

October 2015

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Review was granted in the following cases during the month of October 2015:

Secretary of Labor v. KenAmerican Resources, Inc., Docket No. KENT 2013-211 (Judge Gill, August 25, 2015)

Secretary of Labor v. John Richards Construction, Docket No. WEST 2014-440-M (Judge Bulluck, August 25, 2015)

Sherwin Alumina Company v. Secretary of Labor, Docket No. CENT 2015-151-RM, et al (Judge McCarthy, October 5, 2015)

Review was not denied in any case during the month of October 2015.

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 23, 2015

SANDRA G. MCDONALD

v.

TMK ENTERPRISE SECURITY

Docket No. WEVA 2014-387-D

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

DECISION

BY THE COMMISSION:

This proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). It involves a complaint of discrimination filed by Sandra G. McDonald (“McDonald”) against “TMK Enterprise Security” pursuant to section 105(c)(3) of the Mine Act.¹ At issue is whether the Administrative Law Judge erred by finding that “TMK Enterprise Security” could not have been McDonald’s employer because it was not registered as a corporation during the period of McDonald’s employment. For the reasons that follow, we hold that the Judge erred when determining that this entity could not have been McDonald’s employer. Accordingly, we reverse and remand the Judge’s decision.

I.

Factual and Procedural Background

The complaint filed by McDonald concerns her employment as a security guard by a security services contractor at a mine site operated by Frasure Creek Mining, LLC, during the period May 2011 through September 2013. Her employment was terminated on or about September 3, 2013.

On September 13, 2013, McDonald filed a discrimination complaint with the Department of Labor’s Mine Safety and Health Administration (“MSHA”) under section 105(c)(2) of the

¹ Section 105(c)(3), 30 U.S.C. § 815(c)(3), provides in pertinent part:

Within 90 days of the receipt of a complaint filed under paragraph (2), the Secretary shall notify, in writing, the miner . . . of his determination whether a violation has occurred. If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right . . . to file an action in his own behalf before the Commission[.]

Mine Act.² In this complaint, McDonald named her employer, the security services contractor, as “TMK Enterprise Security,” which is listed as a contractor in the MSHA Mine Data Retrieval System.³ MSHA Discrimination Compl.; Mot. to Lift Temporary Stay and to Amend Compl., MSJ000002 (records of the MSHA Mine Data Retrieval System). After an investigation, MSHA declined to pursue her complaint. Subsequently, on January 7, 2014, McDonald filed a discrimination complaint with this Commission under section 105(c)(3) of the Mine Act. That complaint also named “TMK Enterprise Security” as the Respondent.

The Judge scheduled a hearing on the case for November 18, 2014. A few days prior to the hearing, counsel for the Respondent sought to withdraw as counsel asserting as good cause a disagreement between Mark Toler and George King, whom counsel represented to be the owners of the Respondent, regarding the ongoing operation of the business. Counsel also cited the Respondent’s financial inability to continue to retain counsel. The Judge granted the attorney’s request to withdraw and ordered that the security services business file a notice of appearance and specify substitute representation or the *pro se* appearance of King and/or Toler on or before January 14, 2015. The Judge rescheduled the case for hearing on February 10, 2015. Unpublished Order (Dec. 3, 2014). On January 14, 2015, King and Toler informed the Judge that they intended to proceed *pro se* and would participate fully in all remaining hearings. Unpublished Order (Feb. 3, 2015).

On January 21, 2015, McDonald filed a motion for default judgment, alleging that the Respondent had failed to comply with the Judge’s Order. On January 22, 2015, the Judge convened a conference call with the parties. During the call, it was represented that the corporate status of “TMK Enterprise Security” was dissolved in June 2009. The Judge then ordered the parties to participate in a mediation conference with the Commission’s settlement counsel. The mediation was scheduled for January 28, but neither King nor Toler appeared.

On February 2, 2015, McDonald filed a motion for a temporary stay of the proceeding, stating, in part, that she intended to file a motion to amend her original complaint to add parties. The Judge granted the motion and continued the hearing pending the filing of a motion by McDonald to amend her complaint.⁴ Unpublished Order at 2 (Feb. 3, 2015). On February 18, 2015, McDonald filed a motion to lift the stay and amend her complaint to add Frasure Creek, the operator of the mine, as a Respondent in the matter.

² Section 105(c)(2), 30 U.S.C. § 815(c)(2), provides in pertinent part, that “[a]ny miner . . . who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may . . . after such violation occurs, file a complaint with the Secretary alleging such discrimination.”

³ In her complaint to MSHA, McDonald also listed her employer’s contractor ID as “5GI” which, according to the Mine Data Retrieval System, corresponds to the company “TMK Enterprise Security.” MSHA Discrimination Compl.; Mot. to Lift Temporary Stay and to Amend Compl., MSJ000002.

⁴ The Judge did not grant the motion for default judgment, noting that King and Toler had informed his law clerk that they intended to proceed *pro se* and provided assurances that they would participate fully in all remaining proceedings. The Judge also noted, however, that neither King nor Toler had attended the scheduled mediation conference. Unpublished Order (Feb. 3, 2015).

On March 12, 2015, the Judge issued an Order denying the motion to amend to include Frasure Creek, stating that the Secretary's initial investigation did not include consideration of matters contained in the amended complaint, and that McDonald had failed to comply with the statutory prerequisite of initially filing a complaint with the Secretary pursuant to section 105(c)(2). The Judge also found that the corporate status of "TMK Enterprise Security Services, Inc." had been terminated on June 12, 2009, prior to the relevant period of McDonald's employment (May 2011 through September 2013). *McDonald v. TMK Enterprise Security*, 37 FMSHRC 683, 683-85 (Mar. 2015) (ALJ).⁵ Therefore, the Judge dismissed the proceeding as he concluded that "TMK Enterprise Security Services, Inc." could not have been McDonald's employer during the relevant period of her employment. Instead, he found that "McDonald was employed by George King and Mark Toler, the former [principals] of [the corporation], who continued to operate their security services business as a non-corporate entity." *Id.* at 683.

On March 23, 2015, McDonald filed a "Petition for Reconsideration" requesting that the Judge set aside his dismissal order and add King and Toler as Respondents. On March 31, 2015, the Commission directed review *sua sponte* "to determine whether the Judge erred as a matter of law in concluding that TMK Enterprise Security could not have been the employer of Sandra McDonald because it was not registered as a corporation during the period of McDonald's employment." Thus, the Direction for Review focused on whether "TMK Enterprise Security," rather than the corporation "TMK Enterprise Security Services, Inc.," could have been McDonald's employer.

II.

Disposition

For the reasons that follow, we conclude that the Judge erred in failing to consider whether the named respondent, "TMK Enterprise Security," referred to a "person" meaning "any individual, partnership, association, corporation, firm, subsidiary of a corporation, or other organization," pursuant to section 3(f) of the Mine Act, which employed McDonald during the relevant period of her employment. 30 U.S.C. § 802(f).

The Judge found that following the termination of "TMK Enterprise Security Services, Inc." in 2009, George King and Mark Toler continued to operate their security services business as a non-corporate entity. A non-corporate entity may constitute an employer under the Mine Act. Section 105(c)(1) of the Mine Act, 30 U.S.C. § 815(c)(1), provides, in pertinent part that "[n]o person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner." Section 3(f) of the Mine Act defines the term "person" to mean "any individual, partnership, association, corporation, firm, subsidiary of a corporation, or other organization." 30 U.S.C. § 802(f). *See Meredith v. FMSHRC*, 177 F.3d 1042, 1052-56 (D.C. Cir. 1999). Therefore, it is clear that a non-corporate entity such as a partnership, association, or other organization may qualify as a "person" or employer under section 105(c) of the Mine Act.

⁵ The records of the State of West Virginia confirm that the corporate status of "TMK Enterprise Security Services, Inc." had been terminated on June 12, 2009. Mem. in Supp. of Mot. for Default J., Ex. C.

The Judge also noted that the relevant period of McDonald's employment, for the purpose of this proceeding, was May 2011 to September 2013. We find that the record establishes that King and Toler operated one or more non-corporate security services businesses under the name "TMK Security" and/or "TMK Enterprise Security," which employed McDonald during this period.⁶

Furthermore, the record indicates that during 2011 through 2013, "TMK Security" was the trade name for "Appalachian Enterprise Security Services, LLC." Pet. for Recons., Ex. 1. "Appalachian Enterprise Security Services, LLC" listed King and Toler, the former principals of "TMK Enterprise Security Services, Inc.," among its officers. *Id.* Upon the termination of the corporate status of "TMK Enterprise Security Services, Inc.," Messrs. King and Toler clearly continued to operate in a non-corporate form under the name "TMK Security" and/or "TMK Enterprise Security," without attention to details of corporate law. Therefore, the termination of the corporate status of "TMK Enterprise Security Services, Inc." does not lead to the dismissal of the complaint against "TMK Enterprise Security." The entity, either as a partnership of Toler and King or as a trade name for "Appalachian Enterprise Security Services, LLC," was Respondent's employer during the period applicable to the complaint.⁷

Hence, we hold that the Judge erred when he dismissed the complaint against "TMK Enterprise Security."⁸

⁶ In this regard, the "employee disciplinary report" issued to McDonald on September 9, 2013 bears the letterhead "TMK Security." Employee Disciplinary Report, issued on Sept. 9, 2013. However, as noted above, a security entity operated by King and Toler was registered as a contractor with MSHA under the name "TMK Enterprise Security." Significantly, "TMK Enterprise Security" filed an Answer to McDonald's complaint, responded to her interrogatories and requests for production of documents, and filed both a motion to dismiss, and a Pre-Hearing Report. In the Answer to the complaint, motion to dismiss and response to McDonald's discovery requests, the entity referred to itself as "TMK Enterprise Security." Answer to Compl. at 1-2; Mot. to Dismiss at 1-2; Resp. to Disc. Reqs. at 1-2. In the Pre-Hearing Report, the entity referred to itself as "TMK Security." Resp't Preh'g Report at 4. Significantly, it was never denied that McDonald worked for this entity, or that King and Toler were the principals of the entity.

⁷ After termination of its corporate form "TMK Enterprise Security" would have been operating as a partnership between Messrs. King and Toler or as a trade name for "Appalachian Enterprise Security Services, LLC." Therefore, the complainant may amend her complaint to add "Appalachian Enterprise Security Services, LLC," "TMK Security," King, and Toler as Respondents.

⁸ Not only is "TMK Enterprise Security" listed in the MSHA Mine Data Retrieval System, but the Mine Data Retrieval System lists citations issued to the contractor "TMK Enterprise Security" in 2013, several years after the termination of the corporation "TMK Enterprise Security Services, Inc." Mot. to Lift Temporary Stay and to Amend Compl., MSJ000002.

III.

Conclusion

For the reasons stated above, we reverse the Judge and conclude that “TMK Enterprise Security” is a “person” pursuant to section 3(f) of the Mine Act. “TMK Enterprise Security” continues to be a Respondent in this proceeding and leave is granted for McDonald to amend the complaint to add other relevant parties, including King and Toler. The case is remanded for further proceedings consistent with this decision.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

/s/ Patrick K. Nakamura
Patrick K. Nakamura, 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 28, 2015

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

v.

RESOLUTION COPPER MINING, LLC

Docket Nos. WEST 2013-319-RM
WEST 2013-299-M

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

DECISION

BY THE COMMISSION:

These proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). The citation at issue alleges that Resolution Copper Mining, LLC, violated 30 C.F.R. § 57.19076¹ by operating its personnel conveyance system in excess of the maximum speed limitation of 500 feet per minute (fpm). At issue is whether the Administrative Law Judge correctly ruled that the personnel conveyance in question was not governed by the requirements of section 57.19076. For the reasons that follow, we conclude that the Judge erred in rejecting the Secretary of Labor’s interpretation of the standard and vacating the citation. Accordingly, we reverse the Judge’s decision and remand the case for further proceedings.

I.

Factual and Procedural Background

A. Factual Background

Resolution Copper Mining, LLC (“Resolution”) operates the Resolution Mine, an underground copper mine in Arizona. On November 28, 2012, an inspector from the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued Citation No. 8596049 to Resolution. The citation alleged that the operator violated section 57.19076 by hoisting miners in a conveyance vessel at the No. 10 shaft at speeds of up to 1200 fpm, which exceeds the maximum allowable speed of 500 fpm when hoisting persons in a bucket. The outcome

¹ Section 57.19076 requires that “[w]hen persons are hoisted in buckets, speeds shall not exceed 500 feet per minute and shall not exceed 200 feet per minute when within 100 feet of the intended station.” 30 C.F.R. § 57.19076.

determinative issue was whether the vessel used by Resolution constituted a “bucket” within the meaning of section 57.19076. The citation also designated the violation as being “significant and substantial” (“S&S”).²

Resolution, without objection, sought an expedited proceeding before a Commission Administrative Law Judge. The parties agreed that the record would be based upon an evidentiary record already developed in a separate, prior proceeding before Department of Labor Administrative Law Judge Richard M. Clark, described in detail below. On April 19, 2013, the Commission Judge issued a decision vacating the citation. 35 FMSHRC 1072 (Apr. 2013) (ALJ). On May 17, 2013, the Commission granted the Secretary’s petition for discretionary review.

B. Petition for Modification

The proceeding before Judge Clark arose from a petition for modification of the application of section 57.19076 filed by Resolution pursuant to section 101(c) of the Mine Act.³ 30 U.S.C. § 811(c). The petition was filed on April 12, 2011, twenty months before the issuance of the citation in dispute here. On November 4, 2011, MSHA’s Administrator for Metal and Non-Metal Mine Safety and Health (“The Administrator”) issued a Proposed Decision and Order denying Resolution’s petition for modification.⁴ P. Ex. 14. The operator subsequently requested a

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 Under section 101(c), 30 U.S.C. § 811(c), petitions for modification of mandatory standards are handled by the Department of Labor, as opposed to the Commission. The language of section 101(c) provides in relevant part:

Upon petition by the operator or the representative of miners, the Secretary may modify the application of any mandatory safety standard to a coal or other mine if the Secretary determines that an alternative method of achieving the result of such standard exists which will at all times guarantee no less than the same measure of protection afforded the miners of such mine by such standard, or that the application of such standard to such mine will result in a diminution of safety to the miners in such mine.

⁴ Petitions for modification under the Mine Act are governed by the Secretary’s regulations in 30 C.F.R. Part 44. Proposed decisions to grant or deny petitions for modification are made by the Administrator. 30 C.F.R. § 44.13. Within 30 days of the Administrator’s proposed decision, either party may request a hearing before a Department of Labor Administrative Law Judge for an initial decision. 30 C.F.R. § 44.14. Within 30 days of the ALJ’s initial decision, either party may file an appeal to the Assistant Secretary for Mine Safety and Health. 30 C.F.R. § 44.33. Decisions made by the Assistant Secretary are subject to judicial review in the U.S. Courts of Appeals.

hearing before the Department of Labor's Office of Administrative Law Judges, and the case was assigned to Judge Clark. Based on the record developed before him, Judge Clark found that the personnel conveyance system used in the No. 10 shaft did not constitute a "bucket" for purposes of section 57.19076. DOL ALJ Dec. I at 22 (Oct. 2012). Judge Clark did not reach the question of whether Resolution's petition satisfied the requirements for petitions for modification, as set forth in section 101(c).

On May 31, 2013, the Assistant Secretary for Mine Safety and Health set aside Judge Clark's initial decision on the basis that disputes regarding the interpretation and applicability of standards must be resolved before the Commission. DOL Asst. Sec'y Dec. I at 12-17 (May 2013). The Assistant Secretary remanded the case to Judge Clark to determine whether Resolution's proposed alternative satisfied the standard for petitions for modification.

On November 6, 2014, Judge Clark subsequently found that the standard was satisfied on the basis that the operator's proposed alternative guaranteed no less than the same measure of protection afforded by section 57.19076. As a result, Judge Clark granted the petition for modification. DOL ALJ Dec. II (Nov. 2014).

MSHA subsequently appealed Judge Clark's decision to the Assistant Secretary. On June 5, 2015, the Assistant Secretary granted the petition for modification in part with conditions and additional safety enhancements and remanded the case for additional findings of fact and further proceedings consistent with his decision. DOL Asst. Sec'y Dec. II (June 2015).

C. The Commission Judge's Decision

The Commission Judge in the instant case found that the hearing record developed before Judge Clark was comprehensive and granted the operator's unopposed motion for an expedited proceeding. 35 FMSHRC at 1073-74. Based upon the record, the Commission Judge found that the personnel conveyance used at the No. 10 shaft did not constitute a "bucket" for purposes of section 57.19076. Accordingly, he vacated the citation.

The Judge stated that the term "bucket" is not defined in section 57.19076. He further rejected the Secretary's interpretation that the term "bucket" applies to the personnel conveyance at issue in the No. 10 shaft. The Judge acknowledged that an agency's interpretation of an ambiguous regulatory provision is entitled to "controlling deference unless it is plainly erroneous or inconsistent with the regulation." *Id.* at 1077. However, the Judge refused to defer to the Secretary's interpretation on the grounds that it was unpersuasive and inconsistent with the Secretary's own prior interpretation. *Id.* at 1078-79. In doing so, he cited *United States v. Mead Corp.*, 533 U.S. 218, 221 (2001), and *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), and stated that "[a]n agency's interpretation that does not carry the force of law may still be worthy of receiving another form of persuasive deference or 'respect.'" *Id.* at 1077. He further stated that the "persuasiveness and consistency of the Secretary's interpretation must be evaluated to determine how much deference should be accorded, if any." *Id.* at 1078.

In rejecting the Secretary's interpretation, the Judge discounted the opinion of the Secretary's expert witness, Thomas Barkand, who testified that Resolution's "personnel

conveyance” met the definition of a “bucket” primarily because it was suspended from a crosshead. Tr. 250. The Judge found that Barkand failed to explain “how the suspension of the bucket relate[d] to what is considered a bucket in the safety standard.” 35 FMSHRC at 1078-79. The Judge reasoned that “[i]f the Secretary wanted any personnel conveyance suspended from a wire rope without the use of a fixed guide to be subject to the 500 fpm speed limit, he could have easily said so in the safety standard.” *Id.*

In addition, the Judge relied heavily on the definition of “bucket” contained in the *Dictionary of Mining, Mineral, and Related Terms (DMMRT)* in rejecting the Secretary’s interpretation. The *DMMRT* definition states that a “bucket” is “[a]n open-top can, equipped with a bail, used to hoist broken rock or water and to lower supplies and equipment to workers in a mine shaft or other underground opening.” P. Ex. 4. According to the Judge, Resolution’s conveyance failed to meet that definition because it had a closed top, a door, and thinner walls; was taller; was not used to hoist broken rock or water; and was “specifically designed to only hoist miners” and their personal equipment. 35 FMSHRC at 1078. The Judge rejected the Secretary’s argument that the definition of “bucket” in the *DMMRT* should not be relied upon, and stated that the *DMMRT* “is a recognized authority to determine [the] technical usage [of mining terms]” and that the technical usage is relevant to determining the term’s meaning. *Id.*

Finally, the Judge found the Secretary’s interpretation of section 57.19076 to be inconsistent. Quoting from the proposed decision by the Administrator in the separate petition for modification proceeding denying the petition, the Judge concluded that MSHA itself acknowledged that the “personnel conveyance” was not a bucket. 35 FMSHRC at 1079.

II.

Disposition

A. The Secretary’s Interpretation of Section 57.19076 is Reasonable and Persuasive Because It Is Supported by the Language and Purpose of the Standard and the Overall Regulatory Scheme.

The term “bucket” is not defined in the standard or elsewhere in the Secretary’s regulations. Further, as applied to the facts of this case (involving the movement of persons), the term “bucket” is inherently ambiguous. The Secretary maintains that the conveyance used by Resolution is a “bucket” for purposes of section 57.19076 because it is suspended from a crosshead and guided by ropes. The issue is whether interpreting the standard in such a way is a reasonable and persuasive approach.⁵

⁵ It appears that in rejecting the Secretary’s interpretation of section 57.19076, the Judge applied the standard of review for deference articulated in *Skidmore v. Swift*, and held that the Secretary’s interpretation lacked the power to persuade. *See* 35 FMSHRC 1077-78; *Skidmore*, 323 U.S. at 140 (holding that deference to decision of administrator varies, depending on a number of factors that give power to persuade, if not control). Because we hold that the

(continued...)

We hold that the Secretary's approach is reasonable and persuasive because it is consistent with the language and purpose of the standard and serves the Act's promotion of mine safety. The clear purpose of the speed limitations in section 57.19076 is to reduce the likelihood of death or injury that might result from the impact on persons in a bucket if the bucket strikes something while being raised or lowered. The Secretary maintains that the speed of such a conveyance, i.e., one that is suspended from a crosshead and guided by ropes, must be limited because there will be a lesser degree of control, and this lesser degree of control could cause a strike to occur.

The Secretary's position is supported by the testimony of expert witness Barkand. Barkand testified that the personnel conveyance was a bucket because, like the operator's muck and cement buckets, it was hung from a crosshead by ropes that – as opposed to the mechanism that controls a fixed guidance conveyance, such as an elevator – do not “precisely control[] the travel of the conveyance.” Tr. 248-51. In other words, it was the method of suspension and control of the conveyance – in particular, the lesser degree of control – that makes the conveyance a “bucket” for purposes of section 57.19076.

The operator's argument that Barkand's testimony fails to support the Secretary's interpretation is unpersuasive. The operator asserts that Barkand failed to relate the rope-guided method of suspension for the personnel conveyance to what is considered a “bucket” in the safety standard. However, Barkand implicitly testified that the method of suspension could result in the “bucket” striking the shaft wall or other obstruction. Specifically, after testifying about how guided rope conveyances have a lesser degree of control, he subsequently testified about how, in the event of a strike, the kinetic energy transfer would injure miners. Tr. 249-54. Thus, Barkand's testimony supports the Secretary's interpretation.

Given the injuries to miners that would occur if the bucket struck an obstruction, it is reasonable for the Secretary to require speed limitations on rope-guided personnel conveyances to prevent such strikes from occurring while the conveyances are traveling up and down mine shafts. Thus, we are persuaded by the Secretary's interpretation of the term “bucket” as applying to personnel conveyances that are not precisely controlled because they are suspended from crossheads and guided by ropes.⁶

⁵ (...continued)

Secretary's interpretation is reasonable and persuasive, and therefore entitled to deference under *Skidmore*, it is not necessary for us to determine whether the Judge should have applied a more deferential standard of review following *Auer v. Robbins*, 519 U.S. 452, 461 (1997).

⁶ The personnel conveyance at issue is guided and controlled just like any other bucket. Tr. 237-38. It is attached to a cross-head and guided like the other buckets at the mine. *Id.* The personnel conveyance in question also looks like a bucket. Tr. 249-50. The Secretary's Exhibits 1-3 show three different sorts of buckets used at the Resolution mine. R. Exs. 1-3. The primary difference between the personnel conveyance and the muck and cement buckets is the addition of a lid and the fact that there is no side door. But it is guided in the same manner. In contrast, the
(continued...)

The operator argues that, under the regulatory scheme, “guided by ropes” cannot be an essential characteristic of a “bucket” that distinguishes it from some other type of conveyance because the regulations contemplate the use of guide ropes for hoisting personnel in conveyances that are not buckets. For instance, the operator points out that 30 C.F.R. § 57.19019 provides strength requirements for guide ropes when such ropes are “used in shafts for personnel hoisting applications *other than shaft development*” (emphasis added). The operator notes, however, that under 30 C.F.R. § 57.19049, buckets may not be used for hoisting personnel, *except in the case of shaft development and inspection, repair and maintenance activities*. Thus, if a bucket can only be used for shaft development, inspection, repair or maintenance, but guide ropes are permitted to be used for hoisting personnel *outside of those circumstances*, the operator contends that it logically follows that the regulatory scheme contemplates the use of guide ropes for hoisting personnel in conveyances that are not buckets. Thus, according to Resolution, being “guided by ropes” cannot be an essential characteristic of a “bucket” that distinguishes it from some other type of conveyance.

Although this particular point might have some initial appeal, the Secretary has ultimately persuaded us that an essential characteristic of a “bucket” in these circumstances is that it is “guided by ropes.” Specifically, the Secretary points out that section 57.19000(b)(4) states that the hoisting standards (Subpart R of Part 57) *do not apply* to “wire ropes used for elevators.” The Secretary argues that this regulatory delineation between buckets and elevators is intended to reflect the fact that a collision or strike is more likely to occur in the case of a conveyance that is guided by ropes and attached to a crosshead than in the case of a fixed-guidance conveyance, such as an elevator. By contrast, being “guided by ropes” creates significant safety risks, and therefore *is* an essential characteristic of a “bucket.” The Secretary argues that these safety risks support the speed limitations in section 57.19076. We agree, and as a result, conclude that the Secretary’s interpretation is reasonable and persuasive.⁷

⁶ (...continued)

“Maryanne” – another type of personnel conveyance used at the mine – operates using a fixed-cage guided by a fixed-guide method (similar to an elevator), as opposed to a rope-guided method. Tr. 139-140.

⁷ We further note that Resolution’s position is inconsistent with numerous statements in the record made by it, along with its consulting engineers, G. L. Tiley & Associates, and its independent contractor, Cementation Canada – all of which refer to the personnel conveyance as a “bucket.” For example, Petitioner’s Exhibit No. 1, a lengthy PowerPoint presentation, labels the conveyances as “buckets” on the computer screen. P. Ex. 1 (p. 5, Monitor: Shaft Information and Communications) (referring to “No. 1 Bucket” and “No. 2 Bucket”). G. L. Tiley, commissioned to do testing on the conveyance, also refers to the conveyances as “buckets.” P. Ex. 7, pages 3-11. In addition, Cementation of Canada, a contractor working with the operator, described it in 2007 as a “bucket” in their own diagrams. R. Ex. 4. Furthermore, Cementation’s programmable logic controllers and operating description from 2009 do not refer to conveyances, but rather to “buckets.” P. Ex. 17, pages 4, 6, 7. These references certainly undercut Resolution’s legal position.

B. The DMMRT Definition of “Bucket” Is Irrelevant to this Case.

The *DMMRT* definition of “bucket” relied upon by the Judge does not undermine the reasonableness and persuasiveness of the Secretary’s interpretation. In this case, the Judge’s reliance on the *DMMRT* definition is undermined by the Secretary’s safety standards and thus has no relevance to this case.⁸ Specifically, the *DMMRT* definition fails to mention any of the characteristics of a “bucket” that are relevant to the safety of personnel being hoisted in it. For example, the *DMMRT* definition fails to recognize that when a “bucket” is hoisting personnel it must be securely attached to a crosshead.” 30 C.F.R. § 57.19050(a). Further, although the *DMMRT* defines a bucket as “[a]n open-top can, equipped with a bail, used to hoist broken rock or water and to lower supplies and equipment to workers in a mine shaft or other underground opening,” the Secretary’s standards require a “bucket” that is hoisting personnel to be covered, i.e., to “[h]ave overhead protection,” and to have a device that disables the bail. 30 C.F.R. § 57.19050(b), (d); *see also* 30 C.F.R. § 57.19045 (“man cages” and “skips” used for hoisting personnel “shall be covered with a metal bonnet”). Thus, the Secretary’s standards effectively negate the very characteristics (open-topped and equipped with a bail) by which the *DMMRT* defines the term “bucket.”

The *DMMRT* definition does not even recognize that a “bucket” is commonly used to hoist personnel during the sinking of a shaft.⁹ The definition mentions lowering supplies and equipment to miners but says nothing about carrying personnel. Indeed, the *DMMRT* definition simply describes an ordinary “bucket” and has nothing to do with personnel conveyances. As a result, the *DMMRT* definition is clearly incongruous with the standard being interpreted.

Finally, the Judge’s finding of fact that the conveyance was taller than the muck and cement buckets is inconsequential, given the requirement of section 57.19050(c) that a “bucket” used to hoist personnel must be tall enough to “transport persons safely in a standing position.” Nor may a “bucket” in which personnel are riding contain “muck, supplies, materials, or tools other than small hand tools.” 30 C.F.R. § 57.19071. Thus, these facts have no bearing on whether or not the conveyance at issue is a “bucket.”

⁸ As noted above, the *DMMRT* definition states that a “bucket” is “[a]n open-top can, equipped with a bail, used to hoist broken rock or water and to lower supplies and equipment to workers in a mine shaft or other underground opening.” P. Ex. 4. Am. Geological Institute, *Dictionary of Mining, Mineral, and Related Terms* 71 (2d ed. 1997).

⁹ The operator’s assertion that this issue is not properly before the Commission because the Secretary did not make this argument before the Judge lacks merit. At issue before the Judge below was the meaning of the term “bucket” in section 57.19076. The reliability of the *DMMRT* definition of “bucket” is central to this issue. Thus, although the points raised on appeal by the Secretary are not identical to those raised below, they are “sufficiently related” to those raised in support of the Secretary’s interpretation so that the Commission can consider them. *See, e.g., BHP Copper Inc.*, 21 FMSHRC 758, 762 (July 1999); *Keystone Coal Mining Corp.*, 16 FMSHRC 6, 10 n.7 (Jan. 1994).

For all these reasons, we conclude that the *DMMRT* definition of “bucket” is irrelevant to this case.

C. The Judge Failed to Recognize that the MSHA Administrator’s Allegedly Inconsistent Previous Interpretation Was Merely a Description of Resolution’s Legal Position.

The Judge additionally erred in finding the Secretary’s interpretation undeserving of deference on the ground that it was inconsistent with the language in the Administrator’s proposed decision denying the petition for modification. 35 FMSHRC at 1079. The Judge failed to realize that the portion of the Administrator’s proposed decision that he quoted was the introduction, in which the Administrator merely described – verbatim – the position stated in the operator’s petition for modification. Recitation of that description, in that context, did not mean that the Administrator agreed with Resolution’s position.

The operator’s petition for modification and the Administrator’s proposed decision both stated: “The personnel conveyance that this petition is submitted upon is not a ‘bucket,’ but rather is an enclosed capsule designed for the transport of personnel.” P. Exs. 5, 14. Similarly, the succeeding eight sentences in the Administrator’s proposed decision were all taken verbatim from the operator’s petition and all appeared in the Administrator’s proposed decision *prior to* the section with the heading “Findings of Fact and Conclusions of Law.” P. Ex. 14. Under that heading, the Administrator did not repeat the statement relied on by the Judge, but rather addressed the merits of the petition for modification on the assumption that the conveyance was a “bucket” for purposes of section 57.19076. This is consistent with the fact that the Administrator referred to the conveyance as a “personnel bucket” throughout the entire section. P. Ex. 14. Furthermore, the Administrator’s denial of the petition for modification in effect directed that the standard be applied to the conveyance without modification, which implies that the Administrator found that the conveyance was a “bucket” for purposes of section 57.19076.

In short, the Judge’s conclusion that MSHA had taken inconsistent positions regarding the interpretation of the standard is based on a misreading of the Administrator’s proposed decision.

III.

Conclusion

For the reasons stated above, we reverse the Judge's decision and rule that section 57.19076 was violated. We remand the case to the Judge to determine whether to affirm the inspector's S&S designation.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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

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

ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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October 2, 2015

SPARTAN MINING COMPANY,
Petitioner

v.

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

CONTEST PROCEEDING

Docket No. WEVA 2015-407-R
Order No.: 9020932; 12/30/14

Mine: Road Fork #51 Mine
Mine ID No.: 46-01544

SUMMARY DECISION

Before: Judge Barbour

This case is before me upon a Notice of Contest filed by Spartan Mining Company (“Spartan”), challenging the issuance by the Secretary of Labor (“Secretary”) of an imminent danger order, under section 107(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 817(a). The Order was issued on December 30, 2014, at Spartan’s Road Fork No. 51 Mine, an underground bituminous coal mine located in Wyoming County, West Virginia, when an inspector for the Secretary’s Mine Safety and Health Administration (“MSHA”) saw a miner standing alongside a moving continuous mining machine and instructed the miner to immediately remove himself from the area. In conjunction with the Order and pursuant to section 104(a) of the Act, the inspector also issued Citation No. 9020933 to Spartan.¹

The court initially scheduled a June 9, 2015, hearing on this matter. Shortly after the notice of hearing was issued, the parties settled all issues related to Citation No. 9020933 and requested that the court resolve the remaining issues regarding the imminent danger order on summary decision.² The parties agreed to submit stipulations of fact and cross-motions for summary decision, and the court issued an Order cancelling the June 9 hearing. The parties subsequently filed Cross-Motions for Summary Decision with accompanying Briefs (“Sec’y Br.” and “Resp’t Br.”) and Joint Stipulations of Fact (“Stip. 1 through 13”), followed by Reply Briefs from each side (“Sec’y Reply Br.” and “Resp’t Reply Br.”). The court issued an Order

¹ Citation No. 9020933 charged the company with a violation of 30 C.F.R. § 75.220(a)(1), which requires an operator to adopt and comply with an approved roof control plan. A provision in Spartan’s approved plan prohibited miners from standing alongside a continuous miner when the continuous miner was being trammed, unless it was cutting coal. *See* Stip. 10.

² The court approved the settlement on June 24, 2015. *Spartan Mining Co.*, Docket No. WEVA 2015-592, Unpublished Order at 2 (June 24, 2015).

Requesting Additional Joint Stipulations on August 5, 2015, and the parties complied by submitting three additional Joint Stipulations on September 1, 2015 (“Stip. 14 through 16”).

Commission Rule 67(b) states: “A motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows: (1) That there is no genuine issue as to any material fact; and (2) That the moving party is entitled to summary decision as a matter of law.” 29 C.F.R. § 2700.67(b). Based on the stipulations, I find that there is no genuine issue as to any material fact, and that the Secretary is entitled to summary decision as a matter of law. Accordingly, I **AFFIRM** the Order as issued.

STIPULATIONS

The court accepts the following stipulated facts to be undisputed.

1. At all times relevant to this proceeding, Spartan was the “operator” of the Road Fork #51 mine, Mine ID Number 46-01544, as defined by section 3(d) of the Mine Act.
2. At all times relevant to this proceeding, the Road Fork #51 mine was a “coal or other mine” as defined by section 3(h)(1) of the Mine Act.
3. At all times relevant to the proceeding, the Road Fork #51 mine had an effect on commerce within the meaning of section 4 of the Mine Act.
4. Operations of the Road Fork #51 mine are subject to the provisions of the Mine Act.
5. This proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated administrative law judges pursuant to sections 105 and 113 of the Mine Act. Civil penalties are not imposed for imminent danger orders issued pursuant to section 107(a) of the Mine Act.
6. By entering into these Joint Stipulations, neither party waives its right to appeal the Administrative Law Judge’s decision on the Cross Motions for Summary Decision.
7. Order No. 9020932 was issued by an authorized representative of the Secretary and was properly served to Spartan on December 30, 2014.
8. On December 30, 2014, during his inspection of the Road Fork #51 Mine, MSHA Inspector Nicholas Christian observed a continuous mining machine being trammed forward and in reverse in the #1 entry while the continuous

miner operator was positioned alongside the continuous mining machine, which is commonly referred to as the “red zone.”³

9. Immediately after the continuous miner operator was observed in the “red zone,” Inspector Christian removed him from the danger and orally issued imminent danger Order No. 9020932 under section 107(a) of the Mine Act.
10. Paragraph 22 of the MSHA approved roof control plan in place at the Road Fork #51 mine on December 30, 2014, states as follows: “When the continuous miner is being trammed in the working place or anywhere in the mine other than when cutting coal, no person shall be allowed along either side of the continuous mining machine.”
11. The continuous miner operator’s actions that were cited in Order 9020932 were in violation of the above referenced provision of the approved roof control plan. Inspector Christian also issued Citation No. 9020933 pursuant to section 104(a) of the Mine Act for a violation of 30 C.F.R. 75.220(a)(1).
12. Inspector Christian’s decision to issue Order No. 9020932 was based on the single incident described in section 8 of the body of the Order and not on previous occurrences of a factually similar event.⁴

³ The Secretary implies that the machine was being operated remotely by the miner who was standing alongside it. *See* Sec’y Br. 18.

⁴ Section 8 of the Order states the following:

The operator failed to follow the approved roof control plan on the 005-0 MMU. When observed the miner operator was standing in the red zone along the side of the continuous miner in the #1 entry. . . . The miner was being trammed back and forward in the heading while the miner operator was positioned along side of the miner in the red zone. Upon, the miner operator being removed from the danger[, a]n oral imminent danger was issued to the Mine Foreman, at 0900 hours on this date. After, the miner was de[-e]nergized and measurements were taken the miner was 30" from the rib at the outby end of the pan of the miner and 31" at the gauges on the outby end of the miner where the operator was standing. The mining height in this location is approximately 50" therefore restricting the miner[']s ability to stand up right and pos[ing] more of a danger to himself while having to bend over that could result in the controls being engaged and also while the miner is being trammed while the operator is along side of the machine the miner could swing over inadvertently resulting in fatal injuries from crushing hazards against the rib.

Citation #9020933 will be issued in conjunction with this order.

Resp’t Ex. 1.

13. Spartan disputes that the actions of the continuous miner operator described in Stipulation No. 8 constitute a “condition” or “practice” as those terms are used in sections 3(j) and 107(a) of the Mine Act but, for the purposes of this proceeding, does not dispute that the remaining requirements of sections 3(j) and 107(a) of the Mine Act have been satisfied.
14. The continuous mining operator was the only miner working in and prohibited from being in the area around the continuous mining machine while the machine was energized.
15. After observing the miner tramming the continuous mining machine while standing alongside it in the “red zone,” the inspector immediately, within a matter of seconds, removed the miner from danger at that time by flashing his cap lamp at him (the inspector was approximately 60 feet from the miner when this occurred). After the inspector did so, the miner immediately shut off the continuous mining machine and walked over to the inspector. The inspector then called out for the mine foreman and section foreman, who were nearby. The foremen responded within a minute and were verbally informed by the inspector of the issuance of the imminent danger order.
16. The facts in Joint Stipulation No. 8 could have reasonably been expected to cause death or serious physical harm had the inspector not removed the miner from the danger.

ANALYSIS

As the stipulations make clear, on December 30, 2014, Inspector Nicholas Christian issued section 107(a) withdrawal Order No. 9020932 directing a continuous mining operator to exit the “red zone” alongside a continuous mining machine. Stip. 7-9. Christian had reason to believe that the miner could have been killed or seriously harmed had he not acted. Stip. 16. Section 107(a) of the Mine Act provides, in pertinent part:

If, upon any inspection or investigation of a coal or other mine which is subject to this Act, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons . . . to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which caused such imminent danger no longer exist. The issuance of an order under this subsection shall not preclude the issuance of a citation under section 104 or the proposing of a penalty under section 110.

30 U.S.C. § 817(a). Consistent with this statutory directive, Christian identified the existence of a danger in the area around the continuous mining machine while it was energized, immediately withdrew the miner from the danger by flashing his cap lamp at him, and within a minute orally informed the foremen in the area of the issuance of an imminent danger order. Stip. 15.

Section 3(j) of the Act defines “imminent danger” as the “existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated.” 30 U.S.C. § 802(j). In this instance, the danger was abated by withdrawing the miner from the “red zone.” Spartan concedes that the facts giving rise to the Order could have reasonably been expected to cause death or serious physical harm had the inspector not withdrawn the miner. Stip. 16. The only disputed issue presented to the court is whether or not what the inspector observed when he issued the Order falls under the meaning of “condition or practice” as found in section 3(j) of the Act. Resp’t Br. 1-2.

As a preliminary matter, Spartan and the Secretary disagree on the appropriate level of deference that should be afforded to the Secretary’s interpretation of the terms “condition” and “practice.” The Secretary argues that his interpretation is entitled to *Chevron* deference, whereby the court resolves any ambiguity in the statute by deferring to the Secretary’s interpretation so long as it is reasonable. Sec’y. Br. 9-11 (citing *Chevron U.S.A. Inc. v Natural Res. Def. Counsel, Inc.*, 467 U.S. 837, 842-44 (1984)). Spartan argues that the Secretary’s litigating position in this individual case is entitled only to *Skidmore* deference, which depends solely on the persuasiveness of the Secretary’s interpretation. Resp’t Reply Br. 1-7 (citing *Skidmore v Swift & Co.*, 323 U.S. 134, 139 (1994); *United States v Mead Corp.*, 533 U.S. 218, 234-37 (2001)). The court finds it unnecessary to resolve this dispute. Assuming, *arguendo*, that the Secretary’s interpretation is entitled to *Skidmore* deference only, the court is nonetheless persuaded by the Secretary’s argument that the facts in this matter constituted a “condition or practice” under section 3(j).

Under section 107(a), MSHA inspectors are charged with a duty of withdrawing and prohibiting miners from entering an area in which an imminent danger exists until that danger and the “conditions or practices” that gave rise to it no longer exist. Section 3(j) clarifies the definition of “imminent danger” by further reference to a “condition or practice,” but neither 107(a) nor 3(j) defines the phrase “condition or practice.” In the absence of any statutory or regulatory guidance, the Secretary has chosen to define a “practice” as an “act or process of doing something” and a “condition” as a “mode or state of being,” with both definitions encompassing the facts in this case. Sec’y Br. 11-12, 15. The company argues that what Christian observed does not constitute a practice because the Secretary has not alleged any “customary or routine act that formed the basis for the Order.” Resp’t Br. 7. It further argues that what Christian observed does not constitute a condition, since “the conduct described in the Order had already occurred when the Order was orally issued.” Resp’t Br. 10.

The court first looks to apply the ordinary meaning of the disputed terms, given that they are not specifically defined by the Act or regulations promulgated under it. *See Peabody Coal Co.*, 18 FMSHRC 686 , 690 (May 1996). The dictionary defines “practice” as both “[a] habitual or customary action or way of doing something” and “[t]he act or process of doing something; performance or action,” while “condition” is defined as a “mode or state of being.” *The American Heritage Dictionary* 383, 1378 (4th ed. 2009). Although it might be reasonable to think that allegations of a “practice” would require some evidence of repeat or customary conduct, the facts that Christian observed fall squarely under any relevant definition of a “condition” that this

court can identify.⁵ The danger caused by the continued operation of the energized continuous miner in conjunction with the machine operator's presence in the "red zone" was an existing "state of being" that ceased only after the withdrawal of the miner.

Spartan's contention that "the conduct described in the Order had already occurred when the Order was orally issued" suggests that the company does not believe that an imminent danger order had been issued until the inspector formally notified the foremen in the area, at which point the condition had already been abated. Resp't Br. 10. Accordingly, the company cites to *Rag Cumberland Res. LP*, 22 FMSHRC 994 (Aug. 2000) (ALJ), a case involving a mantrip accident, where a Commission Administrative Law Judge ("ALJ") vacated an imminent danger order that was issued well after a miner had already exited the mantrip and reached the surface, and where there was no continued threat to miners. Notably, the decision is silent as to whether the MSHA inspector who issued the imminent danger order took any steps to remove affected miners from the area of danger before the condition had abated or while the collision was impending. *Id.* at 997-98. It is not even clear that the inspector would have had any opportunity to do so at that point. *Id.* The instant matter would be analogous to *Rag Cumberland* if Christian had not acted to remove the miner from the impending danger and had not issued a withdrawal order until well after the continuous miner operator had already exited the "red zone."

It seems to the court that the parties are not so much arguing over the definition of the phrase "condition or practice" as they are over the timing and actions required to establish the Order itself. The court refuses to take the formalistic approach implicitly endorsed by Spartan, which would require inspectors to utter the words "imminent danger order" before withdrawing miners. The Mine Act's legislative history reflects Congress's view that "the authority under [section 107(a)] is essential to the protection of miners and should be construed expansively by inspectors and the Commission." S. Rep. No. 461, 95th Cong., 1st Sess. 39 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977 at 1317 (1978) ("Legis. Hist."). Given this history, the court is unwilling to elevate form over substance.

While it is conceivable that a significant enough delay in the formal notification to an operator of an imminent danger order could pose notice or evidentiary problems that would justify vacating an order, this case does not involve such facts. The immediacy of the danger in the instant matter required an immediate response on the part of the inspector without pausing to explain the statutory authority for ordering withdrawal, and the inspector followed up his withdrawal order with sufficiently prompt formal notification. Therefore, the court views the inspector's ordering of the continuous miner operator out of the red zone and the oral notification to management officials immediately thereafter as one continuous action constituting the

⁵ At one point, Spartan defines "condition" as "involv[ing] some type of inanimate object in a 'state of being'". Resp't Br. 9. While the company provides no authority for this definition, and the court is unable to find any definition that focuses specifically on an inanimate object, the facts in this matter would still fall under Spartan's proposed definition. The continuous mining machine in the entry was an inanimate object that was central to the danger posed to the withdrawn miner. The fact that the withdrawn miner's hazardous conduct also contributed to the danger is immaterial, as the Commission has upheld imminent danger orders caused by a miner's hazardous conduct. *See Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159 (Nov. 1989).

imminent danger order itself and finds that the Order was a valid and appropriate response to a condition which, as stipulated to by the parties, could reasonably have been expected to cause death or serious physical harm before it could be abated. The court concludes therefore that the issuance of the 107(a) withdrawal order was proper.

ORDER

In accordance with the foregoing, the Secretary's motion for summary decision is **GRANTED**, Spartan's motion for summary decision is **DENIED**, and the withdrawal order issued by the Secretary under section 107(a) of the Act is **AFFIRMED**.

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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October 5, 2015

SHERWIN ALUMINA COMPANY, LLC,
Contestant,

v.

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

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

v.

SHERWIN ALUMINA COMPANY, LLC,
Respondent,

v.

UNITED STEELWORKERS, LOCAL 235A
Intervenor.

CONTEST PROCEEDINGS

Docket No. CENT 2015-0151-RM
Citation No. 8778065; 11/13/2014

Docket No. CENT 2015-0152-RM
Order No. 8778066; 11/13/2014

Mine: Sherwin Alumina, L.P.
Mine ID No: 41-00906

CIVIL PENALTY PROCEEDING

Docket No. CENT 2015-0185
A.C. No. 41-00906-371548

Mine: Sherwin Alumina, L.P.
Mine ID: 41-00906

**AMENDED DECISION AND ORDER AND ORDER GRANTING SECRETARY'S AND
INTERVENOR'S JOINT MOTION FOR CORRECTION OF CLERICAL ERROR**

Appearances: Mary Kathryn Cobb, Esq., U.S. Department of Labor, Office of the Solicitor, Dallas, Texas, and Derek Baxter and Philip Mayor, Esq., U.S. Department of Labor, Office of the Solicitor, Arlington, Virginia (on brief) for the Secretary of Labor

Christopher V. Bacon, Esq., and Samantha D. Seaton, Esq., Vinson & Elkins LLP, Houston, Texas for Sherwin Alumina Company, LLC

Susan J. Eckert, Esq., Santarella & Eckert, LLC, Littleton, Colorado for United Steelworkers Local 235A

Before: Judge McCarthy

The Decision and Order that issued on September 24, 2015 is hereby amended pursuant to Commission Rule 69(c), 29 C.F.R. 2700.69(c). My original decision at footnote 6 states, “As discussed *supra*, the Secretary also argues that striking miners who are permanently replaced should likewise be considered working miners and entitled to have their designated representative participate in inspections and conferences.” On September 29, 2015, the Secretary of Labor and Intervenor, United Steelworkers, Local 235A, moved for the correction of a clerical error in the Decision and Order and noted that the word “not” was inadvertently omitted from the quoted sentence. Respondent/Contestant Sherwin Alumina Company does not oppose the motion. The unopposed motion is granted. Accordingly, the sentence should read “As discussed *supra*, the Secretary also argues that striking miners who are *not* permanently replaced should likewise be considered working miners and entitled to have their designated representative participate in inspections and conferences.” (emphasis added).

I. Statement of the Case

This matter is before me upon a Notice of Contest and related Petition for the Assessment of Civil Penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d).

This is a case of first impression. The precise issue presented is whether Sherwin Alumina Company (“Sherwin”) violated section 103(f) of the Mine Act by refusing to allow the properly designated representative authorized by miners to accompany MSHA during physical inspection of the mine after Sherwin locked out and temporarily replaced the miners during an ongoing, economic labor dispute. That refusal prevented the representative from aiding inspections and participating in pre-and post-inspection conferences since the lockout.

Twenty-two years ago, Chairman Holen and Commissioners Backley, Doyle and Nelson affirmed Administrative Law Judge Morris’ conclusion that “striking employees ... were not miners because they were not working in the mine at the time of the inspection” and held that “striking employees ... were not entitled to have their previously designated walk-around representative accompany the MSHA inspector during his inspection of the mine.” *Cyprus Empire Corp.*, 15 FMSHRC 10, 15 (Jan. 1993). Contestant/Respondent Sherwin Alumina argues that *Cyprus Empire* is controlling Commission precedent, and that under the doctrine of *stare decisis*, I must dismiss and vacate the citation and the concomitant failure-to-abate order at issue. Sherwin Br. 1, 21. Sherwin contends that the locked-out employees who designated their walkaround representative are no different than the striking employees in *Cyprus Empire*, because they are not actively working in a mine and therefore they are not miners under the plain language of section 3(g) of the Act. *Id.* at 8. In *Cyprus Empire*, the Commission concluded that the “safety purposes of section 103(f) were not diminished in this instance” because the striking miners were not working at the time and would be entitled to designate a walkaround representative once they returned to work. *Id.*, citing *Cyprus Empire*, 15 FMSHRC at 14. Similarly, Sherwin argues that once the locked-out employees return to work, they too will have the right to designate their own representative. In the meantime, Sherwin argues that the locked-out miners’ safety is not being compromised, they continue to have access to safety information through MSHA’s District Office, and MSHA’s District Office has discretion to review and alter any training that they will receive prior to returning to work. *Id.*, citing Tr. 139, 140, 156-57; 30

C.F.R. part 48. Also, to the extent that section 103(f) serves the secondary purpose of providing information regarding ongoing health and safety conditions to the MSHA inspector, Sherwin argues that such purpose is better served by offering the inspector unlimited access to speak with replacement workers actually working in the mine. Sherwin Br. 8.

The Secretary argues that *Cyprus Empire* is not binding, and that the Secretary's current interpretation of sections 3(g) and 103(f) of the Mine Act must replace the Commission's prior interpretation in that case. Sec'y Br. 24, 26, citing *National Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 983-84 (2005) (*Brand X*) (permitting agencies to provide authoritative interpretations of ambiguous statutory language even after a contrary judicial interpretation). The Secretary emphasizes that only the United Mine Workers (as an intervenor), and not the Secretary of Labor, advanced the Secretary's interpretation beyond the trial level and appealed the judge's adverse decision in *Cyprus Empire* to the Commission. Sec'y Br. 25. Hence, the Commission did not have the benefit of considering the Secretary's current interpretation that the statutory definition of the term "miner" in section 3(g) of the Act, defined to mean "any individual working in a coal or other mine," is ambiguous. Accordingly, under *Chevron*, the Secretary argues that his interpretation of "miner" in the context of section 103(f) to include employees currently locked out or on strike, who have not been permanently replaced and reasonably expect to return to work at the end of the labor dispute, is permissible and entitled to deference. See Sec'y Br. 7; *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984). The Secretary contends that his current interpretation is consistent with the overall remedial purpose of the Act, the specific purposes of the walk-around provision, and Commission and judicial precedent giving a broad interpretation to the walk-around provision so that a locked-out miner representative can continue to protect the safety and health of miners who reasonably expect to return to the mine and resume active work. Sec'y Br. 16-24.

Intervenor, United Steelworkers Local 235A ("Steelworkers"), agrees with the Secretary that the Mine Act's definition of "miner" under section 3(g) is ambiguous, and should be interpreted in the context of section 103(f) to include workers who are on strike or locked out, but who reasonably expect to return to the mine at the end of a labor dispute. Intervenor Br. 8. The United Steelworkers further asserts that there is no evidence that the Secretary of Labor improperly issued the section 104(a) Citation and section 104(b) Order at issue in order to affect the balance of power in the labor negotiations between Sherwin and the Steelworkers. *Id.* at 12-16. Finally, the Steelworkers argue that including a locked-out miners' representative in the inspection party assists with ensuring, and does not compromise, safety at the mine. *Id.* at 20-23.

Early procedural background in this matter was set forth in my January 21, 2015 Order Consolidating Proceedings and Denying Motions. Thereafter, a hearing was held in Corpus Christi, Texas on February 17, 2015. During the hearing, the parties introduced testimony and documentary evidence. Witnesses were sequestered. The Secretary's Motion in Limine to exclude evidence of sabotage was denied. Tr. 16-19. After the hearing, the parties submitted briefs and reply briefs.

For the reasons set forth below, I find that *Cyprus Empire* does not govern disposition of this case because in that matter the Commission left open the prospect of remaining ambiguity in the statutory definition of the term "miner" and the Secretary proffered no position to which the

Commission could accord weight. In this case, by contrast, the Secretary persuasively argues that in the context of Section 103(f), the statutory definition of “miner” in the phrase “representative authorized by his miners” is ambiguous and should include locked out miners, who have been temporarily replaced and reasonably expect to return to work at the end of the labor dispute. Such miners are still working in a mine, they have just been temporarily prevented from doing so during the lockout.

My decision is limited to the context of a lockout in which locked out miners cannot be permanently replaced and may be considered still working in the mine, albeit locked out. As such, they retain an ongoing interest in the primary purpose of the Mine Act, to protect the health and safety of the miners working in, and not permanently replaced from, the mine.

The Secretary obviously plays to a larger audience when he abandons his pre-hearing “lockout” versus “strike” basis for distinguishing *Cypress Empire* and instead argues that both locked out *and* striking miners who have not been permanently replaced are still working in the context of the walk-around provision because they can reasonably expect to resume active work in the foreseeable future, and help protect the safety of temporary replacements during the interim labor dispute. Sec’y Br. 30-31. I decline the Secretary’s invitation to extend his current interpretation to striking miners, who have not been permanently replaced. In my view, that would bog the Commission down in resolving intricate and complex labor relations issues such as temporary versus permanent replacement and the nature of the underlying walk out, either an economic or unfair labor practice strike, which mandate different outcomes on the permanent replacement issue under the National Labor Relations Act.

An economic strike is one neither prohibited by law or collective-bargaining agreement nor caused or prolonged by an employer unfair labor practice and generally has an object of enforcing economic demands on the employer. *See e.g., NLRB v. Transport Co. of Texas.*, 438 F.2d 258, 262 n.6 (5th Cir. 1971). The strike in *Cyprus Empire* was clearly an economic strike over the terms of a new collective-bargaining agreement, in which the strikers could have been, but were not, permanently replaced. Rather, the operator resumed mining operations with salaried employees. *See Cyprus Empire Corp.*, 13 FMSHRC 1040, 1044 ¶ 13 (ALJ)(“The hourly employees commenced the strike on or about May 13, 1991, related to the negotiations over a new collective-bargaining agreement.”). There was no mention of any underlying unfair labor practice.

The Commission has never addressed an unfair labor practice strike, where miners striking, at least in part over an unfair labor practice, cannot be permanently replaced and must be reinstated to existing positions upon their unconditional offer to return to work even if the employer has hired permanent replacements. *See, e.g., NLRB v. International Van Lines*, 409 U.S. 48, 50 (1972). The nature of an unfair labor practice strike, however, may turn on protracted litigation of the alleged underlying unfair labor practice. Further, a strike that is economic at its inception may be converted into an unfair labor practice strike by the employer’s subsequent commission of an unfair labor practice. *See e.g., Citizens Publ’g & Printing Co., v. NLRB*, 263 F. 3d 224 (3d Cir. 2001) (false statement that economic strikers had been replaced converted strike to unfair labor practice strike). Such difficult legal determinations lie exclusively within the technical expertise of the National Labor Relations Board (NLRB).

Thus, rightly or wrongly, *Cypress Empire* controls in the context of an economic strike in which strikers walk off the job and can be permanently replaced, but are entitled to be placed on a preferential rehire list.¹ The Commission is certainly free to revisit *Cypress Empire*, but this judge cannot do so.² I can, however, differentiate between an offensive lockout, in which an operator withholds employment from his miners for the purpose of resisting their demands or gaining concessions, but may not permanently replace them, and an economic strike, in which miners voluntarily choose to withhold their services and may be permanently replaced. Such differentiation is particularly appropriate here in order to resolve whether a lockout renders the term “miner” ambiguous in the context of section 103(f)’s walkaround provision. I find that the statutory phrase “representative authorized by his miners” in section 103(f) is ambiguous in the context of a lockout, and that the Secretary’s interpretation is reasonable, consistent with the underlying purpose of the Act and the purposes of the walk-around provision, and entitled to deference.

¹ *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938)(economic strikers may be permanently replaced and denied a request for reinstatement until vacancy arises); *Laidlaw Corp.*, 171 NLRB 1366 (1968), *enforced*, 414 F.2d 99 (7th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970)(economic strikers, who unconditionally apply for reinstatement when their jobs are filled by permanent replacements, remain employees, and are entitled to full reinstatement upon the departure of replacements, unless they have acquired regular and substantially equivalent employment or employer can establish that failure to offer full reinstatement was for legitimate and substantial business justifications).

² *Cypress Empire* may be criticized for a simplistic failure to reconcile the reasonable expectation of reinstatement rights under federal employment statutes such as the National Labor Relations Act (NLRA) with the entirely discrete yet compatible purpose of the Mine Act to protect the health and safety of miners. In any event, as explained herein, locked out miners, cannot be permanently replaced, are entitled to reinstatement at the conclusion of the labor dispute, and have specialized and experiential knowledge of health and safety concerns at the mine, which knowledge augments the protection of both replacement workers and miners entitled to return to work after resolution of a labor dispute. As the Supreme Court has recognized, “[w]hen two statutes complement each other, it would show disregard for the congressional design to hold that Congress nonetheless intended one federal statute to preclude the operation of the other.” *POM Wonderful LLC v. Coca-Cola Co.*, 134 S.Ct. 2228, 2238 (2014) (citing *J.E.M. Ag. Supply, Inc. V. Pioneer Hi-Bred Int’l, Inc.*, 534 U.S. 124, 144 (2001) (“[W]e can plainly regard each statute as effective because of its different requirements and protections”). See also, *Wyeth v. Levine*, 555 U.S. 563, 578-579 (2009). Compare *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 892-93 (1984) (“[c]ounterintuitive though it may be, we do not find any conflict between application of the NLRA to undocumented aliens and the mandate of the Immigration and Nationality Act (INA)” since enforcement of the NLRA with respect to undocumented alien employees is compatible with the policies of the INA). For the reasons explained herein, given the ambiguity of the statutory term “miner” as one who works in a mine, one could perceive statutory warrant in the Mine Act for treating an operator’s locked out employees as “miners,” particularly in the context of section 103(f) dealing with a “representative authorized by his miners.”

Accordingly, based on a careful review of the entire record, including the parties' post-hearing briefs and my observation of the demeanor of the witnesses,³ I make the following:

II. Findings of Fact

Sherwin operates a large alumina refinery in Gregory, Texas, which encompasses 1200 acres. The facility utilizes hundreds of valves and tanks and miles of piping, and usually employs about 2,000 miners. Tr. 10, 96-97. Of the 2,000 miners operating the plant in 2014, 450 of the "hourly employees" were represented by the United Steelworkers Local 235A ("Steelworkers") under the terms of a collective bargaining agreement set to expire on October 1, 2014. About 500-600 other miners were contract workers. Tr. 97, 113; Jt. Stip. 10; Jt. Ex. 11, Exh. A.

In June of 2013, Joe Guzman was designated by miners working at Sherwin, as an authorized representative under Section 103(f) of the Mine Act. Jt. Ex. 19, Stip. No. 12; Jt. Ex 4. Guzman typically accompanied MSHA inspectors and provided information to inspectors about mine processes and gave them the names of other miners to be consulted. Tr. 28-29. Guzman also participated in post-inspection conferences and kept miners apprised of inspection results. Tr. 28-29, 31-32, 104-05. There is no evidence that Guzman ever engaged in misconduct or sabotage at the Sherwin Mine.

From September 2013 until the hearing, Sherwin received about 458 citations and about 119 of them were designated significant and substantial (S&S) violations by MSHA. Tr. 180. Around November 2013, in response to the large number of S&S citations, Sherwin submitted a corrective action plan (CAP) to MSHA. Tr. 143. About September 2014, MSHA gave Sherwin notice that it was a pattern-of-violations (POV) candidate under Section 104(e) of the Mine Act. Tr. 61, 141.

For several months prior to October 2014, Sherwin and the Steelworkers engaged in unsuccessful negotiations over a successor collective-bargaining agreement. Jt. Ex. 11, Declaration of Paul English, safety, health, and industrial-hygiene manager, at ¶ 3. During negotiations, verbal and written hazard complaints to MSHA increased, but only about a quarter of them were deemed to have any merit. Tr. 80-83, 129. MSHA, the Steelworkers, and Sherwin management and counsel, met in June 2014 to evaluate the CAP plan. Tr. 143. Sherwin's labor relations counsel at the time, Henry Chajet, from Patton Boggs (now merged with Jackson Lewis), raised several general allegations of sabotage with MSHA District Manager, Michael Davis. Tr. 143-44.

Indeed, during the summer of 2014, Sherwin documented several incidents of suspected sabotage at the facility. Tr. 81, 164, 175. Electrical substation panels and switch house cabinets were loosened or unscrewed, and machine guarding was missing or taken off and

³ 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.

laid on the floor. Tr. 81, 164, 175. Air was turned off on a pneumatic overflow alarm in the rod mills. Sherwin purchased a lock to keep the valve open. Tr. 81. Weeks later, the lock was cut and the alarm turned off again. Tr. 81. To prevent any further tampering, Sherwin enclosed the valve with steel, and welded the enclosure shut. Tr. 81.

About mid-June 2014, after an anonymous complaint to MSHA, a pile of presumed asbestos-containing material (PACM) was dumped on the powerhouse floor, just one day after the same area had been examined by MSHA. Tr. 88-90. Also, someone broke into several supervisor offices. A safety relief valve was bent, and seemed to have been forced into a position that would not allow it to work properly. Tr. 167. A medical lancet was stuck into a suction unit in the plant ambulance, resulting in a finger injury to a miner. Tr. 165. Photographs of a 1999 explosion at the Kaiser Aluminum and Chemical Corporation Gramercy plant in Louisiana were left in the Sherwin administration building with a note stating words to the effect that “This could happen to you.” Tr. 165-66.⁴

Absent security cameras in the mine, which likely had to be negotiated with the Steelworkers as a change in working conditions under Section 8(a)(5) of the NLRA, Sherwin was unable to discover who committed the alleged sabotage. Tr. 176-177. Sherwin reported the incidents to government agencies, law enforcement, and several MSHA inspectors. Tr. 88, 167, 176-79, 185.

On Friday, October 10, 2014, the Steelworkers rejected Sherwin’s final offer for a new collective-bargaining agreement. Tr. 183. On Saturday, October 11, 2014, Sherwin locked out approximately 450 miners represented by the Steelworkers in furtherance of its labor dispute with the Steelworkers. Jt. Stip. No. 11. Joe Guzman, and the two miners who designated him as their miner representative under section 103(f), were among those miners locked out by Sherwin. Tr. 55; Jt. Ex. 19, Stip. No. 13.

⁴ Sherwin opened the door to this tragic accident at trial. Tr. 165-66. I take judicial notice that this 1999 explosion injured 29 miners, blinded one, and occurred during a lockout of the United Steelworkers when the Kaiser Aluminum plant was being operated by temporary replacement workers. MSHA later produced a public report regarding this disaster. See MSHA, Report of Investigation, <http://www.msha.gov/disasterhistory/gramercy/report/reportdept.htm>.

Under Commission precedent, judicial notice can be taken of the existence or truth of a fact or other extra-record information that is not the subject of testimony but is commonly known, or can safely be assumed, to be true. *Union Oil*, 11 FMSHRC 289, 300 n.8 (Mar. 1989). Also, the Commission has recognized that the existence and content of MSHA public documents are subject to judicial notice. *Brody Mining, LLC*, 36 FMSHRC 2027, 2030 n. 4 (Aug. 2014) (Inspector General Report); *Black Diamond Constr. Inc.*, 21 FMSHRC 1188, 1202 n. 3 (Nov. 1999) (MSHA handbook); *Jim Walter Resources*, 7 FMSHRC 1348, 1355 n. 7 (Sept. 1985) (MSHA policy memorandum).

This disaster occurred about 6 years after *Cyprus Empire* was decided by the Commission. Perhaps that’s why the Secretary of Labor now asks the Commission to re-examine *Cyprus Empire*.

In anticipation of the lockout, Sherwin had trained management personnel as field supervisors and hired hourly, temporary replacement miners, who had done observational training in the plant during the month prior to the lockout, but performed no hands-on mining. Tr. 184. During the lockout and in response to picketing, Sherwin hired additional security, and bussed the temporary replacement workers into the plant. Tr. 42-43.

Two days after the lockout, Sherwin discovered that about 18 of its 30 hydraulic presses, essential equipment used in the clarification process, were damaged by water that had been introduced into the hydraulic systems. Tr. 178. On questioning from the undersigned, Stephen Hoey, Sherwin's director of environment, safety and health, acknowledged that either the pre-lockout miners represented by the Steelworkers or the post-lockout replacement workers could have committed the alleged sabotage of the presses. Tr. 185.

On October 14, 2014, MSHA inspector Francisco Velma arrived at the Sherwin Mine to continue a regular inspection. Jt. Stip. No. 14; Tr. 36. Velma asked Guzman to accompany him, but Sherwin (English) informed Velma that it would not permit Guzman to enter the mine and assist Velma because of the lockout. Jt. Stip. No. 15. Sherwin provided Velma with legal authority (presumably *Cyprus Empire*) supporting its position. Jt. Stip. No. 15. Velma conducted the inspection without Guzman and chose not to cite Sherwin at that time for preventing Guzman's participation, but Velma did not provide any future assurances that MSHA would not do so in the future. Jt. Ex. 19, Stip. No. 15.

On October 20, 2014, MSHA inspector Brett Barrick informed Sherwin that he wanted Guzman to accompany him on an MSHA inspection. Jt. Stip. No. 16. English again refused to allow Guzman to serve as the designated section 103(f) miners' walkaround representative. English told Barrick that Sherwin was tired of being asked that question and that if MSHA persisted, Sherwin would sue MSHA. Tr. 32-33. According to Barrick, English further told Barrick that Sherwin was excluding Guzman because he "was no longer an employee of the mine."⁵ Tr. 33. English did not deny that he made this statement. I credit Barrick's testimony regarding the exchange, given English's rather vague and non-specific description of this discussion with Barrick, and Sherwin's failure to proffer Barrick's notes. Tr. 47, 84-85.

Barrick completed an inspection without Guzman and did not issue any 103(f) citation to Sherwin at that time. Jt. Ex. 19, Stip. No. 16. Barrick credibly testified that he believed that Sherwin had violated Section 103(f) on this occasion (October 20) by refusing to permit Guzman to accompany the inspection party, but Barrick did not express this view to Sherwin because he thought he needed permission from a supervisor to issue such a citation. Tr. 43-44, 47, 72. Barrick did not provide any assurances to Sherwin that its continued refusal to permit Guzman to accompany an MSHA inspector during the lockout would not result in a future citation. Jt. Ex. 19, Stip. No. 16.

⁵ English's statement was not accurate. Guzman remains an employee of Sherwin, but he had been locked out and was not actively engaged in mining because of the lockout.

Michael Davis, MSHA's South Central District Manager for Metal/Nonmetal Administration, became aware of Sherwin's refusal to accord Guzman section 103(f) miner representative status shortly after Velma's October 14, 2014 inspection. Tr. 123. Davis opined that Sherwin's conduct violated section 103(f) and that a citation should be issued. Tr. 123, 155, 160-61. Davis, however, did not direct Velma or Barrick to issue citations for the October 14 or 20 incidents because of adverse Commission precedent (*Cyprus Empire*) relied on by Sherwin. Tr. 124, 154-55. Rather, Davis spoke with superiors at MSHA headquarters to determine whether a miners' representative appointed by locked-out miners should be permitted to accompany an MSHA inspector during a lockout, and whether a citation should issue. Tr. 155-56, 160-61.

The Secretary's interpretation of Section 103(f) in this lockout context was formalized in a letter drafted at MSHA headquarters and provided to Davis. Tr. 132-34, 160-61; Jt. Ex. 2. Davis signed the letter and gave the letter and consonant citation to Barrick to issue to Sherwin should Sherwin continue to deny Guzman the right to accompany Barrick during his next inspection during the lockout. Tr. 132-34.

On November 13, 2014, Barrick returned to the Sherwin mine to perform another inspection. Jt. Ex. 19, Stip. No. 17; Tr. 34. Barrick met with English and requested that Guzman accompany Barrick as miners' representative during the inspection. Tr. 34. Barrick provided Sherwin with Davis' letter, which indicated that Sherwin's refusal to permit Guzman to accompany the inspection team contravened section 103(f). Tr. 34-35; Jt. Ex. 19, Stip. No. 18; Jt. Ex. 2. Barrick told English that Sherwin had 30 minutes to comply with his request or he would issue a 104(a) citation under section 103(f). Tr. 35. English consulted with counsel and informed Barrick that Sherwin still refused to permit Guzman to accompany the inspection team. Tr. 35.

Barrick then issued Citation No. 8778065. Tr. 35; Jt. Ex. 19, Stip. No. 19; Jt. Ex. 3. That Citation states:

On November 13, 2014 the mine operator refused to allow the miners' representative to accompany the Secretary in inspection of this mine for the purpose of aiding such inspection. This constitutes a violation of section 103(f) of the Mine Act. The condition has not been designated as "significant and substantial" because the conduct violated a provision of the Mine Act rather than a mandatory safety or health standard. The Secretary respectfully disagrees with the reasoning contained in the Federal Mine Safety and Health Review Commission decision in the *Cyprus Empire Corporation*, 15 FMSHRC10 (Jan. 1993), addressing section 103(f) of the Act. The Secretary has also determined that this case should not appropriately apply to the present situation. The interest that underlie the concept of miners' representatives remain important during a lockout, as miners' [sic] who have been locked out have a continued interest in the health

and safety at the mine and miners' representatives play a crucial role in safeguarding this interest.

Jt. Ex. 3.

The violation was designated as non-S&S, with no likelihood of injury or illness, no lost workdays, and low negligence. Jt. Ex. 19, Stip. No. 7; Jt. Ex 3. The Secretary proposed a penalty of \$112 for the alleged section 103(f) violation. Jt. Ex. 19, Stip. No. 8.

Thereafter, Barrick notified English that he would give Sherwin an additional 30 minutes to abate the Citation No. 8778065 by permitting Guzman to accompany Barrick on an inspection, otherwise Barrick would issue a section 104(b)(1) Order for failure to abate. Tr. 35. Thirty minutes later, when Sherwin continued to refuse to permit Guzman to accompany the inspection party, Barrick issued Order No. 8778066. Tr. 35; Jt. Ex. 19, Stip. No. 19; Jt. Ex. 3, pp. 3-4. That Order states:

The mine operator continues to refuse the miner's [sic] representative to accompany the Secretary in inspection of this mine for the purpose of aiding such inspection. Mitigating circumstances have not been provided that would justify extension.

Jt. Ex. 3.

The failure to abate order listed no area affected, which is in accordance with an MSHA Interpretive Bulletin (IB) on the issue. Jt. Ex. 3; MSHA Interpretive Bulletin, Section 103(f) of the Federal Mine Safety and Health Act of 1977, 43 Fed. Reg. 17,546, (Apr. 25, 1978) ("However, actual withdrawal of miners will not *ordinarily* occur in cases arising under section 103(f), because section 104(b) also requires the inspector to determine the extent of the area the mine affected by the violation. In most cases, the area(s) of the mine affected by an operator's refusal to permit participation ... under section 103(f) would be a matter of conjecture and could not be determined [with] sufficient specificity.").

No failure-to-abate penalties were assessed by MSHA, although MSHA's Section 103(f) Interpretive Bulletin states:

"...failure to abate [section 103(f)] violations subjects an operator to additional civil penalties for each day during which the failure to abate continues. (section 110(b).) Under circumstances where an operator refuse[s] to allow participation by a representative of miners, each day thereafter during which an inspector is carrying out activities covered by section 103(f) will be considered a day during which the failure to correct the violation continues, for purposes of proposing additional civil penalties."

43 Fed. Reg. 17547.

Guzman did not file a discrimination complaint with MSHA alleging that Sherwin's "interference" with his exercise of section 103(f) statutory participation rights violated section 105(c). *See id.* at 17,547.

On December 12, 2014, Sherwin filed a timely notice of contest concerning the Citation and Order. Jt. Ex. 5. On December 22, 2014, the Secretary filed a Motion for Expedited Proceedings. Jt. Ex. 7. On December 24, 2014, the Secretary filed a Motion for Summary Decision. Jt. Ex. 10. Sherwin filed Oppositions to both requests. Jt. Exs. 8 and 10. On January 21, 2015, the undersigned set a hearing date for February 17, 2015, ordered expedited discovery, and otherwise denied the Secretary's motion to expedite proceedings. My January 21, 2015 Order also denied the Secretary's Motion for Summary Decision.

On January 23, 2015, after the undersigned inquired during a conference call about whether the temporary replacement miners had designated a miners' representative, some temporary replacement miners designated Francisco S. Alvarez as their miners' representative. Tr. 53, 105, 130-31; Jt. Ex. 19, Stip. No. 20; Jt. Ex. 1. Alvarez is a management official for CCC Group, a contractor that provides about 100 temporary replacement workers for Sherwin. Tr. 107-109, 113.

Alvarez reports to CCC lead manager, Steve Whitehouse, who reports to English. Tr. 106-107. English then provides third-hand feedback about MSHA inspections to the replacement and other non-locked-out miners. Tr. 99, 108, 111-12. At the time of the hearing, although Alvarez had accompanied inspection teams, he was "on a learning curve" and generally did not convey information about MSHA inspections directly to the miners as Guzman had done. Alvarez did not distribute or post MSHA citations and/or orders at control stations in the Mine, and did not point out hazards to MSHA inspectors. Tr. 98-99, 106-08, and 110. Barrick credibly testified and the Act provides that the representative of miners is supposed to assist MSHA in its inspection of the Mine to ensure that the miners have a voice in the health and safety of the Mine. Tr. 29-30.

Neither the locked out miners nor the temporary replacement miners had the benefit of any representative of miners from the time of the lockout on October 11, 2014 until Alvarez's designation on January 23, 2015. Jt. Ex. 19, Stip. 20; Jt. Ex 1; Tr. 75-76, 105-06. MSHA records still identify Guzman as a designated miners' representative. There has been no termination of his designation as representative of miners pursuant to 30 C.F.R. § 40.5(a) or (b). Tr. 56, 62, 144. Those regulations provide:

§ 40.5 Termination of designation as representative of miners.

- (a) A representative of miners who becomes unable to comply with the requirements of this part shall file a statement with the appropriate District Manager terminating his or her designation.
- (b) Mine Safety and Health Administration shall terminate and remove from its files all designations of representatives of miners

which have been terminated pursuant to paragraph (A) of this section or which are not in compliance with requirements of this part. The Mine Safety and Health Administration shall notify the operator of such termination.

III. The Applicable Statutory and Regulatory Framework

As noted, MSHA issued Citation No. 8778065 for an alleged violation of section 103(f) of the Mine Act and issued Order No. 8778066 for failure to abate that alleged violation. Jt. Ex. 3. Section 103(f) provides:

Subject to regulations issued by the Secretary, a representative of the operator and a *representative authorized by his miners shall be given an opportunity to accompany* the Secretary or his authorized representative during the physical inspection of any coal or other mine made pursuant to subsection (a), *for the purposes of aiding such inspection and to participate in pre- or post-inspection conferences held at the mine.* Where there is no authorized miner representative, the Secretary or his authorized representative shall consult with a reasonable number of miners concerning matters of health and safety in such mine. Such representative of miners who is also an employee of the operator shall suffer no loss of pay during the period of his participation in the inspection made under this subsection. *To the extent that that Secretary or authorized representative of the Secretary determines that more than one representative from each party would further aid the inspection, he can permit each party to have an equal number of such additional representatives.* However, only one such representative of miners who is an employee of the operator shall be entitled to suffer no loss of pay during the period of such participation under the provisions of this subsection. Compliance with this subsection shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act.

30 U.S.C. § 813(f) (emphasis added).

Section 103(f) grants miners and their representatives the opportunity to participate in physical inspections and conferences conducted by MSHA inspectors pursuant to section 103(a) for the purpose of observing or monitoring safety and health conditions as part of direct safety and health enforcement activity. In enacting section 103(f), Congress made clear that effective implementation of the Act depends upon active and orderly participation by miners and representatives of miners in the physical inspection process, including both pre and post-inspection conferences. Section 103(f)'s "walk-around provision" promotes this goal by ensuring that an MSHA inspector will benefit from the assistance and participation of a representative authorized by an operator's miners when conducting inspections and post-inspection conferences. *See* 29 U.S.C. 113(f); *Kerr-McGee Coal Corp. v. FMSHRC*, 40 F.3d 1257, 1260 & n.4 (D.C. Cir. 1994); *Utah Power & Light Co. v. Sec'y of Labor*, 897 F.2d 447, 451-52, 455

(10th Cir. 1990); *see also* Tr. 29-30, 104-05 (describing how miners' representative Guzman assisted in inspections and post-inspection conferences, thus fulfilling this role).

The Senate Reports concerning the 1977 Act indicate that the Act's walk-around provisions are intended to enhance miner safety and awareness by assuring that miners are apprised of relevant inspection results by their representative. S. Rep. No. 95-181, at 26 (1977), *as reprinted in* 1977 U.S.C.C.A.N. 3401, 3428, *reprinted in* Subcommittee on Labor of the Committee on Human Resources, 95th Cong., 2d Sess. Legislative History of the Federal Mine Safety and Health Act of 1977 at 616 (Comm. Print 1978) ("Presence of a representative of miners at opening conference helps miners to know what the concerns and focus of the inspector will be, and attendance at closing conference will enable miners to be fully apprised of the results of the inspection. It is the Committee's view that such participation will enable miners to understand the safety and health requirements of the Act and will enhance miner safety and health awareness.").

The status of walk-around rights provided by section 103(f) is discussed at length in MSHA's Interpretive Bulletin (IB) published on April 25, 1978, which notes:

Section 103(f) provides an opportunity for the miners, through their representatives, to accompany inspectors during the physical inspection of the mine, for the purpose of aiding such inspection and to participate in pre-or post-inspection conferences held at the mine. As the Senate Committee on Human Resources stated, "If our national mine safety and health program is to be truly effective, miners will have to play an active part in the enforcement of the Act." S. Rep. No. 95-181, 95th Cong., 1st Sess., at 35 (1977)." Several important purposes are served by affording representatives of miners the opportunity to accompany Mine Safety and Health Administration (MSHA) inspectors. Participation by miners' representatives will enhance miner safety and health awareness and contribute to greater understanding by miners of the safety and health requirements of the Act. In addition, participation in the inspection process by representatives of miners will directly aid inspection itself by providing information through individuals familiar with day-to-day conditions at the mine site.

43 Fed. Reg. 17546.

The Mine Act, MSHA regulations, and MSHA's Interpretive Bulletin are all silent about whether a representative of striking or locked-out miners may serve as a representative of miners during an inspection that occurs amid a strike or lockout. Through regulation, the Secretary of Labor has defined a "representative of miners" as "(1) Any person or organization which represents two or more miners at a coal or other mine for purposes of the Act, and (2) Representatives authorized by the miners, miners or their representative, authorized miner representative, and other similar terms as they appear in the Act." 30 C.F.R. § 40.1(b)(1) and (2). Part 40 of the Code of Federal Regulations contains regulations governing the Representative of

Miners. The regulations contain requirements for the filing of specified identification data to be posted at each mine, the designation of persons to exercise the functions of a representative under provisions of the Mine Act, and the termination of such representatives. 30 C.F.R. §§ 40.2-5; *see also Utah Power*, 897 F.2d at 453.

The Preamble to the Part 40 regulations expressly rejected narrow interpretations of the terms “representative of miners” and broadly interpreted “representative of miners” to encourage miner participation in the health and safety of the mine because Congress deemed it vital to have miners freely participate in health and safety matters at the mines. 43 Fed. Reg. 29,508 (July 7, 1978). The Preamble expressly states:

First, there is no clear statement in the legislative history of the Mine Act defining who is to be a representative of miners for a specific purpose, nevertheless, Congress believed it was vital to have miners freely participate in health and safety matters at the mines. Second, the frequent use of the term “representative” throughout the Mine Act in different contexts suggests that a broad definition would be preferable to a narrow one. Additionally, any attempt to limit the manner in which representatives are selected would be intrusive into labor/management relations at the mine and not in keeping with the spirit of miner participation. Finally, it would be very difficult to put forth a more detailed or restrictive rule which would be applied to all the varied situations at all mines--large and small, union, multi-union and nonunion, coal and metal/nonmetal, which would still be equitable in all situations.

43 Fed. Reg. 29508.

In rejecting the more narrow NLRB definition of “Representative” based on the “majority rule” concept inherent in the context of collective bargaining, “which contemplates only one union miner representative at each mine,” MSHA emphasized the following:

...The purposes of the Mine Act are better served by allowing multiple representatives to be designated. This ensures that all miners have the opportunity to exercise their right to select the representative of their choice for the purpose of performing the various functions of a representative of miners under the Act and within the framework of each provision.

Finally, based on experience under the Federal Coal Mine Health and Safety Act of 1969 and Part 81, it is reasonable to expect that miners will choose representatives with a substantial amount of experience, and problems are not anticipated with this broad

interpretation of the term representative of miners. If problems do arise MSHA will propose appropriate revisions.

43 Fed. Reg. 29508.

I conclude that section 103(f) of the Mine Act, as reinforced by the Preamble to the Part 40 regulations, authorizes a broad interpretation of the statutory phrase “*representative authorized by his miners*” as set forth in section 103(f) to achieve the statutory purpose of facilitating the miners’ voice in health and safety matters at a mine.

To properly and broadly interpret the phrase “representative authorized by his miners” in section 103(f), it is necessary to examine the statutory definition of the term “miner” under section 3(g) of the Act in the context of section 103(f) of the Act. Section 3(g) of the Act defines “miner” as “any individual *working* in a coal or other mine.” 30 U.S.C. § 802(g) (emphasis added). Thus, a “representative authorized by his miners” under section 103(f) is any individual who is properly designated by two or more individuals “working” in a mine of an operator.

It is undisputed that Guzman was properly designated by two or more Sherwin miners who were working in the Sherwin mine at the time of the designation. Jt. Ex. 4. That designation was never terminated pursuant to MSHA regulation. 30 C.F.R. § 40.5. As further explained herein, it would be inconsistent with the fundamental purpose of the Mine Act in protecting miner safety and health to terminate that designation by operation of law because a mine operator invoked an offensive lockout, thereby preventing his unionized miners from returning to work, unless their collective-bargaining representative, who continues to represent locked out miners with respect to mandatory terms and conditions of employment, including safety and health issues, capitulated to the operator’s demands in a labor dispute.

The Secretary of Labor has determined that the Act’s definition of “miner” under section 3(g) in the section 103(f) context is ambiguous, and should be interpreted broadly to include workers who are on strike or have been locked out, but who reasonably expect to return to the mine at the end of the labor dispute. Jt. Exs. 2 and 16; Sec’y Br. 9-10. Intervenor Steelworkers agrees with the Secretary’s “context-specific” interpretation. Intervenor Br. 2, 8. Respondent Sherwin disagrees with this interpretation, and posits that miners entitled to a walkaround representative during an inspection are only those “actively working in a mine at the present time.” Sherwin Br. 8.

In resolving this dispute, I find that, for better or for worse, the Commission’s decision in *Cyprus Empire* controls in the context of a strike, particularly an economic strike, until overruled. It does not, however, bind the undersigned in the context of the instant lockout. Rather, I give *Chevron* step 2 deference to the Secretary’s reasonable interpretation that the statutory phrase “*representative authorized by his miners*” in the context of the walk-around provision of section 103(f) includes a representative authorized by miners who are locked out by

the operator.⁶ Accordingly, I find that Joe Guzman is a “representative authorized by [Sherwin] miners,” who continues to represent “two or more miners at a coal or other mine” pursuant to 30 C.F.R. § 40.1(b)(1) during the lockout for purposes of section 103(f) walk-around rights. Thus, on November 13, 2014, Respondent Sherwin violated section 103(f) of the Act by denying Guzman an opportunity to accompany inspector Barrick, and violated section 104(b) by failing to abate that violation during a subsequent inspection effort 30 minutes later.

IV. Legal Analysis

A. The Statutory Phrase “Representative Authorized by His Miners” in Section 103(f) Is Ambiguous

When analyzing the Secretary’s interpretation of the phrase “representative authorized by his miners” in section 103(f) of the Mine Act, the Commission applies the two-step approach set forth in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984); *Performance Coal Co. v. Fed. Mine Safety & Health Review Comm’n*, 642 F.3d 234, 238 (D.C. Cir. 2011); *Simola, emp. by United Taconite, LLC*, 34 FMSHRC 539, 543-5 (Mar. 2012).

Under that approach, if the statutory language is plain, the Commission must enforce such language according to its terms. *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015); *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010); *Dynamic Energy, Inc.*, 32 FMSHRC 1168, 1171 (Sept. 2010). On the other hand, if the statute is silent or ambiguous, the Commission asks whether MSHA’s interpretation is reasonable and permissible. *Chevron*, 467 U.S. at 843-44; *Thunder Basin Coal Co.*, 18 FMSHRC 582, 584 n.2 (Apr. 1996); *Joy Technologies, Inc. v. Sec’y of Labor*, 99 F.3d 991, 995 (10th Cir. 1996), *cert. denied*, 520 U.S. 1209 (1997). If the Secretary and the Commission have conflicting, reasonable interpretations of the Mine Act, the Secretary’s interpretations rather than the Commission’s interpretations are entitled to deference under *Chevron*. See, e.g., *Joy Technologies, supra*, 99 F.3d at 995; see also *Sec’y of Labor v. Excel Mining, LLC*, 334 F.3d 1, 6 (D.C. Cir. 2003); *Sec’y of Labor v. Mutual Mining, Inc.*, 80 F.3d 110, 113-15 (4th Cir. 1996).

Thus, if a statute is ambiguous, and if the implementing agency’s construction is reasonable, *Chevron* requires a federal court to accept the agency’s construction of the statute, even if the agency’s reading differs from what the court believes is the best statutory interpretation. *National Cable & Telecomm. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005)(*Brand X*), citing *Chevron*, 467 U.S. at 843-44, and n. 11. Put differently, a reviewing court or tribunal, like the Commission, must “accept [the Secretary’s reasonable] construction of

⁶ The Secretary’s proffered interpretation of “representative authorized by his miners” is admittedly broader than a representative selected by locked-out miners. As discussed *supra*, the Secretary also argues that striking miners who are not permanently replaced should likewise be considered working miners and entitled to have their designated representative participate in inspections and conferences. The instant matter, however, deals only with locked-out, not striking miners, and the deference afforded to the Secretary is therefore limited to the facts presented here. It is unnecessary to reach the issue of whether the Secretary’s broader interpretation is also entitled to deference.

the [Mine Act], even if the [the Secretary's] reading differs from what the [Commission] believes is the best statutory interpretation.” *Id.* at 980 (2005)(federal agencies can reverse judicial statutory interpretations of ambiguous statutory interpretations under certain circumstances); *cf.*, *Martin v. OSHRC*, 499 U.S. 144, 152-53 (1991)(reviewing court should defer to Secretary's interpretation when the Secretary and the Commission furnish reasonable but conflicting interpretations of *ambiguous regulation* promulgated by the Secretary under the Occupational Safety and Health Act).

Similarly, a reviewing court's or tribunal's prior construction of a statute does not trump a new and permissible agency construction entitled to *Chevron* deference, absent clear and unequivocal terms of the statute leaving no room for ambiguity and agency discretion. *See Brand X*, 545 U.S. at 982; *see also NLRB v. Iron Workers Local 103 (Higdon Construction Co.)*, 434 U.S. 335, 351 (1978)(agency's pre-*Chevron* resolution of conflicting claims represented a defensible construction of the statute entitled to considerable deference even though courts may prefer a different application; moreover, “[a]n administrative agency is not disqualified from changing its mind, and when it does, the courts still sit in review of the administrative decision and should not approach the statutory construction issue *de novo*, and without regard to the administrative understanding of the statutes.”).

In short, deference is given to the Secretary's interpretation of the Mine Act when that interpretation is reasonable. *Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 460 (D.C. Cir. 1994) (citing *Chevron*, 467 U.S. at 844); *Twentymile Coal Co.*, 36 FMSHRC 2009, 2012 (Aug. 2014). *Chevron* deference is usually granted to reasonable statutory interpretations that the Secretary advances on behalf of MSHA during litigation before the Commission, even though such interpretations are not promulgated in formal rulemaking. *Martin v. OSHRC*, 499 U.S. 144, 156-7 (1991); *Pattison Sand Co. v. FMSHRC*, 688 F.3d 507, 512 (8th Cir. 2012); *Olson v. FMSHRC*, 381 F.3d 1007, 1011 (10th Cir. 2004); *Wamsley v. Mutual Mining, Inc.*, 80 F.3d 110, 115 (4th Cir. 1996); *Sec'y of Labor v. Excel Mining, LLC*, 334 F.3d 1, 6 (D.C. Cir. 2003); *but see North Fork Coal Corp. v. FMSHRC*, 691 F.3d 735, 742 (6th Cir. 2012) (only *Skidmore* deference is owed positions taken by the Secretary during enforcement actions). The fact that the Secretary has waited since 1993 to exercise his interpretive authority and considered judgment on the issues presented in anticipation of the instant litigation, does not lessen the deference owed. *See Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 55 (2011).

Finally, even where the Commission has previously interpreted an ambiguous statutory term or ambiguous statutory terms, the Secretary of Labor, on behalf of MSHA, “may, consistent with the [Commission's] holding, choose a different construction, since the agency remains the authoritative interpreter (within the limits of reason) . . .” *Brand X*, 545 U.S. at 983; *see, e.g., Sec'y of Labor v. Nat'l Cement Co. of Cal., Inc.*, 573 F.3d 788 (D.C. Cir. 2009). When the Secretary does so, he does not say that the Commission's prior interpretation was necessarily wrong, he simply chooses a different permissible interpretation that is reasonable and consistent with the purposes of the Act. *See Brand X*, 545 U.S. at 983. As further explained below, I find that statutory language “representative authorized by his miners” in section 103(f) is ambiguous in the context of a lockout and I give deference to the Secretary's interpretation under *Chevron*.

In *Cyprus Empire*, the United Mine Workers of America (UMWA) argued that the erstwhile Commission must defer to the Secretary's interpretation of the statutory term "miner" in section 3(g) of the Act as applied to walk-around rights in section 103(f). *Cyprus Empire*, 15 FMSHRC at 15. In rejecting this argument, the 1993 Commissioners noted that the Secretary's analogous construction of the term "miner" was rejected as unreasonable by the D.C. Circuit in *Brock v. Peabody Coal Co.*, 822 F.2d 1134, 1151 (D.C. Cir. 1987)(*Peabody*).⁷ Moreover, those Commissioners emphasized that the Secretary did not appeal the judge's adverse decision or otherwise participate in the appeal; that "the wording of the statute sets forth Congress' intent as to the definition of miner; and that "[e]ven if there were remaining ambiguity, the Secretary has presented no position to which the Commission could accord weight." *Cyprus Empire*, 15 FMSHRC at 15. In this case, by contrast, the Secretary has clearly exercised his informed judgment, after consultation with his client MSHA, to argue before the Commission that the definition of "miner" under section 3(g) of the Act is ambiguous in the context of section 103(f), and the terms "representative authorized by his miners" in section 103(f) should include miners who have been locked out and reasonably expect to return to work at the end of the labor dispute.

When deciding whether the statutory language "representative authorized by his miners" in section 103(f) is plain or ambiguous, the Commission must examine the text of the language itself, the specific context in which the words or phrases are used in section 103(f), and the broader structure of the statute as a whole. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997);

⁷ In *Peabody*, the D.C. Circuit affirmed the Commission's holding that laid-off individuals were not miners for purposes of the training rights granted under section 115 of the Act because they were not working in a mine, exposed to the hazards of mining, *or employed* by a mine operator. *Peabody*, 822 F.2d at 1147-49 (emphasis added). The laid off miners in *Peabody* were contractually entitled under the collective-bargaining agreement to be placed on a panel for recall on the basis of "seniority," which was contractually defined as "length of service and the ability to step into and perform the work of the job at the time it was awarded." *Id.* at 1139. The operators passed over some miners at the top of the recall list because they lacked the necessary training or work experience to qualify as "experienced miners" and therefore could not begin working without first receiving "new miner training." *Id.* The court majority concluded that the laid-off individuals did not, in failing to obtain safety training, exercise any right granted a miner by section 115(a) of the Mine Act. Accordingly, the Secretary's position that the operators refused to employ them because of the exercise of a statutory right thereby engaging in prohibited discrimination, was not a reasonable interpretation of sections 105(c)(1) and 115(a) of the Act. *Id.* at 1151.

In her concurrence, then Judge Ruth Bader Ginsburg astutely observed that one need not exclude laid-off miners from the section 3(g) definition of "miner" for all statutory purposes, nor did she read the majority opinion to make so sweeping a disposition, and she rejected the Secretary's position solely on the language and structure of section 115 of the Act dealing with training rights. *Id.*, (Ginsburg concurring). Judge Ginsburg concluded that the word "miner" as employed in section 115 could not reasonably be read to encompass persons laid-off because the training provisions were directed to miners on the job and could not comprehensively be read to accommodate miners "who stand and wait." *Id.* at 1152.

King. v. Burwell, 135 S. Ct. 2480, 2484 (2015). As Chief Justice Roberts recently noted in upholding the Affordable Care Act tax credits on federal exchanges:

But often times the “meaning -- or ambiguity-- of certain words or phrases may only become evident when placed in context.” *Brown & Williamson*, 529 U.S. at 132. So when deciding whether the language is plain, we must read the words “in their context and with a view to their place in the overall statutory scheme.” *Id.*, at 133 (internal quotation marks omitted). Our duty, after all, is “to construe statutes, not isolated provisions.” *Graham County Soil and Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 290 (2010) (internal quotation marks omitted).

135 S. Ct. at 2489.

The Supreme Court has also recognized that “... the same words, placed in different contexts, sometimes mean different things,” and that identical language may convey varying content even when used in different provisions of the same statute. *Yates v. United States*, 135 S.Ct. 1074, 1082 (2015) (Ginsburg, J., plurality opinion). Furthermore, the Court has stated that once a statutory term has an established meaning in some sections of a statute but not in other sections, the term is ambiguous and each section must be examined to determine whether context provides further meaning that would resolve the dispute. *Robinson*, 519 U.S. at 343-44; *see also Brody Mining LLC*, 36 FMSHRC 2027, 2036 (Aug. 2014) *appeal docketed*, No. 14-1171 (D.C. Cir. Sept. 2014) (deference accorded Secretary’s interpretation of ambiguous term “violation” where various statutory provisions could only refer to conditions alleged to be violations).

I agree with the Secretary that the present participle “working” as used in section 3(g)’s statutory definition of “miner” is ambiguous in the section 103(f) context because it connotes both ongoing activity in which the miner is actively engaged in the present, and interrupted activity from which the miner may temporarily be absent, but to which he has a reasonable expectation of returning. See Sec’y Br. 10-11, citing for comparison, *United States v. Hersom*, 657 F.3d 77, 79, n.2 (1st Cir. 2011) (adopting analogous reasoning with respect to the present participle “receiving”). For example, the undersigned might accurately say that I am working on Monday even though it is the Friday before, as I draft this example. Certainly, a miner who takes temporary leave is still working at the mine, although on leave status, and not engaged in work at the present moment. Similarly, the Fourth Circuit has recognized that miners who designated a union official as their representative while the mine was closed during investigation of an accident were “miners [who] currently work at the . . . [m]ine” for purposes of ruling on a preliminary injunction. *Dep’t of Labor v. Wolf Run Mining Co.*, 452 F.3d 275, 287 (4th Cir. 2006).

In fact, as the Secretary enumerates, the Mine Act frequently uses the word “miner” to cover individuals who were working in the mine, but may not be actively working at the time that their statutory rights or obligations are triggered. Sec’y Br. 12-13, citing, *inter alia*, Sections 105(c)(2), 104(g)(1), 111, 115, 201, 203(c) and (d) of the Mine Act. The Commission in *Cyprus Empire* recognized that the statutorily-defined term “miner” must be interpreted in the context of

the particular section in which it arises to effectuate the safety purposes of each section, but as noted, that Commission interpretation did not have the benefit of the Secretary's new and informed judgment in the context of a lockout. 15 FMSHRC at 15; *see also KenAmerican Resources, Inc.*, 35 FMSHRC 1969, 1973 (July 2013) (laid-off worker was "miner" for purposes of section 105(c)(2)'s anti-discrimination provision distinguishing cases like *Peabody* where laid-off workers were not "miners" under other statutory provisions); 35 FMSHRC at 1975 (definition of "miner" "cannot be applied literally" throughout the Act)(Chairman Jordan, concurring).

Thus, contrary to Sherwin's argument, several provisions of the Mine Act would make little sense if the term "working," as used to define "miner," was confined to times when actual mining work was presently being performed. Rather, I find that the term "miner" as used in section 3(g) of the Act is ambiguous, and encompasses times when workers are temporarily disengaged from the actual act of mining. Accordingly, I reject Sherwin argument that the plain meaning of the term "miner" in section 103(f) must mean an individual actually working in the mine at the time of the inspection, i.e., "[t]he term 'working' . . . refer[s] 'to action that is happening at the time of speaking or a time spoken of.'" Sherwin Br. 10. While such a strict construction, as adopted by the Commission in *Cyprus Empire*, may seem plain when viewed in isolation, the Secretary has determined that such a reading is untenable in light of the primary purpose of the Mine Act to most effectively promote miner safety and health. *Cf. Department of Revenue of Oregon v. ACF Industries, Inc.*, 510 U.S. 332, 343 (1994); *see also New York State Dept of Social Servs. v. Dublino*, 413 U.S. 405, 419-420 (1973) (federal statutes cannot be interpreted to negate their stated purposes). Rather, as noted, "the fundamental canon of statutory construction [requires] that the words of a statute must be read in their context and with a view toward their place in the overall statutory scheme." *Utility Air Regulation Group v. EPA*, 134 S.Ct. 2427, 2441 (2014), *citing FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000).

Given that the text of the statutory phrase "representative authorized by his miners" in section 103(f) is ambiguous as discussed above, the Commission must look to the broader structure of the Act to determine whether the Secretary's current interpretation of the statutory walk-around provision produces a substantive effect that is consistent with the overall purpose of the Mine Act. *Cf., United Sav. Assn. of Tex. v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 371 (1988). Ambiguity should be resolved by looking to the context and purpose of the walk-around provision and eschewing a construction that would undermine the purpose of the provision or lead to absurd results. *See, e.g., Sec'y of Labor v. Twentymile Coal Co.*, 411 F.3d 256, 261 (D.C. Cir. 2005); *Emery Mining Corp v. Sec'y of Labor*, 744 F.2d 1411, 1414 (10th Cir. 1984); *Consolidation Coal*, 15 FMSHRC 1555, 1557 (Aug. 1993). I conclude that the context and structure of the statutory walk-around provision within the Mine Act fully supports the Secretary's interpretation that the designated representative of locked out miners shall be given an opportunity to participate in inspections during the lockout because this interpretation is reasonable, permissible, and advances the primary purpose of the Act to protect miner safety and health.

B. The Secretary's Interpretation is Consistent with the Overall Purpose of the Mine Act to Protect Miner Safety and Health and the Specific Purposes of Section 103(f) by Ensuring the Rights of Locked-Out Miners to Aid MSHA's Inspection and Participate in Pre-and Post-Inspection Conferences

The Mine Act's overall purpose is to protect the health and safety of the mining industry's most precious resource, the miner. *Peabody*, 822 F.2d at 1146, citing section 2(a) of the Act, 30 U.S.C. § 801(a). Thus, the Mine Act must be interpreted to achieve the overarching goal of protecting the safety and health of miners. See *United Mine Workers of Am. v. Dep't of Interior*, 562 F.2d 1260, 1265 (D.C. Cir. 1977) ("Should a conflict develop between a statutory interpretation that would promote safety and an interpretation that would serve another purpose at a possible compromise to safety, the first should be preferred.")

Section 103(f) plays a critical role in the overall enforcement scheme of the Act and the Commission will not restrict 103(f) rights, absent a clear indication in the statutory language or legislative history, or appropriate limitation imposed by regulation. *SCP Investments, LLC*, 31 FMSHRC 821, 827 (Aug. 2009) (opinion of Commissioners Young and Cohen); *Consolidation Coal Co.*, 3 FMSHRC 617, 618 (Mar. 1981). As explained above, the definition of "miner," as set forth in the statutory phrase "representative authorized by his miners" in section 103(f), is ambiguous as applied to locked-out miners. The Secretary's interpretation that the phrase "representative authorized by his miners" should include a representative authorized by locked out miners is favored and entitled to deference. This is because that interpretation is fully protective of mine safety and health and best advances the overall purpose of the Act to protect miners, and the specific purposes of section 103(f) in furtherance of that overall statutory goal.

A fundamental purpose of the walk-around rights set forth in section 103(f) is to encourage miner awareness of health and safety concerns. *Kerr-McGee*, 40 F.3d at 1260, 1264 & n.13; *Consolidation Coal*, 3 FMSHRC 617, 618 (Mar. 1981); S. Rep. No. 95-181, at 28; MSHA Interpretive Bulletin, 43 Fed. Reg. 17,546, (Apr. 25, 1978). As inspector Barrick testified, this is the most important aspect of the miners' representative function. Tr. 29. This fundamental purpose of section 103(f) is advanced by permitting the authorized representative of locked-out miners to participate in physical inspections and pre- and post-inspection conferences under section 103(f). The reason is manifest. Participation by a miners' representative in physical inspections and pre and post-inspection conferences permits dissemination of knowledge concerning safety and health hazards or conditions to other miners throughout the mine, particularly the locked-out miners, who have a reasonable expectation of returning. Locked-out miners have an actual and continuing interest in staying abreast of existing, continuing, developing, or abating safety and health issues at the mine where they reasonably expect to return and resume the inherently dangerous work of mining. See *Performance Coal Co.*, WEVA 2010-1909, Unpublished Order at 11, (Dec. 17, 2010) (ALJ) (miners who were employed at time of Upper Big Branch explosion and thereafter were involuntarily relocated to a sister mine have an ongoing interest in the safety of the mine where they were working and will return to work).⁸

⁸ In *Performance Coal*, the judge found that "[t]he purpose of . . . section 103(f) is to
(continued...)

Although lockouts may last for an extended period of time,⁹ locked-out miners cannot be permanently replaced and have a reasonable expectation of returning to work after the conclusion of the lockout because the operator may only hire temporary replacement miners during a lockout, not permanent replacement workers that are permissible in the economic-strike context, such as *Cyprus Empire*. See e.g., *Ancor Concepts*, 323 NLRB 742, 744 (1997) (use of permanent replacements is inconsistent with a declared lawful lockout in support of bargaining position) *enforcement denied on other grounds*, 166 F.3d 55 (2d Cir. 1999); *Harter Equipment, Inc.*, 280 NLRB 597 (1986)(absent specific proof of antiunion motivation, employer did not violate Section 8(a)(3) and (1) by hiring temporary replacements during offensive lockout), *aff'd sub nom. Operating Engineers Local 825 v. NLRB*, 829 F.2d 458 (3d Cir. 1987)(employer's hiring of temporary employees was not unfair labor practice, where employer intended to return regular employees to work at conclusion of dispute, employer was in financial straits, and employer did not have hostile motive); cf., *Harter Equipment, Inc.*, 293 NLRB 647 (1989) (only locked out "employees" in bargaining unit at time of lockout, and not temporary replacements, are eligible to vote in subsequent decertification election). Accordingly, the locked-out miners legally are still "working" at the Sherwin Mine, much like a miner on vacation or sick leave, albeit they will not return to work until the end of the lockout. Given the locked-out miners' reasonable expectation of returning to the Mine at the conclusion of the lockout, they retain an

⁸ (...continued)

allow miners the opportunity to be involved in the safety and health of the mine where they are employed," and it would "circumvent the purpose of the statute" to deny the miners a representative at the closed mine. *Performance Coal Co.*, WEVA 2010-1909, Unpublished Order at 11, (Dec. 17, 2010) (ALJ). The judge persuasively reasoned that the "miners who were employed at the Mine at the time of the accident have an ongoing interest in the safety of the mine where they were working and will potentially return to work. This safety interest is at the heart of the statute and regulations." *Id.* The judge further concluded that the operator's "narrow reading" of section 103(f) would permit mines "to unilaterally prevent" miners' involvement in safety oversight. *Id.*

Similarly here, Sherwin's interpretation of the phrase "representative authorized by his miners" to exclude a lawfully designated, but locked-out representative, unilaterally prevents miners' involvement in safety oversight. In fact, as noted herein, there was no miners' representative permitted to participate in inspections for three months after the lockout, until Alvarez was eventually designated after inquiry from the undersigned. By contrast, as in *Performance Coal*, the Secretary's interpretation of the phrase "representative authorized by his miners" fosters the overarching safety interest at the heart of the statute and regulations by ensuring that an operator cannot use a lockout to unilaterally preclude miners, through their designated representative, from participating in inspections and conferences to help ensure a safe mine environment where they reasonably expect to return to work.

⁹ For example, a lockout lasted for two years (1991-92) at the Ravenswood Aluminum plant in West Virginia, chronicled by Kate Bronfenbrenner and Tom Juravich in *Ravenswood: The Steelworkers Victory and the Revival of American Labor* (1999), and a lockout lasted for two years at the Kaiser Aluminum refinery in Gramercy, Louisiana, during which a tragic explosion injured 29 miners on July 5, 1999. MSHA, Report of Investigation, <http://www.msha.gov/disasterhistory/gramercy/report/reportdept.htm>.

interest in the health and safety of the Mine and should be allowed to have a representative of miners participate in section 103(f) walk-around activities because such participation serves the statutory purposes set forth in section 103(f) of ensuring the rights of miners to assist MSHA in inspections and pre- and post-inspection conferences to maintain the health and safety of all miners working in the mine.

As noted, the Preamble to the Part 40 regulations authorizes a broad interpretation of the phrase “*representative authorized by his miners*” in section 103(f) to achieve the statutory purpose of facilitating the miners’ voice in health and safety matters at a mine. 43 Fed. Reg. 29,508 (July 7, 1978). The Secretary’s interpretation that section 103(f) covers a miners’ representative designated by locked-out miners, who cannot be permanently replaced and reasonably expect to return to work, is reasonable because it furthers the specific and primary “purposes of aiding [MSHA’s] inspection and to participate in pre- or post-inspection conferences held at the mine.” See 30 U.S.C. § 813(f); *Thunder Basin Coal Co. v. FMSHRC*, 56 F.3d 1275, 1278 (10th Cir. 1995); *Kerr-McGee*, 40 F.3d at 1263; 43 Fed. Reg. 17,546 (Apr. 25, 1978); cf., *KenAmerican Resources*, 35 FMSHRC at 1973 (July 2013) (majority panel held that laid-off worker was “miner” for purposes of section 105(c)(2)’s anti-discrimination provision, distinguishing cases like *Peabody* where laid-off workers were not “miners” under other statutory provisions) (Chairman Jordan, concurring).

Another purpose of the walk-around provision is to assure miners that inspectors will uncover violations and hazards. 115 Cong. Rec. S27,287-88 (Sept. 26, 1969), *reprinted in* Subcommittee on Labor of the Committee on Labor and Public Welfare, 94th Cong., 1st Sess., Legislative History of the Federal Coal Mine Health and Safety Act of 1969, at 393 (Comm. Print 1975) (statement of Sen. Metcalf introducing walk-around provision amendment in Coal Mine Health and Safety Act of 1969) (“[I]t might well happen that that miner working in that mine would help the inspector by calling attention to certain safety violations. He is familiar with the operation of the mine, and he would be able to represent his fellow union members or his fellow mine workers to reveal safety violations.”). Participation in inspections and conferences by locked-out miners’ representatives, who reasonably expect to return to work at the conclusion of the lockout, helps promote this purpose because such representatives, as demonstrated in this case, have site-specific knowledge and expertise to aid the Secretary in ensuring mine safety and health during a physical inspection. After all, “... it is reasonable to expect that miners will choose representatives with a substantial amount of experience” 43 Fed. Reg. 29,508. Such a representative will aid MSHA inspectors in their efforts to protect both the current safety of temporary replacement miners and the future safety of the locked-out miners when they return to work.

Based on the record evidence presented in this case, it is likely that inspection participation by the representative of the locked-out miners will enhance mine safety and health more effectively than participation by a representative designated by temporary replacement miners, who will typically lack equivalent site-specific experience and technical knowledge, at least at the outset of the labor dispute. As explained below, the record in this case suggests that the representative designated by the temporary replacement workers at the outset of the lockout typically will be on a significant “learning curve,” and therefore will be less qualified to identify hazards and assist the inspector by providing site-specific technical knowledge about the mine’s

production processes. It is significant that the temporary workers did not participate in mining or actively engage with the mine environment before the lockout began, and instead only observed the locked-out workers. Tr. 184.

On the other hand, the record establishes that since his designation, Guzman had significant mine-specific experience and familiarity with the hazardous processes of refining alumina under pressure using corrosive chemicals and caustic liquids. Tr. 28-29, 40, 104-05, 178. Specifically, inspector Barrick testified that the miners' representative, usually Guzman unless another representative was substituting, would travel with an inspector "to help us by providing information, typically on technical or process-type questions that we might have. Also, he could identify other miners in the area for us. And, of course, his most important job ... is to take that ... information back to his ... miners and let them know what ... he observed during an inspection." Tr. 29. In fact, Paul English, Respondent's safety, health and industrial hygiene manager, testified that Guzman would answer an inspector's questions about mine processes or how equipment worked, provide an opinion about possible allegations, and point out dangers or hazards to an inspector. Tr. 104-105. English confirmed that Guzman actively participated in post-inspection conferences by expressing agreement or disagreement with citations. Tr. 105. English also testified that Guzman would report inspection results back to the miners and that Guzman was a full-time miners' representative pursuant to the corrective action plan (CAP). Tr. 108.

When asked why he would consult a miners' representative like Guzman about processes or technical issues, inspector Barrick testified that "[a] lot of times that miner may have performed that work. He has ..., at times, a better understanding of the processes than sometimes operational folks will" because he has "a working knowledge of ... some of the processes. And if he doesn't, he knows those that do, and we can get those people." Tr. 29. Inspector Barrick further testified, "[w]hen we're evaluating conditions, we want all the facts; we want as much information as we can possibly get about what we're dealing with at that time." Tr. 29-30. Barrick further explained, "... Sherwin is a very complex process; there's a lot there to learn; there's a lot there to understand. So again, the more people we could involve, you know, in that process of trying to garner the right information and make evaluations, and if, indeed we needed to, you know, issue citations, that we ... try to do that in a fair manner." Tr. 30. Barrick also credibly testified that the miners' representative plays a very useful role at closeout conferences, particularly through input regarding the appropriate level of abatement to get at the root cause[s] for cited conditions. Tr. 30-31.

Although English attempted to paint a picture that temporary replacement miners' representative, Francisco Alvarez, a management official with replacement contractor CCC Group, performed the same or comparable miners' representative role as Guzman at the time of the hearing, I discredit this effort. Tr. 106. Alvarez, the new, post-lockout miners' representative for replacement miners, lacked the same or comparable site-specific technical and process knowledge as Guzman since English conceded that Alvarez was "on a learning curve." Tr. 106. In fact, for 105 days during numerous inspections after the commencement of the lockout, no miners' representative was given the opportunity to accompany MSHA inspectors until Alvarez was eventually designated on January 23, 2015, after inquiry from the undersigned. This factual scenario is antithetical to the encouragement of miner participation in the health and safety of the

mine, which Congress deemed so vital to effective safety and health enforcement. See 43 Fed. Reg. 29508.

When CCC Group manager Alvarez was eventually designated as the replacement miners' representative, he did not report inspection results back directly to miners as Guzman had done. Tr. 29, 108. Rather, such information was filtered through English and other Sherwin and CCC management before reaching miners. Tr. 108. Nor did Alvarez point out hazards to an MSHA inspector, as Guzman had done. Tr. 105, 109-10. Further, when English was asked whether English had ever pointed out a hazard to an inspector, English evaded the question. Tr. 105. I find on this record that Alvarez's representative role was not comparable to Guzman's representative role, and because Sherwin excluded Guzman from participating in physical inspections and conferences during the lockout, the purposes of section 103(f) were flouted for more than 3 months.

I further find, consistent with the appropriate broad interpretation of the statutory phrase "representative authorized by his miners" in section 103(f), that "[t]he purposes of the Mine Act are better served by allowing multiple representatives to be designated" in the context of a lockout because "[t]his ensures that all miners have the opportunity to exercise their right to select the representative of their choice for the purpose of performing" section 103(f) representative-of-miner functions. See 43 Fed. Reg. 29508. Thus, Guzman must or "shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection" of the Sherwin mine during the lockout, and Alvarez must or shall be given the same opportunity. In the words of section 103(f), "[t]o the extent that the Secretary or authorized representative of the Secretary determines that more than one representative from each party would further aid the inspection, he can permit each party to have an equal number of such additional representatives. However, only one such representative of miners who is an employee of the operator shall be entitled to suffer no loss of pay during the period of such participation under the provisions of this subsection..." 30 U.S.C. § 813(f). Sherwin's attempt to cabin MSHA's section 103(f) discretion and "to limit the manner in which representatives are selected would be intrusive into labor/management relations at the mine, and not in keeping with the spirit of miner participation." 43 Fed. Reg. 29508.

During a lockout, the designated miners' representative cannot effectively keep involuntarily locked-out miners apprised of the dynamic, ongoing, and constantly evolving safety and health conditions prevalent at the mine, absent participation in physical inspections and conferences. It may be too late to wait until the lockout concludes to bring the specialized knowledge or concerns of the locked-out miners' representative to bear on the physical conditions, hazards, or dangers prevailing at the mine during the lockout because decisions regarding such mine safety issues may be finalized by the time locked-out miners resume active work. For example, citations were written during post-lockout inspections from which Guzman was excluded. Tr. 99. Therefore, Guzman could neither assist MSHA to understand the alleged violations and uncover additional hazards, nor keep the locked-out miners informed about such conditions to which they may be exposed when they return to work. Furthermore, Sherwin faced the prospect of being placed in POV status and challenging such notice and any subsequent section 104(e) withdrawal order during the lockout. Tr. 61, 141. The locked-out miners' representative should be allowed to participate in inspections and conferences related to such

POV proceedings, if any, since the locked-out miners reasonably expect to resume work at the Mine.

Sherwin argues that inspectors can speak to other miners during the lockout. Sherwin Br. 4. Sherwin also argues that the locked out miners have not been precluded from staying abreast of safety issues and citations during the lockout because they can access MSHA's website and submit Freedom of Information Act (FOIA) requests. Further, Sherwin asserts that the locked-out miners are required to receive part 48 training prior to their return, including training on any new safety procedures and concerns that have arisen during the lockout. Sherwin Br. 4-5; Tr. 140; 30 C.F.R. part 48. All that may be true, but Sherwin is essentially substituting its own view of safety and health policy for the expert view of the Secretary of Labor (see Sec'y Reply Br. 5,) and Sherwin's reasonable-alternative-means argument is no substitute for Congress's decision that a properly designated miners' representative be granted the opportunity to invoke the statutory right to accompany inspectors during physical inspections and to participate in pre-and post-inspection conferences.

Nor, as the Secretary points out, is it sufficient to rely on the ability of the miners' representative to request a hazard inspection under section 103(g) when the lockout ends. Sec'y Br. 18-19; *but see Cyprus Empire*, 15 FMSHRC at 15 (economic strikers, subject to permanent replacement, were not entitled to a section 103(f) walk-around representative during the strike because they were not presently exposed to hazards and could request an inspection under section 103(g) if they returned to work). A section 103(g) hazard inspection focuses on an imminent danger or particular violation of a mandatory health or safety standard. 30 U.S.C. § 813(g)(1) ("a special inspection shall be made as soon as possible to determine if such violation or danger exists"). The special inspection may be needed during the lockout and the locked-out miners' representative should be there at MSHA's discretion for the limited purpose of assisting such inspection. If the locked-out miners' representative is unable to participate and assist in regular inspections and conferences during the lockout, he or she may be unaware upon return to work of subtle or dynamic changes in the mine environment likely to cause hazards, or unaware of particular conditions likely to create hazards. Indeed, hazards themselves may go unnoticed before they worsen and increase danger. Such danger is particularly acute at a large alumina refinery that encompasses 1200 acres, and utilizes hundreds of valves, tanks, and miles of piping (Tr. 96), and Sherwin's contrary interpretation of section 103(f) does not promote the safety and health purposes of the statute. The Gramercy explosion at the Kaiser alumina refinery referred to in the record by Sherwin, grounds this concern in reality. Tr. 165-66; *see supra*, n. 4.

Consequently, actual participation by the locked out miners' representative in inspections and conferences during the lockout is crucial to maximizing mine safety and health during the lockout. As the Secretary persuasively argues on brief:

"... subsequent review by the [locked out] miners of a cold record of citations is no replacement for the robust, eye-witness experience the representative has when accompanying the inspection team and seeing for him or herself how conditions are evolving. Any suggestion that miners can simply get up to speed on how conditions at the mine have changed during their

temporary absence by reviewing such records ignores the reality that most people learn and retain information better by witnessing live events than by reviewing notes. Furthermore, not every evolving condition that impacts miner health and safety will be something that leads to a citation. Only by accompanying the inspection team will the miners' representative stay apprised of conditions that may yet evolve into health or safety hazards.

Sec'y Br. 18.

The fact that replacement miners and returning locked-out miners must undergo training before commencing work, and that MSHA is able to speak to other miners during the lockout, is weak justification for excluding a locked-out miners' representative from participating in physical inspections and pre- and post-inspection conferences. As the Secretary again persuasively argues on brief, "[t]elling miners what has happened at a mine after the fact is no replacement for their having had a voice in the dialogue in the first place." Sec'y Reply Br. 5. Furthermore, as explained herein, MSHA need not choose from amongst sources of information or between designated representatives. Rather, MSHA has discretion to broadly gather information from as many sources as possible. Thus, an experienced locked-out miners' representative, such as Guzman, and an inexperienced temporary replacement miners' representative, such as Alvarez, should both be given the opportunity to participate in physical inspections and conferences during the lockout, at MSHA's discretion. Sherwin must give each representative the requisite training to fulfill their statutory responsibilities.¹⁰

¹⁰ Under 30 C.F.R. §48.3, operators must have an approved training plan that covers, *inter alia*, experienced miner training (30 C.F.R. §48.6) and annual refresher training (30 C.F.R. §48.8). Operators may receive citations for failure to properly conduct these trainings. See e.g., *Emery Mining Corp.*, 5 FMSHRC 1400 (Aug. 1983)(Commission held a civil penalty was appropriate when miners did not receive annual refresher training for 15 months in violation of 30 C.F.R. §48.8); *Sally Ann Coal Company, Inc.*, 37 FMSHRC 246 (Feb. 2015)(ALJ Harner)(citation under 30 C.F.R. §48.6 affirmed). As shown herein, unlike laid-off miners seeking to invoke training rights under section 115 of the Act, locked-out miners' representatives like Guzman remain "miners" for the purposes of the section 103(f) of the Act during the course of the lockout. Further, a miners' representative, who works at the mine and regularly assists an MSHA inspector during inspections, would be "regularly exposed to mine hazards," and therefore be a "miner" for training purposes under 30 C.F.R. §48.2. But for Respondent's unlawful exclusion of Guzman as the designated miners' representative under section 103(f) of the Act, Guzman presumably would not have experienced any lapse of training requirements after the lockout began. Accordingly, to the extent that any training of Guzman's has lapsed, Respondent is responsible for retraining him.

The broad discretion conferred on the authorized MSHA inspector when determining the statutory participation right during the particular inspection at issue is aptly captured in the following passage from MSHA's Interpretive Bulletin concerning section 103(f) of the Mine Act.

Considerable discretion must be vested in inspectors in dealing with the different situations that can occur during an inspection. While every reasonable effort will be made in a given situation to provide opportunity for full participation in an inspection by a representative of miners, it must be borne in mind that the inspection itself always takes precedence. The inspector's primary duty is to carry out a thorough, detailed, and orderly inspection. The inspector cannot allow inordinate delays in commencing or conducting an inspection because of the unavailability of or confusion surrounding the identification or selection of a representative of miners. Where necessary in order to assure a proper inspection, the inspector may limit the number of representatives of the operator and miners participating in an inspection. The inspector can also require individuals asserting conflicting claims regarding their status as representatives of miners to reconcile their differences among themselves and to select a representative. If there is inordinate delay, or if the parties cannot resolve conflicting claims, the inspector is not required to resolve the conflict for the miners and may proceed with the inspection without the presence of a representative.

43 Fed. Reg. 17546. In this case, Sherwin unlawfully removed such discretion from inspector Barrick when it denied Guzman section 103(f) rights, as requested by Barrick on November 13, 2014.

Respondent's additional argument that the safety interests of the temporary replacement workers have been protected during the lockout, and that the interests of the locked-out employees will be protected when they eventually return to work is unconvincing and falls short of the requisite, broad interpretation of section 103(f) favoring a representative for each group of miners, whose interests may not always align. Sherwin's argument ignores the fact that no miners' representative participated in inspections after the lockout for over three months. Fortunately, no accident occurred during this period when the plant was operated with replacement workers, who were primarily newly trained miners, with no previous mining experience. Tr. 58-59; *compare* Tr. 165-66 and n. 9 (referring to Gramercy explosion).

Furthermore, it is arguable in a labor dispute context, such as a lockout, that *temporary* replacement workers may be less concerned about appointing an aggressive advocate to represent their safety interests and may be more easily intimidated because of their temporary status than a permanent, albeit locked-out, miners' representative. Even if the temporary replacement workers are concerned with advocating on safety issues, they likely lack the site-specific knowledge possessed by permanent workers, as discussed above. Furthermore, the Mine Act is concerned about the safety of all miners, both permanent and temporary alike, and

temporary replacement miners are entitled to benefit from the knowledge possessed by locked-out miners and their representative, even if the interests of the two groups do not always align in the labor relations context.

Finally, as noted above, only after inquiry from the undersigned during a pre-hearing conference call, did the temporary replacement workers eventually designate a member of the replacement contractor's management team to serve as a representative of miners and report through another manager to Sherwin's safety and health manager, who filtered the message back to the rank and file miners. Tr. 107 -08. In effect, two management representatives purported to "aid" the MSHA inspectors to uncover hazards during lockout inspections, although neither ever apparently pointed out a hazard, while management excluded Guzman, the miners' representative from the locked-out rank and file, who often pointed out hazards. Surely, section 103(f) was not designed to malfunction this way.

I discount Sherwin's attempt to claim that safety has improved because miners represented by the Steelworkers were locked out, and that the temporary replacement workers' commitment to safety has resulted in a noticeable improvement in Sherwin's safety record. Sherwin Br. 4. English testified that since the replacement workers began mining there has been an increased emphasis on safety, the overall health of the facility has improved, and he has received several compliments from various inspectors regarding the replacement workers. Tr. 86-87. In the absence of any concrete data provided by Sherwin, I must weigh English's testimony against inspector Barrick's testimony regarding the underlying impetus for any apparent improvement in safety.

Inspector Barrick testified that mine safety had been improving during the year prior to the lockout due to several factors. Barrick had seen improvement in 2014, after Sherwin developed a corrective action plan (CAP) in September 2013 and re-evaluated workplace examination requirements in conjunction with discussions with the MSHA district office. Tr. 38-39. As noted, the Mine had been informed that it was a POV candidate under section 104(e) because of its pattern of significant and substantial violations, primarily involving housekeeping matters such as guarding issues, electrical issues, and safe access issues. Tr. 40, 61, 141. After the lockout, MSHA changed its historical wall-to-wall inspection procedure to have an inspector present almost every day to intensify evaluation of small areas. Tr. 39. Sherwin was legally obligated to provide the temporary replacement miners with comprehensive training prior to their temporary employment, which it did. Tr. 140, 184; 30 C.F.R. part 48. Although Barrick acknowledged that the replacement workers had done a good job addressing housekeeping issues, most of the replacements were new miners with no previous mining experience. Tr. 58-60. In these circumstances, I reject any argument by Sherwin that mine safety improved because of the lockout and the exclusion of Guzman in contravention of section 103(f) of the Mine Act.

I also reject Sherwin's arguments that the Secretary's interpretation conflicts with federal labor policy under the NLRA. Sherwin Br. 19-20. Specifically, Sherwin argues that the Secretary's interpretation purportedly requires an operator to compensate a locked-out miners' representative in contravention of a non-precedential Advice memorandum from the NLRB's Office of General Counsel. Sherwin Br. 19-20, citing *Brighton Corp.*, 1984 WL 47445 (Feb. 29, 1984) (Advice Memorandum in Case 13-CA-23492). Sherwin further argues that the Secretary's

interpretation forces Sherwin to allow a locked-out miners' representative to enter onto Sherwin's private property, and undermines Sherwin's ability to use an offensive lockout to exert lawful economic pressure during a labor dispute. Sherwin Br. 19-20.

Sherwin's arguments lack merit. As the Secretary persuasively rejoins on reply brief, section 103(f) does not require that a miner's representative receive pay; rather, it only requires that the miners' representative "suffer no loss of pay during the period of his participation in the inspection." Sec'y Reply Br. 6, citing 30 U.S.C. § 813(f). Since a locked-out miner is not entitled to be paid wages and fringe benefits during the lockout, even under the NLRB "authority" relied on by Sherwin itself, Sherwin need not pay the locked-out miners' representative for performing section 103(f) functions during the lockout because such a miner will not suffer a *loss* of pay while locked out. *Cf.* Sec'y Reply Br. 6. Further, Sherwin need only pay the temporary replacement representative, not the locked out representative, even though both participate in the inspection, because section 103(f) explicitly provides that "only one such representative of miners who is an employee of the operator shall be entitled to suffer no loss of pay during the period of such participation under the provisions of this subsection." 30 U.S.C. § 813(f).

Sherwin also argues, this time without citation to any NLRA authority, that the Secretary's interpretation forces Sherwin to allow locked-out employees to enter its mine, thereby effectively interfering with its lawful right to use the lockout as an economic weapon. Sherwin Br. 20. *See generally, American Ship Building*, 380 U.S. 300, 311 (1965)(employer does not violate section 8(a)(1) or 8(a)(3) of the NLRA after a bargaining impasse has been reached by temporarily laying off or locking out employees for the sole purpose of bringing economic pressure to bear in support of a legitimate bargaining position); *Harter Equipment*, *supra*, 280 NLRB at 597, *aff'd sub nom. Operating Engineers Local 825 v. NLRB*, 829 F.2d 458 (3d Cir. 1987).

The Secretary counters:

It is unclear how permitting a miners' representative to enter a mine for the exclusive purpose of joining a (supervised) inspection team noticeably diminishes an operator's ability to use "the tools that the NLRB has allowed employers and unions to use." *Id.* [citing Sherwin Br. 20] Even though the Secretary's interpretation has the effect of allowing a union member to enter a mine when he would not otherwise be able to, the same was true in *Utah Power & Light* and *Kerr McGee*, which permitted union representatives who are not "miners" to serve as miners' representatives. As those cases hold, the solution is not to invalidate the Secretary's interpretation, but to permit the operator to protest if the miners' representative engages in any (mis)conduct that goes beyond his or her role as an advocate for miners' safety.

Sec'y Reply Br. 6.

I once again find myself in full agreement with the Secretary of Labor. As the Steelworkers persuasively argue on brief, there is no evidence that the Secretary improperly issued the Citation and Order at issue to affect the balance of power in the ongoing labor dispute or negotiations between Sherwin and the Steelworkers. Steelworkers Br. 12-15. In fact, I permitted Sherwin to pursue such inquiry at trial over objection from the Secretary and the Steelworkers. Tr. 15. Had there been proof that this was the Secretary's actual motivation and not advancement of miner safety and health, the Secretary would arguably have been acting *ultra vires*. Tr. 15-19; *Compare NLRB v. Insurance Agents (Prudential Insurance Co.)*, 361 U.S. 477 (1960)(economic weapons are "part and parcel" of peaceful resolution of collective-bargaining disputes and NLRB exceeded its power by attempting to regulate the choice of economic weapons to equalize disparity in bargaining power).

Furthermore, Sherwin's poorly articulated reliance on its private property rights under NLRA precedent to trump the statutory rights of an *employee* miners' representative to represent the interest of locked-out miners, and advance the purposes of mine safety and health under section 103(f) during a labor dispute, is not persuasive for several reasons. First and foremost, under the Mine Act, such property rights yield to a warrantless MSHA inspection. *Donovan v. Dewey*, 452 U.S. 594, 602 (1981). The miners' representative participates in an inspection party solely to aid that inspection. 30 U.S.C. § 813(f). In the pervasively regulated mining industry, the warrantless intrusion of an MSHA inspector and representative "aides" to ensure miner safety and health trumps private property rights. *Donovan v. Dewey*, 452 U.S. at 599-600; *compare Utah Power & Light Co. v. Sec'y of Labor*, 897 F.2d 447, 450 (10th Cir. 1990)(even nonemployee union representative entitled to exercise walkaround rights under section 103(f)). Sherwin has advanced no compelling reason why this result should not hold true for an employee miners' representative like Guzman during a lockout.

As shown above, Respondent's arguments rely heavily on issues directly related to the National Labor Relations Act (NLRA). For the reasons discussed *supra*, there are adequate and independent logical and Mine Act bases for rejecting Respondent's labor law claims. However, even if I address Respondent's inchoate arguments under the NLRA, I see no reason why Guzman's walkaround rights should be limited. Rather, allowing Guzman to participate in the inspection party during a lockout is compatible with the NLRA.

By its plain terms, the NLRA confers statutory rights on employees, not unions or nonemployee organizers. *Lechmere, Inc. v. NLRB*, 502 U.S. 522, 532 (1992). There, the Supreme Court stated:

Thus, while "[n]o restriction may be placed on the employees' right to discuss self-organization *among themselves*, unless the employer can demonstrate that a restriction is necessary to maintain production or discipline," [citing *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 113 (1956)](emphasis added) (*citing Republic Aviation Corp. v. NLRB*, 324 U. S. 793, 803 (1945)), "no such obligation is owed nonemployee organizers," 351 U. S. at 113.

Lechmere, 502 U.S. at 533. Thus, under the NLRA, as opposed to the Mine Act, an employer need not be compelled to allow *nonemployees* (usually union organizers) onto its property, except in the rare instance where “the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels.” *Id.* at 537, *citing Babcock*, 351 U.S. at 112 (1956). Significantly, in *Lechmere*, the Court reiterated *Babcock’s* admonition that accommodation between *employees’* statutory rights and employers’ property rights “must be obtained with as little destruction of one as is consistent with the maintenance of the other.” *Id.* at 534, *citing Babcock*, 351 U. S. at 112.

In the Mine Act section 103(f) context, the statutory right of a miners’ representative to be given an opportunity to accompany the inspector to aid the inspection and to participate in pre- or post-inspection conferences held at the mine during a lockout can be maintained with little destruction of the employer’s property interests, which already must yield to a warrantless inspection. In this case, Guzman, the miners’ representative for the locked-out miners, is still an employee, who cannot be permanently replaced, and is exercising a statutory right at the discretion of the MSHA inspector under section 103(f) in furtherance of the overall purpose of the Mine Act to ensure miner safety and health.

Finally, Sherwin has failed to establish that the exclusion of Guzman as a miners’ representative during a post-lockout inspection is necessary to maintain production or discipline. *Cf.*, *NLRB v. Babcock & Wilcox Co.*, 351 U.S. at 113, *citing Republic Aviation Corp. v. NLRB*, 324 U. S. at 803. Although given a full opportunity to create a factual record, Sherwin failed to offer any evidence that Guzman, or any other miner represented by the Steelworkers, engaged in sabotage. Further, Sherwin has not cited a single instance where a miners’ representative has engaged in sabotage, an act that is made less likely by the fact that miners’ representatives usually join inspection teams that include an MSHA inspector and an operator’s representative(s). As noted, the Secretary’s implementing regulations and MSHA’s Interpretive Bulletin concerning section 103(f) of the Mine Act give MSHA inspectors’ broad discretion and control over proper inspection procedures in order to promote safety and avoid worksite disruptions. This is sufficient to counter Sherwin’s unsubstantiated concern about abuse during inspections or conferences by locked-out miners’ representatives. *Cf.*, *In the Matter of Establishment Inspection of Caterpillar Inc.*, 55 F.3d 334, 339-40 (7th Cir. 1995).¹¹

¹¹ Although interpreting a differently worded statute, it is instructive that the Seventh Circuit and the Occupational Safety and Health Review Commission (OHSRC) have rejected similar concerns with respect to strikers invoking the walk-around provision set forth in the Occupational Safety and Health Act. That provision, 29 U.S.C. § 657(e), states:

“[s]ubject to regulations issued by the Secretary, a representative of the employer and a representative authorized by his employees shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any workplace under subsection (a) of this section for the purpose of aiding such inspection. Where there is no authorized employee representative, the Secretary or his authorized representative shall consult with a reasonable number of employees concerning matters of health and safety in the workplace.”

(continued...)

Furthermore, as the Secretary highlights on reply brief, “courts have held that ‘[w]hile . . . walk-around rights may be abused by nonemployee representatives, the potential for abuse does not require a construction of the Act that would exclude nonemployee representatives from exercising walk-around rights altogether. The solution is for the operator to take action against individual instances of abuse when it discovers them.’” Sec’y Reply Br. 4, quoting *Utah Power & Light Co. v. Sec’y of Labor*, 897 F.2d 447, 450 (10th Cir. 1990); see also *Thunder Basin Coal Co. v. FMSHRC*, 56 F.3d 1275, 1278 (10th Cir. 1995) (same); *Kerr-McGee Coal Corp. v. FMSHRC*, 40 F.3d 1257, 1264 & n.12 (similar); see also *Kerr-McGee Coal Corp. v. Sec’y of Labor*, 15 FMSHRC 352, 361 (Mar. 1993). Here, Sherwin failed to establish any pre-lockout misconduct by Guzman in his role as miners’ representative, and Sherwin deprived itself of the opportunity to take post-lockout disciplinary action against Guzman for any misconduct because Sherwin unlawfully excluded Guzman from the inspection party.

Finally, the Secretary’s statutory interpretation in this case, at least in the context of a lockout, is consistent with Commission and judicial precedent giving a broad interpretation to the walk-around provision to permit miners to designate non-miner, third parties as walk-around representatives in order to effectuate the safety purposes of the Mine Act. See *Thunder Basin*, 56 F.3d at 1280 (deferring to the Secretary’s interpretation that the Act permits a nonemployee union agent to serve as a miners’ representative); *Utah Power & Light*, 897 F.2d at 450 (concluding that section 103(f) “confers upon the miners the right to authorize a representative for walk-around purposes without any limitation on the employment status of the representative”); *Kerr-McGee*, 40 F.3d at 1263 (granting deference to Secretary’s interpretation allowing non-elected labor organization to serve as miners’ representative at non-unionized mine because “in view of Congress’ clear concern about miners’ safety, the Secretary’s broad interpretation of the term is consistent with congressional objectives.”). These cases demonstrate the validity and consistency of the policy concerns supporting the Secretary’s current and reasonable interpretation of the Mine Act during a lockout.

In short, the Secretary’s interpretation recognizes the “important role section 103(f) plays in the overall enforcement scheme,” *Consolidation Coal*, 3 FMSHRC at 618, as well as the key

¹¹ (...continued)

Although the OSHA walk-around provision applies to “employees” without reference to whether they are “working,” the Secretary has consistently determined that strikers are still employees who must be allowed to accompany OSHA inspectors to aid their inspections and ensure that inspection procedures are unaffected by labor disputes. See *In re: Establishment Inspection of Caterpillar Inc.*, 55 F.3d 334, 338-39 (7th Cir. 1995); *Rockford Drop Forge Co. v. Donovan*, 672 F.2d 626, 631-32 (7th Cir. 1982). In *Caterpillar*, the Seventh Circuit, recognized that “[t]he purpose of the [Occupational Safety and Health Act] is to inspect for safety hazards and violations of OSHA regulations,” and declined to “force employees to choose between exercising their National Labor Relations Act right to strike and their OSHA right to accompany inspections.” *Caterpillar Inc.*, 55 F.3d at 340, (citing *Marshall v. Barlow’s Inc.*, 436 U.S. 307, 309 (1978)). Similarly, as the Seventh Circuit in *Rockford Drop* recognized, “[s]urely [striking] employees like these should not be disenfranchised from preserving the safety of the workplace where they hope to return.” *Rockford Drop*, 672 F.2d at 632.

position that both miners and miners' representatives serve in furthering the "general health and safety purposes of the Mine Act," *Thunder Basin*, 56 F.3d at 1278. As explained herein, the Secretary's interpretation in the context of a lockout is permissible and fully consistent with the Mine Act's overarching purpose to protect miner safety and health at all times, and with the specific purposes of the walk-around provision in furtherance of that primary statutory objective. Accordingly, I affirm the 104(a) Citation and 104(b) Order, as written, and I affirm the proposed penalty of \$112.

V. Civil Penalty

The Act requires that when evaluating a civil monetary penalty the Commission shall consider six statutory penalty criteria: 1) the operator's history of previous violations; 2) the appropriateness of the penalty to the size of the business; 3) the operator's negligence; 4) the operator's ability to stay in business; 5) the gravity of the violation; and 6) any good faith compliance after notice of the violation. *Douglas R. Rushford Trucking*, 22 FMSHRC 598, 600 (May 2000). The Commission is not required to give equal weight to each of the criteria, but must provide an explanation for a substantial divergence from the proposed penalty under the criteria. *Spartan Mining Co.*, 30 FMSHRC 699, 723 (Aug. 2008).

Here, the Secretary provided a proposed assessment of \$112. The Commission has frequently recognized that section 110(i) of the Mine Act confers upon the Commission the authority to assess all civil penalties provided under the Act. See *Wade Sand & Gravel Company*, Docket No. SE 2013-120-M, slip op. (Sep. 16, 2015); and *Mining & Property Specialists*, 33 FMSHRC 2961, 2963 (Dec. 2011). Neither the Judge nor the Commission is bound by the proposed assessment. 29 C.F.R. § 2700.30(b); *Wade Sand & Gravel Company*, *supra*; *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151-52 (7th Cir. 1984) ("[Neither] the ALJ nor the Commission is bound by the Secretary's proposed penalties... we find no basis upon which to conclude that [MSHA's Part 100 Penalty regulations] also govern the Commission."). However, while the Secretary's proposed penalty is not binding, the Commission has recognized that substantial deviations from the Secretary's proposed assessments must be adequately explained using the section 110(i) criteria. *Performance Coal Co.*, 2013 WL 4140438, *2 (Aug. 2, 2013); *Spartan Mining Co.*, 30 FMSHRC *supra*; *Cantera Green*, 22 FMSHRC 616, 620-21 (May 2000).

In light of the Commission authority described above, I take pains to ensure that my penalty assessments are as transparent as possible. As I discussed in my final *Big Ridge* decision, in an effort to avoid the appearance of arbitrariness, I look to the Secretary's assessment formula as a reference point. *Big Ridge Inc.*, 36 FMSHRC 1677, 1681-82 (July 19, 2014) (ALJ). This formula is not binding, but operates as a lodestar, since factors involved in a violation, such as the level of negligence, may fall on a continuum rather than fit neatly into one of five gradations. Further, unique aggravating or mitigating circumstances may call for higher or lower penalties, and will be taken into account under my independent analysis of the criteria set forth in section 110(i) of the Mine Act and Commission precedent. Here, I find that the penalty proposed by the Secretary of \$112 is consistent with the statutory criteria in section 110(i) of the Mine Act. 30 U.S.C. § 820(i). Accordingly, I assess a \$112 civil penalty against Respondent. If Sherwin

continues to refuse to abate the violation, MSHA may assess daily failure-to-abate penalties. See 30 U.S.C. § 820 (b)(1), 30 U.S.C. § 813(f), and Interpretive Bulletin 43 Fed. Reg. 17,547, *supra*.

VI. ORDER

For the reasons set forth above, I **AFFIRM** Citation No. 8778065 and Order No. 8778066, as written. It is **ORDERED** that the operator provide Joe Guzman with any training that he needs since the lockout to perform his miners' representative functions under section 103(f) of the Mine Act. It is further **ORDERED** that the operator pay a civil penalty of \$112 within 30 days of this decision.¹²

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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October 14, 2015

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
on behalf of JEREMY JONES,
Applicant,

v.

KINGSTON MINING, INC.,
Respondent.

TEMPORARY REINSTATEMENT
PROCEEDING

Docket No. WEVA 2015-1007-D
HOPE-CD 2015-12

Mine: Kingston No. 2
Mine ID: 46-08932

DECISION

Appearances: Lucy Chiu, Esq., U.S. Department of Labor, Office of the Solicitor,
Arlington, VA, for Complainant

Arthur Wolfson, Esq., Jackson Kelly PLLC, Pittsburgh, PA, for
Respondent

Before: Judge Moran

This case is before the Court upon an application for temporary reinstatement filed by the Secretary of Labor on behalf of Jeremy Jones (“Complainant”) pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2) (2012). A hearing was held on October 7, 2015, in Charleston, West Virginia. As noted below, temporary reinstatement matters require a minimal evidentiary burden, with the Secretary being required to show that a miner’s complaint is not frivolously brought. Nevertheless, temporary reinstatement is not automatic; there is an evidentiary burden which the Secretary must meet. In this instance, for the reasons which follow, the Court finds that the Secretary presented too thin an evidentiary reed to meet its burden and therefore the Court finds that the application is frivolous.

Temporary Reinstatement Proceedings

The law on temporary reinstatements has been long established. The September 8, 2014, decision issued by Administrative Law Judge Zielinski provides a good summary and the Court borrows liberally from that decision. *See Sec’y on behalf of Lear v. Kenamerican Res., Inc.*, 36 FMSHRC 2432 (Sept. 2014) (ALJ). As the Judge there noted:

Section 105(c)(2) of the Act, 30 U.S.C. § 815(c)(2), provides, in pertinent part, that the Secretary shall investigate a discrimination complaint “and if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate

reinstatement of the miner pending final order on the complaint.” The Commission has established a procedure for making this determination. Commission Procedural Rule 45(d), 29 C.F.R. § 2700.45(d), states:

The scope of a hearing on an application for temporary reinstatement is limited to a determination as to whether the miner’s complaint was frivolously brought. The burden of proof shall be upon the Secretary to establish that the complaint was not frivolously brought. In support of his application for temporary reinstatement, the Secretary may limit his presentation to the testimony of the complainant. The respondent shall have an opportunity to cross-examine any witnesses called by the Secretary and may present testimony and documentary evidence in support of its position that the complaint was frivolously brought.

“The scope of a temporary reinstatement hearing is narrow, being limited to a determination by the judge as to whether a miner’s discrimination complaint is frivolously brought.” *Sec’y of Labor on behalf of Price v. Jim Walter Resources, Inc.*, 9 FMSHRC 1305, 1306 (Aug. 1987), *aff’d*, 920 F.2d 738 (11th Cir. 1990).

In adopting section 105(c), Congress indicated that a complaint is not frivolously brought, if it “appears to have merit.” S. Rep. No. 181, 95th Cong., 1st Sess. 36-37 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong. 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 624-25 (1978). The “not frivolously brought” standard has been equated to the “reasonable cause to believe” standard applicable in other contexts. *Jim Walter Resources, Inc.*, 920 F.2d at 747; *Sec’y of Labor on behalf of Bussanich v. Centralia Mining Company*, 22 FMSHRC 153, 157 (Feb. 2000).

While an applicant for temporary reinstatement need not prove a prima facie case of discrimination, it is useful to review the elements of a discrimination claim in order to assess whether the evidence at this stage of the proceedings meets the non-frivolous test. In order to establish a prima facie case of discrimination under Section 105(c) of the Act, a complaining miner bears the burden of establishing (1) that he engaged in protected activity; (2) that he suffered adverse action; and (3) that the adverse action complained of was motivated in any part by that activity. *Sec’y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (Oct. 1980), *rev’d on other grounds*, 663 F.2d 1211 (3rd Cir. 1981); *Sec’y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (April 1981).

Protected Activity

A miner’s ability to complain about safety issues is a fundamental right afforded and protected by the Act. Complaints made to an operator or its agent of

“an alleged danger or safety or health violation,” is specifically described as protected activity in section 105(c)(1) of the Act. 30 U.S.C. § 815(c)(1). In addition, the Commission and the courts have recognized that, although not explicitly stated in the Act, a miner’s refusal to work in conditions that he reasonably believes in good faith to be hazardous is also activity protected under the Act. *See Bryce Dolan*, 22 FMSHRC 171, 176-77 (Feb. 2000), and cases cited therein.

.....

It is well-established that the purpose of a temporary reinstatement proceeding is to determine whether the evidence presented by the Secretary establishes that the complaint is not frivolous, not to determine “whether there is sufficient evidence of discrimination to justify permanent reinstatement.” *Jim Walter Resources, Inc.*, 920 F.2d at 744. “It is ‘not the judge’s duty, nor is it the Commission’s, to resolve the conflict in testimony at this preliminary stage of the proceedings.’” *Sec’y of Labor on behalf of Williamson v. CAM Mining, LLC*, 31 FMSHRC 1085, 1088 (Oct. 2009) (quoting *Sec’y of Labor on behalf of Albu v. Chicopee Coal Co.*, 21 FMSHRC 717, 719 (July 1999)). *See also Sec’y of Labor on behalf of Billings v. Proppant Specialists, LLC*, 33 FMSHRC 2383, 2385 (Oct. 2011) (resolving conflicts in the testimony, and making credibility determinations in evaluating the Secretary’s prima facie case, are simply not appropriate at this stage in the proceeding).

Id. at 2438-40.

Findings of Fact

Jeremy Jones, Complainant, testified. He was employed at the Respondent’s Kingston No. 2 mine for 2 ½ years as an underground electrician. Jones has been a certified electrician for approximately 6 ½ years. Tr. 35. He was part of a five man electrical maintenance crew, which included Danny Laverty as the crew supervisor. Tr. 35-36. Greg Shrewsbury was the second-in-line supervisor. Tr. 36. Jones has never been disciplined while working at Kingston. *Id.*

Jones viewed himself as a safety advocate at Kingston in that he filled out “running right” cards. Tr. 37. It was Kingston, however, that asked him to fill out those cards twice a day. *Id.* Utilizing those cards, he would note “anything that [he] saw that was a safety issue . . . some of [those] safety issues, [he] addressed himself, if it was something that [he] could take care of.” Tr. 38. Elaborating on the safety issues about which he reported, Jones stated that he

reported damage to cables. That was almost -- that was a weekly, monthly thing that *we* did. I reported trash a number of times on the [roof] bolt machines. Dust bags that were left laying [sic], which is hazardous material. I reported -- *just normal* -- *just the normal safety things*. I reported the lights on the bolt machine. They were being covered, painted, packed around with mud, which caused the --

caused them to melt and smoke real bad and could have caused a fire or smoke underground

Tr. 38 (emphasis added). Jones did not feel that the running right cards he submitted were actually anonymous, because he believed it would be easy to figure out the submitting individuals' handwriting on them. Tr. 39. When asked if he had the highest submission rate of running right cards when compared to the other electricians on his crew, Jones stated that he didn't know how his rate compared to the others. Tr. 39-40.

Turning to the issue of covering lights on roof bolting machines, Jones stated that the operators of those machines were "painting" the lenses,¹ a practice he viewed as hazardous because it caused the lights to heat up, melting the globe on the outside and risking a fire. Miners did this because the light hurt their eyes. Tr. 40. However, he viewed that practice as unnecessary as there is a switch to shut off the lights.² Tr. 40-41. The practice created work for Jones, requiring him to replace the globe and some of the wiring inside too, because they were getting burned up due to the heat retention. Tr. 41. As Jones described this, it "was something that *we* had continually complained about, wrote on our maintenance worksheets, and [he] addressed it on a number of occasions with [his] supervisors." Tr. 41 (emphasis added). When the Court inquired further about this problem, Jones agreed with the characterization that this problem of miners covering the lenses was a continuing issue during the entirety of his employment. Tr. 42. Further, Jones added that "when [he] would raise the issue . . . *the company would address it* with those [roof bolt] operators." Tr. 42 (emphasis added). To be sure that it understood Jones' recounting, that is, that it was the Court's understanding that the mine would address the issue, Jones confirmed that the mine did address it, although he then added, "if [he] went high enough." Tr. 42-43. Asked how the mine addressed it, Jones explained that "[t]hey would have a meeting with the men, or they . . . would address it in our daily safety meeting before we went underground. We had one every day." Tr. 43.

During his 2 ½ years at Kingston, Jones would raise the bolter light issue to Greg Shrewsbury and Daniel Lavery. Tr. 46. Jones believed that Lavery viewed the issue as simply complaining on Jones' part, not as a safety matter. *Id.* However, this was Jones' personal interpretation; he offered no remark by Lavery to support his view. Additionally, there was nothing unique about Jones' conduct in reporting this bolter light issue; *all* the electricians had a checklist to note these issues. Tr. 47. Jones stated that, on the occasions when Lavery did not address the matter, he would go to Greg Shrewsbury. *Id.* When he did that, Shrewsbury "would immediately call somebody. He would usually call the superintendent or he would call the mine foreman, and there were times where he would tell Danny [Lavery] to go look at whatever it was that I had . . . an issue with." Tr. 47-48. Jones felt that Lavery didn't like his complaints

¹ "Painting" was a general description. Jones actually meant that the miners would pack mud over the lenses. Tr. 41. Miners creatively tried various methods to cover the bolter's lights because the light bothered their eyes.

² Jones' electrical crew boss, Lavery, disagreed that one could simply shut off the lights, as the lights need to be on in order for the roof bolters to see what they are doing. Tr. 153-54. In addition, *all* the bolter's lights go off when one flips the light switch. Tr. 155.

about this, and he contended that there were times when Lavery was “short” with him and that he would send him to work by himself, instead of working with a group. Tr. 49-50. Often, Jones stated, the electricians work as a group, although he acknowledged that some work is done individually. Tr. 50.

Regarding Jones’ reporting that trailing cables for shuttle cars were being anchored too far from dumping points,³ when asked how often *he* would raise that issue, he responded, “[t]hat was something that *we* raised quite often. Several times a month, *we* would have problems.” Tr. 55 (emphasis added). The Secretary then inquired, “When you say ‘we,’ do you mean you, or who [sic] are you talking about?” *Id.* Jones responded, “[m]e and the other electricians.” *Id.* (emphasis added). This issue, as with the others issues Jones had spoken to, occurred “[s]everal times a week usually.” Tr. 56. In this regard, Jones noted “*we* had a cable damage report that *we* turned in. So I mean, *we* turned in cable damage routinely. *We* had a report that *we* --”⁴ Tr. 56 (emphasis added). Jones typically reported this chronic issue to Lavery and if he was dissatisfied with his response, he would tell Greg Shrewsbury about it. Tr. 57. When Jones would raise the issue with Lavery his usual response was for Jones to write it in his [i.e., Jones’] paper. Tr. 57-58. The other electricians on Jones’ team followed the same reporting protocol, including elevating it to Shrewsbury if unsatisfied with Lavery. Tr. 58. Jones confirmed that Lavery’s approach to this issue was the same *to all* of the electricians on the team, not just Jones. Tr. 58. As for whether Jones raised the cable issue more often than the other members of his electrical team, Jones stated, “I don’t know how often -- I know that they raised awareness a number of times, because I was in the office when they did. But to say that they did it more than me, I really can’t truthfully say that I did it more than everybody else.” Tr. 59.

Next, the claim that roof bolt operators were not disposing of dust bags⁵ properly was addressed. Jones spoke to this issue along with his parallel problem of trash left by roof bolt operators on their machines. For these matters, he reported the subject to Danny Helmondollar, as that was his area of responsibility. He raised this concern, “quite often,” meaning several times a month. Tr. 60. The trash included potato chip bags and items such as boards and bolts that were left lying around. Tr. 62. As with the other issues Jones had spoken to, the trash and dust bags were chronic problems during his tenure. Tr. 64. Similarly, Jones *was not* the only one who raised these issues. The Court inquired: “And so these other electricians raised the problem to the same supervisors? [Jones]: Yeah. Pretty much, yes.” *Id.*

³ Trailing cables were supposed to be anchored at the dumping point and also they were to be located in a straight line because otherwise it could run the risk of contact with rib plates and run the risk of cutting the cable, presenting a shock hazard. Tr. 55-56.

⁴ Jones’ response was then interrupted by the Secretary. Tr. 56.

⁵ The dust bags refer to bags which collect dust during the operation of the roof bolting machines. Tr. 60. Jones’ issue was the proper disposal of such bags once they had been filled and removed from the machine. Tr. 62. The bags would then be put in a trash bag, double bagged, and then tied up. Tr. 61. Jones’ objection was that the bags were not then being removed from the mine. Tr. 61-62.

Having covered Jones' safety concerns, the Secretary's Counsel then turned to the Complainant's education about the temporary reinstatement process. Jones disclosed that he first learned of the subject when MSHA special investigator Humphrey came to his house. Tr. 64. This occurred sometime during early August 2015. Tr. 66. Humphrey was there on an entirely different matter having nothing to do with Jones' issues in this proceeding.⁶ Tr. 64-65. During the conversation of the matter unrelated to Jones' discrimination complaint, which had not been made at that point in time, *Humphrey* began asking Jones questions about his being laid off and Humphrey informed Jones that he had rights. Tr. 65. Within a day of that visit, Jones then filed his discrimination complaint. Tr. 66. As Jones expressed it,

So I didn't -- I did not know -- I knew that if -- if they fired me that, you know, for raising safety issues, that I had a case. But I did not know that if I was laid off -- I thought that was something totally separate. But Mr. Humphreys brought the law book in and showed me that I was still protected by the law, you know, even -- even during a layoff, if I felt like that I had been discriminated against.

Tr. 66.

Counsel for the Secretary then moved to introduce, for purposes of identification, Complainant's Exhibit 1, albeit for a limited purpose. This potential exhibit was the employee evaluation form for Jones, dated January 30, 2015. Tr. 70. Jones then stated that he recognized the handwriting on the form to be that of Danny Laverty. *Id.* The Secretary's questions related to the bottom of the exhibit, where comments were inserted for two subjects: what the employee need to improve and "other comments." Regarding the former, Laverty wrote: "Be more able to see the big picture and prioritize what needs to be done, possibly more electrical training." Tr. 70; Ex. C-1. Laverty's comments in the second box, which were hardly critical of Jones, as recorded on the form in January 2015, noted: "Works safe, Good about letting me know if he spots potential problems." Ex. C-1. The Court would expressly note Jones was not laid off until April 10, 2015, and this evaluation by Laverty, if anything, praised Jones raising potential problems.⁷

Jones was then asked about his layoff of April 10, 2015. Jones disclosed that everyone knew that something was developing. Tr. 73-74. Jones "*had conversations with many of the men, and what was going to take place, what did we think was gonna happen.*"⁸ Tr. 74 (emphasis added). The Secretary then rested its case. Tr. 77.

⁶ The subject of Humphrey's visit to Jones' home was not disclosed.

⁷ The testimony not having gone well with regard to this exhibit, the Secretary withdrew offering it, but it was later admitted in the record. Tr. 72; Tr. 159. When the Secretary rested, its case consisted solely of the testimony of the Complainant. No exhibits were entered into the record at that point in time.

⁸ Although Jones then expressed his view that if there was a layoff, he would lose his job if Laverty had anything to do with it, this was mere conjecture, not credible evidence in any respect. Accordingly, it cannot be relied upon to prove anything, other than Complainant's personal perspective and therefore it is of no probative value to the issue before the Court of frivolousness.

Following the Secretary's evidentiary presentation, the Court then asked some questions of Jones, prior to Respondent conducting its cross-examination. Through that questioning, it was learned that Jones had a total of some 13 years of mining experience with various mines, with most of that in underground coal mining. Tr. 79-86. Jones agreed that during all of those years he was aware of MSHA's existence. Tr. 87. On cross-examination, Jones agreed that he worked on a maintenance crew for Kingston on the midnight shift. Tr. 89. Kingston is owned by Alpha Natural Resources. Tr. 91. Jones also agreed that the Running Right cards were encouraged to be filled out and were an Alpha-wide process. Tr. 92. In addition, Alpha did training for this at the Running Right Academy. Tr. 92-93.

In questioning Jones about some of the particulars he raised in his Complaint, Respondent's Counsel first addressed the trailing cables for the shuttle cars. Jones agreed that it was part of his job to make sure the cables were maintained in good repair.⁹ Tr. 97. As to the lights being covered on roof bolters, Jones also agreed that it was part of his job to make sure that the lights were not covered up and if they were, it was part of his job to remedy that condition. Tr. 100. Sometimes the fix was a simple matter of washing off mud that had been applied to the lights, but other times the lights had been painted and this would require new globes to be installed. *Id.* Jones added that this was a cost to the company to replace those globes over and over. *Id.* Therefore, he agreed that the company *wanted* that practice of covering lights to stop. Tr. 101. Jones also agreed that he *and the other electricians* who were working on the maintenance shift would advise the day shift assistance chief, Mr. Shrewsbury, or Jarrod Birchfield, the chief electrician of this issue. Tr. 101-03.

Turning to Jones' interview with MSHA special investigator Humphrey, which occurred on August 3, 2015, Jones agreed that it was at that time that he was advised of the temporary reinstatement provision and he learned that he was "protected by the law during a layoff."¹⁰ Tr. 105-06. Still, while he asserted that he did not know of Mine Act protections when a layoff occurs, Jones acknowledged that he did know that employees cannot be fired for making safety complaints. Tr. 106. In fact, that protected right was part of his annual refresher training. *Id.* He also admitted that he knew there was a 60 day time frame to make such a complaint, but maintained that he understood that to apply only to an improper firing and that he did not know a layoff could be within those rights. Tr. 107. The Secretary then rested. Tr. 115.

Respondent then called Danny Laverty. At the time in issue, Laverty was the third shift maintenance foreman. Tr. 129. His coal mining experience spans some 41 years, all of it in

⁹ In yet another example demonstrating that Jones was really no different in raising safety concerns than the other electricians he worked with, Complainant told an anecdote of a miner who continued to damage the trailing cables. He related that it took a while to get that miner to stop that practice, but the key point is that all of his fellow electricians were complaining about this individual and *that the company took steps to stop the miner from continuing to damage the cables.* Tr. 111.

¹⁰ Of course, if that is what was conveyed to Jones by MSHA's Investigator Humphrey, that he was protected by the law during a layoff, it was a gross oversimplification of a miner's reinstatement rights. Tr. 106. Layoffs per se are not protected.

maintenance. Tr. 133. The Complainant was part of Laverty's crew, working in the No. 3 section. Tr. 130. Laverty described his duties on that shift:

The purpose of the midnight shift was doing maintenance, checking permissibility, keeping the equipment in permissible conditions, making sure the equipment was serviced, greased, oil changed, whatever needs to be done, any issues or things that might have caused them problems during the production shift, to try to fix those. Just a lot of preventive type maintenance

Tr. 131.

Addressing the matter at hand, Laverty explained the work that he and his crew, which included Complainant Jones, were to perform:

[T]hey were -- generally at the start of the shift, they were given a work list to do. Part of it was generated from previous things that they might not have gotten to earlier, and some of it would come from things that might have happened during the shift just prior, for instance, the day shift or evening shift. And also, there were preventive maintenance programs that would come up as worksheets that they were also assigned to do. And they would have to . . . sign them, put their initials on stuff, check things off that they got, not check off things that they didn't get, kind of a checklist of stuff that they could do. They were expected, what they got done, to write down and turn it in when they got outside and sign it, put their names on it.

Tr. 134-35. Laverty agreed that it was common for all his electricians to note their concerns that they encountered during their work. Tr. 136. As he expressed it, "Sometimes the only way we have of knowing that we have an issue or a problem with something is if somebody will come and tell us." Tr. 138. He agreed that Jones brought items to his attention but the other electricians on his crew did so as well, and that Jones activity in this regard was "about the same as anybody else." Tr. 138-39.

Speaking to the issue of lights on the roof bolter being covered, Laverty acknowledged that it has been an ongoing problem and that roof bolter operators should not do that. Tr. 141-43. He also agreed that Jones probably brought instances of this occurring to his attention, but there was nothing unique about that, as he stated that "probably every [electrician] on that shift has come to [him] about -- about the lights." Tr. 143-44. Laverty did not ignore the issue; there were occasions when he would raise it to the chief electrician and to the safety director and it would be raised during safety meetings too. Tr. 145.

As for the issue of trash, as one of Jones' raised safety concerns, Laverty likewise acknowledged that miners leave their lunch trash on top of mining equipment and that it too was a continuing problem, presenting a fire hazard. Tr. 146-47. This subject was likewise brought up to the miners during meetings. Tr. 148-49. While he couldn't recall specifically if Jones raised the issue, his electricians had generally raised the matter with him. Tr. 146. As for the cable issue, another of Jones' safety concerns, Laverty agreed that electricians brought the condition of

cables to his attention. Tr. 149-50. However, he added that noting damage to cables *was part of his electrician crew's job*. Tr. 150. Turning to the dust bag issue, Lavery similarly agreed that “somebody at some point mentioned to me that guys weren't getting rid of their dust bags properly,” but he could not recall which individual noted the matter. Tr. 152.

Upon cross-examination, Lavery did not agree that Jones was more persistent about raising safety issues with him than other miners. Tr. 155. Counsel for the Secretary then revived her interest in admitting C-1, an exhibit offered for identification only during the Secretary's case in chief, but then withdrawn. Lavery agreed the exhibit was his employee evaluation of Jones, which evaluation he made on January 30, 2015. Tr. 156. It is difficult to determine how the evaluation supports the Secretary's case. As Counsel for the Secretary noted, in Lavery's comments about Jones he wrote: “Works safe and is good about letting me know if he spots potential problems.” Tr. 156. The Court took note that the comment reflected that Jones “Works safe” and Lavery stated the obvious, that it was not a criticism but rather that it was “a good thing, that he works safe.” Tr. 158. Similarly, when asked about his remark that Jones was “good about letting me know if he spots potential problems,” that was a positive comment by him about Jones. Tr. 158. Exhibit C-1 was then admitted. Tr. 159.

The Respondent then called Greg Shrewsbury. At the time in issue he was employed at the Kingston No. 2 mine, where he was the assistant chief electrician. Tr. 164-65. Shrewsbury worked the day shift but this he would interact with those miners completing the night shift, as their times overlapped. Tr. 167. Electricians from that night shift would stop by his office as their shift ended and note needed parts and things that would require attention. Tr. 167-68. He encouraged them to do this because it reduces violations. Tr. 169. Complainant Jones would come by his office from time to time, but his visits were not more or less than the other electricians. Tr. 169.

Shrewsbury acknowledged awareness of the issue of lights being covered on roof bolters, describing it as a frequent issue and that it would be addressed in safety meetings. Tr. 171. Similarly, trash was described as a continuing issue and it too would be addressed at safety meetings. The problem would then lessen for a time and then arise again. Tr. 173.

Discussion

The essence of the Secretary's case is the claim that Complainant made safety complaints and that the mine operator, unhappy with Jones' safety advocacy, inappropriately applied its layoff so that Complainant would be laid off. Thus, apart from the late filing, the measure of whether this complaint was frivolously brought involves two elements: did Jones make safety complaints and, if so, was there a connection established between such complaints and the layoff. In a sense, a mine operator has its hands tied in this type of proceeding, as a temporary reinstatement proceeding is not the forum to consider competing claims about the

legitimacy of the layoff procedures.¹¹ However, acknowledging the appropriateness of the limited inquiry, does not equate with an automatic or reflexive finding that a complainant need only assert that he raised “safety concerns” and then couple that with a claim that a mine utilized a suspect layoff system, to establish a non-frivolous claim. The act of challenging temporary reinstatements should not be preemptively deemed frivolous. The inquiry is whether the complaint itself is frivolous.

In this instance, as noted, two obstacles have to be resolved before factoring the fact of the layoff into the analytical mix: Did the Complainant have an excusable basis for his very untimely filing of the discrimination complaint and, if he did, did he engage in genuine protected activity or was he merely performing his maintenance shift duties as an electrician? The Court, as explained below, finds that neither of these predicates was established.

As has been noted, Complainant, Jeremy Jones, was the Secretary’s sole witness. The Secretary presented evidence that Mr. Jones, as the affidavit of the Secretary’s special investigator for this matter provides, raised “safety concerns” with Respondent. Whether raising “safety concerns” is the equivalent of engaging in protected activity, at least in the context of this case, is another matter. Mindful that resolving testimonial conflict is not permitted in temporary reinstatement matters, this decision does not engage in such weighing. Instead the decision relies upon the Secretary’s evidence and evidence from Respondent’s witnesses which was consistent with that testimony. The Court considered each of the witnesses to be credible.

In the Court’s assessment, Mr. Jones was both an intelligent individual and a credible witness.¹² As explained, Complainant’s intelligence is a factor which tends to refute his claim, making it less likely that he was unaware of his protected activity rights, and more likely that, when speaking with the MSHA special investigator, *on a matter unrelated to the discrimination allegations in this proceeding*, that this was an attempt, stimulated by the MSHA investigator, to

¹¹ For that reason the Court restricted both sides from introducing details about their respective contentions as to the legitimacy and honest implementation of its layoff. Instead, it permitted Respondent to make an offer of proof on the subject of the mine’s layoff. Tr. 121-25. After all, since the temporary reinstatement proceeding is not the forum to resolve the merits, or lack thereof, of the layoff system, it makes little sense to have extended testimony about the particulars of the layoff and its application. As the Court expressed during the temporary reinstatement hearing, “the bona fides of the layoff is not something I have to reach.” Tr. 121. It is sufficient to note that it is a disputed issue, but one that will not be resolved until after a full evidentiary hearing on the discrimination claim in chief, a matter several months down the road.

¹² While credible, that does not mean that the Court accepted Jones’ unsupported visceral feelings that Laverty didn’t like his raising safety matters.

backfill safety claims and couple those with the unassailable assertion (for now) that there was a non-legitimate basis for his layoff.¹³

Therefore, when considering the long delay in the filing, Jones' demonstrated intelligence, evidenced by the fact he is an electrician; his long number of years employed in the mining industry; the fact that he acknowledged that he was speaking with fellow employees just prior to the layoff announcement; and that, despite all that, the idea that he was the victim of discrimination did not come to him until he started speaking with an MSHA special investigator on a matter unrelated to any yet to be made claim of his own, all combine to make the delay unexcused.

Even assuming that, on any appeal that may occur, a different vantage point about Jones' late filing was reached, the Court concludes that no nexus was established between Jones' expression of his "safety concerns," and the layoff. To the contrary, Jones' own testimony confirms that his raising of those concerns was indistinguishable from those of the fellow electricians on his crew and that, fairly viewed, they were either part of his job to address those matters or not genuine safety complaints. However labeled, there is no evidence that Kingston did anything other than encourage the miners to bring such concerns to its attention. This was true for the trash, the covering of roof bolter lights, the trailing cables, and the running right cards. Jones' own testimony supports each of these conclusions. In fact, with the Secretary's own, single, exhibit, Jones was paid high regard by Mr. Laverty for working safe and letting him know if he spotted potential problems. Ex. C-1. It is noteworthy that this occurred in January 2015, which was at a time several months before the layoff. Therefore, the Court agrees with the Respondent that, in a very technical, literal sense, while Jones raised safety issues, they were non-viable protected activity in the context that they were made and Kingston took no negative action, by words or deeds, in reaction to them. As noted, on this record, Respondent was supportive and encouraged employees to raise such matters.

Conclusion

Accordingly, the Court finds that, on this record, the Complaint has been frivolously brought. This does not mean that Complainant may not ultimately prevail in a full trial on the merits, a determination about which the Court cannot, and does not, have any opinion at this

¹³ To that point, the Secretary attempted in its Motion in Limine to strike testimony regarding Complainant's job performance and the legitimacy of the layoff, while trying to bootstrap the legitimacy of this case by referencing findings in other proceedings in which two other miners laid were laid off by Kingston, citing *Sec'y on behalf of Brooks v. Kingston Mining*, 37 FMSHRC 1282, 2015 WL 3932760, (June 19, 2015) (ALJ Andrews), and *Sec'y on behalf of Harper v. Kingston Mining*, No. WEVA 2015-816-D, 2015 WL 4512184 (FMSHRC July 14, 2015) (ALJ Lewis). Of course, each case must stand on its own record, and in no manner does this Court second guess or criticize the temporary reinstatements that were ordered in those other cases. However, the Court notes that in the case of *Brooks*, Brooks filed his discrimination claim 10 days after the layoff, and in *Harper*, Harper filed his claim 34 days after the layoff, as compared to Mr. Jones, who filed his claim nearly 4 months after the layoff and then only upon visiting with an MSHA special investigator *on a matter unrelated to his own layoff*.

junction. Different scenarios may develop. The Secretary may decide not to pursue a section 105(c) complaint. If the Secretary does file such an action, it is possible that he may be able to demonstrate that the miners' layoff evaluation was a ruse, implemented for the purpose of ridding itself of miners who made safety complaints, a showing that could then contextually revive the assessment of Jones' expressed safety concerns. It is also possible that challenges to the legitimacy of the layoff may fail. For now, the issue is limited to frivolousness, a determination here made.

ORDER

IT IS ORDERED that the Secretary's application for the **temporary reinstatement** of Jeremy Jones **IS DENIED**. Accordingly, **IT IS FURTHER ORDERED** that this temporary reinstatement proceeding **IS DISMISSED**.

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

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October 15, 2015

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

v.

TRAYLOR MINING, LLC,
Respondent

CIVIL PENALTY PROCEEDING

Docket No. WEST 2014-351-M
A.C. No. 05-00413-341975 X940

Bulldog Mine

DECISION

Appearances: Beau Ellis, Esq. and Kristi Henes, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado; Dennis Bellfi, Mine Safety and Health Administration, U.S. Department of Labor, Denver, Colorado, for Petitioner; Jason W. Hardin, Esq., Fabian & Clendenin, Salt Lake City, Utah for Respondent

Before: Judge Manning

This case is before me upon a petition for assessment of a civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”), against Traylor Mining, LLC (“Traylor”) 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 and documentary evidence at a hearing held in Denver, Colorado, and filed post-hearing briefs. One section 104(d)(1) citation was adjudicated at the hearing. Traylor is an independent contractor that was performing work at the Bulldog Mine, which was an underground silver mine in Mineral County, Colorado.

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

On June 3, 2013, MSHA Inspector David M. Sinuefield¹ issued Citation No. 8597320 under section 104(d)(1) of the Mine Act, alleging a violation of section 57.9100(a) of the Secretary’s safety standards. (Ex. G-5). The citation alleges that the production supervisor for Traylor was injured by the roadheader on a Bobcat excavator when the boom on the excavator was accidentally activated by the excavator operator as he was backing out of a mucked out area.

¹ Inspector Sinuefield has been with MSHA for over eight years. He has investigated accidents as well as hazard complaints. Prior to his employment with MSHA, he worked in the mining industry from 1976 to 2003. He is trained as a mechanic and has worked on, and operated, numerous pieces of mobile equipment.

The citation further states that the supervisor was standing too close to the excavator while observing the mucked out area and, as a result, he failed to follow established rules governing rights-of-way. The citation states that the supervisor engaged in aggravated conduct because he failed to yield the right-of-way to the excavator while it was in operation.

Inspector Sinquefield determined that an injury was reasonably likely to occur, that the violation was of a significant and substantial (“S&S”) nature, and that any injury could reasonably be expected to be fatal. He determined that Traylor’s negligence was high and that one person would be affected. Section 57.9100(a) provides, in part, that “[r]ules governing speed, right-of-way, direction of movement, and the use of headlights to assure appropriate visibility, shall be established and followed at each mine[.]” 30 C.F.R. § 57.9100(a). The Secretary has proposed a penalty of \$52,500 for this citation under the Secretary’s special assessment procedure at 30 C.F.R. § 100.5.

The parties, both at hearing and in their briefs, have represented that Traylor is not contesting the fact of violation for Citation No. 8597320, nor is it contesting the S&S or gravity findings of the inspector. (Tr. 6-7; Traylor Br. 1; Sec’y Br. 2). Rather, Traylor is only contesting the unwarrantable failure and high negligence findings, as well as the specially assessed proposed penalty amount. *Id.* Accordingly, I address only these issues.

My findings of fact in this decision are based on the record as a whole and my observation of the witnesses. Although I have not included a summary of all the evidence presented at the hearing in this decision, I fully considered all of the evidence.

Discussion and Analysis

Summary of the Evidence

The Bulldog Mine was a single entry underground mine owned by Rio Grande Silver. Rio Grande Silver was not involved in the day-to-day operation of the mine. Traylor was contracted to excavate a new tunnel to intercept old mine workings at the Bulldog Mine. Traylor began work at the mine in July 2012 and ceased work in September 2013.

Traylor’s typical mining cycle at the mine involved the drilling of shot holes, loading of shots, blasting, cleaning up and removing of material, and then providing support. As part of the cleanup phase, Traylor utilized a Bobcat excavator with a roadheader attached to the boom to trim the ribs, face, top and floor. The subject roadheader consisted of a boom-mounted cutting head that was attached to the Bobcat.

The cited standard requires, in pertinent part, that mines establish and follow right-of-way rules in order to provide for the safe movement of mobile equipment. 30 C.F.R. § 57.9100(a). Traylor had established a rule via a Job Hazard Analysis (“JHA”) for “[t]rimming/scaling the

perimeter with the Bobcat roadheader.” (Ex. G-7 p. 2.). According to the relevant JHA², in order to prevent the hazard of personnel being struck by the excavator “[n]o personnel are to be forward of the Bobcat blade while trimming.” The JHA further states that the equipment operator “shall stop trimming and place roadheader on the ground if personnel need to be in the area.” *Id.* Finally, the JHA provides that the equipment operator must “maintain constant awareness of his movements and personnel locations.” *Id.*

On May 29, 2013, Lowell Hicks was supervising a crew of miners engaged in the cleanup phase of the mining cycle. Michael Reagan, one of the crew members, was operating the Bobcat excavator with the roadheader attached. Following a trimming session, Reagan stopped the excavator and exited the cab so that he and Hicks could evaluate the situation, take measurements, and see if additional trimming needed to be done. After determining that additional trimming was needed, Reagan got back into the excavator and trimmed some additional rock. Hicks stood beside the excavator cab while Reagan operated it. Reagan then stopped the excavator and again discussed the situation with Hicks. After determining that no additional trimming was necessary, Hicks went to the back of the excavator and unhooked the water line.

Joseph Dalton, another miner on the crew under Hicks’ supervision, then dragged the water line outby so that it would not be run over while the excavator trammed away from the face. Reagan, after waiting 20-30 seconds to make sure the water was unhooked, looked over his left shoulder from in the excavator cab and saw that the hose had been pulled down the drift and Dalton was rolling it up. (Tr. 189). He saw no other miners to his left. Reagan then looked over his right shoulder and saw miners outby the excavator down the drift. While Reagan could not identify the miners he saw over his right shoulder, he determined that all miners were clear of the excavator. He then throttled up the excavator, raised the boom, honked three times, and began to tram backwards.³ Meanwhile, Hicks advanced inby on the left side of the excavator. Reagan did not see Hicks go back inby. After moving only a few feet backwards, the excavator shifted as it moved over uneven ground. As the excavator shifted, Reagan turned to his right to look behind him and, in doing so, his right hand accidentally hit the swing lever, causing the boom to swing and hit Hicks and the rib. (Tr. 190). Reagan centered the excavator before noticing Hicks lying on the ground, at which point he asked Hicks if he had hit him, to which Hicks replied that he had been hit. As a result of his injuries, Hicks was evacuated from the mine and ultimately transported to a hospital in Denver.

² At hearing, the Secretary introduced a second JHA, (Ex. G-8 p. 21), and seemingly planned to allege that Respondent had also violated this JHA. However, the Secretary did not advance that theory in his brief and, as noted by Respondent in its brief, Exhibit G-8 does not apply to the case at hand. Traylor Br. 1-2 n. 1.

³ Reagan testified that the Bobcat excavator was equipped with a backup alarm, which was loud enough to hear over the operation of the equipment, and lights on the front and back, which were bright enough to see where he was going and provided some bleeding light to the sides of the excavator. (Tr. 193). Further, he explained that, because of the length of the boom, the excavator could not spin around and drive out forward. Rather, it had to tram backwards to exit the face area. (Tr. 193-194).

Inspector Sinuefield traveled to the Bulldog Mine to investigate the accident involving Hicks. Sinuefield took notes, photos, and measurements of the scene of the accident. At hearing, Sinuefield acknowledged that he did not ask Dalton, Reagan, or anyone else at the mine about Hicks' normal practice during trimming, and that those individuals who worked with Hicks would have had firsthand knowledge regarding his usual practice. (Tr. 69). Sinuefield traveled to Denver the following day to interview Hicks at the hospital.

Sinuefield testified that Hicks was lucid, candid, and clear during his interview in the hospital. Sinuefield documented his interview with Hicks in his notes. (Ex. G-4). Sinuefield, testifying while reviewing his notes, stated that Hicks told him that during the production cycle it was normal for him to be forward of the cab during the cleanup phase. He stated that Hicks told him that the reason he advanced past the excavator just prior to the accident was because he was "in a hurry[.]" (Tr. 36). Further, the inspector stated that Hicks told him that he "messed up [and he] shouldn't have been there while the machine was running." *Id.*; (Ex. G-4 p. 7). At hearing, on cross-examination, Sinuefield, after stating that there were only inches between the excavator cab and the blade, conceded that there may have been two feet between those areas. (Tr. 64-65). Further, he agreed that if Hicks was next to the cab, behind the blade, he would not have been in violation of the JHA. (Tr. 66-67).

Sinuefield testified that "anybody forward of the blade" was exposed to the hazard of being hit or run over by the excavator. (Tr. 44). While he found that Hicks' exposure to the hazard was limited in time in this instance, he determined that such an accident was reasonably likely based on the repeated exposure of the individual since the violative conduct was a normal practice. Sinuefield acknowledged that, had this been a "one and done" situation, his finding regarding the level of exposure may have been different. (Tr. 45). He explained that similar accidents involving mobile pieces of equipment have been fatal and that Hicks was lucky to be alive in this instance. (Tr. 47-48).

Sinuefield testified that he designated the negligence as high because Traylor provided no mitigating circumstances to explain why it allowed this practice at the mine. (Tr. 48).

Sinuefield designated the violation as an unwarrantable failure. (Tr. 49). In reaching this determination, he concluded that the conduct posed a very high degree of danger given the size and weight of the machine and because Hicks' conduct was a normal practice. Based on Sinuefield's experience and a review of fatalgrams, he believed that a fatality was likely. (Tr. 23). He stated that fatalgrams are of great value to operators who can look at them, decide if they apply to their mine, and then make sure they take steps to avoid such an accident at their own mine. He found that the operator had knowledge of the violation because Hicks, who was a supervisor, admitted to him that he was where he should not have been, and that this was a procedure that Traylor allowed time and time again. (Tr. 52-53). Further, he found that the violation was obvious because Hicks was aware of his position relative to the moving excavator. (Tr. 55-56). Finally, the inspector found that, with regard to duration, the violative conduct was a common practice that was repeated each time. (Tr. 57).

Hicks testified that he was hired as a "walker" at the Bulldog Mine in April 2013. His position was paid hourly and he did not consider himself to be management, but he was hired in

a supervisory role and directed the work of a crew. (Tr. 156). Prior to being hired, he was provided a safety manual, which he read and signed before going through several days of orientation and walkthrough training with his supervisor, Duane Monks. Hicks recalled being trained on right-of-way and specifically remembered being trained on the JHA. He testified that, other than the time of this accident, he could not recall being forward of the excavator blade, it was not normal for him to move forward of the excavator cab while it was in operation, and that normally, after trimming, he would have been the one to drag the hose back down the drift. (Tr. 160-161). Hicks explained that the blade of the excavator was roughly three to four feet in front of the cab. (Tr. 169). In addition, Hicks testified that he had never seen any other Traylor personnel forward of the blade during trimming. Finally, Hicks testified that, while he was not disciplined as a result of the accident, he has been on workers compensation since the accident, and Traylor only worked at the Bulldog Mine for three months after the accident. He was laid off on August 21, 2013. (Tr. R-30).

Both Reagan and Dalton testified that they worked with Hicks on a daily basis and, with the exception of the accident, never saw Hicks or anyone else go forward of the excavator blade while it was operating. (Tr. 187-188, 204). Monks, the mine superintendent and Hicks' direct supervisor, testified that he had observed Hicks and other miners as they worked and that he only saw the miners walk forward of the blade when the roadheader was on the ground and the equipment was off. (Tr. 229). Neither David Pease, the project manager for Traylor Brothers, the parent company of Traylor Mining, nor Monks had ever received a complaint about Hicks acting in an unsafe manner or in a manner that was inconsistent with the JHA. (Tr. 139, 232).

Traylor's witnesses testified that the safety culture at Traylor was good, with routine training regarding rights-of-way and danger zones, including one day where the mine was shut down and miners were trained on all of the mobile equipment in the mine, as well as the specific JHA provision at issue. (Tr. 185, 191, 201-203). Further, they explained that Traylor's safety program encouraged miners to report violations to management, and miners had in the past reported "walkers" for violations. (Tr. 120-121, 207). Pease testified that Traylor had a discipline program and had terminated miners, including a "walker," for safety violations. (Tr. 120-122).

Reagan explained that, given the length of the boom on the excavator, a person standing next to the cab would be safe, as the boom would hit the rib and stop before it would get near an individual standing next to the cab. (Tr. 187). Reagan also testified that, at the time of the accident, he was certain he had taken steps to make sure he knew where everyone was. (Tr. 196). Hicks testified that he did not signal to Reagan that he was going forward. Reagan was not disciplined as a result of the accident. (Tr. 196-197).

Both Reagan and Dalton identified Hicks as their direct supervisor. (Tr. 192, 210). Dalton confirmed that Hicks had the ability to direct work and reprimand the crew for safety violations, however he didn't believe that Hicks had the ability to terminate miners. (Tr. 211). Monks testified that Hicks was in charge of advancing the tunnel and doing it safely. Pease testified that Hicks, as a "walker," was charged with coordinating and supervising the activities on the shift, but also stated that Hicks did not have authority to hire or fire, but that his input would be given weight. (Tr. 150-151).

Analysis of Negligence and Unwarrantable Failure

I find that Traylor was moderately negligent and that the violation was not a result of the operator's unwarrantable failure to comply with the mandatory standard. Many of the Secretary's allegations with regard to negligence and unwarrantable failure are based on his assertion that Hicks was an agent of the operator and that the violative conduct was not an isolated incident, but was normal and occurred on a regular basis. Based on the analysis below, I find that the Secretary established that Hicks was an agent of the operator. The Secretary did not establish by a preponderance of the credible evidence that Hicks regularly walked in front of the blade in violation of the JHA while the excavator was operating.

The Commission has held that, while "the negligence of an operator's 'agent' is imputable to the operator for penalty assessment and unwarrantable failure purposes[,] . . . the negligence of a rank-and-file miner is not imputable to the operator for" those same purposes. *Nelson Quarries, Inc.*, 31 FMSHRC 318, 328 (Mar. 2009). The Mine Act defines an "agent" as "any person charged with responsibility for the operation of all or part of a coal or other mine or the supervision of miners in a coal or other mine[.]" 30 U.S.C. § 802(e). In determining whether an employee is an agent of the operator, the Commission has "relied, not upon the job title or the qualifications of the miner, but upon his function, [and whether it] was crucial to the mine's operation and involved a level of responsibility normally delegated to management personnel." *Ambrosia Coal & Constr. Co.*, 18 FMSHRC 1552, 1560 (Sept. 1996) (quoting *U.S. Coal, Inc.*, 17 FMSHRC 1684, 1688 (Oct. 1995)) (alteration in original); *See also Martin Marietta Aggregates*, 22 FMSHRC 633 (May 2000).

I find that Hicks was an agent of Traylor. Hicks testified that he supervised a crew of miners and directed their work activity. David Pease, the project manager for Traylor Brothers, confirmed that, as a "walker," Hicks was charged with, among other things, supervising, coordinating, and directing work, training and monitoring employees in the proper use of tools, and assuring that work was done in a safe manner. (Tr. 150-151). He further confirmed that walkers are able to issue verbal and written discipline to miners for safety violations and that Hicks' input would be given weight in a decision to terminate a miner. *Id.* Traylor's other witnesses confirmed that Hicks was a supervisor. Duane Monks, the project superintendent, agreed that Hicks was in charge and was the individual responsible for making sure "the work was done and done safely." (Tr. 234). In addition to the testimonial evidence, the parties also introduced documentary evidence that confirms these supervisory responsibilities. (Exs. G-10, G-11).

While Respondent argues that Hicks was not an agent because he was paid by the hour, was not a member of Traylor's management, could not hire or fire personnel, and was not required to hold certifications required by law, I find these arguments unavailing in light of the testimony and documentary evidence discussed above. Traylor Br. 11 n. 5. In addition, while Hicks may not have had ultimate authority to terminate an employee, Traylor's own witnesses confirmed that he was able to discipline employees and that his input would be given weight in a decision to terminate an employee. I find that Hicks' function was crucial to Traylor's operation, involved a level of responsibility consistent with that of a person in management, and that he was an agent of Traylor.

With regard to whether Hicks' violative conduct was normal and occurred repeatedly or was an isolated incident, I am persuaded both by the testimony and Respondent's brief that this was not a regular occurrence. Traylor, in its brief, argues that the Secretary's allegation that Hicks' violative conduct was normal and occurred repeatedly is premised upon a misinterpretation of the evidence. Taylor Br. 2-3. Specifically, Traylor argues that the Secretary misinterpreted a statement made by Hicks to Sinuefield during the interview at the hospital following the accident.

At hearing, Sinuefield, relying upon his field notes taken during his interview of Hicks, testified that Hicks told him that it is Traylor's normal procedure during the cleanup phase for Hicks to be at or forward of the cab. (Tr. 36, 61-62, 66; Ex. G-4 p. 7). Traylor asserts that the Secretary improperly interpreted this to mean that it was Hicks' normal practice to be out of compliance with the JHA's requirement that personnel be behind the blade of the excavator during the trimming phase. (Ex. G-7 p. 2). While Sinuefield initially testified that there were only inches between the cab and the blade on the excavator, he later conceded, after reviewing an exhibit showing a photo of what he identified as an identical excavator with a different attachment on the boom, that there could be two feet in distance between the cab and the blade. (Tr. 63-65; Ex. G-6). Hicks testified that the distance between the cab and the blade was three to four feet. (Tr. 169). I find that the photograph, combined with the testimonies of Hicks and Sinuefield, show that it was possible for Hicks to be "[at] or forward of [the] cab" while at the same time be in compliance with the JHA's requirement that he be *behind the blade*. (Ex. G-4 p. 7)(emphasis added).

The inspector, on direct examination, was asked who would be exposed to the hazard of being hit by the excavator. The inspector replied "[a]nybody forward of the blade, which at this time was Lowell Hicks." (Tr. 44). On cross-examination, Inspector Sinuefield conceded that, if Hicks were behind the blade, there would be no violation.⁴ (Tr. 66-67). Accordingly, I find that the statement made by Hicks to the inspector while he was in the hospital cannot be relied upon by the Secretary to establish that it was normal practice for Hicks to be in front of the blade of the excavator and in violation of the JHA. Given that no other credible evidence was introduced in support of the Secretary's allegation that it was Hicks' normal practice to be in front of the blade, I find that the Secretary has failed to establish that the violative conduct was a common practice. Rather, I credit the testimonies of Traylor's witnesses that going in front of the excavator blade while the excavator was in operation was not a normal occurrence and, based on the evidence presented, find that the violative conduct that resulted in Hicks' injuries was an isolated event. (Tr. 186-187, 140, 204, 206, 229).

Negligence

The Commission has recognized that "[e]ach mandatory standard . . . carries with it an accompanying duty of care to avoid violations of the standard, and an operator's failure to meet

⁴ The citation charges Traylor with a violation of section 57.9100(a) because it was not following its established right-of-way rules as set forth in the JHA. Whether the JHA sufficiently protected miners working around the excavator while it was engaged in trimming operations is not an issue that is before me.

the appropriate duty can lead to a finding of negligence if a violation of that standard occurs.” *A.H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983). In determining whether an operator has met its duty of care, the Commission considers “what actions would have been taken under the same circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation.” *Jim Walter Res. Inc.*, 36 FMSHRC 1972, 1975 (Aug. 2014) (footnote omitted).

I find that Traylor was moderately negligent. I have already found that Hicks was an agent of the mine. Accordingly, his negligence is imputable to the operator for penalty purposes. However, I find that, while Hicks’ act of going into the danger zone was ill-advised and resulted in a serious injury, a finding of moderate negligence is appropriate. As discussed above, much of the Secretary’s case rests on his belief that the violative conduct was a normal practice. For reasons set forth above, I find that the Secretary failed to meet his burden of proof on this issue of fact. The evidence establishes that Traylor took reasonable steps to ensure that miners did not endanger themselves by walking in front of the blade. It provided specific training and had in place specific policies to prohibit the exact conduct that resulted in Hicks’ injuries. Each of the crew members testified that they were aware of the need to remain behind the blade during trimming and that it was not the normal practice of anyone, Hicks included, to go in front of the blade. Moreover, I credit the testimonies of Traylor’s witnesses that safety violators were appropriately disciplined by this operator. Accordingly, I **MODIFY** the citation to moderate negligence.

Unwarrantable Failure

The unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id.* at 2001. Unwarrantable failure is characterized by conduct described as “reckless disregard,” “intentional misconduct,” “indifference,” or a “serious lack of reasonable care.” *Id.* at 2002-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); *see also Buck Creek Coal, Inc.*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test). The Commission has explained that whether a citation is an “unwarrantable failure” is a question that should be evaluated based on the facts and circumstances in each case, and in light of each of the following factors: (1) the length of time that the violation has existed; (2) the extent of the violative condition; (3) whether the operator has been placed on notice that greater efforts were necessary for compliance; (4) the operator’s efforts in abating the violative condition; (5) whether the violation was obvious; (6) whether the condition posed a high degree of danger; and (7) the operator’s knowledge of the existence of the violation. *See Consolidation Coal Co.*, 22 FMSHRC 340 (Mar. 2000); *IO Coal Co.*, 31 FMSHRC 1346 (Dec. 2009). All of the relevant facts and circumstances of each case must be examined to determine if an actor’s conduct is aggravated, or whether mitigating circumstances exist. *Consol.*, 22 FMSHRC at 353.

In *IO Coal Co.*, 31 FMSHRC at 1346, the Commission emphasized that the length of time that the violative condition existed is a “necessary element” of the unwarrantable failure analysis. Here, the condition existed only for a very short period of time. As discussed above,

there is no credible evidence that Hicks' conduct of walking in front of the blade while the excavator was in operation was a normal occurrence. Although Hicks' negligent act resulted in a serious injury, had Reagan not accidentally hit the joystick that caused the boom to swing, the excavator would have continued proceeding outby past Hicks in a matter of seconds to the point where Hicks would no longer have been in danger.

In *IO Coal Co.*, the Commission explained that the "extent of the violative condition is an important element in the unwarrantable failure analysis." *Id.* The Commission has explained that the purpose of this element is to "account for the magnitude or scope of the violation[.]" and the judge may analyze it by looking at, among other things, the "extent of the affected area as it existed at the time the citation was issued[.]" the number of persons affected, and the time and resources required to correct the condition. *Dawes Rigging & Crane Rental*, 36 FMSHRC 3075, 3079-3080 (Dec. 2014) (citing *E. Associated Coal Corp.*, 32 FMSHRC 1189, 1195 (Oct. 2010) and *Watkins Eng'rs & Constructors*, 24 FMSHRC 669, 681 (July 2002)); *Consolidation Coal Co.*, 35 FMSHRC 2326, 2331 (Aug. 2013). Moreover, a judge should not consider an operator's past practices in connection with the extensiveness factor. *Id.* In *Dawes Rigging* the Commission found that, because only one miner endangered himself by walking under a suspended boom, the violation was not extensive. *Id.* Here, the Secretary did not directly address the extent of the violation in his post-hearing brief but, at hearing in his opening statement, the Secretary averred that, while only one miner was injured, other miners were affected because these employees saw that their supervisor believed "that breaking the rules was okay, until it isn't and you get hurt." (Tr. 11). I find that the violation was not extensive in that it involved only one miner and was an isolated incident affecting only a small area.

The Commission has explained that repeated similar violations, even if those prior violations were not a result of an unwarrantable failure, and past discussions with MSHA about a problem at the mine may serve to put an operator on notice that increased efforts to comply are necessary. *IO Coal Co.*, 31 FMSHRC at 1353-1354. The Secretary concedes that MSHA had not previously cited Traylor for a violation of the standard or discussed the issue with Traylor. He argues that fatalgrams describing mobile equipment accidents put Traylor on notice that increased efforts to comply were necessary. Sec'y Br. 12-13. I reject this argument. The rationale underlying this aggravating factor is whether the operator has been put on notice of a problem at its mine that requires additional efforts to comply. Here, the Secretary did not establish that Traylor had been put on notice that increased efforts were necessary.

In evaluating the operator's efforts in abating the violative condition the judge should examine those abatement efforts made prior to the issuance of the citation or order. *Consolidation Coal Co.*, 35 FMSHRC 2326, 2342 (Aug. 2013) (citing *IO Coal Co.*, 31 FMSHRC at 1356 and *Warwick Mining Co.* 18 FMSHRC 1568, 1574 (Sept. 1996)). The Secretary did not directly address this factor in his brief. Traylor asserts that, while there was no opportunity to abate this condition in the time between when Hicks entered the danger area and when he was hit, the operator did make "considerable, meaningful efforts on its own initiative to abate, eliminate and prevent right-of-way rule violations in advance of issuance of the Citation[.]" Traylor Br. 12. I agree that Traylor took steps to prevent just this type of accident from happening. The JHA is clearly written and indicates that, in order to avoid the hazard of an individual being struck by the Bobcat excavator while it was trimming, no person should be

forward of the blade. (Ex. G-7 p.2). Further, Traylor provided substantial training in the form of orientation training, daily safety meetings, and even a full day training on all of the pieces of mobile equipment, each of which addressed the mine's right-of-way rules and the JHA at issue. Moreover, although the Secretary asserts that Traylor did not enforce its right-of-way rules or discipline miners for safety violations, I find the contrary to be true. Traylor offered credible testimony that one of the reasons Hicks was hired was because the previous walker was terminated after committing a safety violation. (Tr. 120). While the Secretary asserts that Traylor's failure to take disciplinary action against Hicks or Reagan is evidence of a lack of safety enforcement, I disagree. Sec'y Br. 9. Hicks never returned to the mine following the accident and it is debatable whether Reagan's involvement in the accident amounted to safety violation. Reagan offered credible testimony that he did check his surroundings before backing up. As a result, I find that Traylor did in fact enforce its safety program.

The obviousness of the violative condition is an important factor in the unwarrantable failure analysis. *IO Coal Co.*, 31 FMSHRC at 1356. The Secretary argues, and I agree, that the violative condition was obvious. Hicks was well aware of the need to remain behind the blade of the excavator while it was in operation. Sinquefield testified that the only item in his notes from the interview of Hicks which was a direct quote was Hicks' statement that he "messed up" and knew he "shouldn't have been there while the machine was running." (Tr. 36, 62; Ex. G-4 p. 7). Moreover, the area was lit, Hicks knew his position relative to the excavator, the equipment operator signaled via honking that he was preparing to move, and the backup alarm would have sounded. I find that the violation was obvious.

The Commission has determined that a high degree of danger posed by a violation is an aggravating factor that supports an unwarrantable failure finding. *IO Coal Co.*, 31 FMSHRC at 1355-1356. The Secretary argues and Respondent concedes that the violative conduct presented a high degree of danger. I agree. Hicks' conduct and the resulting injuries including internal bruising and a slight fracture, are evidence of the high degree of danger that accompanies this type of conduct. (Ex. G-10). Moreover, I credit the inspector's testimony that, given the proximity of the miner to such a large, heavy machine, and the history of fatalities when mobile equipment comes into contact with miners, Hicks "was very lucky not to be dead." (Tr. 48-49).

In *IO Coal*, the Commission reiterated the well settled law that, in addition to actual knowledge, an operator's knowledge of the existence of a violation may be established where the operator "reasonably should have known of the violative condition." 31 FMSHRC at 1356-1357. Here, I find that, because Hicks was an agent of the operator and, given his acknowledgement that he knew he should not have been in area, the operator had actual knowledge of the violation. (Tr. 36, 62; Ex. G-4 p. 7).

After careful consideration of each of the above factors, I find that Traylor did not unwarrantably fail to comply with the mandatory standard. While the violative condition was obvious, potentially involved a high degree of danger, and was known to the operator through its agent, it was not extensive, did not exist for a long period of time, the operator did not have notice that greater efforts were necessary for compliance, and it had taken significant steps towards preventing an accident of just this kind. Accordingly, I **VACATE** the unwarrantable failure finding and modify the citation to a 104(a) citation.

II. APPROPRIATE CIVIL PENALTY

Section 110(i) of the Mine Act sets forth the criteria to be considered in determining an appropriate civil penalty. Traylor had a history of two violations during the 15 months preceding the issuance of subject citation, neither of which was designated as S&S, high negligence, or unwarrantable failure. (Ex. G-1). Respondent is a small independent contractor that worked about 16,361 hours. (Exhibit A to Petition for Assessment of Civil Penalty). The violation was abated in good faith. The penalty assessed in this decision will not have an adverse effect upon its ability to continue in business. The Respondent stipulated to the Secretary's gravity finding that the violation was reasonably likely to result in a fatal accident, that one person was affected, and that the violation was S&S. The negligence findings are set forth above.

While the Secretary offered testimony and documentary evidence in support of his special assessment, given that I have modified the citation to a 104(a) citation with moderate negligence, I need not address those arguments. The Secretary did not establish that this violation was "particularly serious or egregious[.]" *Coal Employment Project v. Dole*, 889 F2d. 1127, 1129-30 (D.C. Cir. 1989). The Special Assessment Narrative Form introduced into evidence at hearing shows that, had this citation been regularly assessed, the penalty would have been \$2,000.00. (Ex. G-14 p. 3). Moreover, if Inspector Sinuefield had determined that the violation was the result of Traylor's moderate negligence, the Secretary's proposed penalty would have been about \$436.00, before any reduction for good faith abatement. 30 C.F.R. § 100.3. In light of my findings set forth above, I find that a penalty of \$1,000.00 is appropriate for this violation. I have given special consideration to the gravity of the violation in assessing this penalty.

III. ORDER

For the reasons set forth above, Citation No. 8597320 is **MODIFIED** to a citation issued under section 104(a) of the Mine Act and the degree of negligence is reduced to moderate. In all other respects the citation is **AFFIRMED**. Traylor Mining, LLC. is **ORDERED TO PAY** the Secretary of Labor the sum of \$1,000.00 within 30 days of the date of this decision. ⁵

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

⁵ 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.

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RWM

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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October 15, 2015

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

v.

JEPPESEN GRAVEL,
Respondent

CIVIL PENALTY PROCEEDING

Docket No. CENT 2014-298-M
A.C. No. 13-02285-344601

Mine: Jeppesen Pits

DECISION AND ORDER

Appearances: Robert Alan Kelly, Esq., Office of the Solicitor, U.S. Department of Labor, Kansas City, Missouri, for the Petitioner

Jay A. Jeppesen, Owner of Jeppesen Gravel, Sibley, Iowa, *pro se*

Before: Judge Rae

This case is before me on a petition for assessment of civil penalties filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”), against Jeppesen Gravel 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” or the “Act”). A hearing was held in Sioux Falls, South Dakota on July 14, 2015 at which the parties presented testimony and documentary evidence. The parties submitted post-hearing closing statements as well.

I. Background

Jay Jeppesen owns and operates Jeppesen Gravel as an unincorporated sole proprietorship located in Osceola County, Iowa. The mine has been in business since the 1950s operated by Jeppesen’s father until Jeppesen took it over in 1975 and has continued in operation to this day. The gravel pit is a part-time endeavor and one of several other businesses Jeppesen runs on the property including a borrow pit. On May 1, 2012 and October 12, 2012, inspectors for MSHA made inspections of the Jeppesen Pits and issued various orders and citations for violations of mandatory safety and health standards. Jeppesen was given a period of time in which to abate the conditions. When the inspectors returned to the mine, either the violations had not been abated or Jeppesen denied the inspectors entry to the mine to inspect for compliance. Jeppesen was ordered to withdraw from any affected areas or equipment, if it had not already

been so ordered, as a result. MSHA inspectors Troy Van Wey¹ and Jeffrey Breon² then returned to the mine on July 22, 2013 and issued 18 violations, one of which was vacated prior to hearing. Of the 17 remaining, one was issued for a denial of entry and the remainder for operating the withdrawn equipment or in the affected areas without termination of the outstanding withdrawal orders. For the reasons set forth below I find the violations have been established and the penalties are assessed as set forth herein.

II. Right of Entry Violation

A. Citation 6550468

MSHA inspector Troy Van Wey issued citation 6550468 on October 1, 2012 for a violation of section 103(a) of the Mine Act. The lengthy narrative portion of this citation reads in pertinent part:

Jay Jeppesen, owner, interfered with the right of entry of MSHA inspectors Jeffrey Breon and Troy Van Wey, both authorized representatives of the Secretary, as they sought to inspect the Jeppesen Pits mine site pursuant to Section 103(a) of the Mine Act. When inspectors attempted to conduct their inspection, Mr. Jeppesen stated that they were trespassing onto private property. Mr. Jeppesen then contacted the Osceola County Sheriff's Office to have the authorized representatives arrested and told the Inspectors to wait in their van until the patrolman arrived instead of beginning the inspection. The Osceola Patrol Deputy arrived at the scene and remained there to keep the peace ... Once the inspectors began their inspection Mr. Jeppesen and his son, Alan, hindered and interfered with the inspection. Jay Jeppesen moved into the close personal space of Inspector Van Wey and yelled at him. When Inspector Van Wey asked [him] to back up out of his personal space, Alan Jeppesen approached ... from the other side and stuck a recording device within one inch of [the inspector's] face. At another point Alan Jeppesen pushed the Federal Inspectors out of the way. When Alan was told that if he pushed the Inspectors again it would result in a citation for intimidation, Alan responded that he had not pushed the Inspectors but if they wanted to see a push, he ... would push both of them and they would know they had been pushed ...

¹ Van Wey has been an MSHA inspector for 10 years, and was assigned as the field office supervisor of the Ft. Dodge, Iowa office for four years, including the timeframes pertinent to this case. He has conducted approximately 200 mine inspections and has 13 years' prior experience as a miner. Tr. 14-18.

² Breon was an aircraft mechanic in the U.S. Air Force for 11 years upon graduation from high school. He has 12 years of experience as a miner and became an MSHA inspector in 2010. He has performed approximately 150 inspections of mines. Tr. 106-09.

Denial of entry has been a recurring and persistent problem at this operation over the years. Most recently on June 11, 2012, citation no. 8668129 was issued to Jay Jeppesen for a violation of Section 103(a) of the Mine Act.

Ex. S-3. The negligence was assessed as the result of reckless disregard with a proposed special assessment of \$4,000.00.

Section 103(a) of the Act provides that any authorized representative of the Secretary “shall have a right of entry to, upon, or through any coal or other mine” for the purpose of making any inspections under the Mine Act. 30 U.S.C. § 813(a). The refusal to permit an inspection is a violation of section 103(a) for which a penalty must be imposed. *Waukesha Lime & Stone Co.*, 3 FMSHRC 1702, 1703 (July 1981). A denial of entry may occur when an operator impedes, interferes with, hinders or delays an inspection of a mine. *Veris Gold USA, Inc.*, 35 FMSHRC 2977 (ALJ) (Sept. 2013). MSHA inspectors are not required to subject themselves to confrontation or physical harm in order to carry out an inspection. *Calvin Black Enterprises*, 7 FMSHRC 1151, 1157 (Aug. 1985). The Commission has recognized that “denial of access to an MSHA inspector ... is an action not to be taken lightly.” *Tracey & Partners*, 11 FMSHRC 1457, 1464 (Aug. 1989).

Jeppesen has a long and contentious history with MSHA which is relevant to the determination of whether Jeppesen’s conduct here rises to the level of a denial of the right of entry to the mine as provided by Section 103(a) of the Mine Act and to substantiate the negligence and special assessment proposed by the Secretary. A summary of this history, as outlined in detail in Judge Manning’s decision in *Jeppesen Gravel*, 30 FMSHRC 324, 325-30 (Apr. 2008) (ALJ), bears repeating here.

As a result of nearly two years of MSHA’s inability to gain Jeppesen’s cooperation in filing legal identity papers, consenting to an inspection without intimidating and harassing the inspectors, and participating in a Compliance Assistance Visit (“CAV”), the U.S. Attorney’s office was contacted for assistance. The end result was that Jeppesen entered into a Consent Judgment in November 2004 issued by the U.S. District Court for the Northern District of Iowa Western Division in which he was ordered to permit representatives of the Secretary of Labor entry to, upon, and through Jeppesen Gravel mines without further direct or indirect interference, hindrance, or delay for the purpose of making inspections. It was further ordered that any inspector may request the presence of a U.S. Marshall to accompany the inspector should the inspector encounter any violation of the Judgment. Ex. S-33.

Following the entry of the Judgment, in June 2005, MSHA returned to the mine to conduct a CAV and Jeppesen failed to cooperate. Several violations were found and the inspectors attempted to speak with Jeppesen to discuss remediation of the conditions. Jeppesen actively avoided them and continued to operate the mine without making what would have been very inexpensive repairs. As a result of his continued refusal to allow inspectors on the property, he was issued violations for not abating 104(b) orders in October 2005. In January 2006, an Assistant U.S. Attorney accompanied by a U.S. Marshall and an Osceola County deputy sheriff went to the mine to encourage Jeppesen’s compliance. The AUSA explained the process for contesting citations and made a comment that it would likely cost Jeppesen only \$1,500.00 to

abate the outstanding violations. At that point, Jeppesen became confrontational and refused to cooperate in an inspection so they left the property.

In July 2006, MSHA went to the mine to terminate the outstanding violations. Alan Jeppesen was present initially but he immediately parked the loader he was using and drove away. Jay Jeppesen then arrived and ordered the inspectors off the property. Jeppesen's actions were so severe that the inspectors left to prevent an altercation. In August 2006, MSHA attempted to make a compliance visit accompanied by a county deputy sheriff. Jeppesen was asked to operate equipment so that the brakes, horns and alarms could be tested. He refused and told the inspectors to leave.

Jeppesen was cited for denial of entry in May 2004, June 2006, July 2006 and August 2006 as a result of his argumentative and intimidating behavior as described above. Judge Manning found Jeppesen had repeatedly harassed and attempted to intimidate MSHA inspectors while in performance of their duties. He noted that Jeppesen did not dispute the violations at trial. Based upon Jeppesen's claimed inability to pay the assessed penalties, he was given an 82% reduction in penalties for the 16 violations. 30 FMSHRC at 336-39.

On December 11, 2013, Jeppesen entered into a settlement agreement with the Secretary that included another violation of 103(a) for denial of entry on June 11, 2012 as well as 36 additional violations including each of the 16 underlying violations at issue herein. He agreed to pay reduced penalties amounting to \$28,500.00. Ex. S-37.

The instant 103(a) violation occurred on October 1, 2012 but was not included in the settlement order of December 11, 2013. MSHA inspectors Van Wey and Breon traveled to the Jeppesen mine to conduct an inspection. They accessed the property via the gravel road located at 719 8th Street, the official mine address provided by Jeppesen to MSHA. Once on site, they contacted Jeppesen by cell phone to begin their inspection. Jeppesen, however, did not arrive until approximately thirty minutes later and immediately commenced yelling and screaming at the inspectors telling them that they were trespassing. He then called 911 and while awaiting the arrival of the deputy sheriff informed the inspectors that they were not permitted to begin their inspection. The two inspectors waited inside their vehicle for the sheriff to come. When deputy sheriff Nate Krikke arrived, Jeppesen instructed him to arrest the two inspectors and tow their vehicles from the property. After Van Wey and Breon properly identified themselves to Krikke, the deputy told Jeppesen that he would not do so. Jeppesen then attempted to send Krikke away but the deputy took it upon himself to remain to keep the peace. Jay Jeppesen continued to harass the inspectors by getting up in Van Wey's face yelling and screaming at him while his son, Alan Jeppesen, pointed a video camera in Van Wey's face and video-recorded the entire inspection. Jay Jeppesen continued to yell at the inspectors and raised his arms in the air in an attempt to physically prevent their access and to intimidate them.³ At one point Alan Jeppesen assaulted Van Wey by pushing his shoulder into the inspector's chest while Jay Jeppesen stood by and laughed at Van Wey. This incident was verified by Deputy Krikke's report and testimony. Tr. 202-06; Ex. S-4. I find the inspectors' and Krikke's version of the facts to be credible.

³ Jay Jeppesen is a tall and heavy man. The inspectors are of average height and weight. I find it objectively reasonable that they would feel physically threatened and intimidated by Jeppesen's actions.

Jeppesen did not deny the facts as presented by Krikke and Van Wey but asserted at trial that he was upset with the manner in which the inspectors arrived on the property. He testified that there were children playing outside the house adjacent to the road the inspectors allegedly sped down and he was concerned for their safety. Krikke, however, credibly testified that there were no children to be seen in the area. Tr. 208. The inspectors testified that they had already arrived at the mine and had been waiting approximately 30 minutes when Jeppesen appeared which makes it highly unlikely anyone saw the inspectors as they drove past the house. They further confirmed that Jeppesen did not raise any concerns about children at the time of the attempted inspection; the first time this issue was raised was at trial. Jeppesen's other objection to MSHA's presence on the property was that they used the ¾-mile-long private road to reach the mine. It was his contention that MSHA should be compelled to use a helicopter instead.

I find that Jeppesen's assertion that he was fearful for the safety of children was an invention conjured up for trial. His opinion that MSHA should arrive by helicopter to perform its inspections does not warrant comment. The road used by MSHA is the one provided by Jeppesen himself as the legal address of the mine and the only means of access by motor vehicle.

I find the violation to be very serious particularly in light of the many instances of such conduct to the point the Secretary had to request the intervention of the Federal District Court, the U.S. Attorney's Office, the U.S. Marshall service, and the county sheriff's office to impress upon Jeppesen the gravity of his actions and the absolute right of the inspectors to enforce the Mine Act. Unfortunately, it appears that Jeppesen has no genuine interest in cooperating with MSHA or complying with a federal order. Jeppesen's conduct was egregious and completely uncalled for. He clearly engaged in harassment, intimidation, and threats of physical harm towards the two inspectors to prevent or unreasonably delay their entry to the mine. I find the violation has been established.

B. Negligence

The Commission has held "that an operator's intentional violation constitutes high negligence for penalty purposes." *Topper Coal Co., Inc.*, 20 FMSHRC 344, 350 (Apr. 1998) (quoting *Consolidation Coal Co.*, 14 FMSHRC 956, 969-70 (June 1992)). It is clear that Jeppesen's conduct on October 1, 2012 was a continuing display of his complete contempt and disregard for MSHA's authority to inspect the mine for health and safety violations and to enforce the Act. His conduct was egregious and both his and his son's actions constituted criminal assault and battery on Van Wey as well as a violation of Section 103(a) of the Act. Their behavior was designed to intimidate and harass the inspectors and presented a real potential for physical harm had it not been for the presence of the deputy sheriff on the property during the inspection. There is no doubt Jeppesen's conduct was intentional and deliberate and constitutes recklessness.

The Secretary has proposed a special assessment for this violation in the amount of \$4,000.00. Part 100 of the Secretary's regulations provides MSHA with the authority to waive the regular assessment process when certain conditions warrant an enhanced penalty. 30 C.F.R. § 100.5(a). Such enhanced assessments are designed for particularly serious or egregious violations. *Coal Employment Project v. Dole*, 889 F.2d 1127 (D.C. Cir. 1989). The severity of conduct at the most extreme end of the spectrum may involve physical assault of an inspector

resulting in serious injury; however, lesser degrees of conduct may justify a special assessment. Here, while no injury occurred, Jeppesen's conduct rose to the level of an assault on Van Wey while his son's conduct constituted a battery. Jeppesen's actions were intentionally designed to intimidate the inspectors and posed a threat of imminent physical harm. Had it not been for Krikke's arrival, physical harm may well have occurred. Jeppesen's actions rose to the highest level of egregious conduct and the Secretary's proposed special assessment is well deserved. The appropriate penalty will be set forth below.

III. Violations for "Working in the Face of an Order"

The following 16 violations were issued under Section 104(a)⁴ of the Mine Act for "working in the face of a prior order" rather than violations of mandatory health and safety standards. Therefore, gravity, significant and substantial,⁵ and unwarrantable failure⁶ designations do not apply.

Twelve of the underlying violations issued to Jeppesen were originally written as Section 104(a) citations for violations of mandatory safety standards, five of which were significant and substantial ("S&S"). Having failed to abate the cited hazards within the prescribed time period, Jeppesen was then issued Section 104(b)⁷ orders mandating withdrawal from the cited equipment and areas until the violations were abated and MSHA was called in to terminate the orders. The remaining four are predicated upon Section 104(d) orders⁸ that were originally assessed as S&S and unwarrantable failure violations. On July 22, 2013, when MSHA inspectors returned to the mine they found that Jeppesen had continued to use the equipment or areas affected by the prior

⁴ Section 104(a) provides, in pertinent part, that if during an inspection of any mine the inspector finds the operator has violated the Act, or any mandatory standard, he shall issue a citation to the operator stating the nature of the violation. 30 U.S.C. § 814(a).

⁵ A violation is S&S if it is of such nature as could significantly and substantially contribute to the cause and effect of a health or safety hazard. 30 U.S.C. § 814(d). A violation is properly designated as S&S if 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).

⁶ Unwarrantable failure is defined as reckless disregard, intentional misconduct, indifference, or a serious lack of reasonable care. *Emery Mining Corp.*, 9 FMSHRC 1997, 2003 (Dec. 1987).

⁷ Section 104(b) of the Mine Act states that upon any follow-up inspection of a mine, if a violation has not been totally abated within the prescribed time, an inspector shall determine the extent of the area affected by the violation and shall promptly issue an order requiring the withdrawal of all persons from the area until it is abated. 30 U.S.C. § 814(b).

⁸ Section 104(d) of the Mine Act is similar to 104(b) in that it requires the inspector to issue an order withdrawing all persons from the affected area, but it pertains to violations that are S&S and/or an unwarrantable failure to comply with a health or safety standard rather than violations that constitute a failure to abate a prior violation. 30 U.S.C. § 814(d).

orders and had not contacted MSHA to terminate any of the orders.⁹ These “working in the face of a withdrawal order” violations were issued as a result by Inspectors Breon and Van Wey.

Each of the underlying 16 violations were conceded by Jeppesen and incorporated into the aforementioned settlement agreement of December 11, 2013. Ex. S-37. Jeppesen did not contest any of the withdrawal orders in accordance with Commission Procedural Rule 20.¹⁰ Therefore all prior underlying violations and the propriety of any subsequent withdrawal orders are admitted and unreviewable at this time.

Jeppesen has raised an overarching claim that he was denied a Compliance Assistance Visit (“CAV”) prior to being issued many of the underlying citations herein. Because Jeppesen entered into the settlement agreement in December 2013, this issue is now moot. I would, nevertheless, find that such a claim does not rise to the level of a defense. Jeppesen neither contacted MSHA to request a CAV on any of the underlying citations or orders nor did he cooperate in any of the CAVs MSHA attempted to conduct in the past, as outlined in Judge Manning’s decision. A CAV is available to an operator at the onset of operations or when putting new equipment or a new plant into service. Any violations found are written up in a notice and the operator is given an opportunity to correct the conditions. If the corrections are not made in a relatively short period of time, the notice becomes a regular citation. Because Jeppesen had been in business for 20 to 30 years before the issuance of the initial underlying citations and orders, which did not encompass any new equipment recently put into service, he was not entitled to a CAV. Tr. 104. Even if he had been, the issue is irrelevant as the conditions went unabated for many, many months and would have been converted into regular violations. MSHA’s failure to conduct a CAV would not have precluded the issuance of the subsequent withdrawal orders or the citations now at issue.

Jeppesen also has raised an inability to pay for the necessary repairs as a reason for not having abated the hazards in question. However, an inability to pay is relevant only to the issue of penalties, not the necessity to abate the condition. *See Asarco, Inc. v. FMSHRC*, 868 F2d 1195 (10th Cir. 1989) (finding that mine operators are strictly liable for violations of safety and health standards).

Additionally, Jeppesen claimed that he was unaware of the requirement to contact MSHA in order to terminate a withdrawal order. Tr. 332. I find this claim to be without merit. An operator is charged with the responsibility to know, understand and adhere to the Act, the mandatory health and safety standards, and all applicable regulations if it is to engage in mining. Jeppesen clearly understands the proper procedure for terminating prior citations and orders. He has been issued many of both citations and orders in the past as demonstrated by the MSHA Violation History Report and prior ALJs’ decisions and settlement order. *Jeppesen Gravel*, 32 FMSHRC 1749 (Nov. 2010) (ALJ); *Jeppesen Gravel*, 30 FMSHRC 324 (Apr. 2008) (ALJ); Exs.

⁹ Any order issued under any subsection of Section 104 remains in effect until it is modified, terminated or vacated by the Secretary or his authorized representative or by the Commission or courts. 30 U.S.C. § 104(h).

¹⁰ Commission Rule 20 provides all contests of citations or orders issued under Section 104 must be filed by the operator within 30 days of receipt. 29 C.F.R. § 2700.20.

S-34, 35, 37, 44. He has been given detailed in-person instructions by the U.S. Attorney on how to properly contest violations. He has been offered the opportunity to participate in close-out conferences and CAVs by MSHA. In short, he has been provided more opportunities than the average small mine operator to familiarize himself with the requirements under the Mine Act. He is clearly not an unintelligent person; he has operated this mine as well as several other businesses for decades. He was savvy enough to have obtained and submitted a copy of the U.S. Department of Labor's "Small Mine Assessment Process Summary" Booklet published by the DOL and National Mine Health and Safety Academy in his pretrial hearing report. Ex. R-23. I find Jeppesen's allegation is disingenuous.

Jeppesen did not seriously contest that he placed the withdrawn areas or equipment back into service without having the withdrawal orders terminated. At trial he admitted to having operated the mine in August 2012, the screen plant in November 2012, and the wash plant, including the cited John Deere tractor, during the two months preceding the July 2013 inspection. Tr. 72-74, 133-34, 138-39, 143, 150, 180, 269-70. He had been observed operating the excavator, wash plant and tractor upon the inspectors' arrival at the mine on July 22, 2013. Tr. 62, 71-72, 131, 134, 236-37, 252, 277, 285.

Therefore, the only issues remaining are the appropriate level of negligence and the proper penalty to assess.

A. Violations Fully or Partially Abated

Inspector Breon assessed each of the "working in the face of a withdrawal order" violations as high negligence violations.¹¹ His reasoning was that Jeppesen clearly knew of the hazardous conditions cited in the withdrawal orders and in many instances in a citation issued prior to the order, yet he then knowingly and intentionally ignored the orders and continued to operate the mine before they were terminated. Many of the conditions would have required only minimal effort on Jeppesen's part to make a telephone call for MSHA to terminate the orders.

The Secretary has acknowledged that Jeppesen had fully abated four of the violations and partially abated another three prior to MSHA's return visit on July 22, 2013. The Secretary concedes that Jeppesen's actions with regard to the relevant seven citations may be considered in mitigation of the high negligence, moderate negligence being more appropriate.¹² *See Sec'y's Post-Trial Closing Statement 14.*

Jeppesen has intentionally and repeatedly thumbed his nose at MSHA's authority and disregarded his responsibility to maintain a safe and healthful working environment, which is deserving of a high negligence designation. However, I agree with the Secretary's recognition

¹¹ High negligence is appropriate when an operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances. 30 C.F.R. § 100.3, Table X.

¹² Moderate negligence is appropriate where "the operator knew or should have known of the violative condition or practice, but there are mitigating circumstances." *Id.*

that Jeppesen's eventual, although late and in some instances insufficient, efforts at compliance are a mitigating factor and I find moderate negligence is appropriate.

The citations modified to moderate negligence and the underlying facts are:

1. Citation No. 8737364/Ex. S-10

The original citation, No. 8667978/Docket No. CENT 2013-188-M, was issued on October 1, 2012 as a non-S&S 104(a) violation. The cited standard is 30 C.F.R. § 56.12008, which requires that electrical cables enter metal frames outfitted with proper fittings or bushings. Ex. S-10d. When the inspectors returned on October 22, 2012, they found no attempt to abate the citation had been made within the time allotted and issued a 104(b) order taking the 480-volt power cable out of service. Ex. S-10e. Inspectors Van Wey and Breon testified that when they returned on July 22, 2013, they found that Jeppesen had abated the condition but could not say when.

2. Citation No. 8737367/Ex. S-13

The original citation, No. 8667980/Docket CENT 2013-188, was issued on October 1, 2012, as an S&S 104(a) citation. The citation was issued on the blue stacking conveyor for a violation of 30 C.F.R. § 56.14107(a) requiring moving machine parts be guarded to prevent persons from contacting fan blades, shafts, gears or any other similar parts that could cause injury. There were numerous pinch points found as a result of exposed moving parts. Ex. S-13d. On October 22, 2012 Breon found that nothing had been done to install guards and a 104(b) order was issued. Ex. S-13e. Having returned in July 2013, the inspectors found that a guard had been installed; Jeppesen claimed this had been accomplished in October 2012.

3. Citation No. 8737370/Ex. S-16

The original citation, No. 8668082/Docket CENT 2012-724, was issued on May 1, 2012 as an S&S 104(a) citation. The citation was issued on a John Deere tractor in violation of 30 C.F.R. § 56.14107(a), which requires moving machine parts be guarded to prevent persons from contacting fan blades, shafts, gears or any other similar parts that could cause injury. Abatement was due, as twice extended, by May 26, 2012. Ex. S-16d. On June 11, 2012, a 104(b) order was issued when Jeppesen would not permit the MSHA inspector to enter the mine to inspect the tractor for compliance with the citation. The tractor was withdrawn from service until an inspector could observe the tractor. Ex. S-16e. Upon the return visit in July 2013, the inspector found that a guard had been installed to protect the cooling fins and drive belt. Jeppesen stated it had been installed two years earlier, which is obviously not true, as the original citation was issued just 14 months earlier.

4. Citation No. 8737372/Ex. S-18

The underlying citation, No. 8668084/Docket 2012-724, was issued on May 1, 2012 as an S&S 104(a) citation under 30 C.F.R. § 56.11001 for a lack of safe access to the water source used to prime the dewatering pump. Ex. S-18d. On June 11, 2012, inspectors were refused access to the mine to observe the condition and a withdrawal order was issued for the dewatering pump.

Ex. S-18e. When the inspectors returned in July 2013, Jeppesen had abated the condition at some unknown time by obtaining water using the excavator bucket rather than by hand.

5. Citation No. 8737365/ Ex. S-11

The underlying citation, No. 8667979/Docket CENT 2013-188, was issued to Jeppesen on October 1, 2012 as an S&S 104(a) violation of 30 C.F.R. § 56.11012 when Breon found the west side elevated travelway of the wash plant did not have a railing, barrier or cover over a large opening at a height of approximately seven feet above ground level. The top of the ladder accessing the area was also not protected in any way. Tr. 93-94; Ex. S-11c. On October 22, 2012 Breon found that nothing had been done to correct this hazard and he issued withdrawal order No. 8737209. Ex. S-11d. Jeppesen at some time prior to the inspector's return in July 2013 had placed a chain across the opening on the travelway, but Breon felt the chain was not sufficiently stable, and nothing had been done to protect the ladder. Tr. 97-98. Jeppesen has not fully abated the condition to this inspector's knowledge. Tr. 99.

6. Citation No. 8737368/Ex. S-14

The underlying citation, No. 8667976/Docket CENT 2013-188, was issued on October 1, 2012 as an S&S 104(a) violation of 30 C.F.R. § 56.14107(a) for failure to guard the drive belts and sheaves on the east and west side of the wash plant. Ex. S-14d. When Jeppesen failed to make any corrections, he was issued a withdrawal order on the drive belts and sheaves of the wash plant on October 22, 2012. Ex. S-14e. Jeppesen thereafter partially abated the violation by guarding the west side of the exposed parts but not the east side. Tr. 172-73.¹³

7. Citation No. 8737371/Ex. S-17

The first citation, No. 8668083/Docket CENT 2012-724, was issued on May 1, 2012 as an S&S 104(a) citation under 30 C.F.R. § 56.14107(a) for failure to provide a guard on the PTO shaft of the dewatering pump. Ex. S-17d. A withdrawal order was issued on this equipment for failure to abate on June 11, 2012 as a result of Jeppesen denying the inspectors entry to the mine to re-inspect the equipment. Tr. 231-32; Ex. S-17e. When Breon and Van Wey returned in July 2013, they found that Jeppesen had guarded part of the shaft by installing some expanded metal to cover the knuckle ends to some extent but not the shaft itself. Tr. 232-33.¹⁴

¹³ Jeppesen questioned the need for a guard on the equipment because he alleged that it was over seven feet above the ground. Tr. 174. However, the bottom part of the guarded area was clearly within easy arm's reach when standing on level ground. Tr. 175-77; Ex. S-14e photograph 344. The issue is, however, moot at this time as Jeppesen admitted to this violation in the December 11, 2013 settlement order referenced herein. Ex. S-37.

¹⁴ Jeppesen questioned whether the shaft required a guard. However, the underlying violation was admitted by him and included in the December 11, 2013 settlement agreement and is therefore final. Tr. 233-34; Ex. S-37.

B. Unabated Violations

Each of the following violations was designated as high negligence for the same reasons as were all the other “working in the face of a withdrawal order” violations. Jeppesen has complete control and responsibility over all operations at the mine including correction of hazardous conditions. Tr. 160. Jeppesen knew of the hazards based upon the prior citations, yet as of July 2013 he had done nothing to correct them and he had not called MSHA to terminate the orders on the ones he had abated. Tr. 149-50. In many instances, the cost or effort involved to abate the condition was minimal at best. Tr. 75-76.

I agree with the Secretary’s assessment of high negligence as stated above based upon Jeppesen’s willful failure to abate longstanding hazardous conditions and his complete disregard for MSHA’s authority and for safety at his mine with respect to the following citations:

1. Citation No. 8737363/Ex. S-9

The first citation, No. 8667977/Docket CENT 2013-188, was issued on October 1, 2012 by Breon as a non-S&S violation 104(a) violation of 30 C.F.R. § 56.12018 because the main 480-volt electrical disconnect box for the wash plant was not labeled to show what it controlled. The termination due date was the following day. Ex. S-9d. When Breon returned 21 days later, the box was not labeled and a 104(b) withdrawal order was issued. Ex. S-9e. On July 22, 2013, the box was still not labeled, but as stated above, the mine including the wash plant had been in operation for approximately two months. Tr. 71-74. Eight minutes after this instant citation was issued, Jeppesen used a Sharpie® marker to label the electrical disconnect at the inspector’s suggestion. Tr. 71, 74.

Breon noted that Jeppesen could have easily abated the violative condition earlier by simply using a marker to label the box but failed to do so in nine months. Tr. 75-76.

2. Citation No. 8737366/Ex. S-12

On May 1, 2012, Citation No. 8668095/Docket CENT 2012-724 was issued as a non-S&S 104(a) violation under 30 C.F.R. § 56.4201(a)(1)¹⁵ for a failure to perform the yearly inspection on a fire extinguisher located in the office/electrical van. Ex. S-12d. A withdrawal order was issued on June 11, 2012 when Jeppesen refused the inspector’s entry to the mine to verify compliance. Ex. S-12e. On July 22, 2013, the extinguisher had not yet been inspected but was still available for use. Tr. 158. Van Wey testified that many volunteer fire departments will send someone to perform the annual inspections free of charge. Small mine operators often purchase a new extinguisher at Walmart and put it into service on the abatement due date. Tr. 157. Jeppesen had done neither.

¹⁵ The proper code section for this violation is § 56.4201(a)(2). However, the narrative portion of the citation clearly defines the violation and it was admitted by Jeppesen in the earlier settlement order. Ex. S-37.

3. Citation No. 8737369/Ex. S-15

The original order, No. 8667985/Docket CENT 2013-284, was issued on October 2, 2012 under 30 C.F.R. § 56.9300(a) as a 104(d)(2) violation when Breon found there was no berm in numerous locations along the access road around the mine site. The order was issued as an S&S violation and an unwarrantable failure, apparently based upon the extensiveness of the violation, the number of previous violations, the open and obvious nature of the condition, and the likelihood and gravity of injury presented. Ex. S-15d. Jeppesen accepted responsibility for this violation as issued. Ex. S-37. When Breon returned to the mine in July 2013, he found that there were still extensive areas around the mine lacking berms. Tr. 183. Tire tracks were visible just feet away from the drop-off to the plant pond. Tr. 185-86. Jeppesen had the equipment and material on-site to easily build berms. There were locations where he could have simply lowered the blade of the excavator to the ground and pushed the material up into a berm. It would have taken him just a few hours to abate the violation. Tr. 182-83.

4. Citation No. 8737373/Ex. S-19

The original order, No. 8668101/Docket CENT 2012-787, was issued on May 5, 2012 under 30 C.F.R. § 56.18002(a) as an S&S, unwarrantable failure 104(d)(1) violation for a failure to conduct an adequate workplace examination of the wash plant. Ex. S-19c. Notations on the pages of a calendar were being used to record examinations and several obvious and dangerous conditions that had been cited over a long period of time had not been addressed. The violation was assessed as S&S and unwarrantable failure. Ex. S-19c. Jeppesen admitted to the violation and it was incorporated into the December 11, 2013 settlement order. Ex. S-37. When Breon returned to the mine in July 2013, Jeppesen was still not conducting workplace examinations of the wash plant but continued to use it. Van Wey testified that the Small Mines Workbook is used by inspectors to educate new owners of small mines as to the requirements for workplace examinations, including the necessity of conducting and documenting these examinations. Tr. 240-41. The booklet sets forth the standard, suggests the manner in which the operator should document the results of the examinations, and informs the operator that the records should be maintained for one year on-site. Tr. 240-42. Based upon the volume of open and obvious violations found, it was readily apparent to Van Wey that Jeppesen had not been performing the examinations. Jeppesen could provide no documentation of having done them. Tr. 243.

5. Citation No. 8737374/Ex. S-20.

Jeppesen was initially issued Citation No. 8667986/Docket CENT 2013-188 on October 2, 2012 as a non-S&S 104(a) violation for using an indoor-rated 480-volt electrical cable to supply power to the screen plant in violation of 30 C.F.R. § 56.12004. This presented a danger of inner conductors being damaged due to weather and mechanical damage. Tr. 254-55. When Breon returned three weeks later, Jeppesen had not replaced the cable with an outdoor-rated one and a 104(b) order was issued. Tr. 255; Ex. S-20e. Nine months later, in July 2013, Breon found Jeppesen had still not replaced the cable. Instead he had sprayed the indoor cable with Flex Seal® rubberized coating, which is not designed to protect electrical cables from damage. The material came off in the inspector's hand when he touched it. Tr. 259; Ex. R-14. When confronted with this fact, Jeppesen laughed about it and said he had painted the cable black. Tr. 260.

6. Citation No. 8737375/Ex. S-21

The underlying citation, No. 8667983/Docket CENT 2013-188, was issued as a non-S&S 104(a) violation on October 2, 2012 for a violation of 30 C.F.R. § 56.4201(a)(1) because the fire extinguisher in the electrical van had not been visually inspected at least once each month to ensure it was fully charged and operational. Ex. S-21c. The tag on the extinguisher that is normally dated and initialed when the inspection is done was missing such demarcations for September and October 2012 and thereafter, which resulted in a 104(b) order being issued on October 22, 2012 for continued failure to make the visual inspections. Tr. 262-64; Ex. S-21d. Jeppesen still had not made the requisite visual inspections and admitted to having no documentation of having done any when the inspectors returned ten months later, which led to the issuance of the instant citation.¹⁶ Tr. 265; Ex. S-21.

7. Citation No. 8737376/Ex. S-22

The initial record-keeping citation, No. 8668099/Docket CENT 2012-724, was issued as a non-S&S 104(a) violation on May 1, 2012 for not having task training records in violation of 30 C.F.R. § 46.9(g). Ex. S-22d. Five weeks later inspectors returned and asked for the records and again Jeppesen could not produce them. Tr. 276. A 104(b) order was issued on June 11, 2012. Tr. 276; Ex. S-22e. Had Jeppesen mailed or faxed the required documents to MSHA, this order would have been terminated without a return visit. Tr. 276. However, he failed to do so and on July 22, 2013, when he still had no documentation available, the instant citation was issued. Tr. 277. Jeppesen had refresher training records for himself and his son, Alan, dated April 2013 but not task training records. Tr. 277-78. If an individual mine owner has no employees,¹⁷ generally the equipment manufacturer will provide the initial task training. The mine owner could certify himself thereafter, but the documentation is still required. Tr. 280. When the inspectors returned again in July 2013, Jeppesen still had no task training records of any kind and several new pieces of equipment were observed on-site. Tr. 279; Ex. S-22.

8. Citation No. 8737377/Ex. S-23

The underlying violation, 104(d)(1) Order No. 8668102/Docket CENT 2012-782, was issued as an S&S, unwarrantable failure violation on May 2, 2012 in violation of 30 C.F.R. § 56.14100(a) for not performing adequate examinations of mobile equipment (the excavator). The order states that there were numerous longstanding hazardous conditions that were open and obvious and were capable of causing serious injuries for which several citations and/or orders had been issued in the past. Ex. S-23c. When Jeppesen continued to operate the mobile

¹⁶ As a reason for not having the inspections done, Jeppesen claimed he had not been operating the mine from July through October 2012. Tr. 266. However, he documented performing workplace examinations in July, August and September of that year. Tr. 269-71. Additionally, he conceded this violation in the settlement agreement. Ex. S-37. His claim is not credible.

¹⁷ Jeppesen admitted that Alan Jeppesen performs work for him at the mine and is paid \$85.00 per hour for his work. Jeppesen is therefore required to complete the task training for Alan as well as himself.

equipment without putting a pre-operation examination program into action, the instant citation was issued. Tr. 285.

9. Citation No. 8737378/Ex. S-24

On May 1, 2012 the initial 104(d)(1) order, No. 8668098/Docket CENT 2012-187, was issued under 30 C.F.R. § 56.9300(a) as an S&S and unwarrantable failure violation for failure to maintain berms. This violation encompassed one area that was 21 feet long with a drop-off of 4 feet and another that was 24 feet long with a drop-off of 4 feet. Tire tracks were observed in both areas, showing this violation posed a very serious hazard to miners. The same condition had been cited numerous times previously. Tr. 286-89; Ex. S-24d. Jeppesen was still operating mobile equipment without the berms when the inspectors returned in July 2013. Tr. 289.

In conclusion, upon the uncontradicted testimony of the inspectors as well as Jeppesen's admissions, I find each of the 16 violations has been established.

IV. Penalties

Section 110(i) of the Mine Act delegates to the Commission and its judges the authority to assess all civil penalties *de novo*. 30 U.S.C. § 820(i). The Act requires that in assessing civil penalties the Commission and its judges shall consider the six statutory penalty criteria found in Section 110(i): 1) the operator's history of previous violations; 2) the appropriateness of such penalty to the size of the business of the operator charged; 3) whether the operator was negligent; 4) the effect on the operator's ability to continue in business; 5) the gravity of the violation; and 6) the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. *Id.*

The Secretary has assessed a special penalty for each of the violations in this docket based upon Jeppesen's repeated and persistent violations, his refusal to recognize MSHA's authority, his lack of respect for the health and safety of miners, and his continued use of withdrawn equipment and work areas.

History of Previous Violations

The Assessed Violation History Report demonstrates that Jeppesen has a long list of prior violations, which is particularly noteworthy for a small mine. Many of the violations are of the same mandatory standards cited here. *See* Exs. S-34, S-35. As set forth above, Jeppesen entered into an agreement in December 2013 in which he agreed to settle 37 outstanding violations including the 16 violations upon which the violations discussed herein are predicated. Ex. S-37. He has been found to have violated Section 103(a) for interfering with the Secretary's right of entry on numerous occasions prior to the violation on October 1, 2012.

I find the number of prior violations is extremely high for a part-time, small mine.

Gravity of the Violations

Because the 16 violations for working in the face of a withdrawal order were issued as a violation of the Act, by MSHA policy, they are marked non-S&S. Gravity is not relevant to these citations.

With respect to the interference with the right of entry citation, as stated above, I find Jeppesen's actions to have been most egregious and physically threatening to the two inspectors. The gravity is very high.

Negligence

The negligence has been assessed as stated in the discussion of the violations. The Secretary has argued that the negligence for Citation 8737374 in which Jeppesen spray painted the electrical cable should be assessed as reckless disregard because the violation reflected an attempt to disguise the lack of abatement. I decline to find reckless disregard. The violation was initially assessed by the inspector as moderate negligence and raised to high negligence upon finding that Jeppesen had sprayed the cable with a rubber sealant. It is not clear that this was done in an attempt to fool the inspector. It was more likely an attempt on Jeppesen's part to not spend money on installing proper equipment and to intentionally flaunt MSHA's authority – his *modus operandi*. I give deference to the inspector's assessment and find high negligence is appropriate.

Demonstrated Good Faith in Rapid Compliance

As the nature of the violations herein makes abundantly clear, the thought of making efforts to rapidly comply with the mandatory standards has never troubled Jeppesen's mind. I find there has been no good faith effort to comply with the cited mandatory standards.

Appropriateness to the Size of the Business and the Ability to Continue in Business

I find that Jeppesen is a sole proprietor of a very small mine with several prior violations of section 103(a) of the Act during the relevant time period. I further find that he has one employee, Alan Jeppesen. Jeppesen argued in the instant matter that Alan Jeppesen is not an employee but an independent contractor whom he pays \$85.00 per hour to perform manual labor. Van Wey testified that Alan had participated in at least two inspections he made. Alan was actively engaged in the attempt to prevent entry to the mine and Jeppesen had signed off on Alan's annual refresher training in 2013. Tr. 163; Ex. S-4, 257. Jeppesen entered into stipulated findings of fact before Commission Judge Melick in November 2010 that Alan was his employee. *See Jeppesen Gravel*, 32 FMSHRC 1749, 1758 (Nov. 2010) (ALJ). Judge Manning also determined that Alan Jeppesen was an employee in 2008. All of these factors lead me to the conclusion that Alan Jeppesen is and continues to be an employee of Jeppesen Gravel.

Regarding sole proprietorships, the Commission has held that ability to continue in business must take into account the effect of a penalty on the individual's ability to meet his financial obligations. *Unique Electric*, 20 FMSHRC 1119, 1122-23 (Oct. 1998). The

Commission has also held that in the absence of proof that the imposition of authorized penalties would adversely affect the ability to continue in business, it is presumed that no such adverse effect will occur. *Sellersburg Stone Co.*, 5 FMSHRC 287, 294 (Mar. 1983).

Jeppesen asserts that the penalties proposed herein would hinder its ability to remain in business. Jeppesen submitted the “Client Copy” of his tax returns for 2013 and 2014 as proof of his claim. These uncertified, unfiled documents indicate he took substantial undefined deductions on his income taxes for various expenses including cost of goods sold, depletion, repairs, “other expenses,” and supplies and depreciation (including over \$23,000 in both years for unspecified “Cap Repairs”) to reduce his gross income by more than \$200,000. Exs. R-20, R-21. He offered no testimony, balance sheets, or evidence of liens with regard to his income and nothing relating to his income or expenses in 2015. He would not disclose how much of his past income and expenses were for the mining business. Tr. 314-15. He offered no explanation for why the mining business is part-time rather than full time and submitted nothing to document his financial familial obligations.

I find the evidence of Jeppesen’s financial status is insufficient to prove an inability to continue in business. *See Spurlock Mining Co. et al.*, 16 FMSHRC 697 (Apr. 1994) (operator failed to introduce “specific evidence” to show penalties would affect ability to continue in business); *Rock Express, Inc.*, 36 FMSHRC 2696 (Oct. 2014) (ALJ) (unaudited document with non-disclosed assets and future earnings did not meet burden); *Uehlin Quarries*, 36 FMSHRC 2281 (Aug. 2014) (ALJ) (summary allegations are not sufficient to reduce penalty even for small family-owned business); *Ikerd Mining Co., LLC*, 35 FMSHRC 3302 (Oct. 2013) (ALJ) (incomplete tax return with “other deductions” without specific testimony not sufficient to reduce penalties); *L&T Fabrication & Constr.*, 21 FMSHRC 71 (Jan. 1999) (ALJ) (unaudited financial records insufficient to reduce penalties).

Jeppesen has, to the contrary, been able to pay his son and Dave Nasters \$85.00 per hour each for manual labor. Tr. 320-21. And, despite the sizeable deductions on his unverified income tax returns, based upon the unabated conditions the inspectors found that had existed for up to 14 months, he had not actually made any such expenditure he deducted as costs of goods sold, repairs, etc.

When looking at the initial citations and orders that led to the issuance of the withdrawal orders, it is readily apparent that many of the violative conditions could have been eliminated with little or no expense at all, making it even more apparent that Jeppesen’s claim of financial hardship is a ruse. In one instance, he abated an electrical violation by using a black marking pen to label a junction box. In another he used a piece of equipment to gather water to prime a pump instead of a handheld bucket. He could have used the equipment on-site to push dirt up to form berms around his property but refused to do so. He told the MSHA inspector he did not have a guard on machinery because it was his right to put a hand in the fan tail pulley if he wanted to. Tr. 152. He could have performed monthly inspections of the fire extinguisher himself at no cost and had the annual inspection done at no charge by a fire department. Proper conduction of pre-operational examinations and completed training documentation obviously carried no expense as well.

In reaching a settlement for \$28,500.00 in 2013, Jeppesen admitted that he had the ability to pay the penalties, yet he has not paid a dime. In fact, he has not paid any of the fines MSHA has ever assessed against him since 2004.¹⁸

The financial inability criterion under the Act is available to operators who at least in good faith try to comply with the mandatory standards of the Act but are limited in the ability to pay higher fines. In this instance, Jeppesen attempts to avoid paying any penalties for extremely hazardous conditions that have persisted for significant periods of time. In fact, he stated to the inspectors repeatedly that each of their citations would only cost him ten cents, apparently referring to the fact that another ALJ had significantly reduced the assessed penalties in the past. Tr. 145, 151-52.

I find that Jeppesen has not met his burden of proving that the proposed penalties will affect his ability to continue in business. I also find that the Secretary has made his case for enhanced specially assessed penalties against Jeppesen Gravel for the demonstrated lack of respect for MSHA, the Mine Act, the individual inspectors who are charged with carrying out lawful inspections of Jeppesen's mine, and the miners he employs as independent contractors or otherwise.

I assess the following penalties based upon the relevant criteria set forth in Section 110(i) of the Mine Act as discussed above:

1. Citation No. 6550468 – \$4,000.00
2. Citation No. 8737364 – \$1,000.00
3. Citation No. 8737367 – \$1,000.00
4. Citation No. 8737370 – \$1,000.00
5. Citation No. 8737372 – \$1,000.00
6. Citation No. 8737365 – \$1,000.00
7. Citation No. 8737368 – \$1,000.00
8. Citation No. 8737371 – \$1,000.00
9. Citation No. 8737363 – \$1,000.00
10. Citation No. 8737366 – \$1,000.00
11. Citation No. 8737369 – \$5,000.00
12. Citation No. 8737373 – \$3,000.00
13. Citation No. 8737374 – \$1,000.00
14. Citation No. 8737375 – \$1,000.00
15. Citation No. 8737376 – \$1,000.00
16. Citation No. 8737377 – \$3,000.00
17. Citation No. 8737378 – \$3,000.00

¹⁸ This information is taken from the U. S. Department of Labor's Mine Data Retrieval System at <http://www.msha.gov/drs/ASP/MineAction.asp>.

V. Order

For the reasons set forth above, the citations are **AFFIRMED** or **MODIFIED** as discussed above. Jay Jeppesen, doing business as Jeppesen Gravel, is **ORDERED TO PAY** the Secretary of Labor the sum of \$30,000.00 within 60 days of this decision. Payment should be sent to: U.S. Department of Labor, Mine Safety and Health Administration, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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WASHINGTON, DC 20004-1710
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October 15, 2015

DANIEL B. LOWE,
Complainant,

v.

VERIS GOLD USA, INC.,
Respondent.

DISCRIMINATION PROCEEDING

Docket No. WEST 2014-614-DM
WE-MD 14-04

Mine: Jerritt Canyon Mill
Mine ID: 26-01621

Appearances: Daniel B. Lowe, *pro se*, Elko, Nevada, for Complainant
David M. Stanton, Esq.,¹ Goicoechea, DiGrazia, Coyle, and Stanton, Elko,
Nevada, for Respondent

Before: Judge Moran

DECISION AND REQUEST FOR DIRECTION FROM THE COMMISSION

In this section 105(c)(3) action under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act” or “Act”), Complainant, Daniel B. Lowe, has asserted that he was fired by Veris Gold USA, Inc., because of safety and health complaints he voiced related to his job at Veris’ Jerritt Canyon Mill. A hearing was held in Elko, Nevada, on June 18, 2015. The Court finds that Veris was motivated to fire Lowe because of his safety and health complaints to Veris management and that the record contains no evidence that Complainant’s termination was based on any non-safety or health basis. Accordingly, for the reasons which follow, Mr. Lowe’s complaint of discrimination is upheld.

The Elements of a 105(c) Discrimination Claim

The basics of a discrimination claim under the Mine Act are well-established and clear. In order to establish a *prima facie* violation of section 105(c)(1) of the Mine Act, Complainant must prove, by a preponderance of the evidence, (1) that he engaged in protected activity; (2) that he suffered an adverse action; and (3) that the adverse action taken against him by the mine operator was motivated in any part by that protected activity. In order to rebut a *prima facie* case, the operator must either show that no protected activity occurred or that the adverse action was in no part motivated by the miner’s protected activity. *Sec’y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (Oct. 1980), *rev’d on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981); *Sec’y of Labor on behalf of*

¹ As explained *infra*, Veris’ attorney, private counsel David Stanton, moved to withdraw from representation of Respondent Veris Gold USA, Inc. Attorney Stanton appeared on the morning of the first day of the hearing and reiterated his request to withdraw from representing Veris, a request made by Veris. The Court had no option but to grant the request and it did so at the commencement of the hearing.

Robinette v. United Castle Coal Co., 3 FMSHRC 803 (Apr. 1981). If the operator cannot rebut the miner's prima facie case in this manner, it nevertheless can defend affirmatively by proving that (1) it was also motivated by the miner's unprotected activity and (2) it would have taken the adverse action in any event for the unprotected activity alone. The operator bears the burden of proof in such an affirmative "mixed motive" defense. *Haro v. Magma Copper Co.*, 4 FMSHRC 1935 (Nov. 1982).

The current action is brought under section 105(c)(3) of the Mine Act. That section provides that if the Secretary determines that a violation of section 105(c)(1) has not occurred, "the [C]omplainant shall have the right . . . to file an action in his own behalf before the Commission, charging discrimination." 30 U.S.C. § 815(c)(3). As the Commission stated in *Jaxun v. Asarco, LLC*, 20 FMSHRC 616, 620 (Aug. 2007), "[t]he Mine Act, the Administrative Procedure Act ('APA'), and the Commission's Procedural Rules permit a Complainant to proceed with an action under section 105(c)(3) of the Mine Act without representation."

Findings of Fact

At the outset of the hearing, Attorney David Stanton, privately retained legal counsel for Veris Gold, appeared. The Court noted that Attorney Stanton filed a motion for his withdrawal as the Respondent's representative. Tr. 6. The Court had previously received word of Attorney Stanton's motion to withdraw at the conclusion of the prior week, one day after another section 105(c)(3) hearing against Veris, *Matthew Varady v. Veris Gold USA, Inc.*, WEST 2014-307-DM, had concluded. This Court presided in the *Varady* discrimination case. That case involved the *pro se* discrimination claim brought Matthew Varady against Veris Gold, and a decision finding for Mr. Varady was issued on September 2, 2015. Attorney Stanton represented Veris in the Varady discrimination matter for the entirety of the hearing. As noted, *infra*, the Varady hearing did not go well, evidentiary-wise, from Respondent's perspective, and it was obvious that Attorney Stanton correctly gauged the adverse evidentiary consequences of the proceeding, owing to the poor credibility of Respondent's various witnesses. Therefore, it was not a surprise to the Court that the attorney moved to withdraw from representation. As the Varady and Lowe matters are closely linked, it followed that withdrawal would be sought in the Lowe matter as well.

Due to the indefinite nature of Attorney Stanton's initial email request to withdraw his representation of Veris, it was not clear whether the attorney's request was confined to the Lowe and Varady matters or whether the attorney was withdrawing completely from all representation of Veris. Attorney Stanton was equivocal about his continuing role, in that he indicated that it would continue until the bankruptcy monitor in Canada acts. Tr. 6. At the time of and prior to the hearing's start, Veris had been involved in a bankruptcy proceeding. Attorney Stanton confirmed that mining would continue at the Veris site and it was his understanding that Veris would continue as a legal corporate entity and he represented that the Veris entity would "remain in existence for some period of time while the monitor addresses some . . . lingering issues," although he did not know exactly what those issues were. Tr. 8. Emphasizing that the mine would be a continuing operation, albeit under a successor, "White Box" or the debtor in possession, Attorney Stanton hoped that his legal representation would continue with the new ownership. Tr. 9. Thus, it is fair to state that the mining operation and attorneys representing it

would continue to move along nicely, while apparently simultaneously attempting to evade responsibility, through bankruptcy legal mechanisms, for acts of discrimination under the Mine Act.

The Court then announced that testimony would be received from Mr. Lowe in this matter, as Complainant still had an obligation to present a *prima facie* case. With Attorney Stanton withdrawing from representation of Veris, an act made at the request of Veris, the Court advised that it could then find Veris to be in default. Tr. 10. Attorney Stanton stated that he had communicated to *Veris and to the bankruptcy monitor* about the risk of being held in default and therefore, he noted, their decision to have him withdraw as counsel was made “with that information in mind.” Tr. 11. Therefore, as Attorney Stanton confirmed, Veris and its successor understood the risk they assumed by foregoing any defense in the Lowe matter. *Id.* With Veris’ full understanding of the consequences of the requested withdrawal, the Court then granted Attorney Stanton’s motion to withdraw from representation and he was then excused from the proceeding.²

² As noted in *Getz Coal Sales, Inc.*, 2 FMSHRC 2172, 2176 (Aug. 1980) (ALJ):

The Commission’s rules do not specifically address the question of the failure of a party-respondent to appear at a hearing pursuant to notice. Rule 63, 29 C.F.R. § 2700.63 provides for summary disposition of cases when a party fails to comply with an order of a judge or the Commission’s rules. Subsection (b) provides that when a respondent is found to be in default in a civil penalty case the judge shall enter summary order assessing the proposed penalties a final and directing that they be paid. Section 105(d) of the Act provides that a mine operator be afforded an opportunity for a hearing in a contested case so that he may contest the citation and any proposed civil penalty assessment proposed by the Secretary.

In *Broken Hill Mining Co.*, 19 FMSHRC 477 (Mar. 1997), the judge issued a default order because Respondent failed to appear at the hearing, but the judge also stated that the Secretary had proven all violations by a preponderance of the evidence after hearing testimony from the Secretary. The Commission remanded the case to another judge for clarification of the judge’s original preponderance of the evidence determination. *Id.* On remand, the judge noted that “[s]ection 2700.66 of Commission regulations, 29 C.F.R. § 2700.66 (1996), provides that when a party does not appear at a hearing, the judge may find the party in default without issuing a show cause order.” *Broken Hill Mining Co.*, 19 FMSHRC 751, 751-52 (Apr. 1997) (ALJ). At the earlier hearing, following a motion for default judgment from the Secretary, the original judge directed that the hearing would proceed with the testimony of the inspectors so that there was a factual basis to assess the civil penalty. *Id.* at 752. After hearing the testimony regarding each citation, the judge affirmed the citation. *Id.* The remand decision also noted that

[s]ection 2700.1(a) of Commission regulations, 29 C.F.R. § 2700.1 (a), provides that the Commission and its judges shall be guided so far as practicable by the Federal Rules of Civil Procedure. Rule 55 (a) of the Federal Rules of Civil Procedure provides that when a party against whom a judgment for relief is

(continued...)

The hearing then continued, it being incumbent, as noted above, for Complainant to establish a *prima facie* case, irrespective of Respondent's election to default. The Court then advised that it was confined to the basis of Mr. Lowe's complaint, as presented to MSHA when he filed his complaint, citing *Hatfield v. Colquest Energy, Inc.*, 13 FMSHRC 544 (Apr. 1991). Tr. 22. In addition to the complaint itself, a one page document, dated November 22, 2013, there is also a statement by MSHA special investigator Kyle E. Jackson. That document, the Court noted, identifies some protected activity. While that protected activity is not expressly contained within the four corners of Mr. Lowe's discrimination complaint, the Court stated that, by inference, it was part of the complaint to MSHA, as the special investigator had to have been informed about such protected activity by Complainant.

In the complaint proper, Lowe listed the following Veris management individuals as responsible for discriminatory action against him: Mr. Kim, Mr. Jones, Mr. Dickson, Mr. Hofer, Francois Marlan, Mr. Ward, and Dr. Goodfield. Tr. 25. The Court then noted that the typewritten discrimination report filed on November 22, 2013, provides:

In accordance with the Mining Act of 1977 and by statutory rights of as a miner, [Daniel Lowe] was continuously discriminated against in matters of safety and health as well as in matters of regulatory compliance. These acts came in the form of constant threats of reprisal by members of senior management and/or corporate officers in matters of safety and health and regulatory compliance. These include threats of termination of employment, termination of my employment, and physical threats of violence by a member of senior management to do [Complainant, Lowe,] bodily harm when attempting to make safe the Jerritt Canyon Mill, as well as all mining operations of Veris Gold USA, Inc. located in Elko County, Nevada.

Tr. 26-27.

Reviewing that document and guided by the *Hatfield* decision, the Court noted that the first allegation was too vague. Tr. 27. Then, the Court continued to read from the Complaint that "[Lowe asserted that he] was given specific direction from senior management/corporate officers

² (...continued)

sought fails to plead or otherwise defend, the party's default may be entered. . . . In applying Rule 55, the courts have stated that in a default situation all well pleaded allegations are taken as true. *Benny v. Pipes*, 799 F.2d 489, 495 (9th Cir. 1986), *cert denied*, 484 U.S. 870, 108 S.Ct. 198 (1987). And when a default judgment is entered, facts alleged in the complaint may not be contested. *Black v. Lane*, 22 F.3d 1395, 1399 (7th Cir. 1994). The standard for appellate review of a default judgment is whether the trial court committed an abuse of discretion. *Johnson v. Gudmundsson*, 35 F.3d 1104, 1117 (7th Cir. 1994). An entry of a default judgment is not an abuse of discretion where a party who fails to appear at a scheduled hearing, because such conduct strays from recklessness to bad faith. *Id.*

Id.

to ignore employee safety and health rights under the Mining Act of 1977 and told [his] job was to keep the mill manager and assistant mill manager stress-free.” *Id.* The Court again noted that the allegation does not inform “as to specific protected activity nor, [the Court noted] could [MSHA] go out and conduct an investigation based on that. If [MSHA] were right at the mine they couldn’t know what to ask about, [because the allegation is] too vague.” *Id.*

Continuing, the Court read:

Due to [Lowe’s] efforts to make necessary changes at the Jerritt Canyon Mill related to safety and health [he] was under constant daily harassment from members of the senior management and/or corporate officers in practically any matter that pertained to regulatory compliance and the statutory rights of miners that would or could interfere with the production of gold. When [Lowe] brought forth legitimate and serious safety and health issues or regulatory compliance issues with senior management and corporate officers, [he] was either ignored or verbally threatened with a reprisal of having [his] employment terminated. At present, production and only production of gold is the only thing that senior management and corporate officers care about. [Lowe is] seeking immediate reinstatement to [his] former position as . . . Mine Safety and Regulatory Compliance Manager with full back pay and allowed expenses.

Tr. 28. Again, the Court advised Complainant at the hearing that “there is nothing . . . alleging specific protected activity.” *Id.*

The Court noted that it did “have the declaration of [MSHA investigator] Kyle Jackson, [wherein] Mr. Jackson [stated that] he investigated claims of discrimination.” Tr. 29. The Court took note that Jackson couldn’t have just invented claims out of his imagination, and therefore, at some point he must have been given information from Mr. Lowe. *Id.* However, the Court did not yet possess such information. It then noted that Jackson stated at page two of his declaration that

[d]uring the week of November 11, 2013 Mr. Lowe engaged in protected activity by reporting housekeeping issues with two lunchrooms at Veris Jerritt Canyon Mill to mill manager . . . Kim and assistant mill manager Chris Jones. Mr. Lowe reported that one of the lunchrooms had an issue with mercury contamination and that another had an issue with dirt on the wall.³

Id. The Jackson declaration continued, “Mr. Lowe also told Mr. Kim and Mr. Jones that Veris needed to enforce company policy that employees not enter the lunchrooms wearing contaminated clothing.” *Id.* The Court noted that two instances of protected activity were identified: the housekeeping dirt and mercury contamination issues. Tr. 30. Jackson’s statement then continued, asserting that “[o]n November 18th Mr. Lowe again engaged . . . in protected activity when he sent an e-mail to chief operating officer Graham Dickson reporting that Mr. Jones had screamed at miner Cheryl Garcia [with Jones asserting] that Ms. Garcia and Mr. Lowe

³ The Court parenthetically noted that dirt on a lunchroom wall did not sound like much of a safety or health violation, although it stated it would keep an open mind about the claim.

were trying to fuck him with the lunchroom housekeeping issue.”⁴ *Id.* The Court then noted that Mr. Lowe’s employment with Veris was terminated on November 21, 2013. *Id.*

The Court then summed up the foregoing by noting that the only things that it could take cognizance of were the housekeeping issue of dirt on a wall, and the mercury contamination, that is, workers entering the lunchroom with contaminated clothing. *Id.*

Having articulated all that it could find in terms of protected activity presented to MSHA when Lowe filed his complaint, the Court inquired if Mr. Lowe had anything else to offer, in terms of information presented to MSHA when he filed his complaint. His response was that he also alleged that Mr. Jones engaged in reckless driving (speeding) on mine property, that he advised Veris of this, and that he was fired not long after that event. Tr. 32-34. However, that allegation is not found in the complaint, nor referenced by MSHA investigator Jackson. Therefore, it cannot be considered as an independent claim of discrimination for the section 105(c)(3) complaint. However, it can be considered to demonstrate that Veris, and Jones in particular, were angry at Lowe over his lunchroom safety complaint.

With the cognizable protected activities identified, the Court then received testimony, starting with the complainant, Mr. Lowe. Lowe began his employment with Veris on April 19th of 2012. Tr. 54. He was hired to address mine safety and regulatory compliance matters.⁵ Tr. 55. His testimony involving the basis of his discrimination claim began with the lunchroom incident. This occurred during an MSHA inspection when dirt was observed on a lunchroom wall and high levels of mercury were found in another lunchroom. Tr. 37. Lowe did not believe that citations were issued for these conditions; the inspector instead gave the mine an opportunity to clean up the conditions. Tr. 38. Lowe was not present when the conditions were found. Tr. 39.

A day or two later, Cheryl Garcia came to Lowe reporting that Chris Jones had just screamed at her, telling her not to fuck him with lunchroom issues, at least according to Lowe’s recounting of the event. Tr. 40. Lowe then elevated the issue to his boss, Bill Hofer, but no action was taken against Jones. Tr. 41. Following that, Lowe sent himself an e-mail to document Jones’ incident with Garcia. Tr. 420. The e-mail, dated November 18, 2013, was sent to Graham Dickson, Veris’ Chief Operating Officer. Ex. C-1. The text of the email stated:

Subject: Employee abuse. Importance: High. Graham, on Friday Dave Jenkins came into Cheryl Garcia’s office seeking assistance with decontaminating areas using HgX. He said he was going to be cleaning the lunchrooms and he showed the janitorial staff how to do this using HgX. Also he stated that once they cleaned

⁴ As to the expletive expression, allegedly made by Mr. Jones, the Court noted that it was not cognizable protected activity when one sends an e-mail as described here that Mr. Jones had screamed at Cheryl Garcia saying that Ms. Garcia and Mr. Lowe were trying to f--- him. Tr. 30.

⁵ Lowe held that position for about a year and two to three months, but then, in July 2013, he was demoted to the position of Compliance Coordinator by Joe Driscoll, who came on as the mine’s new general manager. Tr. 55. The demotion only lasted a month and Driscoll was terminated from Veris’ employment. Lowe was then reinstated to his original position and remained there until his firing. Tr. 57.

the lunchroom they would retest using a Jerome meter. While Dave was in Cheryl's office Chris Jones came in and began screaming at Dave saying, "you don't need to be in here, you are in maintenance, you don't need to talk to her about the mercury issues."

Id. Garcia then went to speak with Jones about his outburst, and Jones related that he believed she and Lowe were trying to f[---] him over the lunchroom cleanliness issues. Tr. 44. Lowe's email continued, stating that he did "not believe any person should be subjected to this kind of behavior when she was only doing her job and doing her job well, and trying to keep our employees safe and healthful." Tr. 45. Dickson did not reply to Lowe's email. Tr. 47.

Next, Lowe alleged that Jones drove aggressively very close behind him on Highway 225 the following morning, November 19th.⁶ Tr. 48. Lowe also related that later that day he went to the office of HR Manager Dwayne Ward, informing him that he had sent the two emails described above and in footnote six. Tr. 52. Lowe expressed to Ward that he thought he might be fired because of the emails. *Id.* According to Lowe, Ward responded that, as it involved Chris Jones, there was nothing he could do about the matter. *Id.* Later that day, Ward spoke to Lowe advising him that he would indeed be fired that Thursday. *Id.* Ward informed Lowe that he was being fired because of attorney's fees incurred by Veris, though he did not understand the particulars. Tr. 52-53. Lowe then went into his office and called in Mark Butterfield, who confirmed the news Ward had given. Tr. 53. All of those events occurred on the 19th. *Id.*

Lowe was next at work on the 21st. *Id.* On that date Lowe went to Dwayne Ward's office and where he met Tia Monahan, HR technician, and Joe Stoddard, HR recruiter/assistant HR manager. Ward then presented a release to Lowe, asking that he sign it. It offered two months of severance pay, but Lowe stated that the release took away all his rights and therefore he refused to sign it. Tr. 58. That release was entered into the record. Ex. C-3. Lowe stated that the release

⁶ This prompted Lowe to send another email to Dickson, this time copying Bill Hofer. The email text of Exhibit C-2 provided:

Subject: Speeding company vehicle. Importance: High. Graham, while traveling northbound on Nevada 225 this morning on the way to work and at approximately 6:15 I observed a vehicle coming up behind me at a high rate of speed. As I passed where the roads splits the farm the vehicle was literally so close to the rear of my vehicle I could not see the vehicle's headlights. Once I passed the farm the vehicle overtook my vehicle and I could see that it was Veris Gold light vehicle with the number LV 3907 on the front fender.

Tr. 50. Lowe estimated the vehicle speed at 85 to 90 mph. Tr. 51. He noted that the license LV 3907 is assigned to Chris Jones. *Id.* Lowe received no email response to his message. *Id.* As noted, this claim cannot be considered, per the holding in *Hatfield*, as a separate act of discrimination.

included the signatures of Tia Monahan and Joe Stoddard on it, bearing witness that Lowe refused to sign it.⁷ Tr. 59.

At that time, Lowe stated that he inquired about the basis of his termination, and that Ward advised that he didn't know but that Veris would think up something and let him know. Tr. 60. The decision was made to have Mark Butterfield then drive Lowe home. Tr. 61. Lowe related that during discovery for this litigation, Attorney Stanton, Veris' attorney until the week prior to the commencement of the Lowe hearing, sent him information and included within that was the letter from Dwayne Ward stating the reason for Lowe's termination. Tr. 63. Up until he received that information from Veris' attorney, which was over a year after he was terminated, Lowe had not been apprised of the reason for his firing. *Id.*

As noted, Lowe asserted that he never received the termination letter until the discovery process. The exhibit was admitted as Exhibit C-4, letter from Veris, dated November 21, 2013, to Danny Lowe. Tr. 63. Lowe maintained that the letter had errors in it. Again, he stated that he never received the letter until disclosed through the discovery process for this litigation, with Lowe asserting that the letter had the wrong zip code. Tr. 64. Lowe read the text of the letter into the record. It stated: "You are being terminated on Thursday, November 21st, 2013. There are several factors that led to this decision. First, you were written up on October the 1st, 2013 for not reporting vacation time taken." Tr. 66. The termination letter continued, "In addition, you have had several conversations with Bill Hofer and Graham Dickson on the performance of your department and how it has not met the needs of the other departments in addition to not keeping normal work hours." Tr. 67.

Lowe challenged the accuracy of both those claims. Regarding the alleged failure to not report vacation time, Lowe asserted that he sent an email to Bill Hofer, requesting the days off. Tr. 66. The claim was that Lowe should have informed Mary Buttes, an administrative aide to Graham Dickson, of his planned leave. When Lowe challenged the write-up, Dickson noted that the notice to advise Buttes of leave was sent out on two dates. However, upon consulting with Veris' IT Manager, Pablo Cortez, Lowe learned that his name was not on the distribution list and therefore he had not been notified of the requirement to inform Ms. Buttes of leave. *Id.* Lowe maintained that the write-up was later rescinded. Tr. 67.

As to the other claimed basis for his discharge, the claim that the performance of Lowe's department had not met the needs of the other departments and that Lowe had not kept normal work hours, Lowe asserted that there had never been any conversation between Hofer, Dickson and himself regarding Lowe's work performance. *Id.* To the contrary, Lowe asserted that Mark Butterfield was prepared to testify that the department managers were happy with his work and that the safety department was meeting the mine's needs. *Id.*

Last, Lowe addressed the claim in his termination letter that he was not keeping normal working hours. Lowe agreed, but in a different sense than the letter implied, as he maintained

⁷ Near the end of the hearing Lowe was able to locate a copy of his employment release, which he refused to sign. Ex. C-3; Tr. 98. Lowe refused to agree to the terms of that document, entitled, "Severance Release and Waiver." On the last page, Lowe's signature appears, below the words "Refused to sign." Two other signatures appear on that page. Ex. C-3 at 6.

that he essentially worked around the clock at Veris. Tr. 68-69. He stated that there were many occasions when his day would begin as early as 3:30 a.m. Tr. 68. In addition, he asserted that Graham had changed his hours so that effectively he was on call 24 hours. Tr. 69.

The letter included a final basis for Lowe's termination, asserting that "[t]he final determining factor of your termination is our accounting department received a bill from [the law firm of] Jackson Lewis in November that was for \$533,815.18." Tr. 69. The letter claimed that Lowe "incurred all these charges without prior approval and also without reporting it to accounting. Therefore, we are terminating you as stated on Thursday, November 23rd, 2013." *Id.* Dwayne Ward's signature was on the termination letter. Lowe's response to the claim was that the legal fees incurred were justified because he was hired, in part, to get rid of all the citations Veris had received, so that it could be released from the potential pattern of violation status, on which it had been placed. Tr. 69-70. Lowe stated that he was hired and authorized to incur such fees, as part of the effort to address the violations. He stated that he has the affidavit of Guy Simpson, who was his original general manager at Veris, and also that of Joseph Welin, affirming that Lowe was authorized to incur those legal fees. Tr. 70. It was, Lowe stated, a tumultuous time at Veris as the mine had gone through seven or eight general managers. *Id.* Except for his brief demotion when Joe Driscoll was a general manager there, everyone knew what Lowe was doing vis-à-vis the attorneys. Tr. 70.

Accordingly, Lowe maintained that his firing stemmed from his confrontation with Chris Jones, as described above.⁸ Tr. 71. Lowe agreed that the events which ultimately precipitated his firing were the lunchroom cleaning issues.

In testimony supporting Lowe's recounting of the events, he called Cheryl Garcia as a witness. Garcia affirmed that she was with an MSHA Inspector during November 2013 when high levels of mercury were discovered in a lunchroom at the mill. Tr. 76. She then notified her manager, Complainant Lowe, that the lunchroom would be closed during the mercury cleanup. *Id.* Garcia also emailed Lowe about the process for the cleanup and copied Veris management officials Kiedoc Kim and Chris Jones about it. Tr. 78. Not long after, Jones saw Jenkins in Garcia's office and yelled at him, telling him that he was to leave and that he had no business being in Garcia's office. *Id.* This intemperate interaction prompted Garcia to visit Jones in his office, whereupon Jones claimed that she and Lowe were trying to cause trouble for him over the lunchroom problems. *Id.*

Matthew Varady also testified for Mr. Lowe. Varady stated that in September 2013 he was overexposed to chemicals while working at his job in the CIL circuit. Tr. 80. Varady contended that he was directed by Kiedoc Kim, Mill Manager, to remain at his CIL job under all circumstances or he would be fired. *Id.* Thereafter, as Varady was feeling ill, Cheryl Garcia, upon consultation with Lowe, directed that he see Dr. Matteran for an evaluation of his

⁸ According to the uncontroverted testimony, the conflict between Lowe and Jones had its antecedent months earlier, in October 2012, when Jones wanted access to the chlorination building. Tr. 71-72. That building had been closed and removed from service. Tr. 72. Jones approached Lowe, wanting access to the building, and Lowe advised him as the procedure to be employed to gain access. *Id.* However, Jones ignored the procedure and was discovered entering the building through a window. *Id.* Lowe believed Jones' act was insubordination. *Id.*

symptoms. Tr. 80-81. Varady learned that the investigation regarding his health problem had been stopped and that Lowe advised him that Chris Jones was trying to terminate Varady's employment for making a safety and health complaint. Tr. 81-82.

Mark Butterfield was then called by Lowe. Butterfield was the safety coordinator at Veris during the relevant time. Tr. 83. He reported to Lowe, who was the safety manager. Butterfield agreed that Lowe assigned him to investigate the health incident involving Varady at the CIL circuit. *Id.* His investigation began by interviewing Doug Morris, who was the mill superintendent at that time. Tr. 83-84. Then he met with the HR Manager, Dwayne Ward, about the matter. Tr. 84. Chris Jones then appeared and inquired about the nature of Butterfield's business. *Id.* Upon learning the subject, he ordered Butterfield to stop the investigation. *Id.* Butterfield resisted the order, advising Jones that he was not in his chain of command. *Id.* Ward then intervened, telling Butterfield that the investigation was put on hold until he, Ward, spoke to Lowe. Tr. 85. Butterfield advised Lowe of the developments; his investigation never resumed. *Id.*

Another Veris employee, Shawn Rose, then testified. Rose's attention was directed to November 19, 2013. Rose agreed that Lowe told him that Dwayne Ward had just tipped Lowe off, advising Lowe that he was going to be fired. Tr. 87-88. Rose did not know at that time of the reason for Lowe's impending dismissal. Tr. 88.

Pablo Cortez then testified. *Id.* Cortez was asked by Lowe about an incident around October 2, 2013, in which Lowe asked about the e-mail group system. Tr. 89. Cortez recalled the incident, advising that there had been an issue about Lowe's time off. *Id.* Veris' Mary Buttes had asked people to advise her if they would be off from work, such as for vacations. *Id.* Cortez recalled that Lowe was not on the e-mail group and therefore was not informed of the request that employees were to notify of time off from work. *Id.* After speaking with Buttes about the matter, Cortez then advised Graham Dickson and Dwayne Ward that Lowe was not on the list. *Id.* Cortez blamed himself for the omission. *Id.*

Tia Monahan testified next. She affirmed her presence in Dwayne Ward's office on November 21, 2013, at the time Lowe was terminated. Tr. 91. She also agreed that she witnessed Lowe's refusal to sign a release regarding that termination. *Id.* When Lowe asked of Ward the official reason for his termination, Monahan related that Ward responded "[t]hat they [Veris] would think of something." *Id.* Joseph Stoddard also witnessed this exchange, according to Monahan. *Id.*

Joseph Stoddard was then called as Complainant's final witness. Tr. 92. Stoddard stated that at the time of the matters associated with Lowe's termination, he was a senior HR manager or specialist. Tr. 93. His employment with Veris ended in December 2013. *Id.* Stoddard was fired from Veris at that time. *Id.* Directed to November 21, 2013, Stoddard agreed that he was in the HR Manager's office on the morning when Lowe was fired and that he also heard the HR Manager say words to the effect that they would think of something to support Lowe's termination. Tr. 94. Stoddard further stated that, the week before Lowe's firing, Ward revealed that Veris would be firing Lowe. *Id.* When Stoddard asked Ward about the reason for doing that, Ward said words to the effect that Lowe "got in Chris Jones's and Mary Buttes's cross-hairs."

Tr. 94-95. Although Stoddard asked for more specifics, he stated that Ward “he didn't really have an answer for that.” Tr. 95.

Discussion

Bearing in mind that Respondent defaulted, waiving its opportunity to defend against the claims of Complainant, based on the credible and un rebutted evidence of record, the Court finds that Daniel Lowe engaged in protected activity when he complained about the housekeeping issues with the two lunchrooms at Veris’ Jerritt Canyon Mill to mill manager Kim and assistant mill manager Jones and by his informing those individuals that Veris needed to enforce company policy that employees not enter the lunchrooms wearing contaminated clothing. The speeding incident, while not a separate basis of protected activity, is instructive to support that Jones was angry at Lowe for his complaints about the safety and health housekeeping issues in the lunchrooms. Thereafter, on November 21, 2013, Lowe’s employment with Veris was terminated.

As Veris elected to default at the start of the hearing, despite being fully informed of the consequences of that determination, by its then-counsel, Attorney Stanton, the credible record evidence establishes that Lowe engaged in the above-described protected activity, that he was thereafter fired, and that his termination was motivated by his engagement in that protected activity. By virtue of Veris’ default, the record is devoid of any evidence to show that Veris was in no part motivated by the miner’s protected activity. Similarly, there is no evidence from Veris to show that it would have taken the adverse action in any event for the unprotected activity alone.

Conclusion

Having found that Daniel Lowe engaged in protected activity and that his employment was terminated on November 21, 2013, because of his exercise of that activity, damages may be awarded. Reinstatement does not appear to be possible as the Veris operation is now run by a new owner.

Request for Direction from the Commission

This case has now become complicated by the fact that Veris sought and received bankruptcy protection. The hearing in this matter occurred on June 18, 2015. As this decision has alluded to, the hearing did not go well for Respondent, Veris Gold, in the companion case of *Matthew Varady v. Veris Gold*, held the week prior to the Lowe matter. No doubt, counsel for Respondent recognized that problems similar to those encountered in the Varady matter would be present for the Lowe hearing. A harbinger of this, the day after the Varady hearing ended, counsel for Veris requested a conference call “to discuss a procedural issue that [he] believe[d] affect[ed] both the Varady and Lowe cases.” Email from David M. Stanton, Counsel for Veris Gold USA, Inc., to the Court (June 11, 2015, 10:42 EDT). Therefore, it did not come as a surprise to the Court that two days after the hearing concluded, Respondent’s attorney advised, via email on June 12, 2015, that he was requesting withdrawal from his representation of Respondent for both the Varady and Lowe matters. Subsequently, the Court learned that Veris has been sold.

Based on news reports, it is the Court's understanding that the Veris mine resumed operations immediately following the ownership change and that most of the same personnel continue to work at the mine.⁹ It is hoped that, rather than attempt to hide behind successorship barriers, the new entity, which literally mines gold, will accept responsibility and pay Mr. Lowe such damages as the Court may award, which are expected to be modest.

In addition, direction is sought from the Commission about how to proceed in this matter of first impression. As noted, Veris Gold has been sold. *See In re Veris Gold Corporation*, No. 14-51015-gwz (Bankr. D. Nev. June 4, 2015) (order recognizing and enforcing the Canadian sale Order).¹⁰ This Court recognizes that the Commission has generally held that successorship does not eliminate liability for discrimination.¹¹ Bearing in mind that Complainant proceeded *pro se* and that the successor entity has never been a party to this matter, the Court, recognizing that it cannot act as *de facto* counsel for Lowe, is uncertain whether it should direct Lowe to file a motion to reopen the hearing¹² for the purpose of adding the purchaser, WBVG LLC, which is wholly owned by WBOX 2014-1 LLC, the DIP Lender, and to 2176423 Ontario Ltd, a company

⁹ The *Elko Daily Free Press* reported on June 25, 2015, that Veris Gold Corp. "sold its Elko County gold mines Thursday to Jerritt Canyon Gold LLC, but most of the miners will remain on the job. The assets sold include the Jerritt Canyon facilities. . . . Jerritt Canyon Gold President and CEO Greg Gibson said the majority of the 250 Veris Gold employees at the site were hired. . . . Jerritt Canyon Gold is a subsidiary of Sprott Mining which is controlled by Canadian billionaire Eric Sprott. Jerritt Canyon Gold owns 80 percent of Veris Gold's assets and the other 20 percent is owned by Whitebox Asset Management, Gibson said. 'Mining was not suspended. Mining will be increased,' Gibson said. . . . He said the site is on track to produce 185,000 to 200,000 ounces of gold this year. The sale of the site happened after a Canadian bankruptcy court ordered Veris Gold to sell its assets. Veris Gold had filed under Companies' Creditors Arrangement Act in Canada, which is a type of bankruptcy protection, in June of last year. It was operating under the protection of the CCAA and the U.S. Bankruptcy Code since June 9, 2014.'" Marianne K. McKown, *Veris Gold sells Jerritt Canyon*, *Elko Daily Free Press* (June 25, 2015), http://elkodaily.com/mining/veris-gold-sells-jerritt-canyon/article_9a84e5c1-c299-5179-8bc6-49f02d15e513.html.

¹⁰ Each of the documents referenced in this section of this decision, all of which were transmitted electronically to the Court by then counsel for Veris, Attorney David Stanton, have been made part of this record.

¹¹ See, for example, *Sec'y on behalf of Corbin v. Sugartree Corp.*, 9 FMSHRC 394 (Mar. 1987), in which the Commission reiterated its successorship doctrine as set forth in *Munsey v. Smitty Baker Coal Co.*, 2 FMSHRC 3463 (Dec. 1980), *aff'd in relevant part sub nom. Munsey v. FMSHRC*, 701 F.2d 976 (D.C. Cir. 1983). There, the Commission approved application of nine factors to be considered when evaluating the appropriateness of successor liability.

¹² For example, the Commission alluded to such an approach at the appropriate time in *Simpson v. Kenta Energy*, 8 FMSHRC 312 (Mar. 1986).

wholly owned by Eric Sprott, as a party.¹³ Alternatively, the Court could wait for the Secretary to fulfill his obligation to seek a civil penalty and monitor the Secretary's actions to hold the successor liable, while holding a final order in this matter in abeyance until the Secretary's action is completed. Still another route could be to direct the Respondent to bring his judgment before the Nevada Bankruptcy court. At paragraph 46 of the Order of the United States Bankruptcy Court for the District of Nevada, it states:

This [District of Nevada United States Bankruptcy] Court shall retain exclusive jurisdiction to enforce the terms and provisions of this Order and the Agreement in all respects and to decide any disputes concerning this Order and the Agreement, or the rights and duties of the parties hereunder or thereunder or any issues relating to the Agreement and this Order including, but not limited to, the interpretation of the terms, conditions and provisions hereof and thereof, the status, nature and extent of the Assets and all issues and disputes arising in connection with the relief authorized herein, inclusive of those concerning the transfer of the assets free and clear of all Liens, Claims and Interests. This Court retains jurisdiction of this proceeding pending the issuance of a final order granting relief.

ORDER

The concept of damages is to “make whole” a person who has been unlawfully discharged. Because Mr. Lowe is not an attorney, the Court offers the following general guidance as to allowable damages. Such damages would include reimbursement for expenses in seeking reemployment and lost wages plus interest¹⁴ from the date of discharge until reemployment, if applicable. Because the “make whole” concept of relief does not contemplate a windfall to such individuals, any unemployment benefits received for the period between the unlawful discharge and the date of new employment, if applicable, are offsets to the damages that may be awarded. Litigation-related expenses are awardable. As examples, these would include copying expenses; any costs related to subpoenaing witnesses; medical expenses, including premiums, that would have been covered by Complainant's medical insurance, if applicable; and lost vacation pay, if applicable. Mileage, telephone calls, and postage are other examples of awardable damages. These are examples only. The guiding principle is for a complainant to recover the financial reimbursement for items he would have received had his employment continued and the expenses in pursuing this litigation, minus benefits received such as unemployment compensation.

¹³ The reference to owner Eric Sprott is consistent with the reporting in the *Elko Daily Free Press* on June 25, 2015, as reflected in footnote 9, *supra*.

¹⁴ In *Local Union 2274, UMWA v. Clinchfield Coal Co.*, 10 FMSHRC 1493 (Nov. 1988), the Commission directed that in discrimination cases it would use the short-term Federal rate applicable to the underpayment of taxes as the rate for calculating interest for periods commencing after December 31, 1986.

Some damages are not recognized for relief under the Mine Act. For example, there is no authority or precedent for awarding compensatory damages for damage to reputation and/or pain and suffering. *Bewak v. Alaska Mech., Inc.*, 33 FMSHRC 2337, 2338 (Sept. 2011) (ALJ); *Peterson v. Sunshine Precious Metals, Inc.*, 24 FMSHRC 810, 811-12 (Aug. 2002) (ALJ); *Casebolt v. Falcon Coal Co.*, 6 FMSHRC 485, 503 (Feb. 1984) (ALJ).

Complainant Daniel Lowe is directed to provide his itemized and documented damages within 30 days of this decision.

Commission Rule 44(b), 29 C.F.R. § 2700.44(b), provides that the Judge shall notify the Secretary in writing immediately after sustaining a discrimination complaint brought by a miner pursuant to section 105(c)(3) of the Act.¹⁵ Consequently, the Secretary shall be provided with a copy of this decision so that he may file a petition for assessment of civil penalty with this Commission. The Secretary of Labor is directed to commence a civil penalty proceeding against Veris for this matter.

So Ordered.

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

¹⁵ The provision, 29 C.F.R. § 2700.44, "Petition for assessment of penalty in discrimination cases," states, in relevant part:

(b) Petition for assessment of penalty after sustaining of complaint by miner, representative of miners, or applicant for employment. Immediately upon issuance of a decision by a Judge sustaining a discrimination complaint brought pursuant to section 105(c)(3), 30 U.S.C. 815(c)(3), the Judge shall notify the Secretary in writing of such determination. The Secretary shall file with the Commission a petition for assessment of civil penalty within 45 days of receipt of such notice.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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October 21, 2015

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

v.

NORTHSHORE MINING COMPANY,
Respondent

CIVIL PENALTY PROCEEDING:

Docket No. LAKE 2014-219-M
A.C. No. 21-00831-341643

Mine: Northshore Mining Co.

DECISION

Appearances: Sean Allen, Esq., U.S. Department of Labor, Office of the Solicitor,
Denver, Colorado for Petitioner

Arthur M. Wolfson, Esq., Jackson Kelly, PLLC, Pittsburgh, Pennsylvania
for Respondent

Before: Judge Barbour

This case is before the court on a petition for the assessment of civil penalty filed by the Secretary of Labor (“Secretary”) on behalf of his Mine Safety and Health Administration (“MSHA”) pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 (the “Mine Act”). 30 U.S.C. § 815(d). At issue is the validity of 11 alleged violations of the Secretary’s mandatory reporting standards for accidents, injuries and illnesses. The standards are found in Part 50 of the Code of Federal Regulations and in pertinent part require each operator to “investigate . . . each occupational injury at [its] mine,” to “develop a report of each investigation” (30 C.F.R. § 50.11(b)), and to complete and mail to MSHA a Mine Accident, Injury and Illness Report Form 7000-1 within ten working days of the occurrence of an

“occupational injury.” 30 U.S.C. § 50.20(a).¹ The disputed violations arose out of MSHA’s November 2013 audit of records retained by Northshore Mining Company (“Northshore”) and records independently made available to MSHA’s auditors. The records involve health related incidents that occurred at Northshore’s Silver Bay operation, a facility at which Northshore produces and stores and from which it ships iron ore pellets (taconite).² As a result of the audit, safety specialist, Bickel, an authorized representative of the Secretary, issued to Northshore six alleged violations of section 50.11(b) and five alleged violations of section 50.20(a). The alleged violations were issued under section 104(a) of the Mine Act (30 U.S.C. § 814(a)), and in each case Bickel found the alleged violations had no likelihood of resulting in injury or illness to a miner and would not cause a miner to lose workdays. The inspector also found that the alleged violations of section 50.11(b) were the result of the company’s low negligence and that the alleged violations of section 50.20(a) were the result of the company’s moderate negligence. The Secretary proposed penalties of \$100.00 for each alleged violation of section 50.11(b) and \$117.00 for each alleged violation of section 50.20(a).

¹ Section 50.11(b) states in part:

Each operator of a mine shall investigate each . . . occupational injury at the mine. Each operator . . . shall develop a report of each investigation An operator shall submit a copy of any investigation report to MSHA at its request.

30 C.F.R. § 50.11(b).

Section 50.20(a) states in part:

Each operator shall maintain at the mine office a supply of MSHA Mine Accident, Injury, and Illness Report Form 7000-1. . . . Each operator shall report each . . . occupational injury . . . at the mine. The principal officer in charge of health and safety at the mine or the supervisor of the mine area in which . . . [an] occupational injury occurs . . . shall complete or review the form in accordance with the instructions and criteria [specified in Part 50]. The operator shall mail completed forms to MSHA within ten working days after an . . . occupational injury occurs.

² The ore is extracted at Northshore’s Babbitt, Minnesota mine in the Mesabi iron range and transported approximately 47 miles by rail to the Silver Bay facility. At Silver Bay the ore is processed into taconite pellets, stored, and shipped via Lake Superior to buyers in the United States, Canada, and elsewhere. Taconite is used in the making of steel. *Heart of the North Shore*, <http://www.heartofthenorthshore.com/business/listings.php?id=108>, (last visited October 20, 2015), Tr. 30; *See also* Tr. 79. Northshore’s Silver Bay facility was described by MSHA safety specialist and inspector, Kenneth (“Ken”) Bickel, as operating around the clock, 365 days a year. Tr. 30.

The company answered the Secretary's petition by admitting jurisdiction, but by asserting that no violations occurred or, if they did, that the proposed penalties were inappropriate. Answer (March 4, 2014) at 1-2. The Commission's Chief Judge assigned the case to the court which ordered the parties to confer to determine if the case could be settled. When counsels were unable to resolve their differences, a hearing was scheduled and held in Duluth, Minnesota. The primary issue at the hearing was whether the occurrences described in the citations and testified to at the trial constituted "occupational injuries" as defined in Part 50.³ If the various incidents were "occupational injuries," the parties agree the alleged violations existed. If they were not, they agree the alleged violations did not occur and the citations should be vacated.

OCCUPATIONAL INJURIES UNDER PART 50

As the court has noted previously (*Hibbing Taconite Company*, 28 FMSHRC 143, 152 (Mar 2006)), the Commission has directed its judges to follow a specific analytical roadmap when deciding if facts fall within a standard. They must look at the "plain language of the regulation," which "[a]bsent a clearly expressed legislative or regulatory intent to the contrary, ordinarily is conclusive." *Freeman United Coal Mining Company*, 6 FMSHRC 1577, 1578 (July 1984). Only if the language is ambiguous should they consider the Secretary's interpretation, to which they must defer if it is reasonable and not plainly inconsistent with the regulation. See *Island Creek Coal Co.*, 20 FMSHRC 14, 18-19 (Jan 1998).

In *Freeman* the Commission noted that,

[S]ection 50.2(e) defines an "**occupational injury**" as "any injury that occurs at a mine for which medical treatment is administered, or which results in death or loss of consciousness, inability to perform all duties on any day after the injury, temporary assignment to other duties or transfer to another job."

6 FMSHRC at 1578.

The Commission stated that although the term "injury" is not further defined, "The ordinary meaning of injury is: 'an act that damages harms, or hurts;' or 'hurt damage, or loss sustained.'" *Webster's Third New International Dictionary (Unabridged)* 1164, (1978). 6 FMSHRC at 1578-79.

³ In Part 50, an "occupational injury" is defined as:

[A]ny injury to a miner which occurs at a mine for which medical treatment is administered, or which result in death or loss of consciousness, inability to perform all job duties on any day after an injury, temporary assignment to other duties, or transfer to another job.

30 C.F.R. §50.2(e).

The Commission further stated that, “The remainder of the definition in section 50.2(e) refers only to the location where the injury occurred (‘at a mine’), and to the result of the injury (‘medical treatment,’ ‘death,’ etc.)” 6 FMSHRC at 1579. The Commission concluded that, “[S]ections 50(2)(e) and 50.20(a), when read together, require the reporting of an injury if the injury – a hurt or damage to a miner -- occurs at a mine and if it results in any of the specified serious consequences to the miner.” *Id.*

In the matters at hand, none of the alleged “hurt or damage” to the miners resulted in death. The question is whether it led to any of the other specified “serious consequences,” most often whether it led to “medical treatment” or to the injured miner’s “inability to perform all job duties on any day after an injury.” 30 C.F.R. § 50.2 (e).

In determining what constitutes “medical treatment” it is helpful to keep in mind that the Secretary has listed many medical procedures that he considers reportable, many medically related procedures he regards as non-reportable, as well as procedures he regards as non-reportable “first aid.” *See* 30 C.F.R. § 50.20-3(a)(1) – 3 (a)(8). Among the procedures regarded as “medical treatment” are suturing of any wound, treatment of fractures, treatment of infection arising out of an injury, treatment of bruises, amputation or the permanent loss of the use of any part of the body, and treatment of second or third degree burns. Excluded from “medical treatment” are procedures that are diagnostic in nature, visits to health care providers where no evidence of injury is found and no medical treatment is given, and preventative procedures such as tetanus shots. Recognizing the lack of a “bright line” between treatments that are medical and those that are considered first aid, the Secretary has included in the regulations specific examples of procedures he views as “first aid” with regard to the treatment of abrasions, bruises, burns, cuts, eye injuries, inhalation of toxic or corrosive gases, foreign objects, sprains and strains. *See* 30 C.F.R. § 50.20-3(a)(1)-3(a)(8).

THE AUDIT AND THE CITATIONS

Ken Bickel works in MSHA’s North Central District office located in Duluth, Minnesota. Tr. 26, 51. He holds a bachelor’s degree in mining engineering. He has worked for MSHA for eight years. Tr. 26, 28. Part of his training to become an authorized representative involved training in the requirements for reporting occupational injuries under Part 50. Tr. 29. Bickel explained that citations for violations of Part 50 frequently are issued as the result of a Part 50 audit, and he described how MSHA conducts such an audit. According to Bickel, the company is notified that MSHA personnel (the auditors) are coming to the mine, and the company is asked to gather “paperwork” for the auditors to review. Tr. 31. Usually, the MSHA team consists of four auditors. Tr. 31. In the case of Northshore’s Silver Bay facility, Bickel was not among the four. In fact, he was not “on site” at any time during the audit. Tr. 53. He explained, “After the audit team completed [its] work . . . [the auditors] came to the [MSHA] district office and we sat down and had a meeting and they presented the information they found . . . and then they identified what they felt were possible violations of some of the Part 50 requirements.” Tr. 32.

Bickel testified that following the meeting regarding the Northshore audit, he reviewed all of the information presented to him by the auditors and determined it established eleven “citable offences.” Tr. 32, 33, 53. The materials Bickel reviewed included medical records,

Northshore's internal reports about specific incidents, and the company's time sheets showing when miners worked and did not work. Tr. 33. After he reviewed the materials, Bickel "prepared the citations and delivered them to Northshore." Tr. 32.

THE BURDEN OF PROOF

The Secretary bears the burden of proving the alleged violations by a preponderance of the evidence. *See ASARCO Mining Company*, 15 FMSHRC 1303, 1306-1307 (July 1993) (*citing Jim Walter Resources, Inc.*, 903, 907 (May 1987); *Wyoming Fuel Co.*, 14 FMSHRC 1282, 1294 (Aug 1992)).⁴

THE ALLEGED VIOLATIONS

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>
6556654	11/22/13	50.20(a)

Citation 6556654 states in pertinent part:

The operator failed to submit . . . MSHA Form 7000-1 for an occupational injury sustained on 8/3/2012 to employee number (613047), a miner working at the . . . [c]ompany, within ten working days after the occurrence of the injury. The employee sustained a concussion that made him loss [*sic.*] consciousness. As of today's date, a report of this injury has not been received by MSHA, approximately 450 days past the submittal date of the 7000-1 form. Mine management is aware of the reporting requirements regarding occupational injuries.

Gov't Exh. P-2.

The inspector found that the alleged violation had no likelihood of causing an injury or illness and that the failure to report the injury was due to the company's moderate negligence.

⁴ Because much of the documentary evidence and testimony relates to personal medical information and because names of the miners associated with the information are used in many of the documents and in the transcript, to protect the miners' confidentiality, the exhibits and the transcript have been sealed by the court. The sealed exhibits and the transcript are fully available to the Commission should it review this decision and to any subsequent court of review. However, they are not available to the public at large. An order sealing the referenced parts of the record was issued by the court prior to the issuance of this decision. Order Sealing Record (October 9, 2015).

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R §</u>
6556655	11/22/13	50.11(b)

Citation No. 6556655 states in pertinent part:

The operator’s occupational injury investigation report for the occupational injury occurring on 8/3/2012 to employee number (613047) did not include all required information as identified under [§]50.11(b). The investigation report did not include (2) the date the investigation began, (8) steps taken to prevent a similar reoccurrence, and (9) identification of any report under [§]50.20.

Gov’t Exh. P-6.

The inspector found that the alleged violation had no likelihood of causing an injury or illness and that the failure to report the injury was due to the company’s low negligence.

THE TESTIMONY

Bickel stated that as a result of his inspection of the company’s documents, he concluded that the company violated section 50.20(a) and 50.11(b), because an employee suffered a loss of consciousness as a result of a mine site incident, and because “loss of consciousness meets . . . MSHA’s definition of a reportable . . . occupational injury.” Tr. 34.⁵ Bickel’s conclusion was based in part on his review of the company’s Incident Reporting Form, a company document used to report events at the mine that may have or that could have caused an injury to a miner or to miners.⁶ Tr. 36-37.

The form asks for a brief description of the incident, and Bickel noted that in describing an August 3 incident, the person who completed the form wrote, “Debris fell from overhead and hit employee.” Gov’t Exh. P-3. Where a more detailed description is called for, the person wrote:

A day crew employee called the control room and asked them to put the precept in run. This caused the hood fan flopgate to flop and sent debris falling down to the main part of the fancase. The injured Employee was in the main case of the hood fan welding on the fan blades when a small piece of

⁵ As noted previously, 30 CFR 50.2(e) states in part, “*Occupational injury* means any injury to a miner which occurs at a mine for which medical treatment is administered, or which results in death or *loss of consciousness*.” (emphasis added).

⁶ According to Bickel when such an event occurs management personnel investigate and one of the investigators completes the form. Tr. 36-37.

debris fell and hit his head. We were in the process of getting out of the fan when a large amount of debris fell on the employee. Two maintenance technicians removed the employee from the fan case and proceeded to check the injured employee for injuries. He had no apparent injuries, but he was brought to the clinic[.]

Gov't Exh. P-3 at 2.

At a place on the form where the person who completes the form is asked to check a box denoting the severity of the incident, the person checked, "Report Only." The person did not check, "MSHA Reportable." Gov't Exh. 3 at 1.

Bickel also reviewed progress notes from the Bay Area Health Center in Silver Bay, a clinic run by Duluth's St. Luke's Hospital. The notes, which are dated August 3, 2012, the date of the incident, were given to Bickel by the audit team. Tr. 37-38; Gov't Exh. P-4. The notes were prepared by a physician's assistant, Charles Wall.⁷ Tr. 38. The notes state:

Patient seen urgently from local iron ore processing plant, he was welding inside a fan motor . . . when a large piece of ore ash fell . . . landed on top of his head and [on the] left side of his neck. Patient is uncertain of loss of consciousness, however, there is a distinct [gap] in [his] timeline. He is alert and oriented x4. No initial complaints however left side of neck became very painful during examination.

Gov't Exh. P-4 at 1.

In additional comments, Wall stated:

Patient remembers being hit on top of head (wearing hard hat), he then reports hearing his name being yelled . . . loud[ly] by coworker and being pulled out of the fan motor by his leg, was confused initially by yelling. Described feelings of "cobwebs" in my head, he admits to incomplete recall of events following trauma. Coworker present reports no witnesses to loss of consciousness as . . . taconite dust from debris prevented visualizing patient.

Gov't Exh. P-4 at 2.

⁷ Although Bickel reviewed Wall's notes, Bickel never spoke with Wall; nor did Bickel know if anyone on the audit team spoke with Wall. Tr. 54.

In assessing the Employee's condition Wall stated, "Head injury, closed, with concussion Probable loss of consciousness." Gov't Exh. P-4 at 2. Wall also noted that he had "[a]ctivated EMS" and that the Employee was being transferred by ambulance to the emergency room of St. Mary's Hospital in Duluth. Gov't Exh. P-4 at 2; Tr. 55-56.

Bickel explained why Walls's progress notes (Gov't Exh. P-4) influenced him to conclude the incident was reportable under Part 50:

I thought [it was] . . . important because [i]t state[s] . . . that the patient was uncertain of loss of consciousness but that there were gaps in his timeline. Apparently, he wasn't thinking . . . clearly after [the incident] happened. And then on the next page, it states that he remembers being hit on top of the head and he was wearing a hard hat but then reports hearing his name being yelled and very loud by [a] coworker and [being] pulled out of the fan motor by his legs and he was confused initially by the yelling, and he describes feeling cobwebs in his head, admits to incomplete recall of events.

Tr. 39.

Bickel further stated he found it significant that:

[The injury to the Employee] was assessed as being a head injury, closed, which . . . I assume . . . means there wasn't any blood, but with a concussion and also probable loss of consciousness. [T]he other thing that may have been somewhat important, he was transported to the facility by an ambulance, which kind of indicated to me that it was potentially serious.

Tr. 39-40.

Bickel did not review any subsequent documents from St. Mary's. Tr. 56. However, Northshore offered a note of the St. Mary's Emergency Department attending physician, Andrea Boehland. Dr. Boehland states in part that the Employee was, "[A]t work today at taconite plant in Silver Bay when [a] 40 pound clump of dried taconite mud fell 30 feet from a smoke-stack silo and hit him on the head, breaking apart on impact. No [loss of consciousness]." Resp. Exh. 6 at 1.

Bickel did not have Dr. Boehland's note when he decided to issue the citations. Tr. 61. Bickel maintained that in a Part 50 audit the operator is required to provide medical records to

MSHA and that because he did not see Boehland's note, Northshore "apparently [did] not . . . provide all the documentation concerning [the] incident." Tr. 61.

Bickel further testified that he also looked at notes made by Kathy Cattles, a member of the audit team. Bickel understood that Cattles "reviewed some of the documents and . . . identified this incident as a possible occupational injury and gave this information to the lead person on the audit team for further investigation." Tr. 42. Bickel used Cattles' notes because they "sort of verified some of the information that was contained in some of the other documentation." *Id.* When he was asked what that information was, he stated:

Possible loss of consciousness . . . some of the facts pertaining to the incident, where the material fell [,] . . . that he was very anxious, that after [the] incident occurred he was . . . unable to count back from 100 or spell "world" backwards. It indicated to me that . . . he wasn't thinking clearly after it happened.

Tr. 42.

Bickel summarized MSHA's position as to the two alleged violations, "In the definition section in Part 50, it describes loss of consciousness or an accident where a loss of consciousness occurs as a reportable injury. So based on that, I felt it was a reportable injury." Tr. 50. Bickel was asked by the court, "And it's as simple as that?," and he responded, "Yeah." *Id.*

Kathy Cattles is an MSHA training specialist in MSHA's EFS Group.⁸ Tr. 65 As such, she participates in Part 50 audits. *Id.* Cattles explained that Part 50 audits are conducted between June and August. Tr. 66. She described the purpose of a Part 50 audit as making sure the audited company has correctly complied with Part 50. Tr. 67. Essentially the audit is a "verification process." *Id.*

Cattles recalled that in November 2013 she was part of the team that went to Northshore. It was the third audit in which Cattles participated, but her first at Northshore. Tr. 75. As Cattles remembered, the auditors checked the accident records given to the team by the company and reviewed pertinent information from hospitals, doctors, and ambulance providers. Tr. 68. The team also conducted interviews with two groups of miners; one was a representative group of all miners and the second was miners who had been injured or "potentially injured." *Id.* Cattles' job during the audit was to monitor the records looking for injuries she believed were reportable and then determine if the injuries had been reported as required. Tr. 69.

With regard to the subject Employee, Cattles reviewed Northshore's Incident Reporting Form (Gov't Exh. P-3) and Wall's Progress Notes (Gov't Exh. P-4). Tr. 71-72. The documents raised questions in Cattles' mind as to whether the injury that occurred as a result of the August 3

⁸ Cattles testified that, "EFS" stands for "Education Field, Small Mines" and among her duties are conducting Part 50 audits and monitoring operators' training plans. Her primary office is in Gillette, Wyoming. Tr. 65.

incident was reportable. In her notes, she wrote “loss of consciousness?” Tr. 75-76; Gov’t Exh. P-5. She testified that she gave her notes to the audit team leader (Gov’t Exh. P-5). The team leader reviewed the materials. Tr. 72. She “guessed” the team leader then wrote a summary of the information and turned it over to the MSHA District Manager, who together with Bickel, decided whether or not to issue citations based on the materials. Tr. 72-73.

The Employee, a railroad car repairman, testified for Northshore.⁹ The Employee stated that although he normally works at the Babbit Mine, in August 2012, he temporarily worked at the Silver Bay facility during the plant’s shutdown. Tr. 79. The Employee recalled that on August 3, he was working on a hood fan at the pelletizer. There, iron ore concentrate is made into pellets that then are transferred by a conveyor to a furnace where they are dried. Tr. 81-82. During the shutdown one of the furnace’s hood fans had to be repaired. The Employee described how he accessed a confined space inside the furnace to weld the fan’s blades. Tr. 82. The Employee was the only person in the chamber, although there was another employee working in an adjacent chamber and an additional employee outside the chamber. Tr. 83. The Employee testified that he was wearing a welding helmet, a hard hat, welding gloves, a welding jacket and steel-toe boots. Tr. 84. The Employee described what happened:

About 25 to 30 feet above me, there was a flop gate that opens and closes . . . [to control] the draft from the fan . . . and there was an electrician functioning the flop gate, opening it and closing it to test it, and there was built up concentrate up above that got knocked loose and it came down.

Tr. 84.

According to the Employee, falling concentrate hit his shoulders and back and “a little bit came down on [his] head.” Tr. 85. The concentrate broke apart when it struck the Employee making the area very dusty. It also smashed a flood light inside the chamber. Tr. 85. The Employee testified that the blow from the falling material staggered him. Tr. 86. He stated, “It got very dark all of a sudden and I got almost knocked down to my knees. I was able to get up right away and I turned around and I saw the access panel and I went to climb out, and . . . [the other employees] helped me out.” Tr. 86. He maintained that he did not lose consciousness. *Id.* He was sure of this because he recalled hearing the other employees hollering and one said, “[Q]uick, get him out of there.” *Id.* They then grabbed his arms and pulled him out of the chamber. The Employee stated that he was “shook up” and that he “sat down and leaned up against the side of the panel just to make sure [he] was okay.” *Id.*

Shortly thereafter the Employee’s supervisor, John Jones, arrived. Tr. 87. Jones asked the Employee what happened. The Employee explained, and Jones said, “[W]e [had] better take you to the clinic to get checked out.” Tr. 87. The Employee and Jones walked to Jones’ pickup

⁹ Northshore owns and operates the railroad that transports ore from its Babbit Mine to its Silver Bay facility. Tr. 80.

truck and Jones drove the Employee from the plant to the clinic in Silver Bay, a seven to ten minute trip. *Id.*

The Employee stated that at the clinic Wall gave him three “mind questions” to see if the Employee was “able to think properly.” Tr. 89. First, he asked the Employee to count backwards by sevens. Tr. 89. The Employee testified that he did not perform very well. Tr. 89. He acknowledged that he was not strong in math. Tr. 89-90. Wall then asked the Employee to spell the word, “world” backwards. The Employee said that “was a little easier, but I . . . still had trouble.” Tr. 90. Finally, Wall gave the Employee a pencil and paper and asked him to draw the numbers on a clock and make the hands point to seven minutes past an hour. Tr. 91. The Employee stated, “that one was fine.” *Id.*

When he was cross examined, the Employee was asked to direct his attention to Wall’s report that the Employee “[d]escribed [feeling] ‘cobwebs’ in [his] head.” Gov’t Exh. P-4 at 2; Tr. 98. The Employee was asked, “Did you tell that to Mr. Wall?” *Id.* The Employee answered that he did not remember. *Id.* He further was asked to look at Wall’s statement that the Employee, “admits to incomplete recall of events following trauma” (Gov’t Exh. P-4 at 2), and he was asked if that is what he told Wall. Tr. 98. The Employee responded, “Yes.” Tr. 99. The Employee further agreed that Wall told him he had a “probable loss of consciousness.”¹⁰ *Id.* Wall also told him that he might have a concussion. Tr. 92. Therefore, Wall sent the Employee to the ER in Duluth. *Id.*

At the hospital in Duluth the Employee had a CT scan. In addition, his right foot was “x-rayed,” and the Employee was examined by emergency room doctor, Andrea Boehland. Tr. 93. According to the Employee, Dr. Boehland told him that the scan and x-ray were “clear” and that she “couldn’t find anything wrong.” *Id.* The Employee also testified that Dr. Boehland did not tell him he had a concussion. Tr. 94. He stated that he was “not sure” what Dr. Boehland’s diagnosis was, but the Employee remembered Dr. Boehland telling him not to drive that night and to stay at someone else’s house “in case of any complications.” *Id.*

The incident happened on a Friday. The employee’s normal work schedule was Tuesday through Friday. Tr. 96. The Employee stayed with his mother and father on Friday night. Saturday, he returned to the plant, picked up his car and drove 56 miles to his house. Tr. 96. On Tuesday, he returned to work as scheduled. Tr. 96-97.

Scott Blood is the company’s senior safety representative at the Silver Bay facility. As such, he is responsible for administering the company’s safety program and for handling workers’ compensation claims. Tr. 102. Blood has held the post of senior safety representative for over 20 years. *Id.* Blood explained the procedures at the mine with regard to investigating work place incidents: “[W]henver there’s an incident, we do an initial investigation of the site . . . interviewing the employee, and then on the follow-up for that, I also handle the reporting for MSHA and also handle the work comp aspect.” Tr. 103.

When asked to explain his role in determining if an injury is reportable to MSHA, Blood replied: “[A]fter doing the . . . physical investigation, as well as discussing what happened with

¹⁰ On redirect the Employee was asked, “And just to be clear, did you lose consciousness?” and he answered, “No, I did not.” Tr. 101.

the employee, we get the medical note that's available . . . if they did treat, we get that, and then we will sit down and review those findings and compare it to the standard to determine if it's reportable." Tr. 103.

With regard to the incident involving the subject Employee, Blood testified that on the morning of August 3 he was in his office at the plant when he received a telephone call informing him that the Employee had been hit by debris in the area of the hood fan. Tr. 104. Blood immediately set out for the area, but by the time he reached it, Jones and the Employee had left for Silver Bay. *Id.* Blood stated that he spoke with the two miners who worked in the area with the Employee so he could "kind of get a feel for what happened." Tr. 104. Blood maintained that during the conversation he asked if the Employee had lost consciousness. Tr. 105 ("I know what the requirements [for reportable injuries] are and that's something I'm thinking about right away." *Id.*) The miners told him, "No." Tr. 106. They explained that there was "a big cloud of dust and they yelled for him right away just to make sure that they had contact with each other." *Id.*

Blood stated that he then drove to the clinic to speak with the Employee. Tr. 104-106. He was concerned about what further might need to be done. He stated that, "[T]he clinic . . . [doesn't] provide anything from an emergency standpoint, x-rays, CT scans, so we're looking at what we need to do . . . as far as . . . further medical treatment." *Id.* According to Blood, when he arrived at the clinic, Wall, told him that he (Wall) was sending the Employee to Duluth for a CT scan, "[j]ust as a precaution." *Id.* Blood stated that he asked the Employee to call him that evening. The Employee called, and Blood remembered the Employee telling him that an x-ray of his foot showed "nothing broken . . . just a bruise" and that "he was released back to work with no restrictions." Tr. 107.

Blood also identified a Report To Work Ability form he received from the clinic in Silver Bay. Tr. 108; Co. Exh. R-3. Blood needed the document to complete workers' compensation paperwork. It was transmitted to him by fax four days after the incident. Tr. 110-111. The report states that the Employee "is able to work without restrictions," (Co. Exh. R-3.), which, Blood maintained, is exactly what happened. Tr. 108. "His next scheduled shift was . . . the next week and he came in for that." *Id.*, *see also* Tr. 113.

THE VIOLATION

The sole question is whether the Secretary proved that on August 3, 2012, the Employee suffered an "occupational injury" as defined in section 50.2(e). "If the Secretary did," the injury should have been reported by Northshore in compliance with sections 50.20(a) and 50.11(b), something the parties agree did not happen.

Although the testimony concerning the allegations occupies over 100 pages of the transcript, the issue can be disposed of in a few paragraphs. Inspector Bickel was clear that he issued the citation because there was a "loss of consciousness." Tr. 34. Any injury resulting in a "loss of consciousness" is specified as an "occupational injury" (30 C.F.R. § 50.2(e)) and hence is reportable. "Loss of consciousness" is defined in part as "the subject's suspension of his conscious relationships with the outside world, during a time generally lower than 3 minutes." *Heart & Vessels*, <http://www.heart-vessels.com/cardiovascular-diseases/loss-consciousness.php>.

(last visited October 20, 2015). “Loss of consciousness” is also defined as, “The occurrence of a loss of the ability to perceive and respond.”

Mnemonic Dictionary, <http://www.mnemonicdictionary.com/?word=loss+consciousness> (last visited October 20, 2015)

The Secretary did not prove that after being hit on the head by falling debris, the Employee lost his conscious relationship with the outside world and/or his ability to perceive and respond. Indeed, the evidence goes the other way. Bickel testified that he was influenced by Wall’s note that the Employee suffered a “[p]robable loss of consciousness.” Gov’t Exh. P-4 at 2; Tr. 55-56; *see also* Tr. 39-40. He was further influenced by the fact that the Employee was confused immediately after the accident, that the Employee reported to Wall that he felt “cobwebs in his head,” and that he admitted to Wall an “incomplete recall of events.” Tr. 39-40; Gov’t Exh. P-4 at 2. Wall’s description of the loss of consciousness as “probable” falls short of establishing what the Employee actually experienced, and “confusion,” “cobwebs” and “incomplete recall” after the accident might or might not be evidence of a loss of conscious relationship with the Employee’s surroundings or of his loss of ability to perceive and respond. Wall’s was the first examination of the Employee and he made his assessment without the benefit of diagnostic tools such as a CT scan. Later that day, when the Employee was examined by a doctor who had the results of a previously ordered CT scan, the doctor reported the scan was negative and that there was no loss of consciousness (“LOC”). Resp. Exh.6 at 2.

More important, the Employee, the only person with first-hand knowledge of what he experienced, testified he did **not** lose consciousness. Tr. 86. The credibility of his testimony is buttressed by the unrefuted testimony of the things that occurred and the actions he took immediately after the concentrate fell on him: being almost knocked to his knees, getting up, perceiving it was dark, hearing the other employees hollering to him, and traveling to the access panel. Tr. 85-86. These things strongly imply that after the accident the Employee retained the ability to perceive his situation and to respond appropriately, and for these reasons, the court finds that the Secretary fell short of proving the Employee suffered a loss of consciousness.

Nor did he prove or even allege the other indices of an “occupational injury.” There was no showing the Employee was unable to perform any of his job duties when he reported for work without restrictions on his next scheduled work day, Tuesday, August 7. Tr. 96-97; 108, 113; Resp. Exh. R-3. Nor was there a showing that “medical treatment” was administered as a result of the accident. The x-ray and CT scan received by the Employee at St. Mary’s Center Emergency Department, both of which showed nothing amiss, were diagnostic in nature, and since no evidence of injury was found they were not “medical treatment.” Resp. Exh. R-6 at 2; 30 CFR § 50.20-3(a).

The citations will be vacated.

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>
6556656	11/22/13	50.20(a)

The citation states:

The operator failed to submit the Mine Accident, Injury and Illness Report (MSHA Form 7000-1) for an occupational injury sustained on 2/6/13 to employee number (30486), a miner working at the Northshore Mining Company, within ten working days after the occurrence of the injury. The employee sustained a back injury that resulted in two lost workdays. As of today's date, a report of that injury has not been received by MSHA, approximately 270 days past the submittal date of the 7000-1 form. Mine management is aware of the reporting requirements regarding occupational injuries. This is the second citation for this standard during this audit.

Gov't Exh. P-7.

The inspector found the alleged violation had no likelihood of causing an injury or illness and that the failure to report the injury was due to the company's moderate negligence. Gov't Exh. 7.

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>
6556657	11/22/13	50.11(b)

The citation states in pertinent part:

The operator's occupational injury investigation report for the occupational injury occurring on 2/6/13 to employee number (30486) did not include all required information as identified under 50.11(b). The investigation report did not include (2) the date the investigation began, (8) steps taken to prevent a similar reoccurrence, (9) identification of any report under 50.20. This is the second citation for this standard during this audit.

Gov't Exh. P-14.

The inspector found the alleged violation had no likelihood of causing an injury or illness and that the failure to report the injury was due to the company's low negligence. Gov't Exh. 7.

THE TESTIMONY

Bickel explained his reason for issuing the citations, “[B]ased on the information provided to me, the [E]mployee . . . sustained a back injury that resulted in lost work, which meets MSHA’s definition of an occupational injury.” Tr. 116. Among the information Bickel considered was the company’s Incident Reporting Form. Gov’t Exh. 8; Tr. 117. He noted that the form quoted the Employee as stating, “I turned to get out of my desk and felt a sharp pain in my back.” Gov’t Exh. P-8 at 2. According to Bickel, the statement “kind of establishes that . . . [the incident] occurred at work.” Tr. 117. He also noted that the form quotes the Employee as stating, “I did not have an issue until 5:00 p.m. when I got to Duluth and had a tough time getting out of my car.” Gov’t Exh. P-8 at 2. In addition, he observed that on the form where the Employee is asked to describe the extent of her injury, the Employee wrote, “Sore back and will not know the exten[t] until time has past.” *Id.*; Tr. 118.

Bickel further reviewed a work assessment form from St. Luke’s Medical Clinic in Duluth. Tr. 120; Gov’t Exh. P-9. The form is dated February 7, 2013, the day after the incident. Gov’t Exh. P-9. The form is signed by Craig L. Gilbertson, MD. On the form Dr. Gilbertson diagnoses the Employee as suffering from a “work-related, acute low back injury.” Gov’t Exh. P-9. He further states that the Employee, “[h]as been advised to remain off work from 2/7/13 through 2/18/13” and that her “[w]ork ability will be re-evaluated on 2/18/13.” *Id.*; Tr. 119-120.

Bickel further found relevant the office visit notes of Dr. Brian Konowalchuk, a physician in the Occupational Medicine Clinic of Essential Health in Duluth. Tr. 121; Gov’t Exh. P-9 at 2-3. On February 11, 2013, five days after the incident, the employee visited Dr. Konowalchuk at the clinic. Dr. Konowalchuk states that the Employee:

reports that on the date of injury while working at Northshore . . . she was performing her usual activities. She reports some interesting events one of which was moving some pillars and then later putting some boxes on a high shelf. She did not notice anything unusual, but sometime later that day was standing up trying to get out of a chair she noted immediate onset of back pain. The pain intensified over the next couple of days. [S]he went to her primary care provider and was placed on work restrictions and rest. She has been out of work since the 18th [11] and she would like to return to work.

Gov’t Exh. 9 at 2.

¹¹ The reference to February 18 is clearly an error on the doctor’s part. The sentence should read, “She has been out of work since the 8th.” *See* Tr. 139-140.

Dr. Konowalchuck further states:

I am going to start her on some physical strengthening. I have encouraged her to discontinue muscle relaxants if not helpful. I will see her . . . this Friday. For now I have released her to light duty work. Hopefully we can get her back to regular duty work within a week. We will see.

Gov't. Exh. P-9 at 3.

Bickel testified that his decision to issue the citations was also influenced by the Duluth Clinic's Report of Work Ability Form. Tr. 122; Gov't Exh. P-9 at 4. The form indicates that on February 15, nine days after the incident, Dr. Konowalchuk released the Employee to work without restrictions.¹² Gov't Exh. P-9 at 4; Tr. 122. The fact that she was released to work without restrictions indicated to Bickel that the Employee's duties previously had been restricted as a result of her back injury. Tr. 123. Bickel noted that the "definition of occupational injury includes not just lost work days, but time where the employee's on the job doing different functions or is restricted in [job] duties [e.g., 'light duty work'] [b]ecause of the injury." Tr. 121-122.

According to Bickel, the company's bi-weekly salary report for February 3, 2013, through February 16, 2013, confirms the Employee missed work because of the incident. Gov't Exh. P-10. The incident occurred on Wednesday, February 6. The following day, Thursday, February 7, the Employee worked one hour and a half, and then went to the hospital to have her back checked. Her pay record shows that she was excused from work with pay on Friday, February 8, on Monday, February 11, and on Tuesday, February 12. Tr. 128, 129; Gov't Exh. 10. Because the Employee was excused from work with pay those days, Bickel concluded her work absences were "probably due to her back injury." Tr. 129. Bickel noted that the doctor she saw on February 7, Dr. Craig Gilbertson, recommended the employee be off work from February 7 through February 18. Tr. 129; Gov't Exh. 10 at 1. In Bickel's opinion, the Employee missed work, "[b]ecause she had a sore back." Tr. 129.

Bickel also confirmed that he reviewed a document issued by the Essential Health Clinic, a clinic located in Hibbing, Minnesota. Tr. 131; Gov't. Exh. P-11. The document contains the copy of an email from Scott Blood to Kim Yuretich, an employee of the clinic. The email was sent by Blood to Yuretich on November 7, 2013. The subject of the email is "Northshore Mining Employee [Appointment]." Gov't Exh. P-11. In the e-mail, Blood states that the Employee told him that she felt a "twinge" in her lower back when she got up to leave work on Wednesday, February 6, and that as the evening went on "she felt a more constant pain in her low back area." Gov't Exh. P-11. Blood further states that the Employee, "was able to come to work this morning [Thursday, February 7] for a couple of hours but the pain persisted.

¹² Doctor Konowalchuk dates the form "11 Feb 2013," but this appears to be another error in that the form states he saw the employee at 3:00 p.m. on February 15, 2013. Gov't Exh. P-9 at 4.

She made an appointment with a Dr. Gilbertson . . . [who] took x-rays and provided her with muscle relaxants and pain killers.” Tr. 132. Dr. Gilbertson authorized her to stay off work until February 18th. Gov’t Exh. P-11. Blood continues that the Employee made an appointment with Dr. Konowalchuk on February 11 at the Essential Health Clinic in Duluth. *Id.*; Tr. 132. Bickel testified that he viewed the document as, “further evidence of what happened, that [the Employee] sustained the injury on Wednesday, it got worse overnight and she went to the doctor on Thursday . . . and then . . . he . . . made the recommendation to stay off work till February 18th.” Tr. 132.

Bickel identified Kathy Cattles’ notes of November 14, 2013. He testified that prior to issuing the citations, he reviewed the notes. Tr. 134; Gov’t Exh. P-12. The notes indicated to Bickel that the Employee’s medical records raised the question in Cattles’ mind as to whether the Employee’s injury was reportable.¹³ Tr. 134-135; Gov’t Exh. 12. He also reviewed notes taken by Cattles documenting an interview with the Employee. Tr. 135; Gov’t Exh. G-13. The Employee, Cattles, MSHA investigator, Jeff Hoblick, and Scott Blood, were present during the interview. Tr. 135. Cattles’s notes state the Employee was asked, “Did you take days off because of [your] back?” and quotes the Employee answering, “Yes.” Gov’t Exh. 13; Tr. 135. Bickel stated, “[A]ny accident or incident that results in time off for [an] employee due to [an] injury is reportable.” Tr. 136.

On cross examination, Bickel clarified that a reason why he concluded the injury to the Employee was reportable was because the Employee missed three days of work.

Question. I believe your testimony was that you determined there was a reportable injury based on [the employee] missing three days. Is that correct?

Answer. Yeah. She missed work on Friday, Monday, and Tuesday.

Tr. 139.

However, Bickel also agreed that simply seeing a doctor following an injury did not make the injury reportable. Tr. 139.

Kathy Cattles confirmed that she reviewed Northshore’s Incident Reporting Form (Gov’t Exh. P-8), the doctors’ notes contained in Government Exhibit P-9, the Employee’s bi-weekly salary time report (Gov’t Exh. P-10), and the copy of the email from Scott Blood to Kim Yuretich (Gov’t Exh. P-11). Tr. 141-142. The documents raised a question in her mind whether the incident on February 6 was reportable. Tr. 142. After she reviewed the documents she gave them to MSHA team leader Jeff Hoblick who put a “summary sheet together and gave [it] to the [MSHA] district manager.” Tr. 143. The citations followed. Tr. 143-144.

Cattles also testified that she and Hoblick interviewed the Employee on November 20, 2013. Cattles stated, “[W]e asked [the Employee] if she took days off because of . . . her back, and she said yes.” Tr. 145.

¹³ Cattles’ notes state in part “Off wk 2/7 – 2/18; muscle relaxant & pain killer[.] Reportable?” Gov’t Exh. P-12.

Scott Blood identified the Employee as a warehouse technician who is responsible for “receiving outside orders . . . making item counts, comparing them to the actual purchase requisitions, and . . . maintaining the inventory levels . . . in our warehouse for our maintenance and operating supplies.” Tr. 151. According to Blood, the Employee is seated 60 percent of her day and her job involves only occasional lifting. Tr. 152. During February 2013 the Employee worked Monday through Thursday from 5:30 a.m. to 3:30 p.m. *Id.*

Blood noted that the day of the incident, February 6, 2013, was a Wednesday. Tr. 156. Blood stated that he became aware of the injury to the Employee when she called him on February 7, around 5:00 p.m. The call was made after her appointment with Dr. Gilbertson in Duluth. During the call she told Blood that although she came to work on February 7, “She . . . wasn’t feeling right so she called and made an appointment with . . . [Dr. Gilbertson].” *Id.* The Employee marked her time card to indicate she worked a couple of hours on February 7 (Thursday) before she left Silver Bay and drove to Duluth. Tr. 157. Blood stated that when he spoke with the Employee he told her that the company was “going to set her up . . . with a back specialist [for an evaluation] as soon as [it] could get her in, which happened to be the next Monday [February 11].” Tr. 158; *see also* Tr. 159. The back specialist was Dr. Konowalchuk. Tr. 158. The Employee was not scheduled to work on February 8, a Friday. Tr. 159.

After the Employee saw Dr. Konowalchuk on February 11, she spoke with Blood and told him that, “Dr. Konowalchuk thought she was . . . able to return to work the following day and do . . . [the] functions of her job.” Tr. 160. Blood did not think the Employee would require any accommodations because her normal job was, as he described it, “very sedentary or light duty.” *Id.* The Employee came to work on February 12, but after a short time she became emotionally distressed and she was sent home for the day.¹⁴ Tr. 161.

Referring to the Employee’s Bi-Weekly Salary Time Report (Gov’t Exh. P-10), Blood explained that the entry for Friday, February 8, showing 8 ½ hours of “excused with pay” time was “merely a paperwork entry to make sure she [got] to 40 hours for the week.” Tr. 163. He again noted that she was not scheduled to work on Friday and therefore she did not work on February 8.¹⁵ Tr. 163 He also noted that the employee was excused from work but paid the

¹⁴ According to Blood, some time before the February incident the Employee suffered a personal trauma that was unrelated to her job, but that affected her emotionally at times when she was on the job. The company made allowances for her when she became emotionally upset. Tr. 153, 160-161.

¹⁵ On cross examination Blood expounded on the reason the Employee’s time card for February 8 indicated the employee was allowed 8 ½ hours of excused with pay time. Tr. 171; Gov’t Exh. 10. Blood stated:

[T]hey put eight . . . and a half hours of excused with pay there [on Friday] just to make her whole for the week. She . . . did not work on Friday. She was not scheduled to work on Friday. That’s a . . . clerical connotation to get her to 40 hours for the week. We explained that to the investigators and I don’t know if they understood.

Tr. 171.

next Monday when she had the appointment with Dr. Konowalchuk. The following day, February 12, was the day she was sent home because she experienced emotional difficulties. Tr. 164. Finally, according to Blood, on Wednesday, February 13, and Thursday, February 14, the Employee worked her regular 10 hour days. *Id.* On Friday, February 15, the Employee had a follow-up appointment with Dr. Konowalchuk. The company allowed her four hours of excused pay for the appointment. *Id.*

Blood was present during the interview MSHA personnel had with the Employee. He described the Employee as “very defensive . . . very unresponsive and sarcastic.” Tr. 167. Blood was asked about Cattles’ note documenting the interview and indicating the Employee was asked, “Did you take days off because of [your] back?” and indicating she answered, “Yes.” Gov’t Exh. P-13; Tr. 167. Blood maintained, “That’s not how . . . [the Employee] responded.” Tr. 167. He stated, “They asked her if she missed work due to her back injury,” and she answered, “[T]hat is what happened if the timecard says that.” Tr. 178.¹⁶

Blood testified he did not report the Employee’s back injury to MSHA because in his opinion the employee, “never . . . miss[ed] any time due to the actual work injury.” Tr. 168. He added, “And she was able to do all of the requirements of her job when she was there. *Id.* Thus, upon returning on February 11, she experienced no change in her job duties. Tr. 178, *see also* Tr. 172. Further, according to Blood, on the 7th of February the Employee left work on her own to see a doctor. He also explained that when he described the Employee’s condition in his e-mail to Kim Yuretich (Gov’t Exh. P-11) he was trying “to give Dr. Konowalchuk or his staff a little description on what’s going on so they know ahead of time what to ask about or to look for.” Tr. 176-177. Blood acknowledged that Dr. Gilbertson had authorized the employee to “remain off work from 2/7/13 through 2/18/13” (Gov’t Exh. P-9), but Blood stated that Gilbertson is, “an emergency room doctor who [does] nothing but x-rays, and so that’s why we sent her to a back specialist: to get a better opinion on what was going on.” Tr. 177. Counsel for the Secretary and Blood then engaged in the following exchange:

Question: But you rely on doctors to make the determination whether an employee . . . is able or unable to work. Isn’t that right?

Answer: Correct.

Question: And this Dr. Gilbertson is a doctor?

Answer: Yes.

Question: And he did make the recommendation that [the Employee] be off for 11 days?

Answer: Yes. And Dr. Konowalchuk made the right call in saying that it was merely a sprain and she was just “fine,” so in our experience dealing with back injuries,

¹⁶ The Employee was not called as a witness by either party.

you get a much better evaluation from a doctor who works specifically with back injuries versus somebody who's an emergency room treating physician.

Tr. 178.

THE VIOLATION

As with the other contested citations, the validity of the subject citations stands or falls on whether the Employee suffered an "occupational injury" as defined in section 50.2. It is clear from the testimony that Bickel issued the citations because he believed the Employee missed three days of work due to the injury to her back, (Tr. 136, 139) and because an occupational injury is defined in part as an "inability to perform all job duties on any day after an accident." See Tr. 123. If Bickel was right as to any of the days, and/or if he was right about the Employees inability to perform her job duties, the citations are valid.

The analysis needs to go no further than February 7, the day following the onset of the back injury. On that day, the Employee came to work on time, worked two hours and then left to see a doctor. She was described by Scott Blood as "not feeling right." Tr. 156. It is reasonable to infer that she left to see a doctor about pain in her back caused by her injury the previous day. The inference is supported by Dr. Gilbertson's diagnosis of "acute low back injury" and by his advice to her to remain off work for up to eleven days. Gov't Exh. P-9. He would not have delivered the diagnosis and advice had the consequences of the injury been benign. As a result, the court concludes the Employee missed eight hours of work on February 7 due to her back pain, a cause that was recognized by Blood when he told the Employee later that day that he would "set her up with . . . a back specialist as [he] soon as I could get her in." Tr. 158. Clearly, the pain was a concern that both the Employee and Blood decided required prompt attention.

Bickel stated that seeing a doctor following an injury does not make the injury reportable. The court does not doubt the sincerity of Bickel's belief. Tr. 139. However, if the day following an injury an employee misses work because the consequences of the injury cause her or him to seek immediate treatment for the injury and thus, within the words of the definition, the employee "is unable to perform all job duties on any day after the accident," (30 C.F.R. § 50.2(e)), then, in the court's view, the "lost workday is the direct consequence of the injured miner's inability to work as a result of the injury." *Consolidation Coal Co.*, 11 FMSHRC 996, 972

This is exactly what happened with regard to the Employee. The court finds that on February 7, the day after the accident, the Employee sought treatment because, her back pain compelled her to seek relief. As a result, for 8 hours (she worked 10 hour days) she was "unable to perform all job duties." 30 C.F.R. § 50. The Employee could not be both on the job in Silver Bay and seeking treatment in Duluth. She had to choose, and in order to alleviate her pain she chose to seek treatment rather than to perform all job duties on the day after the accident. Therefore, her February 6 injury should have been reported.

Bickel also believed the Employee missed work on Friday, February 8, two days after the accident, because of the injury to her back, but he was wrong. Tr. 139. Blood consistently and credibly testified that during February 2013, the Employee was not scheduled to work on Friday. Tr. 152, 159, 163, 171. His testimony was not refuted. The Employee cannot be found to have missed work on a day when she was not scheduled to work.

Finally, Bickel thought the Employee missed work because of her injury on Monday, February 11, and Tuesday, February 12. Tr. 139. Bickel was correct about Monday, February 11. Blood himself made an appointment for the Employee with a back specialist on Monday, February 11. Tr. 158-159. It was, Blood stated, “as soon as [I] could get her in.” Tr. 158. There was a pain-related sense of urgency about the appointment, and the visit to the specialist was directly related to the Employee’s on-the-job injury on February 6. The employee was absent from work all day on February 11 and thus was unable “to perform all job duties on [a] day after [the] injury.” § 50.2(e). For this reason too, the injury should have been reported.

However, Bickel’s belief that the Employee missed work on Tuesday, February 12, because of her February 6 injury (Tr. 139) is unsubstantiated. Although the Employee was asked if she took days off because of her back, whether she answered, “Yes” (Tr. 145), as Cattles maintained, or, “[T]hat’s what happened if the timecard said that” (Tr. 167), as Blood maintained, no conclusion can be drawn from either response as to February 12. The question asked is imprecise and either answer is indeterminate. Further, the Secretary did not refute Blood’s testimony that the Employee was sent home from work on February 12 because of her emotional state, a condition unrelated to her February 6 injury. Tr. 153, 160-161.

An additional basis for finding the violations might have been the treatment the Employee received when she saw a doctor on February 7. The record establishes that the doctor provided her with pain killers and muscle relaxants. Tr. 139; Gov’t Exh. P-11. However, the record does not establish whether the painkillers and muscle relaxants were prescription or nonprescription, and it makes a difference. In general, the use of prescription medications is regarded as “medical treatment” under Part 50, making the injury triggering the use reportable. The use of nonprescription medications is regarded as “first aid,” making the injury triggering the use non-reportable. *See* 39 C.F.R. § 50.20-3.

Therefore, while the court finds a violation, it does so based on its conclusion the Secretary established on Thursday, February 7, and Monday, February 11, the Employee’s absences from work and thus her inability to perform all her job duties were the result of her February 6 injury.¹⁷

GRAVITY AND NEGLIGENCE

The parties agreed that the gravity of the violations and the negligence of the company were as found by the inspector. Tr. 15-16. Accordingly, the court finds that the violations were

¹⁷ The company’s assertions that the visits to doctors on February 7 and February 11 were not reportable because they were “diagnostic in nature” (Resp. Br. 21, 23), misses the point that the cause of the visits was the Employee’s pain that resulted from the February 6 injury and her need to seek treatment for that pain.

not serious and that the violation of section 50.20(a) (Citation No. 6556656) was due to the company's moderate negligence and the violation of section 50.11(b) (Citation No. 6556657) was due to the company's low negligence. Gov't Exh. P-7, Gov't Exh. P-14.

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>
6556660	11/22/13	50.20(a)

The citation states:

The operator failed to submit the Mine Accident, Injury, and Illness Report (MSHA Form 7000-1) for an occupational injury sustained on 5/29/2013 to employee number (611711), a miner working at the Northshore Mining Company, within ten working days after the occurrence of the injury. The employee sustained a lower back injury that caused him to miss one scheduled work day. As of today's date, a report of this injury has not been received by MSHA, approximately 180 days past the submittal date of the 7000-1 form. Mine management is aware of the reporting requirements regarding occupational injuries. This is the fourth citation for this standard during this audit.

Gov't Exh. P-23.

Bickel found that the alleged violation had no likelihood of causing an injury or illness and that the failure to report the injury was due to the company's moderate negligence. Gov't Exh. 23.

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>
6556661	11/22/13	50.11(b)

The citation states:

The operator's occupational injury investigation report for a miner at the Northshore Mining Company for the occupational injury occurring on 5/29/2013 to employee number (611711) did not include all required information as identified under 50.11(b). The investigation report did not include (2) the date the investigation began, (8) steps taken to prevent a similar reoccurrence, and (9) identification of any report under 50.20. This is the fourth citation for this standard during this audit.

Gov't Exh. 29.

Bickel found that the alleged violation had no likelihood of causing an injury or illness and that the failure to report the injury was due to the company's low negligence. Gov't Exh. P-29.

THE TESTIMONY

The citations were triggered by an event that occurred at the mine on May 29, 2013. The company's Incident Reporting Form states that the Employee stepped down to work on a screen and strained his back. Tr. 182; Gov't Exh. P-24. The form also states that as a result of the incident the Employee experienced, "Pain on the right side from lower back to the front." Tr. 182; Gov't Exh. P-24 at 2. Bickel understood that the Employee "was doing routine maintenance . . . removing grizzlies." Tr. 182. Bickel explained that "[g]rizzlies are screens" and from the description of the incident he supposed the Employee was picking up and moving the grizzlies. *Id.*

Bickel identified a four page report from a chiropractor who saw the employee on May 30, 2013, the day after the incident.¹⁸ Tr. 186; Gov't Exh. P-25. The chiropractor's diagnosis was "lumbosacral strain/sprain with radiculopathy." Gov't Exh. P-25 at 2. On the report, the chiropractor checked the box stating, "Employee is able to work without restrictions as of" but did not fill in a date. Tr. 187-188; Gov't Exh. P-25 at 3. The chiropractor's report also states that the Employee scheduled a return visit to the doctor on the following day, May 31, 2013. Tr. 188; Gov't Exh. P-25 at 2, 3. After the follow-up visit, the chiropractor checked the box on the form in front of the statement: "Employee is able to work without restrictions as of" and the chiropractor filled in a date, "June 3, 2013." Tr. 188; Gov't Exh. P-25 at 4. Bickel was asked by the Secretary's counsel, "Based on this documentation [(Gov't Exh. P-25)], does this lead you to believe there was . . . evidence that there was a reportable injury." Bickel replied, "Yeah, because it's documentation that he did actually go to the chiropractor." Tr. 189.

Bickel testified that the audit team interviewed the Employee. The team gave Bickel a list of questions the team members asked and answers the Employee gave. Tr. 190-191; Gov't Exh. P-26. The most significant question and answer in Bickel's opinion was, "Do you remember if you worked the day after the accident?" The team characterized the Employee's response as, "Took the day off because of sore back & went to chiropractor." Tr. 191; Gov't Exh. P-26. Bickel further noted that the audit team asked the Employee whether the day after the accident was a scheduled vacation day, and the Employee responded, "No." *Id.* The Employee's reported answers indicated to Bickel that the Employee "didn't work . . . [the day after the accident] because he had a sore back and he went to the chiropractor because of it." Tr. 192.

Bickel also identified a copy of the Employee's electronic time card for May 18 through June 2, 2013. Gov't Exh. P-27; Tr. 193. Bickel received a copy of the card from the audit team. Tr. 194. Bickel interpreted the time card as confirming that the Employee came to work on May 29 but did not come to work on May 30, the day after the incident. Tr. 195. Summing up what all of the documents indicated, Bickel stated, "I determined that [the Employee] hurt his back

¹⁸ The report came to Bickel's attention after he wrote the citations. Indeed, Bickel saw the report for the first time the day prior to the hearing. The report was among the documents turned over to the Secretary by the company as a result of discovery. Tr. 185.

bad enough on . . . [May 29] that he didn't go to work on the 30th and took that day to go to . . . see the chiropractor and that it caused him to miss a day of work, and that's a reportable injury." Tr. 195; *see also* Tr. 204.

Bickel testified that he also reviewed Cattles' notes. Tr. 196; Gov't Exh. P-28. The notes stated the Employee saw a doctor on May 30, 2013, and also on the following day. Gov't Exh. P-28. In Bickel's view, the notes gave him "information that [the Employee] did go to the chiropractor on May 30th, the day that he did not work." Tr. 196.

Bickel agreed with counsel for the company that, "merely because one medical professional might say something or merely because somebody visits a medical professional doesn't necessarily make an injury reportable by itself." Tr. 202. However, Bickel noted that the definition of "occupational injury" includes the phrase "inability to perform all job duties on any day after an injury" (30 C.F.R. § 50.2(e)), and he concluded this phrase applied to the Employee. Tr. 208-209.

The Employee, a maintenance mechanic who during May 2013 was assigned to work at the crusher, was called to testify by the company. Tr. 225-226. His regular weekly work schedule during May was four 10 hour days, Monday through Thursday. *Id.* The Employee testified that on May 29 he was taking out the upper screen panels on the crusher and putting in new panels. Tr. 227, 238. The job is performed once a week. Tr. 238. After the parts are removed from the crusher they are dropped into a work box. The box is located below the Employee. Tr. 227. The Employee stated that toward the end of his shift on May 29, he stepped down from where he was working, and he stepped into the box. As he did so he felt a "pull" and pain in his right hip. *Id.* It felt like his hip "pop[ped] . . . a little bit." Tr. 228. The Employee mentioned what happened to a miner with whom he worked, but because the "pop" "[d]idn't seem like anything major," the Employee did not mention the incident to his supervisor. Tr. 228-229. Rather, he finished his shift and went home. At the time he felt, "all right." Tr. 229.

The following day, May 30, was a Thursday. In the morning the Employee felt about the same as he had the night before. So, he drove to work. *Id.* When he got to the facility he spoke with his supervisor and told him if there was not a heavy workload that day, he would take the day off to see a chiropractor.¹⁹ Tr. 230. The Employee maintained he would have worked on May 30 if he was needed. He testified, "If the workload was heavy, I would have stayed[.]" Tr. 234. As evidence that he would have stayed on the job had there been a lot of work, the Employee, who lives 60 miles from Silver Bay, stated, "I wouldn't have drove 60 miles . . . to tell . . . [my supervisor] that I was going to take the day off. I would have just took the day off if I was hurt."²⁰ Tr. 230.

¹⁹ This was not the Employee's first visit to a chiropractor. He had seen one when he hurt his back while working for another company. Tr. 231.

²⁰ Putting it another way, the Employee testified if he had not felt able to work he, "would have just called in and told [his supervisor] what happened and took the day off." Tr. 232.

According to the Employee, he explained what happened, and the supervisor told the Employee it was okay with the supervisor if the Employee took the day off, but first the supervisor wanted to talk to Scott Blood. Tr. 231. After the supervisor spoke with Blood, the Employee was asked to complete an Incident Reporting Form before he left to see the chiropractor. Tr. 234-235, 237; Gov't Exh. P-24. The Employee stated that although his supervisor helped him complete the form, he, the Employee, provided all of the information on the form. Tr. 235.

The Employee then left the facility and drove to the chiropractor. After a session with the chiropractor, the Employee testified that he felt "a little bit" better. Tr. 232. He emphasized, however, that his discomfort "wasn't that major to start with." Tr. 232-233. In addition to seeing the chiropractor on May 30, he also saw the chiropractor again on May 31. Tr. 235-236. The Employee was next scheduled to report to work on Monday, June 3, which he did. Tr. 233.

The day the Employee took to go to the chiropractor (May 30) was treated by Northshore as a vacation day. Tr. 239-240. Northshore's employees get up to 3 days of paid time off if they are excused from work by a doctor. According to the company, the Employee elected to take the day as a vacation day. If he had to go to a doctor for a work-related injury, the company would have given him a paid day off to do it and he would not have had to take a vacation day. Tr. 242. However, because the Employee maintained he could work, but nonetheless elected to go to the chiropractor, the company viewed the day as a vacation day. Tr. 244-245.

THE VIOLATION

The existence of the alleged violations depends on whether the May 29 incident was reportable. The record unequivocally establishes that on May 29 the Employee hurt his back while at work (Tr. 182-183, 228); and that on the following day he left work in order to be examined and treated by a chiropractor for a "strained back" resulting from the previous day's incident and causing "[p]ain on the right side from [his] lower back to the front," Tr. 230-231; Gov't Exh. P-24 at 12. The examination included an assessment of spinal "tenderness" and a "soft tissue evaluation." Gov't Exh. P-25. The doctor diagnosed the employee as suffering from a "lumbosacral strain/sprain with radiculopathy" and scheduled the Employee for a follow up visit the next day (May 31), an appointment the employee kept.²¹ Tr.187; Gov't Exh. P-25 at 2.

The visit to the chiropractor on May 30 might have constituted medical treatment had the Secretary established such treatment was administered, but he did not. At most the record establishes that on May 30 the doctor engaged in a physical examination that was diagnostic in nature. The Secretary's regulations explaining the differences between "medical treatment" and "first aid" clearly place diagnostic examinations outside the parameters of "medical treatment." 30 C.F.R. § 50.20-3(a). The court recognizes that the Employee testified he felt "a little bit" better after his May 30 visit, but the record does not indicate why he felt that way. Tr. 232. Was

²¹ Radiculopathy is most commonly exhibited as lower back pain, at times radiating down the leg. Its cause is nerve damage. See *Spine Universe*, <http://www.spineuniverse.com/conditions/back-pain/low-back-pain/lumbar-radiculopathy-low-back-leg-pain>. (last visited October 20, 2015).

it the result of treatment he received? The employee was not asked, and the doctor's records do not indicate what, if any, treatment was given. *See* Gov't Exh. P-25 at 1-2. For these reasons the court concludes the Secretary did not establish that the injury resulted in medical treatment. The question then is whether he proved the injury resulted in the inability of the Employee to perform all of his job duties on any day after May 29 due to a condition resulting from the May 29 incident, and the court finds he did not.

May 29, 2013, was a Wednesday. The Employee's next scheduled work day was May 30. On that day the Employee sought and was given time off to visit the chiropractor. The problem for the Secretary is that the record does not support finding that the "lost workday is the direct consequence of the injured miner's inability to work as a result of the injury." *Consolidation Coal Co.*, 11 FMSHRC at 972. The Employee's testimony that he could and would have worked if the day's workload required it was credible. Tr. 230, 232, 234. Being well acquainted with the joys of commuting, the court finds the Employee's statement that he would not have driven 60 miles to his job site if he knew he could not work to be inherently reasonable and supportive of the Employee's credibility. Tr. 230. Unlike the Employee discussed with regard to Citations No. 6556660 and 6556661, the court concludes the subject Employee's post-incident condition was not one of discomfort or pain keeping him from working and causing him to seek prompt medical relief. Rather, his condition was, as he testified, one wherein he knew he "did something," something that "was nothing major." Tr. 229. For the Employee, securing medical treatment was secondary to fulfilling his obligations to his employer and visiting the chiropractor on May 30 was not the direct consequence of the Employee's inability to work as a result of the May 29 incident. Rather, the court concludes it was the direct consequence of Northshore not having a heavy work schedule on May 30. For these reasons, the court finds that the May 29 incident was not reportable and that the Secretary did not prove the alleged violations.²²

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>
6556666	11/22/13	50.20(a)

The citation states:

The operator failed to submit the Mine Accident, Injury and Illness Report (Form 7000-1) for an occupational injury sustained on 12/24/2012 to employee number (612047), a miner working at the Northshore Mining Company, within ten working days after the occurrence of the injury. The employee sustained a laceration injury that required medical treatment. As of today's date, a report of this injury has not been received by MSHA,

²² The court focuses on May 30 because it agrees with Northshore that the Employee's visit to the chiropractor on Friday, May 31 is not relevant. Resp. Br. 35 n.27. As Bickel noted, the Employee was not scheduled to work on Fridays and there is no evidence that Friday, May 31, was an exception. Tr. 226.

approximately 600 days past the submittal date of the 7000-1 form. Mine management is aware of the reporting requirements regarding occupational injuries. This is the sixth citation for this standard during this audit.

Gov't Exh. P-30.

Bickel found that the alleged violation had no likelihood of causing an injury or illness and that the failure to report the injury was due to the company's moderate negligence. Gov't Exh. P-30.

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>
6556667	11/22/13	50.11(b)

The citation states:

The operator's occupational injury investigation report for a miner at the Northshore Mining Company for the occupational injury occurring on 12/24/2012 to employee number (612047) did not include all required information as identified under 50.11(b). The investigation report did not include (2) the date the investigation began, (3) investigators names, (8) steps taken to prevent a similar reoccurrence, and (9) identification of any report under 50.20. This is the sixth citation for this standard during this audit.

Gov't Exh. P-34.

Bickel found that the alleged violation had no likelihood of causing an injury or illness and that the failure to report the injury was due to the company's low negligence. Gov't Exh. P-34.

THE TESTIMONY

Bickel testified he cited the company because a subject Employee sustained a laceration to his face that required medical treatment. Tr. 247. Before issuing the citations Bickel reviewed the company's Incident Reporting Form. Tr. 247-248; Gov't Exh. 31. He testified the form didn't "contain a lot of information" aside from the fact that it stated the Employee injured both of his lips. Tr. 248. While this was "not enough information . . . to base a citation on . . . it indicated [to Bickel that he] should look into [the incident] some more." *Id.* So, Bickel reviewed a record of the Employee's visit to the Emergency Room (the "ER") of the Lake View Medical

Clinic on December 24, the same day as the incident.²³ Gov't Exh. 32. Bickel testified that the record:

gives what happened to the patient where he was struck by a piece of metal . . . in the lips while he was working, resulting in a lacerated upper and lower lip The assessment for his injury is that there is [*sic.*] lip lacerations and then a discussion of what the plan should be where the doctor or the person seeing him suggested closing the wounds using sutures and they ended up using butterfly stitching to close the wound.[²⁴]

Tr. 248-249.

Bickel also noted that on page 2 of the record, ER doctor, Jonathan Edel, states:

I tried to discuss with the patient the fact that I would recommend suturing with dissolvable sutures for treatment of the lower lip laceration. I also explained that the upper lip laceration was superficial and would not require sutures. I further explained . . . that suturing for the lower lip laceration would provide a more reliable closure. However the patient stated that he did not want sutures. I did explain to the patient that this is certainly a closure option, although [it] is not an optimal closure option. However, because the lower lip laceration was non-gaping in its . . .

²³ Located in Two Harbors, Minnesota, the Lake View Medical Clinic is part of St. Luke's Health Care System, Duluth, Minnesota. The Clinic offers, primary care, specialty care and urgent care. St. Luke's, <http://www.slhduluth.com/Find-a-Location/Lake-View-Medical-Clinic.aspx> (last visited October 20, 2015).

²⁴ Although Bickel used the term "butterfly stitching," the emergency room record uses the term, "steri-strips." Tr. 249; *See* Gov't Exh. 32 at 2. "Steri-Strips" is a brand name for a type of adhesive bandage that is also referred to as a "butterfly closure." *Wikipedia – The Free Encyclopedia*, https://en.wikipedia.org/wiki/Butterfly_closure (last visited October 20, 2015). An internet entry for "Butterfly closures" explains, "Butterfly closures are adhesive bandage strips which can be used to close small wounds. They are applied across the laceration in a manner which pulls the skin on either side of the wound together. Butterfly closures may be used instead of sutures . . . in some injuries, because they lessen scarring and are easier to care for." *Id.*

configuration, I [thought] it would be possible to [S]teri-[S]trip the lower lip laceration given the patient's strong preferences for no suturing The patient again stated that he would strongly prefer closure by [S]teri-[S]trips. The patient's lip lacerations [were] cleansed . . . and then irrigated The wounds were then re-approximated and closed with [S]teri-[S]trips. The patient was provided with wound care instructions. The patient was instructed to return to the ER should he note any signs . . . of wound infection [The] patient was discharged from the ER in stable condition.

Gov't Exh. 32 at 2.

Bickel further noted that the ER record describes the lower lip laceration as 1 cm long and the upper lip laceration as 0.5cm long. Gov't Exh. 32 at 1. According to Bickel, the use of Steri-Strips to close the wound means that the injury was reportable, and he based the citations on the fact that the strips were used.²⁵ Tr. 252, 257. He maintained the strips were the same as butterfly closures. Tr. 257.

The Employee testified that he is a crusher operator at the plant and that one of his duties is to maintain equipment. In December 2012, he worked "swing shifts." Tr. 259. On a "swing shift" he works some days and some nights. *Id.* He worked the night shift on Christmas Eve/Christmas Day 2012 (6:00 p.m. to 6:00 a.m.). Tr. 260. Around 10:30 p.m. on Christmas Eve he was using an impact wrench to take a bolt out of part of an ore crusher when a piece of the wrench socket broke off.²⁶ The metal flew into the Employee's face where it struck and cut the Employee's lips. Tr. 261.

The Employee described the cuts as "just . . . little slit[s]" *Id.* The cut on the upper lip, which did not bleed, was, "almost like a scratch." Tr. 262. The cut on the lower lip, which also did not bleed, was "a little deeper" than the cut on the upper lip. *Id.* The Employee explained that eight years before he had been in an automobile accident and had badly cut his lower lip and chin. The cuts were repaired with what the employee described as "cosmetic surgery." Tr. 263. The surgery resulted in a scar on his lower lip. The lower lip cut he received on December 24 was "right on the scar." Tr. 263. It "followed the same line." *Id.* The Employee testified that he had been hit other times in the area of the scar, and the hits usually caused the area to reopen. *Id.*

²⁵ Counsel for the Secretary: And was the basis of these citations, that Steri-Strips were used?

Witness Bickel: Yes.

Tr. 257.

²⁶ The Employee described the wrench as the "[s]ame thing you'd see on NASCAR that take a tire off." Tr. 261.

As a result, whenever he received a cut on his lower lip, he always had the area cleaned and taped with Steri-Strips, which are less intrusive than sutures. *Id.* According to the Employee a Steri-Strip is not the same thing as a butterfly bandage.²⁷ Tr. 264.

After the incident and before he went to the ER, the Employee testified that he contacted his acting supervisor, Ryan Christianson. Tr. 264-265. Upon learning what happened, Christianson called Scott Blood and described the situation to Blood. Blood told Christianson to send the Employee to the clinic ER (Tr. 276), which Christianson did. Tr. 265. In addition to speaking with Christianson, the Employee told Scott Blood about the incident. *Id.* Blood asked the Employee to let him know what happened at the ER. *Id.*

The Employee described his ER visit as follows:

[T]he nurse cleaned up [the cuts] and the doctor [(Dr. Edel)] came in, looked at it, and asked me about my chin and what the scar was and stuff, and we talked a little bit and I told him I was taped in the past and he said you could tape it.

Tr. 266.

The Employee remembered the doctor telling him taping the cuts “would work, as long as you keep it clean.” Tr. 267. The Employee stated that the doctor taped his lower lip with two Steri-Strips and his upper lip with one Steri-Strip. *Id.* When asked about the doctor’s statement in the emergency room record (Gov’t Exh. 32 at 2) that “suturing for the lower lip laceration would provide a more reliable closure” (*Id.*), the Employee maintained that the statement was not accurate, that the doctor “did not push for stitches or sutures or nothing.” Tr. 268. The Employee was adamant that the doctor did not tell him it was necessary to have the cut sutured and did not try to convince him to have the procedure done. Tr. 269. Rather, the doctor agreed to use Steri-Strips.²⁸ *Id.*

After the ER visit, the Employee returned to work. *Id.* Upon arriving at the plant, the Employee told Scott Blood that his lips had been taped and that he could resume his job. Tr. 276. The Employee completed the rest of his shift. Tr. 270. He also worked the following day, which

²⁷ Scott Blood, in addition to being the mine’s safety director, is an EMT on the Silver Bay Fire and Rescue Squad. Tr. 274. He testified that as an EMT he used both butterfly bandages and Steri-Strips numerous times. Tr. 274-275. He described a butterfly bandage as “a closure that is designed to pull a wound together and maintain access to that wound so you can see that it’s . . . healing properly.” Tr. 274. He described a Steri-Strip as “a piece of bandage or tape, sticky tape that’s designed to cover a wound to keep it clean.” Tr. 275. Like the Employee, he maintained that a butterfly bandage is not the same as a Steri-Strip. *Id.*

²⁸ As the Employee recalled, the doctor said sutures or stitches “as far as cosmetic . . . would be better but a strip would work as long as I followed the guidelines of keeping it clean.” Tr. 271.

was his next regularly scheduled shift. Tr. 269. The employee wore the Steri-Strips for approximately five days. Tr. 271. The Employee believed the strips were effective. He stated that after they came off, his lips looked the same as they did before the incident. Tr. 272.

Scott Blood was asked why he decided the incident was not reportable. Blood stated that he made his decision based on three things: (1) the treatment the Employee received; (2) page 3 of the ER record (Gov't Exh. P-32 at 3^[29]); and; (3) speaking with the Employee. Tr. 277.

Kathy Cattles identified her "handwritten notes on [the] possible injury." Tr. 217; Gov't Exh. P-33. Prior to writing her notes, Cattles testified that she reviewed Northshore's Incident Reporting Form. Tr. 217; Gov't Exh. P-31. She also reviewed the ER record. Tr. 218; Gov't Exh. P-32. According to Cattles, the thing that caught her attention was that the Employee was injured on December 24 and visited a doctor the same day. Tr. 223.

THE VIOLATION

As with all of the other violations, the question of whether the subject citations are valid hinges on whether the Employee suffered an "occupational injury" as defined in section 50.2(e). It is beyond dispute that the Christmas Eve incident meets parts of the definition. "Injury" is defined in part as, "Damage or harm done to or suffered by a person or thing." *The American Heritage Dictionary of the English Language*, Fourth Edition (2009) at 902. The incident resulted in an "injury" in that a metal piece of the wrench hit the Employee in the face cutting his lips and thus causing "[d]amage or harm to" the Employee. *Id.* There is really no dispute about this. There is also no dispute that the Employee was a miner and that the incident occurred at a mine. The incident did not result in death, loss of consciousness, or the inability of the Employee to perform his job duties or in his transfer to another job. Therefore, the only question is whether the treatment the Employee received at the ER was "medical treatment" as the term is defined in the regulations.

As previously noted, the Secretary has differentiated between "medical treatment" and "first aid." 30 C.F.R. § 50.20-3(a). For "cuts and lacerations" (the type of injuries the Employee experienced) "first aid" is in part limited to "cleaning a wound, soaking, applying antiseptic and nonprescription medication and bandages on the first visit." 30 C.F.R. § 50.20-3(a)(4)(i) (*referencing* 30 C.F.R. §50.20-3(a)(1)(i)). The criteria also state that "butterfly [bandages]" used for "cosmetic purposes only can be considered first aid," but that "butterfly [bandage] closures for non-cosmetic purposes, [and] sutures (stitches)" are among the things included in "medical treatment." 30 C.F.R. § 50.20-3(a)(4)(;) 50.20-3(a)(4)(ii).

The question must be resolved within the context of the Employee's Christmas Eve visit to the ER, and in the court's opinion, the issue is not a close call. First, the court finds Dr. Edel's

²⁹ Page 3 constitutes the employee's discharge instructions. The instructions note that the Employee was examined for facial lacerations and that rather than stitches, Steri-Strips were used to close the wounds. The instructions also admonish the patient to keep the wound and/or dressing clean and dry and to watch for signs of infection. Gov't Exh. P-32 at 3. Blood testified that he did not see pages 1 and 2 of the ER record until he participated in the Part 50 audit. Tr. 277.

assessment to be highly persuasive. Gov't Exh. P-32. The doctor examined the Employee and then diagnosed the Employee as having two lacerations, one superficial on his mid-upper lip and a more serious "non-through and through laceration on [his] mid-lower lip." *Id.* at 1. Dr. Edel recommended "suturing with dissolvable sutures for the lower lip laceration" as a treatment that would provide "a more reliable closure." *Id.* at 2. The upper lip, in Dr. Edel's opinion "was superficial and would not require sutures." *Id.* In the event, because the Employee insisted, Steri Strips were applied to both lacerations.³⁰ *Id.*, Tr. 267. Had the laceration to the Employee's lower lip been sutured, the suturing would have been reportable "medical treatment." 30 C.F.R. § 50.20-3(a)(4)(ii). The court deems the Steri Strip that was applied to his lower lip as equivalent to the sutures. Sutures were the preferred medical course, and it would undermine the purpose of the reporting requirements to allow a layman's choice of a medically less desirable procedure to render the treatment non-reportable.

Second, the court finds the use of the Steri Strip on the Employee's lower lip was in fact "medical treatment" because it was not applied solely for "cosmetic purposes" but primarily to close the laceration on his lower lip. It was for all intents and purposes equivalent to, though less effective than, the use of sutures.

GRAVITY AND NEGLIGENCE

The parties agree that the gravity of the violations and the negligence of the company were as found by Bickel. Tr. 15-16. Accordingly, the court finds that the violations were not serious and that the violation of section 50.20(a) (Citation No. 6556666) was due to the company's moderate negligence and the violation of section 50.11(b) (Citation No. 6556667) was due to the company's low negligence. Gov't Exh. P-30, Gov't Exh. P-34.

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>
6556658	11/22/13	50.20(a)

The citation states:

The operator failed to submit the Mine Accident, Injury and Illness Report (MSHA Form 7000-1) for an occupational injury sustained on 5/23/2013 to employee number (612889), a miner working at the Northshore Mining Company, within ten working days after the occurrence of the injury. The employee sustained an eye injury that required medical treatment. As of today's date, a

³⁰ The court does not credit the Employee's testimony that Dr. Edel did not try to convince the Employee to have his lower lip sutured. The doctor's assessment, dictated at 6 minutes before midnight on December 24, when the just past ER events were fresh in the doctor's mind, convinces the court otherwise. Gov't Exh. P-32 at 2. Moreover, although Dr. Edel may not have told the Employee it was "necessary to have a stitch," (Tr. 269), sutures were in his informed opinion the best medical option, and the court believes this opinion was clearly conveyed to the Employee. Gov't Exh. P-32 at 2.

report of this injury has not yet been received by MSHA, approximately 180 days past the submittal date of the 7000-1 form. Mine management is aware of the reporting requirements regarding occupational injuries. This is the third citation for this standard during this audit.

Gov't Exh. P-15.

Bickel found that the alleged violation had no likelihood of causing an injury or illness and that the failure to report the injury was due to the company's moderate negligence. Gov't Exh. P-15.

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>
6556659	11/22/13	50.11(b)

The citation states:

The operator's occupational injury investigation report for the occupational injury occurring on 5/23/2013 to employee number (612889) did not include all required information as identified under 50.11(b). The investigation report did not include (2) the date the investigation began, (8) steps taken to prevent a similar reoccurrence, and (9) identification of any report under 50.20. This is the third citation for this standard during this audit.

Gov't Exh. P-22.

Bickel found that the alleged violation had no likelihood of causing an injury or illness and that the failure to report the injury was due to the company's low negligence. Gov't Exh. P-22.

THE TESTIMONY

The incident triggering the citations was "an eye injury that required medical treatment." Tr. 284; Gov't Exh. P-15. Bickel noted that prior to issuing the citations he reviewed an Incident Reporting Form dated May 23, 2013. Tr. 285; Gov't Exh. P-16. The form indicates on May 23, 2013, the subject Employee was working at the oiling station on the west side of Furnace 12 when a small piece of dirt lodged in his right eye.³¹ Tr. 285; Gov't Exh. P-16 at 1, 2. The form also states that the Employee's right eye was "[i]mmediately flushed . . . with [a] saline solution [and] then [with] tap water." Gov't Exh. P-16 at 4.

³¹ The Form describes the object as a "small fragment of dirt or something." Gov't Exh. P-16 at 2. Bickel described the foreign body as, "apparently taconite dust." Tr. 285

Bickel also reviewed a discharge instruction form from the Lake View Clinic ER. The form is dated May 23, 2013. Tr. 287; Gov't Exh. P-17. The document indicates that the Employee visited the clinic on May 23 and that "he was given instructions to use artificial tears every three to four hours and . . . wear dark glasses and return for further treatment if it's needed." Tr. 286-287; see Gov't Exh. P-17 at 1. Bickel considered the instruction to be "part of the evidence [he] looked at to see what type of treatment [the Employee] received." Tr. 287.

Bickel also looked at a follow up report from the clinic. Tr. 287, Gov't Exh. P-17 at 3. The report is dated May 29, 2013, six days after the initial incident. Tr. 287. In the report the attending physician diagnoses the employee as having a "corneal FB [(‘foreign body’)]" in his right eye and states that the foreign body was removed. Tr. 287; Gov't Exh. P-17 at 2. The Employee was prescribed Ibuprofen and Tylenol every six hours if needed, was advised to keep his right eye closed, and was restricted from work for the rest of the day. Gov't Exh. P-17 at 2. An additional document from the clinic entitled "Urgent Care Note" further describes the employee's May 29 visit to the facility. In the document Dr. Joel Thompson, who saw the Employee on May 29, states:

This patient was seen by Dr. Cohen last week for a foreign body that dropped into his right eye on 05/23/2013. . . . Dr. Cohen found a small round peripheral corneal body in the interior portion of the cornea and removed that with tetracaine anesthesia. [The Employee] was sent home and told to return if he did not get complete clearance of it. The patient is doing so now after six days of continued discomfort. It has not affected his vision.

Gov't Exh. P-17 at 3.

Bickel believed Dr. Thompson's findings upon examining the Employee to be relevant. The doctor wrote, "The right eye is irritated. [The Employee] has a brown, rust type lesion just at the edge of his visual axis at 6 o'clock. There is no other foreign body on the cornea. After tetracaine anesthetic was applied his symptoms were alleviated." Gov't Exh. P-17 at 3; Tr. 288. In addition, Bickel found the procedure Dr. Thompson performed on the Employee to be significant. Dr. Thompson stated, "With control, a slit lamp and eye foreign body spud, we were able to remove the rust foreign body near completely below the right eye visual axis. In so doing it did cause some blurring of his vision." Gov't Exh. P-17 at 3; Tr. 288. Bickel described a "foreign body spud" as "an instrument that has . . . different shaped ends, depending on what they want to do with it." Tr. 289. Bickel understood that it was used to scrape foreign bodies off the eye. *Id.*

In Bickel's opinion, Dr. Thompson's description of the procedures he used to remove the foreign body (Gov't Exh. P-17 at 3) was a basis for determining the Employee suffered an occupational injury. Bickel stated that the doctor's comments documented the Employee,

had something in his eye for six days, it was bothering him for six days, and that to remove it they couldn't just

flush it out or . . . use a cotton swab or something. They had to use . . . an instrument to remove it because it was lodged in the eye enough that they had to use that foreign body spud to do it. Tr. 289.

Bickel further found the company's "Report on Workability" to be relevant. Gov't Exh. P-18; Tr. 290. The report states that the Employee was unable to work on May 29, 2013, and that he returned to work with no limitations on May 30. *Id.* Bickel stated that the document provided evidence that the Employee was unable to work on May 29 because he underwent a corneal scraping. Tr. 292.

Prior to issuing the citations Bickel reviewed Kathy Cattles' notes dated November 14, 2013. Tr. 293; Gov't Exh. P-20. It was significant to him that Cattles questioned if the incident of May 23 resulted in a one day work restriction. Tr. 293; Gov't Exh. P-20. Bickel also found it significant that the Employee's time card, which was provided to him by the audit team, indicated that the Employee was allowed six hours of "PT" on Wednesday, May 29.³² According to Bickel, the six hours "appeared to be a doctor appointment." Tr. 294; *see also* Tr. 296-297; Gov't Exh. P-21.

Bickel was asked by the court to sum up why he thought the Employee experienced an "occupational injury." He responded:

[O]ne, he required medical treatment because he had material in his eye that could not be removed just by flushing it. They actually had to use an instrument to -- it was embedded in the eye enough that they had to scrape it out, and I felt that met the definition of a medical injury. And the second reason is on the 29th, it appeared that he was on restricted work duty . . . [A]n injury that results in restricted work duty meets the definition of an occupational injury.

Tr. 301.

On cross examination, Bickel admitted that he never had seen a foreign body spud. Tr. 302. ("I've seen pictures of them, but no, I haven't seen them." *Id.*) He further agreed that for there to be a reportable eye injury, a foreign body has to be "embedded" in the eye because, "That's the language used in the standard." *Id.* If the foreign body is not embedded, the treatment to remove the foreign body qualifies as non-reportable "first aid," not as reportable "medical treatment." Tr. 302-303. Finally, he agreed that if an employee misses time at work for "first aid," the incident causing the time off is not reportable. Tr. 303.

Kathy Cattles identified her notes that related to the eye injury. Tr. 219; Gov't Exh. P 20. The notes state the injury occurred on May 23, 2013, at 7:30 a.m. Gov't Exh. P-20. They also state that the injury resulted in two doctor's visits. *Id.* Cattles asked the auditors to confirm the

³² Bickel was not sure but thought "PT" stood for "part time." Tr. 294.

Employee visited a doctor on May 23, and on May 29, and to look into whether the doctor gave the Employee one day of restricted work. She also suggested the auditors ask the Employee about his work schedule. *Id.*

Cattles testified that prior to writing the notes she reviewed the company's Incident Reporting Form. Tr. 219; Gov't Exh. P-16. She also looked at the ER Adult Discharge Instruction form that pertains to the Employee's May 23 visit. Tr. 220; Gov't Exh. P-17. Further, she reviewed a company document entitled, "Report of Workability." Tr. 220; Gov't Exh. P-18. Finally, she reviewed the discharge instruction form that is dated May 29, 2013, and which states in part that the Employee suffered an eye injury, that he is unable to work on May 29, 2013, but that he can return to work with no limitations on May 30. Tr. 220; Gov't Exh. 18. Cattles turned the documents over to the leader of MSHA's audit team who in turn gave them to the MSHA district manager. Tr. 220. Subsequently, the citations were issued.

Scott Blood testified that the Employee was terminated approximately 10 months before the hearing and that he (Blood) did not know where the Employee lives. Tr. 305. According to Blood, when the Employee worked for Northshore, he was a lube technician in the pellet plant, a job that required him to keep equipment greased. *Id.* On the morning of May 23, 2013, Blood was in his office when he received a telephone call from the Employee. The Employee told Blood he had something in his eye and that he had tried unsuccessfully to flush it. The Employee came to Blood's office and Blood looked at his eye. Blood could not see anything but told the Employee that he, Blood, would take the Employee to the Lake View Clinic ER. Tr. 305-306. After they arrived at the ER, the Employee was seen by a doctor while Blood waited in an outer room. Blood testified that subsequently he asked the Employee what happened. The Employee told Blood the doctor looked in his eye, flushed it a little, could not see anything, and was discharging the Employee. Tr. 306. According to Blood, after leaving the ER, the men drove back to the plant where the Employee resumed his regular job. Tr. 307.

Northshore's counsel asked Blood to look at the ER Adult Discharge Instruction relating to the employee's May 23 visit. Tr. 307; Gov't Exh. P-17. One of the instructions was for the Employee to use 3 drops of "artificial tears" every three to four hours. Gov't Exh. P-17 at 1. Blood was asked if "artificial tears" is a prescription medication. Blood responded that it is an "over the counter" product. Tr. 307.

The company's counsel also showed Blood the Employee's time card. Tr. 307-308. Gov't Exh. P-21. Blood testified that after Thursday, May 23, the next scheduled work day for the employee was Monday, May 27, but because the 27th was Memorial Day, the Employee was next scheduled to work on Tuesday, May 28. Tr. 308. However, the Employee did not report for work on May 28 because, according to Blood, the Employee had "flexed his schedule" to work 10 hour days Wednesday (May 29), Thursday (May 30) and Friday (May 31). Tr. 309. The three days, plus Memorial Day, gave the Employee a 40 hour week. Thus, the Employee was only expected to work Wednesday through Friday after Memorial Day, not Tuesday through Friday. Tr. 309.

On Wednesday, May 29, the Employee worked four hours and then was given six hours of personal time. Tr. 309-310, Gov't Exh. P-21. The Employee left the facility after four hours of work and did not tell Blood or anyone else at the facility that he was going to see a doctor.

Tr. 317. Blood was asked about the notation on the Employee's time sheet for Wednesday, May 29, that reads, "Allowed Time PT – Dr Occ 520 6.0." He explained that "PT" stands for "personal time" and that, "Each employee gets 24 hours of . . . personal time allotted to them in a given year that they can use at their discretion. It's not something they need to schedule in advance." Tr. 310. According to Blood, the timecard shows the Employee used six hours of personal time on May 29, time that he happened to use to see a doctor. *Id.* The Employee came back to work on May 30 with no restrictions. Tr. 310-11.

Blood testified that on the morning of May 30 the Employee came to his office, dropped off his doctor's note from the day before, and told Blood he went to the doctor on May 29 because his eye still felt irritated. Tr. 311. The Employee stated that the doctor identified a "particle" in his eye. Tr. 311. Blood stated that the Employee referred to the implement used to remove the "particle" as a "Q-tip," but Blood maintained the correct term for the tool is a "foreign body spud."³³ Tr. 312. Because of his EMT training Blood was familiar with foreign body spuds. He stated that they "used to take objects out of an eye." Tr. 312. Blood described such a spud as "noninvasive" in that the spud "just takes a superficial piece off the eye." Tr. 313. Blood distinguished the "noninvasive" procedure experienced by the Employee from the procedure required when a particle is embedded in the eye. The latter experience was described by Blood as a "surgical procedure." Tr. 314. Blood understood that when the employee first went to the ER on May 23, the attending doctor could not find anything to remove. It was on May 29 that the doctor used "a magnifying glass and was able to find something and swept it out." Tr. 315. Blood stated that he determined the incident was not reportable because the Employee, "missed no work, . . . was not restricted in any way, and there was no embedded object in [the Employee's] right eye." *Id.*

THE VIOLATION

The court finds that the Secretary did not prove the alleged violations. The record establishes that the Employee missed work on May 29 to seek treatment for the presence of a corneal foreign body injury that he received on May 23. In the court's view it is immaterial that the six hours of work the Employee missed to see the doctor was charged to him as personal time. It is the reason for taking the time off that is important. On May 29 the Employee took time off to seek and to receive treatment for his injury and in so doing he was unable to perform his job duties. However, the court agrees with Northshore that taking time off from work to visit a doctor does not necessarily make an injury reportable. Resp. Br. 31; Tr. 139. Even though by so doing the Employee literally exhibited an "inability to perform all of his job duties on any day after the injury" [*i.e.*, on May 29)] (30 C.F.R. § 50.2(e)), in the case of an eye injury, the Secretary still must prove the visit resulted in medical treatment [³⁴]. The

³³ A "spud" is defined as, "A blunt triangular knife used for removing foreign bodies from the cornea." *The American Heritage® Medical Dictionary* (2007, 2004) Houghton Mifflin Company. <http://medical-dictionary.thefreedictionary.com/spuds> (last visited September 11, 2015).

³⁴ To hold otherwise would make meaningless the Secretary's distinction between medical treatment and first aid (30 C.F.R. §50.20-3) since the purpose of the distinction is to render "nonreportable" injuries resulting in first aid.

Secretary failed because he did not prove the Employee received “medical treatment” on May 29.

In distinguishing between “medical treatment” and “first aid” for eye injuries, the Secretary specified that the removal of foreign material that is embedded in the eye is “medical treatment” and the removal of foreign material that is not embedded is “first aid.” 30 C.F.R. § 50.20-3(a)(5). The court recognizes that at first blush there is something bizarre about holding a corneal foreign body that is impervious to flushing and artificial tears and that remains on the cornea for six days and is removed with a “blunt triangular knife” (*see n. 36*) is not “reportable.” However, it is a fact that there are two types of corneal foreign bodies, those that lie on the surface of the eye’s cornea and those that are embedded in the cornea,³⁵ and the Secretary has legally recognized the distinction. 30 C.F.R. § 50-20-3(a)(5). There is no way to definitively conclude from the record whether the foreign body that afflicted the Employee’s right eye was lodged on the surface of his cornea or was imbedded in it. The medical records do not say and treating physicians were not called as witnesses and apparently were not deposed. *See Gov. Exh. P-17*. Thus, there is no way to determine whether the treatment he received on May 29 was “medical treatment” and his absence from work was reportable.

OTHER CIVIL PENALTY CRITERIA

The company’s undisputed history of previous violations shows that in the 15 months before the subject citations were issued, the company paid a total of 229 violations. Gov’t Exh. P-1. While this is a large history, its impact is somewhat moderated by the fact that the vast majority of the previous violations were not significant and substantial contributions to mine safety hazards. The parties did not stipulate as to the size of the operator, but the court takes note of the fact that in proposing penalties for the subject violations the Secretary found the operator to be large, something Northshore does not dispute. *See* Petition for Assessment of Civil Penalty, Exhibit A (March 4, 2014); 30 C.F.R. § 100.3(b). The parties stipulated that any penalties assessed will not impair the company’s ability to remain in business and that the company demonstrated good faith in abating the cited conditions. Tr. 15 (*referencing* Stipulations 7, 6).

³⁵ “A corneal foreign body is a piece of material on or embedded in the transparent structure at the front of the eye (cornea). Corneal foreign bodies are usually minor ocular trauma. A corneal foreign body often occurs when some force (e.g., wind or back draft from a power tool) blows a small particle into the eye that becomes lodged in the surface layer of the cornea (corneal epithelium). Often the particle is made of metal, glass, or organic material. Superficial corneal foreign bodies are much more common than deeply embedded corneal foreign bodies. Corneal foreign bodies are a common occupational hazard, causing ocular morbidity and loss of time from work.” *Reed Group, MD Guidelines*, <http://www.mdguidelines.com/foreign-body-cornea/definition> (last visited October 20, 2015).

ASSESSMENTS

<u>Citation No.</u>	<u>Date</u>	<u>30 CFR §</u>	<u>Proposed Assessment</u>	<u>Assessment</u>
6556654	11/22/13	50.20(a)	\$117	\$0

The court has found that the Secretary did not prove the violation. A penalty cannot be assessed.

<u>Citation No.</u>	<u>Date</u>	<u>30 CFR §</u>	<u>Proposed Assessment</u>	<u>Assessment</u>
6556655	11/22/13	50.11(b)	\$100	\$0

The court has found that the Secretary did not prove the violation. A penalty cannot be assessed.

<u>Citation No.</u>	<u>Date</u>	<u>30 CFR §</u>	<u>Proposed Assessment</u>	<u>Assessment</u>
6556656	11/22/13	50.20(a)	\$117	\$117

The court has found that the violation occurred. Based on the agreement of the parties the court also has concluded the violation was not serious and was due to the company's moderate negligence. Given these findings and the other civil penalty criteria the court finds the Secretary's proposed assessment is appropriate and it assessed Northshore \$117 for the violation.

<u>Citation No.</u>	<u>Date</u>	<u>30 CFR §</u>	<u>Proposed Assessment</u>	<u>Assessment</u>
6556657	11/22/13	50.11(b)	\$100	\$100

The court has found that the violation occurred. Based on the agreement of the parties the court also has concluded the violation was not serious and was due to the company's low negligence. Given these findings and the other civil penalty criteria the court finds the Secretary's proposed assessment is appropriate and it assessed Northshore \$100 for the violation.

<u>Citation No.</u>	<u>Date</u>	<u>30 CFR §</u>	<u>Proposed Assessment</u>	<u>Assessment</u>
6556660	11/22/13	50.20(a)	\$117	\$0

The court has found that the Secretary did not prove the violation. A penalty cannot be assessed.

<u>Citation No.</u>	<u>Date</u>	<u>30 CFR §</u>	<u>Proposed Assessment</u>	<u>Assessment</u>
6556661	11/22/13	50.11(b)	\$100	\$0

The court has found that the Secretary did not prove the violation. A penalty cannot be assessed.

<u>Citation No.</u>	<u>Date</u>	<u>30 CFR §</u>	<u>Proposed Assessment</u>	<u>Assessment</u>
6556666	11/22/13	50.20(a)	\$117	\$117

The court has found that the violation occurred. Based on the agreement of the parties the court also has concluded the violation was not serious and was due to the company's moderate negligence. Given these findings and the other civil penalty criteria the court finds the Secretary's proposed assessment is appropriate and it assessed Northshore \$117 for the violation.

<u>Citation No.</u>	<u>Date</u>	<u>30 CFR §</u>	<u>Proposed Assessment</u>	<u>Assessment</u>
6556667	11/22/13	50.11(b)	\$100	\$100

The court has found that the violation occurred. Based on the agreement of the parties the court also has concluded the violation was not serious and was due to the company's low negligence. Given these findings and the other civil penalty criteria the court finds the Secretary's proposed assessment is appropriate and it assessed Northshore \$100 for the violation.

<u>Citation No.</u>	<u>Date</u>	<u>30 CFR §</u>	<u>Proposed Assessment</u>	<u>Assessment</u>
6556658	11/22/13	50.20(a)	\$117	\$0

The court has found that the Secretary did not prove the violation. A penalty cannot be assessed.

<u>Citation No.</u>	<u>Date</u>	<u>30 CFR §</u>	<u>Proposed Assessment</u>	<u>Assessment</u>
6556659	11/22/13	50.11(b)	\$100	\$0

The court has found that the Secretary did not prove the violation. A penalty cannot be assessed.

ADMITTED VIOLATION

<u>Citation No.</u>	<u>Date</u>	<u>30 CFR §</u>	<u>Proposed Assessment</u>	<u>Assessment</u>
6556663	11/22/13	50.11(b)	\$100	\$100

At the beginning of the hearing, Counsel for the Secretary stated his understanding that the company had withdrawn its contest of the citation. Tr. 11. Counsel for the company did not disagree, and the court concludes the violation existed as charged. The court also affirms Bickel's gravity and negligence findings. The Secretary's proposed penalty is assessed.

ORDER

Citations No. 6556654, 6556655, 6556660, 6556661, 6556658 and 6556659 **ARE VACATED**. Within 30 days of the date of this decision, Northshore is **ORDERED TO PAY** the Secretary a civil penalty of \$534, and upon payment of the penalty this case is **DISMISSED**.³⁶

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

Distribution: (Certified Mail)

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/db

³⁶ Payment shall be sent to the: MINE SAFETY AND HEALTH ADMINISTRATION
U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, P.O. BOX 790390, ST. Louis, Mo
63179-0390.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 22, 2015

ALPHA HIGHWALL MINING, LLC,
and REVELATION ENERGY, LLC,
successor in interest,
Contestant,

v.

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

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

v.

ALPHA HIGHWALL MINING, LLC,
and REVELATION ENERGY, LLC,
successor in interest,
Respondent

CONTEST PROCEEDINGS

Docket No. KENT 2012-1207-R
Citation No. 8270168; 05/29/2012

Docket No. KENT 2012-1208-R
Citation No. 8270169; 05/29/2012

CIVIL PENALTY PROCEEDING

Docket No. KENT 2013-142
A.C. No. 15-19621-301671

Mine: Bucyrus Highwall Miner #76

DECISION APPROVING SETTLEMENT
AND
ORDER TO PAY

Before: Judge Feldman

These consolidated civil penalty and contest proceedings are before me based on a petition for assessment of civil penalty filed by the Secretary of Labor (“Secretary”) under section 105(d) of the Federal Mine Safety and Health Act of 1977, as amended (“the Act”), 30 U.S.C. § 815(d), against the Respondent, Alpha Highwall Mining, LLC (“Alpha Highwall”).

On March 11, 2015, the parties filed a joint motion to approve settlement naming Revelation Energy, LLC (“Revelation Energy”) as the successor in interest to Alpha Highwall. The parties’ settlement terms included a substantial reduction to the initial proposed civil penalty from \$90,000.00 to \$5,000.00. The substantial reduction in civil penalty is based, in large part, on the modification of 104(d)(1) Citation No. 8270168 and 104(d)(1) Order No. 8270169 to 104(a) citations, to reflect that the cited conditions were not attributable to unwarrantable failures. In further support of the substantial reduction in civil penalty, Revelation Energy, as the successor in interest to Alpha Highwall, has agreed to implement improved safety measures at the mine site:

In addition to the payment of [the agreed-upon \$5,000.00 civil penalty], [Revelation Energy] by virtue of its acquisition [of Alpha Highwall’s liability], [has] agreed to spend at least \$55,000 to purchase handheld two-way radios, cameras for the highwall miners, and shelters for the miners at [surface] mines operated by Revelation Energy [some of which were previously-operated by Alpha Highwall]. The handheld radios will be provided to the miners who work at the [surface] mines and the cameras and shelters will be installed on the highwall miners operated by Revelation Energy. [Revelation Energy] has agreed to purchase this equipment, and to install the equipment, at the mines by July 15, 2015. By this date, [Revelation Energy] has also agreed to provide the Secretary with receipts showing that the equipment was purchased. [Revelation Energy] has also agreed to update its ground control plan to specify that the equipment will be purchased and installed by July 15, 2015, and that the equipment will be maintained in good working order thereafter.

Jt. Mot. to Approve Settlement, at 2 (Mar. 11, 2015).

On April 9, 2015, I issued an Order Holding the Joint Motion to Approve Settlement in Abeyance, 37 FMSHRC 970 (Apr. 2015) (ALJ), contingent upon documented compliance by Revelation Energy of the acquisition and installation of the subject equipment specified in the parties’ settlement terms, as well as the required modification of Revelation Energy’s ground control plan.

On September 30, 2015, the Secretary filed a Motion for Final Order Approving Settlement asserting that:

Respondent has provided the Secretary with documentation and evidence demonstrating its implementation of the required cameras, shelters, and two-way radios, and has supplied the necessary revisions to its ground control plan. The Secretary is satisfied with Respondent’s compliance and requests that the administrative law judge approve the joint settlement filed on March 11, 2015.

Mot. for Final Order Approving Settlement, at 2 (Sep. 30, 2015).

I have considered the representations and documentation submitted in this matter and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act. **WHEREFORE**, the motion to approve settlement **IS GRANTED**, and pursuant to the parties' agreement, Alpha Highwall Mining, LLC, and Revelation Energy, LLC, **ARE ORDERED** to pay the \$5,000.00 civil penalty within 30 days of this Order in satisfaction of the two citations at issue.¹ Upon receipt of timely payment, the captioned matter **IS DISMISSED**.

/s/ Jerold Feldman
Jerold Feldman
Administrative Law Judge

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¹ Payment should be sent to the Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390. Please include the Docket No. and A.C. No. noted in the above caption on the check.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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October 22, 2015

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

v.

CONSOLIDATION COAL COMPANY,
Respondent

CIVIL PENALTY PROCEEDINGS

Docket No. VA 2012-42
A.C. No. 44-04856-269664

Docket No. VA 2013-192
A.C. No. 44-04856-311828

Mine: Buchanan Mine #1

DECISION AND ORDER

Appearances: Eric Johnson, Esq., Office of the Solicitor, U.S. Department of Labor,
Nashville, Tennessee, for the Petitioner

Billy R. Shelton, Esq., Jones, Walters, Turner & Shelton PLLC,
Lexington, Kentucky, for the Respondent

Before: Judge Rae

I. STATEMENT OF THE CASE

These cases are before me upon two petitions for assessment of civil penalties filed by the Secretary of Labor (“the Secretary”) pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, as amended, (“the Mine Act”), 30 U.S.C. § 815(d). At issue are three citations issued to mine operator Consolidation Coal Company (“Consol”) under section 104(a) of the Mine Act: Citation 8189820 in Docket Number VA 2012-42 and Citations 8202408 and 8197859 in Docket Number VA 2013-192.

A hearing was held in Kingsport, Tennessee on November 18, 2014, at which time testimony was taken and documentary evidence was submitted. The parties also filed post-hearing briefs. I have reviewed all of the evidence at length and have cited to the testimony, exhibits and arguments I found critical to my analysis and ruling herein without including a detailed summary of the testimony given by each witness. Based upon the entire record and my observations of the demeanor of the witnesses, I uphold or uphold and modify each of the citations as set forth below.

II. BACKGROUND

The three citations at issue in this docket were issued at different times by different MSHA inspectors at the Buchanan Mine #1, which is a large underground coal mine located in Buchanan County, Virginia. The factual circumstances surrounding each of the alleged

violations are set forth in the body of my decision below. The parties have stipulated to the following facts:

1. During all times relevant to this matter, Consolidation Coal Company (Respondent) was the operator, as defined in Section 3(d) of the Mine Act, 30 U.S.C. § 802(d), of the Buchanan No. 1 mine, Mine ID No. 44-04856.
2. The Buchanan No. 1 mine is a “mine” as that term is defined in Section 3(h) of the Mine Act, 30 U.S.C. § 802(h).
3. At all material times involved in this case, the products of the Buchanan No. 1 mine entered commerce or the operations or products thereof affected commerce within the meaning and scope of Section 4 of the Mine Act, 30 U.S.C. § 803.
4. Respondent is large in size, having produced 5,654,353 tons of coal at its Buchanan No. 1 mine in 2011 and 3,506,216 tons in 2012.
5. The proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judges pursuant to Sections 105 and 113 of the Mine Act, 30 U.S.C. §§ 815 and 823.
6. MSHA Inspectors Jason D. Hess, William G. Ratliff, and Paul E. Smith, whose signatures appear in Block 22 of Citation Numbers 8202408, 8189820, and 8197859, respectively, were acting in their official capacity and as authorized representatives of the Secretary of Labor when they issued the citations.
7. The citations at issue in this proceeding were properly served by duly authorized representatives of the Secretary of Labor, Mine Safety and Health Administration, upon an agent of Respondent.
8. The total proposed penalties for the citations will not affect Respondent’s ability to continue in business.

Joint Exhibit 1; Tr. 6.¹

III. LEGAL PRINCIPLES

A. Gravity/Significant & Substantial (S&S) Designation

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 *Mathies Coal Company*, the Commission set forth the following four-part test to determine whether a violation is properly designated S&S:

¹ In this decision, the abbreviation “Tr.” refers to the transcript of the hearing. The Secretary’s exhibits are numbered S-1 to S-11 and the Respondent’s exhibits are numbered R-3 and R-4.

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

6 FMSHRC 1, 3-4 (Jan. 1984); *accord Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Sec’y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988); *Consolidation Coal Co. v. FMSHRC*, 824 F.2d 1071, 1075 (D.C. Cir. 1987). The inspector’s judgment is also an important element of an S&S determination. *Wolf Run Mining Co.*, 36 FMSHRC 1951, 1959 (Aug. 2014); *Mathies*, 6 FMSHRC at 5. The S&S determination must be based on the particular facts surrounding the violation at issue. *Peabody Coal Co.*, 17 FMSHRC 508, 511-12 (Apr. 1995); *see, e.g., Wolf Run*, 36 FMSHRC at 1957-59.

It is the third element of the S&S criteria that is the source of most controversies regarding S&S findings. This element is established only if the Secretary proves “a *reasonable likelihood* the hazard contributed to will result in an event in which there is an injury.” *U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (Aug. 1984). Evaluation of the reasonable likelihood of injury should be made assuming “continued normal mining operations,” *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984), i.e., the evaluation should be made “in consideration of the length of time that the violative condition existed prior to the citation and the time it would have existed if normal mining operations had continued.” *Black Beauty Coal Co.*, 34 FMSHRC 1733, 1740 (Aug. 2012); *Rushton Mining Co.*, 11 FMSHRC 1432, 1435 (Aug. 1989).

The S&S nature of a violation and the gravity of the violation are not synonymous. Gravity is generally expressed as the degree of seriousness of the violation. The gravity assessment and a finding of S&S are frequently based upon the same or similar factual circumstances, *Quinland Coals, Inc.*, 9 FMSHRC 1614, 1622 n.11 (Sept. 1987), but the focus of the inquiries differs. The Commission has pointed out that the focus of the gravity inquiry “is not necessarily on the reasonable likelihood of serious injury, which is the focus of the S&S inquiry, but rather on the effect of the hazard if it occurs.” *Consolidation Coal Co.*, 18 FMSHRC 1541, 1550 (Sept. 1996).

B. Negligence

Negligence is conduct that falls below the standard of care established under the Mine Act. Under the Mine Act, an operator is held to a high standard of care and is required to be on the alert for conditions and practices that may cause injuries and to take necessary precautions to prevent or correct them. 30 C.F.R. § 10.0(d). Moderate negligence is defined by the Secretary as having occurred in connection with a violation when “[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances.” *Id.* § 100.3, Table X. If the mitigating circumstances are “considerable,” the Secretary considers the level of negligence to be low. *Id.*

IV. FINDINGS OF FACT AND ANALYSIS

A. Citation Number 8202408² (Ventilation Plan Violation)

1. The Violation

This citation was issued by MSHA Inspector Jason D. Hess³ on November 9, 2012 and alleges the operator violated the mandatory health and safety standard at § 75.370(a)(1) by failing to maintain the required number of operable water sprays on a continuous mining machine, in contravention of the mine's approved ventilation plan. Ex. S-1. The Secretary has proposed a penalty of \$1,203.00 for the alleged violation.

The cited safety standard provides that each operator of an underground coal mine shall develop and follow a ventilation plan that is designed to control methane and respirable dust in the mine and is approved by the MSHA district manager. 30 C.F.R. § 75.370(a)(1). Once a ventilation plan has been approved and adopted, its provisions are enforceable at the mine as mandatory safety standards. *Martin County Coal Corp.*, 28 FMSHRC 247, 254 (May 2006).

The ventilation plan for the Buchanan Mine #1 requires continuous mining machines to utilize a specified configuration of 38 dust control sprays that are strategically placed around the machine in blocks in order to wet the machine's ripper drums, tamp down dust, and facilitate air movement. Tr. 36-40, 45, 91; Ex. S-3. A certain number of sprays must remain operable during each cut. Part 1.R of the ventilation plan provides in pertinent part:

Prior to starting every cut on all CM [continuous miner] sections, the water sprays on the miner will be visually examined to insure that all 38 sprays are operating. Once the cut has started, a minimum of 80% of the sprays which are supposed to be operating for that cut must be maintained (no less than 50% of the sprays in each spray block must be operating).

Ex. S-3 at 3. These requirements are reiterated in Part 3.A.5.a and in Part 10, Sketch 9 of the ventilation plan. Ex. S-3 at 6, 19.

Inspector Hess discovered a violation of the ventilation plan while he was investigating a methane ignition that had occurred on the 20 Right development panel during the evening

² The citations were not presented at trial in numerical or chronological order. They are addressed herein in the order in which they were presented at trial.

³ Hess worked in the mining industry as an equipment operator, electrician, and foreman for eleven or twelve years before he was hired by MSHA to serve as a coal mine inspector in April 2007. He underwent about 22 weeks of training at MSHA's Mine Academy in Beckley, West Virginia to receive his Authorized Representative card. Since early 2012 he has served as a ventilation specialist, in which capacity he reviews mine ventilation plans, assists operators in developing such plans, and advises the district manager on ventilation issues. He also holds collateral training and certification as an accident investigator. Tr. 16-20.

production shift on November 8, 2012. Tr. 20, 93. Continuous miner operator Will Reedy had been performing a cleanup run in the No. 1 entry (i.e., clearing the slag and spilled cuttings from the working place after taking a cut of coal) when a large piece of sandstone had fallen from the mine roof. Tr. 27. As Reedy was using his continuous miner to cut the sandstone slug, an orange flame had flared up at the continuous miner and traveled across the floor and up the coal rib before Reedy was able to extinguish it with the wash-down hose. Tr. 28, 67, 100.

Inspector Hess arrived at the mine several hours later to investigate the cause of the ignition. Although the Buchanan Mine #1 is an extremely gassy mine, Reedy denied obtaining any abnormal methane readings or noticing anything else out of the ordinary before the ignition. Tr. 21-22, 26, 65-66. Air readings taken after the ignition had revealed methane concentrations of 0.3 to 04.%, which are normal levels for this mine, and Hess confirmed that the ventilation system in the working place was functioning as intended. Tr. 32-35, 115. The sole exception was that when a baffle curtain that had been hung after the ignition was taken down, methane accumulated in the roof cavity left behind by the sandstone slug. Tr. 32-35, 68-71. Hess speculated that when the slug fell, methane had been released from the roof and pulled down into the working place, where it had accumulated to a concentration of greater than 5% and combined with oxygen to produce a combustible mixture that was ignited when the continuous miner's drill bits sparked on the sandstone while cutting it. Tr. 78, 80.

When Hess examined the continuous miner for conditions that could have contributed to the ignition, he observed that 8 of the machine's 38 water sprays were clogged and inoperable. Ex. S-1. Each spray is set into a recess on the surface of the machine. Tr. 48. Hess discovered that coal was packed into some of the recesses such that a screwdriver was needed to remove the clogged spray assemblies, and they still would not spray even after they had been cleaned and reattached, indicating internal clogging. Tr. 48-49. Based on these observations, Hess issued the citation, which was terminated about forty minutes later when the inoperable sprays had been cleaned. Ex. S-1.

The fact that eight of the sprays were clogged means that only thirty sprays were operable during the last cut unless one or more of the inoperable sprays somehow became clogged while the machine was sitting idle after the cut, as suggested by Consol. Resp.'s Post-Hr'g Br. 18. Hess indicated this was highly unlikely. He saw no way the sprays could have become completely packed with coal during the brief amount of time the machine was cutting the sandstone slug or while it was idled afterward. Tr. 49, 62, 87, 90. I agree with his assessment. It is much more likely that the sprays became clogged with coal dust while the machine was cutting coal earlier in the shift. Consol presented testimony from Donald Sparkman, manager of safety for the company's Central Appalachian operations, that the mine and the continuous miner had been out of service for about two months until five days before the ignition, which could have allowed particles to accumulate in the water lines due to the corrosive, acidic nature of the water at the mine. Tr. 151-54. However, even accepting Sparkman's suggestion that the sprays became clogged when the bumping of the machine as it was cutting the sandstone dislodged accumulated sediment in the water lines, this would have occurred while the machine was operating, not after it had been shut off. Tr. 90. I find that while the continuous miner was cutting the sandstone slug, only 30 of its 38 sprays (78.9%) were operable. This was a violation of the ventilation plan's requirement that 80% of the sprays be maintained during every cut.

In addition, the operator violated the requirement that 50% of the sprays in each spray block remain operable during every cut. All four of the sprays in the two ripper side spray blocks, which are located on either side of the ripper head, were completely clogged. Ex. S-1; Tr. 40, 44. Furthermore, only one of the three sprays in the right pan side spray block was functioning. Ex. S-1; Tr. 44-45. Counsel for the Respondent has called attention to the fact that Inspector Hess said the pan side sprays were on left side of the machine during a deposition but later said they were on the right. However, Hess credibly explained that he simply made a mistake during the deposition because he was referring to a mirror-image sketch of the continuous mining machine at the time. Tr. 39, 55-59, 81; *see* Ex. S-3, Part 10, Sketch 9 (bearing legend "Right side miner shown, left side miner is mirror image"). Regardless, the ventilation plan's 50% requirement was violated by the fact that neither of the ripper side spray blocks contained a single operable spray.

Because two of the ventilation plan's requirements were violated, a violation of § 75.370(a)(1) occurred.

2. Gravity and S&S Findings

Parties' Positions

Inspector Hess marked this violation as S&S and reasonably likely to cause an injury that would result in lost workdays or restricted duty for two miners. Ex. S-1. Hess believed that the inoperable sprays, and particularly the complete failure of all the sprays in both of the ripper side spray blocks, had caused the November 8 ignition. Tr. 37-38, 46, 51, 89. Although the ignition did not result in any injuries, Hess believed that a greater quantity of fuel could have easily allowed a fire to propagate back to burn the miner operator and the nearby hauler operator, or the ignition could have even led to a fatal explosion. Tr. 50-53.

Consol argues that the S&S designation is inappropriate because the Secretary has failed to establish that an injury-causing event was reasonably likely and therefore has failed to satisfy the third *Mathies* element. Resp.'s Post-Hr'g Br. 17-18.

S&S Analysis

A violation of a mandatory safety standard occurred, satisfying the first element required to sustain an S&S finding under the *Mathies* test.

The second *Mathies* element, the existence of a discrete safety hazard contributed to by the violation, is also satisfied because this violation contributed to the discrete hazard that an ignition, fire, or explosion would occur. As explained by Inspector Hess, who was a ventilation specialist with more than fifteen years of experience in underground mining at the time he issued this citation, the violative condition contributed to the likelihood of an ignition both by impairing the system by which the continuous miner's drill bits are wetted down and by inhibiting the air movement that is needed to sweep dust and gases away from the face area and to prevent methane from accumulating to ignitable levels around the continuous miner while it is working. Tr. 36-38, 45-47, 91. Hess was especially concerned about the complete inoperability of all the sprays in both ripper side spray blocks. One of the functions of these particular sprays is to create

a Venturi effect that aids the mine's ventilation system by pulling air across the continuous mining machine. Tr. 37-38, 91. In addition, these sprays keep the outside ring of bits cool on the ripper head. Tr. 37, 46. The loss of these two functions contributed to the discrete hazard that methane would accumulate around the machine while it was in service and would be ignited by a spark from the hot drill bits, leading to an ignition, fire, or explosion.

For violations that contribute to the hazard of an ignition, fire, or explosion, the third *Mathies* element is satisfied when a "confluence of factors" existed that could have triggered an ignition, fire, or explosion with continued normal mining operations. *Paramont Coal Co. Virginia, LLC*, 37 FMSHRC 981, 984 (May 2015); *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (Apr. 1988). Such factors include the presence of potential ignition sources, such as nearby equipment that might spark or create frictional heat, and the presence of any substances that are ignitable or that could provide a fuel source to propagate a fire or explosion, such as methane or accumulations of coal dust. *See, e.g., Consolidation Coal Co.*, 35 FMSHRC 2326, 2338-41 (Aug. 2013) (upholding S&S finding for ventilation violation when ignition sources and methane were present).

An ignition actually occurred in this case. Hess attributed the ignition to the loss of function of the continuous miner's side sprays, for the reasons discussed above. Given Hess's convincing testimony and his training and experience as a ventilation specialist, I credit his opinion in this regard and find that the hazard contributed to by this violation resulted in an actual ignition.

Even if an ignition had not actually occurred, a confluence of factors existed at the time of the violation that was reasonably likely to trigger an ignition or fire. The Buchanan Mine #1 liberates twelve million cubic feet of methane per day, making it the gassiest mine in its MSHA district and placing it on a five-day methane spot inspection cycle under section 103(i)⁴ of the Mine Act. Tr. 21-22, 155, 207. The mine also has a history of methane ignitions and two explosions have occurred there in the past ten years. Tr. 52, 64, 155, 176, 207. The violation occurred at the working face, where methane is known to be liberated, and a large rock had separated from the roof just before the violation, which likely released methane. Methane was present and available to mix with oxygen in the ambient air and serve as a fuel source for a fire. Ignition sources were also present. Although Hess did not identify any permissibility violations, the face equipment in use at this location could have generated heat and sparks with continued normal mining operations. In particular, the continuous miner's drill bits were likely to generate sparks as they were cutting sandstone, which sparks easily and was present in the mine roof in the area where the violation occurred. Tr. 117, 143-44, 150, 154-55. The violation increased the likelihood that a spark produced by the miner's drill bits would lead to an ignition or fire because the clogged sprays would not have been able to properly cool the outer ring of drill bits, extinguish sparks, and move air across the machine to prevent methane from accumulating. Because a confluence of factors existed which were reasonably likely to trigger an ignition or fire with continued normal mining operations, the third *Mathies* element is satisfied.

⁴ Section 103(a) mandates that whenever a mine "liberates excessive quantities of methane or other explosive gases," the Secretary shall perform a spot inspection of the mine at least once every five days. "Excessive quantities" of gases are defined as more than one million cubic feet of gases liberated during a 24-hour period. 30 U.S.C. § 813(i).

Turning to the fourth *Mathies* element, a fire at the working face would be reasonably likely to cause serious or fatal injuries, such as burns or injuries from smoke inhalation, to any miners working there. See *McCoy Elkhorn Coal Corp.*, 36 FMSHRC 1987, 1992-93 (Aug. 2014) (noting “common sense” proposition that an ignition or fire in an underground coal mine presents a risk of serious injury).

Because the four *Mathies* criteria are met, this violation is S&S.

Gravity Analysis

This was a serious violation because it exposed at least two miners, the continuous miner operator and the nearby hauler operator, to potentially fatal injuries from a fire.

3. Negligence

Inspector Hess charged Consol with moderate negligence because he believed that mine management was not taking the initiative to ensure the continuous miner’s sprays were being properly cleaned throughout the shift. Tr. 53-54. Consol does not directly dispute the moderate negligence designation, but has presented testimony that continuous miner operators are trained to follow a sandstone cutting plan and to always check the machine’s sprays before beginning a cut and that miner operator Reedy was a competent employee who would have followed these requirements. Tr. 92, 110, 116-18, 132-33, 144.

I agree with Hess. Under the ventilation plan, Consol is responsible for checking the condition of the continuous miner’s sprays before each cut is made. Mine management should have been particularly alert to the need to keep the sprays clean because they were aware that the water at the mine carried particulate matter that could clog the water lines and that the continuous miner had been idled for two months before being placed back in service recently. Tr. 111, 131-32, 151-54. Based on the amount of material clogging the exterior of the sprays and the level of compaction described by Hess, it is evident that the sprays were not checked before the sandstone slug was cut and had been clogged since at least the previous cut, leading to a methane ignition. Miner operator Reedy and section foreman Tommy Proffitt are to be commended for reacting quickly and appropriately to contain the fire, reflecting proper training, and fortunately no one was injured. Tr. 113-14. However, the miners’ after-the-fact actions were not appropriate measures on management’s part to guard against the violation occurring in the first place. I find that moderate negligence is appropriate under the circumstances.

B. Citation Number 8197859 (Accumulation Violation)

1. The Violation

This citation was issued by MSHA Inspector Paul E. Smith⁵ just before noon on December 5, 2012 and alleges that there was an accumulation of combustible materials in the

⁵ Inspector Smith worked in the mining industry for more than twenty years as an
(continued...)

form of float coal dust along the No. 3 belt flight on the 21 Right section, in violation of the mandatory health and safety standard at § 75.400. Ex. S-4. The Secretary has proposed a penalty of \$19,793.00 for the alleged violation.

The cited standard states: “Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on diesel-powered and electric equipment therein.” 30 C.F.R. § 75.400. Recent, minor coal spillages may be exempted from the regulation, but if “the quantity of combustible materials is such that . . . it could cause a fire or explosion if an ignition source were present,” the regulation has been violated. *Old Ben Coal Co.*, 2 FMSHRC 2806, 2808 (Oct. 1980); see *Black Beauty Coal Co. v. FMSHRC*, 703 F.3d 553, 558-59 (D.C. Cir. 2012).

Inspector Smith issued this citation after traveling the mine on the morning of December 5 to inspect the mine’s water system and carbon monoxide (CO) monitoring system. Tr. 160-61. Accompanied by assistant general maintenance foreman Elmer Deel and one other miner, Smith traveled underground and visited each of the working sections. Tr. 161, 197-200. The last section the inspection party visited was the 21 Right section, which was actively producing coal at the time. Tr. 200, 219. The men entered the section through the belt/track intake entry, rode to the end of the track in a mantrip, and walked to the dumping point so that Smith could check the CO sensor and water pressure at the belt tailpiece. Tr. 200; Ex. S-5 at 12-15.

Inspector Smith testified that as he was walking back out of the entry, he noticed that the area underneath the belt flight was “pretty dark.” Tr. 162. This can be a sign of inadequate rock dusting, since properly rock-dusted surfaces should be white (the color of rock dust) or gray (the color of rock dust mixed with coal) rather than black. Tr. 164, 192, 206, 222. Looking more closely, Smith observed an eight-foot-wide layer of float coal dust resting along the belt structure and the mine water line for a distance of eleven crosscuts, or approximately 1,650 feet, with a few short gaps. Tr. 162-64. By measuring the accumulated material with a tape measure and a pocket screwdriver serving as a dipstick, Smith determined the accumulation ranged in depth from paper-thin to an eighth of an inch thick. Tr. 163. The National Institute of Occupational Safety and Health determined in a 2006 study⁶ that a paper-thin layer of float coal dust is substantial enough to propagate a fire or explosion if it is not mixed thoroughly with rock dust. Tr. 162. Accordingly, Smith issued a citation identifying a hazardous condition.

Consol argues that the citation should be dismissed because its three witnesses testified they saw no evidence of a 1,650-foot-long coal dust accumulation. Resp.’s Post-Hr’g Br. 18-19. However, two of Consol’s witnesses, section foreman Terry Hamilton and ventilation foreman Ricky Rose, did not actually observe the cited area during the operative timeframe. Hamilton was working inby at the face at the time the citation was issued and expressly denied observing

⁵ (...continued)

equipment operator, foreman, and electrician before he was hired by MSHA in 2008. He trained at the Mine Academy and received his Authorized Representative card in March 2009. He inspects underground and surface coal mines. Tr. 157-59.

⁶ “Float Coal Dust Explosion Hazards,” DHHS (NIOSH) Pub. No. 2006-125 (Apr. 2006), available at www.cdc.gov/niosh/mining/UserFiles/works/pdfs/2006-125.pdf.

the cited accumulation. Tr. 219-20. Rose testified he saw no float coal dust during the pre-shift examination for the cited area, but he had performed the exam six hours before the citation was issued. Tr. 188, 191. Foreman Deel was the only witness who was present when Inspector Smith issued the citation and who saw the material that Smith deemed to be an accumulation.

Deel, who has more than forty years of coal mining experience, opined that the citation was unwarranted because the area under the belt flight “was real lightly gray and there [weren’t] any real deposits that I could see.” Tr. 196, 203. His testimony raises factual disputes as to the composition and extensiveness of the cited material. However, there was testimony from both Smith and Consol’s witnesses that the cited area had not been rock dusted in accordance with the mine’s normal rock dusting schedule because the track duster that was ordinarily used in that area had broken down. Tr. 168, 202, 210. Deel conceded he did not know when the area had last been dusted. Tr. 210. These facts lend credence to Smith’s assertion that float coal dust had been allowed to accumulate on previously rock dusted surfaces, which can occur quickly along belt lines. Tr. 169. The accumulated material may have contained some rock dust, but only a small amount of float coal dust is needed for an ignition, as conceded by foreman Deel. Tr. 206. I credit Smith’s testimony that the accumulation was dark enough to indicate it was mostly coal dust and that the amount of coal dust present was substantial enough to cause or propagate a fire or explosion if an ignition source were present.

I find that a violation of § 75.400 occurred.

2. Gravity and S&S Findings

Parties’ Positions

Inspector Smith marked this violation as S&S and reasonably likely to cause fatal injuries to twelve miners. Ex. S-4. His concern was that if a “methane event” were to occur in the face area and travel to the belt entry, the accumulated float coal dust could cause a powerful dust explosion that would endanger the entire twelve-man crew working on the section. Tr. 166-68.

Consol argues that the third *Mathies* factor is not met, and therefore the violation is not S&S, because there were no ignition sources or methane in the cited area and the area was properly rock dusted, making the likelihood of an ignition or explosion minimal or nonexistent. Resp.’s Post-Hr’g Br. 19-20.

S&S Analysis

A violation of a mandatory safety standard occurred, satisfying the first *Mathies* element.

The violation contributed to the discrete hazard that an ignition, fire, or explosion would occur and would be propagated along the belt entry. As the Commission has long recognized, float coal dust serves as a fuel source for fires and explosions because it is combustible and is easily placed into suspension in the air, allowing it to propagate explosions in enclosed spaces. *See, e.g., Utah Power & Light, Mining Div.*, 12 FMSHRC 965, 970 (May 1990), *aff’d*, 951 F.2d 292 (D.C. Cir. 1991). Thus, float coal dust that has not been adequately mixed with rock dust so as to render it inert increases both the risk of and the dangers posed by an ignition, fire, or

explosion. The accumulated float coal dust observed by Inspector Smith clearly had not been adequately mixed with rock dust because it was dark in color and it was located in an area that had not been rock dusted according to schedule. The accumulation was approximately 1,650 feet long, eight feet wide, and ranged from paper-thin to an eighth of an inch deep, which was substantial enough to cause or propagate a fire or explosion. Although the coal dust was not heavily deposited in some spots and was slightly damp in others, Inspector Smith explained that an explosion could jump over any gaps and a fire could easily dry out the damp patches. Tr. 164, 167. Considering all of the facts, I find that the accumulation of float coal dust contributed to the hazard of a mine fire or explosion, satisfying the second *Mathies* element.

However, the third *Mathies* element is not satisfied. As noted above in my discussion of Citation Number 8202408, the pertinent inquiry is whether consideration of all the facts surrounding the violation reveals that a confluence of factors existed that could have triggered an ignition, fire, or explosion with continued normal mining operations. In arguing that the “confluence of factors” test is met, the Secretary points to factors such as the mine’s history of methane liberation and ignitions, the sandstone strata in the mine’s roof, and the 1,650-foot distance spanned by the cited accumulation. Sec’y’s Post-Hr’g Br. 16-19. Yet the Secretary has failed to identify any likely ignition sources. Consol’s witnesses testified and Inspector Smith conceded that there were no ignition sources in the cited area or at the dumping point, which was 450 feet away. Tr. 174-75, 178, 190, 203, 221. The Secretary has echoed Inspector Smith’s concern that a methane ignition at the working face would travel into the belt entry, and from there a fire or explosion could be propagated by the accumulated float coal dust. Sec’y’s Post-Hr’g Br. 16. But Smith was “not really sure” how far the accumulations were from the face and could not say whether ignition sources were present there because he had not traveled in by the dumping point. Tr. 164-65, 173, 181. Consol’s witnesses testified there were no permissibility problems or excess methane at the face that day and sandstone was not being mined. Tr. 207-08, 219. The absence of these conditions decreases the likelihood of an ignition occurring at the face. Even if an ignition were to occur at the face, Deel testified that the accumulations were more than 900 feet away, and Inspector Smith offered no facts or explanation as to how an ignition could have blown out by more than 900 feet to the cited area to ignite the accumulated coal dust. Tr. 206. In short, although the accumulated coal dust contributed to the hazard of a mine fire or explosion by supplying a potential fuel source, there is no evidence of any ignition sources that could have caused the coal dust to combust. Furthermore, there was likely rock dust from the mine’s routine rock dusting regimen mixed in with the coal dust. After considering all the evidence, I find that the Secretary has failed to establish a confluence of factors existed that were reasonably likely to trigger an ignition, fire, or explosion.

Because the third *Mathies* element is not satisfied, this violation is not S&S.

Gravity Analysis

The gravity of this violation is serious in that the float coal dust could have propagated a mine fire or explosion, which could have caused serious or fatal injuries to all twelve miners on the section, if an ignition source had been present.

3. Negligence

Inspector Smith charged the operator with moderate negligence in connection with this violation because the cited area had not been rock-dusted on schedule even though there were four rock dusting machines at the mine. Tr. 168; Ex. S-4. However, the Secretary concedes that mitigating factors existed in that the area had been examined six hours earlier and float coal dust can accumulate quickly. Sec'y's Post-Hr'g Br. 20; Tr. 169.

I find that the negligence associated with this violation is more properly described as low. The cited layer of coal dust was paper-thin at some points and only an eighth of an inch deep at its thickest, indicating it had existed for a short period of time. In addition, Deel indicated that the belt was not being run while the rock duster was down. Tr. 202, 211-12. Under these circumstances, the mine operator's negligence was low.

C. Citation Number 8189820 (Roof Control Violation)

1. The Violation

This citation was issued by MSHA Inspector W. Gregory Ratliff⁷ on July 14, 2011 and alleges that the inspector observed a cut of coal that exceeded the maximum depth allowed under the mine's roof control plan, in violation of § 75.220(a)(1). Ex. S-6. The Secretary has proposed a penalty of \$3,405.00 for the alleged violation.

The cited safety standard provides in pertinent part: "Each mine operator shall develop and follow a roof control plan, approved by the District Manager, that is suitable to the prevailing geological conditions, and the mining system to be used at the mine." 30 C.F.R. § 75.220(a)(1). As is the case for ventilation plan provisions, the provisions of a mine's approved roof control plan are enforceable as mandatory safety standards at the mine. *Martin County Coal Corp.*, 28 FMSHRC at 254.

The provision at issue in this case is Part 1, Section K of the mine's approved roof control plan, which provides that the standard cut depth at the mine is 20 feet. Ex. S-8 at 3. Although cuts up to 25 feet deep may be taken under some circumstances when a prescribed set of procedures is followed, Subsection K.7 limits cut depth to 20 feet in certain situations, including in the presence of "[a]ny detectable condition which is known to indicate the presence of adverse roof conditions." *Id.* at 4.

Ratliff issued this citation after traveling to the mine around 5:00 AM on the morning of July 14 to investigate an unrelated complaint. Tr. 227-28. Company safety inspector Robert Baugh accompanied him into the mine. Tr. 286. While Ratliff was conducting an imminent danger run on the 17 Right development panel, he observed adverse roof conditions and a cut

⁷ Inspector Ratliff has worked for MSHA as a coal mine inspector since February 2008. He worked in the mining industry as an equipment operator, shop foreman, and fireboss for approximately 24 years before being hired by MSHA in 2007 and subsequently completed about a year of field training and coursework at the Mine Academy to become certified as an inspector. Tr. 225-26.

that appeared to exceed 20 feet in depth in a crosscut that was being developed between the No. 3 and No. 2 entries. Tr. 229. The crosscut had punched through to the No. 2 entry and the roof had partly collapsed. Tr. 267-69, 291. Miners were in the process of bolting the unsupported roof using 6-foot resin bolts. Tr. 241, 259-60. Ratliff said he waited until the cut was bolted then measured it with a tape measure, which revealed a depth of 23.5 feet measured from the last row of roof bolts (which contained several damaged bolts) and 26 feet measured from the next-to-last row. Tr. 229-30, 244; Ex. S-11. He cited the condition at 11:38 AM and the citation was terminated at 2:00 AM the next day with notation that the roof had been supported. Ex. S-6.

The citation states that the cut depth was limited to 20 feet due to adverse roof conditions in the previous cut. Both Ratliff and Baugh observed adverse conditions in the cited area in the form of cracks in the mine roof, cracks in test holes from the prior cut, and areas where the roof had fallen. Tr. 232-33, 287, 306. Baugh speculated that the adverse conditions may not have been detectable until after the cut had been taken and the roof had fallen. Tr. 309. However, section foreman Hamilton, who was in charge on the section when the cut was taken, testified that he would not have knowingly taken a 22 or 23 foot cut in that area. Tr. 271-72. The area was being bolted on a “tiger pattern” and extra bolts were being added between rows, which are measures taken to increase roof support under adverse conditions. Tr. 312-13. I find that the cut depth was limited to 20 feet under the mine’s approved roof control plan due to adverse roof conditions in the area.

Because the cut depth was limited to 20 feet, Inspector Ratliff’s 26-foot and 23.5-foot measurements could each support a finding that the roof control plan was violated. Consol’s witnesses have disputed these measurements on several grounds.

First, Consol’s witnesses testified that Ratliff had measured from the wrong row of roof bolts in obtaining the 26-foot figure. Tr. 303. The depth of a cut is measured starting from the last full row of undamaged roof bolts installed on the previous cut. Tr. 230, 278, 308. Ratliff took the prudent course of measuring from the next-to-last row of bolts because at least two of the bolts in the last row were damaged. Tr. 234. However, Hamilton said he had checked the area before the cut was initiated and all the roof bolts were intact at that time, meaning that the last row should have been used as the starting point for measuring the cut. Tr. 269-70. I find Hamilton’s testimony to be credible. The bolts were likely dislodged or otherwise damaged by the roof fall or by the continuous miner as it was trimming the roof afterward, as Hamilton and Baugh stated. Tr. 269-70, 292-93. The cut depth should be measured from the last row of bolts because it was fully intact when the cut was taken.

Consol’s witnesses also disputed Inspector Ratliff’s finding that the cut was 23.5 feet deep when measured from the last row of bolts. Foreman Hamilton had initially projected the cut would be 19 feet deep but later learned that his calculation was off by one foot due to a misplaced spad. Tr. 270-78; *see* Ex. R-4. He testified that the cut had not been fully bolted until the day after the citation was issued, at which time he had measured it and found it to be just a few feet deeper than projected. Tr. 280. Similarly, Baugh testified that he had returned to the cited area the day after the citation was issued when the roof was fully supported, which allowed him to walk into the cut and take measurements along each wall and along the centerline. He found that the cut was 22 feet deep along each wall and 22 feet 4 inches deep down the middle

and memorialized these findings in a detailed six-page report that contains four demonstrative drawings. Tr. 294-95; Ex. R-3. Baugh conceded that a 22-foot cut violates the roof control plan but opined that this cut may have been compliant until the roof fell and caused the face to collapse with it, thereby extending the depth of the cut. Tr. 308. This scenario is possible, but there is no clear evidence that it occurred. Based on the available evidence, I find that the cut was between 22 and 23.5 feet deep, in violation of the mine's approved roof control plan.

Because the roof control plan was violated, a violation of § 75.220(a)(1) occurred.

2. Gravity and S&S Findings

Parties' Positions

Inspector Ratliff assessed this violation as S&S and reasonably likely to fatally injure two miners. Ex. S-6. He explained that the violation contributed to the hazard of the roof "breaking back in through the adverse conditions" to the bolted areas where miners were working, which could allow miners to be struck by falling rock weighing approximately 150 pounds per square foot. Tr. 239-40.

Consol contends that it was unlikely a roof fall would travel far enough out by the cited area to cause injury because no miners would come close to the cited area before the roof was bolted except the roof bolters, who are protected by the ATRS (automated temporary roof support) systems on their machines. Resp.'s Post-Hr'g Br. 20-21.

S&S Analysis

A violation of a mandatory safety standard occurred, satisfying the first *Mathies* element.

This violation contributed to the discrete safety hazard of a roof fall occurring due to the extended span of unsupported roof at an intersection. Thus, the second *Mathies* element is satisfied.

However, the third *Mathies* element is not satisfied. The Secretary has not established that a roof fall was likely to result in injury in this case. It is unlikely that miners would have accessed the area affected by the hazardous condition because they work a substantial distance back from the unsupported roof and are not permitted to enter the "red zone" beyond the next-to-last row of bolts. Tr. 307. The continuous miner operator normally stands at least 20 feet back from the last row of bolts and is not permitted to go beyond the next-to-last row of bolts even when performing gas checks. Tr. 297-98, 314. Miners generally are not allowed underneath the last row of bolts except to extend ventilation, in which case the continuous miner's ripper head must be placed against the roof to exert upward pressure, or to operate the roof bolting machine, in which case the ATRS provides supplemental roof support. Tr. 298. Moreover, the mine was employing a tiger bolting pattern in the cited area at the time of the violation, meaning that additional resin bolts had been installed to support the top and to combat any existing adverse roof conditions. Tr. 312-13. This supplemental roof support decreased the likelihood that a roof fall originating in the extended cut would be able to spread into or significantly affect the bolted roof areas behind it. Inspector Ratliff provided no explanation as to how a crack or roof fall

would work its way back to where miners were located given the supplemental roof support and tiger bolting pattern that was being used. Furthermore, assuming that normal mining operations had continued without being interrupted by the issuance of the citation, the hazardous condition would not have exposed miners to danger for a lengthy period of time because the unsupported roof was already being bolted by the time Inspector Ratliff arrived. Based on all the foregoing facts, I find that the hazard contributed to by this violation was not likely to result in an injury-causing event with continued normal mining operations.

Because the third *Mathies* element is not met, this violation is not S&S.

Gravity Analysis

The gravity of this violation is serious in that the cited condition contributed to the risk of a potentially life-threatening roof fall which could affect miners working at the face such as the roof bolters or the miner operator.

3. Negligence

Inspector Ratliff charged the operator with moderate negligence because he believed an on-shift examiner should have noticed the condition. Tr. 241; Ex. S-6. I agree with his assessment. Members of mine management were aware of adverse roof conditions and that when a crosscut breaks through into an entry, there is an increased risk that coal will fall away from the ribs and face, extending the depth of the unsupported roof. Tr. 272, 281, 296, 308. It is not unusual at the mine to reduce cut depth in order to avoid leaving a lengthy stretch of unsupported top next to a small column of coal that is likely to collapse. Tr. 272, 283. Here, the circumstances known to mine management should have spurred them to reduce the cut depth to less than 20 feet, but they failed to take this measure. Moderate negligence is appropriate under these circumstances.

V. PENALTIES

The Commission has reiterated in *Mize Granite Quarries, Inc.*, 34 FMSHRC 1760, 1763-64 (Aug. 2012):

Section 110(i) of the Mine Act grants the Commission the authority to assess all civil penalties provided under the Act. 30 U.S.C. § 820(i). It further directs that the Commission, in determining penalty amounts, shall consider:

The operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(i).

The Commission and its ALJs are not bound by the penalties proposed by the Secretary, nor are they governed by MSHA's Part 100 regulations, although substantial deviations from the proposed penalties must be explained using the section 110(i) criteria. *See Sellersburg Stone Co.*, 5 FMSHRC 287, 293 (Mar. 1983). In addition to considering the 110(i) criteria, the judge must provide a sufficient factual basis upon which the Commission can perform its review function. *See Martin County Coal Corp.*, 28 FMSHRC at 247.

Size of Operator; Ability to Continue in Business; Violation History

The parties have stipulated that Consol is large in size, having produced more than five million tons of coal in 2011 and more than three million tons of coal in 2012, and that the penalties proposed by the Secretary will not impair Consol's ability to remain in business. Joint Exhibit 1. Consol has an average, moderate number of prior violations that is proportionate to its size. *See Exs. S-9, S-10.*

Good Faith

The Secretary credited Consol with good faith in abating all three violations at issue in this case. Good faith is also reflected in the portion of each citation that describes the actions taken to abate the condition and in the testimony regarding the operator's abatement efforts.

Negligence and Gravity

The gravity of each violation and Consol's negligence with respect to the violations are discussed at length within the body of my decision above.

Conclusion

After considering the six statutory penalty criteria, I assess the following penalties for the three violations at issue in this case:

Citation Number 8202408 (ventilation violation) - \$1,203.00

Citation Number 8197859 (accumulation violation) - \$1,700.00

Citation Number 8189820 (roof control violation) - \$1,500.00

ORDER

Consol is hereby **ORDERED** to pay the sum of \$4,403.00 within thirty (30) days of the date of this Decision and Order.⁸

/s/ Priscilla M. Rae

Priscilla M. Rae

Administrative Law Judge

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⁸ Payment should be sent to: Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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October 22, 2015

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

v.

CONSOL BUCHANAN MINING
COMPANY, LLC,
Respondent

CIVIL PENALTY PROCEEDING

Docket No. VA 2014-0198
A.C. No. 44-04856-344491

Mine: Buchanan Mine #1

DECISION AND ORDER

Appearances: Robert S. Wilson, Esq., Office of the Solicitor, Department of Labor, Arlington, Virginia and David A. Steffey, Conference and Litigation Representative, Mine Safety and Health Administration, District 5, Norton, Virginia for Petitioner

Billy R. Shelton, Esq., Jones, Walters, Turner & Shelton PLLC, Lexington, Kentucky 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). Docket No. VA 2014-0198 involves five citations, Nos. 8208302, 8208448, 8208450, 8208451, and 8196366. At the outset of trial, the parties filed a Joint Motion to Approve Partial Settlement of Citation Nos. 8208302 and 8208448.¹ Tr. I, 20-23. Citation Nos. 8208450, 8208451, and 8196366 remain in dispute.

¹ I have reviewed the parties' Joint Motion for Partial Settlement as placed on the record at the hearing. The parties request that Citation No. 8208448 be modified to reduce the level of negligence from "moderate" to "low" and that the proposed penalty of \$108 be found appropriate. The parties also request that Citation No. 8208302 be modified to delete the "significant and substantial" designation, reduce the level of negligence from "moderate" to "low," and reduce the civil penalty from \$807 to \$500. Tr. 20-22. I have considered the representations and documentation submitted. I conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act.

The primary issues presented are whether MSHA had jurisdiction to inspect the guard house and bulldozer respectively cited in Citation Nos. 8208450 and 8208451, whether the auxiliary fan violation alleged in Citation No. 8196366, as amended at trial, significantly and substantially contributed to the cause and effect of a respirable-dust health hazard and/or methane-ignition safety hazard, and whether that alleged violation was reasonably likely to result in a fatal injury.

A hearing was held on January 26 and 27, 2015 in Abingdon, Virginia. The parties introduced testimony and documentary evidence.² Witnesses were sequestered.

For the reasons set forth below, I find that MSHA properly exercised jurisdiction when inspecting the guard house and bulldozer cited in Citation Nos. 8208450 and 8208451, respectively. I find that the penalties proposed by the Secretary of \$108 for Citation No. 8208450 and \$108 for Citation No. 8208451 are consistent with the statutory criteria in section 110(i) of the Mine Act. 30 U.S.C. 820(i).

I also find that the auxiliary fan violation alleged in Citation No. 8196366, as amended at trial to allege a fatal as opposed to permanently disabling injury, significantly and substantially contributed to the cause and effect of a methane ignition hazard, which was reasonably likely to result in a fatal injury in this gassy mine. Accordingly, I find it unnecessary to decide whether that same violation also significantly and substantially contributed to the cause and effect of a respirable-dust health hazard that was reasonably likely to result in a fatal injury. Based upon my independent assessment of the record evidence, I find that the penalty proposed by the Secretary of \$1203 for Citation No. 8196366 should be increased to \$2,678 consistent with the statutory criteria in section 110(i) of the Mine Act and my finding that the severity of gravity increased from permanently disabling to fatal. 30 U.S.C. 820(i). Accordingly, I assess a total civil penalty of \$2,894 for the three remaining violations found herein.

² P. Exs. A-C and P. Exs. 1-30 were received into evidence. Tr. 15-18, 226, 431. R. Exs. 1-7 were also received into evidence.

Based on a careful review of the entire record, including the parties' post-hearing briefs and my observation of the demeanor of the witnesses,³ I make the following:

II. Findings of Fact Concerning Citation Nos. 8208450 and 8208451

A. Stipulations

The parties stipulated to the following:

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.
2. Consol Buchanan Mining Company, LLC [Consol Buchanan] is the owner and operator of the Buchanan Mine #1.
3. Operations of the Buchanan Mine #1 are subject to the jurisdiction of the Act.
4. The proposed penalty amounts that have been assessed for the violations at issue pursuant to 30 U.S.C. § 820(a) will not affect the ability of Consol Buchanan to remain in business.
5. Consol Buchanan does not dispute that the MSHA Inspectors listed in Item 22 of the citations at issue were acting in their official capacity and as authorized representatives of the Secretary of Labor when each of the citations involved in this proceeding were issued.
6. True copies of each of the citations that are at issue in this proceeding along with all continuation forms and modifications, were served on Consol or its agents as required by the Act.
7. Each of the violations involved in this matter were abated in good faith.
8. Government Exhibit 1 is an authentic copy of Citation No. 8208450, with all modifications and abatements, and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.
9. Government Exhibit 2 is an authentic copy of Citation No. 8208451, with all modifications and abatements, and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.

³ 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.

10. Government Exhibit 3 is an authentic copy of Citation No. 8196366, with all modifications and abatements, and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.
11. With respect to Citation No. 8196366, Consol Buchanan does not contest the fact of violation, but does contest the gravity determinations, whether the violation was significant and substantial, the level of negligence, and the appropriateness of the proposed penalty amount.
12. For purposes of Section 110(i) of the Act, the proposed penalty amounts are appropriate given the operator's history of violations and the size of the operator.

P. Ex. C. *See also* Tr. 9-10, 15.⁴

B. Background Facts Concerning Citation Nos. 8208450 and 8208451

Citation Nos. 8208450 and 8208451 are the first citations ever issued at Consol Buchanan's VP-8 stockpile site (VP-8). Tr. 201-02. VP-8 was an abandoned mine that originally consisted of two separate mines, VP-5 and VP-6. Tr. 453. These mines were owned and operated by Island Creek Coal Co., a subsidiary of Consol Energy, Inc., until Consol Buchanan, another subsidiary, purchased them sometime before 2006 and combined them under the Mine ID of VP-5. Tr. 204-05, 453-54. The combined property, renamed VP-8, was placed in abandoned status in 2006. Tr. 203-04, 453-55. The VP-8 site purportedly remained abandoned until the time of the citations at issue. Tr. 438-39, 455-57, R-5.

The record establishes that Consol Buchanan began using VP-8 to stockpile clean coal about a year or two after purchasing the site from Island Creek. Tr. 371, 401. When the Buchanan Mine #1 produced more coal than was needed to ship immediately, clean coal was taken from the Buchanan Prep Plant to the Permac facility, a site two miles down the road, which could hold about 120,000-130,000 tons of coal. Tr. 69, 399. Once the Permac facility was full, excess coal was taken to VP-8, which could hold up to 150,000 tons of coal. Tr. 50-51, 69.

VP-8 is situated on the other side of a hill from the Buchanan Prep plant, less than two miles away as the crow flies, and a four or five mile drive around the hill. Tr. 200, 240-41. The site has two access points. A lower gate is located closest to the coal stockpile and was most often used by coal trucks and other stockpile equipment. An upper gate primarily serviced vehicles traveling to gas and oil operations up the hill, although the coal stockpile was also accessible through this gate. Tr. 65-67, 95-96.

⁴ It should be noted that the parties agreed to two additional stipulations in this matter. P. Ex. C. However, those stipulations deal with Citation No. 8208302, which was included in the Joint Motion for Partial Settlement. Therefore, it is not necessary to include them here. Further, Respondent's stipulations regarding the appropriateness of the civil penalty dealt with the proposed penalties as they were before subsequent modification of Citation No. 8196366 at hearing, as will be discussed *infra*.

Consol Energy, Consol Buchanan's parent corporation, contracted with G4S Security to provide security for all equipment kept at the site. Tr. 322-23. G4S manned a guard house just inside the upper gate, about 500-600 feet from the coal stockpile. Tr. 214. The original guard house was replaced with a newer building sometime between October 2013 and January 2014. Tr. 260-61, 290-93. MSHA inspector Mark Tuggle was the first to inspect the new guard house in January 2014. Tr. 257.

Coal trucks from the preparation plant typically accessed VP-8 by the lower gate, but they would use the upper gate when the stockpile became too large. Tr. 133-34, 138. Although the G4S security guards stationed at the upper gate did not stop coal trucks, they stopped all other vehicles going to the coal stockpile, including equipment operators, mine foremen, contractors, and state and federal inspectors, who were required to sign in and out of the property. Tr. 100, 104, 108-09, 297-98, 340-41, R-3. Besides monitoring traffic at the upper gate, the guards occasionally made rounds at the stockpile area, and they were required to check the lower gate after hours to make sure it was locked. Tr. 100-01, 316-17. The guards were responsible for the security of the stockpile equipment. Tr. 218-19, 323. The guards also provided annual MSHA hazard training for workers at the site. Tr. 98-99, 103-04, 320-21, 405-06, 434-45. The guard house itself provided power to a nearby fuel tank used to fuel the stockpile equipment. Tr. 214, 262-64, 296, 431-32.

At least by 2012, MSHA began inspecting the VP-8 stockpile. MSHA inspector Wes Clevinger added the VP-8 stockpile site to MSHA's Information Tracking System (ITS) during an inspection in 2012, although it may have been in the system before that time. Tr. 129-33, 228, 257, 302-04. Clevinger inspected VP-8 several times beginning in 2006. Tr. 122-23. He and other MSHA inspectors inspected the site regularly between 2012 and 2014. Tr. 122-23, 176-77, 192-93, 239-40. Clevinger examined the old guard house in 2012. Inspector Robbie Bowers examined the old guard house on March 19 and September 5, 2013. Inspector Tuggle examined it on October 17, 2013. Tr. 134-37, 206-07, 244, 249, P. Ex. 18, 19. Clevinger and Tuggle also inspected the fuel tank, whenever it was present. Tr. 157-58, 243-44, 249-52, 262; P. Ex. 19.

Throughout all of these inspections, VP-8 was treated as an adjunct facility of the Buchanan Mine #1 ID, although it remained in "abandoned" status. Tr. 453; R. Ex. 5. No representative of Consol Buchanan ever raised any objection to the inspections, or suggested that action should be taken to officially attach VP-8 to the Buchanan Mine #1 ID. Tr. 127, 180-81, 358, 471-72. No evidence was presented at hearing to show that any loading or unloading took place at the VP-8 site between August 2, 2013 and September of 2014, but at the time Tuggle issued the instant citations in January 2014, coal was stockpiled at the site. Tr. 391-92, 435-36.

Tuggle wrote Citation Nos. 8208450 and 8208451 during his inspections on January 16 and 17, 2014, respectively. Tr. 261; P. Exs. 1 & 2. Citation No. 8208450 alleges a violation of 30 C.F.R. § 77.904, which states:

Circuit breakers shall be labeled to show which circuits they control unless identification can be made readily by location.

The Citation narrative states:

The circuit breakers installed in the breaker box of the new guard house at the VP#8 location [are] not labeled to show which circuits they control. The circuits [cannot] be readily identified without use of a meter or similar device.

P. Ex. 1.

Tuggle testified that all the wiring was in good shape and the breaker box was covered, but the electricians who wired the guard house should have known that the circuit breaker was not labeled. Tr. 267, 268-69. Since the power cords leading from the circuit breaker were in the guard house wall, there was no way to identify where they went. Tr. 265. This created the possibility that someone performing electrical work would fail to de-energize the correct circuit and would receive an electrical shock. Tr. 267-68.

Tuggle designated Citation No. 8208450 as non-S&S because he determined that the violation was not reasonably likely to result in injury or illness. P. Ex. 1. Tuggle designated gravity as lost work days because most workers wear rubber boots or other insulation, and were likely to receive only a non-fatal shock. *Id.*; Tr. 268. Tuggle designated Respondent's negligence as moderate. P. Ex. 1. A Buchanan Prep Plant electrician abated the violation. Tr. 268-69. MSHA proposed a civil penalty of \$108.

During the same inspection, Tuggle issued a separate citation, not at issue here, for an undated fire extinguisher in the guard house. Tr. 253. Respondent did not contest that citation, and paid the penalty proposed by the Secretary.⁵ Tr. 252-53.

Also on January 16, 2014, Tuggle noticed a bulldozer before leaving the VP-8 site. Tr. 269. Although the bulldozer was not locked and tagged out, Tuggle was unable to fully inspect it because there was no operator available to operate it for him. Tr. 269-70.

The next day, January 17, 2014, Tuggle returned to the VP-8 site to inspect equipment remaining on the site, including the bulldozer. Tr. 269-70. Upon examination of the bulldozer, Tuggle wrote Citation No. 8208451 alleging a violation of 30 C.F.R. § 1110, which states:

Firefighting equipment shall be continuously maintained in a usable and operative condition. Fire extinguishers shall be examined at least once every 6 months and the date of such examination shall be recorded on a permanent tag attached to the extinguisher.

⁵ This fact is especially significant, as will be discussed *infra*, because of Respondent's adamant objection to jurisdiction in this case.

The condition or practice section of Citation No. 8208451 states:

The fire extinguisher provided on the Caterpillar D8N dozer (S/N 9TC1395) has not been examined since June 2013 or 7 months. Additionally, the on-board fire suppression system has not been examined since July 2012 or 18 months ago. Both tags were checked and have same dates of July 2012. Proper examination of fire fighting equipment is necessary to ensure fire fighting equipment is being maintained in a usable condition for use when necessary. The operators normal cycle for the contract fire suppression company is due in February 2014. This is a spare dozer and not regularly used. The fire extinguisher and fire fighting system is charged and could be used if necessary.

P. Ex. 2.

Tuggle designated the citation non-S&S because he determined that the violation was unlikely to result in injury or illness. P. Ex. 2. Tuggle designated the gravity as unlikely to result in a lost-work-days injury because the fire extinguisher was charged and could be used, despite the stale inspection date. Tr. 276. Tuggle designated Respondent's negligence as moderate. P. Ex. 2. MSHA proposed a civil penalty of \$108. P. Ex. A.

Tuggle testified that normal use of a bulldozer causes it to heat up, and that substances such as antifreeze oil and hydraulic fluid may provide fuel for a fire. Tr. 276-77. He further testified that regular inspections of the fire extinguisher helped to ensure the safety of equipment operators in the event of a fire. Tr. 277.

The dozer had recently undergone repairs, and had been returned to the VP-8 site about a week before Tuggle inspected it. The dozer had not been locked and tagged out. Tr. 269, 271-73, 276, 278-79. After it was returned to the VP-8 site from the repair shop, the dozer's blade and hoses had been reattached, and superintendent Paul Danko instructed equipment operator Mike Bradshaw to run the dozer to try it out. Tr. 62-63, 275, 278-79, 380, 421-22 P. Exs. 21, 22; *but see* Tr. 433.⁶ However, the Secretary failed to establish that the dozer had actually been operated after its repair and prior to issuance of the citation. Tr. 59, 349, 424.

On the day the citation was issued, the dozer was situated near the guard house, facing the stockpile. Tr. 274, 288, 418-19. At that time, there was no work being done on the stockpile, although there was coal stockpiled there. Tr. 288, 435-36.

⁶ Danko denied that he gave this instruction. Tr. 433. However, Bradshaw's testimony to the contrary was corroborated by testimony from Tuggle, as well as by Tuggle's notes. Tr. 275; P. Ex. 21. I credit Bradshaw's clear recollection that Danko instructed him to run the dozer to try it out, as corroborated by Tuggle's notes. Moreover, irrespective of this credibility resolution, I find that the dozer was *capable* of being operated, which finding is bolstered by other evidence in the record. *See* 10-11, *infra*.

III. Legal Analysis Concerning Citation Nos. 8208450 and 8208451

A. MSHA Jurisdiction Was Proper Over the VP-8 Site

Consol Buchanan does not dispute that the conditions alleged in Citation Nos. 8208450 and 8208451 constituted violations of the cited standards. Respondent put on no evidence to undermine the citations at trial, and made no arguments on the issue in its post-hearing brief. R. Br. 9. I credit inspector Tuggle's uncontested testimony regarding the fact and gravity of the violations, and I find that the Secretary has met its burden of proof on these issues. Specifically, I find that the breaker box in the guard house was unlabeled and that the fire extinguisher on the dozer had an expired inspection date. Tr. 267-69, 276. Further, I find that each citation was non-S&S, and unlikely to result in lost workday/restricted duty injuries. Tr. Tr. 268, 276, P. Ex. 1&2.

Despite conceding the facts of the violations, Consol Buchanan argues that MSHA lacked jurisdiction to inspect and issue citations for the guard house and the bulldozer. R. Br. 9. Specifically, Respondent argued that while the definition of a "mine" under the Mine Act should be "very broad," jurisdiction should not be asserted in a way that is "contrary to common sense." R. Br. 9-10 citing *Southern Nevada Paving*, 2008 WL 4287781, *8 (Aug. 2008). In short, it argues that assertion of jurisdiction over VP-8 is patently irrational.

MSHA derives its jurisdiction over the nation's mines and miners from the Mine Act, which states, in pertinent part:

Each 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 Mine Act defines the reach of the term "mine" broadly to include:

C) . . . structures, facilities, equipment, machines, tools, or other property . . . used in, or to be used in . . . the work of preparing coal. . . .

30 U.S.C. § 802(h)(1). The Mine Act also defines what constitutes the "work of preparing coal":

"work of preparing the coal" means the breaking, crushing, sizing, cleaning, washing, drying, mixing, *storing, and loading* of bituminous coal, lignite, or anthracite, *and such other work of preparing such coal as is usually done by the operator of the coal mine.*

30 U.S.C. § 802(i) (emphasis added).

The Secretary cites Commission and Circuit Court precedent for the proposition that MSHA's jurisdiction must be broadly interpreted. For instance, the Third Circuit has emphasized Congressional intent that "what is considered to be a mine and to be regulated under this Act" was to be given the broadest possible interpretation and that doubts were to be resolved in favor of inclusion of a facility within the coverage of the Act." *Marshall v. Stoudt's Ferry Preparation Co.*, 602 F.2d 589, 892 (3d Cir. 1979) (quoting S.Rep.No.181, 95th Cong., 1st Sess. 1, 14, reprinted in 1977 U.S.C.C.A.N. 3401, 3414). The D.C. Circuit echoed this observation in *Donovan v. Carolina Stalite Co.*, 734 F.2d 1547, 1553-54 (D.C. Cir. 1984) ("Because the Act was intended to establish a 'single mine safety and health law, applicable to all mining activity,' its jurisdictional bases were expanded accordingly to reach . . . 'structures . . . which are used or are to be used in the . . . preparation of the extracted minerals.'" S.Rep. No. 461, 95th Cong., 1st Sess. 37 (1977); S.Rep. No. 181, 95th Cong., 1st Sess. 14 (1977), U.S. Code Cong. & Admin. News 1977, 3401, 3414.); see also *RNS Services Inc. v. Secretary of Labor*, 115 F.3d 182, 185 (3d Cir. 1997) ("The storage and loading of coal is a critical step in the processing of minerals extracted from the earth in preparation for their receipt by an end-user, and the Mine Act was intended to reach all such activities."); *United Energy Servs., Inc. v. Fed. Mine Safety & Health Admin.*, 35 F.3d 971, 975 (4th Cir. 1994) ("[T]he proper focus of our analysis is on the safety of mining operations and . . . we should construe broadly the Act's coverage to achieve this goal.") (citing S.Rep. No. 181, 95th Cong., 1st Sess. 1, 14, reprinted in 1977 U.S.C.C.A.N. 3401, 3414.).

The Commission has also consistently given broad and inclusive interpretation to the jurisdictional limits of the Act. See *Secretary of Labor (MSHA) v. Pyramid Mining, Inc.*, 16 FMSHRC 2037, 39 (1994) ("The legislative history of the Mine Act and the Federal Coal Mine Health and Safety Act of 1969 recognize the hazards presented by abandoned mining areas and address the health and safety of non-miners as well as miners."); *Secretary of Labor (MSHA) v. Jim Walter Resources*, 22 FMSHRC 21, 22 (2000) (holding that a common supply shop, which was not located at any mine site and lacked a Mine ID, was subject to Mine Act jurisdiction).

The Secretary argues that the VP-8 coal stockpile fits within this broad interpretation of Mine Act jurisdiction. I agree. Even the most creative legal mind would be hard pressed to find that a coal stockpile does not fall within "lands, . . . structures, facilities, . . . or other property . . . used in" the "storing, and loading" of coal. 30 U.S.C. § 802(h)(1), (i). The site's abandoned status and the confusion over the Mine ID do not suffice to defeat jurisdiction. *Pyramid Mining*, 16 FMSHRC at 39; *Jim Walter Resources*, 22 FMSHRC at 22. Indeed, jurisdiction is even more soundly established here than in those cases because the VP-8 site has not been abandoned, and the stockpiling of clean coal plays a more direct, integral and essential part of the mining process than the role played by a supply shop.

Nevertheless, even assuming MSHA jurisdiction over the VP-8 site generally, Consol Buchanan argues that MSHA lacked jurisdiction over the guard house and the bulldozer cited in Citation Nos. 8208450 and 8208451, respectively. For the reasons set forth below, I find that MSHA properly exercised jurisdiction to inspect the guard house and the bulldozer, and that Citation Nos. 8208450 and 8208451 were properly issued, as written.

1. Jurisdiction Was Proper Over the Guard House

With regard to the guard house, Consol Buchanan argues that jurisdiction over the VP-8 site should be restricted to “areas where the coal was being stockpiled and the areas associated with the stockpiling of coal.” R. Br. 9. But Consol Buchanan effectively admitted MSHA’s jurisdiction over the guard house by paying the penalty on the fire extinguisher citation issued there by Inspector Tuggle during the same inspection.⁷ Tr. 252-53. Even apart from this settlement admission, I find that Citation No. 8208450 was properly issued, as written, since the guard house was used in, and its presence in part resulted from, the work of storing and loading coal at the VP-8 stockpile, and because the guards working in the guard house provided MSHA hazard training.

In its brief, Respondent argues that the guard house was located on a separate and distinct area of the VP-8 site, and that the guard house and the work of the guards who manned it, were not “integral” or “necessary” to the work of stockpiling coal. R. Br. 9-10. These arguments lack merit. The guard house itself and the guards who manned it were located on the VP-8 site and directly involved in the work done at the stockpile.

Specifically, the circuit breaker in the guard house cited by inspector Tuggle was used to provide power to the tank that fueled stockpile equipment. Tr. 263-64. Similarly, employees and equipment engaged in loading, unloading, and storing coal occasionally used the upper gate to access the stockpile, especially when it was full. Independent contractors, like Cleco, signed in at the guard house and assisted in coal operations. Tr. 394-95; R. Ex. 3 (1/7/14, 1/8/14, 1/10/14). Also, the G4S guards stationed at the upper gate had important roles in the stockpiling process. Specifically, these guards would patrol the stockpile and provided security for the equipment at the stockpile. Tr. 218-19, 323. They also provided annual MSHA-required, site-specific hazard training to workers at the site. Tr. 321. Accordingly, I find that these guards were agents of Respondent, lodged with apparent authority to hold themselves out to third parties as responsible for MSHA training and security at the site. Tr. 218-19, 321-23; Restatement (Second) of Agency §§ 8, 27 (1958); see also *Martin Marietta Aggregates*, 22 FMSHRC 633, 637-638 (May 2000)

⁷ Furthermore, Consol Buchanan has been on notice of MSHA’s claim of jurisdiction over the VP-8 site since at least 2011, when the first inspection occurred. Tr. 177-78; P. Ex. 14. As noted above, at no point since then did Respondent object to or question MSHA’s jurisdiction to inspect VP-8. The testimony of Donald Sparkman, a previous MSHA field office supervisor and current Consol Buchanan safety manager, does not help Respondent’s position. Tr. 449, 451-52. Sparkman testified that he thought that MSHA lacked jurisdiction over the VP-8 site, but suggested that jurisdiction might be appropriate if a Mine ID were properly and officially attached to the site. Tr. 463, 471-72. Despite testifying that he was aware that this process would need to be initiated by the operator, Sparkman failed to initiate this process when he left MSHA to go to work for Consol Buchanan. Tr. 470-71, 472; see also 30 C.F.R. §§ 41.10-41.13 (regulations dealing with operators requirement to provide notifications regarding legal identity of a mine). If Sparkman thought that MSHA was improperly exercising jurisdiction *after* he began working for Consol Buchanan, the fact that he neither raised any objection nor tried to correct the situation by seeking a VP-8 Mine ID looks like an effort to preserve a technical jurisdictional argument in case of litigation. It was Sparkman, after all, who first raised the jurisdictional issue in this case. Tr. 464-65, 467-68.

(reading the statutory definition of “agent” under 30 U.S.C. § 802(e) “agent” to include someone with responsibilities normally delegated to management personnel, with responsibilities that are crucial to the mine’s operations, and who exercises managerial responsibilities at the time of the negligent conduct). Therefore, I conclude that jurisdiction was proper over the guard house as an integral part of the VP-8 stockpile site.

Having determined that the guard house was an integral and necessary part of the mine stockpile, it is also evident that miners in the guard house, including electricians, could be exposed to safety hazards within the purview of the Mine Act. Those hazards would include electrocution or shock hazards posed by de-energizing an unlabeled circuit breaker in the guard house. Tr. 263-64, 267-68. See *W.J. Bokus Indus., Inc.*, 16 FMSHRC 704, 708 (Apr. 1994) (MSHA properly cited equipment (gas cylinders) in a storage garage shared by a sand and gravel operation and an asphalt plant because cited equipment was “used or [was] to be used in mining and . . . could affect miners in the garage.”); *Jim Walters Resources*, 22 FMSHRC 21 (Jan. 2000) (central supply shop located between one and six miles from closest coal extraction site is a mine under section 3(h)(1) because a mine includes “facilities and “equipment” used or to be used in mining operations or coal preparation facilities).

Accordingly, I find that Citation No. 8208450 was properly issued, as written, and that the proposed penalty of \$108 is appropriate under the criteria set forth in section 110(i) of the Act.

2. Jurisdiction Was Proper Over the Bulldozer

With regard to Citation No. 8208451, Consol Buchanan contends that the cited bulldozer was not in service at the time of the citation. I find that that the bulldozer was available for use and was not locked and tagged out.⁸ Commission case law has consistently held that if equipment in violation of MSHA regulations “has not been rendered inoperable [and] is located in a normal work area, fully capable of being operated, that constitutes ‘use.’” *Wake Stone Corp.* 36 FMSHRC 825, 828 (2014) (quoting *Ideal Basic Indus., Cement Div.*, 3 FMSHRC 843, 845 (1981)) (internal quotations omitted); see also *Alan Lee Good*, 23 FMSHRC 995, 997 (2001) (finding that even equipment not to be used on a particular shift must be maintained in functional condition if not tagged out of operation); *Mountain Parkway Stone, Inc.*, 12 FMSHRC 960, 963 (1990) (finding that “use of the equipment” existed where truck was not tagged out and was in turn-key condition). The Commission has found that allowing equipment to stay “parked in a primary working area could allow operators easily to use unsafe equipment yet escape citation merely by shutting it down when an inspector arrives.” *Ideal Basic* 3 FMSHRC at 845.

In *Wake Stone*, the Commission held that vehicles “located in a normal work area, . . . capable of being used, and [not] locked and tagged out . . . were in ‘use’ at the time of

⁸ The dozer was available for operation. The blade and hoses had been reattached, it was on the lot where it had previously been operated, and it had not been locked and tagged out of service. Tr. 59, 269-70, 274. Operator Bradshaw, prep plant foreman Case, and superintendent Danko all considered the dozer to be available for use once the blade and hoses had been reattached. Tr. 62-63, 275, 421-22.

inspection.” *Id.* at 4. Here, the dozer was located on the VP-8 site, where it had previously been used to move coal on the stockpile.⁹ Tr. 59. In fact, it had been sitting at VP-8 for about a week after its return from the repair shop. Tr. 271-73, 278-79. Superintendent Danko’s testimony established that, like the equipment in *Mountain Parkway*, the dozer was fully capable of being used. It was “ready to go” after the blade and hoses had been reattached. Tr. 421-22. Further, inspector Tuggle testified that in order to use the dozer, someone would only have to “open the door and start it.” Tr. 274. Finally, irrespective of whether the dozer was not ‘logged back in,’ as the operator sought to establish,¹⁰ the dozer was not locked and tagged out of service, as Commission precedent in *Wake Stone* requires. Tr. 381-83, 274.

The record establishes that no pre-operational inspection of the dozer was performed during the week that it sat at VP-8 without being locked and tagged out after it was returned from the repair shop.¹¹ Tr. 283-84. The fact that Respondent may have performed a pre-operational check before running the dozer, however, is no basis for vacating the violation. The Commission specifically rejected that argument in *Wake Stone Co.*, 36 FMSHRC at 828-29, and reinforced the rule that equipment that is not locked and tagged out of operation and parked for repairs must be maintained in functional condition. The Commission reasoned that “requiring that operators continuously keep machinery in operational condition encourages more vigilance with regard to instituting and enforcing effective maintenance procedures.” *Wake Stone*, 36 FMSHRC at 829.

For all of the above reasons, I find that the bulldozer was “used in, or [was] to be used in” the work of “storing, and loading” coal under the Act. Therefore, I find that MSHA had jurisdiction over the bulldozer at the VP-8 site. I conclude that Citation No. 8208451 was properly issued, as written, and that the proposed penalty of \$108 is appropriate under the criteria set forth in section 110(i) of the Act.

IV. Findings of Fact and Legal Conclusions Concerning Citation No. 8196366

A. Background Facts

Consol Buchanan Mine #1 is a large mine that employs about 600 miners, who work on three shifts. Tr. 481, 482-83. In 2013 and 2014, the mine had eleven mechanized mining units (MMUs) and used continuous miners and a longwall in super sections for production operations. Tr. 482. The mine is on a five-day spot inspection schedule under section 103(i) of the Mine Act because it emits high methane levels exceeding one million cubic feet of methane every 24

⁹ The dozer was left near the upper gate, 50-60 feet from the fuel tank that was powered by the guard shack. Tr. 274.

¹⁰ Foreman Case testified that he did not think the bulldozer had been put back on the active inventory log, or “back into service.” Tr. 381. However, he admitted that he wasn’t “100 percent sure” if this was true. Tr. 383.

¹¹ Superintendent Danko did look over the dozer shortly after it was delivered, but only to make sure that it was delivered back on site and had the blade back on it. Tr. 446; *see also* Tr. 418-19.

hours. Tr. 483; 30 U.S.C. § 103(i). The Consol Buchanan Mine #1 liberates between ten and eleven million cubic feet of methane every 24 hours. Tr. 483. The mine has had face ignitions while cutting sandstone on some of the older panels. Tr. 601.

On the morning of January 27, 2014, MSHA health inspector Mark Deel arrived at the Mine to conduct an E01 inspection for respirable dust at mechanized mining unit (MMU) 015. Tr. 481, 485-86. Deel and the 015 MMU crew entered the Mine about 7:30 a.m. Tr. 485-86. After attending a safety briefing with section foreman David Remines, Deel began an imminent danger run on 015 MMU at about 8:30 a.m. Tr. 486-88, 585-86. Deel measured between 0% to 0.4% methane throughout the section. Tr. 498-99, 509.

During his imminent danger run, Deel traveled down the #2 entry to inspect the #2 and #1 face, and to check the dust parameters on the continuous miner in the #2 entry. Tr. 508. The #2 entry is an intake air passage, used to ventilate the face with clean air. Tr. 494. Once air passes down the #2 entry to the face, it is routed back up the #1 entry, away from working miners. Tr. 494-95. At this point, it is designated as return air, since it carries coal dust and methane away from the face. Tr. 496, 563.¹²

At the time of Deel's inspection, there were two auxiliary fans in the #1 entry, just outby the last open cross cut. Tr. 508, 519-20; P. Ex. 26. The dog box, a curtain extending across the #1 entry to adjust return air pressure, was situated just inby between the auxiliary fans and the last open crosscut. Tr. 495, 526; P. Ex. 26. Ventilation tubing ran all the way from the #1 face, past the dog box, and up to the fans. Tr. 568-69; P. Ex. 26.

It took Deel approximately 45 minutes to inspect the #2 and #1 face, after which he traveled back up the #2 entry. Tr. 509, 539. While doing so, Deel observed a cloud of rock dust in the crosscut between the #1 and #2 entries. Tr. 489, 540, 546, 548. The Secretary stipulated that the dust observed was rock dust, not coal dust, but Deel testified and the Secretary alleges that coal dust would have been generated during continued normal mining operations and mixed with the rock dust creating a respirable dust hazard that would contribute to pneumoconiosis, a permanently disabling disease that eventually causes death. Tr. 541, 619. Upon inspection, Deel discovered that positive pressure in the #1 return air passage had allowed the check curtain in the crosscut to fall slack, opening a gap approximately one foot by five feet, through which return air was entering the #2 intake passage. Tr. 526.

¹² Foreman James Belcher pithily summarized the critical distinction between intake air and return air:

Q: Okay, so if I understand you correctly, you cannot use return air to ventilate a working face?

A: No, that is bad air.

Tr. 563.

At approximately 10 a.m., Deel wrote Citation No. 8196366 for a violation of 30 C.F.R. § 75.331(a)(4), which states:

(a) When auxiliary fans and tubing are used for face ventilation, each auxiliary fan shall be— (4) Located and operated to avoid recirculation of air.

The Citation's condition or practice narrative states:

The auxiliary fans being used to ventilate the faces of 015 MMU are not being located and operated to avoid recirculation of air. When examined return air was being allowed to recirculate into the intake air ventilating the 015 MMU through a check curtain located 1 crosscut outby the last open crosscut. This condition is allowing methane and rock dust to be emitted into the intake atmosphere. 0.3% ch₄ was detected coming through the curtain from the return entry. Four miners are currently working inby this condition on the 015 MMU. This condition creates the hazards of a methane ignition and exposure to respirable dust that would result in permanently disabling injures (sic) or disease. Upon continued normal mining coal dust would be ventilated from the working faces and allowed to recirculate into the intake air.

P. Ex. 3.

Deel designated the citation S&S because he determined that the violation contributed to a health hazard that was reasonably likely to result in a permanently disabling injury, and he determined that four workers were affected, as a result of Respondent's moderate negligence. Tr. 499, 515, 538, P. Ex. 3. At trial, the Secretary moved to amend the gravity designation to reasonably likely to result in a fatal injury and to allege both a health and safety violation. That motion was granted.¹³ Tr. 25-29. MSHA initially proposed a civil penalty of \$1203, prior to the amendment.

At the time of the citation, mining had not yet begun on the section. The four miners, whom Deel observed working inby the cited condition, were preparing for the shift and cleaning their equipment. Tr. 487, 496, 515. These miners included two roofbolt operators, a continuous miner operator, and a section foreman. Tr. 501.

Deel testified that under continued normal mining conditions, the recurrent recirculation of return air into the intake air passage would increase the level of methane and coal dust at the

¹³ Deel marked the citation as a health violation, but not a safety violation. Tr. 485, 541-42; P. Ex. 3. The Secretary moved to amend the citation to allege a safety violation as well. That motion was also granted. Tr. 28-30. Deel testified that he should have marked the citation as both a safety and health violation, but as a health specialist, he only marked the health violation box out of habit and oversight. Tr. 485, 541-42. I credit Deel's reasonable explanation as Respondent did not undermine this testimony on cross. Tr. 516.

face over time. Tr. 494-96, 500, 524-25, 541-42. Therefore, without abatement of the cited condition, the hazards of exposure to respirable dust and methane ignition would worsen over time. Tr. 499-500, 503-04, 529-30, 538. High levels of respirable coal dust increase the likelihood that miners will develop pneumoconiosis or black lung disease. Tr. 503, 541, 565. Float coal dust also contributes to the likelihood that a methane ignition will result in fatal injury, since coal dust can propagate an explosion. Tr. 503-04, 567.

Inspector Deel determined that Respondent's negligence was moderate. He testified that "The Mine Act requires the mine operator to have a high standard of care. They've got to be on the lookout for hazards and to correct those hazards." Tr. 502. Deel determined that the level of dust that was "caked" near the back side of the check curtain indicated that the condition had existed for some time, and should have been noted during the pre-shift examination. Tr. 502-03. Deel's notes indicate that the condition existed for at least 4 hours and should have been noted on the previous shift. P. Ex. 25, p. 11.

On cross examination, Respondent established that 45 minutes earlier, Deel and the section foreman had walked by this area and did not see any problem with dust emanating around the curtain. Tr. 509. Further, Respondent established that any coal dust recirculating would have been "peppered with" and mixed with rock dust and fallen to the ground prior to exiting through the curtain. Tr. 520-21.

Remines testified that he met Deel at the crosscut when Deel was taking his methane reading. Tr. 588. Remines testified that he did not see any dust at the check curtain in the crosscut where Deel testified that he had observed a cloud of dust; however Remines did acknowledge the negative pressure situation and the gap in the check curtain.¹⁴ Tr. 589, 608-09.

Remines further testified that after meeting back up with Deel, he immediately walked to the dog box in Entry #1, observed that it had been knocked out of place, and readjusted it. Tr. 589-91, 609. As soon as the dog box was adjusted by Remines, the pressure differential created by the auxiliary fans was rectified, and the hole in the check curtain closed. Tr. 526, 589-90.

Meanwhile, after taking the methane reading, Deel measured the gap in the curtain. Deel was unable to collect any other data before Remines adjusted the dog box, after which the curtain closed. Tr. 528.

Section foreman James Belcher worked the night-owl shift before Deel arrived on the 015 MMU. Tr. 555-56. Belcher testified that after the end of his shift, between 4:30 a.m. and

¹⁴ In resolving this conflict, I credit Deel's clear recollection of the rock dust, as corroborated by his notes, which state "dust was observed coming around check curtain between 1 and 2 entries ... a hole is present between the curtain and the outby rib measuring 1.5 feet x 5 feet with dust coming through the hole ... [d]ust is present on the back side of the stopping that is ½ built indicating the condition existed on the previous shift." See P. Ex. 25.

6:00 a.m., Belcher performed a pre-shift examination of the section.¹⁵ Tr. 556, 560; R Ex. 6. Belcher testified that he inspected the check curtain and crosscut cited in Citation No. 8196366, as well as the dog box and the auxiliary fans, but he observed no recirculating dust or other hazards. Tr. 556, 557, 575.

Respondent presented evidence that the Buchanan Mine #1 engages in certain practices to mitigate the risks posed by respirable dust and methane ignition. While mining is ongoing, the #1 entry is constantly rock dusted by dusters attached to the auxiliary fans. Tr. 520, 521, 559-60, 573. Rock dust eliminates float coal dust by mixing with it and then dropping out of the air. Tr. 573-73, 593-94. Further, the air pressure in entry #2 is kept at a high volume to dilute methane. Tr. 518-19, 596-97.

In addition, each continuous miner is equipped with methane detectors located five feet outby the ripper head. Tr. 511-12, 529. When the methane monitors detect one percent methane, they give a visual warning. Tr. 511, 525. At one and a half percent, the continuous miner shuts down. Tr. 511-12. However, it is possible for methane monitors to become clogged or lose calibration. Tr. 530-31, 616. Furthermore, even when the methane monitors are functioning properly, ignition remains possible because methane at the face can rise to ignition levels before detection by the monitors. Tr. 534.

The Buchanan Mine also uses a technique known as “core holing” to map the type of rock present in the roof in front of the continuous miner. Tr. 605-07. Core holing indicates when the roof is sandstone, which tends to spark, as opposed to slate, which does not tend to spark. Tr. 513, 601-03. The roof was slate at the time of Deel’s inspection. Tr. 602. Although Remines personally has never experienced any problems with the core holing technique, he acknowledged on cross examination that sandstone roof tends to come and go, that core holing is not always an accurate predictor of when sandstone is present, that float dust suspended in the air is explosive, and that trailing cables become damaged during continuous mining. Tr. 604-05, 607-08.

Deel observed potential ignition sources inby the cited condition, such as trailing cables and continuous miner bits, but he did not examine the cables for damaged jackets or exposed leads. Further, Deel conceded that cables that are properly maintained are not ignition sources and that the cited area had adequate air volume and was properly rock dusted. Tr. 501, 512, 535-36.

¹⁵ While I acknowledge Belcher’s testimony here, I credit Deel’s testimony that the condition had existed for about four hours. Although Belcher testified that there were no hazards between 4:30 and 6:00 a.m, Deel did not issue the citation until four hours later at 10 a.m. Further, Deel pointed to specific and compelling evidence that rock dust had accumulated and caked near the back of the curtain. I find that the condition existed for about four hours after section foreman Belcher completed his pre-shift at 6 a.m.

B. Citation No. 8196366 Was a Significant and Substantial Violation and Would Affect Four Miners

Consol Buchanan does not specifically dispute the existence of a violation or the designation of moderate negligence.¹⁶ Rather, Respondent focuses its challenges on the S&S designation and the appropriateness of the proposed penalty. R. Br. 12.

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). Consistent with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Co.*, 6 FMSHRC at 1575. “The fact that injury [or a condition likely to cause injury] has been avoided in the past or in connection with a particular violation may be ‘fortunate, but not determinative.’” *U.S. Steel IV, supra*, 18 FMSHRC at 867, quoting *Ozark-Mahoning Co.*, 8 FMSHRC 190, 192 (Feb. 1986). See also *Elk Run Coal Co.*, 27 FMSHRC 899, 906-07 (Dec. 2005); *Blue Bayou Sand & Gravel, Inc.*, 18 FMSHRC 853, 857 (June 1996).

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 133, 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 S&S determination must be based on the particular facts surrounding the violation and in the context of continued normal mining operations. *Texasgulf, Inc.*, 10 FMSHRC 498, 500 (Apr. 1988) (quoting *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984)).

The first *Mathies* element is satisfied here. As noted, Consol Buchanan did not specifically contest the existence of the violation alleged in Citation No. 8196366 at trial or in its post-hearing brief. In any event, the record evidence establishes a violation of 30 C.F.R. § 75.331(a)(4) because auxiliary fans used for face ventilation were not operated to avoid recirculation of air. Rather, probative record evidence establishes that during continued normal mining operations, the auxiliary fans located outby the last open crosscut in the Number 1 return air entry would allow return air from the working faces to recirculate methane and respirable

¹⁶ Although Respondent initially contested the negligence determination and number of people affected in its answer and pre-hearing report, it did not mention these issues in its opening statement at trial, nor did it make argument on these issues in its post-hearing brief. Tr. 36-41; R. Br. 12. In any event, I affirm the moderate negligence determination and the fact that four miners were affected by violation, as set forth below.

coal dust (mixing with rock dust) back through a “damaged” check curtain located one crosscut outby the last open crosscut into the Number 2 entry intake air course that ventilated 015 MMU. Tr. 494-96, 500, 503, 541-42; see also P. Ex. 3. As Deel credibly testified, “... the check curtain in the crosscut between Number 1 and Number 2 had an opening because the pressure from the auxiliary fans which were inby in the Number 1 Entry caused a positive pressure in the Number 1 Entry and just caused the curtain to fall slack and away from the rib.” Tr. 526. This created an opening in the check curtain allowing methane and rock dust to be emitted back into the intake atmosphere. Tr. 525-26; P. Ex. 3. Accordingly, I find that the Secretary has established the fact of the violation by a preponderance of the evidence.

With regard to the second *Mathies* element, the Secretary need only identify a discrete safety or health hazard associated with the putative S&S violation. *Highland Mining Co.*, 34 FMSHRC 3434, n. 5 (Dec. 2012). The instant increase in respirable coal dust or methane recirculating to the face contributed to both a health and a safety hazard. Based on the evidence presented at hearing, I find that under continued normal mining conditions and without any presumption of abatement, the violative condition contributed to the discrete safety hazard of a methane ignition and to the discrete health hazard of respirable dust exposure. Tr. 500. Continued normal mining operations would release coal dust and methane into return air at the face. Tr. 503-04, 530, 541. Without abatement of the positive pressure caused by the auxiliary fans at the “damaged” check curtain, respirable dust and methane would have continued to “circle the block” and been recirculated to the face, where miners worked. Tr. 500, 524-25, 526, 530, 541. I credit Deel’s testimony that there was a cloud of rock dust near the crosscut between the Number 1 and Number 2 entries and that the dust was “caked” near the back side of the check curtain.¹⁷ Tr. 502-03, 539-40, 546. Further, float coal dust combined with increased methane levels and the presence of potential ignition sources creates the safety hazard of a methane ignition and propagation. Tr. 503-04.

Respondent contends that the violation did not contribute to any discrete safety or health hazard. R. Br. 13. Specifically, Respondent argues that its safety measures, including rock dusting, ventilation practices, methane monitors, and core holing, would have prevented the hazards from ever materializing. Respondent characterizes these safety measures as part of continued normal mining operations. R. Br. 13. For the following reasons, I reject Respondent’s argument.¹⁸

¹⁷ Whether coal dust was reasonably likely to have made it through the curtain and actually been recirculated given its likely mixture with rock dust before that point reaches the third *Mathies* factor and not the instant inquiry into whether a discrete health hazard was created by the violation.

¹⁸ On March 23, 2015, after the close of the hearing, the Secretary filed a Notice of Supplemental Authority. In that notice, the Secretary provided a copy of Judge Paez’s decision in *Mach Mining, LLC*, 37 FMSHRC 614 (Mar. 2015). According to the Secretary, that case was substantially similar to the instant matter. The Secretary noted that Judge Paez rejected the operator’s argument in that case that it took additional remedial safety measures and found that an S&S designation was appropriate despite low measured levels of methane. Respondent filed a Response to the Secretary’s Notice of Supplemental Authority. In it, Respondent argued that
(continued...)

The Commission has consistently held that the adoption of redundant safety measures to mitigate or extinguish a hazard does not change the fact that a hazard may pose a serious risk to miners. *Buck Creek Coal Co. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995); *Consolidation Coal Co.*, 35 FMSHRC 2326, 2330 (Aug. 2013); *Cumberland Coal Resources, LP.*, 33 FMSHRC 2357, 2369 (Oct. 2011) (redundant, mandatory safety protections to not constitute a defense to an S&S determination). Respondent's redundant safety measures such as ventilation practices, methane monitors, rock dusting and core holing do not change the fact that methane ignition and overexposure to respirable coal dust pose serious risks to miners in this gassy mine. Respondent's redundant safety measures aim to mitigate or detect these hazards. They do not eliminate them. Accordingly, I find that the second *Mathies* element is satisfied.

With regard to the third *Mathies* element, the Secretary demonstrated that the cited condition or violation contributed to the hazard of methane ignition which was reasonably likely to result in an injury. The Commission has held that where the violation contributes to the hazard of methane explosion or ignition, "the likelihood of an injury resulting from the hazard depends on whether a 'confluence of factors' exists that could trigger an explosion or ignition." *McCoy Elkhorn Coal Corp.*, 36 FMSHRC 1987, 1992 (Aug. 2014)(quoting *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (Apr. 1988)). Such factors may include potential ignition sources, the presence of methane, the presence of float coal dust or loose coal, and the type of equipment operating in the area. *Paramont Coal Company Virginia LLC*, 2015 WL 3526151, at *3 (May 2015); *Utah Power & Light Co., Mining Div.*, 12 FMSHRC 965, 970-71 (May 1990); *Texasgulf*, 10 FMSHRC 498, 501-03 (Apr. 1988).

Here, the mine has had face ignitions while cutting sandstone on some of the older panels. Tr. 601. Although the roof was slate at the time of Deel's inspection (Tr. 602), foreman Remines acknowledged that sandstone roof tends to come and go and that core holing is not always an accurate predictor of when sandstone is present. Tr. 604-05, 607. A methane content of 0 to .4 percent was already present at the faces and .3 percent methane was present at the check curtain prior to the start of mining operations. Tr. 524. Deel credibly testified on cross examination that when the .4 methane at the face mixed with the .3 methane at the curtain to create .7 methane and then recirculated through intake air and around the block, the buildup of methane would increase. Tr. 500, 524-25. As noted, under normal continued mining operations, more methane would be released from the face, along with coal dust. Given the gassy nature of the mine, a sudden buildup of methane could reasonably be expected to occur. In fact, Congress has recognized that methane can accumulate rapidly. S. Rep. No. 91-411 at 59, reprinted in Legis. Hist. 1969 Act at 185. Deel credibly testified that "... inby the methane monitor, when you start cutting coal, emitting methane, and it gets above the end of the or into the explosive range before the methane monitor can pick it up." Tr. 534. If methane was continually recirculated during continuous normal mining operations from return air through the check

¹⁸ (...continued)

Judge Paez's decision was not binding, that other ALJ decision had made different findings, and that Judge Paez was dealing with a violation of a ventilation plan rather than an auxiliary fan violation. As will be discussed *infra*, in the instant matter Respondent's remedial efforts and the low level of methane were immaterial to the ultimate determination. While Judge Paez's decision was well-reasoned and persuasive, my findings here largely rest on the credible facts presented and the cases cited herein.

curtain to intake air because of the auxiliary fan violation, a rapid methane buildup to a 5 percent explosive level was even more likely.

Furthermore, Deel observed several potential ignition sources inby the cited condition, specifically trailing cables and continuous miner bits. Tr. 501. Respondent argues that there was no evidence that *actual* ignition sources were present, such as exposed leads or pieces of sandstone roof that had fallen to the mine floor. Tr. 535-36, 600-01. However, the Commission has long held that the Secretary need not establish the presence of an imminent danger or actual ignition source in order to uphold an S&S designation. *Elk Run Coal Co.*, 27 FMSHRC 899, 906 (Dec. 2005); *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 828 (Apr. 1981). The presence of potential ignition sources is sufficient under the confluence of factors test. *Cf.*, *Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 -136 (7th Cir. 1995)(affirming judge’s S&S determination at 16 FMSHRC at 542, that a tail roller that was completely covered and turning in combustible coal fines could easily become an ignition source that could cause a fire if the roller became heated, despite the apparent absence of evidence that the tail roller was hot or that any defects in the roller were present); *Knox Creek Coal Corp.*, 36 FMSHRC 1128, 1133-34 (May 2014)(permissibility violations led to deteriorating conditions that were reasonably likely to create an ignition hazard in a gassy mine). Accordingly, considering the specific facts and circumstances of this case, I conclude that there was a sufficient confluence of factors to establish that the auxiliary fan violation contributed to a hazard of a methane ignition that was reasonably likely to result in an injury.¹⁹

Concerning the fourth *Mathies* factor, I find a reasonable likelihood that any injury resulting from the reasonable likelihood of a methane explosion would be of a reasonably serious nature and result in a fatality. As the 2010 Upper Big Branch tragedy reminds us, during continued normal mining operations, the ignition of methane and any subsequent propagation can lead to a fire or explosion, potentially crushing workers under heavy rocks, or burning them to death. *See Pinnacle Mining Co.*, 36 FMSHRC 1918, 1923 (July 2014); *Knox Creek Coal Corp.*, 36 FMSRHC 1128, 1134, 1137 (May 2014); *Black Diamond Coal Mining Co.*, 7 FMSHRC 1117, 1120 (Aug. 1985) (recognizing that “ignitions and explosions are major causes of death and injury to miners”). Therefore, I find that the fourth *Mathies* element is satisfied.

For all of the above reasons, I find that the violation alleged in Citation No. 8196366 significantly and substantially contributed to the cause and effect of a discrete safety hazard of methane ignition that was reasonably likely to result in a fatality. Therefore, I affirm the S&S Citation, as amended at trial.

As noted, Deel observed four miners working inby the cited condition, preparing for the shift and cleaning their equipment. Tr. 487, 496, 515. They were the two roofbolt operators, a

¹⁹ I am persuaded by the testimony elicited by Respondent that coal dust particles in the air would mix with heavier rock dust and fall to the ground prior to recirculation of the air. (Tr. 520-21, 573). However, having determined that the violation was reasonably likely to contribute to an injury as a result of a methane ignition, I find it unnecessary to decide whether the auxiliary fan violation also contributed to a health hazard of inhalation of respirable dust that was reasonably likely to result in an injury by contributing to the development of black lung disease.

continuous miner operator, and a section foreman. Tr. 501. Accordingly, I conclude that Deel reasonably determined that four miners were affected by the violation.

C. The Violation was the Result of Respondent's Moderate Negligence

Further, I conclude that Deel reasonably determined that Respondent's negligence was moderate. As Deel testified, "The Mine Act requires the mine operator to have a high standard of care. They've got to be on the lookout for hazards and to correct those hazards." Tr. 502. Indeed, the Mine Act imposes a high standard of care on foremen and supervisors. *Midwest Material Co.*, 19 FMSHRC 30, 35 (Jan. 1997) (holding that "a foreman ... is held to a high standard of care"); *see also Capitol Cement Corp.*, 21 FMSHRC 883, 892-93 (Aug. 1999) ("Managers and supervisors in high positions must set an example for all supervisory and nonsupervisory miners working under their direction," *quoting Wilmot Mining Co.*, 9 FMSHRC 684, 688 (Apr. 1987); *S&H Mining, Inc.*, 17 FMSHRC 1918, 1923 (Nov. 1995) (heightened standard of care required of section foreman and mine superintendent).

Although the Secretary's definitions of terms in Part 100 are not binding on the Commission, they nonetheless provide guidance. *See Wade Sand & Gravel Co.*, ___ FMSHRC ___, slip op. at 4 (Sept. 16, 2015). Relevant to the discussion here, MSHA defines negligence by regulation in the civil penalty context as "conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm." Negligence is further defined as "the failure to exercise a high standard of care." 30 C.F.R. § 100.3. 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).

For the reasons previously stated in my final *Big Ridge* decision, I find MSHA's penalty regulations and the manner in which the Secretary applies them in proposing a penalty to provide useful guidance. *See Big Ridge Inc.*, 36 FMSHRC ___, slip op. at 4-6 (July 19, 2014) (ALJ); *see also Wade Sand & Gravel, supra*, slip op. at 7, n. 1 (Chairman Jordan and Commissioner Nakamura concurring). 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. In these circumstances, I find that the Secretary properly designated the level of negligence as moderate.

In this regard, I have credited Deel's testimony that the condition had existed for about four hours. Although section foreman Belcher testified that there were no hazards between 4:30 and 6:00 a.m. when he concluded his pre-shift examination, Deel did not issue the citation until four hours later at 10 a.m. Further, Deel pointed to specific and compelling evidence that rock dust had accumulated and caked near the back of the curtain. I find that the condition existed for about four hours after section foreman Belcher completed his pre-shift at 6 a.m. Accordingly, I conclude that Respondent should have known of the condition at least prior to Deel's discovery, particularly since a section foreman was working in by the cited condition. The moderate negligence designation was appropriate.

D. Civil Penalty

I independently assess the civil penalty pursuant to the criteria in section 110(i) of the Mine Act. The Buchanon Mine is a large underground coal mine that produces over 2,000,000 annual tons of coal. P. Ex. A. It has a low history of previous violations during the prior 15-month period. P. Ex. A and 28. The parties stipulated that the proposed penalty amounts that have been assessed for the violations at issue pursuant to 30 U.S.C. § 820(a) will not affect the ability of Consol Buchanan to remain in business. MSHA determined that Respondent demonstrated good-faith in attempting to achieve rapid compliance after notification of the violations. P. Ex. A. I have found that the operator was moderately negligent for each violation found. I have affirmed the gravity determinations for Citation Nos. 8208450 and 8208451, and increased the severity of gravity with respect to the severity of injury expected in Citation No. 8196366 from permanently disabling to fatal. Accordingly, I find that the penalties proposed by the Secretary of \$108 for Citation No. 8208450 and \$108 for Citation No. 8208451 are consistent with the statutory criteria in section 110(i) of the Mine Act. 30 U.S.C. 820(i). Based upon my independent assessment of the record evidence, I find that the penalty proposed by the Secretary of \$1203 for Citation No. 8196366 should be increased to \$2,678 consistent with the statutory criteria in section 110(i) of the Mine Act and my finding that the severity of gravity increased from permanently disabling to fatal. 30 U.S.C. 820(i). Accordingly, I assess a total civil penalty of \$2,894 for the three violations found herein.

V. ORDER

WHEREFORE, the parties' Joint Motion for Approval of Partial Settlement made on the record is **GRANTED**.

For the reasons set forth above, I **AFFIRM** Citation Nos. 8208450 and 8208451, as written. I further **AFFIRM** Citation No. 8196366, as amended at trial to allege that the auxiliary fan safety violation under section 75.331(a)(4) was reasonably likely to result in a fatal injury to four miners working inby as a result of Respondent's moderate negligence.

It is **ORDERED** that the operator pay a total civil penalty of \$3,502 for the violations found herein within 30 days of this decision.

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

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October 27, 2015

LAWRENCE PENDLEY,

Complainant,

v.

HIGHLAND MINING CO. AND JAMES
CREIGHTON,

Respondent.

DISCRIMINATION PROCEEDING

Docket No. KENT 2013-606-D
MSHA Case No.: MADI-CD 2010-07 & 11

Mine: Highland No.9
Mine ID: 15-02709

**DECISION ASSESSING CIVIL PENALTIES
AGAINST HIGHLAND MINING CO. AND JAMES CREIGHTON
AND ORDER TO PAY**

This case is before me upon a complaint of discrimination brought by Lawrence Pendley (“Complainant”), a miner, against Highland Mining Co. and James Creighton, (“Respondents”), pursuant to § 105(c)(3) of the Federal Mine Safety and Health Act of 1977 (“Mine Act”), 30 U.S.C. § 815(c)(3).

On February 12, 2015, I issued a decision finding that Pendley had been discriminated against by the Respondents. Pursuant to Commission Rule 44(b), 29 C.F.R. §2700.44(b), a copy of the decision was sent to the office of the Regional Solicitor for assessment of civil penalty.¹ On May 27, 2015, the Secretary Petitioned for assessment of civil penalties in the amount of \$20,000.00. The Respondent timely answered on June 26, 2015.

On August 1, 2015, James Creighton filed an Answer to the Petition for Assessment of Civil Penalty. In his Answer, Creighton stated that he retired on September 21, 2013 after having been found disabled by the Social Security Administration. He further stated that he has not worked any job since that time, and that due to his retirement and disability, “a monetary penalty would have an extreme hardship on my family and myself.” He moved this Court to reconsider the monetary penalty assessed by the Secretary.

The Secretary submitted a Brief in Support of Civil Penalty Assessment and Opposition to Joint and Several Liability and Motion to Amend the Pleadings on August 27, 2015. In this pleading, the Secretary moved to amend the pleadings to clarify that it was assessing a penalty of \$19,500.00 against Highland Mining Co. and \$500.00 against James Creighton. It argued that the penalty assessed against Highland was appropriate under the criteria set forth in Section 110(i)

¹ The decision was sent to the wrong office of the Solicitor in error, which led to a delay in the Secretary’s assessment of civil penalty.

and Commission precedent. However, since there was no case law concerning the application of Section 110(i) criteria to individuals, it suggested applying the criteria set forth under Section 110(c) and Commission case law interpreting that Section. Applying the 110(c) analysis, the Secretary argued that the penalty assessed against Creighton was appropriate.

On September 01, 2015, Highland submitted its brief opposing the penalty assessment. It argued that the penalty assessed against Highland should be substantially reduced because (1) the theory of liability was based upon the conduct of an hourly employee, (2) the Complainant was not an employee, (3) the Complainant placed himself in the area where Creighton was working, and (4) the mine is no longer in operation.

For the following reasons, I find that a civil penalty of \$19,500.00 against Highland is appropriate, but reduce the penalty assessed against Creighton to \$250.00.

The Civil Penalty of \$19,500.00 Against Highland is Appropriate

The principles governing the authority of the Commission's administrative law judges to assess civil penalties de novo for violations of the Mine Act are well established. Section 110(i) of the Mine Act delegates to the Commission and its judges the authority to assess all civil penalties provided in the Act. 30 U.S.C. 820(i). The Act delegates the duty of proposing penalties to the Secretary. 30 U.S.C. §§ 815(a), 820(a). The Act requires that in assessing civil monetary penalties, the Commission and its judges shall consider the six statutory penalty criteria listed in §110(i) of the Act:

[1] the operator's history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] the effect on the operator's ability to continue in business, [5] the gravity of the violation, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(i). *MSHA obo Perry Poddey v. Tanglewood Energy, Inc.*, 18 FMSHRC 1315 (Aug. 1996) (Applying 110(i) criteria to Respondent in discrimination case.)

In the instant case, the Secretary seeks civil penalties from Highland in the amount of \$19,500.00. Given all of the evidence, as well as my findings contained in the underlying Decision, I find that this penalty is appropriate.

In assessing a \$19,500.00 penalty, I have given full consideration to the Section 110(i) criteria. With regards to Highland's history of previous violations, according to MSHA's Mine Data Retrieval System, in the 15 months prior to the violation date of March 30, 2009, Highland had 618 violations over 977 inspection days. Furthermore, in addition to the instant case, Pendley filed two separate discrimination complaints with the Commission, on February 25, 2010 and March 25, 2010, which resulted in a finding of discriminatory acts by Highland.

In 2009, when the acts relevant to this matter took place, the size of the operator's business can be considered large. The 2009 production totals for the mine were 3,676,615 tons of

coal, and the controller produced 28,356,573 tons of coal. These figures place both the mine and the operator in the largest category of the tables provided in 30 C.F.R. §100.3(b).

In the instant case, Highland exhibited negligence in its failure to act or cease interference with Pendley's rights. As detailed in the underlying Decision, Superintendent Millburg knew of the contentious history between Pendley and Creighton, and was informed of Creighton's conduct, and he chose to do nothing to stop it. While it is true that he watched security footage of the interaction, he did not take the next step of instructing Creighton not to interfere with Pendley's rights.

With regards to the operator's ability to continue in business, there is nothing in the record that indicates that such a fine would adversely affect its ability to stay in business.

I further find that the gravity of the conduct by Highland was serious and supports the Secretary's proposed penalty. As described in more detail in the underlying Decision, miners' representatives serve an important function in ensuring a safe and healthy environment for miners. I found significant interference with Pendley's rights by management—when Creighton's conduct was ignored, as well as withholding of materials from Pendley. I find that such conduct demonstrated a disregard for miners' representative rights, and were sufficiently serious to support the Secretary's proposed penalties. Furthermore, there was no evidence of good faith abatement in the record.

Based on these reasons and the underlying Decision, I find that a penalty of \$19,500.00 against Highland is appropriate.

The Civil Penalty of \$500.00 Against Creighton is Reduced to \$250.00

Though there is no Commission caselaw concerning the criteria to use when assessing a penalty against an individual in a discrimination case, the Commission has provided guidance for assessing individual penalties in the 110(c) context:

The Supreme Court has held that, in interpreting a single enactment, courts should give the statute "the most harmonious, comprehensive meaning possible." *Weinberger v. Hynson, Westcott and Dunning, Inc.*, 412 U.S. 609, 631-32 (1973). Interpreting sections 110(c) and 110(i) harmoniously, we hold that, in keeping with our prior holding that "findings of fact on the statutory penalty criteria *must* be made," *Sellersburg*, 5 FMSHRC at 292 (emphasis added), Commission judges must make findings on each of the criteria as they apply to *individuals*. The criteria regarding the effect and appropriateness of a penalty can be applied to individuals by analogy, and we find that such an approach is in keeping with the deterrent purposes of penalties assessed under the Mine Act. In making such findings, judges should thus consider such facts as an individual's income and family support obligations, the appropriateness of a penalty in light of the individual's job responsibilities, and an individual's ability to pay. Similarly, judges should make findings on an individual's history of violations and negligence, based on evidence in the record on these criteria. Findings on the gravity of a violation and whether it was abated in good

faith can be made on the same record evidence that is used in assessing an operator's penalty for the violation underlying the section 110(c) liability.

Sec'y v. Sunny Ridge Mining Company, Inc. & Mitch Potter & Tracy Damron, employed by Sunny Ridge Mining Company, Inc., 19 FMSHRC 254, 272, (Feb. 1997). The goal of statutory harmony, deterrent purposes of penalties, and general reasoning employed by the Commission in *Sunny Ridge Mining*, applies equally to penalties assessed against individuals in the discrimination context. Based on an application of the 110(i) criteria by analogy, I find that the appropriate penalty assessed against Creighton is \$250.00.

As detailed in the underlying decision, as well as Judge Barbour's decision in *Sec'y v. Pendley v. Highland Mining*, 34 FMSHRC 3406 (Dec. 27, 2012) (ALJ), Creighton had a long history of issues with Pendley that go back as far as 2005. These allegations of discrimination included threats, destruction of property, and physical violence. For one individual, this conduct represents a long history of previous violations.

In the underlying decision, I found that Creighton purposefully interfered with Pendley's rights as a miners' representative. Therefore, he exhibited a total absence of any standard of care. Furthermore, Creighton's actions were intended to interfere with Pendley's walkaround rights, which are essential for ensuring health and safety in the mine. Therefore, the level of gravity was high. And there was no good faith abatement of the conduct by Creighton. Up until the date of the hearing, Creighton continued to construct elaborate excuses for how his conduct was appropriate.

However, in spite of Creighton's egregious conduct, there is one factor that counsels a reduction in penalty. Creighton retired from mining on September 21, 2013, and has not worked any job since that time. He has been found disabled by the Social Security Administration. Creighton has stated that due to his limited income, "a monetary penalty would have an extreme hardship on my family and myself." Based upon this information, I find that a \$250.00 penalty would reasonably serve as a deterrent.

Therefore, it is hereby **ORDERED** that Respondent Highland Mining pay a civil penalty in the amount of \$19,500.00 for its violation of Section 105(c) of the Act, within thirty (30) days of the date of this decision.²

² Payment should be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, P. O. BOX 790390, ST. LOUIS, MO 63179-0390

It is further **ORDERED** that Respondent James Creighton pay a civil penalty in the amount of \$250.00 for his violation of Section 105(c) of the Act, within thirty (30) days of the date of this decision.³

Upon receipt of these payments, this case is hereby **DISMISSED**.⁴

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

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³ Payment should be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, P. O. BOX 790390, ST. LOUIS, MO 63179-0390

⁴ Following the two prior Decisions on February 12, 2015 and September 21, 2015, this constitutes the final Decision of the ALJ in this matter.

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October 28, 2015

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

v.

PRODUCTOS DE AGREGADOS DE
GURABO,
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. SE 2013-449-M
A.C. No. 54-00316-323193

Mine: Productos de Agregados de Gurabo

DECISION AND ORDER

Appearances: Terrence Duncan, Esq., U.S. Department of Labor, Office of the Solicitor,
New York City, New York, for the Secretary

Damaris Delgado-Vega, Esq., Ortiz & Ortiz, San Juan, Puerto Rico, for
the Respondent

Before: Judge Lewis

STATEMENT OF THE CASE

This case is before the undersigned ALJ based upon a petition for assessment of civil penalty filed by the Secretary of Labor against Respondent, Productos de Agregados de Gurabo pursuant to 104(a) and 105(d) of the Federal Mine Safety Act of 1977, 30 U.S.C. §815(d).

Following inspection of Respondent's mine, an MSHA inspector issued Citation No. 8723601 for lack of safe access to a conveyor's greasepoint in violation of 30 C.F.R. §56.11001. The inspector alleged a miner had stated that miners accessed the greasepoint by climbing the plant's conveyor belt. At hearing, the miner denied making the assertion. This decision turns on the uncorroborated, out-of-court statement alleged by the inspector and whether such testimony can constitute substantial evidence in the face of testimonial denial of the out-of-court statement by the alleged declarant. For the following reasons, I find that the out-of-court statement lacked sufficient indicia of reliability to support the citation as written.

PROCEDURAL HISTORY

This case has a rather thorny procedural history.

On April 12, 2013, MSHA Inspector Isaac Villahermosa conducted an inspection of the Productos de Agregados de Gurabo (“P.A.G.”) surface mine, wherein he issued Citation No. 8723601 under Section 104(a) of the Federal Mine Safety and Health Act of 1977 (“the Mine Act”). MSHA assessed a civil penalty of \$873.00 on May 29, 2013. P.A.G. timely contested the assessment on June 7, 2013 and the case was designated for simplified proceedings on July 17, 2013.

In a December 30, 2013 filing, the Respondent challenged the citation on jurisdictional grounds, alleging that, *inter alia*, P.A.G.’s business did not affect interstate commerce within the meaning of §3(b) of the Mine Act and, as a result, MSHA lacked the jurisdiction to cite Respondent’s mine.¹ On March 18, 2014 the Secretary moved to discontinue simplified proceedings. The Solicitor argued the Respondent’s jurisdictional arguments necessitated discovery more complex than simplified proceedings would allow. On April 9, 2014, this Court ordered simplified proceedings discontinued.

The Solicitor submitted a request to the Court for two subpoenas to depose P.A.G. staff on June 26, 2014. These subpoenas were served on July 7, 2014. The Respondent’s counsel moved on August 6, 2014 for a protective order from the Secretary’s subpoena requests and further moved for sanctions against the Secretary’s counsel. Respondent argued that the Secretary’s counsel’s responses to interrogatories were deliberately obfuscatory and, as such, the Respondent was unprepared for depositions. On August 8, 2014 the Secretary’s counsel responded, arguing that the motions were both untimely and they mischaracterized the Solicitor’s response to discovery requests. Given Respondent’s jurisdictional assertions and the parties’ discovery disputes, this Court conducted a pre-hearing conference on August 8, 2014. During this conference, this Court, *inter alia*, agreed to bifurcate the proceedings so that the threshold issue of jurisdiction could be addressed initially. This Court further agreed to certify any interlocutory ruling regarding jurisdiction for review by the Federal Mine Safety and Health Review Commission (FMSHRC) as involving a controlling question of law, the immediate review of such which would materially advance the final disposition of the proceedings.

On August 11, 2014, this Court issued the following orders: ORDER BIFURCATING HEARING; ORDER TO CONFER REGARDING MATERIAL FACTS; ORDER GRANTING REQUEST FOR LIMITED DISCOVERY; ORDER DENYING REQUEST FOR PROTECTIVE ORDER; ORDER DENYING REQUEST FOR SANCTIONS. In said order(s) this Court specifically directed that the parties confer as to whether they could agree to all material facts regarding operation of P.A.G. as to the issue of jurisdiction. If no genuine issue of material fact existed, the parties were directed to file cross motions for summary decision on the question of jurisdiction. If the parties could not agree to all material facts, an initial hearing would be held limited solely to the question of jurisdiction.

¹ Though not captioned as such, the filing was essentially a Motion to Dismiss.

As to Respondent's extensive discovery requests regarding the bases of MSHA's asserted jurisdiction over the subject mine, this Court found that the Productos de Agregados de Gurabo operation met the definition of "coal or other mine" as set forth in §3(h)(1) of the Mine Act and that the Commonwealth of Puerto Rico was clearly included as a "state" under §3(c) of the Mine Act. Discovery regarding jurisdiction was therefore limited to whether the mine was engaging in "commerce" as that term was defined in §3(b) of the Mine Act.²

The Respondent ultimately abandoned its jurisdictional challenge in a filing on March 12, 2015.³

In an effort to resolve the underlying citation without the necessity of a hearing in Puerto Rico, this Court appointed a mediator to assist the parties to reach a possible settlement. A telephonic mediation was held on March 30, 2015. Despite the parties' best efforts, a settlement could not be reached.

On April 6, 2015 the Respondent petitioned the Court to conduct a personal "ocular" inspection of the P.A.G. mine site, and on April 23, 2015 the Secretary's counsel filed a memorandum opposing the Respondent's request. On April 24, 2015, the Court denied Respondent's petition for an "ocular" inspection of the P.A.G. mine site.

A hearing was held on April 29 and 30, 2015 in Carolina, Puerto Rico. At the conclusion of the hearing the Court ordered counsel to submit post-hearing briefs. On July 6, 2015 the Secretary's counsel requested and was granted an extension to file a post-hearing brief. Similarly, on July 29, 2015, the Respondent requested and was granted an extension to file a post-hearing brief. The Secretary's counsel filed a post-hearing brief with the Court on August 5, 2015. The Respondent filed a memorandum of law petitioning the court to vacate Citation No. 8723601 on August 10, 2015. The Secretary's counsel's reply brief to the Respondent's August 10 memorandum was filed with the Court on August 13, 2015. The Respondent filed a reply to the Secretary's post-trial brief on August 17, 2015.

STIPULATIONS

At hearing the parties entered the following joint stipulations into the record:

1. The Federal Mine Safety and Health Review Commission has jurisdiction over these proceedings and over Respondent, P.A.G.

² See also Respondent's extensive pleadings, including interrogatories, regarding the issue of jurisdiction at *Resp't's Doc.*, Dec. 30, 2013, *Sec'y's Resp. to Resp't's Interrogs.*, sets one and two, Jul. 14, 2014, *Resp't's Notice of Appearance and Mot. for the Limited Purpose of Requesting a Protective Order from the Subpoena for the Dep. Scheduled for Aug. 14, 2014*, and *Sanctions Against Sec'y's Att'y*, Aug. 6, 2014, et. al.

³ During various prehearing conferences this Court expressed its opinion that, notwithstanding various Puerto Rican statutes prohibiting the export of alluvium materials from the Rio Grande de Loiza, P.A.G.'s overall mining operations clearly involved interstate "commerce" as broadly defined in §3(b) of the Act.

2. Isaac Villahermosa conducted an inspection of P.A.G.'s mine on April 12, 2013.
3. Isaac Villahermosa issued Citation No. 8723601 at the end of his inspection of P.A.G.'s mine on April 12, 2013.
4. The citation issued by Inspector Villahermosa on April 12, 2013 was modified by Inspector Villahermosa that same day in response to an observation or comment by Mr. Calixto Frias.
5. Productos de Agregados de Gurabo timely contested the citation and its related penalty.
6. Inspector Villahermosa took the photos that accompanied Citation No. 8723601.
7. P.A.G. has never been cited for the condition alleged in Citation No. 8723601 as a violation of safe access.
8. Inspector Villahermosa, during his inspection of P.A.G.'s mine on April 12, 2013, did not witness the act of a miner climbing over the guardrails of the ladder platform to reach the conveyor, then bend over to grease the conveyor roll.
9. Respondent Productos de Agregados de Gurabo was/is the owner-operator of the Productos de Agregados de Gurabo mine.
10. Respondent P.A.G. was or is a mine within the meaning of Section 4 of the Federal Mine Safety and Health Review Act, 30 U.S.C. §804, and has/had products which entered into state commerce and/or operations or products which affected interstate commerce within the meaning of Section 4 at the time of the violation alleged in the citation.
11. Respondent P.A.G.'s mine was/is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. §801, et seq. at the time of the violation alleged in the citation.
12. At the conclusion of the inspection, Inspector Villahermosa issued Citation No. 8723601. The citation alleged that Respondent violated the Mine Act regulation 30 C.F.R. §56.1100.

Tr. 124-6.

SUMMARY OF THE TESTIMONY AND RECORD

Productos de Agregados de Gurabo is a Puerto Rico-based surface mining concern, refining alluvium materials, mostly sand and gravel, from a nearby flood plain and river channel.

GX-4.⁴ P.A.G. began operations on October 1, 1989, and Calixto Frias is its Chief Executive Officer. GX-6, GX-4. Located about twenty miles south of San Juan, P.A.G.'s operation is a small one, consisting of two plants, Plant No.1 and Plant No. 2, each with a loader, feeder, conveyor, and sifting apparatus overseen from one administrative office; trucks are also used on site for transporting raw and processed materials. Tr. 53-5, 207-9. In total, P.A.G. employed three miners in April of 2013. Tr. 202-3.

On the morning of April 12, 2013, Inspector Isaac Villahermosa conducted a general inspection of the P.A.G. mine.⁵ Following his inspection, Villahermosa issued to Calixto Frias, C.E.O. of P.A.G., Citation No. 8723601 for lack of safe access for maintenance of the main conveyor head of Plant No. 1, in violation of 30 C.F.R. §56.11001. Tr. 40. Frias, acting in his capacity as C.E.O. of P.A.G., timely contested the citation on June 7, 2013. GX-3.

Villahermosa arrived on-site at P.A.G. at approximately 7:00 am on April 12, 2013. Tr. 97-8. Villahermosa was accompanied by Isaias Delgado, an equipment operator employed by P.A.G.⁶ Tr. 24-5.

During the inspection of Plant No. 1, Inspector Villahermosa noticed what he believed to be an unsafe distance between the greasepoint of the conveyor and the elevated platform that provided access to the conveyor.⁷ Tr. 27. Inspector Villahermosa testified that upon mounting the platform, he visually observed that the greasepoint was three to four feet distant horizontally

⁴ Exhibits submitted by the Secretary are designated "GX." Those exhibits submitted by the Respondent are designated "RX." These correspond to the exhibits submitted into the record prior to and during hearing. This Court's attachments are designated "CX."

⁵ Isaac Villahermosa has over eight years of experience as an MSHA inspector, with roughly 250 inspections conducted as of April 29, 2015. Tr. 23. Prior to beginning work with MSHA, Villahermosa served with the United States Navy as a safety inspector and competent person for 22 years before receiving an honorable discharge. Tr. 51. Villahermosa is one of two MSHA inspectors for the entire territory of Puerto Rico, supported by one supervisor, Luis Valentín. Tr. 52, 285.

⁶ Isaias Delgado has been employed by P.A.G. as an equipment operator since 2001. Tr. 321, GX-4. He completed his formal education at the 10th grade level. Tr. 248.

⁷ The conveyor of Plant No. 1 is a Powerscreen Model Chieftain 5 x 10. This machine is loaded with unprocessed alluvium, either collected from a flood plain or a dredged from a river bed, and then used to filter the alluvium into fine grain and oversized materials, both of which are then deposited by the filter into separate piles. GX-4. Model Chieftains are equipped with a conveying arm that extends at least ten feet into the air diagonally; this arm uses a running conveyor belt to transport the alluvium. GX-5. The conveying arm has two bearings at its uppermost point that facilitate the rolling of the conveyor belt's pulley. GX-5. These bearings require periodic maintenance, including manual greasing, which at P.A.G. occurred roughly every two weeks during periods of regular activity. Tr. 46. This greasing is performed with a hand-operated grease gun.

from the platform's railing. Tr. 33. Inspector Villahermosa testified that he asked Mr. Delgado just how greasing was performed, given the distance from the platform to the greasepoint on the bearing. Tr. 28. According to Villahermosa's testimony, Delgado replied, "In order to get to the pulley I climb up to the conveyor." Tr. 28-9. After further questioning on just where one would mount the conveyor in order to climb up its incline, Delgado allegedly took Inspector Villahermosa down to ground level and pointed out the span of a metal support beam, running just beneath the beginning of the conveyor belt, which he used as a foothold when climbing onto the belt itself. Tr. 28-9, GX-2.

Mr. Delgado denied under oath that any conversation of this sort ever took place. Tr. 213. He testified that in order to reach the greasepoint, he had to reach outward from the platform with his arms out, but said he had no difficulties doing so from the platform. Tr. 222-3, 246. Mr. Delgado testified that while he and Inspector Villahermosa had spoken during the inspection, the first he heard of the allegation that he told Villahermosa he climbed the conveyor was after the citation was issued.⁸ Tr. 206, 246-7.

While at Plant No. 1, Villahermosa took three photographs of the conveyor. The first depicted the metal support beam that Delgado allegedly identified as the beginning step for the climb up the conveyor. Tr. 29, GX-2. The second, taken from ground level, depicts the conveyor belt as it rises upward. Tr. 29, GX-2. The third depicts the bearing in question and was apparently taken from the platform itself. Tr. 29, GX-2. Inspector Villahermosa testified he took these photographs "to show the areas where the greasepoint was unreachable." Tr. 29. He made no measurements to determine how far the bearing was from the platform. Tr. 73. He did not ask Mr. Delgado to sign a document memorializing the statements the equipment operator had allegedly made to the inspector. Tr. 120. Inspector Villahermosa did not attempt to reach out from the platform to access the bearing, but visually estimated the distance between the platform and bearing.⁹ Tr. 60. Inspector Villahermosa never witnessed Delgado, or any other employee of P.A.G., actually climb the conveyor itself. Tr. 101.

After photographing the conveyor, Inspector Villahermosa notified Mr. Delgado that the bearings needed to be reached with extension hoses to allow easier greasing from the conveyor platform and that this abatement needed to take place within ten minutes. Tr. 143. Once Mr. Delgado made clear his intent to comply with all instructions, including halting production at Plant No. 1 until abatement took place, Villahermosa granted P.A.G. an extension to complete abatement. Tr. 143-4.

Calixto Frias arrived on-site toward the end of Villahermosa's inspection. Tr. 38. At this time, Inspector Villahermosa issued Citation No. 8723601 to Frias personally. Tr. 39. The

⁸ At one point under questioning about his reaction to Villahermosa's description of their conversation during inspection of Plant No. 1, Delgado offered, "The thing is, I didn't go up the conveyor." Tr. 235. Mr. Delgado's somewhat confused testimony might be the result of a difficulty navigating the murky shoals of courtroom examination instead of a deliberate effort at confusing the issue.

⁹ Inspector Villahermosa testified at hearing he was 5'6" in height (but appeared to be somewhat shorter to this Court). Tr. 68.

citation alleged that safe access was not provided for maintenance of the bearings on the conveyor of Plant No. 1, that miners accessed the greasepoint by climbing the conveyor belt itself, and that a fall while climbing the conveyor could lead to serious injury or death if a miner struck the concrete beneath the conveyor. GX-2, Tr. 45. The potential for an accident if a miner were to fall from the conveyor, as well as the frequency of the greasing (every two weeks during peak periods), led Inspector Villahermosa to conclude the violation was significant and substantial (S&S). GX-2, Tr.46. Upon receipt of the citation, Frias contested the issuance's language alleging the operator had been cited twice previously for the same condition but made no other argument as to the citation's validity. GX-2, Tr. 39. Villahermosa modified the citation to read "standard," rather than "condition." Tr. 39-40,152. Inspector Villahermosa told Mr. Frias that extension hoses would have to be affixed to the bearings of the conveyor of Plant No. 1 to abate the violation alleged in the citation. Tr. 167.

Frias did not take Villahermosa to Plant No. 1 to dispute the citation in detail or point out existing safe access areas. Tr. 41. Frias testified that he received the citation, informed Inspector Villahermosa of his intent to challenge the citation's validity, but did not have time to fully process the entire text of the citation itself. Tr. 322. Mr. Frias testified that it was only after Inspector Villahermosa had left the office that he had time to "analyze and understand what the allegation was," by which point Villahermosa was no longer available to discuss the citation. Tr. 322-3. Mr. Frias expressed fear of retaliation as a further reason for his failure to contend with Inspector Villahermosa on the morning of April 12. Tr. 202.

Following the receipt of the citation Frias went out later the same day and purchased extension hoses and had the hoses installed on the bearings of the conveyor of Plant No. 1. Tr. 157-8. At hearing, Frias testified that the hoses purchased to abate the violation were threaded into the greasepoints of the conveyor by standing on the same platform Villahermosa cited for unsafe access. Tr.188-9. Frias did not disclose any difficulties that his employees had in greasing the head pulley with grease guns alone.¹⁰ Tr. 188-9.

Sometime after April 12 Mr. Frias and Mr. Delgado spoke about the citation. Mr. Frias testified that he waited at least a day before approaching Mr. Delgado to discuss just what happened that led to the citation. Tr. 170. In testimony Frias remarked upon Inspector Villahermosa's "perturbing" effects on his staff during and after inspections and said that "I didn't want Isaias [Delgado] to feel at that time that I was questioning him or blaming him or saying anything that might perturb him." Tr. 204. For his part, Mr. Delgado asserted that he was told about the violation the next day, April 13, 2013, and that the conversation touched only upon the installation of the greasehoses. Tr. 218-9.

Within two weeks, Inspector Villahermosa returned and noted the proper installation of the extension hoses. He concluded the violation had been abated. Tr. 41-2.

Approximately one year after the events of April 12, 2013, Inspector Villahermosa issued another, unrelated citation to P.A.G., prompting Mr. Frias to call on the local MSHA field office. Tr. 196. There Mr. Frias spoke to Luis Valentín, Inspector Villahermosa's supervisor. Tr. 196,

¹⁰ There was some question during testimony as to whether Mr. Delgado and Mr. Diaz, another employee of P.A.G., installed the greasehoses, or if Mr. Diaz alone installed the hoses.

285-6. Mr. Frias complained of Villahermosa's most recent citation and Citation No. 8723601, believing they were "becoming a pattern of irregularities." Tr. 196. At hearing Mr. Valentín testified that Inspector Villahermosa had something of a reputation for his problematic "delivery" of citations and that his style of inspection had garnered comment from operators before, but Valentín had never personally seen Villahermosa behave improperly while on the job. Tr. 299, 307.

At hearing, Inspector Villahermosa was presented with photographs taken by the Respondent that appeared to depict safe access to the backside of the conveyor from the platform. Tr. 340, RX 1-8. Inspector Villahermosa was uncertain as to whether the photographs accurately depicted Plant No. 1's setup when he issued Citation No. 8723601. Tr. 340-1.

At hearing, Inspector Villahermosa described how his third photograph, depicting the bearing of the conveyor, was taken. GX-2. At first he asserted it was taken while in front of the conveyor as if the platform lacked access to the backside.¹¹ Tr. 77-8. Later Villahermosa stated that the platform in question did "come out some," and he was standing in that space when he took his third photograph. Tr. 82-3.

At hearing, the Secretary introduced into evidence enhanced copies of Inspector Villahermosa's original notebook entries concerning the inspection. Tr. 139. Inspector Villahermosa testified that the duplicates accurately reflected the notes he took during the inspection on April 12, 2013. Tr. 145-6. One page of the notebook possessed certain irregularities that led the Respondent to question the authenticity of the exhibit. Tr. 145-6. The Court, after experiencing difficulty aligning the enhanced version with the unenhanced version already in the record, requested Inspector Villahermosa's original notebook for examination. Tr. 141, 148.¹² Ultimately, the Secretary supported his case by Villahermosa's testimony alone and without the benefit of the inspector's field notes. CX-3.

¹¹ At no point in the record does Inspector Villahermosa assert directly that the platform had no access to the backside, but his language throughout his testimony is suggestive of this. Tr. 56, 69, 80. That Villahermosa implied there was a lack of access to the backside of the conveyor is confirmed by his own statement that "*I said it didn't go down the side. I didn't say it didn't come out some.*" Tr. 83, emphasis added. This relatively minor detail assumes greater importance when one considers that the citation at issue alleged unsafe access to the greasepoint. Villahermosa later testified that he could not be sure if safe access to the backside did exist. Tr. 83. Villahermosa testified further that if he had seen safe access to the backside, he would have instead cited Respondent for improper guarding. Tr. 342. Villahermosa's testimony suggests the inspector himself was unsure at hearing if safe access existed, but chose to rely on Delgado's alleged out-of-court statement to support his citation.

¹² As discussed *infra*, the Solicitor agreed to have the original notebook, located in an MSHA district office in Birmingham, Alabama, mailed to the Court within approximately twenty days. Tr. 148. Twenty one days later, the Solicitor authored a letter to the Court averring that UPS records showed the notebook, sent by overnight mail, had been delivered to the New York Solicitor's Office. Somehow the package, and the original notebook with it, had disappeared

(continued...)

CONTENTIONS OF THE PARTIES

The Respondent contends that the Secretary has failed to meet its burden of proof, asserting that the citation's factual basis has not been proven by a preponderance of the evidence. P.A.G. further contends that Isaias Delgado's alleged remark is an uncorroborated hearsay statement that cannot alone sustain the violation. P.A.G. also contends that insufficient notice was provided by the citation itself because it did not include Delgado's alleged statement. Additionally, P.A.G. argues that the Secretary's additional corroborative evidence is not, in fact, corroborative. P.A.G. argues, in the alternative, that if the citation is found valid, it does not satisfy the *Mathies* standard as a significant and substantial violation.

The Secretary contends that a preponderance of the evidence establishes that P.A.G. failed to provide and maintain a safe access for the conveyor of Plant No. 1 and that the violation should be affirmed as S&S and one of high negligence. He argues that Isaias Delgado told MSHA Inspector Isaac Villahermosa that routine maintenance was performed by climbing the conveyor belt of Plant No. 1. The Secretary also contends that Isaias Delgado and Calixto Frias's testimony is not credible. He further argues that, even if the Court chooses to disregard Mr. Delgado's alleged statement to MSHA Inspector Villahermosa, there is sufficient additional corroborative evidence to support the citation as issued. He maintains that the citation itself provided adequate notice of the alleged violation to P.A.G.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On April 12, 2013, MSHA Inspector Isaac Villahermosa issued Citation No. 8723601 to Respondent. The inspector alleged that:

A safe access was not provided for maintenance of the main conveyor head pulley in plant # 1. Miners access area by climbing on the conveyor belt when required for maintenance. Miners can sustain serious or fatal injuries if they fell from approximately 5 to 10 feet to the floor. The mine operator had been cited 2 times previously for this condition.¹³

GX-2 §8.

30 C.F.R. §56.11001, "Safe access," provides that:

Safe means of access shall be provided and maintained to all working places.

¹² (...continued)

after delivery -- certainly, in the Solicitor's words, "the unlikeliest of occurrences." Letter from Terence Duncan, Senior Trial Attorney, Secretary of Labor, to the undersigned (May 20, 2015) see CX-3.

¹³ The citation was later modified to read "standard" in place of "condition" at Calixto Frias's objection. See *supra*.

Burden of Proof and Standard of Proof

The Secretary must prove the basis of a violation by a preponderance of the evidence. *Jim Walter Resources, Inc.*, 28 FMSHRC 983, 992 (Dec. 2006), *RAG Cumberland Resources, Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000), *Jim Walter Res., Inc.*, 9 FMSHRC 903, 907 (May 1987). This includes every element of the citation. *In re: Contests of Respirable Dust Sample Alteration Citations: Keystone Mining Corp.*, 17 FMSHRC 872, 878 (Aug. 2008).

Commission precedents have held that “[t]he burden of showing something by a ‘preponderance of the evidence’ the most common standard in the civil law, simply requires the trier of fact ‘to believe that the existence of a fact is more probable than its nonexistence.’” *RAG Cumberland Resources Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000), quoting *Concrete Pipe & Products of California, Inc. v. Constr. Laborers Pension Trust for S. California*, 508 U.S. 602, 622 (1993).

The United States Supreme Court has held that “[b]efore any such burden can be satisfied in the first instance, the factfinder must evaluate the raw evidence, finding it to be sufficiently reliable and sufficiently probative to demonstrate the truth of the asserted proposition with the requisite degree of certainty.” *Concrete Pipe & Products of California, Inc. v. Constr. Laborers Pension Trust for S. California*, 508 U.S. 602, 622 (1993). The assessment of evidence is a process of weighing, rather than mere counting: “[T]here is a distinction between civil and criminal cases in respect to the degree or quantum of evidence necessary to justify the [trier of fact] in finding their verdict. In civil cases their duty is to weigh the evidence carefully, and to find for the party in whose favor it preponderates.” *Lilienthal's Tobacco v. United States*, 97 U.S. 237, 266 (1877).¹⁴

¹⁴ “What is the most acceptable meaning of the phrase, proof by a preponderance, or greater weight, of the evidence? Certainly the phrase does not mean simple volume of evidence or number of witnesses. *One definition is that evidence preponderates when it is more convincing to the trier than the opposing evidence.* This is a simple commonsense explanation which will be understood by jurors and could hardly be misleading in the ordinary case.” 2 McCormick On Evid. § 339 (7th ed.), emphasis mine. Indeed the notion of justice being an assessment by weighing has ancient roots, extending at least as far back as the *Iliad's* Book XXII: “Then, at last, as they were nearing the fountains for the fourth time, the father of all balanced his golden scales and placed a doom in each of them, one for Achilles and the other for Hektor.” HOMER, THE ILIAD, BOOK XXII, trans. Samuel Butler, 1898.

While the Secretary must prove the elements of a citation by a preponderance of the evidence, this Court's factual determinations must be supported by substantial evidence.¹⁵ The Commission has recognized out-of-court statements may constitute substantial evidence. *Mid-Continent Res., Inc.*, 6 FMSHRC 1132, 1135-37 (May 1984).

The Hearsay Evidence Presented By the Secretary was Not Sufficiently Probative or Trustworthy so as to Support a Finding of a §56.11001 Violation

It is undisputed that Inspector Villahermosa did not personally witness any miner or miners improperly climbing upon the conveyor to gain access to the main conveyor belt assembly and/or being unable to safely access the greasepoint at issue. Tr. 101. Rather, in issuing his citation, Villahermosa primarily relied upon the alleged hearsay statements of P.A.G. miner, Isaias Delgado. Tr. 28-9. Thus, this Court is confronted with the critical question as to whether the Secretary has been able to carry his burden of proof by relying upon the alleged out-of-court statements of Isaias Delgado.

The alleged oral statements of Delgado appear to meet the classic definition of hearsay: an out-of-court declaration that a party offers to prove the truth of the matter asserted. FED. R. EVID. 801(c).

Although Commission procedural rules explicitly allow for the admission of hearsay evidence, this Court does harbor reservations regarding the use of such to serve as the primary basis to support a finding of a mandatory safety standard violation. Nonetheless, as noted *supra*, the Commission has held properly admitted hearsay evidence, deemed to be sufficiently relevant and material in nature, and the reasonable inferences drawn from such, may constitute substantial evidence so as to uphold an ALJ's finding of violation. *See Mid-Continent Res., Inc.*, 6 FMSHRC 1132. *See also Sec. of Labor v. R.E.B.*, 20 FMSHRC 203, 206 (Mar. 1998) (regarding the Court's obligation to determine whether hearsay evidence is reliable and entitled to any probative weight.)

This Court has carefully considered the Commission's directives in *Mid-Continent* in evaluating the hearsay evidence presented by the Secretary in the case *sub judice* and is constrained to find that such evidence was not "surrounded by adequate indicia of probativeness and trustworthiness" so as to be able to sufficiently support a finding of violation. *See Mid-Continent*, at 1136.

¹⁵ When reviewing the finding of fact by a lower court, the Commission will decline to disturb the determination if it is supported by substantial evidence. *Wolf Run Mining Co.*, 32 FMSHRC 1669, 1687 (Dec. 2010), *U.S. Steel Mining Co.*, 8 FMSHRC 314, 319 (Mar. 1986). This test of factual sufficiency has been a part of Commission jurisprudence since its inception, required by the plain text of the Mine Act itself. 30 U.S.C. § 823(d)(2)(A)(ii)(I). Substantial evidence has been described by the Commission as "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)).

The Commission in *Mid-Continent* rejected a *per se* rule that evidence may not be considered to be substantial for purposes of review merely because it bears a hearsay label. Rather, the Commission held that the underlying probative value of the hearsay evidence had to be carefully evaluated against various case specific factors:

Although no single test can be established to evaluate the role of hearsay in determining whether substantial evidence supports a judge's finding, we measure the probative value of such evidence by weighing it against various factors, which, when added together, may tip the scale for or against a determination that substantial evidence is present. For example, we look to whether the out-of-court declarant, whose statement is reported at the hearing by another, had an interest in the outcome of the case and thus a reason to dissemble. *Richardson v. Perales*, 402 U.S. at 402–03. We also examine whether the out-of-court statement rests on personal knowledge gained from firsthand experience. 402 U.S. at 403. If there is more than one reported statement, we inquire whether the statements are consistent. 402 U.S. at 404. We also find significant whether the party against whom the statement was used exercised the right of subpoena so as to cross-examine the out-of-court declarant. 402 U.S. at 404. We likewise determine whether the making of the statement was denied or whether its contents were declared untrue. And we examine the content of any contradictory or corroborating evidence. *School Board of Broward County, Florida v. H.E.W.*, 525 F.2d 900, 907 (5th Cir.1976). Our aim is to determine if, given all of these factors, there is “such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion.” *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938).

Mid-Continent Res., Inc., 6 FMSHRC 1132, 1136-37, 1984.

In *Mid-Continent*, the ALJ permitted testimony regarding out-of-court declarations made by a mine foreman to two MSHA Inspectors concerning the improper installation by an unqualified individual of a cover plate which was part of a causative chain leading to an explosion and the Court primarily relied upon such hearsay evidence in concluding that there had been a violation of a mandatory safety standard. No contrary evidence was presented by the mine operator.

The hearsay evidence presented *sub judice* was far more problematic.

The out-of-court declarant in *Mid-Continent* was a foreman, presumed to know what he and his miners were doing. *See Mid-Continent*, at 1137. As discussed *intra* Delgado was a rank and file miner with a limited education and no supervisory role.

In *Mid-Continent* the out of court declarant had *not* been subpoenaed by the operator to rebut at hearing what he was reported to have said by the inspectors. *Mid-Continent*, at 1137. As discussed *infra*, Delgado appeared and testified on behalf of the Respondent, not endorsing Villahermosa’s version of their conversation.

In *Mid-Continent*, there were two inspectors who gave consistent testimonial accounts as to what the out-of-court declarant purportedly said. Here, Villahermosa had no such fellow

corroborating inspector nor any other witness supporting what he had allegedly heard Delgado say.

In *Mid-Continent*, the Respondent essentially did not defend against the Secretary's evidence that an unqualified person had installed the coverplate. In the case *sub judice* the operator mounted a vigorous defense of the citation that there was unsafe access, offering both testimony and photographic evidence that miners could safely access the conveyor pulley by means of guarded stair-wells and safely grease the pulley by standing on an adjoining platform. Tr. 182-5, 188-9.

In *Mid-Continent*, the fact that an explosion had taken place not only raised an inference of a possible safety violation but, given that the explosion was fatal in nature, understandably raised questions regarding the Respondent's witnesses' willingness to be altogether forthcoming. *See Mid-Continent* at 1138. There were no such compelling circumstances impacting upon Respondent's witnesses' willingness to tell the truth.

Delgado's Out of Court Statements

In his brief, the Secretary suggests that Delgado's statements were not hearsay but were admissible non-hearsay pursuant to sections 801(d)(2)(A) and (D) of the Federal Rules of Evidence.¹⁶ Given the above cited Commission case law allowing for the admission of hearsay evidence, such evidentiary distinction may be of little import. However, this Court observes that the commentary to Rule 801 states that "the hearsay problem arises when the witness on the stand denies having made the statement or admits having made it but denies its truth." *See* subdivision D, FED. R. EVID. 801(d)(2).

This is, of course, precisely what took place at hearing. Delgado denied ever having made the incriminating statements or denied the veracity of such. Tr. 102-3. Thus, the question of whether Delgado had in fact admitted to Villahermosa that he had accessed the head pulley by climbing onto and walking on the main conveyor belt becomes a critical factual issue for this Court to decide.

At hearing, Villahermosa, under questioning by this Court, acknowledged that he had not secured an affidavit from Delgado attesting to such unsafe access nor did he have Delgado sign or initial any written statement confirming such. Tr. 120. This Court notes that such written evidence would have substantially supported Villahermosa's version of events and the lack of such evidence further weakened the Secretary's case.

Moreover, Villahermosa also contended that he had memorialized Delgado's admissions in his general field notes. GX-2, at 8. At hearing the Secretary proffered an "enhanced photocopy" of page 3 of Villahermosa's field notes wherein it was indicated that Delgado had reportedly "stated that he climbed up the main conveyor to reach the head pulley for maint[enance]." Tr. 140. Respondent's counsel objected to the admission of the enhanced field

¹⁶ In *Mid-Continent*, the Commission drew no distinctions in its analysis of "trustworthiness" of the out-of-court declaration between hearsay and a non-hearsay exception.

note because the photocopy of Exhibit P-2 supplied to her in discovery did not legibly reveal this alleged statement. This Court attempted to align both the enhanced photocopy presented at hearing and the unenhanced photocopy supplied to Respondent in discovery without success. *See* CX-1 and CX-2, which are photocopies, enhanced and non.¹⁷ Tr. 140-8. To ensure that the enhanced photocopy was an accurate depiction of the inspector's original field notes, and, was in no way the result of tampering or alteration, this Court requested that the Secretary secure the original field note from MSHA. Tr. 148. Subsequent to the hearing, however, Secretary's counsel advised this Court that an exhaustive search had failed to uncover the original field note which possibly had been mislaid or discarded in error. CX-3. Accordingly, the Secretary would only be referring to the inspector's testimony regarding his conversation with Delgado. CX-3.

That such a critical piece of corroborative evidence went missing is troubling. However, this Court declines to speculate whether this absent evidence was due to incompetence, mischief, or just plain bad luck. Whatever the reason, the lack of a corroborative original field note further damaged the Secretary's case.

At hearing, Delgado took abnormal lengths of time to respond to questions. He had limited formal schooling, and appeared susceptible to suggestion or intimidation. His answers were halting and simple, suggesting he had some difficulty understanding much of the proceedings.¹⁸ Despite the lengthy direct and cross-examinations of Delgado, this Court remains uncertain as to what this witness actually said or meant to say on the date in question. Considering Villahermosa's failure to memorialize Delgado's statements via written attestation, the disappearance of Villahermosa's original field notes, Delgado's repudiation of the alleged statements, Villahermosa's lack of observation of any cited unsafe activity -- this Court declines to give much probative weight to Delgado's alleged out-of-court statement.¹⁹

Moreover, the Secretary's reliance upon such evidence raises, in this Court's mind, troubling questions regarding the Respondent's rights to due process.

¹⁷ Court attachments 1, 2, and 3 are, respectively: Villahermosa's field notes as given to Respondent in discovery, the Secretary's enhanced photocopy of Villahermosa's field notes, and a letter from the Secretary described in detail *infra*. These attachments are part of the record.

¹⁸ Regardless of Delgado's limitations, answering some of the questions offered at hearing by Respondent's counsel would have proved challenging even for an experienced litigant. *See*, for example, the exchange at Tr. 240-1.

¹⁹ For a comparable case, consider *Hoska v. U.S. Dep't of the Army*, 677 F. 2d 131, D.C. Cir., 1981. In *Hoska* a civilian employee of the Department of the Army was terminated when accused of on-the-job improprieties. The Department of the Army supported its decision by relying "almost entirely on unsubstantiated hearsay evidence." *Hoska*, at 282. Conversely, *Hoska*, the terminated employee, bitterly maintained his innocence of all charges. The D.C. Circuit found *Hoska's* resistance, along with the failure of the Department of the Army to produce any substantial evidence beyond out-of-court statements, persuasive, and decided in *Hoska's* favor. *Hoska*, at 292-4.

There is a vast and growing body of law dealing with rights of the criminally accused vis-a-vis alleged confessions and admissions. Such criminal jurisprudence may not be directly applicable to cases arising out of the Mine Act. However, many of the constitutional, due process, and evidentiary considerations articulated in such jurisprudence would appear relevant to the present controversy. For over a century, federal courts have recognized that “[t]he fundamental requisite of due process of law is the opportunity to be heard.” *Grannis v. Ordean*, 234 U.S. 385, 394 (1914). Recent history has seen a growing body of due process jurisprudence, born out of the recognition that the power of the state- in all its forms, civil or criminal- must be balanced against the individual’s right to defend against deprivation. See, e.g., *Goldberg v. Kelly*, 397 U.S. 254 (1970), *Wheeler v. Montgomery*, 397 U.S. 280 (1970), *Ortwein v. Schwab*, 410 U.S. 656 (1973), *Mathews v. Eldridge*, 424 U.S. 319 (1976), *et. al.* Since *Goldberg*, federal courts have viewed due process considerations as not solely the province of the criminal sphere, reasoning that deprivations of property also triggered such protections in the civil context. These considerations have their roots in the jurisprudence of criminal law.

For example, the “*corpus delicti*” (Latin for “body of the crime”) is an evidentiary rule that requires the prosecution, in a criminal case, to produce evidence that a crime has been *actually committed before* the statements of the accused can be admitted as evidence of guilt. This rule is traced back to the infamous *Perry’s Case* in England. 14 How. St. Tr. 1311 (1660). A John Perry had reportedly implicated himself, his brother, and his mother in the murder of an individual who had mysteriously disappeared, leaving behind only a “hacked and bloody hat.” Sometime after the three family members were hanged, the purported victim turned up, alive and well, claiming he had been kidnapped by Turkish pirates and enslaved before eventually escaping. This case is better known in the United Kingdom as “the Campden Wonder.”

In response to this and other similar miscarriages of justice, both English and American courts developed the *corpus delicti* rule to guard against “the hasty and unguarded character which is often attached to confessions and admissions and the consequent danger of a conviction where no crime has in fact been committed.” *Com. v. Turza*, 340 Pa. 128, 134 (1940). See also *In re Flodstrom* 134 Cal. App. 2d 871 (1954).

While many courts have now abandoned strict application of the *corpus delicti* rule in favor of a “trustworthiness” approach, courts still require that the government must introduce substantial evidence which would tend to establish the trustworthiness of the defendant’s statement. *Opper v. United States*, 348 U.S. 84 (1954).

The *corpus delicti* rule is reflected in the above cited Commission case law that likewise directs this Court to employ a “trustworthiness” test in evaluating the Secretary’s offered hearsay evidence as to Delgado’s alleged incriminatory statements.

Given the total circumstances, this Court can only speculate as to whether Delgado had actually made the inculpatory statements or not.²⁰ Such hearsay evidence is too thin of ice upon which to base a finding of a violation.

²⁰ “Where there is room for question, something is wrong.” – Jewish folk saying. JOSEPH L. BARON, A TREASURY OF JEWISH QUOTATIONS.

Disregarding Delgado's Out-of-Court Declarations, There Was Insufficient Evidence Presented to Uphold the Citation

In his brief, the Secretary argues that a reasonable operator in Frias's position would have immediately disputed the validity of the violation with Villahermosa at the time of the citation's issuance and that Frias's failure to do so would constitute additional evidence to uphold the citation. Sec'y's Br., at 5-6, 8. The Secretary essentially advanced a similar argument as to Frias's continued silence about the accuracy of the allegations in the citation at issue when he met with Villahermosa's supervisor, Luis Valentín, months later to discuss an unrelated citation.

In asserting such, the Secretary is advancing the old "silence is affirmation" argument.²¹ Of course, if this mine operator stood accused of criminal wrongdoing, such an argument would fly in the face of a vast body of law protecting an individual's Fifth Amendment rights against self-incrimination, including the right to remain silent. The Secretary cited no statutory or Commission case law for the proposition that under the Mine Act a miner operator's silence at the time of citation issuance or thereafter should be considered to be evidence of violation or create an adverse inference regarding such.

At hearing, the Respondent essentially argued that it would have been an adventure in futility to have attempted to dissuade Villahermosa. Tr. 167. This Court has repeatedly heard similar explanations from various mine operators for their silence in other cases: they did not actively dispute the issuance of citations at the scene because either they already knew the futility of such or they feared that any argument would merely inflame the inspector. While there might be a set of particular case circumstances where silence could arguably suggest affirmation of violation, this Court does not believe such exists here.²²

²¹ See the Latin proverb, "Qui tacet consentire videtur,": he who is silent is considered to agree.

²² In Robert Bolt's classic 1966 film "A Man for All Seasons," Cromwell's exchanges with Sir Thomas More illustrate the problematic nature of construing silence as consent:

Cromwell: Now, Sir Thomas, you stand on your silence.

Sir Thomas More: I do.

Cromwell: But, gentlemen of the jury, there are many kinds of silence. Consider first the silence of a man who is dead. Let us suppose we go into the room where he is laid out, and we listen: what do we hear? Silence. What does it betoken, this silence? Nothing; this is silence pure and simple. But let us take another case. Suppose I were to take a dagger from my sleeve and make to kill the prisoner with it; and my lordships there, instead of crying out for me to stop, maintained their silence. That would betoken! It would betoken a willingness that I should do it, and under the law, they will be guilty with me. So silence can, according to the circumstances, speak! Let us consider now the circumstances of the prisoner's silence. The oath was put to loyal subjects up and down the country, and they all declared His Grace's title to be just and good. But when it came to the prisoner, he refused! He calls this silence. Yet is there a man in this court - is there a man in this country! - who does not know Sir Thomas More's opinion of this title?

(continued...)

In his brief the Secretary further suggests that Respondent's abatement of the violation on the same date it was cited constituted corroborative evidence to uphold the violation. Sec'y's Post Trial Reply Br., at 6.

It is clear that an operator's demonstrated good faith in attempting to achieve rapid compliance after notification of violation should be considered in determining the penalty amount to be assessed. See, *inter alia*, §100.3(a)(1)(V). This Court, however, does not find that Respondent's speedy cooperation in abating the cited unsafe access condition(s) to be further evidence that a violation, in fact, existed. Some acts of abatement- dependent upon the particular circumstances of a case- may well be indicative of the existence of a violation. But not *every* act of abatement necessarily constitutes evidence of a violation.

Frias essentially testified at hearing that the purchase and installment of the greaser-extensions was a relatively minor affair that could be performed rapidly and inexpensively. Tr. 157. Rather than risk further citations and/or orders by further debating the matter with an obviously adamant Villahermosa, Frias chose the prudent course of quickly installing extensions, even if they were unneeded, to mollify the inspector.²³ Tr. 157. At hearing, Frias credibly testified that miners standing on the platform- as depicted in RX-4- were able to safely grease the head pulley without the necessity of an extension. RX-4.

This Court found Frias to be quite sincere and credible in his explanations at hearing and therefore finds that the abatement in this case's context did not constitute proof of violation, either inferentially or directly.

The Photographic Evidence Presented Appears to Support Either Party's Position

Much of this controversy has turned on the arrangement of the conveyor's walkway and placement of platform at the time of the citation. Photographs have been moved into evidence by

²² (...continued)

Crowd in court gallery: No!

Cromwell: Yet how can this be? Because this silence betokened, nay, this silence was, not silence at all, but most eloquent denial!

Sir Thomas More: Not so. Not so, Master Secretary. The maxim is "Qui tacet consentire": the maxim of the law is "Silence gives consent". If therefore you wish to construe what my silence betokened, you must construe that I consented, not that I denied.

Cromwell: Is that in fact what the world construes from it? Do you pretend that is what you wish the world to construe from it?

Sir Thomas More: The world must construe according to its wits; this court must construe according to the law.

A MAN FOR ALL SEASONS (Columbia Pictures 1966).

²³ This Court has heard similar rationales advanced by operators in describing their abatement efforts in numerous cases, some of which were credible and some not.

both parties, who each allege their photographs support their theory of the case. Given the testimonial contradictions existent in the case, some description of the photographs is necessary. The Respondent's six photographs appear to depict safe access to the conveyor's greasepoint. RX-1-6. Three photographs depict P.A.G. employees engaged in greasing maintenance with apparent safe access. RX-3-4, 6. Two depict P.A.G. employees mounting the platform in order to access the greasepoint. RX-1-2. Finally, one photograph depicts a tape measurer, appearing to show the greasepoint's height, measured at 5 feet. The Respondent maintained at hearing that these photographs accurately depicted the conveyor/platform on April 12, 2013 when the Secretary issued its unsafe access citation. Tr. 182-5.

The Secretary's photographic evidence is described in detail *supra* in the Summary of Facts and Testimony. The photographs taken by Villahermosa are cropped or framed in such a way as to make determination of the violation by examination of such – even in their enlarged formats – extremely problematic. The first photograph shows only the bottom of the conveyor itself, setting aside Villahermosa's stated reasons for taking said photograph. GX-2, at 13. The second photograph merely shows the incline of the conveyor from below, rendering the viewer unable to discern a safe access or, for that matter, an unsafe access. GX-2, at 13. Finally, the third photograph shows the greasepoint itself, at close range, with no view of the arrangement of the platform or the platform's actual distance from the conveyor's greasepoint. GX-2, at 13.

MSHA inspectors are not expected to possess a professional's proficiency in photography, nor should citations fail solely because of inartful photographic framing. However, in none of Villahermosa's photographs can the Court discern evidence of a safe access violation. The pictures fail to show the position of the platform, and whether that platform extended out and around the conveyor to permit safe access to the backside greasepoint on the pulley head. The pictures also fail to depict any P.A.G. employee climbing up the conveyor belt. Even accepting that all three photographs accurately depict the conveyor on the date of the citation, they do not fully support the Secretary's assertion that there was unsafe access.

The photographic evidence arguably supports either party's position. At hearing, Villahermosa himself was unable to say with certainty whether the Respondent's photographs accurately depicted the conveyor as it stood on the date of citation. Tr. 340-1. This Court has compared all photographic evidence and concludes that Villahermosa's photographs and the Respondent's photographs could, together, depict the conveyor accurately. Because Villahermosa's photographs are so framed in their depiction of the conveyor's setup, they appear to differ from the Respondent's in only one pertinent respect: the Respondents' photographs depict the greaseshoses installed by way of abatement. In all other respects the two sets of photographs can be reconciled together. Therefore the Secretary's photographs, as proffered, may or may not depict unsafe access and as such this Court finds they do not constitute persuasive evidence to support an unsafe access violation.

The Secretary's Alleged Corroborative Evidence Is Not Supportive of a Finding of Violation

As discussed *supra* Villahermosa did not actually witness any miner placing himself at risk in attempting to grease the pulley. In his Post-Trial Brief, the Secretary argues that the

citation is supported by additional corroborative evidence. The Secretary contends this evidence can support the citation even without admitting Isaias Delgado's out-of-court statement. Sec'y's Post-Trial Br., at 9-11.

The Court finds that none of the Secretary's cited corroborative evidence, singly or *in toto*, constitutes persuasive evidence of violation. This Court will address the Secretary's arguments regarding such *seriatim*.

The Secretary's first piece of corroborative evidence is essentially a summary of Villahermosa's own testimony: Villahermosa opined that the walkway did not provide a continuous, safe access to the greasepoint. Sec'y's Post-Trial Br., at 9. This contention was, as noted *supra*, contradicted by Frias who ridiculed the idea that someone would climb upon the beltway and need to bend over in an awkward position to grease the pulley and who further testified that his miners were able to easily access the greasepoint from a standing position on the adjoining platform. Tr. 190, 182.

The second is another hearing assertion of Villahermosa's. Sec'y's Post-Trial Br., at 9. Inspector Villahermosa estimated the distance between the greasepoint and the walkway's terminus was roughly three to four feet. Sec'y's Post-Trial Br., at 9. However, he took no actual measurement of the distance between where a miner would be standing up against the rail and reaching with a greasegun toward the greasepoint. Tr. 60. Frias, as noted *supra*, testified that miners were able to safely grease the pulley with grease guns without need of an extension. Tr. 182.

The third, fourth, and fifth pieces of corroborative evidence are again assertions of Villahermosa's. Sec'y's Post-Trial Br., at 10. All three concern the alleged statements made and actions taken of Isaias Delgado while in the presence of Inspector Villahermosa. Sec'y's Post-Trial Br., at 10. Delgado denied at hearing any actions or statements that would support a finding of violation. Tr. 209, 213. This Court considered this evidence at length *supra* and finds it to be a problematic basis for the citation at issue.²⁴

The sixth piece of corroborative evidence is essentially the same "silence is affirmation" argument already advanced by the Secretary and discounted by this Court. Sec'y's Post-Trial Br., at 10.

The seventh piece of evidence is a fact summary that implies an operator's efforts at abatement constitutes proof of a violation. Sec'y's Post-Trial Br., at 10. As noted *supra*, the fact that Frias abated the violation pursuant to the instructions of Inspector Villahermosa could just as easily have been an effort to mollify Villahermosa as it could have been an effort to abate a

²⁴ This Court acknowledges that an inspector's testimony, standing alone, may constitute sufficient evidence to prove the existence of a safety violation – *if such testimony is found to be reliable* – see, *inter alia*, *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-9 (Dec. 1998) (holding that the opinion of an investigator that a violation is S&S is entitled to substantial weight). However, as discussed herein, Villahermosa's testimony was based upon alleged out-of-court declarations that this Court finds to be unreliable and untrustworthy in nature, and based upon observations by Villahermosa that were credibly and persuasively rebutted by Calixto Frias.

violation. Moreover, Commission precedent has long held that the method of abatement cannot prove, or disprove, the validity of a citation: “the method of abatement is not determinative of the existence of a violation. *See also Asarco Mining Co.*, 15 FMSHRC 1303, 1309 (July 1993) (method of abatement not before Commission in a contest proceeding); *U.S. Steel Mining Co.*, 6 FMSHRC 2305, 2308 n.6 (Oct. 1984) (judge's discussion of abatement method in resolving merits of S&S finding was error). In short, the manner of abatement is not pertinent to the existence of a violation.” *Secretary of Labor v. Western Industrial Inc.*, 25 FMSHRC 449, 453, (Aug. 2003).

The eighth, ninth, tenth, and eleventh pieces of evidence are a collection of what might be termed “missed opportunities,” wherein Frias could have challenged the citation’s validity during or after its issuance. This summary is surely meant to imply that Frias’s silence or inaction is evidence of violation. Sec’y’s Post-Trial Br., at 10-11. This is again unpersuasive to the Court. As noted by the Respondent, the Secretary’s additional corroborative evidence, taken together, constitutes recapitulation and not corroboration.²⁵ Resp’t’s Reply Brief, at 5. This Court declines to draw adverse inferences against the Respondent from evidence presented by the Secretary which is so problematic in nature. This Court finds the Secretary’s additional corroborative evidence is not sufficiently probative or reliable so as to constitute substantial evidence.

The evidence and arguments presented by the Secretary are unpersuasive. As such, the Secretary has not carried his burden by the preponderance of the evidence. Therefore, the Court finds that the citation at issue should be vacated.²⁶

ORDER

Accordingly, it is hereby **ORDERED** that Citation No. 8723601 is **VACATED**.

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

²⁵ Technically, this sort of reasoning would fall under the fallacy of “proof by assertion.” MARCUS TULLIUS CICERO, *DE NATURA DEORUM* (H. Rackham, trans., Harvard University Press 1933) (45 BCE).

²⁶ For this reason the Court makes no finding regarding the significant and substantial (S&S) determination made by Inspector Villahermosa, nor the operator’s alleged degree of negligence.

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October 28, 2015

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

v.

KEMPTON TRANSPORT, INC.,
Respondent.

CIVIL PENALTY PROCEEDINGS

Docket No. WEST 2014-998
A.C. No. 02-03107-359253 B0279

Docket No. WEST 2015-20
A.C. No. 02-03107-362302

Mine: West Side Pit

DECISION

Appearances: Daniel Brechbuhl, United States Department of Labor, Office of the Solicitor, Denver, Colorado, for Petitioner;

Dell Kempton, Kempton Transport Inc. Phoenix, Arizona for Respondent.

Before: Judge Miller

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). These dockets involve nine citations with a total proposed penalty of \$1,252.00. The Respondent has indicated that his objection to the citations is that he is not subject to the jurisdiction of the Mine Act. The parties presented testimony and evidence regarding the jurisdiction issue and the citations at a hearing held in Phoenix, Arizona, on October 21, 2015.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Kempton Transport, Inc., is a closely held corporation with its principle place of business in Mesa, Arizona. At the time these citations were issued, Kempton trucks were working at the West Side Pit, a sand and gravel operation located in Mesa County, Arizona. Kempton routinely provides trucking services at various locations for M.R. Tanner companies, including M.R. Tanner mining, the owner of the West Side Pit. Mr. Kempton was approached by Tanner to load gravel and other material at a new construction area near the end of the runway at the small Glendale airport. There was no written contract, but the parties agreed to a price to have the Kempton trucks load sand and gravel at the airport site and transport it across the road to a crusher operation and unload the material at either a stock pile or at the crusher. Tanner employees loaded the material, and Kempton drivers transported the material. Kempton described the material as “native material” and agreed it was rock, sand and gravel, and dirt.

Kempton explained that the pit area near the end of the runway was not yet developed, but that Kempton was hired for the construction project. The project was construction of a sand and gravel pit at the end of and below the level of the runway. Each of the large Kempton trucks was weighed after loading at this construction site, and then traveled the half mile to dump the material at the Tanner crushing location.

Kempton owns and operates fourteen trucks, four of which were assigned to work on this project for Tanner. Kempton often works for Tanner, and often hauls material between pits and crushers, as well as from pit to pit for various sand and gravel operations. Kempton has not been issued a citation in the past and the drivers at this pit received the required site-specific training. They had not received new miner training.

Kempton began the job hauling from the pit construction area to the crusher in June 2014. The Inspector issued the nine citations at issue here in July 2014. Kempton continued on the job until September 2014, when his trucks were committed to work elsewhere. During the three months that Kempton worked on this job, his trucks were at the pit and crusher five days a week, for an average of eight hours per day. Each truck made about 30 roundtrips per day between loading at the pit and dumping at the crusher.

Kempton argues that it was not an “operator” as defined by the Mine Act since it was only on the property for this job, which was considered a part of the construction of the pit, and not a part of any mining operation. The Secretary argues that Kempton worked as a subcontractor at the sand and gravel operation and therefore was an operator subject to the provisions of the Mine Act. For the reasons that follow, I find that Kempton is a subcontractor working at the mine site and an operator, subject to the jurisdiction of the Mine Act.

The Mine Act’s definition of “operator” contemplates production-operators and independent contractors “performing services or construction at such mine.” *Berwind Nat’l Resources Corp.*, 21 FMSHRC 1284, 1293 (Dec. 1999)). Kempton asserts that it is not an independent contractor as contemplated by the Act because it had no written contract, it was involved only in construction work as the mine was not yet developed, and it engaged in hauling between the pit and crusher for only a short period of time. The Secretary argues that a written contract is not necessary and that since Kempton was hauling sand and gravel from one area to the crusher to be processed, it was an independent contractor subject to the provisions of the Act.

While the Act does not define “independent contractor,” the Secretary’s regulations define an “independent contractor” as an entity “that contracts to perform services or construction at a mine.” 30 C.F.R. § 45.2(c). In *Joy Technologies Inc.*, the Commission decided that, in determining whether an entity is an independent contractor, the “focus is on the actual relationships between the parties, and is not confined to the terms of [the parties’] contracts. . . . [T]he determination of whether a party is properly designated to be within the scope of section 3(d) of Act is not based upon the existence of a contract, nor the terms of such a contract.” 17 FMSHRC 1303, 1306 (Aug. 1995) (quoting *Bulk Transportation Services, Inc.*, 13 FMSHRC 1354, 1358 n.2 (Sept. 1991)), *aff’d*, 99 F.3d 991 (10th Cir. 1996).

The undisputed facts establish that Kempton had an agreement with Tanner to provide hauling services for Tanner, specifically from the new pit near the airport to the crushing operation about half a mile away. Kempton provided the trucks and the drivers and in return was paid a sum for the work. Clearly, and although not written, the parties had an agreement for work and an unwritten, verbal contract.

In 1989, the Commission addressed the issue of “operator” liability pursuant to the “independent contractor” clause of Section 3(d) in two Otis Elevator Company decisions, *Otis Elevator Co.*, 11 FMSHRC 1896 (Oct. 1989) (hereinafter “*Otis I*”) and *Otis Elevator Co.*, 11 FMSHRC 1918 (Oct. 1989) (hereinafter “*Otis II*”). In *Otis I*, the Commission explained that “Section 3(d) [of the 1977] Mine Act expanded the definition of ‘operator’ under . . . [the 1969 Coal Act] to include ‘any independent contractor performing services or construction at such mine.’” 11 FMSHRC at 1900. “[T]he goal of Congress, in expanding the definition of ‘operator’ . . . to include ‘independent contractors,’ was to broaden the enforcement power of the Secretary so as to reach not only owners and lessees but a wide range of independent contractors as well.” *Id.* at 1900-1901. However, the Commission noted that, in analyzing an independent contractor’s contacts with the mine, “not all independent contractors are operators under the Mine Act, and that ‘there may be a point, at least, at which an independent contractor’s contact with a mine is so infrequent or *de minimis* that it would be difficult to conclude that services were being performed.” *Id.* (quoting *National Industrial Sand Ass’n*, 601 F.2d 689, 701 (3d Cir. 1979)).

In its *Otis* decisions, the Commission outlined a two pronged test for determining whether an entity is an “operator” pursuant to the “independent contractor” clause of Section 3(d) of the Mine Act. First, one must examine the subject entity’s “proximity to the extraction process” and whether that entity’s work is “sufficiently related” to that process. *Otis I*, 11 FMSHRC at 1902. In *Otis I*, the Commission determined that the independent contractor, an elevator service contractor, satisfied this prong of the test because its employees “were working in the center of mining activities while servicing equipment essential to the mining process, were exposed to mining hazards, and had a direct effect on the safety of others because of their exclusive control over the safety of the mine elevators[.]” *Id.* Here, Kempton employees were driving large haul trucks on the mine property to be loaded with material, then driving them to a second, separate mine site to unload the material to be crushed and processed. I find the activity to be sufficiently proximate to the extraction process, as, like in *Otis I*, the trucks are in the center of the mining activity. Next, the Kempton employees’ work was sufficiently related to the process of removing the sand and gravel and transporting it to a related site for processing. The Kempton drivers were exposed to mining hazards and had a direct effect on the safety of others because of their exclusive control over the operation of the haul trucks.

The second prong of the *Otis* test requires an examination of “the extent of [the entity’s] presence at the mine.” *Otis I*, 11 FMSHRC 1896, 1902 (Oct. 1989). In *Lang Bros., Inc.*, 14 FMSHRC 413, 420 (Sept. 1991), the Commission stated that “[a]n independent contractor’s presence at a mine may appropriately be measured by the significance of its presence, as well as by the duration or frequency of its presence.” I find that Kempton and its employees had an extensive presence at the mine. While Tanner employees extracted the sand and gravel and loaded the mined material onto the trucks, Kempton trucks and drivers controlled the next phase of moving the material to the crusher. They did this five days a week for eight hours a day over

the entire term of the contract. In *Joy Technologies Inc.*, the Commission found that substantial evidence supported the ALJ's finding that an independent contractor spending six days at the mine over a two and a half month period, along with an expectation that such contact would continue, satisfied the second prong of the *Otis* test. 17 FMSHRC at 1308; *see also Lang Bros., Inc.*, 14 FMSHRC an413 (Sept. 1991) (sufficient presence found when contractor was present seven to ten days on a non-continuing basis) and *Otis I*, 11 FMSHRC 1896 (Oct. 1989) (sufficient presence found when contractor was present six hours per month). I find that the presence of Kempton drivers and trucks each day amounts to a sufficient and significant presence at the mine. Accordingly, I find that the Secretary has satisfied the second prong of the *Otis* test and that Kempton is an independent contractor.

The parties stipulated at hearing, that if it is found that MSHA has jurisdiction over the Kempton trucks, then there is no further dispute and the citations are admitted as issued. Therefore, I find that the nine citations contained in these two dockets demonstrate the violations and conditions as described in each document. However, after listening to the testimony of Mr. Kempton, I find that he had a good faith belief that the drivers operating the trucks were not required to have new miner training. Therefore, I reduce the negligence in Citation Nos. 8829835 and 8829836 to low and reduce the penalty accordingly to \$100.00 for each violation.

II. PENALTY

The principles governing the authority of Commission administrative law judges to assess civil penalties de novo for violations of the Mine Act are well established. Section 110(i) of the Mine act delegates to the Commission and its judges "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(i). The Act delegates the duty of proposing penalties to the Secretary. 30 U.S.C. §§ 815(a), 820(a). Thus, when an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess the penalty. 29 C.F.R. § 2700.28. The Act requires that "in assessing civil monetary penalties, the Commission [ALJ] shall consider" six statutory penalty criteria which include the history of violations, the size of the operator, the negligence, gravity, the ability to continue in business and good faith abatement. 30 U.S.C. § 820(i). In keeping with this statutory requirement, the Commission has held that "findings of fact on the statutory penalty criteria must be made" by its judges. *Sellersburg Stone Co.*, 5 FMSHRC 287, 292 (Mar. 1983), *aff'd*, 736 F.2d 1147, 1152 (7th Cir. 1984). Once findings on the statutory criteria have been made, a judge's penalty assessment for a particular violation is an exercise of discretion, which is "bounded by proper consideration of the statutory criteria and the deterrent purpose[s] . . . [of] the Act's penalty scheme." *Id.* at 294; *see also Cantera Green*, 22 FMSHRC 616, 620 (May 2000).

The history of assessed violations was not admitted into evidence because, as the Secretary explained, Kempton did not have a mine ID and had not been cited in the past. Kempton is considered a small operator and the penalties as proposed will not affect its ability to continue in business. The Respondent demonstrated good faith in abating the citations. The negligence is discussed above. I find that a penalty of \$1,186.00 is appropriate.

III. ORDER

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), I reduce the negligence from moderate to low and the penalty to \$100.00 each for Citation Nos. 8829835 and 8829836 and assess a total penalty of \$1,186.00. Kempton Transport, Inc., is **ORDERED** to pay the Secretary of Labor the sum of \$1,186.00 within 30 days of the date of this decision.

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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October 29, 2015

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

v.

KOPPER GLO MINING, LLC,
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. SE 2014-403
A.C. No. 40-03365-352685

Mine: Double Mountain Mine

DECISION

Appearances: Jennifer Booth Thomas, United States Department of Labor, Office of the Solicitor, Nashville, Tennessee, for Petitioner;

Melanie J. Kilpatrick, Rajkovich, Williams, Kilpatrick & True, PLLC, Lexington, Kentucky, for Respondent.

Before: Judge Miller

This case is before me upon a petition for assessment of a civil penalty filed by the Secretary of Labor in accordance with section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). This docket involves one citation issued pursuant to section 104(d)(2) of the Act with a proposed penalty of \$35,500.00. The parties presented testimony and evidence regarding the citation at a hearing held in Knoxville, Tennessee, on September 1, 2015.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Double Mountain Mine is an underground bituminous coal mine located in Claiborne County, Tennessee. The parties have stipulated to the jurisdiction of the Federal Mine Safety and Health Act of 1977 and to the jurisdiction of the Commission. The parties also entered a number of stipulations related to the penalty criteria which are discussed below. *Jt. Stip.* ¶¶ 3-4.

Citation No. 8365728 was issued by Inspector Jim Lundy on May 2, 2013, pursuant to section 104(d)(2) of the Act for an alleged violation of 30 C.F.R. § 75.220(a)(1), a failure to follow the roof control plan. The citation alleges that the operator failed to implement the rib control measures in its approved roof control plan, including either removing loose ribs or supporting them with fencing and steel posts. The failure to follow the plan led to unaddressed sloughing and unsupported brows. Lundy determined that the condition was highly likely to result in a permanently disabling injury, was S&S, affected two people, and was a result of high negligence and the mine's unwarrantable failure to comply with the mandatory standard. The Secretary proposed a civil penalty in the amount of \$35,500.00 for this alleged violation. The

citation was terminated when MSHA determined that the loose ribs had been scaled and chain link fencing with steel jacks had been installed around all pillars to within forty feet of the working faces, and rib bolts had been installed as required by the roof control plan.

Based upon the parties' stipulations, my review of the entire record, my observation of the demeanor of the witnesses, and consideration of the post-hearing briefs, I find that the violation and S&S designation are appropriate and that the negligence is high, as alleged. However, I do not find the violation to be the result of an unwarrantable failure to comply.

A. The Violation

Roof, face, and rib falls have historically been one of the leading causes of injuries and death in underground coal mines. Safety Standards for Roof, Face and Rib Support, 53 Fed. Reg. 2354, 2354, 2369 (Jan. 27, 1998). To combat these hazards, Congress directed that mine operators develop and follow roof control plans "suitable to the roof conditions and mining system of each coal mine." 30 U.S.C. § 862(a). The Commission has stated that the intent of the roof control provision is "to afford comprehensive protection against roof collapse." *Elk Run Coal Co.*, 27 FMSHRC 899, 904 (Dec. 2005) (quoting *UMWA v. Dole*, 870 F.2d 662, 669 (D.C. Cir. 1989)).

In promulgating the current version of the roof control standard, the Secretary explained that roof control plans are intended to offer flexibility in order to address each mine's unique conditions. Safety Standards for Roof, Face and Rib Support, 53 Fed. Reg. 2354, 2369 (Jan. 27, 1998). The rule requires that "[e]ach mine operator shall develop and follow a roof control plan, approved by the District Manager, that is suitable to the prevailing geological conditions, and the mining system to be used at the mine. Additional measures shall be taken to protect persons if unusual hazards are encountered." 30 C.F.R. § 75.220(a)(1).

In order for the Secretary to prove a violation of § 75.220(a)(1), he must establish, first, that the provision allegedly violated is part of the approved and adopted plan, and, second, that the condition cited actually did violate the plan provision. *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1280 (Dec. 1998); *JWR*, 9 FMSHRC at 907. "When a plan provision is ambiguous, the Secretary may establish the meaning intended by the parties by presenting credible evidence as to the history and purpose of the provision, or evidence of consistent enforcement." *Harlan*, 20 FMSHRC at 1280.

In this case, the parties agree that pages 16 and 16a of the approved roof control plan for this mine are the provisions at issue. Therefore, the focus must be on whether the conditions observed by the MSHA inspector constituted a violation of those provisions.

The provisions of the roof control plan at issue relate to the support of ribs, specifically ribs that are inby. Sec'y Ex. 2 at 16, 16a. The provisions on page 16 have been in effect since the plan was adopted. When the mine received a citation involving rib control in August 2012, it discovered that its interpretation of page 16 was different than MSHA's and began the process to amend the plan. The focus of the plan negotiations was on the provisions regarding control of the brows and ribs near the face. At hearing, witnesses for the mine explained that their goal

during the negotiations was to clarify what conditions must be present to require extra rib control measures. Shortly after the negotiations began, there was a roof fall at the mine that resulted in a fatality, which caused MSHA to examine other provisions of the plan, as well. As a result of the negotiations, page 16a was added to the plan. It included a clarification of the rib conditions requiring additional control measures, a definition of the term “brow,” and several new rib control requirements that would apply in certain situations. Sec’y Ex. 2 at 16a. The original page 16 of the plan was not removed, but it was amended in some respects by the addition of page 16a.

The central issue in this case is what conditions trigger the rib control requirements on pages 16 and 16a. The Secretary asserts that wire fencing and metal support must be installed when sloughing occurs and brows as defined in 16a are created. Bolting must be done if the height of the area is above 6.5 feet. Timbers may be used for support only in outby areas. The mine asserts that support measures are only required if the brows are cracked or there is some other indication of instability, and that sloughing is not a sign of instability.

MSHA’s Inspection

Jim Lundy is a mine inspector who has been with MSHA since May 2006. He is a health specialist and has worked in the coal mining industry since 1973, including as an assistant manager of safety. He holds a number of mine certifications and degrees as well as a nursing license. Lundy went with a team to Kopper Glo’s Double Mountain mine on May 2, 2013, to conduct a health inspection. Prior to conducting the inspection, Lundy reviewed the mine’s roof and ventilation plans as well as the weekly and shift examination books. The examination books revealed that there had been problems with sloughing ribs in an area of the mine for nine shifts over the three previous days, and that action had been taken to pull down some of the problem ribs. During his underground inspection of the mine, Lundy observed the loose ribs. A photo produced at hearing shows the roof, the ribs, and the support in place. Ex 6. An overhanging brow can be seen in the top of the photos. There is also sloughage—loose material that has come down from the sides—on the ground between two wooden roof support posts.

Lundy observed rib sloughage and overhanging brows in the five inby headings he inspected, all of which were within 40 feet of the face. In three areas, Lundy measured that the height of the brows was more than six and a half feet from the floor. In most areas, the brows exceeded the minimum dimensions given in the definition of a brow on page 16a of the roof control plan. While it is unclear whether Lundy observed cracks on the brows, he believed that the sloughage and overhanging brows were indicative of instability and constituted adverse rib conditions triggering additional support requirements under the roof control plan. No steel posts, plates, fencing, bolts, or brackets had been installed in any of these areas, nor had the ribs been pulled down. Instead, wooden timbers had been set between the brows and the mine floor or bottom rock ledge. Additionally, Lundy observed that the mine did not have a supply of steel pipes or fencing in the area, as was required by the roof control plan. See Sec’y Ex. 2 at 2. He thus issued Order No. 8365728 for a violation of 30 C.F.R. § 75.220(a)(1) for failure to implement the rib control measures in the mine’s approved roof control plan.

MSHA and Kopper Glo offered differing interpretations of the rib conditions at the mine, particularly the sloughage. Inspector Lundy explained that sloughage occurs when pressure from the overlying rock in a mine increases as coal is removed. Because the coal is a softer material than the rock, it is compressed outward. Since the coal is not elastic enough to absorb the pressure, the edges of the rib crumble under the pressure. The rock left above the sloughing coal is known as a brow. Inspector Lundy testified that when a rib starts to slough, the area is compromised, because the brow is left without support. Additionally, sloughing decreases the size of the coal pillar leaving less to support the roof, which can cause the roof to sag. These conditions could lead the rib to crack, which would be a sign of instability. In Lundy's opinion, though, instability could also exist where there was sloughing but no visible cracking. A witness for the mine, Patrick Slone, who assisted the mine in developing its roof control plan, disagreed. He testified that while sloughing results from excess pressure, it does not necessarily mean the ribs are unstable. Slone also testified that brows are sometimes created not from sloughing but rather through intentional mining activity when more height is needed in the mine. Slone seemed to indicate that instability was unlikely to occur in the Double Mountain Mine because the coal seam was only thirty-six inches high, and he testified that the sloughage observed by Lundy at the mine was not a sign of instability.

The Roof Control Plan

The roof control plan for Double Mountain Mine creates requirements for rib control for "all areas on the working section (MMU) where rib conditions warrant." Ex. 2 at 16. The supplement on page 16a expands on when the rib control methods are required: it explains that an "adverse rib/brow ... will be pulled down or adequately supported," and explains that an adverse rib or brow is one with "visible cracks or signs of instability." Ex. 2 at 16a.

When adverse ribs or brows are present, the mine is given options for how to address them. First, miners may pull or remove the loose rib. Ex. 2 at 16, 16a. But because sometimes the rib cannot be pulled down or continues to slough after it is pulled down, the plan offers alternatives. Page 16 provides that the mine may install steel pipe and wire fencing. Ex. 2 at 16 ¶¶ 2, 3. In "short" areas, where only a portion of the pillar is affected by sloughing, the mine is directed to install the pipe "after the normal roof bolting cycle." Ex. 2 at 16 ¶ 2. In areas where the entire pillar is sloughing, the mine is to install the pipe "as soon as practicable." Ex. 2 at 16 ¶ 3. The supplement creates additional requirements for rib support in certain areas. For adverse ribs and brows in the face area, the mine is to install angle brackets and cable lashing. Ex. 2 at 16a. For outby areas, the mine is given the option to install timbers. *Id.* The supplement also provides a definition of a brow: a brow is "an area that is created from sloughing of coal ribs. This area is 12 inches wide, 24 inches long and 4 inches in height and thickness (minimum)." *Id.* It goes on to require that brows "shall be supported." *Id.* Finally, the supplement requires that if there are adverse ribs or brows "above 6.5 feet in height, bolting will be done to secure the affected ribs/brows." *Id.* The requirement that sloughing pillars must have additional support was not removed from page 16, and remained in effect even with the addition of page 16a. If the brow is cracked or shows other signs of instability, then further support, beyond the pipe required for sloughage, must be installed. The only additional support observed by Lundy was timbers, most often used for roof support and not approved for additional rib and brow support inby.

In his inspection, Lundy observed rib sloughage and overhanging brows in five inby headings. The Secretary argues that these were “adverse ribs/brows” that required rib control measures under the plan, including bolting in areas over 6.5 feet high and angle brackets and steel posts and fencing in all of the areas. The mine had not implemented any of those measures, but rather was using timbers as roof support. Kopper Glo argues that because there were no visible cracks in the ribs and brows, there were no “adverse ribs/brows,” and that therefore no rib control methods were required under the plan. The question, then, is whether sloughage and overhanging brows with no visible cracking must be supported as stated on page 16, and whether they constitute “adverse ribs/brows” requiring the support listed on page 16a of the plan.

The Commission has explained that plan provisions are enforceable as mandatory standards. *Martin Cty. Coal Corp.*, 28 FMSHRC 247, 254 (Mar. 2011) (ALJ); *Energy W. Mining Co.*, 17 FMSHRC 1313, 1317 (Aug. 1995); *Jim Walter Res., Inc.*, 9 FMSHRC 903, 907 (May 1987) (“*JWR*”); see also *UMWA v. Dole*, 870 F.2d 662, 671 (D.C. Cir. 1989). When interpreting a plan provision, a judge should thus apply the principles governing the interpretation of regulatory standards. *Martin Cty. Coal*, 28 FMSHRC at 255 (citing *Energy West*, 17 FMSHRC at 1317). Accordingly, when the language of the plan provision is clear, the provision should be enforced as written “unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results.” *Id.* As a part of the inquiry, “in ascertaining the plain meaning of the statute, the court must look at the particular statutory language at issue, as well as the language and design of the statute as a whole.” *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (citations omitted). Traditional tools of construction, including examination of a provision’s text and legislative history, may be employed to determine whether the drafters “had an intention on the precise question at issue.” *Coal Employment Project v. Dole*, 889 F.2d 1127, 1131 (D.C. Cir. 1989) (citations omitted).

Here, I find that the plan was clear, and that sloughing of the ribs required fencing under page 16 of the plan. I also hold that sloughing of the ribs constituted an “adverse” condition requiring additional support under page 16a. “In the absence of a statutory or regulatory definition of a term, the Commission applies the ordinary meaning of that term.” *Twentymile Coal Co.*, 30 FMSHRC 736, 750 (Aug. 2008). The plan indicates that ribs and brows are “adverse” when there are “visible cracks or signs of instability.” Ex. 2 at 16a. “Instability” in ordinary usage is “the state of being likely to change.” Merriam-Webster Dictionary (2015). The Dictionary of Mining, Mineral, and Related Terms defines “slough” as “fragmentary rock material that has crumbled and fallen away from the sides of a borehole or mine working.” Am. Geological Inst., Dictionary of Mining, Mineral, and Related Terms 515 (2d ed. 1997). It defines “sloughing” as “minor face and rib falls.” *Id.* These descriptions are suggestive of changing conditions in the mine and thus instability. The descriptions of sloughing provided by Lundy and Slone are also characteristic of instability: they explain that sloughing is caused by the pressure of rock on the soft coal. Lundy describes sloughing as “the loose material coming down from the coal rib from its natural state.” Tr. at 30. In other words, the coal is changing from its natural state in reaction to the pressure created by mining.

This interpretation is consistent with language used elsewhere in the plan. Page 12, which involves refuge chambers, lists sloughing as a possible defect in roof and rib conditions. Ex. 2 at 12. Additionally, this interpretation is consistent with Judge Maurer’s decision in

Harlan Cumberland Coal, in which he held that “heavy rib sloughage” along with other conditions created an “adverse roof condition” triggering a provision of a mine’s extended cut plan. 17 FMSHRC 1342, 1351-52 (Aug. 1995) (ALJ).

Kopper Glo argues that the mine’s intent in negotiating the supplement to page 16 was for the rib control measures to be required only where there were visible cracks in the ribs or brows. Resp. Br. at 2-3. The operator argues that there was sloughage throughout the mine, and it would not have agreed to the additional measures if they were required wherever there was sloughage. However, I do not find that the testimony at hearing clearly established that intent, nor do I find that it was expressed in the final language of the plan amendment. Thus I find this argument unpersuasive.

Kopper Glo also asserts that because its interpretation differed from Lundy’s, it was not provided fair notice of the standard to be applied under the plan. Resp. Br. at 9-10. However, I find that the plan was clear and that there is not sufficient evidence to support an argument that the mine did not have fair notice of the requirements of the plan. When evaluating a party’s fair notice argument, the court should first look to see if the language of the standard “provides clear and unambiguous notice of its coverage and requirements[.]” *DQ Fire & Explosion Consultants, Inc.*, 36 FMSHRC 3083, 3087 (Dec. 2014). If the language is clear and unambiguous, then “no further notice is necessary.” *Id.* If the standard is ambiguous, the court generally will defer to the Secretary’s reasonable interpretation of the standard. *See e.g. Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 463 (D.C. Cir. 1994)). As discussed above, the roof control plan provides clear notice to a reasonably prudent person familiar with the mining industry and the protective purposes of the plan. After negotiating the plan, the mine should have recognized the specific prohibitions and requirements of the plan. *See Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990).

For these reasons, I find that the sloughing observed by Lundy was a “sign of instability” in the ribs under page 16a of the plan. The plan is clear that adverse conditions exist when there are “visible cracks *or* signs of instability.” Ex. 2 at 16a (emphasis added). I therefore find Kopper Glo’s argument that the requirements were only triggered by cracking to be without merit. I also find that sloughing is a rib condition “warrant[ing]” the rib control measures required under page 16. Consequently, the mine was required to install the additional support described in the plan. Ex. 2 at 16. Kopper Glo argues that it had not yet completed roof bolting in some of the inspected areas and so was not required to have begun the rib control measures. Resp. Br. at 7-8. However, the evidence shows that at least some of the areas had been roof bolted. The mine was required to begin rib control measures in those areas. Because the operator had not implemented the rib control measures required by the plan, it violated the plan. The Secretary has established a violation of 30 C.F.R. § 75.220(a)(1).

B. Gravity and S&S

The Secretary asserts that Kopper Glo’s violation was highly likely to cause a permanently disabling injury and that it was significant and substantial (“S&S”). A “significant and substantial” violation is described in section 104(d)(1) of the Mine Act as a violation “of such nature as could significantly and substantially contribute to the cause and effect of a coal or

other mine safety or health hazard.” 30 U.S.C. § 814(d)(1). A violation is properly designated significant and substantial “if based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *Cement Div., Nat’l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984), the Commission explained its interpretation of the term “significant and substantial”:

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

The difficulty with finding a violation S&S normally comes with the third element of the *Mathies* formula, in which the Secretary must establish that there is a reasonable likelihood that the hazard will result in an injury. The Commission has explained that the third element of the formula “requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury.” *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1834, 1836 (Aug. 1984). The Commission discussed the third element of the *Mathies* test in *Musser Engineering, Inc. and PBS Coals, Inc.*, 32 FMSHRC 1257 (Oct. 2010) (affirming an S&S violation for using an inaccurate mine map). The Commission clarified that the “Secretary need not prove a reasonable likelihood that the violation itself will cause injury,” but rather that the hazard created would cause an injury. *Id.* at 1280-81. The Commission reaffirmed its position in *Cumberland River Coal*, 33 FMSHRC 2357, 2365 (Oct. 2011).

The Commission has acknowledged the high degree of danger posed by roof control plan violations. See *Cyprus Plateau Mining Corp.*, 16 FMSHRC 1610, 1616 (Aug. 1994). In *Harlan Cumberland Coal*, 17 FMSHRC 1342, 1352 (Aug. 1995) (ALJ), Judge Maurer upheld an S&S designation for a roof control plan violation involving rib sloughing.

In designating the violation S&S, Inspector Lundy explained that given the sloughage and unstable conditions he observed, it was likely that rock would fall from the brow or the ribs. He noted that numerous miners worked on foot and operated mobile equipment in the areas he observed, and thus a falling rock could hit a miner and cause a permanently disabling injury.

Kopper Glo argues that the violation was not S&S because there were timbers in place in the areas cited to help support the roof and brows. Resp. Br. at 15. The Secretary argues that the timbers would have been ineffective to prevent an injury because they did not provide lateral support. Sec’y Br. at 5. Kopper Glo counters that the primary danger was not from a lateral rock burst because of the narrow height of the coal seam. Resp. Br. at 15. Rather the primary danger was of a falling rock from the roof, which the timbers would address adequately. *Id.* However, Lundy observed that the operator had not fastened the timbers to the roof, so they could easily come dislodged and would fail to protect against a rock falling from the roof. Additionally, the

falling timber itself would present a hazard. I find that the amount of sloughing indicates that a lateral force dislodging a timber was likely to occur and therefore the timbers did not adequately address the hazard.

Applying the elements of the *Mathies* test, I have found that there was a violation of the roof control plan, and hence a violation of a mandatory standard. This violation contributed to the hazard of inadequately supported brows and sloughing ribs, which could lead to a fall of the ribs or an outburst of coal. The hazard of falling ribs or coal from the brow would be reasonably likely to lead to a miner in the area being hit by the falling material, resulting in serious injury or death. Therefore, I find the violation to be S&S.

C. Negligence

Each mandatory standard carries with it a duty of care to avoid violations of that standard and, if a standard is violated, a finding of negligence is made. *A. H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983). In this case, MSHA determined that the negligence was high. The Secretary, by regulation, defines negligence under the Act as “conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm. Under the Mine Act, an operator is held to a high standard of care.” 30 C.F.R. § 100.3(d). High negligence, according to the Secretary’s regulations, occurs when the operator knew or should have known of the violative condition and there are no mitigating circumstances. *Id.*

In *Consolidation Coal Co.*, 36 FMSHRC 615, 637-38 (Feb. 2014) (ALJ), Judge Barbour upheld a finding of reckless disregard of 30 C.F.R. § 75.202 involving sloughing ribs in a lunch area. The judge relied on the facts that the sloughage was visibly obvious and ongoing, that the area was heavily used, and that the mine had had recent fall-related accidents. *Id.*

Here, Inspector Lundy cited the operator for high negligence. He noted that the rib sloughage had been listed in the mine books as a hazard to be corrected for nine shifts, and that while some of the ribs had been pulled down and timbers had been set, the operator had taken none of the measures required by the roof control plan to further support the ribs. In addition to these factors, the sloughage was obvious, especially given that it was occurring in numerous locations in the working areas where miners and management were continuously present. Further, the mine had a responsibility to understand the requirements of the roof control plan and to have the materials necessary to comply with the plan readily available. I thus do not find the operator’s misunderstanding of the plan requirements to be a mitigating factor. Finally, in the twenty-four months preceding the citation, the mine had five violations of the roof control plan as well as a fatality involving a roof fall. For these reasons, I find that the high negligence assessment was appropriate for this violation.

D. Unwarrantable Failure

The Secretary argues that the violation was the result of the operator's unwarrantable failure to comply with safety standards. The unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d). The Commission has explained that unwarrantable failure is "aggravated conduct constituting more than ordinary negligence. Unwarrantable failure is characterized by conduct described as 'reckless disregard,' 'intentional misconduct,' 'indifference,' or a 'serious lack of reasonable care.'" *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2007) (citing *Emery Mining Corp.*, 9 FMSHRC 1997, 2001-04 (Dec. 1987)) (citations omitted). The Commission has held that in determining whether a violation is an unwarrantable failure, the judge should consider all of the relevant facts and circumstances in the case and determine whether there are any aggravating or mitigating factors. *Id.* Based upon the following analysis of the factors enumerated by the Commission, I find that there is not adequate evidence to support a finding of unwarrantable failure in this case.

Extent of the violative condition. In *IO Coal Co.*, 31 FMSHRC 1346, 1352 (Dec. 2009), the Commission explained that the "extent of the violative condition is an important element in the unwarrantable failure analysis." The purpose of considering this factor is to "account for the magnitude or scope of the violation." *Dawes Rigging & Crane Rental*, 36 FMSHRC 3075, 3079 (Dec. 2014) (citing *E. Associated Coal Corp.*, 32 FMSHRC 1189, 1195 (Oct. 2010)). Relevant facts the judge may consider include "the extent of the affected area as it existed at the time the citation was issued[.]" the number of persons affected, and the time and resources required to correct the condition. *Dawes Rigging*, 36 FMSHRC at 3079-80; *Consolidation Coal Co.*, 35 FMSHRC 2326, 2331 (Aug. 2013). Here, the violative condition existed in all five of the inby headings Lundy inspected, a significant portion of the mine. At hearing, the inspector acknowledged that some of the crosscuts did not have brows of the dimension requiring support under page 16a of the plan. However, the inspector observed brows and sloughing in many of the areas he observed. However, he indicated that only two persons were affected by the violation. I find that the violation was extensive in the amount of area affected.

Length of time that the violation has existed. In *IO Coal*, the Commission emphasized that the duration of time that the violative condition exists is a "necessary element" of the unwarrantable failure analysis. 31 FMSHRC at 1352. Here, the pre-shift examination books indicated that the condition had existed for at least nine shifts prior to the citation being issued. The operator had attempted to address the issue by setting timbers and pulling down some of the ribs. I find that the length of time is significant in this case.

Whether the operator was placed on notice that greater efforts were necessary for compliance. The Commission has explained that repeated, similar violations and past discussions with MSHA about a problem may serve to heighten the awareness of the operator that increased efforts to comply are necessary. *IO Coal*, 31 FMSHRC at 1353. Prior violations may establish notice even though they did not involve precisely the same activity, cited standard, or area of the mine and were not the result of unwarrantable failure. *Id.* at 1353-54; *Black Beauty Coal Co. v. FMSHRC*, 703 F.3d 553, 561 (D.C. Cir. 2012). In this case, there were five substantiated violations of the roof control plan at the mine in the two years preceding the citation at issue. One of the five violations involved a fatality caused by an unsupported roof.

However, the mine's citation record for roof control violations was below the national average. While the operator should have been familiar with the requirements of its roof control plan, I cannot find that the mine was placed on notice that greater efforts were needed.

Operator's efforts in abating the violative condition. The Commission has explained that the abatement efforts relevant to the unwarrantable failure analysis are those that were made prior to the issuance of the citation or order. *Consol. Coal*, 35 FMSHRC at 2342. Here, the examination books indicated that the mine had attempted to pull down the sloughing ribs. The witnesses agree that the first step in controlling ribs is to take them down. The mine had also installed timbers to support the brows, though they had not installed them in compliance with the roof control plan. I find that the mine had taken efforts to abate the condition.

Whether the violation posed a high degree of danger. The Commission has found the high degree of danger posed by a violation to be an aggravating factor supportive of an unwarrantable failure finding. *IO Coal*, 31 FMSHRC at 1355-1356. In some cases, the degree of danger may be "so severe that, by itself, it warrants a finding of unwarrantable failure." *Manalapan Mining Co.*, 35 FMSHRC 289, 294 (Feb. 2013). A fatal accident occurring as a result of the cited condition or practice is compelling evidence of a high degree of danger. *Midwest Material Co.*, 19 FMSHRC 30, 34 (Jan. 1997). Kopper Glo argues that the sloughing ribs are not unusual in this mine and do not pose a high degree of danger. While the violation is S&S and could lead to a rib fall and subsequent injury, the Secretary has not shown that the degree of danger supports an unwarrantable failure finding.

Whether the violation was obvious. The obviousness of the violative condition is an important factor in the unwarrantable failure analysis. *IO Coal*, 31 FMSHRC at 1356. This factor is discussed in the negligence analysis above. I find that the condition was obvious.

Operator's knowledge of the existence of the violation. The Commission has held that an operator's knowledge of the existence of a violation may be established where the operator "reasonably should have known of the violative condition." *IO Coal*, 31 FMSHRC at 1356-57. In this case, the operator's actual knowledge is difficult to discern. While the evidence shows that the operator knew that the sloughing ribs and overhanging brows were a problem, it is not clear that they knew they were violating the roof control plan. While I find that the plan was clear and that the mine operator should have known what its plans required, I nevertheless credit the testimony of the mine's witnesses that they did not understand that they were violating the plan. The safety personnel, the consultant, and certainly the general manager should have known what the plan required and I do not find that their misunderstanding negates the violation. However, I find it relevant that Inspector Lundy himself was not entirely confident about the requirements of the plan at first. When the mine informed Lundy they were using timbers as brow support, he suspected that was inadequate, but went to the surface to check the plan and speak to a roof control specialist before making his final decision whether to issue a citation. Given that there was some uncertainty regarding the plan, I do not find that the operator's knowledge was an aggravating factor here.

While the analysis is very close in this case, I am not persuaded that the violation was the result of an unwarrantable failure to comply. A finding of unwarrantable failure does not require

that all of the factors be present. However, in light of the evidence presented here, I do not find that there were sufficient aggravating factors to demonstrate an unwarrantable failure.

II. PENALTY

The principles governing the authority of Commission administrative law judges to assess civil penalties de novo for violations of the Mine Act are well established. Section 110(i) of the Mine Act delegates to the Commission and its judges “authority to assess all civil penalties provided in [the] Act.” 30 U.S.C. § 820(i). The duty of proposing penalties is delegated to the Secretary. 30 U.S.C. §§ 815(a), 820(a). Thus, when an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess the penalty. 29 C.F.R. § 2700.28. The Act requires that in assessing civil monetary penalties, the ALJ must consider six statutory penalty criteria: the operator’s history of violations, its size, whether the operator was negligent, the effect on the operator’s ability to continue in business, the gravity of the violation, and whether the violation was abated in good faith. 30 U.S.C. § 820(i). In keeping with this statutory requirement, the Commission has held that judges must make findings of fact on the statutory penalty criteria. *Sellersburg Stone Co.*, 5 FMSHRC 287, 292 (Mar. 1983), *aff’d*, 736 F.2d 1147, 1152 (7th Cir. 1984). Once these findings have been made, a judge’s penalty assessment for a particular violation is an exercise of discretion “bounded by proper consideration of the statutory criteria and the deterrent purposes underlying the Act’s penalty scheme.” *Id.* at 294; *see also Cantera Green*, 22 FMSHRC 616, 620 (May 2000).

The history of assessed violations was admitted into evidence and shows a reasonable history for this mine. The mine is a medium-sized operator. The parties have stipulated that the penalties as proposed will not affect the operator’s ability to continue in business, and that Respondent demonstrated good faith in abating the citation. The gravity and negligence are discussed above. Given all of the evidence in this case, and particularly the finding of high negligence, I find that a penalty of \$20,000.00 is appropriate.

III. ORDER

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), I assess a penalty of \$20,000.00 for Citation No. 8365728. Kopper Glo Mining, LLC, is **ORDERED** to pay the Secretary of Labor the sum of \$20,000.00 within 30 days of the date of this decision.

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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October 29, 2015

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

v.

CR MEYER & SONS COMPANY, INC.,
Respondent

CIVIL PENALTY PROCEEDING

Docket No. WEST 2014-834-M
A.C. No. 04-02542-354386 1ZU

Mt. Pass Mine & Mill

DECISION

Appearances: Abigail Daquiz, Esq., Office of the Solicitor, U.S. Department of Labor, Seattle, Washington, for Petitioner;
Eric E. Hobbs, Esq., Michael, Best & Friedrich LLP, Milwaukee, Wisconsin, 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 CR Meyer & Sons Company, Inc., (“Meyer”) 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 and documentary evidence at a hearing and filed post-hearing briefs. One section 104(d)(1) citation was adjudicated at the hearing. Meyer is an independent contractor that was performing work at the Mountain Pass Mine & Mill operated by Molycorp Minerals (“Molycorp”).

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

On September 10, 2013, MSHA Inspector Miles D. Frandsen¹ issued Citation No. 8700228 under section 104(d)(1) of the Mine Act, alleging a violation of section 56.14105 of the Secretary’s safety standards. (Ex. G-8). The citation alleges that two miners who were charged with reinstalling an out of place guard, which was designed to protect persons from moving parts on an agitator, failed to lock out and tag out the equipment before reinstalling the guard. The agitator was in operation when they reinstalled the guard. The citation further states that the

¹ Inspector Frandsen has been an inspector with MSHA for about eleven years. (Tr. 14). He is trained as an electrical inspector. Prior to his employment with MSHA he worked as a mechanic at various mines; he acquired electrical papers; and he was a maintenance supervisor and production supervisor. (Tr. 16).

violation was the result of Meyer's aggravated conduct because the foreman was aware that the agitator was not locked out or tagged out in violation of Meyer's written policy.

Inspector Frandsen determined that an injury was reasonably likely to occur, that the violation was of a significant and substantial ("S&S") nature, and that any injury could reasonably be expected to be permanently disabling. He determined that Meyer's negligence was high and that one person would be affected. Section 56.14105 mandates, in part, that "[r]epairs or maintenance of machinery or equipment shall be performed only after the power is off, and the machinery or equipment is blocked against hazardous motion." 30 C.F.R. § 56.14105. The Secretary proposed a penalty of \$8,000.00 for this citation under the Secretary's special assessment procedure. 30 C.F.R. § 100.5.

My findings of fact in this decision are based on the record as a whole and my observation of the witnesses. Although I have not included a summary of all the evidence presented at the hearing in this decision, I fully considered all the evidence.

Discussion and Analysis

1. Evidence

On September 10, 2013, Inspector Frandsen traveled to Molycorp's Mountain Pass Mine & Mill to conduct an inspection. Frandsen entered a building, generally known as the separations building, that contained a tank farm. (Tr. 21, 117). The tanks, which were large, vertical, and made of fiberglass, had motors on top that turned a shaft that mixed the contents of the tanks using paddles attached to the shaft. The shaft was about six to eight inches in diameter. (Tr. 52). The top of tank at issue in this case was about eight to ten feet off the floor and was approximately eight feet in diameter.² (Tr. 23, 121). Miners accessed the top of the tanks via a stairway onto scaffolding. (Tr. 120-121, 24). The mixing device in the tanks is often called an agitator. The inspector went up on the scaffolding for the first tank and noticed that a guard had been "flipped to the left" at the top of the tank. (Tr. 22). He issued a citation to Molycorp for this condition because the turning shaft was exposed. (Tr. 16). The guard was about 18 inches wide and 3 to 4 inches high. (Tr. 33, 55, 131). The guard was designed to be attached by two bolts to the frame holding the motor. One bolt had been removed and the guard had been flipped up and over to the left with the other bolt still attached. The guard came to rest on top of the tank in a horizontal position to the left of the opening. (Ex. G-4). The spinning shaft was behind the opening. *Id.*; (Tr. 52). The inspector believed that the condition created an obvious entanglement hazard. (Tr. 24-25). He testified that miners go up onto the scaffolding from time to time to take samples from the tank. (Tr. 23).

² There is some question as to whether the top of the tank was eight feet in diameter or eight feet in circumference. In response to the question, "How big aground was the agitator or the tank[.]" Berube responded "probably eight feet[.]" (Tr. 121). Given that both parties agree that the cited guard was approximately 18 inches wide, and relying on that measurement for scale when examining Exhibit R-6, I find that the tank was approximately 8 feet in diameter. If the circumference were eight feet, the diameter would be less than three feet. (Diameter = Circumference ÷ π)

Following the inspector's issuance of the citation, Molycorp called Meyer, an independent contractor at the mine, and instructed it to address the problem. Meyer is a large nationwide contractor that performs maintenance and other work for the mining industry, the pulp and paper industry, and other industries. (Tr. 19, 79). Inspector Frandsen testified that he got to know Meyer at the Mountain Pass Mine & Mill and developed respect for its safety department and its employees. (Tr. 19).

Frandsen continued his inspection of the separations building but, before he left the area, he wanted to see if the condition that prompted him to issue the citation to Molycorp had been abated. Inspector Frandsen issued other citations to Molycorp for the same violation on other tanks in the separations building. (Tr. 41-42). When he arrived back at the subject tank, he saw two people standing on top of the scaffolding leaning out over the tank. (Tr. 24-27). He asked the employees if the agitator was locked out and they replied "no." *Id.* The inspector told the two men to come down. The two men, both employees of Meyer, were foreman Robert Berube and miner Robbie Heikinnen. (Tr. 27). Berube told the inspector that he had flipped the guard back into position and that they were now going to ask Molycorp to shut down the agitator and lock it out before they secured the guard with a bolt. (Tr. 28-30; Exs. G-5, 6, 7). Frandsen told the Meyer employees that the agitator should have been shut down and locked out before the guard was flipped back into position. (Tr. 31-32). He said that the Meyer employees should not have reached out over the tank without first shutting down the equipment. (Tr. 32).

Inspector Frandsen considered this violation to be obvious. The "first step of any mechanic" is to recognize what you need to do and then "get [the] machine off" so you "can go out there safely and put the guard back in place." *Id.* According to Frandsen, Meyer should have contacted Molycorp personnel for instructions as to the proper procedure for shutting down the tank. (Tr. 34-35). By reaching over to flip the guard back into place, an employee created a risk of becoming entangled in the rotating shaft. (Tr. 32). One of the men could have slipped and accidentally pushed his arm through the opening. There was spilled liquid on top of the tank, which increased the hazard. The inspector believed that the rotating shaft was very close to the mouth of the opening so that a person's arm would not have to go very far beyond the opening to come into contact with the shaft. (Tr. 32-33). Inspector Frandsen testified that someone would "probably get [his] fingers cut off if they get down in there[.]" (Tr. 41).

The inspector determined that the violation was a result of Meyer's high negligence and unwarrantable failure to comply with the safety standard. He reached this conclusion because Berube, a foreman for Meyer, was present and directing the work. (Tr. 43). According to Frandsen, a foreman is an agent of the operator and his failure to ensure that the job was completed in a safe manner demonstrates high negligence. (Tr. 43-44)

Robert Berube was a journeyman pipefitter and a foreman with Meyer on September 10, 2013. (Tr. 110). He testified that he was in Meyer's office at the mine when he was told to go look at guards in the separations building. (Tr. 118). He immediately proceeded to the separations building along with Robbie Heikinnen, another Meyer employee. *Id.* When Berube entered the building, he met a "plant guy" who took them up on the scaffolding to show Berube the subject guard. (Tr. 120). Berube testified that he "looked it over" and "flipped the guard." (Tr. 120, 125). He could not see into the opening, but estimated that the shaft for the agitator was

about four feet in front of him. (Tr. 122-23). Heikinnen was not involved and was simply standing on the scaffolding. Once the guard was in place, Heikinnen put the bolt through the hole on the right side but did not attach the nut. (Tr. 128).

Berube did not consider his act of flipping the guard back in place to be hazardous. (Tr. 129). He was not near the unguarded opening when he flipped the guard. He just put a finger under the far left side of the guard, flipped his finger up, and let gravity pull the guard down into place. (Tr. 127). He estimated that he was about two feet to the left of the opening when he flipped the guard back, and an additional 14 inches existed between the mouth of the opening and the shaft. (Tr. 129-31). Berube testified that, even if he slipped, he would not have come into contact with the shaft because he was standing on the scaffolding about two feet to the left of the unguarded opening. (Tr. 131-32).

Berube also did not consider his act of flipping the guard back in place to be “repairs or maintenance of machinery or equipment[.]” (Tr. 129). Brian Bork, Meyer’s safety manager, testified that Berube’s actions were more akin to housekeeping than repair or maintenance. (Tr. 98-99, 106).

2. Violation

I find that a violation of the cited safety standard occurred as alleged. The pertinent requirements under the cited standard are threefold. First, the standard applies only when repairs or maintenance of machinery or equipment are being conducted. Second, the operator must ensure that the machinery or equipment is powered off. Third, the operator must ensure that the machinery or equipment is blocked against hazardous motion. 30 C.F.R. § 56.14105.

I find that the act of flipping the subject guard back into place amounted to “repairs or maintenance.” In *Walker Stone Co.*, 19 FMSHRC 48, 51-52 (Jan.1997) the Commission, relying upon the dictionary definitions of the terms “repair” and “maintenance,” found that the operator’s act of breaking up and removing rocks from a clogged crusher amounted to “repairs or maintenance.” Repair was defined as “to restore by replacing a part or putting together what is torn or broken: fix, mend . . . to restore to a sound or healthy state: renew, revivify” *Id.* (quoting *Webster’s Third New International Dictionary, Unabridged* 1923 (1986)). “Maintenance” was defined as “the labor of keeping something (as buildings or equipment) in a state of repair or efficiency: care, upkeep . . .’ and ‘[p]roper care, repair, and keeping in good order.” *Id.* (quoting *Webster’s Third New International Dictionary, Unabridged* 1362 (1986), and *A Dictionary of Mining, Mineral, and Related Terms* 675 (1968)).

Respondent argues that the work done by Meyer did not amount to either repairs or maintenance but that it was housekeeping. (Meyer Br. 9-10). I disagree. When Molycorp was cited for the lack of a guard to protect miners from the hazard of the exposed moving machine parts of the agitator, it contacted Meyer to remedy the unsafe condition. Meyer, in an effort to carry out its assigned duty, charged Berube with the task. When Berube traveled to the separations building, climbed the stairs, stood on the scaffolding, and reached over the top of the tank to flip the guard back into place, he was exposed to the same hazard that caused the inspector to cite Molycorp. Berube’s actions were meant to bring the agitator back into a safe

state of repair by replacing the guard, an essential part to the safe operation of the agitator. *See Hibbing Taconite Co.*, 35 FMSHRC 3531, 3534 (Dec. 2013) (ALJ). Accordingly, I find that Berube's act of flipping the guard back into place amounted to "repairs or maintenance."

The machinery or equipment was not powered off. The inspector credibly testified that the agitator motor and shaft were "in operation." (Tr. 52). Respondent did not offer testimony disputing the Secretary's assertion. Accordingly, the work was conducted while the power was on the machinery or equipment.

The machinery or equipment was not blocked against hazardous motion. Respondent argues that, contrary to the inspector's assertion, the standard does not require the locking and tagging out of machinery or equipment. (Meyer Br. 7). I agree with Respondent that the standard does not require locking and tagging out. However, I credit the inspector's testimony that, in this instance, the most effective way to block against hazardous motion, which is required by the standard, is to lock and tag out the motor. (Tr. 31, 34, 58-59). As Frandsen explained, "there is really no other way to block the motor against motion other than [to] de-energize" and "the safest way is to lock and tag out." (Tr. 31). The evidence demonstrates that the agitator was powered on and the shaft was not blocked against motion. Accordingly, I find that the Secretary has proven a violation of the cited standard.

Respondent, relying on the inspector's testimony, argues that the cited standard applies only if miners are exposed to a hazard and that, because no hazard was present, there was no violation of the standard. (Meyer Br. 10-12). I disagree. The Mine Act imposes no general requirement that a violation of one of the Secretary's standards be found to create a hazard in order for a citation to be validly issued. *Allied Products, Inc.*, 666 F.2d 890, 892-93 (5th Cir. 1982). The Secretary need only establish that a hazard exists when the cited standard explicitly requires such a showing. Here, the pertinent language of the cited standard makes no reference to any requirement that a hazard exist. Rather, it only requires that operators, when conducting repairs or maintenance to machinery or equipment, power off the equipment *and* block it against hazardous motion. At the very least, the standard requires that the equipment or machinery be powered off. Accordingly, I reject Meyer's argument. As discussed below, I also find that miners were exposed to a hazard in this instance.

3. Significant & Substantial

I find that the violation was S&S.³ I have already found that there was a violation of the cited safety standard. I find that a discrete safety hazard existed. I credit the inspector's testimony

³ 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). 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* (continued...)

that the failure to de-energize the agitator motor and block it against motion before replacing the guard exposed miners to the hazard of entanglement or the severing of fingers. Moreover, I note that the machinery itself was equipped with stickers in the area of the opening which warned of “Danger” and the need to “Keep Hands Clear,” with an illustration showing severed fingers. (Exs. G-5 and G-6; Sec’y Br. 11-12).

Meyer, relying on Berube’s testimony, argues that the closest Berube got to the shaft was three to four feet. (Meyer Br. 11). I do not credit Berube’s testimony regarding estimated distances. Berube, when asked on direct examination how far the “agitator machine” was from where he was standing, initially testified that it was a distance of two feet. (Tr. 122). When asked to confirm the distance of two feet, he responded “roughly,” and then proceeded to ask his own counsel to clarify the question before changing his estimate of the distance to four feet. *Id.* Further, while Berube testified that the distance from the unguarded opening to the shaft was 14 inches, I find that the inspector’s estimation of the distance as being only a few inches and very close to the edge of the opening to be far more accurate when examined in conjunction with Exhibit G-5. (Tr. 32-33, 129-130). Finally, Meyer argues that the inspector’s failure to take measurements, or even get onto the scaffolding to examine the opening, discredits his testimony that the miners were “very close” to the hazard. (Meyer Br. 3). While Inspector Frandsen did not take actual measurements, he did ascend the scaffold and observe the missing guard prior to issuing the guarding violation to Molycorp. (Tr. 21). As a result, he was familiar with the space and I credit his distance estimates as well as his determination that Meyer’s employees were in close proximity to the hazard when they were on the scaffolding.

Whether it was reasonably likely that the hazard contributed to by this violation will result in an injury is a close issue. The Commission has explained that the “reasonably likely” requirement does not require the Secretary to prove that an injury was “more probable than not.” *U.S. Steel Mining Co.*, 18 FMSHRC 862, 865 (June 1996). In addition, the “Secretary need not prove a reasonable likelihood that the violation itself will cause injury” but, rather, that the hazard *contributed to* by the violation will cause an injury. *Musser Engineering, Inc.* and *PBS Coals, Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010); *Cumberland Coal Res.*, 33 FMSHRC 2357, 2365 (Oct. 2011) (emphasis added). As discussed above, I find that Berube was in close proximity to the unguarded opening which created the entanglement and severing hazards discussed above. I find that the Secretary established that the hazards contributed to by the violation were reasonably likely to cause an injury.

I also credit the inspector’s testimony that there was a reasonable likelihood that any injury will be of a reasonably serious nature up to and including severed fingers. For these reasons, I find that the violation was S&S.

³ (...continued)

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). An experienced MSHA inspector’s opinion that a violation is S&S is entitled to substantial weight. *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-79 (Dec. 1998).

4. Negligence and Unwarrantable Failure

I find that Meyer was moderately negligent and that the violation was not a result of the Meyer's unwarrantable failure to comply with the mandatory standard. Much of the Secretary's argument in support of his high negligence and unwarrantable failure designations is premised on his fact that Berube was an agent of the mine and was directly responsible for the violation. While I agree that Berube was agent of Meyer, I find that the actions of Berube and Heikinnen, were idiosyncratic and based upon a belief that they were not exposed to a hazard.

The Commission has held that "the negligence of an operator's 'agent' is imputable to the operator for penalty assessment and unwarrantable failure purposes." *Nelson Quarries, Inc.*, 31 FMSHRC 318, 328 (Mar. 2009). The Mine Act defines an "agent" as "any person charged with responsibility for the operation of all or part of a coal or other mine or the supervision of miners in a coal or other mine[.]" 30 U.S.C. § 802(e). In determining whether an employee is an agent of the operator, the Commission has "relied, not upon the job title or the qualifications of the miner, but upon his function, [and whether it] was crucial to the mine's operation and involved a level of responsibility normally delegated to management personnel." *Ambrosia Coal & Constr. Co.*, 18 FMSHRC 1552, 1560 (Sept. 1996) (quoting *U.S. Coal, Inc.*, 17 FMSHRC 1684, 1688 (Oct. 1995)) (brackets in original); See also *Martin Marietta Aggregates*, 22 FMSHRC 633 (May 2000).

I find that Berube was an agent of Meyer and that his negligence may be properly imputed to Meyer. Berube testified that he was a foreman for Meyer and was responsible for ensuring that jobs were completed properly and on time. (Tr. 112). As a foreman he dealt with scheduling and worked with both Meyer's safety department, as well as the safety department of Molycorp. (Tr. 112-113). Further, Berube agreed that he was responsible in part for safety on the job. (Tr. 113, 133). I find that Berube's function was crucial to Meyer's operation at Molycorp's Mountain Pass Mine & Mill, involved a level of responsibility consistent with that of a person of management, and that he was an agent of Meyer.

The Commission has recognized that "[e]ach mandatory standard . . . carries with it an accompanying duty of care to avoid violations of the standard, and an operator's failure to meet the appropriate duty can lead to a finding of negligence if a violation of that standard occurs." *A.H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983). In determining whether an operator has met its duty of care, the Commission considers "what actions would have been taken under the same circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation." *Jim Walter Res. Inc.*, 36 FMSHRC 1972, 1975 (Aug. 2014) (footnote omitted).

I find that Meyer was moderately negligent. I find that, while Berube's act of flipping the guard back in place was a violation, it was idiosyncratic in nature. Neither Berube nor Bork viewed the work being done as a hazard. While I decline to credit Berube's testimony that the shaft was 14 inches away from the unguarded opening, I do credit his honest belief that he did not expose himself to a hazard when he flipped the guard back into position from where he was standing. Meyer's training materials, specifically its Employee Construction Risk Management Booklet, addresses similar situations and dictates that Meyer employees should lock and tag out

the machinery or equipment before beginning work. (Ex. R-1 p. 23). I note that Inspector Frandsen testified that, during his time at the mine site, he developed a good respect for Meyer, and felt that Meyer was a very good contractor with a good safety department. (Tr. 19). Further, Berube testified that Meyer's safety training was superb compared to training he had received at other companies and that Meyer's safety culture across its operations nationwide was good and involved a commitment to safety on behalf of senior management. (Tr. 115). Because Berube's actions were based upon the mistaken belief that a violation did not exist and given Meyer's training materials and its safety culture, I find that moderate negligence is appropriate. Accordingly, I **MODIFY** the citation to moderate negligence.

The unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id.* at 2001. Unwarrantable failure is characterized by conduct described as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2002-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); *see also Buck Creek Coal, Inc.*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test). The Commission has explained that whether a citation is an "unwarrantable failure" is a question that should be evaluated based on the facts and circumstances in each case, and in light of each of the following factors: (1) the length of time that the violation has existed; (2) the extent of the violative condition; (3) whether the operator has been placed on notice that greater efforts were necessary for compliance; (4) the operator's efforts in abating the violative condition; (5) whether the violation was obvious; (6) whether the condition posed a high degree of danger; and (7) the operator's knowledge of the existence of the violation. *See Consolidation Coal Co.*, 22 FMSHRC 340 (Mar. 2000); *IO Coal Co.*, 31 FMSHRC 1346 (Dec. 2009). All of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether mitigating circumstances exist. *Consol.*, 22 FMSHRC at 353.

It is important to put this violation into context. The guards on about 93 of the tanks in the separations building had been left in an open position like the guard on the subject tank. (Tr. 42). Berube was sent to the building to investigate the situation and to come up with a solution. After investigating the situation at the tank closest to the door, Berube determined that the guards on the tanks needed to be put back into place and secured. Inspector Frandsen testified that Berube told him that he was going to get Molycorp to shut down the agitators as his next step in the process. (Tr. 31, 64-65). Berube's mistake was that he flipped the guard back into position on the first tank before he asked that the tanks be shut down. There was no reason for him to take this action. I find that this action did not rise to the level of aggravated conduct.

In *IO Coal Co.*, 31 FMSHRC at 1352, the Commission emphasized that the length of time that the violative condition existed is a "necessary element" of the unwarrantable failure analysis. The Commission has found that a duration of a "matter of seconds" may weigh against an unwarrantable failure finding. *Dawes Rigging & Crane Rental*, 36 FMSHRC 3075, 3080 (Dec. 2014). Here, the violative condition existed for at most a matter of seconds between the time when Berube first touched the guard and when the guard fell into position after he flipped it up and over.

In *IO Coal Co.*, the Commission explained that the “extent of the violative condition is an important element in the unwarrantable failure analysis.” 31 FMSHRC at 1351. The Commission has explained that the purpose of this element is to “account for the magnitude or scope of the violation[.]” and the judge may analyze it by looking at, among other things, the “extent of the affected area as it existed at the time the citation was issued[.]” the number of persons affected, and the time and resources required to correct the condition. *Dawes Rigging & Crane Rental*, 36 FMSHRC 3075, 3079-3080 (Dec. 2014) (citing *E. Associated Coal Corp.*, 32 FMSHRC 1189, 1195 (Oct. 2010) and *Watkins Eng’rs & Constructors*, 24 FMSHRC 669, 681 (July 2002)0; *Consolidation Coal Co.*, 35 FMSHRC 2326, 2331 (Aug. 2013). In *Dawes Rigging* the Commission found that, because only one miner endangered himself by walking under a suspended boom, the violation was not extensive. *Id.* Here, only Berube was exposed to the hazard when he flipped the guard into position. While Heikinnen engaged in repairs or maintenance when he placed the bolt through the hole on the right hand side of the guard after it was flipped into place, the inspector agreed that he was not exposed to a hazard because the guard was in place. (Tr. 61-62). The violative condition was limited to conduct at this particular tank and guard. I find that the violation was not extensive.

The Commission has explained that repeated similar violations, even if those prior violations were not a result of an unwarrantable failure, and past discussions with MSHA about a problem at the mine, may serve to put an operator on notice that increased efforts to comply are necessary. *IO Coal Co.*, 31 FMSHRC at 1353-1354. Here, the Secretary presented no evidence regarding past discussions with MSHA. The body of the citation states that Meyer was not cited for a violation of this standard in the two years prior to the issuance of this citation. (Ex. G-1).

In evaluating the operator’s efforts in abating the violative condition the judge should examine those abatement efforts made prior to the issuance of the citation or order. *Consolidation Coal Co.*, 35 FMSHRC 2326, 2342 (Aug. 2013) (citing *IO Coal Co.*, 31 FMSHRC at 1356 and *Warwick Mining Co.* 18 FMSHRC 1568, 1574 (Sept. 1996)). Here, there was only a matter of seconds between when the violative condition arose and when it ended. As a result, there was no time to abate this condition. I note that Meyer had taken steps to prevent such conduct from occurring through the implementation of its Employee Construction Risk Management Booklet, which specifically required Meyer employees to lock and tag out machinery or equipment before beginning maintenance work.⁴ (Ex. R-1 p. 23).

The obviousness of the violative condition is an important factor in the unwarrantable failure analysis. *IO Coal Co.*, 31 FMSHRC at 1356. In *Eastern Associated Coal Corp.*, 32 FMSHRC 1189, 1200-1201 (Oct. 2010), the Commission cited evidence that the violative conditions were not obscured from view in upholding a judge’s finding that a roof control violation was obvious. Meyer argues that, because Berube credibly testified that he did not believe that he was exposed to a hazard or that a violation existed, the violation was not obvious. (Meyer Br. 15-17). I disagree. I have already determined that a hazard existed and that the

⁴ Meyer’s Employee Construction Risk Management Booklet states that “[e]mployees shall place a lock and tag at the point of energy isolation on any equipment or machine before performing any maintenance, adjustment, or construction to indicate that there shall not be any operation until the individual has removed the lock and tag.” (Ex. R-1 p. 23).

presence of a hazard was not required for the finding of a violation. I find that the condition cited by the inspector was obvious. The agitator was in operation and Respondent's employee began repairs or maintenance without powering off the equipment and blocking it against hazardous motion.

The Commission has determined that a high degree of danger posed by a violation is an aggravating factor that supports an unwarrantable failure finding. *IO Coal Co.*, 31 FMSHRC at 1355-1356. As stated above, I find that this violation was S&S. Berube's proximity to the unguarded opening of the rotating shaft exposed him to a hazard which could have reasonably been expected to result in an entanglement type injury or severed fingers. The degree of the danger was only moderately high as opposed to extremely high.

In *IO Coal*, the Commission reiterated the well settled law that, in addition to actual knowledge, an operator's knowledge of the existence of a violation may be established where the operator "reasonably should have known of the violative condition." 31 FMSHRC at 1356-1357. Meyer should have known of the violation. Although Berube did not believe that a violation existed, Meyer's own safety material suggests that Berube and Heikinnen should have locked and tagged out the machinery or equipment before beginning work on the guard. (Ex. R-1 p. 23). Moreover, just as the cited standard did not require the presence of a hazard before powering off the agitator and blocking it against hazardous motion, the Meyer's safety policy also does not explicitly require the presence of a hazard before locking and tagging out any equipment or machinery before conducting maintenance. *Id.*

After careful consideration of each of the above factors, I find that Meyer did not unwarrantably fail to comply with the mandatory standard. While the violative condition was obvious, potentially involved a high degree of danger, and was known to the operator through its agent, it was not extensive, did not exist for significant period of time, the operator did not have notice that greater efforts were necessary for compliance, and it had taken steps towards preventing the cited conduct. In reaching this conclusion I have taken into account the Secretary's argument that "the important factor is the role that CR Meyer's foreman played in this blatant disregard for a basic safety measure." (Sec'y Br. 14). However, given the above analysis and my finding that Berube's action was idiosyncratic and without any real purpose, I find that Meyer's conduct was not aggravated or a result of its unwarrantable failure to comply with the mandatory standard. Accordingly, I **VACATE** the unwarrantable failure finding and modify the citation to a 104(a) citation.

II. APPROPRIATE CIVIL PENALTY

Section 110(i) of the Mine Act sets forth the criteria to be considered in determining an appropriate civil penalty. Meyer had a history of eight violations during the 15 months preceding the issuance of the subject citation, including one imminent danger order.⁵ None of these enforcement actions were taken at the Mountain Pass Mine & Mill. Respondent is a large nationwide contractor that worked over 200,000 hours. (Exhibit A to Petition for Assessment of

⁵ The parties did not submit a history of violations. The court obtained the history data from MSHA's Mine Data Retrieval System, available at <http://www.msha.gov/drs/drshome.htm>.

Civil Penalty). The violation was abated in good faith. The penalty assessed in this decision will not have an adverse effect upon its ability to continue in business. (Jt. Stip. ¶ 9). The violation was serious and Meyer's negligence was moderate.

The Secretary proposed the penalty under his special assessment regulation. I have modified the citation to a 104(a) citation with moderate negligence. I find that the Secretary did not establish that this violation was "particularly serious or egregious" so as to justify the proposed special assessment of \$8,000.00. *Coal Employment Project v. Dole*, 889 F2d. 1127, 1129-30 (D.C. Cir. 1989). More importantly, I am not bound by the Secretary's penalty proposal. The Special Assessment Narrative Form attached to the Petition for Assessment of Civil Penalty shows that, had this citation been regularly assessed, the penalty would have been \$2,000.00. (Special Assessment Narrative Form attached to Petition for Assessment of Civil Penalty). Moreover, if Inspector Frandsen had determined that the violation was the result of Meyer's moderate negligence, the Secretary's proposed penalty would have been about \$555.00, before any reduction for good faith abatement. 30 C.F.R. § 100.3. In light of my findings set forth above, I find that a penalty of \$800.00 is appropriate for this violation.

III. ORDER

For the reasons set forth above, Citation No. 8700228 is **MODIFIED** to a citation issued under section 104(a) of the Mine Act and the degree of negligence is reduced to moderate. In all other respects the citation is **AFFIRMED**. CR Meyer & Sons Company, Inc., is **ORDERED TO PAY** the Secretary of Labor the sum of \$800.00 within 30 days of the date of this decision.⁶

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

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⁶ Payment should be sent to the Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 30, 2015

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

v.

JOHN RICHARDS CONSTRUCTION,
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. WEST 2015-101-M
AC No. 24-020270-361812

Mine: Richards Pit

SUMMARY DECISION
ORDER DENYING MOTION FOR RECUSAL
ORDER DENYING MOTIONS FOR RECONSIDERATION

Before: Judge Bulluck

This case is before me upon a Petition for Assessment of Civil Penalty filed by the Secretary of Labor (“Secretary”) on behalf of the Mine Safety and Health Administration (“MSHA”) against John Richards Construction (“JRC”), pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 (“Act”), 30 U.S.C. § 815(d). The Secretary seeks a total penalty of \$200.00 for two alleged violations of his mandatory safety standards regarding yearly inspection of fire extinguishers and maintenance of a handrail on an elevated walkway.

The Secretary filed a Motion for Summary Decision (“Sec’y Mot.”) with attached exhibits (“Exs. P-1 through P-8”), including the Declaration of MSHA Inspector David J. Small and his inspection notes for both citations. JRC responded with a Brief in Opposition to Secretary’s Motion for Summary Decision (“Resp’t Br.”), with attached Affidavit of Mark C. Smith and Fire Extinguisher Records covering years 2013 and 2014 (“Exs. R-1 and R-2”), that also moves for my recusal, for reconsideration of the Order Granting Secretary’s Motion for Simplified Proceedings, and the Order Denying Transcript Request.

I. Procedural Rulings

Commission Rule 81(b) permits a party to request that a Judge withdraw from a proceeding on grounds of personal bias or other disqualification by setting forth in detail the matters alleged to constitute personal bias or other disqualification in an affidavit. 29 C.F.R. § 2700.81(b). JRC alleges that I colluded with counsel for the Secretary to circumvent JRC’s rights, as evidenced by my decision to continue the originally scheduled September 9, 2015 hearing. Resp’t Br. at 2. This argument fails in that unfavorable “judicial rulings alone almost never constitute a valid basis for a bias or partiality motion” absent evidence of “deep-seated

favoritism or antagonism as would make fair judgment impossible.” *Medusa Cement Co.*, 20 FMSHRC 144, 148-49 (Feb. 1998) (quoting *Liteky v. United States*, 510 U.S. 540, 555 (1994)); *Rock of Ages Corp.*, 20 FMSHRC 106, 125 (Feb. 1998) (citing *Liteky* for the proposition that judicial rulings are inadequate grounds for disqualification). As stated during conference calls with the parties and in an email from my law clerk, I rescheduled the hearing to allow the parties an opportunity to continue negotiation over the citations at issue, to permit additional time for issuance of my summary decision in the companion docket, WEST 2014- 440-M, and to consider any motions filed by the parties in the instant matter, including a motion for summary decision by either or both parties. Since my decision to continue the hearing was grounded in the undisputed facts of this case, as stated by John Richards, himself, and agreed to by the Secretary’s counsel, Lauren Polk, and was consistent with my fundamental duties to preside over this proceeding, JRC’s motion for my recusal is, hereby, **DENIED**.

JRC’s motions for reconsideration of the Order Granting Secretary’s Motion for Simplified Proceedings, and the Order Denying Transcript Request have been considered. See Resp’t Br. at 1-2. JRC does not, however, present any new information or sufficient basis to reverse either decision. Therefore, JRC’s motion for reconsideration of the Order Granting Secretary’s Motion for Simplified Proceedings is, hereby, **DENIED**; and JRC’s motion for reconsideration of the Order Denying Transcript Request is, hereby, **DENIED**.

II. Summary Decision

Pursuant to Commission Rule 67(b), “[a] motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows: (1) [t]hat there is no genuine issue as to any material fact; and (2) [t]hat the moving party is entitled to summary decision as a matter of law.” 29 C.F.R. § 2700.67(b). When considering a motion for summary decision, the court looks at the record “‘in the light most favorable to . . . the party opposing the motion,’ and . . . ‘the inferences to be drawn from the underlying facts contained in [the] materials [supporting the motion] must be viewed in the light most favorable to the party opposing the motion.’” *Hanson Aggregates New York, Inc.* 29 FMSHRC 4, 9 (Jan. 2007) (quoting *Poller v. Columbia Broadcasting Sys., Inc.*, 368 U.S. 464, 473 (1962) and *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)).

Based on the facts represented by the parties, I find that there is no genuine issue as to any material fact. For the reasons set forth below, I conclude that the Secretary is entitled to summary decision as a matter of law on the issue of whether JRC violated both mandatory safety standards. Accordingly, I **AFFIRM** the citations, as issued, and assess penalties against JRC.

A. Factual Background

The Richards Pit is an intermittent sand and gravel mine in Seeley Lake, Montana, owned and operated by JRC, which employs two to three employees. Exs. P-1 at 1, P-7 at 1-2. John Richards is the owner of JRC. Answer to Pen. Pet. at 1. On July 29, 2014, MSHA Inspector David Small conducted a regular inspection of the Richards Pit while the portable crushing plant was not operating, and subsequently issued two citations to JRC. Sec’y Br. at 2; Ex. P-1 at 1-2.

The Secretary contends that no material facts are at issue, and that he is entitled to summary decision as a matter of law. Sec’y Br. at 2. On the contrary, JRC argues that material facts are in dispute. Resp’t Br. at 2. Looking at the record in the light most favorable to JRC, however, I conclude that there are no material facts in dispute.

B. Material Facts

1. Citation No. 8762878

It is uncontested that during Small’s July 29, 2014 inspection of the fire extinguishers at the Richards Pit, Richards was unable to produce records that the cited fire extinguishers had received an annual inspection. Ex. P-1 at 2. According to Small, Richards stated that he was unaware that he needed to conduct yearly inspections of the fire extinguishers, and asked Small for additional time to conduct the inspections. Exs. P-1 at 2, P-4 at 1. In order to have the citation terminated, JRC produced an invoice indicating that Missoula Fire Equipment had performed the inspections of the cited fire extinguishers on August 6, 2014. Exs. P-3, P-5. The Secretary infers from these facts that annual inspections had not been performed. Sec’y Br. at 5.

Through conference calls and subsequent submissions, Richards has represented that fire extinguisher inspections had been performed and were current at the time of Small’s inspection. Resp’t Br. at 2; Exs. R-1, R-2. This dispute is immaterial, however, because its resolution does not affect “the outcome of the suit under governing law.” *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986). The issue before me is not whether the annual inspections had been performed, but whether, at the time of inspection, the operator was able to demonstrate to the inspector compliance with the standard by producing adequate documentation of timely inspections.

2. Citation No. 8762879

While inspecting the portable crusher plant at the Richards Pit, Small observed a missing 23-inch section of handrail associated with an elevated walkway that was nine feet above ground level. Exs. P-1 at 2, P-6. According to Small, Richards stated that one of his employees had removed the handrail a week prior to the inspection. Ex. P-1 at 2. It is undisputed that the cited section of handrail was missing at the time of inspection, that the missing section was readily observable, that the crusher plant had not operated in 2014, and that there was no barricade or signage warning of the alleged hazard. Exs. P-1 at 2, P-7 at 14. JRC argues, however, that the section was in the midst of repairs. Resp’t Br. at 1. The Secretary disagrees, contesting that JRC was “actively performing maintenance” on the handrail section. Sec’y Br. at 6.

Resolution of whether the handrail on the portable crusher was in a maintenance mode is not material to the fact of violation, given that JRC had not reported to MSHA that the plant had been shut down, and even though the plant was not operating, the elevated walkway was openly accessible, without benefit of any safety precautions addressing the unprotected area.

C. Discussion and Analysis

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

1. Citation No. 8762878

a. Fact of Violation

Small issued 104(a) Citation No. 8762878, alleging a violation of section 56.4201(a)(2) that was “unlikely” to cause an injury resulting in “lost workdays or restricted duty,” affecting “one person,” and was caused by JRC’s “low” negligence.¹ The “Condition or Practice” is described as follows:

The yearly inspection of the fire extinguishers were not conducted at the mine site. At least once every 12 months checks shall be conducted to determine the condition of the extinguishing agent, mechanical parts, hose, nozzle, and vessel to determine that the extinguisher will function properly. Based on continued mining operations a person could be injured if a fire were to occur and a fire extinguisher did not function properly.

Ex. P-2. The citation was terminated on August 13, 2014, based upon production of an invoice documenting that Missoula Fire Equipment had checked the fire extinguishers on August 6, 2014. Exs. P-3, P-5.

The Secretary contends that JRC’s failure to provide Small with current annual inspection records of the fire extinguishers during the inspection violated section 56.4201(a)(2). Sec’y Br. at 5. Regarding this contention, Small asserts that he was presented with no documentation that the inspections had been performed, although the fire extinguishers appeared to be in good condition. Exs. P-1 at 2, P-4. On the other hand, JRC argues that the annual fire extinguisher inspections had, indeed, been performed by employee Mark Smith. Resp’t Br. at 1; Exs. R-1, R-2; Ex. P-7 at 14.

Section 56.4201(a)(2) requires, at least, annual maintenance checks of fire extinguishers to ensure that they are operational. As noted earlier, this standard is only enforceable if the operator demonstrates to the inspector, through records or tags, that the fire extinguishers have been properly inspected. *Constr. Materials Corp.*, 23 FMSHRC 321, 323 (Mar. 2001) (ALJ); *see North Idaho Drilling, Inc.*, 35 FMSHRC 2472, 2489-90 (Aug. 2013) (ALJ) (outdated tags

¹ 30 C.F.R. § 56.4201(a)(2) provides that “[f]irefighting equipment shall be inspected according to the following schedules: [a]t least once every twelve months, maintenance checks shall be made of mechanical parts, the amount and condition of extinguishing agent and expellant, and the condition of the hose, nozzle, and vessel to determine that the fire extinguishers will operate effectively.”

affixed to extinguisher established violation); *Carder, Inc.*, 27 FMSHRC 839, 853-54 (Nov. 2005) (ALJ) (“last proof” of an inspection established violation); *Hollow Contracting, Inc.*, 18 FMSHRC 2044, 2059 (Nov. 1996) (ALJ) (finding a section 56.4201(b) violation where the fire extinguishers lacked inspection documentation).

In this case, even when viewing the evidence in the light most favorable to JRC, i.e., drawing an inference that JRC had timely inspected the fire extinguishers prior to Small’s inspection, it is undisputed that JRC failed to provide Small with documentation that the inspections had been performed. Therefore, I find that the Secretary has established a violation of section 56.4201(a)(2).

b. Gravity and Negligence

The record establishes that the Richards Pit operated only intermittently, employing two to three miners, that the portable crusher had not been operated in 2014, and that the fire extinguishers appeared to be in good condition. Therefore, I find that the violation was unlikely to result in injuries causing lost work days or restricted duty and, viewing the evidence in the light most favorable to the operator - - that the inspections actually had been timely performed, but that the documentation was unavailable for whatever reason - - that JRC’s negligence was low in committing the violation, as alleged by the Secretary.

2. Citation No. 8762879

a. Fact of Violation

Small issued 104(a) Citation No. 8762879, alleging a violation of section 56.11002 that was “unlikely” to cause an injury resulting in “lost workdays or restricted duty,” affecting “one person,” and was caused by JRC’s “moderate” negligence.² The “Condition or Practice” is described as follows:

A section of the top handrail was missing located on the elevated walkway on the impact crusher for the crusher plant for road rock material. The section missing is approximately 23 inches long, 42 inches above the walkway floor and nine feet above ground level. Based on continuing mining operations a person could be injured if they were to fall from that height.

Ex. P-6. The citation was terminated on July 29, 2014 when a handrail was welded in place.

The Secretary contends that section 56.11002 requires JRC to maintain the elevated walkway in good condition, with handrails, since the walkway is accessible to miners. Sec’y Br. at 6. JRC argues that the handrail was removed because it was loose, that the section was in the

² 30 C.F.R. § 56.11002 provides that “[c]rossovers, elevated walkways, elevated ramps, and stairways shall be of substantial construction provided with handrails, and maintained in good condition. Where necessary, toeboards shall be provided.”

midst of repairs, and that the crusher would not have been operated without a pre-shift inspection that would have noted, and required repair of, the missing section. Resp't Br. at 1.

It is uncontested that the portable crusher had not been operated in 2014 and that, viewing the evidence in the light most favorable to JRC, the handrail was being repaired. Considering the evidence that the walkway was elevated nine feet above ground level, and was missing a 23-inch section of handrail, without barricade or warning signage to prevent access, it is clear that any miner accessing the walkway would be exposed to a fall hazard, even from something as simple as a distraction, a misstep, or a momentary loss of balance.

I find JRC's arguments unpersuasive. Section 56.11002 does not condition a finding of violation upon any consideration of "pending repairs," or an operator's speculation that it would have cured a defect prior to operating machinery sometime in the future. *See Cactus Canyon Quarries of Texas, Inc.*, 23 FMSHRC 280, 290 (Mar. 2001) (ALJ) (finding an S&S violation of section 56.11002 where a fall of three to four feet was likely); *Alsea Quarries*, 33 FMSHRC 1840, 1843 n.3, 1845 (Aug. 2011) (ALJ) (finding a section 56.11002 violation in spite of evidence that the crusher was under repair); *Asphalt, Inc.*, 15 FMSHRC 2206, 2208 (Oct. 1993) (ALJ) (upholding a section 56.11002 violation even though the mine was in the midst of repairs during inspection). Therefore, I find that the Secretary has established a violation of section 56.11002.

b. Gravity and Negligence

It is uncontested that a miner would be exposed to injuries such as broken bones as a result of a nine-foot fall, and that the risk of injury was unlikely because only the handrail was being repaired, rather than the plant being operated. It is also clear from the record that the violation had existed for one week, and that Richards had knowledge of the condition because the missing railing was readily observable. Therefore, I find, as alleged by the Secretary, that JRC was moderately negligent in the violating the standard.

D. Penalty

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

Applying the penalty criteria, and based upon a review of MSHA's online records, I find that JRC is a small, intermittent operator, with no prior violations of section 56.11002 or section 56.4201(a)(2) during the relevant time period, and an overall violation history that is not an aggravating factor in assessing appropriate penalties. I also find that JRC demonstrated good faith in achieving rapid compliance after notice of the violations. Since JRC has not put forth any evidence that imposition of the proposed penalties would adversely affect its ability to remain in business, "it is presumed that no such adverse [e]ffect would occur." *Sellersburg*, 5 FMSHRC at 294 (citing *Buffalo Mining Co.*, 2 IBMA 226, 247-48 (Sept. 1973)).

The remaining criteria involve consideration of the gravity of the violations and JRC's negligence in committing them. These factors have been discussed fully, respecting each

violation. Therefore, considering my findings as to the six penalty criteria, the penalties are set forth below.

1. Citation No. 8762878

It has been established that this violation of section 56.4201(a)(2) was unlikely to cause an injury that could reasonably be expected to result in lost workdays or restricted duty, that JRC's negligence was low, and that it was timely abated. Therefore, I find that a penalty of \$100.00, as proposed by the Secretary, is appropriate.

2. Citation No. 8762879

It has been established that this violation of section 56.11002 was unlikely to cause an injury that could reasonably be expected to result in lost workdays or restricted duty, that JRC's negligence was moderate, and that it was timely abated. Therefore, I find that a penalty of \$100.00, as proposed by the Secretary, is appropriate.

ORDER

WHEREFORE, the Secretary's Motion for Summary Decision is **GRANTED**; Respondent's Motions for Recusal and Reconsideration of Order Granting Secretary's Motion for Simplified Proceedings and Order Denying Transcript Request are **DENIED**; and John Richards Construction is **ORDERED TO PAY** a total civil penalty of \$200.00 within 30 days of this Decision.³

/s/ Jacqueline R. Bulluck
Jacqueline R. Bulluck
Administrative Law Judge
202-434-9987

³ Payment should be sent to: Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390. Please include Docket number and A.C. number.

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ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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October 6, 2015

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

v.

COEUR ALASKA, INC.,
Respondent.

CIVIL PENALTY PROCEEDINGS

Docket No. WEST 2015-346-M
A.C. No. 50-01544-370187

Docket No. WEST 2015-401-M
A.C. No. 50-01544-373015

Docket No. WEST 2015-422-M
A.C. No. 50-01544-373488

Docket No. WEST 2015-470-M
A.C. No. 50-01544-375449

Mine: Kensington

**ORDER GRANTING RESPONDENT'S
MOTION TO COMPEL MSHA SPECIAL ASSESSMENT REVIEW FORMS**

Before: Judge Simonton

These cases are 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. The Chief Judge assigned these matters to me on June 22, 2015 and distributed the court's standard prehearing order to both parties. Within, the parties were instructed that,

... they shall provide a copy of all relevant, discoverable documents that relate to each citation/order including, but not limited to, copies of inspection notes, citation documentation, narratives, photos ... Notes taken during or shortly after the inspection that contain factual information are not privileged and must be disclosed as a part of the exchange of information.

Prehearing Order, 1.

On September 17, 2015, the Respondent moved to compel the production of MSHA's special assessment review forms ("SAR forms") for the six specially assessed citations contained in the above dockets. Resp. Mot., 1. The Secretary opposed the motion, stating that the SAR forms contain the "pre-decisional" thoughts, opinions, and recommendations of MSHA personnel and are protected by deliberative process privilege. Sec'y Ans., 4-5 (citing *Jordan v. U.S. Dept. of Justice*, 591 f.2d 753, 772 (D.C. Cir. 1978); *In re Contests of Respirable Dust*

Sample Alteration Cases 14 FMSHRC 987, 990-93 (June 1992)(“Dust Cases”); *Consolidated Coal*, 19 FMSHRC 1239, 1246 (July 1997).

On September 28, 2015, I ordered the Secretary to submit the SAR forms for my *en camera* review to determine whether the SAR forms contained information protected by the deliberative process privilege. Order for En Camera Review.¹ Within that order, I acknowledged the current split in ALJ ruling on this issue. *Id* at 2. However, I also highlighted several of my colleagues’ findings upon actual review of SAR forms that,

The forms contain no meaningful discussion of the pros and cons of specially assessing the cited standards and no exegesis of the policy reasons behind the Secretary's choices.

Consol, 2012 WL 4753924, *2 (July 2012)(ALJ Barbour)(finding that SAR forms were not protected by deliberative process); see also *Traylor Mining*, 37 FMSHRC 1373, 1373 (June 2015)(ALJ Manning)(stating that disclosure of SAR forms would not expose the Secretary’s deliberations in any meaningful way).

After *en camera* review, I conclude that the SAR forms for Citation Nos. 8611879, 8786162, 8611872, 8611874, 8611875, and 8611880 do not contain any deliberative content. On the first substantive section of the form, the inspector summarizes the facts of the citation at the beginning of the SAR form and recommends the citation for special assessment. On the second portion of the form, a series of supervisors either approve or disapprove the special assessment designation with very brief one or two sentence statements.

All of the information contained on these forms is strictly factual in nature, comprised primarily of concise descriptions of the alleged violation’s gravity and the operator’s negligence. None of the information on the submitted forms reveal broad policy considerations or the “deliberative” nature of the agency’s decision making process. Accordingly, the forms are not protected by the deliberative process privilege and must be disclosed. *Dust Cases*, 14 FMSHRC at 1993 (“purely factual information that does not expose an agency’s decision making process does not come within the ambit of privilege”).

Although not critical to my ruling, I must note that for at least one citation, Citation No. 8611880, there is a unique fact listed in the inspector’s summary within the SAR form that is not fully described in either the original citation or the Special Assessment Narrative form. Regardless of whether or not this or other facts are available through other disclosures, the Respondent is entitled to the full factual basis upon which the special assessment was issued so that it may mount a complete defense to both the fact of violation and the assessed penalty. See *Traylor Mining* 37 FMSHRC 1373 (stating that any significant deviation from the Secretary’s penalty assessment must be explained by the ALJ); see also *Sellersburg Stone*, 5 FMSHRC 287,

¹ I incorporate all observations, findings, and references of the September 28 Order within this ruling. A copy of the September 28 Order has been attached for record purposes.

293 (Mar. 1983); *Hubb Corp.*, 22 FMSHRC 606, 612 (May 2000); *Mize Granite Quarries Inc.*, 34 FMSHRC 1760, 1763 (Aug. 2012).

ORDER

The Secretary is ordered to provide complete copies of the SAR forms for Citation Nos. 8611879, 8786162, 8611872, 8611874, 8611875, and 8611880 to the Respondent without delay.

/s/ David Simonton
David Simonton
Administrative Law Judge

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October 16, 2015

MATTHEW A. VARADY,
Complainant,

v.

VERIS GOLD USA, INC.,
Respondent.

DISCRIMINATION PROCEEDING

Docket No. WEST 2014-307-DM
WE-MD 14-03

Mine: Jerritt Canyon Mill
Mine ID: 26-01621

ORDER REGARDING COMPLAINANT'S MOTION FOR DAMAGES¹

Before: Judge William B. Moran

In this section 105(c)(3) action under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act" or "Act"), Complainant, Matthew A. Varady, asserted that he was fired by Veris Gold USA, Inc., because of safety and health complaints he voiced related to his job at Veris' Jerritt Canyon Mill. The Court issued its decision on September 2, 2015, finding that Complainant was so discriminated against. That decision directed Complainant to provide his itemized and documented damages within 30 days of the decision.

The Court will address each of the items of damages and remedies sought by Complainant in his Motion. **Initially, it is important to note that the Court cannot award *any damages* until Complainant submits an affidavit which provides the date he resumed gainful employment and which declares whether workmen's unemployment compensation was received or not, and, if it was received, the dates and all amounts received through such compensation.**

"1: The sum of \$25.57 an hour, plus interest at a rate of 5%, for 76 hours a pay period, as regular hourly pay, from the date of Nov 8, 2013 to the date of April 21, 2014 equaling 11 pay periods. Totaling **\$22,438.24.**" For the reasons identified in the paragraph below, the Court cannot rule on this item at this time.

¹ In Varady's document seeking damages, Complainant also filed a motion to rule on successorship. In that document, "Complainant motions the court to find the new ownership, Jerritt Canyon Gold, jointly and severally liable for damages using the 9 factors set forth in the successorship doctrine enunciated by the Commission in *Glenn Munsey vs. Smitty Baker Coal Co.* 2 FMSHRC 3463 (December 1980)." Motion at 3. Jerritt Canyon Gold was not a party to these proceedings and is not presently a party. The Court does not believe that it has jurisdiction to rule on successorship. In a related case, *Lowe v. Veris Gold, Inc.*, WEST 2014-614-DM, the Court issued its decision on October 15, 2015, requesting direction from the Commission as to the same successorship issue. Accordingly, the Court defers ruling on this motion at this time.

“2: The sum of \$38.85 an hour, plus interest at a rate of 5%, for 56 hours a pay period, as overtime hours, including mandatory overtime worked, From the date of Nov 8, 2103 to the date of April 21,2014 equaling 11 pay periods. Totaling **\$25,126.64.**” Complainant will need to identify the number of days composing a “pay period.” In this connection, it would seem doubtful that Complainant would be working an additional 56 hours per week or even every two weeks. If Complainant contends otherwise, he will have to demonstrate, by submitting past pay stubs, that he routinely worked an additional 56 hours per pay period.

“3: The sum \$25.57 an hour, plus 5% interest, for 80 hours, for paid vacation leave. Totaling **\$2,147.20.**” Complainant will need to document that he received 80 hours of paid vacation leave, as well as the days, during the 12 months preceding his employment termination, in which he received paid vacation and the amounts paid. Further, Complainant will have to demonstrate that he would have accrued such vacation pay during the period following his termination and up to the time he resumed gainful employment.

“4: The sum of \$25.57 an hour, plus 5% interest, for 54 and 1/2 hours, for personal time off. Totaling **\$1,472.78.**” The same problem as identified for item 3, above, exists for this request. Complainant must demonstrate that during the 12 months preceding his termination he was entitled to and received “personal time off” and the number of hours so received. Complainant must submit documentation establishing entitled to this benefit as well as pay stubs so identifying payments for such personal time in the amount of 54 and ½ hours.

“5: The sum of \$38.85 an hour, plus 5% interest, for 48 hours, for paid holidays. Totaling **\$1,957.92.**” The Complainant should see, from the requirements listed for items 1 through 4 above, that he must demonstrate that during the 12 months preceding his termination he was entitled to and received “paid holidays” including the number of hours so received and demonstrate that such pay was *in addition to* his normal pay, so that there is no “double counting” of his income. The best way for the Complainant to establish his fair and complete income would be to provide copies of his paystubs during the 12 months preceding his termination, minus any post-termination benefits he received from Veris, minus any workmen’s compensation benefits received to date, together with a paystub and sworn statement as to when he resumed gainful employment.

Regarding items 6 through 12, listed immediately below, the Court will not repeat the evidentiary deficiencies for these, as the same problems exist. Accordingly, for these to be considered, Complainant must supply the needed information for each of items 6 through 12.

“6: The sum of \$.25 an hour, plus 5% interest, for 76 hours a period, as a shift differential, from the date of Nov 8, 2013 to the date of April 21, 2014 equaling 11 pay periods. Totaling **\$219.45.**” **See comment, in bold print, preceding item 6.**

“7: The sum of \$.25 an hour, plus 5% interest, for 8 hours per pay period, as a shift differential for overtime, from the date of Nov 8, 2013 to the date of April 21, 2014 equaling 11 pay periods. Totaling **\$23.10.**” **See comment, in bold print, preceding item 6.**

“8: The sum of \$68.14, plus 5% interest, per pay period, for insurance premiums, from the date of Nov 8 ,2013 to the date of April 21, 2014 equaling 11 pay periods. Totaling **\$787.01.**” **See comment, in bold print, preceding item 6.**

“9: The sum of \$2,379.87 for a production bonus, plus 5% interest. Totaling **\$2,498.86.**” **See comment, in bold print, preceding item 6.**

“10: The sum of the previously mentioned, plus 3% of that sum ,and 5% interest on the 3% , for a 401k match, . Totaling **58,456.26.**” **See comment, in bold print, preceding item 6.**

“11: The sum of \$35 a day, for 13 subpoenaed witnesses, for two days time. Totaling **\$910.**” **See comment, in bold print, preceding item 6.**

“12: The sum of **\$150**, for mileage and fuel costs, paid to Mr. Michael Pierce, for his travel from Twin Falls, Idaho ,in the event he was needed to testify.” **See comment, in bold print, preceding item 6.**

“13: The sum of **\$300,000.00** for punitive damages² for intentional discrimination by the Respondent, pursuant to Title V Section 102 of the Civil Rights Act of 1991. **Exhibit 2.**” As previously explained by the Court, this category of damages is not cognizable relief in discrimination matters under the Mine Act. Therefore this request is **DENIED.**

² As the Court explained in its September 2, 2015, decision, the “concept of damages is to ‘make whole’ a person who has been unlawfully discharged. Because Mr. Varady is not an attorney, the Court offers the following general guidance as to allowable damages. At the hearing, Varady stated that he is no longer seeking reinstatement, but is seeking, among other items, reimbursement for expenses in seeking reemployment. Tr. 19. Such expenses are recoverable. Lost wages plus interest² are also part of the recognizable damages and would cover the period between the date of Complainant’s discharge and the time when he again became employed. Because the “make whole” concept of relief does not contemplate a windfall to such individuals, any unemployment benefits received for the period between the unlawful discharge and the date of new employment are offsets to the damages that may be awarded. Litigation-related expenses are awardable. As examples, these would include copying expenses; any costs related to subpoenaing witnesses; medical expenses, including premiums, that would have been covered by Complainant's medical insurance, if applicable; and lost vacation pay, if applicable. Mileage, telephone calls, and postage are other examples of awardable damages. These are examples only. The guiding principle is for a complainant to recover the financial reimbursement for items he would have received had his employment continued and the expenses in pursuing this litigation, minus benefits received such as workmen’s unemployment compensation. Some damages are not recognized for relief under the Mine Act. For example, there is no authority or precedent for awarding compensatory damages for damage to reputation and/or pain and suffering. *Bewak v. Alaska Mech., Inc.*, 33 FMSHRC 2337, 2338 (Sept. 2011) (ALJ); *Peterson v. Sunshine Precious Metals, Inc.*, 24 FMSHRC 810, 811-12 (Aug. 2002) (ALJ); *Casebolt v. Falcon Coal Co.*, 6 FMSHRC 485, 503 (Feb. 1984) (ALJ).” *Varady v. Veris Gold USA, LLC*, WEST 2014-307-DM, 2015 WL 5307780, at *20 (FMSHRC Sept. 2, 2015).

“14: The sum of **\$300,000.00** for pecuniary damages to cover possible future medical treatment due to the sustained injury, that led to the intentional discrimination by Respondent, pursuant to Title V Section 102 of The Civil Rights Act of 1991. Exhibit 2.” As explained in the September 2, 2015, decision, such damages are not awardable and therefore this request is also **DENIED**.

“15: The sum of **\$175,368.78** for pain, suffering, and emotional distress caused by the injury suffered by the Complainant due to the Respondent's undisputed negligence in providing a safe working environment.” As explained in the September 2, 2015, decision, such damages are not awardable and therefore this request is **DENIED**.

“16: The removal of all negative items or information within the Complainant's employee file.” The final decision will include the standard language employed to address this issue.

“17: Repair the Complainant's employment status to rehire able.” The Court does not understand the nature of Complainant's request. Complainant is directed to explain the nature of this request.

Complainant is further advised that the Court cannot have a continuing dialogue over substantiation of his claimed damages. If Complainant does not provide the requested information in response to this Order, the Court will have no choice but to simply deny those items for which documentation is lacking. Once the Court issues a final order in this matter, Complainant can always appeal that Order before the Commission, challenging the Court's decision regarding damages and any other matter with which he takes issue. Complainant is directed to provide the requested documentation no later than 30 days after the date of this Order.

SO ORDERED.

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

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October 20, 2015

HUNTER SAND & GRAVEL, LLC,
Contestant,

v.

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

CONTEST PROCEEDINGS

Docket No. KENT 2014-391-RM
Citation No. 8728537; 2/25/2014

Docket No. KENT 2014-392-RM
Order No. 8728538; 2/25/2014

Docket No. KENT 2014-393-RM
Order No. 8728539; 2/25/2014

Docket No. KENT 2014-394-RM
Order No. 8728540; 2/25/2014

Docket No. KENT 2014-395-RM
Citation No. 8728541; 2/25/2014

Mine: Dredge IV
Mine ID: 15-17687

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

v.

HUNTER SAND & GRAVEL, LLC ,
Respondent

CIVIL PENALTY PROCEEDINGS

Docket No. KENT 2014-566-M
A.C. No. 15-17687-350333

Docket No. KENT 2015-75
A.C. No. 15-17687-362767

Mine: Dredge IV

**ORDER GRANTING IN PART & DENYING IN PART MOTION FOR PARTIAL
SUMMARY DECISION**

Before: Judge Barbour

These cases are before me upon notices of contest filed by Hunter Sand & Gravel, LLC, (“Hunter”) and civil penalty petitions filed by the Secretary of Labor (“Secretary”), acting on behalf of his Mine Safety and Health Administration (“MSHA”), pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977 (“Act”), 30 U.S.C. §§ 815, 820. In the two Civil Penalty dockets, the Secretary seeks a civil penalty in the amount of \$152,820.00 for four alleged violations of the Secretary’s safety and health standards for the nation’s surface

metal and nonmetal mines and one alleged violation of the Secretary's training and retraining standards for miners engaged in shell dredging or employed at sand or gravel mines. All five violations relate to a fatal accident on December 10, 2013, when the Secretary alleges a dredge hand walked onto a snow and ice covered barge ("Barge MEM 611") at the company's Dredge IV mine and slipped and fell into the water.

On a conference call dated July 28, 2015, the parties informed the court that a dispute over MSHA's jurisdiction in this matter was impeding settlement efforts, and the parties requested that the court resolve the dispute through summary decision. The court agreed to the request provided that the parties could present the court with no genuine dispute over material facts, preferably by stipulating to all material facts. The court subsequently scheduled a December 8, 2015, hearing on this matter. On October 5, 2015, the Secretary filed a Motion for Partial Summary Decision with an accompanying Memorandum of Law in Support ("Sec'y Br.") and attached exhibits. In its motion, the Secretary asserted that MSHA had jurisdiction to issue the five citations and orders in this proceeding, and requested that the court affirm that Hunter violated 30 C.F.R. § 56.11016 in Citation No. 8728537 by failing to clear snow from the walkway of Barge MEM 611 on December 10, 2013, as soon as practicable. Sec'y Br. 1-2.

On October 15, 2015, Hunter responded with a Statement in Opposition to the Secretary's Motion for Partial Summary Decision and Memorandum of Law in Support ("Resp't Br."). In its Statement, the company withdrew its contest to what it deemed "the Secretary's relatively narrow exercise of jurisdiction over Dredge IV and Barge MEM 611 in this proceeding." Resp't Br. 2. However, Hunter opposed granting partial summary decision on Citation No. 8728537 on the basis that the record raises genuine issues of material fact. Resp't Br. 2. The Secretary subsequently filed a Reply Brief ("Sec'y Reply Br.") in further support of his position.

Commission Rule 67(b) provides that a "motion for summary decision shall be granted only if the entire record, including the pleading, 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). When considering a motion for summary decision, the court looks at the record "'in the light most favorable to . . . the party opposing the motion,' and . . . 'the inferences to be drawn from the underlying facts contained in [the] materials [supporting the motion] must be viewed in the light most favorable to the party opposing the motion.'" *Hanson Aggregates New York, Inc.*, 29 FMSHRC 4, 9 (Jan. 2007) (quoting *Poller v. Columbia Broadcasting Sys., Inc.*, 368 U.S. 464, 473 (1962) and *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)).

Here, the burden is on the Secretary, as the moving party, to establish his right to summary decision. On the issue of jurisdiction, I find no genuine dispute as to any material fact as neither party now contests that MSHA had jurisdiction to issue the five citations and orders in this proceeding. However, the Secretary has failed to meet his burden to establish his right to summary decision on Citation No. 8728537.

30 C.F.R. § 56.11016 establishes that, "[r]egularly used walkways and travelways shall be sanded, salted, or cleared of snow and ice as soon as practicable." The Secretary cites the Black's Law Dictionary definition of "practicable" as "reasonably capable of being

accomplished; feasible in a particular situation” and argues that it would have been “feasible for Hunter to clear the snow from the walkways before sending its miners out to walk on them.” Sec’y Br. 12. Hunter, in turn, states that the record “calls into question the presence of and extent of such alleged snow conditions on the Barge at the time of arrival, and suggests that such efforts may have been unwarranted at the time,” as well as “simultaneously fruitless and treacherous” due to darkness and unfavorable weather conditions. Resp’t Br. 8. The Secretary replies that “Hunter sent at least one miner out onto the walkways of Barge MEM 611 to obtain a draft reading before [the fatal accident occurred]” and thus the company’s claim that it was “unsafe to clean the snow from the barge’s walkways, but that, at the same time, it was safe to send miners out on to the barge MEM 611’s walkways in order to continue production evidences very little care for the health and safety of its miners.” Sec’y Reply Br. 4. Whether or not this is true, Hunter has raised genuine issues of material fact as to the practicability of clearing snow from the barge before the fatal accident occurred.

Furthermore, the company disputes whether Barge MEM 611 was a “regularly used” walkway or travelway, since moveable barges “arrive, are loaded and depart from Dredge IV within the short period of three to six hours.” Resp’t Br. 10. The Secretary however believes that the record is sufficient to establish regular use because the allegedly uncontroverted testimony of three miners shows that “(1) miners regularly traveled [other] barge walkways [at the mine] when they were covered with snow and (2) that miners traveled the walkways of Barge MEM 611 prior to the time that [a miner] fell overboard.” Sec’y Reply Br. 3. The court agrees with Hunter that in addition to issues of practicability this dispute raises genuine issues of regularity that also must be resolved through the hearing process.

ORDER

In accordance with the foregoing, the Secretary’s motion for partial summary decision is **GRANTED IN PART** on the issue of whether MSHA had jurisdiction to issue the five citations and orders in this proceeding. The Secretary’s motion is **DENIED IN PART** on the issue of whether Hunter violated 30 C.F.R. § 56.11016 in Citation No. 8728537. The hearing on these matters will proceed as scheduled on Tuesday, December 8, 2015, at 8:30 a.m. in Paducah, Kentucky.

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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October 21, 2015

SCOTT D. MCGLOTHLIN,
Complainant,

v.

DOMINION COAL CORPORATION,
Respondent.

DISCRIMINATION PROCEEDING

Docket No. VA 2014-233-D
NORT-CD-2013-04

Mine: Dominion No. 7
Mine ID: 44-06499

ORDER DENYING PARTIES' JOINT MOTION TO DISMISS

Before: Judge Feldman

This matter is before me based on a Complaint of Discrimination brought by Scott D. McGlothlin against Dominion Coal Corporation (“Dominion”), pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815(c)(3) (2006) (“Mine Act” or “the Act”). The parties filed cross-motions for summary decision as there were no outstanding issues of relevant material facts.

A consolidated Decision Granting Complainant’s Motion for Summary Decision and Decision on Liability, issued on June 11, 2015, resolved the liability at issue in this matter without the need for an evidentiary hearing. *McGlothlin v. Dominion Coal Corp.*, 37 FMSHRC 1256 (June 2015) (ALJ). That decision held that Dominion violated the anti-discrimination provisions of section 105(c)¹ by interfering with McGlothlin’s right to pay protection under 30 C.F.R. Part 90 as a miner with pneumoconiosis, when Dominion reduced McGlothlin’s pay after McGlothlin sought a determination from the National Institute for Occupational Safety and Health (“NIOSH”) concerning his eligibility for Part 90 protection. *Id.* at 1264-1266.

¹ Section 105(c)(1) provides, in relevant part:

No person shall . . . in any manner discriminate . . . or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner . . . [who] is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101

30 U.S.C. § 815(c)(1); 37 FMSHRC at 1258.

The Decision on Liability noted that it was an interim decision that did not become final, in that it was not ripe for appeal, until a Decision on Relief was issued. *Id.* at 1265-1266. The June 11, 2015, Decision on Liability also noted that the liability decision would be referred to the Secretary pursuant to Commission Rule 44(b), 29 C.F.R. § 2700.44(b), to provide the Secretary with the opportunity to file a petition for assessment of civil penalty for Dominion's violation of 105(c) of the Act. Following notification, on July 24, 2015, the Secretary filed a penalty petition, docketed as Docket No. VA 2015-285, seeking to impose a \$12,500.00 civil penalty as a consequence of Dominion's violation of the anti-discrimination provisions of the Act.²

The Decision on Liability ordered the parties to confer in an attempt to reach an agreement on the specific relief to be awarded. The parties were advised that consideration should be given to the difference in the compensation paid to McGlothlin and the compensation that he is entitled to as a Part 90 miner, plus interest, reasonable attorney fees, and reimbursement for any other relevant incidental expenditures. *Id.* The parties were given two options: 1) to file individual petitions on relief if the parties could not agree on a relief proposal; or 2) to file a joint petition on relief if Dominion could agree to the relief proposed by McGlothlin. The parties did neither.

Rather, on September 2, 2015, the parties filed a Joint Motion to Dismiss McGlothlin's complaint in light of the parties' proposed agreed-upon relief. The parties' Joint Motion to Dismiss is predicated upon McGlothlin's agreement that "the parties jointly move the Court to dismiss all claims in this action with prejudice," in exchange for Dominion's agreement to the relief, including attorney fees, sought by McGlothlin. In this regard, the parties' Motion to Dismiss was accompanied by a Confidential Settlement Agreement and General Release of All Claims that specified the agreed upon relief to be awarded to McGlothlin, including reimbursement for attorney fees.³

Longstanding Commission case law has recognized the utility of bifurcated decisions on liability and decisions on relief in section 105(c) proceedings.⁴ Bifurcation preserves

² Civil penalty Docket No. VA 2015-285 was assigned to me on September 18, 2015. As discussed *infra*, collateral estoppel applies in this matter. Thus, Docket No. VA 2015-285 will be held in abeyance pending the ultimate resolution of the issue of Dominion's liability for violation of section 105(c) of the Act.

³ The parties have requested that the terms of their agreed-upon relief be kept confidential. I will give effect to the parties' request for confidentiality at this time.

⁴ See, e.g., *Gawthrop v. Triplett Bros. Excavating*, 17 FMSHRC 64 (Jan. 1995) (ALJ Feldman) (decision on liability), and *Gawthrop v. Triplett Bros. Excavating*, 17 FMSHRC 359 (Mar. 1995) (ALJ Feldman) (decision on relief); *Jeanlouis v. Morton Int'l*, 25 FMSHRC 536 (Sept. 2003) (ALJ Feldman) (decision on liability), and *Jeanlouis v. Morton Int'l*, 25 FMSHRC 673 (Nov. 2003) (ALJ Feldman) (decision on relief); *Womack v. Gramont Western US*, 25 FMSHRC 235 [n.4 cont'd] (May 2003) (ALJ Feldman) (decision on liability), and *Womack v. Gramont Western US*, 25 FMSHRC 469 (Aug. 2003) (ALJ Feldman) (decision on relief);

(continued...)

Commission resources by avoiding the unnecessary development of a record regarding the appropriate relief to be awarded in cases where the discrimination complaint is dismissed after an evidentiary hearing on liability. *See, e.g., Metz v. Carmeuse Lime, Inc.*, 34 FMSHRC 1820 (Aug. 2012), *aff'd Metz v. FMSHRC*, 532 F.App'x 309, 2013 WL 3870733 (3d Cir. 2013). Although bifurcated decisions on liability are not final, in that they are not ripe for Commission appeal until a decision on relief is rendered, the decision on liability is a final disposition on the merits with respect to liability. Thus, absent a petition for discretionary review filed with the Commission, a mine operator that is found liable in a decision on liability following a hearing is collaterally estopped from denying liability in a related civil penalty proceeding.

As a threshold matter, the Commission has repeatedly acknowledged its authority to review the propriety of settlement motions conferred in section 110(k) of the Act extends to settlement agreements arising under section 105(c) of the Act. *Sec'y of Labor o/b/o Maxey v. Leeco, Inc.*, 20 FMSHRC 707, 707 (July 1998) (citations omitted). In this regard, the parties may submit, subject to Commission approval, post-decision settlement terms with respect to their proposals regarding the appropriate civil penalty and relief to be awarded in discrimination cases brought pursuant to section 105(c).

However, the parties may not mutually agree to vitiate a post-adjudication decision on liability *nunc pro tunc* through a mutual agreement that both insulates a mine operator from the adverse history of a 105(c) violation, and releases the operator from the resultant civil penalty liability that must be imposed as a consequence of that violation. 30 U.S.C. §§ 814(a), 815(a); 29 C.F.R. § 2700.44(b). To hold otherwise would render Commission decisions on liability in bifurcated 105(c) proceedings as advisory opinions that are analogous to decisions by non-binding alternative dispute resolution bodies that may be disregarded at the whim of the parties.

A case in point is the Commission's order in *Sec'y of Labor o/b/o Hopkins v. ASCARO, Inc.*, 19 FMSHRC 1 (Jan. 1997). In *Hopkins*, Judge Manning, in his bifurcated decision on liability, determined that ASARCO, Inc. ("ASARCO") had violated section 105(c) of the Act. 18 FMSHRC 317 (Mar. 1996) (ALJ). The decision on liability was followed by Judge Manning's supplemental decision and final order on relief. 18 FMSHRC 1160 (July 1996) (ALJ). Although the Secretary had proposed a civil penalty of \$5,000.00, Judge Manning, finding relevant mitigation, reduced the civil penalty to \$800.00, and awarded Hopkins back pay, interest, and miscellaneous expenses. ASARCO filed a petition for discretionary review

⁴ (...continued)

Descutner v. Newmont USA, 34 FMSHRC 2838 (Oct. 2012) (ALJ Barbour) (decision on liability), and *Descutner v. Newmont USA*, 35 FMSHRC 504 (Feb. 2013) (ALJ Barbour) (decision on relief); *Meek v. Essroc Corp.*, 13 FMSHRC 1970 (Dec. 1991) (ALJ Fauver) (decision on liability), and *Meek v. Essroc Corp.*, 14 FMSHRC 518 (Mar. 1992) (ALJ Fauver) (decision on relief), *aff'd Meek v. Essroc Corp.*, 15 FMSHRC 606 (Apr. 1993); *Adkins v. Ronnie Long Trucking*, 21 FMSHRC 171 (Feb. 1999) (ALJ Hodgdon) (decision on liability), and *Adkins v. Ronnie Long Trucking*, 21 FMSHRC 377 (Mar. 1999) (ALJ Hodgdon) (decision on relief); *Sec'y of Labor o/b/o Lopez v. Sherwin Alumina, LLC*, 36 FMSHRC 730 (Mar. 2014) (ALJ Bulluck) (decision on liability requesting a follow up petition for relief from the parties).

challenging Judge Manning's conclusions, which was granted by the Commission. Following ASARCO's petition for discretionary review, the parties filed with the Commission a joint motion to approve settlement agreement, in which ASARCO agreed to pay the relief sought by Hopkins. The settlement agreement also proposed that ASARCO pay a \$500.00 civil penalty, rather than the \$800.00 civil penalty assessed by Judge Manning. The Commission, noting that oversight of proposed settlements is committed to the Commission's sound discretion, granted the motion to approve settlement and vacated their direction for review. 19 FMSHRC at 2-3.

Significantly, the settlement terms approved by the Commission *did not* include circumvention of Judge Manning's finding of liability by virtue of ASARCO's agreement to pay the \$500.00 civil penalty. However, in the present case, unlike *Hopkins*, the settlement terms proffered on behalf of Dominion must be rejected as they seek to insulate Dominion from liability that would preclude imposition of the \$12,500.00 civil penalty sought by the Secretary. Simply put, parties to a Commission proceeding do not have standing to vacate a judicial finding of liability.

In reaching this conclusion, I am cognizant of the Commission's decision in *Shemwell*. In the bifurcated proceeding in *Shemwell*, the Commission concluded that a judge retains the jurisdiction to consider approval of settlement terms before the issuance of a decision on relief because the decision on liability, alone, does not constitute a final decision on the merits as contemplated by Commission Rule 69.⁵ *Sec'y of Labor o/b/o Shemwell v. Armstrong Coal Co., Inc.*, 36 FMSHRC 1097, 1100-01 (May 2014) (vacating the judge's denial of a motion to approve settlement in a discrimination proceeding). In the majority decision in *Shemwell*, the Commission, on abuse of discretion grounds, vacated the judge's decision denying a Joint Motion to Approve Settlement, and approved *sua sponte* the parties' settlement terms.

However, unlike this case, in *Shemwell*, the Commission expressly conditioned its approval of the parties' settlement terms on the fact that deterrence was achieved through settlement terms that included an admission of liability by the mine operator with respect to any subsequent proceedings brought against it under the Mine Act. *See id.* at 1102-03. In this regard, in *Shemwell*, the mine operator did not deny liability, but rather agreed to pay a reduced civil penalty of \$35,000.00, as opposed to the \$70,000.00 civil penalty initially proposed by the Secretary and imposed by the judge.

ORDER

In view of the above, **IT IS ORDERED** that the parties' Joint Motion to Dismiss **IS DENIED**, because it is contingent on proposed settlement terms that seek to release Dominion from an adjudicated finding of liability in a Commission proceeding.

If the parties agree on relief, it is immaterial whether the parties' agreement on relief is styled as a joint petition for relief or as a motion to approve settlement. However, any proposal

⁵ Commission Rule 69(b) provides: "[e]xcept to the extent otherwise provided herein, the jurisdiction of the Judge terminates when his decision has been issued." 29 C.F.R. § 2700.69(b).

for relief, filed jointly or individually, should include a calculation consisting of the difference between McGlothlin's approximate hourly compensation of \$25.67 and the \$35.00 per hour he was entitled to during the period from June 16, 2013, to date, plus an adjustment for overtime, if any, as well as any incidental expenses incurred.

With respect to the issue of the reasonable attorney fees to be awarded, relevant detailed attorney fee petitions should be submitted for worked performed in this matter. This submission should include separate detailed logs specifying the nature and extent of the legal services rendered by each of McGlothlin's attorneys with respect to all filings and depositions in this proceeding, as well as any other legal services for which reimbursement is sought. Specifically, the log should contain a daily accounting of the claimed legal services, the hours worked, and the hourly rate of legal fees sought to be recovered for each service by each attorney.

IT IS FURTHER ORDERED that the parties file separate petitions for relief, or a joint petition, **within 21 days of the date of this Order**.

/s/ Jerold Feldman
Jerold Feldman
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 29, 2015

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

v.

DOMINION COAL CORPORATION,
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. VA 2015-285

Mine: Dominion No. 7
Mine ID: 44-06499

**STAY ORDER PENDING ULTIMATE DISPOSITION
OF UNDERLYING DISCRIMINATION PROCEEDING**

Before: Judge Feldman

This proceeding is before me based upon a petition for assessment of civil penalty filed by the Secretary on July 24, 2015, pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act). 30 U.S.C. § 815(d). The Secretary seeks to impose a civil penalty of \$12,500.00 as a consequence of a June 11, 2015, Decision on Liability in a 105(c)(3) discrimination proceeding, docketed as VA 2014-233, which concluded that Dominion Coal Corporation (“Dominion”) was liable for a violation of section 105(c) of the Act when it interfered with Scott D. McGlothlin’s rights under Part 90 of the Act. *McGlothlin v. Dominion Coal Corp.*, 37 FMSHRC 1256 (June 2015) (ALJ).

On September 2, 2015, the parties in Docket No. VA 2014-233 filed a Joint Motion to Dismiss McGlothlin’s complaint in light of the parties’ proposed agreed-upon relief. The parties’ Joint Motion to Dismiss was predicated upon McGlothlin’s agreement that “the parties jointly move the Court to dismiss all claims in this action with prejudice,” in exchange for Dominion’s agreement to the relief, including attorney fees, sought by McGlothlin. On October 21, 2015, the parties’ request to dismiss McGlothlin’s complaint was denied because it was contingent on proposed settlement terms that seek to release Dominion from an adjudicated finding of liability in a Commission proceeding.¹ Thus, while the appropriate relief to be awarded to McGlothlin in Docket No. VA 2014-233 is yet to be determined, Dominion will be precluded from denying liability in this civil penalty proceeding brought by the Secretary

¹ Although the Decision on Liability is not final in that the judge retains jurisdiction under Commission Rule 69(b), a decision on liability is an interlocutory decision that may be appealed or reviewed, subject to the discretion of the Commission, pursuant to the provisions of Commission Rule 76(a). 29 C.F.R. §§ 2700.69(b), 2700.76(a). However, the parties may not mutually agree to “vacate” an interlocutory liability decision.

based on the doctrine of collateral estoppel, unless the Decision on Liability is ultimately vacated by the Commission.

As such, in view of the above, **IT IS ORDERED** that the captioned docket **IS STAYED** pending the ultimate resolution of the issue of Dominion's liability for violation of section 105(c) of the Act in Docket No. VA 2014-233.

/s/ Jerold Feldman
Jerold Feldman
Administrative Law Judge

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