, was conveying coal. Tr. 249-54. He asserted that he observed miner Ricky Shubert standing in the walkway hosing coal from under the belt takeup, and that he did not make note of accumulations in the H-2 takeup area because cleaning was underway. Tr. 252-59; Ex. P–5 at 3. He also stated that he did not observe any contact between the accumulations and the rollers or the belt, that he would have stopped the belt had that been the case because contact can cause fires, and that he had previously seen mine fires due to bearing failure and belt strings. Tr. 252-57.

2. Analysis

A violation of section 75.400 occurs "where the quantity of combustible materials is such that, in the judgment of the authorized representative of the Secretary, it could cause a fire or explosion if an ignition source were present." *Old Ben Coal Co.*, 2 FMSHRC 2806, 2808 (Oct. 1980) ("Old Ben II") (footnote omitted). This judgment is viewed through the objective standard of whether a "reasonably prudent person, familiar with the mining industry and the protective purposes of the standard, would have recognized the hazardous condition that the regulation seeks to prevent." *Utah Power & Light Co.*, 12 FMSHRC 965, 968 (May 1990), *aff'd* 951 F.2d 292 (10th Cir. 1992).

Peabody launches its challenge to the violation by focusing on the cause of the accumulation, i.e., the extensive belt tear, and arguing that given the size of the spill, it had a reasonable amount of time to clean it up. Resp't Br. at 6-8 (citing *Old Ben Coal Co*., 1 FMSHRC 1954, 1958 (Dec. 1979) ("Old Ben I") (noting that "some spillage of combustible materials may be inevitable in mining operations"); *Utah Power & Light Co*., 951 F.2d 292, 295 n.11 (10th Cir. 1991) (stating that "loose coal . . . . must be cleaned up with reasonable promptness, with all convenient speed"); *but see Black Beauty Coal Co.*, 703 F.3d 553, 559 n.6 (D.C. Cir. 2012) (rejecting the argument that operators have a "reasonable time" for cleaning before a section 75.400 citation can be issued)). While the Commission has stated that "[w]hether a spillage constitutes an accumulation under the standard is a question, at least in part, of size and amount," (*Old Ben I*, 1 FMSHRC at 1958) the D.C. Circuit has explained that, although spills can occur quickly, accumulations of combustible materials substantial enough to cause or propagate a fire are prohibited, even if recent. *Black Beauty*, 703 F.3d at 558-59, 559 n.6; *see Utah Power*, 951 F.2d at 295 n.11; *Prabhu Deshetty*, 16 FMSHRC 1046, 1049 (May 1994) (rejecting a defense based on recentness of a spill). Moreover, the D.C. Circuit has explained that the discussion of

"reasonable promptness" in *Utah Power* is dicta that has not been followed by the 10th Circuit in subsequent cases, and that operators are not afforded a reasonable time to clean accumulations before a violation of section 75.400 can be found. *Black Beauty*, 703 F.3d at 558-59, 559 n.6. Here, the evidence clearly establishes that there were substantial accumulations of coal in the H-2 belt takeup area. Chatham's account of the condition is largely corroborated by his contemporaneous notes and photographs, and even Bell and Esch admitted that it would have been dangerous to run the belt in the condition documented by Chatham's photographs. Ex. P–3 at 3-4. While the accumulations were the result of a substantial belt tear, they were significant enough to require major cleanup efforts before resuming operation of the belt to run coal.

Peabody also argues that it had cleared the accumulations from underneath the H-2 belt in the takeup area, that the material must have washed back, and that cleaning would have continued but for the inspection and Bell's crew being called away. Resp't Br. at 7-8. While I credit that after the belt tear on December 11 at 1:05 p.m., Peabody had moved the accumulations under the belt onto the walkway before restarting the belt later that evening, and that cleaning had continued during the subsequent evening, owl, and day shifts, the accumulations were never completely removed from the belt takeup area and taken out of the mine. Notably, on December 12 day shift, Deavours assigned Bell's men to continue the cleanup of the belt takeup area, but then diverted them to another hazard elsewhere. Bell turned off the pumps when he left the area, and the belt continued to run. However, even if the outby crew's cleaning had not been subordinated to another task that morning, its efforts would have constituted a mere fraction of the 10 to 13 miner crew, working over the course of three shifts, to clean up the "mess" and terminate the citation.

While the record establishes that the H-2 belt takeup area was very wet, the evidence that the accumulations were dry in several spots was unrebutted. The Commission has long explained that "wet coal accumulations pose a significant danger in underground coal mines" because they can dry out through frictional contact with the belt or rollers, and propagate a fire or explosion. *Mach Mining, LLC*, 40 FMSHRC 1, 3-6 (Jan. 2018) (citing *Consolidation Coal Co.*, 35 FMSHRC 2326, 2329-30 (Aug. 2013); *Black Diamond Coal Mining Co.*, 7 FMSHRC 1117, 1120-21 (Aug. 1985)).

Based on the evidence in its entirety, I find that the accumulations of loose coal and coal fines, measuring 120 feet long, 21 feet wide, and up to 30 inches deep, were substantial and extensive, that they were contacting the H-2 belt and rollers, that belt strings coated in loose coal, coal fines, and float coal dust were wrapped around rollers, bearings, and the takeup frame, and that the accumulations had dried out in places from frictional contact and, therefore, were combustible. Accordingly, I conclude that Peabody violated section 75.400.

B. Gravity

The Secretary argues that there was a realistic potential for fire to occur. Sec'y Br. at 14-16. Conversely, Peabody maintains that an ignition was unlikely because of the wet conditions in the mine, the absence of methane in the area, and the unlikelihood of belt drive motor cables sparking. Resp't Br. at 8-10. Peabody also argues that the accumulations would have been cleaned up in the context of "continued normal mining operations" and, accordingly, would not

have been reasonably likely to cause injury had the inspector not intervened. Resp't Br. at 8-10 (citing *U.S. Steel*, 7 FMSHRC 1125, 1130 (Aug. 1985) (explaining that when considering whether a violation is S&S, the evaluation of the reasonable likelihood of injury should be made in the context of "continued normal mining operations")). Finally, Peabody contends that Chatham's claim that he smelled burning rubber should be discounted. Resp't Br. at 10.

The Commission has recently restated the four *Mathies* criteria that the Secretary must establish in order to prove that a violation is S&S under *National Gypsum*:

> (1) the underlying violation of a mandatory safety standard; (2) the violation was reasonably likely to cause the occurrence of the discrete safety hazard against which the standard is directed; (3) the occurrence of that hazard would be reasonably likely to cause an injury; and (4) there would be a reasonable likelihood that the injury in question would be of a reasonably serious nature.

Peabody Midwest Mining, LLC, 42 FMSHRC___, slip. op. at 5 (June 2, 2020); *see ICG Illinois, LLC*, 38 FMSHRC 2473, 2475-76 (Oct. 2016); *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2038 (Aug. 2016); *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984); *see also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103-04 (5th Cir. 1988) (approving *Mathies* criteria), *aff'g* 9 FMSHRC 2015, 2021 (Dec. 1987). Resolution of whether a violation is S&S must be based "on the particular facts surrounding that violation." *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (Apr. 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007, 2011-12 (Dec. 1987).

The fact of violation has been established, satisfying the first *Mathies* criterion, and the discrete safety hazard against which section 75.400 is directed is fire or explosion contributed to by accumulations of combustible materials.

The S&S determination must be made at the time that a citation is issued "without any assumptions as to abatement;" however, if active abatement is underway at the time of citation issuance, the sufficiency of the abatement measures must be considered when determining whether a violation contributes to the hazard. *See generally Knox Creek Coal Corp.*, 811 F.3d 148, 165-66 (4th Cir. 2016); *Mach Mining*, 40 FMSHRC at 1, 5-6; *Paramont Coal Co.*, 37 FMSHRC 981, 985 (May 2015); *U.S. Steel*, 7 FMSHRC at 1130; *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). In this case, active abatement was not underway at the time of inspection. Bell's crew's cleaning of the takeup area had been interrupted before Chatham came upon the condition, and those efforts were marginal, at best, in light of the significant accumulations. Accordingly, based on the cleanup deficiency from belt tear to inspection, I find that, in the context of continued normal mining, the accumulations would have existed.

In cases involving combustible accumulations, the Commission has clarified that when considering the second and third steps of the *Mathies* analysis, "the likelihood of an injury resulting depends on the existence of a 'confluence of factors' that could trigger the ignition or explosion. Factors include any potential ignition sources, the presence or potential for presence of methane, float coal dust accumulations, loose coal or other ignitable substance, and the types

of equipment operating in the area." *Mach Mining*, 40 FMSHRC at 3-4 (citations omitted) (citing *McCoy Elkhorn Coal Corp.*, 36 FMSHRC 1987, 1992 (Aug. 2014)); *see also Utah Power*, 12 FMSHRC at 971; *Texasgulf*, 10 FMSHRC at 501-03. Belts and belt rollers contacting accumulations can be ignition sources, even absent defects. *Mach Mining*, 40 FMSHRC at 4-6; *Buck Creek*, 52 F.3d at 135; *see Knox Creek Coal Corp.*, 36 FMSHRC 1128, 1139-42 (May 2014). Finally, it is well established that a fire in an underground coal mine poses a significant risk of injury to miners. *Buck Creek*, 52 F.3d at 135-36; *Black Diamond*, 7 FMSHRC at 1120.

Despite Shoal Creek's gassy nature, there is no evidence that methane was liberated in the H-2 belt takeup area. However, the possibility of sparks emanating from the non-permissible belt drive motors was unchallenged, as was the smell of burning rubber, which was consistent with the condition observed in the takeup area. Furthermore, the numerous points of frictional contact between the accumulations and the belt and several rollers, along with the belt strings wrapped tightly around several rollers, bearings, and the frame, had begun to dry out the accumulations. Accordingly, I find it reasonably likely that the coal accumulations contributed to the occurrence of a fire in the mine, and that the second *Mathies* criterion has been satisfied.

Moving on to the third and fourth *Mathies* criteria, evidence establishing that intake air from the primary escapeway, combined with intake air from the H-2 belt entry, would dilute any smoke or contaminants reaching the longwall face, does not eradicate the danger of exposing the section crew to toxic air at the face and in the alternate escapeway, no matter how minimal the contamination. As the Seventh Circuit has expressed in *Buck Creek*, a finding that "a fire burning in an underground coal mine would present a serious risk of smoke and gas inhalation" is a common sense conclusion. 52 F.3d at 135-36; *see also Black Diamond*, 7 FMSHRC at 1120 (recognizing that "ignitions and explosions are major causes of death and injury to miners"). Therefore, based on the evidence established in this case and the relevant precedent, I find that a mine fire would be reasonably likely to cause an injury, and a reasonable likelihood that the resultant injury would be of a reasonably serious nature, satisfying the *Mathies* test. Accordingly, this violation was S&S.

C. Unwarrantable Failure and Negligence

Unwarrantable failure is aggravated conduct constituting more than ordinary negligence, characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *CAM Mining, LLC*, 38 FMSHRC 1903, 1908-09 (Aug. 2016); *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); *Emery Mining Corp.*, 9 FMSHRC 1997, 2001-04 (Dec. 1987); *see also Buck Creek Coal*, 52 F.3d at 136. The Commission has recognized the relevance of several factors in determining whether conduct is "aggravated" in the context of unwarrantable failure, such as the extensiveness of the violation, the length of time that the violation has existed, whether the violation posed a high risk of danger, whether the violation was obvious, the operator's knowledge of the existence of the violation, the operator's efforts in eliminating the violative condition, and whether the operator has been put on notice that greater efforts are necessary for compliance. *See McCoy Elkhorn*, 36 FMSHRC at 1993 (citing *Manalapan Mining Co.*, 35 FMSHRC 289, 293 (Feb. 2013); *IO Coal Co.*, 31 FMSHRC 1346, 1350-57 (Dec. 2009); *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev'd on other grounds*, 195 F.3d 42 (D.C. Cir. 1999)). Each case must be

examined on its own facts to determine whether an actor's conduct is aggravated, or whether mitigating circumstances exist. *Eagle Energy, Inc.*, 23 FMSHRC 829, 834 (Aug. 2001) (citing *Consolidation Coal*, 22 FMSHRC 340, 353 (Mar. 2000)). Although some factors may be irrelevant to a particular scenario, all relevant factors must be examined. *ICG Hazard LLC*, 36 FMSHRC 2635, 2637-38 (Oct. 2014) (citing *IO Coal*, 31 FMSHRC at 1351).

The Secretary contends that, given the time that it took to clean up the accumulations, the condition was extensive. Sec'y Br. at 16-20 (citing *McCoy Elkhorn*, 36 FMSHRC at 1993 (upholding a finding of extensiveness where it took an entire crew four hours to clean up accumulations)). Peabody makes the counter argument against extensiveness, in that the accumulations were confined mostly to the belt takeup area. Resp't Br. at 15. In this regard, the Commission has explained that extensiveness of the violative condition has traditionally been determined by examining the magnitude of the violation as it existed at the time that the citation was issued. *See Eastern Assoc. Coal Corp.*, 32 FMSHRC 1189, 1195 (Oct. 2010). The accumulations observed by Chatham were 120 feet long, 21 feet wide, and up to 30 inches deep, in contact with the belt and numerous rollers, and drying out in places, and belt strings were wrapped around rollers, bearings, and the takeup frame. Furthermore, it took 10 to 13 miners, over at least three shifts, to clean up the accumulations. Accordingly, this violation was extensive and clearly obvious, both aggravating factors.

The Secretary asserts that accumulations existing for more than a shift, as in this case, constitute aggravated conduct. Sec'y Br. at 17 (citing *Buck Creek*, 52 F.3d at 136 (upholding a finding of unwarrantable failure where the accumulations existed for more than one shift after identification during a pre-shift examination)). Peabody argues that the condition existed for less than 24 hours, and that the accumulations washed back under the belt at some point after they had been moved onto the walkway. Resp't Br. at 14-15. The record establishes that the belt tear occurred on December 11 day shift around 1 p.m., and that Peabody cleared the coal from under the belt onto the walkway before the belt was restarted on evening shift around 5:15 p.m., but that the accumulations were never completely removed from the walkway and taken out of the mine until after the citation was issued. Crediting that washback from the walkway occurred at some point after the initial cleanup of the spill, it is clear that the accumulations remained in the belt takeup area over a period spanning four shifts, from mid-day shifts December 11 to December 12. Accordingly, the violation existed for a significant length of time, an aggravating factor.

The Secretary argues that the S&S designation indicates that this condition was highly dangerous. Sec'y Br. at 17-19 (citing *San Juan Coal*, 29 FMSHRC 125, 132-33, 134-35 (Mar. 2007) (finding that the judge failed to relate facts considered in finding that a violation was S&S to the "degree of danger" prong of the unwarrantable failure analysis)). On the other hand, Peabody minimizes the danger by contending that the accumulations were wet. Resp't Br. at 14-15. The evidence establishes that the accumulations were extensive, drying out due to frictional contact with the belt and rollers, and that belt strings, coated with loose coal, coal fines and float coal dust, were wrapped around rollers, bearings, and the frame, posing a serious risk of ignition; additionally, this belt entry was an alternate escapeway, an essential component of the evacuation scheme for the active H-2 longwall in the event of an emergency. Accordingly, I find that this condition posed a high risk of danger, also an aggravating factor.

The Secretary contends that Peabody had knowledge of the condition because Barnett and Esch had examined the area, and Bell's crew was cleaning there on the day of inspection. Sec'y Br. at 16-20. Peabody counters that it was aware of the condition at the time of the belt tear and took remedial action, but makes no representation as to its awareness of the intervening washback prior to Chatham's inspection. See Resp't Br. at 11-14. It is well settled that an operator's knowledge may be established, and a finding of unwarrantable failure supported, where an operator reasonably should have known of a violative condition. *See Drummond Co., Inc*., 13 FMSHRC 1362, 1367-69 (Sept. 1991); *Emery*, 9 FMSHRC at 2002-04. The record establishes that the belt was repaired and the accumulations moved from under it onto the walkway prior to resumption of production during the evening shift, and that cleaning continued during the succeeding owl and day shifts. Peabody's general knowledge, that washback occurred in the wet takeup area and that the accumulations were never completely removed from the walkway and taken out of the mine, has also been established. While Peabody's washback contention has been credited, it has failed to establish when it occurred during the course of events. However, Barnett's observation of hosing under the belt takeup during his evening pre-shift examination on December 11 should have put Peabody on notice that accumulations were back under the belt, notwithstanding the customary non-recording of hazards actively being addressed. Likewise, lack of notation of the hazard in the December 12 owl pre-shift report raises speculation as to whether the washback under the belt was overlooked or simply not recorded because of active spraying. See Ex. P–5 at 2-5. In any case, by day shift on the morning of inspection, the dispatchment of Bell's crew to clean in the takeup area clearly establishes Peabody's knowledge of the "mess" that Chatham would encounter a short while thereafter. Accordingly, there are several indicators that lead to a finding that Peabody knew or should have known of the ongoing condition, an aggravating factor.

The Secretary maintains that Peabody's cleaning efforts were insufficient, given the condition. Sec'y Br. at 18-19 (citing *San Juan Coal*, 29 FMSHRC at 134-35 (explaining that "subordination of cleanup efforts to other work may support an unwarrantable failure finding"); *Peabody Coal* Co., 14 FMSHRC 1258, 1260-63 (Aug. 1992) (affirming an unwarrantable failure where one miner had been assigned to clean the cited area, but it took five miners four hours to abate the violative condition)). Peabody responds that its cleanup efforts were reasonable in light of its knowledge of the condition after the spill, the fact that cleanup would have continued, and because Chatham's opinions about the condition and cleanup efforts were erroneous. Resp't Br. at 12-15 (citing *Peabody Midwest Mining, LLC*, 41 FMSHRC 340, 352 (June 2019) (ALJ) (finding that the violation was not unwarrantable based, in part, on the mine's determination that its planned cleanup would eliminate the condition before it became hazardous)). Peabody also contends that "good faith" cleanup efforts can mitigate a finding of unwarrantable failure. Resp't Br. at 11-13 (citing *Cannelton Industries, Inc*., 20 FMSHRC 726, 734 (July 1998); *see also Peabody Midwest Mining, LLC*, 41 FMSHRC 279, 303 (May 2019) (ALJ); *Peabody Midwest Mining, LLC*, 40 FMSHRC 87, 141 (Jan. 2018) (ALJ)). The Commission has stated that when an operator has been placed on notice of a problem, the level of priority that it places on abatement is relevant, and that the focus is on the operator's abatement efforts prior to being cited. *Enlow Fork Mining Co.*, 19 FMSHRC 5, 13-19 (Jan. 1997). Additionally, good faith cleanup efforts, even if based on a mistaken belief, can be a mitigating factor; however, the belief must be reasonable under the circumstances. *Amax Coal Co.*, 19 FMSHRC 846, 851 (May 1997); *see also Cannelton*, 20 FMSHRC at 734. Obviously, the cleanup efforts after the belt was restarted

did not eliminate the condition, and Deavours' reassignment of Bell's crew, on the morning of December 12, to address another problem, indicates that Peabody failed to appreciate the seriousness of the accumulations and prioritize abatement. This is especially so in light of its general knowledge that washback occurred regularly in the H-2 belt takeup area, and given the extensiveness of the accumulations left in the walkway. Finally, Peabody raises legitimate questions as to Chatham's understanding of belt operation during cleanup, its use of hoses for cleaning, and its cleanup efforts during December 12 owl and day shifts. However, any misconceptions that Chatham held about running the belt or hosing as essential components of its cleaning process, as well as Peabody's actual efforts on December 12, have no bearing on Peabody's overall inattention to the magnitude and seriousness of the accumulations, an aggravating factor.

Repeated similar violations may also be relevant to an unwarrantable failure determination to the extent that they serve to put an operator on notice that greater efforts are necessary for compliance with a standard. *Amax Coal*, 19 FMSHRC at 851; *see also Consolidation Coal Co.*, 23 FMSHRC 588, 595 (June 2001). The Commission has rejected the argument that only past violations, involving the same regulation and occurring in the same area, may be properly considered when determining whether a violation is unwarrantable. *Peabody Coal*, 14 FMSHRC at 1263. Shoal Creek was cited 121 times for violations of section 75.400 in the two years preceding this citation, and 25 times in the quarter. Peabody took control of Shoal Creek from Drummond on December 4, 2018 and, at the time of inspection, one section 75.400 citation had been issued directly to Peabody. Ex. P–16 at 10, 19, 21. Notably, management employees Bell and Deavours retained employment with Peabody at Shoal Creek after having worked for Drummond. Moreover, it was well known that the area was prone to accumulations and washback. Taken together, the evidence establishes that Peabody was on notice that greater efforts for compliance were necessary, particularly in the cited area, another aggravating factor.

After considering all the aggravating factors, I conclude that Peabody was highly negligent, and that this violation was the result of its unwarrantable failure to comply with the standard.

2. Order No. 9136320

Inspector Darryl Allen issued 104(d)(1) Order No. 9136320 on February 19, 2019, alleging an "S&S" violation of section 75.380(d)(1) that was "reasonably likely" to cause an injury that could reasonably be expected to be "fatal," and was caused by Peabody's "high" negligence and unwarrantable failure to comply with the standard.[4] The "Condition or Practice" is described as follows:

> The alternate escapeway leading from H-3 and H-2 longwall sections, to the west service shaft, is not maintained in safe condition to always assure passage of anyone, including disabled persons. Thick muddy water, containing coal fines, and covering

[4] 30 C.F.R. § 75.380(d)(1) provides that "[e]ach escapeway shall be . . . [m]aintained in a safe condition to always assure passage of anyone, including disabled persons."

> thick coal muck, has been allowed to accumulate in the West Main 4 belt entry, (A.E.) from cross cut 82 to 83. The muddy water and muck, covering tire ruts, rocks, coal, and other stumbling hazards, exists in three low areas of the belt entry between cross cuts 82 and 83, each measuring approximately 20 ft. in length x the full width of the walkway side of the belt entry, and ranging from 12 to 18 inches deep. A 13 hp. pump is observed suspended in the water at cross cut 82, but is not in operation, and will not pump most of the thick mud and coal fine material. No pumps or pump lines are currently located at the other two low areas. This condition was reported to management on 2/18/19 following the 8:00 p.m. to 11:00 p.m. pre-shift examination, and was entered in the outby pre-shift records under Hazardous Conditions, or Violation of a Mandatory Safety Standard, and was countersigned by the Owl Shift Mine Foreman. No corrective actions appear to have been taken. The operator has engaged in aggravated conduct constituting more than ordinary negligence. This violation is an unwarrantable failure to comply with a mandatory standard. Standard 75.380(d)(1) was cited 17 times in two years at mine 0102901 (17 to the operator, 0 to a contractor). This violation is an unwarrantable failure to comply with a mandatory standard.

Ex. P–6. The order was terminated on February 19, after the operator had removed water, coal fines, and coal muck from the holes, filled them with road mix and gravel, and cleared a six-foot-wide travelway in the alternate escapeway. Ex. P–6.

A. Fact of Violation

The Secretary contends that Peabody violated the standard because the alternate escapeway did not satisfy the "functional passability" test in *Utah Power*. Sec'y Br. at 33-34 (citing 11 FMSHRC 1926, 1930 (Oct. 1989)).[5] Conversely, Peabody seeks vacation of the order, maintaining that the cited area in the West Main No. 4 belt entry was safe to travel, that three miners traveled the area without any problem and, challenging Allen's account of the condition as uncorroborated, that establishment of a violation is largely a factual determination. Resp't Br. at 21-22.

1. Summary of Testimony

a. Darryl Allen

Inspector Darryl Allen testified for the Secretary that, upon arrival at Shoal Creek in the early morning of February 19 to conduct a quarterly E01 inspection, he found in the February 18 evening pre-shift report, "water and muck deep 82 to 83 and 82" in the West Main No. 4 belt

[5] The "functional passability" test in *Utah Power* predated section 75.380(d)(1) but, nonetheless, includes consideration of disabled miners' ability to safely utilize escapeways.

entry, and that men were assigned to address the issue, but that the work was not completed. Tr. 277, 284, 286-87, 292-93, 300-01, 305, 309-10; Ex. P–9(a), (b). He explained that the West Main No. 4 belt entry is the alternate escapeway for the H-2 and H-3 working faces, and that it is subject to examination every shift. Tr. 296-98, 358-59. He stated that Peabody safety supervisor Brett Clements transported the inspection party to crosscut 84, where it crossed over to the West Main No. 4 belt entry, and that he encountered thick "boot-sucking" muck and water, measuring 12 to 18 inches, in holes located between crosscuts 82 and 83, each hole stretching the width of the walkway for a distance of approximately 20 feet, with tire ruts, coal fines, and rocks throughout the area. Tr. 312-13, 316-19, 338-39, 373. He testified that the first hole was filled with about 12 inches of water and muck, that the second hole, in which he almost fell, was filled with muck higher than the top of his boots, and that the third hole, filled with water and soupy muck, was approximately 18 inches deep. Tr. 316-24. He stated that there was a pump in the hole by crosscut 82 that was not running, and explained that it was not designed to handle muck. Tr. 324, 327-29. By his account, there were no indications that any cleaning had been underway, and he speculated that the muck could have accumulated over a period of weeks. Tr. 328-33. Consequently, he explained, he issued a withdrawal order because he was concerned about miners being impeded or losing balance and falling if they needed to use the escapeway and that, because the travelway was too narrow for vehicles, miners would have to travel on foot through this condition and then another 1 ⅓ miles in order to reach the exit. Tr. 297, 311-12, 316-17, 326, 331-34. Allen also expressed concern about the ability of disabled miners to escape in an emergency, noting that navigating the area in the cited condition with a stretcher would be dangerous. Tr. 375-77.

b. Clarence Whitt

Owl shift pump supervisor Clarence Whitt testified for Peabody that he had worked at Shoal Creek for about 16 years, that he typically reviews the fire boss book between 10:20 and 10:30 p.m., that he records his cleaning assignments on the pre-shift report, and that he is directly notified of high priority issues by radio. Tr. 388-98, 400-01. He asserted that he reviewed the February 19 evening pre-shift report, that it identified water and muck at crosscut 82 and between crosscuts 82 and 83 in the West Main No. 4 belt entry, and that he went directly to that area with a pumper and found a hole at crosscut 82, approximately 20 feet long, 8 to 10 feet wide, and 8 to 10 inches deep, filled with water and muck, noting that he could not see the bottom of the hole. Tr. 396-97, 402-03, 411-15; Ex. P–9(a). As he continued inby, he stated, he found a second hole filled with muck, and that he did not walk the length of the hole or over to crosscut 83. Tr. 405, 416, 421-22. He stated that thick muck filled both holes, but that he did not identify any tripping hazard between crosscuts 82 and 83, and he admitted that he was focusing on cleanup when assessing the condition rather than escaping in an emergency. Tr. 416-18, 421, 428, 432. Whitt also equivocated as to whether the muck was "boot sucking;" having testified that it was not, he was referred to his contradictory deposition testimony that it was, then was not, admitting that the change in his prior testimony had occurred after conferring with counsel. Tr. 406, 420, 425, 430, 431. He explained that the pump cannot remove muck, and that it is located at crosscut 82 because the area is low lying and anything uphill drains down to it. Tr. 402-06, 409, 415-16, 419. He admitted that he did not know the depth of the muck after pumping water off the hole at crosscut 82 and acknowledged that, based on his experience, muck takes time to build up. Tr. 420, 425, 430-31. He testified that after pumping the water, he was called

away to service the main sump, that he never called for anyone to clean up the muck, and that he asked Joe Kennedy to check whether the water had built back up in the hole at crosscut 82. Tr. 403, 418-22. Finally, he explained that mobile equipment, such as skidsteers, was necessary to remove muck and, while no equipment was there when he left, he heard over the radio that it was on the way. Tr. 418-24.

c. Joe Kennedy

Owl shift pump supervisor Joe Kennedy testified for Peabody that he had worked at Shoal Creek for over six years. Tr. 433-34. He explained that he and Whitt would review the examination records at the beginning of the shift and divide the work, noting that the records are important for passing information between shifts. Tr. 434, 443-44, 450. He testified that at the beginning of February 19 owl shift, he was working in an area without radio communication, that he left there between 4:30 and 5:30 a.m., and that he received a call about the West Main No. 4 belt entry. Tr. 436-39. He stated that he proceeded to crosscut 82 and found a little water and a lot of muck and that, as he walked the area, he did not need waders and encountered no tripping hazards. Tr. 439-41. He testified that he pumped water at crosscut 82 for 15 to 30 minutes at 6 a.m., then called for someone to scoop the muck because the pumps can only handle water, and that he expected it to take place during day shift because there was no mobile equipment in the area at the time. Tr. 441-43, 456-57.

d. Brett Clements

Brett Clements testified for Peabody that he had been working as a safety supervisor at Shoal Creek since 2013. Tr. 458. He stated that he dropped off the inspection party at crosscut 84, parked the mantrip at crosscut 81 and entered the West Main No. 4 belt entry there, that he met the inspection party around crosscut 83, and that he called mine foreman Doug Altizer about missing lifeline cones and muck that Allen had identified in the belt entry. Tr. 460-63, 487-89, 500-01. Explaining that the entry slopes down from crosscut 81 to 82 and that water and muck were known to accumulate at that low point, he stated that he encountered a hole filled with muck and water at crosscut 82 and another filled with soupy muck between crosscuts 82 and 83, approximating both holes at 15 to 20 feet long, about walkway width, and 12 to 13 inches deep. Tr. 462, 480-83, 486, 490-91. He asserted that he had no trouble walking through the holes, that no water came up over his 16-inch boots, and that he did not encounter any trip and fall hazards, noting that he did not recall Allen stumbling. Tr. 462-64. In his opinion, withdrawing the miners was unnecessary because the material did not obstruct his travel in the escapeway. Tr. 465. He testified about the photographs that he had taken, indicating how high the muck had come up on his boots in the holes at crosscut 82 and between crosscuts 82 and 83, and identifying the inactive pump in the hole at crosscut 82. Tr. 466-67, 472-76, 496-98; Ex. R–1(a)-(c). He explained that soupy muck would need cleaning with a skid steer because it was too thick to pump, and stated that he was not present when the order was terminated by scooping with a skid steer and filling the holes with road mix and gravel, enabling water to flow down to the pump. Tr. 477, 480-486, 490-91, 500.

2. Analysis

Section 75.380(d)(1) requires underground coal mine operators to maintain each escapeway in safe condition to assure passage of anyone, including injured miners. *Maple Creek Mining, Inc*., 27 FMSHRC 555, 556-59 (Aug, 2005). Operators must also keep escapeways clear for miners to quickly exit the mines in the event of emergencies. *Mach Mining, LLC*, 35 FMSHRC 2937, 2942-43 (Sep. 2013) (citing *Am. Coal Co.*, 29 FMSHRC 941, 948, 953-54 (Dec. 2007)). The Commission has also explained that the proper consideration "is not whether miners have been safely traversing the route under normal conditions, but rather the effect of the condition of the route on miners' ability to expeditiously escape a dangerous underground environment in an emergency." *Am. Coal*, 29 FMSHRC at 950 (citations omitted). Moreover, the Commission has noted that "[o]f particular importance in determining whether an escapeway is adequate under section 75.380 is the ability of miners to transport an injured miner on a stretcher through it." *Maple Creek*, 27 FMSHRC at 560.

While Peabody correctly contends that the question of whether an escapeway is passable is largely a factual one, its arguments - - that because Whitt, Kennedy, and Clements walked the area between crosscuts 82 and 83 eight times, collectively, without difficultly, escaping miners would not be impeded, and that Allen overstated the seriousness of the condition - - are not persuasive. *See* Resp't Br. at 21-22 (citing *Am. Coal*, 29 FMSHRC at 948; *Maple Creek*, 27 FMSHRC at 559-61; *Big Laurel Mining Corp.*, 37 FMSHRC 2001, 2032 (Sept. 2015) (ALJ)). The plain wording of section 75.380(d)(1) makes clear that it contemplates consideration of whether **disabled miners** would be able to pass safely, and is not restricted to able-bodied miners who, in this case, were already aware of the condition and not acting in response to an emergency.[6] *See Maple Creek*, 27 FMSHRC at 556-57, 560 n.5 (addressing the fact that use of an escapeway during an emergency is significantly more dangerous than using the same entry as a travelway in a non-emergency situation).

The evidence clearly establishes that there were three holes spanning the width of the walkway, filled with either water standing atop muck or a mixture of water and thick muck, i.e., soup, and that there were ruts and rocks throughout the area. While witnesses reported having encountered different depths of material in the holes, given the size and irregularities of the depressions, in conjunction with evidence lacking in exactitude as to where Allen and each miner was standing within them, I credit all testimony on this point, and find that water and muck in these holes ranged from 8 to 18 inches deep. Likewise, I credit Allen that one of the holes contained deep, boot-sucking muck, simply because the other witnesses may not have walked through the exact area in which he barely avoided falling. Regarding the inconsistent testimony as to the number of holes in the entry, I credit Allen's testimony that there were three based on his detailed description, supported by his contemporaneous notes, and the fact that neither Clements nor Whitt traveled the full length of the cited area. *See* Ex. P–8 at 2-5. Therefore, based on the evidence in its entirety, I find that the conditions in the West Main No. 4 alternate

[6] Peabody's cite to *American Coal*, involving a violation of section 75.380**(b)**(1) and providing guidance on escapeways generally, does not address safe passability of disabled miners and, consequently, is not instructive on this point. *See* Resp't Br. at 21 (citing 29 FMSHRC at 948).

escapeway would impede miners' safe passage under emergency conditions, particularly miners carrying a stretcher or assisting an injured miner, and that Peabody violated section 75.380(d)(1).

B. Gravity

The Secretary contends that this violation was S&S because in an emergency, miners were reasonably likely to be delayed, and delay could cause serious injury. Sec'y Br. at 34-36. On the contrary, Peabody contends that *Cumberland Coal* requires consideration of the facts and circumstances surrounding an alleged violation of an emergency standard when determining whether it is S&S, and that delay was unlikely. Resp't Br. at 23-24 (citing *ICG Illinois*, 38 FMSHRC at 2483 (Althen, dissenting); *Mach Mining*, 36 FMSHRC at 1530 (Cohen, concurring)). Peabody also argues that the muck, water, and holes would have been eradicated in the context of continued normal mining and, accordingly, would not have been reasonably likely to cause injury had the inspector not intervened. Resp't Br. at 25-26 (citing *U.S. Steel*, 7 FMSHRC at 1130) (explaining that evaluation of the reasonable likelihood of injury should be made in the context of "continued normal mining operations").

The fact of violation has been established, satisfying the first *Mathies* criterion, and the discrete safety hazard that section 75.380(d)(1) is intended to prevent is impeding or delaying miners, including those disabled, in exiting the mine should usage of the escapeway become necessary in an emergency.

The Commission has explained that it is crucial to identify the hazard in the context of the occurrence of the envisioned emergency and that, "[b]ecause the particular facts in a case may not establish that a violation of an [emergency] standard contributes to a hazard which is reasonably likely to result in an injury, not every violation of an [emergency] standard will be S&S." *Cumberland Coal Res.*, 33 FMSHRC 2357, 2369 (Oct. 2011), *aff'd* 717 F.3d 1020 (D.C. Cir. 2013); *see also Peabody Midwest*, 42 FMSHRC___, slip. op. at 4-6; *ICG Illinois*, 38 FMSHRC at 2483 (Althen, dissenting) ("[A]ssuming the existence of an emergency is not the same thing as assuming that the violation is S&S . . . . [T]he particular facts surrounding the violation must be considered.").

The evidence establishes that pump supervisors Whitt and Kennedy pumped water from the hole at crosscut 82 on February 19 owl shift. However, at the time of inspection, no action had been taken to remove the water or soupy mixtures from the other two holes, much less fill them. Accordingly, based on the inadequate remedial efforts leading up to inspection, I find that the condition would have existed in the context of continued normal mining. Peabody's position that safe travel in the alternate escapeway would not have been impeded, as evidenced by the three miners' uneventful travel through the cited area, is unavailing. The evidence clearly establishes that the water and muck-filled holes in the rutted, and rock strewn terrain, posed trip and fall hazards that would be reasonably likely to impede escaping miners, particularly in the case of disabled miners being assisted in exiting the mine safely, satisfying, the second *Mathies* criterion.

Regarding the third and fourth *Mathies* criteria, any trip and fall hazards impeding and delaying safe passage through the alternate escapeway during an emergency would be reasonably

likely to prolong miners' exposure to adverse atmospheric conditions, resulting in, but not limited to, respiratory and musculoskeletal injuries of a reasonably serious nature, satisfying both criteria. Accordingly, I find that this violation was S&S.

C. Unwarrantable Failure and Negligence

In support of the unwarrantable failure charge, the Secretary asserts that the water and muck-filled holes in the alternate escapeway were extensive, obvious, and highly dangerous, that they had existed since, at least, February 18, that Peabody was aware of the condition, that its abatement efforts were inadequate, and that it was on notice that greater efforts were necessary for compliance. Sec'y Br. at 36-41.

Peabody counters that it knew about the condition, that reasonable efforts were made to address it in the short time that it had existed, and that further cleaning would have continued. Resp't Br. at 26-27. Peabody also contends that the cited area was traveled numerous times by its miners, without incident, indicating that the condition was not as dangerous or extensive as Allen believed, and that it was not on notice to expend greater effort to be compliant. Resp't Br. at 27-28.

The evidence establishes that there were three sizable holes, walkway-wide, filled with water atop muck or soupy muck, about 20 feet long and 8 to 18 inches deep, in a rutted, rocky area of the escapeway, and that the condition was first recorded in the February 18 evening pre-shift report. This condition was reasonably likely to impede safe passage of miners responding to an emergency, and more so miners disabled and in need of assistance, notwithstanding the fact that two pump supervisors walked, without incident, through a portion of the area during owl shift. Accordingly, I find that the condition was extensive and obvious, and that it had existed for at least three shifts, a significant timespan given the highly dangerous nature of unexpected trip and fall hazards in the escapeway, and the mandate that it **always** be maintained to assure safe passage of **everyone**. These are aggravating factors.

It is clear that Peabody was aware of the hazardous condition since February 18 evening shift, and also of the area's susceptibility to accumulations of water and muck. Moreover, the owl shift pump supervisors, having observed the targeted area on February 19, took no action to ensure that mobile scooping equipment was delivered to the area on their watch rather than relying on the next shift. While Peabody correctly points out that Allen mistakenly believed that no cleaning, whatsoever, had occurred before he issued the withdrawal order, it is clear that pumping at crosscut 82 was only the initial action necessary to abate the condition. Furthermore, termination of the order not only involved removal of the water and muck, but filling the holes, a remedial step that it is reasonable to conclude would not have occurred, but for issuance of the order. Accordingly, I find that Peabody had knowledge of the condition, and that its abatement efforts were insufficient, both aggravating factors.

Shoal Creek was cited 17 times for violations of section 75.380(d)(1) in the two years preceding this order. Peabody took control of the mine on December 4, 2018 and, at the time of this order, two section 75.380(d)(1) citations had been issued directly to Peabody at the mine. Ex. P–16 at 6-7, 21. Notably, when ownership changed hands, pump supervisors Whitt and

Kennedy, and safety supervisor Clements were retained by Peabody and, based on this violation history and the importance of maintaining passable escapeways in underground mines, Peabody should have appreciated the urgency in abating the condition. Accordingly, I find that Peabody was on notice that greater efforts for compliance with this emergency standard were necessary, also an aggravating factor.

After considering all the aggravating factors, I conclude that Peabody was highly negligent, and that this violation was the result of Peabody's unwarrantable failure to comply with the standard.

3. Order No. 9136341

Inspector Darryl Allen issued 104(d)(1) Order No. 9136341 on March 11, 2019, alleging an "S&S" violation of section 75.400 that was "reasonably likely" to cause an injury that could reasonably be expected to result in "lost workdays or restricted duty," and was caused by Peabody's "high" negligence and unwarrantable failure to comply with the standard. *See supra* at 4 n.2. The "Condition or Practice" is described as follows:

> Combustible material in the form of wet and dry coal fines and coal muck, have been allowed to accumulate in the North Main 1 belt entry, and are observed in contact with the belt surface and belt rollers. The accumulation exists from cross cut 20, inby to the belt tail pulley at cross cut 22.5, a distance of approximately 400 ft. in length, x 20 ft. wide, and ranging from 6 to 24 inches deep. Coal fines are under the belt tailpiece, in contact with the bottom belt, and belt tail pulley. The belt has been shut off by the mine foreman, due to 8 seized belt rollers being rubbed by the moving belt, currently cited between cross cut 10 and the belt tail. Two bottom belt rollers are observed buried in packed coal, with only the top of the rollers visible on the off walkway side of the belt. Two of the seized belt rollers are observed near the tail piece at structure nos. 432 and 441. The bottom belt has been running on top of packed damp to dry coal fines from the tail pulley to cross cut 22, a distance of approximately 100 ft. in length. Coal accumulation at the North Main 1 belt tail has been reported by belt examiners and entered in the examination records for 8 consecutive shifts, from 3/8/19 during the 12:00 to 2:00 p.m. exam to 3/10/19 during the 8:00 to 10:00 p.m. exam. During the most recent pre-shift examination conducted this morning, 3/11/19 between 4:00 and 7:00 a.m., the examiner reported 3 frozen rollers including one roller that was broken. During today's inspection at approximately 11:00 a.m., these damaged rollers, and others, are still observed being rubbed by the moving belt. No miners are observed in the area at the time of inspection, and no corrective actions of reported conditions have been taken. The mine foreman has shut the belt off and called for a belt crew to begin corrective

> actions. Standard 75.400 was cited 131 times in two years at mine 0102901 (131 to the operator, 0 to a contractor). This violation is an unwarrantable failure to comply with a mandatory standard.

Ex. P–10. The order was terminated on March 12, after Peabody removed the coal fines and coal muck from under the tailpiece and walkway. Ex. P–10.

A. Fact of Violation

The Secretary maintains that Peabody mine foreman Mike Earl, by and large, confirmed Allen's account of the condition. Sec'y Br. at 23. Peabody argues that because the material noted in the records had been cleaned recently, it was spillage rather than prohibited accumulations and that, given its wetness, it was not combustible. Resp't Br. at 34-35 (citing *Utah Power*, 951 F.2d at 295 n.11 (noting that operators must clean "loose coal" with "reasonable promptness"); *Consolidation Coal Co*., 33 FMSHRC 385, 395-96 (Feb. 2011) (ALJ) (stating that cited material must be combustible in order to establish a violation of section 75.400.)).

1. Summary of Testimony

a. Darryl Allen

Inspector Darryl Allen testified for the Secretary that he continued the quarterly E01 inspection of Shoal Creek on March 11 around 7:00 a.m., and that he believed that accumulations in the North Main No. 1 tail area, identified in 11 consecutive pre-shift and on-shift reports, had not been fully addressed since March 7, noting that the condition had been recorded inconsistently as "hazardous" and "non-hazardous." Tr. 511, 518-539, 600-05; Exs. P–11 at 1, P–12 at 36-56. He testified that, upon arrival at the North Main No. 1 belt entry, he identified a seized roller near crosscut 10, that foreman Mike Earl stopped the belt, that continuing inby, he identified seven more seized rollers and issued a citation for eight seized rollers between crosscuts 10 and 22 ½, and that he also issued a citation for two nonfunctional fire hose outlets. Tr. 541-48. He stated that around crosscut 20 until around crosscut 22 ½, he found rib-to-rib accumulations of coal fines and coal muck, 6 to 24 inches deep, that the belt was in contact with coal accumulations in two places in the tail area for approximately 20 feet and 100 feet, respectively, and that two rollers were completely impacted by coal in the tail area. Tr. 541, 548-55, 557, 561, 572, 612; Exs. P–11, P–13(c)-(k). Allen described his photographs of the conditions, acknowledging that the exact locations depicted were unclear. Tr. 559-76, 617; Exs. P–13 (a)-(k), P–14 (a), (b). He asserted that he had touched the accumulations, and that they were drying out at points of contact with the belt and rollers. Tr. 555-56, 565-67. By his account, no cleaning was occurring when the inspection party reached the affected areas, and no mobile cleaning equipment was present. Tr. 557. He estimated that cleaning would have required a crew of miners using shovels and mobile equipment, but acknowledged that MSHA has no specific requirements as to cleaning methods. Tr. 557-58, 590, 615. Based on the extensiveness of the accumulations, he opined that they could have existed for multiple weeks, and that the mine was aware of them from the records. Tr. 588-90. He acknowledged that when he returned to the cited area on March 12, four to five feet of material had been cleared from underneath the belt, and that some of it could have been noncombustible, such as fire clay. Tr. 591-94. Allen also

testified about previous accumulations violations at Shoal Creek, stating that he had "tried to work with the mine" to prevent them, but that "they just didn't seem to improve any." Tr. 576-84, 595-96, 616; Ex. P–15(a)-(f).

b. Chris Robertson

Owl shift foreman Chris Robertson testified for Peabody that he had worked at the mine for about 10 years, that his schedule included alternate weekends, that weekends are used typically for maintenance, although the mine runs coal on Saturday sometimes, that the belts do not operate when the mine is not producing, and that the belt is not examined in its entirety during shifts when it is not running. Tr. 622-24, 626-28. He stated that he reviews the records at the beginning of his shift to identify hazards and assign workers, and explained that Peabody's examiners designate hazardous conditions either ("HC") for high priority, or ("HS") for lower priority non-hazardous health and safety conditions, and that the records reflect when a shift refers unaddressed issues to the next shift. Tr. 624, 626-28; Ex. P–12. He explained that the tail area was prone to accumulations, and that a full-time miner was stationed there to monitor accumulations. Tr. 658-62. Robertson reviewed the records from March 7 evening shift through March 11 owl shift, and testified that the belt was not running from Saturday, March 9 owl shift until Monday, March 11 owl shift, that the accumulations noted were not hazardous because there was no friction when the belt was not running, and that accumulations cannot be removed from the mine when the belt is shut down. Tr. 630-41; Ex. P–12 at 37-54. He stated that the belt was restarted between 3:00 and 5:00 a.m. on March 11, that the accumulations were cleaned at his direction during that shift, and that his account was based on his review of the records rather than his memory. Tr. 625, 629-39, 643-45; Ex. P–12 at 37-55. He noted that the accumulations identified in the March 11 owl pre-shift report were at crosscuts 23 and 24, not 22 where the tailpiece is located, that a sump, catching water and coal fines from the tail area near crosscuts 22 and 23, can be clogged by muck and coal, and that accumulations must be washed from under the belt when it is running, then scooped onto it to be taken out of the mine. Tr. 639-41, 647-53; Ex. P–12 at 56. He noted that when the belt is shut down, it can be "bumped," i.e., intermittently started and stopped quickly, for loading, but that it needs to run in order to take accumulations out of the mine. Tr. 645-50. Finally, he acknowledged that accumulations in contact with turning rollers can dry out, but opined that because the tail area is always wet, that would not happen. Tr. 642-43, 651.

c. Mike Earl

Day shift mine foreman Mike Earl testified for Peabody that he worked at Shoal Creek from 2003 to 2006 and, currently, since 2009. Tr. 656. He explained that all coal transported out of the mine travels on the North Main No. 1 belt, that the sump helps control accumulations around the tail area, and that a full-time employee is stationed there because the belt entry is susceptible to water and accumulations, which can occur quickly. Tr. 657-62. He testified that on March 8, he reviewed the owl pre-shift report for that day, noted the hazardous accumulations at crosscut 22 in the North Main No. 1 belt entry, and that he countersigned the report which indicated that men had been assigned. Tr. 675-76; Ex. P–12 at 38. Earl stated that at the beginning of his shift on March 11, he reviewed the record and delegated work assignments, then joined the inspection party. Tr. 655, 662, 669, 675-77. According to him, the inspection party

entered the North Main No. 1 belt entry at crosscut 6 and, walking inby, found the seized roller around crosscut 10, which had been noted in the examination record, and he turned off the belt and called Johnathan Aaron to fix it. Tr. 663-69. He stated that as the inspection party approached the tailpiece, beltline attendant Aaron Thrasher was washing material from under the belt between crosscuts 22 and 23, that he told Thrasher to turn off the water, and that he did not recall any mobile equipment in the area. Tr. 664-66, 670. His testimony was inconsistent as to where the cited accumulations began and, ultimately, he stated that he could not remember, but that they could have started anywhere between crosscuts 20 and 22 ½, that they stretched 80 to 100 feet, and that there were coal fines on rollers and accumulations in contact with the belt. Tr. 664, 667-68, 671-73. He acknowledged that cleaning would require spraying by more than one miner, and that the belt would have continued running if he had not shut it down when the inspection party reached crosscut 10. Tr. 674, 678. He also testified that the order was terminated by cleaning that continued from day shift through evening and owl shifts. Tr. 678-79.

d. Johnathan Aaron

Day shift dewater supervisor Johnathan Aaron testified for Peabody that he supervised the tail area of the North Main No. 1 belt and delivered equipment, explaining that he would review examination records and delegate work, and that on March 11 day shift, he assigned Aaron Thrasher to change rollers at crosscuts 20 and 21 and clean accumulations in the tail area, noting that he would need to spray and use a skid steer. Tr. 682-87, 700; Ex. P–12 at 56. He testified that the skid steer was down, that while he and Thrasher were repairing it, Mike Earl called him about a seized roller at crosscut 10, that he left Thrasher working on the skid steer and that, subsequently, Thrasher went to clean the tail area. Tr. 688-91, 696-700, 713-14; Ex. R–2. According to Aaron, he did not become aware of the extensiveness of the accumulations at the tailpiece until Allen found them. Tr. 691, 699, 713-14. He explained that the belt department has 10 skid steers, 7 Lo Tracs,[7] and 2 loaders, that not all mobile equipment is available at any given time and that, immediately after the order was issued, 10 miners terminated the order using loaders, skid steers, and Lo Tracs. Tr. 701-04, 711-15; Ex. R–2.

2. Analysis

Restated, a violation of section 75.400 occurs "where the quantity of combustible materials is such that, in the judgment of the authorized representative of the Secretary, it could cause a fire or explosion if an ignition source were present." *Old Ben II*, 2 FMSHRC at 2808.

Although Shoal Creek is a wet mine and the tail area in the North Main No. 1 belt entry is particularly wet, the unrebutted evidence that the accumulations were drying out in several places belies Peabody's contention that the accumulations were non-combustible. Furthermore, its contention, that the accumulations were spillage because of recent occurrence, is also unavailing. *See Black Beauty*, 703 F.3d at 558-59, 559 n.6 (explaining that operators are not afforded a reasonable time to clean accumulations before a violation of section 75.400 can be found, and that accumulations of combustible materials substantial enough to propagate a fire are

[7] Lo Tracs are mobile equipment used by Peabody to remove material from underneath the belts. Tr. 702.

prohibited, even if recent). Accordingly, based on the evidence in its entirety, I find that there were accumulations of coal fines and coal muck, from around crosscut 20 to 22 ½, entry-wide, that there were several points of contact between the accumulations and the belt, that two rollers were completely impacted by coal, that eight rollers, some in the tail area, were seized, and that some accumulations had dried out due to frictional contact and, therefore, were combustible. Accordingly, I conclude that Peabody violated section 75.400.

B. Gravity

The Secretary argues that, given the realistic potential for fire to occur, the violation was S&S. Sec'y Br. at 23-25. Peabody maintains that an ignition was unlikely to occur because of the wet conditions in the mine and absence of methane, and further, that its active cleanup was interrupted by Allen. Resp't Br. at 36-37.

The fact of violation has been established, satisfying the first *Mathies* criterion, and the discrete safety hazard against which section 75.400 is directed is fire or explosion contributed to by accumulations of combustible materials.

The evidence establishes that beltline attendant Aaron Thrasher was assigned to clean the tail area at the beginning of March 11 day shift, but was delayed because the skid steer was down, and that he was repairing it with dewater supervisor Johnathan Aaron when the inspection started. Ultimately, Thrasher went to the tail area to clean without a functioning skid steer. While Allen did not see any cleaning underway in the tail area, I credit that Thrasher was spraying under the belt when the inspection party reached the area, and that he stopped cleaning at Earl's direction. Notably, it took 10 miners, cleaning with hoses and mobile equipment through the day, evening, and owl shifts, to remove the accumulations. Accordingly, based on Peabody's scanty allocation of manpower and mobile equipment for cleanup prior to issuance of the order, I find that the accumulations would have existed in the context of continued normal mining. Despite Shoal Creek's gassy nature, there is no evidence that methane was liberated in the cited area. However, based on the evidence of extensive accumulations in contact with the belt and rollers, multiple seized and impacted rollers, and accumulations drying out due to frictional contact, I find that the coal accumulations contributed to the reasonable likelihood of a fire in the mine, and that the second *Mathies* criterion has been satisfied.

The evidence also establishes that in the event of a mine fire, at the very least, the full-time miner stationed at the tail area would be exposed to smoke-filled air. Moreover, fire burning in the underground coal mine would present a serious risk of smoke and gas inhalation, resulting in injuries of a reasonably serious nature, satisfying the third and fourth *Mathies* criteria. *See Buck Creek*, 52 F.3d at 135-36; *see also Black Diamond*, 7 FMSHRC at 1120. Accordingly, I find that this violation was S&S.

C. Unwarrantable Failure and Negligence

In support of the unwarrantable failure designation, the Secretary asserts that the accumulations were extensive, obvious, and highly dangerous, that they had existed for at least 11 shifts preceding inspection, that Peabody had knowledge of the condition, that its efforts to

abate it were inadequate, and that it was on notice that greater efforts were necessary for compliance. Sec'y Br. at 25-29.

Peabody contends that the unwarrantable failure designation is inappropriate because the accumulations in the North Main No. 1 belt entry, noted in the March 8 owl pre-shift report, were cleaned during the next evening shift and recorded as non-hazardous in the pre-shift report, then partially cleaned during March 9 owl shift, and fully cleaned during March 11 owl shift. Resp't Br. at 38-41. Peabody also maintains that the cited accumulations were new, having existed for less than a shift, that they were not extensive, and that it was not on notice that greater efforts for compliance were required. Resp't Br. at 40-42.

The evidence establishes that coal accumulations, rib-to-rib, spanning an area from around crosscut 20 to crosscut 22 ½, were in contact with the belt and rollers, that two rollers were completely impacted by them, that multiple rollers, some in the tail area, were seized, and that some of the accumulations had dried out. This extensive and obvious condition created a serious risk of ignition, and was highly dangerous. These are aggravating factors.

Examination records indicate that the accumulations in the North Main No. 1 belt entry tail area began on Thursday, March 7 evening shift and continued throughout the weekend, and that some cleaning in the tail area had occurred during March 8 evening, and March 9 and 11 owl shifts. Foreman Chris Robertson's testimony that the tail area was completely cleaned on March 11 owl shift is undercut by the extensiveness of the coal accumulations in contact with the belt and rollers, the rollers completely impacted with coal, and the seized rollers that the inspection party encountered later that morning, a condition reasonably likely to have developed over several shifts. Moreover, if accumulations are commonplace in the tail area, as Peabody contends, one full-time miner stationed there would seem reasonable to monitor them, but would constitute insufficient manpower to keep them in check. In light of the credible observations of the accumulations and the evidence as a whole, I find that the area was not completely cleaned during March 11 owl shift, and that what did occur did not even put a dent in the condition. Nevertheless, crediting Peabody's assertion - - that the condition was not hazardous for the better part of the weekend when the belt was not running - - does not negate that it became hazardous when it was not fully abated before production resumed on March 11 owl shift. Accordingly, I find that the accumulations existed, to varying degrees, since March 7 evening shift until the inspection on March 11 day shift, and that Peabody was aware of it, both aggravating factors.

The evidence indicates that some cleaning in the North Main No. 1 belt entry had occurred during multiple shifts on March 8, March 9, and March 11, and that Thrasher had been spraying under the tail without any mobile equipment when the area got inspected. Notably, it ultimately took 10 miners, cleaning with hoses and mobile equipment over a period of three shifts, to terminate the order, a sizeable work crew compared to the lone miner hosing the area. Accordingly, I find that Peabody's efforts fell far short of what was required to abate the hazardous condition, and this is an aggravating factor.

The Commission has emphasized that "past discussions with MSHA about an accumulation problem serve to put an operator on heightened scrutiny that it must increase its efforts to comply with the standard." *San Juan Coal*, 29 FMSHRC at 131 (quoting *Consolidation*

Coal, 23 FMSHRC at 595); *see also Amax Coal*, 19 FMSHRC at 851. Shoal Creek Mine had 131 section 75.400 violations in the past two years and, although Peabody took control of the mine on December 4, 2018, at the time of this order, 20 section 75.400 violations had been issued directly to Peabody. Exs. P–10, P–16 at 6-7, 21. Additionally, Allen had tried to assist management in preventing coal accumulations during prior inspections, and the record establishes that shift foremen Chris Robertson and Mike Earl had also worked at Shoal Creek under the prior ownership. Accordingly, I find that Peabody was on notice that greater efforts for compliance with this standard were necessary, another aggravating factor.

After considering these aggravating factors, I conclude that Peabody exhibited a high degree of negligence, and that this violation was the result of its unwarrantable failure to comply with the standard.

IV. Penalties

While the Secretary has proposed a total civil penalty of $76,061.00, the judge must independently determine the appropriate assessment by proper consideration of the six penalty criteria set forth in section 110(i) of the Mine Act:

> (1) the operator's history of previous violations; (2) the appropriateness of the penalty to the size of the business of the operator; (3) whether the operator was negligent; (4) the effect on the operator's ability to continue in business; (5) the gravity of the violation; and (6) whether good faith was demonstrated in attempting to achieve prompt abatement of the violation.

30 U.S.C. § 820(i); *See Sellersburg Co.*, 5 FMSHRC 287, 291-92 (Mar. 1983), *aff'd* 736 F.2d 1147 (7th Cir. 1984). Additionally, the Commission has recognized the difference between regularly and specially assessed proposed penalties, requiring that judges explain divergences from regularly assessed penalties but not those specially assessed, and avoid using special assessments as anchoring points in setting penalties. *Solar Sources Mining, LLC*, 42 FMSHRC 181, 190-202, 198 n.25 (Mar. 2020); *see also American Coal Co*., 933 F.3d 723, 727 (D.C. Cir. 2019) (explaining that the Secretary is under no obligation to "prove" his decision to propose a special assessment rather than a regular assessment).

Two of the three charges in this proceeding involve serious accumulations violations. While the Secretary has based his proposed penalty for the violation in the H-2 belt entry on application of his Part 100 penalty points, the proposed penalty for the arguably similar violation in the North Main No. 1 belt entry has been specially assessed. One plausible explanation for this difference in approach is that the 104(d)(1) citation in the H-2 belt takeup area preceded the 104(d)(1) order in the North Main No. 1 tail area by a mere three months, clearly placing Peabody under heightened scrutiny to prevent recurrent violations.

Applying the *Sellersburg* penalty criteria, and based on a review of MSHA's online records, I find that Peabody is a large operator. The record also indicates that Peabody demonstrated good faith in achieving rapid compliance after notice of the violations, and

consideration of the Assessed Violation History Reports follows for the one citation and two orders. The parties have stipulated that imposition of the proposed penalties will not adversely affect Peabody's ability to remain in business. Jt. Stip. 6. The remaining criteria involve consideration of the gravity of the violations, and Peabody's negligence in committing them, factors that have already been discussed fully. Therefore, considering my findings as to the six penalty criteria, the penalties are set forth below.

1. Citation No. 9136082 (SE 2019-0075)

It has been established that this S&S violation was reasonably likely to cause an injury that could reasonably be expected to result in lost workdays or restricted duty, and that it was caused by Peabody's high negligence and unwarrantable failure to comply with the standard. In the fifteen-month period preceding issuance of this citation, 87 violations of section 75.400 issued to Shoal Creek became final orders of the Commission. Ex. P–16 at 10, 19, 21. Because of the overlap in Drummond and Peabody management when Shoal Creek ownership changed hands, as well as evidence that accumulations violations were problematic at the mine and the cited area was prone to accumulations, I find the violation history aggravating. The Secretary has proposed a regularly assessed penalty of $3,161.00 for this serious violation. Applying the civil penalty criteria, I find that a penalty of $7,500.00 is appropriate.

2. Order No. 9136320 (SE 2019-0146)

It has been established that this S&S violation was reasonably likely to cause an injury that could reasonably be expected to result in a fatality, and that it was caused by Peabody's high negligence and unwarrantable failure to comply with the standard. In the fifteen-month period preceding issuance of this order, 12 violations of section 75.380(d)(1) issued to Shoal Creek became final orders of the Commission. Ex. P–16 at 6-7, 21. Because of the overlap in Drummond and Peabody management when Shoal Creek ownership changed hands, I find the violation history aggravating. The Secretary has specially assessed a penalty of $57,700.00 for this serious violation. Applying the civil penalty criteria, I find that a penalty of $38,500.00 is appropriate.

3. Order No. 9136341 (SE 2019-0146)

It has been established that this S&S violation was reasonably likely to cause an injury that could reasonably be expected to result in lost workdays or restricted duty, and that it was caused by Peabody's high negligence and unwarrantable failure to comply with the standard. In the fifteen-month period preceding issuance of this order, 88 violations of section 75.400 became final orders of the Commission. Ex. P–16 at 10, 19, 21. Because of the overlap in Drummond and Peabody management when Shoal Creek ownership changed hands, along with the recent, serious accumulations violation in the H-2 belt entry and MSHA's emphasis on accumulations prevention at the mine, I find the violation history aggravating. The Secretary has specially assessed a penalty of $15,200.00 for this serious violation. Applying the civil penalty criteria, I find that a penalty of $15,000.00 is appropriate.

ORDER

WHEREFORE, it is **ORDERED** that Citation No. 9136082, and Order Nos. 9136320 and 9136341 are **AFFIRMED**, as issued, and that Peabody Southeast Mining, LLC, **PAY** a civil penalty of $61,000.00 within 30 days of the date of this Decision.[8] **ACCORDINGLY**, these cases are **DISMISSED**.

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

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[8] Payment should be made electronically at Pay.Gov, a service of the U.S. Department of the Treasury, at https://www.pay.gov/public/form/start/67564508. Alternatively, send payment (check or money order) to: U.S. Department of Treasury, Mine Safety and Health Administration, P.O. Box 790390, St. Louis, MO 63179-0390. Please include Docket and A.C. Numbers.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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October 21, 2020

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. CONSOL PENNSYLVANIA COAL CO., LLC, Respondent.	CIVIL PENALTY PROCEEDING Docket No. PENN 2019-0100 A.C. No. 36-07230-490127 Mine: Bailey Mine

AMENDED DECISION AND ORDER[1]

Appearances: John M. Strawn, Esq., & Kenneth J. Polka, CLR, Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Secretary of Labor

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

Before: Judge Lewis

STATEMENT OF THE CASE

This case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (the "Act" or "Mine Act"). A hearing was held in Pittsburgh, Pennsylvania. The parties subsequently submitted briefs which have been fully considered in reaching the within decision.

LAW AND REGULATIONS

Section 314 (b) of the Act and Section 75.1403 of the Regulations provide:

> Other safeguards adequate, in the judgment of an authorized representative of the Secretary to minimize hazards with respect to transportation of men and materials shall be provided.

[1] This order has been amended to include the technical citation numbers associated with the safeguards at issue herein.

Section 75.1434 **Retirement Criteria** provides:

Unless damage or deterioration is removed by cutoff, wire ropes shall be removed from service when any of the following conditions occurs:

(a) The number of broken wires within a rope lay length, excluding filler wires, exceeds either—
(1) Five percent of the total number of wires; or
(2) Fifteen percent of the total number of wires within any strand;
(b) On a regular lay rope, more than one broken wire in the valley between strands in one rope lay length;
(c) A loss of more than one-third of the original diameter of the outer wires;
(d) Rope deterioration from corrosion;
(e) Distortion of the rope structure;
(f) Heat damage from any source;
(g) Diameter reduction due to wear that exceeds six percent of the baseline diameter measurement; or
(h) Loss of more than ten percent of the rope strength as determined by non-destructive testing.

FINDINGS OF FACT AND CONCLUSION OF LAW

The findings of fact are based on the record as a whole and the undersigned's careful observation of the witnesses during their testimony. In resolving any conflicts in the testimony, the undersigned has taken into consideration the interests of the witnesses, or lack thereof, and consistencies, or inconsistencies, in each witness's testimony and between the testimonies of the witnesses. In evaluating the testimony of each witness, the undersigned has also relied on his demeanor. Any failure to provide detail as to each witness's testimony is not to be deemed a failure on the undersigned's part to have fully considered it. The fact that some evidence is not discussed does not indicate that it was not considered. *See Craig v. Apfel,* 212 F.3d 433, 436 (8th Cir. 2000) (administrative law judge is not required to discuss all evidence and failure to cite specific evidence does not mean it was not considered).

JOINT STIPULATIONS

1. The Bailey Mine ("Mine") is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977 ("Act").

2. The Mine is owned and operated by Respondent, Consol Pennsylvania Coal Company, LLC.

3. The presiding Administrative Law Judge has jurisdiction over the above-captioned proceedings pursuant to Section 105 of the Act.

4. The parties stipulate to the authenticity of their exhibits, but not to the relevance or truth of the matters asserted therein.

5. The subject citations and safeguards were served by a duly-authorized representative of the Secretary upon agents for Respondent on the dates and times and the placed stated therein.

6. Respondent demonstrated good faith in abating the alleged conditions after the issuance of the safeguards and citations.

7. The penalties proposed on the Exhibit A attached to the Petition for Assessment for Citation Nos. 9076455 and 9076456 are incorrect. The Petitioner agreed to reduce the gravity of the citations to no likelihood, no lost workdays, non-S&S, and also the negligence to none at a pre-penalty settlement conference. The proposed penalties should have been $135 for each citation. The mine tonnage, controller tonnage and number of violations represented in the Exhibit A attached to the Petition for Assessment are correct.

8. Payment of the total proposed penalty of $270 in this matter will not affect Respondent's ability to continue in business.

T. 4-6[2]

SUMMARY OF TESTIMONY

WITNESSES

Joseph A. Vargo

At the time of hearing, Inspector Vargo had worked for MSHA for over 12 years. T. 13. He initially worked as a coal mine inspector and later in 2012 had been working as an electrical specialist. Prior to working for MSHA, Vargo had worked as a coal miner for approximately 30 years.[3] T. 14.

Inspector Vargo had issued a technical citation to Respondent arising from Vargo's issuance of a safeguard (No. 9076448) in connection with unsafe conditions observed at the operator's slope track and hoist on August 13, 2018. T. 15-18; *see also* P-1.

Inter alia, Vargo had noted a wear pad on the slope that had been worn down approximately one and three quarters inches. T. 17.

[2] "T" refers to the hearing transcript. "P" refers to the Secretary's exhibits. "R" refers to Respondent's exhibits. "SB" refers to Secretary's post hearing brief and "RB" refers to Respondent's post hearing brief.

[3] *See* T. 13-15 for detailed description of Vargo's mining experience and specialized certifications.

The purpose of the wear pads was to keep the hoist rope from coming into contact with anything that could cause damage to the rope. T. 19. The slope hoist rope should not come into contact with any abrasive material such as gravel, rock, slate, or coal that would cause it damage. T. 20. Excessive wear of the wire rope could lead to the potential of the rope breaking, sending anyone in the car to the bottom at an excessive rate of speed. T. 21-22.

The regulations require that non-destructive testing of the rope—either through measurements or x-rays—be performed every six months. T. 22. The concern is that, during the six month interval, broken wires or metallic loss might not be detected by visual examination. T. 23.

At hearing, photographs were admitted into evidence, which depicted wear on the slope pads in August 2018, leading to the safeguard in question being issued. T. 23-28; P-5.

There were approximately 100 wear pads on the slope track, which had a 14-degree grade. T. 29, 44. Water could get into the valleys of the steel hoist rope, causing corrosion. T. 29. There were numerous escalation reports indicating the rope was either kinked or damaged. T. 30; *see also* P-9. Photographs of the hoist rope, taken in August 2018, revealed what appeared to be broken wires in the middle of the rope. T. 32; *see also* P-5. Photographs also revealed the rope being in contact with coal, and slate/rock mixture. T. 33; P-5. Materials on the tracks during the hoist lowering or raising could cause brake damage and loss of control. T. 39-40. Someone not riding in a car could be exposed to a slip and fall hazard. T. 41.

On cross-examination, Inspector Vargo agreed that he had no experience working on hoists prior to coming to MSHA. T. 45. He also testified that he had never worked on a hoist slope during his MSHA career. T. 45. His training regarding hoists came from a ½ day training at the mining academy and annual refresher training. T. 46.

Vargo had not issued any safeguards between 2007 and August 2018. T. 27. The safeguards at issue were his first issuances. T. 47.

In order to issue a safeguard there must be an actual hazard with respect to the transportation of men and materials and the hazard must not already be covered by a mandatory safety standard. T. 47-48.

Vargo had found the hazard associated with Safeguard No. 9076448 to involve damage and wear to the slope rope. T. 48. He testified that wear pads were cut through or missing. T. 48. There was contact with steel grating, and trough rollers were not turning. T. 48. There was metallic loss and distortion found in the rope. T. 48.

Vargo found that the hoist rope was compliant with the mandatory standards addressing hoist rope retirement criteria on August 7, 2018. T. 51.

A hoist rope, pursuant to § 75.1434, must be removed from service when the number of broken wires within a rope lay length, excluding filler wires, exceeds 5% of the total number of wires, or 15% of the total number of wires within any string. T. 52. Also pursuant to § 75.1434, a

rope must be retired or reterminated if its diameter reduction exceeds 6% of the initial baseline. T. 53.

Vargo had not issued a citation under § 75.1434 (h) because the standard specified a loss of more than 10% of rope strength and the rope strength loss was not as yet beyond 10%. T. 55.

Vargo testified that a hazard existed, even though the slope rope was still compliant with the standard, because the rope "was right at the borderline." T. 56. One more trip could have put it over the borderline. T. 56. Everything that the rope was in contact with was abrasing the wire, the hoist rope. T. 56.

Although Vargo had recommended that wear pads be replaced, he did not record such in his notes. T. 58.

Wear pads were approximately 24" by 24" by 2" thick. T. 59. In his August 15, 2018 citation, Vargo noted a wear pad worn down to 1 ¾". T. 59; *see also* P-2. Vargo had not recorded in his notes that he had observed that 50-60 wear pads were worn or missing. T. 60. He had been told of such by a mine foreman. T. 60. Vargo himself had taken no measurements of the pads. T. 61.

Vargo had not inspected the slope on August 7, 2018. He had inspected the slope hoist, the brakeman car, the slope hoist building, and the remote hoist building. T. 61-62.

MSHA had not published any directives as to when wear pads should be replaced. T. 64. A wear pad that was worn down one and three quarter inches would not be serving its function. T. 64. The photographs in Exhibit P-5 depicted the slope rope as it looked when it was not in operation. T. 65.

Vargo agreed that the slope rope would be exposed to rain and snow at times. T. 72. He believed that the two furthest trough rollers inby receive the most stress. T. 73. However, he conducted no further inquiry to determine whether this was so. T. 73. He further had not determined how much, if any, the two static rollers contributed to slope rope deterioration. T. 74.

There was no mention of the slope rope contacting concrete in the safeguard or Vargo's notes. T. 78.

Exhibit P-8 contained reports of the slope hoist being down for more than 30 minutes. Vargo agreed that the March 9, 2018 report concerning braking system lock-up had nothing to do with rope deterioration. T. 78-79. Another report indicating that the hoist had gone down also was not associated with slope rope issues. T. 79; P-8, 3. Vargo further agreed that a kink in a hoist rope could happen to a new rope. T. 80.

On August 13, 2018, Vargo determined that the entire length of the rope contacted material, rock, coal, slate, gravel, and water. T. 85. Vargo further stated that this was not unusual for a slope rope. T. 86.

As to Safeguard No. 9076449, Vargo had observed mine supplies along the slope. He did not know whether any of the material actually contacted the slope car. T. 87; P-4. He had seen some material in the middle of the track contacting the rope but had not noted such in the safeguard. T. 87. Although he slipped on a roof plate while walking the slope, he had again not noted such in the safeguard. T. 88-89. Vargo agreed that no one regularly walked the slope. T. 89. He further agreed that, provided supplies were against the rib and not contacting the slope car, they would not create a clearance issue or hazard. T. 89-90.

In reference to the summary of safeguards, Vargo agreed that there was no written explanation as to what requirements were called for in order to have "properly maintained" wear pads and rollers under Safeguard No 9076448. T. 91-92; R-18. The "above mentioned material" in the safeguard referred to slate, rock, gravel, mud, coal, and water. T. 92. Vargo again agreed that having supplies pushed against the rib in the slope, which did not contact the slope car would not be a violation of Safeguard No. 9076449. T. 93. Vargo further agreed that an individual walking up the slope belt would have a handrail to hold onto. T. 95.

On redirect Vargo further clarified that mine operators are provided with the full text of safeguards that have been issued and not just the summary of safeguards as contained in R-18. T. 96.

Slope wear pads are not doing their jobs if they don't keep the hoist rope off the ground and from contact with other materials. T. 97.

At the time of Vargo's hoist rope inspection in August 2018, Bailey Mine's next non-destructive test ("NDT") was scheduled for October 2018. T. 98. Vargo, however, agreed the mine operator changed or reterminated portions of their ropes between the times of the mandatory six month non-destructive tests. T. 99. He additionally agreed that Baily Mine conducted daily visual rope exams that included the hoist rope. T. 99.

Michael Snyder

At the time of hearing, Michael Snyder had worked for MSHA for 33 years. T. 103.

He described various photographs taken at Bailey Mine on August 17, 2018, contained in Exhibit P-5. T. 104. These included: the hoist rope (P-5, 1 and 2); the rear of the brakeman car to which the hoist rope was attached (P-5, 3); the hoist rope running through debris (P-5, 4); the hoist rope drum (P-5, 5); wear pads covered with debris (P-5, 6); another photo of the rope from a longer perspective, running on top of the cross ties (P-5, 7); another view of the rope cutting through the wear pads into the dirt (P-5, 8). T. 104-108.

The rope was 1 5/8" in diameter and the wear pads about 2" thick. T. 108. A non-destructive examination was taken of the rope at the worst section T. 108. The non-destructive test was "right at ten percent loss of metallic area." T. 108. Three physical diameter measurements were "right at approximately six percent." T. 108.

The hoist rope diameter measurements had been taken "at the worst spot" of 1.572, 1.571 and 1.572—1.571 being the smallest diameter reading. T. 110; *see also* P-6. By dividing 1.71 by 1.67, there was found to be a 5.93% diameter reduction.[4] T. 110. Any reduction exceeding 6% met the regulation retirement criteria. T. 110. While the diameter had not yet exceeded the regulation, "it was right at the edge." T. 110.

There had been a non-destructive test performed on April 21, 2018—about one month after the rope had been installed. T. 111. Given that the next scheduled 6-month examination was set for October 21, 2018, and the inspection at-issue was on August 7, 2018, it would be 6 weeks before the hoist rope would have been examined again. T. 111.

Lubrication allows the hoist rope wires to "move freely around." T. 111. Exhibit P-5 contained a photograph taken on August 7, 2018 of the spool showing a dry rope. T. 111-112. Areas having lubrication would appear darker. T. 113.

Exhibit P-7 contained the memo sent to the district manager of the Mine Safety and Health Administration Russell Riley by Snyder, detailing the August 7, 2018 non-destructive test findings. T. 114. Based on his observations and testing, Snyder recommended that more frequent non-destructive examinations be conducted—every 4 months rather than 6-month intervals. T. 115.

On cross-examination Snyder agreed that there were no violations or hazards found in respect to the hoist rope on August 7, 2018. T. 119-120.

In determining whether there is diameter reduction exceeding six percent of the baseline diameter measurement, pursuant to § 75.1434 (g), calipers could be used. T. 120-131. The hoist rope strength was "right at the limit" but "compliant" within the limits of § 75.1434 (h). T. 122. The hoist rope also did not meet the broken wires retirement criteria contained in § 75.1434 (a). T. 124. If a non-destructive test reveals more than a 10% loss of rope strength or a distortion of rope structure, the entire rope may not require changing out, but instead only require a retermination.[5] T. 125.

Snyder was not aware that the operator reportedly conducted a daily examination of the hoist rope. T. 126-127. He agreed that approximately 350 feet of hoist rope was reterminated on August 7, 2018. T. 129. The rope itself was approximately 3,000 feet long. The rope (after the retermination) was not changed out in entirety. T. 130. Snyder had recommended wear blocks be installed to keep the hoist rope off the ground between the head shiv and the top of the slope. T. 131-132. Snyder was not aware of any criteria for determining whether a wear pad is worn out. T. 132. Nor was he aware of anything published by MSHA in reference to such. T. 132-133. The wear pads protect the rope by allowing the rope to cut through them. T. 133. Until the rope cuts

[4] The Transcript erroneously states the diameter reduction as 1.71 in one instance, where it should read 1.571. T. 110

[5] A retermination was described as when one takes a portion of the rope and installs a new portion to the existing rope with zinc oxide. T. 125.

the pad in two, the rope remains off the ground and does not sustain additional abrasion which would accelerate its wear. T. 133.

When the slope rope is in actual operation, the tension in the rope would be different. T. 135. As the conveyance travels down the slope, the rope tension is going to increase by the weight of the rope that travels down the slope. T. 136.

Snyder disagreed that the life of a slope rope depended upon factors that included its frequency of use. T. 137. If the rope hoist is properly maintained, "it lasts longer." T. 137.

Snyder was not present at Bailey Mine on August 13, 2018, when Vargo conducted the inspection that resulted in the issuance of the August 15, 2018 safeguard. T. 138.

When the hoist rope was reterminated, it was still in compliance but close to meeting the retirement criteria. T. 139. Both old and new ropes can develop kinks, especially when they are abused or mishandled. T. 139-140.

Snyder's degree was in mine engineering, and he testified that he was neither a structural steel engineer nor a civil engineer. T. 141. Mine engineering did not specifically teach students about wire rope. T. 141.

Visual examination of a rope hoist can reveal clusters of broken wires, inadequate lubrication, deformation to the rope. T. 142. Snyder noted no reported hazards in the Respondent's log book following the operator's last 14-day examination on March 29, 2018. T. 142-143.

Snyder did not have the authority to issue citations. T. 143. The multiple areas of concern regarding the hoist rope motivated Snyder to advise the operator to remove a portion of the rope. T. 144.

In reference to the safeguard at Exhibit P-2, Snyder observed some of the same conditions on August 7, 2018. T. 144. Anything that adds friction to the rope—as it is observed dragging through rock, gravel, slate, and coal—is going to accelerate its wear. T. 145. Snyder did not believe that as the rope moves down the slope, more tension would be created on the wear pads or rollers. T. 146. The tension would be constant. T. 146. To perform the electromagnetic test, the rope would need to be in motion. T. 146.

Prior to his August 7, 2018 inspection Snyder clarified that the last 14-day test would not have been conducted as early as March. T. 147.

Snyder had visited Baily's slope and other coal mine slopes in the past and had observed coal and rock going down the slopes. T. 147. He also agreed that the slope was exposed to outside elements, including rain and snow. T. 148.

Craig Elson

Craig Elson worked for Consol Energy at the Crabapple Portal and had done so for approximately 18 years. T. 152. At the time of hearing, he worked as assistant master mechanic, overseeing underground and surface maintenance. T. 152.[6]

A slope hoist is used to haul material in and out of a coal mine. T. 155. In case of an elevator malfunction, a hoist can also be used to transport individuals. T. 156. The slope hoist at the Crabapple Portal is operated by a hoistman. T. 156. Different types of cars are loaded with supplies. T. 156. They will then be hoisted through the track switch, taken off the hoist car and delivered to where needed throughout the coal mine. T. 156. The hoist rope is attached to a brakeman car; supply cars are coupled to the brakeman car.[7] T. 156.

The total length of rope at the Crabapple Portal is 3,000 feet. T. 157. From the pit mouth to slope bottom is approximately 1600 feet to 1800 feet.[8] T. 157. The slope rope is attached to a drum; the drum winds or unwinds causing the supplies to be dropped or raised.[9] T. 157-158. All the cars, including brakeman car and supply car, are on a track. T. 157.

When Elson worked as a surface electrician, he would line up hoist rope tests, including non-destructive tests, 30-day tests, 60-day tests conducted by Frontier-Kemper. T. 158. He was also involved with any of the examinations involving the rope and hoist. He would address any breakdowns with the rope or car, drum room electrical issues, verbal frequency driver operation, and any communication problems from the top to the bottom of the slope. T. 158.

Sensors (called "tags") are placed at the pit mouth and near the bottom of the slope and on top of the brakeman car so that the exact location of the car based upon a mathematical footage calculation can be determined. T. 158-159.

The hoist operator has a computer in front of him containing the location information. T. 159. There is another computer at the main hoist house containing the same information. T. 159.

Elson did not escort the inspector on the date the safeguard (P-2) was issued. T. 160. Kevin Wilson, now retired, had done so. T. 160. Elson was working on August 7, 2018, when the hoist rope was examined by MSHA tech support. T. 160. A caliper is used to determine whether there is diameter loss exceeding 6% of the baseline. T. 161. Not every rope is identical in diameter size, there being a few tenths of difference between various ropes. T. 162.

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[6] *See* TT 152-155 for other mining positions held and certifications received.

[7] A brakeman car is used to hoist individuals. T. 156.

[8] Pit mouth "is the opening in the earth where you go from surface to underground in the beginning of the tunnel on your 22 degree decline into the coal mine." T. 157.

[9] The drum is also called a "drum room." Tr. 157-158.

The hoist rope, when examined on August 7, 2018, was not beyond the retirement criteria. T. 163. MSHA did not issue any citations on August 7, 2018. T. 163. After the August 7, 2018 inspection Consol took out 350-foot of the rope that was approaching retirement criteria.[10] T. 163. The rope was earlier changed on December 14, 2017, and March 29, 2018. T. 163-165; *see also* R-1.

A non-destructive test was also performed in April 2018 by a subcontractor, Evergreen. T. 166; *see also* R-2. In conducting the NDTs, Evergreen utilizes a two-piece machine placed around the hoist rope. T. 167. The hoist car is run at a set speed; the rope is x-rayed twice, once down and once back. T. 167.

A review of Evergreen's certificates of inspection from April 23, 2016, through April 21, 2018, did not reveal that the Baily Crabapple slope rope had, at any point, met the retirement criteria. T. 168; R-2. The rope, however, was reterminated or changed between the non-destructive test dates. T. 168-169. Rope changes would be required in order to maintain three wraps on the drum: a 3,000 foot rope can be reterminated only so many times to stay within those specs to have the required number of wraps. T. 169. Some of the reasons for retermination or changing the ropes would be kinks, deformation and broken strands. T. 169.

In addition to the 6 month NTDs, Consol conducts a visual examination of the hoist rope every 14 days during which the hoistman inspects the entire length of the cable for any kind of deformation or broken strand. T. 169. The hoistman also visually examines the hoist rope every 24 hours. T. 170-171; *see also* R-3.

Additionally, there is a weekly permissibility examination performed, during which mechanics check all the safeties, connection points of the rope, anything electrical with the brakeman car itself, including brakes, lights, and batteries. T. 171-172; *see also* R-4.

During the examination of the slope car, "all the safeties" are checked. T. 172. The brakes are engaged to verify that they all set properly; batteries are checked for voltage; all lights and communications are checked. T. 172. The operator also checks for overspeed, mismatched speed, roll back.[11] T. 172; *see also* R-4.

Once a shift before the hoist is operated, a hoistman also conducts an examination. T. 173-174; *see also* R-5. He checks the car brakes, the connection point of the rope—"basically just making sure everything is in safe operating condition." T. 174.

If during the daily slope car checklist a deficiency is found, the car would be taken out of service and MSHA would be notified of such by the shift supervisor. T. 175.

Referring to Safeguard 9076448, wherein it was reported that the wear pad that the slope rope hoist rides on top of was worn down approximately 1 ¾", Elson noted that the wear pads at

[10] Ketchum Construction, a subcontractor, actually performed the work. T. 163.

[11] For example, if the hoist rope would break, the car would go into overspeed. The brakes would be locked to the rail, avoiding a runaway car. T. 172-173.

Bailey Mine were sometimes 2" thick and sometimes 2 ½" thick. T. 176. There are approximately 80 wear pads on the slope, which are designed to protect the rope. T. 176. Due to undulations in the mine floor, pads do not wear out at the same rate. T. 176-177. Rope tension also affected pad wear. T. 177. A fully loaded train with seven cars caused a higher tension on the rope than a brakeman car alone which could have sags in the rope. T. 177.

When a wear pad became worn through at Bailey Mine, it was either changed out or turned 90 degrees. T. 178. By turning the pads diagonally, double life could be gotten out of one pad. T. 178. Elson estimated that during his approximate six years as electrical supervisor on the surface, there were at least six occasions when the pads were turned or changed out. T. 178.

Elson discussed the two trough rollers, approximately 40 feet inby the slope track opening, that were reported to not be turning. *See also* Safeguard No. 9076448. There were seven trough rollers at the pit mouth, a couple outside the pit mouth and a few more inby the mouth. T. 178-179. The trough rollers were used to keep the rope over the knuckle. T. 179. The slope track was approximately 22 degrees. T. 179. The actual slope track on the surface before getting to the pit mouth opening was less. T. 179. During the transition over the crest, the trough rollers held the rope up off the surface, "concrete material or whatever." T. 179. Rollers are made of steel and are exposed to the weather. T. 179. They are subject to "wash back": water gets on the belt; coal is loaded onto the water; as it starts up the slope, the water will wash the coal backwards and make a "mess." T. 179-180.

Elson opined that the rollers at Crabapple Portal were not subject to the same wear or tension. T. 180. The third trough roller would take the most pressure or force. T. 181. On August 13, 2018, this roller was turning. T. 181. The two inby rollers, which were reported in the safeguard not to be turning, were numbers six and seven out of seven total rollers. T. 181.

The slope hoist rope does sometimes come into contact with gravel, rock, slate, mud, coal, and water—as reported in the safeguard. T. 181. While the operator does its best to prevent such contact, there is approximately 300 feet of cable exposed to the weather at all times. T. 181.

Elson disagreed with the assertion in the safeguard that the hoist rope had been removed from service "multiple times" for excessive wear. T. 181-182; *see also* P-2. On two occasions a non-destructive test was conducted. T. 182. Although the rope was below the retirement age, it was decided to change it out. T. 182. This was not done because of excessive wear; the majority of time it was "for kinks in the rope, distortion." T. 182.

In reference to Safeguard No. 9076449 noting various mine supplies on both sides of the tracks (P-4), Elson did not know of any material contacting the slope car as it dropped down. T. 182. Nobody normally walked the hoist slope. T. 182-183. If for whatever reason, one were to walk out of the mine, one would use the slope belt rather than the slope track because of the high velocity of air coming down the slope track—over 9,000 CFM. T. 183-184.

Elson disagreed that having mine supplies in the slope entry constituted a hazard. T. 184.

In reference to the wear pads depicted in the final photograph in P-5, Elson agreed that these pads were rectangular in shape and would have to be changed out—unlike the square wear pads on the slope. T. 185. Elson further agreed that a second rectangular wear pad depicted in the P-5 final photograph would require replacement. T. 186.

If wear pads are covered with material and the rope is dragging through the material the wear pad is not serving its purpose. T. 186; *see also* P-5. The examination reports in R-1 disclosed the need to replace the hoist rope before six months had elapsed. T. 188. A non-turning roller would add more frictional wear than a turning roller. T. 188-189.

There are three LED lights that face the track and route which, in combination with cap lights, aid visibility at night. T. 192-193. However, Elson conceded that the nighttime darkness on midnight shift would affect visibility. T. 190; *see also* R-3. The escalation reports, where problems were noted, all came during daylight hours rather than midnight hours. T. 191.

Elson did not possess a hoistman card or a hoistman certification nor had he ever physically worked on wire ropes. T. 189.

Usage of the slope rope would affect its life. T. 192. The rope changes reported in R-1 were between NDTs, establishing the operator was not only changing the rope when a NDT was performed. T. 192.

Michael Tennant

Michael Tennant had worked for Respondent for approximately 20 years, being employed at Baily Mine for 18 years.[12] T. 194. Tennant had been working as a safety supervisor for Baily Mine in August 2018. T. 195.

Exhibit P-1 was a technical violation issued in response to a letter submitted to District Manager Russell Riley in connection with the safeguard issued on August 13, 2018. T. 196. Exhibit P-3 was a similar technical citation for a different safeguard issued on August 13, 2018. T. 197.

Tennant was aware that Inspector Vargo intended to inspect the Crabapple slope, hoist, and rope on August 13, 2018. T. 197. He discussed Vargo's issuance of the safeguards and conveyed his disagreement with such. T. 198.

Exhibit R-7 was a list of dates that Tennant reported to MSHA that Crabapple hoist had been down in 2016, 2017, and 2018. T. 200. Tennant had created the document to rebut the safeguard assertion that the Crabapple hoist had been taken down multiple times for wear on the rope.[13] T. 200. On none of the dates reported in 2016 had the hoist been taken out of service for

[12] *See* TT 194-195 for full resume.

[13] The full title of the document, which was partially obscured, read "reportable Crabapple Hoist Car." T. 200. "Reportable" meant anytime the elevator was inoperable for more than 30 minutes in which case MSHA had to be notified. T. 200.

excessive wear. T. 201. On October 22, 2016, the operator did take the hoist out of service because it was "close enough to the non-destruct." T. 201.

In reference to R-8 (Request for Health and Safety Conference), Tennant had requested conferences on the safeguards issued. T. 203.

As to Safeguard No. 9076448, Tennant disagreed that there was any specific hazard presented. T. 206. The slope hoist rope was "in fine shape." T. 2016. Nobody's life was in danger; no equipment was in danger. T. 207.

As to Safeguard No. 9076449 (P-4) Tennant again did not believe any specific hazard was presented by mine supplies on the side of the slope tracks. T. 207. He was unaware of any car coming into contact with any of the cited material. T. 207. There was already a safeguard at the mine that required 24 inches clearance. T. 207-209; *see also* R-10 Re slip and fall hazard.

As compared to track haulage, the slope car only went to the bottom area of the mine. T. 210. The slope car was moved by the hoist rope; track cars were pulled by a locomotive. T. 211; *see also* R-10, Safeguard No. 3670427.

Tennant contended that if the hazard presented was a "slip and trip" hazard, Safeguard No. 3670427 already addressed such. T. 212; R-10. If the hazard was derailment, there had been nothing observed by Vargo of materials coming into contact with the slope car. T. 212.

Supplies in the slope entry or on the slope itself did not present a hazard unless they came into contact with a car. T. 212-213.

CONTENTIONS OF THE PARTIES

As to Safeguard No. 9076448 (P-2), the Secretary contends that the Respondent failed to address various unsafe conditions involving the slope hoist rope at the Crabapple Portal of Bailey Mine. These hazardous conditions included: multiple worn wear pads on the slope track; the hoist rope running into steel grating for approximately six feet; two trough rollers that would not turn when the hoist rope was in contact with them; the hoist rope being dragged through gravel, rock, slate, mud, coal, and water; excessive wear and damage to the hoist rope; the slope hoist rope's removal from service multiple times for excessive wear.

As to Safeguard No. 9076449 (P-4), the Secretary contends that the Respondent improperly allowed the accumulation of debris and supplies on both sides of the slope track.

As to Safeguard No. 9076448, Respondent contends that the alleged transportation hazards associated with the Crabapple hoist rope were already covered by mandatory safety standards at 30 C.F.R. § 75.1430 through § 75.1438. As such, the safeguard was facially invalid because there was no actual mine specific transportation hazard not (already) covered by a mandatory safety standard. Respondent alternatively contends that, even if the safeguard was facially valid, there were no actual transportation hazards existent at any of the pertinent times within. The Respondent makes a similar argument with regards to Safeguard No. 9076449,

arguing that it is invalid because there was no actual mine specific transportation hazard, and that the safeguard did not adequately articulate the hazard or the conduct required of the operator to remedy such hazard.

As to Safeguard No. 9076449, at hearing the Respondent contended that any alleged transportation hazard associated with the track was already covered by an existing mandatory safety standard (Safeguard No. 3670427) and that, in the alternative the Secretary failed to prove the existence of any actual transportation hazard associated with the slope track.

ANALYSIS

Issue I: Was Safeguard No. 9076448 facially invalid in that the contemplated transportation hazard—hoist slope rope failure due to excessive wear and tear—was already covered by existing mandatory safety standards at 30 C.F.R. §§ 75.1430 through 75.1438?

Issue II: Assuming Safeguard No. 9076448 was not facially invalid, did the Secretary carry his burden of proving the existence of an actual transportation hazard?

Issue III: Assuming the Secretary carried his burden of proof, did he properly articulate the conduct required of the operator to remedy the hazard?

Issue IV: Was Safeguard No. 9076449 facially invalid in that the contemplated safety hazards associated with the slope hoist track were already covered by prior Safeguard No. 3670427?

Issue V: Assuming Safeguard No. 9076449 was not facially invalid, did the Secretary carry his burden of proving the existence of any actual transportation hazard?

Issue VI: Assuming the Secretary carried his burden of proof, did he properly articulate the conduct required of the operator to remedy the transportation hazard?

I. Safeguard No. 9076448 was facially invalid in that the contemplated transportation hazard—hoist rope failure due to wear and tear—was already covered by mandatory safety standards found at 30 C.F.R. §§ 75.1430 through 75.1438.

At hearing and in his post hearing brief the Respondent contended that a safeguard may not be issued if there are already existing mandatory standards addressing the transportation hazard alleged. *See also* RB 7-11. *Cyprus Cumberland Resources Corp.*, 19 FMSHRC 1781, 1784– 85 (Nov. 1997), citing *Southern Ohio Coal Co.*, 14 FMSHRC 1, 8 (January 1992) ("*SOCCO II*")) ("In order to issue such a safeguard, an inspector must determine that there exists an actual transportation hazard not covered by a mandatory standard and that a safeguard is necessary to correct the hazardous condition.").

The Secretary did not dispute this proposition at hearing. Inspector Vargo responded affirmatively when asked at hearing, "would you also agree with me that to issue a safeguard, the actual hazard with respect to the transportation of men and materials you determined to have

existed must also not be covered by a mandatory standard?" T. 48. Rather, the Secretary cited to the applicable sections of the Act and regulations establishing MSHA's authority to issue mine-specific safeguards to minimize hazards with respect to the transportation of men and materials and Commission case law in support of such. *See, inter alia*, SB 4-5, *citing* § 314 (b) of the Act, 30 C.F.R. § 75.1403 of the regulations, and the Commission holding at *Pocahontas Coal Co. LLC*, 38 FMSHRC 157, at 157 (Feb. 2016).

However, the general authority of MSHA inspectors to issue transportation safeguards on a mine-to-mine basis is not at issue.[14] Rather, Respondent has challenged Coal Mine Inspector Vargo's issuance of this particular safeguard on the basis that mandatory safety standards in Part 75 of 30 C.F.R. already address the alleged transportation hazard posed at Baily Mine.

As to this threshold question, this Court finds that the existent safety standards in Part 75 of 30 C.F.R. §§ 75.1430 through 75.1438 do address the transportation hazard alleged to have existed at the operator's Crabapple Portal.

This Court begins its analysis by considering what was the specific transportation hazard alleged.

The hazard as described in Safeguard No. 9076448 was "wear and damage (to) the hoist rope." P-2, Section 8, Condition or Practice. At hearing, CLR Polka stated that the safeguard had been issued to protect miners from being exposed to the hazards of "the rope wearing out before it is expected and increasing the likelihood of an accident related to (the) rope failure." T.8. Similarly, Inspector Vargo testified that his "main concern" in issuing the safeguard was damage and wear to the slope rope. T. 48.

At hearing there was much testimony directed toward various hoist slope conditions, including worn or missing wear pads, static trough rollers; the hoist rope's exposure to the elements; the hoist rope's contact with steel grating or concrete; and the hoist rope dragging through gravel, rock, slate, mud, coal, and water. *See* P-2, *see also* T. 17, 18, 20, 28, 33, 41, 70, 73, 74. Such conditions may or may not constitute hazards in and of themselves. However, clearly the ultimate transportation hazard contemplated in Safeguard No. 9076448 was *hoist rope failure due to excessive wear and tear*. Such hazard is already covered in the cited regulations under *Wire Ropes* in Title 30 of the regulations, §§ 75.1430 through 75.1438. Said sections address in detail when damaged or deteriorated wire hoist ropes should be repaired or replaced in order to avoid rope failure.

Inter alia, these sections specifically provide that "wire ropes…used to hoist" (§ 75.1430) shall be subject to "minimum rope strength" values (§ 75.1431), "initial measurement" (§ 75.1432), "examinations," including biweekly visual examination and 6 month non-destructive testing (§ 75.1433), "retirement criteria," including rope diameter reduction and rope strength loss percentages (§ 75.1434), "end attachment retermination," (§ 75.1437) and "end attachment

[14] Likewise, the question is not, as Secretary seems to imply, whether a safeguard is invalid because it addresses hazards that exist at other mines. *See* SB 5, *Citing Oak Groves Res., LLC*, 35 FMSHRC at 2013.

replacement" (§ 75.1438). These regulatory standards go to the heart of what constitutes excessive hoist rope wear and tear and render the within safeguard as duplicative and preemptive.

Considering, therefore, the record *in toto* and Respondent's persuasive arguments on point, this Court finds Safeguard No. 9076448 to be facially invalid. The ALJ, however, recognizes that this a close question.[15] Accordingly this Court will further consider whether the Secretary carried his burden of proving that an actual transportation hazard existed when CMI Vargo issued the safeguard and whether MSHA had properly articulated the conduct required of the operator to remedy such hazard with specificity.

II. The Secretary failed to carry his burden of showing that an actual transportation hazard existed at the time in question.

As discussed *intra*, neither of Secretary's witnesses had testified that any of the retirement criteria were met under § 75.1434 on the dates Snyder performed his non-destructive test nor the dates Vargo conducted his inspections or issued the safeguard. T. 51, T. 55, T. 85.

Vargo opined that an actual transportation hazard existed because the hoist rope was "right at the borderline." T. 56. Similarly, Snyder testified the rope was "right at the limit." T. 122. There is a speculative quality to these opinions which renders them problematic. According to Vargo's and Snyder's rationales, although the hoist rope was still compliant with all applicable wire rope regulations, a transportation hazard nonetheless presently existed because at some looming time the rope would become non-compliant and fail. Such reasoning implicates fundamental norms of due process. The reasoning also improperly imports the Commission's assumption of continued mining operations in determining reasonable likelihood, to the analysis of whether a violation existed. *See Black Beauty Coal Co.*, 34 FMSHRC 1733, 1740 (Aug. 2012), *aff'd sub nom. Peabody Midwest Mining, LLC v. FMSHRC*, 762 F.3d 611 (7th Cir. 2014).[16]

In considering whether the Secretary carried its burden of proving an actual hoist rope transportation hazard existed, this Court has considered the weight to be accorded Vargo and Snyder's testimony. The Secretary cites Vargo's 30 years of mining experience and urges that "great weight' be given their testimony "due to their specific experience and training regarding the issues in this case…" SB 4.

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[15] Arguably, the MSHA inspector may have been properly exercising his statutory and regulatory authority under Section 314 (b) of the Act and Section 75.1403 of the regulations notwithstanding the Part 75 *Wire Ropes* standards discussed within. This is not an instance where the overreach of authority is manifested with refulgent clarity such as, for example, Martin Luther's accusation of Pope Leo X's usurpation of jurisdiction over Purgatory.

[16] The following analogy may not be on all fours. However, this Court wonders if the Secretary's witnesses would accept—with equal equanimity—the finding of a Highway Patrol Officer that they were guilty of speeding because they were traveling at 64 miles per hour in a 65 MPH zone and would be presumably going over the speed limit shortly.

This Court notes, however, that while Inspector Vargo had decades of experience in mining, he had little direct experience working on hoist slopes. On cross-examination, Vargo conceded he had never worked on slope hoists or with hoist ropes prior to joining MSHA in 2007. T. 45. He had no hoist-related certifications. T. 45-46. He had not performed actual work on slopes while at MSHA. T. 45. He had received "probably half a day" training on slopes at the Mine Academy. T. 46. He had never issued a safeguard prior to the issuance of the within safeguards. T. 47.

Vargo was unable to corroborate some of his testimony with his contemporaneous notes. T. 58-61; *see also* P-2. He had failed to take photographs on the date(s) of his observations, documenting such. T. 61. He also had failed to take actual measurements as to the depth of the grooves on the wear pads. T. 61. He was uncertain as to actual number of trough rollers that were located on the hoist. T. 72. Although he believed that the two inby rollers cited in the safeguard bore the most pressure, he had not inquired to confirm such. T. 72.

Inspector Vargo was also unable to determine how much—if any—contributory effect non-turning trough rollers would have on overall hoist rope erosion.[17] T. 72; P-2. He was unaware that Respondent had contracted wire rope specialists to perform work on the hoist rope days before he had issued the safeguard.

Inspector Snyder's mining engineering discipline did not involve any education in wire ropes. T. 141. Like Mr. Vargo, Michael Snyder had found no violations of the hoist rope on August 7, 2018. T. 51, 55, 110-120. He found the rope to be "right at the limit" but compliant. T. 122. He conceded that rope strength loss of 10% could be remedied by reterminating the affected section rather than changing out the entire rope. T. 125-126. He was unaware that the operator was also conducting daily examinations of the hoist rope. T. 127. He further agreed that, prior to the issuance of the safeguard, 350 feet of the hoist rope had been reterminated on August 7, 2018. T. 129-130. Snyder had not considered at the time the rope had been reterminated, whether it was safe to operate despite the worn wear pads.[18] T. 132.

On the other hand, Craig Elson, the operator's assistant master mechanic, had job experience with hoist operations. T. 157-158. He testified that the hoist rope had been reterminated on August 7, 2018, days prior to the August 15, 2018 issuance of the within safeguard. T. 163, 165. Elson further gave unrebutted testimony that, as long as there were three remaining wraps on a drum [see also § 75.1436 (b)], portions of the rope could be cut out, still allowing it to remain compliant and not thereby requiring the entire hoist rope to be replaced. T. 125-126. He also noted that there were daily visual examinations of the hoist, as well as the 14-day examinations. T. 170; *see also* R-3. Elson noted that wear pads wore out at different rates due to undulations in the floor. T. 177. He further testified that the third trough roller (which was turning during Vargo's inspections) would be sustaining the most pressure or force—not the two

[17] As noted *infra* Elson maintained that the two non-turning trough rollers would not be bearing the most pressure exerted by the hoist rope—rather the third roller, which was turning, would.

[18] Though finding Snyder to be an honest individual, this Court also found Snyder to be purposely unresponsive to some of Respondent's counsel's questions.

inby static trough rollers described by Mr. Vargo in the safeguard. T. 180-181. Unlike Vargo, Elson knew the exact number of trough rollers located on the slope hoist. T. 181.

As to Vargo's assertion in Safeguard No. 9076448 that the slope rope had been removed from service multiple times for excessive wear, Mr. Elson testified that this was inaccurate. T. 182. The majority of times that the rope was removed was for kinks or distortions—not wear or tear.[19] *See* R-7.

The Operator's safety supervisor, Michael Tennant, also disagreed with Vargo's characterization, submitting a written summary detailing the dates that the Crabapple hoist was reported "down" to MSHA. T. 199-201; R-7. The hoist had been reported down only two times in 2018, prior to Vargo's August 7, 2018 inspection, one of which was for car brake issues and one for kinks, neither time for wire rope wear and tear. R-7.

Neither of the Secretary's witnesses gave persuasive testimony as to the nature or rate of wear/tear to the hoist rope caused by the various alleged hazardous conditions that they described.

This Court concludes that the Respondent's witnesses knew as much as or more than Secretary's witnesses regarding the actual operation of the slope hoist and was ultimately left uncertain as to the accuracy of the Secretary's contentions that actual transportation hazards existed.

As trier-of-fact and trier-of-law, this Court was unable to find that the Secretary proved his case by the preponderance of the evidence.

III. The Secretary failed to articulate the hazard and conduct required of the operator to remedy the contemplated hoist rope hazard with specificity.

Even if the Secretary had carried his burden of establishing the existence of an actual transportation hazard, this Court is also persuaded by Respondent's argument that the Secretary failed to articulate the hazard and conduct required of the operator with specificity. *See* RB, pp. 14-16.

At hearing, the Secretary's witnesses acknowledged that many of the conditions cited at the slope hoist—exposure to the elements, the presence of gravel, rock, slate, mud and water—were commonly found at mines throughout the country. T. 86.

This Court was not enlightened by Secretary's hearing presentation as to how such conditions could be specifically remedied.[20]

[19] Kinks may be found in even new wire ropes. T. 80, 139.

[20] *See also* Respondent's arguments on point at RB, pp. 15-16.

At hearing legitimate questions were also raised as to the effect of tension on the rope when the hoist was in operation and whether during operation the rope actually came into contact with debris. *See, inter alia*, T. 132-135.

CMI Vargo noted in his safeguard that "all wear pads that the hoist rope travels over be properly maintained." P-2. However, Vargo gave vague and inconsistent testimony as to what constituted "proper maintenance" T. 62-64, T. 91.[21] MSHA has not published any specific guidelines as to wear pad maintenance or replacement. T. 64, T. 132-133.

At hearing and in the safeguard, Vargo had noted that a wear pad had been worn down approximately 1 ¾ inches. P-2. This was an estimate as Vargo had failed to take actual measurements of the groove or, indeed, the actual thickness of the wear pad in question. At hearing it was indicated that wear pads wore out at different rates, that wear pads were of different shapes, including square and rectangular shapes, and that they were of varying thickness. *See, inter alia*, T. 176-178. Given all these variables this Court concludes that the operator was given insufficient notice as to when a particular pad or group of pads actually needed to be replaced.

This Court does not have the authority or inclination to dictate what specific guidelines should have been placed in MSHA's safeguard regulating hoist ropes at Baily Mine. However this Court suggests that the remedies for repair or replacement of such items as wear pads or trough rollers should have some specificity. For example, a wear pad measuring 2 ½ inches in thickness should be replaced or rearranged when it is worn down to ¼ inch thickness.[22] Similarly, notice of specific criteria as to when the number and position of static rollers pose a transportation hazard should be afforded to the mine operator.[23] As to the condition of hoist rope removal from service "multiple times," the ALJ suggests that a specific number of times within a specific time period for a specific cause be clearly set forth in the safeguard.

In summary this Court further finds that the safeguard was fatally deficient in articulating the hazard and conduct of the operator to remedy such hazard with specificity. For the foregoing reasons, Safeguard No. 9076448 violation should be vacated.

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[21] In its brief the Respondent persuasively reviewed Vargo's contradictory testimony. RB, at pp. 15-17.

[22] At hearing Secretary's witness, Mr. Snyder, implied that a wear pad could serve its function until it was actually cut in half. T. 132-133.

[23] In his brief Respondent persuasively argues that neither the safeguard nor Mr. Vargo detailed what it meant for rollers to be "properly maintained" or to "turn freely" or how operator was to achieve the mandate. RB, p. 16.

IV. Safeguard No. 9076449 does not address transportation hazards covered by a previous safeguard issued at Baily Mine.

Unlike Safeguard No. 9076448, this Court concludes that Safeguard No. 9076449 is facially valid in that the specific transportation hazards which Inspector Vargo sought to prevent were not already covered by an existing mandatory safety standard.

In reaching the within conclusion, this Court was persuaded by the arguments raised in Secretary's brief as to the differing hazards contemplated in Safeguard Nos. 3070427 and 9076449. *See also* SB, 8-10.

Respondent has contended that Safeguard No. 3670427, issued at Baily Mine in March 2001, already addressed the safety hazards contemplated in the MSHA inspector Safeguard No. 9076449, issued in August 2018. T. 210-211.

This Court does not agree. The Secretary's arguments against such preemption are persuasive. *See also* SB, 8-10.

At hearing Baily Mine's safety supervisor, Michael Tennant, agreed that Safeguard No. 3670427 dealt specifically with track haulage. T. 210. On cross-examination, he conceded that the safeguard did not address such hazards as hoist car derailment.

Considering also that Safeguard No. 9076449 dealt with a different area of the mine, the slope hoist area, as opposed to track haulage areas, that track cars are moved by locomotives and slope cars by a hoist rope, and given the different transportation described *infra*, this Court finds Safeguard No. 9076449 to be facially valid.

V. The Secretary failed to carry its burden of proving that an actual transportation hazard contemplated in Safeguard No. 9076449 existed at the time of MSHA's inspection(s).

Safeguard No. 9076449 indicated that various mining supplies and discarded items were seen on both sides of the slope tracks. P-4, Section 8. The Secretary contends that these conditions created various hazards. *See also* SB, 9-10. There would be a slip and trip hazard presented to miners traveling on foot such as examiners, track cleaners, and miners using the track slope as an emergency route. T. 38-39, 44, 183. Debris could fall into the hoist car's brake clamps and track, preventing the cars from stopping, creating a struck-by hazard for miners in the hoist cars, including examiners and miners working in the slope track or working at the bottom of the slope track. T. 40-41. There being no seat belts, miners might be thrown out of the hoist cars. T. 39. Debris could come into contact with the rail and the hoist car wheels and could cause a derailment. T. 39-43. The hoist rope could abrade against debris in the slope track and create additional excessive wear. T. 39-41. A struck-by hazard would be created for miners working in or at the base of the slope track or for miners riding in hoist cars. T. 30-41.

At hearing, however, Mr. Vargo offered little evidence that the supplies and debris described in the safeguard were actually in contact with the slope track, brakes or slope cars, or

slope hoist.[24] On cross-examination, Vargo admitted that he did not know whether any material was actually contacting the slope car. T. 87.

As to many of the alleged hazards, Vargo offered little in the way of corroborative support. He had failed to take measurements to determine how close material was to the track. T. 87. While testifying that there was material in some areas contacting the slope rope, no such observations were recorded in the safeguard or his contemporaneous notes. T. 87; *see also* P-4.

Similarly, as to whether material presented a slip and trip hazard, Vargo again failed to note such in the safeguard or his notes.[25] T. 88. This led to Vargo having to split hairs in his testimony. His explanation that he hadn't said "slipped" or "tripped", but only that he slipped was somewhat confusing. T. 89. This Court found it an open question as to whether Vargo and his escort had slipped because of the steepness of grade or because of material in the space between the track and supplies. Given that it is Secretary's burden to establish each operative fact, this Court specifically finds that the Secretary failed to carry such burden as to the existence of an actual slip and trip or slip and fall hazard.

This Court finds the Respondent's arguments as to the absence of actual transportation hazards to be persuasive and holds that it is correct. *See also* SB at 17-18.

VI. Assuming the Secretary did carry his burden of proof, the Secretary failed to properly articulate the conduct required of the operator to remedy the contemplated transportation hazards.

This Court agrees with Respondent's argument that Safeguard No. 9076449 is invalid because it contains vague and non-specific remedies that do not adequately address or provide adequate notice of the conditions and how the operator is to remedy the contemplated transportation hazard. *See* RB, p. 18.

The safeguard directs that the slope track be "kept free of these mine supplies and other supplies that are hoisted in and out of the mine." T. 93; P-4. Given that supplies are hoisted in and out of the mine, the safeguard provides insufficient direction as to how the slope track should be kept free of such. Considering Vargo's testimony that supplies or materials located in the slope which do not contact the slope car are not hazardous, the safeguard provides insufficient notice as to what remedies should be undertaken to avoid the contemplated transportation hazards.[26]

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[24] The issue of slope rope damage has already been discussed above.

[25] This Court also notes there may be an issue as to whether a slip and fall hazard constitutes a hazard with respect to transportation under § 75.1403.

[26] For example should there be a certain clearance distance maintained between the haulage track and any supplies, materials, debris along the track?

For the foregoing reasons, Safeguard No. 9076449 violation should be vacated.

ORDER

It is the **ORDER** of this Court that Citation Nos. 9076455 and 9076456 and respective associated Safeguard Nos. 9076448 and 9076449 are hereby **VACATED** and **DISMISSED**.

/s/ John Kent Lewis
John Kent Lewis
Administrative Law Judge

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