

October 2014

TABLE OF CONTENTS

COMMISSION DECISIONS

10-07-2014	ICG HAZARD, LLC	KENT 2009-951	Page 2635
10-16-2014	STATE OF ALASKA, DEPARTMENT OF TRANSPORTATION	WEST 2008-1490-M	Page 2642

COMMISSION ORDERS

10-02-2014	LIMESTONE DUST CORP.	VA 2013-499-M	Page 2651
10-03-2014	ASH GROVE CEMENT COMPANY	CENT 2013-574-M	Page 2653
10-03-2014	AMERON HAWAII	WEST 2013-972-M	Page 2655
10-03-2014	D & S MINING & EXPLORATION	WEST 2013-985-M	Page 2657
10-06-2014	FRONTIER-KEMPER CONSTRUCTORS, INC.	WEST 2013-999-M	Page 2659
10-06-2014	BUCKLEY POWDER COMPANY	WEST 2013-1023	Page 2661
10-08-2014	PATTISON SAND COMPANY, LLC	CENT 2013-607-M	Page 2663
10-16-2014	THE AMERICAN COAL COMPANY	LAKE 2011-13	Page 2665
10-20-2014	TACKETT CREEK MINING	SE 2013-557-M	Page 2667
10-20-2014	THE QUARTZ CORPORATION USA	SE 2013-594-M	Page 2669

10-20-2014	PROFESSIONAL CONTRACTING, LLC	VA 2013-559	Page 2671
10-21-2014	BENTON COUNTY STONE COMPANY, INC.	CENT 2013-675-M	Page 2673
10-21-2014	CHEYENNE ELKHORN COAL COMPANY, INC.	KENT 2013-1073	Page 2675
10-21-2014	CHEYENNE MINING COMPANY, INC.	KENT 2014-2	Page 2677
10-21-2014	CHARLES RECKNER, JR., employed by BUCK RUN AGGREGATES	LAKE 2013-567-M	Page 2679
10-21-2014	CCZ, INC.	WEST 2014-9-M	Page 2681
10-21-2014	BROOKS RUN MINING COMPANY, LLC	WEVA 2013-1122	Page 2683
10-21-2014	DOMINION COAL CORPORATION	VA 2013-565	Page 2685

ADMINISTRATIVE LAW JUDGE DECISIONS

10-01-2014	NORDIC INDUSTRIES, INC.	WEST 2014-193-M	Page 2687
10-03-2014	ROCK EXPRESS, INC	CENT 2010-1236-M	Page 2696
10-03-2014	TWENTYMILE COAL COMPANY	WEST 2009-1323	Page 2715
10-06-2014	SEC. OF LABOR O/B/O CAMERON GARCIA V. VERIS GOLD U.S.A., INC.	WEST 2014-788-DM	Page 2721
10-14-2014	SEC. OF LABOR O/B/O JEFFERY HARRIS V. HANSON AGGREGATES MID-PACIFIC, INC.	WEST 2014-935-DM	Page 2724
10-16-2014	WARRIOR INVESTMENTS COMPANY, INC.	SE-2013-361	Page 2726

10-17-2014	EXTRA ENERGY, INC.	VA 2013-511	Page 2733
10-29-2014	HECLA LIMITED	WEST 2012-353-RM	Page 2749
10-31-2014	RONALD SAND & GRAVEL	WEST 2012-1042	Page 2756

ADMINISTRATIVE LAW JUDGE ORDERS

10-02-2014	SEC. OF LABOR O/B/O REGALD ROBBINS V. ALDEN RESOURCES, LLC	KENT 2014-594-D	Page 2787
10-09-2014	WISCONSIN INDUSTRIAL SAND CO.	LAKE 2014-0692-M	Page 2789
10-20-2014	AUSTIN POWDER COMPANY	PENN 2012-116-R	Page 2791
10-24-2014	KANAVAL'S EXCAVATING & GRAVEL	YORK 2013-217-M	Page 2795

Review was denied in the following cases during the month of October 2014:

Cactus Canyon Quarries, Inc., Docket No. EAJA 2014-1-M (Judge Rae, September 15, 2014)

Rex Coal Company, Inc. v. Secretary of Labor, MSHA, Docket No. KENT 2011-1037 (Judge Andrews, September 15, 2014)

Mona Kerlock v. Asarco, LLC, Docket No. WEST 2014-851-DM (Judge Miller, August 27, 2014)

There were no cases in which review was granted during the month of October 2014.

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 7, 2014

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

Docket Nos. KENT 2009-951
KENT 2009-952
KENT 2009-960

v.

ICG HAZARD, LLC

BEFORE: Nakamura, Acting Chairman; Cohen and Althen, Commissioners

DECISION

BY THE COMMISSION:

These matters arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“the Act”). Two orders issued to ICG Hazard, LLC, by the Secretary of Labor remain at issue before the Commission.¹ The specific issues for review are: whether the Administrative Law Judge properly affirmed Order No. 8315597 as a section 104(d)(1) order;² and whether the Judge properly assessed a \$138,500 civil penalty for Order No. 8316130.

For the reasons that follow, we modify section 104(d)(1) Order No. 8315597 to a section 104(a) citation³ and remand the citation for reassessment of the penalty. We also vacate the Judge’s penalty for Order No. 8316130 and impose a civil penalty of \$70,000.

¹ Of the fifteen citations and orders in the captioned dockets, seven were resolved through partial settlement, and eight were affirmed by the Judge. Unpub. Dec., slip op. at 21-22 (Oct. 2012) (ALJ). ICG sought review of four citations and orders; the Commission granted review of the two orders discussed herein and denied review of Citation No. 8315134 and Order No. 8315174.

² In relevant part, section 104(d)(1) establishes additional sanctions for any violation caused by “an unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards.” 30 U.S.C. § 814(d)(1).

³ Section 104(a) generally authorizes the Secretary to issue citations for violations of “this [Act], or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to this [Act].” 30 U.S.C. § 814(a).

I.

Order No. 8315597

A. Factual and Procedural Background

Mine Safety and Health Administration (“MSHA”) Inspector James Daniels issued Order No. 8315597 after inspecting the 001 Section Joy Continuous Miner in ICG’s Flint Ridge Mine No 2. The order alleges that ICG failed to conduct an adequate on-shift dust control examination, in violation of section 75.362(a)(2),⁴ by failing to note that the continuous miner had inadequate water pressure and insufficient sprays. Gov. Exs. 12, 13. The inspector designated the alleged violation as non-significant and substantial (“non-S&S”), but attributable to a high degree of negligence.

Inspector Daniels also determined that the violation was the result of an unwarrantable failure to comply with a mandatory standard pursuant to section 104(d) of the Act. Gov. Ex. 13. Because MSHA had previously issued a section 104(d)(1) citation to ICG at this mine, he determined that the violation gave rise to a section 104(d)(1) order.⁵

The Judge affirmed the order as “non-S&S with a high degree of negligence” based on the obviousness of the missing sprays and inadequate pressure. Slip op. at 16. The Judge made no explicit finding of unwarrantable failure; however, she ultimately affirmed the violation as a section 104(d)(1) order by stating “Modifications - None” in her summary of the penalties, and raised the penalty from \$2,000 to \$5,000. *Id.* at 22; Pet. for Assessment of Penalty, Ex. A.

ICG contends, and the Secretary agrees, that the Judge failed to make an unwarrantable failure finding, and therefore Order No. 8315597 cannot stand as a section 104(d) order. The

⁴ Section 75.362(a)(2) states in relevant part that “[a] person designated by the operator shall conduct an examination and record the results and the corrective actions taken to assure compliance with the respirable dust control parameters specified in the approved mine ventilation plan . . . within 1 hour after the shift change,” including an examination of “water pressures . . . [and] water spray numbers.” 30 C.F.R. § 75.362(a)(2).

⁵ Section 104(d)(1) establishes a “d-chain” framework in which an initial violation that is both S&S and an unwarrantable failure is designated as a section 104(d)(1) citation, and any subsequent unwarrantable failure violation within the next 90 days, even if not S&S, necessarily results in the issuance of a section 104(d)(1) withdrawal order. 30 U.S.C. § 814(d)(1).

Here, the d-chain predicate was Citation No. 8315134, which was issued 57 days prior to Order No. 8315597, and alleged an S&S violation and an unwarrantable failure to comply with the mine’s ventilation plan, in violation of section 75.370(a)(1). Gov. Ex. 19; *see n.8, infra*. The citation was affirmed by the Judge in the decision at issue, and review was denied. Slip op. at 3-6; *see n.1, supra*.

parties request that the order be modified to a section 104(a) citation. ICG Br. at 5; Sec’y Resp. at 2.

B. Disposition

The Commission has ruled that the question of whether a violation resulted from an unwarrantable failure to comply is based on an examination of specific criteria. Here, the Judge failed to address the relevant criteria, and did not make an explicit finding of unwarrantable failure for Order No. 8315997.

The Commission has defined “unwarrantable failure” as “aggravated conduct constituting more than ordinary negligence.” *Manalapan Mining Co.*, 35 FMSHRC 289, 293 (Feb. 2013) (citing *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec. 1987)). The Commission outlined the criteria for determining whether conduct is “aggravated,” including:

- (1) the extent of the violative condition, (2) the length of time that the violative condition existed, (3) whether the violation posed a high degree of danger, (4) whether the violation was obvious, (5) the operator’s knowledge of the existence of the violation, (6) the operator’s efforts in abating the violative condition, and (7) whether the operator had been placed on notice that greater efforts were necessary for compliance. *See IO Coal Co.*, 31 FMSHRC 1346, 1351-57 (Dec. 2009); *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev’d on other grounds*, 195 F.3d 42 (D.C. Cir. 1999).

Id. Although not all factors may be relevant to every case, all relevant factors must be examined. *Id.*; *IO Coal*, 31 FMSHRC at 1351.

In this case, the Judge made no finding with respect to unwarrantable failure. The Judge’s decision with respect to Order No. 8315597 does note the obviousness of the violation, basing the high negligence finding on the mine’s “fail[ure] to conduct an adequate on-shift in the face of such obvious problems.” Slip op. at 16. The Judge also concludes that the underlying conditions existed for more than one shift, though this finding is made as evidence of the violation itself – i.e., that the conditions did not occur after the most recent on-shift examination – rather than as evidence of aggravated conduct. *Id.* However, the decision fails to address the remaining factors, or alternatively, to explain why they are not relevant.⁶

⁶ A number of other unwarrantability factors, as related to the *underlying conditions only*, are discussed in the Judge’s analysis of Citation No. 8315596, which found that the inadequate water pressure and missing sprays on the 001 continuous miner constituted a failure to comply with the mine’s dust control plan, in violation of 30 C.F.R. § 75.370(a)(1). Slip op. at 15-16; *see* n.8, *infra*. However, as noted by the Judge, the unwarrantability of an inadequate

(continued...)

We emphasize that it is the failure to address all the relevant factors, rather than the mere absence of the phrase “unwarrantable failure,” that compels this conclusion. A Judge must analyze and weigh relevant testimony, make appropriate findings, and explain the reasons for her decision. See *Mid-Continent Res., Inc.*, 16 FMSHRC 1218, 1222 (June 1994) (citing *Anaconda Co.*, 3 FMSHRC 299, 299-300 (Feb. 1981)). Here, the appropriate findings are the relevant unwarrantability factors, irrespective of the inclusion of the words “unwarrantable failure.”

Generally, when a Judge has failed to make appropriate findings, remand is appropriate. See, e.g., *Mid-Continent Res.*, 16 FMSHRC at 1222-23. However, the burden of proving unwarrantable conduct rests with the Secretary, *Peabody Coal Co.*, 18 FMSHRC 494, 499 (Apr. 1996), and here, the Secretary has in essence conceded that the record is insufficient to establish unwarrantable failure.⁷ Accordingly, remand with regard to that element is unnecessary. Order No. 8315597 is modified to a section 104(a) citation, and remanded for reconsideration of the penalty consistent with the removal of the unwarrantable failure designation.

II.

Order No. 8316130

A. Factual and Procedural Background

MSHA Inspector Robert Ashworth issued Order No. 8316130 after inspecting the continuous miner in the mine’s 002 Section. The order alleges that the continuous miner had inadequate water pressure and a number of missing sprays, in violation of section 75.370(a)(1),

⁶ (...continued)

examination must be established independently from that of the underlying violative conditions. *Id.* at 14; see *Consolidation Coal Co.*, 23 FMSHRC 588, 597 (June 2001) (finding that the unwarrantability analyses for related violations of 30 C.F.R. §§ 75.400 and 75.360 may rely on some of the same factual findings, but are not interchangeable).

⁷ The Secretary’s Response Brief states:

[A] reading of the Judge’s decision confirms that the judge did not make a finding that the violation alleged in Order No. 8315597 was an unwarrantable failure. See Dec. at 16. Accordingly, the judge should have modified Order No. 8315597 from a Section 104(d)(1) order to a Section 104(a) citation.

Sec’y Resp. at 2.

which requires compliance with the approved ventilation and dust control plan.⁸ Gov. Ex. 16.

The Secretary initially designated the condition as a flagrant violation and proposed a \$138,500 civil penalty pursuant to section 110(b)(2) of the Act, 30 U.S.C. § 820(b)(2). Prior to the hearing in this matter, the parties filed joint stipulations in which the Secretary agreed not to pursue the flagrant designation. Jt. Ex. 1, Jt. Stip. 6. However, the relevant stipulation was not addressed at the hearing or in the parties' post-hearing briefs, nor did the Secretary propose a new reduced penalty for Order No. 8316130 consistent with a non-flagrant violation.

The Judge affirmed the order as S&S and attributable to unwarrantable failure, with no modifications, and assessed the \$138,500 penalty originally proposed by the Secretary. Slip op. at 17-19, 22. The Judge's decision makes no mention of the flagrant designation.

ICG contends, and the Secretary agrees, that the Judge improperly exceeded the \$70,000 maximum assessable civil penalty for non-flagrant violations provided by section 110(a)(1) of the Act, 30 U.S.C. § 820(a)(1), because the Secretary stipulated that he did not intend to pursue the flagrant designation. ICG Br. at 5-6; Sec'y Resp. at 2. Alternatively, ICG argues that the penalty is improper because the Judge failed to make a finding regarding a flagrant violation. ICG Br. at 7.

ICG requests that the \$138,500 civil penalty be vacated and remanded for reassessment of a penalty consistent with the non-flagrant maximum provided in section 110(a)(1). The Secretary contends that a remand is unnecessary, because "[i]nasmuch as the judge assessed a penalty of \$138,500 . . . the judge a fortiori has already determined that a penalty of \$70,000 is appropriate." Sec'y Resp. at 3 n.1.

B. Disposition

Section 110(a)(1) states that the operator of a mine "in which a violation occurs of a mandatory health or safety standard . . . shall be assessed a civil penalty by the Secretary which penalty shall not be more than \$50,000 [currently \$70,000] for each such violation;" however, pursuant to section 110(b)(2), "[v]iolations under this section that are deemed to be flagrant may be assessed a civil penalty of not more than \$220,000." 30 U.S.C. §§ 820(a)(1), (b)(2). The Judge did not make a flagrant finding with regard to Order No. 8316130. Therefore, the \$138,500 civil penalty assessed by the Judge was improper.

A violation is deemed to be flagrant if it is "a reckless or repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard that . . . reasonably could have been expected to cause[] death or serious bodily injury."

⁸ Section 75.370(a)(1) requires the operator to "follow a ventilation plan approved by the district manager . . . designed to control methane and respirable dust." 30 C.F.R. § 75.370(a)(1).

30 U.S.C. § 820(b)(2). ICG correctly states that the Judge failed to make findings with respect to any of the elements unique to a flagrant violation.

The Secretary's stipulation does not foreclose the possibility of a flagrant designation.⁹ Nevertheless, in this case, the Secretary's stipulation does resolve the issue as a practical matter, because the Secretary did not present any evidence at hearing related to the unique elements of a flagrant violation, i.e., that the violation was a reckless or repeated failure to make reasonable efforts to eliminate a known violation. Therefore, the record compels the conclusion that the Secretary did not establish a flagrant violation. Accordingly, the Judge erred in assessing a penalty in excess of the statutory maximum for non-flagrant violations.

The remaining issue is whether to remand the penalty for reassessment or to reduce the penalty to \$70,000 without a remand. Where the evidence supports only one conclusion, remand on that issue is unnecessary. See *Sedgman*, 28 FMSHRC 322, 331 (June 2006); *Am. Mine Servs., Inc.*, 15 FMSHRC 1830, 1834 (Sept. 1993). Here, the imposition of a \$138,500 penalty clearly indicates that the Judge found that the gravity and negligence associated with the violation (findings which ICG has not challenged) warranted an extremely high penalty.¹⁰ ICG has not challenged the Judge's assessed penalty in Order No. 8316130 except insofar as it exceeded the statutory maximum for non-flagrant violations. We agree with the Secretary that the Judge's decision supports only the conclusion that the Judge intended to assess at least \$70,000. Therefore, remand is unnecessary; the penalty assessed for Order No. 8316130 is vacated, and a penalty of \$70,000 is imposed.

⁹ Section 110(k) of the Act states that "[n]o proposed penalty which has been contested before the Commission . . . shall be compromised, mitigated, or settled except with the approval of the Commission." 30 U.S.C. § 820(k).

¹⁰ The Judge's imposition of an extremely high penalty was justified by the MSHA inspector's findings of inadequate water pressure and missing sprays on a continuous miner. Specifically, the inspector found: (1) only 5 psi of water pressure on the continuous miner instead of the required 60 psi, resulting in only a small trickle of water from the spray; (2) only 3 sprays instead of the required 5 sprays on the front cutter head; (3) only 2 sprays instead of the required 3 sprays on another spray block; (4) only 5 sprays instead of the required 7 sprays on one of the top spray blocks; and (5) only 5 sprays instead of the required 8 sprays on the other top spray block. Slip op. at 17; Tr. 116-22. The Judge agreed with the inspector that the violation resulted in increased dust in the air, and hence the health hazard of greater exposure to respirable dust leading to the crippling diseases of silicosis and pneumoconiosis. Slip op. at 18-19. The Judge also found the violation to be S&S and an unwarrantable failure based on the inspector's testimony that the violation was dangerous in exposing two miners to the hazards of silicosis and pneumoconiosis, that it was extensive and had existed for some time, that it was obvious, and that the operator knew or should have known about the serious violation of its ventilation plan. *Id.*

III.

Conclusion

For the foregoing reasons, section 104(d) Order No. 8315597 is modified to a section 104(a) citation, and remanded for reassessment of a civil penalty consistent with a non-unwarrantable failure violation. Additionally, we vacate the \$138,500 penalty imposed by the Judge for Order No. 8316130 and, consistent with section 110(a)(1) of the Act, impose a penalty of \$70,000.

/s/ Patrick K. Nakamura

Patrick K. Nakamura, Acting Chairman

/s/ Robert F. Cohen, Jr.

Robert F. Cohen, Jr., Commissioner

/s/ William I. Althen

William I. Althen, Commissioner

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 16, 2014

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

Docket No. WEST 2008-1490-M

v.

STATE OF ALASKA, DEPARTMENT
OF TRANSPORTATION

BEFORE: Nakamura, Acting Chairman; Cohen and Althen, Commissioners

DECISION

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act” or “Act”). At issue are the sand and gravel operations the State of Alaska Department of Transportation (“AKDOT”) conducts in conjunction with maintaining the Dalton Highway, which is used by vehicles to service the Alaska Pipeline. An Administrative Law Judge granted AKDOT’s motion to dismiss the proceeding for a lack of jurisdiction under the Mine Act. 34 FMSHRC 179 (Jan. 2012) (ALJ). The Secretary of Labor petitioned for review. For the reasons that follow, we reverse the determination of the Administrative Law Judge and conclude that the AKDOT operations are subject to the Mine Act.

I.

Factual and Procedural Background

The Dalton Highway is a gravel road, approximately 420 miles in length, that is used year-round, even when it is frozen. 34 FMSHRC at 180-81. During the original construction of the road, 40 or so pits were developed near it. AKDOT uses its equipment during a limited period in the summer to remove sand and gravel from the pits as needed for AKDOT’s use in maintaining the road during the following year. *Id.* at 181. A large piece of equipment known as a “SAG Screener” is employed by AKDOT in connection with its sand and gravel operations; the SAG Screener travels from pit to pit. *Id.* at 179, 181.

With regard to such multi-site operations, the Department of Labor's Mine Safety and Health Administration ("MSHA") takes the position that it considers the location at which portable equipment is being used to be a "mine" for purposes of enforcing the Mine Act.¹ In 2002, MSHA requested that the portable screeners that AKDOT uses in road and other operations be registered with MSHA. Consequently, the SAG Screener was issued an MSHA Mine ID number that year. 34 FMSHRC at 181.

In June 2008, when the pit and screening operation was taking place near Mile 144 of the Dalton Highway, it was the subject of an MSHA inspection. The MSHA inspector stated that he observed AKDOT employees

excavating material from a "gravel pit," [and] loading the material into a screener which separated it into different sizes of rock and placed the rock in different piles based on its size. Three different sizes of rock were being produced because there were three conveyor belts carrying the rock from the screener to three separate piles. In addition, there was a conveyor for the oversize. The sized rock had commercial value.

Sec'y's Resp. to Show Cause Order, Decl. of James E. DeJarnatt, ¶ 5. The MSHA inspector stated that the screener was approximately 1/4 mile from the road at one of the pits and that a bulldozer was being used to expand the pit. In total, there were three individuals working there. *Id.*, ¶¶ 3-4, 6.

The inspector issued two citations to AKDOT for violations he found with respect to two of the front-end loaders it was using in the operation.² After MSHA proposed penalties of \$100 for each of the violations, AKDOT moved to dismiss the citations on the ground that its operations in question were beyond MSHA's jurisdiction under the Mine Act. 34 FMSHRC at 179.

In ruling on AKDOT's motion to dismiss, the Judge concluded that because the road being maintained was used in support of the Alaska Pipeline, AKDOT's operations affected interstate commerce. 34 FMSHRC at 182. The Judge went on to hold, however, that the

¹ See PPM Vol. III, sect. 41-2 (May 16, 1996) (construing 30 C.F.R. Part 41 Notification of Legal Identity requirements to provide that "[w]hen a mine operator has a portable plant which operates in several different locations, the mine identification number is to be assigned to the plant only and not to the pit. Mine operators will need to submit only one legal identification form for each portable plant.").

² One citation was for exposed wires from a bushing on a loader in violation of the mandatory standard in 30 C.F.R. § 56.12004 requiring that such conductors be protected from mechanical damage. The other citation was for an inoperable backup alarm on a second loader in violation of 30 C.F.R. § 56.14132(a)'s requirement that backup alarms be maintained in functional condition. 34 FMSHRC at 179.

screening by AKDOT did not rise to the level of “milling” of the excavated material, which is necessary to confer jurisdiction on MSHA under an interagency agreement between it and the Department of Labor’s Occupational Safety and Health Administration (“OSHA”).³ Rather, according to the Judge, “bulk” material was being extracted from the pits as a matter of convenience, and therefore under that agreement those pits were “borrow pits” and thus the subject of OSHA, not MSHA, jurisdiction. *Id.* at 184. The Judge further found the operations to be excluded from the ambit of Mine Act jurisdiction because the screening that was occurring was neither a principal activity normally performed in the mineral milling process nor an activity undertaken to make the material suitable for a particular use meeting market specifications. *Id.* at 187.

II.

Disposition

The Secretary maintains that the Judge not only erred in concluding that the Interagency Agreement did not confer upon MSHA jurisdiction over the cited AKDOT operations as a “milling” operation, but that he also ignored other evidence that established that the AKDOT operations constituted a “coal or other mine” under section 3(h)(1) of the Mine Act, 30 U.S.C. § 802(h)(1).

AKDOT does not address the question of milling, but instead argues that the Judge’s decision can be upheld on three grounds: (1) the products resulting from AKDOT’s operations do not enter or affect commerce, and thus under section 4 of the Mine Act, 30 U.S.C. § 803, those operations cannot be regulated by the Mine Act;⁴ (2) AKDOT’s operations are conducted within the right-of-way of a public road, and thus fall outside the scope of the definitional provisions of section 3(h)(1) of the Mine Act; and (3) AKDOT’s extraction of material falls within the “borrow pit” terms of the Interagency Agreement, and therefore is subject to OSHA, not MSHA, jurisdiction.⁵

We agree with the Judge regarding his interpretation of section 4 of the Act and find that the operations of AKDOT in question affect interstate commerce. We conclude that in determining that the AKDOT operations did not constitute a “coal or other mine” under section 3(h)(1), the Judge failed to properly apply the terms of the statute. The Judge also erred in his interpretation of the meaning of “milling” in the Interagency Agreement. We reverse his

³ *MSHA-OSHA Interagency Agreement*, 44 Fed. Reg. 22,827 (Apr. 17, 1979), amended by 48 Fed. Reg. 7521 (Feb. 22, 1983) (“the Interagency Agreement”).

⁴ As the prevailing party below, AKDOT may urge in support of the decision under review even those arguments that the Judge considered and rejected. *See, e.g., Sec’y on behalf of Price v. Jim Walter Res., Inc.*, 12 FMSHRC 1521, 1529 (Aug. 1990).

⁵ With its response brief, AKDOT submitted a motion that the Commission hear oral argument in the case. Commissioners were polled and denied that request.

decision and find that the AKDOT operations are a “coal or other mine” under the Mine Act and that they are subject to MSHA’s regulatory jurisdiction.

A. Whether AKDOT’s Sand and Gravel Operations “Affect Commerce.”

Section 4 of the Mine Act provides that “[e]ach coal or other mine, the products of which enter commerce, or the operations or products of which affect commerce, and each operator of such mine, and every miner in such mine shall be subject to the provisions of this Act.” 30 U.S.C. § 803. The scope of section 4 of the Mine Act was addressed in *D.A.S. Sand & Gravel, Inc. v. Chao*, 386 F.3d 460 (2d Cir. 2004). Applying *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984), the court concluded that “the language of [the section], the language and design of the Mine Act as a whole, and the Act’s legislative history” all indicate that Congress intended to regulate mine safety to the full extent of its power under the Commerce Clause. 386 F.3d at 462. Drawing in part on the Supreme Court’s holding that even wheat grown solely for personal consumption was the proper subject of federal regulation under the Commerce Clause (*Wickard v. Filburn*, 317 U.S. 111, 127-28 (1942)), the *D.A.S.* court further concluded that even though the operator sold its products entirely within the state in which the products were mined and produced, the operator was subject to the Mine Act. 386 F.3d at 464; *see also Hodel v. Virginia Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 275-83 (1981) (holding that legislation regulating surface mining of private land was within Congress’ Commerce Clause powers).

We read the court’s decision in *D.A.S.* to mean that any mining or milling that an entity engages in for its own use constitutes “commerce” under section 4 of the Mine Act. The Supreme Court in *Wickard v. Filburn* made it clear that, with regard to purely local actors, the focus is on whether the activities of such actors taken together would have the potential to affect the interstate market at issue. There is no question that such potential is present with respect to entities that mine or mill sand or gravel for their own use.

AKDOT nevertheless maintains that the Dalton Highway is so remote that the sand and gravel it produces there could not be marketed anywhere else due to prohibitive transportation costs. Therefore, according to AKDOT, even when AKDOT’s production is considered together with local actors similarly situated, there would be no impact on the interstate market for the product. In support, AKDOT cites two Ninth Circuit cases deciding issues under the Alaska Claims Settlement Act (“ACSA”). Neither case, however, supports the conclusion AKDOT would have the Commission reach.

In the first case, *Chugach Natives, Inc. v. Doyon, Ltd.*, 588 F.2d 723, 732 (9th Cir. 1979), the court found that, for purposes of allocating the rights to profit from various property interests granted under the ACSA, the value of sand and gravel deposits is highly dependent on their proximity to developed areas that will use such material, and that they are unprofitable to ship over long distances. The court used similar reasoning with regard to rock when later presented with the question of whether the holder of timber rights to land under the ACSA had a right to acquire at a reasonable cost the rock underlying the land to use in constructing such roads as are necessary to harvest the timber; the transportation cost of shipping rock to the site was

prohibitive relative to the value of the timber rights. *See Koniag, Inc. v. Koncor Forest Resource*, 39 F.3d 991 (9th Cir. 1994).

The two cases are of no import here, because there was no finding in this case that the construction and continued existence of the Dalton Highway was in any way dependent on its proximity to sources of sand and gravel. In marked contrast, the importance of continued operation of the Alaska Pipeline and the need for use of the Dalton Highway to maintain it means that sand and gravel from some source has to be used to maintain the road, even if it would have to be transported from elsewhere. The fact that AKDOT is able to produce sand and gravel locally means that it does not have to purchase it. Because this is the type of effect on commerce that was sufficient to bring the wheat in *Wickard v. Filburn* within the ambit of the Commerce Clause, the two Ninth Circuit cases do not provide any basis on which to depart from court and Commission precedent regarding the “commerce” language of section 4 of the Mine Act.

B. Whether the AKDOT Operations Are a “Mine” under the Mine Act.

The term “coal or other mine” is defined in pertinent part in section 3(h)(1) of the Mine Act as:

(A) *an area of land from which minerals are extracted . . .*, (B) private ways and roads appurtenant to such area, *and* (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, *equipment, machines, tools*, or other property . . . , on the surface or underground, *used in*, or to be used in, or resulting from, *the work of extracting such minerals from their natural deposits . . . or used in*, or to be used in, *the milling of such minerals, or the work of preparing coal or other minerals*, and includes custom coal preparation facilities. In making a determination of what constitutes mineral milling for purposes of this chapter, the Secretary shall give due consideration to the convenience of administration resulting from the delegation to one Assistant Secretary of all authority with respect to the health and safety of miners employed at one physical establishment.

30 U.S.C. § 802(h)(1) (emphases added).

In the legislative history of the Act, Congress made it clear “that what is considered to be a mine and to be regulated under this Act be given the broadest possibl[e] interpretation, and it is the intent of this Committee that doubts be resolved in favor of inclusion of a facility within the coverage of the Act.” S. Rep. No. 95-181, at 14 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 602 (1978) (“*Legis. Hist.*”). Accordingly, the Commission has consistently construed

section 3(h)(1) broadly in favor of Mine Act coverage. *E.g., Calmat Co. of Arizona*, 27 FMSHRC 617, 622, 624 (Sept. 2005).

1. AKDOT's Extraction Activities

a. The Language and History of the Mine Act

Sand and gravel mining operations, whether year-round, intermittent, or seasonal, have long been subject to mine safety regulation. *See* S. Rep. No. 95-181, at 57, *Legis. Hist.* at 645 (detailing scope of industries subject to one of Mine Act's predecessor statutes, the Metal and Non-metallic Mine Safety Act of 1966, and that would therefore be subject to the Mine Act). Without question, any entity that engages in the extraction of sand or gravel falls within the definition of "coal or other mine." *See, e.g., Donovan v. Carolina Stalite Co.*, 734 F.2d 1547, 1548 (D.C. Cir. 1984) (slate gravel quarry operator, including its conveyors, subject to Mine Act); *Jerry Ike Harless Towing, Inc.*, 16 FMSHRC 683, 688 (Apr. 1994) (operator's extraction of "sand, a mineral, from its natural deposit . . . covered by the Mine Act.").

Because AKDOT conceded from the outset of this proceeding that it extracts material from its pits that it then processes on the spot to produce sand and gravel, its operations plainly fall within section 3(h)(1).⁶ The AKDOT excavation pits are covered under subsection (A) – areas of land on which extraction occurs. Moreover, the screening process and the trucks and conveyors that it uses are covered under subsection (C) – equipment, machines, or tools used in mining. *See W.J. Bokus Indus., Inc.*, 16 FMSHRC 704, 708 (Apr. 1994) (equipment used in "mining-related tasks" covered by section 3(h)(1)).

AKDOT nevertheless argues that because all of its pit and screening operations occur within the right-of-way of the Dalton Road, and the Mine Act specifically includes only "private roads" within the definition of "mine," the Secretary exceeds the scope of the Mine Act when he seeks to treat as a mine an operation occurring within a public road right-of-way. *See* 30 U.S.C. § 802(h)(1)(B) (extending jurisdiction to "private ways and roads appurtenant to [areas of land from which minerals are extracted]").

However, even if all of AKDOT's operations at issue occur within the dedicated right-of-way, that does not resolve the question of Mine Act jurisdiction. While mining operations within a public road right-of-way may be unusual, there is nothing in the language of section 3(h)(1) of the Mine Act that forecloses application of the Act to such operations conducted on public road rights-of-way.

⁶ Mike Oden, Sr., an AKDOT safety manager, in an affidavit supporting AKDOT's Motion to Dismiss, stated that to meet its need for sand and gravel to maintain the Dalton Highway for safe year-round access, AKDOT "produces and stockpiles sand and gravel in borrow pits located along the Dalton Highway right-of-way," and that such pits "provide[] construction and maintenance materials" for the highway. ¶¶ 5, 9.

The definition of “mine” was drafted in the conjunctive. It begins with subsection (A), the area of land from which minerals are extracted, and extends out beyond such areas to include subsection (B) appurtenant private roads, and in subsection (C) to such things as equipment used in mining or milling. The fact that the terms of subsection (B) foreclose extending jurisdiction over a public road under that subsection does not mean that operations or activities conducted on a public road right-of-way also fall outside the scope of subsections (A) or (C). And it is both those subsections of the definition that plainly encompass the AKDOT pit and screening operation. Consequently we hold that AKDOT’s operations clearly fall within the terms of section 3(h)(1)’s definition of “coal or other mine.”

b. The MSHA-OSHA Interagency Agreement

AKDOT also argues that the sand and gravel should be considered mere “fill,” and thus its pits are simply “borrow pits.” AKDOT’s argument is premised on the “determination” which the Secretary made pursuant to the final sentence of section 3(h)(1)(C). That determination is the aforementioned Interagency Agreement that allocates between MSHA and OSHA the responsibility for various types of operations that may involve the milling of extracted minerals. While the Judge agreed with AKDOT, neither applicable law nor the evidence in this proceeding supports his conclusion on the issue.⁷

Deference is owed to an agency’s reasonable interpretation of the jurisdictional terms of the statutory provisions it is charged with administering. *City of Arlington, Tx v. FCC*, 133 S. Ct. 1863, 1868-73 (2013). Given the explicit delegation in section 3(h)(1) of the Act to the Secretary, the Interagency Agreement is to be deferred to whenever it is reasonable in light of the Mine Act’s definition of “mine.” *Donovan v. Carolina Stalite Co.*, 734 F.2d at 1552.

Appendix A to the Interagency Agreement, in setting forth specific examples of unquestioned MSHA authority under the Mine Act apart from milling, includes operations involving the “[o]pen pit mining” of “[s]and and [g]ravel.” 44 Fed. Reg. at 22,829. Thus, the Interagency Agreement provides MSHA jurisdiction over the AKDOT operations at issue here before the question of milling is even reached.

We recognize that the Interagency Agreement generally accords OSHA, and not MSHA, jurisdiction over “borrow pits.” However, it limits what can be considered a “borrow pit” to:

an area of land where the overburden, consisting of unconsolidated rock, glacial debris, or other earth material overlying bedrock is

⁷ When reviewing an Administrative Law Judge’s factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). “Substantial evidence” means “such relevant evidence as a reasonable mind might accept as adequate to support [the Judge’s] conclusion.” *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

extracted from the surface. Extraction occurs on a one-time only basis or only intermittently as need occurs, for use as fill materials by the extracting party in the form in which it is extracted. No milling is involved, except for the use of a scalping screen to remove large rocks, wood and trash. The material is used by the extracting party more for its bulk than its intrinsic qualities on land which is relatively near the borrow pit.

Id. at 22,828. In concluding that AKDOT was excavating materials from such borrow pits along the Dalton Highway, the Judge focused on AKDOT's intermittent use of the pits as well as an example discussed in MSHA PPM, Vol. I, at sect. 4-3 (1996). There, MSHA stated that where a landowner uses material in basically the same form as it is extracted to fill potholes in a road, the excavation will be considered a borrow pit and thus not subject to MSHA jurisdiction. 34 FMSHRC at 184-85.

The Judge ignored the evidence that the screening process AKDOT was engaged in did more than "scalp" away large rocks, wood, and trash from the material it was extracting. As noted by the inspector, it was being used by AKDOT to size the material into different piles. Decl. of James E. DeJarnatt, ¶ 5. Moreover, in response to the Judge's Order Requesting Clarification, AKDOT's counsel compiled statements from State employees and offered to provide declarations of the employees if the Judge required. Counsel summarized that "[t]he materials stored in each pit originate from natural deposits in each pit. The natural deposits at each pit make certain pits a better source for a particular construction of [sic] maintenance material: to wit, riprap (big rock), rock, gravel, or sand." AKDOT Resp. to Request for Clarification at 2. Thus, the evidence contradicts the Judge's conclusion that AKDOT's excavations are borrow pits it uses to provide material that is used in basically the same form as it is extracted.

2. AKDOT's Subsequent Processing Activities

The Judge concluded that AKDOT's use of the SAG Screener did not constitute "milling" under section 3(h)(1). 34 FMSHRC at 182-185. The Judge erred in concluding that "milling" was not occurring.

The Interagency Agreement states that "[m]illing consists of one or more of the following processes: crushing, grinding, pulverizing, *sizing*, 44 Fed. Reg. at 22,829 (emphasis added). "Sizing" is defined in the Interagency Agreement as "[t]he process of separating particles of mixed sizes into groups of particles of all the same size, or into groups in which particles range between maximum and minimum sizes." *Id.* at 22,829-30. The uncontradicted Declaration of MSHA inspector DeJarnatt, quoted *supra*, establishes that AKDOT used the Sag Screener to separate the material from the pit into separate piles based on size, with the oversized rock separated out entirely. Because the evidence establishes that AKDOT was using the SAG Screener to size the material it was extracting, AKDOT was clearly engaging in "milling" under section (h)(1) as that term is interpreted in the Interagency Agreement.

III.

Conclusion

For the foregoing reasons we reverse the Judge's determination that the AKDOT Dalton Highway sand and gravel operations are not a "mine" under the Mine Act and remand this case for further proceedings.

/s/ Patrick K. Nakamura
Patrick K. Nakamura, Acting Chairman

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

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

COMMISSION ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 2, 2014

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

v.

LIMESTONE DUST CORP.

Docket No. VA 2013-499-M
A.C. No. 44-02783-317444

BEFORE: Nakamura, Acting Chairman; Cohen and Althen, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On August 2, 2013, the Commission received from Limestone Dust Corp. (“Limestone”) 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 9, 2013, and became a final order of the Commission on May 9, 2013. Limestone asserts that it mistakenly waited for another

proposed assessment to arrive before forwarding them to its counsel in June. MSHA mailed a delinquency notice on June 24, 2013. The Secretary does not oppose the request to reopen and urges the operator to take steps to ensure that future penalty contests are timely filed.

Having reviewed Limestone's request and the Secretary's response, 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/ Patrick K. Nakamura
Patrick K. Nakamura, Acting Chairman

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

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 3, 2014

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

Docket No. CENT 2013-574-M
A.C. No. 14-00034-321358

v.

ASH GROVE CEMENT COMPANY

BEFORE: Nakamura, Acting Chairman; and Cohen, Commissioner¹

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On July 2, 2013, the Commission received from Ash Grove Cement Company (“Ash Grove”) 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 May 16, 2013, and became a

¹ Commissioner Althen was recused from this case.

final order of the Commission on June 17, 2013. Ash Grove asserts that its safety director was out of the office and discovered the delinquency on June 28, 2013. The Secretary does not oppose the request to reopen and urges the operator to take steps to ensure that future penalty contests are timely filed.

Having reviewed Ash Grove's request and the Secretary's response, 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/ Patrick K. Nakamura
Patrick K. Nakamura, Acting Chairman

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 3, 2014

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

v.

AMERON HAWAII

Docket No. WEST 2013-972-M
A.C. No. 51-0004-318505

BEFORE: Nakamura, Acting Chairman; Cohen and Althen, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On July 15, 2013, the Commission received from Ameron Hawaii (“Ameron”) 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 16, 2013, and became a final order of the Commission on May 16, 2013. Ameron asserts that the proposed assessment was inadvertently lost in interoffice mail. The error was discovered after receiving MSHA's delinquency notice, dated July 1, 2013. The Secretary does not oppose the request to reopen and urges the operator to take steps to ensure that future penalty contests are timely filed.

Having reviewed Ameron's request and the Secretary's response, 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/ Patrick K. Nakamura
Patrick K. Nakamura, Acting Chairman

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

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 3, 2014

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

Docket No. WEST 2013-985-M
A.C. No. 24-01779-302683

v.

D & S MINING & EXPLORATION

BEFORE: Nakamura, Acting Chairman; Cohen and Althen, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On July 23, 2013, the Commission received from D&S Mining and Exploration (“D&S”) 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).

D&S asserts that it did not receive the proposed assessment and discovered the delinquency after it received a collection notice dated July 9, 2013. Records of the Department of Labor’s Mine Safety and Health Administration (“MSHA”) indicate that the proposed assessment was mailed to D&S’ address of record, but a copy of the FedEx envelope reveals that the address was changed to another, handwritten, address, and then refused by recipient. MSHA mailed another copy of the proposed assessment and a delinquency notice to another address for D&S, and they were returned undelivered. MSHA referred this case to the Department of Treasury for collection on May 23, 2013. The Secretary does not oppose the request to reopen, but urges the operator to take steps to ensure its address of record is an address that can receive future penalty assessments and that future penalty contests are timely filed.

Having reviewed D&S’ request and the Secretary’s response, 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 2700.¹ Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of civil penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ Patrick K. Nakamura
Patrick K. Nakamura, Acting Chairman

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

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

¹ The Commission previously granted relief to D&S from final orders under similar circumstances of alleged non-receipt of properly-sent proposed assessments in WEST 2012-1227 and WEST 2012-1228 (May 21, 2013). D&S is hereby placed on notice that the Commission will not grant relief in the future if similar circumstances arise again.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 6, 2014

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

Docket No. WEST 2013-999-M
A.C. No. 26-00827-316927 A01

v.

FRONTIER-KEMPER
CONSTRUCTORS, INC.

BEFORE: Nakamura, Acting Chairman; Cohen and Althen, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On July 19, 2013, the Commission received from Frontier-Kemper Constructors (“Frontier”) 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 26, 2013, and became a final order of the Commission on April 25, 2013. Frontier asserts that it mailed a contest to the payment center on May 20, 2013. The Secretary does not oppose the request to reopen, but notes that the contest form MSHA received at its St. Louis, MO, payment center, was postmarked May 7, 2013. MSHA mailed a delinquency notice on June 10, 2013. The Secretary urges the operator to take steps to ensure that future penalty contests are timely filed and mailed to the Civil Penalty Compliance Office in Arlington, VA.

Having reviewed Frontier's request and the Secretary's response, 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/ Patrick K. Nakamura
Patrick K. Nakamura, Acting Chairman

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

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 6, 2014

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

v.

BUCKLEY POWDER COMPANY

Docket No. WEST 2013-1023
A.C. No. 48-00086-325274 SB9

BEFORE: Nakamura, Acting Chairman; Cohen and Althen, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On August 5, 2013, the Commission received from Buckley Powder Company (“Buckley”) a motion seeking to reopen Citation No. 8478099 in 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 June 26, 2013, and became a final order of the Commission on July 26, 2013. Buckley asserts that its administrative personnel inadvertently missed the contest deadline by one week. The Secretary does not oppose the request to reopen, and urges the operator to adopt procedures to ensure that future penalty contests are timely filed.

Having reviewed Buckley's request and the Secretary's response, in the interest of justice, we hereby reopen Citation No. 8478099 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/ Patrick K. Nakamura
Patrick K. Nakamura, Acting Chairman

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

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 8, 2014

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

Docket No. CENT 2013-607-M¹
A.C. No. 13-02297-323804

v.

PATTISON SAND COMPANY, LLC

BEFORE: Nakamura, Acting Chairman; Cohen and Althen, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On July 19, 2013, the Commission received from Pattison Sand Company, LLC (“Pattison”) a motion seeking to reopen Citation No. 8737286 in 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).

¹ Pursuant to 29 C.F.R. § 2700.79, the Order dated October 3, 2014, has been amended to correct a clerical error in the captioned Docket No.

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on June 11, 2013, and became a final order of the Commission on July 11, 2013. The proposed assessment included a number of section 104(c) citations as well as Citation No. 8737286, a citation issued under section 104(d)(1) of the Mine Act. Pattison asserts that it intended to contest the section 104(d)(1) Citation No. 8737286, but that its human resources director mistakenly sent the assessment to accounting for payment. The error was discovered on July 16, 2013, after MSHA commenced a section 110(c) investigation. The Secretary does not oppose the request to reopen and urges the operator to take steps to ensure that future penalty contests are timely filed.

Having reviewed Pattison's request and the Secretary's response, in the interest of justice, we hereby reopen this matter as to Citation No. 8737286 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/ Patrick K. Nakamura
Patrick K. Nakamura, Acting Chairman

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

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 16, 2014

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

Docket No. LAKE 2011-13

v.

THE AMERICAN COAL COMPANY

BEFORE: Nakamura, Acting Chairman; Cohen and Althen, Commissioners

ORDER

BY THE COMMISSION:

The United Mine Workers of America (“UMWA”) has filed a motion to intervene in this proceeding. The Secretary of Labor has filed an opposition to the UMWA’s motion, and the UMWA has filed a reply to the Secretary’s opposition. In addition, the United Steel, Paper and Forestry, Rubber Manufacturing, Energy, Allied Industrial and Service Workers International Union (“USW”) has filed a motion to intervene in this proceeding, and the Secretary has filed an opposition to the USW’s motion.

The Secretary opposes intervention by the UMWA and the USW on the basis that, because neither union represents miners at the subject mine, neither union has “[a] legally protectable interest directly relating to the property or events that are the subject of the case on review” within the meaning of Commission Procedural Rule 73, 29 C.F.R. § 2700.73. S. Opp’n at 2.

Whether to permit intervention lies within “the sound discretion of the Commission.” 29 C.F.R. § 2700.73. Although neither the UMWA nor the USW represents miners at the mine, both unions have a longstanding commitment to the health and safety of miners and represent miners at other mines under the jurisdiction of the Department of Labor’s Mine Safety and Health Administration (“MSHA”). Resolution of the issue regarding interpretation of section 110(k) of the Mine Act, 30 U.S.C. § 820(k), addressed in this proceeding will impact the adjudication of every case in which MSHA seeks approval of a settlement entered into with an operator.¹ The Secretary’s choice to advance this interpretation in a case where miners are not represented by

¹ In contrast with this proceeding, in *Excel Mining LLC*, 22 FMSHRC 318 (Mar. 2000), the Commission denied a union intervenor status because that case pertained to standards applicable only to coal mines, while the union’s separate litigation, which was the basis for its request to intervene, pertained to standards applicable to metal and non-metal mines. *Id.* at 320.

the UMWA or the USW should not foreclose intervention by the unions, particularly where there is no party to this action to challenge the Secretary's position.² Having reviewed the pleadings filed by the unions and the Secretary, we conclude that the unions have a sufficient legally protectable interest relating to this proceeding. Pursuant to Commission Procedural Rule 73, we hereby grant the motions and permit the UMWA and the USW to intervene. 29 C.F.R. § 2700.73.

Subsequent to the filing of the unions' motions, Congressman George Miller filed a motion to participate as amicus curiae in this proceeding. Pursuant to Commission Procedural Rule 74, we hereby grant the motion and permit The Honorable George Miller to participate as amicus. 29 C.F.R. § 2700.74.

Within 30 days of the date of this order, the Union Intervenors shall file a joint brief with the Commission. The joint brief shall not exceed 50 pages.

Within 20 days of service of the Union Intervenors' brief, The Honorable George Miller shall file his amicus brief. The amicus brief shall not exceed 25 pages.

Within 30 days of service of the amicus brief, the Secretary shall file any reply brief. That reply brief shall not exceed 20 pages.

/s/ Patrick K. Nakamura
Patrick K. Nakamura, Acting Chairman

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

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

² We note that a cornerstone of the Mine Act is encouraging the participation of miners in the enforcement of the Mine Act. *See, e.g.*, 30 U.S.C. §§ 813(f), 813(g), 815(c); 29 C.F.R. 2700.1(c) ("These rules shall be construed to . . . encourage the participation of miners and their representatives.").

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 20, 2014

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

Docket No. SE 2013-557-M
A.C. No. 40-03392-324138

v.

TACKETT CREEK MINING

BEFORE: Nakamura, Acting Chairman; Cohen and Althen, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On August 20, 2013, the Commission received from Tackett Creek Mining (“Tackett”) 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 June 13, 2013, and became a

final order of the Commission on July 15, 2013. Tackett asserts that it failed to timely contest the assessment due to a clerical error, and hired a consultant to avoid errors in the future. The Secretary does not oppose the request to reopen, and urges the operator to adopt procedures to ensure that future penalty contests are timely filed.

Having reviewed Tackett's request and the Secretary's response, 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/ Patrick K. Nakamura
Patrick K. Nakamura, Acting Chairman

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

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 20, 2014

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

Docket No. SE 2013-594-M
A.C. No. 31-01334-320514

v.

THE QUARTZ CORPORATION USA

BEFORE: Nakamura, Acting Chairman; Cohen and Althen, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On September 16, 2013, the Commission received from The Quartz Corporation USA (“Quartz”) 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 became a final order of the Commission on June 5, 2013. Quartz asserts that it attempted to contact MSHA multiple times regarding a possible error in the proposed assessment, but did not receive a response until August 23, 2013. The response on August 23 2013 was that MSHA no longer had jurisdiction. The Secretary does not oppose the request to reopen, and urges the operator to take steps to ensure that future penalty contests are timely filed.

Having reviewed Quartz's request and the Secretary's response, 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/ Patrick K. Nakamura
Patrick K. Nakamura, Acting Chairman

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

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 20, 2014

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

Docket No. VA 2013-559
A.C. No. 44-07252-325417 A1837

v.

PROFESSIONAL CONTRACTING,
LLC

BEFORE: Nakamura, Acting Chairman; Cohen and Althen, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On September 24, 2013, the Commission received from Professional Contracting 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 June 26, 2013, signed for by Margaret Estep, and became a final order of the Commission on July 26, 2013. Eddie Joe Estep asserts that he relocated in June and never received the proposed assessment. Estep further states that he discovered the delinquency on September 13, 2013 upon checking MSHA's Data Retrieval System. The Secretary does not oppose the request to reopen, but notes that the address of record was only changed on November 18, 2013. The Secretary urges the contractor to take steps to ensure that future penalty contests are timely filed.

Having reviewed this request and the Secretary's response, 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/ Patrick K. Nakamura
Patrick K. Nakamura, Acting Chairman

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

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 21, 2014

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

Docket No. CENT 2013-675-M
A.C. No. 03-01730-321084

v.

BENTON COUNTY STONE
COMPANY,
INC.

BEFORE: Nakamura, Acting Chairman; Cohen and Althen, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On August 22, 2013, the Commission received from Benton County Stone Company, Inc. (“Benton”) a motion seeking to reopen two citations within 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 May 14, 2013, and became a final order of the Commission on June 13, 2013. Benton asserts that it mailed a contest to the payment center, and encloses a fax copy dated June 7, 2013. The Secretary does not oppose the request to reopen, and notes that the MSHA St. Louis, MO, payment center, received a payment for the uncontested penalties, by check dated June 11, 2013. MSHA mailed a delinquency notice on July 29, 2013, and received payment for the contested penalties by check dated August 13, 2013. The Secretary urges the operator to take steps to ensure that future penalty contests are timely filed and mailed to the Civil Penalty Compliance Office in Arlington, VA.

Having reviewed Benton's request and the Secretary's response, in the interest of justice, we hereby reopen Citation Nos. 8688645 and 8688646 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/ Patrick K. Nakamura
Patrick K. Nakamura, Acting Chairman

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

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 21, 2014

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

Docket No. KENT 2013-1073
A.C. No. 15-17993-320807-03

v.

CHEYENNE ELKHORN COAL
COMPANY, INC.

BEFORE: Nakamura, Acting Chairman; Cohen and Althen, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On September 25, 2013, the Commission received from Cheyenne Elkhorn Coal Company, Inc. (“Cheyenne”) a motion seeking to reopen two citations within a penalty assessment that had allegedly 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).

Records of the Department of Labor’s Mine Safety and Health Administration (“MSHA”) indicate that Cheyenne filed a timely contest on May 21, 2013, but MSHA mistakenly processed only two of the four citations checked on the proposed assessment contest form.

Having reviewed Cheyenne's request and the Secretary's response, we conclude that the penalty assessments for Citation Nos. 8279020 and 8278023 were properly contested and never became final. We therefore deny Cheyenne's motion as moot, and remand this matter 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/ Patrick K. Nakamura
Patrick K. Nakamura, Acting Chairman

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

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N

WASHINGTON, D.C. 20004-1710

October 21, 2014

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

Docket No. KENT 2014-2
A.C. No. 15-19153-308172

v.

CHEYENNE MINING COMPANY, INC.

BEFORE: Nakamura, Acting Chairman; Cohen and Althen, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On October 15, 2013, the Commission received from Cheyenne Mining Company, Inc. (“Cheyenne”) 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 December 11, 2012, and became a final order of the Commission on January 10, 2013. MSHA mailed a delinquency notice on February 25, 2013, and referred the case to the Department of Treasury for collection

on June 13, 2013. Cheyenne asserts that its counsel mailed a timely contest, and discovered the delinquency after receiving a collection notice. The Secretary does not oppose the request to reopen, but notes that the Civil Penalty Compliance Office in Arlington, VA, has no record of receiving a contest in this case.

Having reviewed Cheyenne's request and the Secretary's response, 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/ Patrick K. Nakamura
Patrick K. Nakamura, Acting Chairman

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

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 21, 2014

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

Docket No. LAKE 2013-567-M
A.C. No. 33-04318-299531 A

v.

CHARLES RECKNER, JR., employed by
BUCK RUN AGGREGATES

BEFORE: Nakamura, Acting Chairman; Cohen and Althen, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On July 16, 2013, the Commission received a motion seeking to reopen a penalty assessment under section 110(c) of the Mine Act, 30 U.S.C. § 820(c), that had become a final order of the Commission.

Under the Commission’s Procedural Rules, an individual charged under section 110(c) has 30 days following receipt of the proposed penalty assessment within which to notify the Secretary of Labor that he or she wishes to contest the penalty. 29 C.F.R. § 2700.26. If the individual fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 29 C.F.R. § 2700.27.

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 September 6, 2012, signed

for by C. Reckner, and became a final order of the Commission on October 9, 2012. Reckner asserts that he was not aware that he had to contest his individual assessment separately from the operator's assessment. The Secretary does not oppose the request to reopen and confirms that the operator's assessment was contested and a Motion to Approve Settlement was filed in that case on July 24, 2013.

Having reviewed this request and the Secretary's response, 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/ Patrick K. Nakamura
Patrick K. Nakamura, Acting Chairman

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

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 21, 2014

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

v.

CCZ, INC.

Docket No. WEST 2014-9-M
A.C. No. 45-03716-324881

BEFORE: Nakamura, Acting Chairman; Cohen and Althen, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On October 4, 2013, the Commission received from CCZ 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 June 19, 2013, and became a final order of the Commission on July 19, 2013. CCZ asserts that it mailed a timely contest to the payment center along with a check for payment of the uncontested penalties. The Secretary does not oppose the request to reopen, and notes that MSHA’s St. Louis, MO, payment center,

received a payment for the uncontested penalties by check dated June 24, 2013. MSHA mailed a delinquency notice on September 3, 2013. The Secretary urges the operator to take steps to ensure that future penalty contests are timely filed and mailed to the Civil Penalty Compliance Office in Arlington, Virginia.

Having reviewed CCZ's request and the Secretary's response, 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/ Patrick K. Nakamura
Patrick K. Nakamura, Acting Chairman

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

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 21, 2014

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

Docket No. WEVA 2013-1122
A.C. No. 46-09353-318248-02

v.

BROOKS RUN MINING COMPANY,
LLC

BEFORE: Nakamura, Acting Chairman; Cohen and Althen, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On July 23, 2013, the Commission received from Brooks Run Mining Company, LLC (“Brooks”) 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 a pre-penalty contest was filed for Citation No. 6617100. However, the proposed assessment was not contested and was in fact paid by check dated May 14, 2013. Brooks asserts that it mistakenly paid the penalty and its counsel discovered the error on July 3, 2013. The Secretary does not oppose the request to reopen, and urges the operator to adopt procedures to ensure that future penalty contests are timely filed.

Having reviewed Brooks' request and the Secretary's response, 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/ Patrick K. Nakamura
Patrick K. Nakamura, Acting Chairman

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

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 21, 2014

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

Docket No. VA 2013-565
A.C. No. 44-07220-324619

v.

DOMINION COAL CORPORATION

BEFORE: Nakamura, Acting Chairman; Cohen and Althen, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On September 24, 2013, the Commission received from Dominion Coal Corporation (“Dominion”) 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 June 18, 2013, and became a final order of the Commission on July 18, 2013. Dominion asserts that its safety department

misplaced the assessment and didn't forward it to its counsel. The error was discovered after receiving MSHA's delinquency notice, dated September 4, 2013. The Secretary does not oppose the request to reopen, and notes that MSHA received a payment for the uncontested penalties, by check dated June 27, 2013. The Secretary urges the operator to take steps to ensure that future penalty contests are timely filed and mailed to the Civil Penalty Compliance Office in Arlington, Virginia.

Having reviewed Dominion's request and the Secretary's response, 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/ Patrick K. Nakamura
Patrick K. Nakamura, Acting Chairman

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

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

ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
721 19TH STREET, SUITE 443
DENVER, CO 80202-2536
TELEPHONE: 303-844-3577 / FAX: 303-844-5267

October 1, 2014

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

v.

NORDIC INDUSTRIES, INC.,
Respondent

CIVIL PENALTY PROCEEDING

Docket No. WEST 2014-193-M
A.C. No. 04-04149-338834

Parks Bar Quarry

DECISION

Appearances: Randy Cardwell, Conference & Litigation Representative, U.S. Department of Labor, Vacaville, California, and Isabella Finneman, Esq., Office of the Solicitor, U.S. Department of Labor, San Francisco, California, for Petitioner;
Bradley B. Johnson, Esq., Harrison, Temblador, Hungerford & Johnson, Sacramento, California, for Respondent.

Before: Judge Manning

This case is before me upon a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”), against Nordic Industries, Inc., pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the “Mine Act”). The parties presented testimony, documentary evidence, and closing arguments at a hearing held in Sacramento, California. Three section 104(a) citations were adjudicated at the hearing. Nordic Industries operates the Parks Bar Quarry, a crushed stone operation, in Yuba County, California.

**I. DISCUSSION WITH FINDINGS OF FACT
AND CONCLUSIONS OF LAW**

A. Citation No. 8702904

On October 23, 2013, MSHA Inspector Roshan L. Gulati issued Citation No. 8702904 under section 104(a) of the Mine Act, alleging a violation of section 56.11012 of the Secretary’s safety standards. (Ex. G-2). The citation alleges that there was a 2 foot wide opening on the screen access platform in the Baxter Plant that was not adequately guarded to prevent a person from falling through the opening. The citation states that a chain was installed to prevent travel through the opening but the latch was broken so the chain offered no protection. The citation further states that a maintenance crew member enters the area once a week.

Inspector Gulati determined that an injury was unlikely to occur but that an injury could reasonably be expected to result in lost work days or restricted duty. He determined that the operator's negligence was moderate and that one person would be affected. Section 56.11012 mandates, in part, that "[o]penings above, below, or near travelways through which persons or materials may fall shall be protected by railings, barriers, or covers." 30 C.F.R. § 56.11012. The Secretary proposed a penalty of \$100.00 for this citation.

Discussion and Analysis

The basic facts are not in dispute. Inspector Gulati testified that when he started his inspection on October 23, 2013, none of the four plants at the quarry were operating but an employee was loading customer trucks. (Tr. 12-13). He started his inspection at the Baxter Plant. He walked up the stairway next to the screen to the landing at the top. When he reached the top, he noticed that there was a gap in the handrails around the landing. (Tr. 14-15). The gap was about 2 feet wide. There was a chain attached at the top of the vertical post for the handrail on one side of the opening but the latch hook was missing on the vertical post on the other side. (Tr. 16). As a consequence, the chain could not be fastened between the two vertical posts to provide a visible warning of the hazard. It appeared to the inspector that a hook was present in the past but that it had broken off. *Id.* He said the break did not appear to be fresh because it was not shiny. Inspector Gulati testified that this condition "could create a hazard for [a] person to fall through this unprotected opening." (Tr. 15; Ex. G-3 at 2).

Inspector Gulati testified that there was no other way to access the shaker screen, which was locked out at the time of his inspection. The drop-off from the landing to the chute for the screen was about 3 feet. (Tr. 17). Although the chain could not be strung across the cited opening, there were steel plates across the bottom of the opening. (Tr. 18; Ex. G-3 at 3). These plates were attached to the chute and extended up above the middle rail of the adjacent handrails. They directly abutted the landing. One plate was about 18 inches high and the other 24 inches high. (Tr. 19). Inspector Gulati testified that a miner will travel to the landing once a week to check on the condition of the screen and the handrails. (Tr. 19-20). Miners would also go to the landing to perform routine maintenance as needed.

Inspector Gulati believes that the cited condition violated section 56.11012 because the top chain, "which subs as a handrail," was not "functional at the time of [the] inspection." (Tr. 21). He determined that the landing at the top of the stairway was a "travelway" because employees "did access this place during operation for workplace examination and during maintenance." (Tr. 22). The inspector considered the violation to be obvious. (Tr. 23).

Richard Hamilton, the foreman at the Parks Bar Quarry, testified that the landing at the top of the stairway next to the shaker screen is a work platform that is used to "gain access to the screen, the shaker deck, for maintenance and inspection." (Tr. 76). He said that there was no other reason for a miner to be on this platform. Miners do not walk or travel on this platform to get from one place to another. (Tr. 78-79). The plant is always locked out and tagged out when performing these functions and the chain would need to be unlatched from one side while performing this work. (Tr. 76). He had never noticed that the latch was broken on one side and believed it occurred a few days prior to the inspection. (Tr. 77). The plant was locked out for

several days preceding the day of Inspector Gulati's inspection so a pre-operational examination was not performed. (Tr. 78). Hamilton believes that the steel plates on the side of the "rip rap chute" prevented a miner from falling off the platform. (Tr. 78).

The principal issue raised by Nordic Industries concerns the definition of "travelway" as used in the safety standard. Travelway is defined as "a passage, walk or way regularly used and designated for persons to go from one place to another." 30 C.F.R. § 56.2. Nordic Industries contends that the platform at the top of the stairway was not a travelway because it was not a walk or way regularly used and designated for persons to go from one place to another. A miner would only travel to the platform to perform work.

I find that the evidence establishes that the cited area was a travelway, as that term is defined by the Secretary at section 56.2 and that Nordic Industries violated the cited safety standard. It is clear that the platform was not a pedestrian walkway through the plant, but miners walked across the platform to get to the screen for maintenance. As Hamilton testified, the platform was used to "*gain access to the screen, the shaker deck, for maintenance and inspection.*" (Tr. 76) (emphasis added). Although Hamilton testified that there would be no reason for a miner to be upon the platform other than to perform maintenance, he admitted that there were no barricades at the bottom of the stairs to prevent a miner from accessing the platform. (Tr. 76, 86-87). Thus, a miner could walk up to the platform to visually inspect the screen or to provide assistance during maintenance and the chain would not be present to provide a warning or protection. I find that the steel plates at the bottom of the opening did not supply the needed protection and, indeed, could present a tripping hazard.

I find that the gravity was low. Hamilton testified that company policy requires that the screen be locked and tagged out before anyone walks up to the platform. (Tr. 76, 79). I credit this testimony. The violation presented a stumbling hazard. As the inspector determined, the most likely injury would be cuts, lacerations, or fractures. (Tr. 23). The likelihood of an injury was low. The company's negligence was low. The plant had been shut down for several days at the time of the inspection and a pre-operational examination had not been performed. The violation was not obvious given the company's safety policies.

I **MODIFY** Citation No. 8702904 to reduce the gravity and negligence to low. A penalty of \$100.00 is appropriate for this violation.

B. Citation No. 8702905

On October 23, 2013, Inspector Gulati issued Citation No. 8702905 under section 104(a) of the Mine Act, alleging a violation of section 56.11001 of the Secretary's safety standards. (Ex. G-5). The citation alleges that safe access was not provided to the operator of a John Deere excavator. Two of the four foot holds upon both sides of the excavator were bent. The citation alleges that the condition created a fall hazard, which could result in injuries.

Inspector Gulati determined that an injury was unlikely to occur but that any injury could reasonably be expected to result in lost work days or restricted duty. He determined that the operator's negligence was moderate and that one person would be affected. Section 56.11001

mandates that “[s]afe means of access shall be provided and maintained to all working places.” 30 C.F.R. § 56.11001. Prior to the hearing, the Secretary filed an unopposed motion to amend the penalty petition to allege, in the alternative, a violation of section 56.14100(b). That safety standard provides that “[d]effects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons.” 30 C.F.R. § 56.14100(b). The Secretary proposed a penalty of \$100.00 for this citation.

Discussion and Analysis

Inspector Gulati testified that the cited footholds on each side of the excavator were bent inward or twisted upward. (Tr. 24-26; Ex. G-6, at 2-3). This condition created a slipping, tripping, and falling hazard. (Tr. 26). Inspector Gulati was testified that if a miner tried to use one of the damaged footholds, he could slip because it would not provide 3 inches of toe clearance. (Tr. 59). The inspector was especially concerned that the equipment operator could slip while dismounting the equipment. (Tr. 55). The second foothold on each side was not damaged, but they were a little over 33 inches above ground level. (Tr. 58). Foreman Hamilton told the inspector that the footholds frequently become damaged during normal operations. (Tr. 30).

Inspector Gulati determined that the cited condition was unlikely to result in an injury because there were handholds available. (Tr. 32). He determined that the operator’s negligence was moderate because the condition was obvious. (Tr. 33). He believed that the footholds were damaged “some time back.” (Tr. 54).

Hamilton testified that the footholds had been in the same condition cited by the inspector since 2007. (Tr. 80). He does not believe that the bent footholds presented a safety hazard. *Id.* No miner had been injured while ascending or descending the excavator. (Tr. 81). He is the principal operator of the excavator and he had never been concerned for his safety while entering or exiting the excavator’s cab. (Tr. 80; Ex. R-6).

Nordic Industries argues that the test to be applied here is whether “a reasonably prudent person familiar with the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining industry, would recognize a hazard warranting corrective action.” (Tr. 97-98). It argues that the evidence establishes that the footholds could still be used and that anyone accessing the excavator would be able to maintain three points of contact. Consequently, a reasonably prudent person would not believe that the cited conditions created a hazard to miners.

The Commission has held that, under the reasonably prudent person test, “the violative condition is appropriately measured against the standard of whether a reasonably prudent person familiar with the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining industry, would recognize a hazard warranting corrective action within the purview of the applicable regulation.” *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2129 (Dec. 1982); *see also Asarco, Inc.*, 14 FMSHRC 941, 948 (June 1992). The Commission stated in *Ideal Cement Co.*, “the appropriate test is not whether the operator had explicit prior notice of a specific prohibition or requirement,” but whether a reasonably prudent person,

familiar with the protective purposes of the standard, would have ascertained the specific prohibition of the standard and concluded that a hazard existed in that “particular factual setting[.]” 12 FMSHRC 2409, 2415-16 (Nov. 1990). Therefore, with respect to a broadly worded safety standard, if a reasonable person with knowledge of the particular facts, including facts peculiar to the mining industry, would recognize the existence of a defect constituting a hazard requiring corrective action within the purview of the applicable regulation, the operator has sufficient notice of the standard.

Both section 56.11001 and 56.14100(b) are broadly worded safety standards. I find that a reasonably prudent person would conclude that the bent footholds were a defect on the excavator that affected safety. I also find that a reasonably prudent person would conclude that Nordic Industries did not maintain a safe means of access to the cab of the excavator, which was a working place. The risk of injury will be particularly notable when a miner is descending from the cab of the excavator.

The Commission has held that a violation of the MSHA’s guarding standard requires a “reasonable possibility of contact and injury” that includes “contact stemming from inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness.” *Thompson Brothers Coal Co., Inc.*, 6 FMSHRC 2094, 2097 (Sept. 1984). To determine whether a reasonable possibility exists, the Commission stated that all “relevant exposure and injury variables, e.g., accessibility of the machine parts, work areas, ingress and egress, work duties, and as noted, the vagaries of human conduct” must be considered. *Id.*

The same principles apply with respect to this citation. As a result of inattention, fatigue, and environmental factors such as bad weather, a miner may slip and fall while exiting the cab because he was unable to maintain a good foothold regardless of maintaining three points of contact. The miner could easily sustain scrapes, bruises, or more serious injuries. As Inspector Gulati recognized, such an event was not reasonably likely. I find the Secretary established a violation of both safety standards, but I base my decision upon a violation of section 56.14100(b). The gravity was only moderately serious.

I find that the violation was the result of Respondent’s low negligence. I credit the testimony of Hamilton that at least one of the footholds was damaged since 2007, soon after Nordic Industries purchased the excavator. (Tr. 80). Hamilton normally operates the excavator and he credibly testified that he never had any difficulty accessing the cab or exiting the cab and that he never slipped while doing so. *Id.* Hamilton genuinely believed that the excavator was safe to operate in the cited condition and his belief was not unreasonable under these circumstances. (*See e.g.* Ex. R-6)

I **MODIFY** Citation No. 8702905 to reduce the negligence to low. A penalty of \$100.00 is appropriate for this violation.

C. Citation No. 8702906

On October 23, 2013, Inspector Gulati issued Citation No. 8702906 under section 104(a) of the Mine Act, alleging a violation of section 56.14130(i) of the Secretary’s safety standards.

(Ex. G-7). The citation alleges that the lap portion of the seatbelt on a Caterpillar wheel loader was not maintained in functional condition and replaced when necessary to assure proper performance. Specifically, the citation alleges that the 2 ¾ inch strap on the left side of the driver was badly frayed over a length of about 4 inches and also contained cuts, holes or nicks. It states that more than 50% of the webbing across its width was damaged and worn out.

Inspector Gulati determined that an injury was reasonably likely to occur and that an injury could reasonably be expected to be fatal. He determined that the operator's negligence was moderate and that one person would be affected. Section 56.14130(i) states, in part, that seat belts on wheel loaders "shall be maintained in functional condition and replaced when necessary to assure proper performance." 30 C.F.R. § 56.14130(i). The Secretary proposed a penalty of \$263.00 for this citation.

Discussion and Analysis

Inspector Gulati testified that when he examined the left side of the lap belt he saw that it was "very, very badly nicked." (Tr. 34, 36-39; Ex. G-8 at 3-5). He saw "holes," "longitudinal cuts," and a "vertical tear across the bridge of that strap." (Tr. 34). He characterized the belt as "very badly worn out." (Tr. 34). Inspector Gulati determined that the conditions he observed violated section 56.14130(i) because the seatbelt "was not replaced in spite of the fact that it was severely frayed, nicked, had holes, [and] had cuts, both longitudinally and across the width of the belt." (Tr. 42).¹

Inspector Gulati was advised by Hamilton that the loader had not been subjected to a pre-operational examination because the loader arrived at the mine site about a week earlier and was never used. (Tr. 39). Hamilton also told the inspector that it was "available for use to top off the customer trucks." *Id.* The loader was not tagged out. (Tr. 41). Because the vehicle had not been used at the mine, Inspector Gulati gave Nordic Industries an opportunity to perform a pre-operational examination upon the loader before he inspected it. Inspector Gulati did not start his inspection of the loader until he was told that the pre-operational exam was completed. (Tr. 40-41).

The inspector was concerned that if Nordic Industries continued to use the loader with the damaged seatbelt, the belt would fail during a serious accident. (Tr. 42). He cited a document entitled the "Operator Restraint System for Off-Road Work Machines" produced by SAE International, which recommends that seat belts be immediately replaced if the belt strap is "nicked or frayed." (Tr. 45; Ex. G-9 at 4).

Inspector Gulati determined that the violation was S&S because, with all the holes, nicks, and cuts, the strength of the strap was compromised. The "minimal width of the strap" would not hold a miner in the event of an accident. (Tr. 46). An injury would likely be fatal. *Id.* He determined that Respondent's negligence was moderate because he gave the operator the opportunity to discover the violation during the pre-operational examination. (Tr. 47).

¹ I credit Inspector Gulati's description of the damage to the belt and his photographs depicting the damage. (Tr. 34-39; Ex. G-8 at 3-5). Respondent's photo was taken after the belt was removed from the vehicle. (Ex. R-7).

Hamilton testified that Nordic Industries replaces seatbelts when they become damaged or inoperable. (Tr. 83). He said that he felt rushed and intimidated during the pre-operational examination that day because the inspector stood a few feet away. (Tr. 84). Hamilton believes that before the loader was operated for the first time, the equipment operator would have performed a more thorough pre-operational examination and discovered the problems with the seatbelt. Hamilton testified that he would have shut down the loader until a new seatbelt arrived. Furthermore, he testified that the defective seatbelt did not present a hazard because that loader is only used to top off loaded trucks and its speed would not exceed five miles per hour. (Tr. 85). If there was an accident at that speed, the seatbelt would fully restrain the loader operator. (Tr. 86).

Nordic Industries argues that the Secretary did not establish a violation of the safety standard. More critically, it contends that the Secretary did not establish that the violation was S&S. The loader was delivered to the mine about a week before the inspection, was not used, and was not given a thorough pre-operational checkup. (Tr. 99). The operator would have replaced the seatbelt before it was put into service.

I find that the Secretary established a violation of the safety standard. The cited equipment was a wheel loader and the seatbelt was not replaced to assure proper performance. I credit the inspector's description of the damage as documented by his photographs. Nordic Industries cited three cases to support its position that the citation should be vacated: *Ammon Enterprises*, 30 FMSHRC 799, 813-14 (July 2008) (ALJ); *Ron Coleman Mining, Inc.*, 21 FMSHRC 935, 935-36 (Aug. 1999) (ALJ); *Buffalo Crushed Stone*, 16 FMSHRC 2154, 2161 (Oct 1994) (ALJ). Those cases are inapposite. In one case the inspector testified that the seatbelt would still function properly if the vehicle were involved in a rollover accident, in another the inspector said that the seatbelt would still function despite the damage to the belt, and in one case the citation was issued because the seatbelt was dirty and oil stained.

I find that the Secretary did not establish that the violation was S&S.² The violation created a discrete safety hazard. The issue is whether there was a reasonable likelihood that the hazard contributed to by the violation would cause injury. A seatbelt protects the equipment operator from injury in the event of an accident and helps keep him in his seat when traveling over rough terrain. I credit the testimony of Hamilton that at the time of the August 2014 hearing, the loader was only used on an occasional basis to top off large double bottom dump

² An S&S violation is a violation "of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard." 30 U.S.C. § 814(d) (2006). In order to establish the S&S nature of a violation, the Secretary must prove: "(1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard – that is, a measure of danger to safety – contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury will be of a reasonably serious nature." *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984); *accord Buck Creek Coal Co., Inc.*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power Co., Inc.*, 861 F. 2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria). The Commission has held that "[t]he test under the third element is whether there is a reasonable likelihood that the hazard contributed to by the violation . . . will cause injury." *Musser Engineering, Inc. and PBS Coals, Inc.*, 32 FMSHRC 1257, 1281 (Oct. 2010).

trucks that had been loaded using larger loaders. (Tr. 84-85). That was its intended use. As a consequence, assuming continued mining operations, the loader will travel in a flat area away from other traffic and it will not exceed a speed of five miles per hour. The hazard presented by the violation was that the loader operator would be injured in the event of an accident due to the condition of the seatbelt. I find that under the facts in this case it was unlikely that the seatbelt would fail to protect the equipment operator in an accident and, as a consequence, the violation did not contribute to the risk of an injury.³ I find that the gravity of the violation was serious and that, while unlikely, a fatal injury was possible.

I find that Respondent's negligence was moderate. Nordic Industries was given the opportunity to perform a pre-operational check of the loader and its employees failed to inspect the seat belt. My negligence finding considers that the loader had not been used at the mine prior to this MSHA inspection.

I **MODIFY** Citation No. 8702906 to delete the S&S determination. A penalty of \$100.00 is appropriate for this violation.

II. APPROPRIATE CIVIL PENALTIES

Section 110(i) of the Mine Act sets forth the criteria to be considered in determining an appropriate civil penalty. I have considered the Assessed Violation History Report, which was submitted by the Secretary. (Ex. G-12). Respondent was issued three citations in the 24 months prior to October 23, 2013, and only one of these citations was designated as S&S. Respondent is a small operator. The violations were abated in good faith. The penalties assessed in this decision will not have an adverse effect upon the ability of Respondent to continue in business. The gravity and negligence findings are set forth above.

³ These facts are similar to *East Coast Limestone, Inc.*, 19 FMSHRC 761, 765-66 (April 1997) (ALJ). In that case, the seatbelt was severely damaged, but the cited loader traveled at speeds that did not exceed 10 miles per hour because it was only used to pick up material and dump it into the crusher. The judge modified the citation to delete the S&S designation.

III. ORDER

I **MODIFY** the citations for the reasons set forth above. Nordic Industries, Inc., is **ORDERED TO PAY** the Secretary of Labor the sum of \$300.00 within 30 days of the date of this decision.⁴

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

Distribution:

Randy L. Cardwell, Conference & Litigation Representative, Mine Safety & Health Administration, 991 Nut Tree Road, 2nd Floor, Vacaville, CA 95687 (Certified Mail)

Isabella M. Finneman, Esq., Office of the Solicitor, U.S. Department of Labor, 90 7th Street, Suite 3-700, San Francisco, CA 94103-6704 (Certified Mail)

Bradley B. Johnson, Esq., Harrison, Temblador, Hungerford & Johnson, 980 9th Street, Suite 1400, Sacramento, CA 95814 (Certified Mail)

RWM

⁴ Payment should be sent to the Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9958 / FAX: 202-434-9949

October 3, 2014

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

v.

ROCK EXPRESS, INC.,
Respondent.

CIVIL PENALTY PROCEEDINGS

Docket No. CENT 2010-1236-M
A.C. No. 25-01215-229461

Docket No. CENT 2011-578-M
A.C. No. 25-01215-247122

Mine: CR 332

DECISION AND ORDER

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

Terry Jensen, appearing *pro se*, Scottsbluff, Nebraska, for Respondent.

Before: Judge Paez

This case is before me upon the petitions for the assessment of civil penalty filed by the Secretary of Labor (“Secretary”) pursuant to section 105 of the Federal Mine Safety and Health Act of 1977 (“Mine Act”), 30 U.S.C. § 815(d). The Secretary, on behalf of the Mine Safety and Health Administration (“MSHA”), alleges two violations of 30 C.F.R. § 56.14130, a mandatory safety standard regarding the use of seat belts and roll-over protective structures (“ROPS”) at surface metal and nonmetal mines. Rock Express, Inc. (“Rock Express” or “Respondent”) timely contested the citations.¹

I. STATEMENT OF THE CASE

In dispute are one section 104(d)(1) citation and one section 104(d)(1) order issued to Rock Express at its CR 332 mine. To prevail, the Secretary must prove his charges “by a preponderance of the credible evidence.” *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995) (citing *Garden Creek Pocahontas Co.*, 11 FMSRHC 2148, 2152 (Nov. 1989)), *aff’d sub nom., Sec’y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096, 1106–1107 (D.C. Cir. 1998). This burden of proof requires the Secretary to demonstrate that “the existence of a fact is more probable than its nonexistence.” *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000) (citations and internal quotations omitted), *aff’d*, 272 F.3d 590 (D.C. Cir. 2001).

¹ Rock Express filed two answers, one regarding Citation No. 6587838 and one regarding Order No. 6587840. I refer to them as “Citation Answer” and “Order Answer” respectively.

Citation No. 6587838 charges Rock Express with a violation of 30 C.F.R. § 56.14130(i) for failing to maintain the seat belt of a Dresser 540 Loader. Order No. 6587840 charges Rock Express with violating 30 C.F.R. § 56.14130(g) for an operator's failure to wear a seat belt while operating a Galion A550 Grader. The Secretary designated the citation and order each as significant and substantial ("S&S")² and as the result of Rock Express's unwarrantable failure to comply with a mandatory health or safety standard.³ The Secretary proposes Rock Express pay a penalty of \$2,000 for the citation and \$4,000 for the order.

Chief Administrative Law Judge Robert J. Lesnick assigned these consolidated dockets to me, and I held a hearing in Gering, Nebraska.⁴ The Secretary presented testimony from MSHA Inspector Daniel H. Scherer. (Tr. 13:11–24.) Rock Express presented testimony from Mine Manager Bobbie D. Henderson. (Tr. 148:16–17.) The parties submitted post-hearing briefs.⁵

II. ISSUES

The Secretary argues that the condition of the Dresser 540 Loader, as well as mine manager Henderson's alleged failure to wear a seat belt while operating the Galion A550 Grader, were properly cited as violations, that the allegations underlying the citation and order are valid, and that the penalties proposed for Rock Express are appropriate. (Sec'y Br. at 34.) Rock Express refused to stipulate that CR 332 was subject to the jurisdiction of the Mine Act and argues that jurisdiction over CR 332 would not extend to the Galion A550 Grader used on the access road adjacent to the site. (Tr. 8:4–10.) Rock Express denies either violation existed and disputes the Secretary's assertions regarding gravity and negligence. (Resp't Br. at 1–2.) Rock Express further argues that the proposed penalties are inappropriate considering the size of its operation and its inability to continue business. (*Id.*)

Although Rock Express did not stipulate that CR 332 was a "mine" subject to the jurisdiction of the Mine Act, I note that it never litigated this issue during these proceedings. Moreover, Rock Express not only filed a Legal Identity Report with MSHA for CR 332 in 2004, but CR 322 has been issued a Mine ID number and Rock Express has paid citations issued

² The S&S terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious any violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard."

³ The unwarrantable failure terminology is taken from section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), which establishes more severe sanctions for any violation that is caused by an "unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards."

⁴ In this Decision, the hearing transcript, the Secretary's Exhibits, and Rock Express's exhibits are abbreviated as "Tr.," "Gov't Ex. #," and "Resp't Ex. #," respectively.

⁵ In this Decision, I refer to the Secretary Post-Hearing Brief as "Sec'y Br.," and to Rock Express's Post-Hearing Brief as "Resp't Br."

during prior inspections. (Gov't Ex. 1; Gov't Ex.14.) Accordingly, I conclude that the Secretary properly asserts jurisdiction over Rock Express's CR 332 mine. *See* 30 U.S.C. § 803.

Manager Henderson also testified that the proposed fines have been a mental and financial burden, which led him to shut down CR 332 despite customers' offers of help. (Tr. 154:11–15, 156:20–157:22.) However, mine operators bear the burden of proof for questions of financial hardship. *Broken Hill Mining Co.*, 19 FMSHRC 673, 677–78 (Apr. 1997). The Commission has indicated, “[i]n the absence of proof that the imposition of authorized penalties would adversely affect [an operator’s] ability to continue in business, it is presumed that no such adverse effect would occur.” *Sellersburg Stone Co.*, 5 FMSHRC 287, 294 (Mar. 1983), *aff’d*, 736 F.2d 1147, 1152–53 (7th Cir. 1984); *see also Unique Electric*, 20 FMSHRC 1119 (Oct. 1998) (expressing concern over creating an incentive for operators to wind down their businesses to avoid payment of civil penalties). Here, Rock Express offered into evidence a single-page, unaudited document purporting to show its finances for the fiscal year in which Inspector Scherer issued the citation and order. (Resp’t Ex. 1.) Even if I were to credit Rock Express’s financial document, the document only shows a single year in which Rock Express incurred a loss of \$37.39.⁶ (Resp’t Ex. 1.) Significantly, Rock Express did not disclose its total assets. *Cf. Heritage Res., Inc.*, 21 FMSHRC 626, 638 (June 1999) (ALJ) (finding no effect on ability to continue in business in light of operator’s substantial assets). Moreover, Rock Express provided testimony that customers were “begging” for their product and offering help. (Tr. 157:19–22.) *Cf. Kennie-Wayne, Inc.*, 16 FMSHRC 2441, 2442–44 (Dec. 1994) (ALJ) (finding penalty had no effect on ability to continue in business in light of operator’s future business prospects). Therefore, I determine that Rock Express has not demonstrated by the preponderance of the evidence that the proposed penalties would affect its ability to remain in business.

Thus, the remaining issues before me are: (1) whether MSHA has jurisdiction over the Galion A550 Grader; (2) whether the cited conditions constitute violations of the Secretary’s mandatory health and safety standards; (3) whether the record supports the Secretary’s assertions regarding gravity and negligence underlying each violation; and (4) whether the proposed penalties are appropriate.

For the reasons set forth below, Citation No. 6587838 is **MODIFIED** to a section 104(a) citation, remove the unwarrantable failure designation, and reduce the level of negligence to “moderate.” In addition, Order No. 6587840 is **AFFIRMED** and amended to a section 104(d)(1) citation, as a matter of law.

⁶ I note that the Secretary contested the significance, not the validity, of this financial information, after I admitted Resp’t Ex. 1. (Tr. 161:6–12, 165:7–8; Sec’y Br. at 32.)

III. BACKGROUND AND FINDINGS OF

A. Pit Operations at CR 332

Rock Express operated the CR 332 sand and gravel pit on leased property near Angora, Nebraska. (Gov't Ex. 1; Tr. 150:12–19, 154:11–15, 185:22–25.) A quarter-mile access road connects the mine to a series of gravel roads that leads to a state highway.⁷ (Tr. 27:10–18, 172:21–23.) The mine access road is the “only access in and out of [the gravel pit].” (Tr. 33:13–14.) The access road leads to a roadway that loops around the gravel pit. (Tr. 27:20–25.) This loop creates a more efficient traffic pattern allowing trucks to receive their payload while avoiding cumbersome turnarounds. (Tr. 33:16–25, 195:1–3.) At points where the loop runs adjacent to the pit, Rock Express erected berms as necessary.⁸ (Tr. 34:3–8.)

Rock Express operated the CR 332 mine seasonally and had begun operations only “a couple weeks prior” to the inspection. (Tr. 74:11–12.) Rock Express alternated between crushing and hauling rock every few days as business conditions required. (Tr. 158:4–5.) Henderson last operated the CR 332 mine on Thursday and Friday of the week prior to the inspection in this case. (Tr. 38:1–3.) Among the equipment used on the mine site were a Dresser 540 loader and a Galion A550 road grader. (Gov't Ex. 11; Tr. 91:4–11, 94:7.) A few other pieces of mining equipment were “piled up” at the end of the quarter-mile mine access road. (Tr. 25:3–7.)

As the mine manager, Henderson was in charge of health and safety at the mine site and had ultimate responsibility for maintenance of equipment safety. (Gov't Ex. 1; Tr. 37:11–15, 75:17–24, 165:16–18.) Henderson was present at the mine on a daily basis when mine equipment was operating, often with just one other miner. (Tr. 76:3–7; 110:16–21.) The mine had no history of injuries. (Tr. 145:19–21.)

B. MSHA's Inspection

At approximately 7:30 a.m. on Monday, July 8, 2010, Inspector Daniel H. Scherer arrived at CR 332 for a routine E01 inspection. (Tr. 20:5–22.) Inspector Scherer became an authorized representative with the right to conduct inspections in 2007. (Tr. 13:21–15:4.) His prior experience included 16 years as an underground miner where he operated various types of mobile equipment, such as loaders, designed for use in underground mines. (Tr. 15:8–19:5.) He did not become a full-time special investigator until 2011, after the inspection. (Tr. 13:11–13.) Upon arrival Scherer found no one at CR 332, so he called Henderson to inform him that he was there to perform an inspection. (Tr. 34:21–25.) Henderson told Scherer that no one was available to accompany him. (Tr. 35:16–22.) Scherer then began to visually inspect the mine. (Tr. 38:5–9.)

⁷ Mine Manager Henderson stated that an irrigation company owns the gravel roads in part and that, despite “no trespassing” signs, these roads are open to the public. (Tr. 174:11–19.)

⁸ “*Berm* means a pile or mound of material along an elevated roadway capable of moderating or limiting the force of a vehicle in order to impede the vehicle's passage over the bank of the roadway.” 30 C.F.R. § 56.2 (emphasis in original).

Beginning his inspection at the mouth of the access road, Scherer observed that the Dresser 540 wheel loader was located in the pit, while the Galion A550 road grader was parked at the entrance to the pit. (Gov't Ex. 11; Tr. 90:5, 109:8–13.)

1. Dresser 540 Loader

Scherer walked through CR 332 while observing roadways and equipment, including the Dresser 540 Loader. (Tr. 38:5–9.) Rock Express had used this Dresser 540 loader at CR 332 for approximately three years. (Tr. 203:16–17.) Scherer testified that the seat belt for the Dresser 540 Loader was frayed along both the upper and lower edges, oil soaked, brittle-looking, aged, and weathered. (Tr. 39:15–19, 43:5–12; Gov't Ex. 3.) The fraying was approximately one half inch at deepest, while fraying in the one-fourth- to one-half-inch range spanned “probably 3 inches long.” (Tr. 46:20–47:2.) Scherer also testified that some manufacturers warn that oil causes the material to deteriorate. (Tr. 48:19–21.) According to Scherer, most equipment manufacturers also “put out literature” advising replacement of belts showing “fraying, cuts, tears, [or] oil soaking.” (Tr. 49:2–6.)

Scherer stated that seat belt fraying can result in ejection of one miner from the loader. (Tr. 64:12–15, 64:19–65:12, 71:10–20.) Scherer also explained that in case of ejection, “mining history shows [miner operators are] often run [over] by the piece of equipment that they’ve been operating and are crushed and it’s a fatal injury.” (Tr. 65:1–66:25) In Scherer’s opinion, the belt had been in this condition for months, if not longer. (Tr. 73:19–22, 75:2–3.) Henderson offered no explanation for the seat belt’s condition at the time of inspection. (Tr. 73:17–24.)

Scherer also noticed that one of the loader’s pair of tether straps was not connected. (Gov't Ex. 2; Gov't Ex. 4; Tr. 39:20–40:2, 56:16–22.) This pair of tether straps ensures the seat assembly, including the seat belt, stays anchored within the roll-over protection system (“ROPS”) in case of roll-over. (Tr. 54:16–24.) In addition, both of the tether straps showed oil soaking and “some cuts.” (Tr. 39:20–40:2.) Rock Express had been cited for not properly using tether straps on a different loader just over a year prior to this inspection. (Gov't Ex. 8; Tr. 79:6–11.)

Scherer testified that a properly functioning operator restraint system would secure the operator and limit injury in case of roll-over or collision. (Tr. 54:2–8.) Scherer considered the tether straps to be part of the seat belt assembly. (Tr. 55:7–10.) Based on his observations, Scherer issued Citation No. 6587838 alleging, “the seat belt was not replaced when necessary to assure proper performance” and “one of the tether straps was disconnected from the seat assembly.” (Gov't Ex. 2; Tr. 38:18–25.) He also designated this citation as both S&S and an unwarrantable failure on the part of Rock Express. (*Id.*; Tr. 77:16–23.)

2. Galion A550 Grader

Inspector Scherer then examined the Galion A550 Grader. When Scherer came to the grader, he found the seat belt tied behind the seat. (Gov't Ex. 9; Gov't Ex. 10; Tr. 98:1–16.) Henderson told Scherer at the time of inspection that he felt he did not need to wear a seat belt when operating the grader and that Scherer was “overstepping.” (Tr. 107:8–12.) According to

Scherer, Henderson said, “I’m the only person who operates that road grader and I don’t – why would I wear that thing? I don’t wear it.” (Tr. 94:20–22.) Henderson responded to the Secretary’s interrogatories by stating: “[t]he correct quote would have been ‘I do not use the seat belt because I have to stand so I get a better view of the blade.’ I am not a tall person!!” (Gov’t Ex. 16.) Henderson also admitted he did not have a harness and safety line. (Tr. 99:9–16.) A little over a year prior to the citation, a Rock Express employee admitted that he did not use a seat belt when operating a loader, resulting in a similar citation. (Gov’t Ex. 13; Tr. 112:16–16.)

Rock Express used the grader to repair and maintain the pit’s rough, uneven roads. (Tr. 106:16–20.) According to Scherer, this working environment creates the intrinsic hazard that the grader could tip over and eject the operator from the machine, which could result in crushing or other fatal injuries. (Tr. 100:6–21, 101:14–102:1, 106:18–19.) The access road at CR 332 requires continual refurbishment because it lies in a drainage area—“a gully between the hills.” (Tr. 24:2–11, 200:4–201:10.) Indeed, Rock Express had already repaired the road three times that season alone. (Tr. 202:14–17.) Compounding the need for frequent repair, channels—cut by drainage water and measuring four feet wide by two feet deep—run intermittently along the length of the quarter mile access road. (Tr. 32:7–20.) In normal operations, Scherer testified that graders will “flex and go and yaw and stuff” as its wheels encounter ruts and potholes. (Tr. 103:16–24.)

Based on Henderson’s admission and his own observations, Scherer issued Order No. 6597840, alleging that Henderson “had operated the grader without wearing a seat belt for an extended period of time.” (Gov’t Ex. 9.) He designated this order as both S&S and an unwarrantable failure on the part of Rock Express. (*Id.*; Tr. 106:9–11, 110:24–111:10.)

IV. PRINCIPLES OF LAW

A. Regulatory Interpretation

First, the Commission determines whether or not a regulation is ambiguous. *Walker Stone Co. v. Sec’y of Labor*, 156 F.3d 1076, 1080 (10th Cir. 1998). A regulation is ambiguous when its meaning is open to “plausible and divergent interpretations.” *Daanen & Janssen*, 20 FMSHRC 189, 192 (Mar. 1998). The Commission “ascertain[s] the meaning of regulations not in isolation, but rather in the context in which those regulations appear.” *Wolf Run Mining Co.*, 32 FMSHRC 1669, 1681 (Dec. 2010) (citing *RAG Shoshone Coal Corp.*, 26 FMSHRC 75, 80 & n.7 (Feb. 2004)). Unambiguous regulatory provisions “must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results.” *Jim Walter Res., Inc.*, 28 FMSHRC 579, 587 (Aug. 2006). Second, where the meaning of the regulation is ambiguous, the Commission determines whether the Secretary’s interpretation of the regulation is reasonable and thus entitled to deference. *Mach Mining, LLC*, 34 FMSHRC 1784, 1806 (Aug. 2012), *aff’d*, 728 F.3d 643 (7th Cir. 2013).

B. Fair Notice

The Commission's test for notice is "whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard." *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990). A wide variety of factors are relevant in determining whether an operator had adequate notice of regulatory requirements, such as "the text of the regulation, its placement in the overall regulatory scheme, its regulatory history, the consistency of the agency's enforcement, and whether MSHA has published notices informing the regulated community with ascertainable certainty of its interpretation of the standard in question." *Lodestar Energy, Inc.*, 24 FMSHRC 689, 694–95 (July 2002) (citations omitted).

C. Significant and Substantial

An S&S violation is one "of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety and health hazard." 30 U.S.C. § 814(d)(1). A violation is S&S "if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

To establish an S&S violation, the Secretary must prove the four elements of the *Mathies* test:

- (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard—that is, a measure of danger to safety—contributed to by the violation;
- (3) a reasonable likelihood that the hazard contributed to will result in an injury;
- and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

Mathies Coal Co., 6 FMSHRC 1, 3–4 (Jan. 1984) (footnote omitted). *See also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995) (approving the *Mathies* criteria); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (same).

The Commission has also provided further guidance in applying the *Mathies* test. The Commission has held that an inspector's judgment is an important element in an S&S determination. *Mathies*, 6 FMSHRC at 5. The Commission has also observed that the "reference to 'hazard' in the second element is simply a recognition that the violation must be more than a mere technical violation—i.e., that the violation present a measure of danger." *U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (Aug. 1984). Moreover, the Commission clarified that "the correct inquiry under the third element of *Mathies* is whether *the hazard* identified under element two is reasonably likely to cause injury." *Black Beauty Coal Co.*, 34 FMSHRC 1733, 1742 n.13 (Aug. 2012) (emphasis added) (citations omitted), *aff'd sub nom., Peabody Midwest Mining, LLC v. FMSHRC*, 762 F.3d 611 (7th Cir. 2014). Finally, the Commission specified that the evaluation of the reasonable likelihood of injury should be made "in terms of continued normal mining operations." *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985) (quoting *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984)).

D. Unwarrantable Failure

In *Emery Mining*, the Commission determined that an unwarrantable failure is “aggravated conduct constituting more than ordinary negligence.” 9 FMSHRC 1997, 2001 (Dec. 1987). Unwarrantable failure is characterized by such conduct as “reckless disregard,” “intentional misconduct,” “indifference,” or a “serious lack of reasonable care.” *Id.* at 2003–04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); *see also Buck Creek Coal, Inc.*, 52 F.3d at 136 (approving the Commission’s unwarrantable failure test).

Whether conduct is “aggravated” in the context of unwarrantable failure may be determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist, such as the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator’s efforts in abating the violative condition, whether the violation is obvious or poses a high degree of danger, and the operator’s knowledge of the existence of the violation. *See Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000); *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev’d on other grounds*, 195 F.3d 42 (D.C. Cir. 1999); *Midwest Material Co.*, 19 FMSHRC 30, 34 (Jan. 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243–44 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988). These factors are viewed in the context of the factual circumstances of each case, and some factors may not be relevant to a particular factual scenario. *Consolidation Coal*, 22 FMSHRC at 353. All of the relevant facts and circumstances of each case must be examined to determine if an actor’s conduct is aggravated or whether mitigating circumstances exist. *Id.*

E. Civil Penalty

Although the Secretary proposes penalties, the Commission assesses penalties for violations of the Mine Act *de novo*. *Douglas R. Rushford Trucking*, 22 FMSHRC 598, 600 (May 2000). When assessing a civil penalty, section 110(i) of the Mine Act requires that I consider six criteria, including the operator’s history of previous violations, the appropriateness of the penalty relative to the size of the operator’s business, the operator’s negligence, the penalty’s effect on the operator’s ability to continue business, the gravity of the violation, and the demonstrated good faith of the operator in attempting to achieve rapid compliance. 30 U.S.C. § 820(i). The criteria are not required to be given equal weight. *Thunder Basin Coal.*, 19 FMSHRC 1495, 1503 (Sept. 1997).

V. LEGAL ANALYSIS AND CONCLUSIONS OF LAW

A. Citation No. 6587838 — Seat Belt Maintenance Violation — Dresser 540 Loader

Inspector Scherer issued Citation No. 6587838 for the condition of a seat belt and tether strap in the Dresser 540 Loader, pursuant to section 56.14130(i). Section 56.14130(i) provides as follows: “[s]eat belts shall be maintained in functional condition, and replaced when necessary to assure proper performance.” 30 C.F.R. § 56.14130(i). The Secretary argues that Rock

Express violated this standard because it either (1) failed to replace the lap belt when necessary to assure proper performance or (2) failed to maintain one of the tether belts in functional condition. (Sec’y Br. at 17.)

1. Lap belt

The Secretary claims Scherer’s visual observations of dirt and oil stains, fraying, and cuts sufficiently demonstrate the lap belt was functionally impaired and in need of replacement to assure proper performance. (Sec’y Br. at 18.) In making the determination that the belt was functionally impaired and needed to be replaced, Scherer relied on literature that suggests replacing seat belts in similar condition to the belt found in the Dresser 540 Loader. (Sec’y Br. at 17; Tr. 49:2–6.) However, Scherer admitted that the “[literatures’ recommendations] depend[] on the individual belt manufacturer,” and he was unsure if he ever read literature from the manufacturer of the lap belt in question. (Tr. 49:2–13.) Moreover, Scherer failed to document existing literature. Because Scherer’s determination regarding the lap belt’s functionality relies on undocumented literature that his own testimony indicates may not be applicable here, I do not credit Scherer’s conclusion that Rock Express failed to replace the lap belt when necessary to assure proper performance. *Cf. Ron Coleman Mining, Inc.*, 21 FMSHRC 935, 936 (Aug. 1999) (ALJ) (finding little probative value in the assertions of an inspector who failed to provide adequate documentation from the seat belt manufacturer).

Other than Scherer’s testimony, the Secretary presented no evidence that suggests fraying and oil soaking would impair the function or proper performance of the lap belt or seat belts of similar condition. *Cf. Id.* at 936 (dismissing citation alleging a section 56.14130(i) violation because MSHA failed to show mud and dirt imbedded in a seat belt impeded the seat belt’s use by failing to test the functionality of the belt). Here, it is not apparent that “quarter [to] half-inch” fraying or dirt and oil stains render the seat belt not functional.⁹ *Cf. Ammon Enters.*, 30 FMSHRC 799, 814 (July 2008) (ALJ) (holding visual observation of a 0.75 inch tear on a four-inch-wide seat belt to be insufficient to demonstrate the belt was not functional).

As the record before me does not establish whether the lap belt was functionally impaired or in need of replacement, I conclude the Secretary has not demonstrated by a preponderance of the evidence that Rock Express failed to maintain the seat belt in a functional condition or replace it when necessary to assure proper performance.¹⁰

⁹ In his post-hearing brief, the Secretary misquotes Mine Manager Henderson as stipulating that “the seat belts on the loader were severely frayed.” (Sec’y Br. at 18.) The transcript shows Henderson said he was unaware the seat belt was severely frayed in a context that indicates his disagreement with the Secretary’s assertions. (Tr. 170:4–11.)

¹⁰ SAE J386, which paragraph (h) of section 56.14130 incorporates by reference, requires replacing frayed or heavily worn seat belts. Thus, the lap belt may violate section 56.14130(h). Still, failure to comply with section 56.14130(h) does not necessarily indicate replacement is “necessary to assure proper performance” pursuant to section 56.14130(i). 30 C.F.R. § 56.14130(i) (emphasis added); *cf. Daanen & Janssen, Inc.*, 18 FMSHRC 1796, 1803

(continued...)

2. Tether Strap

The Secretary also asserts that the disconnected tether belt establishes the cited violation because tether belts, if present, are part of a seat belt for purposes of section 56.14130(i). (Sec’y Br. at 19.) For the reasons that follow, I determine section 56.14130(i) to be ambiguous and accord deference to the Secretary’s reasonable interpretation. *See generally Mach Mining, LLC*, 34 FMSHRC at 1806. Based on that interpretation, I also conclude that the disconnected tether belt violated section 56.14130(i).

The starting point of regulatory interpretation is the language of the regulation. *Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987). As the Secretary reads the standard, “seat belt” may refer to the “total system . . . which transfers the seat belt force to a machine.” (Sec’y Br. at 19 (quoting SAE J386 (1997).) Alternatively, “seat belt” could refer to a specific part of the total system such as the physical lap belt worn in the seat. Given these two plausible interpretations, I determine the regulation to be ambiguous. *See generally Daanen & Janssen, Inc.*, 20 FMSHRC at 192–93 (concluding that ambiguity exists when a regulation’s meaning is open to “plausible and divergent” interpretations).

Where the meaning of the regulation is ambiguous, I must defer to the Secretary’s reasonable interpretation. *See Mach Mining, LLC*, 34 FMSHRC at 1806. Here, the Secretary argues tether straps are part of a seat belt for purposes of section 56.14130(i) because tether straps are part of the operator restraint system. (Sec’y Br. at 19.) Thus, the Secretary interprets “seat belt” to mean operator restraint system.¹¹ The Secretary further defines operator restraint system as the “total system composed of the seat belt assembly . . . and extension (tether) belts, if applicable, which transfers the seat belt force to a machine.” (Sec’y Br. at 19 (quoting SAE J386 (1997).) For the reasons below, I determine the Secretary’s interpretation to be reasonable.

First, the Secretary’s interpretation is consistent with the language of the regulation. Looking at the text of the regulation, I note that section 56.14130 does not provide a definition of “seat belt” that excludes tether belts. I also determine that definitions in the SAE J386 do not bind the Secretary. Although paragraph (h) incorporates “the requirement of SAE J386,” 30 C.F.R. § 56.14130(h), the definitions in SAE J386 are not requirements for purposes of paragraph (h) because they “do not state mandatory requirements with which an operator must comply.” *Daanen & Janssen, Inc.*, 18 FMSHRC at 1801. Indeed, the portion of SAE J386

¹⁰ (...continued)

Oct. 1996) (ALJ) (determining that a missing label establishes a violation of section 56.14130(h) but does not impair functionality), *aff’d*, 20 FMSHRC 189 (Mar. 1998). Moreover, the Secretary neither alleged a violation of section 56.14130(h) nor sought to plead that in the alternative.

¹¹ I note that the Secretary, through MSHA, uses “seat belts” as shorthand for “operator restraint system” when it states the express purpose of the final rule amending section 56.14130 is “to update its requirements for operator restraint systems (seat belts). . . .” Seat Belts for Off-Road Work Machines and Wheeled Agricultural Tractors at Metal and Nonmetal Mines, 68 Fed. Reg. 36,913, 36,913(2003) [hereinafter “Seat Belt Rule”].

containing definitions is separate from portions discussing technical requirements. As the definitions in SAE J386 are not plainly incorporated into the regulation, I determine that the Secretary's interpretation is not plainly inconsistent with the language of the regulation even if definitions in SAE J386 may indicate otherwise.¹² See generally *Plateau Mining Corp. v. FMSHRC*, 519 F.3d 1176, 1192 (10th Cir. 2008) (indicating the Secretary's interpretation of his own regulation is entitled to deference unless "plainly erroneous or inconsistent with the regulation." (quoting *Auer v. Robbins*, 519 U.S. 452, 461 (1997))).¹³

Second, the Secretary's interpretation is consistent with the safety-promoting purposes of the Mine Act. See generally *Dolese Bros. Co.*, 16 FMSHRC 689, 693 (Apr. 1994) (requiring a safety standard to be interpreted to further the objectives of the Mine Act). The Secretary's interpretation requires MSHA to consider all components that transfer seat belt forces when determining whether a seat belt is functional. Indeed, a lap belt in optimal condition cannot perform its function of securing a miner within a machine and the ROPS if the miner is strapped to a seat that itself is ejected from the machine. As Scherer testified, "tether straps are designed to ensure the seat assembly stays anchored within the ROPS . . . so [the miner and seat assembly] don't get ejected together or bounce around together." (Tr. 54:16–23.) There is little sense in securing a miner to a seat without securing that seat to the machine. Thus, the Secretary's broad interpretation allows MSHA to inspect seat belts as they actually function to affect miner safety. Accordingly, I defer to the Secretary's interpretation of the standard.

Separate from the issue of regulatory interpretation is whether the regulated party has received fair notice of the Secretary's interpretation of the regulation. *Wolf Run Mining Co.*, 32 FMSHRC 1669, 1682 (Dec. 2010). MSHA previously issued Citation No. 6327197 to Rock Express for a violation of section 56.14130(h) in another loader because of missing tether straps. (Gov't Ex. 8.) Because paragraph (h) and (i) both refer to seat belts, 30 C.F.R. § 56.14130, this citation put Rock Express on notice that MSHA considers tether straps as seat belts for purposes of section 56.14130. Moreover, I note that MSHA promulgated a final rule amending section 56.14130 in 2003 with the express purpose "to update its requirements for operator restraint systems (seat belts) . . ." Seat Belt Rule, 68 Fed. Reg. at 36,913. This language indicates "seat belt[]" is shorthand for operator restraint system, and notifies the regulated community of the Secretary's interpretation. I therefore determine that Rock Express had adequate notice of the Secretary's interpretation of the regulation.

Because I have determined tether belts to be part of seat belts for purposes of section 56.14130, I must determine whether Rock Express failed to maintain the grader's tether strap in

¹² SAE J386 does not define seat belt, but it does provide a definition of seat belt assembly that implies seat belts are in a separate category, and thus distinct, from tether belts.

¹³ I recognize that the SAE J386 states tether belts "may" rather than "shall" be used to transfer seat belt forces, but the SAE J386 also states tether belts "must" meet force requirements in all operating positions. This is consistent with the Secretary's interpretation that tether straps must be maintained in functional condition when present.

functional condition.¹⁴ I recognize that the regulation requires maintenance, which is different than continuous performance. *See generally Akzo Nobel Salt, Inc. v. FMSHRC*, 212 F.3d 1301, 1302 (D.C. Cir. 2000) (indicating that “properly maintained” means something different than “continuously functioning”). Here, the Secretary provided evidence that the tether strap was disconnected at the time of inspection. (Gov’t Ex. 4.) Likewise, I determine that the Secretary reasonably inferred the condition of the tether strap was the same during Rock Express’s operations prior to the inspection as it was on the day of the inspection. Looking at the transcript of the hearing and Rock Express’s pleadings and briefs, I note that Rock Express never contended that the condition of the tether strap was different prior to the inspection. Moreover, Inspector Scherer observed the condition of the tether belt while the Dresser 540 Loader was located inside the pit, he found the loader’s tracks on a feed ramp in CR 332, and Rock Express had been operating for a couple of weeks prior to the inspection. (Gov’t Ex. 11; Tr. 53:6–12, 74:11–13, 90:5.) As Inspector Scherer testified, tether belts keep miners secure when other components of the operator restraint system fail, and disconnected tether belts cannot serve this function. (Tr. 54:16–25, 56:23–57:2.)

Accordingly, I conclude that Rock Express violated section 56.14130(i) by failing to keep the tether belt strap connected to the seat.

3. Gravity and S&S

Rock Express’s violation of section 56.14130(i) establishes the first element of the *Mathies* test for an S&S violation. The second element asks whether the violation contributed to a discrete safety hazard inasmuch as the violation provides a measure of danger to safety. Here, the discrete safety hazard is the risk of the miner and seat assembly getting ejected from the machine together or being bounced around in the cab together. (Tr. 64:8–10.) Inspector Scherer explained that the violation contributes to this hazard because a disconnected tether strap cannot secure the seat assembly within the machine if the anchoring points fail. (Tr. 54:16–25.) Therefore, the Secretary has met his burden of proof on the second element of *Mathies*.

The third and fourth elements of *Mathies* ask whether the safety hazard is reasonably likely to contribute to a reasonably serious injury. The Commission clarified that “[t]he correct inquiry under the third element of *Mathies* is whether *the hazard* identified under element two is reasonably likely to cause injury.” *Black Beauty Coal Co.*, 34 FMSHRC at 1742 n.13 (emphasis added). In other words, the hazard must be reasonably likely to result in an event in which there is an injury. *U.S. Steel Mining Co.*, 6 FMSHRC at 1836. Here, the hazard identified is a miner strapped to a poorly secured seat assembly being ejected from the machine or bounced around in the cab. (Tr. 64:8–10.)

¹⁴ Scherer additionally testified that the tether belt was frayed, dirty, and greasy. (Tr. 78:11–12.) For reasons discussed *supra* Part V.A.1, I determine that these visual observations are insufficient to establish the tether belt is not functional for purposes of section 56.14130(i).

I credit Scherer's testimony that anchoring bolts can be reasonably expected to fail in the context of continued normal mining due to a violent roll over or a tip-over. (Tr. 54:18); *see also U.S. Steel Mining Co.*, 7 FMSHRC at 1130 (indicating that an evaluation of the reasonable likelihood of injury should be made in the context of continued normal mining operations); *Mathies*, 6 FMSHRC at 5 (Jan. 1984) (noting that an inspector's judgment is an important element in an S&S determination). The Secretary also provided evidence that Rock Express regularly operated the Dresser 540 Loader to climb the feed ramp in the vicinity of a skidsteer loader, which subjected it to the risk of a violent rollover or collision. (Tr. 52:24–53:12; Sec'y Br. at 23.) Further, Henderson admitted Rock Express uses the loader to fill washouts on the access road when it is in poor condition. (Tr. 171:14.) Inspector Scherer credibly testified that ejection from a machine is reasonably likely to cause crushing, blunt force, or even fatal injuries. (Tr. 65:1–9.) In addition, he stated that bouncing around the cab is reasonably likely to cause the miner to lose control of the machine, causing an even more injurious accident. (Tr. 66:7–12.) Indeed, MSHA records show miners suffer fatal injuries when they are not properly secured within the machine. (Gov't Ex. 5; Gov't Ex. 6.)

Further, the condition of the anchoring bolts does not diminish the seriousness of the disconnected tether strap because the presence of redundant safety measures may indicate recognition of the significant dangers associated with the operator restraint system. *Cf. Buck Creek Coal, Inc.*, 52 F.3d at 136 (indicating that an operator's assertion that redundant safety measures eliminate a serious risk "defies common sense" because "the precautions are presumably in place . . . precisely because of the significant dangers. . . ."); *see also AMAX Coal Co.*, 19 FMSHRC 846, 850 (May 1997) (noting that the presence of alternative fire safety equipment does not negate a significant risk of fire).

In view of the above, I therefore determine that the Secretary has met his burden of proving that reasonably serious injuries were reasonably likely to occur and has thus satisfied the third and fourth elements of *Mathies*. Because I have determined that the Secretary has met his burden of proving the four elements of the *Mathies* test, I conclude that the Secretary has established this violation was S&S.

4. High Negligence and Unwarrantable Failure

The Secretary asserts Rock Express's conduct constitutes high negligence and designated the violation as an unwarrantable failure. Here, the Secretary contends that the disconnected tether strap was obvious, that the condition was dangerous, that Henderson knew or should have known about this violation because he was the mine manager responsible for health and safety and operated the loader 30% of the time, and that Respondent was on notice that greater efforts were necessary for compliance. (Sec'y Br. at 25–26.) An operator's conduct constitutes high negligence where the operator "knew or should have known of the violative condition or practice, and there are no mitigating circumstances." 30 C.F.R. 100.3(d) at Table X. I note that MSHA previously issued Citation No. 6327197 to Rock Express for violations in a different loader for missing tether straps. (Gov't Ex. 8.) I therefore determine that the citation put Rock Express on notice of the regulation's requirement to use its vehicles' tether straps, and that Rock Express should have known a disconnected tether strap presents the same safety hazard as a

missing tether strap. I further determine that Rock Express should have known the tether strap was disconnected because its condition was visible upon opening the loader door. (Gov't Ex. 4; Tr. 60:13–15.) Despite this notice, it appears Respondent took no steps to abate the violative condition in this case.

An unwarrantable failure determination involves many of the same factors as negligence. *San Juan Coal Co.*, 29 FMSHRC 125, 136 (Mar. 2007) (recognizing that a finding of high negligence suggests an unwarrantable failure). However, an unwarrantable failure determination additionally requires “aggravated conduct constituting more than ordinary negligence.” *Emery Mining*, 9 FMSHRC at 2001. Viewing the factors of aggravated conduct in the context of the factual circumstances in this case, I note my determination that the violation was obvious, that Rock Express had been put on notice that greater efforts are necessary for compliance, and that Respondent appears to have taken no steps to abate the violative condition. The Secretary has also demonstrated that the violation poses a high degree of danger by meeting his burden of proving this violation to be properly designated as S&S. *See* discussion *supra* Part V.A.3.

However, other factors weigh strongly against an unwarrantable failure designation. Nothing in the record demonstrates the extent of the violation, whether the violation existed for a significant length of time, or whether Henderson had actual knowledge of the violation. Indeed, the violation is limited to one of two tether straps, which together form a single component of the operator restraint system. (Tr. 39:20–40:2.) As the Secretary has not proven any other failures in the system, I determine the violation was not extensive. I also note that Scherer found the tether strap resting on top of a fire extinguisher (Gov't Ex. 4; Tr. 56:20–21) rather than buried under other items or clutter. The placement of the strap therefore suggests the violation occurred fairly recently. In addition, the Secretary has not provided pre-operation reports or other documentation suggesting this violation was brought to Henderson's attention. Given the apparently short duration of the violation, I determine that Henderson did not have actual knowledge of the violation.

Although Rock Express was negligent in failing to connect the tether strap to the seat, the Secretary has not met his burden of proving that Respondent's conduct was aggravated. I recognize that this violation exposed miners to significant dangers and followed an earlier citation for similar conduct. However, the short duration, limited extent, and lack of actual knowledge convince me that Rock Express's failure to connect the tether strap was not aggravated conduct constituting more than ordinary negligence. Based on the evidence before me and the factors weighing against the unwarrantable failure designation, I therefore determine that Rock Express's conduct does not rise to the level of unwarrantable failure. These same factors somewhat mitigate Rock Express's negligence in this case. Accordingly, I also determine Respondent's level of negligence to have been moderate.

Given my above determinations, Citation No. 6587838 is **MODIFIED** to remove the unwarrantable failure determination and reduce the level of negligence to “moderate.” Because a section 104(d)(1) citation requires the violation to be designated as both S&S and an unwarrantable failure, *see* 30 U.S.C. § 814, Citation No. 6587838 is also **MODIFIED** to a section 104(a) citation.

5. Civil Penalty

Under section 110(i) of the Mine Act, I must consider six criteria in assessing a civil penalty. 30 U.S.C. § 820(I). I have affirmed the Secretary's S&S designation. However, for the reasons discussed above, I have modified the citation to remove the unwarrantable failure designation and reduce the level of negligence to moderate. *See* discussion *supra* Part V.A. Because the violation was not an unwarrantable failure, I have modified Citation No. 6587838 to a section 104(a) citation. Accordingly, Citation No. 6587838 is not subject to the statutory minimum penalty of \$2,000.00 for a section 104(d)(1) citation.

With regard to the remaining section 110(i) factors, nothing in the record suggests that Respondent did not abate this violation in good faith. In addition, nothing in the record suggests that the proposed penalty is inappropriate based on the size of the mine. Rock Express failed to meet its burden of proof showing that the penalties would affect Rock Express's ability to continue business. *See* discussion *supra*, Part II. Looking at the mine's history of violations, I note that there were only six citations issued to Rock Express at CR 332 between April 2009 and the issuance of Citation No. 6587838 in July 2010. (Gov't Ex. 14.) Two of these six violations involved section 56.14130. (*Id.*) Both of those violations were issued pursuant to section 104(a) and designated S&S. (*Id.*) Rock Express's four other citations were also issued pursuant to section 104(a) and were non-S&S. Thus, this modest history of previous violations mitigates against the Secretary's proposed penalty. Considering the section 110(i) factors, especially as they relate to Rock Express's degree of negligence, I conclude that a penalty of \$850.00 is appropriate for Citation No. 6587838.

B. Order No. 6587840 — Seat Belt Usage Violation

1. Jurisdiction extends to the Galion A550 Grader

Rock Express claims MSHA did not have jurisdiction to inspect, enter, or issue Order No. 6587840 regarding the Galion A550 Grader because Rock Express uses the grader on an access road leading to CR 332, and not within the gravel pit itself. (Gov't Ex. 16; Order Answer at 2.) However, "whether a mine operator's equipment is covered by the Mine Act is not determined by its location but rather by its function. . . ." *Jim Walter Res., Inc.*, 22 FMSHRC 21, n.11 (Jan. 2000) (citing *W.J. Bokus Indus., Inc.*, 16 FMSHRC 704, 708 (Apr. 1994)). The Mine Act extends jurisdiction to include vehicles "used in . . . the work of extracting such minerals . . ." 30 U.S.C. § 802(h)(1); *accord Nat'l Cement Co. of Cal., Inc.*, 573 F.3d 788, 795 (D.C. Cir. 2009) ("[S]ubsection (C) [of the Mine Act], which covers mining-related equipment, clearly encompasses mining vehicles . . ."). Other Commission ALJs have found that section 3(h)(1) of the Act extends to equipment necessary for activities that are beyond the actual act of extraction, but still part of the overall mining process. *See Bonanza Materials, Inc.*, 15 FMSHRC 1355, 1357 (July 1993) (ALJ) (holding that jurisdiction extends to "peripheral activities which are functionally integrated to any degree" to mining operations); *see also Kaiser Aluminum and Chem. Corp.*, 3 FMSHRC 2296, 2299 (Oct. 1981) (ALJ) (holding that the phrase "used in" includes indirect usage for purposes of the Mine Act).

Rock Express used the grader to repair the access road, so it could get its trucks in and out of the gravel pit. (Tr. 152:25–153:2.) Henderson testified that he could not reach CR 332 in his pickup truck without repairing the access road. (Tr. 171:5–8, 200:16–19.) Indeed, Henderson worked a different job near Alliance on the day of the inspection because the access road was washed out. (Tr. 151:25–153:2.) Moreover, using the grader to repair the access road is a regular part of operations at CR 332 inasmuch as Henderson used the grader to repair the road three times that season alone. (Tr. 172:3–9; Gov’t Ex. 16.) Here, mineral extraction work at CR 332 does not occur unless Rock Express uses the Galion A550 Grader to maintain the access road. The regular and necessary use of the Galion A550 Grader for extraction purposes, albeit indirect, indicates that the grader is an integral part of the extraction process. Thus, I determine that the Galion A550 Grader is “used in” mining activity for purposes of the Mine Act. Accordingly, I conclude that the Secretary properly asserted jurisdiction over the Galion A550 Grader.¹⁵

2. Violation

Scherer issued Order No. 6597840 for Mine Manager Henderson’s alleged failure to wear a seat belt while operating the Galion A550 Grader under section 56.14130(g). Section 56.14130(g) provides that “[s]eat belts shall be worn by the equipment operator except that when operating graders from a standing position, the grader operator shall wear safety lines and a harness in place of a seat belt.” 30 C.F.R. § 56.14130(g). Although Scherer did not observe Henderson operate the grader at CR 332, Henderson admitted to not wearing a seat belt whenever he operated the grader. (Gov’t Ex. 16; Gov’t Ex. 17; Tr. 94:20–22, 107:8–10.) Furthermore, Scherer found the seat belt tied together behind the seat, thus supporting Henderson’s admission that he never used the seat belt. (Tr. 94:11–16.) While it is possible to comply with 30 C.F.R. § 56.14130(g) in lieu of a seat belt by wearing a harness and lifeline while standing, Scherer testified that the grader did not have this equipment. (Tr. 143:4–5; Gov’t Ex. 17.) Without a seat belt or harness, any usage of the grader establishes a violation of section 56.14130(g). Given Henderson’s admission, I conclude that Rock Express violated section 56.14130(g).

3. Gravity and S&S

Rock Express’s violation of section 56.14130(g) establishes the first element of the *Mathies* test for an S&S violation. The second element asks whether the violation contributed to a discrete safety hazard inasmuch as the violation provides a measure of danger to safety. Here, I credit Scherer’s testimony that failing to wear a safety restraint exposes a miner to the risk of slipping or falling out of the ROPS or vehicle, especially when standing. (Tr. 102:18–103:4.) I therefore determine that the Secretary has met his burden of proof on the second element of *Mathies*.

¹⁵ Because I have determined MSHA properly asserted jurisdiction over the Galion A550 Grader, I need not reach the issue of jurisdiction regarding the access road itself.

The third and fourth elements of *Mathies* ask whether the safety hazard is reasonably likely to contribute to a reasonably serious injury. Henderson admitted he regularly stands while using the grader on an access road in conditions that he could not cross with a pickup truck. (Gov't Ex. 16; Tr. 171:5–8, 200:16–18.) There are channels four feet wide and two feet deep cut by drainage water running intermittently along the length of the quarter mile access road. (Tr. 32:7–20.) Scherer testified that moments of inattention or distraction can lead to the wheel going off the edge of the access road, or going over a berm along the edge of the pit, which would result in forces capable of ejecting an unbelted miner, even at typical operating speeds. (Tr. 106:5–8, 144:11–145:6.) Given this uneven ground, the evidence demonstrates that a miner is reasonably likely to sustain injuries after being ejected from the machine. *Cf. Bob Bak Constr.*, 28 FMSHRC 817, 820 (Sept. 2006) (ALJ) (holding that failure to wear a seat belt on a slight slope was S&S). Moreover, Scherer testified that MSHA Fatalgrams and accident reports show miners are reasonably likely to be thrown from their equipment and run over, which would “likely result” in a fatality. (Tr. 101:21–102:7.) Scherer testified that *Rules to Live By*, an MSHA publication, shows seat-belt related accidents contributed to 60 or 70 percent of fatalities during the 10 years prior to publication. (Tr. 78:23–79:3.) I therefore determine that the Secretary has met his burden of proving that reasonably serious injuries were reasonably likely to occur and has satisfied the third and fourth elements of *Mathies*.

Based on my determinations above, I therefore conclude that the Secretary properly designated the violation as S&S.

4. High Negligence and Unwarrantable Failure

The Secretary designated this violation as an unwarrantable failure and characterizes Rock Express's negligence as high. In support of his allegations, the Secretary points to Henderson's official capacity, his repeated failure to use a seat belt or harness, the high degree of danger of operating this machine while standing with no restraint system or harness, and a previous citation for violating section 56.14130(g) that he argues put Rock Express on notice that greater efforts were needed for compliance. (Sec'y Br. at 30–31.)

Viewing the factors of aggravated conduct discussed in *Consolidation Coal* in the context of the factual circumstances in this case, I find that the evidence before me supports the Secretary's unwarrantable failure designation. *See Consolidation Coal*, 22 FMSHRC 340, 353 (Mar. 2000).

Henderson's testimony and responses to the Secretary's discovery requests indicate that his disregard for seat belt safety likely extended to every time he had used the grader, which suggests the violation existed for a significant length of time. (Tr. 94:20–22.) This repeated, deliberate failure to wear a seatbelt on the grader also indicates that the violation was extensive. (*Id.*) Further, Rock Express was put on notice that greater efforts were necessary for compliance when MSHA issued a citation during the previous year for another section 56.14130(g) violation. (Gov't Ex. 13; Tr. 112:14–16.) In addition, Rock Express made no efforts to abate this violative condition by instituting policies that ensure seat belt use. Instead, the operator tied the seat belt behind the seat in deliberate violation of the regulation. (Tr. 94:11–14.) The Secretary has also met his burden of proving this violation to be properly designated S&S, which

indicates a high degree of danger. *See* discussion *supra* Part V.B.3. The violation was obvious and deliberately disregarded. I find this deliberate disregard especially troubling because the need to wear a seat belt is not only a Mine Act requirement, but a general safety principle for all who operate motor vehicles of any kind. Finally, Henderson’s admission indicates knowledge of the violative condition. (Gov’t Ex. 16.)

I further note that several Commission Administrative Law Judges have found seat belt violations to be unwarrantable in the presence of similar evidence, which I find persuasive. *See e.g., Portable Rock Prod. Co.*, 22 FMSHRC 973, 977 (Aug. 2000) (ALJ) (indicating that a failure to wear a seat belt was unwarrantable because the requirement was discarded “with impunity”); *Ron Coleman Mining Inc.*, 21 FMSHRC at 938–39 (holding that a safety coordinator’s violation was an unwarrantable failure considering his official capacity); *Robert L. Weaver*, 21 FMSHRC 370, 375 (Mar. 1999) (ALJ) (holding that failure to wear a seat belt was an unwarrantable failure violation because a prior seat belt violation provided notice). After examining the facts of this case in the context of the relevant factors, I conclude that the Secretary met his burden of proving that the violation was properly designated as an unwarrantable failure and that Rock Express’s negligence was properly characterized as high.

5. Civil Penalty

I take note of Rock Express’ small size and limited history of violations, as discussed *supra*, Part V.A.5. I also note that Rock Express failed to meet its burden of proof showing that the penalties would affect its ability to continue in business. *See* discussion *supra* Part II. In addition, I have affirmed the Secretary’s allegations regarding the gravity of the violation and Respondent’s degree of negligence. The complete failure to wear any sort of restraint placed Henderson at risk of a fatal injury. More importantly, the conduct of Rock Express constitutes more than ordinary negligence. Henderson is responsible for health and safety, yet showed a complete disregard for seat belt safety. Lastly, I note nothing in the record suggests that Rock Express failed to abate the violation in good faith. Because this is a section 104(d)(1) citation, I am bound by the \$2,000.00 statutory minimum.¹⁶ 30 U.S.C. § 820(a)(3)(A). Nonetheless, given the section 110(i) factors, especially as they relate to Respondent’s negligence, I conclude that the Secretary’s proposed penalty of \$4,000.00 is appropriate for Order No. 6587840.

¹⁶ Because Citation No. 6587838, which was issued as a section 104(d)(1) citation, was amended to a section 104(a) citation, and there is no evidence of the issuance of any other section 104(d)(1) citation within the previous 90 days prior to the issuance of Order No. 6587840, the latter must be reduced to a section 104(d)(1) citation by operation of law. 30 U.S.C. § 814.

VI. ORDER

In light of the foregoing, **IT IS ORDERED** that Citation No. 6587838 is **MODIFIED** to a section 104(a)(1) citation, removing the unwarrantable failure designation and lowering the level of negligence from “high” to “moderate.”

It is further **ORDERED** that Order No. 6587840 is **MODIFIED** to a section 104(d)(1) citation by operation of law but is affirmed in all other aspects. Rock Express is **ORDERED** to **PAY** a penalty of \$4,850.00 within 40 days of this Order.

/s/ Alan G. Paez
Alan G. Paez
Administrative Law Judge

Distribution:

Gregory Tronson, Esq., U.S. Department of Labor, Office of the Solicitor, Cesar E. Chavez Memorial Building, 1244 Speer Blvd., Suite 216, Denver, CO 80204

Terry Jessen, Owner, Rock Express, Inc., P.O. Box 1140, Scottsbluff, NE 69361

/mlb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 Pennsylvania Avenue, NW, Suite 520N
WASHINGTON, DC 20004
TELEPHONE: 202-434-9953 / FAX: 202-434-9949

October 3, 2014

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

v.

TWENTYMILE COAL COMPANY,
Respondent.

CIVIL PENALTY PROCEEDINGS:

Docket No. WEST 2009-1323
A.C. No. 05-03836-192254

Docket No. WEST 2010-38
A.C. No. 05-03836-195088

Docket No. WEST 2010-578
A.C. No. 05-03836-207148

Mine: Foidel Creek

Before: Judge Barbour

DECISION ON REMAND

On August 26, 2014, the Commission reversed in part the court's underlying decision (34 FMSHRC 2138 (August 2012)). The Commission found that in Docket No. WEST 2010-578-M, the court erred factually with regard to Order No. 8460435.¹ The Commission held that the subject on-shift examination was conducted during a production shift. 36 FMSHRC (Aug. 2014) (slip op. 2-5). The Commission therefore reinstated the order and remanded the matter to the court to determine whether the examination was inadequate as alleged and, if so, whether the violation was a significant and substantial contribution to a mine safety hazard ("S&S") and the result of an unwarrantable failure by Twentymile Coal Company ("Twentymile"). Slip op. at 5.

THE ORDER

Order No. 8460435 states:

An inadequate on-shift examination was conducted for the 8 Main North belt conveyor. The latest beltline examination was conducted between 07:30 a.m. and 08:00 a.m. The hazards associated with this order were not entered in the record books

¹ The court had vacated the order based on its conclusion that the Secretary failed to prove coal was produced during the shift for which the on-shift examination was conducted. 34 FMSHRC at 2171-72.

for either 8/10/09 [or] 8/11/09. The hazards of the coal accumulations are in contact with the return belt, as well as dried coal fines on the hardware and belt roller clusters. The conditions were cited in citation # 8460434 issued on 8/11/09. The violation resulted from unwarrantable failure based on the extensive accumulations which were obvious to anyone concerned with safety.

Gov't Exh. 1.

The order was issued on August 11, 2009, after Mine Safety and Health Administration Inspector Randy Gunderson observed accumulations of coal and coal fines along the 8 Main North Belt at Twentymile's Foidel Creek Mine.² Tr. 291-292. Gunderson's description of the accumulations is set forth in the court's underlying decision and is incorporated by reference into this remand decision. 34 FMSHRC at 2168. Significantly, the accumulations were extensive, so much so that there were places where black accumulations were contacting the bottom belt of the conveyor. *Id.* There also were dry coal fines on the belt structure and on the belt rollers. *Id.* In the inspector's opinion, the accumulations were "obvious." *Id.* (*citing* Tr. 300). Further, and as explained in the underlying decision:

Gunderson thought it likely that the accumulations had come into existence at a "progressive" rate. Tr. 300. "It could be a week, a couple of days. It could be a month." *Id.* He based his belief on "[j]ust experience." *Id.*

34 FMSHRC at 2169.

² The accumulations found by Gunderson are described in Citation No. 8460434, August 11, 2009. The citation states:

Coal accumulations have been allowed to exist along the 8 North Main belt conveyor, from the tail piece to the take-up. The accumulations of coal have piled high enough to come in contact with the return belt and rollers, ranging in depth to 1' 8", 6' wide and 600 feet in length. Dry coal fines have accumulated on the belt structure, and around the roller clusters. This belt was in operation just prior to this inspection. All coal accumulations, both on the hardware and under the belt, shall be cleaned, in their entirety, and the area rock dusted.

Gov't Exh. 2.

Equally important, Gunderson testified that on August 10, he cited the company for other extensive accumulations of coal on the same section. In addition, he cited the company for extensive accumulations of coal fines in a crosscut. 34 FMSHRC at 2169. He discussed the August 10 citations with company management officials. *Id.*

After finding and citing the extensive accumulations on August 11, Gunderson also cited the company for violating section 75.362(b), the standard requiring on-shift examinations for hazardous conditions along belt conveyor haulageways. Gunderson believed the on-shift examination on August 11 was inadequate in that the extensive accumulations Gunderson found on August 10 and August 11 were not reported by the on-shift examiner and recorded in the examination book. In Gunderson's opinion, the company's failure to adequately conduct the on-shift examination was an S&S violation of the standard and was the result of the company's unwarrantable failure to comply. Gov't Exh. 1.

THE VIOLATION

In reversing the court, the Commission found that Twentymile's August 11 "early morning examination" (slip op. 4) was conducted during the "graveyard shift," that coal was produced during that shift, and that the on-shift examination was required to be adequate. Slip op. 5. In considering the question on remand, the court concludes that the examination was in fact not adequate and that Twentymile violated section 75.362(b). The court reaches this conclusion because it finds logical and persuasive the testimony of Gunderson that the extensive accumulations came into existence at a "progressive" rate. Tr. 300. Gunderson could not rule out that the accumulations he observed along the belt on August 11 developed following the subject on-shift examination, however, he thought it unlikely. *Id.* In the court's view the accumulations were so extensive, the only reasonable conclusion to draw from the evidence is that for the most part they were present when the on-shift examination was conducted during the grave yard shift. There is in fact nothing in the record to suggest a plausible reason for the extensive accumulations other than a multi-shift failure to note them and clean them up.

Guderson speculated that the examiner did not report the accumulations because he "wasn't looking hard enough." Tr. 316. The accumulations were "obvious" (Tr. 300) and a less generous but more reasonable conclusion to draw from the testimony is that the on-shift examiner, who traveled the belt line when the accumulations were present, in fact, saw the accumulations, but failed to report their presence. The court therefore finds that the presence of the extensive accumulations during the examination and the failure to mention the hazard in the on-shift examination report establishes that the on-shift examination was indeed inadequate and that the violation occurred as alleged.

S&S and GRAVITY

The court described the legal frameworks for determining the S&S nature of a violation and the gravity of a violation in its underlying decision and it incorporates the frameworks here. 34 FMSHRC at 2157-2158. Regarding the S&S nature of the violation, there was a violation of section 75.362(b) thus satisfying the first *Mathies* criterion. The court further finds that the other *Mathies* criteria have been met. The violation contributed to a discrete safety hazard in that failure to report the accumulations meant the hazard of a fire along the beltline was not eliminated. Obviously, the hazard posed serious dangers to miners working or traveling both outby and inby the accumulations -- dangers from flames if the accumulations ignited and from smoke and fumes caused by any ignition. Moreover, the hazard was reasonably likely to come to fruition. The court accepts Gunderson's testimony the accumulations included dry coal fines, which "catch fire a lot easier than wet or damp coal fines" (Tr. 297) and that some of the accumulations were actually in contact with potential ignition sources, the return belt and the belt rollers. Gov't Exh. 2; Tr. 295, 296, 298. That the resulting injuries in the event of an ignition would likely have been reasonably serious, indeed even fatal, is beyond dispute. Thus, the violation was S&S.

The violation also was very serious. The failure to report the accumulation meant that the hazard it posed continued. It easily could have lead to one or more miners being injured or killed.

UNWARRANTABLE FAILURE AND NEGLIGENCE

The term "unwarrantable failure" is defined as aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (Dec. 1987). It is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or "serious lack of reasonable care." *Id.* at 2004-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC at 193-194. Aggravating factors include the length of time a violation has existed, the extent of the violative condition, whether the operator was on notice that greater efforts were necessary for compliance, the operator's efforts in abating the violative condition, whether the violation posed a high degree of danger and the operator's knowledge of the existence of the violation. *See Consolidation Coal Co.*, 22 FMSHRC 340-353 (March 2000); *Mullins & Sons Coal Co.*, 16 FMSHRC 192,195 (February 1994); *Windsor Coal Co.*, 21 FMSHRC 997, 1000 (September 1999); *Consolidation Coal Co.*, 23 FMSHRC 588, 593 (June 2001). The circumstances of each case must be examined to determine if an operator's conduct is aggravated, or whether mitigating circumstances exist. *Consol*, 22 FMSHRC at 353.

The court finds that the violation was the result of Twentymile's unwarrantable failure to comply with section 75.362(b) and that in failing to comply, Twentymile was highly negligent. The record establishes that Twentymile was on notice it had a problem with inadequate examinations. I accept Gunderson's unrefuted testimony that Twentymile was cited four times in the previous 15 months for inadequate on-shift examinations and 16 times for inadequate pre-shift examinations. Tr. 332, 344. Gunderson stated that in his opinion the examiners were not "doing a very good job." Tr. 323. In the case of the subject violation, he understated their lack of

care. The accumulations were, as Gunderson testified, obvious and extensive. Tr. 300, 324. They were virtually staring the examiner in the face. Yet, he ignored them. The result was that his fellow miners faced a high degree of danger. In failing to comply with section 75.362(b), the court finds the examiner and hence the company exhibited the degree of indifference and the serious lack of reasonable care that is the mark of unwarrantable failure. Moreover, the examiner's lack of reasonable care equates to a high degree of negligence on the company's part.

CIVIL PENALTY CRITERIA

The court set forth its findings with regard to the criteria of history of previous violations, size of the operator, ability to continue in business and good faith abatement in its underlying decision, and it incorporates those findings herein. 34 FMSHRC at 2184.

CIVIL PENALTY ASSESSMENT

<u>ORDER NO.</u>	<u>DATE</u>	<u>30 CFR §</u>	<u>PROPOSED PENLTY</u>	<u>ASSESSMENT</u>
8460435	8/11/09	75.362(b)	\$4,000	\$4,000

The violation was very serious and the company's negligence was high. These findings and the criteria referenced above warrant the assessment of the penalty proposed by the Secretary.

ORDER

If it has not already paid the civil penalties previously assessed (34 FMSHRC at 2187), within 30 days of the date of this decision on remand, Twentymile **IS ORDERED** to pay such civil penalties in the amount of \$15,262. Within the same 30 days, Twentymile **IS ORDERED** to pay the civil penalty of \$4,000 assessed above.

Further, if he has not already done so, within 30 days of the date of this decision on remand, the Secretary **IS ORDERED** to modify and vacate the citations referenced for modification and vacation in the court's initial decision.

Upon payment of the civil penalties and upon modification and vacation of the citations, this proceeding is **DISMISSED**.

/s/ David F. Barbour
David F. Barbour
Administrative Law Judge

Distribution: (Certified Mail)

Melanie Garris, U.S. Department of Labor, Office of Civil Penalty Compliance, MSHA, 1100 Wilson Blvd., 25th Floor, Arlington, VA 22209-3939

W. Christian Schumann, Esq.; Jerald Feingold, Esq., U.S. Department of Labor, Office of the Solicitor, 1100 Wilson Blvd., Room 2220, Arlington, VA 22209-2296

Amanda Slater, Esq.; U.S. Department of Labor, Office of the Solicitor, MSHA Backlog, 1244 Speer Blvd., Suite 216, Denver, CO 80204

Christopher G. Peterson, Esq.; Page Jackson, Esq., Jackson Kelly, PLLC, 1099 18th Street, Suite 2150, Denver, CO 80202

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

/db

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
721 19th St. Suite 443
Denver, CO 80202-2500
TELEPHONE: 303-844-5266 / FAX: 303-844-5268

October 6, 2014

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA) On Behalf
of Cameron Garcia,
Petitioner,

v.

VERIS GOLD U.S.A., INC.,
Respondent.

TEMPORARY REINSTATEMENT
PROCEEDING

Docket No. WEST 2014-788-DM
MSHA Case No.: WE MD 14-17

Mine: Jerritt Canyon Mill Mine
Mine ID 26- 01621

DECISION DISSOLVING TEMPORARY REINSTATEMENT ORDER

On July 16, 2014, pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 (“Act”) and 29 C.F.R. §2700.45, this court ordered the temporary reinstatement of the Petitioner, Cameron Garcia, upon a finding that his Temporary Reinstatement Application was “non-frivolous.” *Sec’y of Labor o/b/o Cameron Garcia v. Veris Gold USA*, 2014 WL 3725868, * 8-9 (ALJ)(July 2014).

On August 20, 2014, this court approved the terms of the parties’ Amended Joint Agreement, which agreed to the temporary economic reinstatement of Cameron Garcia in lieu of physical reinstatement.¹ Within the Agreement, the parties stated:

The parties agree that the economic reinstatement shall remain in place: (1) until such time as the Secretary declines to pursue a discrimination proceeding on Mr. Garcia’s behalf; or, (2) if a discrimination proceeding is brought by the Secretary, until the disposition of the discrimination proceeding by the Commission; or (3) an agreement of the parties. ...

August 20, 2014 Decision Approving Temporary Economic Reinstatement Agreement, 2.

¹ After reviewing the parties original Joint Motion, this court requested that parties submit an amended motion with language pursuant to *Vulcan Constr. v. FMSHRC*, 700 F.3d 297, 310 (7th Cir. 2012) regarding the potential termination of Mr. Garcia’s temporary reinstatement. The parties complied with the court’s request without delay or objection.

On September 30, 2014, MSHA's Technical Compliance and Investigation Office issued a letter to Mr. Garcia and the Respondent, stating that due to insufficient evidence, the Secretary of Labor would not file a merits discrimination case with the Commission on Mr. Garcia's behalf. MSHA Determination Letter. On October 3, 2014 the Respondent filed a Motion to Dissolve Mr. Garcia's temporary reinstatement. Mot. to Dissolve. The Respondent stated that they consulted with the Secretary on this matter and that the Secretary did not oppose the dissolution of Mr. Garcia's temporary economic reinstatement. Mot. to Dissolve, 1.

Several federal appellate courts have recently announced that for 105(c) discrimination claims, "the temporary reinstatement provision ends when the Secretary's involvement ends." *Vulcan Constr. v. FMSHRC*, 700 F.3d 297, 310 (7th Cir. 2012); *See also North Fork Coal Corp. v. FMSHRC*, 691 F.3d 735, 744 (6th Cir. 2012) (holding that temporary reinstatement order must be dissolved when the Secretary of Labor concludes there is no evidence of discrimination).

As such, binding precedent requires that this court's July 16 Temporary Reinstatement Order and the August 20 Temporary Economic Reinstatement Agreement be dissolved.

ORDER

This court's July 16, 2014 Order directing the temporary reinstatement of Cameron Garcia is hereby **DISSOLVED**. Furthermore, the terms and obligations of the August 20, 2014 Temporary Economic Agreement are **TERMINATED** effective September 30, 2014.² Mr. Garcia may elect to file a discrimination complaint on his own behalf with the Commission within 30 days' notice of the Secretary's determination.³ 30 U.S.C. 815(c) 3.

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

² MSHA notified Mr. Garcia and the Respondent that it did not intend to pursue a 105(2) complaint on September, 30, 2014. The parties' August 20th Temporary Economic Agreement stated that the temporary reinstatement would continue "until such time as the Secretary declines to pursue a discrimination proceeding." As such, the Respondent is obligated to compensate Mr. Garcia per the terms of the Temporary Economic Reinstatement Agreement through September 29, 2014.

³ Mr. Garcia is directed, if he elects to file a Section 105 (c) (3) complaint, to file his complaint by mail no later than October 30, 2014 to the: Federal Mine Safety and Health Review Commission 1331 Pennsylvania Avenue, NW 520 N Washington, D.C. 20004-1710.

Distribution: (First Class U.S. Mail)

Cameron Garcia, 450 Castle Crest Dr., Silver Creek, NV 89815

Seema Patel, U.S. Department of Labor, Office of the Solicitor
90 Seventh Street, Suite 3-700, San Francisco, CA 94103

Peter Gould, Squire Patton Boggs (US) LLP
1801 California Street Suite, 4900 Denver, CO 80202

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

Office of Administrative Law Judges
1331 Pennsylvania Avenue, N.W., Suite 520N
Washington, D.C. 20004

October 14, 2014

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
on behalf of JEFFERY HARRIS,
Petitioner,

v.

HANSON AGGREGATES MID-PACIFIC,
INC.,
Respondent.

TEMPORARY REINSTATEMENT
PROCEEDING

Docket No. WEST 2014-935-DM
WE MD 14-22

Clayton Mine
Mine ID 04-00159

DECISION DISSOLVING TEMPORARY REINSTATEMENT ORDER

This temporary reinstatement proceeding is before me upon the Application for Temporary Reinstatement brought by the Secretary of Labor (“Secretary”), on behalf of Jeffery Harris, pursuant to section 105 of the Federal Mine Safety and Health Act of 1977 (“Mine Act”). 30 U.S.C. § 815. The Secretary made his application on August 15, 2014, and Chief Administrative Law Judge Robert J. Lesnick assigned this case to me on August 20, 2014.

On August 28, 2014, I issued an order approving the terms of the parties’ Settlement Agreement and Joint Motion for Temporary Reinstatement. My August 28 Order temporarily -- reinstated Harris and directed the Secretary to report to my law clerk regarding the status of his investigation. According to the terms of the agreement, Harris’s temporary economic reinstatement would terminate upon a finding by the Secretary that section 105(c)(1) of the Mine Act has not been violated.

On October 9, 2014, MSHA’s Technical Compliance and Investigation Office issued a letter to Harris and Hanson Aggregates Mid-Pacific, Inc. (“Hanson” or “Respondent”) stating that due to insufficient evidence the Secretary would not file a merits discrimination case with the Commission on Harris’s behalf. (MSHA Determination Letter at 1.)

Several federal appellate courts have recently determined that for section 105(c) discrimination claims, “the temporary reinstatement provision ends when the Secretary’s involvement ends.” *Vulcan Constr. Materials, L.P. v. FMSHRC*, 700 F.3d 297, 310 (7th Cir. 2012); *see also N. Fork Coal Corp. v. FMSHRC*, 691 F.3d 735, 744 (6th Cir. 2012) (holding that temporary reinstatement order must be dissolved when the Secretary concludes there is no evidence of discrimination). Thus, binding precedent requires that I dissolve my August 28, 2014, order.

WHEREFORE, it is hereby **ORDERED** that my August 28, 2014, order directing the temporary reinstatement of Harris is hereby **DISSOLVED**. Furthermore, the terms and obligation of the parties' Settlement Agreement are **TERMINATED** effective October 9, 2014. Harris may elect to file a discrimination complaint on his own behalf with the Commission within 30 days' notice of the Secretary's determination.¹ 30 U.S.C. § 815(c)(3).

/s/ Alan G. Paez
Alan G. Paez
Administrative Law Judge

Distribution: (Via Electronic Mail & U.S. Mail)

Bruce L. Brown, Esq., U.S. Department of Labor, Office of the Solicitor, 300 Fifth Street,
Suite 1120, Seattle, WA 98104
(brown.bruce.l@dol.gov)

Margaret S. Lopez, Esq., Ogletree, Deakins, Nash, Smoak & Stewart PC, 1909 K Street, Suite 1000,
Washington, D.C. 20006
(Margaret.Lopez@ogletreedeakins.com)

Jeffery Harris, 3365 Gray House Lane, Stockton, CA 95206 (Via U.S. Mail Only)

/pjr

¹ If Harris elects to file a section 105(c)(3) complaint, he is directed to file his complaint by mail no later than November 10, 2014, to: Federal Mine Safety and Health Review Commission, 1331 Pennsylvania Avenue, NW, Suite 520N, Washington, D.C. 20004

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9958 / FAX: 202-434-9949

October 16, 2014

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

v.

WARRIOR INVESTMENTS COMPANY,
INC.,
Respondent

CIVIL PENALTY PROCEEDING

Docket No. SE-2013-361
A.C. No. 01-03419-317249-01

Docket No. SE-2013-252
A.C. No. 01-03419-312649

Docket No. SE-2014-33
A.C. No. 01-03419-330771-01

Mine: Maxine-Pratt Mine

**DECISION AND ORDER AFFIRMING BENCH DECISION
AND APPROVING SETTLEMENT**

Appearances: Thomas A. Grooms, Esq., U.S. Department of Labor, Office of the
Solicitor, Petitioner

J. D. Terry, Esq., Respondent

Before: Judge McCarthy

I. Statement of the Case

These cases are before me upon petitions for assessment of civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d).

A hearing was held in Birmingham, Alabama on April 3, 2014. Witnesses were sequestered. After the hearing, the parties filed a Joint Motion to Approve Settlement and Notice of Vacating Citation, which resolved all outstanding citations and orders left unresolved at hearing.

Docket No. SE-2014-33 involves five citations, which the parties agreed to settle prior to hearing, and one unresolved Section 104(g)(1) Order No. 8525679. At the hearing, the parties agreed to file a post-hearing Settlement Agreement on the five settled citations, and joint stipulation of facts and cross-motions for summary judgment on unresolved Order No. 8525679. I left the record open for such filings. Tr. 269-74. After filing the joint stipulation of facts, the parties agreed to settle that Order, as set forth in their Joint Motion. Specifically, the Secretary decided to vacate that Order.

Docket No. SE 2013-361 involves a single 104(a) Citation No. 8524664 that the parties resolved at the conclusion of the hearing. The outlines of the Settlement Agreement were placed on the record and the undersigned left the record open for receipt of the written Settlement Agreement. Tr. 267-69.

Docket No. SE-2013-252 involves a single Section 104(d)(1) unwarrantable failure Citation No. 8524528 alleging a violation of 30 C.F.R. § 75.1501(a). 30 C.F.R. § 75.1501(a) provides: “(a) For each shift that miners work underground, there shall be in attendance a responsible person designated by the mine operator to take charge during mine emergencies involving a fire, explosion, or gas or water inundation. 30 C.F.R. § 75.1501(a)(1) further provides: “(1) The responsible person shall have current knowledge of the assigned location and expected movements of miners underground, the operation of the mine ventilation system, the locations of the mine escapeways and refuge alternatives, the mine communications system, any mine monitoring system if used, locations of firefighting equipment, the mine’s Emergency Response Plan, the Mine Rescue Notification Plan, and the Mine Emergency Evacuation and Firefighting Program of Instruction.”

Specifically, Citation No. 8524528 alleges that on September 4, 2012, there was no one at the Maxine-Pratt mine trained as a responsible person designated by the operator to take charge during a mine emergency involving fire, explosion, or gas or water inundations. The gravity was categorized as “reasonably likely,” the injury or illness that was reasonably expected to result was alleged to be “lost workdays or restricted duty,” the violation was designated as “significant and substantial, and the negligence was categorized as “high.”

At hearing, I issued a bench decision affirming Section 104(d)(1) Citation No. 8524528, as written, and assessing the proposed penalty of \$3,143. Having carefully reviewed the record, I affirm my bench decision set forth below.

II. Bench Decision Affirming 104(d)(1) Citation No. 8524528, As Written

“I’m going to find a violation. I’m going to affirm the citation [Citation No. 852458] as written. I find that there were no persons at the mine trained as responsible person designated by the operator to take charge during a mine emergency. I’m going to find that based on the credited testimony of Inspector Weekly, that, in fact, there was a statement made by Mr. Meadows that he didn’t have training as a responsible person at this mine. Mr. Meadows testified that he had the training at another mine.

Also, there was an admission by Mr. Terry that, in fact, he had not given the training because he had not gotten around to it. Therefore, I would find that any responsible person training that was given to the others was not effective under the Mine Act. I find that the violation contributed to a discre[te] measure

of safety; i.e., the ability to get out of the mine in the event of an emergency.

I find that the violation was significant and substantial. In making this finding, I assume the existence of an emergency. Specifically, I assume existence of a fire. I find that if a fire occurred and there was not a responsible person designated to direct the men out of the mine during the emergency, that that would contribute to a hazard, the inability to escape that was reasonably likely to result in serious injury as written, lost work days or restricted duty; specifically, smoke inhalation.

Furthermore, I find that negligence is high. I base my finding of high negligence on the admission by the Respondent that it did not give the training and knew or should have known that it should have been given.

Finally, I find that there is no evidence of mitigating circumstances to reduce the negligence from high to a lower level. I affirm the proposed penalty of \$3,143.00.

We'll adjourn for lunch

Tr. 177-79.

. . . . Prior to breaking for lunch I issued a bench decision explaining why I was going to affirm the citation as written. While I was walking to lunch I realized that I hadn't specifically explained my rationale for affirming the unwarrantable failure order under (d) -- I'm sorry -- unwarrantable failure citation under 104(d)(1).

I hereby find that the citation as written was an unwarrantable failure, that there was aggravated conduct that constituted more than ordinary negligence; specifically, that there was a serious lack of care on the Respondent's part for failing to insure that there was an individual who had responsible person training at this specific mine.

Addressing the seven factors that the Commission looks to for an unwarrantable failure, I find that the duration of the violation supports an unwarrantable failure finding. When Superintendent Meadows became superintendent on May 8th of 2012, he had not received the responsible person training at this mine, and that lasted until the date of the citation, which is

September 4th, 2012. Therefore, for several months it's been established that there was no responsible person at the mine.

I find the violation was extensive. There was no responsible person trained for the entire mine at this mine under the standard. Although Mr. Meadows, Superintendent Meadows was trained at another mine as a responsible person, there's no evidence presented and the Secretary has established through the credible testimony of Inspector Weekly that there were no training records, and through admissions by the Respondent's witnesses, through the credited testimony of Inspector Weekly, that there was no responsible person trained at this mine when the citation was issued. Therefore, all of the other miners who received the training that was given by Mr. Meadows prior to hi[s] receiving responsible person training at this mine was ineffective. And I find that constitutes an extensive violation because it covers the whole mine without a responsible person trained in the event of an emergency in regard to evacuation.

I further find that the Respondent knew or should have known that a responsible person was not trained at this mine. The unrebutted testimony of Inspector Weekly establishes that the Respondent knew that the training should have been given and, according to his testimony, Mr. Terry admitted that he knew the training was required to be given but had not gotten around to that. Mr. Terry was not called to rebut that testimony. Mr. Meadows did not rebut that testimony because he did not recall the nature of the conversation. So I find that the knowledge element supports the unwarrantable failure finding, together with the duration of the violation and the extensiveness of the violation.

I further find that the violation contributed to a high degree of danger. Without a responsible person trained at this mine, I credit Inspector Weekly's testimony that the miners may be confused in the event of an emergency if there was a fire and they were required to evacuate both as to who they had to take direction from during the emergency and receiving the requisite training that would affect their ability to escape. I assume the event of an emergency, as I did in my S & S analysis. Therefore, I find the failure to train a responsible person directly affects miners' ability to escape in event of emergency.

I find the violation was also obvious because it's specifically set forth in the regulations and the regulation requires that a responsible person be designated and trained. I find that the Respondent took no efforts to abate the citation before it was

written because it made no efforts to give the responsible person training to Mr. Meadows. He had the training at another mine site but did not have the training at this mine site.

The only factor that does not support an unwarrantable failure finding is the notice factor. I find that MSHA did not give the Respondent notice that greater efforts were necessary to comply with 75.1501(a). However, I credit Inspector Weekly's testimony that there was a PIL that was given to the industry generally that put them on notice of this requirement. Nevertheless, I don't find that specific notice required, and that factor cuts against an unwarrantable failure finding.

Given that I've found a serious lack of care arising to more than ordinary negligence based on the fact that six of the seven factors establish an unwarrantable failure, I find the unwarrantable failure and I affirm the citation as written.

Tr. 179-183.

Although my bench decision affirmed the proposed penalty of \$3,143, I hereby make clear I have evaluated the Secretary's proposed penalty in light of the principles announced in my recent *Big Ridge* decision. *Big Ridge Inc.*, 36 FMSHRC __ slip op. at 4-6 (July 19, 2014) (ALJ). I find that the penalty proposed by the Secretary of \$3,143 is consistent with the statutory criteria set forth in section 110(i) of the Mine Act and with the public interest. 30 U.S.C. 820(i). Accordingly, I assess a \$3,689 civil penalty against Respondent for Citation No. 8524528.

III. Joint Motion to Approve Settlement

I have reviewed the parties' Joint Motion to Approve Settlement and Notice of Vacating Citation for Docket Nos. SE 2013-361 and SE 2014-33. A reduction in penalties from \$11,854.00 to \$4,896.00 is proposed under the Settlement Agreement.¹

In Docket No. SE 2013-361, the parties request that Citation No. 8524664 be modified to delete the significant and substantial designation and to reduce the negligence from "high" to "moderate."

In Docket No. 2014-33, the parties state that Order No. 8525679 has been vacated. The Secretary's discretion to vacate a citation or order is not subject to review. *E.g.*, *RBK Constr. Inc.*, 15 FMSHRC 2099 (Oct. 1993). Citation No. 8525667 remains unchanged, but the parties

¹ Pursuant to 29 C.F.R. 2700.1(b) and Federal Rule of Civil Procedure 12(f), I strike paragraphs four and five from the motion as immaterial and impertinent to the issues legitimately before the Commission. The paragraphs incorrectly cite and interpret the case law and misrepresent the statute, regulations, and Congressional intent regarding settlement under the Mine Act.

justify the reductions in penalties by stating there are legitimate factual and legal disputes regarding gravity and negligence. The parties also request that Citation Nos. 8525669, 8525670, and 8525671 be modified to reduce the negligence from “high” to “moderate.”

I have considered the representations and documentation submitted in this case, and I conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act. Accordingly, I approve the parties’ Settlement Agreement as consistent with the criteria set forth in section 110(i) of the Act and in furtherance of the public interest. The settlement amounts are as follows:

SE 2013-0361

<u>Citation No.</u>	<u>Assessment</u>	<u>Settlement</u>
8524664	\$6,115.00	\$1,000.00
	\$6,115.00	\$1,000.00

SE. 2014-0033

<u>Citation No.</u>	<u>Assessment</u>	<u>Settlement</u>
8525667	\$540.00	\$486.00
8525669	\$946.00	\$757.00
8525670	\$1,795.00	\$1,436.00
8525671	\$946.00	\$757.00
8527002	\$460.00	\$460.00
8525679	\$1,052.00	\$0.00
	\$5,739.00	\$3,896.00

IV. Order

For the reasons set forth above, Citation No. 8524528 is **AFFIRMED**, as written.

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

It is **ORDERED** that Citation No. 8524664 be **MODIFIED** to delete the significant and substantial designation and to reduce the negligence from “high” to “moderate.”

It is **ORDERED** that Citation No. 8525679 be **VACATED**.

It is **ORDERED** that Citation Nos. 8525669, 8525670, and 8525671 be **MODIFIED** to reduce the negligence from “high” to “moderate.”

To the extent Respondent has not already done so, within 40 days of the date of this decision, Respondent, Warrior Investments Company, Inc., is **ORDERED TO PAY** a total civil penalty of \$8,039, i.e., \$3,143 for the litigated citation and \$4,996 for the settled citations.²

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

Distribution:

J.D. Terry, Attorney and Safety Director, Warrior Investment Co., Inc., 218 Highway 195,
Jasper, AL 35503

Thomas A. Grooms, U.S. Department of Labor, Office of the Solicitor, 618 Church Street, Suite
230, Nashville, TN 37219

² Payment should be sent to: Mine Safety & Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390. This penalty reflects the \$3,143.00 penalty assessed in Docket SE 2013-0252 for Citation No. 8524528 and the settlement agreement penalty of \$4,896.00 for the Citations in Dockets SE 2013-0361 and SE 2014-0033.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9958 / FAX: 202-434-9949

October 17, 2014

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

v.

EXTRA ENERGY, INC.,
Respondent

CIVIL PENALTY PROCEEDING

Docket No. VA 2013-511
A.C. No. 44-07172-329197

Mine: Virginia Point No. 1 Surface Mine

DECISION AND ORDER

Appearances: Anthony M. Berry, Esq., Office of the Solicitor, U.S. Dept. of Labor,
Nashville, Tennessee for Petitioner

Nicholas Preservati, Esq. and Sarah Korwan, Esq., Preservati Law Offices,
PLLC, Charleston, West Virginia for Respondent

Before: Judge McCarthy

I. Statement of the Case

This case is before me upon a petition for assessment of a civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). The Petitioner charges Respondent, Extra Energy, Inc. (Extra Energy), with moderate negligence while committing a significant and substantial (S&S) violation of 30 C.F.R. § 77.404(a), affecting one miner.

The issues before me are whether Respondent violated the standard by failing to maintain the steering linkage components on a large haul truck in safe operating condition, whether the violation was significant and substantial because it was reasonably likely to result in a fatal injury to one miner, whether Respondent's negligence was moderate, and whether the proposed penalty of \$3,689 is appropriate.

Hearings were held on March 12 and April 18, 2014 in Bluefield, Virginia and Beckley, West Virginia, respectively. During the hearings, the parties introduced testimony and documentary evidence. Witnesses were sequestered.

For the reasons set forth below, I find that Citation No. 8203250 was properly issued, as written, and I assess a civil penalty of \$3689.

Based on a careful review of the entire record, including the parties' post-hearing briefs and my observation of the demeanor of the witnesses,¹ I make the following:

II. Findings of Fact

A. Stipulations of Fact and Law

At hearing, the parties agreed to the following stipulations:

1. The Administrative Law Judge and the Federal Mine Safety and Health Review Commission have jurisdiction to hear and decide these civil penalty proceedings pursuant to Section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815.
2. Extra Energy, Inc., is the operator of Virginia Point No. 1 Surface Mine, Mine I.D. 44-07172. Operations of Extra Energy, Inc., are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., as amended.
3. MSHA Citation No. 8203250 and all appropriate modification and continuation forms, may be admitted into evidence for the purpose of establishing the accuracy of any statements asserted therein.
4. Respondent produced 711,304 tons of coal in 2012 at the mine (Mine Identification No. 44-07172).
5. Payment by Respondent of the proposed penalty of \$3,689 will not affect the Respondent's ability to remain in business.
6. Inspector Mark Tuggle was an authorized representative of the Secretary. Tr. 12- 13.

Tr. 11-13.

B. Background Information

The cited standard provides that “[m]obile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately.” 30 C.F.R § 77.404(a). The cited truck, a Caterpillar 777B model, is a large dump truck, often used for rock hauling in the pit mining process. The

¹ In resolving conflicts in testimony, I have taken into consideration the demeanor of the witnesses, their interests in this matter, the inherent probability of their testimony in light of other events, corroboration or lack of corroboration for testimony given, experience and credentials, and consistency, or lack thereof, within the testimony of witnesses and between the testimony of witnesses.

truck measures 32 feet in length, 17 feet in width, and 16.1 feet in height. It is capable of hauling a 320,000 pound load. Tr. 60, 66.

The steering system of the truck is controlled by a hydraulically-operated steering linkage assembly, consisting of several rods and arms located on the underside of the truck. Tr. 75; Jt. Ex. 2. The steering wheel controls steering cylinders on the left and right side of the steering linkage located next to the front wheels. Tr. 75, 292. As the steering wheel is turned, a proportioning valve sends hydraulic fluid into one cylinder, which forces that cylinder to push on the linkage system and the opposing cylinder to pull, thereby supplying the force necessary to turn the wheels of the truck. Tr. 78. If the steering wheel is turned in the opposite direction, the fluid valve reverses direction and the hydraulic fluid flows accordingly. Tr. 76.

Two tie rods installed on each side of the bottom of the truck are an integral part of the steering linkage assembly. Tr. 76; Jt. Ex. 2. The tie rods connect the left and right wheels so that they turn simultaneously in alignment. Tr. 78. The tie rods have no hydraulic components and do not push or pull the truck's wheels. Tr. 76.

A pitman arm extends down from the steering box and connects to one end of each tie rod. The opposite end of each tie rod is connected to either the left or right wheel via a steering arm. Tr. 77. The tie rods are connected to the pitman and steering arms by ball joints. Tr. 80-81; Jt. Ex. 2. Like a hip joint, a ball joint connects two ends, but allows a range of angular motion. The ball joint connects the vertical components for the assembly with the horizontally located tie rods. Tr. 79; Jt. Ex. 2.

The balls joints are comprised, in part, by a ball with a threaded rod at the bottom. The ball rests within a socket connected to an arm. Tr. 79.² The tie rod is connected to the steering linkage assembly by a nut, which is tightened over the threaded rod at the bottom of the ball joint. Tr. 79. According to Caterpillar's 777B service manual, the nut must be torqued to 1,000 foot pounds. Jt. Ex. 2. After the nut is torqued, a cotter pin, or metal fastener with two prongs, is inserted in a hole drilled horizontally through the threaded rod at the end of the ball joint, and then through a notch on the castellated nut. Tr. 50-51.³ The cotter pin ensures that the nut remains tightened according to specifications. Tr. 50,51.

² Inside the socket there may be grease or rubber bushing to ensure that the ball can move, as required, within the socket. Tr. 79. The parties' testimony differs as to whether the ball joints rest within a rubber bushing, or whether the socket is greased. Tr. 79, 302; Jt. Ex. 2. Since that issue is not dispositive of whether the ball joint was working properly and the truck was maintained in a safe operating condition, I need not resolve the conflict.

³ If the hole in the bolt and the notch on a nut do not allow a cotter pin to pass through, the nut is furthered tightened until the hole and the notch line up. Once the cotter pin is inserted through both the nut and bolt, the prongs are extended or flared backwards along the nut to ensure that the nut does not loosen and the cotter pin does not slip out of the nut. Tr. 51, 140.

C. The Inspection at Issue

1. Background

On June 24, 2013, MSHA inspectors Mark Tuggle⁴ and Stephen Crouse⁵ arrived at the Virginia Point No. 1 Mine site to conduct a ground plan inspection of an independent contractor's high wall mining operation. Tr. 33-34. Between noon and 12:30 p.m., while sitting in his vehicle near the site, Tuggle noticed oil on the ground. Tr. 88. After observing a Caterpillar 777B haulage truck make "several passes," Tuggle identified the truck as the source of the oil. Tr. 89.

Tuggle observed the truck from about 100 feet away and saw "differential wheel movement" from the rear tires as the truck moved backward. Tr. 41, 88-89. Tuggle then signaled for the driver, Franklin Hunt, to stop the vehicle. Tr. 90.⁶ Hunt pulled over to a nearby berm and called maintenance foreman, Robbie Ray, via radio. Tr. 94, 248-49.⁷

2. Visual Inspection

After the truck was parked and the tires were chocked, Tuggle stooped down under the vehicle to inspect the steering mechanism. Tr. 46. Tuggle instructed Hunt to turn the steering wheel various ways so that Tuggle could observe the movement of the ball joints. Tr. 46-47. During one turn, Tuggle measured an inch of vertical play between the ball and socket joint on the left front side, using a standard-rule tape measure. Tr. 47. Tuggle's contemporaneous notes confirm this measurement. P. Ex. 2. Tuggle's notes also confirm that "the nut is loose on the

⁴ Tuggle worked in mines intermittently between 1985 and 1990 and consistently between 1991 and 2006. Tr. 30. Tuggle began work with MSHA in 2006. Tr. 30. Tuggle received his Authorized Representative card in September 2007. Tr. 31. Tuggle also attended the Mine Academy and earned a Bachelor's Degree in Mining Engineering from Bluefield State College. Tr. 31. Tuggle earned certifications in diesel mechanics and auto mechanics from Southwest Virginia Community College. *Id.* Tuggle owned two trucking companies prior to the inspection. Tr. 151. Tuggle routinely conducted inspections on trucks when he owned these companies. Tr. 152.

⁵ Crouse is a surface coal mine safety and health inspector for MSHA. Tr. 161. Crouse received his Authorized Representative card in January 2012 and attended the Mine Academy. Tr. 161. Crouse has experience with heavy equipment and coal-truck maintenance. Tr. 161.

⁶ Hunt has occasionally driven the rock truck for Respondent during the past ten years. Tr. 231-33. Hunt completed hazard training in connection with his truck operating duties. Tr. 232. Hunt testified that he can detect a loss of control from steering when it occurs. Tr. 233.

⁷ Ray is a certified mining foreman in Virginia and has been employed by Respondent for five and one-half years as a maintenance foreman. Tr. 288. Ray routinely works on steering systems on Caterpillar trucks. Tr. 290. Previously, Ray worked at Carter Machinery for seven years as a field service technician. Tr. 288-89. While there, Ray maintained, inspected, repaired and serviced hydraulic steering systems on Caterpillar 777 model trucks. See Tr. 287-89.

bottom of the ball joint and the nut has sheared the cotter pin keeper and allowed the nut to back off.” *Id.*

Tuggle then called Crouse over to observe the ball joint movement. Tr. 48. Crouse went under the truck, while Tuggle stood to the side and gave Hunt directions for turning the steering wheel. Tr. 48. Crouse testified that he observed the nut on the ball and socket joint hanging down about an inch, about to fall off, and in bad condition. Tr. 163, 171. Although Crouse did not conduct a “full inspection” of the truck, Crouse testified that he would have issued a citation for a section 77.404(a) violation because of the vertical movement in the ball joint and the loose nut on the tie rod ball joint. Tr. 170-73. Crouse testified that the violative condition contributed to the hazard of loss of control of the haul truck, particularly given the changing surface and grade over which the truck was driven. Tr. 164-65, 168. Crouse testified that he would have written the citation as highly likely, rather than reasonably likely, to result in a fatal injury. Tr. 166.

While waiting for maintenance foreman Ray to arrive, Crouse spoke with assistant superintendent, Ritchie Bowman. Bowman told Crouse that Ray was coming with a dial indicator to measure the play in the ball joint. Crouse told Bowman that a dial indicator was not needed; it’s a no-brainer because the nut is about ready to fall off and the truck is not being kept in safe operating condition. Tr. 173.

Ray arrived after Tuggle and Crouse examined the ball joint and steering assembly. Tr. 104-05. Ray brought a dial indicator to measure horizontal movement of the steering linkage. Tr. 105-06. Crouse and Ray then went under the truck to check for play while Hunt turned the steering wheel in various directions. Tr. 106. Tuggle credibly testified that while Ray was making his own examination, Ray stated, “There’s no need to even measure this.” Tr. 105. Crouse testified that Ray removed the nut with his hands after a couple turns. Tr. 173-74. According to Tuggle, when Ray attempted to re-torque the nut onto the ball joint, he was unable to do so because of excessive wear. Ray subsequently installed an entirely new joint assembly to replace the old one. Tr. 149.

3. The Controverted Cotter Pin

Tuggle testified that the cotter pin on the ball joint at issue was sheared. Tuggle testified that he was unable to see the ends of the cotter pin protruding from the joint assembly, and the nut had slid down the threading on the rod at the end of the ball joint. Tr. 50. As noted, the ends of a cotter pin should be frayed backward to prevent the cotter pin from falling out of the nut and rod. Tr. 140. Based on his observations, Tuggle concluded that the ends were sheared off and that the rest of the cotter pin remained within the hole that had been drilled into the rod and the slot in the nut. Tr. 141. Tuggle testified that shearing can occur when the nut is subject to excessive torque or downward force. Tr. 109.

Tuggle further testified that when Ray came to investigate the problem, Ray removed the nut with his bare fingers, at which time Tuggle was able to see the sheared cotter pin. Tr. 100.

Tuggle testified that Ray then pulled the remaining pieces of the cotter pin out with needle-nosed pliers, and threw the remnants on the ground. Tr. 100, 109, 120.

Crouse corroborated Tuggle. Crouse testified that when he investigated the tie rod and ball joint, the cotter pin appeared to have been sheared. Tr. 163.

Ray testified that he could take and rock the nut back and forth and it was covered in oil or grease and mud. He testified that the top of the nut was flush with the bottom of the steering link. Tr. 334. Ray further testified that there could be no vertical movement on the ball stud because the nut prevents it from coming up out of the center link. Tr. 334-35. Ray testified that he and Respondent's mechanic, Arvil Phipps, cleaned the grease and mud off the nut with rags, and the cotter pin was still in the stud. Ray testified that he could see the round head of the cotter pin sticking out between the cutouts of the nut where it was driven back in the groove. Tr. 335-36. The following leading exchange then occurred on direct examination of Ray.

Q. So the end was not sheared off?

A. No.

Q. And it was sticking out from the ball stud itself under the nut?

A. It was recessed in the nut. That's -- we drive it in and bend the opposite sides of it down.

Q. But it wasn't completely in the ball stud?

A. No. No. It was sticking out.

Q. All right. And the other -- what was the other -- the condition of the other end of the cotter pin?

A. It was bent down the backside of the ball stud.

....

Q. So there is two legs on the end of this pin?

A. It's a split pin.

Q. One was bent up and one was bent down?

A. Yes.

Tr. 336.

Respondent's mechanic Phipps, who had been in Respondent's employ for one and one-half years, testified that when he arrived to fix the ball joint, he removed the cotter pin with a pliers and a hammer. Tr. 269. Phipps testified that the cotter pin was not sheared and was in one piece. Tr. 269-70. Phipps further testified that after he removed the cotter pin, he tightened up the nut, but inspector Tuggle was still not satisfied, so a whole new assembly was installed. Tr. 269-70.

4. Issuance of Citation No. 8203250

At 3:36 p.m., Tuggle issued Citation No. 8203250 for a § 74.404(a) violation. Tr. 35. The violation was designated S&S because the gravity was reasonably likely to result in a fatal injury affecting one miner. Negligence was designated as moderate. P. Ex. 1. Tuggle testified that Respondent should have been aware of the hazardous condition of the ball joint during the pre-operational inspection of the truck, and that there were no mitigating circumstances. Tr. 64, Tr. 67-68. The proposed penalty is \$3,689.

D. Conflicting Testimony about the Potential Effect of a Loose Nut on a Ball Joint with an Inch of Vertical Play

1. Petitioner's Testimony

Tuggle testified that the potential hazard resulting from a loose nut and inch of vertical play in the ball joint was comprised steering and loss of control of the truck should the ball joint slip. Tr. 53,59. Specifically Tuggle testified as follows:

- Q. Okay. Now, as for the reasonable likely – reasonable likelihood, what was the hazard that you contemplated?
- A. That the truck would actually lose the tie rod, the ball joint would actually come apart, the wheel stability would be lost. There would still be partial steering due to the hydraulic jacks, but the steering itself would be compromised. And the roads, even though they were wide in certain areas, they were passing cars, -- or not cars, pickup trucks and service trucks, water trucks. They were actually passing where the miners were on foot walking back and forth from the highwall miner to the Porta John, their cars and the bus. And if they lost any control in it, then there is a chance that it would run over or kill somebody, because one of these trucks -- there is multiple videos you can go on msha.gov, and you can actually look up on Google, where these trucks have run over similar pickup trucks, and they're flat as a pancake.
- Q. And what do you believe made that reasonably likely?
- A. Is because the nut was ready to fall off, and this truck was loaded coming down steeper grades. Fully loaded, and, you know, with a – it's three – excuse me, it's close to 324,000 pounds loaded.

Q. Okay.

A. So coming down the steep grade, if you lost it down a steep grade fully loaded, and you're trying to rely on just a single jack to steer your wheels, the chance is that that -- you're not going to be able to steer it.

Q. Now, did you witness this vehicle operating loaded?

A. Yes, I did.

The Court: Did you measure the grade?

The Witness: No, I did not measure the grade. It was steep on the right side as it come into the pit, but as an engineer, I would guess it between ten and twelve degrees.

Tr. 59-60. On rebuttal, Tuggle further testified that the haul truck was driven at speeds between 12 and 15 miles per hour (mph) while loaded, and greater than 20 mph when unloaded. Tr. 400-01.

Crouse's testimony about the hazard of losing control of the vehicle under continued normal mining conditions corroborated Tuggle's testimony that such a loss of control would result in injury or fatality to the driver or to other miners in the vicinity. Tr. 164-67.

Tuggle further testified that during training at the Mine Academy, MSHA instructs inspectors to consult a manual, which Tuggle referred to as the "Fleet Commercial" or the "Commercial Vehicle Program Manual," to aid in determining when a vehicle is in safe operating condition. Tr. 57-58, 84-85.⁸ According to Tuggle, the manual provides that a vehicle with any vertical play in a ball joint is to be removed from service. Tr. 84. Based on his experience in the trucking industry prior to working for MSHA and his training at the Mine Academy, Tuggle credibly testified that vertical play in a ball joint constitutes an unsafe operating condition requiring that the truck immediately be placed out of service. Tr. 154-55.

With regard to his negligence designation, Tuggle testified that an inadequate pre-operational inspection had been performed on the haul truck. Tuggle observed other vehicle

⁸ The manual was not submitted into evidence. Tr. 85. I take administrative notice of the North American Standard Out-of-Service Criteria, issued by the Commercial Vehicle Safety Alliance. The manual provides that a vehicle is to be taken out of service if any of its ball and socket joints exhibit "any motion, other than rotational, between any linkage member and its attachment point of more than 1/8 inch (3.2mm) measured with hand pressure only" or if any tie rod exhibits "any looseness in any threaded joint." *Commercial Vehicle Safety Alliance*, North American Standard Out-of-Service Criteria, at 44 (revised April 1, 2010). This manual is relied on and cited by the United States Department of Transportation. 49 C.F.R. Pt. 385.4(b)(1)(2013); 79 F.R. 27766, May 15, 2014).

inspections earlier that day that were conducted with poor lighting and there was only one person present to inspect the steering system. Tr. 64. Tuggle testified that a proper inspection of the steering system requires two persons, one to observe the ball joints for play, and another to turn the steering wheel from side to side to reveal any play. Tr. 129.

2. Respondent's Testimony

Ray testified that a ball stud could not be removed, even if the nut on the bushing was missing. Tr. 307. Rather, in order to remove the tie rod ball joint from its socket, the cotter pin must first be removed. Tr. 304. According to Ray, an impact wrench is required to remove the nut from the ball stud. He testified that manual removal is impossible. Tr. 301, 305. Ray also testified that a properly installed ball stud cannot be dislodged without the application of considerable force. Tr. 304. Ray testified that removing the ball stud from the socket in the wishbone assembly generally requires the use of a 20-ton hydraulic jack. *Id.* After such jack is applied to the joint, the ball is raised from the assembly and hit with a hammer to remove the ball joint from the socket. Tr. 304, 307.

Respondent's safety and compliance director, Philip Hale, referred to the Caterpillar 777B's steering jacks as a "failsafe system." Tr. 199.⁹ In Hale's view, the steering jacks are responsible for moving the tires as the truck turns, and the loss of a tie rod would not result in a hazard since the tie rod only ensures that the wheels turn uniformly, not that they turn at all. Tr. 199.

Respondent's truck operator, Gregory Cole, testified that he alone performed a pre-operational check on the cited truck at 6:00 a.m. on the day of Tuggle's inspection. Tr. 206, 222-223.¹⁰ The pre-operational checklist in evidence does not mention any safety concerns. R. Ex. 1. Cole drove the truck from about 6:00 a.m. until 1:30 p.m. that day, and he did not notice any steering difficulties. Tr. 214, 225. Cole testified that if any steering difficulty had occurred, he would have pulled the truck over immediately and examined it, per company policy. Tr. 214. Cole testified that at the time of the inspection, the mine roads over which the truck was driven did not contain sharp turns or steep grades. Tr. 213-4.¹¹

⁹ Since 2010, Hale has been a safety and compliance office for ArcelorMittal Mines, the owner of the property where Respondent operates. Prior to holding this position, Hale was an inspector for MSHA for five years. Tr. 191.

¹⁰ Cole had been employed by Respondent for about five years as a heavy equipment operator and received annual safety training refresher courses. *Id.* Cole was responsible for daily pre-operational examinations of the vehicles and machinery that he operated. *Id.* Cole also had been a truck driver for ten years prior to employment with Respondent. *Id.* Cole holds a commercial driver's license and has several years of experience operating the model truck at issue. Tr. 204-06.

¹¹ Hale testified that the average grade at the mine site was between seven and eight percent. Tr. 196. Hale also testified that a flyover photo of the mine site showed the steepest

(continued...)

Driver Hunt testified that there was a five to six percent grade along the route driven on June 24, 2013. Tr. 236. Hunt further testified that the turns of the steering wheel that Tuggle asked him to perform during the inspection were sharper than the turns usually encountered at the mine site. Tr. 245.

E. Respondent's Post-Inspection Video Evidence

Respondent introduced a flash drive containing two videos of the cited Caterpillar 777B haul truck, which was identified by the serial number 1747 on the outside of the driver's cab window. Tr. 360.

The first video is two minutes and thirty-six seconds long. It is identified on the flash drive as "195" and it was received in evidence as R. Ex. 2. This video shows the truck being driven off site, on flat terrain, with the right side tie rod disconnected. Tr. 360; R. Ex. 2. Ray estimated that the truck in the video was driven at about five to ten mph over terrain with rocks, similar to that at the mine site. Tr. 364, 369. Tuggle testified, on rebuttal, that the terrain in the video was less steep than the terrain present at the mine site. Tr. 400.

I find the video to be of little probative value to Respondent's defense. The video was taken off site. The truck in the video is not loaded. Mine roads and curves are not being navigated in the video. Moreover, the operator is aware of the filming and could compensate for a detached tie rod.

Throughout the video, the camera pans away as the haul truck makes a turn, or the turn is executed behind another large vehicle. During the truck's initial turn in the video, the front left tire starts to turn before the right front tire. Thereafter, the right front tire appears to turn more quickly to "catch up." Tr. 397; R. Ex. 2 at 00:55-00:58. For much of the video, one is unable to see the front tires of the truck. R. Ex. 2 at 01:05-01:24.

At one point in the video, the massive truck is driven behind a bus and another vehicle, and the front tires are not visible as the truck backs up to make a turn. R. Ex. 2 at 01:24-01:41. The camera pans away completely at one point while the truck is making this maneuver. R. Ex. 2 at 01:43. Thereafter, when the truck is straightened out, the left side is driven over wooden cribbing on the ground. R. Ex. 2 at 01:53-01:56. At this point, the video pans away and zooms in and out. R. Ex. 2 at 01:55.

Later in the video, the right front tire is driven over wooden cribbing and that tire distinctly wobbles. R. Ex. 2 at 02:11-02:16. Tuggle testified that this wobbling resulted from the detached tie rod on the right front tire. Tr. 399-400. Thereafter, the camera pans away and one is only able to see the back of the truck before the video camera is turned off. R. Ex. 2 at 02:30, 02:36.

¹¹ (...continued)

grade between seven and eight percent and the modal grade at about four percent. Tr. 197. Cole testified that although the mine has "some steep grades," they were not present when the citation was issued. Tr. 213-14.

The second video is labelled “1644.” This video is three minutes and 55 seconds long. R. Ex. 3. This video shows the process of ball stud removal. Tr. 309; R. Ex. 3. A 20-ton Air Over hydraulic jack is placed on wooden cribs and lined up with the ball joint stud. Tr. 311; R. Ex. 3 at 00:01-01:38. The jack applies force against the ball stud and causes it to pop loose from the assembly. Tr. 311; R. Ex. 3 at 01:10-01:26.

A driver then gets into the cab and maneuvers the truck around a relatively flat area. R. Ex. 3, 02:25-03:23. The viewer only sees the right side, or driver’s side of the truck for a significant segment towards the end of the video. R. Ex. 3, 03:20-03:50. As the truck reverses and turns, the left front tire is somewhat out of alignment and the video stops. R. Ex. 3 at 03:48-03:52.

III. Analysis and Disposition

A. The Violation of Section 77.404(a)

Section 77.404(a) imposes two duties upon an operator: (1) to maintain machinery and equipment in safe operating condition, and (2) to remove unsafe equipment from service. Derogation from *either* duty violates the standard. *Peabody Coal Co.*, 1 FMSHRC 1494, 1495 (Oct. 1979).

The large haul truck cited by inspector Tuggle was mobile equipment. It is undisputed that such mobile equipment was in service when cited. The dispute is whether the truck was maintained in safe operating condition. I find that the truck was not maintained in safe operating condition and was not removed from service. Accordingly, Respondent derogated both duties. I find the violation.

Equipment is in unsafe operating condition under section 77.404(a) when a reasonably prudent person familiar with the factual circumstances surrounding the alleged hazardous condition, including any facts peculiar to the mining industry, would recognize a hazard warranting corrective action within the purview of the applicable regulation. *Ambrosia Coal & Construction Company*, 18 FMSHRC 1552, 1557 (Sept. 1996) (citing *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2129 (Dec. 1982) (applying identical standard in underground coal mines). Applying this test, I find that a reasonably prudent person familiar with driving a large and often-loaded haul truck over uneven, curved and graded mine roads, would recognize that an inch of vertical play in a ball joint *and* a loose nut on the ball joint constitutes failure to maintain the truck in safe operating condition, free from hazards that require corrective action. Had a pre-operational inspection been completed, with one person monitoring the steering linkage and another moving the steering wheel, the defects would have been noticed by a reasonably prudent person.

I credit Tuggle’s testimony that there was an inch of vertical play between the ball and socket joint on the left front side when Hunt turned the wheel. Tuggle used a standard-rule tape measure. Tr. 47. Tuggle’s contemporaneous notes confirm this measurement and confirm that the nut was loose on the bottom of the ball joint and had sheared the cotter pin keeper, allowing

the nut to back off. P. Ex. 2. Crouse essentially corroborated Tuggle's testimony. Specifically, Crouse testified that he observed the nut on the ball and socket joint hanging down about an inch, about ready to fall off, and in bad condition. Tr. 163, 171. I credit Crouse's testimony that while waiting for maintenance foreman Ray to arrive, Crouse told assistant superintendent Bowman that a dial indicator was not needed; it's a no-brainer because the nut is about ready to fall off and the truck is not being kept in safe operating condition. Tr. 173. I further credit Tuggle that when Ray arrived with the requisite tools to measure the play and make his own examination, Ray chose not to and admitted, consistent with Crouse's no-brainer opinion, that "[t]here's no need to even measure this." Tr. 105. Ray did not deny this. Further, Crouse credibly testified that Ray removed the nut with his hands after a couple turns. Tr. 173-74. Accordingly, I find an inch of vertical play in the ball joint and a loose nut on the ball joint.

The Commission has recognized that movement in steering linkage ball joints alone can rise to the level of a hazardous defect. *See LaFarge North America*, 35 FMSHRC 3497, 3500 (applying section 56.14100(c), which concerns defects that make continued operation hazardous, and remanding to determine amount of movement in ball joints and whether such amount constitutes a hazardous defect). I find that an inch of vertical play in the ball joint is sufficient to constitute a hazardous defect. Tuggle convincingly testified that he was trained at the Mine Academy to use the "Commercial Vehicle Program" as source criteria for vertical play in the ball joint and that any vertical movement requires that the vehicle immediately be removed from service. Tr. 57. The North American Standard Out-of-Service Criteria manual, issued by the Commercial Vehicle Safety Alliance, provides that a vehicle is to be taken out of service if any of its ball and socket joints exhibit "any motion, other than rotational, between any linkage member and its attachment point of more than 1/8 inch (3.2mm) measured with hand pressure only" or if any tie rod exhibits "any looseness in any threaded joint." *Commercial Vehicle Safety Alliance*, North American Standard Out-of-Service Criteria, at 44 (revised April 1, 2010). Since this manual was relied on by Tuggle pursuant to his training at the mine Academy, I find it provides useful guidance for whether the inch of vertical play in the ball joint constituted a hazardous defect making continued operation of the haul truck unsafe. Further, I emphasize that Tuggle was an experienced MSHA inspector, with specific skill and training in the trucking industry, and therefore his opinion, based on his training, that an inch of vertical play in the ball joint was sufficient to constitute a hazardous defect requiring the haul truck's removal from service, is entitled to substantial weight. *Cf., Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-79 (Dec. 1998); *Buck Creek Coal Co. v. FMSHRC*, 52 F.3d 133,135 (7th Cir. 1995). Accordingly, I conclude that the inch of vertical play in the ball joint constitutes a hazard making continued operation of the haul truck unsafe and requiring its removal from service.

I further credit Tuggle's testimony that the nut at the bottom of the ball joint was loose and ready to fall off, had sheared the cotter pin keeper, and was removed by Ray with his bare hands. Tr. 50. Tuggle's contemporaneous notes confirm his testimony to this effect. P. Ex. 2. Crouse corroborated Tuggle. Tr. 163, 171, 173-74. Although Ray and Hale testified that a loose nut on the ball joint did not constitute an unsafe operating condition, they never addressed whether play in the ball joint constituted such a condition. Tr. 199, 295. Moreover, I discount their testimony and find Tuggle's testimony more persuasive. In describing the hazard, Tuggle testified "[t]hat the truck would actually lose the tie rod, the ball joint would actually come apart,

the wheel stability would be lost. There would still be partial steering due to the hydraulic jacks, but the steering itself would be compromised” Tr. 59. Tuggle's testimony that he observed the haul truck's tires out of alignment before he issued the citation supports the inference that a loose ball joint can compromise steering. Tr. 88-89. The video evidence offered by Respondent further bolsters rather than refutes the contention that a loose or disconnected ball joint in a tie rod compromises steering control, which can be hazardous. Tr. 397; R. Ex. 2 at 00:55-00:58; *see also* R. Ex. 2 at 02:11-02:16 (right front tire is driven over wooden cribbing and tire distinctly wobbles). Tuggle credibly testified that the wobbling of the front right wheel in the video as the truck rode over the wooden crib resulted from the detached tie rod on the right front tire. Tr. 399-400.

In sum, based on my review of the entire record, I find that the Secretary has proven by a preponderance of the evidence that Respondent violated Section 77.404(a) by failing to maintain the haul truck in safe operating condition, and by failing to remove it from service.

B. The Violation of Section 77.404(a) was Significant and Substantial

The Mine Act describes an S&S violation as one “of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard.” 30 U.S.C. § 814(d)(1). The Commission has held that a violation is S&S “if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

To establish an S&S violation under *National Gypsum*, the Secretary must prove the four elements of the Commission's subsequent *Mathies* test: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard – that is, a measure of danger to safety – contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. *See Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); *accord Buck Creek Coal, supra*, 52 F.3d at 135 (7th Cir. 1995) (recognizing wide acceptance of *Mathies* criteria); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving use of *Mathies* criteria). An evaluation of the reasonable likelihood of injury is made assuming continued normal mining operations. *U.S. Steel Mining Co. (U.S. Steel III)*, 7 FMSHRC 1125, 1130 (Aug. 1985) (*quoting U.S. Steel Mining Co. (U.S. Steel I)*, 6 FMSHRC 1573, 1574 (July 1984)).

For the reasons explained above, I have found the underlying violation of mandatory safety standard 77.404(a).

With regard to the second *Mathies* factor, the violation created a discrete safety hazard or measure of danger to safety. My finding of a violation *a fortiori* requires a finding of a discrete measure of danger to safety as the standard violated requires a failure to maintain mobile equipment (the haul truck) in safe operating condition. Ergo, if the truck is not maintained in safe operating condition there is necessarily a discrete measure of danger to safety.

Furthermore, the Secretary need only identify a safety hazard associated with the putative S&S violation. *Highland Mining Co.*, 34 FMSHRC 3434, n. 5 (Dec. 2012). Although the parties focused much attention on the discrete hazard of loss of control caused by a detached tie rod, the record evidence establishes that one inch of vertical play in the ball joint and the loose nut at the bottom of the ball joint contributed to the discrete hazard of compromised steering and loss of control of the haul truck. Tr. 59; Tr. 85. As noted, I have found that there was one inch of vertical play in the ball joint, which required the truck's removal from service according to MSHA's experienced inspectors, MSHA Academy training, and guidance from the *Commercial Vehicle Safety Alliance*, North American Standard Out-of-Service Criteria. In addition, I have found that the nut at the bottom of the ball joint was loose, ready to fall off, and had sheared the cotter pin keeper. Further, I have credited Tuggle's testimony over testimony from Respondent's witnesses that these hazards would compromise wheel stability and steering. Tuggle's pre-citation observation that the tires were out of alignment bolsters my findings that the loose ball joint compromised wheel stability and steering. The video evidence offered by Respondent does more to bolster than refute my finding of the danger of a loose or disconnected ball joint that could result in a detached tie rod and compromise wheel stability, alignment and steering control. Tr. 397, 399-400; R. Ex. 2 at 00:55-00:58; *see also* R. Ex. 2 at 02:11-02:16. There is clearly different and unaligned wheel movement in the video, and the tire with the detached tie rod exhibits wobbly motion. Tr. 397, R. Ex. 3; 0:55-:58, 1:53-1:56; Tr. 399-400. Accordingly, I find that the second *Mathies* factor is satisfied.

Regarding the third *Mathies* factor, the Secretary demonstrated a reasonable likelihood that the hazard contributed to by the violation, i.e., loss of control of the large haul truck on the mine roads, was reasonably likely to result in an injury during continued mining operations. During continued mining operations, a large haul truck driven at speeds between 12-15 mph over uneven, curved and graded mine roads, with an inch of vertical play in a ball joint *and* a loose nut on the ball joint was reasonably likely to result in loss of control of the truck and injury to the driver, injury to another driver during collision with another vehicle, or injury to another miner travelling on foot in the vicinity of haul truck operations. The driver of the truck or a passing vehicle was clearly exposed to injury from collision or loss of control of the truck due to failure to maintain the truck in safe operating condition. Further, the credited testimony from inspectors Tuggle and Crouse establishes that other miners travelling in passing vehicles or on foot were exposed to post-collision injury from loss of control of the truck. Tr. 59, 62-63, 164, 167. In these circumstances, an injury was reasonably likely to occur during continued operation of the large haul truck over mine property with defective components on the steering linkage assembly.

Concerning the fourth *Mathies* factor, I find a reasonable likelihood that any such injury would be of a reasonably serious nature. The loss of control hazard contributed to by the failure to maintain the large haul truck in safe operating condition was reasonably likely to result in a collision and concomitant serious or fatal injury to the truck driver, miners in a colliding vehicle, or miners struck on foot. The Caterpillar 777B is a very large rock haul truck, measuring over 16 feet high and capable of carrying a load of over 320,000 pounds. A collision with another vehicle or miner likely would be serious or fatal. Accordingly, the Secretary has shown a

reasonable likelihood that an injury resulting from the hazard contributed to by the violation was reasonably likely to be serious or fatal.

C. Respondent's Negligence was Appropriately Designated as Moderate

The Respondent challenges Tuggle's moderate negligence designation. The level of negligence is properly designated as moderate when "[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances." 30 C.F.R. § 100.3, Table X. The level of negligence is properly designated as low when there are *considerable* mitigating circumstances surrounding the violation. 30 C.F.R. § 100.3, Table X (emphasis added).

Based on the testimony and briefs, I do not find considerable mitigating circumstances that would justify reducing the negligence designation from moderate to low. Respondent highlights none. Further, the lack of adequate procedures for investigating defects in steering linkage assembly components during Respondent's pre-operational inspection supports a moderate negligence designation. In this regard, the pre-operational inspection should have included two individuals. The record establishes that there is no way to measure or observe play in the ball joint without one miner manipulating the steering wheel and another checking the tie rod and ball joints for movement and play. In these circumstances, I find that the Secretary properly designated the level of negligence as moderate.

D. Civil Penalty

I have evaluated the Secretary's proposed penalty in light of the principles announced in my recent *Big Ridge* decision. *Big Ridge Inc.*, 36 FMSHRC__slip op. at 4-6 (July 19, 2014) (ALJ). I find that the penalty proposed by the Secretary is consistent with the statutory criteria in section 110(i) of the Mine Act. 30 U.S.C. 820(i). Accordingly, I assess a \$3,689 civil penalty against Respondent.

IV. ORDER

For the reasons set forth above, I **AFFIRM** Citation No. 8203250, as written. It is **ORDERED** that the operator pay a civil penalty of \$3,689 within 30 days of this decision.¹²

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

¹² Payment should be sent to: Mine Safety & Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.

Distribution:

Nicholas Preservati, Esq. and Sarah Korwan, Esq., Preservati Law Offices, PLLC, P.O. Box 1431, Charleston, West Virginia 25325

Anthony Berry, Esq., U.S. Department of Labor, Office of the Solicitor, 211 7th Avenue North, Suite 420, Nashville, Tennessee 37219

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
721 19TH STREET, SUITE 443
DENVER, CO 80202-2536
TELEPHONE: 303-844-3577 / FAX: 303-844-5267

October 29, 2014

HECLA LIMITED,
Contestant

v.

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

CONTEST PROCEEDINGS

Docket No. WEST 2012-353-RM
Order No. 8605614; 11/16/2011

Docket No. WEST 2012-354-RM
Order No. 8605622; 12/14/2011

Lucky Friday Mine

DECISION AND ORDER

Appearances: Laura E. Beverage, Esq., Karen L. Johnston, Esq., Jackson Kelly PLLC,
Denver, Colorado for Contestant.

Matthew L. Vadnal, Esq., Katherine M. Kasameyer, Esq., Office of the
Solicitor, U.S. Department of Labor, Seattle, Washington and San
Francisco, California for Respondent.

Susan J. Eckert, Esq., Santarella & Eckert, LLC, Littleton, Colorado for
Intervenor United Steelworks Local No. 5114.

Before: Judge Manning

This case is before me upon notices of contest by Hecla Limited of two orders of withdrawal issued under section 103(k) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 813(k). Hecla operates the Lucky Friday Mine, an underground silver, zinc, and lead mine near Mullan, Idaho. An MSHA inspector issued Order No. 8605614 following a fall of ground that occurred on November 16, 2011 and Order No. 8605622 after a fall of ground that occurred on December 14, 2011. MSHA terminated both orders on June 12, 2013. The issue in these cases is whether the Secretary abused his discretion when he maintained Order No. 8605614 after he issued Order No. 8605622 even though the second order closed the entire mine.

The United Steelworkers Local 5114, through counsel, intervened in these cases. The Steelworkers also filed a compensation case seeking compensation under the fourth sentence of section 111 of the Mine Act, Docket No. WEST 2012-466-CM. Although my resolution of the issues before me in the present contest cases will also affect the compensation case before me,¹

¹ Upon agreement of the parties, the record developed in these contest cases will be incorporated by reference into the record for the compensation case.

this decision does not resolve all issues in the compensation case, which is set for hearing in January 2015.²

The parties introduced testimony at a hearing held in Coeur d'Alene, Idaho. Hecla and the Steelworkers filed principal post hearing briefs. At hearing, the Secretary did not take a position concerning the termination of Order No. 8605614, but reserved the right to file a reply brief if Hecla contested the validity of either Order No. 8605614 or Order No. 8605622. Instead, the Secretary opted to file a full post hearing brief titled as a reply brief. I accepted the Secretary's submission as a late brief in chief.

For the reasons set forth below, I find that the appropriate standard of review is whether the Secretary's actions were arbitrary and capricious and I find that, under the facts presented, the Secretary did not violate that standard by maintaining Order No. 8605614 after he issued Order No. 8605622.

I. SUMMARY OF EVIDENCE³

On November 16, 2011, a fall of ground occurred in the Lucky Friday Mine. At 2:25 a.m. that same day, Ron Jacobsen, Field Office Supervisor of the Boise, ID Field Office, verbally issued Order No. 8605614 pursuant to section 103(j) of the Mine Act. The order identified the affected area as the "54 Ramp from the 5700 intersection from the spray chamber cut out to the down ramp of the old day box cut out and the 5900 main haulage from 100 feet from the intersection of the lateral on the 5900 level to 30 feet before the chevron." Ex. G-1 at 1-2. At 1:05 p.m., Inspector Scott Amos issued modification No. 8605614-01, modifying Order No.

² The fourth section of section 111 states:

Whenever an operator violates or fails or refuses to comply with any order issued under section 103, section 104, or section 107 of this Act, all miners employed at the affected mine who would have been withdrawn from, or prevented from entering, such mine or area thereof as a result of such order shall be entitled to full compensation by the operator at their regular rates of pay, in addition to pay received for work performed after such order was issued, for the period beginning when such order was issued and *ending when such order is complied with, vacated, or terminated.*

30 U.S.C. § 821(emphasis added). It appears that this sentence of section 111 has never been the subject of any litigation before the Commission.

³ I accept, rely upon, and incorporate by reference the 65 factual stipulations agreed upon and submitted on July 29, 2014, as Proposed Factual Stipulations by the parties and the intervenor.

8605614 to a section 103(k) order that allowed miners to begin repairs of the affected area, excluding the 54 ramp area.⁴

On November 20, 2011, Inspector Rod Gust issued modification No. 8605614-03 to permit the installation of three stress gauges in the 5900 main haulage drift. The 5900 haulage drift was the primary access to the active mining area of the mine at this time. The Lucky Friday Mine is a deep mine; the 5900 level is 5900 feet below the surface. The stress gauges were intended to monitor changes in pressure that may lead to a fall of ground. On December 2, 2011, Gust issued modification No. 8605614-04 to allow the mine to restore utilities through the 5900 drift where the fall occurred. Mine management had to monitor the three installed stress gauges on a shift to shift basis.

MSHA approved Hecla's proposal to install a steel liner through the affected area of the 5900 haulage drift. The steel liner was intended to protect miners in that area from any falls of ground. On December 14, 2011, at approximately 7:40 p.m., a rockburst occurred in the 5900 pillar, injuring seven miners who were installing the steel liner. MSHA issued Order No. 8605622, a section 103(j) order that removed all miners working in the 5900 main haulage. Order No. 8605622 encompassed all underground areas of the mine including the area affected by Order No. 8605614. On December 15, 2011, Amos issued modification No. 8605622-01, modifying Order No. 8605622 to a section 103(k) order that required the operator to obtain prior approval for all actions taken to recover and restore operations anywhere in the Mine.⁵

On December 21, 2011, Inspector Ronald Eastwood issued Citation No. 8565565 alleging that the mine operator worked in the face of Order No. 8605614 by failing to perform the required stress gauge reading directly before the rockburst. Hecla contested this citation,

⁴ On November 17, 2011, MSHA also issued modification No. 8605614-02 to allow Hecla to scale, bolt, and repair through the fall at the 5900 haulage way and the 5700 sublevel of the 54 ramp.

⁵ On December 16, 2011, Inspector Scott Amos issued modification No. 8605622-02 to allow essential repair work in the #2 shaft and Inspector Rodric B. Breland issued modification No. 8605622-03 to allow service work on the pumps at the 2800 and 5300 level pump stations. On December 20, 2011, Inspector Ronald Eastwood issued modification No. 8605622-04, requiring the mine to write and submit an abatement plan for each violation. On February 14, 2012, Breland issued modification No. 8605622-06 to prohibit all access to the 54 ramp between levels 5500 and 5900. On February 17, 2012, Breland issued modification No. 8605622-07, which allowed Hecla to commence the Silver Shaft "Clean Down Procedure." On February 22, 2012, Breland issued modification No. 8605622-08 to allow the removal of mobile equipment out of areas that may flood. On July 30, 2012, Breland issued modification No. 8605622-09 so the operator could inspect the 54 ramp between the 5500 and 5900 levels. On August 9, 2012, Breland issued modification No. 8605622-10 to allow the operator to drive a bypass around the 5900 main haulage drift. On January 4, 2013, Inspector Keith Palmer issued modification No. 8605622-11, allowing the operator to access the 54 Ramp to perform ground support maintenance from the 5500 Sublevel to the 5900 level. On February 7, 2013, Breland issued modification No. 8605622-12 and modified the affected area for the order to the 5900 level I-drift pillar and the haul road leading North and South from the pillar to the chain link barricades.

which was originally set to be adjudicated at the instant hearing, but the parties reached a settlement of Citation No. 8565565 a few days before the hearing.⁶ The citation was not vacated and I approved the settlement.

On December 20, 2011, Inspector Ron Jacobsen issued Citation No. 8690610 under section 104(a), requiring that Hecla remove concrete debris from the shaft sets in the Silver Shaft. The stated termination deadline was 1:00 p.m. on December 20, 2011, but Citation No. 8690610 was later modified to extend the termination deadline to 12:00 p.m. on December 30, 2011. On January 5, 2012, Inspector Steven Kidwell issued Order No. 8599596, taking the entire Silver Shaft out of service. Active repairs of the Silver Shaft require all utilities to be shut off, leaving the entire mine with no power, no water, and no compressed air. The Silver Shaft was also the Mine's primary escapeway. As a result, no mining or repair work was possible underground until the shaft was cleaned and inspected to the 5900 level. Hecla had to install a Galloway⁷ in the shaft to clean cementitious material from the walls of the entire shaft. MSHA did not allow the Silver Shaft to be returned to service until all work was completed. The shaft was not reactivated until MSHA issued modification No. 8599596-10 on February 26, 2013.

In addition to Citation No. 8690610, an impact inspection as well as a regular inspection resulted in MSHA issuing numerous citations and orders at the Mine. Hecla had to abate these violations before the 103(k) orders could be terminated. The lengthy abatement process required to address the numerous conditions cited by MSHA contributed to Order Nos. 8065614 and 8065622 existing for an uncommonly long period of time for section 103(k) orders.

Hecla determined that repairing the 5900 haulage drift was not feasible and MSHA approved its plan to build a new drift in an adjacent area to bypass the old drift. Modification No. 8605622-10. On April 2, 2013, Inspector Keith Palmer issued modification No. 8605622-13 to allow the operator to construct sand walls on the North and South sides of the rockburst area in the 5900 haulage drift and subsequently backfill the area. On June 12, 2013, Stemberge issued modification Nos. 8605614-07 and 8605622-14, terminating Order Nos. 8605614 and 8605622.

II. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

The only issue before me in this hearing is whether MSHA acted in an arbitrary or capricious manner when it maintained Order No. 8605614 upon issuing Order No. 8605622. Although Hecla advances several arguments concerning the relationship between Order No. 8605614 and Order No. 8605622, my review in this contest proceeding is limited to ascertaining

⁶ The Steelworkers rely upon this citation and the fact that MSHA terminated Order No. 8605614 on June 12, 2013, as the basis for its claim that miners are due compensation until that date under the fourth sentence of Section 111 of the Mine Act. The Steelworkers maintain that by permitting miners to work in the 5900 drift without taking a required reading of the stress gauges, Hecla violated or failed to comply with the terms of Order No. 8605614.

⁷ A Galloway is a multidecked work platform that is suspended in a mine shaft.

if MSHA's action was arbitrary or capricious.⁸ The matter before me is Hecla's contest of Order Nos. 8605614 and 8605622, both of which are 103(k)⁹ orders. The Act does not specify a standard of review for such orders. Section 103(k) awards MSHA broad discretion to effectively address potentially dangerous, post-accident situations in mines. *S. Rep. No. 95-181*, at 29 (1977), reprinted in *Senate Subcomm. on Labor, Comm. on Human Res., Legislative History of the Federal Mine Safety and Health Act of 1977*, at 617 (1978). The wide grant of authority under the Act and the expertise of MSHA in dealing with dangers in mines suggest that a 103(k) order merits a narrow standard of review. See *West Ridge Resources, Inc.*, 31 FMSHRC 287, 301-02 (Feb. 2009) (ALJ). The appropriate standard of review for 103(k) orders is an arbitrary and capricious standard. *Pattison Sand Co., LLC v. Federal Mine Safety and Health Review Com'n*, 688 F.3d 507, 512-513 (8th Cir. 2012); *Pinnacle Mining Co.*, 33 FMSHRC 2207, 2232 (Sept. 2011)(ALJ); *Performance Coal Co.*, 32 FMSHRC 1352, 1357 (Sept. 2010) (ALJ). Hecla, moreover, did not directly challenge either order, but rather the agency's action of maintaining Order No. 8605614 after it issued Order No. 8605622.

Based upon the evidence before me, I find that MSHA's action was not arbitrary or capricious. The Commission "is not to substitute its judgment for that of the agency" under the narrow scope of review of the arbitrary and capricious standard. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42-44 (US 1983). The Secretary "must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Id* at 43 (citing *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (US 1962)). The Secretary's action is arbitrary and capricious if the Secretary:

has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so

⁸ In addition to arguing that the Secretary's actions were arbitrary and capricious, Hecla also argues that withdrawal of miners from the affected area complied with section 103(k), Order No. 8605622 superseded and mooted Order No. 8605614, Order No. 8605622 terminated Order No. 8605614 as a matter of law, and that Order No. 8605622 made it impossible for Hecla to comply with Order No. 8605614. Although I considered these arguments with respect to the arbitrary or capricious standard of review, these arguments will also be addressed in the compensation case.

⁹ Section 103(k) of the Act states:

In the event of any accident occurring in a coal or other mine, an authorized representative of the Secretary, when present, may issue such orders as he deems appropriate to insure the safety of any person in the coal or other mine, and the operator of such mine shall obtain the approval of such representative, in consultation with appropriate State representatives, when feasible, of any plan to recover any person in such mine or to recover the coal or other mine or return affected areas of such mine to normal.

30 U.S.C. § 813(k).

implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Id. A party that seeks to prove that agency action is arbitrary and capricious carries “a heavy burden indeed.” *Wisconsin Valley Improvement v. FERC*, 236 F.3d 738, 745 (D.C. Cir. 2001) (citing *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 714 (D.C. Cir. 2000)). Hecla did not fulfill its burden to show that MSHA’s decision to maintain Order No. 8605614 when it issued Order No. 8605622 was arbitrary or capricious.

There was a rational connection between MSHA’s decision to maintain Order No. 8605614 after issuing Order No. 8605622 and the particular facts that arose. The Secretary claims that he retained Order No. 8605614 to focus upon the affected area because it was dangerous and the cited conditions were not corrected. (Tr. 82-84). Although Breland testified that certain aspects of Order No. 8605622 superseded aspects of Order No. 8605614,¹⁰ Breland, Amos, and MSHA’s assistant district manager Kevin Hirsch all agree that conditions in the area affected by Order No. 8605614 were not corrected and Order No. 8605614 was therefore not terminated. (Tr. 86, 109, 170). The Secretary believes and the testimony of all three of his witnesses reflects that the area targeted by Order No. 8605614 presented a greater danger than other areas of the mine. Hirsch testified that at the time MSHA issued Order No. 8605622, it was not clear whether Order No. 8605622 would be terminated before or after Order No. 8605614. (Tr. 230). Hirsch’s argument may seem academic since Order No. 8605622 encompassed the entire mine, but it reflects that MSHA believed at the time that maintaining Order No. 8605614 kept a “spotlight” on the most dangerous area of the mine, ensuring that it would not be overlooked and accessed by miners. (Tr. 83). MSHA issued each order, moreover, under separate MSHA event numbers.

Practically, MSHA could have modified Order No. 8605622 to highlight the 5900 area; maintaining Order No. 8605614 was not the only way to address the cited area. After MSHA issued Order No. 8605622, the only modifications it issued to Order No. 8605614 simply corrected a numbering error in the modification chain and terminated the order. Every modification that concerned efforts within the mine was made to Order No. 8605622, including modification 8605622-13, which exclusively addressed the area controlled by Order No. 8605614. Although these actions are inconsistent with the Secretary’s position that Order No. 8605614 needed to be maintained to control the area in and around the 5900 haulage drift, they do not render MSHA’s decision to maintain that order arbitrary or capricious. Reviewing courts should “not substitute our own judgment for that of the agency[.]” *Wisconsin Valley Improvement*, 236 F.3d at 745. Numerous inspectors from different field offices inspected the Lucky Friday Mine after the rockburst of December 14, 2011 and six different inspectors issued modifications to Order Nos. 8605614 and 8605622. There was miscommunication between Hecla and MSHA about how the orders affected each other as both Superintendent Doug Bayer

¹⁰ MSHA acknowledged that the issuance of Order No. 8605622 made it impossible for Hecla to comply with many of the requirements set out in Order No. 8605614, as modified. Hecla could no longer monitor the stress gauges in the 5900 drift or enter that drift for any purpose. As detailed in footnote eight, Hecla relies on this fact in making many of its arguments. I find that these arguments are not determinative in these contest cases but will be relevant when considering the application of fourth sentence of section 111 in the compensation case.

and Vice President of technical services John Jordan believed that Order No. 8605614 was moot and terminated. (Tr. 300, 370). In this confusing situation, it was rational for MSHA to maintain Order No. 8605614 to show both MSHA and Hecla employees that the area addressed by Order No. 8605614 was especially dangerous. Miners were less likely to enter the area and inspectors were less likely to mistakenly modify a 103(k) order without considering the conditions addressed by Order No. 8605614. The Secretary did not offer an explanation that runs counter to the evidence before it; MSHA sought to protect miners by highlighting a dangerous area, which maintaining Order No. 8605614 accomplished.¹¹

My decision today is confined to the facts and issues before me. It does not address many of the issues required to resolve the compensation case before me.

III. ORDER

For the reasons set forth above, I **AFFIRM** Order Nos. 8605614 and 8605622.¹² I hold that the Secretary's decision to maintain Order No. 8605614 after the issuance of Order No. 8605622 was not arbitrary or capricious.

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

Distribution:

Laura E. Beverage, Esq., Jackson Kelly PLLC, 1099 18th St., Suite 2150, Denver, CO 80202
(Certified Mail)

Matthew L. Vadnal, Esq., and Patricia Drummond, Esq., Office of the Solicitor, U.S.
Department of Labor, 300 Fifth Avenue, Suite 1120, Seattle, WA 98104-2397 (Certified Mail)

Susan J. Eckert, Esq., Santarella & Eckert, LLC, 7050 Puma Trail, Littleton, CO 80125
(Certified Mail)

¹¹ My holding in this case is based my consideration of the two section 103(k) orders of withdrawal. The issuance of Citation No. 8565565 alleging that Hecla worked in the face of the first section 103(f) order does not alter my holding that the Secretary's actions were not arbitrary or capricious.

¹² The parties do not dispute that the Commission has jurisdiction to review 103(k) orders and has the authority to either affirm or vacate 103(k) orders. The Secretary and the Steelworkers, however, argue that the Commission lacks the authority to modify 103(k) orders. It is unnecessary to reach this issue because I affirmed the 103(k) orders at issue here.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9958 / FAX: 202-434-9949

October 31, 2014

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

v.

RONALD SAND & GRAVEL,
Respondent.

CIVIL PENALTY PROCEEDING:

Docket No. WEST 2012-1042
A.C. No. 45-03628-28844

Mine: Ronald Sand & Gravel

DECISION

Appearances: Sean Allen, Esq., U.S. Department of Labor, Office of the Solicitor, 1244 Speer Boulevard, Suite 216, Denver, Colorado, on behalf of Petitioner

Louie Gibson, Ronald Sand & Gravel, 1221 S. Thorp Highway, Ellensburg, Washington, on behalf of Respondent

Before: Judge Barbour

In this proceeding arising under the Federal Mine Safety and Health Act, 30 U.S.C. § 801, *et seq.* (2012), the Secretary of Labor (“Secretary”) on behalf of his Mine Safety and Health Administration (“MSHA”) alleges that Ronald Sand and Gravel (“Ronald”) in 11 instances violated various mandatory safety, training, and reporting standards for the nation’s metal and nonmetal mines.¹ The Secretary further alleges that six of the 11 purported violations were significant and substantial contributions to mine safety hazards (“S&S” violations²), that 10 of

¹ The standards are set forth at 30 C.F.R. Part 56 (safety), 30 C.F.R. Part 46 (training), and 30 C.F.R. Part 50 (reporting).

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

the 11 were caused by Ronald's moderate negligence, and that one was caused by its low negligence. Further, the Secretary asserts that the inspector who cited the alleged violations made correct gravity findings. The Secretary proposes penalties ranging from \$243.00 to \$100.00. In the aggregate, the proposed penalties total \$1,553.00.

After the Secretary's petition was filed, Louie Gibson, Ronald's owner and operator, answered on behalf of the company. The Commission's Chief Judge assigned the case to the court, and the court ordered the Secretary's counsel to contact Gibson to determine whether the case could be settled. After several discussions with Gibson, counsel advised the court that the company wanted a hearing and the case was noticed for hearing in Ellensburg, Washington. On November 15, 2013, counsel stated that he intended to call a witness who, due to fears of physical retaliation, preferred to testify remotely, *e.g.*, via the telephone. Counsel also requested that the hearing take place in a facility with full security, including metal detectors. During a subsequent conference telephone call with counsel and Gibson, the court discussed the possibility of transferring the hearing to the federal or county courthouse in Yakima, Washington, both of which are subject to full security protocols. The parties agreed to the transfer, even though it meant deferring the date of the hearing. The parties also agreed to the court's suggestion that another attempt be made to settle the matter. The court appointed a settlement counsel. After much back and forth, the settlement counsel reported his efforts had failed. Therefore, the case was heard in Yakima on July 15, 2014. At the hearing, Gibson represented the company.

TESTIMONY OF GREGORY ("GREG") NICHOLS

Gregory ("Greg") Nichols lives more than 500 miles from Yakima. He was sworn in and testified via the telephone.³ Nichols stated that he has 30 years or more of mining experience, but that his career with Ronald was short. It began on March 9, 2012, when the company advertised a job for an equipment operator. Nichols came to the mine to apply. Tr. 19, 21. Nichols was hired and began work on Monday, March 12. He worked a full day on Monday. He did not work on Tuesday, March 13. He worked a half day on Wednesday, March 14, and then, he quit (his version), or he was fired (Ronald's version). Tr. 21-22.

Nichols described the mine as primarily a rock crushing facility at which basalt rock is loaded from an excavator into a crusher and crushed to size. Tr. 23, 36-37. According to Nichols the equipment at the site consists of an "impact mill⁴], a rolls [(sic.)], a screen deck and some . . . conveyor belts." *Id.* Nichols maintained that prior to beginning work he was not given any newly employed experienced miner training. *Id.* Nor was he given a tour of the mine site. Tr. 24. He testified that he did not receive any instructions in recognizing electrical hazards. *Id.* Emergency medical procedures were not reviewed with him. He was not advised about the

³ The court took the Secretary's concerns at face value. In allowing Nichols to testify remotely, the court recognized the detriments of remote testimony, but chose to err, if at all, on the side of security.

⁴ The "impact mill" was frequently referred to as "the crusher" and the "impactor/crusher."

mine's evacuation plan or the health and safety aspects of the tasks to which he would be assigned, and he was not advised of his rights under the Mine Act. *Id.* Nichols stated that he was never asked to sign any training forms and that he was never given any site specific hazard awareness training. *Id.*

Nichols recalled that on his first work day, Gibson asked him to crawl inside the impact mill to repair some plates, a task that required welding. Tr. 25. The metal plates protected the mill from being damaged by rock during the crushing process. Tr. 25-26. Nichols maintained that the entire time he worked on and in the mill, it was not locked or tagged out. Tr. 26-25. Nichols stated that he expressed concern about this to Gibson and that Gibson responded that Nichols would "know when to get out [of the mill] when [he] heard the machine start." Tr. 27. As best Nichols could recall, the key for the mill's motor was in its ignition, at the top of the mill. Tr. 29, 30, 60. Had the key been turned in the ignition, Nichols was "pretty sure" the engine driving the mill would have started, and if the mill went into gear, Nichols stated that it would "have ate me up." Tr. 30, *see also* Tr. 31.

Nichols also maintained that while he was welding inside the mill, Gibson and his helper crawled over the outside of the machine changing some of the mill's outer plates. Tr. 27-28. The vibrations from their work and from the welding caused dust and debris to fall on Nichols, some of which landed on his face. *Id.* Nichols was also concerned about the pinch points to which he was subject inside the mill. He stated that if the interior barrel of the mill rolled while he was inside, his hands could be caught in the moving parts. Tr. 32-33.

Nichols testified that he worked inside the mill for "an hour or so" before the mill was activated and started crushing.⁵ Tr. 56. He testified that after he got out of the mill and it started running, he greased a bearing on one of the conveyor belt rollers and freed some jammed rollers. Tr. 33-34. He believed that the moving bearing and its mechanism were not guarded. Tr. 34. Nichols stated, "You could just crawl up on the bearing and get to the grease surface and grease that bearing while it was running. And you were just . . . inches from the rolls while you're greasing it." Tr. 34-35 *see also* Tr. 74. Nichols estimated that the bearing required greasing every 15 to 20 minutes. Tr. 35, 74.

⁵ According to Nichols, after the mill started, the push for production was constant:

[W]e pretty much crushed eight hours . . . nine maybe. [A]s soon as we got the crusher working we didn't stop. We didn't even stop to talk [I]t was all hand signals, go do this, go do that . . . dig that out, get that conveyor tracked and running again. We're crushing, we're not shutting down.

Tr. 55; *see also* Tr. 73-74.

After production started, Nichols recalled Gibson feeding rock into the mill with the excavator. Nichols described the work environment as harsh. He and Scott Dunsing, the other miner on the job, worked,

for eight hours straight in 28-degree weather with the snow blowing sideways and the dust going everywhere all over [Gibson's] truck, all over [Nichols'] car, all over us. It was horrible.

Tr. 56.

Nichols testified that while working at the mine he never was provided with safety glasses or other eye protection, despite the fact the “dust and stuff was really bad.” Tr. 41. Nor was he provided with ear protection. He always carried his own ear plugs. Tr. 42. Further, there were no toilet facilities at the mine. Tr. 43.

During his first day on the job, Nichols, who had his own hard hat, did not wear it. Rather, he wore a wool hat to stay warm. Tr. 38. Nichols recalled that Dunsing wore a baseball cap. Gibson wore a hard hat, but intermittently. Tr. 38. In Nichols' opinion, it was hazardous to go without a hard hat because when the mill was operating, fly rock “pop[ped] out of the top of . . . [the mill's] feeder.” Tr. 39. The fly rock could travel 20 to 25 feet. Nichols believed that both he and Dunsing were exposed to the fly rock. Tr. 40. He estimated that the fly rock averaged two to three inches in diameter. *Id.*, 80. He stated that when the mill was operating, rocks were “coming out of the sky like meteorites.” Tr. 80. He also described the rocks as, “like bullets coming down on top of you.” *Id.* Nichols maintained that Gibson told him to stand away from the mill because of the fly rock. Tr. 81.

During his brief time as an employee of Ronald, Nichols lived at the mine in the generator shack (also referred to as the “well house”). Tr. 54. According to Nichols, there was no port-a-potty at the well house, nor anywhere else at the mine. Nichols claimed he “made do” with a bucket and some timbers. Tr. 75-76.

Nichols maintained that on his third day (Wednesday), several problems arose with defective equipment, and Nichols described Gibson as not “in a very good mood.” Tr. 44. After a controversy between the two over whether or not Nichols knew how to operate a grease gun, Nichols said to Gibson, “I can't work for you,” and Nichols prepared to leave the mine. Tr. 45. Nichols claimed that he reminded Gibson that Gibson owed him money for the time he had worked and that he decided to wait around for Gibson to pay him. *Id.* While he was waiting, Dunsing appeared. Nichols testified that Dunsing was “pretty much crying that [Gibson had] yelled and screamed at him and called him all these words and . . . [Dunsing] asked . . . if I could give him a ride home. And I told him, [s]ure[.]” Tr. 46.

Nichols stated that before leaving the area he had another run-in with Gibson, one that caused Nichols to pay a visit to the county sheriff. Nichols testified:

[Gibson] was telling me he was going to turn me in for driving on a suspended license . . . And I went to the town hall and talked to the sheriff there about [Gibson] threatening me . . . but it was out of the sheriff's jurisdiction So he just told me You can drive if you want, just go back to Wenatchee and get out of here.

Tr. 47.

After meeting with the sheriff, Nichols stated:

I was waiting around to get my pay. And it took a while so I went back to the mine . . . and there was a bunch of guys there, all [Gibson's] friends . . . and I'm sure [Gibson] told them about me.

Tr. 47.

According to Nichols, at some point before he left the county, Gibson called Nichols "a few names" (Tr. 47), and on Wednesday, December 14, an unnamed employee of Gibson's allegedly told Nichols never to come back to the area where the mine was located, that if he returned, he would be killed. Tr. 48. Nichols testified that the threat prompted him to call MSHA and report conditions at the mine that Nichols believed to be hazardous. Nichols stated:

[T]he employee told me never to come back to this valley or he'd shoot me. And he told me he was going to call the police on me for driving on a suspended license.

After he threatened me . . . [t]hat's when I called MSHA.

Tr. 52-53.

Also, on that Wednesday, Nichols sent a text to Gibson confirming that he was quitting, that he was, as he put it, "done running [the] crusher." Tr. 64. According to Nichols, Gibson responded, "You coward, get your ass back up here . . . come back up to the mine." Tr. 66. Nichols replied to Gibson, "I guess some people have to learn the hard way." Tr. 67. When asked by Gibson what he meant, Nichols stated:

That means . . . [y]ou're going to learn that you can't go do that to people and stick people in that

position and treat people that way. That's what that text means.

Tr. 67.

Gibson testified that when he called MSHA (Tr. 47-48), he told the person who answered that he wanted an inspector to "come out [to the mine] and see . . . what [Gibson] put [his] employees through."⁶ Tr. 65

TESTIMONY OF INSPECTOR DEAN BROOKS

Nichols' call led MSHA to send its inspector, Dean Brooks, to the mine. However, before traveling to the mine, Brooks went to Nichols's home where he and Nichols talked about Nichols's experiences at the mine and about conditions there. Tr. 49. Then, on March 16, Brooks inspected the mine. Tr. 95.

Brooks testified that he has worked for MSHA for approximately nine years. He estimated that approximately 80% of his time has been spent inspecting mines. Tr. 90. Brooks stated that prior to his March visit he inspected Ronald's operation approximately four or five times. Tr. 92, 112. He described the mine as "set up on the side of a hill." Tr. 92. Brooks recalled the overall mine site as being approximately 300 feet long by 140 feet wide. Tr. 92. He believed that the area had been cleared by using an excavator and a bulldozer. *Id.* In addition to the crushing plant, there were areas for parking equipment and stockpiling product. *Id.*

Brooks testified that his March 16 visit to the facility was ordered by his supervisor in response to Nichols' "hazardous condition" complaint. Tr. 95. Upon arriving at the mine, Brooks determined that mining activity had taken place. According to Brooks, rock had been crushed, sized, and sorted. Although Brooks agreed that mining activity occurred "sporadically," the stockpiles of product indicated to Brooks that the mine "had been in production." Tr. 98. Brooks also noted that haul trucks were used at the mine, as were excavators, a water truck, and pickup trucks. Tr. 97. Upon arriving, Brooks met with Gibson. Tr. 108. At the time, mining was not in progress, but maintenance activities were underway. *Id.*

The March 16 inspection resulted in the issuance of several citations for violations of mandatory safety, training, and reporting standards. During the course of his testimony, Brooks described the conditions that lead him to issue each of the citations. Tr. 106-258.

TESTIMONY OF INSPECTOR MICHAEL NELSON

Michael Nelson is an MSHA inspector and accident investigator. Tr. 260-261. Nelson has been with MSHA since 2009. Nelson testified that he has inspected "[p]robably hundreds" of sand and gravel crushing operations. Tr. 261. On March 6, 2012, ten days before Brooks' visit,

⁶ Nichols also stated, "My motivation for calling MSHA [was] that it was [a] highly dangerous crushing plant and no one needed to be exposed to that place." Tr. 86.

Nelson conducted a compliance assistance visit at the Ronald facility. Tr. 262, 263. The plant, which was not yet in operation, was partially set up. Nelson went to the facility because the company was installing a new crusher. Tr. 262-263. Nelson stated that the purpose of his visit was to “point out violative conditions or practices” with regard to the new operation and give the company an opportunity to correct potential violations before work began. Tr. 263. Nelson maintained that he pointed out several possible violations with regard to guarding on the crusher. Tr. 264. He also believed he spoke with someone about lock out/tag out procedures, although he could not recall if Gibson was involved in the discussion. Tr. 265, 270.

LOUIE GIBSON

Louie Gibson testified on behalf of the company. He maintained that everything Nichols alleged was a lie. Tr. 272. According to Gibson, Nichols was motivated to lie because he was fired and he wanted to “get back” at Gibson. *Id.* Gibson pointed out that Nichols only contacted MSHA after he was let go. *Id.*

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>
8566007	3/16/2012	56.12016

The citation states:

The portable crusher/screen plant, electrically powered equipment that was being worked on was not properly locked out before beginning work. Two miners were observed installing guards and doing other maintenance around the plant and while the main power-supply gen-set was locked out, no tags were placed to indicate who had put them there or why the generator was locked out. Were an accident to occur because proper lock-out/tag-out procedures were not followed a serious injury could result.

Gov’t Exh. 3.

Brooks testified he issued the citation because the company had not “follow[ed] proper lock out/tag out procedures.” Tr. 106. In Brooks’ opinion the company’s failure subjected its miners to the hazards of becoming entangled in the equipment or of being injured by rocks coming off the conveyor. *Id.* Such accidents could be fatal. *Id.*

Brooks stated that lock out/tag out procedures “are taken extremely seriously by MSHA because of the seriousness of injuries that occur” when they are not followed. *Id.* He found, however, that an accident was “unlikely.” Gov’t Exh. 3. Because the mine is small, there were few miners exposed to the hazard, and the miners all knew one another and where each miner worked. Tr. 107. Brooks therefore believed that the likelihood of a miner being hurt due to the violation “was pretty slim.” *Id.*

Nonetheless, in Brooks' view, Gibson should have known about the miners' failure to follow proper lock out/tag out procedures because the standard is "fairly plain," the condition was "fairly obvious" and Gibson had a training program covering lock out/tag out requirements and was familiar with the requirements. Tr. 109.

Gibson asked Brooks if any names were written on the sides of the locks, and Brooks stated that he could not recall. Tr. 114, 127.

THE VIOLATION, ITS GRAVITY, AND THE COMPANY'S NEGLIGENCE

Section 56.12016 requires that before mechanical work is done on electrically-powered equipment, "[p]ower switches shall be locked out" and "suitable warning notices shall be posted at the power switch and signed by the individuals who are to do the work." Brooks' testimony and his contemporaneous notes establish that work was being done on the electrically powered crusher and although the electricity to the plant was locked out, no signed tags were in place warning that work was being done on the plant and identifying those doing the work. Gov't Exh. 3 at 2. In other words, the power switch for the crusher was not properly tagged out. Tr. 106.

The violation was very serious in that a failure to follow proper lock out/tag out procedures could lead to the power being restored while maintenance work was ongoing and when a miner was in the vicinity of the plant's moving parts. A miner easily could be seriously injured or killed. Tr. 106. However, as Brooks explained and found, such an accident was unlikely. *Id.* Gov't Exh. 3 at 2. The fact that very few miners worked at the mine and that the miners were aware of one another's presence and assigned tasks significantly reduced the chances power would be mistakenly restored to the plant. Tr. 106.

The violation was the result of moderate negligence on Ronald's part. Brooks acknowledged the company trained its miners in lock out/tag out procedures. Tr. 109. Nonetheless, the court accepts Brooks' characterization of the lack of signed warning notices as "fairly obvious." Tr. 109. Gibson should have recognized the violation and corrected it. He did not. Thus, he, and through him, the company, failed to meet the standard of care required.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>
8566008	3/16/2012	56.20008

The citation states:

At the mine-site . . . toilet facilities readily accessible to mine personnel and truck drivers was [(sic)] not provided. There is a crushing plant set up and at least one miner works on-site, running the plant, doing maintenance or loading trucks, sometimes for 8-hours or more at a time. The nearest toilet is located in a private residence approximately 400 yards away. The renters have dogs that run

free and whether the toilet there is available is uncertain. Were a miner to have an accident because conveniently located and accessible sanitary facilities did not exist an injury could result.

Gov't Exh. 5.

According to Brooks, during the course of the inspection on March 16, he asked Gibson if there was a port-a-john at the mine. Brooks stated that Gibson responded:

he didn't think he needed to have one . . . because he owns a . . . [nearby] house And that he has permission to go in there and use the bathroom. And I think at that time I asked him who lives in the house and he said there's renters there but they won't mind. And then . . . I made a note that there were a couple of dogs running around the house. And this is some distance from the mine site . . . 400 yards.^[7] And there wasn't much of a path going across the field[.]

Tr. 119.

In the inspector's view, the conditions did not meet the requirements of the standard, which provides that toilet facilities be "compatible with the mine operations and . . . [that they be] readily accessible to mine personnel." 30 C.F.R. §56.20008(a). Brooks' finding that there was no "readily accessible" sanitary facility at the mine was based on the fact that there was no port-a-john at the mine, that the rental house was approximately 400 yards away, and that the renter's dogs were not leashed. Tr. 121. Brooks concluded that although the condition was unlikely to result in an injury (Tr. 122-123), Gibson should have known that the off-site house did not meet that standard and therefore that the company, through Gibson, was moderately negligent. Tr. 124, Gov't Exh. 5.

THE VIOLATION, ITS GRAVITY, AND THE COMPANY'S NEGLIGENCE

Brooks was a credible witness and the court finds the conditions, which are restated in his contemporaneous notes, existed as he described. *See* Gov't. Exh. 5. Further, the court agrees with Brooks that the "arrangement" to use the bathroom at the rental house did not comport with the standard in that the bathroom was not "readily accessible." Even if the house was 100 yards from the mine, as suggested by Gibson (Tr. 125), the presence of the unleashed dogs hindered miners' access to the bathroom. The court also agrees with Brooks that the violation was unlikely to cause an accident. Gov't Exh. 5. The violation was not serious, and the court further agrees with the inspector that Ronald's negligence was "moderate." *Id.*, *Id.* at 2. The court has no doubt that

⁷ When asked on cross examination if the rental house was approximately 100 yards from the mine, rather than 400 yards, Brooks responded that he "didn't think so." Tr. 125.

Gibson genuinely believed the house was suitable and in compliance, but, as the court has found, the presence of the unleashed dogs alone should have alerted him to his error.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>
8566009	3/16/2012	56.15004

The citation states:

A miner was observed doing maintenance work around the crusher/screen plant at the Parke Road mine site when he was not wearing safety glasses or other eye protection. He was doing maintenance at the time and using tools where there could be impact or abrasion. The plant which normally produces crushed rock was down for maintenance at the time. This is a windy location and there is dust that gets blown around and fly rock is generated by the crusher, screens and loading operations. When questioned, the miner stated he didn't like wearing eye protection as it's too hard to keep clean and admitted he didn't always wear safety glasses when running the plant. Were a miner to be struck in the eye because he was not wearing eye-protection a serious injury could result.

Gov't Exh. 6.

Brooks testified that he issued the citation because during the inspection he saw miners who were not wearing eye protection while working in a location where there might be a hazard to the miners' eyes.⁸ Tr. 127, 136. The miners were Gibson and another man who was working with him.⁹ They were engaged in maintenance and repair work. Brooks also noticed dust being picked up by the wind where the men were working. He believed that the dust posed a hazard to the men's unprotected eyes. Tr. 128, 139. Brooks therefore cited the company for a violation of section 56.15004, a mandatory safety standard requiring persons to wear safety glasses when in or around an area of a mine where a hazard exists which could cause injury to their unprotected eyes. By failing to wear eye protection, the miners exposed themselves to the possibility of a foreign object striking one or both of their eyes. Tr. 127-128. Brooks testified that he asked Gibson why he was not wearing eye protection, and Gibson responded that "he didn't like wearing eye protection as [it was] too hard to keep clean." Tr. 129. Brooks stated that Gibson also told him that he didn't always wear safety glasses when running the plant. *Id.*

⁸ Brooks stated he was alerted to look for possible violations of section 56.15004 by talking to Nichols about working conditions at the mine. Tr. 136.

⁹ Although the citation and Brooks' notes restrict the allegation to one unnamed miner, Brooks in his testimony made clear that he saw two miners who in his opinion violated the standard.

Brooks found the condition to be S&S. He explained that he did so because he saw the miners working in conditions that could have resulted in scratched corneas “or worse.” Tr. 134. Brooks also feared that chips from rocks flying off the crushing equipment could lodge in the miners’ eyes, although Brooks admitted that he did not see any fly rock while the men were working around the equipment. Tr. 132.

He believed that the company was moderately negligent in not requiring the miners to wear safety glasses. Brooks stated that Gibson “didn’t do everything in his power to make sure that everyone on that site was wearing safety glasses.” Tr. 135. Brooks felt that most people would think there was an eye protection problem at the mine given the dust and other flying material. Tr. 136.

**THE VIOLATION, ITS S&S NATURE, ITS GRAVITY,
AND THE COMPANY’S NEGLIGENCE**

The citation charges the company violated section 56.15004, and the evidence more than proves the violation. Brooks’ testimony that the area where the miners were working was very dusty was not refuted, and the court finds it to be a fact. Nor was his testimony contradicted that the miners were not wearing safety glasses even though the dust posed a hazard to their unprotected eyes. Tr. 128, 139. On the basis of these facts, the court finds a violation of section 56.15004.

The court further finds that the violation was both S&S and serious. The court has found a violation of section 56.15004. The court further finds that the discrete health hazard presented by the violation was damage to the eyes of the miners who chose not to wear eye protection. As Brooks observed, scratched corneas or worse could have been the result. Tr. 134. The court concludes that assuming continued maintenance activities in the blowing dust, it was reasonably likely that the lack of eye protection would cause at least one scratched cornea. This is especially true as the court credits Brooks’ testimony that Gibson said that he did not like to wear safety glasses because they were too hard to keep clean and that he did not always wear them when running the plant. Tr. 129. The impairment of vision that would result is a serious injury. The fact that a serious injury could result from the violation means that the violation itself was serious as well as S&S.

The court further finds that the company’s negligence was high. Brooks maintained that Gibson “didn’t do everything in his power to make sure that everyone on that site was wearing safety glasses.” Tr. 135. This is undoubtedly true, and the evidence supports finding that Gibson was still more culpable. He was one of the miners who worked in the swirling dust without safety glasses. Tr. 129. As the on-site manager, he was called to a high standard of care, one that he utterly failed to meet.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>
8566013	3/20/2012	46.6(a)

The citation, as modified, states:

This violation occurred on 3/12/12. A miner working at the mine was put to work doing maintenance and repair procedures and other activities without first being given new miner training. Two other miners were working at the mine at the time. The [Mine Act] declares that an untrained miner is a hazard to himself and others. Were an accident to occur because a miner was not trained a serious injury could result.

Gov't Exh. 7.

As previously described, Brooks met with Nichols at Nichols' home. Tr. 138-139, 142. During the course of their meeting, Nichols told Brooks that before he started working at the mine, he was not given any training. Tr. 144-146. Following their talk, Brooks visited the mine and issued a citation alleging the company violated section 46.6(a) by putting Nichols to work without first giving him newly employed experienced miner training as required by the regulation. Tr. 142-143; Gov't Exh. 7. Brooks issued the citation despite the fact that the company maintained records purporting to show that Nichols had in fact been trained. Brooks identified a document titled "New Task Training Record/Certificate." Gov't Exh. 9; Tr. 146. The form states that it pertains to Nichols. Brooks testified that he saw the form at the mine although he could not recall when. Tr. 146. The form, which is dated March 12, 2012, indicates the subjects covered during the purported training and the time spent on training for each specified piece of equipment. Gov't Exh. 9. Brooks noted that the form lists all of the equipment at the mine site and indicates that Nichols was trained on everything listed. Tr. 147; *See* Gov't Exh. 9. However, Brooks also noted that although the form has a space titled "Miner's Initials," Nichols's initials do not appear anywhere on the document.¹⁰ Tr. 148.

In addition, Brooks identified a document entitled "Site-Specific Hazard Awareness Training Record/Certificate." Gov't Exh. 9 at 2. Brooks noted that the document is signed by Gibson and that it indicates Nichols was given site-specific training for 45 minutes on March 12. Tr. 148-149. Further, Brooks identified a document titled, "New Miner Training Record/Certificate," which is signed by Gibson and which indicates that Nichols received almost 14 hours of training on March 12. Gov't Exh. 9 at 3. Adding up all of the training that the forms indicate was given to Nichols on March 12, Brooks calculated that Nichols received 21 hours of training.¹¹ Tr. 150. Brooks was skeptical the forms reflect the truth. Brooks stated:

[Nichols] says he only worked between nine and 14 hours total. And he described much of that time

¹⁰ Brooks acknowledged that there is no regulatory requirement that miners initial or otherwise sign such a form. Tr. 148.

¹¹ The three certificates actually indicate that a total of 1,300 minutes, or approximately 21½ hours, was devoted to training Nichols on March 12. Gov't Exh 9 at 1-3.

being spent inside the crusher or working around the plant while the plant was running. So I don't see how he could have possibly received this much training. And certainly not on [March 12] So, something's not right.

Tr. 150.

Although Brooks agreed it is theoretically possible to give a miner 21 hours of training in a day, he stated that he found it "unlikely." Tr. 150. However, Brooks also agreed that it is permissible to give training on several pieces of equipment at the same time and that there is nothing in the regulations stating how long the training must be. Tr. 158. The regulations simply require that the training must be "adequate." *Id.* Given the possibility of the overlap in hours, Brooks could not "say for sure if [Gibson] did or didn't provide the training." Tr. 159.

Gibson, on the other hand, was adamant that he gave Nichols the required newly employed experienced miner and site specific training. He stated, "[T]hat's exactly what we done." Tr. 160. He testified he provided Nichols with an introduction to the mine that was site specific, he gave Nichols a tour of the mine, he instructed him on recognizing and avoiding electrical hazards, he reviewed the mine's emergency medical procedures with Nichols, he reviewed the mine's emergency evacuation plans, he talked to Nichols about traffic patterns and control of mobile equipment, and he spoke with Nichols about hazardous materials on the work site. Tr. 274-275. According to Gibson, all of the training was given on March 12 while the crusher was being set up. Tr. 276. But, when asked if he gave Nichols instructions on his statutory rights under the Act, Gibson candidly stated he did not. Tr. 275. (He tartly commented that Nichols "knew those evidently." *Id.*) Nor did he explain the company's rules for reporting hazards. *Id.* ("I don't think I did. I don't think I understand that one." *Id.*)

Brooks found that the violation was reasonably likely to result in fatal injuries to Nichols. Gov't Exh. 7; Tr. 153. He stated that an untrained miner is a "hazard to himself and others." *Id.* He noted that Nichols had been exposed to the various hazards that he, Brooks, had found, while Nichols worked as an untrained miner.¹² Brooks thought it reasonable to expect a fatal injury to

¹² Brooks listed the hazards as:

The [hazard] of objects getting in his eyes. The hazard of being inside the [crusher] without it being properly locked out. The hazard of the tags being missing on the main generator. The [hazard] of fly rock when he was down on the ground. The [hazard] of not having a port-a-john in place[and the hazard caused by] guards that were missing.

Tr. 153.

occur as a result of the lack of training. Tr. 155, Gov't Exh. 7. Brooks was especially concerned about the company's alleged failure to follow required lock out/tag out procedures while Nichols was inside the crusher and about Nichols being struck by fly rock when working near the crusher or being entangled in the crusher's rolls. Tr. 156.

Brooks believed the company was moderately negligent. Gibson had a training plan in place, as well as policies regarding training. Brooks did not think that Gibson had intentionally denied Nichols training. Rather, he believed that the need to train Nichols had been "overlooked." Tr. 157.

**THE VIOLATION, ITS S&S NATURE, ITS GRAVITY,
AND THE COMPANY'S NEGLIGENCE**

Section 46.6(a) requires an operator to provide a newly employed experienced miner with specific training before the miner begins work. Seven areas of required training are detailed: (1) an introduction to the work environment; (2) recognition and avoidance of electrical and other hazards; (3) a review of emergency medical procedures; (4) instructions in the health and safety aspects of the tasks to be assigned; (5) instruction on the statutory rights of miners; (6) a review and description of the line of authority of supervisors and miners' representatives and their responsibilities; and (7) an introduction to the rules and procedures for reporting hazards. 30 C.F.R. §46.6(b)(1)-(7). The court concludes the evidence establishes a violation of the standard, but that the violation was not as extensive as the Secretary contends.

The Secretary's allegation, as expressed in the citation, appears to be that Nichols was put to work without being given any new miner training. Gov't Exh. 7. The court finds that the evidence is insufficient to make such a finding. The burden of proving the allegation is on the Secretary, and although Nichols testified he was given no training (Tr. 24), Gibson was certain that this was not so, that Nichols was provided with training. Tr. 160, 174-175. For his part, Brooks admitted that he "could not say for sure" if the required training was or was not provided. Tr. 159. The court finds the evidence on the issue of the company failing to provide all required training before Nichols was put to work to be at best in equipoise, which means the Secretary failed to carry his burden.

However, subsumed within the allegation of an all-encompassing violation of the standard, is the allegation that particular parts of the standard were violated, and here Gibson's admissions support finding a limited violation. Section 46(b)(5) requires that a newly employed experienced miner be instructed on the statutory rights of miners under the Act. Gibson admitted that Nichols was not trained in this regard. Tr. 275. Section 46.6(b)(7) requires that a newly employed experienced miner be introduced to the company's rules and procedures for reporting hazards. Gibson also admitted that Nichols was not trained in this regard. *Id.* Therefore, the court finds that in these two instances, Ronald violated section 46.6(a).

The court also finds that the violation was neither S&S nor serious. In neither instance were the hazards contributed to by the violation reasonably likely to lead to injuries of a reasonably serious nature. It is important to recognize that Nichols was a knowledgeable, experienced miner, not a starry-eyed neophyte. Nichols was familiar with the Mine Act and MSHA's role in enforcement. He knew how to report hazards to the agency and he also knew if

he chose to do so, he could report them to Gibson. It is therefore unlikely the violation would have led to any injuries at the mine.

The court further finds that the company's negligence was low. As Brooks acknowledged, the company had a training plan and training policies in place. Tr.157. The court agrees with Brooks that Gibson's failure to instruct Nichols on his statutory rights and his failure to introduce Nichols to the company's rules and procedures for reporting hazards was not intentional. Tr. 157. Gibson was in a hurry to begin crushing, and the court believes that Brooks was probably correct when he stated that Gibson "overlooked" his duty to fully comply with section 46.6(b). Tr. 157. Thus, while the record supports finding that Gibson did not meet the standard of care required of him, it also supports finding that he was not far off the mark.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>
8566010	3/20/2012	56.12016

The citation states:

A violation occurred on 3/12/21012. Miners were reported to have been working inside and around exposed moving parts of the . . . horizontal impactor/crusher without it being properly locked out. Power to the crusher is provided by a diesel drive motor (direct drive) that is started with an electric starter. According to a witness, the key was in the ignition at the time and the functional starting mechanism was beyond the immediate physical control of the miners doing the work. Were an accident to happen because the crusher was not adequately locked out while miners were working inside, a serious injury could result.

Gov't Exh. 10.

Section 56.12016 requires in part that "Electrically powered . . . equipment be deenergized before mechanical work is done on such equipment." It also requires that "[p]ower switches . . . be locked out or other measures taken which shall prevent the equipment from being energized without the knowledge of the individuals working on [the equipment]." According to Brooks, who based the alleged violation upon what Nichols told him, the company violated the standard by leaving the key for starting the crusher in the ignition while Nichols was working inside the equipment. Tr. 165. Brooks stated:

He told me that the key was in the ignition while he was working inside. And that he didn't have

control over the starting mechanism for that particular unit while he was inside it.

Tr. 166.¹³

As Brooks understood it, Nichols was “doing maintenance and repairs to the inside portion of the . . . [crusher].” Tr. 166. Brooks assumed that Gibson ordered Nichols to work inside the machine where Nichols was exposed to a “significant hazard.” Tr. 166. With the key in the ignition, the impactor’s starting mechanism was not disabled. Because the unit could be started with the key, the standard was violated. *Id.* To comply with the standard, the key should have been “pulled out of the ignition and [been] in [Nichols’] possession.” Tr. 168. If someone turned the key while it was in the ignition, the equipment’s drive motor would start, its clutch mechanism would divert the drive motor’s energy to the v-belts, and the crusher would begin to turn. Tr. 174. At that point, Nichols would have been “dragged forward on the conveyor belt,” caught in the mechanism, and seriously injured or killed. Tr. 175; *see also* Tr. 171. Recognizing that he based the alleged violation solely upon what Nichols said, Brooks added that he found Nichols credible because, “he knew enough about mining . . . to convince me that he was credible in the events that he was describing.” Tr. 179.

Brooks concluded that a very bad accident was “reasonably likely” to befall Nichols because there was nothing to prevent one from happening. Tr. 180. Brooks also found that the operator, through Gibson, was moderately negligent in allowing the violation. He noted that Gibson is qualified to train miners and that as a qualified trainer, he is supposed to know the requirements of the law. Tr. 182. He should have known that a miner cannot go into a crusher without the crusher’s key in his or her pocket. *Id.* Brooks described the hazard created by the violation as “pretty obvious.” Tr. 183. However, he did not believe that Gibson intended to expose Nichols to harm. Tr. 183.

THE VIOLATION

Brooks was clear that he based the alleged violation solely upon what Nichols told him. Tr. 178. He found Nichols credible in this regard, and so does the court. As Brooks stated, Nichols’ story was not “a story most people would make up.” *Id.* Moreover, Gibson did nothing to rebut Brooks’ version of the facts. Although at the time of the alleged violation another miner was working on site, Gibson did not offer testimony by the miner as to the location of the key. Nor did he otherwise refute Brooks’ testimony. The court therefore finds that on March 12, 2012, Nichols was working inside the crusher and the key to the diesel motor that powered the equipment and caused it to move was in the motor’s ignition. There was nothing to “prevent the [crusher] from being energized without the knowledge of the person working on [or in] it.” Section 56.12016. Ronald clearly violated the standard, as Brooks found.

¹³ Brooks was asked if he really believed that Nichols was working inside the crusher. Brooks replied that he did. Brooks stated, “[H]e told me he was in there. And I don’t have any reason not to believe him.” He observed that it was “not a story most people would make up.” Tr. 178.

S&S AND GRAVITY

Brooks found the violation was S&S and reasonably likely to result in a fatal injury to Nichols. Gov't Exh. 10. The court agrees. There was a violation. There was a discrete safety hazard contributed to by the violation, in that with the key in the ignition, the compactor could have been started unbeknownst to Nichols, who being unable to quickly escape, easily could have been maimed or killed. Tr. 175, *see also* Tr. 171. There also was a reasonable likelihood the hazard contributed to (the inadvertent starting of the crusher while Nichols was inside) would result in an injury. First, as mining continued and Nichols worked inside the crusher, he was not visible to anyone starting the crusher's motor. Second, the rush to start production at the facility, increased the likelihood the crusher would be started without a careful determination of Nichols' whereabouts. Once the key was turned and the crusher began operating, Nichols would have been in dire danger of dismemberment or death. Taken together these factors establish the S&S nature of the violation.

Moreover, when considered in the context of the result of the injuries that were likely to occur (dismemberment or death) due to the violation, the court concludes that the violation was very serious.

NEGLIGENCE

Brooks found that the company was moderately negligent in allowing the violation (Gov't Exh. 10, Tr. 183), but the court, having considered the evidence, finds that the company's negligence was high. For all intents and purposes, Gibson was acting for the company. He was present when the violation took place. He placed one of his employees in a location and in a situation that easily could have led to the employee's serious injury or death. These factors mean that Gibson, and hence the company, failed to meet the high standard of care expected of him. Moreover, there were no mitigating circumstance. Gibson knew where Nichols was and he knew or should have known where the key was located. Further, Gibson was qualified to train his miners in the safety procedures called for by the Act and its regulations. Tr. 182. He was aware, knew, or should have been aware of what section 56.12016 requires. Despite this, he allowed the very serious violation to take place under his nose.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>
8566015	3/20/2012	56.14107(a)

The citation states:

This viola[tion] occurred on 3/12/2012 and was reported to MSHA during a hazard complaint investigation. A miner accessed an elevated platform next to the . . . crusher to grease the shaft bearing while the shaft was running. The grease fittings were located near the exposed shaft end and shaft bearing and while there the miner was close (within 12 inches) to the

unguarded rotating drum roller. Were a miner to contact the moving parts a serious injury could result. The Operator stated that they only do this when the plant is shut down and locked out.

Gov't Exh. 12.

Shortly after Nichols wrote the citation for the violation of the lockout procedures (Citation No. 8566010), he wrote Citation No. 8566015, alleging a violation of section 56.14107(a) Tr. 189; Gov't Exh. 12. The standard provides that all moving machine parts must be guarded against contact.¹⁴ Nichols told Brooks that on March 12 he encountered an entanglement hazard when he was directed to climb on the crusher and stand inches from its moving parts so he could grease a bearing while the crusher was operating.¹⁵ Tr. 193. There was, according to Nichols, no guard on the crusher's roller and its bearing.¹⁶ Tr. 195. When the machine is operating the shaft in which the bearing is located spins. Tr. 193. Gov't Exh. 12 at 5. To grease the bearing, Nichols had to stand on a platform adjacent to the unguarded and spinning bearing and shaft. Tr. 191-192. This put him inches from the moving parts (Tr. 198) and exposed Nichols to the hazard of becoming entangled in the parts. Tr. 192. Once he was caught by the moving bearing or shaft, Nichols could have been drawn into the roller's pinch point. *Id.* Brooks believed Nichols would have been lucky to only lose an arm. Tr. 193. Brooks stated that he was not surprised Nichols reported the condition because, in fact, the mine was not a safe place to work. Tr. 199. Brooks maintained that if Nichols had not told him about the condition, he still would have cited it based on what he saw when he inspected the mine. Tr. 194. He described what he observed as an "exposed moving machine part next to an area [which] somebody could access." Tr. 195.

Brooks believed that working close to the moving parts made inadvertent contact reasonably likely to occur. Tr. 193. It would take only a "momentary lapse of consciousness" for Nichols to place his hand on the shaft or for Nichols to slip and fall onto the parts. Tr. 193. In addition, Nichols said that Gibson instructed him to grease the bearing of the shaft. Tr. 196.

¹⁴ 30 CFR §56.14107(a) states in full:

Moving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and take-up pulleys, flywheels, couplings, shafts, fan blades; and similar moving machine parts that can cause injury.

¹⁵ Brooks wrote "within 12 inches" on the citation. Gov't Exh. 12. Nichols testified the distance was within six inches. Tr. 193, 198. When determining the existence of the violation and the hazard it presented, the court finds the difference in the measurements immaterial.

¹⁶ Brooks chose to believe Nichols because he "saw other things [at the mine] that confirmed [Nichols's] honesty." Tr. 235. Brooks saw fresh grease in the vicinity of the bearing. Tr. 195. He also found that the moving parts lacked a guard, just as Nichols maintained. *Id.*

Therefore, in Brooks' opinion, Gibson should have known about the lack of a guard. It was visually obvious and other moving machine parts were guarded. *Id.*

Nelson maintained that during the compliance assistance visit, he specifically told Gibson the area needed to be guarded. Tr. 266. Gibson, however, disputed Nelson's account. Gibson asserted that the unguarded area about which Brooks and Nelson testified was not the area cited by Brooks. Tr. 268.

To abate the condition the company installed remote grease lines, thus eliminating the need for a miner to be adjacent to the moving parts. Tr. 197. Gibson also eliminated the platform where Nichols stood and retrained miners about exposure to moving parts. *Id.*

THE VIOLATION

The record fully supports finding the company violated section 56.14107 as alleged. Brooks faithfully reiterated what Nichols told him, and what Nichols said was confirmed by what Brooks saw. Tr. 195. The court finds that a miner could come within a few inches of the unguarded moving parts and that the parts could cause a serious injury if they were contacted by the miner. The court concludes that the cited area should have been guarded. It was not.

S&S and GRAVITY

The violation was both S&S and serious. The first element of the *Mathies* test was established in that the company violated the standard. The second element – that is a discrete measure of danger to safety contributed to by the violation – also was met. The lack of a guard to prevent access to the moving parts meant that a miner was subject to a severe injury should the miner become entangled in the parts. The third element – a reasonable likelihood that the hazard contributed to will result in an injury – was established as well. The work assigned to Nichols put him within inches of the unguarded moving part. While there is no evidence his footing was insecure or that he was otherwise likely to slip, the court takes judicial notice of the fact that being so close to the unguarded, moving parts meant that Nichols' clothing or hand was likely to contact the moving parts. A small move in the wrong direction, a dropped tool, or simply a moment of inattention, and Nichols would have been caught. Finally, Brooks' testimony clearly established that the fourth element of the *Mathies* test was met and that the violation was serious. Brooks noted, and there is really no dispute, that once entangled in the moving parts, Nichols would have been lucky if he only lost an arm. Tr. 193.

NEGLIGENCE

Brooks found the company was moderately negligent, and the court agrees. As Brooks testified, Gibson should have known of the violation. Gibson assigned Nichols to grease the equipment. Tr.196. Nelson and Gibson clashed over whether Nelson advised Gibson the area needed to be guarded, and the court finds there is insufficient corroborative evidence to determine who is correct. Tr. 266, 268. Therefore, the court concludes that the evidence does not establish the company was on actual notice guarding was required. The court finds, as Brooks testified, that other moving machine parts were guarded as required (Tr. 196) and notes there is

no evidence that the company habitually failed to comply. Nonetheless, the lack of a guard was visually obvious. Had the company exercised the care required by the circumstances, a guard would have been in place.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>
8566011	3/20/2012	56.15004

The citation states:

This violation occurred on 3/12/2012. At least 2 [m]iners were reported to have been seen working around and inside the . . . crusher where there was dirt and airborne dust and possible metal fragments that could be knocked loose and present a hazard to the face and eyes. They were hard-face welding and replacing worn metal plates at the time. Safety glasses or goggles were not being worn and reportedly not provided on-site. Were an accident to occur because the miners were not wearing eye protection when working in a hazardous location a serious injury could result.

Gov't Exh. 13.

Brooks issued the citation for an alleged violation of mandatory safety standard C.F.R. §56.15004.¹⁷ When asked why, Brooks replied, "Nichols told me that he had observed miners working on [the] impact crusher without wearing safety glasses." Tr. 202. He further stated, "[T]hey weren't wearing eye protection. That's what the violation is." Tr. 203. Brooks emphasized that Nichols told him when he, Nichols, was working at and in the crusher, dirt and debris were "raining down on him." Tr. 203. In addition, when the crusher was operating there was a hazard to unprotected eyes from fly rock and dust. Tr. 204. The dust was especially prevalent when the crusher was started, something that Brooks also observed at other crusher installations. *Id.* Nichols described the dust as "very bad," and he told Brooks that other miners commented about the problem. Tr. 205. Brooks stated that he too believed that the dust was excessive, that during his inspections of the site Brooks had seen thick, airborne dust "numerous times." Tr. 206.

¹⁷ 30 C.F.R. §56.15004 states:

All persons shall wear safety glasses, goggles, or face shields or other suitable protective devices when in or around an area of a mine or plant where a hazard exists which could cause injury to unprotected eyes.

Given the hazards presented by the dust and the other things in the air, Nichols concluded that miners who did not wear safety glasses subjected their eyes to injury from foreign objects. Tr. 204. As for himself, Nichols testified that he “wouldn’t think of working around a place like that without safety glasses.” Tr. 206. Brooks stated that earlier he had seen miners who were not wearing eye protection at the site and that this bolstered his belief that Nichols was telling the truth. *Id.* He also noted that he had seen Gibson at the site without eye protection. Tr. 209.

In Brooks’ opinion, the lack of eye protection was likely to lead to a disabling eye injury. Tr. 207. Brooks also found that the failure to wear eye protection was “fairly obvious” and that the company was moderately negligent in allowing the condition to exist. *Id.* In his contemporaneous notes, Brooks wrote that a miner said that he asked Gibson for safety glasses and that Gibson did not respond. Tr. 208, Gov’t Exh. 4 at 11.

**THE VIOLATION, ITS S&S NATURE, ITS GRAVITY,
AND THE COMPANY’S NEGLIGENCE**

The court finds the violation existed as charged. It is true that the government’s allegations are based solely upon what Brooks was told by Nichols – that two miners who were working in and under the crusher were exposed to airborne dirt and dust particles but did not wear safety glasses. Tr. 202, 203; Gov’t Exh. 13 at 3. However, in the court’s opinion, Brooks’ testimony of what he saw and experienced at the mine fully corroborates what Nichols reported. Tr. 204, 206, 209. The court therefore finds that on March 12 two miners were working inside and around the impactor/crusher, and that the eyes of both miners were subject to injury from airborne dirt and dust fragments in that neither miner was wearing safety glasses in violation of section 56.15004.

The violation was both S&S and serious. The *Mathies* requirements have been met. There was a violation. The failure to wear safety glasses while working in an environment where the atmosphere contained airborne dirt and dust particles created a discrete safety hazard, that is the danger of an eye injury or injures from the particles getting into the miners’ eye or eyes. Given the prevalence of the airborne particles, especially the dust (*see* Tr. 204, 205, 206), it was reasonably likely an eye injury or injuries would occur. Further, a scratched cornea or worse can cause lost time at work. Such injuries are therefore reasonably serious, and the violation itself was serious.

The court also agrees with Brooks that the violation was the result of the company’s moderate negligence. The fact that the miners were not wearing eye protection was obvious. The lack of compliance by the miners should have been noted and corrected. It is fair to state that the company did not meet the standard of care required by the circumstances.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>
8566012	3/20/2012	56.15002

The citation states:

A violation occurred on 3/12/2012. At least one miner was reported to be working around and on the crusher/

screen plant where the hazard of flying or falling rock was apparent, without having a hard hat on. The miner was observed standing on the elevated service deck next to a screen and adjacent to the rolls crusher. He was wearing a soft ball-cap type hat. He was also walking and working around other plant locations where a similar hazard existed. Were a miner to be struck on the head when not wearing a hard-hat a serious injury could result.

Gov't Exh. 14.¹⁸

Brooks testified that he issued the citation because Nichols told him that he, Nichols, and his co-worker, Dunsing, were working on a platform adjacent to the screen deck of the crusher and that Dunsing was not wearing a hard hat. Tr. 211-212. Brooks understood from Nichols that rather than a hard hat, Dunsing was wearing a soft baseball-type cap. Tr. 215. He also understood that Dunsing worked without a hard hat for "several hours." *Id.*

By virtue of being adjacent to the screen deck, Brooks believed that Dunsing was in danger of being hit in the head by fly rock. Tr. 213. Brooks testified that the rock would have come out of the crusher or would have been "kicked out" by the crusher's rollers. Tr. 214. He further observed that when Dunsing climbed off the platform, he would have been even more exposed to dangerous fly rock than he was when standing on the platform. Tr. 214.

Because of the size of some of the fly rock (up to three inches in diameter. Tr. 116), Brooks found that it was reasonably likely Dunsing would have been killed if he were hit on the head. Tr. 215.; Gov't Exh. 14. He testified that it was "fairly obvious" Dunsing was working without a hard hat, and he found that the company was moderately negligent. Tr. 216.

THE VIOLATION

The court finds that the Secretary failed to prove the violation. Obviously, Brooks did not see Nichols and/or Dunsing working without a hard hat on March 12. Rather, the allegation of a violation is based solely upon what Nichols told Brooks happened on March 12. Nichols' motives in reporting the alleged violations were not altruistic, to say the least. Nichols had been fired, and he was angry at his former employer. Moreover, Nichols did not appear to testify, but rather, and at the Secretary's request, offered testimony over the telephone, an arrangement that made it difficult to judge his credibility. The court therefore concludes that allegations based solely on events related by Nichols require at least some corroboration, and unlike other alleged

¹⁸ 30 C.F.R. §56.15002 states:

All persons shall wear suitable hard hats when in or around a mine or plant where falling objects may create a hazard.

violations based on Nichols' rendition of events, the Secretary in this instance offered no reliable corroborating evidence.

The Secretary tried but failed to provide such evidence. Brooks testified that he thought he remembered that during his inspection, he saw Dunsing working without a hard hat. However, Gibson then reminded Brooks that Dunsing was fired one week before Brooks arrived at the mine. Tr. 221. Upon being reminded, Brooks stated that he "guessed" he had not seen Dunsing working without a hard hat. Tr. 221.

Brooks also testified that when he spoke with Dunsing on the telephone, Dunsing told Brooks he did not want to "cooperate" with Brooks. Tr. 222. Dunsing said that Brooks was being "used by an employee who got fired because he didn't know how to do his job correctly." Tr. 223. Whether or not the statement is true, Dunsing's response highlights why it was necessary for the Secretary to corroborate Nichols' allegations.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>
8566017	3/21/2012	56.14107(a)

The citation states:

On the Pioneer 40x48 portable rolls/screen plant, [t]he tail-pulley for the conveyor was not guarded on the west side. Miners work in the area when the plant is being run, however the pulley is partially guarded by its position behind the frame and no miners work close by. Were a miner to contact the moving parts through the triangular 20-inch by 24-inch opening a serious injury could result.

Gov't Exh. 16.

Brooks testified that he issued the citation because the company failed to guard a moving pulley at the front of the mine's rolls crusher. Tr. 228; *see* Gov't Exh. 16 at 4. Brooks explained that nothing was in place to prevent a miner from contacting the moving part.¹⁹ Tr. 228. Brooks feared that a miner could inadvertently touch the pulley, become entangled in it, and be permanently disabled ("[A]t the least it would probably tear your arm off." Tr. 230) or be killed. Tr. 229, 230. However, he also believed that an injury or a fatality was "unlikely," because, as he testified, "nobody generally works around" the area. Tr. 230. The only real exposure to the hazard came when the pulley's bearings had to be greased (*Id.*), and while there was some evidence that miners greased the pulley when the crusher was running, Brooks noted that

¹⁹ The pulley is clearly visible in Government Exhibit 16 at 4. Brooks drew a box in blue around the unguarded area. Gov't Exh. 16 at 4; Tr. 229; *see also* Gov't Exh. 12 at 5 (area circled in red); Tr. 229-230.

Nichols did not report that miners had to continuously grease it.²⁰ Tr. 230-232. In addition to inadvertently extending a hand into the pulley's pinch point, it was possible, according to Brooks, for a miner to trip on the rocks at the base of the crusher and fall into the pinch point. Tr. 231.

Brooks found that the lack of a guard was due to the company's moderate negligence. Gov't Exh. 16; Tr. 233. The unguarded area was visually obvious. Tr. 233. He also speculated that holes in the frame of the crusher below the unguarded area were an indication that a guard had once been affixed to the frame. *Id.* On cross examination, Gibson asked Brooks why an MSHA inspector who was at the mine the previous week did not cite Ronald for the violation. Brooks replied, "I don't know, you'll have to ask him." Tr. 234; *see also* Tr. 239.

THE VIOLATION, ITS GRAVITY, AND THE COMPANY'S NEGLIGENCE

The court finds that the violation existed as charged. The cited pulley was a moving machine part. The pulley could have been contacted rather easily in that, as Brooks testified, there was nothing to block access to it. Tr. 228; *see* Gov't Exh. 16 at 4 (area within hand drawn blue box). Moreover, the evidence establishes that miners at least occasionally had to work in the vicinity of the opening and grease the pulley. Tr. 230-232. While the remote fitting meant that a miner greasing the pulley was unlikely to contact the moving pulley while greasing it, the miner could, as Brooks feared, trip or slip on rocks at the base of the crusher and fall forward toward the pulley in such a way that the miner's hand, arm, and/or clothing would have been caught. Tr. 231. The pulley should have been guarded.

Brooks thought that the unguarded pulley was unlikely to cause a disabling injury (Gov't Exh. 16), and the court agrees. The very limited exposure of miners to the hazard supports Brooks' opinion. Because of the limited exposure, the court finds that this was not a serious violation.

The court further finds that the company's negligence in allowing the violation was low. Brooks noted that the lack of a guard was visually obvious. Tr. 333. However, the remote grease fitting to some extent disguised the fact that a potential hazard lurked beyond the fitting, which may be why an MSHA inspector who visited the mine prior to Brooks may not have issued a citation for the lack of a guard.²¹ Tr. 234, 239. Taken in its totality, the evidence suggests that the violative condition was easy to miss.

²⁰ The extent of even this limited exposure was put into question when Brooks agreed with Gibson that there was a remote grease fitting for the pulley. Tr. 239. Brooks maintained, however, that some exposure remained because the fitting was "not remoted very far." *Id.*

²¹ On the other hand, the "inspection" to which Gibson referred may have been Nelson's compliance assistance visit, a courtesy visit during which citations were not issued. The matter was not clarified, and it is impossible to know.

CITATION NO. DATE 30 C.F.R. §
8566018 3/21/2012 56.14107(a)

The citation states:

On the Pioneer 40 x 48 portable rolls/screen plant, the drive belts and sheaves on the east side were not adequately guarded. While the front and side was substantially guarded, a miner could easily reach behind the guard and contact the moving parts through the 16-inch by 16-inch open area. Miners work around the plant but not close to the hazard. Were a person to come in contact with the moving parts a serious injury could result.

Gov't Exh. 17.

Brooks testified that although there was a guard for the moving parts on the crusher's drive motor, the guard was not high enough to prevent someone from reaching over it and ensnaring his or her arm in the turning shims and v-belts. Tr. 241; Gov't Exh 17 at 4 (area circled in blue); Tr. 244; Gov't Exh. 14 at 4 (upper area circled in red). As stated on the citation, the unguarded area measured approximately 16 inches by 16 inches. *Id.* According to Brooks, a person could slip or trip and fall into the moving parts. Or, a person could accidentally reach over the insufficient guard and not be aware moving parts were located in the area into which he or she reached. Tr. 242.

However, Brooks also agreed that there was limited access to the area because miners only occasionally worked in the vicinity of the drive belts and sheaves on the east side of the crusher. When they did, they were usually doing maintenance or, cleanup work, greasing the shaft bearing, or checking the belts.²² Tr. 242, 245. If such an accident occurred, Brooks thought that the likely result would be a permanently disabling injury, in that the miner would lose a finger, a hand, or an arm. Tr. 243, 246. As Brooks recalled, the unguarded area was "less than shoulder height." Tr. 248.

In Brooks' opinion, the company should have known about the cited condition. Tr. 250. Moreover, Nelson testified that during his compliance assistance visit, he advised Gibson that drive belts and sheaves needed to be guarded, and his testimony was not refuted. Tr. 267.

²² Brooks later agreed that access might be even more limited than he originally envisioned because it was possible the grease tube for the shaft bearing was "remoted out." Tr. 249. He was not sure. *Id.*

**THE VIOLATION, ITS GRAVITY,
AND THE COMPANY'S NEGLIGENCE**

The court finds that the violation existed as charged. The testimony of Brooks establishes that the cited pulley sheave and the belts on the east side of the crusher were not adequately guarded. Tr. 241. No evidence was offered countering Brooks' testimony to this effect, and the court finds that the existing guard did not prevent a miner from inadvertently reaching an arm or hand over the guard and into the moving pulley and belts. The court notes that an opening approximately 16 inches square is more than enough space for a miner to insert his or her hand or arm. *See* Gov't Exh. 16 at 4. Moreover, the opening was not so high as to prevent contact by location. Tr. 248. Further, the testimony establishes that miners occasionally accessed the cited area when they were engaged in maintenance, checking the belts, or greasing the bearings. Tr. 242, 245. These miners were subjected to the hazard of being caught in the moving parts.

However, the court also concludes that exposure was so limited, the violation was not serious. The chance of an injury causing accident actually occurring was exceedingly low because miners only occasionally were in the area and because Brooks admitted that he was not sure that one of the activities he feared would subject miners to contact with the moving parts – greasing the bearings of the pulley – was more than minimally hazardous. *See* n. 23 *infra*.

Finally, the court agrees with Brooks that the violation was due to Ronald's moderate negligence. Gov't Exh. 17; Tr. 250 The lack of a guard was visually obvious. Moreover, because of Nelson's warning, the company was on notice a guard was required. Tr. 267. Had Ronald's management exercised the care required by the circumstances, a guard would have been installed.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>
8566019	3/21/2012	50.30(a)

The citation states:

The operator failed to submit the required 7000-2 Quarterly Report form within 15 days following the end of the quarter. The 3rd quarter of 2011 ended on September 30 and the Quarterly Report due on October 15th was not submitted until October 24, 2011. This is a paperwork violation only.

Gov't Exh. 18.

On March 21, 2012, Brooks cited Ronald for a violation of 30 C.F.R. § 50.30(a), a standard requiring each operator of a mine in which a miner works to submit a quarterly employment report.²³ The citation states that the company failed to submit the required form

²³ 30 C.F.R. §50.30(a) states:

Each operator of a mine in which an individual

(continued...)

within 15 calendar days of the end of the third quarter of 2011. Gov't Exh. 18. The citation goes on to state that it is "a paperwork violation only." *Id.* When issuing the citation, Brooks found that there was no likelihood the failure to submit the form would result in an injury. *Id.* He also found that the failure was the result of the company's low negligence. *Id.*

Gibson stated that he "agreed" with the citation, but he noted that although the information was reported late, it was only "nine days late." Tr. 251.

THE VIOLATION, ITS GRAVITY, AND THE COMPANY'S NEGLIGENCE

After Gibson stated that he agreed with the citation and offered no testimony or other evidence to counter the inspector's gravity and negligence findings, the court found on the record that the violation occurred as charged and that the gravity and negligence of the operator were as described by Brooks. Tr., 251-252. The court affirms these findings.

OTHER CIVIL PENALTY CRITERIA

The court has found violations and it must assess civil penalties taking into account the statutory civil penalty criteria. 30 U.S.C. § 820(i).

HISTORY OF PREVIOUS VIOLATIONS

The Secretary introduced an assessed violation history report that shows in the two years prior to March 16, 2012, two violations were assessed and paid by Ronald. Tr. 120; Gov't Exh. 1. This is a very small history of previous violations.

SIZE OF THE BUSINESS

Although the parties did not reach a stipulation with regard to the size of Ronald's business, and although the company offered no evidence about its size, the court notes that when proposing penalties, the Secretary assigned no penalty points to Ronald due to its size. Petition for Assessment of Civil Penalty, Exh. A. Therefore, based on Exhibit A, the court concludes that Ronald is very small.

ABILITY TO CONTINUE IN BUSINESS

There is confusion in the record regarding this criterion. When asked by the court whether the company agreed that the total of the penalties proposed by the Secretary (\$1,553.00) would not impact the company's ability to continue in business, Gibson answered that "it would

²³ (...continued)

worked during any day of a calendar quarter shall complete a MSHA Form 7000-2 . . . and submit the original to the MSHA Office of Injury and Employment Information, . . . within 15 calendar days after the end of each calendar quarter.

impact it, yes,” and the court responded, “I’ll accept that . . . as a stipulation.” Tr. 17. However, the Secretary never agreed that the proposed penalties would have an impact on the business, and the court wonders if there is a mistake in the transcript and that Gibson actually stated, “it would not impact it,” an answer that seems possible given the court’s response.

In any event, as the court explained at the beginning of the hearing, the company bears the burden of proof on the issue, and Ronald presented no evidence. Tr. 12. Therefore, the court finds that total penalties of up to \$1,553.00 will not affect the company’s ability to continue in business.

GOOD FAITH ABATEMENT

At the hearing, counsel for the Secretary agreed that Ronald had exhibited good faith in abating the alleged violations, and the court so finds.

ASSESSMENT OF PENALTIES

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED PENALTY</u>	<u>ASSESSED PENALTY</u>
8566007	3/16/12	56.12016	\$100	\$200

The court has found that the violation was very serious although an accident was unlikely and that the violation was due to the company’s moderate negligence. Given these findings and the civil penalty criteria discussed above, the court finds that a penalty of \$200 is appropriate. The court has departed from the proposed penalty because of its belief the injury or death that would most likely result if the equipment was started outweighs the fact that it was unlikely the equipment would be started while a miner was working around it.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED PENALTY</u>	<u>ASSESSED PENALTY</u>
8566008	3/16/12	56.20008(a)	\$100	\$100

The court has found that the violation was not serious, that an injury causing accident was unlikely to occur because of the violation, and that the violation was caused by the operator’s moderate negligence. Given these findings and the civil penalty criteria discussed above, the court finds that a penalty of \$100 is appropriate.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED PENALTY</u>	<u>ASSESSED PENALTY</u>
8566009	3/16/12	56.15002	\$100	\$200

The court has found that the violation was serious and that the company’s negligence was high. Given these findings and the civil penalty criteria discussed above, the court finds that a civil penalty of \$200 is appropriate. The court has departed from the proposed penalty because of its belief that the company, as represented by Gibson, utterly failed to meet the standard of care required of it.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED PENALTY</u>	<u>ASSESSED PENALTY</u>
8566013	3/20/12	46.6(a)	\$243	\$100

The court has found that the violation was not serious and that the company's negligence was low. Given these findings and the civil penalty criteria discussed above, the court finds that a civil penalty of \$100 is appropriate. The court has departed from the proposed penalty because of its finding that the violation was less serious than alleged by the Secretary and because the company also was significantly less negligent than the government alleged.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED PENALTY</u>	<u>ASSESSED PENALTY</u>
8566010	3/20/12	56.12016	\$243	\$275

The court has found that the violation was very serious and that the company's negligence was high. Given these findings, the court finds that a civil penalty of \$275 is appropriate. The court has departed from the proposed penalty because it finds the company's level of negligence to be higher than did the inspector.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED PENALTY</u>	<u>ASSESSED PENALTY</u>
8566015	3/20/12	56.14107(a)	\$108	\$108

The court has found that the violation was serious and that the company's negligence was moderate. Given these findings and the civil penalty criteria discussed above, the court finds that a civil penalty of \$108 is appropriate.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED PENALTY</u>	<u>ASSESSED PENALTY</u>
8566011	3/20/12	56.15004	\$108	\$108

The court has found that the violation was serious and that the company's negligence was moderate. Given these findings and the civil penalty criteria discussed above, the court finds that a civil penalty of \$108 is appropriate.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED PENALTY</u>	<u>ASSESSED PENALTY</u>
8566012	3/20/12	56.15002	\$108	\$0

The court has found that the Secretary did not prove the alleged violation.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED PENALTY</u>	<u>ASSESSED PENALTY</u>
8566017	3/21/12	56.14107(a)	\$100	\$75

The court has found that the violation was not serious and that the company's negligence was low. Given these findings and the civil penalty criteria discussed above, the court finds a civil penalty of \$75 is appropriate. The court has departed from the proposed penalty because it finds that the company was less negligent than the government alleged.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED PENALTY</u>	<u>ASSESSED PENALTY</u>
8566018	3/21/12	56.14107(a)	\$100	\$100

The court has found that the violation was not serious and that the company's negligence was moderate. Given these findings and the civil penalty criteria discussed above, the court finds that a civil penalty of \$100 is appropriate.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED PENALTY</u>	<u>ASSESSED PENALTY</u>
8566019	3/21/12	56.14107(a)	\$100	\$100

The court has found that the inspector's gravity and negligence findings are as stated on the citation. Given these findings and the civil penalty criteria discussed above, the court finds that a civil penalty of \$100 is appropriate.

ORDER

Citation No. 8566012 **IS VACATED**, and Citation No. 8566013 **IS MODIFIED** by deleting the S&S finding. Within 30 days of the date of this decision, the company **IS ORDERED** to pay civil penalties that total \$1,366 in satisfaction of the violations found above.²⁴ Upon payment of the penalties, this proceeding **IS DISMISSED**.

/s/ David F. Barbour
David F. Barbour
Administrative Law Judge

Distribution: (Certified Mail)

Sean J. Allen, Esq., U.S. Department of Labor, Office of the Solicitor, 1244 Speer Boulevard, Suite 216, Denver, Colorado 80204

Louie Gibson, Ronald Sand & Gravel, 1221 S. Thorp Highway, Ellensburg, WA 98926

/db

²⁴ Payment shall be sent to : Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O., Box 790390, St. Louis, MO 63179-0390.

ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9950 / FAX: 202-434-9949

October 2, 2014

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA), on behalf
of REGALD ROBBINS,
Complainant,

v.

ALDEN RESOURCES, LLC,
Respondent.

TEMPORARY REINSTATEMENT
PROCEEDING

Docket No. KENT 2014-594-D
BARB-CD-2014-04

Mine ID: 15-17691
Mine: Mine #3

ORDER ON MOTION TO TOLL TEMPORARY REINSTATEMENT ORDER

This case is before me upon an application for temporary reinstatement pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 “(Mine Act”), 30 U.S.C. § 815(c). On July 28, 2014, I granted the Secretary’s *Motion for Temporary Reinstatement* after a hearing conducted in Louisville, Kentucky on July 22, 2014.

On September 19, 2014, Respondent filed a *Motion to Toll Temporary Reinstatement Order*, informing me that the mine where Complainant is employed is in a temporary shutdown and that while several personnel remained on the payroll, 44 of the miners, including Complainant, were informed that they were to be laid off on September 8, 2014.

On September 29, 2014, the Secretary filed a response to Respondent’s motion stating that the Complainant did not wish to oppose Respondent’s motion.

On October 2, 2014, I held a telephone conference with the parties to hear further argument on the motion. Mr. Shelton explained that the shutdown related to the recent discovery that the mine was no longer producing low ash coal, and that the temporary shutdown was needed to determine whether the mine might yield more low ash coal after further production. The mine is conducting drilling operations to make an assessment as to the viability of further production. No decision has been made by Respondent on the likelihood that the mine will return to the production of low ash coal in the near future. Both Mr. Oppegard and Ms. Gregory represented that Complainant did not oppose the motion.

As Complainant does not oppose the motion, *Respondent’s Motion to Toll Temporary Reinstatement Order* is **GRANTED**. The tolling is **effective September 8, 2014**, and shall remain in effect until future Order of this Court.

In granting the motion, I **HEREBY ORDER** that Respondent file with me a status report on the investigation of the future production of the mine and any information related to potential re-opening of the mine **every thirty days** commencing on **November 1, 2014**.

If the mine returns to operation at any time, it is **HEREBY ORDERED** that Complainant be returned to his position **immediately upon the commencement of operations**. Absent good cause, none of the other miners laid off as the result of the above described action shall take precedence over Complainant upon the return to mining operations at the mine.

/s/ James G. Gilbert
James G. Gilbert
Administrative Law Judge

Distribution: (*Electronic email*)

Billy Shelton, Esq., Jones, Walters, Turner & Shelton, PLLC, 151 N. Eagle Creek Drive, Suite 310, Lexington, KY 40509; billys1@jwtslaw.com

Angele Gregory, Esq., U.S. Department of Labor, Office of the Solicitor, 618 Church Street, Suite 230, Nashville, TN 37219; pietrangelo.angele@dol.gov

Regald Robbins, 227 Kent Road, Harrogate, TN 37752

Tony Oppegard, Esq., P.O. Box 22446, Lexington, KY 40522; tonyoppegard@gmail.com

Wes Addington, Esq., Appalachian Citizens Law Center, 317 Main Street, Whitesburg, KY 41858; wes@appalachianlawcenter.org

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9958 / FAX: 202-434-9949

October 9, 2014

WISCONSIN INDUSTRIAL SAND CO.,
Contestant

v.

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

CONTEST PROCEEDING

Docket No. LAKE 2014-0692-M
Citation No. 6556664; 07/31/2014

Mine: Maiden Rock
Mine ID 47-03110

ORDER DENYING MOTION FOR EXPEDITED HEARING

Before: Judge McCarthy

This case is before me upon a notice of contest under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). Section 104(a) Citation No. 6556664 was issued to Respondent on July 31, 2014 for an alleged violation of 30 C.F.R. § 57.11050(a). On August 29, 2014, Respondent filed a Notice of Contest and a Motion for Expedited Hearing. 2014. The Secretary filed a Response in Opposition to Respondent's Motion on October 3, 2014.

On September 29 and October 8, 2014, I held conference calls with the parties. During the latter conference call, I granted the Secretary's motion, absent objection from Respondent, to plead 30 C.F.R. § 57.11050(b) in the alternative.

For the following reasons, I deny the Respondent's Motion for Expedited Hearing.

The Commission's Procedural Rule that addresses motions for expedited hearings is silent about criteria to guide when a motion for expedited hearing should be granted or denied. See 29 C.F.R. § 2700.52. Accordingly, Commission Administrative Law Judges are allowed "informed discretion" to determine whether an expedited hearing is necessary, and are directed to schedule a hearing within a *reasonable* time. *Secretary of Labor (MSHA) v. Wyoming Fuel Co.*, 14 FMSHRC 1282 (Aug. 28 1992) (emphasis added). Generally, Commission Judges have held that an expedited hearing is warranted upon a showing of "extraordinary or unique circumstances resulting in continuing harm or hardship." *Southwest Portland Cement Co.*, 16 FMSHRC 2187 (Oct. 4, 1994) (ALJ); *Mountain Cement Co.*, 23 FMSHRC 694 (June 25, 2001)(ALJ); *Consolidation Coal Company*, 16 FMSHRC 495 (February 1994) (ALJ).

Respondent argues that an expedited hearing is appropriate here because abatement is expensive and/or unnecessary. Respondent miscites *Getchell Gold Corp.*, properly found at 21 FMSHRC 507 (May 1999) (ALJ), in support of this proposition. That case involved a withdrawal order under Section 104(d)(2). Section 105(d) of the Act requires the Commission to “take whatever action is necessary to expedite proceedings for hearing appeals of orders issued under section 104.” 30 U.S.C. § 815(d)(2014). This statutory requirement evinces “a congressional concern that contests of withdrawal orders be expeditiously heard, at least where . . . the underlying violation has not been abated.” *Southern Ohio Coal Co.*, 1 FMSHRC 1470, 1472 (Oct. 1979).

In this case, no withdrawal order has issued. Furthermore, the Section 104(a) Citation has already been abated and no Section 104(b) Order is before me. The mine continues production, but has stopped developing an exhaust shaft until this matter is resolved.

Respondent also argues that an expedited hearing is proper because there is a strong possibility that MSHA abused its discretion. Respondent relies on *Mountain Cement*, 23 FMSHRC 694 (ALJ). In *Mountain Cement*, the judge was concerned that MSHA abused its discretion because 20 violations were issued as 104(d)(2) orders, and most were subsequently modified during conference to 104(a) citations. Here, a single 104(a) Citation is at issue because the parties posit conflicting interpretations of MSHA’s standard. The operator’s disagreement with MSHA’s regulatory interpretation does not rise to the level of an extraordinary or unique circumstance under the facts presented.

In sum, Respondent has not presented any extraordinary or unique circumstances that warrant an expedited hearing.

Per my October 8 conference call with the parties, a Notice of Hearing will issue under separate cover setting this matter for hearing at 1 p.m. CST in Minneapolis, Minnesota on November 24, 2014 and continuing dates thereafter until completed.

Respondent’s Motion for any further expedited hearing is **DENIED**.

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

Distribution:

Barbara Villalobos, Esq. U.S. Department of Labor, Office of the Solicitor, 230 South Dearborn Street, 8th Floor, Chicago, IL 60604

Joshua Schultz, Esq., Office of Adele Abrams, 4740 Corridor Place, Suite D, Beltsville, MD 20705

/med

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 20, 2014

AUSTIN POWDER COMPANY,
Contestant

v.

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

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

v.

AUSTIN POWDER COMPANY,
Respondent

CONTEST PROCEEDING

Docket No. PENN 2012-116-R
Citation No. 7040091;01/20/2012

River Hill Coal Co., Inc.
Mine ID 36-00884 A2708

CIVIL PENALTY PROCEEDING

Docket No. PENN 2012-172
A.C. No. 36-00884-281523 E24

Mine: River Hill Coal Co., Inc.

Docket No. PENN 2012-77
A.C. No. 36-09312-273298

Mine: Allegheny Strips

Docket No. CENT 2013-213
A.C. No. 23-02262-309819

Mine: Hume #1

Docket No. KENT 2013-274
A.C. No. 15-19451-307263 E24

Mine: S-9 Findlay Branch

Docket No. KENT 2012-1030
A.C. No. 15-17834-287578 E24

Mine: F-9 Prater Branch

Docket No. SE 2012-128
A.C. No. 01-03375-273206

Mine: Johnson Mine

Docket No. VA 2012-542
A.C. No. 44-07133-293119

Mine: No. 26 Strip

AMENDED ORDER TO CONSOLIDATE¹

Before: Judge Andrews

On August 15, 2014, the Secretary requested that all pending matters alleging violations of the Federal Mine Safety and Health Act of 1997 (Mine Act) against Austin Powder Company be consolidated for hearing and decision. The Secretary submits it is necessary to determine whether Austin Powder Company and its subsidiaries are unitary operators. Respondent objects to consolidation, arguing that the unitary operator issue must be determined on a case-by-case basis. However, Respondent previously moved for the above-cited proceedings to be stayed pending the outcome of PENN 2012-172, thus underscoring the common relationship in the issues presented in PENN 2012-172 and the other dockets. Indeed, Respondent states in its motions that “the issues will be identical to those being litigated in PENN 2012-172.”

Pursuant to 29 C.F.R. §2700.12, the undersigned may consolidate dockets for “proceedings that involve similar issues.” All eight dockets include the issue of whether Austin Powder Company and its subsidiaries constitute a unitary operator. Therefore, in the interest of judicial economy, the above captioned dockets are hereby **CONSOLIDATED** for hearing and decision. The parties are also hereby **ORDERED** to report any other Austin Powder Co. dockets that should also be consolidated due to the similar unitary operator issue.

All of the above-captioned dockets have been assigned to the undersigned. When filing additional submissions, parties must reference the undersigned and the lead docket, PENN 2012-172.

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

¹ A.C. No. 36-00884-281532 has been amended to A.C. No. 36-00884-281523. A.C. No. 36-0932-373298 has been amended to A.C. No. 36-09312-273298. Docket No. KENT 2012-274 has been amended to Docket No. KENT 2013-274.

Distribution: (U.S. First Class Mail)

Stephen Turrow, Esq., Office of the Solicitor, U.S. Department of Labor, 1100 Wilson Blvd.,
22nd Floor, Arlington, VA 22209

Anthony M. Berry, Esq., Office of the Solicitor, U.S. Department of Labor, 211 7th Avenue
North, Suite 420, Nashville, TN 37219

Kimberly M. Engel, Esq., Office of the Solicitor, U.S. Department of Labor, The Curtis Center,
Suite 630E, 170 S. Independence Mall West, Philadelphia, PA 19106

Elizabeth L. Friary, Office of the Solicitor, U.S. Department of Labor, 211 7th Avenue North,
Suite 420, Nashville, TN 37219

Virginia E. Fritchey, Esq., Office of the Solicitor, U.S. Department of Labor, 525 Griffin St.,
Suite 501, Dallas, TX 75202

Thomas A. Grooms, Esq., Office of the Solicitor, U.S. Department of Labor, 618 Church Street,
Suite 230, Nashville, TN 37219

Dominique Gutierrez, Esq., Office of the Solicitor, U.S. Department of Labor, 211 7th Avenue
North, Suite 420, Nashville, TN 37219

C. Renita Hollins, Esq., Office of the Solicitor, U.S. Department of Labor, 211 7th Avenue North,
Suite 420, Nashville, TN 37219

Carol Liang, Office of the Solicitor, U.S. Department of Labor, Cesar E. Chavez Memorial
Building, 1244 Speer Boulevard, Suite 216, Denver, CO 80204

Jennifer Y. Pao, Esq., Office of the Solicitor, U.S. Department of Labor, The Curtis Center, Suite
630E, 170 S. Independence Mall West, Philadelphia, PA 19106

David A. Steffey, CLR, MSHA, U.S. Department of Labor, P.O. Box 560, Norton, VA 24273

Adele L. Abrams, Esq., CMSP, Law Office of Adele Abrams, P.C., 4740 Corridor Place, Suite
D, Beltsville, MD 20705

David J. Hardy, Esq., Hardy Pence, PLLC, 500 Lee Street East, Suite 701, P.O. Box 2548,
Charleston, WV 25329

James (Jim) P. McHugh, Hardy Pence, PLLC, 500 Lee Street East, Suite 701, P.O. Box 2548,
Charleston, WV 25329

Christopher D. Pence, Esq., Hardy Pence, PLLC, 500 Lee Street East, Suite 701, P.O. Box 2548,
Charleston, WV 25329

Eric L. Silkwood, Esq., Hardy Pence, PLLC, 500 Lee Street East, Suite 701, P.O. Box 2548,
Charleston, WV 25329

Wm. Scott Wickline, Esq., Hardy Pence, PLLC, 500 Lee Street East, Suite 701, P.O. Box 2548,
Charleston, WV 25329

/nsc

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9958 / FAX: 202-434-9949

October 24, 2014

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

v.

KANAVAL'S EXCAVATING &
GRAVEL,
Respondent

CIVIL PENALTY PROCEEDING

Docket No. YORK 2013-217-M
A.C. No. 30-03156-329374

Mine: Kanaval's Excavating & Gravel

ORDER GRANTING SECRETARY'S MOTION FOR SUMMARY DECISION

This case is before me upon a petition for assessment of a civil penalty filed by the Secretary of Labor ("Secretary") against Kanaval's Excavating & Gravel ("Kanaval's" or "Respondent") on September 18, 2013, pursuant to section 105 of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 815. Respondent timely filed its Answer contesting the \$100.00 proposed penalty, and Chief Administrative Law Judge Robert J. Lesnick assigned Docket No. YORK 2013-217-M to me on December 2, 2013.

I. STATEMENT OF THE CASE

Citation No. 8713473, the sole violation at issue in this case, charges Respondent with a violation of 30 C.F.R. § 50.30(a) for failing to file a report on the mine's employment activity within the amount of time required by the regulation.¹ On July 30, 2014, I issued an order granting the Secretary's request for a stay of the parties' responses to my Prehearing Order until Friday, August 22, 2014, so the Solicitor of Labor could file a motion for summary decision in the matter. Thereafter, on August 4, 2014, the Secretary filed his Motion for Summary Decision, wherein he requests that I affirm the citation but reduce the negligence finding to "low" and assess the Secretary's proposed penalty.² (Sec'y Mot. at 1-2; Sec'y Mem. at 3.) I subsequently lifted the stay on August 22. Respondent did not file a response to the Secretary's Motion.

¹ Section 50.30(a) provides, in relevant part: "[e]ach operator of a mine in which an individual worked during any day of a calendar quarter shall complete a MSHA Form 7000-2 in accordance with the instructions and criteria in §50.30-1 and submit the original to [MSHA] within 15 days after the end of each calendar quarter."

² For the purposes of this decision, references to the Secretary of Labor's Motion for Summary Decision, Memorandum of Law in Support of the Secretary's Motion for Summary Decision, and the exhibits attached thereto are abbreviated as "Sec'y Mot.," "Sec'y Mem.," and "Sec'y Mem., Ex. #," respectively.

II. ISSUES

The Secretary asserts that Respondent was properly cited for a violation of section 50.30(a) but that the negligence determination should be reduced to “low.” (Sec’y Mot. at 1–2; Sec’y Mem. at 3.) The Secretary further asserts that there are no material facts in dispute. (Sec’y Mot. at 1–2.) Respondent, on the other hand, contends that the citation should be nullified. (Resp’t Answer at 1.)

The issues before me are as follows: (1) whether the Secretary is entitled to summary decision because the record establishes the elements of a violation of 30 C.F.R. § 50.30(a), as well as the Secretary’s allegations regarding the level of gravity and negligence; and, (2) whether the Secretary’s proposed penalty is appropriate. For the reasons that follow, the Secretary’s motion for summary decision is **GRANTED**.

III. FINDINGS OF FACT

Kanaval’s Excavating & Gravel was a surface mine producing sand and gravel in Cohocton, New York. (Sec’y Mem., Ex. 1.) Subsequent to the inspection in this matter, the mine permanently closed in January 2014. *See* Mine Safety & Health Admin., *Mine Data Retrieval System*, <http://www.msha.gov/drs/drshome.htm> (last visited October 23, 2014). Prior to that, the mine operated sporadically for several years, closing for several months at a time. (Sec’y Mem., Ex. 3.) During the fourth quarter of 2012, an average of one person worked a total of seventy-six hours at the mine. (*Id.*) Kanaval’s closed for the winter season on November 4, 2012, opening again only on April 16, 2013. (Resp’t Answer at 1.)

On June 19, 2013, MSHA Inspector Michael Carey conducted an inspection of Kanaval’s mine. (Sec’y Mem., Ex. 2.) During his inspection, Carey reviewed the mine’s MSHA Form 7000-2—Quarterly Employment and Coal Production Reports. (*Id.*) Carey noted that Respondent submitted its Quarterly Employment Report on January 29, 2013. (*Id.*) Carey subsequently issued Citation No. 8713473, alleging a violation of 30 C.F.R. § 50.30(a), which reads as follows:

An MSHA #7000-2 (Quarterly Employment Report) for the 4th Quarter of 2012 (October, November, December) was not completed nor submitted to MSHA’s Health and Safety Analysis Center prior to January 15, 2013. The form was submitted on January 29, 2013.

(Sec’y Mem., Ex. A.) Carey determined that there was no likelihood this paperwork violation would cause injury or illness to any workers. (*Id.*) Carey designated Kanaval’s negligence as moderate because the company had experience filing the quarterly employment reports. (Sec’y Mem., Ex. 2.)

IV. PRINCIPLES OF LAW—ANALYSIS—CONCLUSIONS OF LAW

A. Principles of Law

1. Summary Decision

Commission Rule 67(b) provides that “[a] motion for summary decision shall be granted only if the entire record, including pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows: (1) That there is no genuine issue as to any material fact; and (2) That the moving party is entitled to summary decision as a matter of law.” 29 C.F.R. § 2700.67(b). The Commission has consistently recognized that summary decision is an “extraordinary procedure,” analogizing Commission Rule 67 to Rule 56 of the Federal Rules of Civil Procedure. *Lakeview Rock Prods., Inc.*, 33 FMSHRC 2985, 2987 (Dec. 2011) (citations omitted). The Supreme Court has determined that summary judgment is appropriate “upon proper showings of the lack of a genuine, triable issue of material fact.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986).

2. Section 50.30(a)

Section 50.30(a) requires that a mine operator (1) submit a Quarterly Employment Report (2) within fifteen days of the end of a calendar quarter (3) for any quarter in which an individual worked in the mine.

B. Analysis and Conclusions of Law

1. Summary Decision is Appropriate

Here, there is no genuine dispute over the facts of the violation. Respondent, who is *pro se*, declined to respond to the Secretary’s Motion for Summary Decision despite my office’s repeated efforts to elicit a response.³ Nevertheless, Respondent in his Answer does not challenge the Secretary’s assertions that the mine operated during the fourth quarter of 2012 and that Kanaval’s filed its quarterly report two weeks late. Indeed, Respondent admits that the mine operated until November 4, 2012, more than a month into the fourth quarter of the year. (Resp’t Answer at 1.) Therefore, I conclude that summary decision is appropriate in this case.

2. Citation No. 8713473

The facts of this paperwork violation are uncontroverted. During the fourth quarter of 2012, one person worked seventy-two hours at Kanaval’s Excavating & Gravel. The fourth

³ At my request, Law Clerk Carter Tellinghuisen set up a conference call with the parties in this case to hear Respondent’s defense and explain to Mr. Kanaval the court’s procedures for responding to a motion for summary decision. When contacted by telephone, Mr. Kanaval assured Mr. Tellinghuisen he would participate in the August 25 conference call. Nevertheless, Mr. Kanaval failed to join the call. Mr. Tellinghuisen attempted to contact Mr. Kanaval by telephone and email during the week of August 25 to schedule another conference call. Yet Mr. Kanaval failed to respond to any of these repeated attempts to contact him.

quarter ended December 31, 2012. 30 C.F.R. § 50.30–1(b). Respondent therefore was required to file a Quarterly Employment Report by January 15, 2013. Kanaval's instead filed the report on January 29, 2013, two weeks late, thus fulfilling the elements of a violation of 30 C.F.R. § 50.30(a).⁴ Accordingly, I conclude that Kanaval's violated section 50.30(a).

Inspector Carey determined in the citation that there was no likelihood that this violation would cause injury or illness. Indeed, there is no suggestion that Kanaval's tardy filing posed a threat to anyone. I conclude that the Secretary appropriately determined that there was no likelihood that this paperwork violation could cause injury or illness to any miner.

While Inspector Carey decided Kanaval's tardy filing amounted to moderate negligence, the Secretary argues in the memorandum in support of his motion that Respondent's negligence would more appropriately be judged as "low." (Sec'y Mem. at 3.) I agree. Indeed, Kanaval's mine was closed in January 2013, when the Quarterly Employment Report was due. In addition, Respondent eventually filed the paperwork on his own without being prompted by MSHA. This evidence suggests Kanaval's negligence was low. *See* 30 C.F.R. § 100.3(d) at Table X (suggesting "low negligence" where the operator "knew or should have known of the violative condition or practice, but there are considerable mitigating circumstances."). In my determination, the fact that this one-person mine was closed during the period when the report was due is a considerable mitigating circumstance, especially when the sole proprietor recognized his oversight and filed the paperwork on his own just two weeks after the deadline.

I therefore conclude that Respondent violated 30 C.F.R. § 50.30(a), that the violation had no likelihood of causing injury or illness to any miners, and that Respondent's negligence was low. Consequently, I determine that the Secretary is entitled to summary decision as a matter of law.

V. PENALTY

The Secretary proposed a \$100.00 civil penalty for this violation, the minimum penalty under the Secretary's penalty criteria in his section 100 regulations. 30 C.F.R. § 100.3(g). Commission Administrative Law Judges are not bound by the Secretary's penalty criteria but by the Mine Act and the Commission's interpretation of the statute. *See Mining & Property Specialists*, 33 FMSHRC 2961 (Dec. 2011). Under section 110(i) of the Mine Act, I must consider six criteria in assessing a civil penalty: (1) the operator's history of previous violations; (2) the appropriateness of the penalty relative to the size of the operator's business; (3) the operator's negligence; (4) the penalty's effect on the operator's ability to continue in business; (5) the violation's gravity; and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of a violation. 30 U.S.C. § 820(i).

⁴ Although Respondent does not question the facts in this case, it does challenge the Secretary's decision to enforce section 50.30(a) on a single-person mine that was closed at the time of the violation. (Resp't Answer at 1.) Respondent further requests that the Secretary review and rewrite its regulations to be more flexible for such small mines. (*Id.*) Although I am sympathetic to Respondent's position, this is not the forum to request a new rulemaking. *See* 30 U.S.C. § 811.

Although I have determined that Respondent violated section 50.30(a) by filing MSHA form 7000-2 fourteen days late, the gravity of this violation is negligible. The tardy paperwork in no way placed any miner in danger. As the Secretary himself has argued, Respondent's negligence was low. Indeed, Respondent addressed the oversight before MSHA even noticed the filing error. Moreover, Respondent had no history of violations of this matter in the two years prior to Inspector Carey's visit. (Sec'y Mot. Ex. 4.) Although Kanaval's eventually abandoned its operation of the sand and gravel quarry at the start of 2014, Respondent did not argue and presented no evidence that the Secretary's penalty would affect the company's ability to continue in business. Finally, in considering the appropriateness of the penalty relative to the size of the operator's business, I note this mine is an extremely small, one-man operation where work was performed sporadically throughout the year.

Based on the above, I determine the Secretary's suggested penalty of \$100.00 to be excessive. Upon my consideration of the six penalty criteria, I assess a penalty of \$50.00 as appropriate for this paperwork violation. I further note that, although the Secretary has prosecutorial discretion, the fact that he dedicated the Solicitor's resources toward a case of such insignificance is disappointing. This case is exactly the type of matter that would likely have been resolved quickly through one of MSHA's close-out conferences. We live in a world bound by a scarcity of time and resources. Resources spent pursuing this matter are thus unavailable for the pursuit of serious violations that could have a real impact on miner safety and health.

VI. ORDER

In light of the foregoing, it is hereby **ORDERED** that the Secretary's Motion for Summary Decision is **GRANTED**, and Citation No. 8713473 is **MODIFIED** by changing the negligence determination from "moderate" to "low."

WHEREFORE, Respondent is **ORDERED** to **PAY** a penalty of \$50.00 within 40 days of this decision.⁵

/s/ Alan G. Paez

Alan G. Paez

Administrative Law Judge

Distribution:

Judith Marblestone, Esq., U.S. Department of Labor, Office of the Regional Solicitor,
201 Varick Street, New York, NY 10014

Michael Kanaval, Administrator, Kanaval's Excavating & Gravel, 32 ½ North Main Street,
Cohocton, NY 14826

/lct

⁵ Payment should be sent to: U.S. Department of Labor, MSHA, Payment Office,
P.O. Box 790390, St. Louis, MO 63179-0390. Please include docket and A.C. numbers.