

September 2013

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Secretary of Labor, MSHA, v. Hibbing Taconite Company, Docket Nos. LAKE 2013-231-RM, et al and LAKE 2013-348-M. (Judge Miller, August 14, 2013)

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Secretary of Labor, MSHA v. Cumberland Coal Resources, LP, Docket No. PENN 2012-278. (Judge Steele, August 20, 2013)

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Secretary of Labor, MSHA v. Excel Mining, LLC, Docket No. KENT 2010-160. (Judge Biro, August 15, 2013)

Secretary of Labor, MSHA v. Rock N Roll Coal Company., Docket No. WEVA 2011-1418. (Judge Bulluck, September 5, 2013)

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 19, 2013

MACH MINING, LLC

v.

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

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Docket No. LAKE 2009-324-R

Before: Jordan, Chairman; Young, Cohen, and Nakamura, Commissioners¹

DECISION

BY THE COMMISSION:

In this contest proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act” or “Act”), the Secretary of Labor issued a citation to Mach Mining, LLC, alleging a failure to record hazardous conditions during weekly examinations in violation of 30 C.F.R. § 75.364(h). An Administrative Law Judge found that Mach had committed a significant and substantial violation of the regulation, but that it was not due to an unwarrantable failure to comply. 32 FMSHRC 1375, 1385 (Sept. 2010) (ALJ).

The Secretary subsequently filed a petition for discretionary review challenging the Judge’s unwarrantable failure finding, which the Commission granted. For the reasons stated herein, we reverse the Judge’s decision and conclude that Mach’s violation of the requirement to record the hazardous conditions was a result of its unwarrantable failure.

¹ Commissioner William I. Althen assumed office after this case had been considered at a Commission meeting. A new Commissioner possesses legal authority to participate in pending cases, but such participation is discretionary. *Mid-Continent Res., Inc.*, 16 FMSHRC 1218 (June 1994). In the interest of efficient decision making, Commissioner Althen has elected not to participate in this matter.

I.

Facts and Proceedings Below

Mach Mining operates the Mach #1 Mine, an underground coal mine near Johnston City, Illinois. 32 FMSHRC at 1376-77; PDR at 2. On February 12, 2009, MSHA Inspector Bobby Jones conducted a regular quarterly inspection of the Mine. 32 FMSHRC at 1376-77; Stip. 9. During the inspection, Jones examined the primary escapeway at Headgate No. 4 (“HG #4”). 32 FMSHRC at 1378. At the mouth of the HG #4 primary escapeway was an 11-foot tall regulator containing a 4'4" wide x 6' tall opening that controls the velocity of air coursing through the escapeway. Stips. 17-19, 21, 23. The opening must be traversed by miners when using the escapeway. Stip. 23. A lifeline within the escapeway runs from the fan at the surface of the mine to the loading point. 32 FMSHRC at 1384; Stip. 13. While in the escapeway, Jones discovered numerous hazardous conditions dispersed over 100 to 120 feet of the travelway. 32 FMSHRC at 1382; Stip. 11. The conditions included a pallet of crib ties, a take-up track, a pile of gob, concrete blocks on both sides of the regulator, and water on the ground. 32 FMSHRC at 1377; Stips. 11, 29, 31, 32, 40. The pallet of crib ties, take-up track, pile of gob, and the concrete blocks had been present in the escapeway since January 6, 2009, when the regulator was created. Stip. 42. Jones inspected the weekly examination logs and discovered that there was no record of the hazardous conditions. Tr. 13-17.

Mach began its weekly examinations of the primary escapeway at HG #4 five weeks prior to the issuance of the subject citation. Stip. 35. Company Mine Examiner Dave Adams was assigned the task of conducting the weekly examinations for hazardous conditions at HG # 4 from January 8 through February 12, 2009. During this period, Adams failed to note any hazardous conditions in his examination records. Stips. 36, 43, 44. The most recent weekly examination performed by Adams prior to Jones’ inspection occurred on or about February 9, 2009, three days before Jones’ inspection. Stip. 41.

As a result of Inspector Jones’ observations at HG #4, he issued two citations. The first, Citation No. 8414211, alleged a significant and substantial (“S&S”)² violation of 30 C.F.R. § 75.380(d)(1), which requires that escapeways be “[m]aintained in a safe condition to always assure passage of anyone.” The second, Citation No. 8414214, the subject of this case, alleged an S&S violation of 30 C.F.R. § 75.364(h), which requires that hazardous conditions be recorded

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.”

during weekly examinations.³ 32 FMSHRC at 1378. Jones also designated this violation as an unwarrantable failure to comply.⁴ *Id.* The “Condition and Practice” section of the citation states:

When inspected the weekly examination records did not show the hazards noted in Citation No. 8414211. These conditions had existed since the HG#4 unit went into production and the area had been examined for five consecutive weekly examinations. The extensiveness of these hazardous conditions were obvious to the most casual observer. A crew was sent to start clearing the hazards immediately.

G. Ex. 3. Mach had not been previously cited for the existence of materials in the escapeway. 32 FMSHRC at 1382-83.

The Judge held separate hearings and issued separate decisions on the two citations. On February 24, 2010, he issued a decision affirming Citation No. 8414211 and its S&S designation. *Mach Mining, LLC*, 32 FMSHRC 213 (Feb. 2010) (ALJ).⁵ Mach did not appeal this decision.

On September 27, 2010, the Judge issued his decision on Citation No. 8414214 and affirmed the section 75.364(h) violation. 32 FMSHRC at 1380. He found that there was a violation “due to the *combination* of the pallet crib ties, take-up track, pile of gob, loosely strewn concrete blocks on either side of the regulator, and the presence of water, which would hinder and delay the emergency evacuation of miners, especially any who were injured.” *Id.* (emphasis in original). In addition, the Judge noted that, despite the presence of the items in the escapeway

³ 30 C.F.R. § 75.364(h) provides, in pertinent part, that:

Recordkeeping. At the completion of any shift during which a portion of a weekly examination is conducted, a record of the results of each weekly examination, including a record of hazardous conditions found during each examination and their locations, the corrective action taken, and the results and location of air and methane measurements, shall be made.

⁴ The unwarrantable failure terminology is also taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which establishes more severe sanctions for any violation that is caused by “an unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards.” If an MSHA inspector finds that a violation is S&S and due to the operator's unwarrantable failure, the citation is to be issued pursuant to section 104(d)(1), which can lead to more stringent enforcement measures.

⁵ The Judge had previously issued another decision in these matters on July 15, 2009, for the purpose of addressing whether the cited area was a “working section.” *Mach Mining, LLC*, 31 FMSHRC 947 (July 2009) (ALJ).

for five weeks, Adams had failed to note any of the conditions in his weekly reports. *Id.* The Judge also affirmed MSHA's S&S designation. *Id.* at 1381. He determined that a reasonably serious injury was reasonably likely to occur because the combination of accumulated items in the escapeway created a stumbling and tripping hazard and would impede a prompt evacuation in an emergency, especially in the presence of smoke and low visibility. *Id.*

The Judge determined that Mach's negligence did not rise to the level of unwarrantable failure. *Id.* at 1385. He did, however, identify a number of factors that weighed in favor of an unwarrantable failure finding. He found that the accumulated materials extending 100 to 120 feet in the escapeway were extensive. *Id.* at 1382. He also found that the cited materials were obvious. *Id.* at 1385. He determined that the violation posed a high degree of danger. *Id.* at 1383. Also, he found that the conditions had existed and not been reported for five weeks. *Id.* at 1382.

Nonetheless, the Judge found it persuasive that Mach had not previously been cited for an obstructed escapeway and had not otherwise been notified by MSHA that greater compliance efforts were necessary. *Id.* at 1382-83. He then concluded that because Mach lacked prior notice of the need for greater compliance, its abatement efforts prior to the issuance of the citation should be viewed in the context of its "good faith belief that the accumulated items were not hazardous." *Id.* at 1383-84. Additionally, although the Judge noted that the existence of the cited materials was obvious, he found Adam's testimony – that he in "good faith" believed that the cited materials were not hazardous conditions that he was required to report in a weekly examination – to be credible and "objectively reasonable" under the circumstances. *Id.* at 1384-85. The Judge ultimately concluded that "considering the lack of notice from MSHA, [] the level of [Mach's] negligence is mitigated regarding what it reasonably should have known concerning the existence of a hazard." *Id.* at 1385.

II.

Disposition

Unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec. 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); *see also Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test). It is conduct that is "not justifiable" or "inexcusable." *Utah Power & Light Co.*, 12 FMSHRC 965, 971 (May 1990), *citing Emery Mining*, 9 FMSHRC at 2001.

Whether conduct is "aggravated" in the context of unwarrantable failure is determined by considering all of the facts and circumstances of each case to see if any aggravating factors exist, including (1) the extent of the violative condition, (2) the length of time that the violative condition existed, (3) whether the violation posed a high degree of danger, (4) whether the

violation was obvious, (5) the operator's knowledge of the existence of the violation, (6) the operator's efforts in abating the violative condition, and (7) whether the operator had been placed on notice that greater efforts were necessary for compliance. See *Manalapan Mining Co.*, 35 FMSHRC 289, 293 (Feb. 2013); *IO Coal Co.*, 31 FMSHRC 1346, 1351-57 (Dec. 2009); *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev'd on other grounds*, 195 F.3d 42 (D.C. Cir. 1999). While some factors may be irrelevant to a particular factual scenario, *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000), all of the relevant facts and circumstances of each case must be examined to determine if an operator's conduct is aggravated, or whether mitigating circumstances exist. *Id.*; *Manalapan Mining*, 35 FMSHRC at 293; *IO Coal*, 31 FMSHRC at 1351.

When passing the Mine Act, Congress stated that "the unwarranted failure order recognizes that the law should not tolerate miners continuing to work in the face of hazards resulting from conditions violative of the Act which the operator knew of or *should have known of* and had not corrected." S. Rep. No. 95-181, at 31 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 619 (1978) (emphasis added). It is well settled that an operator's knowledge may be established, and a finding of unwarrantable failure supported, where an operator reasonably should have known of a violative condition. *IO Coal*, 31 FMSHRC at 1356-57; *Emery Mining*, 9 FMSHRC at 2002-04; *Drummond Co.*, 13 FMSHRC 1362, 1367-68 (Sept. 1991), *quoting Eastern Assoc. Coal Corp.*, 13 FMSHRC 178, 187 (Feb. 1991). An operator's good faith belief or disagreement regarding whether a cited condition constituted a hazard is "inextricably intertwined with the issues of the operator's knowledge of the existence of the violation and the obviousness of the violation." *IO Coal*, 31 FMSHRC at 1357.

In the instant case, the Judge determined that Mach, in "good faith," believed that the cited materials in the escapeway "did not constitute a hazardous condition that had to be reported." 32 FMSHRC at 1385. As support, the Judge noted Adams' belief, based on his experience, that no hazard existed because of the presence of a lifeline that was accessible to miners, and a clear walkway or path from the opening in the regulator to the stairs to the first overcast. *Id.* at 1384. He also noted Adams' testimony that "[t]here was nothing present in the area that wasn't present throughout the mine," and found "significant" his testimony that "prior to February 12, no one from MSHA had told him that the accumulated items in the escapeway constituted hazardous conditions." *Id.* at 1384. The Judge further stated that "I observed his demeanor, and find his testimony credible in all these regards." *Id.* at 1384-85.

We find no evidence in the record that compels us to overturn the Judge's credibility determination with regard to Adams' testimony. See *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992).⁶ However, the analysis does not end here. As the Judge correctly explained (32 FMSHRC at 1385), if he finds that there was a "good faith" belief by the operator, he must next determine whether that belief was objectively reasonable under the

⁶ We note that the Secretary does not challenge the Judge's finding of Mach's good faith belief. PDR at 9.

circumstances. *IO Coal*, 31 FMSHRC at 1357; *Kellys Creek Res.*, 19 FMSHRC 457, 463 (Mar. 1997) (citing *Cyprus Plateau Mining Corp.*, 16 FMSHRC 1610, 1615-16 (Aug. 1994)).

In light of the extensiveness and obvious nature of the hazardous conditions and the protective purpose of the relevant standard, we conclude that the Judge erred in finding that Mach's "good faith" belief was objectively reasonable. The Judge found that Adams' belief was objectively reasonable because Mach had not been notified by MSHA that the materials in the escapeway posed a problem. 32 FMSHRC at 1385. Consequently, he concluded that the level of Mach's negligence regarding what it reasonably should have known concerning the existence of the hazardous conditions was mitigated. He thus held that the Secretary had "not established that the level of Respondent's negligence relating to the violation at bar reached the level of aggravated conduct." *Id.*

Instead of relying solely on the lack of prior notice, the Judge was required to decide whether a reasonably prudent person familiar with the protective purpose of the standard would have ascertained that extensive debris scattered throughout a primary escapeway constituted a hazardous condition requiring reporting in the weekly examination log. *See American Coal Co.*, 29 FMSHRC 941, 953 (Dec. 2007). We hold that a reasonably prudent mine examiner should have recognized the extensive and obvious hazardous conditions which were present here.

Even without being informed by an MSHA inspector, a reasonably prudent mine examiner should know that a combination of a pallet of crib ties, concrete blocks, a gob pile, take-up track, and water over 120 feet of the escapeway floor would significantly impede any miner attempting to quickly escape and thus frustrate the purpose of section 75.364(h). Indeed, Inspector Jones stated in the citation that the "extensiveness of these hazardous conditions [was] obvious to the most casual observer."⁷ Gov. Ex. 3. The cluttered escapeway Inspector Jones described and diagrammed allows for only one conclusion: that the primary escapeway contained numerous and extensive hazards that Mach was required to record in the weekly examination log, and immediately correct. *See Gov. Ex. 2.*

The purpose of requiring that escapeways always be clear and available is self-evident. Miners must be able to quickly exit the mine in the event of an emergency. *See American Coal*, 29 FMSHRC at 954. In *American Coal*, the Commission explained the importance of keeping escapeways clear of impediments:

An operator thus violates section 75.380(b)(1)'s requirement to "provide" escapeways from a working section when its miners are substantially hindered or impeded from accessing designated

⁷ The danger was also recognized by the Judge, who affirmed the Secretary's S&S designation, concluding that a reasonably serious injury was reasonably likely to occur because the combination of accumulated items in the escapeway created a stumbling and tripping hazard and would impede a prompt evacuation in an emergency, especially in the presence of smoke and low visibility. 32 FMSHRC at 1381.

escapeways, as in such an instance the escapeways are not being supplied for the use of the miners. There is no disputing that escapeways are needed for miners to quickly exit an underground mine and that impediments to a designated escapeway may prevent miners from being able to do so. The legislative history of the escapeway standard states that the purpose of requiring escapeways is “to allow persons to escape quickly to the surface in the event of an emergency.”

Id. at 948.

Contrary to the Judge’s reasoning (32 FMSHRC at 1384-85), Mach’s failure to provide a clear and unobstructed escapeway is not excused by the presence of a required lifeline. It was completely unreasonable for Adams to imply that the lifeline would help miners navigate a dangerous, cluttered obstacle course. To the contrary, the lifeline’s purpose is to help miners find the mine’s exit in conditions of low visibility and panic. *See* Fed. Reg. 71430, 71431 (Dec. 8, 2006); 30 C.F.R. § 75.380(d)(1). It is equally unreasonable to believe that because the primary escapeway was no more cluttered than the rest of the mine, no hazard existed. Section 75.380(d) requires that the primary escapeway be free of obstructions “to *always* assure safe passage.” 30 C.F.R. § 75.380(d)(1) (emphasis added).” The operator’s arguments do little more than demonstrate Mach’s serious lack of reasonable care and its clear lack of appreciation for the dangers posed by obstructed escapeways.

Accordingly, Mach’s “good faith” belief that it was not required to note in its weekly examination and promptly correct the hazards presented by the various materials dispersed throughout the primary escapeway was not objectively reasonable under the circumstances. As a result, the lack of prior notice from MSHA did not constitute a mitigating factor with regard to Mach’s negligence.

III.

Conclusion

Mach exhibited a serious lack of reasonable care in its failure to record and correct these conditions in the escapeway as required by the Act. The record evidence permits no other conclusion. We therefore reverse the Judge's decision and affirm the Secretary's designation of Mach's violation of 30 C.F.R. § 75.364(h) as an unwarrantable failure to comply with the standard.⁸ *See American Mine Servs., Inc.*, 15 FMSHRC 1830, 1834 (Sept. 1993) (remand not necessary when record supports no other conclusion).

/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

⁸ We note that the penalty proceeding, Docket No. LAKE 2009-426, was assigned to a different judge.

Distribution

Christopher D. Pence, Esq.
Hardy Pence, PLLC
500 Lee Street, Suite 701
P.O. Box 2548
Charleston, WV 25301
cpence@hardypence.com

Edward Waldman, Esq.
W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., 22nd Floor
Arlington, VA 22209-2296
waldman.edward@dol.gov

Melanie Garris
Office of Civil Penalty Compliance
MSHA
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209

Administrative Law Judge Avram Weisberger (retired)
Federal Mine Safety & Health Review Commission
Office of Administrative Law Judges
1331 Pennsylvania Avenue, N.W., Suite 520N
Washington, D.C. 20004

COMMISSION ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N

WASHINGTON, D.C. 20004-1710

September 27, 2013

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. YORK 2012-105-M
v.	:	A.C. No. 30-00040-279765
	:	
HANSON AGGREGATES NEW YORK, LLC :	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On March 15, 2013, the Commission received from Hanson Aggregates New York, LLC (“Hanson”) a motion seeking to reopen a penalty assessment proceeding and relieve it from the default order entered against it.

On August 23, 2012, Chief Administrative Law Judge Robert J. Lesnick issued an Order to Show Cause which by its terms became a Default Order if the operator did not file an answer within 30 days. This Order to Show Cause was issued in response to Hanson’s failure to answer the Secretary of Labor’s March 21, 2012 Petition for Assessment of Civil Penalty. The Commission did not receive Hanson’s answer within 30 days, so the default order became effective on September 24, 2012.

Hanson asserts that it contacted the Conference Litigation Representative (“CLR”) on April 25, 2012, but has not received a response. Hanson further states that it received a delinquency notice dated February 1, 2013, and contacted MSHA soon thereafter. The Secretary does not oppose the request to reopen and notes that the CLR received Hanson’s answer to the penalty petition, but it does not appear that a copy was sent to the Commission.

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

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

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

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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

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

Distribution:

David P. Kurtz
Hanson Aggregates New York, LLC
P.O. Box 513
Jamesville, NY 13078
David.Kurtz@hanson.com

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

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

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N

WASHINGTON, D.C. 20004-1710

September 27, 2013

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. CENT 2012-292-M
v.	:	A.C. No. 16-00802-276652
	:	
SOUTHERN FILTER MEDIA, LLC	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On February 19, 2013, the Commission received from Southern Filter Media, LLC (“Southern Filter”) a motion seeking to reopen a penalty assessment proceeding and relieve it from the default order entered against it.

On August 3, 2012, Chief Administrative Law Judge Robert J. Lesnick issued an Order to Show Cause which by its terms became a Default Order if the operator did not file an answer within 30 days. This Order to Show Cause was issued in response to Southern Filter’s failure to answer the Secretary of Labor’s January 26, 2012 Petition for Assessment of Civil Penalty. The Commission did not receive Southern Filter’s answer within 30 days, so the default order became effective on September 4, 2012.

Southern Filter asserts that it did not receive the Show Cause Order. The record indicates that the Show Cause Order was delivered on August 6, 2012. Southern Filter further states that it received a delinquency notice dated January 31, 2013, and contacted MSHA and the Commission soon thereafter. The Secretary does not oppose the request to reopen, but notes that all documents were mailed to the operator’s address of record.

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

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

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

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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

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

Distribution:

Samuel J. Barton
Southern Filter Media, LLC
37826 Greenwell Springs Rd.
Greenwell Springs, LA 70739
jbarton@soufilter.com

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

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

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N

WASHINGTON, D.C. 20004-1710

September 27, 2013

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2011-814-M
v.	:	A.C. No. 04-05776-249393
	:	
RANCH ROCK PRODUCTS, INC.	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On January 25, 2013, the Commission received from Ranch Rock Products, Inc., (“Ranch Rock”) a motion seeking to reopen a penalty assessment proceeding and relieve it from the default order entered against it.

On May 3, 2012, Chief Administrative Law Judge Robert J. Lesnick issued an Order to Show Cause which by its terms became a Default Order if the operator did not file an answer within 30 days. This Order to Show Cause was issued in response to Ranch Rock’s failure to answer the Secretary of Labor’s October 5, 2011 Petition for Assessment of Civil Penalty. The Commission did not receive Robinson’s answer within 30 days, so the default order became effective on June 4, 2012.

Ranch Rock asserts that it did not receive the penalty petition and that a former employee misfiled the Show Cause Order. Ranch Rock further states that it received MSHA’s delinquency notice, dated November 13, 2012. The Secretary does not oppose the request to reopen, but notes that the penalty petition was received by Ranch Rock and signed for on October 11, 2011. MSHA referred this case to the Department of Treasury for collection on January 10, 2013.

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

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

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

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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

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

Distribution:

Nick Tonkinson
Ranch Rocks Products Inc.
P.O. Box 1556
Corana, CA 92878
njtonkinson@ranchrockcorp.com

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

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

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

ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

721 19th STREET, SUITE 443
DENVER, CO 80202-2536
303-844-5267/FAX 303-844-5268

September 3, 2013

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2012-351
Petitioner,	:	A.C. No. 05-04591-274457
	:	
v.	:	Docket No. WEST 2012-827
	:	A.C. No. 05-04591-285698-01
	:	
BOWIE RESOURCES, LLC,	:	
Respondent	:	Bowie No. 2 Mine

DECISION

Appearances: Jeffrey M. Leake, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Patrick W. Dennison, Esq., Jackson Kelly, PLLC, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Manning

These cases are before me upon petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”), against Bowie Resources, LLC, pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the “Act” or “Mine Act”). The parties introduced testimony and documentary evidence at a hearing held in Glenwood Springs, Colorado. The Secretary presented closing arguments and Bowie filed a brief on Citation No. 8141233.

Bowie operates the Bowie No. 2 Mine in Delta County, Colorado. One section 104(a) citation and one section 104(d)(2) order were adjudicated at the hearing and Bowie also agreed to pay the Secretary’s proposed penalty of \$100.00 for Citation No. 8473704 in WEST 2012-351. The Secretary proposed a total penalty of \$53,912.00 for the citation and order that were adjudicated.

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

A. Citation No. 8141233; WEST 2012-351

On October 13, 2011, MSHA Inspector Jack William Eberling issued Citation No. 8141233 under Section 104(a) of the Mine Act, alleging a violation of Section 75.403 of the Secretary’s safety standards. The citation states that dark, dry coal dust and fines were upon the mine floor of a haul road within two entries of the faces being mined. Mobile equipment using electric 480V trailing cables traveled upon this haul road and the cables were dragged over the mine floor. A rib/floor rock dust sample was taken. The condition existed for about 2.5 hours

from the beginning of the shift. Belt air measuring 18,900 cfm ventilated the area and the air flowed into the section where seven miners were working. (Ex. G-7).

Inspector Eberling determined that an injury or illness was reasonably likely to occur and that such an injury or illness could reasonably be expected to result in lost workdays or restricted duty. Further, he determined that the violation was significant and substantial (“S&S”), the operator’s negligence was moderate, and that seven persons would be affected. Section 75.403 of the Secretary’s safety standards requires that where rock dust is required to be applied the incombustible content of the combined coal dust, rock dust, and other dust shall be not less than 80 percent. 30 C.F.R. § 75.403. The Secretary proposed a penalty of \$1,412.00 for this citation.

I find that the Secretary established a violation of section 75.403 because the ventilation plan does not expressly exempt Bowie from the safety standard’s requirement to adequately rock dust the area in question. Section 75.403 requires a certain level of noncombustible content in all dust where rock dust is required to be applied and section 75.402 details where that requirement is in effect. In essence, rock dusting under section 75.403 is required unless one of five exceptions applies:

1. The dust in the area is too wet to propagate an explosion,
2. The dust in the area is too high in incombustible content to propagate an explosion,
3. The area is within 40 feet of a working face,
4. The area is inaccessible or unsafe to enter,
5. The Secretary or his authorized representative has permitted an exception.

30 C.F.R. § 75.402. I find that none of these exceptions apply here.

First, Inspector Eberling tested the dust for wetness and determined that the dust was not too wet to obviate the necessity to rock dust. (Tr. 250-52). The area in question was at a slightly higher elevation than its surroundings, so it did not retain water for long. Kenneth Smith, a safety technician for Bowie, testified that there was no visible dust in the air and the mine floor was moist, compact, and wet. (Tr. 304). I credit the testimony of the inspector that the floor was not too wet to eliminate the need for rock dusting.

Second, the inspector observed that the floor was dark, which indicated that the concentration of non-combustible material was not at the requisite 80% as per the safety standard. (Tr. 245-46). The inspector took a sample of the material and subsequent laboratory testing later determined that the sample consisted of 44.3% non-combustible material. (Tr. 247-49; Ex. G-10). Bowie did not argue that the sample itself was faulty, but did argue that dust sampling must be taken from representative areas of the mine floor, rather than from areas where discrete coal accumulations exist. (Resp. Br. 13, citing *Consolidation Coal Co.*, 22 FMSHRC 455, 465-66 (Mar. 2000) and *McElroy Coal Co.*, 15 FMSHRC 17, 21 (Jan. 1993)). Bowie argues that because coal haulage roadways are places where coal spillage naturally occurs, samples must be taken from areas of the mine floor without spillage. (Resp. Br. 13). However, Bowie introduced no evidence to suggest that the sample taken by Inspector Eberling was not a representative sample of the dust upon the floor. I find that the sampling comported with the requirements of the safety standard.

Third, there is no argument or evidence that the area was within 40 feet of a working face. Fourth, there is no evidence that the area was inaccessible or unsafe to enter.

Bowie's principle argument relates to the fifth exception. Bowie's position is that language in its ventilation plan permitted an exception to the requirements of the safety standard. Specifically, it refers to page 12 of the mine's ventilation plan where it provides that "[r]oadways used in transportation of coal in the working section shall be kept wet and/or compacted." (Ex. R-3). Bowie maintains that this provision was designed to control respirable dust and the potential for ignitions; as long as the floor of a roadway is wet or compacted, Bowie complies with the requirements in section 75.403 under the ventilation plan. I disagree, as discussed below.

Bowie argues that the ventilation plan provision is in place to both control the amount of respirable dust in the air and to prevent ignitions. (Resp. Br. 3). I agree that keeping the floor wet and/or compacted may reduce the potential for ignition, but complying with the ventilation plan provision does not excuse Bowie from rock dusting. Nothing in the ventilation plan discusses the rock dusting requirement or any exception thereto. Nothing in the ventilation plan suggests that the subject provision was meant to supersede the requirements of sections 75.402 and 403.

Lastly, Bowie unsuccessfully contends that rock dusting the cited area will cause slick conditions if the rock dust is wet and will create respirable dust and visibility issues if the rock dust is dry. (Resp. Br. 11-12; Tr. 304-06, 322, 329). Smith testified that dusting the floor would create problems such as respirable dust in the air and slick and slimy conditions. (Tr. 305-06). Kyle Ledger, a face foreman for Bowie, agreed that the road should not be dusted, as dry dust could create a visual hazard and wet dust would make the floor hazardous for travel. (Tr. 322, 329). I must look to the language of the approved ventilation plan in place at the time of issuance, which does not exempt Bowie from the rock dusting requirement. Bowie can seek to change the language in the plan to address these problems.

Inspector Eberling designated the citation as S&S.¹ He determined that injury or illness was reasonably likely to occur because the material on the ground was dry coal fines. (Tr. 250-

¹ An S&S violation is a violation "of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard." 30 U.S.C. § 814(d) (2006). A violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In order to establish the S&S nature of a violation, the Secretary must prove: "(1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard – that is, a measure of danger to safety – contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury will be of a reasonably serious nature." *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984); *accord Buck Creek Coal Co., Inc.*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power Co., Inc.*, 861 F. 2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria).

52). In addition, the direction of airflow would carry any fire in the cited area toward the face where miners worked. (Tr. 254). The equipment in use in the area requires a 480-volt trailing cable, which due to the rough terrain found in underground mines is typically subject to mechanical damage and resulting failures and faults of the cable. (Tr. 255-59). Such a failure or fault would create a temperature well above the ignition point of coal. (Tr. 259). If a damaged trailing cable ignited the coal fines, the inspector determined that lost workdays or restricted duty could reasonably be expected to result from a fire. (Tr. 267-68). Such injuries could result from smoke, which could cause lung or brain injuries. (Tr. 268-70).

I find that the condition described in Citation No. 8141233 was not reasonably likely to contribute to an injury. Inspector Eberling testified that the failure of a shuttle car cable *could* be an ignition source. (Tr. 256-57). The fact that a violative condition could result in an injury is not sufficient for an S&S finding. *Wolf Run Mining Co.*, 32 FMSHRC 1669, 1677-78 (Dec. 2010) (citing *Peabody Coal Co.*, 17 FMSHRC 26, 29 (Jan. 1995)). The only possible ignition source was a damaged trailing cable of a shuttle car. There was no evidence that any of the cables were damaged or would likely become damaged to the extent necessary to start a fire before such cable was replaced or repaired. There was no indication that a cable was hot and there was no evidence of methane in the atmosphere. The Secretary did not fulfill his burden to show that the citation was S&S. The gravity of the violation was only moderately serious.

I also find that Bowie's negligence was low. Although Bowie's interpretation of the mine's ventilation plan was incorrect, the interpretation was made in good faith. Bowie genuinely believed that it was not required to meet the combustibility standard for roadways used in the transportation of coal so long as the road dust was compacted or wet. No roadway at this mine was ever cited for a violation of the combustibility. I find that Bowie did not take this position solely as a litigation strategy.

Based upon the above, the citation is **MODIFIED** to non-S&S and to low negligence. A penalty of \$1,000.00 is appropriate for this violation.

B. Order No. 8141442; WEST 2012-827

On August 18, 2011, MSHA Inspector Brad Allen issued Order No. 8141442 under Section 104(d)(2) of the Mine Act, alleging a violation of Section 75.400 of the Secretary's safety standards. (Ex. G-2). The order states that the inspector found combustible material in several places upon a large front-end loader, called a "hauler" by the parties, and that these accumulations created a fire hazard. Specifically, loose coal, coal fines, bug dust,² and other combustible materials including oil mixed with loose coal/dust were permitted to accumulate upon a hauler that was in use in an active mining section.

² "Bug dust" refers to coal-based material that is slightly larger than coal fines.

The order lists four locations where the inspector discovered combustible material. First, the inspector found accumulations up to 1 and 1 ½ inches deep that were saturated with oil in the belly pan under the engine that was about 4 feet wide by 7 feet long. Engine oil was pooled upon the coal mix in the belly pan. There was also an empty 32 ounce plastic drinking bottle on the operator's side of the engine compartment. Second, the inspector found similar accumulations in the belly pan of the transmission compartment. Third, the inspector found a thin coating of float coal dust and oil upon the bottom side of the engine compartment covers and upon the engine valve cover. Finally, he found a hydraulic oil and coal dust mixture in the cab of the hauler in the compartment for the joy stick and park brake actuation valve.

In the order, the inspector stated that these accumulations “provided substantial fuel to propagate a mine fire or explosion should one occur and such propagation would be reasonably likely to result in death or serious injury.” (Ex. G-2). He further stated that the hauler was used during the shift and the engine was “hot to touch.” *Id.*

Inspector Allen determined that an injury was reasonably likely to occur and that such an injury could reasonably be expected to be fatal. Further, he determined that the violation was S&S, that the operator's negligence was high, that seven persons would be affected, and that the violation constituted an unwarrantable failure to comply with a mandatory safety standard. Section 75.400 of the Secretary's regulations requires that “[c]oal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on diesel-powered and electric equipment therein.” 30 C.F.R. § 75.400. The Secretary proposed a penalty of \$52,500.00 for this order under his special assessment regulation. 30 C.F.R. § 100.5.

1. Violation of Section 75.400

I find that the evidence establishes that Bowie violated section 75.400. I credit the testimony of the inspector that engine oil and coal fines were in the belly pan, some hydraulic fluid or other material was in the operator's compartment, and combustible material was upon the bottom of the engine compartment cover. Bowie argues that all of these accumulations existed because the operator drove the hauler through a deep mud hole about 20 minutes before MSHA inspected it. It contends that muck from the mine floor splashed onto the hauler and washed into the belly pan. This muck contained the wet material, including coal, coal dust, and bug dust, that Inspector Allen observed. Upon reviewing the evidence, I agree that much of the material upon the hauler came from the mud hole, but I find that some of the material had been present before the start of the shift. The Secretary established a violation.

I reach this conclusion based upon my review of the evidence presented by the parties at the hearing.³ Nate Gaston, a downshift employee of Bowie, testified that he was the operator of the hauler the day of the inspection and performed the preoperational check upon the cited equipment. (Tr. 120). The hauler is a large, powerful, front-end loader that is principally used during longwall moves to transport the longwall shields and other equipment. Following his examination, Gaston determined that the hauler was safe to operate and he washed it before traveling to the area where he intended to operate it. He wrote the following upon the preoperational checklist in the comments section: “Washed and serviced, oil under motor, washed out, checking to see where it’s coming from.” (Tr. 118-20; Ex. R-7). Gaston testified that after he washed the engine compartment including the belly pan, the hauler was clean. (Tr. 121, 123). During this time he could not find the source of the oil. Using the dipstick, Gaston measured the oil level twice over a period of time to see if the engine was losing oil, but the oil level remained the same. (Tr. 121-22). He intended to watch the oil level as the shift progressed and he contacted a mechanic to try to find the source of the oil during the shift. (Tr. 134-35). Gaston said that there was only a little oil in the belly pan and it did not create a hazard. (Tr. 121, 136-37).

Gaston further testified that after he washed the hauler, he traveled through a muddy, dirty water hole that was about 2 feet deep. (Tr. 117, 123). He went through this water hole to get a tub to move power cables and again when he returned to the work area. After Gaston operated the hauler for about 20 minutes, Inspector Allen inspected it. Gaston believes that the material the inspector saw in the belly pan and elsewhere upon the hauler was muck from the mud hole. (Tr. 125, 137).

Keith Trujillo, Gaston’s supervisor, testified that the water hole was in entry No. 2 at crosscut No. 32 and it was a constant problem because it was a low spot where water and muck accumulated. (Tr. 146, 159). Bowie installed a pump to try to control it. He described it as soupy and dirty. (Tr. 147). Trujillo also testified that the hauler is typically washed at the start of every shift because it gets dirty; spraying the engine compartment with a hose flushes out any accumulations through holes at the bottom of the belly pan. (Tr. 148, 152, 161). He testified that Bowie requires equipment operators to wash equipment because accumulations can create a fire hazard. (Tr. 153-54). He stated that the presence of oil in the belly pan does not necessarily mean that engine oil is leaking because a miner can easily spill oil while servicing the hauler. (Tr. 157). After Bowie moved the cited hauler to the surface, it was determined that a seal was leaking a small amount of oil. (Tr. 164).

³ The evidence presented by Bowie with respect to this order differed significantly from the evidence presented by the Secretary. As a consequence, I was required to make a number of credibility determinations when analyzing the evidence with respect to this order. Credibility determinations involve not only weighing the trustworthiness of a witness, but also determining whether a particular witness has the knowledge necessary to give weight to his testimony. The witness may be competent to testify about the conditions at a mine, but he may not have a complete understanding of factors such as the sequence of events that transpired, the hazard presented by a cited condition, and the length of time that the condition existed. Thus, a witness’s experience in the mining industry, his experience evaluating mine safety issues, and his knowledge of the mine at issue can be crucial to evaluate credibility.

Ray Turner, a safety technician for Bowie, believed that the material upon the machine came from the water holes. (Tr. 186-87). He said that these water holes had coal fines and chunks of coal suspended in the water. (Tr. 186-87, 204). The hauler needed to return to the surface to see if any engine oil or hydraulic leaks could be found. Turner did not believe that the conditions found by Inspector Allen created a fire hazard because the hauler was permissible and did not provide an ignition source. (Tr. 195-96).

I credit Gaston's testimony that he washed the hauler, but I find that some combustible material remained. The plastic water bottle had not been removed and it was unlikely that muck had splashed as high as the bottom of the engine compartment covers, for example. I find that the Secretary established a violation by a preponderance of the evidence. *See, e.g., RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Dec. 2010) (“[t]he burden of showing something by a preponderance of the evidence . . . simply requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence.”) (internal citations and quotations omitted).

2. Significant and Substantial and Gravity

I find that the Secretary did not establish that the violation was S&S. The Secretary established the fact of violation and that accumulations create a discrete safety hazard. Both parties agree that accumulations on equipment in underground coal mines can create a serious hazard. The Secretary did not, however, establish that the conditions were reasonably likely to contribute to a fire or other injury causing event. I reach this conclusion for a number of reasons. First, Bowie's employees were aware of the presence of some oil in the belly pan. Nate Gaston saw the oil as he cleaned the belly pan with a hose, noted it in his preoperational check list, washed it out with a hose, and tried to find the source of the oil. The parties dispute the amount of oil that was present. I find that the oil leak was small and there was less oil present than the inspector believed; the amount was closer to that asserted by Gaston and Bowie's other witnesses. Second, Gaston removed out most of the coal-related accumulations before he operated the hauler; most of the material cited by the inspector was deposited upon the hauler when Gaston drove through mud holes about 20 minutes earlier. Finally, no likely ignition source existed because, as a permissible piece of equipment, the hauler would not become hot enough to ignite the wet accumulations. As summarized below, I find that Bowie's witnesses were in a better position to have this information than the inspector because these witnesses observed, disassembled, and repaired the hauler after the order was issued, as discussed below.

Joshua Bailey, a maintenance worker, was called to see if he could find an oil leak after Inspector Allen issued the order. He testified that the hauler appeared to be in good condition and that he did not find any leaks. (Tr. 172-73). He was surprised that the hauler was cited by MSHA because he saw Gaston washing the hauler, including the engine compartment, at the beginning of the shift. (Tr. 171). He did not find any hydraulic fluid leaking. (Tr. 174). He also noted that the mine floor in the area had many holes and water puddles. (Tr. 173). Bailey believed that the accumulation in the operator's cab resulted from driving the hauler through muddy, water-filled holes and that the material in the belly pan also came from the mud holes. (Tr. 174-75).

Jake Wadley, a shop mechanic, performed weekly permissibility checks upon underground equipment. He testified that the cited hauler was washed frequently because it was used in dirty areas of the mine. (Tr. 212). As a consequence, when mechanics in the shop performed weekly permissibility checks, they frequently noted that the hauler required washing due to accumulations. (Tr. 211-12; Ex. R-6). He looked at the subject hauler after Inspector Allen issued the order to look for oil leaks. (Tr. 214). During his examination, he noted that the hauler was very wet and muddy. *Id.* He removed the belly pan and found rocks, coal, and mud within the belly pan. (Tr. 215). He then used a mirror to look under the hauler to try to find an oil leak. Wadley determined that any leak probably originated at the front main seal. *Id.* The condition was not obvious and could not be detected without using a mirror. (Tr. 216). He asked that the hauler be moved to the surface shop. Once it was in the surface shop, he determined that there was an “occasional drip” of oil from the seal and from the super charger mounted upon the left side of the motor. (Tr. 218). Because the hauler was certified as a permissible piece of equipment, the operating temperature was around 185 to 200 degrees and it could not exceed about 400 degrees Fahrenheit. (Tr. 219-20). The hauler was equipped with an automatic fire suppression system which would shut it down if the temperature exceeded 210 degrees. (Tr. 221).

I credit the testimony of Bowie’s witnesses as summarized above. Gaston washed the hauler before he operated it, he monitored the oil level, and he called a mechanic to come to examine it. Most of the other material upon the hauler was muck that splashed upon it and into the belly pan when it traveled through the mud hole at crosscut 32. Holes in the bottom of the belly pan would allow the “soupy” mixture to get inside. The material in the belly pan was wet. I find that operating the hauler in that condition did not create a serious hazard as long as the equipment operator took steps to discover the source of the oil in the belly pan.

Inspector Allen erroneously believed that the hauler was not maintained as a permissible piece of equipment and that the engine and super charger could get extremely hot. (Tr. 23-24). Bowie established that his assumptions were not correct. Bowie maintained the hauler in permissible condition and the engine’s operating temperature was about 200 degrees Fahrenheit. It is unlikely that the engine or the super charger attached to the engine would have gotten hot enough to ignite the oil or the coal accumulations. No other ignition sources were identified by the inspector. Assuming continued mining operations, a mechanic would have arrived, detected the leak, and washed and repaired the hauler or taken it out of service. The hauler automatic fire suppression system of the hauler also reduced the likelihood of an injury as a result of a fire.

I considered Inspector Allen’s testimony in reaching this conclusion. He determined that the risk of injury resulting from the violation was reasonably likely because the equipment was in use, there were substantial accumulations, the engine was hot to touch, and the mine was gassy. (Tr. 34-35). Additionally, the equipment had a super charger, which is a source of extreme heat. (Tr. 37). The inspector also determined that fatal injuries could reasonably be expected to result from an ignition of the combustible materials. (Tr. 38-40, 43). I find that, although a fire was possible, it was not likely considering continued mining operations. The violation was moderately serious.

3. Negligence and Unwarrantable Failure

I find that the Secretary did not establish that the violation was the result of Bowie's high negligence or its unwarrantable failure to comply with the safety standard. Whether conduct is the result of an operator's unwarrantable failure is determined by considering all the facts and circumstances of a case. Some factors may be irrelevant in a particular case. *Consolidation Coal Co.*, 22 FMSHRC at 353. All the relevant facts and circumstances must be examined to determine if an operator's conduct is aggravated, or whether mitigating circumstances exist. *Id.*; *IO Coal Co.*, 31 FMSHRC 1346, 1351 (Dec. 2009).⁴

The Secretary argues, based upon the testimony of Inspector Allen, that Bowie's high negligence and unwarrantable failure caused the violation. Inspector Allen testified that the condition of the machine was obvious, open, and extensive; the hauler operator showed the preoperational checklist to a supervisor. (Tr. 43). Therefore, a supervisor was aware that a machine with an oil leak was operating in that section. *Id.* In addition, Inspector Allen testified that the mine was cited 39 times for violations of section 75.400 in the two-year period leading up to the issuance of this order and that, about a month before, he gave notice to Bowie that it needed to take greater efforts to comply with the safety standard. (Tr. 44-45). For the reasons set forth below, I find that the evidence does not support an unwarrantable failure finding.

As to the extent of the violative condition, although there were accumulations in several places upon the vehicle, most of the accumulations found in the belly came from the mud holes below, rather than from a deficiency in the hauler itself or the failure of Gaston to clean it at the start of the shift. Much of the other material, including material in the transmission compartment, likely came from the large mud hole. Upon investigation, it is clear that the motor oil accumulations came from leaks in the vehicle, but I find that these accumulations were not as extensive as the inspector believed.

The length of time that the violative condition existed is unclear; the Secretary did not present evidence upon this issue. Accumulations existed at the beginning of Gaston's shift, but he used a hose to clean them. Most of the accumulations upon the hauler at the time of the inspection had been present for 20 to 30 minutes.

⁴ Unwarrantable failure is defined by such conduct as "reckless disregard," "intentional misconduct," "indifference" or a "serious lack of reasonable care." *Emery Mining Corp.*, 9 FMSHRC at 2003; *see also Buck Creek Coal, Inc. v. FMSHRC*, 52 F. 3d 133, 136 (7th Cir. 1995). Whether conduct is "aggravated" in the context of an unwarrantable failure analysis is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist, such as the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator's efforts in abating the violative condition, whether the violation is obvious or poses a high degree of danger, and the operator's knowledge of the existence of the violation. *See e.g. Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000). Repeated similar violations are relevant to an unwarrantable failure determination to the extent that they serve to put an operator on notice that greater efforts are necessary for compliance with a standard. *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992).

As to the obviousness of the condition, the accumulations were obvious to Gaston when he was told to operate the hauler. I credit the testimony of Gaston that he used a hose to clean the hauler for a considerable amount of time. (Tr. 119). The hauler contained muddy material and accumulations at the time of Inspector Allen's inspection and, although they were obvious, the source of the accumulations was disputed at the hearing. As stated above, I find that most of the accumulations were wet muck from the bottom. It was only after Bowie removed the belly pan that it discovered the oil leak. The Secretary did not establish that the leak should have been obvious to the operator during the preoperational check.

The inspector testified that he put the operator on notice that greater efforts were necessary for compliance with section 75.400 approximately one month before the instant inspection and that the operator was cited under the safety standard about 39 times during the previous two years. The fact that 39 citations were issued to Bowie over the previous two years is not particularly significant. While the fact that Inspector Allen put Bowie on notice is significant, I find that Nate Gaston took his responsibility to remove accumulations from the hauler seriously. He washed the hauler, monitored the oil level, and contacted a mechanic to identify the problem. I find that Gaston's actions and the actions of other Bowie employees indicate that Bowie took its responsibilities under section 75.400 seriously.

I have considered Inspector Allen's testimony that Bowie's compliance with section 75.400 had fallen off since his previous inspection of the No. 2 Mine. I note that section 75.400 covers a wide variety of hazards and I conclude that Nate Gaston was taking affirmative steps to keep equipment clean and free of accumulations. I credit the testimony of Trujillo that Gaston diligently serviced his equipment. (Tr. 148). I also recognize, as does Bowie, that it is extremely important to keep equipment free of accumulations, including oil, to prevent the hazards associated with fire and smoke.

For the reasons set forth above, Order No. 8141442 is **MODIFIED** to a section 104(a) citation with moderate negligence. The S&S determination is removed. The gravity was serious. A penalty of \$15,000.00 is appropriate.

II. APPROPRIATE CIVIL PENALTIES

Section 110(i) of the Mine Act sets forth the criteria to be considered in determining an appropriate civil penalty. Bowie's history of previous violations is set forth in Exhibit G-1. During the period between 8/18/2010 and 8/17/2011, Bowie had a history of 250 paid violations at the mine of which 55 were S&S violations. For the period 7/13/2010 through 10/12/2011 the numbers were 211 and 34. At all pertinent times, Bowie was a large operator. The violations were abated in good faith. There was no proof that the penalties assessed in this decision will have an adverse effect on Bowie's ability to continue in business. The gravity and negligence findings are set forth above.

III. ORDER

Based upon the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), I assess the following civil penalties:

<u>Citation/Order No.</u>	<u>30 C.F.R. §</u>	<u>Penalty</u>
WEST 2012-351		
8141233	75.403	\$1,000.00
8473704	75.1909(j)(2)	100.00
WEST 2012-827		
8141442	75.400	15,000.00
TOTAL PENALTY		\$16,100.00

For the reasons set forth above, the citation and order are **MODIFIED** as set forth above. Bowie Resources, LLC, is **ORDERED TO PAY** the Secretary of Labor the sum of \$16,100.00 within 40 days of the date of this decision.⁵

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

Distribution:

Gregory Tronson, Esq., Office of the Solicitor, U.S. Department of Labor, 1999 Broadway, Suite 800, Denver, CO 80202 (Certified Mail)

Patrick W. Dennison, Esq., Jackson Kelly, 3 Gateway Center, Suite 1340, 401 Liberty Ave., Pittsburgh, PA 15222 (Certified Mail)

RWM

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.

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES**

875 GREENTREE ROAD
7 PARKWAY CENTER, SUITE 290
PITTSBURGH, PA 15220
TELEPHONE: (412) 920-7240
FAX: (412) 928-8689

September 4, 2013

WARRIOR COAL, LLC,	:	CONTEST PROCEEDINGS
Contestant,	:	
	:	Docket No. KENT 2011-1259-R
v.	:	Citation No. 8503376; 07/14/2011
	:	
	:	Docket No. KENT 2011-1260-R
SECRETARY OF LABOR,	:	Order No. 8503378; 07/14/2011
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Mine ID: 15-17216
Respondent.	:	Mine: Cardinal Mine
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. KENT 2012-705
Petitioner,	:	A.C. No. 15-17216-280358-01
	:	
v.	:	
	:	
WARRIOR COAL, LLC,	:	
Respondent.	:	Mine: Cardinal Mine

**ORDER GRANTING THE SECRETARY'S MOTION FOR SUMMARY
DECISION AND DENYING RESPONDENT'S MOTION
FOR SUMMARY DECISION**

Appearances: Jennifer Booth Thomas, Esq., Office of the Solicitor, U.S. Department of Labor, 618 Church Street, Suite 230, Nashville, Tennessee for the Secretary of Labor

Melanie J. Kilpatrick, Esq., Rajkovich, Williams, Kilpatrick & True, PLLC, 3151 Beaumont Centre Circle, Suite 375, Lexington, Kentucky for Respondent

Before: Judge Steele

This case is before me upon the Notice of Contest filed by Warrior Coal, LLC, (“Warrior”) and the subsequent Petition for Assessment of Civil Penalties by the Secretary of Labor (the “Secretary”), pursuant to Section 105 of the Federal Mine Safety and Health Act of 1977 (the “Act” or “Mine Act”), 30 U.S.C. § 815. The parties agreed to submit this matter for resolution on motions for summary decision. They filed briefs, exhibits and reply briefs.

STIPULATIONS

In its Motion for Summary Decision, Warrior Stipulates to the following facts:

1. Warrior is subject to the Federal Mine Safety and Health Review Act of 1977 (the “Act”).
2. Warrior operates the Cardinal Mine (the “Mine”), and its products enter into and affect interstate commerce within the meaning of the Act.
3. Warrior is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission, and the Administrative Law Judge has the authority to hear this case and issue a decision.
4. The civil penalty assessed in this case will not affect the ability of Warrior to remain in business.

ISSUES

At issue is whether Warrior had the obligation to provide the Secretary with the names, addresses, telephone numbers, positions and shifts worked of all of its employees in conjunction with an investigation under 110(c) of the Act. Further at issue is whether a withdrawal order under Section 104(b) is valid when no areas of the mine or miners are affected.

CONTENTIONS OF THE PARTIES

The Secretary argues that his request for information was reasonable and within the scope of his investigative authority provided by the Act. He states that while miners may refuse to give the requested information to MSHA, operators have no such rights. Further, he contends that MSHA’s policy manuals are not officially promulgated and, therefore, are not binding on the Commission or the Secretary in his enforcement actions. Finally, he argues that the issuance of a withdrawal order under 30 U.S.C. § 814(b) was proper under the Commission’s decision in *BHP Copper, Inc.*, 21 FMSHRC 728 (July 1999).

Warrior argues that the information requested by MSHA is not required to be kept by the operator. Further, it contends that its employees have privacy rights that are guaranteed by the Act and MSHA’s own rules regarding special investigations. It states that this was an attempt to avoid MSHA’s rule that miners can decline to provide any personal information to MSHA.

Finally, it argues that a withdrawal order under 30 U.S.C. § 814(b) cannot be issued when no area or persons are affected.

LAW AND LEGAL AUTHORITY

Section 103(a) of the Act states, in pertinent part:

(a) Authorized representatives of the Secretary or the Secretary of Health, Education, and Welfare shall make frequent inspections and investigations in coal or other mines each year for the purpose of (1) obtaining, utilizing, and disseminating information relating to health and safety conditions, the causes of accidents, and the causes of diseases and physical impairments originating in such mines, (2) gathering information with respect to mandatory health or safety standards, (3) determining whether an imminent danger exists, and (4) determining whether there is compliance with the mandatory health or safety standards or with any citation, order, or decision issued under this title or other requirements of this Act.

30 U.S.C. § 813(a).

Section 103(h) of the Act provides,

In addition to such records as are specifically required by this Act, every operator of a coal or other mine shall establish and maintain such records, make such reports, and provide such information, as the Secretary or the Secretary of Health, Education, and Welfare may reasonably require from time to time to enable him to perform his functions under this Act.

30 U.S.C. § 813(h).

Section 104(b) of the Act states:

If, upon any follow-up inspection of a coal or other mine, an authorized representative of the Secretary finds (1) that a violation described in a citation issued pursuant to subsection (a) has not been totally abated within the period of time as originally fixed therein or as subsequently extended, and (2) that the period of time for the abatement should not be further extended, he shall determine the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to immediately cause all persons, except those persons referred to in subsection (c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

30 U.S.C. § 814(b).

Section 110(c) of the Act provides:

Whenever a corporate operator violates a mandatory health or safety standard or knowingly violates or fails or refuses to comply with any order issued under this Act or any order incorporated in a final decision issued under this Act, except an order incorporated in a decision issued under subsection (a) or section 105(c), any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (d).

30 U.S.C. § 820(c).

FACTS

On May 10, 2011, the Secretary issued 104(d)(1) Citation No. 8498874 and 104(d)(1) Order No. 8498875 to Warrior due to hazardous roof conditions and an inadequate preshift examination, respectively.¹ *See* Secretary's Motion for Summary Decision, p. 2-3. Based on the issuance of this citation and order, the Secretary commenced a special investigation under Section 110(c) of the Act. *Id.* at p. 3. The special investigators believed that the conditions subject to the citation and order may have existed for three production shifts, and they stressed the importance of interviewing all employees who may have had knowledge of the conditions during these shifts. *Id.* at p. 4. Special Investigator Michael Newcom ("Newcom") also stated that the addresses and phone numbers of these employees were necessary so that the employees could speak freely with investigators outside of the mine setting. *Id.* at p. 4. By letter dated June 21, 2011, District Manager Jim Langley ("Langley") notified Warrior representative Tommy Kessinger that MSHA was requesting the names, addresses, positions, shifts worked and telephone numbers for all of Warrior's employees at the Cardinal Mine. *Id.* at p. 5; Respondent's Motion for Summary Decision, p. 3; Government Exhibit G; Respondent Exhibit 1.² The letter asserted authority for the request under Section 103(a) of the Act.

By letter dated June 28, 2011, Warrior, through its in-house counsel, Gary McCollum, Esq., requested details regarding the purpose of the investigation and the need for the personal information requested. GX-H; RX-2. At that time, Warrior raised concerns that according to MSHA's Special Investigation Procedures Handbook, the information requested could be provided by the miners on a voluntary basis. *Id.* It also requested additional information to verify that statements were taken without duress, and no promises or commitments were made

¹ These alleged violations are docketed at Docket No. KENT 2012-706 and are still at issue. The undersigned makes no judgment as to their validity at this time; rather, they are noted simply for context.

² Hereinafter, Government exhibits will be referred to as "GX" followed by a letter, and Respondent's exhibits will be referred to as "RX" followed by a number.

by the special investigators. *Id.* Langley responded to Warrior by letter on June 29, 2011, stating that MSHA was investigating a Section 110(c) case and advised Warrior to cooperate and comply with the request by July 8, 2011³ or face legal action under Section 108 of the Act. GX-I; RX-3. Langley also provided Warrior with a copy of the Commission decision in *BHP Copper, Inc.*, 21 FMSHRC 758 (July 1999). *Id.* By letter dated July 1, 2011, Warrior notified Langley of its intent to comply, but again requested information concerning what MSHA was investigating and why it needed the personal information of every employee. GX-J; RX-4. This letter again raised the concern of the miners' privacy rights, and their ability to refuse to provide the information. *Id.* By letter dated July 6, 2011, MSHA provided the subject of the investigation to Warrior and also requested copies of the notes taken by Safety Director Bruce Morris ("Morris") relating to the conditions subject to the investigation. GX-K; RX-5.

On July 12, 2011, Warrior sent a letter to Langley stating that Morris had provided MSHA with a list of individuals working on the day shift for the No. 2 Unit at the time that the citation and order were issued. GX-L; RX-6. The letter further informed Langley that Morris and three other employees had agreed to participate in interviews with Newcom. *Id.* Warrior stressed that it was not refusing to comply with MSHA's demands for information; however, it was requesting a "narrower, and more focused, demand from MSHA." *Id.* It argued that MSHA's demand was so broad that it covered personal confidential information for employees that were not even miners. *Id.* Finally, it stated that the request for Morris's notes was overly broad in that, as worded, it would request Attorney McCollum's personal legal files, which it asserts implicated attorney-client privilege and/or work product protections. *Id.*

In response, on July 14, 2011 at 9:58 a.m., MSHA issued 104(a) Citation No. 8503376 to Warrior for a violation of Section 103(a) of the Act. The "Condition or Practice" section states:

The operator failed to produce/provide requested information to MSHA special investigators during the performance of the investigation duties under section 110 of the Act. By letter dated June 30, 2011, MSHA requested documents necessary to carry out its investigation under section 110 of the Act of certain citations issued by the Secretary's authorized representative. These documents have not yet been provided.

GX-M; RX-7. Newcom designated this Citation as having no likelihood of injury or illness and not significant and substantial. *Id.* He stated that no miners would be affected and no lost workdays could reasonably be expected for the alleged violation. *Id.* However, he designated Warrior's negligence as reckless disregard. *Id.* A penalty of \$555.00 was assessed for this violation.

³ The letter actually states that the information must be provided by July 8, 2009. This is an obvious typographical error.

Approximately one hour later, at 10:59 a.m., Newcom issued 104(b) Order No. 8503378 to Warrior for failure to abate. GX-N; RX-8. The “Condition or Practice” section of this Order states:

The operator provided the Safety Manager’s notes from the 5/10/2011 pre-production meeting, however the operator refused to provide the additional information requested in MSHA’s letter dated June 30, 2011. The reasonable time for abatement has expired and there was no justification for any additional time to allow the operator to comply with the requirements of the citation.

Id. In the “Area or Equipment” section, Newcom wrote, “No area affected.” *Id.*

Warrior filed its Notice of Contest with the Commission for Citation No. 8503376 and Order No. 8503378 on July 15, 2011. The case was assigned to the undersigned on November 27, 2012. *See* Order of Assignment and Pre-Hearing Order. These proceedings were initially set for hearing on April 24, 2013 in Madisonville, Kentucky; however, the parties agreed that cross motions for summary judgment were appropriate, as no material facts are in dispute. *See* Notice of Hearing and Order to File Prehearing Report.

CONCLUSIONS

Commission Rule 67(b) sets forth the circumstances under which a motion for summary decision may be granted:

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). The parties have agreed that there are no genuine issues of material fact, and the issue can be properly decided on the record before me. Based on the parties’ motions, replies and evidence submitted, Respondent’s Motion for Summary Decision is **DENIED** and the Secretary’s Motion for Summary Decision is **GRANTED**.

Section 103(h) of the Act allows MSHA to make reasonable requests for information from operators, even when this information is not specifically required to be obtained by the Act or its regulations. 30 U.S.C. § 813(h). This was addressed by the Commission in *Big Ridge, Inc.*, 34 FMSHRC 1003 (May 2012), *affm’d* 715 F.3d 631 (6th Cir. 2013). The Commission found that the language of Section 103(h) is expansive rather than restrictive. *Id.* at 1013. It specifically stated that “Congress gave clear instructions that ‘information’ that is *not* specifically required to be maintained by the Act shall, nonetheless, be provided to the Secretary to enable her to perform her functions, as long as the request is reasonable.” *Id.* at 1012-1013. It

notes that Congress explicitly rejected previous forms of this section, which had limited the Secretary's access to records specifically prescribed by regulation. *Id.* at 1013.

Further, although employees have privacy rights pursuant to the Act, operators cannot refuse to provide information to MSHA when it has a legitimate government purpose for obtaining the information. In passing Section 110(c) of the Act, Congress stated that in order to induce greater compliance with the Act, it intended to hold individual officers responsible for the operation, control and/or supervision of the mine liable for violations. *See Sec'y of Labor v. Bill Simola, employed by United Taconite, LLC*, 34 FMSHRC 539, 546-547 (Mar. 2012)(Citing S. Rep. No. 91-411, at 39, *reprinted in Coal Act Leg. Hist.* at 165, *reprinted in Senate Subcomm. on Labor, Comm. on Human Res., Legislative History of the Federal Mine Safety and Health Act of 1977*, at 628-29 (1978)). Conversely, the Commission noted that protections from liability afforded by corporate shield would reduce incentive to comply with the Act's regulations. *Id.* at 547 (Citing *Richardson v. Sec'y of Labor*, 689 F.2d 632, 633-634 (6th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983)).

Based on the foregoing, the undersigned finds that the Secretary's information request made pursuant to the particular circumstances of the 110(c) investigation related to this case was reasonable and for a legitimate government purpose. As contemplated by Congress, Section 110(c) of the Act encourages operators and their agents to ensure that mining operations are conducted safely and within the regulations. This in turn can help prevent the tragedies experienced in mines such as Upper Big Branch and Sago. It is also important to note that whether Warrior was required to keep the information sought by MSHA or not, it cannot realistically contend that it does not keep up-to-date contact information for the employees of a mine of this size. In 2011, Warrior's Cardinal Mine logged more than one million operator hours worked.⁴ As with any employment setting, it can be imagined that miners take vacation, get sick and call off for any number of reasons. Warrior must have some way of contacting alternate employees to come in for a shift.

The special investigators believed that the conditions leading to the initial unwarrantable failure citation and order had existed for three production shifts. Thus, the Secretary had two options – he could request Warrior to give him the contact information for each individual specifically working on each shift of these shifts, or he could request the contact information for all of Warrior's employees. In deciding on the latter, the Secretary placed the burden of interviewing nearly 400 miners on himself, realizing that many would have no knowledge of the conditions at issue. Simply supplying the contact information for its employees placed almost no burden on Warrior. Any miners unwilling or uncomfortable discussing mine conditions with MSHA could simply refuse, as is their right.

Although it does not change the outcome, the Secretary's reliance on *BHP Copper*, 21 FMSHRC 758 (July 1999) seems a little misplaced. While the Commission states that it is not persuaded by the operator's argument that Section 103(h) only requires information that is required by regulation, the Commission also goes to great lengths to stress that an accident investigation involving a fatality was ongoing. *Id.* at 764-765, 768. In the instant case, no

⁴ See MSHA's Mine Data Retrieval System, <http://www.msha.gov/>.

accident, and certainly no fatality, occurred. While investigations into operator compliance are worthy causes and can prevent future accidents, they cannot be given equal weight with investigations into injuries or fatalities to miners. The Commission's decision in *Big Ridge* more accurately relates to the given question.

The Secretary also argues that MSHA's policy manuals are not officially promulgated rules binding on the Commission and the Secretary in his enforcement actions. The undersigned agrees. The Commission has previously indicated that manuals are not officially promulgated and do not prescribe rules of law binding on the Commission. *King Knob Coal Company, Inc.*, 3 FMSHRC 1417, 1420 (June 1981)(citing *Old Ben Coal Company*, 2 FMSHRC 2806, 2809 (Oct. 1980)). In his decision in *Tilden Mining Company*, ALJ Paez stated that, "the express language of a statute or regulation 'unquestionably controls' over material like a manual." *Id.*, 33 FMSHRC 876, 882 (Apr. 2011)(ALJ)(citing *D.H. Blattner & Sons*, 18 FMSHRC 1580, 1586 (Sept. 1996)). The Commission also cautioned, however, that this does not mean that a manual can never be afforded legal significance. *King Knob Coal*, 2 FMSHRC at 2809. Cases may arise where documents reflect a genuine interpretation or statement of policy whose soundness commends deference. *Id.* That is not the case here, however.

The statements in the Special Investigator's Handbook states that employees may provide information to MSHA on a voluntary basis. As previously stated, the undersigned does not disagree with that statement. However, the Secretary is requesting the contact information from Respondent, not the miners. Section 103(h) specifically states that records *in addition to information required by the Act* may be reasonably required by the Secretary from time to time to perform his functions under the Act. Even if the Secretary's policy manual stated that he could not request the information, the Act would clearly overrule. Further, the Secretary is not skirting its own policy. If miners choose not to provide any information when contacted, it is clearly their right to do so.

I further find that a 104(b) order can be validly issued where no areas or persons are affected. The Commission has upheld at least one such order in the past. *See Thunder Basin Coal Company*, 16 FMSHRC 671 (Apr. 1994); also *see generally Kentland-Elkhorn Coal Corporation*, 1 FMSHRC 1833, 1834(Nov. 1979)(order did not require the withdrawal of miners from mining operations for failure to pay walk-around employee). Although not precedential in nature, the undersigned finds the conclusions made by Judge Barbour in *Hopkins County Coal, LLC*, 34 FMSHRC 789 (Apr. 2012)(ALJ) to be persuasive. In his decision, the ALJ states the operator incorrectly treated the determination of the extent of the area affected by the violation as an additional requirement to issuing an order under Section 104(b) of the Act. *Id.* at 804. He makes no attempt to determine the exact meaning for the phrase, "[the representative] shall determine the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine ... to immediately cause all persons ... to be withdrawn from ... such area until [the] ... representative ... determines that such violation has been abated." *Id.* at 805. However, the ALJ finds the Secretary's interpretation that if no area is affected, no miners need be withdrawn to be reasonable. *Id.* As such, the Secretary may issue a "no persons affected" 104(b) order. *Id.*

Here, the Secretary issued Order No. 8503378 for the failure to abate Citation No. 8503376, which was issued for the failure to provide information requested pursuant to a Section 110(c) investigation. The undersigned finds that the Secretary correctly acknowledged that the failure to provide the documents created no inherent hazard for miners and, thus, felt no need to have them withdrawn from the working area. This creates balance in inducing operators to abate violations, while acknowledging that miners are not necessarily endangered by every infraction. Such commonsense measures are too often overlooked in the legal arena.

ORDER

It is **ORDERED** that the Secretary's Motion for Summary Decision is **GRANTED**. It is further **ORDERED** that Warrior **PROVIDE THE REQUESTED INFORMATION** to MSHA within 30 days of the date of this Decision. Finally, it **ORDERED** that Citation No. 8503376 and Order No. 8503378 are **AFFIRMED** as written and Warrior shall **PAY** the Secretary of Labor the sum of \$555.00 within 30 days of the date of this Decision.¹

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

Distribution:

Jennifer Booth Thomas, Esq., Office of the Solicitor, U.S. Department of Labor, 618 Church Street, Suite 230, Nashville, TN 37215-2862

Melanie J. Kilpatrick, Esq., Rajkovich, Williams, Kilpatrick & True, PLLC, 3151 Beaumont Centre Circle, Suite 375, Lexington, KY 40503

¹ 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

721 19th STREET, SUITE 443
DENVER, CO 80202-2500
303-844-5267/FAX 303-844-5268

September 5, 2013

VERIS GOLD USA, INC., (FORMERLY QUEENSTAKE RESOURCES U.S.A.), Contestant,	:	CONTEST PROCEEDINGS
	:	Docket No. WEST 2012-1124-RM
	:	Citation No. 8692812; 06/05/2012
	:	
v.	:	Docket No. WEST 2012-1126-RM
	:	Order No. 8692814; 06/06/2012
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Respondent.	:	Docket No. WEST 2012-1127-RM
	:	Citation No. 8692815; 06/06/2012
	:	
	:	Jerritt Canyon Mill
	:	Mine ID: 26-01621
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner,	:	CIVIL PENALTY PROCEEDINGS
	:	
	:	Docket No. WEST 2013-26-M
	:	A.C. No. 26-01621-300934
	:	
v.	:	Docket No. WEST 2013-357-M
	:	A.C. No. 26-01621-306880-01
	:	
VERIS GOLD USA, INC., (FORMERLY QUEENSTAKE RESOURCES U.S.A.), Respondent.	:	
	:	Jerritt Canyon Mill

DECISION

Appearances: Joseph Lake and Leon Pasker, Office of the Solicitor, U.S. Dept. of Labor, San Francisco, California for the Secretary;
Brian Hendrix and Avi Meyerstein, Jackson Lewis, Denver, Colorado for the Respondent.

Before: Judge Miller

These cases are before me on Notices of Contest filed by Veris Gold U.S.A., Inc., formerly known as Queenstake Resources U.S.A., Inc. ("Veris"), and Petitions for Assessment of Civil Penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration against Veris, pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § § 815 and 820). Veris operates the Jerritt Canyon Mill near Elko, Nevada. (Tr. 9). The dockets involve two citations and one order issued by MSHA in

response to incidents that occurred at the mine on June 5th and 6th, 2012.¹ The parties presented testimony and documentary evidence at a hearing held in Reno, Nevada on July 25, 2013.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

a. *Background*

The parties agree that the Mine Safety and Health Administration has jurisdiction over the mine. (Tr. 9). The mine is engaged in the mining and processing of gold ore. Veris is a large operator and the penalties proposed will not hinder its ability to continue in business. (Tr. 9-11).

On June 4, 2012, the MSHA Elko, Nevada field office received a complaint about unsafe equipment and unmaintained pumps, pipes and hoses at the Jerritt Canyon Mill. Sec'y Ex. 10. As a result, Inspector John Stull traveled to the mine on June 5, 2012 to begin a complaint inspection. After checking in at the mine, Stull went to the office of the safety supervisor, Dan Lowe, and provided a copy of the complaint. Lowe immediately became angry, called the complaint "bullshit" and subsequently, engaged in activity that interfered with the inspection. Lowe was loud, argumentative and repeatedly cursed and yelled at Stull, while escalating his behavior to the point of intimidation and harassment. As a result, I find that the mine impeded the investigation and violated Section 103(a) of the act, failed to abate the citation issued for that violation, and, finally, after being warned several times, worked in the face of the order issued for failing to abate the original citation.

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

At hearing, the Secretary called Inspector Stull, his supervisor, Gary Hebel, and former Veris employee, and now MSHA mine inspector, Jeffrey Bain. I found each of the Secretary's witnesses to be credible and thorough in their description of the events. The mine operator called Dan Lowe, the mine's safety manger, who is accused of impeding the inspection, and his subordinate, Mark Butterfield. While Butterfield's testimony was generally credible, I do not find Lowe to be a credible witness and, instead, rely on the facts as presented by Inspector Stull. While the parties agree to some of the relevant facts involved in this case, there are a number of

¹ At hearing, the Secretary elected to vacate Citation No. 8692571, which is part of Docket No. WEST 2013-357. (Tr. 12-13).

differences in their accounts of the incidents and, where necessary, I address those differences below.

b. Summary of Events

On June 4, 2012 the MSHA Elko, Nevada field office received a complaint that alleged two safety hazards at the Jerritt Canyon Mill, one of which involved unsafe equipment, and the other of which involved maintenance of pumps, pipes and hoses. Stull, who had nearly four years of experience as a mine inspector at the time, was assigned to conduct the complaint investigation. (Tr. 29). Stull traveled to the mine on June 5, 2012 and checked in at the guard shack. While in the guard shack, Stull observed an injured miner waiting to be transported to town. (Tr. 34). The miner had a cut on his leg after being hit while shoveling. (Tr. 34). Given the injury, Stull was on high alert that there were possible safety problems at the mine. (Tr. 34-35).

Stull next met with Dan Lowe, the mine's safety director. (Tr. 35). Although Stull had inspected the mine and mill in the past, this was his first encounter with Lowe. (Tr. 35). Stull handed Lowe a redacted copy of the complaint. (Tr. 35); Sec'y Ex. 9. After receiving the written complaint, Lowe became upset, and responded that the complaint was "bullshit" and that the allegations were vague. (Tr. 35-36). Lowe immediately called the MSHA district manager, Wyatt Andrews, to discuss the vagueness of the complaint. (Tr. 36). Lowe was under the impression that Andrews instructed Stull not to inspect the complaint item concerning pumps, pipes and hoses, but Stull denies that Andrews directed him to do so. (Tr. 85, 86).

Following his meeting with Lowe, Stull requested a list of equipment at the mine, and Butterfield, an employee who worked for Lowe in the safety department, went to find the list, while Lowe and Stull headed to the equipment shop to begin the inspection. (Tr. 87). Stull began the inspection by approaching a forklift similar to the one listed in the complaint, but found it had a flat tire and was out of service. (Tr. 37-38). The inspector and Lowe walked the "no go" line while Stull checked off, but did not formally inspect, the equipment that was not ready for use. (Tr. 41).

Stull then moved on to look at the equipment, specifically a guzzler truck, on the "ready" line. (Tr. 38). While inspecting the guzzler truck Stull observed that the cab was littered with bottles, a grease gun, trash and other debris. (Tr. 39). When Stull mentioned the condition of the cab, Lowe became very upset, said that Stull's concern was "bullshit," raised his voice and began to argue with Stull. (Tr. 40). Lowe told Stull that the mine could not be cited under the housekeeping standard and took out his regulation book to show the housekeeping regulation to the inspector. (Tr. 91). Lowe also pointed out that the key in the ignition had a "do not operate" tab on it. Stull continued with what he was doing and did not respond, while Lowe became increasingly loud and continued to swear. Lowe threatened to videotape Stull with the recording device on his phone. (Tr. 40). Lowe insists that he was merely pointing out errors to the inspector and his swearing was not directed at the inspector, but rather MSHA in general. Stull, on the other hand, testified that he had never seen such hostility. (Tr. 40-41). Stull next approached a crane that had been operated for training purposes the day before. (Tr. 42). Stull asked to see the pre-op cards for the crane, but the mine refused to provide them. (Tr. 42-43).

Lowe told Stull that he didn't have authority to ask for the pre-op sheets and that they would not be provided. (Tr. 42-43). However, at hearing, Lowe insisted that he did check to see who had operated the crane on the prior day and inquired about the pre-op forms. Stull does not recall Lowe providing any explanation, just loudly refusing each request. (Tr. 104-105). Lowe told Stull to inspect the crane as it was. Stull recalls that Lowe was loud and accusatory while cursing during the discussion about the crane. At this point, Stull informed Lowe that he was impeding the investigation. (Tr. 43-44).

Butterfield testified generally that both men were raising their voices through the inspection, but only Lowe was cursing and pointing fingers. (Tr. 187, 191, 200). Butterfield recalls that Stull did not use the word "impeding," but does remember Stull using the word "intimidate." (Tr. 212, 227, 228, 235).

Stull then moved on to the lube truck, which he observed pulling into the line. (Tr. 44). Stull approached the truck and asked the operator for the pre-op documents. The operator provided the documents as requested. (Tr. 44). The pre-op documents showed that the operator had noted that two studs were missing on one of the tires. Sec'y Ex. 14-2. Stull asked why the studs had not been repaired and was told that the mine had ordered the parts. (Tr. 45). However, the document that was eventually given to Stull, Sec'y Ex. 15, indicates that the parts were not ordered until the following day, June 6, 2012. Since Stull could not tell if the broken studs were a hazard, he asked to have the wheel removed for further investigation, but Lowe refused to do so. (Tr. 46-47).

Butterfield explained that at this point in the inspection the inspector was becoming agitated and unhappy as the two men continued their verbal back and forth. Lowe recalls that the truck operator, who was a mechanic, explained that the condition of the wheel was not a hazard, and that he changed the lug nuts himself to assure they were positioned safely. Stull did not recall any explanation from the driver of the truck. (Tr. 110).

Stull testified that, at that point during the inspection, Lowe had a fit and rattled off a number of expletives, including "[f]uck, this is bullshit . . . I want you fucking off my property[,]" became very aggressive, pointed his finger at Stull, and, pulled out his phone to make a call. (Tr. 47-48, 119, 121). Stull had never experienced this kind of treatment or conduct during an inspection. (Tr. 48). He explained that Lowe spoke loudly with his face just a foot or two away from Stull's face, and pointed his finger at Stull. (Tr. 48). Stull asked Lowe to be professional, but Lowe came within inches of Stull's face and, while pointing at Stull, said "I don't give a fuck. . . . I don't give a shit what you want" and told Butterfield to "[c]all the sheriff" and have Stull removed. (Tr. 48).

Stull explained that, during this interaction, he was between the equipment and the four mine representatives (i.e., Lowe, Butterfield, Lee and the truck driver) and felt "scared" and "unsafe." (Tr. 48-49). Butterfield agreed that Lowe was cursing, but explained that the cursing was not directed at Stull. Instead, Butterfield claimed that Lowe was criticizing MSHA. However, Lowe was pointing his finger at Stull while cursing, and saying MSHA "didn't know shit." Lowe again told Stull that the inspection was "bullshit," and MSHA was not following the

Mine Act. Given Lowe's behavior, and the fact that Stull was cornered by Lowe and Butterfield, Stull felt threatened. (Tr. 49).

Butterfield explained that Lowe often uses bad language and hand movements, but while Butterfield heard Lowe swearing, he did not hear the inspector swear. (Tr. 200, 224). Nor did Butterfield see a physical altercation, but agreed that there was a verbal one unlike any he had seen while working at the mine. (Tr. 200). After placing the call to the sheriff and requesting a civil standby, Butterfield returned to Lowe and Stull to say that the sheriff had been summoned. (Tr. 185-227).

Stull stated that he was being intimidated and he was done and was going to leave the property. (Tr. 51-52, 126). In fact, Lowe had told Stull to leave, but Lowe insists that he invited the inspector to continue the inspection several times. Lowe asked the inspector at least three times if he was done with his inspection and then told the inspector that, if was done, he had no right to remain on the property. Stull made an attempt to diffuse the situation by walking away and going to his car in the hope that it would allow Lowe to cool off, however, Lowe and Butterfield followed his every step. (Tr. 52, 54).

Stull, even while inside his car, continued to feel intimidated, and so removed his car from inside the gate and parked outside to call his supervisor, Hebel. (Tr. 52, 54, 128-129). Stull explained to Hebel that Lowe was impeding the inspection, and described the verbal abuse, cursing, and yelling to Hebel. (Tr. 55). Hebel testified that Stull was nervous, distraught, and not himself. (Tr. 249). Hebel informed Stull that he was on his way.

Stull waited in his car until the sheriff arrived. (Tr. 56). Lowe and Butterfield came out of the gate to greet the sheriff. Stull told the sheriff why he was there, and Lowe countered that Stull had no authority to be there given that he had finished his inspection, that the mine property runs along the road and down to the highway, and said that Stull must leave. (Tr. 56). Stull agreed to move down to the highway, and did so while he waited for Hebel. (Tr. 56). While waiting, Stull wrote up and issued Citation No. 8692812 for impeding the investigation. (Tr. 57); Sec'y Ex. 1. He set the termination time for 2:00 that day.

When Hebel arrived, he spoke to the sheriff, who then escorted Hebel and Stull back to the guard shack where they met with Lowe. (Tr. 57-58, 250-251). Stull gave Lowe a copy of the citation and Lowe responded that it was "all a bunch of lies." (Tr. 58). Lowe told Hebel that it was Stull who was flipping out and that he thought Stull had a problem. (Tr. 58). Stull explained the situation to everyone present and informed them that he was issuing a citation for impeding and that he wished to continue the inspection without Lowe. (Tr. 59). Hebel recalled Lowe saying "just issue the fucking thing." (Tr. 252). At that time, Lowe agreed he would not go on the inspection and, subsequently, Stull left with Butterfield to continue the inspection. (Tr. 61-62, 251).

While Stull and Butterfield continued the inspection, Lowe and Hebel went to Lowe's office where Hebel attempted to speak with Lowe about professional behavior and communication. (Tr. 61-62, 251). Lowe responded that he could do what he wanted and that it was his mine. (Tr. 252). Hebel testified that he had spoken to Lowe in the past about his

behavior, and explained that, on this occasion, he found Lowe's loud, cursing statements to have constituted intimidation.

Both Hebel and Stull agree that they made it clear to Lowe that he was not wanted and, in fact, could not participate in the remainder of the inspection. (Tr. 251). Hebel and Stull both explained to Lowe that the citation for a violation of Section 103(a) would stay in effect until the complaint inspection was complete. (Tr. 62). Lowe told them that that was fine, and he would not go with Stull. However, at hearing, Lowe testified that he did not understand that the citation meant that he could not accompany Stull for the entirety of the complaint inspection, and, instead, he thought the violation was terminated when Stull returned to continue his inspection that afternoon. I credit the testimonies of Stull and Hebel in this regard as in others. Stull was clear with Lowe that he did not terminate the citation. Stull intended to leave the citation in place as he had no intention of terminating the citation if it meant that Lowe would continue to follow him and engage in aggressive behavior, including the incessant swearing, yelling and intimidation.

Stull continued the inspection with Butterfield for several hours, and then, along with Hebel, returned to the office in Elko. (Tr. 62-63). While in the office, Stull called a truck dealer to discuss the missing studs on the lube truck. (Tr. 64). The technician he spoke to recommended a torque test to determine if the wheel was secure and not a hazard. (Tr. 64).

Jeff Bain, currently an MSHA inspector, was employed in Veris' mine safety department during Stull's June 2012 inspection. (Tr. 158). Bain testified that, while working in the mine's safety department, he was responsible for accompanying inspectors during inspections. (Tr. 160). Bain testified regarding his recollection of the events on June 5th, about his time working at the mine, and his history with Lowe. I found Bain to be a very calm, honest and straight forward witness, and I credit his testimony.

Bain explained that, at the time of the inspection, he reported directly to Lowe, who had been hired as the mine's safety manager. (Tr. 160-161). Lowe, as part of his job, conducted training regarding how the safety department personnel should accompany mine inspectors. (Tr. 161). Lowe's methods were a big change from how the mine had operated in the past as Lowe instructed the safety department to be more adversarial, and, wanted them to get the inspector on and off the property as fast as possible. (Tr. 161). Bain explained that Lowe trained them to engage the inspector at every point, contest what the inspector said, and bring up issues with the inspectors in the strongest terms in an attempt to have the citation vacated. (Tr. 161). According to Bain, they were instructed to be argumentative, but not to the point that they made the inspector mad. (Tr. 162).

On June 5th, Bain observed Lowe and Stull engaged in a heated discussion near the guard shack. (Tr. 162-163). Although Lowe disputes the fact, Bain testified that he was asked by Lowe to observe what was going on. (Tr. 163). Bain observed Lowe speaking in a loud voice, and arguing over a hazard complaint and inspection. (Tr. 163). Lowe was berating MSHA, the training of inspectors, and how MSHA applied training to inspections. (Tr. 163). Bain, while standing eight to ten feet away, heard the inspector tell Lowe that he was being impeded and intimidated. (Tr. 163-164). Bain heard Lowe using expletives, but didn't recall Stull using any.

(Tr. 164). He heard Lowe ask Stull if he was done, and Stull said yes, but that he was going to call his supervisor and possibly issue an impending violation. (Tr. 164). It was obvious to Bain that Stull was shaken and that Stull wanted to disengage from the conversation with Lowe. (Tr. 165).

At some point, Bain learned from Butterfield that Lowe had asked Butterfield to call the sheriff because there was a trespasser on the site. (Tr. 165). Bain was shocked and found the action unusual. (Tr. 166). When the sheriff arrived, Bain moved on, but later questioned Lowe about the incident. (Tr. 167). Lowe explained that he wanted to show MSHA who was boss, that he didn't want to let the inspector push the company around, and that this was his way of training the inspector. (Tr. 168). Lowe explained to Bain that he was training one field office and one inspector at a time, and teaching them how to look at hazards and apply standards. (Tr. 168). Lowe also told Bain that if he directed his criticism at MSHA as a whole, and as long as he did not personally direct his abuse at an inspector, he could skirt an impending citation. (Tr. 168-169). According to Bain, Lowe said he was justified in calling the sheriff because the inspector said he was done and, as a result, no longer had a right to be on the property. (Tr. 169). While Lowe testified that he called the sheriff to diffuse the situation and because there was something wrong with the inspector, I find Bain's explanation to be more in keeping with the other testimony and, accordingly, I credit Bain's recollection of the events.

On June 6, 2012, Stull returned to the mine alone to continue the complaint inspection with the expectation that he could do so without interference from Lowe. (Tr. 64-65). Stull met Butterfield, who accompanied him back to the lube truck, where Brian Lee joined the two of them and they began the inspection. (Tr. 64-65). Stull asked Lee if he could check the torque on the tire with the missing studs so that Stull could determine if the condition created a hazard. (Tr. 65-66). Lee agreed and went to find the proper tools. (Tr. 66). However, before the torque test could be initiated, Lowe approached the party. (Tr. 66). Stull didn't want any confrontation with Lowe and, in an effort to avoid Lowe, attempted to continue to conduct the test. (Tr. 66-67). Lowe asked Stull what he was doing and, when told about the torque test, Lowe said "[b]ullshit . . . [, y]ou are not going to do anything." (Tr. 67). Lowe was speaking loudly, as Stull tried to explain the purpose of the test. (Tr. 67). Lowe said that the mine didn't have to do it and was not going to do it. (Tr. 67). Stull then explained to Lowe that he was not supposed to be in the inspection party, as there was still a citation in place that had not been terminated which prohibited Lowe from impeding the inspection. (Tr. 67).

Lowe testified that he was not aware that the citation had not been terminated or that the expectation was that he could not join the inspection party. However, I credit the testimonies of Stull and Hebel that they told him that the citation was not going to be terminated until the inspection was complete and that Lowe could not accompany the inspector during that time. I note that Lowe made much of the fact that he is well versed on MSHA regulations, yet he missed the fact that the citation had not been terminated. Also, I note that, in his testimony, Lowe pointed out that he was given until the end of the first day to terminate the citation. If he was aware of the time given, he certainly should have been aware that it was not terminated.

After telling Lowe that he could not travel with the inspection party, Stull explained that, if Lowe did not leave, he would have to issue a failure to abate order. (Tr. 67). Lowe told Stull

to go ahead and issue the order because he was not going to leave the inspection party. (Tr. 68). Stull gave Lowe another opportunity to leave and explained to Lowe that he could avoid the order by leaving and allowing other members of the safety department to complete the inspection.

Stull then called Hebel at the field office and explained that Lowe was trying to join the inspection and that Stull was alone, and nervous. (Tr. 68). Hebel confirmed that Stull sounded nervous about dealing with Lowe once again. Stull discussed with Hebel issuing a 104(b) order and explained that there was no diffusing the situation with Lowe. As a result, Hebel agreed that Stull should go ahead and issue the 104(b) order. While Stull was on the phone, Hebel could hear Lowe's loud voice in the background and specifically remembered hearing him say "fucking issue it." (Tr. 253).

Following the phone call to Hebel, Stull asked to speak to the mine manager. (Tr. 68). Lowe replied that he was in charge of the mine when Stull was conducting his inspection. (Tr. 68). Stull subsequently learned that Mike Armuth was the acting mine manager that day and asked to speak to him. (Tr. 70). Lowe spoke to Armuth alone first, then Armuth came out to speak with Stull. (Tr. 322). Stull explained that there was an impending citation in place from the previous day, that it had not been terminated, and that Lowe was very much aware of its existence. Stull also explained that he had given Lowe an opportunity to avoid a failure to abate order and he was giving Armuth that same opportunity. Stull explained that he was going to issue the 104(b) order if he was not allowed to continue without interference from Lowe. (Tr. 71). Stull gave the mine five minutes to abate the condition. (Tr. 71-72). Stull testified that the short time frame was reasonable since Lowe only had to leave the inspection party for the mine to comply. (Tr. 72). Lowe belligerently refused and Armuth agreed with Lowe. Stull then went out to his car and wrote the 104(b) order, Sec'y Ex. 2, and approximately 40 minutes later provided a copy to Lowe. (Tr. 72).

When Stull returned to hand the order to the mine, he spoke with Bain, who agreed to ask Lowe if the mine was going to comply. (Tr. 76). Bain returned and said they would not comply and called Butterfield to pick up the 104(b) order and take it to Lowe. (Tr. 75, 76). Butterfield agreed to have Lowe look at it and, again, Lowe said they were not going to comply. (Tr. 75-76) Stull explained to those present that his next step was going to be issuing another violation for working in the face of the 104(b) order. Even so, Lowe loudly and arrogantly refused to allow Stull to continue his inspection unimpeded.

Stull advised the mine that he would give them time to talk and consider that they were working in the face of the order and he would call back at 3:00 p.m. to see if they had made any decisions. Stull left the mine around noon. Hebel and Stull called the mine at 3:00 p.m. and spoke with Lowe. Lowe advised Hebel and Stull that he wouldn't comply and MSHA should just go ahead and issue the next citation. Stull wrote up Citation No. 8692815 for working in the face of a 104(b) order, and sent the order by email. Hebel recalls that the conversation with Lowe was short. Lowe was asked to comply and not interfere in the inspection, but Lowe responded "fuck no" and hung up. (Tr. 255).

At hearing, Lowe insisted that he explained to Stull that his job was to accompany the inspector and that MSHA could not keep him from doing his job as a representative of the mine. However, Stull explained a number of times that Lowe must stay away during the inspection in order to comply with the order and terminate the original citation.

Stull, in an attempt to complete the complaint inspection, returned to the mine a day or two later. (Tr. 79). However, this time, Stull did not go alone. He was accompanied by Hebel and the district manager, Kevin Hirsch. (Tr. 79). Bain accompanied the MSHA inspection party initially, but then left and another member of the safety department accompanied them. (Tr. 80). Lowe did not join the inspection at first, but did show up at some point later. (Tr. 80). Again Lowe was argumentative, but with the presence of the MSHA supervisors, he was not attacking Stull or MSHA to the degree he had the prior two days, nor was he intimidating and harassing like he was on previous days. (Tr. 80). Stull did not feel he was harassed or intimidated by Lowe on that day and, therefore, he terminated the citation. (Tr. 80).

c. Citation No. 8692812

On June 5, 2012, Inspector Jack Stull issued Citation No. 8692812 to Veris for a violation of section 103(a) of the Mine Act. Section 103(a) of the Act states, in pertinent part, as follows:

Authorized representatives of the Secretary . . . shall make frequent inspections and investigations in coal or other mines. . . . In carrying out the requirements of this subsection, no advance notice of an inspection shall be provided. . . . [and the authorized representatives] shall have a right of entry to, upon, or through any . . . mine.

30 U.S.C § 813(a). The citation described the alleged actions as follows:

On 06/05/2012, Danny Lowe, Safety Manager, refused to allow Jack Stull, an authorized representative of the secretary, entry into the Jarrett (sic) Canyon Mill for the purpose of conducting an inspection of the mine pursuant to Section 103(a) of the Act. Mr. Lowe harassed, intimidated and verbally assaulted Mr. Stull. Mr. Lowe instructed Mark Butterfield, Safety Coordinator, to call the sheriff. Once the sheriff arrived, Mr. Lowe denied Jack Stull entry to the mine and asked Mr. Stull to leave the mine property. This 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 inspector determined that an injury was not likely, that the violation would not result in any lost workdays, that no persons were affected, and that the negligence was high.

Stull issued Citation No. 8692812 after enduring the yelling, cursing, intimidation and aggressive behavior of the mine’s safety manager, Dan Lowe. While both parties may have raised their voices, it was Lowe who constantly cursed, yelled, pointed his finger, demeaned and

criticized MSHA and the inspector, and, in the final act of intimidation, called the sheriff to have the inspector removed. The mine's witnesses acknowledged that this behavior took place, and seem to believe that such conduct is excused because they find it acceptable. I disagree. I find that Lowe's behavior was far worse than that described in the cases cited below, that the conduct rose to the level of harassment and intimidation and, in doing so, impeded the investigation and violated Section 103(a) of the Act.

The Commission has noted that the Secretary has broad authority to conduct inspections and investigations under section 103(a) of the Act. Section 103(a) authorizes inspections and investigations to determine "whether there is compliance with the mandatory health or safety standards or with any citation, order, or decision issued under the subchapter or other requirement of this chapter." *Big Ridge, Inc. et al.*, 34 FMSHRC 1003, 1012 (May 24, 2012) (citing 30 U.S.C § 813(a)). In *United States Steel Corp.*, 6 FMSHRC 1423 (June 1984), the Commission held that a violation of Section 103(a) existed where an operator failed to provide an inspector transportation to the site of an accident, which in turn prevented him from inspecting the scene. In addition, the Commission concluded that the company's insistence on the presence of a company attorney at an interview during the investigation of the accident, without specifying when the attorney would be present, then failing to produce the attorney, "had the effect of unreasonably delaying the . . . investigation" and that this delay "impeded" the investigation in violation of Section 103(a). *Id.* at 1433.

At least two Commission judges have found violations of Section 103(a) in circumstances somewhat similar to the case at hand. In *Sanger Rock & Sand*, 11 FMSHRC 403 (Mar. 1989) (ALJ), the judge found a violation of Section 103(a) when the operator was uncooperative during the inspection, delayed furnishing records that the inspector requested, and twice called the inspector a "liar." In *Jeppesen Gravel*, 30 FMSHRC 324 (Apr. 30, 2008) (ALJ), the judge affirmed violations of Section 103(a) of the Act when the operator refused to allow an authorized representative to inspect the mine, harassed and tried to intimidate the inspector while he was trying to conduct a compliance follow-up inspection, and screamed and made provoking comments toward the inspector.

The mine asserts that Lowe is naturally loud and accustomed to cursing, and argues that he was merely questioning the inspector and providing information that related to the citations. I find this argument to be without merit and, instead, find that his behavior was purposefully aimed at intimidating and harassing the inspector. Additionally, I do not find Lowe to be a credible witness. I base this finding on my observation of his testimony, including the tone of his voice, his body language, and his derogatory remarks. While Lowe and Butterfield attempted to dismiss the derogatory statements made during the inspection by insisting that they were directed at MSHA, and not the inspector, I find that they were purposefully made with the intent of intimidating and harassing the inspector. Moreover, while Lowe insists that he had the sheriff called as a way to diffuse the situation, he told Bain that he did so to show Stull "who was boss" and that "he wasn't going to let [Stull] push the company around and he was going to train the inspectors[.]" (Tr. 168). Lowe trained the safety department to question MSHA inspectors but when practicing his own policy, particularly when alone with the inspector, he did so in an overly aggressive and antagonizing manner. At hearing, Lowe continued his behavior and directed derogatory statements at Stull. Challenging an inspector and seeking clarification is

acceptable, but should not include yelling, cursing, calling names, and other intimidating behavior.

Lowe intentionally engaged in an intimidating manner and, as a result, the negligence for this citation goes beyond “high.” I note that Lowe engaged in his worst behavior when he was either alone with the inspector, or with the inspector and Butterfield, his subordinate, present. Lowe was much better behaved when Stull returned with Hebel, and again when Stull completed his inspection with Hebel and the district manager present.

Based upon my assessment of credibility and testimony as a whole, I find that the mine violated Section 103(a) as alleged. I also find this to be a very serious violation. Stull was at the mine on a complaint inspection and, whether Lowe agrees that there was a legitimate complaint or not, there is a basis to believe that a miner had some concern about his safety. Impeding the inspection essentially had the effect of preventing Stull from looking into the allegations in a timely manner and helping to correct a hazard that may have been serious. I find that Lowe’s behavior was aggravated and therefore assess a penalty of \$10,000.00 for this violation.

d. Order No. 8692814

On June 6, 2012, Inspector Stull returned to the mine and issued Section 104(b), Withdrawal Order No. 8692814. Section 104(b) provides, in part, as follows:

If . . . [an inspector] finds (1) that a violation described in a citation issued pursuant to subsection (a) has not been totally abated within the period of time as originally fixed therein or as subsequently extended, and (2) that the period of time for the abatement should not be further extended, he shall . . . promptly issue . . . [a withdrawal] order[.]

30 U.S.C. § 814(b). The order states as follows:

Danny Lowe, Safety Manager, continued to deny Jack Stull, an authorized representative of the Secretary, the right of entry into the Jarrett (sic) Canyon Mill for the purpose of conducting an inspection of the mine in accordance with the requirements of Section 103(a) of the Act. Mr. Lowe failed to take action to abate citation # 8692812. The mine is hereby given 05 minutes to comply with this order.

After issuing the 104(a) violation for impeding the inspection on June 5th, Stull returned on June 6th and was again harassed by Lowe. The mine had done nothing to abate the original citation and, given Lowe’s behavior and the nature of the violation, it was not reasonable for Stull to extend the time to abate.

The mine argues that the underlying citation had been terminated on the previous day when Stull returned and continued his inspection with Butterfield. However, when Stull began

the next day he had not issued a termination, nor had he extended the time for abatement. When Stull observed Lowe arrive and he immediately became argumentative, he determined that Lowe continued to impede his investigation. On the first day, Lowe agreed to withdraw from the inspection party and, for a short period of time, let Stull continue his inspection while Butterfield represented the mine. When Stull returned on the 6th and resumed his inspection, Lowe initially did not go along, but shortly thereafter joined the inspection party. Lowe asserts that Stull told him to leave immediately, but I credit Stull's recollection that Lowe began the intimidating behavior immediately upon his arrival, before Stull could even ask him to leave. Prior to issuing the 104(b) order, Stull informed Lowe at least twice that he should not be present and should allow the inspection to continue with another representative. I find that Stull was reasonable and gave the mine every opportunity to abate the violation prior to issuing the order. Again, Lowe was able to stall the inspector in his investigation into the complaint of unsafe conditions at the mine.

The mine also argues that Lowe cannot be kept from the inspection given that his job is to accompany the inspection party. I find this argument to be without merit. I recognize that the mine has a right to have a representative accompany the inspector, and the mine can choose who to appoint as that representative. However, when the appointed representative continues to harass the inspector and impede the investigation, it is reasonable for the inspector to seek an alternative representative. The mine had several other safety department representatives available and, in fact, Butterfield accompanied the inspector through most of his inspection without incident. Bain also was appointed to travel with Stull on one of the inspection days, as well as other managers and representatives from various departments. In keeping Lowe from participating, MSHA was not infringing on any right the mine had to allow a representative to accompany the inspector.

Section 103(f) of the Mine Act states in pertinent part that “[s]ubject to regulations issued by the Secretary, a representative of the operator . . . 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 the provisions of subsection (a)[.]” 30 U.S.C. § 813(f). The Commission recently addressed the rights of a representative appointed by the mine to accompany an inspector and concluded that the walkaround rights under section 103(f) are “for the purpose of aiding such inspection.” 30 U.S.C. § 813(f); *SCP Investments, LLC*, 31 FMSHRC 821 (Aug. 2009). The Commission has acknowledged that the inspector does have some discretion in limiting walkaround rights. *Secretary of Labor on behalf of Wayne v. Consolidation Coal Co.*, 11 FMSHRC 483, 489 (Apr. 1989). In *SCP Investments, LLC*, 31 FMSHRC 821, 831 (Aug. 2009) the Commission acknowledged that the legislative history of section 103(f) confirms that failure to allow a certain representative to accompany an inspector does not in any way take away from the resulting inspection. “Rather, what section 103(f) clearly does with regard to operators vis-a-vis MSHA and its inspectors is grant a qualified right[.]” *Id.* at 833.

Clearly there is no intent in the statute or the regulation to give a mine operator an unfettered right to accompany an inspector and harass, intimidate and impede that inspector. To the contrary, Section 103(f) is meant to allow a mine representative to accompany an inspector for the purpose of aiding in the inspection, not impeding it. I find that Lowe does not have an

unrestricted right to accompany the inspector and that Stull's request to have Lowe kept from accompanying him was reasonable under the circumstances found here, and particularly in light of the fact that other representatives of the mine were available to, and in fact did, accompany the inspector.

In order to establish the validity of a Section 104(b) order, the Secretary has the burden of proving by a preponderance of the evidence the existence of the initial underlying citation, including a reasonable time for abatement; the expiration of the abatement time; the failure to abate the cited violative conditions; and that the abatement time should not be extended. *Clinchfield Coal Co. v. UMWA*, 11 FMSHRC 2120, 2135 (Nov. 1989) (Commissioner Lastowka concurring).

In *Calvin Black Enterprises*, 7 FMSHRC 1151 (Aug. 1985), the Commission upheld a 103(a) violation and 104(b) withdrawal order after inspectors were denied entry to a mine because the mine's owner had issued instructions that no one was permitted on mine property without his written permission. The mine told the inspectors they were trespassing, and, as a result, the inspectors issued a citation for a 103(a) violation. Twenty minutes later, the inspectors again requested and were denied permission to inspect, prompting the inspectors to issue a 104(b) withdrawal order. The mine continued operations following issuance of the withdrawal order and was subsequently cited for working in the face of an order. Also, in *Hopkins Cnty. Coal, LLC*, 34 FMSHRC 789 (Apr. 2012) (ALJ), a Commission judge upheld a violation of 103(a) where the mine operator refused to produce the records requested by the MSHA inspector. The court also upheld a 104(b) withdrawal order because the mine operator refused to produce the requested documents after the citation was issued.

I conclude that evidence supports the inspector's determination that the time set for abatement was reasonable and should not have been extended. I have already found that there was a violation and I find that the 104(b) order was properly issued. The inspector did not abuse his discretion in determining the time set for abatement. He listed 2:00 pm as the termination time, but decided that, given Lowe's behavior and refusal to stay out of the inspection, it could not be abated at that time, and should remain in place until the complaint inspection was complete. When Stull, accompanied by Butterfield, attempted to continue his inspection the first day, he did not want a repeat of the harassing behavior exhibited by Lowe. Therefore, he asked Lowe to stay away until the inspection was complete. Still, Lowe arrived the next day after the inspection began, and exhibited the same belligerent and aggressive behavior. Not only had he been warned the previous day that the citation had not been terminated, he was warned the following morning when he appeared. Stull saw no reason to amend or change the citation and wanted to continue unimpeded. In order for Stull to terminate the citation, there must be some action to abate the violation. Here, Lowe continued to impede the inspection, and, as a result, the original citation was not sufficiently abated and would not be terminated until Stull was free to complete his inspection without the constant interference and harassment from Lowe.

Stull credibly testified that, while he gave the mine ample notice of the abatement requirements, his primary concern was completing the complaint inspection and he could not do so while Lowe continued the aggressive behavior. I find that Stull had a clear understanding of the law. He gave the company an original termination date, and when he determined that Lowe

had not complied and was continuing to harass him, he gave the mine operator additional chances to abate the violation. Stull gave due consideration to the safety of the miners in setting a time and in finally issuing an order for a failure to abate.

Even if Lowe had reason to believe that MSHA could not order him to stay away from an inspection, he was required to first abate the citation, and then bring up the issue in the proper course. He did not do so and, instead, intentionally continued to ignore the instructions of the inspector. I find that the 104(b) order was validly issued. I have considered the failure to abate in assessing the penalty for the citation discussed above.

e. Citation No. 8692815

On June 6, 2012 Stull observed that the mine operator continued to work in the face of the 104(b) withdrawal order, discussed *supra*. As a result, he issued Citation No. 8692815 for a violation of Section 104(b) of the Mine Act. The violative conduct was described as follows:

The mine operator is continuing to operate even though a 104(b) order #8692814 for non-compliance was issued by MSHA on June 6, 2012. This order required the operator to comply with the standards under 103a of the Mine Act. This 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 condition or practice was later modified for the below stated reason:

This action is taken to modify the condition or practice to include the following verbiage; Safety manager Danny Lowe indirectly denied entry by continuing to harass the MSHA inspector, even after a reasonable time was given to abate the order.

The inspector determined that an injury was not likely, that the violation would not result in any lost workdays, that 1 person was affected, and that the negligence was high.

Inspector Stull issued this citation for working in the face of the 104(b) order discussed above, only after he had spoken to both Lowe and to the acting mine manager. Stull explained to both individuals that Lowe’s behavior was intimidating and interfered with the inspection, and that Lowe must not accompany the inspector during the course of this inspection. Stull’s expectation was reasonable and he relayed his expectations to Lowe on a number of occasions, as well as to the mine manager and other persons at the mine. Lowe, on the other hand, continued to be demeaning and rude and told Hebel and Stull that “fuck no” he would not comply. (Tr. 255). Lowe would not discuss the matter or seek a way to resolve it, but continued with his aggressive and threatening behavior. At that point, Stull had no choice but to issue the citation.

The mine argues that, because the failure to abate order should not have been issued, neither should this citation. The mine also argues that MSHA had no authority to keep Lowe from being part of the investigation and, in fact, they allowed him to join part way through the next inspection day. First, I have already found that the 104(b) failure to abate order was properly issued. Second, I do not agree that MSHA overstepped its authority. It is clear that MSHA was trying to get the complaint inspection complete without further delay, and that Lowe was the sole force standing in the way. In order to complete the investigation, the impediment must be removed. Other members of the safety department can, and often do, accompany the inspectors, and they were available on the dates Stull was at the mine. Lowe was allowed to rejoin the inspection before the failure to abate order was terminated only because Stull was not alone and Lowe, while aggressive, was better behaved in the presence of others, including the district manager. There is no question that the citation was valid, that it had not been abated, and that the mine continued to refuse to comply, thereby working in the face of an order.

In *Hopkins Cnty. Coal, LLC*, 34 FMSHRC 789 (Apr. 2012) (ALJ), the Commission judge concluded that a mine inspector properly issued a citation which alleged the mine continued to operate in the face of a withdrawal order and continued to violate section 103(a) by refusing to produce the requested records. Like the inspector in *Hopkins*, Stull gave the mine a number of opportunities to avoid the citation for working in the face of the order, but the mine refused. I find that the order is valid as issued. I also find this to be a serious violation. Stull was not able to complete a complaint inspection due to Lowe's actions and, therefore, was not able to follow up on a miner's safety concern. Lowe's aggressive behavior and his failure to comply with the failure to abate order were intentional. Considering the history of the mine, its size, its failure to abate the violation, along with the gravity and negligence of the violation, I assess a \$15,000.00 penalty.

f. Citation No. 8692571

The Secretary has elected to vacate Citation No. 8692571. (Tr. 12-13).

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:

- (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). The history of assessed violations was admitted into evidence and shows a reasonable history for this mine. The mine is a large operator. The operator has stipulated that the penalties as proposed will not affect its ability to continue in business. The gravity and negligence are discussed above. Veris, as discussed in detail *supra*, failed to demonstrate good faith in abating the original 104(a) citation, as well as the subsequently issued 104(b) order. Based upon the six penalty criteria, and particularly the level of negligence demonstrated by the mine, an increased penalty is reasonable. The penalty amounts are as follows:

Citation No. 8692812	\$10,000.00
Order No. 8692814	Non-Assessable
Citation No. 8692815	\$15,000.00
<u>Citation No. 8692571</u>	<u>VACATED</u>
TOTAL	\$25,000.00

III. ORDER

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), I assess the penalties listed above for a total penalty of \$25,000.00. Veris Gold U.S.A., Inc., formerly known as Queenstake Resources U.S.A., Inc. is hereby **ORDERED** to pay the Secretary of Labor the sum of \$25,000.00 within 30 days of the date of this decision.

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

Distribution:

Joseph Lake and Leon Pasker, Office of the Solicitor, U.S. Department of Labor, 90 Seventh Street, Suite 3-700, San Francisco, CA 94103-1516

Brian Hendrix and Avi Meyerstein, Jackson Lewis LLP, 10701 Parkridge Blvd., Suite 300, Reston, VA 20191

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9987 / FAX: 202-434-9949

September 5, 2013

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2011-1418
Petitioner	:	A.C. No. 46-08646-249741
	:	
v.	:	
	:	
ROCK N ROLL COAL COMPANY,	:	Mine: No. 3
INC.,	:	
Respondent	:	

DECISION

Appearances: Eve Epstein, Esq., U.S. Department of Labor, Office of the Solicitor, Arlington, Virginia, for Petitioner;

James F. Bowman, Midway, West Virginia, for Respondent.

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 his Mine Safety and Health Administration (“MSHA”), against Rock N Roll Coal Company, (“Rock N Roll”), pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 (“Act”), 30 U.S.C. § 815.¹ The Secretary proposed a civil penalty in the amount of \$8,000.00 for one alleged violation of his mandatory safety standards.²

¹ Hilda L. Solis, the Secretary of Labor when this hearing was conducted, resigned office on January 22, 2013. Thomas E. Perez is the current Secretary of Labor.

² Prior to convening the hearing, the parties reached an agreement to settle twelve of the thirteen contested citations and, subsequently, the Secretary filed a Motion For Decision and Order Approving Partial Settlement.

Although the Secretary’s Petition proposed a penalty of \$5,080.00 for Citation No. 8119766, in light of his post-hearing position that Rock N Roll’s negligence was high rather than moderate, (continued...)

A hearing was held in South Charleston, West Virginia. The following issues are before me: (1) whether Rock N Roll violated 30 C.F.R. § 75.1504; (2) whether the violation was significant and substantial; and (3) whether Rock N Roll was moderately negligent in violating the standard. The parties' Post-hearing Briefs are of record.

For the reasons set forth below, I **AFFIRM** the citation, as modified, and assess a penalty against Rock N Roll.

I. Stipulations

The parties stipulated as follows:

1. Respondent, Rock N Roll Coal Company, is an "operator" as defined in Section 3(d) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 802(d), at its mine, Mine No. 3.
2. Mine No. 3 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 Mine No. 3 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's operations at Mine No. 3 are subject to the jurisdiction of the Mine Act, 30 U.S.C. § 803.
5. Respondent is subject to mandatory safety and health regulations established by the Mine Safety and Health Administration, 30 U.S.C. § 811, *et seq.*
6. This proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judges pursuant to §§ 105 and 113 of the Mine Act, 30 U.S.C. §§ 815 and 823. By operation of Commission Rule 5(a), all jurisdictional facts are to be deemed admitted unless specifically denied in responsive pleadings.

²(...continued)

he is seeking an elevated penalty. **Sec'y Br. at 22.** *See Performance Coal Co.*, 2013 WL 4140438 (Aug. 2013) (remanding the case to the ALJ to consider the Secretary's post-hearing request for an elevated penalty).

7. Respondent's Emergency Response Plan, which was submitted on October 9, 2009 and approved on October 27, 2009, was in effect at the time of the issuance of Citation Number 8119766.

8. Respondent's Mine No. 3 liberates a relatively small amount of methane.

9. Danny Justice has been continuously employed as the mine foreman at the No. 3 mine since April 24, 2000. Mr. Justice supervised the emergency evacuation drills during his employment at the mine.

10. The No. 3 mine conducted approximately 60 evacuation drills since it began operation on July 29, 1997.

11. Respondent conducted mandatory evacuation drills each quarter.

12. Respondent alternated the use of the primary and secondary escapeways each quarter.

13. Facilities assisting rapid evacuations, such as lifelines, primary and alternate escapeway maintenance, communications, SCSR caches and refuse alternatives, were not cited for any violations at the time of issuance of the citation.

14. Twelve miners were working underground at the No. 3 mine at the time of issuance of the citation.

15. The proposed penalty would not have any effect on the Respondent's ability to continue its business.

16. The R-17 Assessed Violation History Report is authentic.

17. Citation Number 8119766 was properly issued and served by an Authorized Representative.

18. Citation Number 8119766 may be admitted into evidence for the purpose of establishing its issuance, not for the purpose of establishing the accuracy of any statements asserted therein.

19. MSHA's proposed assessment data sheet accurately sets forth the number of assessed penalty violations charged to Respondent for the period stated, and the number of inspection days per month for the period stated.

20. The documents entitled United States Department of Labor MSHA Laboratories, Mount Hope, West Virginia Analysis of Air Samples dated September 5, 2008 through January 7, 2011 are authentic.

Sec'y Pre-hearing Report at 1-4; Tr. 7-10.

II. Factual Background

Rock N Roll operates Mine No. 3, an underground coal mine located in McDowell County, West Virginia. Pursuant to Section II of the Mine Improvement and Emergency Response Act of 2006 ("MINER Act"), 30 U.S.C. § 876, Rock N Roll submitted its Emergency Response Plan ("ERP" or "Plan") to MSHA on October 9, 2009, and it was approved by MSHA on October 27, 2009. Stip. 7. Rock N Roll's ERP contains procedures for four distinct emergency evacuation scenarios: fire, explosion, water inundation and gas inundation, in compliance with 30 C.F.R. § 75.1502. Ex. P-3.

On January 27, 2011, Tracy Calloway, an MSHA inspector for two and a half years, conducted a regular inspection of Mine No. 3. Tr. 28-29. Prior to employment at MSHA, Calloway had been a certified electrician in the mining industry for six years. Tr. 54. In preparation for inspection, Calloway reviewed Rock N Roll's Plan and its record of emergency evacuation drills. Tr. 29. The Record of Fire Drills ("Record"), indicated that quarterly emergency evacuation drills had been conducted on May 7, August 6, and November 8, 2010. Ex. P-4.³

The Record of May 7 states that participants "called outside put fire out travel escapeway," indicating that a fire emergency had been simulated. Ex. P-4. The Record of August 6 states "cut into old works water," which led Calloway to conclude that water inundation had been simulated. Ex. P-4; Tr. 39. The Record of November 8 states "cut in to [*sic*] old work no water," from which Calloway concluded that Rock N Roll had, again, simulated water inundation. Ex. P-4; Tr. 39. Calloway determined that Rock N Roll was not in compliance with section 75.1504, requiring that operators initiate emergency evacuation drills using a different scenario each quarter. Calloway had also observed that the operator had failed to specify which escapeways were traveled during the May 7, August 6, and November 8 evacuation drills, also a violation of section 75.1504, requiring that this information be recorded. Ex. P-4; Tr. 33. Therefore, Calloway cited Rock N Roll for its failure to alternate emergency evacuation drill scenarios in compliance with its ERP, and make a complete record of each drill.

³ Mine No. 3 records all emergency evacuation drills on a form entitled "Record of Fire Drills," irrespective of the scenario simulated. Ex. P-5 at 14.

III. Findings of Fact and Conclusions of Law

Calloway issued Citation Number 8119766 pursuant to section 104(a) of the Act, alleging a “significant and substantial” violation of 30 C.F.R. § 75.1504(a) that was “reasonably likely” to cause a “fatal” injury and was a result of Rock N Roll’s “moderate” negligence.⁴ The “Condition or Practice” is described as follows:

The operator has simulated the same emergency scenario (water inundation) during the past two quarterly emergency evacuation drills. Also, the escapeway being traveled during the drill is not being specified in the record book.

Ex. P-2. The citation was terminated after Rock N Roll conducted an emergency evacuation drill in the primary escapeway simulating a fire, and recorded the drill.⁵

1. Fact of Violation

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

⁴ The citation was amended by the Secretary to allege a violation of the broader standard, section 75.1504. See Order Grant. Mot. to Modify Citation of July 27, 2012. At hearing, the Secretary specifically alleged that Rock N Roll had violated sections 75.1504(b)(3) and 75.1504(d)(1).

30 C.F.R. § 75.1504(b)(3) requires that “[e]ach quarterly evacuation training and drill shall include the following: [a] realistic escapeway drill that is initiated and conducted with a different approved scenario each quarter” 30 C.F.R. § 75.1504(d)(1) requires that “[a]t the completion of each training or drill required in this section, the operator shall certify by signature and date [t]he names of the miners participating in the training or drill. . . . [and] the content of the training or drill component completed, including the escapeway traveled and scenario used”

⁵ Calloway instructed Rock N Roll to abate the violation by starting the rotation anew with a fire drill, then executing the other three emergency scenarios in consecutive quarterly drills. Tr. 53.

Rock N Roll concedes that it violated section 75.1504(d)(1) by failing to record the escapeways traveled during the quarterly emergency evacuation drills, but contests the allegation that it violated section 75.1504(b)(3) by failing to alternate the scenarios. Tr. 18-20; Resp't Br. at 5-6.⁶

The Secretary takes the position that Rock N Roll conducted two consecutive water inundation emergency evacuation drills on August 6 and November 8, 2010. Sec'y Br. at 7-8. He asserts that section 75.1504(b)(3) requires the operator to alternate its quarterly drills so as to simulate, in a calendar year, the four scenarios specified in its Plan. Sec'y Br. at 9. Arguing a contrary position, Rock N Roll contends that the Record, "cut in to [*sic*] old work no water," would be interpreted by any reasonable person, familiar with the mining industry, as indicating that a gas inundation scenario had been used in the November 8 drill. Resp't Br. at 7-8.

Inspector Calloway was the sole witness who testified at the hearing. He stated that he had concluded that the August 6 and November 8 emergency evacuation drills had simulated water inundations based on the similarity of the records. Tr. 34-35, 81-82.

Danny Justice, the mine foreman responsible for conducting evacuation drills at Mine No. 3, was deposed on January 11, 2012. He admitted that he had "used water cutting into old works two times in a row." Ex. P-5 at 5, 9. He also acknowledged that, while he had used water inundation and fire scenarios for "years and years," he had never conducted an emergency evacuation drill with a gas inundation or explosion scenario. Ex. P-5 at 8-10.

Justice's deposition testimony corroborates Calloway's assessment that the drill scenarios were the same. He establishes the violation several times by emphatically discounting ever having simulated gas inundation or an explosion to initiate an emergency evacuation drill. In advancing its position that the November 8 drill involved gas inundation, except for its representative's bare assertion, Rock N Roll presented no witnesses or documentary evidence to support its argument, electing to let "the record [speak] for itself." Tr. 15-17, 82-83, 89; Resp't Am. Pre-hearing State. at 1-2. The record in its entirety overwhelmingly supports a conclusion

⁶ The Secretary also suggests that Rock N Roll failed to specify the miners participating in the drills. Sec'y Br. at 5-6; Tr. 32-33. The citation, however, does not make this allegation and, in any case, it need not be addressed, inasmuch as the violation has been established based on failure to specify the escapeways.

that Rock N Roll used water inundation scenarios in two consecutive emergency evacuation drills, in contravention of the standard and its ERP requiring use of four different scenarios in a calendar year.⁷ Therefore, I find that Rock N Roll violated section 75.1504(b)(3).

2. Significant and Substantial

To prove that a violation is “significant and substantial” (“S&S”) under *National Gypsum*, 3 FMSHRC 822 (Apr. 1981), the Secretary must establish the four criteria set forth by the Commission in *Mathies Coal Company*, 6 FMSHRC 1 (Jan. 1984). The Secretary bears the burden of proving: 1) the underlying violation of a mandatory safety standard; 2) a discrete safety hazard - - that is, a measure of danger to safety - - contributed to by the violation; 3) a reasonable likelihood that the hazard contributed to will result in an injury; and 4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. *Mathies*, 6 FMSHRC 1, 3-4; *see also* *Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Sec’y of Labor*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff’g* 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria). Evaluation of the third criterion, the reasonable likelihood of injury, should be made in the context of “continued normal mining operations.” *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). Moreover, resolution of whether a violation is S&S must be based “on the particular facts surrounding that violation.” *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (Apr. 1998); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007, 2011-12 (Dec. 1987). The Secretary must prove that there is a reasonable likelihood that the hazard contributed to by the violation will cause an injury, not a reasonable likelihood that the violation itself will cause injury. *Musser Eng’g, Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010). When the alleged violation is of an emergency safety standard, as is the case here, a state of emergency must be presumed. *Cumberland Coal Res., LP v. FMSHRC*, 717 F.3d 1020, 1026-27 (D.C. Cir. 2013), *aff’g* 33 FMSHRC 2357 (Oct. 2011). Therefore, it is not the likelihood of an emergency occurring that should be evaluated, but rather the likelihood of injury upon occurrence of an emergency. *Id.*

The fact of violation has been established, and miners were unprepared to respond appropriately in the event of gas inundation or explosion emergencies. The focus of the S&S analysis, then, is the third and fourth *Mathies* criteria, *i.e.*, whether the hazard was reasonably likely to result in an injury, and whether the injury would be serious.

The Secretary contends that, because the miners lacked training in effective life-saving responses to gas inundation and explosion, they were simply unprepared to react properly and, therefore, subjected to the possibility of dying. Sec’y Br. at 15.

Rock N Roll argues that miners were adequately trained to evacuate the mine in the event of an emergency because it regularly conducted drills, and the evacuation routes and procedures specified in its ERP are exactly the same for all four scenarios. Resp’t Br. at 10. Therefore, it

⁷ Section 75.1504(b)(3)(i) requires that all four scenarios be used in a calendar year. *Emergency Mine Evacuation*, 71 Fed. Reg. 71430-01, 71440 (Dec. 8, 2006).

contends that this alleged violation was not likely to result in injury. Resp't Br. at 11-12. In support of its position, Rock N Roll cites *Jim Walter Resources, Inc.*, 28 FMSHRC 579, 595-97 (Aug. 2006), in which the Commission upheld an ALJ's finding that the operator's failure to conduct required fire drills was not reasonably likely to lead to unprepared miners in the event of a fire, because they had been adequately trained otherwise. In the instant case, however, miners at Mine No. 3 were never trained to respond to gas inundation or explosion emergencies and, as will be discussed, the record reflects that Rock N Roll's fire emergency training left much to be desired.

Calloway concluded that this violation was likely to result in serious injury because lack of emergency training has been a significant factor in many mine fatalities. Tr. 51. He gave extensive credible testimony regarding the potential effect of each emergency on the mine, and the different reactions required for each situation. Tr. 41-44. In his opinion, in the event of gas inundation or explosion, miners would likely die as a result of not being task-trained to respond to those emergencies. Tr. 52. Justice, on the other hand, testified that in the event of an emergency, his only concern was evacuating the mine, and that preparing miners to respond to gas inundation and explosion was unnecessary because Mine No. 3 liberates no methane. Ex. P-5 at 9; see Stip. 8. Justice's obvious disagreement with the scenario-specific focus of Rock N Roll's ERP, however, does not justify his disregard of its requirements.

Miners lacking life-saving task-training, specifically tailored to address gas inundation and explosion, would likely panic and become confused or disoriented; these conditions are likely to impede efficient evacuation, if necessary, and result in serious burn and respiratory injuries, or even death. Therefore, I find that Rock N Roll's violation of section 75.1504 is S&S.

IV. Negligence

Calloway testified that he found Rock N Roll to be moderately negligent because, although the operator should have been adhering to the requirements of section 75.1504(b)(3) and its ERP to alternate four drill scenarios, it was, at least, regularly conducting quarterly drills. Tr. 52. The Secretary, however, argues that Rock N Roll's negligence was "high" rather than "moderate," because Justice acknowledged that he was aware of the requirements of section 75.1504, but made a conscious decision to disregard them. Sec'y Br. at 20-21.

Justice acknowledged knowing that he was required to alternate between all four emergency scenarios in conducting quarterly evacuation drills and that he could have done so, but "just didn't do it." Ex. P-5 at 9. He also revealed that at the time of his deposition, nearly a year after Citation No. 8119766 had been issued, he had yet to simulate gas inundation and explosion, believing them to be a "waste of [his] time." Ex. P-5 at 9-10.

Rock N Roll's ERP requiring fire, explosion, gas inundation, and water inundation emergency drills has been in place since October 27, 2009. For more than a year prior to being cited, however, Justice had been aware that alternating the four scenarios was required, but clearly

chose to disregard the Plan. Furthermore, for another year after Rock N Roll was cited for failing to satisfy the scenario rotation requirement, by Justice's own admission, he deliberately continued to simulate two scenarios only. Ex. P-5 at 9.

I find that Justice's prolonged non-compliance with section 75.1504 was willful and, because he was the foreman responsible for task-training miners in emergency-specific life-saving techniques, his negligence was high and imputable to Rock N Roll. To make matters worse, as was alluded to earlier, there is credible evidence that the fire emergency drills were lacking in quality and effectiveness, and that miners interviewed by Calloway were unable to specify their duties in response to that emergency. Tr. 53, 121.

V. Penalty

While the Secretary has proposed a civil penalty of \$8,000.00, the judge must independently determine the appropriate assessment by proper consideration of the six penalty criteria set forth in section 110(i) of the Act, 20 U.S.C. § 820(j). *See Sellersburg Co.*, 5 FMSHRC 287, 291-92 (Mar. 1983), *aff'd* 763 F. 2d 1147 (7th Cir. 1984).

Applying the penalty criteria, I find that Rock N Roll is a medium-size operator, whose violation history is not an aggravating factor in assessing a penalty. Ex. P-1, P-7; Sec'y Br. at 22. The parties stipulated that the proposed civil penalty will not affect Rock N Roll's ability to continue in business. Stip. 15. I find that Rock N Roll demonstrated good faith in abating the violation.

The remaining criteria involve consideration of the gravity of the violation and Rock N Roll's negligence in committing it. It has been established that this serious violation was reasonably likely to result in fatal injuries to twelve miners, and that Rock N Roll was highly negligent in committing it. Indeed, the operator's conduct was deliberate in failing to prepare its miners for emergencies that rank amongst the leading causes of death for underground coal miners and, respecting preparation for fire emergencies, it short-changed its workforce in the training that it did provide. Therefore, applying the civil penalty criteria, I find that a penalty of \$10,000.00 is appropriate.

VI. Approval of Settlement

The Secretary has filed a Motion for Decision and Order Approving Partial Settlement as to twelve of the thirteen citations. A reduction in penalty from \$8,420.00 to \$4,735.00 is proposed. The citations, initial assessments, and the proposed settlement amounts are as follows:

<u>Citation No.</u>	<u>Initial Assessment</u>	<u>Proposed Settlement</u>
8119757	\$ 745.00	\$ 300.00
8119758	\$ 1,944.00	\$ 900.00
8119762	\$ 117.00	\$ 117.00
8119763	\$ 117.00	\$ 117.00
8119764	\$ 117.00	\$ 117.00
8119765	\$ 117.00	\$ 117.00
8119767	\$ 1,304.00	\$ 100.00
8119771	\$ 392.00	\$ 300.00
8119772	\$ 117.00	\$ 117.00
8119773	\$ 392.00	\$ 300.00
8119781	\$ 2,473.00	\$ 1,850.00
8119782	\$ 585.00	\$ 400.00
TOTAL:	\$ 8,420.00	\$ 4,735.00

I have considered the representations and documentation submitted in the case, and I conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act.

ORDER

WHEREFORE, it is **ORDERED** that the Secretary **MODIFY** Citation Number 8119766 to increase the degree of negligence to “high;” Citation No. 8119757 to reduce the level of gravity to “unlikely” and “non-significant and substantial,” and the degree of negligence to “low;” Citation No. 8119758 to reduce the level of gravity to “lost workdays or restricted duty” and “1 person affected;” Citation Nos. 8119762, 8119763, 8119764 and 8119765 to reduce the level of gravity to “permanently disabling;” Citation No. 8119767 to reduce the level of gravity to “unlikely,” “lost workdays or restricted duty” and “non-significant and substantial,” and the degree of negligence to “low;” Citation No. 8119771 to remove the “significant and substantial” designation; Citation No. 8119773 to reduce the degree of negligence to “low;” Citation No. 8119781 to reduce the level of gravity to “unlikely,” “permanently disabling” and “non-significant and substantial;” Citation No. 8119782 to reduce the level of gravity to “unlikely” and remove the “significant and substantial” designation; and that Rock N Roll **PAY** a civil penalty of \$14,735.00 within 30 days of the date of this Decision.⁸

/s/ Jacqueline R. Bulluck

Jacqueline R. Bulluck
Administrative Law Judge

Distribution:

Eve Epstein, Esq., U.S. Dept. of Labor, Office of the Solicitor, 1100 Wilson Blvd, 22nd Floor
West, Arlington, VA 22209

James F. Bowman, P.O. Box 99, Midway, WV 25878

JRB/mjc

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. Please include Docket number and A.C. number.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

Office of the Administrative Law Judges
1331 Pennsylvania Ave., N.W., Suite 520N
Washington, D.C. 20004-1710
Telephone: (202) 434-9980
Fax: (202) 434-9949

September 12, 2013

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2009-1178-M
Petitioner,	:	A.C. No. 15-00034-185745-4QM
	:	
v.	:	
	:	
ORICA NELSON QUARRY SERVICES,	:	
Respondent.	:	Mine: Greenville Quarries

DECISION

Appearances: Willow E. Fort, Esq., U.S. Department of Labor, on behalf of the Secretary

Douglas Maggard, Sustainability Director, on behalf of North American Orica USA

Before: Judge David F. Barbour

This case is before me upon a petition for assessment of a civil penalty filed by the Secretary of Labor¹ (“Secretary”) on behalf of the Mine Safety and Health Administration (“MSHA”) pursuant to Section 105(d), 30 U.S.C. § 815(d), of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). The Secretary seeks a penalty of \$2,282.00 for the alleged violation of 30 C.F.R. § 56.6306(c) contained in Citation No. 6508896, which was issued to Orica Nelson Quarry Services (“Orica”), a contractor at the Greenville Quarries mine, pursuant to Section 104(a) of the Mine Act. The Greenville Quarries mine is a surface limestone mine located in Greenville, Kentucky operated by Roadbuilders & Parkway Construction, LLC (“Roadbuilders”).

¹ Hilda L. Solis resigned as Secretary of Labor on January 22, 2013. Thomas E. Perez was sworn in as Secretary of Labor on July 23, 2013.

PROCEDURAL BACKGROUND

After the Secretary filed her penalty petition, Orica answered and contested the validity of the charges contained in the citation. The case was subsequently assigned to me by Chief Administrative Law Judge Robert J. Lesnick. It was consolidated with Docket No. KENT 2009-1142, the Secretary's case against Roadbuilders, and the consolidated cases were set for hearing. The part of the consolidated matter involving Roadbuilders settled prior to hearing, and on April 05, 2012, I issued a decision approving the settlement. *Roadbuilders and Parkway Construction LLC*, Decision Approving Settlement (April 05, 2012). The case against Orica was heard in Chattanooga, Tennessee and is the subject of this decision.

At the close of the hearing, I granted the parties' request for leave to file briefs. Tr. 237. In her brief the Secretary requested that the number of persons affected by the alleged violation of Section 56.6306(c) be increased from "one" to "four", that the degree of negligence be increased from "moderate" to "high" and that a civil penalty of \$11,307.00 be assessed. Sec. Br. 17-18.

THE MINE AND BLASTING PROCEDURES

At Greenville Quarries limestone rock is mined through blasting. The mine has a canyon-like configuration with two side walls and a single highwall on one end. Tr. 61-62. The highwall is 34 feet high and 165 wide. Gov. Ex. 1, Tr. 62. There is a 15 foot wide rock berm on both the left side and right side of the pit adjacent to each of the side walls. Tr. 61. The berms extend the length of the two side walls and end near or at the base of the highwall, narrowing the pit floor to approximately 135 feet. Tr. 61-62, *See* Gov. Ex. 3. A blasting area and production bench are located on top of the highwall. Tr. 61. Limestone is dislodged from the highwall for processing through blasting. Blasting fractures the limestone and propels it out the front of the highwall onto the pit floor below where it is gathered by front end loaders, dumped into haulage trucks, and taken out of the pit for processing. Tr. 28-30. Roadbuilders employs contractors at the mine to prepare the mine site and to conduct blasting. Orica is a blasting contractor at the mine. Tr. 27. As a blasting contractor, Orica provides the blasting materials and lays out the shots.² Tr. 28-29. In preparation for blasting, a separate drill hole contractor drills boreholes into the bench using a drill steel.³ Tr. 45, 64. The drill hole contractor attempts to make the drill holes as vertical as

² A shot occurs when the explosives are blown. Tr. 43.

³ A drill steel is an iron bar or tube approximately 10-12 feet in length with a bit on the end used for drilling vertical boreholes. Tr. 64-65.

Bench is "a name applied to ledges of all types of rock that are shaped like steps or terraces." U.S. Department of the Interior, Bureau of Mines, *A Dictionary of Mining, Mineral*
(continued...)

possible, but even with the use of assistive devices, drill bits frequently “wander”, resulting in boreholes that are not completely vertical. Tr. 64, 103, 111.

Once the drill hole contractor drills the boreholes, the blasting contractor, in this case Orica, loads the holes with explosives.⁴ Tr. 44-45. A detonator, also known as a cap or blasting cap, and a cast booster are placed at the bottom of each hole.⁵ Tr. 45-46. A lead line is connected to the cap and extended out of the hole. Tr. 49. Orica fills the boreholes with ANFO, a blasting agent, and emulsion.⁶ Tr. 117. The holes are then covered with stemming.⁷ Tr. 46. All the lead lines are tied together and surface caps, also known as surface delays, are placed on the surface. Tr. 46-47. Orica then “runs [the lines] far out.” Tr. 47. Finally, Orica initiates the shot, causing an explosion that fractures the rock, blows it loose from the highwall and propels it forward out onto the pit floor below. Tr. 30, 47. Front end loaders operating in the pit clear the dislodged material away from the base of the highwall, which improves the effectiveness of subsequent shots. Tr. 112. The loaders then load the dislodged material into haul trucks.

STIPULATIONS

The parties stipulated to MSHA’s jurisdiction to conduct the April 7, 2009 inspection of the Greenville Quarries mine. Tr. 18-19. The parties also agreed that the definition of the term “blast site” provided in 30 C.F.R. § 56.2 defines the parameters of the blast site. *Id.*

³(...continued)
and Related Terms 96 (Paul W. Thrush ed., 1968).

⁴ A borehole is “a hole [made] with a drill . . . or other tools . . . for blasting purposes.” U.S. Department of the Interior, Bureau of Mines, *A Dictionary of Mining, Mineral and Related Terms* 125 (Paul W. Thrush ed., 1968).

⁵ The detonator initiates the explosion and the cast booster contains explosive material which provides the explosive force that propagates the explosion. Tr. 45, 48.

⁶ Emulsion is an explosive blasting agent which has a consistency similar to mayonnaise. Tr. 46, 164. The bench at the Greenville Quarries mine is wet. Tr. 46. Without emulsion, which displaces any water present in the boreholes, the blasting agents used at the mine would not work. Tr. 46, 164. ANFO is an explosive blasting agent. Tr. 164.

⁷ Stemming is crushed stone base or another material that is placed in a borehole to direct the force of the blast horizontally toward the face of the highwall. Tr. 46, 48.

THE TESTIMONY

On April 07, 2009, Mine Safety and Health Administration ("MSHA") Inspector Thomas G. Galbreath conducted a regular inspection at the Greenville Quarries mine, accompanied by Jerry Dozer, the mine superintendent at the time of the inspection.⁸ Tr. 37. Galbreath and Dozer drove to the pit. Tr. 37. Galbreath stated that he exited the truck and when he looked up he observed haulage activity on the production bench on top of the highwall, and he observed miners loading boreholes with explosives on the bench at the top the highwall. Tr. 37. He testified that he observed a 990 loader scooping up shot rock from against the face of the highwall beneath the portion of the highwall that had been loaded with explosives and putting the shot rock onto a haul truck. Tr. 38-40.

In late March or early April 2009, prior to the loading⁹ of the explosives on the highwall, the drilling contractor had drilled four rows, each with 11 boreholes, in an 11 foot by 11 foot pattern on top of the bench on the highwall. Tr. 147, Gov. Ex. 6, pg. 2, Orica Ex. 3. In total, the contractor drilled 44 boreholes, each four inches in diameter and each 34 feet deep vertically, extending from the top to the bottom of the highwall. Tr. 147, 176, Gov. Ex. 6, pg. 2. Galbreath stated one of the blasters told him that 16 boreholes located closest to the left¹⁰ side of the bench (the first four boreholes in each row all four rows back), were loaded, but the lines were not yet connected. Tr. 73-75, Tr. 97. At the hearing, Galbreath circled the 16 loaded boreholes on the left side of the highwall on Respondent's Exhibit 3 ("Resp. Ex. 3"), a diagram of the highwall depicting the location of the boreholes on top of the highwall and the haul truck and loader in the pit. Tr. 97. The other 28 boreholes were not loaded. Galbreath estimated the first row of boreholes was located six feet from the edge of the highwall. Tr. 64.

⁸ Galbreath works in MSHA's Lexington, Kentucky Field Office and has been employed by MSHA for approximately 11 years, during which he inspected blasting activities at mine sites. Tr. 21-22. He has received classroom training on blasting from MSHA as well as extensive training from Bill Handshoe, an MSHA blasting expert. Tr. 22. Prior to becoming an inspector, Galbreath was a safety director at an underground coal mine for six years where he was responsible for overseeing blasting operations and providing training. Tr. 24. Galbreath also worked at the mine loading boreholes with explosives, charging the holes then initiating the blasts. Tr. 25.

⁹ "Loading means placing explosive material either in a blasthole or against the material to be blasted." 30 C.F.R. § 56.2.

"Explosive material means explosives, blasting agents and detonators." *Id.*

¹⁰ Unless otherwise stated, all directions are given in relation to a person facing the highwall while standing on the floor of the quarry pit.

From the pit floor, Galbreath observed a loader mucking¹¹ in the quarry pit against the bottom of the vertical face of the highwall. Tr. 38. Galbreath testified that he saw the loader scoop up shot rock, directly in front of the loaded boreholes and load the shot rock onto a waiting haul truck. Tr. 38-39. This mucking and loading activity had been in progress since the start of the shift that morning. Citation No. 6508896.

Galbreath testified that the loader was mucking within 50 feet of a loaded borehole, in violation of Section 56.6306(c), which, as outlined below, prohibits all activities except blasting and hauling within a 50 foot radius of loaded boreholes. Tr. 64. Galbreath believed the standard was violated because the loader was digging against the base of the highwall which was six feet or less from the first row of eleven boreholes, of which four on the left side were loaded. Tr. 65, *see* Tr. 174, *see* Resp. Ex. 3. Galbreath believed that “bit wander” could have altered the location of the first row of boreholes, moving them closer than six feet from the face of the highwall. Tr. 65. Each borehole was 34 feet deep, extending from the production bench on top of the highwall to the bottom of the highwall. Tr. 64. Galbreath was concerned that the loader mucking against the highwall might dig into a loaded hole and trigger a premature detonation. Tr. 66. Accordingly, at 8:32 a.m., Galbreath issued Citation No. 6508896 to Orica for a violation of Section 56.6306(c). Citation No. 6508896, Gov. Ex. 1. Galbreath thought that a premature detonation was reasonably likely to cause fatal injury to the loader operator. Gov. Ex. 1, Tr. 66. He believed the miners on top of the highwall would also be directly or indirectly affected. Tr. 66. Galbreath found the violation to be a significant and substantial contribution to a mine safety or health hazard (“S&S”). Tr. 67, Gov. Ex. 1. Galbreath concluded the alleged violation reflected Orica’s moderate negligence based, in part, on miner Thurman Grundy’s statement to him that the miners doing the blasting could see the miners in the pit, but were unaware of their exact location. Tr. 68-69. The citation states the violation was terminated when the mucking and haulage activities were moved away from the front of the bench. Gov. Ex. 6, pg. 2.

Thurman Grundy was called as a witness by the company. Grundy is currently retired, but prior to his retirement he had 21 years of experience working with Orica and 19 years of blasting experience. Tr. 146-147. Grundy stated that he was loading the boreholes on the left side of the highwall when Inspector Galbreath arrived at the mine. Tr. 149. Sixteen boreholes on the left side, four holes across and four rows back, were loaded. Tr. 174, Resp. Ex. 3. The other boreholes were not loaded. Tr. 174. The boreholes also were not yet tied together. Tr. 162. Grundy contended that the first row of loaded boreholes was approximately ten feet, not six feet, away from the edge of the highwall. Tr. 176. Grundy denied that the loader was within 50 feet of the loaded boreholes. Tr. 155. He estimated there was a distance of at least 55 feet between the loader and the loaded boreholes. Tr. 169. Grundy testified that he measured the distance at the time, but did not write the measurement down. *Id.* Grundy also testified that because the pit area in front of the loaded side of the highwall was “clean” when he inspected it

¹¹ Galbreath defined mucking as the act of scooping up blasted rock and any other material on the ground with a loader and loading it into a haul truck. Tr. 42.

the previous morning, a loader would not have been mucking at the face in front of the loaded boreholes. Tr. 168. Grundy was aware the loader was mucking at the base of the highwall. Tr. 159. Grundy and the loader operator always wave to each other in the morning to alert the other to his presence. Tr. 168. He testified that the loader was a safe distance from the loaded boreholes because it stayed near the unloaded portion of the highwall. Tr. 159.

William (“Bill”) Handshoe is an experienced blaster licensed in Kentucky, Tennessee, West Virginia and Virginia who works in MSHA’s Knoxville Field Office. Tr. 107-108. He has experience in quarries and coal mines and in loading highwalls. Tr. 109. The Secretary called Handshoe as a witness. Handshoe testified that, in his experience, a drill bit can wander and thus alter the location of a borehole by one to two feet. Tr. 135. As a result, the loaded boreholes could actually be located as close as four or five feet from the face of the highwall. Handshoe stated that the blaster is in charge of the blast site and directs the workforce doing the blasting and the mucking in the pit. Tr. 119. Handshoe believed that the hazard posed by the alleged violation was that the loader could dig into the highwall and trigger a premature detonation, causing fly rock to come out of the highwall and hit anyone in the blast site. Tr. 119. Handshoe testified that though there are many variables to take into consideration, such as cracks and fragmentation of the highwall from the previous blasts, it was “more reasonably likely than not” that a loader mucking in front of the highwall would dig into a loaded borehole. Tr. 113. Given the large size of the loader used in the pit that day, Handshoe thought that it would be easy for its teeth to “grab into the [cast] booster” while it was scooping up rock and cause an explosion. Tr. 114. Handshoe also speculated that emulsion could leak out of a borehole from between pieces of loosened rock and the teeth of the loader could “get into it,” causing an explosion. Tr. 117. Handshoe was not present at the mine on the day of the inspection, but he did not believe the detonation of one borehole was likely to trigger the detonation of the other loaded holes because, based on his examination of a picture of the loaded boreholes, Exhibit GX-3, pg. 2, the lead lines had not yet been attached to the surface caps and connected together. Tr. 130, Tr. 133.

Jerry Dozer testified on behalf of the company. Dozer stated that he accompanied Galbreath into the pit area, though he was not present during the entire inspection. Tr. 193-194. Dozer is currently retired, but he had approximately 33 years of experience with Orica prior to retiring and for three of those years he worked for the company at the Greenville Quarry mine. Tr. 181. He stated that the first row of boreholes, the row closest to the edge of the highwall, was roughly eight to ten feet from the edge. Tr. 183. He observed the loader mucking against the right side of the highwall then loading shot rock onto a truck. Tr. 193. He testified that no mucking occurred on the left side where the boreholes were being loaded because the left side had been mucked out the day before. Tr. 186.

Michael Music was a witness for Orica. Music is retired, but occasionally consults for the mining industry. Tr. 206. He has approximately four years of blasting experience and has worked for MSHA as an inspector, as a field office manager, and as chairman and a member of MSHA’s Highly Explosive Standards Committee. Tr. 207-208, Tr. 225. Music testified that blasting at the site would have caused significant cratering on the highwall,

making the face “cracked and weak.” Tr. 220. Music speculated that the distance from the edge of the highwall to the four boreholes closest to the edge of the highwall was greater than six feet. Tr. 221. Music was not present during the inspection and did not observe the condition of the highwall. Tr. 224.

THE VIOLATION

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>
6508896	04/07/2009	56.6306(c)

The citation states:

The blasting contractor did not assure that the blast site area was secure before loading explosives. A Cat 990 front end loader was mucking in the quarry pit below the bench w[h]ere explosives were being loaded into [boreholes]. The loader was digging against the face of the highwall and loading trucks against the highwall being loaded. The highwall was approximately 34 feet in height and the [boreholes] were approximately 34 feet deep. The holes were already charged with emulsion and a cast booster/cap. The [boreholes] were approximately six feet from the edge at the top of the bench. A hazard of the loader digging into a charged hole or a premature detonation existed. This hazard would cause a fatal injury to a miner. This process had existed since the start of the shift this morning. Two blasters were working on top of the bench loading the blast holes.

Citation No. 6508896.

Section 56.6306(c) provides:

Once loading begins, the only activities permitted within the blast site shall be those activities directly related to the blasting operation and the activities of surveying, stemming, sampling of geology, and reopening of holes, provided that reasonable care is exercised. Haulage activity is permitted near the base of a highwall being loaded or awaiting firing, provided no other haulage access exists.

30 C.F.R. § 56.6306(c).

Section 56.2 defines a blast site as follows:

Blast site means the area where explosive material is handled during loading, including the perimeter formed by the loaded blastholes and 50 feet (15.2 meters) in all directions from loaded holes. A minimum distance of 30 feet (9.1 meters) may replace the 50-foot (15.2-meter) requirement if the perimeter of

loaded holes is demarcated with a barrier. The 50-foot (15.2-meter) and alternative 30-foot (9.1-meter) requirement also apply in all directions along the full depth of the hole.

30 C.F.R. § 56.2.

For the reasons that follow, I find that the Secretary has established a violation of Section 56.6306(c). Inspector Galbreath credibly testified that he observed a loader loading a haul truck directly beneath loaded boreholes, well within the blast site. Galbreath's testimony is consistent with his findings in the citation and is corroborated by his contemporaneous inspector's notes, which state that he observed a loader loading a haul truck "*against* the highwall being loaded" (Citation No. 6508896 (emphasis added)) directly in front of loaded boreholes. Gx. 6, pg. 2.

Prior to issuing the citation, Galbreath went up to the top of the highwall and observed the location of the loaded boreholes and the proximity of the loader to those boreholes. *See* Tr. 63. Though Galbreath did not provide measurements or estimates of the distance between the haul truck and the loaded portion of the highwall, he has substantial experience with blasting, and based on his statement in the citation that the loader was loading the haul truck *against* the loaded highwall, I credit his finding that prohibited loading activities were taking place within the blast site. In my view, the record clearly supports finding that the loader and the haul truck were in close proximity to the loaded portion of the highwall, well within a 50 foot radius, while this loading activity was taking place and thus, were within the blast site. Grundy and Dozer contend that the haul truck was located on the right side of the pit, away from the loaded holes. However, Grundy and Dozer's testimony regarding the location of the haul truck lacked specificity and unlike Galbreath's testimony, was not corroborated by contemporaneous notes.

I further find that although the standard specifically allows haulage activity near the base of the highwall being loaded, provided no other haulage access exists, the loader's activities do not fall within the definition of haulage. Galbreath and Handshoe persuasively defined hauling as the transportation of material away from the blast site. Tr. 60, Tr. 115-116. They agreed that haulage does not include loading. *Id.* Similarly, the *Dictionary of Mines, Mineral and Related Terms* defines haulage as, "[t]he drawing or conveying . . . of men, supplies, ore and waste both underground and on the surface." U.S. Department of the Interior, Bureau of Mines, *Dictionary of Mines, Mineral and Related Terms* 530 (Paul W. Thrush ed., 1968)(emphasis added). Here, the activity that triggered the violation was the loading of the haul truck.

NEGLIGENCE

Inspector Galbreath determined the violation was the result of Orica's moderate negligence. In her brief, the Secretary requested that the level of negligence be increased to high. Sec. Br. 18. I find that such an increase is warranted. The Mine Act holds operators and contractors to a high duty of care. The blasting contractor has a duty to ensure the safety of miners within the blast site. Galbreath credibly testified that Grundy was aware miners were working in the pit while it was preparing the shot, but was unaware of their exact location. Grundy testified that the loader was a safe distance from the loaded boreholes and would not have been mucking in the pit below the loaded portion of the highwall because that area was "clean." I find Galbreath's testimony, which is corroborated by his contemporaneous notes, to be the more persuasive. Gov. Ex. 2. Orica knew that there were miners working in the pit beneath the highwall while it loaded explosives and should have remained aware of the activities of those miners as it continued to load explosives. The miners in the pit were likely to be seriously injured or killed if a premature detonation occurred. Accordingly, I find that Orica's negligence was high.

GRAVITY

Galbreath believed that the hazard to which the violation contributed was a premature detonation triggered by the loader digging into a loaded borehole. Inspector Galbreath determined that if a premature detonation occurred it could result in serious or fatal injuries, and I agree. To gauge the gravity of a violation I must assess the effect of the hazard if it occurs, *Consolidation Coal Co.*, 18 FMSHRC 1541, 1550 (Sept. 1996). In this instance, if a premature detonation occurred, the loader operator, the haul truck driver and the miners doing the loading on top of the highwall could be hit by flying rock and would have sustained broken bones, internal injuries or they could have been killed. The violation was clearly serious.

S&S

A violation is properly designated as S&S if the violation is a significant and substantial contribution to the cause and effect of the hazard. 30 U.S.C. § 814(d). To establish the S&S nature of a violation, the Secretary must prove: "(1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard - that is, a measure of danger to safety - contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury will be of a reasonably serious nature." *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984); *accord Buck Creek Coal Co., Inc.*, 52 F. 3d. 133, 135 (7th Cir. 1995); *Austin Powder Co., Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir 1988)(approving *Mathies* criteria). It is the third element of the S&S criteria that is the source of most controversies regarding S&S findings. The 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., Inc.*, 7 FMSHRC 1125, 1129(Aug. 1985). An S&S determination must be based on the particular facts surrounding the violation and must be made

in the context of continued normal mining operations. *Texasgulf, Inc.*, 10 FMSHRC 498, 500 (Apr. 1988)(quoting *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984)). 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 1573, 1575 (July 1984).

I have found that Orica violated Section 56.6306(c) when the loader loaded a haul truck within the blast site and that if the hazard identified by the Secretary, a premature detonation triggered by the loader digging into a loaded borehole or explosive material, were to occur it would result in serious or fatal injuries. However, I also find that the Secretary did not prove that the hazard was reasonably likely to occur and thus, failed to establish the third *Mathies* criterion. Galbreath testified that he observed the loader mucking directly in front of the loaded boreholes and was concerned that the loader would dig into a loaded borehole. Tr. 66. However, this testimony is not supported by his inspector's notes, which state, "[L]oading activity was taking place in front of the loaded bench . . . The loader was digging *on the opposite side of the bench.*"¹² Gov. Ex. 2 (emphasis added). The Secretary's other witness, Handshoe, did not personally witness the violation and the Secretary did not clarify this inconsistency. Nor did Galbreath mark the photos he took when he issued the citation to indicate the relative location of the loader to the loaded boreholes. The Secretary has failed to establish whether the loader was mucking in front of the loaded holes. Indeed, the inspector's notes indicate that the loader was mucking on the unloaded side of the bench, which is consistent with the testimony of Grundy and Dozer. Orica contends that not only was the loader not mucking underneath the loaded boreholes when Inspector Galbreath observed the loader, it also would not have later begun mucking under the loaded holes. Both Grundy and Dozer credibly testified that the left side of the pit at the base of the highwall had previously been mucked out and was "clean".

Neither Galbreath's notes nor his testimony nor Handshoe's testimony persuade me that it was reasonably likely that the loader, which was mucking at the face by the unloaded side of the bench, would dig into a loaded borehole, even with allowances made for bit wander of one to two feet.¹³ The record fails to show that the loader was operating close enough for that to happen. Though Handshoe testified that it was "more reasonably likely than not" that the teeth of the loader could dig into emulsion that had leaked out from between fractured rock and cause a premature detonation, he also admitted that such an outcome was dependent on a variety of factors, which were identified, but not developed through his testimony or that of the Secretary's other witness, Handshoe, and Handshoe had no personal knowledge of the facts nor

¹² I assume that one haul truck at a time was being loaded with mucked material. Though the citation and Galbreath's notes refer to two trucks, Dozer confirmed that Orica was rotating two trucks to remove the mucked material (Tr. 193) and both the Secretary and the Respondent's witnesses only made reference to one truck.

¹³ Music testified that prior blasting could have made the face of the highwall "cracked and weak," but, as stated above, he did not personally observe the condition of the highwall and his speculative statements do not persuade me to change my determination.

did he observe the condition of the highwall. Moreover, the record does not support finding that the emulsion, if it leaked, would reach the area where the loader was operating.

I am mindful that a significant and substantial determination must be made based on the particular facts surrounding the violation. As noted above, the violation was triggered when the loader loaded the haul truck directly in front of the loaded boreholes. However, it was the loader's mucking activities, not the loading of the truck, which Inspector Galbreath testified was the potential trigger for the identified hazard - a premature detonation. Galbreath testified that the loader was mucking in front of the loaded boreholes, but this testimony is contradicted by his inspector's notes, which state that the loader was mucking at the face on the unloaded side of the highwall, and by the testimony of Grundy and Dozer. I find the Secretary did not establish that a premature detonation was reasonably likely and failed to establish that Orica's violation of the standard was a significant and substantial contribution to a mine safety or health hazard.

NUMBER OF PERSONS AFFECTED

The Secretary requested in her brief that the number of persons affected be increased from "one" to "four." Sec. Br. 18. Handshoe argued that had a premature detonation occurred, four people, the blaster and the helper on top of the highwall and the loader operator and the truck operator in the pit, would all be affected. Tr. 119-120. Handshoe testified that the blaster and helper on top of the highwall would be affected because once the blast is initiated, even when stemming is used, fly rock still comes out the top of the borehole. Tr. 120-121. I credit this testimony and I find that four persons were affected by the violation.

HISTORY OF PREVIOUS VIOLATIONS

In the two year period prior to the inspection at issue, Orica paid civil penalties for 23 violations, 5 of which were violations of Section 56.6306. Gov. Ex. 7. This is a moderately large history of previous violations. *See* 30 C.F.R. § 100.3(c)(1).

SIZE AND ABILITY TO CONTINUE IN BUSINESS

According to Exhibit A, which is attached to the Secretary's penalty petition, Orica worked 237,646 annual hours, making it a large contractor. In the absence of evidence to the contrary, I find that the assessed penalty will not affect the Respondent's ability to continue in business. *See Sellersburg Stone Co.*, 5 FMSHRC 287, 294 (Mar. 1983)(finding the mine operator has the burden of showing that the penalty will have a detrimental effect on its ability to continue in business).

GOOD FAITH ABATEMENT

Orica promptly and effectively abated the violation by moving the haul truck and the loader. The penalty proposed by the Secretary reflects a reduction for good faith abatement.

<u>CITATION NO.</u>	<u>30 C.F.R. §</u>	<u>PROPOSED PENALTY</u>	<u>ASSESSMENT</u>
6508896	56.6306(c)	\$2,282.00	\$2,000.00

In her brief the Secretary argued that an increase in the proposed penalty to \$11,307.00 is appropriate based on her proposed findings regarding Orica's negligence and the number of persons affected and is in accordance with the penalty criteria set forth in 30 C.F.R. § 100.3.¹⁴ Commission judges determine civil penalties *de novo*. I have considered the civil penalty criteria and conclude that, in light of the circumstances, particularly my finding of high negligence, my finding that four persons were affected by the violation and my determination that the Secretary failed to establish the identified hazard was reasonably likely to come to fruition, a civil penalty of \$2,000.00 is more appropriate.

It is **ORDERED** that Citation No. 6508896 be **MODIFIED** to delete the inspector's significant and substantial finding, to reduce the likelihood of injury to "unlikely," to increase the number of persons affected to "four," and to increase the degree of negligence to "high."

It is further **ORDERED** that the Respondent pay a penalty of \$2,000.00 within 30 days of the date of this decision.¹⁵ Upon receipt of payment, this case is **DISMISSED**.

/s/ David F. Barbour

David F. Barbour

Administrative Law Judge

¹⁴ The Secretary did not file a motion to amend the penalty petition. Instead, she raised this argument for the first time in her brief, a dubious practice, as the court previously noted in *Performance Coal Company*, 35 FMSHRC ___, slip op. at 2, n.3, No. WEVA 2008-1825 (August 16, 2013).

¹⁵ Payment should be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, P. O. BOX 790390, ST. LOUIS, MO 63179-0390.

Distribution:

Willow E. Fort, Esq., Office of the Solicitor, U.S. Department of Labor, 618 Church Street,
Suite 230, Nashville, TN 37219

Douglas Maggard, Director, US SH&E, Orica USA, Inc., 2873 Highway 252,
Laurens, SC 29360

/ca

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 16, 2013

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING:
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2013-167
Petitioner,	:	A.C. No. 15-19325-302646
	:	
	:	Mine: Mine No. 7
	:	
v.	:	
	:	
	:	
CLAS COAL COMPANY, INC.,	:	
Respondent.	:	

DECISION

Appearances: Mary Sue Taylor, Esq., U.S. Department of Labor, Nashville, TN on behalf of the Secretary

 James K. McElroy, CLR, Department of Labor, MSHA, Pikeville, KY, on behalf of the Secretary

 Roy Parker, Safety Manager, on behalf of Clas Coal Company, Inc.

Before: Judge David F. Barbour

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor (“Secretary”) on behalf of his Mine Safety and Health Administration (“MSHA”), against Clas Coal Company, Inc. (“Clas” or “the Company”). The case is brought pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. §§815, 820, (the “Mine Act”). The Secretary petitions for the imposition of penalties that total \$1,512 for two alleged violations of the nation’s mandatory safety and health standards for underground bituminous coal mines. The violations are alleged in citations issued pursuant to section 104(a) of the Mine Act, 30 U.S.C. §814(a), at Clas’s Mine No. 7, an underground bituminous coal mine located in Pike County, Kentucky.

One citation alleges a violation of 30 C.F.R. §75.1722(a), which requires that, “Gears; sprockets; chains, . . . pulleys . . . and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to person shall be guarded.” The Secretary

asserts that on August 23, 2012, Gary Ray, an MSHA inspector who was conducting an inspection of the mine, found that the rotating shaft of a head drive was not guarded. The shaft of the drive projected one half inch beyond its bearings. The Secretary proposes the company be assessed a civil penalty of \$100 for the alleged violation.

The other citation alleges a violation of 30 C.F.R. §75. 380(d)(1), which requires that, “Each escapeway . . . be [m]aintained in a safe condition to always assure passage of anyone, including disabled persons.” The Secretary asserts that on August 23, Inspector Ray found that the mine’s alternate escapeway was not so maintained in that water mixed with mud was allowed to pool in three areas. The mix ranged from 7 inches to 12 inches deep, and the pools were from 15 feet to 30 feet long. The Secretary argues that the condition endangered 12 miners who worked on the section, that the condition was reasonably likely to cause a permanently disabling injury, that the condition was a significant and substantial contribution to a mine safety hazard (“S&S”) and that the company was moderately negligent in allowing the condition to exist. The Secretary proposes the Company be assessed a civil penalty of \$1,412 for the alleged violation.

The Company answers that the shaft on the head drive was located in such a way there was no reason a miner would reach into the area of the drive and be caught or snagged by the shaft. It further points out that even if an errant miner for some reason reached into the area, the surface of the shaft was smooth and unlikely to catch the miner or to snag his or her clothing. According to the Company, the shaft did not protrude as much as indicated by the inspector and information displayed on MSHA’s website stated that a similar shaft was “Okay.” The company asks that the citation be vacated.

With regard to the allegedly unsafe alternate escapeway, the Company contends that Inspector Ray’s gravity and S&S findings are excessive. It asserted that the water and muck in the alternate escapeway was not so deep as to overtop the boots of miners nor of a depth to enter the compartments of vehicles traveling the escapeway. The Company states that it was in the process of installing a dewatering system when the citation was issued. The pooled water and muck had to settle a couple of days before it could be pumped.

The company also maintains that in the unlikely event the alternative escapeway had to be used, only five miners at most were likely to travel through the mix on foot. The rest would ride out of the mine on battery powered equipment. In the company’s view, the citation should be modified by lowering Inspector Ray’s gravity finding and by deleting his S&S finding.

After the company’s answer was received the case was assigned to me, and I ordered the parties to engage in pre-hearing settlement discussions. When the parties reported they were at an impasse, I noticed the case for hearing. At the same time, I encouraged the parties to continue their efforts to find a way to resolve their differences, reminding them that a mutually agreeable settlement is in almost all instances preferable to an outcome dictated by trial. I also asked the parties if the matter could not be settled, whether they were agreeable to a remotely conducted hearing, one that would save all involved considerable expense. However, the

parties advised me they preferred an on-site hearing in view of the fact that exhibits might need to be identified and marked by the witnesses.

The hearing was called to order on August 13, 2013, in Pikeville, Kentucky. Prior to going on the record, I again discussed with the parties whether further settlement discussions might yet produce an agreement. When they advised me that they would not, the hearing commenced.

Before calling his first witnesses, Counsel for the Secretary read the following stipulations into the record:

1. Clas . . . extracts and sells coal in interstate commerce, and is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its Administrative Law Judges.
2. Clas . . . owns and operates Mine No. 7 located in Feds Creek, Pike County, Kentucky.
3. [Mine]No. 7 . . . reported a production of 53,590 tons of coal in the first two quarters of 2013. The average number of underground coal mine[rs] at this mine is 35.
4. Clas . . . took over management of this mine on July 10, 2012.
5. Clas . . . received on[e] violation at this mine prior to the violations issued on August [23,] 2012.
6. The proposed assessments will not affect the ability of Clas . . . to continue in business.
7. The violations cited were abated within the time frame given by the [i]nspector.
8. Citation No. 8276490 was issued on Thursday, August [23] for a violation of . . . [section] 75.380(d)(1), and served on an agent of Clas.

Tr. 16-17.

Counsel for the Secretary also stated that the Secretary agreed to vacate Citation No. 8276491, the citation in which a violation of section 75.1722(a) was alleged. The Secretary

concurrent with the Company that the cited head drive “appeared to be the same as [one that was stated to be ‘Okay’] on MSHA’s website.” Tr. 18.

The parties then presented their respective cases, and at the close of the testimony, I entered the following bench decision:

First, . . . it is clear that there are honestly held opinions on both sides of the issues . . . and I appreciate that fact. None of the witnesses . . . not Inspector Ray, not [MSHA] Supervisor [Brian] Dotson, not [Clas’s safety manager, Roy] Parker[,] dissembled or stated things other than what they truly [believe].

* * *

[B]ased on the testimony . . . [of] the witnesses, and the documentary evidence, I rule as follow[s:]

First, . . . the Company violate[d] [s]ection 75.380(d)(1) The standard requires each escapeway, . . . includ[ing] alternate escapeways, to be maintained to assure [the] passage of anyone, including disable persons. Clearly, an escapeway in which the passage of any miner is hindered[,] is not a safe escapeway.

[Tr. 134]

I accept the testimony of Inspector Ray regarding the condition of the cited alternate escapeway He was there. He traveled . . . the escapeway. He measured the depth of the liquid material[,] . . . a slurry-like mix of water and solids[.] . . . [T]he mix existed in three pools[,] 15 feet to 30 feet long and 12 inches to 7 inches deep. I accept [the inspector’s] descriptions [as accurate].

I further accept his testimony that the slurry-like mix obscured what it covered, and it was entirely reasonable for Inspector Ray to infer the mix covered rocks. He felt the vehicle on which he was traveling bump over the rocks. He saw rocks in the parts of the [escapeway] that were not covered with the mix. His belief that the mix covered similar rocks was logical, and I credit it.

I also credit his belief that the slurry[-like] mix and the rocks covered by it [would have] hindered the passage of miners . . . use[ing] the . . . escapeway. While it may not have . . . [hindered them] if [they rode] through the escapeway and out of the mine on [the] rubber[-]

[Tr. 135.]

tired[,] battery powered vehicles that were available[, a]s . . . Inspector Ray's and Supervisor Dotson's testimony made clear, miners might well not have [the] luxury [of using the vehicles] and [they] might be required, because of debris in the entries and/or heavy smoke, to travel out [of the mine] on foot.

In such a situation, the slurry-like mix would slow them, and there is no [gainsaying] the fact that the hidden rocks could cause them to stumble and fall, subjecting them to injuries such as sprained ankles, or worse. Moreover, even if they were not injured, the additional delay caused by the slurry mix could lead to smoke inhalation, or . . . in the worst case scenario [if they were delayed long enough,] to death.

[Thus,] the record clearly establishes the violation. It also establishes that the violation was . . . [S&S.] My finding in this regard tracks the case law, as it must. As [Commission Administrative Law Judge Richard] Manning pointed out in a case . . . [similar] to this, a judge must determine whether there [is] a reasonable likelihood that the hazard

[Tr. 136.]

contributed to by the violation could . . . [result] in an injury in an emergency situation in which the escapeway [must] . . . be used. Judge Manning's decision is . . . *Twenty mile Coal Co.*, 29 [FMSHRC 806, 811 (Sept. 2007).]

When viewed . . . this way, the issue is whether the uneven footing hidden under the slurry mix made it reasonably likely an exiting miner . . . [would trip] . . . fall and [be] injured [during an emergency exit.] I . . . conclude the answer is, yes.

I [am] particularly impressed by the testimony of . . . Inspector Ray and Supervisor Dotson, that [had an injured miner needed evacuation on a stretcher or had evacuating miners needed to be tethered together to follow each other out of the mine,] at least one of those carrying [the] stretcher[,] . . . or [at least one of those] tethered together would have been likely to slip, stumble and fall. This is . . . common sense, because they would not be able to see where they had to step [a]nd their . . . overwhelming concern . . . would [be] to hurriedly exit. A sprained or a twisted ankle seems [to be the] most likely . . . result.

I will add that I do not think . . .

[Tr. 137.]

Inspector Ray's belief that a miner might drown is . . . likely . . . given the fact that the slurry mix was not deep, and any miner who fell from a stretcher, or who fell while being tethered, would have been . . . quickly helped by those around him or her. [However, this does not detract from the fact that] . . . the delay of miners escaping the mine in an emergency situation [and the uneven footing they would encounter] was reasonably likely to cause an injury.

That stated, while I find that this was [both an S&S] and a serious violation, it was not as serious as Inspector Ray believed. [Although] all 12 of [the section's] miners . . . were put in danger by the violation, I find [that those] . . . most likely to . . . [be] injured were those carrying a stretcher with an injured miner. In other words, I find that five miners were most immediately affected. Tethered miners also . . . [were affected, but they would] . . . be . . . likely to quickly help one another if one of their [fellow miners] slipped or [tripped.]

I also agree with Inspector Ray's assessment that the Company was moderately negligent. As Mr. Parker [testified], he had been

[Tr. 138.]

in the area prior to the violation being cited, and he knew that the mine and the [escapeway were] wet. The Company [should have] had the equipment on hand to remove the water [and mud], [s]omething it clearly recognized, since Mr. Parker [stated that] . . . the Company was in the process of installing the equipment.

Still, the company gets credit for [identifying] what was needed, and for moving forward with its installation. In addition, I find it telling that the [Secretary] agrees . . . [MSHA inspectors] traveled through the area prior to August [23,] and when the condition existed, . . . but [that they] did not cite . . . a violation.

I [therefore] find that the Company's negligence was on the low side of moderate. I [also] think it important to recognize that Clas . . . is not a recalcitrant operator. Mr. Parker's testimony that the Company tries very hard. . . to comply with all of the [Secretary's] regulations . . . is born out by [S]tipulation [5], to wit that in the month and almost two weeks it . . . controlled the mine, and in three weeks it

[Tr. 139.]

had been actively mining, the Company . . . received but one [citation].

* * *

[T]he record [also] affirms [the conclusion] that [S]tipulation [7] is accurate. The Company did, indeed, work diligently to abate the violation[.]

Therefore, [and for the reasons stated above,] I conclude that the violation existed, and that the relevant case requires that I affirm the [inspector's S&S] finding[,and] I . . . note here that this case is very similar to

[Commission Administrative Law] Judge [Margaret] Miller's case, *Independence Coal Company, [Inc.]*, [32 FMHRC 654 (June, 2010),] . . . in which she found the hazards caused by water that . . . collected in an . . . escapeway were reasonably likely to contribute to an injury in the event of an emergency evacuation

[Tr. 140.]

I [further] find that although 12 miners . . . could have been affected, the most likely number was five[,] that the Company's negligence was on the low side of moderate, and [that] the Company's overall attitude toward compliance[,] as exhibited by Mr. Parker's testimony and by the single [citation] issued at the mine between the time the Company took control of the mine and the [subject] violation[,] warrant a lower penalty than that proposed.

Were I to assess the [Secretary's] proposed [penalty] of \$1,412, it would be more than twice what the Company has previously paid for an [S&S] violation, I therefore assess a . . . penalty of \$912[,] . . . which is . . . more than a third of what the Company has . . . [paid] for a violation of [section 75.380], and indeed [a third] more than the Company has . . . ever paid for any violation.

[Tr. 141.]¹

¹ Editorial changes correcting syntax, grammar, spelling, and typographical errors have been made in reproducing the bench decision.

ORDER

Within 30 days of the date of this decision, Clas **IS ORDERED** to pay a penalty of \$912 for the violation of section 75. 380(d)(1) set forth in Citation No. 8276490.² Within the same 30 day, if he has not already done so, the Secretary **IS ORDERED** to vacate Citation No. 8276491. Upon payment of the penalty and vacation of the citation, this proceeding **IS DISMISSED**.

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

Distribution (Certified Mail):

Mary Sue Taylor, Esq., Office of the Solicitor, U.S. Department of Labor, 618 Church Street, Suite 230, Nashville, TN 37219-2456

James K. McElroy, CLR, Department of Labor, MSHA, 100 Fae Ramsey Lane, Pikeville, Kentucky 41501

Roy Parker, Safety Manager, Clas Coal Company, Inc., P.O. Box 643, Elkhorn, KY 41522

/db

² Payment should be sent to the Mine Safety & 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

721 19th Street, Suite 443
Denver, CO 80202-2500
303-844-5267/ FAX 303-844-5268

September 16, 2013

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. WEST 2012-922-M
Petitioner,	:	A.C. No. 04-02542-287276-01 S314
	:	
	:	Docket No. WEST 2012-923-M
v.	:	A.C. No. 04-02542-287276-02 S314
	:	
	:	Docket No. WEST 2012-1026-M
	:	A.C. No. 04-02542-290124-01 S314
CONSOLIDATED REBAR, INC.,	:	
Respondent.	:	Mt Pass Mine and Mill

DECISION

Appearances: Bryan Kaufman, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
David W. Donnell, Esq., Robert D. Peterson Law Corporation, Rocklin, California, for Respondent.

Before: Judge Manning

These cases are before me upon petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”), against Consolidated Rebar, Inc., pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the “Act” or “Mine Act”). The parties introduced testimony and documentary evidence at a hearing held in Henderson, Nevada, and submitted post-hearing briefs.

A total of two section 104(a) citations and a citation and order issued under section 104(d) were adjudicated at the hearing. The Secretary proposed a total penalty of \$5,696 for these matters.

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

A. Citation Nos. 8689027 and 8689028

On March 23, 2012, Inspector Eric P. Wiedeman issued Citation No. 8689027 under section 104(a) of the Mine Act, alleging a violation of section 56.14100(b) of the Secretary’s safety standards. (Ex. G-4). The citation stated that a rental forklift had a broken horn that

required touching a wire to ground to operate. It also had exposed broken glass upon a fuel gauge. Respondent operated the cited forklift with these conditions. *Id.* Inspector Wiedeman determined that an injury was reasonably likely to occur and that such an injury could reasonably be expected to be fatal. Further, he determined that the violation was Significant and Substantial (“S&S”), the operator’s negligence was high, and that one person would be affected. Section 56.14100(b) of the Secretary’s regulations requires “[d]efects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons.” 30 C.F.R. § 56.14100(b). The Secretary proposed a penalty of \$1,304.00 for this citation.

On March 23, 2012, shortly after issuing Citation No. 8689027, Inspector Wiedeman issued Citation No. 8689028 under section 104(a) of the Mine Act concerning the same underlying conditions as Citation No. 8689025, alleging a violation of section 56.14100(d) of the Secretary’s safety standards, which requires, in part, “[d]efects on self-propelled mobile equipment affecting safety, which are not corrected immediately, shall be reported to and recorded by the mine operator.” 30 C.F.R. § 56.14100(d). The citation states that “the equipment operator failed to note on the pre-operational exam that the defects existed and put the unit in operation.” (Ex. G-5). Inspector Wiedeman determined that an injury was reasonably likely to occur and that such an injury could reasonably be expected to be fatal. Further, he determined that the violation was S&S, the operator’s negligence was moderate, and that one person would be affected. The Secretary proposed a penalty of \$392.00 for this citation.

Discussion and Analysis

Respondent’s argument that the cited defects did not affect safety fails. Respondent argues that Guy Kaawaloa, the foreman, and Brensin Kamanu,¹ the forklift operator, testified that Respondent’s horn use complied with Mine requirements. Kamanu also testified that when the forklift transported loads, he used a spotter or a leading vehicle. (Tr. 201-02). The forklift had operational service brakes and a flashing light. (Tr. 187). Kamanu positioned the boom attached to the forklift in a manner that did not obstruct his view while driving. (Tr. 190-91). Kamanu placed cardboard over the broken gauge to keep dirt out of it. (Tr. 197). He always wore gloves while working at the Mine. (Tr. 194). Respondent’s efforts to avoid injury may make an injury less likely, but they also show that these defects do affect safety. Complying with safety measures is necessary because operating heavy equipment is dangerous if safety precautions are not followed. *See Buck Creek Coal, Inc.*, 52 F.3d 133, 136 (7th Cir. 1995). Although the above practices make the cited vehicle safer, the absence of a safety precaution, such as an easily accessible horn to use during an emergency, adversely affects safety.

I find that the conditions described in Citation No. 8689027 presented a violation of section 56.14100(b). The defective horn and the gauge affect safety. I credit Inspector Wiedeman’s testimony that the horn of the forklift is a signaling device that alerts people of the

¹ Kaawaloa and Kamanu were employees of Harris Rebar at the time the inspector issued the citations. It appears that Harris Rebar acquired Consolidated Rebar, retained the services Kaawaloa and Kamanu, and continued to use Consolidated Rebar’s Mine ID number. The parties were aware of this relationship and did not raise any issues about it. (Tr. 150).

forklift's presence, especially during an emergency. (Tr. 25). Attempting to maintain control of the vehicle while trying to touch a wire to a grounding nut could result in the equipment overrunning a person. (Tr. 25-26). Flashing lights or a spotter may reduce this hazard, but it still exists. Inspector Wiedeman also stated that the broken glass on the gauge presented a hazard of causing lacerations to the hands and fingers of miners. (Tr. 27). The piece of cardboard covering the gauge was not secured to prevent its movement. (Tr. 28-29). These two defects made crushing and lacerating of miners more likely and the defects existed for days. The cited defects affected safety and were not corrected in a timely manner, which establishes a violation of section 56.14100(b).

I find that Citation No. 8689027 was S&S² because it was reasonably likely that the cited violation would contribute to a serious injury. The defective horn contributed to the hazard of a miner being fatally crushed in a collision between the cited vehicle and a pedestrian or another vehicle. I credit the undisputed testimony of the inspector that the Mt. Pass Mine, owned by Molycorp, had thousands of contractor employees on site at any given time. (Tr. 15). The areas where contractors worked, including the cited area, were "saturated" with people. (Tr. 16, 27). There were many pieces of equipment in the cited area. (Tr. 27). At the time of the inspection, the mine was on a hillside of different grades with numerous work levels. (Tr. 16). The vehicle moved between areas of the mine. (Tr. 32-33). The defective horn was reasonably likely to contribute to an injury because the cited vehicle traveled upon various grades in crowded areas. In the event the operator lost control of the forklift, the inability to warn equipment or pedestrians in its path was likely to cause an injury. The defective horn of the forklift, furthermore, could lead to an injury if the cited vehicle never lost control and was operated with the utmost care because it lacked the ability to warn operators of other pieces of equipment, which may be out of control or carelessly driven, of its presence.

I find that Citation No. 8689028 is a violation of section 56.14100(d) because the violations cited in Citation No. 8689027 were not recorded in a timely manner. Operators are responsible for the violations of safety standards by foremen. *Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1463-64 (Aug. 1982). The defects were never recorded despite Kamanu's testimony that the foreman knew that they had existed for days. (Tr. 198). Respondent argues that it did not violate section 56.14100(d) because the operator of the forklift verbally reported

² An S&S violation is a violation "of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard." 30 U.S.C. § 814(d) (2006). A violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In order to establish the S&S nature of a violation, the Secretary must prove: "(1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard – that is, a measure of danger to safety – contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury will be of a reasonably serious nature." *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984); *accord Buck Creek Coal Co., Inc.*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power Co., Inc.*, 861 F. 2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria).

the defects to foreman Kaawaloa.³ Respondent's argument fails, however, because Respondent deliberately did not record the defects that were reported to it. The argument that the foreman knew of the conditions but neither abated nor recorded them does not undermine the violation; rather, it suggests that a foreman was highly negligent and failed to record conditions because he knew that the conditions required service but did not stop production to address those conditions.

Citation No. 8689028 is S&S. The underlying conditions alone created hazards that were reasonably likely to seriously injure miners. The deliberate failure to record or abate violations, however, is more dangerous than the underlying conditions because in addition to perpetuating the underlying conditions, it can lead to the creation of additional and more dangerous conditions. Recording safety defects lessens the likelihood that other hazardous conditions will arise. The unwillingness of Kaawaloa to record or address hazardous conditions was reasonably likely to result in an injury of a reasonably serious nature and would likely contribute to the creation of additional hazardous conditions. Citation No. 8689028 was a violation of section 56.14100(d) that was reasonably likely to contribute to a forklift crushing and killing a miner.

I find that both Citation Nos. 8689027 and 8689028 were the result of Respondent's high negligence because its agent, foreman Kaawaloa, admittedly knew of the violations but did not abate them and affirmatively avoided recording defects. (Tr. 175). Foremen are the agents of the operator and their negligent actions can be imputed to the operator. *Nelson Quarries, Inc.*, 31 FMSHRC 318, 329 (2009). The failure to address known conditions due to a desire to continue production is highly dangerous to miners. Not recording conditions is also dangerous, as it allows those conditions to exist and multiply without abating the hazards. Both conditions existed for several days and multiple shifts. Both conditions posed serious safety risks.

A penalty of \$1,200.00 is appropriate for Citation No. 8689027 and a penalty of \$1,200.00 is appropriate for Citation No. 8689028.

B. Citation No. 8689025 and Order No. 8689026

On March 23, 2012, Inspector Wiedeman issued Citation No. 8689025 under section 104(d)(1) of the Mine Act, alleging a violation of section 56.14101(a)(2) of the Secretary's safety standards. The citation states, in part, that the parking brake on a Ford F-450 service truck failed to function when tested. The truck traveled upon multiple grades and in areas with heavy foot traffic. Kaawaloa knew for at least a week that the parking brake was defective. (Ex. G-1). Inspector Wiedeman determined that an injury was reasonably likely to occur and that such an injury could reasonably be expected to be fatal. Further, he determined that the violation was S&S, the operator's negligence was high, that one person would be affected, and that the violation was the result of Respondent's unwarrantable failure to comply with a mandatory safety standard. Section 56.14101(a)(2) of the Secretary's regulations requires, in part, "[i]f equipped on self-propelled mobile equipment, parking brakes shall be capable of holding the equipment with its typical load on the maximum grade it travels." 30 C.F.R. § 56.14101(a)(2).

³ Verbal notice is not sufficient because section 56.14100(d) requires that "[d]efects ... shall be reported to *and* recorded by the mine operator." 30 C.F.R. § 56.14100(d) (emphasis added).

The Secretary proposed a penalty of \$2,000.00 for this citation.

On March 23, 2012, shortly after issuing Citation No. 8689025, Inspector Wiedeman issued Order No. 8689026 under section 104(d)(1) of the Mine Act concerning the same underlying conditions as Citation No. 8689025, alleging a violation of sections 56.14100(d) and 56.14100(a) of the Secretary's safety standards, in the alternative. The order states, in part, "The foreman knew the parking brake was not functioning properly and did not record it on the exam." (Ex. G-2). Inspector Wiedeman determined that an injury was reasonably likely to occur and that such an injury could reasonably be expected to be fatal. Further, he determined that the violation was S&S, the operator's negligence was high, that one person would be affected, and that the violation was the result of Respondent's unwarrantable failure to comply with a mandatory safety standard. Section 56.14100(a) of the Secretary's regulations requires, in part "[s]elf-propelled mobile equipment to be used during a shift shall be inspected by the equipment operator before being placed in operation on that shift." 30 C.F.R. § 56.14100(a). Subsection (d) is set forth above. The Secretary proposed a penalty of \$2,000.00 for this order.

Discussion and Analysis

The parking brake cited in Citation No. 8689025 violated section 56.14101(a)(2) because it was not capable of holding the cited vehicle on the steepest grade it traveled. Although they disagree about the circumstances of the brake test, Inspector Wiedeman and Kaawaloa agree that the parking brake was unable to stop the motion of the cited vehicle. (Tr. 43, 171). I credit both Inspector Wiedeman's and Kaawaloa's testimony that the parking brake was defective and I credit the inspector's testimony that the brake defect prevented the brake from holding the vehicle on the steepest grade it traveled.

I find that Citation No. 8689025 was S&S. Respondent argues that the defective parking brake did not pose a hazard; I disagree. I credit the inspector's testimony that defective parking brakes can cause fatalities; MSHA's "Rules to Live By" fatality prevention list includes section 56.14100 because brake problems are a leading cause of fatalities in mines.

The cited brake defect was reasonably likely to contribute to an injury. Respondent argues that a defective parking brake is unlikely to cause injury because a vehicle would not "pop-out of gear," but defective parking brakes are a leading cause of fatalities in mines according to the "Rules to Live By." The cited vehicle, furthermore, traveled upon various grades. (Tr. 181). The vehicle was likely to stop upon one of those grades. Inspector Wiedeman testified, and Respondent did not dispute, that the Mine was "saturated" with people, which increases the likelihood of an injury being suffered in the event of a mishap. (Tr. 16, 27, 49-50). Respondent's argument that the safe operation of the vehicle by Kaawaloa meant that the defective parking brake had no likelihood of contributing to an injury fails. Chocking of tires and turning wheels into berms should be used in addition to a parking brake. Kaawaloa, furthermore, admitted that he failed to follow safety regulations by not fixing the brake, which makes it uncertain that he would adhere to other safety practices. (Tr. 167). The busy area where the vehicle operated made it reasonably likely that Citation No. 8689025 would contribute to fatally crushing a miner.

I find that Order No. 8689026 was a violation of section 56.14100(d). As stated above, defective parking brakes affect safety. Kaawaloa and the inspector both testified that Kaawaloa examined the truck and knew of the condition of the brake, but did not record the defect. (Tr. 42-43, 166-167). Kenneth Windham, Respondent's safety coordinator, also admitted that the defective parking brake of the cited truck was not documented. (Tr. 145). Respondent argues that Kaawaloa's knowledge of the defect undermines the violation, but making a record of defects found during preoperational examinations is required, even if a foreman is aware of a particular defect.⁴

I find that Order No. 8689026 was S&S. Respondent misinterpreted the nature of a section 56.14100(d) S&S violation. Respondent essentially argues that because the foreman was aware of the defective parking brake, failing to inspect the vehicle and record defects did not make the parking brake more likely to injure a miner. A violation of section 56.14100(d), however, relates to performing proper examinations upon equipment. The parking brake defect underlies Order No. 8689026 and provides both proof of a failure to record a defect as well as a specific example of the hazards likely to exist due to failing to properly examine vehicles. The violation and its S&S designation, however, are based upon the failure to record hazardous defects found during an examination. Not recording defects increases the likelihood that dangerous conditions will not be found or repaired, which is why the examination records are required. Failing to create records of hazardous defects is dangerous. Citation No. 8689026 is likely to cause a serious injury for the same reasons as Citation No. 8689025, but under continued normal mining operations Order No. 8689026 is also likely to contribute to an injury because the failure to record defects can lead to numerous and multiple hazards remaining unrepaired or unaddressed, as discussed with respect to Citation No. 8689028, above.

⁴ Respondent's argument that it did not violate section 56.14100(d) because it is "irrelevant" whether Kaawaloa recorded the defective brake because he knew that the condition existed and that it did not affect safety is inaccurate. As stated above, a defective parking brake does affect safety. The deliberate failure to record defects also affects safety regardless of the underlying condition because a failure to record any defect can lead to the creation of other hazardous conditions exposing miners to danger for a longer period of time.

I find that both Citation No. 8689025 and Order No.8689026 were the result of Respondent's high negligence and unwarrantable failure.⁵ Respondent's argument that an unwarrantable failure designation requires a high degree of danger is inaccurate. Although a high degree of danger posed by a cited condition is an important factor when considering an unwarrantable failure designation, it is not a requirement. It is one of several factors that must be considered in light of the facts of the case. *See e.g. Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000). I find, furthermore, that the cited conditions did pose a high degree of danger because the failure to record the defective parking brake could contribute to a fatal injury. Respondent's foreman admitted that he knew of the defective parking brake and admitted that he did not record the defect. Both were obvious, Respondent made no effort to abate them, and the defective brake existed for at least several days. There are no mitigating circumstances. High negligence and unwarrantable failure designations were designed for situations where an operator is aware of conditions that pose safety hazards, but chooses to ignore those conditions for the sake of production, which Respondent's agent admitted was the situation presented here. The agent demonstrated aggravated conduct because his actions were intentional and reckless.

A penalty of \$2,000.00 is appropriate for Citation No. 8689025 and a penalty of \$2,000.00 is appropriate for Order No. 8689026.

II. APPROPRIATE CIVIL PENALTIES

Section 110(i) of the Mine Act sets forth the criteria to be considered in determining an appropriate civil penalty. Respondent has no history of previous violations as set forth in Exhibit G-17. At all pertinent times, Respondent was a small operator. The violations were abated in good faith. There was no proof that the penalties assessed in this decision will have an adverse effect on Respondent's ability to continue in business. The gravity and negligence findings are set forth above.

⁵ Unwarrantable failure is defined by such conduct as "reckless disregard," "intentional misconduct," "indifference" or a "serious lack of reasonable care." *Emery Mining Corp.*, 9 FMSHRC at 2003; *see also Buck Creek Coal, Inc. v. FMSHRC*, 52 F. 3d 133, 136 (7th Cir. 1995). Whether conduct is "aggravated" in the context of an unwarrantable failure analysis is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist, such as the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator's efforts in abating the violative condition, whether the violation is obvious or poses a high degree of danger, and the operator's knowledge of the existence of the violation. *See e.g. Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000). Repeated similar violations are relevant to an unwarrantable failure determination to the extent that they serve to put an operator on notice that greater efforts are necessary for compliance with a standard. *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992).

III. ORDER

For the reasons set forth above, Citation Nos. 8689025 and 8689027 and Order No. 8689026 are **AFFIRMED**. Citation No. 8689028 is **MODIFIED** to increase the negligence from Moderate to High. Consolidated Rebar, Inc., is **ORDERED TO PAY** the Secretary of Labor the sum of **\$6,400.00** within 30 days of the date of this decision.⁶

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

Distribution:

Bryan Kaufman, Esq., Office of the Solicitor, U.S. Department of Labor, 1999 Broadway, Suite 800, Denver, CO 80202 (Certified Mail)

David W. Donnell, Esq., Robert D. Peterson Law Corporation, 3300 Sunset Boulevard, Suite 110, Rocklin, CA 95677 (Certified Mail)

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**

7 PARKWAY CENTER
875 GREENTREE ROAD, SUITE 290
PITTSBURGH, PA 15220
TELEPHONE: (412) 920-2682
FAX: (412) 928-8689

September 17, 2013

MICHAEL E. TRENT,	:	DISCRIMINATION PROCEEDING
Complainant,	:	
	:	
v.	:	Docket No. SE 2013-213-DM
	:	Case No. SE-MD 13-05
	:	
	:	
CEMEX CONSTRUCTION	:	
MATERIALS ATLANTIC, LLC,	:	Mine: Knoxville Cement Plant
Respondent	:	Mine ID: 40-00840

**ORDER GRANTING THE RESPONDENT'S
MOTION FOR SUMMARY DECISION**

Appearances: Michael E. Trent, 2111 Rosewood Road, Knoxville, TN 37924,
Complainant

Michelle C. Whitter, Esq., Jackson Kelly PLLC, 1099 18th St., Suite 2150,
Denver, CO 80202, for Respondent

K. Brad Oakley, Jackson Kelly, PLLC, 175 E. Main St., Suite 500, P.O.
Box 2150, Lexington, KY 40507, for Respondent.

Before: Judge Andrews

This case is before me upon a discrimination complaint filed by Michael E. Trent (“Complainant”) pursuant to Section 105(c) of the Federal Mine Safety and Health Act of 1977 (the “Act” or “Mine Act”), 30 U.S.C. § 815(c). Trent is a *pro se* Complainant. Respondent has filed a Motion for Summary Decision. Trent has not filed an opposition, and has not responded to numerous attempts by this court to contact him. For the reasons that follow, the Motion for Summary Decision is Granted.

Procedural Background

Trent filed a discrimination complaint with the Mine Safety and Health Administration (MSHA) on November 30, 2012, after he was terminated on August 28, 2012 from his position in Utility-Production with Respondent. On January 3, 2013, MSHA sent Trent a letter determining that the facts disclosed during the investigation did not constitute a violation of Section 105(c). Trent filed an appeal of MSHA’s determination on February 4, 2013, which became the instant action. The case was repeatedly delayed, at Trent’s request, in order to provide him time to secure counsel. Trent ceased responding to repeated communications from

this Court, and it is presumed that he did not secure counsel. On July 11, 2013, Respondent filed the instant Motion for Summary Decision. Repeated attempts by this Court to reach Trent by certified mail, e-mail, and phone went unheeded. However, a signature card signed by Trent indicates that he received the communications from this court, including a copy of the Motion and a letter providing an August 1, 2013 deadline to respond in some fashion.

EXHIBITS

Attached to Respondent's Motion for Summary Decision were a number of exhibits, described herein.¹

Exhibit A is Trent's Discrimination Complaint, November 30, 2012.

Exhibit B is Trent's Discrimination Report attached to the Discrimination Complaint. It includes a handwritten statement of the alleged incident, as well as a 7-page typed statement.

Exhibit C is the January 3, 2013 determination letter from MSHA to Trent.

Exhibit D is the February 4, 2013 appeal by Trent.

Exhibit E is Respondent's First Set of Discovery Requests.

Exhibit F is Trent's response to discovery requests.

ISSUES

At issue is whether Trent has alleged a claim of protected activities under Section 105(c) of the Act.

CONTENTIONS OF THE PARTIES

The Respondent argues that Trent failed to allege a prima facie case of discrimination under the Mine Act because he failed to describe a protected activity. The Complainant alleges that he was terminated for improperly performing a task for which he was not task trained.² RX-D. Specifically, Trent alleges that he was fired for violating company policy in regards to the lock out tag out procedures of the FK pump. *Id.* He appears to make an argument of pretext and disparate treatment in alleging that other employees who have similarly violated that policy were not terminated. *Id.*

¹ All exhibits were submitted by Respondent and will be cited as RX- followed by a letter.

² The Complainant did not provide any filings in this matter, so his previous discrimination filings will serve as his contentions.

LAW AND LEGAL AUTHORITY

Commission Rule § 2700.67 permits a party to file a Motion for Summary Decision at any time after the commencement of a proceeding, provided that it is not within 25 days before the date chosen for hearing. Such a motion will be granted if there is no genuine issue of material fact and if the moving party is entitled to summary decision as a matter of law. 29 C.F.R. § 2700.67. As the Commission observed in *Hanson Aggregates New York, Inc.*, 29 FMSHRC 4, (Jan. 2007), (“*Hanson*”) it “has long recognized that [] ‘[s]ummary decision is an extraordinary procedure,’” and [it] has analogized it to Rule 56 of the Federal Rules of Civil Procedure, under which “the Supreme Court has indicated that summary judgment is authorized only ‘upon proper showings of the lack of a genuine, triable issue of material fact.’” *Energy West Mining Co.*, 16 FMSHRC 1414, 1419 (July 1994) (quoting *Missouri Gravel Co.*, 3 FMSHRC 2470, 2471 (Nov. 1981); *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986)).*Hanson* at *9. Further, the Commission looks “at the record on summary judgment in the light most favorable to ... the party opposing the motion,” and that “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.” *Poller v. Columbia Broadcasting Sys., Inc.*, 368 U.S. 464, 473 (1962); *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). Mindful of the procedural rule and the Commission's words, the Court concludes that there is no genuine issue of material fact and that Highland is entitled to summary decision as a matter of law.

Section 105(c) of the Mine Act protects miners from discharge, discrimination, or other interference of the miner’s exercise of a statutory right. Such statutory rights include, but are not limited to, filing or making a complaint relating to the Act, making a complaint of an alleged danger or safety or health violation in a coal or other mine, or institution any proceeding under the Act against an operator. 30 U.S.C. 815(c)(1).

FACTS

The relevant facts of this case are not in dispute. Trent worked as a production worker for Cemex. RX-A. He was terminated on August 28, 2012 for violating the company’s Lock-out/Tag-out policy. *Id.* Trent alleges that he was not task trained on the FK pump, but that he did not object, complain, or refuse to do the task. RX-B. D. Another employee who violated the policy, Scott Stratton, was not terminated. RX-B.

ANALYSIS

The Mine Act protects miners and applicants for employment from discrimination motivated by the miner’s protected activity. *See Tanglewood Energy, Inc.*, 19 FMSHRC 833 (May 1997). The Commission has held that a complainant in a discrimination proceeding has the burden of establishing a *prima facie* case of discrimination. *Sec. of Labor obo David Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799-2800 (Oct. 1980). In order to establish such a *prima facie* case, the complainant must present evidence “sufficient to support a conclusion that the individual engaged in protected activity and that the adverse action complained of was motivated in any part by that activity.” *Sec. of Labor obo Donald E. Zecco v. Consolidation Coal Co.*, 21 FMSHRC 985, 989, (Sept. 1999). Though the *prima facie* case requirement is minimal,

the complainant must present some facts upon which the trier of fact can find retaliation. The Commission has stated:

To make out a prima facie case of discrimination, the complainant need only “present[] evidence sufficient to support a conclusion that the individual engaged in protected activity and that the adverse action complained of was motivated in any part by that activity.” See *Driessen*, 20 FMSHRC at 328 (emphasis added). This burden of proof is lower than the ultimate burden of persuasion, which the complainant must sustain as to the overall question of whether section 105(c)(1) has been violated. See *EEOC v. Avery Dennison Corp.*, 104 F.3d 858, 861 (6th Cir. 1997) (holding that “[t]here must be a lower burden of proof to sustain a prima facie case than to win a judgment on the ultimate issue of discrimination”); *Texas Dep’t of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981) (holding that “the burden imposed on a plaintiff at the prima facie stage is not onerous”); *McGuinness v. Lincoln Hall*, 263 F.3d 49, 53 (2d Cir. 2001) (stating that the burden of establishing a prima facie case of discrimination is “minimal”) (citing *St. Mary’s Honor Center v. Hicks*, 509 U.S. 502, 506 (1993); *Young v. Warner-Jenkinson Co., Inc.*, 152 F.3d 1018, 1022 (8th Cir. 1998) (“‘The prima facie burden is not so onerous as, nor should it be conflated with, the ultimate issue’ of discriminatory action.”)⁶ To establish a prima facie case, it is sufficient that the alleged discriminatee present evidence from which the trier of fact could infer retaliation. See *Young*, 152 F.3d at 1022 (concluding that plaintiff “produced evidence sufficient to raise an inference of discrimination”); see also *Long v. Eastfield College*, 88 F.3d 300, 304-05 n.4 (5th Cir. 1996) (stating that at prima facie stage, plaintiff need not prove that protected activity was sole factor motivating employer’s challenged decision; “[t]he ultimate determination . . . is whether the conduct protected . . . was a ‘but for’ cause of the adverse employment decision”).

Jayson Turner v. National Cement Co. of California, 33 FMSHRC 1059, 1065 (May 2011). In the instant case, Trent has failed to meet even that minimal burden.

The Mine Act seeks to protect miners to refuse work that he believes would expose him to an identifiable danger. *Mountain Top Trucking Co., Inc.*, 1997 WL 34994, *23 (ALJ) (Jan. 1997). In the instant case, Trent could have refused to perform the task that he was not trained to perform, or he could have complained. Had he engaged in either of these choices, his actions would be protected. However, Trent performed the task, and when he did so in violation of a company policy he was terminated. “Any claim of protected activity that is not grounded on an alleged violation of a health or safety standard or which does not result from some hazardous condition or practice existing in the mine environment for which the operator is responsible falls without the penumbra of the statute. *Sec. of Labor obo Danny H. Bryant v. Clinchfield Coal Co.*, 4 FMSHRC 1379, 1421 (July 1982)(ALJ). According to the undisputed facts, there was no protected activity.

Trent appears to argue that other miners who similarly violated the policy were not terminated. Had Trent engaged in protected activity, this fact could be evidence of disparate treatment or pretext. However, in the instant case, it does not violate Section 105(c) of the Act.

Because Trent has not alleged a protected activity, he has not met his burden of presenting a prima facie case of discrimination. Wherefore, the Respondent's Motion for Summary Decision is **GRANTED**.

ORDER

It is **ORDERED** that the Respondent's Motion for Summary Decision is **GRANTED**.

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

Distribution:

Michael E. Trent, 2111 Rosewood Road, Knoxville, TN 37924, Complainant

Michelle C. Whitter, Esq., Jackson Kelly PLLC, 1099 18th St., Suite 2150, Denver, CO 80202,
for Respondent

K. Brad Oakley, Jackson Kelly, PLLC, 175 E. Main St., Suite 500, P.O. Box 2150, Lexington,
KY 40507, for Respondent.

/mzm

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 18, 2013

OAK GROVE RESOURCES, LLC,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. SE 2010-349-R
	:	Order No. 6698829; 01/06/2010
v.	:	
	:	Docket No. SE 2010-353-R
	:	Order No. 6698828; 01/06/2010
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Mine: Oak Grove Mine
ADMINISTRATION, (MSHA),	:	Mine ID 01-00851
Respondent	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. SE 2010-828
Petitioner	:	A.C. No. 01-00851-220638
	:	
v.	:	
	:	
OAK GROVE RESOURCES, LLC,	:	Mine: Oak Grove
Respondent	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. SE 2012-306
Petitioner	:	A.C. No. 01-00851-281172-A
	:	
v.	:	
	:	
MIKE SUMPTER, employed by,	:	Mine: Oak Grove
OAK GROVE RESOURCES, LLC,	:	
Respondent	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. SE 2012-308
Petitioner	:	A.C. No. 01-00851-281172-A

v.	:	
	:	
	:	
REX HARTZELL, employed by,	:	Mine: Oak Grove
OAK GROVE RESOURCES, LLC,	:	
Respondent	:	

DECISION

Appearances: Thomas Grooms, U.S. Department of Labor, Nashville, Tennessee, on behalf of the Secretary of Labor;
R. Henry Moore, Jackson Kelly, PLLC, Pittsburgh, Pennsylvania, on behalf of Oak Grove Resources, LLC, Mike Sumpter and Rex Hartzell

Before: Judge Zielinski

These cases are before me upon Notices of Contest and Petitions for Assessment of Penalty filed by the Secretary of Labor pursuant to sections 105(d) and 110(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815(d) and 820(c). The petition in SE 2010-828 alleges that Oak Grove Resources, LLC, is liable for four violations of the Secretary’s Safety Standards for Underground Coal Mines, and proposes the imposition of civil penalties in the amount of \$182,000.00. The petition in SE 2012-306 alleges that Mike Sumpter, an agent of Oak Grove, is personally liable for two violations of the standards, and proposes the imposition of civil penalties in the amount of \$14,300.00. The petition in SE 2012-308 alleges that Rex Hartzell, an agent of Oak Grove, is personally liable for two violations of the standards, and proposes the imposition of civil penalties in the amount of \$14,100.00. A hearing was held in Birmingham, Alabama, and the parties filed post-hearing briefs.

In mid-December 2009 and early January 2010, due to a combination of circumstances, excessive water accumulated in a bleeder system used by Oak Grove to ventilate the gob of an active longwall panel and a number of worked-out panels. The water, and a roof fall on the headgate side of the active panel, prevented required examinations of the bleeder entries. On January 6, 2010, an MSHA inspector issued four withdrawal orders based on conditions in the bleeder. Oak Grove promptly filed Notices of Contest of three of the orders pursuant to section 105 of the Act. An expedited hearing was held on its contest of Order No. 6698830, which curtailed mining on its 11-East longwall panel. The hearing was held in Birmingham, Alabama on January 26-28, 2010, and a bench decision was issued at the close of the hearing sustaining the order in all respects.¹ A written decision was issued on February 12, 2010,

¹ Pursuant to the parties’ stipulation, the record compiled in the 2010 proceeding has been made a part of the record in this proceeding. Stip. 8. The record consists of the transcript of the 2010 hearing, the transcript of the 2013 hearing and the exhibits introduced at the 2010

(continued...)

dismissing Oak Grove's contest. *Oak Grove Resources, LLC*, 32 FMSHRC 169 (Feb. 2010) (ALJ). Oak Grove's petition for review was granted by the Commission, which affirmed the decision. *Oak Grove Resources, LLC*, 33 FMSHRC 2657 (Nov. 2011). That decision has become final, and the validity of Order No. 6698830 as to Oak Grove has been established.

Remaining for decision are Oak Grove's contests of civil penalties assessed for the three remaining orders, the amount of the civil penalty to be imposed on Oak Grove for the violation charged in Order No. 6698830, and Sumpter's and Hartzell's contests of the assessments and petitions filed against them. For the reasons that follow, I find that Oak Grove committed two of the three remaining violations, and impose civil penalties in the total amount of \$61,000.00 against the operator. I find that Mike Sumpter and Rex Hartzell are each liable under section 110(c) for one violation and impose civil penalties in amounts of \$3,500.00 and \$2,500.00 against them respectively.

Findings of Fact - Conclusions of Law

Oak Grove Resources operates the Oak Grove Mine, an underground coal mine, in Jefferson County, Alabama. A substantial amount of its coal production is obtained through operation of longwall mining equipment, and it has mined a number of longwall panels in the East section of the mine, served by the Main East Bleeder system. In December of 2009, Oak Grove experienced problems with excessive water in the bleeder entries. Efforts to control the water and maintain the travelability of the bleeder entries were proving inadequate. In mid-December, parts of the bleeder became inaccessible, which prevented examination and monitoring of the system required by the Secretary's regulations and Oak Grove's approved ventilation plan. Efforts to address the water problems were further frustrated by MSHA's issuance of orders preventing further work pending resolution of impermissible atmospheric conditions behind seals in another area of the mine. MSHA conducted an inspection of the bleeder system on January 6, 2010, during which the four withdrawal orders at issue in these proceedings were issued.

The panel being mined when the challenged enforcement actions were taken was designated "11 East LW38" which, at the time, was the north-most of a series of panels mined in that section. The panel ran in an east-west direction. Mining commenced at the east end on March 2, 2009, and had proceeded west approximately 6,000 feet by December 15, 2009. The mined-out area of the 11-East panel, the "gob," was ventilated by the Main East Bleeder system, the primary component of which was the No. 6 fan, located off the northeast corner of the panel. That centrifugal exhaust fan also provided ventilation for fourteen or more other mined-out longwall panels through lengthy bleeder entries that ran from the end of the track entry, to the east and then north behind (east of) the old panels. The bleeder system is depicted in a number of exhibits, notably, Government Exhibit No. 35. The bleeder entry was accessed from the track entry. There was a low roof in the first part of the bleeder system, and it had to be traversed

¹(...continued)

hearing, as supplemented for the 2013 hearing. Transcript citations to the 2013 hearing transcript.

largely by “duckwalking.” It took the better part of a shift to travel the bleeder entry from the end of the track to Measuring Point Location (“MPL”) No. 781, a bleeder examination point near the southeast corner of the 11-East panel. Prior to January 6, 2010, persons traveling in the bleeder entry had no ability to communicate with the surface or miners in other locations of the mine.

The Oak Grove mine liberated in excess of one million cubic feet of methane in a 24-hour period, and was subject to spot inspections by MSHA pursuant to section 103(i) of the Act. 30 USC § 813(i). Mined-out areas, like the 11-East gob, continue to generate methane, and must be ventilated “so that methane-air mixtures and other gases, dusts, and fumes from throughout the worked-out areas are continuously diluted and routed into a return air course or to the surface of the mine.” 30 C.F.R. § 75.334(a)(1). The ventilation system for mined-out areas must be examined in its entirety at least every seven days. 30 C.F.R. § 75.364(a). Part of the weekly examination must include:

At least one entry of each set of bleeder entries used as part of a bleeder system under § 75.334 shall be traveled in its entirety. Measurements of methane and oxygen concentrations and air quantities and a test to determine if air is moving in the proper direction shall be made at the measurement point locations specified in the mine ventilation plan to determine the effectiveness of the bleeder system.

30 C.F.R. § 75.364(a)(2)(iii).

If the bleeder system used does not continuously dilute and move methane-air mixtures and other gases, dusts, and fumes away from worked-out areas into a return air course or to the surface of the mine, or it cannot be determined by examinations under § 75.364 that the bleeder system is working effectively, the worked-out area shall be sealed.

30 C.F.R. § 75.334(d).

Oak Grove had positioned pumps in the bleeder entries to control water accumulations. It began to experience problems with the pumps around mid-December, 2009. By the end of the month, the problems had grown, and there were significant accumulations of water in low spots of the bleeder entries that prevented access to MPLs that were required to be examined to evaluate the effectiveness of the bleeder system.² On December 30, 2009, an MSHA inspector issued a citation to Oak Grove for failing to make bleeder examinations required by section 75.364(a)(2)(iii). On January 1, Oak Grove initiated efforts to drill bore holes down to the bleeder entries near the rear of the 11-East panel to provide electrical power for more powerful pumps, communication lines, and additional compressed air capacity.

² Oak Grove’s efforts to repair and replace pumps were stymied by several orders issued by MSHA barring miners from going underground in those areas. The orders related to dangerous atmospheres behind seals located several miles from the 11-East panel.

On January 4 Oak Grove began to operate the longwall in the 11 East panel, despite the continued inability to reach MPLs and evaluate the effectiveness of the bleeder system, as required by section 75.364(a)(2)(iii). Oak Grove ostensibly believed that an alternative method of evaluating the effectiveness of the bleeder system had shown that it was operating effectively.

On January 5, 2010, Edward Boylen, an MSHA inspector, commenced a regular inspection of the Oak Grove mine. He met with mine officials, reviewed records, and became aware that there had been roof falls in the bleeder entries on the headgate side of the 11-East panel and water accumulations in the lengthy tailgate side of the bleeder system. He decided to travel to the longwall and conduct a spot methane inspection, but did not complete it. When he exited the mine, he examined charts of pressure measurements at the No. 6 exhaust fan, and found that the pressure differential had increased by more than 50% since December 15, 2009, indicating that there were significant restrictions in the bleeder system's air flow. That same day, members of the United Mine Workers of America, the union representing miners at Oak Grove, met with MSHA officials and expressed concerns about the safety of miners who were involved in efforts to pump water from the bleeder system.³

MSHA was very concerned about information reported by the Union members about conditions in the bleeder entries. MSHA phoned Oak Grove on January 5 and informed it that the longwall should not be in production. Oak Grove called back to discuss the issue, and questioned MSHA's authority to impose such a condition in the absence of any official enforcement action. Joseph O'Donnell, Jr., assistant district manager for MSHA's District 11, then advised Oak Grove to "forget" the earlier call, and stated that MSHA would see them in the morning. Oak Grove operated the longwall on the evening shift on January 5 and the owl shift on January 6.

On the morning of January 6, 2010, Boylen and Jacky Shubert, an MSHA field office supervisor, arrived at the mine to conduct an inspection of the bleeder system. They met with Oak Grove officials, examined records of weekly bleeder examinations and noted that a complete examination had last been accomplished on December 14, 2009. Ex. G-9. The records reflected that the mine had been idle on December 21 due to an order related to the seal problem. The records of examinations on December 29 and January 4 reflected that two MPLs on the headgate side of the 11-East panel could not be examined because the entries were impassible due to a roof fall, and that no measurements had been taken at nine other MPLs established in Oak Grove's approved ventilation plan. Oak Grove managers readily acknowledged that required measurements had not been taken at 11 MPLs since December 14.

Shubert and Boylen traveled to the South end of the Main East Bleeder system, and began to walk up the bleeder entry. They encountered two areas where roof material had spalled from around roof bolts, leaving the plates up to six inches away from contact with the roof. At 10:15 a.m., Boylen issued Order No. 6698828, charging Oak Grove with a roof control violation. As

³ Oak Grove officials also met with MSHA on January 5, on a variety of topics. The meeting was not related to the UMWA's meeting, and Oak Grove officials were unaware of the other meeting.

the inspection proceeded, accumulations of water were found in five locations that were determined to present unsafe travel conditions. One accumulation, at MPL 476, was waist-to-chest-deep for a distance as far as a cap light would shine. Boylen and Shubert decided not to proceed further. That afternoon, Boylen issued Order No. 6698829, for unsafe travel conditions posed by the water accumulations; Order No. 6698830, for failing to seal the worked-out areas and operating the longwall, when required examinations to evaluate the effectiveness of the bleeder system had not been conducted; and Order No. 6698831 for failing to conduct proper preshift examinations of the areas where miners were traveling and working in the bleeder system. The orders were issued pursuant to section 104(d)(2) of the Act, and charged that the violations were the result of Oak Grove's unwarrantable failures to comply with the standards.⁴

Docket No. SE 2010-828 - Violations charged against Oak Grove

Order No. 6698828

Order No. 6698828 was issued by Boylen⁵ at 10:15 a.m. on January 6, 2010, pursuant to section 104(d)(2) of the Mine Act. It alleges a violation of 30 C.F.R. § 75.202(a) which states, "[t]he roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock

⁴ Section 104(d)(2) of the Act provides:

(2) If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) until such time as an inspection of such mine discloses no similar violations. Following an inspection of such mine which discloses no similar violations, the provisions of paragraph (1) shall again be applicable to that mine.

The underlying section 104(d)(1) withdrawal order had been issued on October 21, 2003, and Oak Grove had not experienced a "clean" inspection since that date. Consequently, it remained on the section 104(d)(2) "chain." Ex. G-5, G-6.

⁵ Boylen had considerable mining experience involving design, set-up and operation of longwall mining systems. However, he had limited experience as an MSHA inspector, having received his authorized representative card approximately two months prior to the inspection. Tr. 58.

bursts.” The violation was described in the “Condition and Practice” section of the citation as follows:⁶

The roof, face and ribs of the areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts. Areas located in the Main East Bleeders were observed to not have been safely supported for travel by miners in the following locations: (1) In the 4 East panel area in the No. 4 entry, along the barrier pillar, an area of 30 feet has 7 bolts that have no contact with the roof since the roof material has spalled from around the plates and is unsupported; (2) Two blocks in by the above, also in the Main East Bleeders, the center of the entry is unsupported because 12 bolts have no support around the roof plates. The roof is unsupported for a distance of approximately 40 feet. In these two areas, there are deteriorated roof plates. Certified Examiners have examined this area each shift and miners have traveled this way for at least 10 shifts. The mine operator has engaged in aggravated conduct constituting more than ordinary negligence by allowing employees to travel in this area. This violation is an unwarrantable failure to comply with a mandatory standard.

Ex. G-39.

Boylen determined that the violation was highly likely to cause a permanently disabling injury, that it was significant and substantial, that two persons were affected, and that the operator’s negligence was high, and rose to the level of unwarrantable failure. A civil penalty in the amount of \$38,500.00 was specially assessed for the violation.

The Violation

During the inspection of the Main East bleeder system, Boylen and Shubert were accompanied by Larry Pasquale, an Oak Grove safety representative, Kenny Nichols, an Oak Grove foreman, and Randy King, a miners’ representative with the United Mine Workers of America. They rode on a track-mounted vehicle to the track terminus, and traveled on foot from that point. The first 1,500 feet of the bleeder had a relatively low roof, which required crawling, or duck walking; very strenuous travel.

After entering the bleeder and proceeding through the low section, they encountered a crew of third-shift miners on their way out, who had stopped to rest before traveling through the low area. They related that another MSHA inspector had been in the bleeder a few days earlier, and had instructed that the route of travel through the bleeder system should be marked. Tr. 37. In response to that instruction, reflective tape had been hung from roof bolts, marking the travel

⁶ Grammar and spelling errors have been corrected in quotations from documents prepared in the field, and post-issuance modifications have been included where appropriate.

route. Boylen inquired why the miners appeared to be wet, and one responded that “you’d be wet too if you had to walk through water up to your neck.” Tr. 39. Nichols, verified that miners had to travel through deep water to reach the newly installed bore hole where work was being done to connect electric, air and communication lines.

After proceeding a considerable distance, to an area behind an old panel designated “3 East LW22”, Boylen observed seven roof bolts that he believed were not effectively supporting the roof. Ex. G-35. The plates on the bolts were not in contact with the mine roof, because 4 to 6 inches of material had spalled away from the roof, exposing the shafts of the bolts.⁷ Tr. 43-45. Oak Grove’s roof control plan required that four bolts be installed across the 20-foot wide entry, in rows spaced 5 feet apart. The subject bolts were near the center of the entry, in different rows, and the condition extended for 30 feet. Boylen estimated that 30% of the area was not properly supported. Tr. 45. Material had also spalled from the ribs, and was lying on the mine floor, 2 to 3 feet out from the ribs. Approximately two breaks further inby, Boylen encountered a similar condition. There were 12 similarly defective bolts near the center of the entry in an area that extended for 40 feet. He noticed marks on the floor where something had been dragged through, and was told that a 13 horsepower pump had been brought in to address the water problems. Tr. 48. It had been dragged down the center of the entry because of the debris near the ribs. Boylen marked the areas on a map of the mine. Tr. 33; Ex. 35.

The material that had spalled from the ribs made walking next to the ribs difficult. Because of the reflective tape, and the rib spalling, Boylen believed that the route most miners would have taken through the entry would have placed them under the subject bolts. Tr. 46. Boylen did not make any detailed notes or sketches of the layout of the bolts he was concerned with. However, he conceded that miners could pass through the areas without traveling under the subject bolts. Tr. 61. He and the rest of the inspection party traveled through both areas, and passed through again on their way out of the bleeder. Tr. 60, 67.

Based on the overall conditions he observed, Boylen believed that the roof in the areas where the subject bolts were located was not supported or otherwise controlled to protect miners from falls of the roof.

Oak Grove contends that the fact that the bolt plates were not in contact with the roof did not render the support inadequate. The area had been mined many years earlier, most likely in the 1990s, and, over time, roof material had spalled from around the bolts. Other roof control issues had prompted the installation of cribs and timbers in some areas of the bleeder entries, but not at the specific locations cited. There was no freshly fallen roof material on the floor of the mine, and the roof and bolts had most likely been in that condition for a considerable period of time. Boylen knew that the area had been mined 10 to 15 years earlier, and recorded in his field notes that the conditions had existed for “a long period of time - months.” Ex. G-3 at 12. The bleeder

⁷ The term “spall,” in this context, means “[t]o break off in layers parallel to the surface.” American Geological Institute, *A Dictionary of Mining, Mineral and Related Terms* 168 (2d ed. 1996) at 524.

was inspected by MSHA every quarter, and the conditions would have existed during recent MSHA inspections. The crew that Boylen encountered in the bleeder had informed him that another MSHA inspector, identified as Tim Foster, had been in the bleeder only a few days earlier. Tr. 37. Pasquale and Rex Hartzell confirmed Foster's travel through the bleeder on or about December 28, 2009. Tr. 170, 182, 231. Foster had instructed Oak Grove to mark the travel route through the bleeder with reflective tape, but had not issued a citation for the roof conditions.

Pasquale, who may have installed some of the original roof bolts, explained that the condition develops over time as flakes of coal fall or spall away from the roof after it is exposed to the atmosphere, and that the roof had been in that condition "for a good while." Tr. 159. In response to a question about the nature of the material of the mine roof, he replied that it was basically "little flakes of coal. No big lumps had fallen out, no pots or kettle bottoms Nothing like that." Tr. 183. He had walked the bleeder with MSHA inspectors on quarterly inspections, and stated that the roof was in the same condition as when he went through on an MSHA inspection at the end of October or early November. Tr. 170, 182. There was no "fresh" material that had fallen from the roof; and the material on the mine floor had been "walked on" during weekly examinations. Tr. 182.

Under normal conditions, the bleeder is traveled only once per week, by an examiner, who should be looking for hazardous conditions and should be able to identify conditions such as those that Boylen described as obvious. However, from mid-to-late December, and especially in early January after the seal problem was resolved, crews of rank-and-file miners were working deep in the bleeder installing pumps and making the connections of the electric, air and communication lines run down through the bore hole to increase Oak Grove's capacity to deal with water. Travel into the work site was arduous, and took several hours one-way. Miners traveling to the workplace, and especially those traveling out after having worked a shift, would have been exhausted and unlikely to have been paying close attention to surrounding conditions like the roof and ribs.

In *Canon Coal, Co.*, 9 FMSHRC 667, 668 (April 1987) (cited in *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1277 (Dec. 1998)), the Commission held that:

Questions of liability for alleged violations of this broad aspect of this standard [the precursor to the present section 75.202(a)] are to be resolved by reference to whether a reasonably prudent person, familiar with the mining industry and the protective purpose of the standard, would have recognized that hazardous condition that the standard seeks to prevent. Specifically, the adequacy of particular roof support or other control must be measured against the test of whether the support or control is what a reasonably prudent person, familiar with the mining industry and protective purpose of the standard, would have provided in order to meet the protection intended by the standard. We emphasize that the reasonably prudent person test contemplates an objective – not subjective – analysis of all the surrounding circumstances, factors, and considerations bearing on the inquiry in issue. (citations omitted)

In an enforcement proceeding under the Act, the Secretary has the burden of proving all elements of an alleged violation by a preponderance of the evidence. *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995), *aff'd, Sec'y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998); *ASARCO Mining Co.*, 15 FMSHRC 1303, 1307 (July 1993); *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989); *Jim Walter Resources, Inc.*, 9 FMSHRC 903, 907 (May 1987). Oak Grove contends that the Secretary has not carried his burden of proving that the conditions violated the standard.

The bolts in question were 4 to 8 foot fully grouted bolts. Fully grouted bolts form a beam of support for the main mine roof, when the resin, or glue, around the shaft of the bolts hardens. Unlike tension bolts, the plate is not forced up against the roof.⁸ It provides support only for the "skin" of the roof that it is in contact with, a very small percentage of the exposed roof area. The glued-in shaft of the bolt provides the primary roof support.⁹ Boylen generally agreed. Tr. 68-69. He obviously was concerned more with skin control of the roof, because his determination that likely injuries would consist of fractures, contusions and sprains, does not appear to have been premised upon a fall of the main mine roof.¹⁰ Tr. 54; Ex. G-3 at 13.

The critical question is whether the condition of the skin, or immediate mine roof was such that additional roof control measures were necessary to protect persons from hazards related to falls of roof material. Pasquale credibly described material that might fall from the mine roof as little flakes of coal. There were no lumps, pots, kettle bottoms, or other larger pieces that might cause injury. Boylen did not offer a markedly different description of the roof conditions. While he believed that the roof was failing, that opinion was a generalized evaluation of the overall condition of the roof, as he observed it from the time he entered the bleeder. Tr. 50-51. He did not note the presence of broken or cracked material, or any other defects in the subject area that posed a hazard. His sole focus appears to have been on the fact that the plates were no longer in contact with the roof. Tr. 43; Ex. G-3 at 9-10. At least two MSHA inspectors had been through the bleeder within the past two months, when virtually the same conditions would have existed, and neither identified them as a hazard. It is likely that the conditions, or substantially similar conditions, had existed for years, and that several MSHA inspectors had observed them

⁸ Tension bolts are anchored at their point of deepest penetration, and torque is applied forcing the plate against the mine roof. The upward pressure of the plate supplies the main roof support. Where a plate on a tension bolt is no longer in contact with the roof, virtually no roof support is provided and the bolt is nothing more than a steel rod hanging down in the drilled hole. *See American Coal Co.*, 35 FMSHRC ____ (June 13, 2013) (ALJ) (slip opinion at 9).

⁹ Pasquale related that the roof bolt manufacturer had advised him that after the resin had hardened around the bolt it really didn't matter whether the plate was there or not, a proposition that some MSHA inspectors had found humorous. Tr. 161-62, 184.

¹⁰ Boylen did not know the length of the bolts that had been installed. Tr. 70. He did not opine that the spalling of 4 to 6 inches of material rendered the bolts inadequate from a length standpoint.

without taking action. Nor had the conditions been reported as hazardous by certified persons conducting weekly examinations of the bleeder system.

I find that the Secretary has not met her burden of proving that a reasonably prudent person, familiar with the mining industry and protective purpose of the standard, would have provided additional support to the mine roof in the areas cited in order to meet the protection intended by the standard.¹¹ Accordingly, I find that the standard was not violated.

Order No. 6698829

Order No. 6698829 was issued by Boylen at 1:47 p.m. on January 6, 2010, pursuant to section 104(d)(2) of the Mine Act. It alleges a violation of 30 C.F.R. § 75.370(a)(1), which requires that mine operators develop and follow a ventilation plan approved by the MSHA district manager. The violation was described in the “Condition and Practice” section of the citation as follows:

The mine operator did not follow the Ventilation Plan submitted by the mine operator and approved by the MSHA District Manager on January 14, 2009. Page 1, Item D(3) of the ventilation plan states, “Bleeder Entries will be maintained and water will be pumped to maintain free air flow and safe travel.” Water causing unsafe travel was observed in the following locations: (1) In the Main East Bleeder Entry, between 4 East and 5 East, old longwall panels in the No. 4 entry, there existed water for a distance of approximately 400 feet in length and 28 inches deep. The water was mucky and black in color with tripping hazards laying in the water that could not be seen. (2) Water was also allowed to accumulate inby 2 blocks of MPL 423 between the 5th and 6th East Old Panels. The water was 100 feet in length and 24 inches deep. The water was mucky and black in color with tripping hazards laying in the water that could not be seen. (3) Water was allowed to accumulate 3 blocks inby MPL 423, in the No. 4 entry of the Main East Bleeders. The water was 50 feet in length and 24 inches deep. The water was mucky and black in color with tripping hazards laying in the water which could not be seen. (4) The water was also found 4 blocks inby the MPL 423, in the No. 4 entry. The water was 100 feet in length and 26 inches deep. The water was mucky and black in color with tripping hazards that could not be seen. (5) Water was also allowed to accumulate at MPL 476 in the Main East Bleeders, in the No. 4 entry. The water was waist to chest deep for a distance as far as a cap light would shine. The water was black in color and mucky. Certified Mine Examiners have examined this travel way each shift and miners have traveled this way for at least 10 shifts. The mine operator has engaged in aggravated conduct constituting more

¹¹ A similar issue was presented in *Big Ridge, Inc.*, 34 FMSHRC 2668, 2682-85 (Oct. 2012) (ALJ). There, I found that the immediate mine roof in an area where material had spalled away from between roof bolt plates was broken and cracked, and was not adequately supported or controlled, in violation of the standard.

than ordinary negligence by allowing employees to travel in this area. This violation is an unwarrantable failure to comply with a mandatory standard.

Ex. G-1.

Boylen determined that the violation was highly likely to cause a permanently disabling injury, that it was significant and substantial, that two persons were affected, and that the operator's negligence was high. He also determined that the operator's negligence rose to the level of unwarrantable failure. A civil penalty in the amount of \$38,500.00 was specially assessed for the violation.

The Violation

Oak Grove's approved ventilation plan provided, in pertinent part, that "[w]ater will be pumped [from bleeder entries] to maintain free airflow and safe travel." Ex. G-7. Boylen encountered significant accumulations of water in the bleeder at five locations, including in by MPL 476, where it was chest-deep.¹² He described the water in all locations as black and mucky, and there were stumbling hazards such as rocks, cement blocks, and pieces of wood and line curtain. Tr. 77-78, 96. Nichols told him that he had traveled through the water, and had fallen and lost his false teeth. Tr. 91.

Oak Grove did not present any evidence disputing Boylen's description of the water accumulations. In defense of the violation, it advances a novel argument that the plan provision does not require that safe passage be maintained at all times, but, rather, it "expresses a purpose or movement towards a goal, not necessarily achievement of the goal."¹³ Resp. Br. at 28. The argument is rejected. I find no ambiguity in the plan language. It requires that water be pumped to maintain safe travel at all times. The word "maintained" is included in numerous standards, and has been consistently interpreted as imposing an ongoing obligation, e.g., that warning devices on mobile equipment be "capable of performing on an uninterrupted basis and at *all* times." *Nally & Hamilton Enterprises, Inc.*, 33 FMSHRC 1759, 1763 (Aug. 2011) (emphasis in original).

¹² The depth of the water, as reflected in the order, exceeded MSHA's informal guideline that tolerated water as long as it did not exceed the height of typical boots, i.e., just below knee level. Tr. 112.

¹³ It is unfortunate that this argument was not advanced in open court, where it would have had to pass the proverbial "straight face" test.

The water accumulated in the bleeder entries presented a hazard to safe travel because of its murkiness and concealed stumbling hazards. The standard was violated.¹⁴

Significant & Substantial

The Commission reviewed and reaffirmed the familiar *Mathies*¹⁵ framework for determining whether a violation is S&S in *Cumberland Coal Res.*, 33 FMSHRC 2357, 2363-65 (Oct. 2011):

The S&S terminology is taken from section 104(d) of the Mine Act, 30 U.S.C. § 814(d), and refers to more serious violations. A violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. See *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In *Mathies*, 6 FMSHRC 1, the Commission further explained:

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

Id. at 3-4 (footnote omitted); accord *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria). An evaluation of the reasonable likelihood of injury should be made assuming continued normal mining operations. See *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985). The Commission has emphasized that 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 1834, 1836 (Aug. 1984).

....
....

¹⁴ Water had also accumulated in other areas of the bleeder, rendering them impassible. Ex. C-9. While safe travel through such areas was not maintained, the impassible areas did not present hazards to miners traveling the bleeder. Boylen's focus was on flooded areas that were passable, and were being traveled by miners.

¹⁵ *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984).

The Commission recently discussed the third element of the *Mathies* test in *Musser Engineering, Inc. and PBS Coals, Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010) (“*PBS*”) (affirming an S&S violation for using an inaccurate mine map). The Commission held that the “test under the third element is whether there is a reasonable likelihood that the hazard contributed to by the violation, i.e., [in that case] the danger of breakthrough and resulting inundation, will cause injury.” *Id.* at 1281. Importantly, we clarified that the “Secretary need not prove a reasonable likelihood that the violation itself will cause injury.” *Id.* The Commission concluded that the Secretary had presented sufficient evidence that miners who broke through into a flooded adjacent mine would face numerous dangers of injury. *Id.* The Commission also emphasized the well-established precedent that “the absence of an injury-producing event when a cited practice has occurred does not preclude a determination of S&S.” *Id.* (citing *Elk Run Coal Co.*, 27 FMSHRC 899, 906 (Dec. 2005); and *Blue Bayou Sand & Gravel, Inc.*, 18 FMSHRC 853, 857 (June 1996)).

A violation of a safety standard has been established. It contributed to a hazard, that a miner attempting to travel through the bleeder entry would trip or slip and fall and suffer an injury. Whether the violation was S&S turns on whether an injury was reasonably likely to result from the hazard contributed to and whether it would have been reasonably serious.

Oak Grove also advances novel arguments on the S&S issue. It contends that, since the provision is in the ventilation plan, it “must necessarily be directed to ventilation hazards and a S&S finding should not be based on stumbling hazards.” Resp. Br. at 32-33. It also contends that the exposure of the crews of miners who were working to correct the excessive water conditions should not be considered in evaluating the issue, and that the fact that no injuries were suffered by miners or the examiners who traveled through the water contradicts the inspector’s theoretical assessment. Like its argument on liability, these contentions are easily disposed of.

The plan requirement that water must be pumped from bleeder entries to maintain safe travel, obviously, is not restricted to hazards posed by ventilation. The plan references section 75.364’s requirement that weekly examinations be made of all worked out areas, including the requirement in subsection (a) that at least one entry in a set of bleeder entries be traveled in its entirety. The ability to travel bleeder entries free of all hazardous conditions is an essential element of the plan.

Mine examiners were required to travel the bleeder every week. Those who performed the examinations while the excessive water was present were exposed to the hazard contributed to by the violation. Crews of miners working to install pumps and connect electrical, air and communication lines that had been inserted into the mine through the bore hole were also subjected to the hazard contributed to. The argument that

their exposure should not be considered in evaluating whether the violation was S&S is not supported by any citation to authority and is nonsensical.¹⁶

It is well-settled that the fact that the hazard contributed to did not result in an injury does not preclude a finding of S&S. *Elk Run Coal Co., Inc.*, 27 FMSHRC 899, 906 (Dec. 2005).

A significant number of miners traveled through the hazardous water accumulations in the bleeder entries for a period of approximately one-to-two weeks. Travel to the work places was long and arduous, and they worked long shifts. I find that the hazard contributed to was reasonably likely to result in a reasonably serious injury, and was S&S. Boylen posited that miners could suffer broken bones or sprains and that injuries could be exacerbated by the length of time required to exit the bleeder and receive medical attention. I find that such an injury would most likely have resulted in lost work days or restricted duty, and that one person would have been affected.

Unwarrantable Failure

In *Lopke Quarries, Inc.*, 23 FMSHRC 705, 711 (July 2001), the Commission reiterated the law applicable to determining whether a violation is the result of an 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 such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991) ("R&P"); *see also Buck Creek [Coal, Inc. v. FMSHRC]*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test).

Whether conduct is "aggravated" in the context of an unwarrantable failure analysis is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist, such as the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator's efforts in abating the violative condition, whether the violation is obvious or poses a high

¹⁶ Under section 104(c) of the Act, persons whose presence is required to eliminate a condition described in an order are not prohibited from entering the area subject to the order. That provision does not suggest that their exposure to hazards should not be considered in the S&S analysis.

degree of danger, and the operator's knowledge of the existence of the violation. See *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000); *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev'd on other grounds*, 195 F.3d 42 (D.C. Cir. 1999); *Midwest Material Co.*, 19 FMSHRC 30, 34 (Jan. 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988). 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. Because supervisors are held to a high standard of care, another important factor supporting an unwarrantable failure determination is the involvement of a supervisor in the violation. *REB Enters., Inc.*, 20 FMSHRC 203, 225 (Mar. 1998).

The Secretary asserts that the violation was the result of Oak Grove's unwarrantable failure because it knew, through Sumpter, its acting superintendent, and Hartzell, its general mine foreman, that the ventilation plan's requirement that water be pumped from the bleeder entries to maintain safe travel was being violated and, yet, they continued to mine coal. Sec'y. Br. at 8-9. Oak Grove contends that the excessive water in the bleeder system was present because of factors beyond its control, and that withdrawal orders issued because of problems with seals prevented it from addressing pump malfunctions. It contends that it acted promptly to address the issue after the seal orders were lifted, and that it had made substantial efforts to eliminate the water before Boylen issued the order.

The violative condition, excessive water in the bleeder entries that constituted a hazard to travel, was obvious, extensive, and well known to Oak Grove's managers, including Sumpter and Hartzell. Notations of excessive water that prevented examination of MPLs had been made in the bleeder examination books on December 29, 2009 and January 4, 2010. Ex. G-9. Agents of Oak Grove examined the bleeders on those days, and examiners conducting preshift or supplement examinations for crews working to install additional pumps had traveled through the areas for at least 10 previous shifts.

On the other hand, the violation did not pose a high degree of danger to miners and Oak Grove had made substantial efforts to abate the violation prior to Boylen's order. As noted above, the instant violation was S&S, however, it was reasonably likely to result in a lost work days or restricted duty injury to one miner, not more serious injuries to multiple miners.

Prior to January 6, Oak Grove had made significant efforts to abate the violative condition. When the withdrawal orders issued for the seals were terminated, in late December, it began to increase its capacity to pump water from the bleeders.¹⁷ Additional pumps and air lines

¹⁷ It is unclear exactly when such orders were in effect. Pasquale testified that there had been stoppages due to potentially explosive atmospheres behind the seals beginning in
(continued...)

were dragged through the lengthy and difficult bleeder entries. Tr. 200-02, 229-30. On December 31, Oak Grove's managers met and formulated a plan to increase pumping capacity. Tr. 202. They determined to drill two boreholes into the mine, the first one was for the installation of electrical power for new, more powerful, pumps, additional compressed air lines for air pumps, and a phone line for communication. Efforts to establish the boreholes commenced immediately. Survey and site work for the first hole was performed on January 1. Drilling started on January 2 and was completed on January 3. Casing was installed in the hole on January 4; and conduit was installed for the phone line and electrical cable on January 5. Ex. C-7. Miners that were in by the deeper water when Boylen was inspecting the bleeder on January 6 were connecting the electrical power and phone lines. Large pumps had been dragged in through the bleeders, as Boylen learned during his inspection. Tr. 48-49. The pumps were activated later that day, but not until after the order had been entered. Ex. C-7. Sumpter felt that they were doing "everything possible" to deal with the water. Tr. 217.

Conclusion

The Secretary's unwarrantable argument is largely premised on the fact that Oak Grove mined coal on January 4, 5 and 6. Operation of the longwall was highly significant with respect to Order No. 6698830, which was based on Oak Grove's inability to determine whether the bleeder system was working effectively due to its failure to conduct weekly examinations. The subject order, Order No. 6698829, was issued because "[w]ater causing unsafe travel was observed" at several locations in the bleeder entries. Ex. G-1. Whether Oak Grove was mining coal had little or no significance to the travel hazards presented by water in the bleeder entries.

Water accumulated in the bleeder entries because of factors largely beyond Oak Grove's control. While Oak Grove was well aware that it presented hazards to miners traveling through it, it did not present a high degree of danger to miners. Significantly, Oak Grove had added capacity to its air pumps and, more than a week before the order was issued, embarked upon a major upgrade of its pumping capacity, drilling bore holes and installing more powerful pumps. Moreover, the vast majority of travel through the areas was by miners engaged in remedial actions.

I find that the violation was not the result of Oak Grove's unwarrantable failure, but, that its negligence was moderate.

Order No. 6698830

Order No. 6698830 was issued by Boylen at 2:00 p.m. on January 6, 2010, pursuant to section 104(d)(2) of the Mine Act. It alleged a violation of 30 C.F.R. § 75.334(d), which requires

¹⁷(...continued)

November of 2009. Tr. 174-75. The bleeder examination book reflected that no examination occurred on December 21, and bore the notation "mine idle due to 52A seal problem." Ex. G-9. Examinations were conducted, at least partially, on December 29 and January 4.

that a worked-out area be sealed if its bleeder system does not continuously dilute and move methane-air mixtures and other noxious gases out of the mine, or if it cannot be determined from the required weekly examinations that the bleeder system is working effectively.

As previously noted, Oak Grove's contest of this order was rejected after a hearing, and the order was sustained in all respects. That decision was affirmed by the Commission. As to Oak Grove, the only remaining issue is the amount of the civil penalty to be imposed. The individual respondents, Mike Sumpter and Rex Hartzell, were not parties to those proceedings. Their liability for this violation, under section 110(c) of the Act, is discussed *infra*.

Order No. 6698831

Order No. 6698831 was issued by Boylen at 2:15 p.m. on January 6, 2010, pursuant to section 104(d)(2) of the Mine Act. It alleges a violation of 30 C.F.R. § 75.360(a)(1), which requires that "a certified person designated by the operator must make a preshift examination within 3 hours preceding the beginning of any 8-hour interval during which any person is scheduled to work or travel underground." The violation was described in the "Condition and Practice" section of the citation as follows:

An adequate pre-shift examination was not conducted in the Main East Bleeder entries by mine examiners. As many as 10 miners per shift were allowed to enter the bleeder entries before the preshift was conducted and the area pronounced safe to work and travel. This condition existed for at least 10 shifts. The mine operator has failed to post, correct, or record numerous hazardous conditions found by MSHA during inspections of the underground Main East Bleeder entries on this date. Three 104(d)(2) orders have been issued for obvious and extensive violations. All orders were issued in areas where required examinations by certified examiners were conducted.

[The substantive allegations of Order Nos. 6698828, 6698829 and 6698830 were repeated].

Citation No. 6698645 was written on 12/30/20[09] due to the bleeder not being made in its entirety.

The mine operator has engaged in aggravated conduct by failing to post, correct, or record hazardous conditions during inspections of the Main East Bleeder entries, constituting more than ordinary negligence by allowing people to travel through hazardous conditions. This violation is an unwarrantable failure to comply with a mandatory standard.

Ex. G-40.

Boylen determined that the violation was highly likely to cause a permanently disabling injury, that it was significant and substantial, that ten people were affected, and that the operator's negligence was high. He also determined that the operator's negligence rose to the level of unwarrantable failure. A civil penalty in the amount of \$52,500.00 was specially assessed for the violation.

The Violation

Section 75.360 requires that preshift examinations be conducted within 3 hours preceding the beginning of any 8-hour interval during which any person is scheduled to work or travel underground. A record of the examination, including any hazardous conditions found, must be made before any other persons enter an underground area of the mine. The operator must establish 8-hour intervals of time subject to the required preshift examinations.

Miners were scheduled to work underground as soon as the latest seal order was lifted, addressing the water issues in the bleeders, repairing and installing pumps and making connections to the electrical, air and communication lines inserted through the borehole. Preshift examinations, at least in the traditional sense, were not being completed prior to miners going underground. As previously noted, travel to the work area alone consumed several hours, and until the communication line was connected, most likely on January 6, there was no way to call out the results of a preshift examination. Tr. 147. An examiner would have had to travel back out of the bleeder entries to make the report. Travel to the area of the borehole and back out would have consumed the majority of a shift.

Boylen knew that miners who were not certified examiners were working on the water problem, and he questioned how preshift examinations could be conducted under the circumstances. He was advised that Oak Grove was not attempting to conduct preshift examinations. Rather, as Pasquale and Sumpter explained, because of the logistics, they were conducting something similar to a supplemental examination.¹⁸ Tr. 164, 219. A certified examiner would proceed ahead of the work crew, examining the area as he went. When Boylen examined the preshift record books, he found that the examinations were being recorded as if regular preshift examinations had been conducted. Tr. 136. Moreover, none of the conditions that he believed were obvious hazards had been recorded. Tr. 139-40. Hartzell, who had signed-off on the preshift examination reports, testified that Oak Grove was conducting supplemental and preshift examinations and that “people with papers were in and out of the area throughout the 24-hour period.” Tr. 242.

The working conditions, and the extensive and difficult travel involved, made conducting preshift examinations extremely difficult. MSHA determined that supplemental examinations, which are more typically intended to address situations where unscheduled work becomes necessary, were not permitted for the scheduled work that was being performed. Tr. 148. Boylen posited that a proper preshift examination might be accomplished by using multiple examiners, each examining a portion of the area. Tr. 148-49. After the order was issued, Oak Grove had an

¹⁸ Section 75.361 provides that a supplemental examination shall be made within 3 hours before anyone enters an area in which a preshift examination has not been made. Oak Grove’s “supplemental examinations” do not appear to have been conducted properly, because miners following the examiner entered the underground area before the entire area had been examined.

examiner go in with the crew through the preshifted area, work for one hour, and then “examine his way out,” thereby conducting the preshift examination for the next shift. Tr. 224-25.

Miners were scheduled to work and travel in the bleeder system for over a week prior to January 6, 2010. Oak Grove did not conduct and record preshift examinations within 3 hours of their entering the underground area.¹⁹ Nor were the hazardous conditions observed by Boylen identified and corrected prior to miners traveling through the areas. The standard was violated.

Significant and Substantial

The standard was violated in two respects, preshift examinations were not completed in a timely manner, and hazards that should have been observed were not recorded and corrected. Each aspect of the violation must be analyzed to determine whether it was S&S.

The “timing” aspect of the violation was clearly a secondary consideration, judging from Boylen’s order. He described the absence of an “adequate” preshift examination, and went on to discuss the failure to “post, correct, or record” hazardous conditions. Ex. G-40. His explanation of the unwarrantable failure determination was couched entirely in terms of the failure to “post, correct, or record” hazardous conditions. There is no dispute that examinations were being made frequently. As Hartzell explained, examiners were going in and out of the area throughout the day. Boylen was aware of the frequency of examinations being made. He noted in Order No. 6698828 that: [c]ertified examiners have examined this area each shift and miners have traveled this travel way for at least 20 shifts.” Ex. G-39. He made the same observation in Order No. 6698829. Ex. G-1.

The Commission has recognized that the preshift examination requirements are “of fundamental importance in assuring a safe working environment underground.” *Buck Creek Coal Co.*, 17 FMSHRC 8,15 (Jan. 1995). Failure to conduct a timely preshift examination can be found to have been S&S when a supplemental examination has been made in lieu of a proper preshift examination. *See Jim Walter Resources, Inc.*, 28 FMSHRC 579, 601-04 (Aug. 2006). Although miners may restrict their travel to examined portions of a partially examined work area, there could be hazards in the unexamined portions of the area that could affect them. Nor does the fact that an untimely examination was completed without any hazards having been discovered necessarily preclude an S&S finding, because mine hazards can be transitory in nature. *Id.*

¹⁹ Oak Grove argues that miners were in the bleeders “round the clock,” and that the Secretary failed to prove that examinations were not done “in an 8-hour interval,” as specified in the standard. Resp. Br. at 36. However, the standard also provides that “the operator must establish 8-hour intervals of time subject to the required preshift examinations.” 30 C.F.R. § 75.360(a)(1). The precise time periods worked by the miners is not apparent. Boylen determined that there were crews of 5 miners, and that at any given point in time, two crews might be in the bleeders, one entering and one exiting. Tr. 143. The miners were, no doubt, working extended shifts because of the difficulty in accessing the working place. Preshift examinations were required prior to the start of their shifts.

However, on the facts of this case, while the issue with the timeliness of the examinations may have contributed to a discrete safety hazard of miners being exposed to hazardous conditions, it was highly unlikely that a reasonably serious injury would have occurred. Unlike the situation in *Jim Walter*, there was no active mining going on in the area. Consequently, there was no risk of miners being exposed to hazards associated with active mining, many of which can occur on short notice. The bleeder entries had been mined many years earlier and, aside from the occasional need to install supplemental roof support, and deal with water accumulations, there is no evidence of new hazards developing in the bleeders. Moreover, as Hartzell explained, there were certified examiners traversing the areas of concern on a regular basis. Boylen had noted that certified examiners had been examining the area each shift for at least 20 shifts. It is unclear how closely the pattern of actual examinations by certified examiners traveling into and out of the work area may have replicated the required preshift examinations.²⁰

I find that the timing aspect of the violation may have contributed to a hazard of miners being exposed to unknown hazardous conditions, but that it was unlikely that miners would have been exposed to such conditions and it was unlikely that any such conditions would have resulted in a reasonably serious injury.

The second aspect of the preshift examination violation is the failure to record and correct hazardous conditions that should have been found during the examinations. Boylen believed that examiners had failed to “post, correct, or record numerous hazardous conditions,” namely those cited in Order Nos. 6698828, 6698829 and 6698830. Ex. G-40. Boylen believed that those conditions rendered it highly likely that 10 persons (two crews of miners) would suffer permanently disabling injuries.

However, Order No. 6698828, alleging failure to control the mine roof, was not sustained. Order No. 6698829, alleging unsafe travel through water accumulations with unseen tripping hazards, was sustained as an S&S violation that was reasonably likely to result in a lost work days injury to one miner. Order No. 6698830, issued for failure to seal the worked out area, and continuing to operate the longwall, when required bleeder examinations had not been conducted, does not appear to have any relevance to the instant order, which was issued with respect to preshift examinations of the travelway and work places of the miners working to resolve the water problem in a portion of the bleeder.²¹

²⁰ As noted above, Sumpter had explained that compliance was achieved by having an examiner “examine his way out” of the work area.

²¹ Miners working to make connections at the borehole were able to reach that area, albeit after wading through chest-deep water. That travel route, obviously, did not include portions of the bleeder that were impassible. The failure to conduct a traditional preshift examination of the travel route and work place would not have contributed to any hazards associated with a failure to conduct a weekly examination of the inaccessible sections of the bleeder.

The failure to conduct a proper preshift examination, identifying hazardous conditions and posting them or correcting them prior to miners entering the area, can give rise to a measure of danger to miners' safety, i.e., that they would encounter hazardous conditions that were not posted or corrected. Here, the hazardous condition that miners encountered because of the posting or correcting failure was traveling through several areas of accumulated water in which there were tripping hazards that could not be seen. Concealed tripping hazards were the subject of Order No. 6698829, which was found to be an S&S violation, because the hazards it contributed to were reasonably likely to result in a lost work days injury to one miner.

The failure to post and correct aspect of the violation contributed to the hazard of miners continuing to be exposed to travel through water with concealed tripping hazards. Combined with the possibility of exposure to newly developing hazards attributable to the timing aspect of the violation, I find that the hazards contributed to by the preshift violation were reasonably likely to result in a reasonably serious injury, a lost work days injury to one miner, and that the violation was S&S.

Unwarrantable Failure

On the face of it, it could be considered obvious that a preshift examination should have been conducted because work was scheduled in the bleeder system. On the other hand, there were severe logistical considerations that presented considerable obstacles to performing such examinations, notably the fact that an examiner could not travel into the bleeder, complete a preshift examination and call it out within the required 3-hour window. The bleeder system had been mined many years earlier, and was not as susceptible to the development of new hazards as an active working section. Certified examiners were traveling through the scheduled work area frequently over the several days that the practice of conducting supplemental examinations had existed.

Oak Grove knew that it was not conducting proper preshift examinations. It had not done so for several days and would have continued to do so while work deep in the bleeder system to address the water accumulation problems was ongoing. It had not been placed on notice that greater compliance efforts were necessary. The violation was not particularly extensive, and it did not present a high degree of danger to miners. While Oak Grove had not attempted to abate the violation by conducting preshift examinations, it had conducted what it referred to as supplemental examinations, and had numerous certified examiners traveling through the work area throughout the work day.

The failure to post and correct aspect of the violation is more troubling. Order No. 6698829 was terminated on January 15, with a notation that "cited areas of water have been pumped down." There is no mention of the removal of tripping hazards, which presumably would have remained in the travelway, but would have been rendered visible by the removal of the water. This suggests that tripping hazards were not numerous and tended to be outside the normal route of travel used by the crews, which may have been guided by the reflective tape hung in response to Foster's instruction. As Boylen had noted in the other orders, certified examiners had been examining the area for more than 20 shifts. The crews of miners working to correct the

water accumulations had also been traveling through the bleeders for at least 20 shifts. All involved were, no doubt, well aware of the conditions of travel through the water accumulations, and there is no evidence that any incidents resulting in injury occurred.

On consideration of the above, I find that Oak Grove did not exhibit conduct that rose to the level of deliberate indifference or reckless disregard, and that the violation was not the result of Oak Grove's unwarrantable failure to comply with the standard. I find that Oak Grove's negligence with respect to the preshift examination violation was moderate.

Docket Nos. SE 2012-306 and SE 2012-308 - Violations charged against Sumpter and Hartzell

The petitions in these cases were filed pursuant to section 110(c) of the Act against Mike Sumpter and Rex Hartzell, in their individual capacities. In Docket No. SE 2012-306, the Secretary alleges that Mike Sumpter, Oak Grove's acting superintendent at the time, is personally liable for the violations alleged in Order Nos. 6698829 and 6698830, for which civil penalties in the amount of \$7,000.00 and \$7,300.00 were assessed respectively. In Docket No. SE 2012-308, the Secretary alleges that Rex Hartzell, Oak Grove's general mine foreman at the time, is personally liable for the violations alleged in Order Nos. 6698829 and 6698830, for which civil penalties in the amount of \$6,900.00 and \$7,200.00 were assessed respectively.

Section 110(c) of the Mine Act states: "Whenever a corporate operator violates a mandatory health or safety standard . . . , any director, officer, or agent of such corporation who knowingly authorized, ordered or carried out such violation, . . . shall be subject to . . . civil penalties." 30 U.S.C. § 820(c).

The proper legal inquiry for determining liability under section 110(c) is whether the corporate agent knew or had reason to know of a violative condition. *Kenny Richardson*, 3 FMSHRC 8, 16 (Jan. 1981), *aff'd on other grounds*, 689 F.2d 632 (6th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983); *accord Freeman United Coal Mining Co. v. FMSHRC*, 108 F.3d 358, 36264 (D.C. Cir. 1997). To establish section 110(c) liability, the Secretary must prove that an individual knew or had reason to know of the violative condition, not that the individual knowingly violated the law. *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1131 (July 1992) (citing *United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558, 563 (1971)).

A knowing violation thus occurs when an individual "in a position to protect employee safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition." *Kenny Richardson*, 3 FMSHRC at 16. The Commission has explained that "[a] person has reason to know when he has such information as would lead a person exercising reasonable care to acquire knowledge of the fact in question or to infer its existence." *Id.* (citation omitted). In addition, section 110(c) liability is

generally predicated on aggravated conduct constituting more than ordinary negligence. *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1245 (Aug. 1992).

Ernest Matney, 34 FMSHRC 777, 783 (Apr. 2012).²²

Order No. 6698829

Order No. 6698829 was sustained as an S&S violation as to Oak Grove. However, it was not found to be the result of Oak Grove's unwarrantable failure, rather its negligence was found to be moderate, primarily because of extensive efforts to remedy the violative conditions prior to issuance of the order.

Sumpter and Hartzell were well aware that there was flooding in the bleeder system, and were actively engaged in efforts to address the problem. They had reviewed, and Hartzell had signed, bleeder examination records that reported that portions of the bleeder system were flooded and some were impassible on December 29 and January 4. Tr. 237, 239-40; Ex. G-9, C-13. They had discussed the state of the bleeder with MSHA inspector Busby on December 30, and advised him that he could not travel the bleeder without passing through water well over his boot tops. Tr. 201, 231. Hartzell had informed MSHA inspector Foster, on December 28, that the bleeder system was flooded out, and described the efforts that were being made to address the issue. While they were aware that miners had to travel through significant accumulations of water, and that travel in the bleeder system was arduous, there is no evidence that they had been advised that such travel was hazardous. There is no indication that they had personally traveled the bleeder system, or otherwise had been advised that there were tripping hazards that could not be seen in the flooded areas.

The violation charged in Order No. 6698829 was not attributable to Oak Grove's unwarrantable failure to comply with the standard, even though detailed knowledge of the conditions was attributable to Oak Grove through its agents – its bleeder and preshift/supplemental examiners. Sumpter and Hartzell did not have such detailed knowledge of the conditions. I find that neither Sumpter, nor Hartzell, exhibited aggravated conduct that would subject them to personal liability for the violation.

²² Sumpter and Hartzell argue that they cannot be subjected to liability under section 110(c) because their employer, Oak Grove, is a limited liability company, not a corporation. However, as acknowledged in their brief, the Commission has held that section 110(c) permits imposition of liability upon agents of a limited liability company. *Bill Simola*, 34 FMSHRC 539 (March 2012). Respondents point out that further appeals in the *Simola* case were frustrated by the Secretary's dismissal of the petition when the case was remanded. The Commission's decision dictates that the defense must be rejected here. Respondents will be free to seek whatever further review of the issue they deem appropriate.

Order No. 6698830

As noted previously, the validity of Order No. 6698830 as an S&S and unwarrantable failure violation has been conclusively established as to Oak Grove. Sumpter and Hartzell were not parties to that proceeding. The Secretary must establish all elements of their liability in this proceeding.

Duplication

Initially, Sumpter and Hartzell argue that Order No. 6698830 is duplicative of Citation No. 6698645, which was issued by MSHA inspector Busby seven days earlier, on December 30, 2009. The Commission held that Oak Grove waived the duplication argument in the underlying contest proceeding, and that decision has become final. Sumpter and Hartzell contend that they have not waived the argument. Resp. Br. at 42-42. Sumpter and Hartzell are not bound by the decision in the contest case brought by Oak Grove. The Secretary had not yet sought to hold them personally liable for any of the violations charged against Oak Grove, and they were not parties to that proceeding. A violation of a safety standard by the mine operator is a necessary predicate to personal liability of an operator's agent under section 110(c). "The Secretary must still fully prove his case in a section [110(c)] proceeding against the agent. The operator's violation is merely an element of proof in the Secretary's case against the agent." *Kenny Richardson*, 3 FMSHRC 8, 10 (Jan. 1981).

Had Sumpter and Hartzell been parties to the contest proceeding, they would have been entitled to present evidence and make arguments in an effort to rebut the Secretary's case against Oak Grove. If successful, that necessary predicate to their personal liability would have been defeated. Asserting the duplication argument as to Oak Grove is, and would have been, a proper element of their defense. Not having waived the argument, they are entitled to present it in this proceeding. Here the stipulated inclusion of the record of the prior proceeding provides ample evidence of Oak Grove's violation of the standard, as charged in Order No. 6698830. The duplication argument is the only additional defense to Oak Grove's violation asserted by Sumpter and Hartzell.

Citation No. 6698645 was issued by MSHA inspector Paul Busby on December 30, 2009. It charged a violation of section 75.364(a)(2)(iii), which requires that:

(2) At least every 7 days, a certified person shall evaluate the effectiveness of the bleeder systems required by § 75.334 as follows:

.....
(iii) At least one entry of each set of bleeder entries used as part of a bleeder system under § 75.334 shall be traveled in its entirety. Measurements of methane and oxygen concentrations and air quantities and a test to determine if the air is moving in the proper direction shall be made at the measurement point locations specified in the mine ventilation plan to determine the effectiveness of the bleeder system.

The violation was described in the Condition and Practice section of the citation as follows:

The East bleeder was not made in its entirety by a certified person at least every 7 days to evaluate its effectiveness. The East bleeder was examined in its entirety on 12/22/2009.²³ The area of the bleeder from 1st East to 10-East was examined on 12/29/2009. The area from 10-East to the No. 6 fan was recorded as being impassable due to high water levels. The pumps used to maintain water levels in the bleeder have failed, resulting in high water levels in the bleeder entries. Pumps are currently being transported to the affected area to lower the water to safe, passable levels.

Ex. C-1.

Oak Grove's longwall panel was not producing coal at the time, and Busby's citation was issued pursuant to section 104(a) of the Act. He determined that the violation was unlikely to result in a lost work days injury to 8 persons and that Oak Grove's negligence was low. The citation specified that the violation was to be abated by 7:00 a.m. on December 31, 2009.

Respondents argue that Order No. 6698830 is duplicative of Citation No. 6698645 for several reasons. First, each "addressed the same condition and imposed the same duties on Oak Grove." Resp. Br. at 43. Second, the requirements of the standard cited in Citation No. 6698645, section 75.364(a)(2)(iii), are subsumed in the requirements of section 75.334(d), the standard cited in Order No. 6698830. Third, both the order and citation required the same action for abatement. Respondents' arguments are unavailing, and are based on misstatements of the law.

Whether enforcement actions are duplicative is not determined by examining whether *the enforcement actions* impose different duties on the operator. Rather, it is the duties imposed by *the standards violated* that must be identical before violations can be found duplicative. *Spartan Mining Co., Inc.*, 30 FMSHRC 699, 716 (Aug. 2008) (opinion of Commissioners Jordan and Cohen);²⁴ *Cumberland Coal Resources, LP*, 28 FMSHRC 545, 553 (Aug. 2006); *Western Fuels-Utah, Inc.*, 19 FMSHRC 994, 1003-05 (June 1997) (citing *Cyprus Tonopah Mining Corp.*, 15

²³ The bleeder was last examined in its entirety on December 14. There was no examination on December 21 because, as noted in the examination book, the mine was "idle due to 52A seal problem." Ex. G-9, C-13. Oak Grove had written MSHA on December 21 stating its understanding that examinations of the bleeder and other areas in the North workings were permitted while the seal problem was being resolved. MSHA responded in writing on December 22 making clear that such examinations were not permitted. Ex. C-13, C-15.

²⁴ The Commission in *Spartan* split 2-2 on the issue of duplication. Commissioners Duffy and Young, disagreeing with Commissioners Jordan and Cohen, found that the violations were duplicative. As a result, the ALJ's determination that the violations at issue in the case were not duplicative was allowed to stand.

FMSHRC 367, 378 (Mar. 1993); *Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1462-63 (Aug. 1982); and *El Paso Rock Quarries, Inc.*, 3 FMSHRC 35, 40 (Jan. 1981)).

Pursuant to section 75.364(a)(2)(iii), Oak Grove had a legal duty to evaluate the effectiveness of the bleeder system by, *inter alia*, traveling at least one entry of each set of bleeder entries in its entirety and making certain measurements. Under section 75.334(d), Oak Grove had a legal duty to seal the worked-out area if the bleeder system was not working effectively or it could not be determined from the section 75.354 examinations and evaluations that the bleeder system was working effectively. It is clear from the language of the standards that they do not impose the same duties. Therefore, Order No. 6698830 is not duplicative of Citation No. 6698645. Even if violations emanate from the same events, they are not duplicative if the standards impose separate and distinct legal duties. See *Spartan Mining*, 30 FMSHRC at 719 (opinion of Commissioners Jordan and Cohen) (citing *Cyprus Tonopah*, 15 FMSHRC at 378).

Nor are the requirements of section 75.364(a)(2)(iii) subsumed in the requirements of section 75.334(d). While they both deal with bleeder systems, they impose separate and distinct requirements. One provision could be violated without violating the other, and vice versa.²⁵ Section 75.364(a)(2)(iii) requires that the effectiveness of the bleeder system be evaluated by traveling the bleeder in its entirety every 7 days and taking measurements at points specified in the mine's ventilation plan. It can be violated, as here, if the bleeder is not traveled in its entirety and the measurements are not taken. Those failures would not state a violation of section 75.334(d), which requires that a worked out area be sealed if the operator was unable to determine whether the bleeder system was working effectively because of its inability to take the required measurements. Conversely, section 75.334(d) could be violated if all required section 75.364 evaluations had been made, if those evaluations showed that the system was not working effectively or were inconclusive, and the area was not sealed.

Lastly, Respondents argue that the citation and order were duplicative because the same action was required for abatement, pumping the accumulated water from the bleeder system to allow travel, citing the opinion of Commissioners Duffy and Young, in *Spartan Mining*,

²⁵ In *Western Fuels-Utah*, the Commission held that a charge of violating a specific standard was duplicative of a charge of violating a more general standard. However, the Commission made clear that its decision was not based solely upon the premise that every violation of the more specific standard would also be a violation of the more general one. Rather, it looked to whether the operator had been cited for more than one specific act or omission. Had there been evidence of additional deficiencies that violated the general regulation, such that that allegation would not have been based upon the identical evidence used to support the violation of the more specific standard, the charges would not have been found duplicative. 19 FMSHRC at 1004 n.12.

30 FMSHRC at 728-30. However, as noted by Commissioners Jordan and Cohen, that is not an accurate statement of the law. *Spartan Mining*, 30 FMSHRC at 717-18.²⁶

Nor should the method of abatement chosen by an operator be determinative of whether violations are duplicative. When MSHA issues a citation or order citing a violation, it specifies a time within which the violation must be abated. However, it does not specify particular actions that must be taken by the operator to abate the violation, and none were specified in the subject citation or order.²⁷ Rather, the steps to be taken for abatement are chosen by the operator. That a particular circumstance may offer an opportunity for the operator to abate more than one violation by taking a particular action, does not dictate that the violations were duplicative.²⁸ Turning to the requirements of the standards, Citation No. 6698645 could have been abated by pumping water down, and addressing roof falls on the headgate, so that the required examinations could have been made. However, it could also have been abated by securing MSHA's approval of an alternative method of evaluation, as provided in section 75.364(a)(2)(iv). Oak Grove expended considerable effort after the orders had been entered attempting to secure approval of its alternative "subtraction" method of evaluation, as detailed in the decision rejecting its contest of Order No. 6698830. 32 FMSHRC at 174-76. Conversely, Order No. 6698830 could have been abated by sealing the worked out area, or conducting a proper evaluation of the bleeder system that demonstrated that it was working effectively.²⁹

²⁶ Moreover, Commissioner Duffy was forced to concede that the violations in *Spartan* could have been abated by different actions. He concluded that, because one was not practical, the method of abatement was the same, and that the violations were duplicative. 30 FMSHRC at 728-29.

²⁷ It is apparently contrary to MSHA policy for an inspector to instruct an operator how to abate a violative condition. *See Valley Camp Coal Co.*, 7 FMSHRC 1197, 1252 (Aug. 1985) (ALJ); *Sunshine Mining Co.*, 1 FMSHRC 1535, 1542 (Oct. 1979) (ALJ).

²⁸ A different result might follow if two violations could be abated only by identical actions. That is not the case here.

²⁹ Order No. 6698830 was terminated on February 9, 2010, after water was pumped down allowing safe travel to the No. 6 fan, and the roof fall on the headgate side had been cleaned and supported allowing safe travel. The bleeder was examined in its entirety on February 8 and found to be working effectively, and the pressure differentials at the No. 6 fan had "leveled off at 20," indicating that the restriction had been removed. Ex. G-2 (termination sheet added post-hearing).

The respective standards cited in Citation No. 6698645 and Order No. 6698830 imposed different legal duties on Oak Grove. The requirements of section 75.364(a)(2)(iii) are not subsumed in section 75.334(d). The respective violations did not dictate that the same abatement actions be taken. Order No. 6698830 was not duplicative of Citation No. 6698645.³⁰

Personal Liability

As noted above, there is ample evidence in the record that Oak Grove committed an S&S and unwarrantable failure violation of section 75.334(d), as charged in Order No. 6698830, and as found in the decision in the contest proceeding. The duplication argument advanced by Sumpter and Hartzell has been rejected. Consequently, the Secretary has established the necessary predicate to their individual liability. The remaining questions are whether they knew or had reason to know of the violative condition, and whether they exhibited aggravated conduct constituting more than ordinary negligence.³¹

Sumpter and Hartzell readily admitted that they knew that the effectiveness of the bleeder system had not been evaluated as required by section 75.364, and, consequently, that it could not be determined from the non-existent required evaluations whether the system was working effectively. They also knew that operating the longwall and failing to seal the worked-out area, was a violation of section 75.334(d). Tr. 222-23, 238, 244. Their defense rests on arguments that they did not engage in aggravated conduct.³² They advanced several justifications for their actions; MSHA had not required sealing of the bleeder when evaluations were temporarily prevented in the past; they believed that the bleeder system was working effectively based on their alternative evaluation procedure and the fact that air changes had been made at the longwall face; and, MSHA's issuance of Citation No. 6698465 and failure to specifically order shutting

³⁰ Respondents also argue that the logic of their abatement argument would “compel a finding that Order No. 6698829 was also duplicative of the other two enforcement actions.” Resp. Br. at 54 n. 14. The abatement prong of their duplication argument is rejected, as is its extension as proposed in the footnote.

³¹ Sumpter and Hartzell are situated virtually identically as to the pertinent factors determinative of liability under section 110(c). While they operated at different levels of Oak Grove's management structure, they both had full knowledge of all of the relevant facts and the responsibility to assure the safety of Oak Grove's miners. Respondents' brief treats them as being similarly situated, all arguments being advanced on behalf of both individuals without distinctions as to their respective culpability. Resp. Br. at 62-70.

³² Sumpter and Hartzell suggest that, since other “essentially” similarly situated officials of Oak Grove were not charged, there is an appearance of selective prosecution that violates the equal protection clause of the U.S. Constitution. Resp. Br. at 64 n.17. The argument is not developed, or accompanied by citation to authority. There is nothing in the record to suggest that the decisions to charge the individual respondents constituted an abuse of the Secretary's prosecutorial discretion.

down of the longwall during phone conversations on January 5 led them to believe that that action was not required. These explanations will be addressed in order.

MSHA's prior actions bore little relationship to the conditions at issue. Hartzell testified that there were several occasions in the past where measuring points in the bleeder system could not be reached during weekly examinations, and that shutting down of the longwall had not been required. Tr. 232-33. As he explained, when particular MPLs could not be reached, e.g., because of high water, a pump would be installed to pump the water down, and the measurements would then be made a "day or two later;" all of which would be recorded in the examination book. *Id.* MSHA was aware of these incidents because it reviewed the examination books during its quarterly inspections and, apparently, took no action with respect to them. Tr. 233. It is not surprising that MSHA took no action when it noted that sometime in the past there had been temporary delays of a day or two in completing weekly examinations, which may or may not have been at least technical violations of sections 75.364 and 75.334, and which apparently showed that the bleeder system was working effectively. Such instances do not justify the mining of coal when substantial portions of the bleeder system could not be examined for an extended period of time, here, three weeks, and there was evidence of serious restrictions in air flow through the system.

Sumpter and Hartzell explained that air changes had been made to ventilation of the longwall face, one of which was necessitated by anticipated increases in pressure as the panel was mined-out. Tr. 244. Mining had begun in the panel on March 2, 2009, and had proceeded approximately 6,000 feet by mid-December. Sumpter explained that ventilation begins to "tighten up" when a panel has been mined 3,000 feet and that air changes are eventually required. Tr. 203-04. On January 1, there was insufficient air flow across the face of the longwall, and a change was made to the ventilation system. Tr. 203. On January 3, other ventilation changes were made because Sumpter was concerned about maintaining pressure toward the gob. Tr. 204-05. However, increases in the water gauge pressure differential at the main bleeder fan, fan No. 6, had shown that something serious was occurring in the bleeder system. The water gauge had increased from 20 to more than 30 inches of water between December 15 and January 2. Ex. G-19. Hartzell acknowledged that that indicated there was a "significant restriction" in the bleeder system. Tr. 244. Notably, the air changes that Sumpter implemented on January 3 to assure there was pressure on the gob had no positive effect on the No. 6 fan pressure differentials.³³

Sumpter and Hartzell expressed confidence that the bleeder system was working effectively. That contention, and the reasonableness of their beliefs are addressed below.

They also argue that "nothing in [the citation issued by Busby on December 30] would indicate that Oak Grove was prohibited from operating the longwall." Resp. Br. at 66. However, the longwall was not operating on December 30 and, under Oak Grove's business plan, it would

³³ The pressure differentials returned to the 20-inch level in February, after the water had been pumped down, and other actions had been taken, resulting in termination of Order No. 6698830 on February 9, 2010. Ex. G-2.

not have been operated until at least January 1, 2010, a fact that may well have been known to Busby. Tr. 203. Busby specified that the violation be abated by 7:00 a.m. on December 31, less than 16.5 hours after it had been issued, and before any potential resumption of mining. Consequently, as of January 4 when mining began, Oak Grove had failed to timely abate the citation and was subject to further enforcement action. While the citation may not have specifically prohibited operation of the longwall, it was to have been abated within hours, before mining would have begun. Operation of the longwall on January 4 was not sanctioned by, or consistent with, the citation.³⁴

MSHA's retraction of its directive to shut down the longwall during the exchange of phone calls on January 5, likewise offers no defense. First, Oak Grove had already been operating the longwall on January 4 and 5 prior to the calls.³⁵ There was no explicit approval by MSHA to operate the longwall, and Oak Grove had raised a legitimate question about the propriety of issuance of a verbal withdrawal order, over the phone, when MSHA was not on site to observe and evaluate actual mining conditions. MSHA promptly issued the order shutting down the longwall when the mine was inspected on January 6.

Where a mine operator acts "on a good-faith belief that its cited conduct was actually in compliance with applicable law, and that belief was objectively reasonable under the circumstances, the operator's conduct will not be considered to be the result of unwarrantable failure when it is later determined that the operator's belief was in error." *Kellys Creek Resources, Inc.*, 19 FMSHRC 457, 463 (Mar. 1997). Sumpter and Hartzell argue that the same logic should apply in section 110(c) cases. Assuming that such a defense is available to an individual charged under section 110(c) of the Act, Sumpter and Hartzell cannot avail themselves of it. They both admitted that they knew that Oak Grove's operations, for which they were responsible, were in violation of Sections 75.364(a)(2)(iii) and 75.334(d). They have no colorable argument that they believed, in good faith, that their conduct was in compliance with applicable law, or that any such belief was objectively reasonable.

They also argue that an individual who reasonably believes that a particular practice is safe should not be subject to liability under section 110(c), citing *Rinker Materials*, 30 FMSHRC 104, 119 (Jan. 2008) (ALJ). Accepting, for purposes of argument, that an agent who held an objectively reasonable belief that a practice was safe should not be found to have engaged in aggravated conduct and found liable under section 110(c) of the Act, neither Sumpter, nor Hartzell can escape liability on that basis.

³⁴ On January 14, with Order No. 6698830 in place, the abatement time for the citation was extended to January 29, an action which has no relevance to events that occurred on January 4-6, 2010. Ex. C-1.

³⁵ Oak Grove's production report showed that the longwall had been operated on the "owl shift" and evening shift on January 4, and the owl shift on January 5. Ex. G-10. Following the calls, it was also operated on the evening shift on January 5 and the owl shift on January 6.

Sumpter and Hartzell both testified that they believed that the bleeder system was working effectively when the longwall was operated on January 4, 5 and 6. I am not convinced that they did not have some doubt about the effectiveness of the bleeder system.³⁶ In any event, while they may have believed that the bleeder system was working effectively and that operation of the longwall was relatively safe, their beliefs were not objectively reasonable under the circumstances.

First, they knew that Oak Grove clearly was in violation of sections 75.364(a)(2)(iii) and 75.334(d), two fundamental standards intended to assure that bleeder systems are operating effectively. Second, the section 75.334(d) violation was of high gravity. As noted in the order and the decision on the contest case, the mine liberated substantial amounts of methane and operation of the longwall with an ineffective bleeder system, or a bleeder system whose ineffectiveness could not be determined, posed a threat of serious injuries to the entire mining crew. Third, pressure differential readings at the No. 6 fan showed that a significant restriction in the flow through the bleeder system had developed between December 15 and January 2, and that those readings were unaffected by the air changes made on January 1 and 3.³⁷ Fourth, they ostensibly relied on an unproven alternative evaluation method that should have been made a part of the approved ventilation plan, but which was unilaterally implemented, without notice to MSHA.³⁸ As developed extensively after the issuance of the order, there were several reasons to doubt that the subtraction method accurately demonstrated that there was sufficient air flow out the tailgate entries of the panel at the back of the gob. If Sumpter and Hartzell were convinced that the alternative evaluation method was viable, it should have been proposed to MSHA as a revision to the ventilation plan before re-starting production. That was not done. Rather, the plan was implemented unilaterally, an action that suggests that problems in attempting to demonstrate its viability were anticipated.

³⁶ Sumpter was rightfully concerned about maintaining positive pressure on the gob. After the air changes of January 1 and 2 had been made, he instructed Hartzell that the air flows critical to the “subtraction” alternative bleeder evaluation method be closely monitored. Tr. 205-06.

³⁷ Hartzell attempted to relate the increase in pressure differentials to normal increases in pressure as a longwall panel is mined-out, increases that Sumpter explained prompted the air changes of January 1. However, the two were obviously unrelated. The panel had been mined for a period of 9.5 months, from March 2 to December 15. The increases in the pressure differentials occurred after December 15, when no mining took place.

³⁸ Section 75.364(a)(2)(iv) provides that an alternative method of evaluation may be specified in the ventilation plan. Sanctioning of an alternative method of evaluation would also likely have abated the violation charged in Busby’s December 30 citation. Section 75.370 specifies procedures for proposing revisions to a ventilation plan. There is no evidence that Oak Grove attempted to follow those procedures before implementing its alternative evaluation method.

In conclusion, I find that Sumpter and Hartzell knew, or should have known, that operation of the longwall without examinations required by section 75.364(a)(2)(iii), and under the unproven and unapproved alternative evaluation method, presented an unacceptable risk of serious injuries to miners. To the extent that they entertained a belief that operation of the longwall was safe, any such belief was unreasonable. They knowingly violated section 75.334(d), and engaged in aggravated conduct constituting more than ordinary negligence. I find that they are personally liable for the violation cited in Order No. 6698830.

The Appropriate Civil Penalties

As the Commission 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).

Under this clear statutory language, the Commission alone is responsible for assessing final penalties. *See Sellersburg Stone Co. v. FMSHRC*, 736 F.2d at 1151-52 (“[N]either 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.”). While there is no presumption of validity given to the Secretary’s proposed assessments, we have repeatedly held that substantial deviations from the Secretary’s proposed assessments must be adequately explained using the section 110(i) criteria. *E.g.*, *Sellersburg Stone*, 5 FMSHRC at 293; *Hubb Corp.*, 22 FMSHRC 606, 612 (May 2000); *Cantera Green*, 22 FMSHRC at 620-21 (citations omitted). A judge need not make exhaustive findings but must provide an adequate explanation of how the findings contributed to his or her penalty assessments. *Cantera Green*, 22 FMSHRC at 622. In addition to considering the statutory criteria, the judge must also set forth a discernible path that allows the Commission to perform its review function. *See, e.g.*, *Martin Co. Coal Corp.*, 28 FMSHRC 247, 261 (May 2006).

Although all of the statutory penalty criteria must be considered, they need not be assigned equal weight. *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997). Generally speaking, the magnitude of the gravity of a violation and the degree of operator

negligence are important factors, especially for more serious violations for which substantial penalties may be imposed. *Musser Engineering*, 32 FMSHRC at 1289 (judge justified in relying on utmost gravity and gross negligence in imposing substantial penalty); *Spartan Mining Co.*, 30 FMSHRC 699, 725 (Aug. 2008) (appropriate for judge to raise a penalty significantly based upon findings of extreme gravity and unwarrantable failure); *Lopke Quarries, Inc.*, 23 FMSHRC 705, 713 (July 2001) (judge did not abuse discretion by weighing the factors of negligence and gravity more heavily than the other four statutory criteria).

Findings on Penalty Criteria - Oak Grove

Good Faith - Operator Size - Ability to Continue in Business

The parties stipulated that imposition of the proposed penalties would not affect Oak Grove's ability to continue in business. Stip. 4. The parties did not stipulate to the size of Oak Grove as an operator. However, forms reflecting calculations of penalty assessments were filed with the petition and indicate that the Oak Grove Mine is a large operator, as is its controlling entity, and I so find.

History of Violations

The Secretary requested leave to submit, post-hearing, an exhibit reflecting Oak Grove's history of violations, a report generated from MSHA's database, typically referred to as an "R-17." However, the document was not filed. R-17 reports are of limited value, because they do not provide a qualitative assessment of violation history, i.e., whether the number of violations is high, moderate or low. *See Cantera Green*, 22 FMSHRC at 623-24.

Qualitative violations' history information can be found on assessment forms filed with the petition, which reflect that Oak Grove had 226 violations become final, and 866 inspection days, in the pertinent time period. The Secretary's Part 100 regulations for regular penalty assessments take into account two aspects of an operator's violation history, the "total number of violations and the number of repeat violations of the same citable provision of a standard in a preceding 15-month period." 30 C.F.R. § 100.3(c). Only violations that have become final are used in the calculations. For total violation history, points used in the penalty calculation are assigned on the basis of the number of violations per inspection day, ranging from 0 points for 0 to 0.3 violations per day to 25 points for in excess of 2.1 violations per day. Under the regulations, Oak Grove's history of violations was low, and none of the alleged violations qualified for enhancement because of repeat violations.

I find that Oak Grove's overall history of violations, as relevant to these violations, was low, and should be considered a mitigating factor in the penalty assessment process.

Gravity - Negligence

Findings on gravity and negligence are set forth in the discussion of each violation.

The Secretary's Penalty Assessment Process – Special Assessments vs. Regular Assessments

The Secretary specially assessed penalties for all of the violations at issue. Oak Grove contends that the total of the penalties assessed for the four violations, \$182,000.00, is substantially higher than the \$47,906.00 in penalties that would have been assessed pursuant to the Secretary's regular assessment formula, and that the Secretary has not justified the imposition of enhanced penalties for the subject violations. I discussed considerations involved in determining appropriate penalties at some length in a recent decision. *American Coal Company*, 35 FMSHRC ___ (June 13, 2013) (slip op. at 48-51). That discussion will not be repeated here. However, the methodology set forth in *American Coal* for determining the amount of the penalty to be imposed for a violation will be followed here, and in future cases.

Method for Determining the Amount of Penalties for the Litigated Violations

The purpose of explaining significant deviations from proposed penalties, as Commission judges are obligated to do, is to avoid the appearance of arbitrariness.³⁹ Similarly situated operators, determined to be liable for violations of similar gravity, negligence and other penalty criteria, ideally should not be assessed significantly different penalties. Absent some guideline, however, a judge has no quantitative reference point to aid in specifying a penalty within the current statutory/regulatory range of \$1.00 to \$70,000.00. The Secretary's regulations for determination of a penalty amount by a regular assessment, 30 C.F.R. §100.3, take into consideration all of the statutory factors that the Commission is obligated to consider under section 110(i) of the Act. The product of that regular assessment formula provides a useful reference point that would promote consistency in the imposition of penalties by Commission judges.⁴⁰

Accordingly, in determining penalties for the litigated violations, the penalty produced by application of the Secretary's regular assessment formula will be used as a reference point, and adjusted depending on the particular findings with respect to the statutory penalty criteria. The tables and charts in the regulations provide a limited number of categories for some factors. For example, the table for operator's negligence consists of five gradations, ranging from "No negligence" to "Reckless disregard." 30 C.F.R. §100.3(d). In reality, however, the degree of an operator's negligence will fall on a continuum, dictating that adjustments will generally be required. Other unique circumstances may dictate lower or higher penalties. Violations involving "extreme gravity" and/or "gross negligence," or, as previously stated in section 105(a) of the Secretary's penalty regulations, "an extraordinarily high degree of negligence or gravity, or

³⁹ *Sellersburg Stone Co.*, 5 FMSHRC 287, 293 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984).

⁴⁰ See *Magruder Limestone Co., Inc.*, 35 FMSHRC 1385, 1411 (May 2013) (ALJ) (regular assessment regulations provide a helpful guide for assessing an appropriate penalty that can be applied consistently).

other unique aggravating circumstances,” may dictate substantially higher penalty assessments.⁴¹ A party seeking a reduced or an enhanced penalty must assume the burden of producing evidence sufficient to justify any requested adjustment. Where the Secretary urges a penalty higher than that derived by reference to the regular assessment process, e.g., a higher penalty resulting from the special assessment process, he will have the burden of establishing the appropriateness of the higher penalty, based upon the statutory penalty criteria.

Docket No. SE 2010-828 - Respondent Oak Grove

Order No. 6698829 is affirmed as an S&S violation. However, it was not highly likely to result in a permanently disabling injury to two miners. Rather it was reasonably likely to result in a lost work days injury to one miner. More significantly, it was not attributable to Oak Grove’s unwarrantable failure to comply with the safety standard. Oak Grove’s negligence was moderate. A specially assessed civil penalty in the amount of \$38,500.00 was proposed for this violation. If calculated under the Secretary’s regular assessment formula, the result would have been a penalty of approximately \$5,000.00. The reduced levels of negligence and gravity would not justify an enhanced penalty. Considering the factors itemized in section 110(i), I impose a penalty of \$3,000.00 for this violation.

Order No. 6698830 has been affirmed as an S&S violation and an unwarrantable failure to comply with the safety standard. A specially assessed civil penalty in the amount of \$52,500.00 was proposed for this violation. A penalty calculated under the Secretary’s regular assessment formula would have resulted in a penalty of approximately \$19,000.00. The high gravity of the violation, which contributed to a risk of serious injury to the entire mining crew, justifies an enhanced penalty. Considering the factors itemized in section 110(i), I impose a penalty of \$55,000.00 for this violation.⁴²

Order No. 6698831 is affirmed as an S&S violation. However, it was not highly likely to result in a permanently disabling injury to ten miners. Rather it was reasonably likely to result in a lost work days injury to one miner. More significantly, it was not found to be the result of Oak Grove’s unwarrantable failure. Oak Grove’s negligence was moderate. A specially assessed civil penalty in the amount of \$52,500.00 was proposed for this violation. If calculated under the Secretary’s regular assessment formula, the result would have been a penalty of approximately \$5,000.00. The reduced levels of negligence and gravity would not justify an enhanced penalty.

⁴¹ The subject language was deleted in 2007. *30 C.F.R. Part 100 Final Rule*, 72 Fed. Reg. 13592 - 13,621 (March 22, 2007).

⁴² The Secretary’s brief states that a penalty of \$70,000.00 was proposed for this violation. Sec’y. Br. at 11. The actual specially assessed penalty is \$52,500.00. The reference to \$70,000.00 appears to be an error. It is not accompanied by any discussion that would indicate that the Secretary intended to urge imposition of a penalty higher than that actually assessed. *See Performance Coal Co.*, 35 FMSHRC ____ (Aug. 2, 2013). In any event, I find that a penalty of \$55,000.00 is appropriate.

Considering the factors itemized in section 110(i), I impose a penalty of \$3,000.00 for this violation.

Penalties against individual Respondents.

The imposition of penalties against individual Respondents found liable under section 110(c) of the Act was also addressed in *Mize Granite Quarries*, 34 FMSHRC at 1764.

The six statutory criteria also apply, with revisions appropriate to individuals, to the assessment of section 110(c) penalties against individuals. *Sunny Ridge Mining Co.*, 19 FMSHRC 254, 272 (Feb. 1997). As the judge noted, the relevant inquiries include whether the penalty will affect the individual's ability to meet his financial obligations and whether the penalty is appropriate in light of the individual's income and net worth. 33 FMSHRC at 916; *Ambrosia Coal and Constr. Co.*, 19 FMSHRC 819, 824 (May 1997).

The parties stipulated that Sumpter and Hartzell "have no previous history of assessment under Section 110(c) of the Act and the imposition of the propos[ed] penal[t]ies will not affect their financial viability." Stip. 7. In light of the stipulation, and considering that the individuals were not found liable for the violation alleged in Order No. 6698829, specific information as to their income and net worth, analogous to the "size" criteria, is unnecessary. Findings as to their negligence and the gravity of the violations were made above.

Docket No. SE 2012-306 - Respondent Mike Sumpter

Sumpter was found liable for the violation charged in Order No. 6698830, for which a specially assessed civil penalty in the amount of \$7,300.00 was proposed. While he and Hartzell engaged in aggravated conduct sufficient to sustain personal liability, their negligence was not so high as to suggest enhanced penalties. Considering the factors itemized in section 110(i), I impose a penalty of \$3,500.00 for his violation.

Docket No. SE 2012-308 - Respondent Rex Hartzell

Hartzell was found liable for the violation charged in Order No. 6698830, for which a specially assessed civil penalty in the amount of \$7,200.00 was proposed. Considering the factors itemized in section 110(i), and considering that Hartzell was at a lower level of Oak Grove's management structure than Sumpter, I impose a penalty of \$2,500.00 for his violation.

ORDER

Based on the foregoing, as to the remaining allegations against Oak Grove in Docket No. SE 2010-828, it is **ORDERED** that Order No. 6698828 is **VACATED**; and Order Nos. 6698829 and 6698831 are modified, as stated in the discussion of those orders, to citations issued pursuant to section 104(a) of the Act, and are **AFFIRMED, as modified**.

As to the petition filed against Mike Sumpter in Docket No. SE 2012-306, the allegation that he is personally liable for the violation charged in Order No. 6698829 is **DISMISSED**. The allegation that he is personally liable for the violation charged in Order No. 6698830 is **AFFIRMED**.

As to the petition filed against Rex Hartzell in Docket No. SE 2012-308, the allegation that he is personally liable for the violation charged in Order No. 6698829 is **DISMISSED**. The allegation that he is personally liable for the violation charged in Order No. 6698830 is **AFFIRMED**.

It is **FURTHER ORDERED** that Oak Grove pay civil penalties in the amount of \$61,000.00 within 45 days of this order; that Mike Sumpter pay a civil penalty in the amount of \$3,500.00 within 45 days of this order; and that Rex Hartzell pay a civil penalty in the amount of \$2,500.00 within 45 days of this order.⁶

/s/ Michael E. Zielinski
Michael E. Zielinski
Senior Administrative Law Judge

Distribution (Certified Mail):

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

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

⁶ Payment should be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, P.O. BOX 790390, ST. LOUIS, MO 63179-0390.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 20, 2013

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 2011-701
Petitioner	:	A.C. No. 11-02752-253416-01
	:	
	:	Docket No. LAKE 2011-881
v.	:	A.C. No. 11-02752-259393-01
	:	
	:	Docket No. LAKE 2011-962
	:	A.C. No. 11-02752-262111-01
	:	
	:	Docket No. LAKE 2012-58
	:	A.C. No. 11-02752-268036-01
	:	
THE AMERICAN COAL COMPANY,	:	
Respondent	:	Mine: New Era Mine

DECISION AND ORDER

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

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

Before: Judge Lewis

STATEMENT OF THE CASE

These cases are before the undersigned ALJ on Petitions for Assessment of Civil Penalty filed by the Secretary of Labor against Respondent, The American Coal Company (“Respondent” or “American Coal”), pursuant to Sections 104(a) and 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §815(d). A hearing was held in Evansville, Indiana from May 21, 2013 to May 22, 2013. The parties subsequently submitted post-hearing briefs.

PROCEDURAL HISTORY

Between October, 2010 and March, 2011 MSHA inspectors Phillip Stanley, Bernard Reynolds, Wendell Crick, Jared Preece, and Edward Law issued ten (10) citations to Respondent for alleged safety violations at American Coal’s New Era Mine (“Mine”) located in Saline County, Illinois. Prior to the commencement of the hearing the parties reached a partial settlement regarding Citation Nos. 8427681, 8432066, and 8500423 in Docket No. LAKE 2011-

881 and Citation Nos. 8431001 and 8431003 in Docket No. LAKE 2012-58.¹ The remaining below citations issued by Inspectors Stanley and Law went to full hearing.

ISSUES

The issues to be determined are whether Respondent violated §75.1403 and §75.202(a) as alleged in Citation Nos. 8432052 (LAKE 2011-962), 8428508 (LAKE 2011-701), 8432118 (LAKE 2012-58), 8432126 (LAKE 2012-58), and 8432129 (LAKE 2012-58) respectively; if so whether any of the violations were significant and substantial in nature (“S&S”); and what would be the appropriate final penalty for any violations.²

STIPULATIONS

The parties have entered into several stipulations, admitted as Parties Joint Exhibit 1. Those stipulations include the following:

1. Respondent, at all times relevant to these proceedings, engaged in coal-mining activities and operations at the Mine in Saline County, Illinois.
2. Prior to September 24, 2010, Respondent was the owner and operator of the Galatia Mine, which encompassed multiple operations and mines (New Era, New Future and Galatia North). On September 24, 2010, the New Future Mine began operating under Mine ID No. 11-03232, and the New Era Mine continued operating under Mine ID No. 11-02752. Respondent remained the owner and operator of both mines.
3. Respondent’s mining operations affect interstate commerce within the meaning and scope of Section 4 of the Act, 30 U.S.C. §803.
4. Respondent is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ et seq. (the “Mine Act”).
5. Respondent is an “operator” as defined in §3(d) of the Mine Act, 30 U.S.C. §803(d), at the Mine where the contested citations in these proceedings were issued.
6. The Administrative Law Judge has jurisdiction over these proceedings pursuant to §105 of the Act.
7. The individuals whose signatures appear in Blocks 22 of the contested citations at issue in these proceedings are authorized representatives of the United States of America’s

¹ See also Transcript, Volume I, hereinafter referred to as “Tr. I,” at 5-6.

² As discussed *infra*, the ALJ finds that Respondent’s challenges regarding the arbitrary and excessive nature of MSHA/the Secretary’s original special assessments fail to raise cognizable claims in that the Commission alone is responsible for assessing final penalties.

Secretary of Labor, assigned to MSHA, and were acting in their official capacities when issuing the citations at issue in these proceedings.

8. The citations at issue in these proceedings were properly served upon Respondent as required by the Mine Act.
9. The citations at issue in these proceedings may be admitted into evidence for the purpose of establishing their issuance but not for the truthfulness or relevancy of any statements asserted therein.
10. The operator demonstrated good faith in abating the violations.

Joint Exhibit 1 (*see also* Tr. I at 6).

SUMMARY OF THE TESTIMONY

1. Docket No. LAKE 2011-701

a. Citation No. 8428508

i. Phillip Stanley

At the Hearing Phillip Stanley (“Stanley”) appeared and testified on behalf of the Secretary. (Tr. I, 10).

Stanley had been working for MSHA for the past 3 ½ years. (Tr. I, 11). Prior to such he had worked for a little over three years in the coal industry and 16-17 years in potash.³ (Tr. I, 12).

Stanley had worked for Respondent at Galatia for 1 ½ years, operating a continuous miner machine, a roof bolter, cars, and anything else to do with underground production work. (Tr. I, 13).

Referring to Secretary’s Exhibit 1 (S-1), Stanley indicated that the citation at issue involved a violation of a mandatory standard, §75.202(a). (Tr. I, 15). The violation occurred in the area of New Era Mine located near Entry One of the Northeast headgate. (S-1, Tr. I, 16). Stanley was conducting a quarterly EO1 inspection. (Tr. I, 18). Stanley informed an employee of Respondent, Mark Dennis, that he wished to inspect this area. (Tr. I, 18-19).

Upon his arrival, Stanley witnessed several roof bolts whose bearing plates were not in contact with the mine roof. (Tr. I, 21-22). Stanley had made a drawing in his notes depicting six

³ Potash is primarily used as fertilizer. Unlike a coal mine, a potash mine is not gassy. But it is set up basically the same way with continuous miners, bolters, cars, feeders, belts, and the same room-and-pillar type mining that is in coal. (Tr. I, 12).

(6) roof bolts hanging from the mine roof where the bearing plates no longer contacted the roof. (Tr. I, 23-34; S-2, p. 3 of 7).

Stanley described fully grouted roof bolts as ones which have a glue inserted into the bore hole. The roof bolt goes in with the glue and the epoxy. The glue or the resin sets up and creates a solid beam as pressure is applied to the roof. (Tr. I, 24). The bearing plates are applied directly to the mine roof to support whatever draw rock or immediate roof strata is present. The glue binds all together and creates one solid beam. The bolts ensure that all stays intact. (Tr. I, 24).

The type of bolts used is a requirement of the mine's roof control plan. (Tr. I, 25). The roof was not solid where the bearing plates of the six bolts had pulled away. (Tr. I, 26). The damaged bolts gave no roof support. (Tr. I, 27). At least a portion of the draw-rock between the bearing plate and the limestone roof had turned loose and hit the mine floor, thereby leaving nothing between the bearing plates and the remaining draw rock. (Tr. I, 27). The (unsafe) condition had apparently existed for a "considerable period of time" in that there was rock dust on the mine roof in the cited area. (Tr. I, 27). Further, the draw-rock which had already fallen to the floor had a mixture of rock dust and float coal dust, as well as old and new foot traffic across the gob "or what they call gob or what I would call the draw rock that fell from the mine roof." (Tr. I, 27-28).

Although uncertain of how long the rock dust had existed in the area, Stanley noted that it had been there long enough to become gray instead of white. (Tr. I, 28). In his experience, rock dust in return air courses will go grey in a matter of two-to-three weeks. (Tr. I, 28-29). The rock dust had "certainly" been there for more than one shift. (Tr. I, 29). The foot traffic, because of dis-colorization from the surrounding area, appeared recent in origin. (Tr. I, 29-30). It had appeared that miners had actually walked on the gob that had fallen from the mine roof. (Tr. I, 30).

Given that the gob (either gray or black shale) was directly beneath the cited area and was the same make-up as the immediate roof, and given that the roof bolts were suspended as they were, it was apparent that the material had come from the roof. (Tr. I, 31).

The (unsafe) condition was immediately obvious because the roof bolts were suspended far enough below the immediate roof that "it looked like a piece of modern art." (Tr. I, 31). The amount of gob, which had fallen from the mine roof, was anywhere between six (6) to twelve (12) inches of immediate roof that was now laying on the mine floor beneath the cited condition and for the entire expanse of the cited area. (Tr. I, 31).

The hazard posed to those traveling beneath the damaged bolts was that of falling roof material – "fractured shale." (Tr. I, 32). Given the size and vastness of the area, Stanley's fear was that miners "would get a piece of rock on them that was bigger than they were and ride them to the ground and create some permanently disabling injury, if not a fatality." (Tr. I, 33).

Stanley was accompanied by Respondent's employee, Mark Dennis, during his inspection. Dennis reportedly commented, "I can't believe I've never seen this."⁴

Examiners would pass through the affected area at least once per shift. (Tr. I, 34). Permanently disabling crush injuries due to falling roof material would be likely to occur. (Tr. I, 34).

Stanley was familiar with a case that had taken place either at New Era Mine or at New Future Mine in which a miner went under unsupported roof and a rock fell, pinning him to the ground for six (6) hours. As a result of his injuries this miner was put on permanent disability. (Tr. I, 35).

Stanley's designation of the type of injury likely to occur with a roof fall was determined on a "case-by-case basis" but included the size and type of material existent. (Tr. I, 35). In Respondent's case, the rocks were big enough to ride someone to the ground and pin him. (Tr. I, 35-36).

Stanley determined that high negligence was involved in this cited violation because of the examiners' traffic directly adjacent to the cited area, both old and new tracks, and the examiner's duty, which was basically to record hazards and have such recognized before a miner sustains injury. (Tr. I, 36). Given that the condition was so obvious, Stanley found no mitigating circumstances for failure to report such. (Tr. I, 36).

Stanley had not written an unwarrantable failure because he had not seen a date, time, and initial report in plain sight of the hazard and because of his lack of experience. (Tr. I, 36-37). If he observed the same condition now, he would have issued a §104(d). (Tr. I, 36-37). In order to terminate the action, the mine operator decided to barricade the travel way. (Tr. I., 37).

Stanley served Respondent's safety person, Mike Smith, with a copy of the citation in the mine safety office on the surface. (Tr. I, 36-37). Smith had not accompanied Stanley during his inspection. Stanley met with Smith, Dennis, and a Mr. Webb regarding the citation. (Tr. 38-39).

Webb had contended that examiners did not travel through the area cited within Citation No. 8428508. However, out of Webb's presence, Smith admitted that examiners did in fact travel through the cited area. (Tr. I, 40; *see also* S-2, p. 7).

On cross-examination, Stanley stated that he had started with MSHA around December, 2008. (Tr. I, 41). Prior to his October 22, 2010 inspection he had not previously inspected the 4th East headgate area. (Tr. I, 43). The area in question was an outby, worked out area. (Tr. I,

⁴ During cross-examination, Stanley agreed that Dennis' alleged statement was not in fact in reference to the Citation 8428508 unsafe roof condition at issue but was in reference to a different "slider cut" violative condition. (*see also* Sec. 2 , pp 2-3 (inspector's notes, pp. 6-8; Tr. I, 58-60)).

45). The area had been sealed off.⁵ There was one seal in each of the old entries, the headgate and tail gate being separated by 1,000 feet. (Tr. I, 45). The seals had sampling pipes for checking ingassing and outgassing of methane and oxygen content. (Tr. I, 47). At the time the citation was issued, Respondent was required to examine the seals every on-shift. (Tr. I, 48). Although he did not use an anemometer, Stanley agreed that there was airflow in the affected areas. (Tr. I., 49). Stanley did not know when the last rock dusting in the affected area had taken place. (Tr. I, 51). He was also uncertain as to whether the affected area could be accessed with a pod duster. (Tr. I, 52).

There were props and cribs a little further in by the number One (1) Entry which would have provided access for a pod duster. (Tr. I, 53). Stanley agreed that the only people who would be in the area were examiners and potential rock dusters. He was, however, uncertain as to the rock duster's schedule. (Tr. I, 53). Although not a travel way, the area was, in Stanley's opinion, part of the examiner's route. (Tr. I, 54).

Referring to a diagram contained in his notes, Stanley testified that he had come to a man door and immediately observed a violation of Respondent's Roof Control Plan as cited in No. 8428507. (Tr. I, 57; S-2, p. 5 of inspector's notes).

Stanley confirmed that his notes reference to Dennis' comment – "I can't believe I never seen this" – was regarding a "slider cut" citation and not the No. 8428508 instant violation. (Tr. I, 59-60; S-2, p. 3).

Referring to his diagram of the cited area (S-2, p. 3), Stanley indicated that the area where the damaged bolts were located was approximately 14 feet wide. (Tr. I, 65). He traveled under the supported roof "bagged by screen wire. Adjacent to the cited area." (Tr. I, 66). Stanley was not concerned with a major rock fall. The well worn foot path across the gob was also immediately adjacent to the cited area. (Tr. I., 67). Stanley agreed that the six (6) roof bolts drawn in his diagram were not lined up side-by-side. (Tr. I, 69-70). He had failed to record depth/distance; but agreed that the six (6) bolts were spread out some distance lengthwise in by on Entry One. (Tr. I, 70).

Stanley agreed that fully grouted resin bolts were not like the typical older roof bolts that were dependent upon the bearing plates; the glue put into the mine roof with the fully grouted resin bolts moved through the cracks and laminations between the material of the roof and helped seal it together. (Tr. I, 71). However, Stanley disagreed with Respondent's counsel's suggestion that, even if the bearing plates are damaged and/or not in contact with the roof, the shaft and glue will still provide some support to the overall bear of the main roof. (Tr. I, 71).

In the strata of the mine roof the primary beam would have been limestone and directly beneath that would have been the shale, much of which had fallen out and was still present. (Tr. I, 72).

⁵ Seals are basically large walls or blocks that seal old worked out areas. (Tr. I, 46).

Stanley could not recall whether Smith had brought him down in a golf cart. Dennis did not accompany him on the inspection of the seals and air course. (Tr. I, 74). Being referred to his notes at S-2, p. 6 (p. 17 of 22), Stanley did recollect that he had met Smith prior to returning to the surface. (Tr. I, 75).

Stanley denied being told by Dennis that Dennis was an air course examiner and did not usually inspect the seals themselves. (Tr. I, 76). He further conceded that he was uncertain as to what individual at subject mine had the responsibility for examining seals. (Tr. I, 76).

Stanley further agreed that R-42 contained the type of Respondent's examiner's reports which he would have reviewed in determining whether there had been an inadequate on-shift exam. (Tr. I, 77-80). Stanley also agreed that for an examiner to have actually observed the condition that he had seen and to have to report such, the examiner would need to have traveled the same route as Stanley. (Tr. I, 80). However, he did not know whether the on-shift and pre-shift examiners had used a different route from the one he had used during his inspection. (Tr. I, 81). He conceded, however, that after the affected area was barricaded off, examiners would have had to use a different route. (Tr. I, 81).

Stanley found high negligence for the following reasons: the condition was "blatantly obvious"; there was evidence of foot traffic; and the examiner had taken him on the route in question. (Tr. I, 82). Stanley conceded that he had not spoken with mine operator employees to ascertain the route of travel utilized by examiners. (Tr. I, 83). Stanley also conceded that Webb had denied that Respondent's examiners used the route traveled by Stanley. Further, Webb had asserted that Stanley could not determine the age of the foot prints. (Tr. I, 88). Stanley had not required the sealing of the roof or rib in the affected area. (Tr. I, 90).

Stanley agreed his field notes did not describe any fractures or crack in the roof. (Tr. I, 93).

As to his recommendation for special assessment, Stanley had taken into account the examiner's route of travel, the obvious and extensive nature of the condition, and the fractured roof and ribs in the cited area. (Tr. I, 96). While he did not wish to issue a flagrant violation or unwarrantable failure violation, Stanley saw the special assessment as an "additional tool" that inspectors had to help companies be complaint and protect the health and safety of miners. (Tr. I, 96). Stanley did not know whether there was any publicly available guidance prior to October 22, 2010 that would alert operators when special assessments would be appropriate. (Tr. I, 97).

Referring to the special assessment forms at R-4 and R-5, Stanley could not explain, inter alia, how the actual special assessment amounts were arrived at. (Tr. I, 98-102).

On re-direct examination, Stanley testified that the footprints he observed were "immediately adjacent to the cited area on top of the gob that had fallen from the cited area. (Tr. I, 105). Stanley further explained that the foot prints were not under either the "supported or controlled area." They were between the controlled area and the uncontrolled area and the uncontrolled area immediately adjacent, meaning that the debris that had fallen from the roof was on the mine floor. (Tr. I, 106). Because falling roof material does not necessarily fall

straight down, people who walked where the footprints were observed could be struck in that route of travel. (Tr. I, 106). Because Dennis took him on the route by the affected area, it appeared obvious to Stanley that this was the route used by examiners. (Tr. I, 106-107). There were no barricades or flagging material to prevent people from walking directly under the unsupported roof. (Tr. I, 107).

Cribs⁶ in the cited location suggested to Stanley that the mine operator had at one point felt the roof was unstable and decided that the best way to support it was with cribbing material. (Tr. I, 108).

In addition to the gob seen on the mine floor suggesting that additional roof might fall, Stanley also observed screen wire that had fallen as well which was indicative of curtain shale falling. (Tr. I, 108-109). Given further the fracturing of the indicated roof and rib sites, the potential for a miner being covered up was reasonable. (Tr. I, 109). Based upon his visual observations of the laminating effects between the immediate roof and upper roof -- a big portion of draw rock had already fallen to the ground -- Stanley opined that the instant fully grouted bolts were unacceptable.

Stanley had informed Dennis that he wished to inspect the seals. Dennis, the examiner temporarily assigned to the safety department, led him to such. (Tr. I, 113).

It was not possible for Stanley to ascertain how long the unreported (unsupported) roof condition had existed but he could only assume that it had been for an extended amount of time and that the mine operator had rock dusting in the interim. (Tr. I, 114).

Stanley had traveled with other inspectors on EO1 inspections a number of times. (Tr. I, 116).

On re-cross examination, Stanley conceded that he had not discussed the location of footprints in his field notes as being located between the controlled and uncontrolled area. (Tr. I, 117). He did not observe any screen on the mine floor nor did he record in his notes any screen hanging from the roof. (Tr. I, 118). Although he had testified regarding the position of a massive roof fall at Entry One, Stanley had nonetheless walked through the area. (Tr. I, 119).

Stanley testified that the hazard he was concerned about at Entry No. 1 was a roof fall and that involved the "immediate roof." But as he encountered crib work in by that location and knowing the history of the mine and roof falls, it had occurred to him that more than an immediate roof fall could occur. (Tr. I, 121).

⁶ Cribs are standing supports to hold the roof; they are typically six by six timbers of varying lengths stacked one on top of another in a crisscross fashion from the mine floor to the mine roof. (Tr. I, 107).

ii. Mark Dennis

At the hearing Mark Dennis appeared and testified on behalf of Respondent. Dennis had worked for American Coal for a little over seven (7) years. (Tr. I, 123). He had been a daily examiner and a weekly examiner. (Tr. I, 123). Before America Coal, he had worked in mining as a belt mechanic, outby supervisor, and equipment operator. (Tr. I, 124).

At the time the instant citation(s) were issued, Dennis had been working as a weekly examiner, traveling worked-out areas, old air courses, and perimeters of long walls. (Tr. I, 125). He did not examine seals, a job performed by daily examiners. Dennis was also not a pre-shift examiner. (Tr. I, 125).

Dennis testified that he had not examined the seal(s) referred to in the left hand column of Respondent's pres-shift examination report, as he was in other areas, including the air course. (Tr. I, 126-127; *see also* R-43, p. 4, Line 44).

Referring to a map of New Era Mine contained at R-37, Dennis stated that it depicted the worked-out longwall panels on the east side. (Tr. I, 128). Dennis was familiar with these panels, including the fourth East Gate. (Tr. I, 129). Dennis testified that Stanley had required that he be taken to the area, later cited, just inside the north man door. (Tr. I, 129-130; R-37, p. 4).

Dennis testified that, during his regular weekly examination, he would normally start on the outby side of the south man door. (Tr. I, 133; R-37, p. 4). During Stanley's inspection, however, Dennis went through the north man door in order to "save a few footsteps, instead of going through the south door and then double walking." (Tr. I, 136). He had probably not been inside the north man door since the operator had mined out the area. (Tr. I, 136).

Dennis stated that it was his idea – not Inspector Stanley's – to take the (north) man door. He did not know what route the daily examiners utilized. (Tr. I, 136). When he went through the man door, he observed seeing some rib rash but nothing out of the ordinary. (Tr. I, 136). The rib rash had flaked off the wall and created a little mound against the rib. (Tr. I, 137). As he walked further inby, he saw more of the same rib rash. (Tr. I, 137).

Dennis disagreed with the inspector's findings in the citation that the area was frequently traveled. (Tr. I, 137). While there was evidence of foot travel, Dennis saw no indication that it was fresh travel. (Tr. I, 137). The rock dusting was grayish and dingy in appearance, not of a white color indicative of fresh travel. (Tr. I, 137, 138).

Dennis observed footprints down the middle of the walkway or entry. (Tr. I, 138). "There would be no reason to walk on top of the rib rash." (Tr. I, 138). Because of lack of water, the footprints could have been present for an indefinite period. (Tr. I, 139). Dennis only vaguely recalled loose roof bolts which would have, in any case, been over the rib rash. (Tr. I, 139). Dennis affirmed that he was unaware of the route the daily examiners took and had never traveled with the daily examiners. (Tr. I, 139).

Dennis had accompanied Stanley throughout his inspection, eventually ending at the third East Headgate, having examined four (4) seal panels. (Tr. I, 140-141). The entire route would have covered 45-50 crosscuts and would have been over 6,000 feet in length. (Tr. I, 141). Dennis was not familiar with anybody working or traveling in the crosscut of Entry One in the cited area on October 22, 2010. (Tr. I, 141).

On questioning by the Court, Dennis explained the entry in question was approximately 18 feet wide with the center being located at 9 feet and the first roof bolt being located 3 feet from the rib. The footprints were a minimum of six feet from the roof bolts. (Tr. I, 141-142).

On cross examination, Dennis testified that his weekly examination reports would be located in a different examination book that where the daily exam reports were found. (Tr. I, 142-143). The daily on-shift examiner travel a different route than the one used by Dennis. (Tr. I, 144). Dennis agreed that it was not part of his typical route to go through the man door in question. (Tr. I, 144).

Dennis testified that there would be no reason for anyone to walk on rib rash when they could have “a good, smooth, flat, dry surface.” (Tr. I, 145). He did not observe any fallen material in the walkway. (Tr. I, 145). “In general, the top looked fairly decent.” (Tr. I, 147).

On re-direct examination, Dennis stated that a walkway was smaller than an entry and that, for the most part, people walked in the center of the walkway which would be, for the most part, roughly 12 to 18 inches wide. (Tr. I, 147-148).

iii. Michael Dean Smith

At hearing Michael D. Smith (“Smith”) appeared and testified on behalf of Respondent. Smith was currently employed as a mining resource engineer with the SI University, Carbondale, Illinois. He had previously worked for approximately 8 years as a safety inspector for Dominion Coal and for 23 ½ years for Consolidated Coal Co., (Tr. I, 153). Smith had worked at numerous jobs in coal mining: roof bolter, miner, shuttle car, and diesel powered scoop operator, and beltman. (Tr. I, 154).

On the day the instant citation was issued, Smith went to the fourth East Headgate area. (Tr. I, 155). He met with inspector Stanley. Smith had some difficulty opening the man door. Stanley pointed out the loose bolts in question in an area which used to be an old belt entry. (Tr. I, 156-157). There were some old belts, an old piece of curtain, and some old sloughing off the ribs present. There were also “a few footprints” going through the area. (Tr. I, 157). Smith was asked if he agreed with the citation. He saw loose bolts “evident of the condition.” (Tr. I, 157). Smith did not know where the footprints came from. (Tr. I, 157-158). At the same time, Smith did not presently know what route the seal examiners traveled. (Tr. I, 158). After being informed of the condition, Smith had the area flagged off. (Tr. I, 158).

After getting to the surface, Smith, Stanley, and Webb “conferenced this citation.” (Tr. I, 158). After investigation, Smith learned that examiners did not travel through the man door to the left but passed through the right man door. (Tr. I, 159). Smith was unaware of such when he met with Stanley. (Tr. I, 159).

Smith disagreed that he had reportedly stated to Stanley that he had known examiners traveled through the area. (Tr. I, 160; *see also* R-22, p. 22). Smith agreed that the conditions observed by Stanley did exist and (the roof) “needs support.” (Tr. I, 160). Smith assented that he had advised Stanley that he did not know the actual path which examiners traveled to the fourth East Gate Seals.⁷ (Tr. I, 161).

Smith specifically testified to the following:

I don’t know which way they traveled. I knew they made that sealed area in the fourth east headgate, but now there was three man doors there, one of them was flagged off straight ahead. So I knew they either had to go through the one on the right or the one on the left. I believed that they went to the one on the right, but I didn’t know about it until later on when I got to talk to the examiner.

(Tr. I, 161).

Smith recalled that there were footprints through the left door in the crosscut Entry One but noted that footprints in a coal mine could be seen “all over the place.” (Tr. I, 161). He did not know when they were (actually) made. (Tr. I, 161). The footprints went around the bolts – to the left side rib and down the edge up toward the seal. (Tr. I, 162).

On cross examination, Smith confirmed that he was no longer with American Coal and was not familiar with the area in question until after the citation was issued. (Tr. I, 162-163). Only after investigation did he learn that the examiners took a route different from Stanley. (Tr. I, 164). He had flagged off the cited area because he was not certain whether anybody was working or traveling in the area. (Tr. I, 166).

Smith indicated he had no personal knowledge of the route taken by examiners. (Tr. I, 168).

⁷ In virtually every case that the undersigned has presided over there has been an allegation by an inspector that one or more of Respondent’s employees gave an incriminating statement. Invariably this reported admission or declaration against interest has been denied at hearing.

iv. Robert Deere

At hearing Robert Deere appeared and testified on behalf of Respondent. Deere had worked as an examiner for American Coal since 2004. (Tr. I, 169). He previously worked for Inland Steel and Consolidated for 28 ½ years. Among numerous positions, he was a miner operator, buggy operator, and examiner. He had approximately 17 years of examiner experience. (Tr. I, 170).

Deere was familiar with the fourth East Headgate area. (Tr. I, 171). He had examined it prior to the October 22, 2010 citation date. (Tr. I, 174; *see also* R-42, copy of pre-shift examiners report containing Deere's signature(s).) Deere indicated on a map of the area the route he usually travelled during his examinations. (Tr. I, 176-177; R-37, p. 4).

Deere testified that he did not use the route taken by Stanley to examine the seals. Access through the middle man door had been previously flagged off due to deterioration, including rib rashing in the area. Examiners did not use the left man door (which was used by Stanley to gain access) because this area was also not in good condition, had been gobbled, and there was no reason for anyone to walk in the area. Rather, Deere normally travelled through the right man door, this route going through a much better supported area. (Tr. I, 176-178).⁸

On cross examination Deere agreed that the south/left door used by Inspector Stanley had not been flagged or dangered off. Although the number 2 (center) entry door had been barricade, there was no barricade prior to October 22, 2010 from the south door. (Tr. I, 180).

Deere further testified that the subsequent barricading of the south door after citation issuance did not alter his normal route for examinations. (Tr. I, 181).

2. Docket No. LAKE 2012-58

a. Citation No. 8432118

i. Edward W. Law

At hearing Edward W. Law appeared and testified on behalf of the Secretary. Law had worked as a coal mine inspector for MSHA since September, 2005, being stationed at the Benton field office since 2008. (Tr. I, 190). As a coal mine inspector, he inspects all air courses, belts, equipment, surface areas, and records. (Tr. I, 190). Prior to working for MSHA, he worked for American Coal for 21 years and Consolidated Coal for approximately 2 years. (Tr. I, 191). His jobs with American Coal included labor equipment operator, supply man, and underground and surface repairman. (Tr. I, 191).

Law's Citation No. 8432118 involved a violation of a mandatory safety standard, §75.202(a), which also was a violation of one of the "rules to live by." (Tr. I, 192). Law found inadequately supported ribs at the first East Headgate seal entrance. (S-12, p. 1). Law observed

⁸ *See also* R-37, p. 4, for route reportedly taken by Deere marked in green pen.

a cracked rib, broken and leaning, with a gap behind the rib up to three inches from the coal pillar. (Tr. I, 193; *see also* S-13). Law testified that, when a rib had as much separation as he observed, especially when it was undercut, it would be like removing a leg from underneath a table. At any point it could roll out and fall on the ground. (Tr. I, 193-194).

Law opined that seal examiners would normally travel in the cited area, as well as individuals required to maintain the seals. (Tr. I, 195). Given that the area had been scooped out or undercut, Law estimated that the condition had existed for a number of shifts. (Tr. I, 196, 200). The cracked rib was not being supported. Law could tell where it had been worked on. (Tr. I, 198). The area was black where the rib had been pulled down. There was an indentation where a piece of rib had been pulled out. (Tr. I, 198). The area was not flagged or dangered off in any way. (Tr. I, 198).

Prior to February 28, 2011 Law had safety talks at the mine regarding roof/rib control but not regarding the specific cited area. (Tr. I, 201-202).

Law found that an injury was reasonably likely to occur to a person either being directly or indirectly struck by a collapsing rib. (Tr. I, 203). The rib was 7 feet high and would probably fall in one solid piece into the travel way. (Tr. I, 204). The injuries sustained in a rib fall, including broken bones, could reasonably be expected to result in lost workdays. (Tr. I, 204). If an individual were walking directly next to the rib, there could be a fatal injury. (Tr. I, 204). However, experienced miners who are aware of rib collapse danger, usually walk in the middle of walkways so that the severity of the injury would be less. (Tr. I, 204).

Law found that one person, the examiner, coming in or coming out on the seal, would be affected. (Tr. I, 205). Usually a rib fall only affects one person. (Tr. I, 206).

Law had modified the cited area in question from “1st east headgate” to “1st east tail gate.” (Tr. I, 206-207; *see also* S-12, pp. 1 and 2). When Law handed the citation to Michael Smith, Smith did not raise any mitigating circumstances. (Tr. I, 207).

Law had designated moderate negligence because some work had been performed in the area but the operator “probably should have done more” including flagging it or pulling the rib down or reporting it. (Tr. I, 207-208). Noting the unsafe condition to be “pretty obvious” Law had chosen to give the examiner the benefit of the doubt as Law had not written “absolutely it was obvious.” (Tr. I, 208-208).

In order to terminate the citation the operator had pulled the rib down. (Tr. I, 208; *see also* S-12, p. 3). Law had recommended the citation for special assessment because the operator had a “lot of issues with ribs” and roofs and had been cited a “pretty high” number of times for 202(a) violations. (Tr. I, 209).

On cross examination Law testified that he may have written some of his notes contained at S-13 both below and above ground and may have also number some pages at different times. (Tr. I, 211-214).

Law's familiarity with the routes of examiners in the 5 right seal panels depicted in the map at R-37 was based upon his experience as an MSHA inspector and not as a former American Coal Employee. (Tr. I, 221). Law agreed that there were multiple entries that the first East Longwall Tailgate that (seal) examiners could have taken. (Tr. I, 228). No matter which way they would have chosen, they would have needed to go past the crosscut where the cited rib was recorded. (Tr. I, 227-228). Law did not recall whether he had observed any footprints in the rib area. (Tr. I, 231). Nor did he identify any individual near the loose rib during the date of citation. (Tr. I, 232).

Law testified that it was possible that part of the rib had fallen down and had not been pulled down by Respondent.⁹ (Tr. I, 232-233). The fact that the area around the missing portion of the rib was black did not necessarily indicate that the causal event was recent in nature. (Tr. I, 233). Law agreed that his notes did not indicate any material on the floor in the rib area either way. (Tr. I, 233). Law agreed that the first East Tailgate sealed area was an outlying area of the mine, located a "good distance" from the active section. (Tr. I, 235, 236). Except for examination, Law was not personally aware of any work being scheduled in the first East Tailgate area. (Tr. I, 238). Respondent's past history of violations involving ribs and roofs was considered by Law in recommending a special assessment. (Tr. I, 239). In general, Law also considered, in making a special assessment recommendation, whether there was a "rule to live by" violation. (Tr. I, 243).

Specifically as to the within citation, law also considered "the severity of the rib size." (Tr. I, 244). Law agreed that although the violative conduct as to the within citation was not highly negligent in nature, it did help justify a special assessment.¹⁰ (Tr. I, 246).

ii. Michael Smith

As to Citation No. 8432118 (R-11) Smith testified that at the time the citation was issued he did not know the route examiners used to examine the seal areas. Subsequently, after speaking with the examiners, Smith learned that they went in at the fourth East Tailgate area, avoiding the first East Tailgate area cited by Inspector Law, by backtracking out. (Tr. I, 259-261). Miners also did not regularly travel the area where the unsupported rib was located. They also would travel up to the fourth East Tailgate and double back. (Tr. I, 261).

On cross examination Smith reiterated that miners did not go near the cited rib area (which was near an airlock) but went in at the fork and doubled back. (Tr. I, 262, 263).

⁹ As discussed *infra*, the ALJ found Law's testimony on this point somewhat contradictory.

¹⁰ As discussed *infra*, the ALJ did not find the inspector's explanation as to why he recommended a special assessment as opposed to a regular assessment altogether enlightening. (*See also* R-45).

Smith believed that §75.202(a) only applied to areas where persons “normally” worked or traveled. (Tr. I, 263). He agreed that the air-locked area (where the cited rib was located) had not been blocked off. (Tr. I, 264).

iii. Robert Deer

As to Citation No. 8432118 (R-11) Deere testified that he was familiar with the first East Tailgate area. (Tr. I, 267). Referring to the map of the first East Longwall Tailgate at R-37, p. 8, Deere further indicated that it depicted the area he usually examined, including seals. (Tr. I, 268).

Instead of trying to access the seals through the area where the discussed airlock was located (which was “fairly low”), Deere would drive down the fourth tail gate seals where he could drive off the road and park his golf cart with no danger of anyone hitting it.¹¹ (Tr. I, 269).

On cross examination, Deere testified that it was “just as easy” to “walk down and walk right back out” instead of going in and out two different places. (Tr. I, 271). However, he conceded that the airlock area (used by law) had not been blocked off. (Tr. Tr. I, 271).

b. Citation No. 8432126

i. Edward W. Law

At hearing Law testified that he had issued Citation No. 8432126 because he had discovered four damaged roof bolts in the mine’s main north travel way in the crosscuts between entries #5 and #6. (Tr. II, 281; S-14). The damaged bolts had created three different areas of unsupported roof. Once a bearing plate is no longer against the roof as instantly, there is no support as far as skin control.¹² (Tr. II, 282).

Law had ended up at the cross-cut during his inspection in order to allow an outby vehicle, which had right of way, to travel past him. (Tr. II, 283). “Just about everybody” traveled the main north travel way throughout the day: miner, management, and safety people. (Tr. II, 284). Law had drawn a diagram depicting the crosscut at issue. (Tr. II, 285; S-15, p. 4). Law opined that the damaged bolt condition had been existent for several shifts prior to his inspection because there were tracks through the area. (Tr. II, 286). After the four (4) bolts had been damaged there was no evidence of supplemental support being added or re-bolting. (Tr. II, 288). Given the visible tracks on the mine floor and the need for vehicles to pull into the crosscut to allow clearance, there was a hazard created of roof fall that could result in broken bones. (Tr. II, 289). Law had graded the gravity as lost workdays due to falling roof rock reasonably being expected to result in fractures causing lost workdays. (Tr. II, 289). Given the

¹¹ See also Deere’s detailed description of route taken at Tr. I, 268-270 and R-37, p. 8 in which Deere also asserts that no miner routinely traveled by the cited rib area.

¹² A bearing plate secures the immediate roof, skin of the roof; it also anchors the bolt tightly wherever the bolt is set with glue. (Tr. II, 282).

lack of skin control with only the bolt shaft remaining there was a reasonable likelihood of roof fall. (Tr. II, 289).

When Law pulled into the crosscut, the condition was noticeable to him. (Tr. II, 290). The area had not been flagged off. (Tr. II, 291). There would have been constant travel, up and down, past the crosscut. (Tr. II, 291). Law had designated one person as likely to be affected because in open top rides there would generally be only one person. (Tr. II, 292).

He had found moderate negligence because the affected area was off the travel way and there were multiple crosscuts. (Tr. II, 292-293). The crosscut could have “easily been missed.” (Tr. II, 292-293). The citation was terminated by having the bolts replaced and the area re-bolted. (Tr. II, 294; S-13, p.2). Law had again recommended a special assessment because §75.202(a) involved one of the ten “rules to live by” and because of Respondent’s past violation history. (Tr. II, 294).

Israel Burtis, Respondent’s Safety Technician, had accompanied Law during his March 2, 2011 inspection. (Tr. II, 295).

On cross examination, Law testified that the four compromised bolts at issue had been hit by some piece of mobile equipment: two had been sheered off and two had been damaged. (Tr. II, 290-297). The damaged roof bolts were bent to the point where they were no longer in contact with the roof. (Tr. II, 297). Law testified that at Respondent’s mine anybody, including management, could have operated the machinery that had damaged the bolts. (Tr. II, 299-300). Law specifically referenced his observation of scoop tracks (but not other machine tracks) in his notes. (Tr. II, 301; R-14). He further did not observe any footprints. (Tr. II, 301).

Law agreed that, generally, mine examiners were not required to go into crosscuts. (Tr. II, 303). On March 2, 2011 Law did not observe any material hanging from the roof or fallen material on the floor. (Tr. II, 304). Law had not identified anyone at American Coal who had observed the cited condition prior to Law’s citation issuance. (Tr. II, 304). Law did not know the actual amount of limestone present above the immediate roof in the cited area. (Tr. II, 308). A “good amount” of limestone offers the best support for a mine roof. (Tr. II, 308). If, however, the limestone had been thinned out, there could have been a catastrophic failure and fatal injury. (Tr. II, 308-309).

Stating that a “good amount” of limestone would be “even a foot,” Law agreed that the goal was to anchor bolts in good limestone. (Tr. II, 309). Law did not record in his notes any evidence of roof cracking, spalling or chandeliering in the cited area. (Tr. II, 312-313).

Law agreed that the bolts at issue were fully grouted resin bolts. (Tr. II, 313). He further testified that if the head of a bolt had been sheered off or the bearing plate damaged, because glue is brittle, the bolt might not hold the roof skin layer.¹³ (Tr. II, 315-316).

Law agreed that there might be areas on each side of the crosscut where a golf cart could pull in and remain under supported roof. (Tr. II, 319). Except for golf carts, other vehicles did not have canopies, including the diesel ride, the scoop car and cab, the ram cars, and the mantrips. (Tr. II, 319-320).

Law testified that any citation involving a violation of one of the ten required “rules to live by” required filling out of a SAR (Special Assessment Review Form). (Tr. II, 320). Among the factors considered in making a special assessment determination was Respondent’s prior violation history. (Tr. II, 320-322; *see also* R-45).

Law testified that he was unfamiliar with the special assessment narrative form at R-19 and did not know how the special assessment column number had been arrived at.¹⁴ (Tr. II, 325-326).

ii. Israel Burtis

At the hearing Israel Burtis appeared and testified on behalf of Respondent. Burtis confirmed that Citation No. 8432126 (R-13) had been served on him by Inspector Law. (Tr. II, 331). Burtis and Law were riding in a golf cart when they arrived at the cited crosscut area. (Tr. II, 334).

Burtis testified that he did not observe any adverse roof condition; he saw no T3 channel¹⁵ or screen wire which would have been indicative of roof failure. (Tr. II, 335). Burtis saw nobody else in the area of the crosscut. (Tr. II, 336). Hourly employees operating equipment would, however, be expected to go through the area. (Tr. II, 336).

On cross examination, Burtis testified that he traveled the main north travel way while conducting audits. (Tr. II, 337). He confirmed that outby traffic had the right-of-way, requiring inby traffic to pull into crosscuts in the affected area. (Tr. II, 337). During his audits, he did not always pull into every crosscut. (Tr. II, 337). Although he did not see a T3 Channels or screen mesh, Burtis did observe the sheered off and damaged roof bolts. (Tr. II, 338-339).

¹³ See Tr. II, 313-318, for full exchange between Respondent’s counsel and Inspector Law regarding a full grouted resin bolt’s ability to support roof area if the bolt head is sheered off or damaged. Despite counsel’s best efforts, Inspector Law would not concede that such compromised bolts still afforded some support for roof skin.

¹⁴ Despite Law’s professed lack of knowledge regarding special assessment penalty determinations, Respondent’s counsel argued that an inquiry into MSHA’s decision-making process for special assessments was necessary. (*See also* Tr. II, 326-328).

¹⁵ T3 channels indicate low limestone. (Tr. II, 338).

iii. Gary Vancil, Jr.

At hearing Gary Vancil, Jr. (“Vancil”) testified on behalf of Respondent. Vancil worked as a senior geologist for American Coal. (Tr. II, 340). His responsibilities included coal quality, drilling, and most importantly, hazard mapping and roof control. (Tr. II, 340). He had attained bachelor’s and master’s degrees in Geology from Southern Illinois, (Tr. II, 340). He had worked in the limestone industry and had worked for 2 years with American Coal. (Tr. II, 341).

Vancil was familiar with the roof lithology at New Era Mine. (Tr. II, 341). Referring to the roof control plan for subject mine, strata information, Vancil testified that the No. 6 seam (the seam at issue) had a roof made up of sandstone, Anna shale, and Breaston Limestone. (Tr. II, 342; R-30, p. 4). The shale had a 4-6 inch thickness and the limestone a 5 foot, 6-inch thickness. (Tr. II, 342; R-30, p. 4). Limestone would be strong, very competent it would not be laminated or porous. (Tr. II, 343). Once coal is removed, the limestone, if 42 inches or more in thickness, makes the best roof. (Tr. II, 343-344).

A limestone roof of such thickness would not be prone to chandeliering, scaling, or other skin control issues. (Tr. II, 344). Vancil has observed how the limestone roof behaved at the New Era Mine behind the longwall gob. On the 6th and 7th East panel, he could see behind the shields the roof with no support and the face approximately 1,000 to 1,200 feet wide and the limestone overhanging the shields for about 30 feet without breaking. (Tr. II, 345). Vancil was not aware of any instance – based upon his personal experience, review of records, and/or talking with individuals – in which there was a roof fall where the limestone was over 42 inches in thickness. (Tr. II, 346-347). Records only recorded roof falls in area where the roof had gray shale or limestone missing. (Tr. II, 347).

As opposed to limestone, Anna shale could be either “competent or incompetent,” “hit or miss.” (Tr. II, 348).

Vancil testified that he had personal knowledge of the roof lithology in the cited area – spad 15376 between Entries Five and Six. (Tr. II, 348). Referring to R-9, p. 2, a mine map overlaid with his hazard map, Vancil indicated that roof bolters drew test holes to measure limestone thickness. (Tr. II, 349). Vancil subsequently ran a camera up the roof into the test hole(s) and recorded it, checking the roof lithology and trying to match it with the bolter’s tag. (Tr. II, 349).

Vancil had personally inspected the cited area, including the immediate roof, and found that it was limestone in the crosscut. (Tr. II, 350-351). In looking at the rib, Vancil could see where there had been shale but it had been taken down during mining. (Tr. II, 351). However, he saw no evidence of shale in the roof of the crosscut. (Tr. II, 351). One of the test boreholes indicated over 6 feet of limestone in the crosscut. (Tr. II, 352). Vancil did not observe any evidence of cracking, jointing, sandstone channels, or kettle bottoms in the roof. (Tr. II, 353).

Reviewing inspector Law’s drawing of the cited areas at R-14, p. 6, Vancil opined that it was unlikely, based upon his experience and person knowledge of the area, that there would have

been skin control issues with the limestone roof in the area. (Tr. II, 353-354). Given the limestone roof, Vancil opined that it was “highly unlikely” that the four damaged roof bolts would have led to a larger roof fall. (Tr. II, 354).

On cross-examination, Vancil agreed that limestone could “quickly” vary at the mine, “from crosscut to crosscut,” with varying degrees of lithology of the 6 seam. (Tr. II, 355).

Vancil was unsure as to whether he or a prior geologist had created the hazard map he testified regarding. (Tr. II, 355). He had inspected the area in question after the citation had been issued, approximately one week prior to the within May 22, 2013 hearing. (Tr. II, 356). Vancil agreed that if there was shale or sandstone in the immediate area, even through there was limestone present above, a bearing plate would serve as skin control. (Tr. II, 356). He further agreed that once a fully grouted resin bolt’s glue of resin sets up, it becomes brittle, especially if not mixed correctly. (Tr. II, 357).

c. Citation No. 8432129

i. Edward W. Law

As to Citation No. 8432129 (S-16), Law testified that he issued such on March 3, 2011 based upon Respondent’s violation of §75.202(a). (Tr. II, 360). Law had found the roof at crosscut 8, between entries #5 and #4, to be inadequately supported. An area along the inby rib had three (3) roof bolts that were too far from the coal pillar, exposing an area of 5.5 to 6 feet wide by 20 feet in length. Also there were roof bolts (2) too far from the coal pillar exposing an area 5.5 to 6 feet wide by 15 feet in length. (Tr. II, 361; S-16).

Law believed that Respondent’s roof control plan would have allowed only a four foot distance off the rib. (Tr. II, 362). The #8 crosscut would be another area in which vehicles would pull in to allow outby traffic. (Tr. II, 362). The area in question would be similar to the previously testified to areas (Citation No. 843216). The crosscut itself was originally bolted in compliance but the coal ribs or coal pillars had deteriorated to the point that a wide area was created between the last row of bolts and the solid existing coal pillar. (Tr. II, 364). Coal pillar deterioration could be caused by weight, weather, equipment, and/or moisture. (Tr. II, 364).

The coal pillar area had not been flagged off or dangered off. (Tr. II, 364). Once in the crosscut, the unsafe condition was “pretty easily” seen. (Tr. II, 364).

Based upon his experience, Law opined that areas, such as that cited, did not go from compliance to a 1 ½ to 2 foot distance in a short period. (Tr. II, 365). It would take several shifts, depending if equipment was rubbing, causing it to rash out, or fairly quickly where cable was hung around the corner. (Tr. II, 365). Under “normal terms,” weight and weather, the condition would have taken “a while” to happen. (Tr. II, 365).

The hazard created was that of roof fall and/or rib roll out. The minimum 4 foot (bolting) distance was so that there would not be unsupported areas in which coal might fall out, individuals beings truck by roof, rock, and coal ribs being crushed out. (Tr. II, 367). Such injuries would result in lost work days. (Tr. II, 367; S-17, p. 5). Because the rides were open-

sided, falling material could strike the operator or occupant of a vehicle, causing lost work days. (Tr. II, 368).

Law had designated the conduct as constituting moderate negligence because it might not have been observed unless one pulled into the area. (Tr. II, 368). Although he did not see anybody in the area, Law indicated that examiners and management would travel through the area and might pull into the crosscut. (Tr. II, 368-369). Law had recommended a special assessment for essentially the same reasons, number of previous citations/violations, that existed for the other citations testified to. (Tr. II, 370).

On cross examination, Law agreed that there were “lots of crosscuts” in the main north area. (Tr. II, 371). He further agreed that the cited area was not an active section. (Tr. II, 372). As with other citations Law had not issued any exam-related citations. (Tr. II, 372).

Law stated that the areas had become noncompliant because of rashing out and getting wider when the bolts were originally installed. (Tr. II, 373). The areas were along both sides of the crosscut. (Tr. II, 373). Law did not note any mobile equipment tracks or foot prints being in the crosscut. (Tr. II, 373). Law agreed that the older an area is, the more the area will start to widen and the more rib rash can occur. (Tr. II, 375). Law did not identify any actual cracking or spalling in the roof. (Tr. II, 379). The fact that bolting was 6 feet from the rib caused the roof to be compromised. (Tr. II, 379).

Law agreed that his notes and citation did not mention anything about the roof other than the unsupported area. (Tr. II, 379). There was only mention that the 6 foot distance (from rib to bolting) caused the roof to be compromised. (Tr. II, 380). Law’s rationale for special assessment was essentially the same as previously testified to. (Tr. II, 381).

On re-direct examination Law indicated that he was travelling with mine manager, Marvin Webb, at the time of the citation. (Tr. II, 382).

ii. Gary Vancil, Jr.

As to Citation No. 8432129, Vancil testified that he was personally acquainted with the cited area. (Tr. II, 384). The immediate roof in the crosscut was limestone in the middle and shale on the outside edges; limestone was in the middle of the entry and above the shale. (Tr. II, 384). There was approximately 67 inches of limestone between Entries Four and Five. (Tr. II, 384). Based upon the bolter tag and review of the hazard map, Vancil opined the limestone in crosscut #8 was good. (Tr. II, 385-386; *see also* R-39, p. 3).

Given the rib rashing described in the citation, Vancil opined that the potential for a roof fall in the immediate roof in crosscut 8 was unlikely. (Tr. II, 386). The limestone was competent all throughout the area in question. (Tr. II, 386). Vancil did not observe shale in the area where the rib rash was present. In the area where he saw roof support – cable bolts and timber – he did not see any shale in the immediate roof. (Tr. II, 387-388). The limestone had rolled down and was on top of the coal. (Tr. II, 388-389). Based upon his experience, the

unsupported 5.5 to 6 foot area that had rib rashing would not be at risk for a roof fall due to the absence of water and the amount of limestone present. (Tr. II, 390-391).

On cross examination, Vancil indicated that he had inspected the area one week prior to hearing. He did not know if the cable bolts had been installed in response to the citation. (Tr. II, 391).

3. Docket No. LAKE 2011-962

a. Citation No. 8432052

i. Edward W. Law

In reference to Citation No. 8432052 (S-9), Inspector Law testified that Respondent had violated a mandatory safety standard, §75.1403. The safeguard involved was written so that transportation type accidents could be avoided. (Tr. II, 395).

The original safeguard, Citation No. 3033358 was issued on January 13, 1988 when Law was still working at (Kerr-McKee) Galatia Mine. (Tr. II, 393; S-10). A miner operator was standing on the back side of a curtain when a ram car operator came through the curtain, striking the miner and causing leg injuries. (Tr. II, 394; S-10). The safeguard provided that all equipment be parked at least 25 feet away from curtains or that the curtain be marked to warn miners that equipment was parked behind the curtains. (Tr. II, 394; S-10).

Law had observed a transformer, in violation of the safeguard, located directly behind a curtain between entries 3 and 4 with no marking on the opposite side warning miners of its presence. (Tr. II, 394-395). The transformer was up against the curtain in the area of the 9th headgate. (Tr. II, 395). The transformer was approximately 12 feet by 18 feet in size and was “very heavy.” (Tr. II, 396). Law estimated that it had been at the cited location for several shifts. (Tr. II, 396). Miners in vehicles and doing set-up work would be in the area, including scoopers and ram car operators. (Tr. II, 397). Though he had not issued a previous citation for an improperly located/marked transformer, he had issued similar citations in the past for violating the safeguard. (Tr. II, 398).

The hazard created by the safety violation would be: some vehicle ramming in the transformer and the vehicle operator being injured; or some miner on foot behind the transformer being struck by the transformer after it was rammed. (Tr. II, 400). It was likely that somebody would be injured because a miner-pedestrian would have no protection from the collision. If another vehicle was cutting behind the transformer, the miner-pedestrian could be caught between 2 pieces of equipment. (Tr. II, 401). Although law had designated the gravity as lost workdays, he indicated the injury could be worse. (Tr. II, 401).

In the case of a mobile equipment operator, he would suffer impact injuries – though such injuries would likely be less serious than those suffered by a miner on foot. (Tr. II, 402). Law observed that equipment operators did not wear seat belts. (Tr. II, 402). Law found that one

individual would likely be affected, although, given the right circumstances, two people could be injured. (Tr. II, 403).

Law had found only moderate negligence because it was difficult to ascertain who would have actually known the transformer's location. (Tr. II, 404). Light could be seen through the curtain; a shadow of an object might also be discerned. (Tr. II, 404). In order to have proper markings, hang flags or pogo sticks indicating, "stop, power center" should have been erected. (Tr. II, 405). Also, something should have been hung in the crosscut, alerting the operator before he got to the curtains. (Tr. II, 405). The citation had been terminated after the curtain was marked to warn miners. (Tr. II, 406). Law held a close-out conference after issuing the citation. (Tr. II, 406).

On cross examination, Law stated that the curtains at the time of the within citation were pull-through curtains, made of plastic or nylon base. (Tr. II, 408). At the time of the original safeguard incident the curtains were opaque. (Tr. II, 408). Miners cars and ram cars, as involved in the earlier incident, moved along frequently. (Tr. II, 409-410). Law agreed that individuals on a working crew would know during their shift the locations of the transformer. (Tr. II, 412). He further agreed that, as a general practice, miners would be dropped off in the area of the transformer. (Tr. II, 412). Law estimated that he had cited the instant safeguard less than 5 times in the past. (Tr. II, 416). Law indicated that the 55 past citations noted in the instant citation concerned a multitude of safeguards associated with §75.1403 and not just No. 3033358.¹⁶ (Tr. II, 417; S-9).

Though not mentioned any specific activities in his field notes, Law asserted that he observed vehicles and individuals, in addition to bolters, in the cited area. (Tr. II, 419-420). Law remembered a string of lights above the transformer, although he did not know the specific number of light bulbs. (Tr. II, 432).

In recommending the within citation for a special assessment, Law considered the number of previous §75.1403 violations, that the violation involved on of the ten "rules to live by," and that it was S&S. (Tr. II, 433).

ii. Israel Burtis

At the hearing Burtis testified that he had accompanied Inspector Law when the within citation was issued. (Tr. II, 436; R-6). Burtis testified that the curtain involved was a clear run-through curtain. The power station (transformer) was on the back side and lit up. (Tr. II, 436). Burtis asserted that one could see through the curtain and what was behind the curtain. (Tr. II, 437). The power center was where everyone came for communications and maps. (Tr. II, 437). Everybody gathered at the power center at the start of the shift to get their game plan together for the day. (Tr. II, 437).

¹⁶ See also R-36 for various other safeguards cited in connection with §75.1403 and Respondent's cross-examination regarding such at Tr. II, 417-418.

Burtis further testified that he could tell where the power center was because of the lights which illuminated the entry and shone through the curtain. (Tr. II, 437-438). In addition to the transformer, Burtis observed a roof bolter and possibly broken down battery scoop in the area. (Tr. II, 438).

iii. Edward W. Law

On rebuttal, Law stated that he recollected that the cited curtain was a line curtain that was opaque. While one could see light through it, one could not tell what type of equipment was behind it. One could only see shadows of things. (Tr. II, 439).

On cross examination, Law disagreed that clear curtains were commonly used behind a transformer at Galatia Mine. (Tr. II, 440).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Citation No. 8432052 (LAKE 2011-962)

a. The Secretary Has Carried His Burden Of Proof By A Preponderance Of The Evidence That §75.1403 (Safeguard No. 3033358) Was Violated.

On January 4, 2011, Inspector Edward Law issued the within citation which, under Section 8, Condition or Practice, reads as follows:

The 12,470 VAC Unit transformer company #90, located on the 9th West Headgate, 008-MMU, between #3 and #4 at the survey station 19,546 North is parked against a curtain and the opposite side of the curtain is not marked with to warn miners of the equipment parked on the other side.

Standard 75.1403 was cited 55 times in two years at mine 1102752 (55 to the operator, 0 to a contractor).

(S-9).

§75.1403, Other Safeguards, provides as follows:

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

30 C.F.R. §75.1403.

Safeguard No. 3033358, in pertinent part, requires that “all equipment be parked at least 25 feet away from curtains or that the curtain be marked to warn miners that equipment is parked behind the curtains.” (S-10).

At hearing, Inspector Law testified he observed a transformer located directly against a curtain in the area of the northwest headgate with no markings on its opposite side to warn members of its presence. (Tr. II, 394-395). A very heavy piece of equipment, the transformer was approximate 12 feet wide and 18 feet long. (Tr. II, 394-395). The curtain in question was opaque. Light and shadows could be perceived behind it but not objects. (Tr. 404-405).

In issuing the instant citation, Law referenced the accident described in Citation No. 3033358 (safeguard) (S-10). An individual, while working on a continuous miner, located approximately six feet behind an (unmarked) curtain, was struck by a ram car coming through the curtain. (Tr. II, 394). The safeguard required that “all equipment” be parked at least 25 feet from curtains or that the curtains be marked to warn miners that equipment was parked behind a curtain. (S-10).

At hearing, Respondent offered no evidence contradicting Law’s testimony regarding the location of the transformer vis a vis the curtain. Nor did Respondent present any evidence establishing that the curtain itself was marked. Further, Respondent offered no evidence that the area on the opposite side of the curtain was in any way flagged or posted.¹⁷

Given such the ALJ finds that the Secretary clearly carried his burden of proving by a preponderance of the evidence that Respondent had violated §75.1403 and associated safeguard.

In reaching this finding the ALJ specifically rejects Respondent’s argument that the within citation should be vacated because a properly narrow construction of the safeguard would require that “equipment” mean only *mobile* equipment. (*Respondent’s Post-Hearing Brief*, p. 58). As the Secretary correctly argues, the inspector, who issued the safeguard notice, did not restrict in any way the *type of equipment* to be covered. (*Secretary’s Post-Hearing Brief*, p. 14). The ALJ agrees with the Secretary’s position that the language of the notice recognizes that it is “the presence of equipment behind a curtain, and not the means of transportation for that equipment that contributes to the hazard.” (*Id.*). Likewise, the ALJ accepts the Secretary’s argument and cited case law that “parked” does not change the meaning of the word “equipment” but rather refers to the temporary nature of the equipment in a particular location. (*Id.*).

The first element of *Mathies* – the underlying violation of a mandatory safety hazard – has been clearly established.

¹⁷ At hearing Law testified that hang flags or pogo sticks should have been erected warning the miners of the transformer’s location. (Tr. II, 405). He further suggested something be hung out in the crosscut as advance warning because the transformer at issued was up against the curtain. (Tr. II, 405).

In *Wolf Run Mining*, 32 FMSHRC 1228, 1233 (2010) the Commission concluded that a violation of safeguard notice issued by a MSHA inspector constitutes a violation of Section 314(b)¹⁸ of the Mine Act and is therefore a violation of a mandatory safety standard.

The clear purpose of the safeguard is to protect miners from possible injury because the presence of equipment behind an unmarked curtain might not be known or perceived. The unreasonably narrow construction suggested by Respondent would inexorably lead to all sorts of hairsplitting defenses¹⁹ by miner operators that would defeat this purpose.

In its brief Respondent also argued that the within citation should be vacated because a strand of lights illuminated the transformer area and constituted a de facto marking of the curtain as to bring attention and notice of the transformer's location. (*Respondent's Post-Hearing Brief* at p. 60; see inter alia, Tr. II, 432, 436-437, 439).

This Court also holds that the clear wording of the safeguard requires that curtains be marked and not merely that an area be illuminated.

The problem with Respondent's light equals marking and notice rationale is that in the case *sub judice*, despite the presence of lighting, Inspector Law could not see what was actually behind the curtain at issue or the object's depth. (Tr. II, 439). The purpose of the safeguard is to alert miners of the actual presence of equipment at a close distance behind the curtain. Lighting which merely allows miners to possibly discern shadow-shapes at some unknown depth behind a curtain does not sufficiently satisfy the safeguard's purpose.

Likewise, Respondent's argument and evidence that the location of the transformer was well-known to those working on the section is equally unpersuasive as to the essential issue of violation.²⁰ (see, inter alia, *Respondent's Post-Hearing Brief* at p. 59).

¹⁸ "(b) Other safeguards adequate, in the judgment of an authorized representative of the Secretary, to minimize hazards with respect to transportation of men and materials shall be provided."

¹⁹ The ALJ foresees similar case scenarios as existed here. Equipment might have missing or damaged wheels or rollers or skids; equipment might lack power or a power source; equipment might be tagged out; equipment might have defective parts rendering it inoperable. Mine operators, accepting Respondent's narrow construction, could arguable claim that such equipment was not technically *mobile* and, therefore, fell outside the scope of the safeguard.

²⁰ The ALJ, however, accepts that the factors of lighting and known location may be considered in determining the level of negligence and in assessing gravity.

Respondent seems to suggest that he should be found not to have violated §75.1403 because most miners were aware of the within transformer's location.²¹ However, the purpose of the safeguard is to reasonably alert *all* individuals, include those unfamiliar with the affected mine area, that a piece of equipment is located behind a curtain.

The ALJ therefore finds that Citation No. 8432052 was properly issued by Inspector law for a violation of §75.1403 (Safeguard No. 3033358) and should not be vacated.

b. Considering The Record *In Toto* And Applying Applicable Case Law, The Violation Was Significant And Substantial In Nature.

Well-settled Commission precedent sets forth the standard used to determine if a violation is S&S. A violation is 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., National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). The Commission later clarified this standard, explaining:

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.

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

As discussed supra, the first element of *Mathies* has been proved by the Secretary.

As to the second prong of *Mathies* – a discrete safety hazard, that is a measure of danger to safety, contributed to by the violation – the record again establishes satisfaction of such.

At hearing Inspector Law testified in detail regarding the discrete safety hazards contributed to by the safety standard/safeguard violation. An individual walking behind the transformer might be struck by the transformer being moved by a vehicle ramming into it through the unmarked curtain. (Tr. II, 400). A vehicle operator ramming into the transformer might also sustain injuries, including lacerations. (Id.). There was further potential of both injuries happening at the same time involving a miner on foot on the other side of the curtain and/or someone in a vehicle on the opposite side. (Id.).

²¹ Taken to its logical conclusion, such a defense would allow operators to justify their failure to post warnings because of alleged “common knowledge” regarding the existence of safety hazards – a slipper slope for miners’ safety.

Law also testified that if an individual was “cutting behind” the transformer and a big piece of equipment came through and the miner did not know it was coming, he could be caught between the two pieces of equipment.²² (Tr. II, 401).

The third element of the *Mathies* test – a reasonable likelihood that the hazard contributed to will result in an injury – is also supported by the record and applicable case law.

The Commission recently discussed the third element of the *Mathies* test in *Musser Engineering, Inc., and PBS Coal Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010) (“PBS”) (affirming an S&S violation for using an inaccurate mine map). The Commission held that the “test under the third element is whether there is a reasonable likelihood that the hazard contributed to by the violation, i.e., [in that case] the danger of breakthrough and resulting inundation, will cause injury.” *Id.* at 1281. Importantly, we clarified that the “Secretary need not prove a reasonable likelihood that the violation itself will cause injury.” *Id.* The Commission concluded that the Secretary had presented sufficient evidence that miners who broke through into a flooded adjacent mine would face numerous dangers of injury. *Id.* The Commission also emphasized the well-established precedent that “the absence of an injury-producing event when a cited practice has occurred does not preclude a determination of S&S.” *Id.* (citing *Elk Run Coal Co.*, 27 FMSHRC 899, 906 (Dec. 2005); and *Blue Bayou Sand & Gravel, Inc.*, 18 FMSHRC 853, 857 (June 1996)).

At hearing Inspector Law described the hazard posed to a mobile equipment operator of colliding with a hidden transformer as being reasonably likely to result in an injury to the operator “banging around inside” (a cab) and “being jostled.”²³ (Tr. II, 401, 402). The hazard posed to miner on foot being struck by equipment whose operator was unaware of his presence behind an unmarked curtain would also reasonably be likely to result in an injury. (*see also Secretary’s Post-Hearing Brief* at p. 16 re *Mathies* third element that the Court adopts without recitation herein).

Under *Mathies* the fourth and final element that the Secretary must establish is that there is a “reasonable likelihood that the injury in question will be of a reasonably serious nature.” *Mathies Coal Co.*, 6 FMSHRC at 3-4; *U.S. Steel*, 6 FMSHRC at 1574.

With respect to the fourth *Mathies* element, as outline supra, Law testified that injuries resulting from the cited violation would be lost workdays or restricted duty. (Tr. II, 401-402; S-9). Law further observed that a person pinned between mobile equipment and being knocked

²² Though he assessed the gravity as lost workdays or restricted duty, Law noted the injury in such a scenario could be much worse. (Tr. II, 402). The potential for catastrophic injury or death due to pinning between machines or machines and standing objects is beyond dispute. The ALJ notes a recent July 18, 2013 MSHA fatal-gram regarding the tragic death of an Illinois miner. While taking lunch behind a line curtain, he was truck by a battery powered coal hauler and fatally pinned between the coal hauler and coal rib.

²³ At hearing Law further noted that equipment operators in mines generally do not wear seat belts.

under the rub rail would sustain even worse injuries. (Tr. II, 402). A mobile equipment operator traveling through the curtain and colliding with the transformer would likely sustain injuries including lacerations. (Tr. II, 400).

Given *Musser's* holding that the Secretary need not prove the *violation itself* will cause injury, Commission law that the *absence of an injury producing event* does not preclude a determination of S&S,²⁴ and Inspector Law's judgment that the within violation was "S&S," the undersigned finds the Secretary has also carried its burden of proving S&S.²⁵

c. Respondent's Conduct Was Reasonably Designated As Being "Moderate" In Nature.

In the citation at issue, Inspector Low found that the operator's conduct was moderately negligent in character.

30 C.F.R. §100.3(d) provides the following:

(d) Negligence. Negligence is 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. A mine operator is required to be on the alert for conditions and practices in the mine that affect the safety or health of miners and to take steps necessary to correct or prevent hazardous conditions or practices. The failure to exercise a high standard of care constitutes negligence. The negligence criterion assigns penalty points based on the degree to which the operator failed to exercise a high standard of care. When applying this criterion, MSHA considers mitigating circumstances which may include, but are not limited to, actions taken by the operator to prevent or correct hazardous conditions or practices.

In 30 C.F.R. §103(d), Table X, the category of moderate negligence is described thusly: "The operator knew or should have known of the violative condition or practice, but there are some mitigating circumstances."

At hearing, Law testified that he had designated only a moderate level of negligence because "it was difficult to tell who would have known if (the condition) was there." (Tr. II, 404). "There was no supervisor directly in the area and no mine manager in the area that I could say was aware of it." (Tr. II, 404). However, Law opined that, "someone should have seen it on one of their passing through exams..." (Tr. II, 404).

A reasonably prudent person, familiar with the mining industry and protective purpose of the standard, would be constrained to agree with Law's assessment that someone should have seen the unsafe condition posed by a transformer being juxtaposed to an unmarked curtain. The

²⁴ See *Elkhorn Coal Co.*, 27 FMSHRC 899, 906 (Dec. 2005).

²⁵ The Commission has held that the judgment of an MSHA inspector is an "important element" in determining whether a violation is S&S.

miner operator's conduct did fall below the high standard of care imposed by the mine not to protect miners against the risks of harm associated with machinery that is hidden or obstructed from view by a curtain.

The ALJ finds no reason to modify any of the negligence or gravity findings reached by Inspector Law as to this citation and adopts all of the Secretary's Post-Hearing Brief rationales in support of such.

d. Penalty

The ALJ shall discuss the issue of penalty imposition in greater depth with succeeding citations. The Court has broad discretion to assess penalties *de novo*. See *Spartan Mining Co.*, 2008 WL 4287784 at 22 (2008).

As noted *supra*, while not accepting Respondent's arguments that illumination of the area and/or miner's general awareness of the transformer's location dictated vacating the citation, the ALJ does view those factors as constitute mitigating circumstances. The ALJ gave only partial credence to the testimony of Respondent's witness regarding the visibility of the power center through the curtain, but does not accept that the illumination of the curtain gave possible partial warning regarding the hazard. Likewise, the ALJ accepts that most miners in the area were aware of the transformer's location despite the lack of curtain marking.²⁶ In the circumstances the ALJ finds it reasonable to reduce the proposed \$4,800.00 penalty to \$3,800.00. The citation is otherwise affirmed as issued.

2. Citation No. 8428508 (LAKE 2011-701)

a. The Secretary Has Carried His Burden Of Proof By A Preponderance Of The Evidence That §75.202(a) Was Violated.

On October 22, 2010, Inspector Phillip Stanley issued Citation No. 8428508 to Respondent, alleging violation of 30 C.F.R. §75.202(a). The following unsafe condition or practice was cited:

The roof or rib where persons normally work or travel was not supported to protect persons from the hazards associated with the fall of the roof and rib. An area of unsupported roof exists at survey station 314.09 north in entry #1 of the 4th East Headgate. From the inby corner going across entry #1 to the solid rock, 6 roof bolts are hanging from the roof, from 6 inches up to more than 2 feet, and are not supporting the roof. The distance from the corner to the first effective roof bolt is 14 ft. The width of the unsupported roof as you go inby is 6 ft. This area is frequently travelled and an insufficient examination is also being cited. (Citation No. 8428509)

²⁶ See *Secretary's Post Hearing Brief* questioning Burtis' testimony at p. 12, FN 12.

Standard 75.202(a) was cited 109 times in two years at mine 11-02752 (109 to the operator, 0 to a contractor).

(S-1).

Standard 75.202(a) provides as follows:

- (a) The roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts.

In finding that the above standard was in fact violated the ALJ has been guided by controlling jurisprudence which holds that mine operators are strictly liable for violations of health and safety standards regardless of the chance of injury. *See e.g. Asarco v. Comm'n*, 868 F.2d 1195, 1197 (10th Cir. 1989). “[W]hen a violation of a mandatory safety standard occurs in a mine, the operator is automatically assessed a civil penalty.” *Id.* at 1197. If conditions existed that violated the regulations, citations are proper. *Allied Prods., Inc. v. Comm'n*, 666 F.2d 890, 892-93 (5th Cir. 1982)(footnote omitted). The Secretary is *not* required to prove that violation creates a safety hazard or that a violation is significant and substantial. *Asarco*, 30 FMSHRC 254, 256 (2008). A non-significant and substantial violation should be found and a penalty assessed even if the chance of injury is not very great. *Id.*

At hearing Inspector Stanley²⁷ testified that he had observed six (6) roof bolts in the northeast headgate area that were not supporting the immediate mine roof. (Tr. I, 16-17, 22, 24). The bracing plates were not in contact with the roof and shale pieces had fallen away from between the roof and the plates. (Tr. I, 21, 26). Stanley concluded that the bolts – one of which appeared to be bent -- were no longer serving any purpose in controlling the immediate roof. (Tr. I, 25-27).

Stanley further opined that the unsafe condition had existed for a “considerable period of time” given the gray color of the rock dust in the area. (Tr. I, 27). The draw rock, which had drawn to the floor, had a mixture of rock dust and float coal dust, as well as old and new foot traffic across the gob. (Tr. I, 27-28). Based upon his mining experience, Stanley opined that the area had been rock dusted two to three weeks prior. (Tr. I, 28-29). The rock dust had “certainly” been there for more than one shift. (Tr. I, 29). The foot traffic due to discoloration appeared more recent in origin. (Tr. I, 29-30).

Stanley testified that this area was examined regularly – at least once per shift. (Tr. I, 32).

²⁷ Stanley had less experience as an inspector and less experience in coal mining than Law. (see also summary of testimony supra regarding such). As discussed infra the ALJ accorded somewhat less weight to certain of Stanley’s determinations because of such.

As a result of his observations Stanley issued the within citation for violations of §75.202(a).

In its Post-Hearing Brief, Respondent properly states that it is the Secretary's burden, under the Mine Act, to prove each alleged violation by a preponderance of the evidence. (*See Respondent's Post-Hearing Brief* at p. 13); *see also* Commission and Circuit case law holding such as *Keystone Mining Corp.*, 17 FMSHRC 1819, 1838 (Nov. 1995), *aff'd* 151 F.3d 1096 (D.C. Cir. 1988). However, this burden is not an onerous "beyond a reasonable doubt burden" but a standard that only requires the Secretary to prove something is "more likely than not." *Keystone Mining Corp.*, 17 FMSHRC at 1838.

In its brief, Respondent essentially argues that there was insufficient evidence presented to establish that the condition existed in "areas where persons work or travel." (*See Respondent's Post-Hearing Brief* at p. 14 and 30 C.F.R. §75.202(a)). The ALJ grants that the cited area was in an outby section of Respondent's mine near seals and distant from active work areas.²⁸ However, the statutory language of §75.202(a) does not demand that the Secretary prove the affected area is "frequently" traveled or "actively" worked – only that it be shown that persons work or travel in the area.

In the final analysis, the undersigned gave credence to Stanley's observations and opinions that foot prints had recently been made by an individual or individuals – whether examiners, rock dusters, or pumpers – in the area where the damaged bolts and unsupported roof was located. (*see also* summary of testimony supra for Stanley's more detailed testimony as well as *Secretary's Post Hearing Brief* arguments which the undersigned found persuasive regarding such at pp. 17-22).

The ALJ has also considered the reported admission of Respondent's safety officer, Michael Smith, that examiners did, in fact, travel through the cited area. This admission, which Stanley also documented in his field notes, was corroborative of Stanley's testimony and opinion regarding signs of recent foot travel in the cited area.²⁹ (*See also* Tr. I, 40; S-2, p. 7).

²⁸ As discussed infra the ALJ did find such factors to constitute mitigating circumstances as to inter alia the level of negligence designated.

²⁹ Although Smith denied making such a statement, (Tr. I, 160) the ALJ, as trier of fact, has a duty to resolve conflicts in testimony without finding that a witness committed perjury. The ALJ found Stanley to be an honest historian and declines to accept Smith's suggestion that Stanley had made up the admission and fabricated notes "to bolster" his citation. (*see also* Tr. I, 160). Later, in his testimony Smith states, "I don't recall making that statement." (Tr. I, 167). However, he did not produce his own notes which he had taken of the conversation. (Tr. I, 168). When confronted with conflicting testimony and mindful of a preponderance of the evidence standard, the ALJ finds that it is "more likely than not" that Stanley's recollection of events, supported by contemporaneous notes, was more credible than Smith's bald recollections.

b. Considering The Record *In Toto* and Applying Applicable Case Law, The Violation Was Significant And Substantial In Nature.

Applying the *Mathies* test to the within citation, the undersigned finds that the violation of §75.202(a) was significant and substantial in nature.

As discussed supra, there is sufficient evidence to establish that the cited roof area was not supported or otherwise controlled to protect persons from hazard related to roof falls. A discrete safety hazard – falling roof material – was contributed to by the violation. (See inter alia Tr. I, 32 where Stanley testified regarding “fractured shale.”)

There was a reasonable likelihood that the *hazard* contributed to by the violation would result in an injury.³⁰ Stanley credibly described the unsafe roof condition with 6 to 12 inches of rock having already fallen in the area of foot travel. (Tr. I, 26, 31-32).

The ALJ further finds that the hazard of falling roof material would create a reasonable likelihood that the injury in question would be of a reasonably serious nature so that *Mathies* fourth element is also satisfied.

c. Gravity

The ALJ recognizes that a roof fall can spread into adjacent areas (*see also Secretary’s Post Hearing Brief* at p. 22 and Tr. I, 105). However, the ALJ finds that the injury which could reasonably be expected to result from the within standard would be more reasonably designated as lost workdays or restricted duty. The ALJ finds that rather than being pinned by falling roof material a miner would most likely be struck by falling shale.

d. Negligence

The ALJ further finds that Respondent’s conduct in this matter was at a moderate level of negligence rather than at a high level as designated by Inspector Stanley. Although, as discussed supra, the inactive character of the cited area does not preclude a finding of violation, the ALJ does accept, in part, Respondent’s arguments that this factor lessened the degree of negligence on the part of the mine operator. (*see also Respondent’s Post-Hearing Brief* at pp. 22-24). As discussed infra, the ALJ also agrees in part with Respondent’s argument that the adjacent nature of the cited conditions constituted somewhat less of a hazard. (*Respondent’s Post-Hearing Brief* at p. 21).

The ALJ observes that the factual issues of who had actually been present in the cited area and who know or should have known of the cited conditions were hotly contested both at hearing and in the parties’ briefs. The ALJ ultimately finds that the Secretary carried his burden of proof that some person or persons did enter the cited area and was exposed to the hazard of roof fall and should have at least *constructively* known of the violative condition. However, the

³⁰ The ALJ again recognizes the Secretary, under *Musser*, above cited, need not prove a reasonable likelihood that the violation itself will cause injury.

ALJ recognizes that Respondent raised legitimate questions regarding these issues which compel the ALJ to find a lesser degree of negligence than found by Inspector Stanley.

e. Penalty

Before addressing the actual penalty to be imposed as to this particular citation, which was specially assessed, the undersigned will address the contentions of the parties regarding special assessments in general

i. Contentions of the Secretary

Mine operators are subject to civil penalties for violations under the Mine Act. The purpose of the penalties is to provide a strong incentive for compliance. The penalty amount should be sufficient to encourage the operator to comply with safety regulations rather than to pay penalties and continue in noncompliance. (*see Secretary's Post-Hearing Brief* at p. 8 and cited statutory and case law legislative history).

The Court has broad discretion to assess penalties *de novo*. In assessing civil monetary penalties the Commission shall consider the factors set forth at §110(i) of the Mine Act, 30 U.S.C. §820(i). In addition the violation's negligence level and possible S&S character should be taken into account. (*Secretary's Post-Hearing Brief* at pp. 8-9).

Respondent should have been aware of the possibility of special assessments. Continued violations of standards were repeatedly cited; the violations were the focus of increased educational and enforcement efforts which would lead to greater enforcement scrutiny. Given the time span during which the citations/dockets were issued, Respondent needed to implement a program that would lessen the frequency of violations. (*Secretary's Post-Hearing Brief* at 34-p. 35).

The purpose of the penalties is to compel compliance with health and safety laws and regulations to deter operators from violating such mandates. ALJs should consider the deterrent effect of penalties in addition to 110(i)'s six statutory factors. (*Secretary's Post-Hearing Brief* at p. 35).

Special Assessment Review ("SAR") forms are irrelevant in the context of *de novo* proceedings and, accordingly, the SAR form is not relevant for *any* purpose. (*Secretary's Post-Hearing Brief* at p. 36) (emphasis added).

ii. Contentions of Respondent

Special assessments proposed by the Secretary prevent the Commission and its ALJs from assessing civil penalties without the appearance of arbitrariness. (*Respondent's Post-Hearing Brief*, at pp. 1-6).

The Secretary's change to the special assessment program in 2007 rendered the regulation vague, ambiguous, and undeserving of deference. (*Respondent's Post-Hearing Brief*, at pp. 6-10).

The Secretary failed to meet his burden of proving, “particularly serious and egregious violations” or “other aggravating circumstances” justifying enhanced penalties. (*Respondent’s Post-Hearing Brief*, pp. 10-19).

In its brief Respondent cites the recent decision of ALJ Zielinski in *American Coal Co.*, LAKE 2011-183 *et al*, slip op., at 51 (June 13, 2013) (ALJ Zielinski); (*see also Respondent’s Post-Hearing Brief* at p. 12). However, although ALJ Zielinski recognized American Coal’s concerns about the practical implications of the Secretary’s determinations to specially assess violations were well founded,³¹ he ultimately concluded that whether the Secretary proposed a regularly or specially assessed penalty was not relevant to the Commission’s determination of a penalty amount. (*American Coal Co.*, at p. 51).

This Court is of the same opinion.³²

Regardless of the special assessment arrived at by the Secretary and the methodology, however flawed, used – this Court is guided in its final determinations by the polestar of 30 U.S.C. §820(i) penalty considerations:

In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

The ALJ has been further guided by Commission case law instructing how §110(i) criteria should be evaluated. *Inter alia*, the undersigned notes: the Commission’s holding in *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997) that all of the statutory criteria must be considered, but not necessarily assigned equal weight; and the Commission’s holding *Musser Engineering*, 32 FMSHRC at 1289 that, generally speaking, the magnitude of the gravity of the violation and the degree of operator negligence are important factors, especially for more serious violations for which substantial penalties may be imposed.

³¹ The undersigned also notes that ALJ Zielinski also found Respondent’s arbitrariness and due process arguments were unavailing in light of the Supreme Court holding in *Fox Television Station, Inc.*, 132 S.Ct. 2307, 317 (2012)

³² At hearing this Court allowed the admission of the Secretary’s “SAR” form over the objection of the Secretary. Pending briefing by the parties this Court reserved his ruling as to the evidentiary purpose that the form could be used for. After considering the arguments of both parties and mindful of the split opinions as to the discoverability of the forms, this Court concludes that the forms are admissible for the limited evidentiary purpose of corroborating the inspector(s) testimony that they had, in fact, recommended special assessments which were subsequently approved by MSHA superiors. While such evidence is perhaps technically relevant, this ALJ has not accorded the forms any probative weight in determining the penalty amounts in this case.

With reference to the operator's history of previous violations, the ALJ agrees with the Secretary's argument that the imposition of significant penalties³³ is consistent with case law holding repeated violations and notice of heightened scrutiny warrant increased penalties. (*see also Secretary's Post-Hearing Brief* at pp. 10-11 and cited case law).

iii. Penalty Assessed

A recent decision, *Sec. v. Performance Coal Co.*, (Docket No. WEVA 2008-1825 (8/2/2013)) reaffirmed that neither the ALJ nor the Commission is bound by the Secretary's proposed penalties. (*see also* 29 C.F.R. §2700.30(b)). However, the Commission in *Performance Coal*, also held that, although there is no presumption of validity given to the Secretary's proposed assessments, substantial deviation from the Secretary's proposed assessments must be adequately explained using §110(i) criteria. (*Id.* at p. 2). (*see also Cantina Green*, 22 FMSHRC 616, 620-621 (May 2000)).

The ALJ finds that a substantial deviation from the Secretary's proposed assessment is warranted herein. As discussed supra, Respondent's conduct was not, in this Court's opinion, highly negligent but only moderately negligent. Further, the gravity designation as to the injury to be expected is more properly described as lost workdays or restricted duty.³⁴

Affirming the citation as issued with a modification of negligence from moderate and gravity of expected injury from permanently disabling to lost workdays or restricted duty, the ALJ finds the Secretary's proposed penalty should be reduced from \$40,308.00 to \$20,000.00.

³³ In *Sec. v. Black Beauty* (Docket Nos. LAKE 2008-327 et al (August 2012)), the Commission, citing its seminal decision in *Sellersburg Stone*, 5 FMSRHC at 295, considered whether an ALJ is permitted to take into account the deterrent purpose of the penalty provisions of the Mine Act when reviewing a settlement proposed. The Commission held that a Judge's decision in assessing a penalty is bound by proper consideration of the statutory criteria *and* the deterrent purpose underlying the Act's penalty assessment scheme.

³⁴ The ALJ, as discussed infra, also finds that the adjacent nature of the cited conditions presented less of a hazard to miners. (*See Respondent's Post-Hearing Brief* at p. 41).

3. Citation No. 8432118 (LAKE 2012-58)

a. The Secretary Has Carried His Burden Of Proof By A Preponderance Of The Evidence That §75.202(a) Was Violated.

On February 28, 2011, Inspector Edward W. Law issued Citation No. 8342118 to Respondent, alleging violation of 30 C.F.R. §75.202(a). The following unsafe condition or practice was cited:

The outby ribs at the 1st East Headgate seal entrance are not being adequately supported or controlled where miners normally work or travel to protect miners from the hazards related to falls of the roof and ribs. The hazardous rib is cracked, broke up and leaning with a gap behind the rib of 1 to 3 inches from rib to coal pillar. The rib is undercut at the base approximately 6 to 8 inches. The rib is approximately 5 to 8 feet long, 7 feet high and 3 to 10 inches thick. The area was flagged out by management after a citation was issued to prevent travel in the area.

Standard 75.202(a) was cited 97 times in two years at mine 1102752 (97 to the operator, 0 to a contractor).

(S-13).

In finding that the above standard was in fact violated the ALJ incorporates the pertinent legal standards and case law with respect to §75.202(a) referenced in the discussion of Citation No. 8428508, supra.

At hearing Inspector Law testified that he had observed inadequately supported ribs in the 1st East tailgate.³⁵ Specifically, he observed a cracked rib, broken, leaning, with a gap behind it up to three inches from the coal pillar. (Tr. I, 193, S-13). The rib was approximately seven feet high and tapered to the base where it was undercut.³⁶ (Tr. I, 192-193). Law concluded that the cracked, undercut rib was no longer supporting the coal pillar – “It’s like taking...a leg up from underneath the table.” (Tr. I, 194).

Given the area that was undercut, Law estimated that the condition had existed for a number of shifts. (Tr. I, 196, 200). Further, he testified that he could see where the area had been worked on, where parts of the rib had been pulled down. (Tr. I, 198). The area was not flagged or dangered off in any way. (Tr. I, 198).

³⁵ Initially, Law had cited the 1st East headgate, but he later modified the citation to more accurately reflect his observations. (Tr. I, 206-207; see also S-12, pp. 1 and 2).

³⁶ Law explained that the bottom in this area was fireclay, which can deteriorate underneath of a rib and cause a coal pillar to become unsupported. (Tr. I, 193). This is what he referred to as becoming “undercut.” (Tr. I, 193).

As a result of his observations Law issued the within citation for violations of §75.202(a).

In its brief, Respondent argues that the instant citation is not valid because there was insufficient evidence presented to establish that the condition existed in “areas where persons work or travel.” (*See Respondent’s Post-Hearing Brief* at p. 30 and 30 C.F.R. §75.202(a)).

To support this argument, Respondent pointed to the evidence that miners did not enter this area. It noted that the fact that this was an outby area of the mine was not contested. (Tr. I, 235) (*see also Respondent’s Post-Hearing Brief* at 30).

Specifically, Respondent argued that examiners did not enter this area. It referred to Deere’s testimony wherein he stated he conducted his examinations without traveling past the cited rib. (Tr. I, 267-270) (*see also Respondent’s Post-Hearing Brief* at 33). According to Respondent, Deere’s observation was bolstered by Inspector Law’s testimony that there were several exits and entrances in the instant section of the mine, meaning that an examiner might travel through the area without passing the cited rib. (*Respondent’s Post-Hearing Brief* at 30-33).

Respondent argued that other miners did not work in the area either. For example, Law did not observe any dusters or other miners in the area at the time of the inspection. (Tr. I, 237) (*see also Respondent’s Post-Hearing Brief* at 33). Law also conceded that the pulled down rib might have fallen on its own, meaning that it was possible that miners were not “working on” the rib in the cited area. (Tr. I, 232-234) (*see also Respondent’s Post-Hearing Brief* at 34).

In light of these arguments and the evidence which supports them, Respondent urges that the instant citation be vacated.

As with Citation No. 8428508, the ALJ recognizes that the cited area was an outby section, near the seals, and distant from active work areas.

However, as noted *supra*, §75.202(a) only requires that it be shown that persons work or travel in the area. This issue hinges on whether examiners (including seal examiners) or rock dusters performed their duties near the cited rib. The undersigned credits the opinion of Law that that seal examiners would normally travel in the cited area, as would individuals who were required to maintain the seals. (Tr. I, 195). Law further opined that that it is common for examiners to “loop through” entries when examining seals. (Tr. I, 143, 164, 179) (*see also Secretary’s Post-Hearing Brief* at 26). This would mean that examiners would travel through the cited area.

Respondent’s proffered evidence that examiners did not travel in this area was based largely on Deere’s testimony that he did not travel in this location. However, this is the testimony of only one examiner out of a total of five. (Tr. I, 269-271) (*See also Secretary’s Post-Hearing Brief* at 26). There is no evidence to suggest that other miners avoided this area during examinations. Further, the cited area was not dangerous off or otherwise marked. (Tr. I, 199). Even if Deere knew to avoid this area and could avail himself of reasonable alternative routes, there is no reason to believe that other miners knew they were to avoid the cited rib area.

In light of Law's testimony that examinations were conducted in this area and the lack of compelling evidence showing that examiners knew to avoid the cited rib, it is reasonably likely that an examiner would travel or work near the cited area. Therefore, the ALJ finds that the Secretary has shown, by a preponderance of the evidence, that miners traveled or worked in the area cited for an unsafe rib. As a result, the violation is established.

b. Considering The Record *In Toto* And Applying Applicable Case Law, The Violation Was Significant And Substantial In Nature.

Applying the *Mathies* test to the within citation, the undersigned finds that the violation of §75.202(a) was significant and substantial in nature.

With respect to the first prong of *Mathies*, as shown supra, there was a violation of §75.202(a).

As discussed supra, there is sufficient evidence to establish that the cited roof area was not supported or otherwise controlled to protect persons from hazard related to roof falls. Specifically, one rib was undercut and failed to provide support. A discrete safety hazard – falling roof material – was contributed to by the violation. (See inter alia Tr. I, 203 wherein Law testified regarding falling material).

There was a reasonable likelihood that the *hazard* contributed to by the violation would result in an injury. Law credibly testified that material falling from the roof could cause broken bones and that a collapse of the rib could cause a crushing injury. (Tr. I, 204-205).

Finally, the ALJ further finds that the hazard of falling roof material would create a reasonable likelihood that the injury in question would be of a reasonably serious nature so that *Mathies* fourth element is also satisfied.

c. Gravity

The ALJ finds that Law's testimony regarding the gravity of the violation was credible. The cited condition was reasonably likely to result in broken bones or other injuries that would cause lost workdays or restricted duty. (See Tr. I, 205). While Law also testified that the rib itself could collapse and cause a crushing injury, the ALJ finds that this would be less likely.

d. Negligence

The ALJ further finds that Respondent exhibited low negligence rather than the moderate negligence designated by Inspector Law. As with the discussion of Citation No. 8428508, supra, the inactive character of the cited area does not preclude a finding of violation but can lessen the degree of negligence. As discussed supra, the ALJ also agrees in part with Respondent's argument that the adjacent nature of the cited conditions constituted somewhat less of a hazard. (*Respondent's Post-Hearing Brief* at p. 36-37). Further, the Secretary conceded that Respondent may have missed the condition. (See *Secretary's Post-Hearing Brief* at 27). Also, Inspector

Law conceded that it was possible that no one had worked on the rib; it had collapsed on its own rather than been pulled down by an inspector. (Tr. I, 232-234) (*see also Respondent's Post-Hearing Brief* at 34). This means that Respondent may not have been aware of the cited condition.

Therefore, there were considerable mitigating factors with respect to Respondent's knowledge of the cited condition. In light of these circumstances, the ALJ finds that a lesser designation of negligence than that cited by Law is appropriate.

e. Penalty

For the same reasons provided with respect to Citation No. 8428508, supra, the ALJ finds that, in light of Respondent's previous violations history and the requirements of pertinent case law, significant penalties are appropriate.

However, as with Citation No. 8428508, a deviation from the Secretary's proposed penalty is warranted. Under *Sec. v. Performance Coal Co.*, that deviation must be explained. As discussed supra, Respondent's conduct was not, in this Court's opinion, the result of moderate negligence but only low negligence.

Affirming the citation as issued with a modification of negligence from moderate to low the ALJ finds the Secretary's proposed penalty should be reduced from \$9,100.00 to \$7,200.00.

4. Citation No. 8432126 (LAKE 2012-58)

a. The Secretary Has Carried His Burden Of Proof By A Preponderance Of The Evidence That §75.202(a) Was Violated.

On March 2, 2011, Inspector Law issued Citation No. 8342126 to Respondent, alleging violation of 30 C.F.R. §75.202(a). The following unsafe condition or practice was cited:

The roof at cross cut #127, survey station #15736, between entries #5 and #6 of the Main North is not being adequately supported or controlled where miners normally work or travel to protect miners from the hazards related to falls of the roof and rib. There is 4 damaged roof bolts in this cross cut creating 3 inadequately supported areas. In one area there is 1 sheared off roof bolt exposing an area approximately (8 by 8 feet), the second area has 1 damaged roof bolt, approximately (8 by 8 feet) and the third area has 2 shared off roof bolts side by side approximately (8 by 12 feet). The area was flagged off by management to prevent travel after the citation was issued.

Standard 75.202(a) was cited 98 times in two years at mine 1102752 (98 to the operator, 0 to a contractor).

(S-14).

In finding that the above standard was in fact violated the ALJ incorporates the pertinent legal standards and case law with respect to §75.202(a) referenced in the discussion of Citation No. 8428508, supra.

At hearing Law testified that he issued the instant citation because he had discovered four damaged roof bolts in the mine's main north travel way in the crosscuts between entries #5 and #6. (Tr. II, 281; S-14). Law opined that the damaged bolts had created three different areas of unsupported roof. (Tr. II, 281). He further testified that several bearing plates had been sheered off, eliminating the skin control. (Tr. II, 282, 285-286, 290). No supplemental support or skin control was added. (Tr. II, 288-289). This created a roof fall hazard. (Tr. II, 290).

According to Law "just about everybody," travelled through the main north travel way daily. (Tr. II, 284). He further opined that the damaged bolt condition had been existent for several shifts prior to his inspection because there were tracks through the area. (Tr. II, 286).

As a result of his observations Law issued the within citation for violations of §75.202(a).

In response to Law's testimony, Respondent presented evidence to show that, despite the damaged roof bolts, the roof was adequately supported. Specifically, it argued that while non-compliance with a roof control plan is to be considered when determining if a roof is adequate supported, such non-compliance is not dispositive of whether a violation of §75.202(a) has occurred. (*See Respondent's Post-Hearing Brief* at 42 citing *Canon Coal Co.*, 9 FMSHRC 667, 668 (April 1987) (citations omitted)). In short, Respondent argues that the cited condition might not meet the requirements of the roof control plan, but nonetheless did not render to roof unsupported.

To support this argument, Respondent pointed to evidence that roof conditions in the cited area were adequate. (*See Respondent's Post-Hearing Brief* at 42-45). Specifically, Respondent argued that the limestone roof was solid, that no adverse roof conditions were noticed or possible, and that the fully grouted resin bolts provided adequate support even when damaged. (*Id.*).

The ALJ specifically rejects Respondent's arguments regarding the solidity of the roof and the assertion that such would invalidate the instant citation.

In making this determination, the ALJ credits Inspector Law's testimony that the cited condition presented a roof fall hazard. (Tr. II, 290). Law opined that the cited area lacked support even though he conceded that he could not determine the lithology of the roof or see any

adverse conditions.³⁷ (Tr. II, 289, 290, 304, 311). With respect to adverse roof conditions, nothing in the record suggests that a lack of such at the time of a citation necessarily implies that a roof is adequately supported.

While Respondent's witness Vancil testified that the roof was solid limestone, he did not inspect the roof until two years after the citation. (Tr. II, 356). Vancil also conceded that there had been shale in the area at one time. (Tr. II, 351). It is more likely than not that the dangerous material observed by Law had fallen in the interim.

The preponderance of the evidence shows that, at the time of the citation, the roof was inadequately supported. Therefore, a violation of §75.202(a) existed.

b. Considering The Record In Toto And Applying Applicable Case Law, The Violation Was Significant And Substantial In Nature.

Applying the *Mathies* test to the within citation, the undersigned finds that the violation of §75.202(a) was significant and substantial in nature.

With respect to the first prong of *Mathies*, as shown supra, there was a violation of §75.202(a).

A discrete safety hazard – falling roof material – was contributed to by the violation. (Tr. II, 290). As discussed supra, there is sufficient evidence to establish that the cited roof area was not supported or otherwise controlled to protect persons from hazard related to roof falls. Specifically, three separate areas were not properly supported. There was exposure to that hazard as Law also opined that several workers in the mine traveled in unprotected equipment in the area and would enter the crosscut to yield the right of way. (Tr. II, 284, 289, 319-320). As noted supra, the alleged solidity of the limestone roof and lack of adverse roof conditions does not eliminate this hazard.

There was a reasonable likelihood that the *hazard* contributed to by the violation would result in an injury. Law credibly testified that material falling from the roof could cause broken bones and that a collapse of the rib could cause a crushing injury. (Tr. I, 290).

Finally, the ALJ further finds that the hazard of falling roof material would create a reasonable likelihood that the injury in question would be of a reasonably serious nature such that *Mathies* fourth element is also satisfied.

³⁷ Respondent also argued that Inspector Law conceded that the fully grouted resin bolts would provide support for the roof even if damaged. As noted by the ALJ in the discussion of Law's testimony supra, the inspector was unwilling to admit that point. As a result, the undersigned will not consider Law's testimony as support for Respondent's position. The undersigned further credits Law's testimony for the proposition that damaged bolts do not provide skin control.

c. Gravity

The ALJ finds that Law's testimony regarding the gravity of the violation was credible. The cited condition was reasonably likely to result in broken bones or other injuries that would cause lost workdays or restricted duty to one miner. (Tr. II, 290, 307) (*see also Secretary's Post-Hearing Brief* at 30).

Respondent argued that such injuries were unlikely for several reasons. First, miners would only occasionally enter the area and when doing so generally use equipment with protection for the operator. (*Respondent's Post-Hearing Brief* at 46-47). Those in vehicles without protection for the operator could pull into areas that were adequately supported. (*Id.* at 47). Respondent also noted that examiners would not be exposed because they were not supposed to examine this area, but instead were suppose to merely "glance" into the crosscut. (*Id.*). Finally, it noted that Law did not observe any employees in the cited area. (*Id.*).

The ALJ rejects these arguments. The preponderance of the evidence supports a finding that this area was a crosscut off of a main travel way and that miners would enter the cited location when yielding the right-of-way in mobile equipment. (Tr. II, 284, 289). This condition would be reasonably likely to create exposure to the hazard.

In addition, while some of the equipment provided protection for operators, several pieces of equipment, including diesel rides, scoops, and ram cars were uncovered. (*See Respondent's Post-Hearing Brief* at 30, Tr. II, 319-320). This would mean miners in these pieces of equipment would be exposed.

Finally, Respondent's argument that operators could have avoided the unsupported area is untenable in light of the other evidence it presented. Specifically, Respondent argued with respect to negligence that no one knew or should have known about the cited condition. (*see Respondent's Post-Hearing Brief* at 48). If miners could not be expected to observe the cited condition then there is no reason to believe they would be in a position to consciously avoid the unsupported area. As a result, these miners would be exposed to the hazardous condition and would be reasonably likely to suffer an injury.

d. Negligence

The ALJ further finds that Respondent's exhibited low negligence rather than the moderate negligence designated by Inspector Law.

As noted *supra*, Respondent argued that it was not aware of the cited condition. (*see Respondent's Post-Hearing Brief* at 48). The preponderance of the evidence supports this assertion. Specifically, the evidence presented confirms that examiners were not required to examine this area. (Tr. II, 303). Inspector Law conceded that the cited condition would be easy to miss.³⁸ (Tr. II, 293).

³⁸ However, given the admitted duty to "glance" into the crosscut, Respondent should have known of the cited condition.

Therefore, there were considerable mitigating factors with respect to Respondent's knowledge of the cited condition. In light of these circumstances, the ALJ recognizes that a lesser designation of negligence than that cited by Law is appropriate.

e. Penalty

For the same reasons provided with respect to Citation No. 8428508, supra, the ALJ finds that, in light of Respondent's previous violations history and the requirements of pertinent case law, significant penalties are appropriate.

However, as with Citation No. 8428508, a deviation from the Secretary's proposed penalty is warranted. Under *Sec. v. Performance Coal Co.*, that deviation must be explained. As discussed supra, Respondent's conduct was not, in this Court's opinion, the result of moderate negligence but only low negligence.

Affirming the citation as issued with a modification of the negligence from moderate to low the ALJ finds the Secretary's proposed penalty should be reduced from \$7,700.00 to \$6,100.00.

5. Citation No. 8432129 (LAKE 2012-58)

a. The Secretary Has Carried His Burden Of Proof By A Preponderance Of The Evidence That §75.202(a) Was Violated.

On March 3, 2011, Inspector Law issued Citation No. 8342129 to Respondent, alleging violation of 30 C.F.R. §75.202(a). The following unsafe condition or practice was cited:

The roof at cross cut #8, between entries #5 and #4 of the Main North is not being adequately supported or controlled where miners normally work or travel to protect miners from the hazards related to falls of the roof and rib. An area along the inby rib has 3 roof bolts that are too far from the coal pillar exposing an area 5 ½ to 6 feet wide by 20 feet in length along the outby rib has 3 roof bolts that are too far from the coal pillar exposing an area 5 ½ feet to 6 feet wide by 15 feet in length. This is an area that is used to pull out of the way. The area was flagged off by management to prevent travel after the citation was issued.

Standard 75.202(a) was cited 99 times in two years at mine 1102752 (98 to the operator, 0 to a contractor).

(S-16).

In finding that the above standard was in fact violated the ALJ incorporates the pertinent legal standards and case law with respect to §75.202(a) referenced in the discussion of Citation No. 8428508, supra.

At hearing Law testified that he issued the instant citation because roof bolts in the #8 cross cut between the #4 and #5 entries were inadequately supported. (Tr. II, 361). Specifically, The roof bolts on the outby and inby rib were too far from the coal pillar creating two areas of unsupported roof measuring 5 ½ to 6 feet by 20 feet and 5 ½ to 6 feet by 15 feet respectively. (Tr. II, 361, 369). Law opined that these ribs had been properly bolted at one time but had deteriorated. (Tr. II, 363-364).

As with Citation No. 8432126, this condition was cited along the main north travel way. (Tr. II, 361). As noted supra, Law testified with respect to that citation that “just about everybody,” travelled on that travel way. (Tr. II, 284).

With respect to the instant citation, Law testified that the condition had existed for several shifts. (Tr. II, 365, 374).

Law opined that without the required support, rib rash creates an arcing effect at the top, and the increased pressure can result in roof or rib falls. (Tr. II, 367-368).

As a result of his observations Law issued the within citation for violations of §75.202(a).

As it did with Citation No. 8432126 supra, Respondent argued that despite the spacing of the roof bolts, the roof was adequately supported. Again, it argued that the cited condition might not meet the requirements of the roof control plan, but nonetheless did not render the roof unsupported. (*See Respondent’s Post-Hearing Brief* at 53)

Respondent presented several arguments to show that the roof conditions in the area were adequate. It argued, inter alia, that the limestone roof was solid, that no adverse roof conditions were noticed or possible, and that the fully grouted resin bolts provided adequate support even when damaged. (*See Respondent’s Post-Hearing Brief* at 53-54)

The ALJ rejects Respondent’s arguments regarding the solidity of the roof and the assertion that such would invalidate the instant citation.

In making this determination, the ALJ credits Inspector Law’s testimony that the cited condition presented a roof fall hazard. (Tr. II, 367-368). Law opined that the cited area lacked support even though he conceded that he could not see any adverse conditions.³⁹ (Tr. II, 361, 380). As noted supra, nothing in the record suggests that a lack of adverse roof conditions at the time of a citation necessarily implies that a roof is adequately supported. The undersigned finds Law’s testimony regarding the pressures placed on the top by the widely spaced bolts to be compelling even in light of the fact that he did not testify to adverse roof conditions.⁴⁰ (Tr. II, 367-368, 380) *See also Secretary’s Post-Hearing Brief* at 33). The inspector was clearly aware

³⁹ Respondent’s arguments regarding resin bolts are rejected for the same reason as discussed supra with respect to Citation No. 8342126.

⁴⁰ It is possible that adverse roof conditions were, in fact present. However, Law did not enter the unsupported area in order to avoid exposure to roof falls and therefore, was unable to testify to such. (Tr. II, 373-374).

of the circumstances raised by Respondent and still testified that the roof was not supported and some risk of exposure to roof hazards was present.

The preponderance of the evidence shows that, at the time of the citation, the roof was inadequately supported. Therefore, a violation of §75.202(a) existed.

b. Considering The Record In Toto And Applying Applicable Case Law, The Violation Was Significant And Substantial In Nature.

Applying the *Mathies* test to the within citation, the undersigned finds that the violation of §75.202(a) was significant and substantial in nature.

With respect to the first prong of *Mathies*, as shown supra, there was a violation of §75.202(a).

A discrete safety hazard – falling roof material – was contributed to by the violation. (Tr. II, 367-368). As discussed supra, there is sufficient evidence to establish that the cited roof area was not supported or otherwise controlled to protect persons from hazard related to roof falls. Specifically, two large areas in the cited location were not properly supported. There was exposure to that hazard as Law also opined that several workers in the mine traveled in unprotected equipment in the area and would enter the crosscut to yield the right of way. (Tr. II, 284, 289, 319-320). As noted supra, the alleged solidity of the limestone roof and lack of adverse roof conditions does not eliminate this hazard.

There was a reasonable likelihood that the *hazard* contributed to by the violation would result in an injury. Law credibly testified that material falling from the roof could cause lost workday or restricted duty injuries. (Tr. I, 365, 368).

Finally, the ALJ further finds that the hazard of falling roof material would create a reasonable likelihood that the injury in question would be of a reasonably serious nature so that *Mathies* fourth element is also satisfied.

c. Gravity

The ALJ finds that Law's testimony regarding the gravity of the violation was credible. The cited condition was reasonably likely to result in lost workday/restricted duty injuries to the operator of a piece of equipment. (Tr. II, 268)

Respondent argued that such injuries were unlikely for several reasons. First, the area was infrequently traveled as evidence by the fact that there was no evidence of travel in the area. (Tr. II, 369, 375) (*see also Respondent's Post-Hearing Brief* at 55). Further, Respondent argues that the limestone was competent and would not collapse and therefore would not cause an injury. (Respondent's Post-Hearing Brief at 55).

The ALJ rejects these arguments. As discussed with respect to Citation No. 8432126 supra, this area was a crosscut off of a main travel way and that miners would enter the cited

location when yielding the right-of-way. (Tr. II, 284, 289). This condition would be reasonably likely to create exposure to the hazard.

Further, as noted by the ALJ supra, the supposed solidity of the limestone top does not eliminate the hazard posed by the cited condition. The preponderance of the evidence supports a finding that, even in light of the composition of the roof, an injury was reasonably likely.

d. Negligence

The ALJ further finds that Respondent's exhibited low negligence rather than the moderate negligence designated by Inspector Law.

The preponderance of the evidence supports a finding that Respondent was not required to examine this area. (Tr. II, 303). Law's testimony supports a finding that the condition could only be seen when in the crosscut and that it might not have been observed. (Tr. II, 364, 368).

Therefore, there were considerable mitigating factors with respect to Respondent's knowledge of the cited condition. In light of these circumstances, the ALJ recognizes that a lesser designation of negligence than that cited by Law is appropriate.

e. Penalty

For the same reasons provided with respect to Citation No. 8428508, supra, the ALJ finds that, in light of Respondent's previous violations history and the requirements of pertinent case law, significant penalties are appropriate.

However, as with Citation No. 8428508, a deviation from the Secretary's proposed penalty is warranted. Under *Sec. v. Performance Coal Co.*, that deviation must be explained. As discussed supra, Respondent's conduct was not, in this court's opinion, the result of moderate negligence but only low negligence.

Affirming the citation as issued with a modification of negligence from moderate to low the ALJ finds the Secretary's proposed penalty should be reduced from \$7,700.00 to \$6,100.00.

ORDER

It is hereby **ORDERED** that Citation Nos. 8432052 (LAKE 2011-962), 8428508 (LAKE 2011-701), 8432118 (LAKE 2012-58), 8432126 (LAKE 2012-58), and 8432129 (LAKE 2012-58) are **AFFIRMED** as modified herein.

Respondent is **ORDERED** to pay civil penalties in the total amount of \$43,200.00 within 30 days of the date of this decision.⁴¹

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

Distribution: (Certified Mail)

Courtney Prsybylski, Esq., & Ryan L. Pardue, Esq., U.S Department of Labor, Office of the Solicitor, 1999 Broadway, Suite 800, Denver CO 80202-5708

Jason W. Hardin, Esq., & Mark Kittrell, Esq., Fabian and Clendenin, 215 South State Street, Suite 1200, Salt Lake City, UT 84111-2323

⁴¹ Payment should be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, P. O. BOX 790390, ST. LOUIS, MO 63179-0390

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES**

875 GREENTREE ROAD
7 PARKWAY CENTER, SUITE 290
PITTSBURGH, PA 15220
TELEPHONE: (412) 920-2682
FAX: (412) 928-8689

September 23, 2013

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. PENN 2011-346
Petitioner,	:	A.C. No. 36-05466-253551
	:	
v.	:	Docket No. PENN 2011-388
	:	A.C. No. 36-05466-256778
EMERALD COAL RESOURCES, LP,	:	
Respondent.	:	Mine: Emerald Mine No. 1

DECISION

Appearances: Jessica R. Brown, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Secretary of Labor.

Patrick W. Dennison, Esq. and R. Henry Moore, Esq., for Emerald Coal Resources, LP

Before: Judge Lewis

These cases arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* (2000) (the “Act” or “Mine Act”). The Secretary of Labor has filed a Petition for Assessment of Civil Penalty pursuant to Sections 104(a) and 105(d) of the Act, 30 U.S.C. § 815(d), in connection with Order Nos. 7082871, 7082872, 7073116, and 7073117 and Citation No. 7082869. A hearing was held in Pittsburgh, Pennsylvania on December 5 and 6, 2012. The parties subsequently submitted post-hearing briefs, and their positions and arguments have been duly considered.

I. BACKGROUND AND SUMMARY OF EVIDENCE

The parties read the following joint stipulations into the record at hearing:

1. Emerald Coal Resources, LP, operates the Emerald Mine No.1, where the citations and orders in contest were issued.¹
2. Emerald Mine No. 1 is an underground coal mine in Greene County, Pennsylvania.
3. Emerald Mine No. 1 produced 4,901,640 tons of coal in 2010.

¹ The citations and orders are referred to collectively as “the citations.” Tr. 11.

4. Emerald produces coal using both the longwall method and the continuous miner method.
5. Emerald is an “operator” as defined in Section 3(d) of the Federal Mine Safety and Health Act of 1977 as amended, 30 U.S.C. § 803(d), at the coal mine at which the citations at issue in this proceeding were issued.
6. Operations of Emerald at the coal mine where the citations were issued in this proceeding are subject to the jurisdiction of the Act.
7. 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 Act.
8. The individuals whose signatures appear in Block 22 of the citations at issue in this proceeding were acting in their official capacity and as authorized representatives of the Secretary of Labor when the citations were issued.
9. True copies of the citations at issue in this proceeding were served on Emerald as required by the Act.
10. The R-17 assessed violation history report is an authentic copy reflecting Emerald’s history of violations and may be admitted as a business record of the Mine Safety and Health Administration.
11. The imposition of the proposed civil penalty will not affect Emerald’s ability to remain in business.
12. Citation Nos. 7082869 and 7082870 and Orders Nos. 7082871 and 7082872 were issued on October 18, 2010, by MSHA Inspector David Leverknight.
13. Inspector Leverknight was accompanied by Company Representative Adam Strimer.
14. Citation No. 7082870 is a final order of the Commission.
15. Order No. 7082871 was issued at 10:15 on October 18, 2010, and terminated at 1:25 on October 19, 2010.
16. Citation Nos. 7082869 and 7082870 and Order Nos. 7082871 and 7082872 were issued with respect to the C-2 longwall belt.
17. The Emerald Mine Shift Production Report is an authentic copy reflecting Emerald Mine No. 1’s coal production from October 15, 2010, through October 18, 2010, and may be admitted as a business record of Emerald’s.

18. Order Nos. 7073116 and 7073117 were issued on October 21, 2010, by MSHA Inspector Allan Jack.²
19. Inspector Jack was accompanied by Company Representative Adam Strimer.
20. Order No. 7073116 was issued at 9:30 on October 21, 2010, and terminated at 22:30 on October 21, 2010.
21. Order Nos. 7073116 and 7073117 were issued with respect to the B-main's left haulage.
22. Emerald demonstrated good faith in the abatement of the citations.
23. Order No. 8007973 is a Section 104(d)(2) order, which was issued on August 6, 2010. This order was contested by Emerald and is scheduled for hearing within the next 20 days.
24. Order No. 8007974 is a Section 104(d)(2) order, which was issued on August 9, 2010. This order was contested by Emerald and is also scheduled for hearing within the next 30 days.³

Tr. 11-14.

² The Transcript inexplicably omits number 18, proceeding from number 17 to 19. Tr. 13. Therefore, stipulations 18-24 are enumerated in the transcript as 19-25.

³ 104(d)(2) Order Nos. 8007973 and 8007974 were affirmed as written with only modifications to the penalties by Judge Harner on August 16, 2013. PENN 2011-168

FINDINGS OF FACT⁴

Citation No. 7082869

Inspector David Leverknight issued Citation No. 7082869 after observing the bottom belt at the C-2 longwall in contact with the belt structure.⁵ GX-1.

The Emerald Mine No. 1 is a large longwall mine, with continuous miner development for the longwall three entry sections. Tr. 30. The C-2 longwall was only one of the longwall sections producing at Emerald Mine. Tr. 195. It was estimated that the section would produce

⁴ The findings of fact are based on the record as a whole and my careful observation of the witnesses during their testimony. In resolving any conflicts in the testimony, I have taken into consideration the interests of the witnesses, or lack thereof, and consistencies, or inconsistencies, in each witness's testimony and between the testimonies of the witnesses. In evaluating the testimony of each witness, I have also relied on his demeanor. Any failure to provide detail as to each witness's testimony is not to be deemed a failure on my part to have fully considered it. The fact that some evidence is not discussed does not indicate that it was not considered. *See Craig v. Apfel*, 212 F.3d 433, 436 (8th Cir. 2000)(administrative law judge is not required to discuss all evidence and failure to cite specific evidence does not mean it was not considered).

⁵ David Leverknight is a Mine Emergency Unit (MEU) Specialist for MSHA at the Pittsburgh Technology Center for Technical Support. Tr. 28. In this capacity, he is responsible for purchasing and maintaining all equipment for the MEU, training team members, and responding to all emergencies. Tr. 28. He has served in this position since July 2012. Tr. 28. As part of his duties, Leverknight inspected the Emerald Mine No. 1. Tr. 30.

Prior to this position Leverknight was an underground coal mine inspector from January 2007 until July 2012. Tr. 28. He received his AR card in January or February of 2008. Tr. 28-29. Before coming to MSHA, Leverknight spent five years working at the Enlow Fork Mine for Consol Energy as an underground trackman, and another five years at that mine as a mine examiner. Tr. 20. Prior to that, he worked for Line Mining Company in Jennerstown, Pennsylvania for seven years and for Pierrepont Mining Company in Stoystown, Pennsylvania for one year. Tr. 30. Leverknight has assistant mine foreman papers, machine runners papers, and other related certifications. Tr. 30.

Leverknight has significant experience dealing mine emergencies during both his tenure at MSHA and his work for operators. Tr. 29. He was on the rescue team that responded to two Loveridge Mine fires in West Virginia, the VP 8 Mine fire in Virginia, the Buchanan Mine fire in Virginia, the Mine 84 fire in Pennsylvania, the Quecreek water inundation in Pennsylvania, the Sago Mine explosion in West Virginia, the Upper Big Branch Mine explosion in West Virginia, the San Juan Mine fire in New Mexico, and the Pleasant Hill seal explosion in West Virginia. Tr. 29. The Mine 84 and VP 8 fires were belt fires. Tr. 29. There were no recordable injuries on these belt fires. Tr. 71-72.

approximately 7,000-9,000 tons of coal per day or shift.⁶ On October 18, 2010, the mine was planning on mining all three shifts. Tr. 195. In October 2010, Emerald was on a five-day spot inspection for liberating in excess of one million CFM of methane in a 24-hour period.⁷ Tr. 31.

Inspector Leverknight went to Emerald Mine on October 18, 2010 in order to perform part of the E01 inspection for the quarter.⁸ Tr. 31. Generally, there would be two or three inspectors at a mine as large as Emerald. Tr. 31. On that day, Leverknight intended to go into the C-2 longwall section and walk the belts from the section up to the mains. Tr. 31. Prior to going underground, he reviewed the preshift books for that belt for that section. Tr. 32.

Leverknight went underground with David Baer from the union and Adam Strimer from the company.⁹ Tr. 32, 157-158, 166-168. Strimer was still a “redhead,” meaning that he was a new miner with less than a year experience, and was not allowed to travel unaccompanied in the mine.¹⁰ Tr. 32, 16-157. At the time of the inspection, Strimer had only been escorting inspectors for three to five months. Tr. 156-157. Prior to this date, Strimer had not been present when orders were issued. Tr. 156-157, 164. He only witnessed an inspector issue an order on October 18 and October 21, 2010. Tr. 164.

⁶ It was not clear from the testimony whether the figure was in reference to shift or daily production.

⁷ A spot inspection occurs when a mine liberates excessive methane in a 24-hour period. Tr. 30-31.

⁸ An E01 inspection is the mandatory quarterly inspection for all underground coal mines. Tr. 31.

⁹ At the time of hearing, Adam Strimer was the Health, Safety and Environmental Coordinator for Axens North America. Tr. 155. He received a master’s degree in Safety Management in 2010 from West Virginia University. Tr. 156. In October 2010, Strimer was an intern in the safety department of Emerald Mine. Tr. 156. As an intern, his duties included traveling with the inspector, filing papers, and taking part in internal communication at the mine. Tr. 156.

David Baer worked at the longwall at Emerald Mine. Tr. 166. He has worked for Emerald since April, 2005, and has also worked as a motorman and outside as a repairman and GI. Tr. 166. Prior to working at Emerald, Baer was a bottom man and outside tippie operator for Maple Creek for four and a half years. Tr. 166. He had a total of 10-11 years of mining experience and was a member of the United Mine Workers. Tr. 166.

In October 2010, Baer was escorting MSHA inspectors approximately two to three times a week when he was on the daylight shift, which he was on every third week. Tr. 166-167.

¹⁰ The terms “redhead” and “red hat” appear to be used interchangeably by the witnesses.

They rode the mantrip all the way into the track up to the section, got out of the mantrip and walked up to 32 crosscut, which is the last open crosscut where the longwall faces and the belt ends. Tr. 32-33, 158-159, 168.

Leverknight began walking the belt at 32 crosscut, and first noticed something out of the ordinary at 27 crosscut. Tr. 34. There he saw the belt rubbing on the belt structure on the stands at the walkway side of the belt. Tr. 35-36. Leverknight had Strimer shut the belt off because Section 75.1725(a) requires that a belt in unsafe condition be taken out of service immediately. Tr. 36, 158-159. Once the belts were shut down, Leverknight felt the stands and testified that they were hot. Tr. 36. He did not see any belt shavings. Tr. 77.

Baer confirmed at hearing that there was an indication that the belt was cutting into the structure. Tr. 168-169. However, Baer did not see the belt cutting into the structure or belt shavings. Tr. 169.

Strimer took notes on the inspection.¹¹ Tr. 157-158; RX-8. He testified that his notes were descriptions of Leverknight's comments, but that he did not confirm that the conditions were as Leverknight described them.¹² Tr. 159-160. Therefore, he cannot remember if he actually witnessed the belt rubbing the structure as his notes indicate or if he saw rollers compacted with coal fines. Tr. 160; RX-8. He could not recall at hearing whether the conditions of the belt line stuck out in his mind. Tr. 161. He also could not recall seeing any belt shavings at the belt line. Tr. 162.

Leverknight continued walking the entire length of the belt, all the way to the main. Tr. 37. During that walk, he noticed several other locations where there was damage to the belt. Tr. 37. At 23 to 22 crosscut, on the tight side of the belt, Leverknight noticed the belt out of alignment, rubbing along the stands. Tr. 37-38. At 3 crosscut, which is almost at the mouth of the section by the takeup unit, the belt was cut into seven stands in a row. Tr. 38. The belt was cut 2.5 inches deep into the steel stand, and Leverknight found the belt in the cut, meaning that it had been running in the cut when he turned off the belt. Tr. 38.

The stands are made of three inch by three inch tubing, and the cut was almost the entire way through.¹³ Tr. 38. The seven stands were each ten feet apart from each other. Tr. 39. He did not see any belt shavings at 23 to 22 crosscut, but did see belt shavings at 3 crosscut. Tr. 77-78.

¹¹ Strimer's notes are labeled October 12, 2010, but Strimer testified at hearing that they were actually for October 18, 2010. Tr. 158.

¹² Baer testified that he took notes 99% of the time when he served as a union representative, and that he probably took notes for the October 18, 2010 inspection. Tr. 171-172. However, Baer was not able to locate his notes prior to the hearing. Tr. 172.

¹³ A structure that has been cut into does not need to be replaced because it is suspended from chains. Tr. 83. The relevance was that it was evidence that the belt was rubbing in the structure, thereby producing heat. Tr. 83-84.

Leverknight testified that he does not consider the presence or absence of shavings meaningful because shavings can be cleaned prior to the inspection. Tr. 78.

Leverknight testified that it was impossible for a rubber belt to cut 2.5 inches into a steel belt stand within a few shifts; it would take an extended period of time. Tr. 83. He concluded that it would not have been possible for the belt to have cut entirely into the structure prior to his inspection, because after the belt was shut off it was still resting 2.5 inches deep in the seven stands. Tr. 84-85.

Gregory King conducted the preshift examination for the belt system between 9:00-11:30 p.m. on October 17, 2010.¹⁴ Tr. 101; RX-5, 34. He found float coal dust on the C-3 belt. Tr. 101; RX-5, 34. He found that the belt needed to be trained on the C-2 belt at the nine to 15 crosscut, and was either starting or very close to coming in contact with the structure at four room to the takeup. Tr. 101-102; RX-5, 34. He found float dust from C-2 transfer to C-3 transfer and fines at the tight side of the C-2 transfer on the C-mains belt. Tr. 102; RX-5, 34. When he finished the examination, he would have gone outside and recorded the findings, as well as any corrective actions taken. Tr. 104-105. On October 17, 2010, King did not find any hazards. Tr. 105.

King testified that when he finds a hazard on the C-2 longwall belt, he shuts the belt down. Tr. 105. On October 12, 2010, King found one hazard on the C-2 belt and one hazard on the C-3 belt. Tr. 105; RX-5. As a result, he shut down both belts and reported the hazards to the computer room, and computer room personnel in turn reported it to the belt department. Tr. 105-106. King testified that Emerald's policy is that if the hazard cannot be fixed by the examiner,

¹⁴ Gregory King has worked for Alpha Resources at Emerald Mine for 11 years. Tr. 97. During that time, he has held the following positions: pumper, motorman, general inside laborer, and mine examiner. Tr. 97. Prior to working at Emerald, he worked for Dilworth Mine for 21 years and Robena Mine for three years. Tr. 97. King received his Pennsylvania assistant mine foreman papers in 1994. Tr. 97-98. He is currently a fire boss and mine examiner at Emerald. Tr. 98. His duties as examiner include performing preshift examinations, walking the belt lines, tracking haulages, performing methane checks, examining roof and ribs, and examining the condition of equipment and belt lines. Tr. 98. During these examinations, King looks for violations and hazards. Tr. 98.

In October 2010, King had approximately one and a half years of experience performing preshift examinations on the C-2 longwall belt. Tr. 99. Sometimes he would conduct the examination of the entire C-2 belt, and sometimes he would split the belt. Tr. 100. When he would split the belt, King and another mine examiner would usually start at the tailpiece. Tr. 100. The other examiner would stay at the tailpiece, while King would go to the haulage, and they would each begin the examination at a pre-determined time. Tr. 100. They would proceed to a split point, which was at 15 crosscut on this section, enter the belt line and continue out. Tr. 100.

Though he could not recall any specifics, King testified that he likely would have begun his preshift examination at around 9:00 or 9:30 p.m. Tr. 104.

then the belt should be shut down, reported, and fixed. Tr. 106. There were no repercussions for shutting the belt down, but there were also no repercussions for not reporting hazards. Tr. 106, 108.

King testified that a longwall belt could get out of train due to a movable tailpiece or moveable takeup unit not being straight or the front end not running the belt straight. Tr. 102. He stated that it was possible for the longwall belt to get out of train every time it pushes or advances. Tr. 102-103. In order to train the belt, one moves the rollers and steers the belt like a car. Tr. 103.

Come-alongs were used on the C-2 belts to help straighten the structure, and there was a structure that was out of line in by the takeup unit around 4 crosscut.¹⁵ Tr. 103. King testified that if the come-along were detached it would not serve its purpose of keeping the structure straight so that the belt would run true. Tr. 103.

David Simkovic was responsible for the C-2 longwall belt in October 2010.¹⁶ Tr. 121. On October 12, 2010, Simkovic assigned one of his beltmen to the C-2 longwall because there was float dust and fines. Tr. 122-123; RX-5, 1. Simkovic described the process of training the belt as necessary after the fire boss reports the problem when the belt is rubbing into the structure or running off to one side. Tr. 124. Reviewing the “Action Taken” section of the book, Simkovic testified that he either trained the belt or was present while his repairmen or beltmen trained the belt. Tr. 123-124; RX-5, 34. He then marked it as “Belt Trained” and “Men Assigned.” Tr. 124; RX-5, 34. To remedy the problem of the belt rubbing the structure, Simkovic repositioned the rollers and lined the belt so that it did not rub the structure or run off the belt. Tr. 124.

Simkovic testified that prior to putting the come-along on the stands at 3 crosscut, the belt had cut into the stands. Tr. 134. They tried to train the belt with rollers, but could not train it. Tr. 134-135. Therefore, they put a jack to push everything into place. Tr. 135. Belt structures do not get replaced simply because they have been cut into, so they believed this solution to be sufficient. Tr. 135.

Simkovic testified that he trained the belt at the 4 crosscut to the takeup at approximately 1:00 or 2:00 a.m. Tr. 125-126. He remembered seeing come-alongs that were placed in the 4 crosscut to the takeup in order to keep the belt in line because it was cutting into the structure.

¹⁵ Leverknight defined a “come-along” as a hand winch used to pull materials. Tr. 79.

¹⁶ David Simkovic has worked at Emerald Mine for 23.5 years, and was working as a belt foreman in 2010. Tr. 120. He has 38 years of total mining experience, and has worked at Western Electric, Nemaquin Mine, Vesta 5 Mine, Pickass Mine, Bobtail Mine, and Gateway Mine. Tr. 120. He has assistant mine foreman and EMT certifications. Tr. 120-121. As a belt foreman, Simkovic’s responsibilities include keeping the belts of the mine running, taking care of violations or hazards in the book or that occur during the shifts, and making sure that the belts perform in good working order. Tr. 121. Simkovic also assists the fire bosses if they encounter a problem. Tr. 121. Simkovic finds out about conditions in the mine by reviewing the books. Tr. 122. He is usually responsible for approximately 10 beltmen and two repairmen. Tr. 123.

Tr. 126. If the come-along was detached then the belt would go back out of line and cut into the structure. Tr. 126-127. Furthermore, the belt plow is put on the return belt in order to remove excess debris from the belt so that it does not end up at the tailpiece of the belt. Tr. 127.

On the midnight shift of October 18, 2010, when he trained the belt, Simkovic continued walking up to the C-2 belt. Tr. 127. He walked four to six blocks in order to ensure that he had not moved the belt such that it was rubbing elsewhere. Tr. 127. Simkovic did not recall seeing the belt rubbing anywhere else. Tr. 127.

Leverknight determined that the belt rubbing the structure and cutting into the stands was unsafe because it caused frictional heat. Tr. 40. Emerald Mine uses a fire resistant belt, however, the belt is not fireproof. Tr. 81. Leverknight found the violation in Citation No. 7082869 to be Significant and Substantial (S&S) because the combination of frictional heat, accumulations of coal, and bad rollers at the mine created a belt fire hazard. Tr. 40, 42-43; GX-1. If the belt rubbed on the structure long enough, it would create shavings that could pile up and smolder, leading to a fire. Tr. 43.

Leverknight assessed the negligence as high because, in his experience, a belt cannot cut 2.5 inches into steel in a short period of time. Tr. 41. This indicated that the conditions had existed for an extended period. Tr. 41. Furthermore, the conditions at three crosscut were obvious because the structure was hanging at eye level for anyone walking past. Tr. 41. The conditions at 27 crosscut were obvious because they were on the side of the belt where miners travel. Tr. 41. He determined that one person would be affected by the violation because he did not see anyone working on the belt. Tr. 42. Therefore, Leverknight concluded that the only person who would be affected would be the mine examiner. Tr. 42.

There were numerous safety systems on the belt line, which the Respondent argues would have mitigated any danger. There were CO sensors on the belt, spaced approximately 1,000 feet apart. Tr. 70. Leverknight tested the sensors and they were functioning. Tr. 71. He estimated that the sensors were set to five or seven parts per million, however safety manager William Schifko testified that the the alarm detects five parts per million and alerts when it detects 10 parts per million.¹⁷ Tr. 70-71, 206-207. CO sensors were used to detect when the belt gets hot and releases carbon monoxide in order to catch the initial stages of combustion. Tr. 71. They provide a warning that would be given to the section to prompt the evacuation of the section. Tr. 71. The C-2 belt also has a fire suppression deluge system in the drive areas, storage areas, motors, and other areas. Tr. 207. There were also handheld detectors and extinguishers along the belt. Tr. 207-208. However, in Leverknight's experience, CO sensors will not sense when the belt is burning. Tr. 91-92. He testified that he has placed a CO detector beside a pile of shavings

¹⁷ William Schifko worked at Emerald for 34.5 years, and in 2010 was working as manager of safety managing compliance issues. Tr. 200-201. At Emerald, he has worked in production, safety, and with the continuous miner and longwalls. Tr. 200-201. He is certified in Pennsylvania as a mine foreman. Tr. 200. His responsibilities as safety manager include ensuring that everyone knows the laws and regulations and investigating circumstances that lead to citations and orders. Tr. 201.

that were smoldering with visible smoke, and the alarm was not triggered. Tr. 92. In addition to the CO sensors, there is a barrel of fire protection, a fire hose, fire valves, and overhead water sprays that are equipped to react to a rise in temperature. Tr. 72. However, the fire suppression system is only at the belt drive and the belt takeup, and it does not cover the middle of the belt. Tr. 92.

The condition could not be fixed until the other orders that Leverknight issued were terminated, because they had to turn on the belt in order to train it. Tr. 43. In order to do so, they had to clean the accumulations and rock dust, and change the rollers before training the belt. Tr. 43. In total, Emerald changed 46 rollers to terminate this citation. Tr. 93; GX-8, 2.

Schifko was not at the mine when Leverknight was conducting his inspection on October 18, 2010; however he did speak with Leverknight later in the day. Tr. 202. Leverknight told Schifko that the come-along at the No. 4 crosscut was not performing properly, so Schifko began investigating the matter. Tr. 202-203. Schifko interviewed Levo and Oros, the two mine examiners who would have performed the preshift examination prior to the inspection. Tr. 203; RX-4. Levo told Schifko that the belt was being pulled by come-alongs and that the belt was in operation during their examination. Tr. 20. He said that the belt was bulk dusted from crosscuts six to 10 and from 10 to 15. Tr. 205.

Order No. 7082871

Order No. 7082871 was issued for accumulations of combustible materials on the C-2 belt at 9 ½ crosscut to the tailpiece at 32 crosscut. Tr. 106-107; GX-3, 1. Leverknight observed accumulations at the 25 to 23 crosscut while traveling along the longwall belt. Tr. 44-45. These accumulations were under the rollers, contacting the rollers, and built up around the rollers. Tr. 45. The belts are approximately 8 to 10 inches off the floor in that area of the mine. Tr. 46.

Depending on the area, the accumulations were a combination of loose coal, fine coal, and coal dust. Tr. 45-46. He testified that he used the word “dirt” in his report to mean “coal” because it is a habit he picked up while working as a mine examiner. Tr. 45. The coal that was in contact with the belt was primarily finer coal dust. Tr. 45-46. Leverknight did not specify in his notes which areas were wet and which were dry. Tr. 75. However, he testified that wet material can become combustible. Tr. 75-76.

Next, Leverknight observed accumulations at the 22 to 21 crosscut contacting two rollers on the tight side of the belt.¹⁸ Tr. 46. He testified that it was a similar combination of loose coal, fine coal, and coal dust. Tr. 46-47. At the 16 to 15 crosscut, Leverknight observed accumulations under the rollers and in contact with the roller on the tight side of the belt. Tr. 47. Because it was on the tight side of the belt, Leverknight had to look under the belt to see the accumulation in contact with the roller. Tr. 47. Leverknight testified that the mine examiner

¹⁸ The longwall belt has a “walk side” where individuals travel and a “tight side” where individuals do not travel. Tr. 37, 41.

should look under the belt in order to be sure that the belt is not in contact with anything when it is running. Tr. 47.

Leverknight then observed similar conditions at the 14 to 13 crosscut, including accumulations and coal in contact with rollers on the tight side of the belt. Tr. 47. He explained that the cause of this condition is often that belt cleaners only clean the walk side and ignore the tight side of the belt. Tr. 47-48. This allows accumulations to build on the tight side. Tr. 47-48.

Leverknight also observed coal accumulations under the rollers on the walk side at 12 crosscut. Tr. 48. These accumulations were similar to the others, with a mixture of loose coal, lump coal, and fine coal dust. Tr. 48. All along the belt, Leverknight noticed a coating of float coal dust on the rock dust. Tr. 48. He believed that these accumulations had existed for some time because the amount of accumulations, the distance that the accumulations covered, and the fact that the spillage was under the rollers indicated that it had not simply spilled off the sides. Tr. 49.

Neither Strimer nor Baer recalled seeing rollers in coal. Tr. 160, 168-169. Strimer testified that he did not get underneath the belt to look to see if the rollers were in contact with accumulations. Tr. 160.

On the afternoon shift of October 17, 2010, Gregory King performed the preshift examination on the C-2 belt from 9 ½ crosscut to 15 crosscut, and John Hoak examined the C-2 belt from 15 crosscut inby to the tail.¹⁹ Tr. 106-107, 116-117. Hoak was “pretty sure” that the belt was running during the examination, but the mine was not producing coal. Tr. 117-118. Hoak did not find any hazards or conditions. Tr. 117. King testified that he did not find any accumulations of combustible materials or material in contact with rollers during his examination. Tr. 107.

King did not train the belt on October 17, 2010, but he was familiar with how it would be done. Tr. 109. One would work from outby in to train the belt between four and three crosscut. Tr. 109. He testified that one could cause accumulations when training the belt if one performed the task incorrectly, however it would be impossible to get accumulations ten crosscuts away. Tr. 108-109. Furthermore, when the belt moves, it can go out of train. Tr. 110. Every time there is a longwall panel completed, which occurs every 90 minutes, the tailpiece moves. Tr. 110. Therefore, the belt could go out of train every 90 minutes. Tr. 110. Additionally, King testified that if the come-along holding the belt in train detached, it could result in the belt running out of

¹⁹ John Hoak works at Emerald Mine as a mine examiner. Tr. 113. He has worked at Emerald for two years as a roof bolter, nine years as a miner operator, five years as a motorman, one and a half years as a pumper, and 2.5 years as a mine examiner. Tr. 114. Prior to Emerald, he worked at Shannopin Mine for 11 years and Banning Mine for three years. Tr. 114. He has been a certified Pennsylvania mine examiner since September 1993, and has been conducting examinations once a week since that time. Tr. 114-115. As an examiner, his responsibilities are to inspect belt lines and haulages for dangers, hazards, violations or conditions, methane content, and direction of air. Tr. 115.

train. Tr. 111. If this were to happen, it could result in coal being dumped off the side of the belt in a quick time frame of 10-15 minutes. Tr. 111.

The longwall belt moves about 950 feet per minute, which makes it a very fast belt. Tr. 132. The other section belts move about 350 feet per minute. Tr. 132. Simkovic testified that accumulations could occur on the C-2 longwall belt very quickly if the tailpiece was moving from the belt running out of train. Tr. 133. Simkovic did not recall seeing any of the conditions described in Order No. 7082871. Tr. 133; GX-3.

Reviewing Order No. 7082871, Mine Examiner James Levo testified that he was responsible for the 9 ½ crosscut to the belt tailpiece, and that he did not recall seeing any accumulations in those areas.²⁰ Tr. 150; GX-3, 1. He testified that if he had seen accumulations or the belt cutting into the structure, he would have listed these in his report. Tr. 150-151. Levo further testified that if there were rollers that were broken or popped out, he would have recorded them as a condition in the book. Tr. 152.

The hazards from coal accumulations include damaging rollers and causing the belt to rub the accumulations and cause a fire. Tr. 51. A mine fire could result in injuries including smoke inhalation and burns. Tr. 51. Additionally, if there was an explosion on a longwall face with the float coal dust, that could propagate an explosion on the belt line. Tr. 51. Leverknight did not detect any methane during the examination, making a methane ignition unlikely. Tr. 73. The float dust was not in suspension, but Leverknight testified that float dust does not have to be in suspension for it to constitute a hazard. Tr. 73-74.

Leverknight issued Order 7082871 as Significant and Substantial because all the elements were present to cause a mine fire. Tr. 52; GX-3. There were accumulations, bad rollers, belt rubbing on the structure, and belt rubbing on the accumulations. Tr. 52. He assessed the violation as high negligence and unwarrantable failure because he believed that the violation had existed for some time, and the preshift examination was performed only a few hours earlier. Tr. 52-53. According to the Emerald Mine Shift Production Report, coal was produced on the C-2 longwall on the daytime and midnight shift of October 15, 2010, and on the midnight shift of October 18, 2013. Tr. 53-54; GX-10-1. Therefore, a preshift examination was required prior to the midnight shift on October 18. Tr. 55. Leverknight testified that the coal produced during the midnight shift was not likely to have caused the accumulations he saw because the accumulations were under the belt and around the rollers, ground fine, and had other qualities

²⁰ James Levo has 30 years of mining experience, with 18 years at Emerald, and 12 years at Clude Mine, Gateway Mine, and Target Mine. Tr. 142. In 2010, Levo worked as a mine examiner at Emerald Mine. Tr. 142. He became certified as a mine examiner in 1984 and has been conducting preshift examinations since 1986. Tr. 142-143. As a mine examiner at Emerald, Levo examines belts and haulages and air courses for hazards and conditions. Tr. 143.

In 2010, Levo conducted preshift examinations on the C-2 longwall belt once a day for five to six days per week. Tr. 144. By that time, he had been conducting these examinations for approximately four to five years. Tr. 144. Levo typically conducted the examination of the outby portion of the belt, the head area to 15 crosscut outby, and Bruce Oros would conduct the examination inby. Tr. 144-146.

indicating they had been there for some time. Tr. 55. Leverknight described the accumulation violation as obvious because of the extensive amount of materials on the belt and the distance that they were spread out. Tr. 55-56. Additionally, Emerald Mine had a history of Section 75.400 violations. Tr. 55.

When Leverknight left the mine at 3:30 pm, this Order had not yet been terminated. Tr. 56-57. The operator originally told Leverknight that they would be finished cleaning up the accumulations and rock dusting by the end of the day shift. Tr. 57. However, at some point the mine superintendent told Leverknight that they would not be finished until later in the afternoon shift. Tr. 57. Therefore Leverknight decided to go back to the Ruff Creek Field Office, which is approximately 10 miles from the mine, and told the superintendent to call him when they were an hour or two from being ready to run the longwall. Tr. 57-58.

Steven Simmons was employed as the belt moving foreman on October 18, 2010, but since there were no belts being moved that day, he was helping with other tasks underground.²¹ Tr. 175-176. He became aware of the circumstances that led to the issuance of Citation No. 7082869 on October 18, 2010 at 10 a.m. Tr. 176. At that time, the computer room attendant called Simmons and told him that there were issues that needed to be resolved. Tr. 176. Simmons went to the drive location at 22 or 23 room and found the belt shoveler who was in charge of cleaning the belt that day. Tr. 177. There were typically two shovelers to a longwall belt line per shift. Tr. 177-178.

Leverknight discussed with Simmons his findings and what needed to be addressed. Tr. 178. Simmons gathered men to clean the area, and he testified that when he arrived there the necessary shoveling was minimal. Tr. 178. Simmons arrived at the longwall belt when it was already down and stated that there were no hot rollers. Tr. 179-180. Simmons testified that the C-2 longwall belt was rock dusted and that the area was easily “whitened up” with rock dust. Tr. 179. He described the consistency of the material underneath the belt as “light, flakey, what they call corn flakes,” that flake off the belt. Tr. 179. Simmons further described the materials as slightly wet or moist. Tr. 179.

Simmons looked at the entire length of the belt and assigned men to clean the material in the areas where Leverknight specified. Tr. 180. Simmons testified that those areas each required less than a shovel full of material to be cleaned out. Tr. 180. Simmons stated that the material was barely in contact with the rollers, and would have only required the moving of a three-quarter inch diameter roof bolt under the belt to clear it. Tr. 180-181. Simmons had 13 men working with him to clean up the accumulations and rock dust. Tr. 184, 186. When Simmons

²¹ Steven Simmons worked at Emerald Mine for eight years, with the first four as a belt foreman and the last four as the belt moving foreman. Tr. 174. Simmons stated that the difference between these positions is that the belt foreman performs any work related to the belt, while the belt moving foreman is primarily in charge of advancing the belts in the working sections. Tr. 175. Prior to working at Emerald, Simmons performed conveyor maintenance for four years at Conveyor Services and four years at Stahora Company. Tr. 175. He had approximately 16 years of experience with mining belts. Tr. 175.

ended his shift at 5 p.m. on October 18, 2010, the entire belt was shoveled and his men were in the process of applying rock dust to the area. Tr. 182.

On October 18, 2010, shift foreman Keith Mills was at an annual retraining class.²² Tr. 188-189. After it was called out that citations and an order were written on the C-2 belt, Mills and Joe Privolo went to investigate the situation. Tr. 189. They arrived at the belt at approximately 11:30 and went to nine room. Tr. 189. Privolo went to the tight side, and Mills went to the wide side, and they began walking the belt. Tr. 189-190. From nine room to 20 room, the area ranged from damp to wet, and the rock dust was a grayish color, indicating moisture. Tr. 190. They continued to 13 to 14 room, where the rollers were marked as needing to be cleaned, and got down on their hands and knees. Tr. 190. They scraped the material with a fiber pin, and concluded that the material was mainly rock dust and wet. Tr. 190. They continued to 15 room and similarly concluded that the material under the bottom roller was mainly rock dust and damp. Tr. 190. They continued to 15 to 16 room and found that two rollers were missing. Tr. 190. The belt was in contact with the mine floor, but the area was wet and rock dusted. Tr. 190-191.

They then proceeded to 16 to 17 room and found fines and rock material in the bottom roller. Tr. 191. At 17 to 18 room, they found that rollers were missing. Tr. 191. At 20 room, they found three men cleaning the area. Tr. 191. The area at around 20 room was dryer and the rock dust was white. Tr. 191. At 26 to 27 room there were missing rollers; at 27 to 28 room there were four missing bottom rollers; and at 28 to 29 room there were seven missing bottom rollers. Tr. 191. The belt from the tail to 17 room had been cleaned and placed on the belt. Tr. 192.

Mills testified that when he left the mine at 12:30 p.m. the majority of the cleaning was complete, but Order No. 7082871 was not abated until 1:25 a.m. Tr. 192-193; GX-3, 3. The only areas that still needed to be cleaned up after Mills left were from 17 room down to nine room. Tr. 193. Mills testified that the area between the tail to the 17 to 18 room was cleaned in approximately one and a half hours. Tr. 193.

Leverknight received a call from the operator at approximately eight hours later, at 11:00 or 11:30 pm. Tr. 58. He returned to the mine and terminated Order No. 7082871 at 1:25 am. Tr. 58; GX-3-3.

²² Keith Mills worked at Emerald Mine for approximately five years. Tr. 186-187. In his first year and a half, he was a section supervisor; he then worked as a shift foreman for three years; and then as a section coordinator. Tr. 187. In 2010, he worked as a shift foreman, where he was responsible for the safety, production, and cost for the entire shift. Tr. 188. Prior to working at Emerald, Mills worked for 30 years at Wabash in Illinois, as safety committeeman, section supervisor, assistant shift foreman, shift foreman and coordinator, and production coordinator. Tr. 187. Mills has Pennsylvania mine foreman papers, Illinois mine examiner and mine manager papers, and Indiana mine manager papers. Tr. 187-188.

Citation No. 7082870

Leverknight issued Citation No. 7082870 for the damaged rollers he observed along the C-2 longwall belt.²³ Tr. 59-60; GX-2. He first saw the damaged rollers at 22 to 21 crosscut. Tr. 60. He observed bad bottom rollers down in the coal on one side that were not turning and were worn flat from the belt rubbing on the roller. Tr. 61. One of the rollers had not been turning, so it was dropped down on one side. Tr. 61. However, the other side of the roller was still in contact with the belt, resulting in a flat spot on the roller. Tr. 61.

Leverknight next observed a damaged bottom roller at the 17 to 16 crosscut. Tr. 61. Similar to the previous situation, one side was hanging down on the coal, and the side in contact with the belt resulted in a flat spot on the roller. Tr. 61.

Leverknight next observed a missing bottom roller at the 16 to 15 crosscut, which allowed the belt to go slack and ride on coal fines under the belt. Tr. 61-62.

Leverknight next observed a damaged bottom roller at the 4 to 3 crosscut. Tr. 62. This roller was dropped down into the coal on one side, while the other side made contact with the belt, leading to a flat spot on the roller. Tr. 62. Leverknight observed a come-along in place that was hooked to the structure to move it over. Tr. 79. It was being used in order to keep the belt trained, however only one side was hooked up. Tr. 79.

Reviewing Citation No. 7082870, Levo testified that the bad rollers cited at four to 3 crosscut and 16 to 15 crosscut would have been in the area where he conducted a preshift examination. Tr. 152; GX-2, 1. He testified that he did not remember seeing the bad rollers cited. Tr. 152-153.

²³ Leverknight provided the following extended definition of “bad” or “damaged” rollers:

Some of the rollers, they have bearings on both ends where they ride on the axle shaft. The bearings go bad and fly apart, and the steel barrel of the roller actually just rubs on the shaft itself.

Some of them, the steel barrel itself of the roller wears in half, and they just start flopping on the shaft.

Some of them are actually damaged on one side. So they drop them down out of the hanger so they’re not in contact with the belt. That’s the damaged rollers.

Flat spots wear in the barrels because the bearings go bad and it locks the roller up so it won’t spin, and the belt just rides on top of it, flattens it from rubbing on it.

Tr. 60.

Leverknight issued Citation No. 7082870 as Significant and Substantial because of the combination of damaged rollers and missing rollers that allowed the belt to ride on the coal accumulations. Tr. 62. Leverknight did not observe any frictional heat when he saw the bad rollers because the belt had been shut off from the moment he originally observed it rubbing on the structure. Tr. 63.

The Respondent did not contest this citation. Tr. 62-63. It changed the rollers on the belt during the process of cleaning accumulations and rock dusting. Tr. 63. It is Schiffko's responsibility to decide which citations and orders to contest, and he decided not to contest Citation No. 7082870. Tr. 206. Schiffko testified that "if the rollers were bad or damaged, they were what they were. I don't frivolously contest issues." Tr. 206.

Order No. 7082872

Leverknight issued Order No. 7082872 for an inadequate preshift examination of the longwall belt. Tr. 63; GX-4. Such examinations are necessary in order to ensure that there are no hazards or violations that would be detrimental to miners in the oncoming shift. Tr. 64. Preshift examinations are required within three hours prior to the oncoming shift for any area in the mine where there will be persons working or traveling. Tr. 64. When a mine examiner discovers a hazard or violation in any area of the mine, he is required to record it in the book and make sure that it is taken care of immediately. Tr. 64. Leverknight issued Order No. 7082872 after he observed the conditions that he cited in Citation Nos. 7082869, 7082870, and Order No. 7082871. Tr. 64-65.

Leverknight issued Order No. 7082872 for inadequate preshift examinations as Significant and Substantial because the underlying conditions were assessed as Significant and Substantial. Tr. 65. He assessed the negligence as high and determined that it was an unwarrantable failure because the examiners are agents of the operator and the conditions appeared to predate the prior examination. Tr. 65-66. The preshift examinations for October 18, 2010 indicate that there were no violations or hazard reported. Tr. 66-67; GX-9-12, 13. Leverknight testified that the accumulations should have been recorded as dangerous and hazardous conditions because they were in contact with the rollers and the belt. Tr. 67. He also believed that the belt rubbing along the structure and the bad rollers should have been recorded as dangerous and hazardous conditions. Tr. 67.

Simkovic testified that if the belt in the C-2 longwall had been observed by a preshift examiner as rubbing along the stand, it would be recorded as a violation. Tr. 136. If the belt were rubbing against the stand or running through the structure where it had cut before, Simkovic would not consider it a hazard. Tr. 136-137.

Leverknight determined that one person was likely to be affected by the failure to conduct an adequate preshift examination because no one was assigned to work on that belt. Tr. 67-68. When he walked the belt, he did not see anyone along the entire length of the belt. Tr. 68. Furthermore, the belt dumps out into the return, so it does not affect the section. Tr. 68. Therefore, he assumed that the only person that would be on the belt would be the examiner. Tr.

68. However, Leverknight also testified that he did not take into account that there were two examiners that split the belt. Tr. 68.

On the October 17, 2010 preshift examination, Mine Examiner James Levo indicated that the belt needed to be trained at the 4 crosscut to the takeout. Tr. 147; RX-5, 34. On October 18, 2010, Levo did not find any hazards or conditions on the C-2 belt, and he did not recall seeing that the belt needed to be trained. Tr. 145-147; RX-5, 34, 37. Levo recalled seeing a set of come-alongs from the 4 crosscut to the takeout that were attached to the rib and the wide side of the belt structure in order to keep the belt structure in place and not let it run out of train. Tr. 147-148. He recalled that the belt structure ran out of train and rubbed the structure prior to October 18, 2010. Tr. 148. When this happens, the belt will usually leave belt shavings and sometimes cut the structure. Tr. 148. Levo testified that if he did not witness the belt rubbing the structure, causing friction or smoke, he would not note in his examination if there were grooves in the structure. Tr. 148-149. He testified that such grooves were not meaningful. Tr. 148-149. Levo testified that when he finishes his examinations of the belts, he fills out the book and then reports his results to his shift foreman or the mine foreman. Tr. 149-150.

In October 2010, Bruce Oros and his co-examiner, Jim Levo, examined the C-2 longwall belt every day.²⁴ Tr. 287-288. On a typical inspection, they would come out of the C-3 area and proceed into the C-2 area, with Levo walking the belt in from the C-3 head and Oros walking toward the tail from 15 room. Tr. 288. Oros conducted the five to seven a.m. examination on October 18, 2010. Tr. 289; RX-5, 36. He did not identify any hazards or conditions during his preshift examination. Tr. 289; RX-5, 36. Oros preshifted the area at 15, 26, 21, 22, 23, and 25 tailpiece at 32 crosscut, and he testified that he did not recall seeing the conditions described in Order 7082871. Tr. 290.

Oros described the longwall belt as volatile stating that “conditions can change at any time. Belt runs dry, you get float dust. Belt walks, you get spillage.” Tr. 291. However, he testified on cross-examination that if material were to spill off the belt, it would be pieces of coal. Tr. 291. Dust would only be produced if the conditions were dry or if the belt was rubbing the structure. Tr. 291-292. Oros testified that if the belt were rubbing the structure, he would shut it down. Tr. 292.

²⁴ Bruce Oros worked as a supervisor and acting shift foreman for Emerald Mine. Tr. 285. Prior to working at Emerald, Oros worked for 13 years at Nemaquin Mine fire bossing, working on the river, at the prep plant, running a buggy shuttle, and bolting. Tr. 286. He has mine examiner and assistant mine foreman papers. Tr. 286. In 2010, Oros was a mine examiner for Emerald, where his duties included insuring that state and federal laws were followed, and that there were no imminent dangers, hazards, and conditions in the mine. Tr. 286-287. Between 1992 and 1996, Oros was the chairman of the safety committee for two locals of the UMWA, where he was responsible for ensuring the safety and health of mine workers. Tr. 286. He has between 25 and 30 years of experience conducting mine examinations. Tr. 286-287.

Leverknight terminated the citation when he came back to the mine that night after the operator gave all the preshift examiners a short retraining on conducting proper preshift examinations on the belt. Tr. 68.

Order No. 7073116

Inspector Allan Jack issued Order No. 7073116 after observing damaged roof bolts and straps, which he determined constituted a violation of 30 C.F.R. § 75.202(a) in that they provided inadequate roof supports.²⁵ Jack was at Emerald Mine No. 1 on October 21, 2010 in order to conduct the normal E01 quarterly inspection. Tr. 222-223. Jack arrived at the mine at 7:05 a.m., let the company know that he was on the property, and checked the on-shift and preshift examinations. Tr. 223. He testified that there was nothing of note in the preshift examination records. Tr. 224.

Jack intended to inspect the B-left haulage and B-inlets, which are the B-main haulage.²⁶ Tr. 224. At the time, Emerald was recovering a longwall at the B-main section, which involves removing and disassembling the longwall and moving it to another section of the mine. Tr. 224. He traveled underground with Adam Strimer, as the company representative, and Matt Shiflet, as the miners' representative. Tr. 225, 294-295.

They started the inspection at the bottom of the No. eight shaft and traveled on foot towards B-4 section. Tr. 295. While traveling up the B-left haulage on foot, Jack observed roof straps hanging from the mine roof, which prompted him to inspect the area more closely. Tr. 225. Jack described the purpose of the roof straps or channels as helping to support the roof by holding up localized loose roof material. Tr. 229. Upon closer inspection, Jack found damaged roof support, missing roof support, and loose hanging materials. Tr. 225. Jack issued Order No. 7073116 upon finding the condition of the B-left haulage, citing a violation of 30 C.F.R. §75.202(a). Tr. 226-227; GX-5.

Haulages are the primary way to enter and exit the mine and also the primary escapeway for the side of the mine Jack was traveling. Tr. 226. All the equipment for the longwall is transported through the haulage. Tr. 265. Miners using the haulage as an escapeway would be traveling on foot. Tr. 226. Some of the vehicles that the miners travel on have canopies, but there are no certified falling object protections on them. Tr. 226.

Jack sketched a diagram in his notes of the mine roof in order to illustrate where the bolts were damaged and missing, and where the mine roof straps were damaged. Tr. 227; GX-13, 3.

²⁵ Inspector Allan Jack worked for MSHA for four years in he Ruff Creek Field Office. Tr. 221. Prior to working for MSHA, he worked for Consol Energy at Enlow Fork Mine for approximately 10.5 years as a miner bolter, center bolter, mining machine operator, and mine examiner. Tr. 221-222. He has assistant mine foreman and Pennsylvania shot fires certifications. Tr. 222.

²⁶ Inspector Jack defined a "haulage" as the entry in the mine that the miners use to travel in and out on something akin to a railroad system on personnel carriers, or mantrips. Tr. 225.

He reviewed his notes and illustrations at the hearing.²⁷ Tr. 228. In total, Jack observed seven rows of damaged roof support. Tr. 232. In the second row, Jack observed a mine channel roof strap that was torn in two pieces and had a twisted bolt plate. Tr. 229. In the third row, he observed a bolt that had the head sheared off of it and was damaged severely. Tr. 229. Furthermore, there were bent and smashed bolts that were put in supplementally, as well as several twisted and bent straps. Tr. 229. In the fourth row, Jack observed a channel that was ripped two times, with the straps pointing aimlessly, as well as damaged bolts and twisted plates. Tr. 229-230. In the fifth row, he observed a mine channel severely battered and smashed, as well as some twisted plates. Tr. 231. In the sixth row, he observed a roof channel that was severely damaged and torn in pieces, as well as bolt heads smashed and missing and twisted plates. Tr. 231. In the seventh row, he observed one damaged bolt head and one bolt head missing. Tr. 231-232.

He described the roof in the area as having loose material hanging, with old and new potted out coal, and rock showing. Tr. 232. There was also roof coal and rock lying on the mine floor that had fallen. Tr. 232. Jack took pictures of the conditions that he described, and interpreted the photos at hearing. Tr. 232-233, -233-245; GX-15; GX-29, 3. Jack did not observe signs of sagging or slicks during his inspection on October 21, 2010. Tr. 261-262.

The plan called for a minimum of five-foot bolts. Tr. 262-263. The bolts used in this section of the mine were combination bolts that were eight-foot long and resin assisted. Tr. 230, 262. The bolt comes in two four foot sections, with the top half being a rougher diamond shape bolt that gets installed in the mine roof with resin. Tr. 230. There is then a coupler in the center where the lower four foot half is inserted with dowel pins. Tr. 230. The bolt is spun for approximately 30 seconds, which permits the resin to set in the mine roof in the top four foot section and allows the bottom half to be torqued.²⁸ Tr. 230. The dowel pin then breaks, causing the two pieces of the roof to come together and form a beam in the mine roof. Tr. 230-231. Jack testified that a bolt head is like a bearing surface holding all the bearing weight, and that a damaged bolt affects its integrity. Tr. 230-231.

The roof bolts are permitted to be as far as five feet between rows and five feet from the center bolt to the rib bolt. Tr. 263. Jack testified that the spacing between the bolts was less than five feet, and there were more bolts than were necessary. Tr. 264-265.

²⁷ In the diagram, a circle represented a bolt that was bent or damaged, a star represented a solid bolt with no damage, a circle with an "X" through it represented bolts that were damaged to the point of having the heads missing, a rectangle with a circle or an "X" within it represented a bolt in a mine roof strap that was damaged with a twisted plate, a squiggly rectangle represented a roof strap that was battered and smashed, and a rectangle represented a roof strap. Tr. 228. GX-13, 3.

²⁸ The B-main left haulage had combination bolts installed, which have a required torque range of 200-300 foot pounds. Tr. 360-361. Each bolt is torqued upon installation. Tr. 361.

Inspector Jack testified that rock dust and rust were indications of whether the damage he observed was old or new. Tr. 234. The area was rock dusted only a few times per year, therefore the presence of flaking rock dust on damaged bolts indicate that the damage was old. Tr. 234.

The hanging strap that Jack described was approximately five feet from the mine floor. Tr. 239. This was a low area of the mine, with the roof being only five feet 11 inches high. Tr. 239. The rest of the haulage was approximately six and a half feet high. Tr. 239-240. In the area of the roof with newer damage, Jack estimated that the roof had been potted out in a six by 12 foot area. Tr. 240. He could not measure the area because there was unsupported top and inspectors will not travel under unsupported top. Tr. 240.

Jack identified a switch near the haulage that is used to go into another sidetrack. Tr. 243-244. Fire bosses and examiners would need to use the switch, and when doing so they would write down the time, date, and their initials. Tr. 244. The mine examiner's initials prior to Jack's inspection were "DT," which Jack understood as a reference to Dave Thearle. Tr. 244. Thearle indicated that he did the examination at 6:12 a.m., and Jack issued the citation at 9:30 a.m. Tr. 244-245.

While underground, Jack told the company representative, Adam Strimer that he was issuing (d) orders on the condition and on the preshift examination. Tr. 245-246. When he reached the surface, he talked with William Schifko about the issues. Tr. 246. After Schifko viewed the conditions, he told Jack that he did not believe that the violation was an unwarrantable failure. Tr. 246.

Jack issued the citation as Significant and Substantial because the top was inadequately supported, there was material hanging, and it was a hazard to a miner traveling through the area. Tr. 246-247. The Emerald Mine has experienced roof falls and there was a large roof fall outby in the same haulage as the condition cited, which occurred prior to the citation. Tr. 247. If an accident were to happen as a result of the hazard cited, it would be fatal because falling materials from the mine roof can kill a miner. Tr. 247. Jack issued the citation as one person affected because he felt that only one person would be entering the area at a time. Tr. 248. Jack estimated that some of the damage had existed for hours and some for weeks. Tr. 248.

There were indications that a number of individuals traveled through the area, including a mine examiner, motormen, a longwall coordinator and his crew, a fire boss pumper, and one other foreman. Tr. 248. Other individuals that traveled through the area on October 21, 2010 include Pumper Fire Boss Jack Favro at 9:09 a.m., Fire Boss Don Hardey at 8:38 a.m. and 8:48 a.m., and Longwall Coordinator Robert Wolfe at 8:22 a.m. Tr. 252; GX-27. The motormen, John Gech and Scott Price, told Jack that they did not damage the ceiling or mine roof. Tr. 248, 250. Gech told Jack that he was hauling shields, but that they did not hit the mine roof. Tr. 250-251. Shields are larger than the normal rolling stock of material in the mine, so they present more of a likelihood for damage to the mine roof. Tr. 252.

The condition was fixed by bringing in a track miner bolter and bolting the area into compliance with the mine's roof control plan. Tr. 253. Jack was told that the mine added more than 40 bolts. Tr. 253. Jack left the mine at approximately 3 p.m on October 21, 2010, and gave

his phone number so that they could contact him when they were close to fixing the problem. Tr. 253-254. Jack returned to the mine later in the evening and terminated Order No. 7073116 at 10:22 p.m. Tr. 253.

Jack assessed Order No. 7073116 as high negligence and unwarrantable failure because the obviousness of the condition. Tr. 254. He testified that anyone could have seen the condition and known that it was a violation. Tr. 254. Furthermore, mine management knew that the area was a problem area because there was supplemental bolting used. Tr. 254. This gave Jack reason to assume that the Respondent was aware that the condition existed or should have been aware that it existed. Tr. 254-255. Emerald was cited 27 times in the two years prior to the hearing for failing to have an adequately supported roof. Tr. 279-280.

Order No. 7073117

Jack also issued Order No. 7073117 for a violation of Section 75.360(b)(1) in conducting the preshift examinations. Tr. 255; GX-6. Section 75.360(b)(1) requires a certified examiner to examine an area not more than three hours prior to the start of an oncoming shift for hazards, air quality, and other issues. Tr. 255-256. There were no violations, dangers, or hazardous conditions observed or reported in the preshift examination report for the morning of October 21, 2010. Tr. 256; GX-16, 9. Jack testified that based on his experience as a mine examiner, he would have recorded the conditions in the B-main left haulage as dangerous and hazardous conditions in order to warn miners in the oncoming shift. Tr. 257. The preshift examiner, fire boss, and any other management that came through the area should have reported the damaged roof strap. Tr. 280.

Mine examiner David Thearle was first made aware of Order No. 7073117 the day after the order was issued.²⁹ Tr. 317. Thearle defined bad roof as roof where there are visible cracks, sagging in places, hanging slate, or with coal that is cracking off from pressure. Tr. 313. Potting and roof sloughage are not reportable until they are above the anchorage. Tr. 279. He testified that the roof in the B-main was “good.” Tr. 313. Thearle testified that when he sees a bad bolt,

²⁹ David Thearle had been employed at Emerald Mine since 1981, working as a fire boss for the five years previous to the hearing. Tr. 309. Prior to Emerald, Thearle was a supervisor and section foreman at Montour 4 from 1973-1978, and a general laborer at Marianna from 1978-1981. Tr. 309. He got his fire boss papers in 1976. Tr. 309. Thearle had a brief stint as an inspector trainee with MSHA from June, 2006-August, 2007. Tr. 310. During that time, he went to training in Beckley for roof control, ventilation, respirable dust, and surface training. Tr. 310.

As an examiner, Thearle examines the mine for hazards and dangers, inspects the belt lines and haulages, and examines the returns and bleeders weekly. Tr. 311. He examines the roof and ribs for accumulations of coal, explosive dust, and gases in order to make sure that conditions are safe for the oncoming shift. Tr. 311. He is responsible for reporting hazards and dangers, but can also record certain violations in the fire boss book. Tr. 311.

In October 2010, Thearle was examining the B-main haulage. Tr. 312. He would travel from the east corridor haulage up to B-7. Tr. 312, 315-316.

he marks it and reports it in the book for the oncoming shift. Tr. 314. Thearle has shut down the belt and haulage as a consequence of conditions, and has not been criticized by management for his actions. Tr. 315.

Thearle performed the preshift examination on October 21, 2010. GX-16, 9. He did not mark down any hazards, and he testified that there were no hazards present that he did not mark. Tr. 317; GX-16, 9. Thearle testified that he did not see any slips and that there was no strap hanging that would have made an examiner duck to avoid it. Tr. 319-320.

Jack issued Order No. 7073117 solely on the basis of the conditions that he cited in Order No. 7073116. Tr. 257. He assessed it as S&S because the extent of the condition, the unsupported mine roof, and the loose rock hanging were not examined properly to warn miners on the oncoming shift. Tr. 257-258. The violation was obvious because Jack could see the roof straps hanging from a distance. Tr. 258-259. He testified that if one were operating a personnel carrier at the time that he observed the conditions, one would have to duck and move out of the way from the hanging straps. Tr. 259. Strimer testified that he did not believe that the strap would have struck someone. Tr. 296-297. He disagreed with Jack's assessment that it was a center strap, and that someone would have to duck in order to avoid the strap. Tr. 297. The only way that one could travel in the area without walking under unsupported roof was if one stayed on the far walk side, which would be difficult in the narrow walkway. Tr. 258. Jack testified that he expected injuries resulting from the roof conditions to be fatal, but he assessed it as only one person affected because only one person would be underneath the exposed top at a time. Tr. 258.

Jack assessed the Order as high negligence and unwarrantable failure because he concluded that it was an obvious condition that the mine examiner neglected to report. Tr. 259. In order to terminate the Order, Jack had mine management review Section 75.360 with all certified people at the mine. Tr. 259. He terminated Order No. 7073117 on October 28, 2010 at 10:44 a.m. Tr. 260. At hearing, Jack was informed that the mine examiners had been retrained on Section 75.360 three days prior to his inspection, and he testified that this information would indicate an even higher level of negligence. Tr. 260.

Strimer estimated that the damage to the strap was fresh, because of the shiny markings, and guessed that it was caused by the longwall move. Tr. 297. Strimer testified that the roof appeared as if something had rubbed against it, based on the lack of rock dust on it. Tr. 299. Strimer did not recall anyone scaling loose material or seeing any loose material on the ground. Tr. 299.

After Strimer, Jack, and Shiflet exited, Strimer, Schifko, Privolo, and John Hunchuck went back down to the area. Tr. 299-300. Hunchuck was the mine foreman and Privolo was the safety manager. Tr. 300. The group took measurements and mimicked the inspector's investigation. Tr. 300-301. Strimer testified that the company investigation occurred approximately two hours after Jack's and the conditions had not changed in that time. Tr. 301. Strimer testified that the notes he took at the time reflected what Jack told him, and that he felt Schifko's diagram and findings were more accurate than Jack's. Tr. 302-304.

William Schifko performed an investigation after Order Nos. 7073116 and 7073117 were issued. Tr. 325. With him were Hunchuck, Privolo, and Strimer. Tr. 326. They went to the B-mains haulage just outby the B-4 track switch. Tr. 326. Schifko testified that when he arrived underground, there was one strap that was hanging from the mine roof. Tr. 345-346. He testified that he saw no evidence of sagging or cracking on the roof. Tr. 327-328.

He determined that the area had been damaged in the past and recently. Tr. 327, 347. The more recent damage was likely caused by the longwall move, which involved moving 265-275 shields, head drives, tail drives, stage loaders, and shears. Tr. 348. There were motormen traveling back and forth through the cited area after the preshift examinations were completed. Tr. 349. The motormen denied causing the damage, and denied hauling anything out of the mine that would have caused the damage. Tr. 350-351. However, Schifko believed that they were not being honest. Tr. 351, 362. The motormen were not disciplined. Tr. 362-363.

Schifko then evaluated the roof bolts for effectiveness and tightness, and sounded the roof as he progressed in order to determine if there is “drummy, hollow roof, weak roof, broken strata.” Tr. 328. He found none of these conditions. Tr. 328-329. Schifko testified that he hit boltheads horizontally and vertically and they were “pinging,” indicating that they were solid. Tr. 336. Schifko did not observe any loose material, and saw little material on the ground. Tr. 351-352.

Schifko testified that there was nothing in MSHA’s program policy manual or from the manufacturer of the roof bolts concerning guidance for roof bolts. Tr. 336-337. Schifko did not observe any areas that were potted out, and relayed that to Jack.³⁰ Tr. 338.

Schifko identified several of the bolts as non-pattern bolts. Tr. 340. He testified that the minimum length of bolt allowable under Emerald’s mine plan is five feet long, and the bolts that were being used were either eight or twelve feet long. Tr. 343-345.

ANALYSIS

The Secretary has Carried His Burden of Proof by a Preponderance of the Evidence that the Condition Described in Citation No. 7082869 Violated 30 C.F.R. § 75.1725(a).

Citation No. 7082869 was issued by Inspector Leverknight on October 18, 2010 at 9:45 a.m. for a violation of 30 C.F.R. § 75.1725(a). It states:

The C-2 Longwall belt, MMU-032 was not being maintained in safe operating condition. The bottom belt was in contact with the belt structure on the walkway side at 27 crosscut. The bottom belt was in contact with the belt structure from 23 to 22 crosscuts on the tight side of the belt and the bottom belt was in contact with the belt structure at 3 crosscut. There were 7 stands in a row with the belt cut through the structure approximately 2 ½

³⁰ Schifko defined “potted out” as “when you have an inversion into the roof. You could get that on initial mining. You could get that at a later date also where materials fall out. Typically, it’s domed shape.” Tr. 338.

inches deep with the belt remaining in the cut. All of these areas were resulting in frictional heat from the belt contacting the steel structure. The operator removed the belt from service immediately.

The inspector assessed gravity as “Reasonably Likely,” “Lost Workdays or Restricted Duty,” and “S&S.” He assessed the negligence as “High,” with 1 person affected. GX-1, 1. The inspector terminated the citation on October 19, 2010 at 1:25 a.m. after the “belt was re-trained and profiled to prevent the belt from contacting the structure.” GX-1, 2.

The Secretary contends that the conditions of the belt, which included its rubbing against and cutting into the belt structure, significant coal accumulations under the belt, and damaged rollers constituted violations of 30 C.F.R. § 75.1725(a). He argues that inspector Leverknight’s testimony sufficiently established proof of the violations, and that the Respondent’s eight witnesses provided testimony that was either consistent with Leverknight’s, not credible, or irrelevant. He argues that the violation was S&S because (1) it violated § 75.1725(a), (2) indicated that the machinery was operating in an unsafe condition, (3) resulted in the discrete safety hazard of a mine fire, an occurrence which (4) presented a reasonable likelihood that smoke inhalation and burns will result.³¹ The Secretary further argues that the violation resulted from the Respondent’s high negligence because there was evidence that the belt had been rubbing against the structure for an extended period of time, the condition was obvious, and it was due to a recurring problem.

The Respondent contends that there was no evidence that Emerald failed to maintain the longwall belt in safe condition, and therefore there was no violation of 30 C.F.R. § 75.1725(a). Respondent argues that the belt did not cut into the stand at crosscut 27, there were no belt shavings present, it was not generating heat sufficient for an ignition of the belt or coal, and the Secretary failed to establish that the condition was unsafe. It argues that if a violation occurred, it was not S&S because there was no “confluence of factors” present to make it reasonably likely that a fire, ignition, or explosion would occur. The Respondent further argues that the Secretary failed to establish high negligence because the cuts in the stand were pre-existing, the come-alongs were used to correct the condition, and there were no belt shavings present.

Section 75.1725(a) requires that “mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately.” The Commission has held that the standard for determining whether machinery or equipment is in an unsafe operating condition is “whether a reasonably prudent person familiar with the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining industry, would recognize a hazard warranting corrective action within the purview of the applicable regulation.” *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2129-2130 (Dec. 1982). Section 75.1725(a) imposes two duties upon an operator: “(1) to maintain machinery and equipment in safe operating condition,

³¹ The Secretary also provided an alternative argument based on the third element of the *Mathies* test prior to the Commission’s clarification in *Musser Engineering, Inc. and PBS Coals, Inc.*, 32 FMSHRC 1257, 1281 (2010). In light of *Musser Engineering*, as well as *Cumberland Coal Resources, LP*, 33 FMSHRC 2357, 2365 (2011), this alternative analysis is unnecessary.

and (2) to remove unsafe equipment from service. Derogation of either duty violates the regulation. The Commission requires that the unsafe equipment be removed from service immediately.” *Id.* (citations omitted).

The Commission has held that a belt rubbing or cutting into the belt structure, along with combustible accumulations and possible ignition sources, constituted a hazard in violation of § 75.1725(a). *Martinka Coal Co. v. MSHA*, 15 FMSHRC 2452, 2456 (Dec. 1993); *MSHA v. Jim Walter Resources*, 18 FMSHRC 804, 817 (May, 1996) (“[T]he belt was not in alignment and was contacting some belt stands, ten rollers were missing, and at three locations one end of a roller was lying on the floor. These condition can cause heat and friction which can lead to smoke or a fire.”); *MSHA v. Alabama By-Products*, 4 FMSHRC 2128, 2130-2131 (Dec. 1982) (finding a combination of frozen rollers and belt running out of train cutting into support structures a violation of § 75.1725).

In the case *sub judice*, inspector Leverknight testified that he observed the belt rubbing on the belt structure at 27 crosscut, and proceeded to have the belt shut down. Tr. 34-36, 158-159. He felt the stands and testified that they were hot from the rubbing. Tr. 36. Leverknight observed at 23 to 22 crosscut the belt out of alignment rubbing along the stands. Tr. 37-38. The belt was cut into seven stands in a row at 3 crosscut. Tr. 37-38. The belt was cut 2.5 inches into the 3-inch structure, and Leverknight determined that since the belt was in the cut, it had been running in the cut when he had the belt shut down. Tr. 38. In addition there was float coal dust and fines present. Tr. 101. Leverknight determined that the belt cutting into and rubbing the structure had caused frictional heat and represented a fire hazard. Tr. 40.

Leverknight testified that he observed five areas of significant coal accumulations under the belt. Tr. 44. These accumulations consisted of loose coal, fine coal, and coal dust. Tr. 46. The accumulations were in contact with bottom rollers, and at some of the locations, Leverknight found damaged belt rollers. Tr. 60-61. These accumulations were cited in Order No. 7082871, and are discussed *infra*.

Respondent’s witnesses offered no evidence that contradicted Leverknight’s testimony. King testified that the belt may have run out of train as a result of the come-alongs detaching. Tr. 103. Simkovic testified that prior to putting the come-alongs at the stands at 3 crosscut, the belt had cut into the stands. Tr. 134. However, Leverknight testified that after the belt was shut off, it was 2.5 inches in the structure, meaning that it was running fully within the cut. Tr. 38. Therefore, even if Simkovic’s testimony is to be credited, it appears that the belt continued to cut into the structure up until it was shut off.

Respondent makes much of the fact that Leverknight did not observe belt shavings at crosscut 22 to 23, and only saw them at crosscut three. Tr. 77. However, Leverknight testified that he does not consider the absence of belt shavings meaningful, because they can be cleaned prior to the inspection. Tr. 78. The apparent absence of belt shavings in crosscut 22 to 23 does not alter the inspector’s conclusion.

I credit Leverknight’s testimony over the testimony of the three examiners and the intern Strimer. Tr. 117, 145, 147, 169-172. The examiners each denied seeing hazardous conditions

along the C-2 belt, however accumulations had to be cleaned and rollers replaced, which indicates that there were violations present. Based upon the evidence presented at hearing, I find that the described *supra* constituted a violation of 30 C.F.R. § 75.1725(a).

Considering The Record *In Toto* And Applying Applicable Case Law, The Violation Was Significant And Substantial In Nature.

Inspector Leverknight determined that the violation in Citation No. 7082869 was S&S due to the combination of frictional heat, accumulations of coal, and bad rollers. Tr. 40, 42-43. He concluded that these circumstances created a hazard of a belt fire. Tr. 42-43.

S&S is described in section 104(d)(1) of the 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 S&S “if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *Cement Div., Nat’l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

As is well recognized, in order to establish the S&S nature of a violation, the Secretary must prove: “(1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard – that is, a measure of danger to safety – contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury will be of a reasonably serious nature.” *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984); *accord Buck Creek Coal Co., Inc.*, 52 F. 3rd. 133, 135 (7th Cir. 1995); *Austin Powder Co., Inc. v. Sec’y of Labor*, 861 F. 2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria).

It is the third element of the S&S criteria that is the source of the most controversies. The 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., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985). An S&S determination must be based on the particular facts surrounding the violation and must be made in the context of continued normal mining operations. *Texasgulf, Inc.*, 10 FMSHRC 498, 500 (Apr. 1988) (quoting *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984)). The Commission has provided additional guidance: “We have emphasized that, in accordance 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., Inc.*, 6 FMSHRC 1866, 1868 (August 1984); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574-75 (July 1984).

Further, “The Secretary need not prove a reasonable likelihood that the violation itself will cause injury.” and “the absence of an injury-producing event when a cited practice has occurred does not preclude a determination of S&S” *Cumberland Coal Resources, LP*, 33 FMSHRC 2357, 2365 (Oct. 2011) (citing *Musser Engineering, Inc. and PBS Coals, Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010); *Elk Run Coal Co.*, 27 FMSHRC 899, 906 (Dec. 2005); and *Blue Bayou Sand & Gravel, Inc.*, 18 FMSHRC 853, 857 (June 1996)). The Commission and courts have observed that the opinion of an experienced MSHA inspector that a violation is S&S is entitled to

substantial weight. *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-79 (Dec. 1998); *Buck Creek Coal, Inc., v. MSHA*, 52 F.3d 133, 135-36 (7th Cir. 1995).

Having found, *supra*, that the conditions described in Citation No. 7082869 violated 30 C.F.R. § 75.1725(a), which is a mandatory safety standard, the first prong of the *Mathies* test is satisfied. The second prong requires a determination of whether the violation contributed to a discrete safety hazard. In the case *sub judice*, Emerald Mine was on a five-day spot inspection for liberating in excess of one million CFM of methane in a 24-hour period. Tr. 31. Furthermore, Leverknight testified that the belt cutting into and rubbing the structure caused frictional heat. Tr. 40. These factors, combined with the accumulations and bad rollers present could reasonably lead to an ignition or fire. Tr. 40, 42-43. See e.g. *Big Ridge, Inc. v. MSHA*, 2010 WL 361647, *3 (Aug. 26, 2010)(ALJ)(finding that a belt cutting into the structure exposed miners to an identifiable and discrete safety hazard of a belt fire); see also *MSHA v. Texasgulf, Inc.*, 10 FMSHRC 498 (April 1988).

The third and fourth prongs of the *Mathies* test are also met. The Respondent misstates the S&S analysis repeatedly in its post-hearing brief. In making the argument that a “confluence of factors” test is appropriate it states the following: “The S&S designation is inappropriate because ‘the confluence of factors’ for an injury-causing event were not present. *The relevant inquiry in this case is whether a ‘confluence of factors’ was present so that a fire causing serious injury was reasonably likely based on the particular facts surrounding this violation.*” Resp. Post Hearing Brief, 21 (emphasis added). It repeats some version of this argument throughout the brief. *Id.* at 26-27, 52. Respondent’s description of the S&S analysis is incorrect, as it conflates the second and third element of the test.

The second and third elements of the S&S test are to be considered separately. In the second element, the question is whether the violation at issue could contribute to a discrete safety hazard. If the violation is found to contribute to a discrete safety hazard, then the analysis proceeds to the third step, which is to be considered individually. In the third step, one must assume that the hazard found in step two will be present, and the sole inquiry is whether the hazard will reasonably likely lead to an injury. At this step, one no longer considers the “confluence of factors” found in the individual violation.

The Commission has clarified this test in no uncertain terms. It stated that the third element of the S&S test “is whether there is a reasonable likelihood that the hazard contributed to by the violation...will cause injury.” *Musser Engineering Inc. and PBS Coals, Inc.*, 32 FMSHRC 1257, 1281 (Oct. 2010); see also *Cumberland Coal Resources LP*, 33 FMSHRC 2357, 2365-2369 (Oct. 2011). The Commission emphasized that the Secretary need not “prove a reasonable likelihood that the violation itself will cause injury...” *Id.* The Respondent here makes the selfsame argument that the Respondent in *Musser* made unsuccessfully, that argues that “there must be a reasonable likelihood that the violation will cause injury.” 32 FMSHRC at 1280-1281. In so doing, it “conflates ‘violation’ with ‘hazard.’” *Id.* The Commission answered the Respondent in *Musser* succinctly, stating, “However, that is not the test...The Secretary need not prove a reasonable likelihood that the violation itself will cause injury.” *Id.* Further, the Commission reaffirmed the well-settled precedent that the absence of an injury producing event, where a cited practice occurs, does not preclude an S&S determination. *Id.* (citing *Elk Run Coal*

Co., 27 FMSHRC 899, 906 (Dec. 2005) and *Blue Bayou Sand and Gravel, Inc.*, 18 FMSHRC 853, 857 (June 1996)). In an 81-page post-hearing brief, with 20 pages devoted to S&S analyses, there is no excuse for Respondent's continual misreading of the S&S test.

In the case *sub judice* the hazard is a fire. Mine fires have long been recognized by the Commission and Congress as reasonably likely to result in injury. See *Black Diamond Coal Mining*, 7 FMSHRC 1117, 1120 (1985) ("We have previously noted Congress' recognition that ignitions and explosions are major causes of death and injury to miners.") *Oxbow Mining, LLC*, 2013 WL 1856627, *22 (April 11, 2013) (ALJ) ("Fires cause many serious injuries, including burns and smoke inhalation."); *Buck Creek Coal, Inc. v. Federal Mine Safety and Health Admin.*, 52 F.3d 133, 135 (7th Cir. 1995) (referring to the conclusion that a fire burning in an underground coal mine would lead to a serious risk of smoke and gas inhalation to miners present as "common sense.") Inspector Leverknight testified that a mine fire could result in injuries including smoke inhalation and burns. Tr. 51. Additionally, if there was an explosion on a longwall face, it could propagate an explosion on the belt line. Tr. 51, 73-74. Under these circumstances, I find that the third prong of the *Mathies* test has been satisfied.

The fourth prong of the *Mathies* test requires the Secretary to show that the injuries expected to result from the hazard will be of a reasonably serious nature. As noted *supra*, a belt fire would expose miners along the C-2 belt to smoke inhalation and burns. Tr. 51. The Commission has repeatedly held that such injuries are serious in nature. See *Oxbow Mining*, 2013 WL 1856627, *22 ("Fires cause many serious injuries, including burns and smoke inhalation."); *Consolidation Coal Co.*, 15 FMSHRC 855, 870 (May 7, 1993) (ALJ) ("Smoke inhalation and burns can severely injure miners.") Considering all the relevant evidence, I find that the Secretary met its burden in establishing that Citation No. 7082869 was S&S.

Respondent's Conduct Was Reasonably Designated As Being "High" In Nature.

Negligence "is 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." 30 C.F.R. § 100.3(d). "A mine operator is required to be on the alert for conditions and practices in the mine that affect the safety or health of miners and to take steps necessary to correct or prevent hazardous conditions or practices." *Id.* MSHA considers mitigating circumstances which may include, but are not limited to, actions taken by the operator to prevent or correct hazardous conditions or practices. *Id.* Low negligence exists when "[t]he operator knew or should have known of the violative condition or practice, but there are considerable mitigating circumstances." *Id.* Moderate negligence is when "[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances." *Id.* High negligence exists when "[t]he operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances." *Id.* See also *Brody Mining, LLC*, 2011 WL 2745785 (2011) (ALJ). Finally, the operator is guilty of reckless disregard where it "displayed conduct which exhibits the absence of the slightest degree of care." 30 C.F.R. § 100.3(d).

In the case *sub judice*, Inspector Leverknight determined that the Respondent's negligence was high for allowing the belt to run in an unsafe condition. Tr. 40-41; GX-2.

Leverknight testified that in his experience a belt cannot cut 2.5 inches into steel in a short period of time, which indicated that the condition had existed for an extended period. Tr. 41, 63. Therefore, the conditions likely preexisted Leverknight's inspection on October 18, 2010. Furthermore, many of the conditions were obvious. The conditions at 3 crosscut were hanging at eye level when one is walking, and the conditions at three and 27 crosscut were on the side of the belt where miners travel. Tr. 41.

Respondent argues that the negligence should have been lower because mitigating circumstances were present. Resp. Post-Hearing Brief, 41. It argues that the cuts in the structure pre-existed the day of the inspection, the company was using come-alongs to correct the belt condition, and there were no belt shavings present. These arguments repeat their previous contentions against the validity of the citation, and do not present mitigating circumstances. When the belt was shut down, it was completely within the cut in the structure, indicating that it continued to cut and rub the structure. Tr. 38. The fact that the belt began cutting into the structure well before Leverknight's inspection does not mitigate the level of negligence; rather, it raises it. Though the company did install come-alongs, the fact that the belt continued to need retraining indicated that they were not working. I find no mitigating circumstances and affirm the negligence as high.

The Secretary has Carried His Burden of Proof by a Preponderance of the Evidence that the Condition Described in Order No. 7082871 Violated 30 C.F.R. § 75.400

104(d)(2) Order No. 7082871 was issued by Inspector Leverknight on October 18, 2010 at 10:15 a.m. for a violation of 30 C.F.R. § 75.400. It states:

Accumulations of damp to dry float coal dust, coal fines, and loose coal, black in color were allowed to accumulate along the C-2 Longwall belt. The accumulations were under the belt rollers from 9 ½ crosscut to the belt tailpiece at 32 crosscut. There were bottom return rollers in contact with the accumulations at the following locations, 25 to 23, 22 to 21, 16 to 15, 14 to 13, and 12 crosscuts. There were a total of 8 return rollers in contact and turning in the accumulations. Between 16 and 15 crosscuts there is a bottom return roller missing allowing the belt to hang down and come in contact with the accumulations making a flat spot where the belt is running in contact with the coal accumulations for the entire width of the belt. The rest of the affected area has accumulations built up under the rollers which is close to being in contact with the bottom return rollers for the entire distance and width of the belt. There is also accumulations of coal fines and coal dust on the ribs, roof, belt structure, and water lines for the entire distance.

The inspector assessed gravity as "Reasonably Likely," "Lost Workdays or Restricted Duty," and "S&S." He assessed the negligence as "High," resulting from an unwarrantable failure to comply with a mandatory safety regulation, and affected 1 person. GX-3, 1-2. The inspector terminated the order on October 19, 2010 at 1:25 a.m. after the "accumulations were cleaned up and rock dusted in the entire affected area." GX-3, 3.

The Secretary contends that the five areas where coal accumulations came into contact with bottom rollers, one area where the belt was running in coal accumulations for the entire

width of the belt, and the presence of coal dust coating the ribs, roof, belt structure, and water lines along the length of the belt constituted violations of 30 C.F.R. § 75.400. The Secretary argues that the fact that it took 14 miners at least 12 hours to clean the accumulations show that they were extensive. The Secretary further argues that the violations were S&S because (1) it violated § 75.400, (2) that accumulations of combustible materials create significant explosion and propagation hazards, (3) resulted in the discrete safety hazard of a mine fire or propagation of an explosion, an occurrence which (4) presented a reasonable likelihood that smoke inhalation and burns will result. The Secretary argues that the violation resulted from the Respondent's high negligence and was an unwarrantable failure to comply with the regulation because the accumulations were obvious, extensive, existed for a significant length of time, and posed a high degree of danger.

The Respondent contends that the material cited was not a citable accumulation of coal, and therefore did not constitute a violation of 30 C.F.R. § 75.400. It argues that a review of all surrounding circumstances, factors, and considerations does not establish the existence of an accumulation of combustible materials. Rather, the materials were primarily wet, non-combustible rock dust. Any combustible material present was the result of the spillage from the belt running out of train after the most recent preshift examination of the C-2 longwall belt, but before the inspection. The Respondent argues that the S&S designation was improper because there was no "confluence of factors" present such that "a fire causing serious injury was reasonably likely based on the particular facts surrounding this violation." Furthermore, it argues that a belt fire would be unlikely to lead to an injury, and that any injuries resulting from a fire would not be serious in nature. The Respondent argues that even if a violation is found to have existed, it did not result from an unwarrantable failure to comply with a mandatory standard.

Section 75.400 requires that "[c]oal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on diesel-powered and electric equipment therein." Leverknight testified that he first observed accumulations at the 25 to 23 crosscut that were under the rollers, contacting the rollers, and built up around the rollers. Tr. 44-45. The accumulations were a combination of loose coal, fine coal, and coal dust, with the coal in contact with the rollers being the finest. Tr. 45-46. Some of the materials were wet, however he testified that wet material can become combustible. Tr. 75-76, 190.

Leverknight also observed similar accumulations at 22 to 21 crosscut, which were contacting two rollers on the tight side of the belt. Tr. 46. He observed accumulations at the 16 to 15 crosscut, under and in contact with the rollers. Tr. 47. He similarly observed accumulations at the 14 to 13 crosscut and the 12 crosscut. Tr. 47, 48. Along the belt, Leverknight observed a coating of float coal dust on the rock dust, indicating that the conditions had existed for an extended period. Tr. 49.

Respondent's witnesses, including Strimer, Baer, Hoak, and Levo testified that they did not recall seeing rollers in the coal, however they did not testify that there were no accumulations present. Tr. 107, 150, 160, 168-169. Furthermore, Strimer testified that he did not look underneath the belt to see if the rollers were in contact with accumulations. Tr. 160. Each

asserted that the accumulations were the result of the belt being out of train and dumping coal on the mine floor. Tr. 111, 117, 133, 150, 169, 178, 193-194, 290-291. However, Leverknight testified that the accumulations were under the belt, around the rollers, ground fine, and had other qualities that indicated that they could not have resulted from recent spillage. Tr. 49, 55.

Respondent argues that the accumulations had a mixture of moisture contents, and that because some of the accumulations were damp or wet, they posed no danger. However, Leverknight's credible testimony revealed that much of the accumulations were dry. Tr. 49-50. Furthermore, the Commission has held that "dampness in the coal did not render it incombustible and...wet coal can dry out in a mine fire and ignite." *Utah Power & Light Co.*, 12 FMSHRC at 969; see also *Clinchfield Coal Co.*, 21 FMSHRC 231, 241 (Feb. 1999)(ALJ)(finding that the belt rubbing against the belt structure produced friction, which generates heat, and was a reasonably likely ignition source.) It has also held that a "construction of [Section 75.400] that excludes loose coal that is wet or allows accumulations of loose coal mixed with non-combustible materials, defeats Congress' intent to remove fuel sources from the mine and permits potentially dangerous conditions to exist." *Black Diamond*, 7 FMSHRC at 1121.³²

Though Simmons minimized the extent of the accumulations, testifying that the shoveling required was minimal, he assigned 14 men to shovel the accumulations on the beltline. Tr. 178, 183-184, 188. I credit Leverknight's testimony that it took Respondent approximately 12 hours to clean these accumulations, indicating that the accumulations were far more extensive than Simmons described. Tr. 56-58. See *Peabody Coal Co.*, 14 FMSHRC 1258, 1263 (1992)(extensiveness of condition inferred through significant abatement efforts). Based on all the evidence presented, I credit Leverknight's testimony and find that the accumulations constituted a violation of 30 C.F.R. § 75.400.

Considering The Record In Toto And Applying Applicable Case Law, The Violation Was Significant And Substantial In Nature.

Inspector Leverknight determined that the violation in Order No. 7082871 was S&S because all the elements for a mine fire were present. Tr. 52. Having found, *supra*, that the conditions described in the Order violated 30 C.F.R. 75.400, which is a mandatory safety standard, the first prong of the *Mathies* test is satisfied. The second prong requires a determination of whether the violation contributed to a discrete safety hazard. The Commission has long recognized the dangers caused by combustible accumulations. *Utah Power & Light Co., Mining Div.*, 12 FMSHRC 965, 970 (1990)(describing Congressional concern over loose coal and explosion hazards); *Consol Pennsylvania Coal Co.* 32 FMSHRC 545, 560 (May 2010)(ALJ)(finding burns and smoke inhalation as injuries reasonably likely to occur from fire or explosion). In the case *sub judice*, there were accumulations, bad rollers, belt rubbing on the structure, and belt rubbing on the accumulations. Tr. 52. These conditions contributed to the

³² The Commission recently reaffirmed that accumulations may still be designated as S&S despite being wet at the time of inspection. *Consolidation Coal Co.*, 2013 WL 4648491, *3 (Aug. 2013). Likewise, the Commission "categorically" rejected the mine operator's argument that safety measures, including rock dusting, carbon monoxide monitors, and fire fighting equipment reduced the degree of danger and rendered the violation non-S&S. *Id.* at *4.

discrete safety hazard of a mine fire or propagation of an explosion resulting from damaged rollers rubbing the accumulations. Tr. 51. Therefore the second *Mathies* prong has been satisfied.

The third and fourth prongs of the *Mathies* test are also met, as there was a reasonable likelihood that the hazard contributed to—a mine fire or explosion—would result in injuries of a reasonably serious nature. As discussed, *supra*, the Commission has long recognized that mine fires are reasonably like to result in an injury. Such injuries could include smoke inhalation and burns, which are of a reasonably serious nature. Tr. 51. Considering all the relevant evidence, I find that the Secretary met its burden in establishing that Order No. 7082871 was S&S.

Respondent's Conduct Was Reasonably Designated As Being "High" In Nature and an Unwarrantable Failure to Comply with the Regulation.

Inspector Leverknight determined that Respondent's negligence was high and that Respondent's violation of 30 C.F.R. § 75.400 resulting from an unwarrantable failure ("UWF") to comply with a mandatory safety regulation. The UWF terminology is taken from section 104(d)(1) of the Act, which establishes more severe sanctions for any violation that is caused by "an unwarrantable failure of [an] operator to comply with...mandatory health or safety standards." 30 U.S.C. § 814(d)(1).

The term "unwarrantable failure" is defined as aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (Dec. 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or the "serious lack of reasonable care." *Id.* at 2004; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 193-94 (Feb. 1991). Aggravating factors include the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts were necessary for compliance, the operator's efforts in abating the violative condition, whether the violation was obvious or posed a high degree of danger and the operator's knowledge of the existence of the violation. *See Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Windsor Coal Co.*, 21 FMSHRC 997, 1000 (Sept. 1999); *Consolidation Coal Co.*, 23 FMSHRC 588, 593 (June 2001). All of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether mitigating circumstances exist. *Consol.*, 22 FMSHRC at 353.

In the case *sub judice*, the cited coal accumulations were extensive, obvious, existed for a significant length of time, and posed a high degree of danger. Leverknight observed extensive accumulations at numerous crosscuts, which required 14 miners over 12 hours to clean. Tr. 44-49, 56-58, 178, 183-184, 188. There was float coal dust covering the ribs, roof, belt structure, and water lines for the entire length of the C-2 longwall belt. Tr. 48. In five of the areas, the accumulations of coal, fines, and dust came into contact with the bottom belt rollers, which were approximately eight to ten inches above the mine floor. Tr. 46-48.

The nature of the accumulations indicated that they had existed for a significant length of time. Leverknight testified that the coal fines and float coal dust that were built up under the

rollers are created over time from the rollers chewing up the coal. Tr. 55. Additionally, they were under the belt, indicating that the accumulations were not the result of recent spillage. Tr. 49, 55. These accumulations posed a high degree of danger to miners, as they could lead to a mine fire or explosion. Tr. 51. Having found no mitigating circumstances, I find that the conditions were the result of Respondent's high negligence and unwarrantable failure.³³

The Secretary has Carried His Burden of Proof by a Preponderance of the Evidence that the Condition Described in Order No. 7082872 Violated 30 C.F.R. § 75.360(b)(10).

Inspector Leverknight issued Order No. 7082872 on October 18, 2010 at 10:30 a.m. for an inadequate preshift examination of the longwall belt in violation of 30 C.F.R. § 75.360(b)(10)³⁴. Tr. 63; GX-4. It states:

After reviewing records, it was determined that an adequate Preshift Examination on the C-2 Longwall section belt MMU-032 was performed on 10/18/2010 on the 12 to 8 shift for the oncoming 8 to 4 shift. The examination was conducted between 000 and 0700 and the hazardous conditions found in Citation Nos. 7082869, 7082870, and 7082871 were not found and/or recorded in the Preshift Exam book. The hazardous conditions are being corrected and this Order will be terminated after the Preshift examiner who conducted the examination is re-instructed on making a proper examination.

The inspector assessed gravity as "Reasonably Likely," "Lost Workdays or Restricted Duty," and "S&S." He assessed the negligence as "High," resulting from an unwarrantable failure to comply with a mandatory safety regulation, and affected 1 person. GX-4, 1. The inspector terminated the order on October 19, 2010 at 12:15 a.m. after the "mine examiner was re-instructed on making a proper preshift examination." GX-4, 2.

Section 75.360(b)(10) requires in pertinent part that "[t]he person conducting the preshift examination shall examine for hazardous conditions and violations [at]...[o]ther areas where work or travel during the oncoming shift is scheduled prior to the beginning of the preshift examination." The Commission has recognized preshift examinations as being "of fundamental importance in assuring a safe working environment underground." *Buck Creek Coal*, 17 FMSHRC at 15; see also *Jim Walter Resources, Inc.*, 28 FMSHRC 579, 598 (Aug. 2006). Chairman Jordan and Commissioner Marks have referred to the preshift inspection requirement as "the linchpin of Mine Act safety protections." *Manalapan Mining Co., Inc.*, 18 FMSHRC 1375, 1391 (August 1996) (Jordan and Marks, concurring and dissenting in part). MSHA requires several layers of examinations, including on-shift, preshift, and weekly examinations, in

³³ The Commission has recognized the close relationship between a finding of unwarrantable failure and a finding of high negligence. *San Juan Coal Co.*, 29 FMSHRC 125, 139 (Mar. 2007) (remanded because a finding of high negligence without a corresponding finding of unwarrantable failure was "seemingly at odds.>").

³⁴ The Order was first erroneously issued pursuant to 30 C.F.R. § 75.360(b)(2). On November 10, 2010, the error was corrected, and the Order was changed to indicate a violation of 30 C.F.R. § 75.360(b)(10). GX-4, 3. This correction was unopposed.

order to ensure miner safety. “These examinations are designed to create a multi-layer, prophylactic approach to the identification and correction of hazardous or unsafe conditions in the mine.” *Coal River Mining, LLC*, 34 FMSHRC 1087, 1095 (May 2012) (ALJ). Quoting the preamble to the final rule, the D.C. Circuit recognized that:

Preshift examinations assess the overall safety conditions in the mine; assure that critical areas are properly ventilated; assure that the mine is safe to be entered by miners on the oncoming shift; identify hazards, whether violations or not, for the protection of miners; and through this identification facilitate correction of hazardous conditions.

National Mining Association v. MSHA, 116 F.3d 520, 540 (D.C. Cir. 1997).

The Commission has clarified that the term “hazardous conditions” in 30 C.F.R. § 75.360(b) does not require that the condition be S&S or reasonably likely to result in injury; rather, the term “hazard” denotes a measure of danger to safety or health. *Enlow Fork Mining Co.*, 1997 WL 14346, *7 (1997). “The Commission has approved the definition of “hazard” as “a possible source of peril, danger, duress, or difficulty,” or “a condition that tends to create or increase the possibility of loss.” *Id.*

The Secretary contends that the preshift examinations performed on the C-2 longwall belt at 5:00 a.m. on October 18, 2010 were inadequate because the examiners failed to record or correct the hazards described in Citation No. 7082869 (belt rubbing structure) Citation No. 7082870 (damaged rollers), and Order No. 7082871 (accumulations). The Secretary argues that these conditions preexisted the preshift examination, and yet none of them were recorded. The Secretary further argues that the violation was S&S because (1) it violated 30 C.F.R. § 75.360(b)(10), (2) that failure to conduct adequate preshift examinations contributed to the safety hazards of mine fire and explosion, (3) that such hazard is reasonably likely to result in an injury, and (4) that the injuries suffered, such as burns and smoke inhalation are reasonably serious in nature. Furthermore, the Secretary argues that the violation resulted from the Respondent’s high negligence and was an unwarrantable failure to comply with the regulation because the preshift examiners failed to record or correct obvious and extensive conditions.

The Respondent contends that preshift examinations were conducted in accordance with the requirements of 30 C.F.R. § 75.360. The Respondent argues that the Secretary has not proven the predicate violations, and therefore cannot prove that there were inadequate preshift examinations. Specifically, it argues that there is no evidence that the belt was out of train prior to the preshift examination, that the accumulations were extensive or combustible, or that the examiners observed damaged rollers. The Respondent argues that if a violation occurred, it was not S&S because “it was not reasonably likely that a fire would occur or that such fire would result in serious injury.” Resp. Post-Hearing Brief, 52. Furthermore, Respondent argues that negligence was lower than assessed because it routinely noted hazards and conditions after preshift examinations. Similarly, Respondent contends that the unwarrantable failure designation was inappropriate because the evidence establishes that the required examinations were conducted in an adequate fashion, and that any conditions existed for only a short time.

In the case *sub judice*, Inspector Leverknight observed several hazardous conditions for which he issued citations and orders: the longwall belt rubbing against and cutting into the structure at various locations; numerous damaged rollers; and extensive and obvious coal accumulations, some of which had rollers or belts running in them. GX-1-2-3. As discussed, *supra*, Citation No. 7082869 was validly issued for the C-2 longwall belt rubbing the belt structure; Citation No. 7082870 was validly issued for numerous damaged rollers on the C-2 longwall belt; and Order No. 7082871 was validly issued for hazardous accumulations. Each of these citations and orders was assessed as S&S, and all but one were assessed at high negligence. As discussed previously, these conditions and hazards existed for an extended period of time that preceded the previous preshift examination. Despite these obvious and extensive hazards, the 5:00 a.m. preshift examinations of the C-2 longwall belt noted “none” under both the Dangerous/Hazardous Conditions section and the Violations section. GX-9, 12-13; TR. 66-67. Therefore, I find that there was not an adequate preshift examination, in violation of 30 C.F.R. § 75.360.

Considering The Record *In Toto* And Applying Applicable Case Law, The Violation Was Significant And Substantial In Nature.

Inspector Leverknight determined that the violation in Citation No. 7082872 was S&S. Having found, *supra*, that the conditions described in the Citation violated 30 C.F.R. 75.360(b)(10), which is a mandatory safety standard, the first prong of the *Mathies* test is satisfied. The second prong requires a determination of whether the violation contributed to a discrete safety hazard, namely a mine fire or explosion. The third and fourth factors are similarly discussed, *supra*, and similarly extend to the inadequate preshift examination.

Respondent’s Conduct Was Reasonably Designated As Being “High” In Nature and an Unwarrantable Failure to Comply with the Regulation.

Inspector Leverknight evaluated Respondent’s negligence as high and the violation as an unwarrantable failure to comply with the cited regulation. The evidence demonstrates that Respondent engaged in aggravated conduct by failing to record obvious hazards which threatened miners’ safety. Respondent’s examiners failed to record or correct the hazards of the belt rubbing the belt structure, damaged rollers on the longwall belt, and extensive coal accumulations, despite the fact that they were obvious and extensive.³⁵ GX-9, 12-13; Tr. 66-67.

The Secretary has Carried His Burden of Proof by a Preponderance of the Evidence that the Condition Described in Order No. 7073116 Violated 30 C.F.R. § 75.202(a):

Inspector Jack issued Order No. 7073116 on October 21, 2010 at 9:30 a.m. for inadequate roof support in violations of 30 C.F.R. § 75.202(a). GX-5. It states:

An area of mine roof on the B-left haulage 5 feet outby the B-4 track switch measuring approximately 12 feet in width and 25 feet in length was not supported to protect miners

³⁵ The details of the obviousness and extensiveness of the violations are discussed *supra* and will not be repeated here.

from hazards related to falls of the mine roof. 3 bolts had the heads of the bolts torn off having no support to the bolt plate or strap. 3 bolts were dislodged from the mine roof having no bearing surface with the mine roof. 8 bolts were damaged from being hit by mining equipment or mining supplies being hauled in and out of the mine causing bolt heads to be bent and smashed hurting the integrity of the roof bolt. This condition was most obvious to any miner traveling the area because some of the straps that have been torn in half were hanging down from the mine roof posing as another hazard to miners traveling in and out of the coal mine. The top in this area consisted of coal and rock which was potted out in areas with some loose material hanging. This condition constitutes more than ordinary negligence, and exposes miners to hazards from roof falls. This violation is an unwarrantable failure to comply with a mandatory standard.

Standard 75.202(a) was cited 27 times in two years at mine 3605466 (27 to the operator, 0 to a contractor).

The inspector assessed gravity as “Reasonably Likely,” “Fatal,” and “S&S.” He assessed the negligence as “High,” resulting from an unwarrantable failure to comply with a mandatory safety regulation, and affected 1 person. GX-5, 1-2. The inspector terminated the order on October 21, 2010 at 10:30 p.m. after the “area of unsupported roof was bolted.” GX-5, 3.

Section 75.202(a) provides that “[t]he roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts.” The comments accompanying the final rule recognize the high death toll caused by inadequate roof support and the need for mandatory roof controls. 53 FR 2354-01, 2354 (Jan. 27, 1988); see also *United Mine Workers of America, Int’l. Union v. Dole*, 870 F.2d 662, 664 (D.C. Cir.1989) (recognizing that roof falls are among the most serious hazards to miners).

Judge Manning has described Section 75.202(a) as having three requirements: (1) the cited area must be an area where persons work or travel; (2) the area must be supported or otherwise controlled, and (3) such support must be adequate to protect persons from falls or bursts of rib. *Oxbow Mining, LLC*, 2013 WL 1856627, *13 (April 11, 2013)(ALJ). The Secretary's roof-control standard in 30 C.F.R. § 75.202(a) is broadly worded. Consequently, the Commission has held that “the adequacy of particular roof support or other control must be measured against the test of whether the support or control is what a reasonably prudent person, familiar with the mining industry and protective purpose of the standard, would have provided in order to meet the protection intended by the standard.” *Canon Coal Co.*, 9 FMSHRC 667, 668 (Apr. 1987).

The Secretary contends that the damaged roof bolts and straps constituted inadequate roof support in violation of 30 C.F.R. § 75.202(a). The Secretary argues that the violation was S&S because (1) it violated §75.202(a), (2) the violation contributed to the discrete safety hazard of a roof fall, (3) there was a reasonable likelihood that a roof fall will cause injury, and (4) such injury included miners being struck by falling rock leading to possible death. Furthermore, the Secretary argues that the violation resulted from the Respondent’s high negligence and was an unwarrantable failure to comply with the regulation because the inadequately supported roof was

obvious, extensive, posed a high degree of danger to miners, and existed for a substantial period of time.

The Respondent contends that there was no violation of 30 C.F.R. § 75.202(a) because the standard is “performance-based” and depends on the “reasonableness of the operator’s efforts to control the roof, given the particular conditions it knew or should have known existed.” Resp. Post-Hearing Brief, 57-58. Respondent argues that the Secretary failed to establish that the roof was unsupported and that Emerald knew or should have known of the cited condition. The Respondent argues that if a violation occurred, it was not S&S because it was unlikely that two events—material falling from the roof and someone standing beneath it— would occur simultaneously. Furthermore, the Respondent argues that the condition was not the result of high negligence or unwarrantable failure.

Roof straps in a mine are used to help support the roof by holding up localized loose roof materials. Tr. 229. I credit Inspector Jack’s testimony where he described his observations and why the noted conditions violated the regulation. Jack observed roof straps hanging from the mine roof, damaged roof support, missing roof support, and loose hanging materials while he was traveling up the B-haulage in areas where miners work and travel. Tr. 225. The roof had loose material hanging, with potted out coal and rock showing. Tr. 232. There were piles of roof coal and rock that had fallen lying on the mine floor. Tr. 232. In total, Jack observed seven rows of damaged roof support. Tr. 232. In the second row, Jack observed a mine channel roof strap that was torn in two pieces and had a twisted bolt plate. Tr. 229. In the third row, he observed a bolt that had the head sheared off of it and was damaged severely, which affects the bolt’s integrity. Tr. 229, 230-231. Furthermore, there were bent and smashed bolts that were put in supplementally, as well as several twisted and bent straps. Tr. 229. In the fourth row, Jack observed a channel that was ripped two times, with the straps pointing aimlessly, as well as damaged bolts and twisted plates. Tr. 229-230. In the fifth row, he observed a mine channel severely battered and smashed, as well as some twisted plates. Tr. 231. In the sixth row, he observed a roof channel that was severely damaged and torn in pieces, as well as bolt heads smashed and missing and twisted plates. Tr. 231. In the seventh row, he observed one damaged bolt head and one bolt head missing. Tr. 231-232.

The bolt heads for the bolts used in this mine are necessary to form the beam properly, because they functions as bearing surfaces that hold all the bearing weight for the bolts. Tr. 231. Therefore, the bolts with damaged or missing bolt heads had compromised the integrity of the bolts, and were not adequately supporting the mine roof. Tr. 230, 235.

Inspector Jack observed flaking rock dust on the damaged roof bolts. Tr. 234. Because the area was only rock dusted several times per year, this indicated that the conditions were old. However, none of these conditions were reported in the examination book, which Jack reviewed prior to entering the mine. Tr. 223-224. The condition ultimately took over 12 hours to correct by bringing in a track miner bolter and adding more than 40 additional roof bolts. Tr. 253. Applying the reasonably prudent person test to the facts, I find that Inspector Jack correctly concluded that the roof in the cited area was not adequately supported.

The witnesses presented by Respondent were not entirely credible. Strimer, who accompanied Jack as an intern at the time of the inspection, testified that he disagreed with Jack's assessment of the roof. Tr. 298-300. However the notes he recorded at the time of the inspection discuss the same conditions that Jack observed, with no mention of disagreement. RX-17; Tr. 302-303. Furthermore, he offered no credible testimony as to why he did not mark any possible disagreement in his notes. Tr. 302-303. Similarly, Schifko was not present when the order was issued. Tr. 246. After Schifko viewed the conditions, he took issue only with the unwarrantable failure designation. Tr. 246.

Considering The Record *In Toto* And Applying Applicable Case Law, The Violation Was Significant And Substantial In Nature.

Inspector Jack determined that the violation in Order No. 7073116 was S&S because the top was inadequately supported, there was material hanging, and it was a hazard to a miner traveling through the area. Tr. 246-247. Having found, *supra*, that the conditions described in the Order violated 30 C.F.R. § 75.202(a), which is a mandatory safety standard, the first prong of the *Mathies* test is satisfied. The second prong requires a determination of whether the violation contributed to a discrete safety hazard. The Emerald Mine had experienced previous roof falls, making a roof fall an acute possibility. Tr. 247. There was a clear danger to miners traveling in the area of rock or coal falling from the roof as a result of the damaged roof supports.

The third and fourth prongs of the *Mathies* test are also met, as there was a reasonable likelihood that the hazard contributed to—a roof fall—would result in injuries of a reasonably serious nature. The Commission has repeatedly stated that a roof fall is reasonably likely to result in an injury. *See Consolidation Coal Co.*, 6 FMSHRC 34 (Jan. 1984)(recognizing the likelihood of injury from miners being exposed to a roof fall hazard). If an accident were to happen as a result of the hazard cited, it would be fatal because falling materials from the mine roof can kill a miner. Tr. 247. Considering all the relevant evidence, I find that the Secretary met its burden in establishing that Order No. 7073116 was S&S.

Respondent's Conduct Was Reasonably Designated As Being "High" In Nature and an Unwarrantable Failure to Comply with the Regulation.

Inspector Jack evaluated the Respondent's negligence as high and determined that the violation was an unwarrantable failure to comply with a mandatory safety regulation. I affirm both determinations. The inadequately supported roof was obvious, extensive, posed a high degree of danger to miners, and existed for a substantial period of time. Respondent was on notice that greater efforts were needed to prevent such violations from occurring, and multiple supervisors and examiners passed through the cited area and failed to correct the hazard.

Inspector Jack cited seven consecutive rows of inadequate roof supports, indicating that the hazards in the cited area were extensive. Tr. 232; GX-5. The extent of the condition is also illustrated in the efforts needed to terminate the Order, which in this case required more than 40 roof bolts. Tr. 253. Rock dust was present, which indicated that the condition had existed for an extended period of time. Tr. 234-238. Jack also testified that he made his observation of the inadequate roof supports while simply walking down the haulage, indicating that the hazards

were obvious to anyone walking in the area. Tr. 239. Further, he testified and presented photographs of a roof strap hanging over the haulage track, which should have been obvious to any individual traveling in the area. Tr. 239; GX-15, 28. Numerous individuals, including mine management traveled in the area after the damage occurred. Tr. 252; GX-27.

Mine management knew that the area posed a problem, because supplemental bolting had been used to previously remedy the matter. Tr. 254, 323, 347. Further, the existence of a roof fall in the same entry provided Emerald additional notice that the haulage roof needed special attention for deteriorating roof conditions. Tr. 247. Emerald was also cited 27 times in the previous two years for failing to have adequately supported roof, which should have placed Respondent on notice that greater efforts were required to comply with the regulation. Tr. 279-280. I find no mitigating factors that would reduce the level of negligence, and affirm the Order as written.

The Secretary has Carried His Burden of Proof by a Preponderance of the Evidence that the Condition Described in Order No. 7073117 Violated 30 C.F.R. § 75.360(b):

Inspector Jack issued Order No. 7073117 on October 21, 2010 at 9:30 a.m. for an inadequate preshift examination in violation of 30 C.F.R. § 75.360(b). GX-6. The Order states:

The preshift examination conducted on October 21, 2010 for the 08:01 A.M. shift on the B-mains left haulage was not adequate. The hazards observed and depicted in Order # 7073116 were not recorded in the preshift exam book located on the surface. This exposes miners entering this area on the 08:01 A.M. shift to unknown hazards, which constitutes more than ordinary negligence. This violation is an unwarrantable failure of the operator to comply with a mandatory standard. This Order will not be terminated until management reviews all the requirements of 30 C.F.R. § 75.360 with all certified persons at this mine.

The inspector assessed gravity as “Reasonably Likely,” “Fatal,” and “S&S.” He assessed the negligence as “High,” resulting from an unwarrantable failure to comply with a mandatory safety regulation, and affected 1 person. GX-6, 1. The inspector terminated the order on October 28, 2010 at 10:44 a.m. after “mine management reviewed 75.360 with all certified people at this mine.” GX-6, 2. For the reasons that follow, I affirm the Order as written.

Section 75.360(b)(1) requires in pertinent part that “[t]he person conducting the preshift examination shall examine for hazardous conditions ...[at] [r]oadways, travelways and track haulageways where persons are scheduled, prior to the beginning of the preshift examination, to work or travel during the oncoming shift.” As described *supra*, the Commission has recognized that this regulation is “of fundamental importance in assuring a safe working environment underground.” *Buck Creek Coal Co., Inc.*, 17 FMSHRC 8, 15 (Jan. 1995).

In the case *sub judice*, much of damage to the roof support was at least a week old, meaning that some pre-existed the inspection. Tr. 232, 234, 248, 347. During the time that Jack conducted his inspection, at least five miners traveled the B-main haulage, including a mine examiner, motormen, a longwall coordinator and his crew, a fire boss pumper, and one other

foreman. Tr. 248; GX-27. Examiner Thearle traveled the same route as Jack, and failed to record or correct the hazards posed by the inadequately supported roof. Tr. 244, 256, GX-5). In spite of the obvious and extensive damage to the roof and roof supports, there were no violations, dangers, or hazardous conditions observed or reported in the preshift examination report for the morning of October 21, 2010. Tr. 256; GX-16, 9. Based on the extensive and obvious hazards and the lack of any record in the preshift book, I find that the Respondent violated Section 75.360(b)(1).

Considering The Record *In Toto* And Applying Applicable Case Law, The Violation Was Significant And Substantial In Nature.

Inspector Jack determined that the violation in Order No. 7073117 was S&S because the failure to record hazards contributed to the discrete safety hazard of roof falls. Having found, *supra*, that the conditions described in the Order violated 30 C.F.R. § 75.360(b), which is a mandatory safety standard, the first prong of the *Mathies* test is satisfied. The second prong requires a determination of whether the violation contributed to a discrete safety hazard. The inadequate preshift examinations contributed to the hazards described in Order No. 7073116, thereby satisfying the second element. The third and fourth prongs of the *Mathies* test are also met, as there was a reasonable likelihood that the hazard contributed to—a roof fall—would result in injuries of a reasonably serious nature. Considering all the relevant evidence, I find that the Secretary met its burden in establishing that Order No. 7073117 was S&S.

Respondent's Conduct Was Reasonably Designated As Being "High" In Nature and an Unwarrantable Failure to Comply with the Regulation.

Inspector Jack evaluated the Respondent's negligence as high and determined that the violation was an unwarrantable failure to comply with a mandatory safety regulation. I affirm both determinations. Respondent's failure to record the hazards present during the preshift examination constituted high negligence and an unwarrantable failure to comply with the regulation. As discussed *supra*, the hazards were obvious and extensive, and none of the examiners or miners traveling the haulage recorded or corrected them. Tr. 252; GX-27. For the same reasons that the underlying Order were an unwarrantable failure, the inadequate preshift was an unwarrantable failure.

Penalty Assessed:

The principles governing the authority of Commission administrative law judges to assess civil penalties *de novo* for violations of the Act are well-established. Section 110(i) of the 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). 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 the six statutory penalty criteria:

[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 of 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). Furthermore, the Commission has held that the judge should consider the deterrent purposes of the Act. *See Jim Walter Resources, Inc.*, 28 FMSHRC 579, 606 (Aug. 2006).

The Secretary proposed a penalty of \$4,500.00 for Citation No. 7082869, \$10,700.00 for Order No. 7082871, \$9,100.00 for Order No. 7082872, \$32,800.00 for Order No. 7073116 and \$30,200.00 for Order No. 7073117. Applying these criteria, I affirm the penalties proposed by the Secretary.

Respondent had 443 assessed violations during the 24 month period preceding the issuance of the citation and orders in this case. GX-25. These included 33 for hazardous accumulations prohibited under Section 75.400 and 27 for inadequate mine roof supports. Tr. 279; GX-25. Emerald Mine No. 1 is a large mine, having produced 4,901,640 tons of coal in 2010. Stip. 3. The Respondent exhibited high negligence and unwarrantable failure in the citation and orders above. The conditions were obvious, extensive, and existed for an extended period of time. Though Emerald demonstrated good faith in abating the violation, the weight of the other factors weighs in favor of the penalties proposed by the Secretary.

ORDER

Citation No. 7082869, Order No. 7082871, Order No. 7082872, Order No. 7073116 and Order No. 7073117 are **AFFIRMED**.

Respondent is **ORDERED** to pay civil penalties in the total amount of \$87,300.00 within 30 days of the date of this decision.³⁶

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

³⁶ Payment should be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, P. O. BOX 790390, ST. LOUIS, MO 63179-0390

Distribution (Certified Mail):

Jessica R. Brown, Esq., Office of the Solicitor, U.S. Department of Labor, Suite 630 East, The Curtis Center, 170 S. Independence Mall West, Philadelphia, PA 19106-3306

Patrick W. Dennison, Esq. & R. Henry Moore, Esq., Jackson Kelly, Three Gateway Center, Suite 1340, 401 Liberty Ave., Pittsburgh, PA 15222

/mzm

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

721 19th STREET, SUITE 443
DENVER, CO 80202-2536
303-844-3577/FAX 303-844-5268

September 23, 2013

AGAPITO ASSOCIATES, INC.,	:	CONTEST PROCEEDING
Contestant	:	
	:	
v.	:	Docket No. WEST 2008-1451-R
	:	Citation No. 7697010; 07/24/2008
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Crandall Canyon Mine
Respondent	:	Mine ID No. 42-01715 CL3
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2008-1447
Petitioner	:	A.C. No. 42-01715-159799 CL3
	:	
v.	:	Crandall Canyon Mine
	:	
AGAPITO ASSOCIATES, INC.,	:	
Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Manning

These proceedings are before me upon a notice of contest and a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”), against Agapito Associates, Inc., pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 et seq. (the “Mine Act”). On September 18, 2013, the Secretary filed an unopposed Motion to Approve Settlement and Order Payment.

These cases arose out of the mine collapse at the Crandall Canyon underground coal mine in Emery County, Utah, in August 2007. The collapse led to the loss of the lives of six miners who were working in the mine and the subsequent loss of the lives of three men working to rescue the trapped miners. Several other individuals also sustained serious injuries. The mine was operated by Genwal Resources, Inc. Following the accident, Genwal closed Crandall Canyon Mine. The Secretary and Genwal settled the cases that were brought against Genwal for violations related to the accident and, by order dated October 4, 2012, I approved that settlement. The Secretary also issued Citation No. 7697010 to Agapito under section 104(d)(1) of the Mine Act alleging a violation of 30 C.F.R. § 75.203(a), which is the subject of these proceedings. Agapito is a geological engineering and consulting company that provided services to Genwal.

The cases were set for hearing before me and the parties conducted extensive discovery. Expert witnesses were designated and were set to be deposed. The parties asked that a settlement judge be appointed to see if they could settle the cases to avoid a lengthy trial. Judge Margaret A. Miller met with the parties and was successful in facilitating a settlement of the cases.

Throughout these proceedings, Agapito maintained that, although it made recommendations with respect to roof control at the mine, the mine's operator chose not to follow its recommendations. Agapito contended that it had no control over the mining method or final mining dimensions used by the operator. Agapito further contended that it used sound engineering principles to develop models that it provided to the mine's operator. The Secretary, on the other hand, maintained that Agapito's modeling served as the basis for the mine's roof control plan and its modeling failed to protect miners from the hazards of bursts.

In order to amicably resolve the issues in these cases, the parties propose the following settlement terms:

1. Modify Agapito's negligence from "Reckless Disregard" to "High."
2. Remove the flagrant designation under section 110(b)(2) of the Mine Act.
3. Reduce the proposed penalty from \$220,000.00 to \$100,000.00 based upon the reduction in Agapito's negligence.

I have considered the representations and documentation submitted and I conclude that the proposed settlement is appropriate under the criteria set forth in Section 110(i) of the Mine Act. Accordingly, the Motion to Approve Settlement is **GRANTED**, the citation is **MODIFIED** to reduce the level of negligence to "High," the Secretary's flagrant designation is **REMOVED**, and Agapito Associates, Inc., is **ORDERED TO PAY** the Secretary of Labor the sum of **\$100,000.00** within 40 days of the date of this Order.¹

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

Distribution:

Timothy S. Williams, Esq., Office of the Solicitor, U.S. Department of Labor, 1999 Broadway, Suite 1600, Denver, Colorado 80202

Derek Baxter, Esq., Office of the Solicitor, U.S. Department of Labor, 1100 Wilson Blvd., 22nd Floor West, Arlington, VA 22209-3939

Mark M. Savit, Esq., Jackson Lewis, 950 17th Street, Suite 2600, Denver, CO 80202

¹ Payment should be sent to Mine Safety & Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, D.C. 20004
Telephone No.: (202) 434-9958 / Fax No.: (202) 434-9949

September 24, 2013

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No.: LAKE 2008-608
Petitioner	:	A.C. No.: 11-03054-158242-01
	:	
v.	:	Docket No.: LAKE 2009-82
	:	A.C. No.: 11-03054-166956-03
BIG RIDGE, INC.,	:	
Respondent	:	Docket No.: LAKE 2009-378A
	:	A.C. No.: 11-03054-177990-03
	:	
	:	Mine: Willow Lake Portal

DECISION AND ORDER

Appearances: Tyler P. McLeod, Esq., and Beau Ellis, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner

R. Henry Moore, Esq., Pittsburgh, Pennsylvania, for Respondent

Before: Judge McCarthy

I. Statement of the Case

These cases are before me upon three Petitions for Assessment of Civil Penalties under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). The cases allege 101 violations of mandatory health and safety standards, but prior to hearing, the parties were able to settle all but three citations and one order issued to Respondent. The remaining citations, Citation Nos. 6679907, 6683969, and 6667482, are for alleged violations of 30 C.F.R. § 75.400, and remaining Order No. 6668437 is for an alleged violation of 30 C.F.R. § 75.364(a)(1). All four alleged violations were designated as significant and substantial (S&S). Citation Nos. 6679907 and 6683969 were designated as high negligence, and Citation No. 6667482 and Order No. 6668437 were designated as unwarrantable failures.

Respondent denies any violation in Citation No. 6679907. Respondent also denies the unwarrantable failure designations for Citation No. 6667482 and Order No. 6668437. In addition, Respondent denies the gravity and negligence findings, the S&S designations, and the appropriateness of the proposed civil penalties for all four violations.

A hearing was held on August 2-3, 2011 in Henderson, Kentucky before former Commission Administrative Law Judge Gary Melick. The parties introduced testimony and documentary evidence, and witnesses were sequestered.

Subsequently, Judge Melick retired from the Commission. A notice was then sent out to the parties that the case was re-assigned to the undersigned. The parties did not contest the re-assignment.

For the reasons set forth in the decision below, I modify Citation Nos. 6679907 and 6667482 to reduce Respondent's negligence from "high" to "moderate." I further modify Order No. 668437 to reduce the likelihood of injury or illness from "reasonably likely" to "unlikely," to delete the significant and substantial designation, and to increase Respondent's negligence from "high" to "reckless disregard." Furthermore, I modify Citation No. 6667482 to change the type of action from a section 104(d)(1) citation to a section 104(a) citation, thus removing the unwarrantable failure designation. Based on said modifications and the failure of the Secretary to provide evidence or testimony supporting the special assessments of Citation No. 6667482 and Order No. 668437, I assess a total penalty of \$67,378.00 for the four violations.

On the entire record,¹ and after considering the post-hearing briefs, I make the following:

II. Stipulated Facts

The parties stipulated to the following facts.

1. These dockets involve an underground bituminous coal mine known as the Willow Lake Portal Mine, which is owned and operated by Respondent, and located in Saline County, Illinois.
2. These dockets involve 101 charging documents, including 94 104(a) Citations, one 104(d)(1) Citation, one 104(d)(1) Order, and five 104(d)(2) Orders. Two 104(a) Citations, one 104(d)(1) Citation, and one 104(d)(1) Order remain in contest to be decided at hearing. The remaining Citations and Orders have been resolved, including all Citations in Docket LAKE 2008-676.
3. Respondent is an "operator" as defined in § 3(d) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 803(d), at the coal mine at which the Citations and Orders at issue in this proceeding were issued.

¹ Since this case was re-assigned from Judge Melick after hearing, the scope of my credibility determinations are limited to the record before me. For obvious reasons, I do not rely on demeanor. In resolving conflicts in testimony, I have taken into consideration the interests of the witnesses in this matter, the inherent probability of their testimony in light of other events, corroboration or lack of corroboration for testimony given, and consistency or lack thereof within the testimony of witnesses and between the testimony of witnesses.

4. Respondent's operations affect interstate commerce.
5. Operations of Respondent at the coal mine at which the Citations and Orders were issued in this proceeding are subject to the jurisdiction of the Mine Act.
6. 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.
7. Respondent is a large operator.
8. Respondent demonstrated good faith in abating the cited conditions.
9. The certified copy of the MSHA Assessed Violations History reflects the history of the mine for the twenty-four months prior to the date of the Citations/Orders and may be admitted into evidence without objection by Respondent.
10. The parties stipulate to the authenticity of those exhibits produced to one another prior to hearing, but not to the relevance or truth of the matters asserted therein.
11. True copies of the Citations and Orders at issue in this proceeding were served on Respondent as required by the Mine Act.
12. The individuals whose signature appears in Block 22 of the Orders at issue in this proceeding were acting in their official capacities and as authorized representatives of the Secretary of Labor when the Citations and Orders were issued.
13. The 104(d)(1) Order No. 6668437 giving rise to the subject 104(d)(2) Orders was issued on November 29, 2007 and is still in contest in this proceeding.
14. The total proposed penalties for the Citations and Orders in this proceeding will not affect Respondent's ability to continue in business.

III. Background

Respondent operates the Willow Lake Portal Mine (WLPM), an underground, bituminous coal mine, in Saline County, Illinois. *Big Ridge*, 33 FMSHRC 689 (Mar. 2011) (ALJ). The mine is large and made up of several miles of belts and super units.² It contains several hundred pieces of equipment, and the air courses are at least eight miles long. Tr. 23-24. At least two

² A super unit brings ventilation up the center of a working section, and the ventilation is split in two directions. This allows two continuous miners to operate at the same time. A continuous miner operates on both the right and left sides of the section, and both machines run on separate splits of air. Tr. at 35-36.

inspectors are required to timely complete a quarterly inspection. Tr. 21-22. The mine is gassy and liberates over two million cubic feet of methane in a twenty-four hour period. Therefore, it is subject to a five-day spot inspection. Tr. at 24.

IV. Citation No. 6679907

A. Findings of Fact

1. Inspector Miller's Testimony

On September 19, 2008, MSHA coal mine inspector, Steven Miller,³ conducted an E01 inspection of the tail roller area of the energized 1B belt conveyor belt for Unit 1. Mine representative, Charles Hendricks, accompanied Miller during the inspection when Miller issued Citation No. 6679907. Tr. at 74. The 104(a) citation alleged a violation of 30 C.F.R. § 75.400 because loose coal and float coal dust had accumulated under and along the tail roller area of the belt and in front of the feeder. The Citation states:

Float coal dust, a distinct black in color, and loose coal were allowed to accumulate under and along the Tail Roller area of the energized 1B Conveyor Belt. Accumulations of loose coal and float dust were also allowed to accumulate on both sides of and in front of the Unit 1 Stamler Feeder in this location as well. The accumulations measured approximately 6 inches to 48 inches deep, 12 feet to 17 feet wide, and 50 feet long. The bottom belt and roller were observed in these accumulations.

P. Ex. 26.

The alleged violation occurred about halfway through the second shift, which ran from 3:00 to 11:00 in the evening. Miller described the "float coal dust" as a "distinct black in color." *Id.* Miller determined that the dark color indicated that an obvious and serious violation had occurred because rock dust had not been recently applied to make the float dust inert. Tr. at 32-33. On cross examination, Miller conceded that he had not measured the depth of the rock dust on the roof and ribs and was unable to tell when rock dust was last applied to the area. Tr. 64-65.

Miller observed four feet of coal accumulations at the feeder at the 1B conveyor belt tail. P. Ex. 27 at 3. He opined that the accumulations were different from normal spillage. Tr. 34-35.

³ Miller has been employed by MSHA for over twenty years since beginning his career with a mining engineering firm. His MSHA work has focused exclusively on underground coal mines. Miller has worked in the ventilation and roof control departments and served as lead accident investigator prior to accepting a position as field office supervisor. He has been inspecting Willow Lake since the mine's inception, and claims to have cumulatively inspected the mine "thousands" of times. Tr. 20-22.

He acknowledged that some unavoidable spillage is common any time coal is transferred in a mine. *Id.* He asserted, however, that “even the most inexperienced miner would have recognized an accumulation here.” Tr. at 33-34. Miller stated that the foreman or miners should have “stopped the belt, cleaned the tail roller, scooped the feeder and put it back in service.” Tr. at 35.

Miller concluded that the frictional contact between the accumulations and the tail roller was reasonably likely to cause a mine fire.⁴ Miller opined that in the event of a fire, smoke would spread to the unit and contaminate the secondary escapeway and injure sixteen miners working in the immediate area. Tr. at 37-38. Miller testified that “miners would have been located in the face area,” and that “depending on how far they were advanced from the belt,” they could have been two to five crosscuts away from the cited location. Tr. at 38. Miller also testified that shuttle car or coal hauler operators were working in the face and would come to the cited location, “transporting coal from the face to the feeder area to dump.” Tr. at 38. Miller further testified that the section foreman normally walks through the area to conduct on-shift inspections, and mechanics may walk across the area in order to do maintenance on equipment. Tr. at 38-39.

Miller described how a fire in the cited location would reach the area where the miners worked. He testified that:

[A]nytime you have a fire -- I mean, ventilation on this, I'm not sure, I'd have to go back and look, but if the ventilation was coming in and going out to a belt regulator or if it was coming up the intake and coming to a belt and going out, I don't recall exactly there, but at best, all you've got is a plant check curtain in by that. It's flammable. It's going to burn, so you'd have the ventilation interrupting in the event you have a fire.

Tr. at 39.

At the time the citation was written, the mine had fire detection and suppression systems in place. Miller noted, however, that the mine had a history of problems with false or inoperative alarms in the CO monitors and heat sensors. Tr. at 40.

Miller concluded that the four feet of coal accumulations had been formulated over the course of a few shifts, or that someone had dumped coal in the wrong place. Tr. at 47. Miller determined that while some of the accumulation had been there “for some time,” some of the coal had accumulated during the current shift. *Id.* Miller further determined that the operator had failed to scoop near the feeder. Tr. at 52. Miller claimed that he had checked with Hendricks for mitigating circumstances, but Hendricks provided none. Tr. at 47.

⁴ On cross, Miller conceded that the only coal accumulations that were subject to friction from the belt were down in the tail roller. The accumulations at the feeder merely provided additional fuel, in the event of a fire. Tr. at 69. Accordingly, I find that the only ignition source was the accumulations that were grinding through the tail roller.

According to the Certified Violation History Report, the Willow Lake Portal was cited over 200 times in the previous two years for accumulation violations. The nature and location of the prior violations was not specified. P. Ex. 33.

Miller testified on cross-examination that he did not recall definitively which way the ventilation flowed in the mine. He believed that the mine “had it in the ventilation plan [that the air could either] . . . go in or go out,” but he was not positive. Tr. at 49. During the inspection, Miller had taken multiple methane tests, but did not detect any abnormal readings at the site of the accumulations. *Id.*

The ram cars carried about eight to ten tons of coal from the continuous miner to the feeder. The beds of coal on the cars were stacked four feet high and about seventeen to twenty feet long. Tr. at 49.

The continuous miners had water sprays to dampen the coal as it was mined. Tr. at 52-53. Miller, however, did not check the continuous miners to see if the water sprays were operating properly on the day of the citation. *Id.* He noted, however, that he would “question by the dryness of the coal float dust in the air how much water was being applied to the coal.” Tr. at 53.

Miller designated the gravity of the violation as “reasonably likely” to result in “lost workdays or restricted duty” to sixteen persons, and thus S&S. He designated negligence as “high.” P. Ex. 26.

2. Testimony from Respondent’s Witnesses

On direct, Hendricks⁵ testified that he did not recall whether he observed the tail roller grinding in coal on the day the citation was issued. Tr. at 76. Hendricks did recall that the coal around the feeder amounted to “normal accumulations,” which inevitably occur during the production cycle, and that the cited condition likely developed during the shift. Tr. at 77. Hendricks further testified that since the coal was fresh off the continuous miner, which is equipped with water sprays, the coal was “somewhat wet.” Tr. at 78. Hendricks further testified that the rim of the feeder was padded to prevent loose coal from accumulating in the direction of the tail roller, and that the position of the tail roller in relation to the feeder was such that spillage from dumping would not accumulate at the tail roller. Tr. at 76, 85. Like Miller, Hendricks did not detect any methane in the area around the feeder. Tr. at 79.

On cross examination, Hendricks testified that accumulations near the feeder could not come into contact with the belt and the tail rollers because of the belt barriers and “the configuration of the conveyor itself.” Tr. at 85. He testified that he did not see any float coal dust in the air. Contrary to his inability to recall on direct, Hendrix testified on cross that he did

⁵ Hendricks has over thirty years of mining experience. At the time the citation was issued, Hendricks was employed as the outby Supervisor at Willow Lake and was responsible for all outby activities, including rock dusting, belt shoveling, and supply hauling. Tr. at 72.

not see any loose coal or float dust in the tail roller. Tr. at 85-86. Hendricks testified that, after the citation was issued, he discussed his objections with Miller, who was primarily concerned with the accumulation at the dump point, and that Miller did not mention any issue with the tail roller turning in accumulations. Tr. at 86-87.

Hendricks also testified that there were production delays during the shift, but the only cleaning-related delay was to address the feeder dump and tailpiece cited by Miller. Tr. at 83-84; *see also* R. Ex. 1. Hendricks further testified that four feet of coal accumulations typically would not be present immediately after routine cleaning, which normally occurred between three and six times per shift. Tr. at 82, 91.

Roy Shavez, mine foreman with twelve years of experience in the mining industry, testified that he was the face boss in charge of the cited area during the prior shift (morning shift), which ended about 4:00 p.m.. Tr. at 93.⁶ Shavez testified that his crew scooped the feeder, shoveled coal from the tailpiece, and rock dusted the area about thirty to forty minutes before the end of their shift. Tr. at 94. Shavez noted that the production report did not normally note when the scoop was utilized to clean the feeder. Tr. at 95.

According to Shavez, during the afternoon shift, one continuous miner ran on one side of the section, while the miner on the other side experienced delays. Tr. at 96; R. Ex. 1. During the production delays caused by the inoperative miner, more coal was loaded onto the feeder from one side of the section than the other. Tr. at 96. Shavez speculated that unless caution was exercised, the coal being dumped on the more productive side would push over to the other side of the feeder because less coal was being dumped on the opposite side to push back. Tr. at 97.

Shavez also testified about the typical cleaning process that he used at the feeder. Shavez acknowledged that foremen had autonomy to establish the method and frequency of cleaning around the feeder because Respondent did not have a uniform cleaning policy. Tr. at 98. Shavez testified that a miner would examine the area periodically throughout the shift and clean up any spillage. Tr. 99-100. Foreman Shavez would check behind the miner who was responsible for shoveling the feeder area to make sure that the area was clean. *Id.*

Chad Barras, Peabody Midwest Safety Director, testified that a fire was not reasonably likely to start at the cited area, and even if a fire were to start, it would not be reasonably likely to result in an injury. Tr. at 112.⁷ Barras testified that the only fatalities known to have resulted from a belt fire since 1980 were the result of the tragedy at the Aracoma Mine in 2006. Tr. at

⁶ Shavez was not the foreman on Unit 1 at the time of the citation, and he was not present during Miller's inspection. Tr. at 99, 102. Tommy Brown, the foreman in charge of the area, had passed away prior to the hearing. Tr. at 77.

⁷ As Peabody Midwest's Safety Director, Barras was in charge of reviewing the safety processes of all Peabody affiliated mines in the region, including Willow Lake Portal. Tr. at 103-04. Although very familiar with the operations at the mine, Barras did not accompany Miller and Hendricks during the inspection, and thus has no first-hand knowledge of the alleged hazardous conditions. Tr. at 115.

107. In support of his assertions, Barras cited the Bentley report, which states that between 1980 and 2005, there were sixty-three reportable fires in belt entries and no fatalities or lost-time injuries. Tr. at 108-09; R. Ex. 3.⁸ Barras further testified that the fatalities at Aracoma were attributable to legion safety failures, including disabled fire suppression, non-functioning carbon monoxide alarms, and a significant delay in warning underground miners once the fire was detected on the surface. Tr. at 106-07.

Barras testified that there has not been a single reportable belt fire at Willow Lake Portal, and only one non-reportable fire in a belt entry. Tr. 117-18, 119. According to Barras, the close proximity of the tail roller to carbon monoxide monitors and miners meant that if the coal accumulations started to burn, the smoke would be detected quickly by monitors or by olfactory perception of miners working nearby. Tr. at 110-11. Barras further testified that once a fire was so detected, it would be addressed by the mine's fire brigades. *Id.*

B. Disposition

1. Violation of 30 C.F.R. § 75.400

a. Relevant Legal Principles

30 C.F.R. § 75.400 provides:

Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on diesel-powered and electric equipment therein.

Section 75.400 prohibits accumulations, not mere spillages. *See Old Ben Coal Co. (Old Ben II)*, 2 FMSHRC 2806, 2808 (Oct. 1980). The Commission stated in *Old Ben* that “we accept that some spillage of combustible materials may be inevitable in mining operations. No bright line differentiates the two terms. Whether a spillage constitutes an accumulation under [30 C.F.R. § 75.400] is a question, at least in part, of size and amount.” *Id.* An accumulation exists if “a reasonably prudent person, familiar with the mining industry and the protective purpose of the standard, would have recognized the hazardous condition that the regulation seeks to prevent.” *Utah Power & Light Co.*, 12 FMSHRC 965, 968 (1990), *aff'd*, *Utah Power & Light Co. v. Sec’y of Labor*, 951 F.2d 292 (10th Cir. 1991); *see also Old Ben II*, *supra*, 2 FMSHRC at 2808 (“[T]hose masses of combustible materials which could cause or propagate a fire or explosion are what Congress intended to proscribe.”); *Black Beauty Coal Co. v. FMSHRC*, 703 F.3d 553, 558 (D.C. Cir. 2012).

⁸ At the time of the hearing, Terry Bentley was the Chief of Health and Safety at MSHA. His 2007 presentation is titled “Reducing Belt Entry Fires in Underground Coal Mines.” Tr. at 107. It is commonly referred to as the Bentley report. The report’s data predates the events at Aracoma. Tr. at 116.

The Commission has expressly rejected the argument that “accumulations of combustible materials may be tolerated for a ‘reasonable time.’” *Old Ben Coal Co. (Old Ben I)*, 1 FMSHRC 1954, 1957–58 (Dec. 1979); *see also Utah Power, supra*, 12 FMSHRC at 968 (section 75.400 “was directed at preventing accumulations in the first instance, not at cleaning up the materials within a reasonable period of time after they have accumulated”) (quoting *Old Ben I*, 1 FMSHRC at 1957); *Black Beauty, supra*, 703 F.3d at 558-59; *Big Ridge*, 35 FMSHRC ___, slip op. at 13, No. LAKE 2009-377 et al. (June 4, 2013). The Tenth Circuit in *Utah Power and Light* similarly stated that “while everyone knows that loose coal is generated by mining in a coal mine, the regulation plainly prohibits permitting it to accumulate; hence it must be cleaned up with reasonable promptness, with all convenient speed.” *Utah Power & Light, supra*, 951 F.2d at 295, n. 11.

b. Application of the Law

I find that Respondent violated section 75.400 because there were accumulations, not spillage. Miller measured the loose coal at the feeder and tail roller to be fifty feet in length and the float dust to be twenty-five feet in length. On cross, Miller explained that the fifty feet of accumulations described in the citation referred only to the loose coal, and that the seventy-five feet noted in the citation also included the float dust. Further, four feet of coal was present on the corner right side of the feeder and accumulations that were thirty-nine inches deep were present on the other side. In addition, accumulations six to eighteen inches deep were present under the tail area. Moreover, the accumulations were present around the feeder and tail piece for so long that coal was packed around the tail roller, which was pulverizing the coal and suspending black float dust into the air.

A reasonably prudent person familiar with the mining industry and the protective purpose of section 75.400 would have recognized that the extensive size and amount of float coal dust and loose coal at the tail roller and feeder were accumulations and not mere spillage. Therefore, I find a violation of section 75.400.

2. S&S

a. Relevant Legal Principles

The Mine Act defines 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). A violation is S&S “if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *Cement Div., Nat’l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

To establish an S&S violation under *National Gypsum*, the Secretary must prove the four elements of the Commission’s subsequent *Mathies* test: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard – that is, a measure of danger to safety – contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a

reasonably serious nature. See *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); accord *Buck Creek Coal*, *supra*, 52 F.3d at 135 (7th Cir. 1995) (recognizing wide acceptance of *Mathies* criteria); *Austin Power, Inc. v. Sec’y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving use of *Mathies* criteria). An evaluation of the reasonable likelihood of injury is made assuming continued normal mining operations. *U.S. Steel Mining Co. (U.S. Steel III)*, 7 FMSHRC 1125, 1130 (Aug. 1985) (quoting *U.S. Steel Mining Co. (U.S. Steel I)*, 6 FMSHRC 1573, 1574 (July 1984)).

In examining the third element of the *Mathies* test for those violations that involve hazards of ignition or fire, the Commission has held that the Secretary must prove that such a hazard is reasonably likely to occur, in addition to proving that the hazard is reasonably likely to result in an injury. *Ziegler Coal Co.*, 15 FMSHRC 949, 953 (June 1993). In *Ziegler Coal*, the Commission found that a fire or explosion hazard that is reasonably likely to occur is a necessary pre-condition to finding that an injury is reasonably likely to occur. *Id.*, citing *U.S. Steel Mining*, 6 FMSHRC 1834, 1836 (Aug. 1984). *U.S. Steel IV*, *supra*, 18 FMSHRC at 867, quoting *Ozark-Mahoning Co.*, 8 FMSHRC 190, 192 (Feb. 1986).

At the same time, the Commission has long held that “[t]he 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); *Amax Coal Co.*, 19 FMSHRC 856, 849 (May 1997), citing *New Warwick Mining Co.*, 18 FMSHRC 1568, 1576 (Sept. 1996); *McElroy Coal Co.*, 30 FMSHRC 237, 247 (Mar. 2008) (ALJ) (“While [the Bentley] . . . report [has] concluded there had been no reportable lost time injuries as a result of belt fires through 2005, it cannot be seriously contended that the report supports the proposition that serious injury or death is not a reasonably likely result of a fire in an underground mine.”); *Big Ridge, Inc.*, 32 FMSHRC 1020, 1024 (Aug. 2010) (ALJ) (“I do not however agree that the [Bentley] report supports the proposition that serious injury or death is not a reasonably likely result of a fire in an underground mine.”).

The Commission has provided the following S&S guidance for accumulation violations:

When evaluating the reasonable likelihood of a fire, ignition, or explosion, the Commission has examined whether a “confluence of factors” was present based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (April 1988). Some of the factors include the extent of the accumulations, possible ignition sources, the presence of methane, and the type of equipment in the area. *Utah Power & Light Co.*, 12 FMSHRC 965, 970-71 (May 1990).

Enlow Fork Mining Co., 5 FMSHRC 5, 9 (Jan. 1997).

Finally, the Commission and courts have held that an experienced MSHA inspector’s opinion that a violation is significant and substantial is entitled to substantial weight. *Harlan*

Cumberland Coal Co., 20 FMSHRC 1275, 1278-79 (1998); *Buck Creek Coal, Inc., v. MSHA*, 52 F.3d 133, 135-36 (7th Cir. 1995).

b. Application of the Law

I find that the Secretary has established that the violation is S&S. I have found a violation of section 75.400 above. The Secretary has also satisfied the second prong of *Mathies* because the violation contributed to a discrete fire hazard. Furthermore, the Secretary has met the third *Mathies* element because there was a danger of a belt fire caused by the ignition of accumulations grinding against the tail roller, and the fire was reasonably likely to cause an injury. Specifically, the accumulations were extensive and an ignition source was present. Miller testified that there were six to eighteen inches of loose coal “coned” around the tail roller. Tr. at 37. Given sufficient friction between conveyor belts, loose coal, and coal dust, coal would be heated to ignition. Tr. at 48.

I discount the effort of Respondent’s witnesses to rebut Miller’s account of the conditions. On direct, Hendricks testified that he did not recall whether there was coal that was being ground up at the tail roller. He did not recall one way or the other. Tr. 76. On cross, however, Hendricks testified that he did not see any loose coal and coal dust in the tail roller. Tr. 85-86. I credit Miller’s testimony that the coal accumulations were grinding in the tail roller, over Hendrick’s inconsistent recollection. Furthermore, while Hendricks testified that the position of the feeder and padding on the rim of the feeder would prevent coal from accumulating at the tail roller, these preventive measures do not appear to have been enough to stop the accumulations that Miller observed. *See* Tr. 76, 85. I place little weight on Barras’ opinion that a fire was not reasonably likely to occur. Unlike the experienced inspector, Barras was not present during the inspection and did not observe the conditions at the tail roller and feeder.

In addition, the fact that there has not been a single reportable belt fire at Willow Lake does not preclude an S&S finding. Tr. at 202-03. The absence of an injury-producing event when a cited practice has occurred is not dispositive of whether a violation is S&S. *See Amax, supra*, 19 FMSHRC at 849; *Elk Run Coal, supra*, 27 FMSHRC at 906; *Blue Bayou Sand & Gravel, supra*, 18 FMSHRC at 857. For the same reason, I give little weight to the Bentley Report (R. Ex. 3), which states that between 1980 and 2005, there were sixty-three reportable fires in belt entries and no fatalities or lost time injuries. *See Big Ridge, Inc., supra*, 35 FMSHRC ___, slip op. at 5; *citing Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007, 2011-12 (Dec. 1987) (rejecting use of Bentley Report and noting that “[i]t would have been inappropriate for the Judge to draw broad conclusions about the likelihood of injury from belt fires from the presentation, when the presentation was prepared for a different reason and had a different focus.”).

Furthermore, applying existing Commission and Seventh Circuit precedent, I decline to give probative value to Respondent’s testimony that it utilizes a number of early fire detection and response systems on its belt line, including methane and carbon monoxide detectors, water sprays, and ventilation control devices. In *Buck Creek*, the Seventh Circuit affirmed a judge’s determination that a coal accumulation violation on a conveyor belt was S&S, despite the

presence of redundant fire detection and prevention measures. 52 F.3d at 136. Thereafter, applying *Buck Creek*, the Commission has determined that little weight should be given to safety measures such as fire detection and suppression systems when determining whether an accumulation violation is S&S. *Amax Coal, supra*, 18 FMSHRC at 1359 n.8; *see also Amax Coal, supra*, 19 FMSHRC at 850 (holding that the presence of fire detection or fire-fighting equipment does not negate the serious safety risk posed by mine fires).

The Commission recently reaffirmed its prior rulings in *Big Ridge, Inc., supra*, 35 FMSHRC ___, slip op. at 4. It reasoned that adopting the argument that mandatory safety protections provide a defense to a finding of S&S would lead to the anomalous result that every protection would have to be nonfunctional before an S&S finding could be made. *Id.* The Commission has held that “such an approach directly contravenes the safety goals of the Act.” *Cumberland Coal*, 33 FMSHRC 2357, 2369-70 (Oct. 2011).

In *Cumberland Coal Resources v. FMSHRC*, the D.C. Circuit recently concurred with the Commission’s approach:

[T]he “focus of the significant and substantial inquiry is the nature of the violation. By focusing the decisionmaker’s attention on ‘such violation’ and its ‘nature,’ ‘Congress has plainly excluded consideration of surrounding conditions that do not violate health and safety standards.’ Because redundant safety measures have nothing to do with the violation, they are irrelevant to the significant and substantial inquiry.”

717 F.3d 1020, 1029 (D.C. Cir. 2013). In any event, I further note that Respondent’s early detection systems had a history of problems with false or inoperative alarms. Tr. at 40.

Respondent also argues that the coal was damp and that a fire was unlikely to occur. The Commission, however, has held that the existence of wet areas where accumulations have occurred does not minimize or prevent the propagation of a fire for S&S purposes. *See Utah Power & Light Co.*, 12 FMSHRC 965, 971 (May, 1990) (“The fact that some of the coal accumulations were damp. . . [is] not determinative [for S&S] because, as noted above, damp coal dries in the presence of fire.”).

The Secretary has also satisfied the fourth element of *Mathies* because a fire was reasonably likely to result in serious injuries. Miller testified that miners were likely to experience injuries that would have resulted in lost workdays or restricted duty. He further testified that the injuries may occur in the form of “smoke inhalation” or “falling in smoke” and “breaking an arm.” Tr. at 40. Accordingly, I conclude that a fire was reasonably likely to result in serious injuries.

In sum, I conclude that the violation is S&S. The Secretary has established an accumulation violation that contributes to a discrete safety hazard, satisfying the first and second prongs of *Mathies*. Moreover, during continued normal mining operations, the violation was reasonably likely to cause a mine fire, which would produce serious injuries, meeting the third

and fourth elements of *Mathies*. Accordingly, I affirm the S&S designation for Citation No. 6679907.

3. Negligence

a. Legal Principles

Section 110(i) of the Mine Act requires that in assessing penalties the Commission must consider, *inter alia*, whether the operator was negligent. 30 U.S.C. § 820(i). Each mandatory standard thus carries with it an accompanying duty of care to avoid violations of the standard. An operator's failure to meet the appropriate duty can lead to a finding of negligence if a violation of the standard occurs.

Negligence "is 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." 30 C.F.R. § 100.3(d). "A mine operator is required . . . to take steps necessary to correct or prevent hazardous conditions or practices." *Id.* "MSHA considers mitigating circumstances which may include, but are not limited to, actions taken by the operator to prevent or correct hazardous conditions or practices." *Id.* High negligence is when "[t]he operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances." *Id.* Moderate negligence is when "[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances." *Id.* Low negligence is when "[t]he operator knew or should have known of the violative condition or practice, but there are considerable mitigating circumstances." *Id.* No negligence is when "[t]he operator exercised diligence and could not have known of the violative condition or practice." *Id.*; *see also* 30 C.F.R. § 100.3(d), Table X.

b. Application of the Law

I find that the Secretary has established that the violation resulted from Respondent's "moderate" negligence. Some facts mitigate against a finding of high negligence. While Miller testified that the black color of the float dust demonstrated that the accumulations were present for a while and at least for more than one shift, he also conceded that the bulk of the accumulations could have occurred in less time if a miner had inadvertently dumped coal in the wrong place. Tr. at 47. I find that such a scenario is more likely given Shavez's uncontroverted testimony that it was his practice to ensure that the area was scooped and dusted prior to the end of his shift, which was immediately prior to the shift during which the citation was issued. Tr. at 94. I also find that the production delays during the afternoon shift make it less likely that the accumulations were the result of gradual spillage as the mine was not running coal for over half of the shift. *See* R. Ex. 1 (showing that coal was produced for 226 minutes of the 545 minutes that miners were working the face).

Accordingly, I find that Citation No. 6679907 should be modified from "high" to "moderate" negligence to reflect the fact that the condition did not last for several shifts, as the Secretary contended, and that the area was scooped and rock dusted by Chavez's crew at the end of the prior shift.

V. Citation No. 6683969

A. Findings of Fact

On January 29, 2009, MSHA coal mine inspector, Larry Morris,⁹ conducted an E01 inspection of the feeder for Unit 2. He issued a 104(a) citation alleging a violation of 30 C.F.R. § 75.400 because oil and oil-saturated coal had accumulated in the tray inside the oil tank compartment. The citation states:

An accumulation of combustible materials, in the form of oil and oil saturated coal fines and loose coal, is present on the Unit #2 (MMU002) working section feeder. The accumulations are present in and around the oil tank and in the oil filter compartment and range from a film of oil to approximately 2 inches of oil saturated coal fines and loose coal.

P. Ex. 29A.

Respondent's internal examination records show that there was an oil leak at the feeder on January 25, 2009, four days before Morris issued the citation. There was no indication in the records that Respondent cleaned the feeder. P. Ex. 32A; Tr. at 151. Morris determined that coal dust and loose coal saturated the oil because the ram and shuttle cars were dumping coal into the feeder faster than the feeder could take it out, which caused an overflow of loose coal and dust to settle in the oil. Tr. at 134. Morris was unable to specify the amount of coal in the oil. Tr. at 134.

⁹ Morris has been a coal mine inspector and accident investigator for MSHA for about five years. During that time, he conducted underground regular and spot inspections, and investigated roof falls, accidents, and fatalities. He has also inspected surface mines and mine construction sites. Morris has been in the coal industry for thirty-seven years. Tr. at 128-29. Prior to working for MSHA, Morris worked as a coal miner in such positions as laborer, conveyor belt foreman, general underground foreman, section foreman, longwall foreman, conveyor belt coordinator, and assistant mine foreman. Morris is familiar with Willow Lake Portal and has performed numerous inspections there. Tr. at 130.

Five minutes prior to issuing the citation, Morris issued 104(d)(2) Order No. 6683968 for a separate violation along the same conveyor belt because the tail piece was running in coal, which created a frictional ignition source.¹⁰ Tr. at 135-36. Morris opined that any fire resulting from the friction at the tail roller would spread to the oil saturated coal in the feeder tray. Tr. at 137. He determined that the foreman had repeatedly shoveled away coal from the tailpiece that morning, but failed to clean the tray. Tr. at 162-63.

At hearing, Morris used a diagram of a feeder and tail piece to illustrate the proximity of the accumulations to the frictional ignition source. See P. Ex. 35A. Although the photographs of the feeder are not the same feeder as the one in question, Morris testified that they represented a “typical tail piece feeder setup.” Tr. at 159. Respondent’s witness, Brad Champley, the production foreman for the section, agreed that the feeder in the diagram was similar to the feeder that was present on January 29, 2009. Tr. 179.

On the diagram, Morris marked the location of the ignition source at the tail pulley with two “Xs,” one red and one blue, and noted that the accumulations at the tray were located diagonally at the bottom of two circles, both red and blue, marked “TRAY.” P. Ex. 35A. Based on the diagram, Morris testified that the ignition source was “within one to two feet” of the feeder tray where the accumulations were located. Tr. at 136-38.

Upon examining the Secretary’s photographs, Champley and Barras testified that the picture of the entire tray and tail roller encompassed about ten feet. Tr. at 183. 190. Barras based his opinion on “the thickness of the radiator” and “the dimensions of the filters and . . . where the boom comes into play.” Tr. at 189-90. Champley testified that the area marked with the red and blue circled “X” did not represent the ignition source, but rather the feeder. Champley further testified that the ignition source was behind a chain in the distance. He marked the location with a circle and a blue letter “A” on the right hand side of the diagram. Tr. at 179; P. Ex. 35A.¹¹

Morris determined that a fire resulting from the accumulations was reasonably likely to occur and spread, injuring ten miners in the area. Tr. at 143-44. Although air was generally

¹⁰ Morris testified that Order No. 6683968 was issued for a hazardous condition because “the rotating tail . . . roller of the belt and the conveyor belt itself were actually turning in loose coal and coal fines . . . up to 18 inches deep, and around the tail roller itself it was dry and the . . . accumulations were so great that the self-cleaning roller could not throw it out fast enough and it actually built up. . . [and] pushed the belt two feet . . . away from the tail pulley and it was getting . . . close to . . . the metal of . . . the tail piece.” Tr. at 136. In a prior case, Judge Melick found that Order No. 6683968 constituted an S&S violation. At hearing for the instant citation, Judge Melick took judicial notice of the S&S designation and the ignition source at the tailpiece for Order No. 6683968. Tr. at 134-36. On appeal, the Commission affirmed Order No. 6683968 as S&S. *Big Ridge, Inc.*, supra, 35 FMSHRC ____, slip op. at 15.

¹¹ The oil tank in the feeder was not shown in the diagram. Rather, it was located off to the top left of the diagram. The boom from the feeder, which placed coal on the conveyor belt, was located off to the right side of the diagram.

moving outby the tail piece, Morris testified that the gaps in the outby curtain, which allowed the conveyor to run through, would also allow some air to move inby towards the feeder. Tr. at 143. Thus, Morris determined that if a fire started at the tail piece, the air traveling through the curtain's holes would cause some movement towards the accumulations at the feeder tray. Tr. at 143. Morris testified that oil-soaked coal is more likely to catch fire than solid or loose coal, or coal fines that are not oil saturated. Tr. at 143. Morris did not know the ignition temperature or flashpoint of the oil or coal accumulations in the feeder tray. Tr. at 167.

There were various safety mechanisms in the feeder, including a guard over the motor, a cooling fan behind the motor, and an automatic shut-off when the feeder approached a certain temperature. On cross examination, Morris testified that he did not check whether the safety mechanisms were operational. Tr. at 161.

Morris testified that the violation was obvious because the miners working near the tail piece could see the feeder tray, which was in the same area as the tail piece. Tr. at 144. The miners had cleaned the tail piece three times that shift before Morris issued the citation. *Id.* Furthermore, the mine foreman cleaned out the gob in the tail piece during an on-shift examination before Morris issued the citation. Tr. at 154-55. Nevertheless, Morris determined that no one had bothered to clean up the accumulations in the feeder tray. Morris testified that the foreman should have seen the accumulations in the nearby tray. *Id.*

Morris concluded that the dirty appearance of the oil-saturated coal indicated that the accumulations were present for over three shifts. Tr. at 150. Morris further testified that Respondent's examination reports demonstrated that the accumulations persisted for four days. In this regard, the report for January 25, 2009 states that the 603 feeder had an oil leak and the fittings were replaced. P. Ex. 32A; Tr. at 146. The entry did not mention any cleaning of oil-saturated coal in the tray.

Morris opined that if the accumulations had been cleaned up, Respondent would have recorded the action of "washed" in the reports. Tr. at 149, 151. For example, on page 1 of P. Ex. 32A, Respondent described car 879 as "needed washed" and recorded "washed" for the action taken. Moreover, Page 2 of the report shows that Respondent described the #66 unit sub as "dirty" and marked the "action taken" column as "cleaned." By contrast, Champley testified that the feeder was typically washed every shift, and it was not typical to record a feeder as washed in a production report because feeders are not normally shut down while being washed. Tr. at 179.

Morris also testified that Respondent had a past history involving several prior violations of 75.400. Tr. at 156. He did not analyze, however, whether those 75.400 violations were the result of accumulations on a feeder, oil tank, or oil filter compartment. Tr. at 169.

The record shows that various safety mechanisms were present at the feeder, which would reduce the effects of any fire. Morris acknowledged that the feeder's fire suppression system was operational when Morris issued the citation. Tr. at 163. In addition, Morris testified that carbon monoxide sensing equipment was present along the belt to detect a fire. *Id.* Further, Morris testified that the feeder tray had a lip on it that was about two to two-and-a-half inches above the height of the accumulations within the tray, and a chain, cable, and water hose were

present between the feeder and the tray. Tr. at 164-65. Also, Barras testified that people working in the area would have been able to smell a fire before it spread. Tr. at 190-93.

Champley testified that it was unlikely that a fire would occur because the mine mechanic “would normally wash the feeder . . . every shift,” and “[h]e . . . did it on his own.” Champley also testified that during the inspection, Morris did not raise any significant concern about any oil-saturated coal or other accumulation at the feeder, and Morris seemed a lot more concerned about the frictional source of ignition at the tail roller. Tr. at 177-79. Champley further testified that while he was shoveling the tailpiece that morning, he did not notice any accumulations of oil-saturated coal around the oil tank or in the oil filter compartment, nor did Morris point such accumulations out to him during the inspection. Tr. at 179. In addition, Champley testified that the miners were located to the far right side of the feeder when shoveling, and the chain, hose, and water cable were located between the miners and the feeder tray. Tr. at 176-86; P. Ex. 35A.

Morris determined the violation to be S&S and designated the gravity of the violation as “reasonably likely” to result in “lost workdays or restricted duty” to ten people. He designated Respondent’s negligence as “high.” P. Ex. 29A. Morris testified that Respondent did not offer any mitigating circumstances at the time of inspection. Tr. at 156.

B. Disposition

1. S&S

I find that the Secretary has established that the violation was S&S. Respondent concedes that a violation of section 75.400 occurred as a result of the accumulations of oil and oil-saturated coal fines and loose coal in the Unit #2 working section feeder. The Secretary has also satisfied the second element of *Mathies* because the cited condition exposed miners to an identifiable and discrete safety hazard, i.e., a propagation hazard for a fire from the friction caused by the accumulations at the tail roller. In addition, the Secretary has met the third element of *Mathies* because the propagation hazard contributed to by the violation was reasonably likely to result in and enhance injury from the fire. The Commission has affirmed Judge Melick’s determination that the accumulations at the tail roller were reasonably likely to contribute to a fire hazard.

Morris testified that the accumulations were only two feet away from the tail roller. Tr. at 165. While Barras and Champley testified that the oil tank and the tail roller were separated by about ten feet, Morris indicated that the tray containing the oil saturated coal fines was not only under the oil tank, but extended the greater part of the length of the feeder. Tr. at 142; P. Ex. 35A (Morris marked the location of the tray with blue arrows). Even Barras conceded that the feeder was only three to four feet away from the tail roller. Tr. at 190. Given the proximity of the accumulations to the tail roller and the direction of the air flow, I find it reasonably likely that the accumulations of oil and oil-saturated coal fines would propagate any fire ignited by the hazardous conditions cited in Order No. 6683968.

I decline to give probative weight to Respondent’s testimony that a cooling fan was present between the tail roller and the oil tank of the feeder. Nor do I give weight to

Respondent's argument that an automatic shutoff valve would have de-activated the feeder when it reached a certain temperature. In *Buck Creek*, the Seventh Circuit declined to give weight to evidence of flame resistant belts, which are preventative safety measures. *Buck Creek, supra*, 52 F.3d at 135-36. By analogy, I decline to give probative weight to Respondent's evidence that the cooling fan and shutoff valve were preventative measures. I also do not give probative weight to Respondent's evidence that the mine's fire detection and suppression systems would have minimized the likelihood of any injuries. *See Tr.* at 161.

Finally, I cannot assume that Respondent would have cleaned the feeder before a fire occurred simply because Respondent had cleaned the feeder in the past. *Big Ridge, supra*, 35 FMSHRC ___, slip op. at 14-15. Without more concrete evidence regarding some sort of internal policy, schedule, or rule obliging employees to clean the feeder on a regular basis, I decline to assume that Respondent would have abated the condition during continued normal mining operations. Finding otherwise would open the door for mine operators to avoid virtually any S&S designation by claiming that they would have abated the violation, merely because they have done so in the past.

I conclude that the accumulations in the feeder tray presented a propagation hazard in the likely event of a fire, and the propagation hazard contributed to by the violation was reasonably likely to result in or enhance serious injury from a fire originating from the ignition hazard. *Cf., Mid-Continent Res., Inc.*, 16 FMSHRC 1226, 1231 (June, 1994) (finding a propagation hazard as a partial basis for affirming an S&S designation). Accordingly, I affirm the S&S designation for Citation No. 6683969.

2. Negligence

I conclude that the Secretary has established that the violation resulted from Respondent's "high" negligence. The January 25, 2009 report describing the oil leak at the feeder suggests that a problem existed for four days and that Respondent should have known about it. P. Ex. 32A. Furthermore, the feeder tray set-up in the diagram was only two-and-a-half inches high and the accumulations had risen two inches in the open metal tray. *Tr.* at 133, 141. Thus, the accumulations were obvious because they were only half an inch from the top of the rim of the tray.

The fact that Morris focused his attention during the inspection primarily on the friction at the tail roller is immaterial, as the duty to comply with the Mine Act falls on the mine operator. The pre- and on-shift reports establish that Respondent did not take the opportunity to identify and correct the violation for three shifts, despite being alerted to a problem. P. Ex. 34A. Furthermore, Respondent did not take reasonable efforts to abate the violation prior to the issuance of the Citation. Although Respondent replaced the fittings, it failed to clean up the accumulations of oil-saturated coal. Finally, as with the prior violation, Respondent's history of section 75.400 violations and MSHA's warnings placed Respondent on notice regarding continuing accumulation problems. Having rejected Respondent's arguments regarding potential mitigating circumstances, I find that Citation No. 6683969 resulted from Respondent's high negligence.

VI. Citation No. 6667482

A. Findings of Fact

On November 24, 2007, MSHA coal mine inspector, Keith Roberts,¹² conducted an E01 inspection of the working section of Unit No. 3. Bart Schiff, Respondent's safety manager, accompanied Roberts. Roberts issued 104(d)(1) Citation No. 6667482 alleging a violation of 30 C.F.R. § 75.400 for accumulations of hydraulic oil, oil-saturated coal, oil saturated coal dust, and oil-saturated rock dust in the main controller and pump motor compartments of the No. 516 coal scoop. P. Ex. 1; Tr. at 276. The Citation states:

Accumulations of combustible material have been permitted to accumulate along and in the approximate 3' L x 8' W frame that houses the main electrical controller, pump motor and operator's compartment of the Long Airdox battery powered coal scoop, Co. No. 516, located on MMU 003. Combustible material in the form of oil, oil-saturated coal, oil-saturated coal dust and oil-saturated rock dust, ranging in depth from approximately ¾" to an approximate 2" is present along the frame and compartment housing the main controller.

Also, combustible oil, oil-saturated coal and oil-saturated coal dust, ranging in depth from approximately ¾" to an approximate 2 ½" is present along the frame and compartment housing the pump motor. A film of oil-saturated dust is present on the hoses and the electrical cables running from the main controller to the pump motor and electrical power take off (PTO) unit.

Additionally, combustible oil, oil-saturated coal, oil-saturated coal dust and oil-saturated rock dust, approximately ¾" in depth is present on the floor of the operator's compartment.

Two ignition sources for the combustible material are present on the machine. The main controller has an opening in excess of .008 inch along the flame path at the top right corner of the enclosure and the electrical cable serving the electrical power take off (PTO) unit is in contact with and fouling against the rotating drive shaft running through the pump motor compartment.

¹² Roberts began working in the coal mining industry in 1972. Tr. at 275. While in the private sector, Roberts held several labor and management positions, including equipment operator, section foreman, face boss training instructor, and safety engineer. *Id.* Roberts has been with MSHA since 1999. He has held various positions concerning underground coal mines, including work as an inspector, investigator, and ventilation and roof control specialist. Tr. at 273-74.

P. Ex. 1.

Roberts designated the gravity of the violation as “reasonably likely” to result in “lost workdays or restricted duty” to one person, and thus S&S. He designated Respondent’s negligence as “high.” P. Ex. 1. He further designated the violation as an unwarrantable failure.

On the date of the inspection, the battery-operated coal scoop was located in a working section that was temporarily idled due to a damaged conveyor belt. Tr. at 277. Roberts and Schiff gave conflicting testimony regarding whether the scoop was energized at the time of the inspection. Tr. at 345; 364; *see also* P. Ex. 9. When the section had been operational, Roberts testified that the scoop would have been primarily used to pick up coal fines that are left behind during the production cycle, and transport them to the feeder. Tr. at 278-79.

Roberts had Respondent remove several covers to access the inner-workings of the scoop. Tr. at 294. Roberts testified that operators are required to perform an examination of the scoop’s inner-workings once a week, and that such a task usually took a team of three miners (a mechanic and two others) a few minutes to remove the bolts, which held the covers in place. *Id.* Once the covers were removed, Roberts observed oil saturated coal and coal dust in the main controller, the pump motor compartment, and the operator’s compartment. Tr. at 290, 280. Roberts, however, did not observe any oil leaks. Tr. at 363.

In preparation for hearing, Roberts drew a crude sketch of a coal scoop that illustrated the approximate locations of the alleged accumulations in the various sections of the scoop. Tr. at 280-81; P. Ex. 37. The sketch was not drawn to scale and Roberts was unsure if the picture reflected the same scoop model that was cited. Tr. at 280-83. Referring to his illustration, Roberts testified that the scoop was made-up of three distinct segments: the front bucket and two main segments of the body. Tr. at 281-82. The front section of the body contained the operator’s compartment, the main controller, the pump motor compartment, the electric power takeoff unit, and the drive shaft. *Id.* The back section of the body contained the batteries and one or two tram motors. *Id.*

Roberts used diagonal lines and red ink to indicate the general locations where he observed accumulations of coal fines and oil. Tr. at 285; *see* P. Exs. 37-39. The alleged accumulations were confined to three locations in the front section of the body: the operator’s compartment, the main controller compartment, and the pump motor compartment.

1. The Operator’s Compartment

Roberts testified that a ¾- inch-deep accumulation of oil saturated coal and coal dust was found on the floor of the operator’s compartment. Tr. at 292-93. The operator compartment is where the operator sits and includes a tram pedal, much like a gas pedal on a car or truck, as well as other operating mechanisms. Tr. at 283; P. Br. at 17. Roberts did not claim that an ignition source was located near the operator’s compartment accumulation. Rather, the accumulation presented a propagation hazard if a fire were to ignite in an adjoining section of the scoop. Tr. at 308.

Schiff did not take notice of the material on the floor of the operator's compartment. Tr. at 364. He testified that it was normal to see a mixture of mud, dirt, and coal on the floor because such material is often tracked in on the operator's boots. Tr. at 364-65. Schiff testified that he was able to see the extent of the accumulations only after the panels in the operator's compartment were removed. Tr. at 365-66, 369. Similarly, Schiff testified that oil was not visible until the panels on the operator's compartment were removed. Tr. at 369.

2. The Main Controller Compartment

Roberts testified that the main controller, which housed the scoop's electrical operating components, had experienced a buildup of $\frac{3}{4}$ to 2 inches of oil-saturated coal and rock dust along the frame of the protective cover. Tr. at 282, 290, 293. Roberts alleged that an impermissible gap of more than .008 of an inch in the main controller cover would allow the electrical components to ignite methane in the air. Tr. at 312; P. Ex. 3.¹³ In such a scenario, Roberts determined that the accumulations of oil and coal dust presented a propagation hazard. *Id.* Alternatively, Roberts alleged that sustained arching or sparking could travel out through the small gap and ignite the accumulations on the outside of the protective cover. *Id.* Roberts explained that the cover needed to be sufficiently flush against the compartment to be an effective barrier to fire. Tr. at 282, 311-12.

Schiff testified that the oil-fill area was behind the main panel, and that when the oil tank was overfilled, the overflow would run down over the main controller panel. Tr. at 366-67. Even with the covers on, Schiff was able to see that some oil had run over the tank. *Id.* According to Schiff, if oil or accumulations are observed, the scoop should be washed. *Id.*

Roberts acknowledged that he found no methane at the scoop during the inspection. Tr. at 345. Although during normal operations the scoop would be required to travel throughout the working section, no evidence of elevated methane levels in the working section was adduced at hearing. Roberts also admitted that the electrical components on the main controller were in a metal and permissible structure, which was separate from the compartment with the accumulations. Tr. at 341; P. Ex. 38-39. Roberts further acknowledged that the scoop was equipped with an emergency stop switch and a fire suppression system, which could be activated from the operator's compartment. Tr. at 337-38.

3. The Pump Motor Compartment

In the pump motor compartment, Roberts observed between $\frac{3}{4}$ and 2 $\frac{1}{2}$ inches of combustible material on the frame, and a film of oil-saturated dust on the hoses and electrical wires inside the compartment. Tr. at 293. Directly below the pump motor compartment is the

¹³ Roberts issued an additional S&S citation, Citation No. 6667489, for the impermissible opening in the cover to the main controller. Tr. at 309; P. Ex. 3. As Respondent had not contested that citation, Judge Melick instructed the parties not to retry that final citation. Accordingly, Robert's testimony on the subject was limited. Tr. at 311.

vehicle's drive shaft. Tr. at 352-53. Roberts testified that there was not a protective cover between the drive shaft and the pump motor compartment. *Id.*

After removing the foot pedal cover, Roberts and Schiff noticed that a 128-volt electrical cable had become loose in the area around the pump motor compartment and was "drooping down." Tr. at 367-68; *see also* P. Ex. 9. While the cable had no discernible damage, Roberts noticed that a portion of the cable was cleaner than the surrounding area and surmised that this was due to the cable touching the rotating drive shaft. Tr. at 299. Roberts testified that, assuming continued, normal mining operations, friction with the drive shaft would eventually eat away at the cable jacket and expose the inner electrical components. *Id.*¹⁴ Roberts determined that a damaged cable would be reasonably likely to cause electrical sparks and arcing capable of igniting the oil and coal dust in the pump motor compartment directly above, and that the resulting fire would easily spread to other areas of the scoop. Tr. at 302. Roberts, however, admitted that he did not know the ignition temperature or flashpoint of the coal or hydraulic oil. Tr. at 336-37.

Roberts acknowledged that the cable had an additional conduit around it for protection. Tr. at 389-90. He also acknowledged the existence of a circuit breaker to provide protection if the cable became fouled with the drive shaft. Roberts testified that a circuit breaker would shut down the scoop, which would prevent any arcing or sparking. Tr. at 391-93. Roberts testified, however, that "there has been a very long history of circuit breakers that have failed under tests and had to have been replaced." Tr. at 304. Although Roberts did not perform a complete check of the scoop's circuit breaker during the inspection, he cited a specific example of a prior failure in September 2007, which involved a fire on a coal scoop where trip settings had been set above acceptable levels. Tr. at 304-05, 406.

Respondent's witness Melvin acknowledged that circuit breakers do fail, but declined to describe the failures as "regular" or occurring "every day." Tr. at 391.

4. Examination Records

Roberts reviewed the examination records for the coal scoop before issuing the Citation. P. Ex. 1. On direct, he testified:

[W]hat's significant to me is that on [November 17, 2007], Scoop 516 was examined, and in the dangerous conditions it has 'needs washed,' which is the same as saying that there's combustible material that needs to be removed from the machine. Under the action taken, it really shows no action taken, it simply says that it's been reported.

¹⁴ Roberts had previously observed an instance at the mine where a drive shaft on a coal scoop had worn away the cable jacket on a hydraulic hose. Tr. at 300; P. Ex. 4. Although, the hydraulic hose and electrical cable were made of different materials, they are both intended to be abrasion resistance. Tr. at 396.

Tr. at 328.

Roberts determined that the records established that the scoop was dirty, but not cleaned. Tr. at 328-30; *see also* P. Ex. 5.¹⁵ Roberts determined that Respondent's failure to address a known hazardous condition played a "significant" role in his determination that the citation should be designated as an unwarrantable failure. Tr. at 328.

Daniel Bishop, who works in Respondent's safety department, testified that the scoop was washed on November 20, four days prior to the citation. Tr. at 381. This testimony is corroborated by the section foreman's report for November 20 on Unit No. 3. R. Ex. 7, p. 6. Bishop also testified that he washed two cars on the day that Roberts issued the citation, but did not wash the scoop because it normally did not get dirty enough to wash every day. Tr. at 383. Respondent's operation reports show that Respondent was not washing the scoops on a daily basis. Tr. at 384-85; R. Ex. 7.

B. Disposition

1. S&S

I find that the Secretary has established that the violation is S&S. Respondent concedes that a violation of section 75.400 has occurred. The violation exposed at least one miner to an identifiable and discrete safety hazard, i.e., the danger of a fire from arcing and sparking that would have ignited the oil-saturated coal accumulations in the scoop's main controller and pump motor compartments. I further find that the violation was reasonably likely to cause a fire and resultant injuries as the oil-saturated coal accumulations were reasonably likely to ignite from the arcing and sparking caused by the PTO cable fouling against the drive shaft, under continued normal mining operations.

I decline to find that the mixture of mud and coal on the floor of the operator's compartment contributed to a fire hazard. The small amount of material present "in the area between the pedals and the seat" was likely tracked in on the boots of a scoop operator. *See* Tr. at 336. Such material was likely composed of a mixture of wet coal and inert dirt or rock dust. Tr. at 364-65; 369. As both water and inert material like rock dust are typically used to prevent the ignition of coal, I find that the mud and dirt mixed in with the small amount of accumulations significantly reduced the risk of ignition of the material in the operator's compartment.

I further find that the impermissible gap on the lid to the main controller was unlikely to result in an explosion or to ignite the coal on the main controller frame. Roberts found no

¹⁵ Roberts reasoned that if Respondent had washed the scoop at any time after November 17, Respondent would have recorded such washing like it did for the 871 and 872 cars that appear on page 1 of the examination records with the following notation: "Dangerous Condition: Dirty; Action Taken: Washed." Tr. at 328-30; *see also* R. Ex. 7. Furthermore, Roberts was troubled by the fact that, during the inspection, Respondent did not provide him with any evidence of efforts to wash the scoop. *Id.*

methane at the scoop, and although the scoop would travel throughout the working section, the Secretary did not proffer evidence concerning the levels of methane in the rest of the working section. The record supports Respondent's argument that the electrical components on the main controller were in a separate metal and permissible structure, apart from the compartment cited by the inspector. Tr. 341; P. Ex. 38, 39.

Following Commission and Seventh Circuit precedent in *Buck Creek, supra*, 52 F.3d at 135-36, I decline to give probative value to Respondent's testimony that a circuit breaker would have shut down the scoop in the event of any arcing or sparking and subsequent ignition. In *Buck Creek*, the D.C. Circuit declined to give weight to evidence of flame resistant belts, which are preventative measures. *Id.*; MSHA, Regulatory Impact Analysis for Flame Resistant Conveyor Belt, Fire Prevention and Detection, and Use of Air From the Belt Entry, Final Rule 5 (Dec. 2008) (describing flame resistant belts as measures used to "prevent conveyor belt fires."). By analogy, I decline to give probative weight to Respondent's evidence of the circuit breaker as a preventative safety measure. Likewise, I decline to give probative weight to Respondent's fire detection and suppression measures, and I emphasize Robert's testimony that the mine has long history of circuit breaker failures. In fact, Roberts cited a specific example involving a fire on a coal scoop. Tr. at 304-05. None of Respondent's witnesses disputed these failures.

In addition, I find that the protective conduit surrounding the PTO cable would have eventually worn away from contact with the drive shaft, given continued, normal mining operations. On cross examination, Melvin admitted that if the PTO cable had continued to run against the moving drive shaft, it would have eroded through the outer jacket into the inner conductors. Tr. at 396-97. This would have resulted in arcing and sparking, thus causing a fire.

Finally, I decline to assume that the scoop operator would have washed the machine before operating it. According to Bishop, the clean-up crews were assigned to wash two cars and one scoop over a six-day rotation. Tr. at 374. Although Respondent washed the feeder four days prior to the citation, I decline to find that Respondent was reasonably likely to wash the scoop before operating it without some sort of concrete example regarding an internal policy schedule or consistent practice obligating miners to do so. As noted, finding otherwise would open the door for mine operators to avoid virtually any S&S designation, merely by claiming that they would have abated the violation. *See Big Ridge, Inc., supra*, 35 FMSHRC ____, slip op. at 12.

Turning to the fourth element of the *Mathies* test, I find that heat or smoke from the fire was reasonably likely to cause "thermal injury" or smoke inhalation and poisoning from fumes emanating from the ignited accumulations or the insulation around the power leads. Tr. at 307. It is reasonably likely that a miner would be operating the scoop at the time of ignition. Furthermore, such thermal and smoke inhalation or smoke poisoning injuries were reasonably likely to be serious. The Commission and its judges have held that smoke inhalation and burns constitute serious injuries for purposes of the fourth prong of *Mathies*. *Amax Coal, supra*, 19 FMSHRC at 847 (upholding judge's finding of S&S based on evidence of smoke inhalation and burns, which constitute serious injuries); *American Coal, supra*, 33 FMSHRC at 2810 (finding smoke inhalation sufficient to support fourth prong of *Mathies*).

Accordingly, I affirm the S&S designation for Citation No. 6667482.

2. Unwarrantable Failure

a. Relevant Legal Principles

The unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d). It 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 such conduct as “reckless disregard,” “intentional misconduct,” “indifference,” or a “serious lack of reasonable care.” *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); *see also Buck Creek Coal, supra*, 52 F.3d at 136 (approving Commission’s unwarrantable failure test).

The Commission has recognized that whether conduct is “aggravated” in the context of unwarrantable failure is determined by considering the facts and circumstances of each case to determine if any aggravating or mitigating circumstances exist. Such factors include the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator’s efforts in abating the violative condition, whether the violation was obvious, whether the violation posed a high degree of danger, and the operator’s knowledge of the existence of the violation. *See, e.g., Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000). A judge has discretion to determine that some factors are irrelevant or are less important than other factors under the totality-of-circumstances analysis. *IO Coal Co.*, 31 FMSHRC 1346, 1351 (Dec. 2009).

The Secretary bears the burden of proving all elements of an unwarrantable failure by a preponderance of the evidence. If an operator reasonably, but erroneously, believes in good faith that the cited conduct is the safest method of compliance with the applicable regulation, its actions will not constitute aggravated conduct that exceeds ordinary negligence. *Jim Walter Res., Inc. v. Sec’y of Labor*, 103 F.3d 1020, 1024 (D.C. Cir. 1997).

b. Application of the Law

Having duly considered each unwarrantable failure factor below, I find that the Secretary has failed to establish that the violation resulted from an unwarrantable failure to comply with section 75.400. While the violation was extensive and posed a moderate degree of danger, the condition did not exist for a lengthy period of time in context, and the operator had no knowledge of the hazardous condition. The accumulations were not obvious, absent dismantlement of the equipment, except for a small amount of oil that was visible from the outside. Furthermore, Respondent provided contemporaneous documentation to refute an important part of the inspector’s rationale for unwarrantable failure. R. Ex. 7, p. 6. In addition, although on notice of an ongoing problem regarding accumulations, Respondent undertook some reasonable efforts to abate the violation prior to the issuance of the citation.

i. The Extent of the Violative Condition

The Commission has viewed the extent of a violative condition as an important element in the unwarrantable failure analysis. *IO Coal Co.*, 31 FMSHRC 1346, 1351-52 (Dec. 2009). This factor considers the scope or magnitude of the violation. *See Eastern Associated Coal*, 32 FMSHRC 1189, 1195, *citing Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 708 (June 1988).

The record establishes that the accumulation violation on the scoop was extensive. The accumulations of coal dust were $\frac{3}{4}$ to 2 $\frac{1}{2}$ inches deep and existed in several sections of the scoop, including the floor of the operator's compartment, the top of the main controller compartment, and inside the pump motor compartment. Tr. at 292-93. In addition, a large portion of the front body of the scoop was covered in a residue of oil and coal fines. *Id.* The extensiveness factor is somewhat mitigated by the short time it took miners to clean up the accumulations. It took just minutes to remove the covers from the scoop and a single miner could remove the accumulated coal dust and oil by washing the machine. Tr. at 294, 379.

On balance, I find that the extensiveness factor weighs slightly in favor of an unwarrantable failure finding.

ii. The Duration of the Accumulation Violation

The Commission has emphasized that the duration of the violative condition is a necessary element of the unwarrantable failure analysis. *See, e.g., Windsor Coal Co.*, 21 FMSHRC 997, 1001-04 (Sept. 1999) (remanding for consideration of duration of cited conditions).

Weekly examination reports state that scoop 516 was in need of washing on November 17 and 19 and that the condition was reported to mine management. P. Ex. 5. Roberts interpreted the report's omission of any action to address the dirty scoop as evidence that the condition lasted for seven days. Tr. at 328. Respondent, however, provided internal production reports showing that the scoop was cleaned on November 20, four days prior to the issuance of the citation. R. Ex. 7. This would indicate that the coal had been accumulating for no more than four days. Respondent was only required to examine the inner-workings of the scoop once per week pursuant to MSHA regulations. 30 C.F.R. §75.512. Accordingly, in this context, I find that a period of up to four days was not a significant length of time, and the duration factor weighs against finding an unwarrantable failure. *See* Tr. at 294, 353.

iii. Whether Respondent Was Placed on Notice that Greater Efforts Were Necessary For Compliance with Section 75.400

Repeated similar violations are relevant to an unwarrantable failure determination to the extent that they serve to put an operator on notice that greater efforts are necessary for compliance with a standard. *IO Coal, supra*, 31 FMSHRC at 1353-55; *Amax Coal, supra*, 19 FMSHRC at 851; *see also Consolidation Coal, supra*, 23 FMSHRC at 595. The purpose of

evaluating the number of past violations of a particular standard is to determine the degree to which those violations have “engendered in the operator a heightened awareness of a serious . . . problem.” *San Juan Coal Co.*, 29 FMSHRC 125, 131 (Mar. 2007), *citing Mid-Continent Res., Inc.*, 16 FMSHRC 1226, 1232 (June 1994). The Commission has also recognized that “past discussions with MSHA” about a problem “serve to put an operator on heightened scrutiny that it must increase its efforts to comply with the standard.” *Id.*, *citing Consolidation Coal*, 23 FMSHRC at 595.

The record establishes that Respondent was put on notice that greater efforts were necessary to comply with section 75.400. Respondent had a significant recent and past history of 75.400 violations. Roberts testified that Respondent had received more than forty citations since the start of the inspection, and about 140 to 150 section 75.400 citations were issued in prior year and a half. Tr. at 312-13; *see also* P. Ex. 8 (showing violation history).

As a result of such multiple section 75.400 citations, Roberts discussed the need for greater emphasis on the general cleanup program with mine management and safety personnel. Tr. at 315. Furthermore, Roberts testified that two other inspectors had discussions with Respondent about accumulations on electrical equipment just five days prior to the issuance of the instant citation. Tr. at 315.¹⁶ Thereafter, Roberts provided Respondent with an electrical inspection policy manual, which provided guidance on how to conduct an adequate examination of electrical equipment. Tr. at 324-25.

I find that Respondent was placed on notice that greater efforts were necessary for compliance with Section 75.400, particularly in light of Respondent's prior history of violations and MSHA's warnings regarding Respondent's ongoing 75.400 problems, which specifically included accumulations on electrical equipment. Accordingly, this factor supports an unwarrantable failure finding.

iv. Whether the Violation Posed a High Degree of Danger

The high degree of danger posed by a violation supports an unwarrantable failure finding. *See, e.g., BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Quinland Coals, supra*, 10 FMSHRC at 709. For purposes of evaluating whether violative conditions pose a high degree of danger, it is often necessary to consider the same facts already considered as part of the gravity evaluation in an S&S analysis. *See San Juan Coal, supra*, 29 FMSHRC at 125, 132-33.

As discussed in detail above in the S&S analysis, the accumulations on the scoop were reasonably likely to cause a serious injury to miners in the area. Specifically, I found that the arcing and sparking from the PTO cable fouling against the drive shaft

¹⁶ Respondent argues that the Secretary failed to prove that two other MSHA inspectors discussed with Respondent the importance of cleaning electrical equipment five days prior to the citation. R. Br. at 25; Tr. at 315-20. Although, the notes by inspector Smoot are almost impossible to decipher, inspector Church's notes clearly indicate that inspectors discussed the “conditions of [electrical] equipment” and “the serious number 75-400 citations of [electrical] equipment.” P. Ex. 7; *see also* Tr. at 317.

would have ignited the oil-saturated coal accumulations on the scoop, if left unabated during continued normal mining operations. The danger posed by the ignition, however, is mitigated by the fact that the $\frac{3}{4}$ to two inches of coal dust likely would not create enough smoke to cause fatal or permanently disabling injuries and that only one miner would likely be affected. *See* P. Ex. 1 (Roberts believed that the hazard would only reasonably result in result in “lost workdays or restricted duty” to one miner). Further, as the fire would be contained in sealed compartments, the risk of propagation is diminished. Accordingly, I conclude that the moderate degree of danger posed by the violation is neutral in the unwarrantable failure analysis.

v. The Respondent’s Knowledge of the Existence of the Violation and Whether the Violation was Obvious

The Commission has held that the knowledge factor in an unwarrantable failure analysis is established by “the failure of an operator to abate a violation [that] he knew or should have known existed.” *Emery Mining Corp.*, 9 FMSHRC 1997, 2002-03 (Dec. 1987); *see also*, Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Cong., 1st Sess., Part I Legislative History of the Federal Coal Mine Health and Safety Act of 1969, at 1602 (1975) (“Coal Act Legis. Hist.”).

There is no evidence that Respondent knew of the violative condition prior to the issuance of the Citation. The condition is not mentioned in pre-shift or on-shift reports and there is no testimony establishing the Respondent’s advance notice of the violative condition. Similarly, the record does not support a finding that Respondent should have known of the accumulation, or that the condition was obvious. As Roberts noted, the inner-workings of the scoop were required to be examined only once a week pursuant to MSHA’s interpretation of section 75.512. Tr. at 294. To properly examine the electrical components, a mechanic and at least one other miner would have to remove the heavy top covers that were bolted to the machine. Tr. at 294, 379. Although some amount of oil could be observed while the covers were on the scoop, it was not until the covers were removed that the accumulations were obvious and “basically staring you right in the face.” Tr. at 323, 366. Roberts did not find any observable oil leaks during his inspection and failed to quantify the amount visible without removing the covers. Tr. at 358. As such, I cannot determine if the visible oil was plentiful enough to constitute an accumulation under section 75.400 or if the oil was the result of minor, permissible spillage incurred while refilling the hydraulic oil reservoir.

As the Secretary has failed to demonstrate that Respondent knew or should have known about the existence of the violation, these factors weigh against an unwarrantable failure finding.

vi. The Respondent’s Efforts in Abating the Violation

An operator’s efforts to abate a violation are relevant to an unwarrantable failure determination. Thus, where an operator has been placed on notice of a problem, the level of priority that the operator places on abatement of the problem is relevant. *IO Coal, supra*, 31 FMSHRC at 1356, *citing Enlow Fork Mining Co.*, 19 FMSHRC 5, 17 (Jan. 1997). The focus is on abatement efforts made prior to issuance of the citation or order. *Id.*

As set forth above, Respondent was placed on notice that greater efforts were necessary to comply with Section 75.400. I find that Respondent undertook some reasonable efforts to abate the violation prior to the issuance of the citation because the scoop was washed on November 20, four days prior to the citation. Accordingly, I conclude that this factor weighs against an unwarrantable failure finding.

vii. Conclusion Regarding Unwarrantable Failure Factors

In sum, after considering the relevant Commission factors, I conclude that the violation in Citation No. 6667482 was not the result of an unwarrantable failure to comply with section 75.400. The violation was extensive, but persisted for only a short amount of time relative to the MSHA mandated inspection schedule. Respondent did not have knowledge of the violation. In addition, the condition was not particularly obvious given the difficulty accessing the inner-workings of the scoop. Respondent was placed on notice that greater efforts were necessary to achieve compliance with Section 75.400 and the condition was moderately dangerous. Perhaps most importantly, however, Respondent was able to adduce evidence at hearing showing that inspector Roberts' unwarrantable failure analysis was based, at least in part, on the erroneous assumption that the condition was not addressed when reported to management in pre-shift reports.

3. Negligence

After close examination of the record, I find that Respondent's negligence should be reduced from "high" to "moderate." As stated above, I find that Respondent undertook reasonable efforts to address the violation prior to the issuance of the Citation because the scoop was washed on November 20, four days prior to issuance of the Citation. Accordingly, this mitigating factor supports a moderate negligence finding.

VII. Order No. 6668437

A. Findings of Fact

On November 29, 2007, MSHA inspector, Danny Ramsey, conducted a ventilation survey of the 2C1 worked-out area.¹⁷ Safety staff member, Bob Clarida, accompanied Ramsey during the inspection. Tr. at 198-200.

Ramsey took notes while conducting the inspection. P. Ex. 11. He issued 104(d)(1) Order No. 6668437, which alleged a violation of 30 C.F.R. § 75.364(a)(1) for inadequate weekly

¹⁷ Ramsey has been in the underground coal mining industry for over thirty-nine years and is currently employed as a roof control specialist in MSHA's Benton, Illinois field office. His duties include review of mine roof control and ventilation plans, and conducting on-site inspections. Prior to working for MSHA, Ramsey held various positions of authority at large underground coal mines. Tr. at 194-97.

examinations in the worked-out area of deepest penetration. Tr. at 198-99; P. Ex. 10. The Order states:

Inadequate weekly examinations have been performed in the 2C1 worked-out area in that the deepest penetration of the worked out area has not been examined since 6/29/07. Water, up to four feet in depth is present across #1 to #6 entries from the face to 3 crosscuts outby and prohibits examinations to the deepest point of the worked-out panel. Methane in excess of 5% is present in entries #1 and #2 and an oxygen-deficient atmosphere of 18.5% is also present in entry #1. The certification board has been progressively moved outby as the water has accumulated. The original certification board located at the deepest penetration of the worked-out area is dated 06/29/07.

P. Ex. 10.

During the inspection, Ramsey and Clarida started at the mouth of the worked-out area and traveled to the evaluation points (EPs), the locations at which methane and oxygen readings were required to be taken under the standard. Tr. at 200. The first EP that they encountered was at the upper left part of the area. They then went to the right side of the area, first in Entry #6 and then Entry #1. *Id.* Once they arrived at Entry #1, Ramsey used his handheld Solaris device to detect “nine-tenths percent of methane” in that entry. Tr. at 201.

Ramsey observed a date, time, and initials (DTI) board, about thirty to forty feet inby from where he detected the methane. Tr. at 201. Mine examiners use DTI boards to certify that they have examined an area. Tr. at 202. Ramsey testified that examiners typically conduct their tests in close proximity to the DTI boards. *Id.*

Proceeding inby along Entry #1, Ramsey encountered progressively deeper water and progressively higher methane concentrations. He detected 1.5% methane about half-way between the outby DTI board and the face. At this point, Ramsey was in four feet of water that nearly reached his thighs. Tr. at 204; P. Ex. 13. Once Ramsey and Clarida reached the face, Ramsey’s Solaris detected explosive levels of methane equaling or exceeding 5 percent%. Tr. at 205. Ramsey collected two atmospheric samples at the face. Later lab tests revealed an explosive mixture of 5.880% methane and 19.25% oxygen. Tr. at 206-208. By contrast, Clarida testified that his spotter only identified 3.4% methane and 19.4% oxygen. Tr. at 245; R. Ex. 5. Clarida attributed the discrepancy to the fact that the methane not equally dispersed or the fact that Ramsey had taken a sample closer to the roof. *Id.* at 245-46.

Ramsey observed a second DTI board at the area of deepest penetration on the right side of the 2C1 mined-out area. Tr. at 206; P. Ex. 13. According to the second DTI board, this area was last examined on June 29, 2007. Tr. at 212. Ramsey observed that the outby DTI board was 300 feet away from the inby DTI board, where the examinations were required to be conducted. Tr. at 214.

Following the issuance of the Order, Clarida spoke with Brad Pate, an hourly examiner and the sole miner tasked with performing weekly examinations of the methane levels at the 2C1 area. Tr. at 259-60. Clarida testified that, without consulting management, Pate determined that he did not have to travel all the way to the face on account of the water accumulations. *Id.* Clarida believed that Pate “didn’t think he was doing anything wrong” by testing the methane levels at the outby location. Tr. at 260.

According to Ramsey, five months or twenty-one weeks had transpired between the last proper examination of the 2C1 worked-out area and the time Ramsey issued Order No. 6668437. Ramsey concluded that Pate conducted at least twenty weekly examinations of the 2C1 area at the incorrect, unapproved, and non-compliant location. Tr. at 214.

Ramsey determined that the explosive concentration of methane and the presence of possible ignition sources in the form of battery-powered vehicles or roof falls made it reasonably likely that an explosion would occur. Tr. at 216-17. He testified that “an examiner traveling through . . . with battery-operated vehicles doing the examinations, and potential roof falls . . . could cause an ignition source.” Tr. at 216. Ramsey also testified that in the past he had personally observed many roof falls causing sparks during the retreat mining process. He determined that the sparks would constitute an ignition source as well. Tr. at 216-17.

In the three days prior to the issuance of the Order, Ramsey took part in three meetings with mine management to discuss inadequate workplace examinations. On November 26, 2007, Ramsey met with Bob Hill, shift mine manager. Tr. at 219-20; P. Ex. 11. The next day, Ramsey spoke to Hill and James Ward, mine general manager. The day after, Ramsey met with Ward and Clarida. *Id.* Ramsey admitted, however, that the meetings did not address weekly exams performed under section 75.364, the cited standard. Tr. at 226-27. Rather, the meetings addressed Respondent’s inadequate workplace examinations generally. *Id.*

At the time of inspection, several curtains had been knocked down in Entry No. 1. Tr. 222. Clarida testified that this caused the air to be short-circuited without traveling all the way around the faces. Tr. at 238. Instead, Clarida claimed that the air traveled straight across into Entry No. 1. *Id.* Clarida testified that the area inby the location where the air entered Entry No. 1 was not ventilated adequately, although the area outby that point was ventilated adequately. *Id.* Clarida testified that if the curtains had been up, the airflow would have traveled around the faces towards the inby DTI board where the tests were supposed to be conducted, and the methane levels in that location would have been proper. Tr. at 226-27; R. Ex. 5; P. Ex. 13 (maps showing path of ventilation with curtains down versus curtains up). Clarida further testified that he observed the curtains that had been knocked down, and he was preparing to re-hang them to dilute the methane, until Ramsey instructed him not to do so. Tr. 247-48.

Ramsey testified that a curtain was down in the water, making it unlikely that Respondent would have found it. Ward and Clarida admitted that they had no idea how long the curtain had been down. Tr. at 253-54, 258. Ward asserted that after he hung curtains back up, the methane levels in the area of deepest penetration were proper. Tr. at 258.

Ramsey designated the gravity of the violation as “reasonably likely” to result in “fatal” injuries to one person, and thus S&S. He designated Respondent’s negligence as “high.” He further designated the violation as an unwarrantable failure. P. Ex. 10.

B. Disposition

1. Relevant Legal Principles

Section 75.364(a)(1) requires mine examiners to conduct weekly examinations in the worked-out areas of deepest penetration. The purpose of the standard is to ensure that the mine’s ventilation is working properly to prevent methane and other noxious gases from accumulating, as well as to prevent oxygen levels from becoming too low.

Section 75.364(a)(1) provides:

At least every 7 days, a certified person shall examine unsealed worked-out areas where no pillars have been recovered by traveling to the area of deepest penetration; measuring methane and oxygen concentrations and air quantities and making tests to determine if the air is moving in the proper direction in the area. The locations of measurement points where tests and measurements will be performed shall be included in the mine ventilation plan and shall be adequate in number and location to assure ventilation and air quality in the area. Air quantity measurements shall also be made where the air enters and leaves the worked-out area. An alternative method of evaluating the ventilation of the area may be approved in the ventilation plan.

2. S&S

I find the Secretary has not established that the violation is S&S. Respondent concedes that a violation of section 75.364(a)(1) has occurred because it conducted inadequate weekly examinations in the worked-out area of deepest penetration. The Secretary has also satisfied the second prong of *Mathies* because the violation contributed to a discrete explosive hazard.

The Secretary, however, has failed to establish the third *Mathies* element because he has not shown that the violation was reasonably likely to cause an explosion or serious injury. The Commission has long held that where there is a violative condition that poses a risk of fire or explosion, a finding of S&S requires a demonstration of a “confluence of factors,” such as the presence of a fuel source in proximity to a potential ignition source, to establish a reasonable likelihood that ignitions or explosions will occur. *See, e.g., Texasgulf, Inc.*, 10 FMSHRC 498, 501 (Apr. 1988).

Here, the Secretary has alleged two possible sources of ignition: roof falls and the use of energized vehicles. First, the Secretary argues that the battery-operated vehicle, which Ramsey testified was used to access the area, could constitute an ignition source if maintained

improperly. Tr. at 216; P. Br. at 31. I find this to be, at best, an unlikely scenario. To reach the area of deepest penetration, where the methane levels had reached explosive levels, Ramsey and Clarida waded through four feet of water. Tr. at 204. It is extremely unlikely that a miner would be able to drive an electric vehicle through this depth of water. Tr. at 222 (Ramsey testified that the vehicles could not make it through the water.). Even if it were possible to do so, the Secretary's case is premised on the fact that miners, and presumably their vehicles, were *not* entering the area to conduct required inspections. As this area of the mine was inactive and primarily accessed only for examination and inspection, it is unlikely that a battery-operated vehicle would access the area where the methane had reached explosive concentrations.

Even if the battery-operated vehicle reached the area with an explosive concentration of methane, the Secretary has not shown that the battery-operated vehicles were reasonably likely to ignite the methane.¹⁸ The Secretary did not offer any evidence that a permissive, battery-operated vehicle could ignite the methane if maintained in proper condition. Further, although Ramsey testified that the mine had received citations for impermissible vehicles in the past, the vehicle that was used to access the area on the day of the inspection was maintained in permissible condition. Tr. at 222, 235. The Commission has remanded an ALJ's S&S finding where, as in this case, the electric machinery alleged to be an ignition source was maintained in permissible condition and no evidence was proffered to show that the electric equipment was capable of getting hot enough during normal use to cause ignition. *Amax Coal Co.*, 18 FMSHRC 1355, 1358 (Aug. 1996).

According to MSHA's training material, explosive methane-air mixtures of 5-15% methane and at least 12% oxygen need either a very small spark (.3 millijoules) or temperatures exceeding 1165 degrees Fahrenheit to ignite. R. Ex. 4 at 23. The Secretary does not allege that the vehicles used to access the area were impermissibly creating sparks or excessive temperatures, but rather that over the service life of the vehicle, problems could arise that would cause such conditions. P. Br. at 31. The Commission, however, has found that "[a] finding that the passage of time increases the likelihood of an injury-producing event cannot, standing alone, satisfy the requirements of either the substantial evidence test or the third element of Mathies." *Amax Coal Co.*, 18 FMSHRC 1355, 1359 (Aug. 1996). Accordingly, I decline to find that the battery-operated vehicles were an ignition source.

Second, the Secretary argues that the area of high methane concentration is prone to roof falls, which can produce sparks capable of igniting methane. P. Br. at 31; Tr. at 216-17.

¹⁸ I discount the Secretary's argument that, assuming continued mining operations, the methane would have continue to build up until it reached active areas or areas where vehicles normally travel. Order No. 6668437 was issued for inadequate inspections, not for the presence of methane. Aside from Ramsey's testimony that the area outby was adequately ventilated and possibly capable of diluting the gas, it is undisputed that Respondent was regularly checking methane levels approximately 300 feet from the area of deepest penetration. Tr. at 214, 238. Had the concentration of methane continued to increase, it is reasonable to infer that the inspection, albeit inadequate, would serve its purpose and alert Respondent to the methane buildup.

Respondent points out that MSHA's training materials explicitly state that, while possible, such ignitions are *unlikely*. R. Br. at 32; R. Ex. 4 at 23. The training materials further state that even in carefully controlled experiments of roof fall frictional ignitions, the Bureau of Mines was only able to ignite methane-air mixtures in about 8% of the trials. R. Ex. 4 at 23. The study concludes that the most likely potential for ignition of methane is when the roof contains large amounts of quartz, which can release a piezoelectric discharge during a roof fall. *Id.*¹⁹

The roof at Willow Lake is made of shale, not quartz-rich sandstone. R. Ex. 4 at 24; Tr. at 233. Although no testimony regarding the exact quantity of quartz in the Willow Lake mine roof was presented at hearing, Ramsey conceded that roofs composed of shale are less likely to create sparking. Tr. at 233-234. The Commission has held that where the Secretary is unable to provide "any credible or probative evidentiary support for any conclusion that ready ignition sources capable of propagating an explosion of . . . methane . . . [are] present" a judge may reasonably conclude that a roof fall does not constitute an ignition source. *Island Creek Coal Co.*, 15 FMSHRC 339 (Mar. 1993) (upholding ALJ's decision that sandstone roof did not constitute an ignition source where the operator established that the roof above a methane concentration did not contain large amounts of quartzite); *see also Consol of Kentucky, Inc.*, 30 FMSHRC 1, 7 (Jan. 2008) (ALJ) (crediting the aforementioned MSHA training materials and finding that the ignition of methane by a roof fall or by lightning "was, at best, a theoretical possibility"); *Cumberland Coal Res., LP*, 27 FMSHRC 295, 319-20 (Mar. 2005) (ALJ) (where the inspector originally alleged roof falls as a possible ignition source, "virtually all of the witnesses, including [the inspector], testified, consistent with . . . MSHA training materials, that a roof fall is an 'unlikely' source of ignition").

While Ramsey testified that he had seen sparking in roof falls during retreat mining, he did not identify what had caused the sparks that he observed. Tr. at 217. Ramsey did, however, suggest that the mine where he had observed sparking may not have had a shale roof like the one at Willow Lake. Tr. at 233. As such, Ramsey did not establish a reasonable basis for his belief that the roof at the location of the methane concentrations could cause sparking. I further note that Ramsey was not admitted as an expert, has no formal scientific or engineering education, and admitted that his opinion was not informed by MSHA research or scientific testing. Tr. at 233; *cf.*, *Island Creek Coal Co.*, 13 FMSHRC 592, (Apr. 1991) (ALJ) (the Secretary and Respondent offered expert witnesses with backgrounds in mining engineering to testify about the possibility of roof falls igniting methane in an underground coal mine). Accordingly, I give Ramsey's testimony on this issue little weight.

Consistent with Commission precedent and the Bureau of Mines study endorsed by MSHA's training materials, I am not convinced that Ramsey's testimony is enough to support

¹⁹ I decline to give any significant weight to Ramsey's hypothesis that roof bolts in the shale roof might cause sparking. *See* Tr. at 233. I also do not give much weight to Clarida's testimony that the dampness of the area would prevent a roof fall from igniting the methane. *See* Tr. at 259. Neither argument was fleshed out fully at hearing, and MSHA's training materials did not mention roof bolts or the presence of dampness or water as important aggravating or mitigating factors.

the general proposition that all roof falls are reasonably likely to cause heat or sparking sufficient to ignite methane. Accordingly, I find that Order No. 6668437 is not S&S.

3. Unwarrantable Failure

a. Application of the Law

Having duly considered each unwarrantable failure factor below, I find that the Secretary established by a preponderance of the evidence that Respondent exhibited a “serious lack of reasonable care” by failing to conduct weekly examinations in the area of deepest penetration. The violation was obvious, extensive, and lengthy in duration. Respondent also had knowledge of the violation and undertook no reasonable effort to eliminate it.

i. The Extent of the Violative Conduct

The violation was extensive because there was a large distance between the location where Pate was conducting weekly inspections and the area of deepest penetration. The outby DTI board was progressively moved back, approximately 3 to 3 ½ crosscuts or 200 to 300 feet away, from the location where the examinations should have taken place. Tr. at 203-06, 213-14; P. Ex. 13.

The extensiveness factor is slightly mitigated by the relative ease by which the methane problem was corrected. After ventilation was restored to the face, the methane buildup was quickly dispersed. Clarida testified that after he re-hung the fallen curtain and several additional curtains, another test of the methane levels at the area of deepest penetration found a concentration of methane that ranged between .6% and .7%. Tr. at 257-58.

On balance, I find that the extensiveness factor weighs slightly in favor of an unwarrantable failure finding.

ii. The Duration of the Violative Conduct

The violation persisted for a lengthy period of time. The DTI boards indicated that the 2C1 area had not been examined at the proper location for more than five months. Tr. at 219, 253. Section 75.364(a)(1) requires worked-out areas to be examined weekly. Therefore, at least twenty examinations were performed at the wrong location. P. Br. at 33. Thus, the duration of the violation weighs strongly in favor of an unwarrantable failure.

iii. Whether Respondent Was Placed on Notice that Greater Efforts Were Necessary For Compliance with Section 75.364(a)(1)

Respondent was not given adequate notice that additional compliance efforts were necessary to comply with the standard. Although Ramsey had three meetings with Respondent’s management addressing inadequate examinations in the three days prior to the Order, these meetings addressed examinations generally. Tr. at 219-20, P. Ex. 11. While the Commission

has found that past violations may be evidence that an operation was placed on notice that greater efforts were necessary to achieve compliance, such repeated violations must be *similar* in nature. *IO Coal, supra*, 31 FMSHRC at 1353-55; *Amax Coal, supra*, 19 FMSHRC at 851; *see also Consolidation Coal, supra*, 23 FMSHRC at 595.

The past violations addressed during the meetings with MSHA did not address violations of section 75.364(a)(1). In fact, Respondent had only received one minor citation under this standard in the prior fifteen months for which a penalty of \$150 was proposed. *See* History of Violations for Big Ridge Inc., MSHA, MINE DATA RETRIEVAL SYSTEM, (search “MSHA Mine ID” for “1103054”; then select “VPID” radio button select “Get Report” button; then enter date “11/29/2007” and select “Get Info” button). Although past violations do not necessarily have to be of the same standard to put the operator on notice, the Secretary has not offered any evidence of the content of the meetings with mine management other than to broadly characterize the meetings as dealing with inadequate workplace examinations. P. Br. at 33. A meeting to discuss inadequate examination could cover anything from failing to conduct weekly checks on electrical equipment to a miner failing to conduct an on-shift examination of a feeder belt. Furthermore, there is no evidence that Pate was in any way involved in the workplace examinations addressed in the meetings.

Given the wide range of issues that could have been discussed, I cannot assume on the record before me that the meetings adequately put Respondent on notice that greater efforts were necessary for compliance with section 75.364(a)(1). Accordingly, I find this factor weighs against a finding of unwarrantable failure.

iv. Whether the Violation Posed a High Degree of Danger

As discussed in detail above in the S&S analysis, Respondent’s failure to test for methane at the area of deepest penetration did not pose a high degree of danger. While the methane and oxygen concentrations were at explosive levels, there was no identifiable ignition source which could reasonably be expected to ignite the gas. Accordingly, I conclude this factor weighs against an unwarrantable failure finding.

v. The Respondent’s Knowledge of the Existence of the Violation and Whether the Violation was Obvious

Respondent had knowledge of the violation and it was obvious. Pate, the only mine examiner tasked with conducting weekly examinations of the 2C1 worked-out area, was an agent of Respondent. Tr. at 259; 265. Therefore, Pate’s conduct and knowledge may be imputed to Respondent for unwarrantable failure purposes. *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (1991).

As noted above, the failure to perform the requisite examination at the appropriate location existed for over five months. The 2C1 worked-out area was examined at the incorrect location at least twenty times. Tr. at 259-60.

Furthermore, it was obvious that the examinations were not being conducted at the area of deepest penetration in accordance with the standard and the mine's ventilation plan. Instead, examinations were performed approximately 200 to 300 feet from the appropriate examination area. Tr. at 203-06, 213-14; P. Ex. 13. When asked how he could tell that the outby DTI board was not in the area of deepest penetration, Ramsey stated, "[w]ell, I could look up the entry and [could] see that it wasn't, for one thing, as far as my light would shine, and then it was at the water's edge that made me believe they were moving the board out as the water got deeper." Tr. at 220.

At hearing, Ward testified that Pate never told him that he conducted examinations in the wrong location. Tr. at 260. Even if true, as Respondent's agent, Pate's actions and knowledge regarding the existence of the violation are imputed to Respondent. *Rochester & Pittsburgh Coal Co., supra*, 13 FMSHRC at 194. Therefore, I conclude that Respondent had knowledge of an obvious violation and these factors support an unwarrantable failure finding.

vi. The Respondent's Efforts in Abating the Violation

Since Respondent was not placed on notice that greater efforts were needed to comply with workplace examination requirements, I find this factor to be neutral in the unwarrantable failure analysis.

vii. Conclusion Regarding Unwarrantable Failure Factors

In sum, after considering the relevant Commission factors, I conclude that the violation in Order No. 6668437 was the result of Respondent's unwarrantable failure to comply with section 75.364(a)(1). Aggravated inattention to an obvious, recurring problem was present. The record establishes that Respondent failed to conduct a weekly examination of the worked-out area at a proper location for over five months. The violation was extensive, obvious, and Respondent knew of its existence. Accordingly, I affirm the unwarrantable failure designation for Order No. 6668437.

4. Negligence

I find that Respondent's negligence was higher than alleged by the Secretary. Although the Secretary has designated the negligence as high, it is clear from the record before me that the operator's conduct was much more than ordinary negligence, exhibiting the absence of the slightest degree of care. Pate, clearly acting as an agent of the operator, failed to examine the 2C1 area at the area of deepest penetration for more than five months. Tr. at 219, 253. Ward testified that when he asked Pate why he had stopped conducting examinations at the correct location, Pate responded that he had done so to avoid having to drudge through the accumulated water and get wet. Tr. at 260. Thus, Pate deliberately substituted his desire to avoid a minor discomfort for the clear and unambiguous meaning of section 75.364(a)(1), a mandatory safety standard. While Pate may not have informed management of his decision to move the location of the mandated examination, the fact that Respondent maintained little or no supervision over its agents is apparent from the five months during which this violative conduct continued. *See id.* Accordingly, negligence is modified from "high" to "reckless disregard."

VIII. Civil Penalty

A. Relevant Legal Principles

Under section 110(i) of the Act, “the Commission shall have authority to assess all civil penalties provided in this Act.” 30 C.F.R. § 820(i). Although the Secretary issues citation and orders under the Act and proposes civil penalties, it is the Commission that is responsible for assessing civil penalties and providing other appropriate relief. *Sellersburg Stone Co.*, 5 FMSHRC 287, 290-91 (Mar. 1983), *aff’d*, 736 F.2d 1147 (7th Cir. 1984). The Commission’s assessment of penalties is a *de novo* determination based on the six statutory criteria specified in section 110(i) of the Act. Section 110(i) of the Act requires the Commission to assess civil monetary penalties considering: (1) the operator’s history of previous violations, (2) the size of the business, (3) the level of negligence by the operator, (4) the effect on the operator’s ability to continue in business, (5) the gravity of the violation, and (6) demonstrated good faith in attempting to achieve rapid compliance after notification of the violation. *See Douglas R. Rushford Trucking*, 22 FMSHRC 598 (May 2000)

In exercising this discretion, the Commission has reiterated that a judge is not bound by the penalty recommended by the Secretary. *Spartan Mining Co.*, 30 FMSHRC 699, 723 (Aug. 2008). In addition, the *de novo* assessment of civil penalties does not require “that equal weight must be assigned to each of the penalty assessment criteria.” *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997). However, when a penalty determination “substantially diverge[s] from those originally proposed, it behooves the . . . judge[] to provide a sufficient explanation of the bases underlying the penalties assessed. . . .” *Spartan Mining, supra*, 30 FMSHRC at 699. Otherwise, without an explanation for such a divergence, the “credibility of the administrative scheme providing for the increase or lowering of penalties after contest may be jeopardized by an appearance of arbitrariness.” *Sellersburg, supra*, 5 FMSHRC at 293.

The Secretary has proposed a penalty of \$40,180.00 for Citation No. 6679907, \$45,708.00 for Citation No. 6683969, \$44,600.00 for Citation No. 6667482, and \$60,000.00 for Order No. 6668437. With the exception of Citation No. 6683969, the Secretary has not provided the Court with documentation showing how each proposed penalty was calculated. Further, the Secretary did not provide the Narrative Findings for Special Assessment nor was any testimony adduced at hearing or arguments made in post-hearing briefs on the appropriateness of the specially assessed penalties.

Pursuant to Commission Rule 28(b)(2), the Secretary is required to include in the Petition for Assessment of Civil Penalty “a short and plain statement of supporting reasons based on the criteria for penalty assessment set forth in section 110(i) of the Act.” The Petitions that the Secretary files, however, are form documents that are essentially the same in every case. In lieu of filing a Petition with the prescribed explanations, the Secretary customarily attaches the information as Exhibit A to the Petition. For “normally assessed” proposed penalties, the Secretary will attach a copy of each citation/order and a printout showing how the proposed penalty was calculated in accordance with 30 C.F.R § 100.3. For “specially assessed” proposed penalties, the Secretary will also include the Narrative Findings for a Special Assessment, which set forth the reasoning for a special assessment.

After reviewing the proposed penalties against the undersigned's calculations under Part 100, it would appear that Citation Nos. 6679907 and 6683969 have been proposed under the normal assessment formula set forth in section 100.3, while Citation No. 6667482 and Order No. 6668437 appear to have been specially assessed. Although a specially assessed penalty may have been appropriate for Citation No. 6667482 and Order No. 6668437 given the danger allegedly posed by the hazards, the Secretary has failed to provide any evidence concerning the justification for the special assessments. In these circumstances, I decline to assess a penalty consistent with the special assessment formula. *See generally*, MSHA, Special Assessment Guidelines (2011), www.msha.gov/PROGRAMS/assess/SpecialAssess/SpecialAssessments2011.pdf.

B. Applying the Section 110(i) Criteria

The parties have stipulated that for the purposes of assessing a penalty, Respondent is a large operator and that as such, the penalties proposed by the Secretary will not affect Respondent's ability to remain in business. The parties have further stipulated that Respondent demonstrated good-faith in abating the violations after issuance of the Citations and Order.

Respondent's history of previous violations is based on the total number of violations and the number of repeat violations of the same provision of a standard that became final in the preceding fifteen-month period. 30 C.F.R § 100.3(c). Citation No. 6679907 was issued on September 19, 2008. In the fifteen months prior, 107 violations of section 75.400 became final, and Respondent had approximately 0.87 violations per inspection day. *See* Mine Safety & Health Admin., Data Retrieval System ("MSHA DRS"), <http://www.msha.gov/drs/drshome.htm> (Big Ridge Inc. ("1103054"), VPID (09/19/2008)). Citation No. 6683969 was issued on January 29, 2009. In the fifteen months prior, 153 violations of section 75.400 became final, and Respondent had approximately 1.05 violations per inspection day. *Id.* (Big Ridge Inc. ("1103054"), VPID (01/29/2009)). Citation No. 6667482 was issued on November 24, 2007. In the fifteen months prior, seventy violations of section 75.400 became final, and Respondent had approximately 0.97 violations per inspection day. *Id.* (Big Ridge Inc. ("1103054"), VPID (11/24/2007)). Order No. 6668437 was issued on November 29, 2007. In the fifteen months prior, only one violation of section 75.364(a)(1) became final, and Respondent had approximately 0.98 violations per inspection day. *Id.* (Big Ridge Inc. ("1103054"), VPID (11/29/2007)).

Given these facts and the negligence and gravity criteria discussed above, I assess civil penalties of \$9,634.00 for Citation No. 6679907, \$45,708.00 for Citation No. 6683969, \$3,143.00 for Citation No. 6667482, and \$8,893.00 for Order No. 6668437, thereby resulting in a total civil penalty of \$67,378.00. This penalty assessment is based on the statutory criteria of section 110(i) and the deterrent purposes of the Act. *Cf.*, *Black Beauty Coal Co.*, 34 FMSHRC 1856 (Aug. 2012).

IX. Order

For the reasons set forth above, Citation Nos. 6679907 and 6667482 are **MODIFIED** to reduce negligence from “high” to “moderate.” Order No. 6668437 is **MODIFIED** to reduce the likelihood of injury or illness from “reasonably likely” to “unlikely,” and to delete the significant and substantial designation. Order No. 6668437 is further **MODIFIED** to *increase* negligence from “high” to “reckless disregard.” Citation No. 6667482 is further **MODIFIED** to change the type of action from a section 104(d)(1) citation to a section 104(a) citation, thus removing the unwarrantable failure designation. Citation No. 6683969 is **AFFIRMED** as proposed. It is further **ORDERED** that the operator pay a total penalty of \$67,378.00 within thirty days of this Order.

/s/ Thomas P. McCarthy

Thomas P. McCarthy
Administrative Law Judge

Distribution:

Tyler P. McLeod, Esq., and Beau Ellis, Esq., U.S. Department of Labor, Office of the Solicitor,
1999 Broadway, Suite 800, Denver, CO 80202-5708

R. Hank Moore, Esq. and Arthur Wolfson, Esq., Jackson Kelly PLLC, Three Gateway Center,
Suite 1340, 401 Liberty Avenue, Pittsburgh, PA 15222-1000

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 24, 2013

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. VA 2013-291-M
Petitioner	:	A.C. No. 44-00068-316647 4IN
	:	
v.	:	Docket No. VA 2013-275-M
	:	A.C. No. 44-00068-316648 JOS
SUNBELT RENTALS, INC., LVR, INC.,	:	
and ROANOKE CEMENT CO., LLC.,	:	Docket No. VA 2013-276-M
Respondents	:	A.C. No. 44-00068-316646
	:	
	:	Mine: Roanoke Cement Company

DECISION ON CROSS-MOTIONS FOR SUMMARY DECISION
ORDER TO DISMISS

Appearances: Willow Eden Fort, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee for the Petitioner

Dinah L. Choi, Esq., Ogletree, Deakins, Nash,, Smoak, & Stewart, P.C., Washington, D.C., for the Respondent, Roanoke Cement Company, LLC

Zachary J. Cohen, Esq., Lesavoy Butz & Seitz LLC, Allentown, Pennsylvania, for the Respondent, LVR, Inc.

Matthew R. Korn, Esq., Fisher & Phillips LLP, Columbia, South Carolina, for the Respondent, Sunbelt Rentals, Inc.

Before: Judge McCarthy

I. Statement of the Case

These cases are before me upon petitions for assessment of civil penalties under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). They involve a nonfatal fall of material accident on January 8, 2013, which resulted in citations against the production operator (Roanoke Cement), prime contractor (LVR), and subcontractor (Sunbelt)

under 30 C.F.R. § 56.18002(a).¹ That standard provides that “[a] competent person designated by the operator shall examine each working place at least once each shift for conditions which may adversely affect safety and health.”

Before hearing, the Secretary filed a Motion for Partial Summary Decision and Memorandum of Law in Support (Sec’y Mot.). That motion “seeks findings that (1) the failure to perform a workplace examination ‘adequate’ to discover latent defects is violative of 30 C.F.R. § 56.18002(a), and that (2) a mine operator and its contractors have a duty to either perform an adequate workplace examination or ensure that one is performed.” Sec’y Mot. 2.

Respondents Roanoke Cement and LVR filed a Joint Opposition and Cross-Motion for Summary Decision and Supporting Memorandum of Law (Jt. Opp. and Cross-Mot.). They argue that a competent person designated by Respondent Sunbelt examined the working place and they had no duty to perform separate or additional examinations of the same working place or to ensure that an “adequate” examination was made. Jt. Opp. and Cross-Mot. 2.

Respondent Sunbelt also filed an Opposition and Cross-Motion for Summary Decision with Supporting Memorandum of Points and Authorities (R. Sunbelt’s Opp and Cross-Mot). Respondent Sunbelt argues that § 56.18002(a) does not contain an “adequacy” requirement; that even assuming an adequacy requirement, Sunbelt performed an adequate examination; and that MSHA failed to provide Sunbelt with fair notice of its regulatory interpretation. R. Sunbelt’s Opp and Cross-Mot. 2.

The Secretary filed a Response to Sunbelt’s Cross-Motion and Reply to Sunbelt’s Opposition (Sec’y Resp. 1). Sunbelt filed a Reply (R. Sunbelt’s Reply).

The Secretary filed an *untimely* Response to Roanoke and LVR’s Cross-Motion and Reply to their Opposition (Sec’y Resp. 2).² Even accepting the Secretary’s late filing, it does not raise a genuine issue of material fact supported by reference to accompanying affidavits or other verified documents as contemplated by Commission Rule 67.

II. Issues

The issues as framed by the citations and cross-motions for summary decision are (1) whether Respondents LVR and Sunbelt violated § 56.18002(a) by failing to perform an “adequate” workplace examination to discover a “latent” hazard, and (2) whether Respondent Roanoke Cement violated § 56.18002(a) by failing to perform an independent workplace

¹ The Secretary filed a Motion to Consolidate the three dockets. The motion was granted and a hearing was set for October 21, 2013 in Roanoke, Virginia.

² Pursuant to Commission Rule 10(d), the Secretary’s response to Respondents’ cross-motions was due on September 6, 2013, but was not filed until September 12, 2013.

examination on January 8, 2013. For the reasons that follow, the Secretary's motion for partial summary decision is **DENIED**, and Respondents' cross-motions for summary decision are **GRANTED**.

III. Findings of Fact³

1. Roanoke Cement operates a pre-heat tower comprised of six, vertically-connected conical vessels or cyclones, which process raw-mix limestone material heated to about 2000 degrees Fahrenheit. Jt. Opp. and Cross-Mot., Ex. A, Oedel Aff. at 2, paras. 4-5.

2. The cyclones are lined with heat-resistant refractory, which insulates and protects the cyclones from wear and corrosion. *Id.* at 5.

3. LVR performs annual pre-heat tower maintenance, including refractory work, pursuant to contract with Roanoke. *Id.* at 6; Sec'y Mot. 2, Ex. A, p. 3.

4. For several years, LVR has contracted with Sunbelt to erect scaffolding within the pre-heat tower so that LVR can perform its work. Sec'y Mot. 2, and Ex. A, p. 3 and Ex. B, Answer 1; Jt. Opp. and Cross-Mot., Ex. A, Oedel Aff. at 2, para. 6.

5. Sunbelt supervisor Kendrick Lavon Davis has personally supervised the annual scaffold erection projects at Roanoke over the past seven years. R. Sunbelt's Opp. and Cross-Mot. 4, and Davis Aff. at 2, para. 4.

6. About a week before Sunbelt began erecting scaffolding, Roanoke shut down the tower for cooling, inspection and cleaning, and used an air wand to clear loose or hanging material. Jt. Opp. and Cross-Mot., Ex. A, Oedel Aff. at 2-3, para. 8; R. Sunbelt's Opp. and Cross-Mot. at 3, Davis Aff. at 3, para 8.

7. On January 2, 2013, Roanoke and LVR walked the exterior staircase of the pre-heat tower and inspected each level by looking through 2' by 2' doors to inspect for damaged refractory and buildup of loose material. None was observed. Jt. Opp. and Cross-Mot., Ex. A, Oedel Aff. at 3, para. 10, and Ex. C, Synder Aff. at 2, para. 7; see also R. Sunbelt's Opp. and Cross-Mot. 3.

8. Roanoke provided site-specific hazard awareness training to LVR and Sunbelt employees before they arrived on site. Jt. Opp. and Cross-Mot., Ex. A, Oedel Aff. at 5, para. 10.

³ The following facts are uncontested as contemplated by Commission Rule 67 and raise no genuine issue of material fact.

9. On January 7, 2013, Sunbelt employees began scaffolding work inside the tower. *Id.* at 6, para. 13; Jt. Opp. and Cross-Mot., Ex. C, Synder Aff. at 2, para. 8.

10. On January 8, 2013, Sunbelt was erecting scaffolding at the sixth level within the pre-heat tower. Sec'y Mot., Ex. B, pp. 1-2.

11. At the start of the shift, Sunbelt supervisor Davis examined the area where the Sunbelt crew would be working and visually inspected the interior areas of the pre-heat tower above the sixth level. R. Sunbelt's Opp. and Cross-Mot. 4, and Davis Aff. at 3, para 8.

12. No physical objects or things were located between the sixth and seventh levels. Sec'y Mot., Ex. B at 2.

13. Davis did not climb the exterior staircase to the seventh level to peer through the small door because Sunbelt employees were not working on that level. R. Sunbelt's Opp. and Cross-Mot. 3-4, and Davis Aff. at 3, para 8.

14. Davis avers that the sixth level provided a better vantage point to examine interior areas above the sixth level because he could see the entire seventh floor, including the areas around the door. *Id.* at 3, para 9.

15. Davis further avers that the conditions that he observed on January 8, 2013 were the same as those observed in all the other pre-heat towers at Roanoke where Sunbelt had worked over the past seven years; that he had never seen more than dust or small particulates fall from the inside of the pre-heat tower; and that any material buildup on the walls was solid, and not loose or likely to fall. *Id.* at 3-4, paras. 10-11.

16. Davis and his crew had received all required MSHA training, including hazard recognition training associated with scaffold erection work. R. Sunbelt's Opp. and Cross-Mot. 3, and Davis Aff. at 2, para 5.

17. Davis was trained to observe potential hazards from falling objects during scaffold erection. *Id.*; see also R. Sunbelt's Opp. and Cross-Mot. 4, and Davis Aff. at 4, para. 12, and Pre-Shift Hazard Assessment Form at Attachment C.

18. Davis recorded his examination on a Pre-Shift Hazard Assessment form, which listed loose falling objects among potential hazards, and he reviewed potential hazards with his crew. R. Sunbelt's Opp. and Cross-Mot. 4, and Davis Aff. at 4, para. 12, and Pre-Shift Hazard Assessment Form at Attachment C.

19. During the January 8, 2013 shift, Sunbelt employee Brian Tyler was struck by unspecified falling material which fell from above him and knocked him unconscious. Sec'y Mot. 2, and Ex. A, pp. 1-2, and Ex. B, Answers 2, 3, 9, 17, and 21; see also R. Sunbelt's Opp. and Cross-Mot. 3 and 5.

20. Tyler was wearing all required personal protective equipment, including fall protection. R. Sunbelt's Opp. and Cross-Mot., Attachment D, MSHA Inspector Nichols' January 8, 2013 post-accident field notes at 3.

21. Inspector Nichols' notes indicate that when he examined the seventh level from a two-foot door outside the tower, he observed build-up of material that could have fallen through a six-foot hole located between the sixth and seventh level above where Tyler was working. R. Sunbelt's Opp. and Cross-Mot., Attachment D, pp. 5-6.

22. Nichols asked Davis whether he traveled to the door on the seventh level during his workplace examination on January 8, 2013. Davis told Nichols that he did not travel to the seventh level. Nichols never asked Davis whether Davis examined the seventh level from inside the pre-heat tower on the sixth level. R. Sunbelt's Opp. and Cross-Mot. at 4, Davis Aff. at 4, para. 15. The Secretary failed to provide any affidavit or other verified document from Nichols that he did so.

23. Nichols issued a citation to Roanoke based on his determination that Roanoke last performed a workplace examination on December 30, 2012 and did not check the area above the accident site before turning the area over to the contractor. Sec'y Mot., Ex. C, p. 1.

24. Nichols issued a citation against LVR because . . . Sunbelt Rentals did not do an adequate work place exam as they never inspected the area above where the employees were working where there was hanging material." Sec'y Mot., Ex. C, p. 3.

25. Nichols issued a citation against Sunbelt because Sunbelt ". . . did not do an adequate work place exam in the area they were working as there [was material] hanging overhead that had not been noted on the workplace exam . . ." Sec'y Mot., Ex. A, p. 4.

IV. Legal Principles and Analysis

Commission Rule 67 sets forth the guidelines for granting summary decision. 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).

A motion shall be accompanied by a memorandum of points and authorities and a statement of material facts specifying each material fact as to which the party contends there is no genuine issue, and supported by reference to accompanying affidavits or other verified documents. 29 C.F.R. § 2700.67(c).

An opposition shall include a memorandum of points and authorities and may be supported by affidavits or other verified documents. The opposition shall also include a separate concise statement of each genuine issue of material fact supported by reference to any

accompanying affidavits or other verified documents. Material facts identified as not in issue by the moving party shall be deemed admitted unless controverted by the statement in opposition. If a party does not respond in opposition, summary decision, if appropriate, shall be entered for the moving party. 29 C.F.R. § 2700.67(d).

Applying these rules, the Commission has long recognized that summary decision is an extraordinary procedure analogous to Rule 56 of the Federal Rules of Civil Procedure, under which “the Supreme Court has indicated that summary judgment is authorized only ‘upon proper showings of the lack of a genuine, triable issue of material fact.’” *Energy West Mining Co.*, 16 FMSHRC 1414, 1419 (July 1994) (quoting *Missouri Gravel Co.*, 3 FMSHRC 2470, 2471 (Nov. 1981) and *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986)); see also *Lakeview Rock Prods., Inc.*, 33 FMSHRC 2985, 2987-88 (Dec. 2011) (reiterating the Commission's summary decision rules). In reviewing a record on summary decision, a judge must evaluate the evidence in the light most favorable to the party opposing the motion. *Hanson Aggregates New York, Inc.*, 29 FMSHRC 4, 9 (Jan. 2007); see also *Poller v. Columbia Broadcasting Sys., Inc.*, 368 U.S. 464, 473 (1962); *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)).

In this case, the undisputed material facts set forth above establish that Respondents are entitled to summary decision as a matter of law.

Commission law holds that the requirements of 30 C.F.R. § 57.18002 are three-fold: (1) daily workplace examinations are required to identify workplace safety or health hazards; (2) the examinations must be made by a competent person; and (3) a record must be kept by the operator. *FMC Wyoming Corp.*, 11 FMSHRC 1622, 1628 (Sept. 1989); *Cemex, Inc.*, 32 FMSHRC 1897, 1903 (Dec. 2010) (ALJ); *TXI Port Costa Plant*, 22 FMSHRC 1301 (Nov. 2000)(ALJ); *Lopke Quarries, Inc.*, 22 FMSHRC 899, 911-12 (July 2000) (ALJ); *Dumbarton Quarry Assocs.*, 21 FMSHRC 1132, 1136 (Oct. 1999) (ALJ). Each of these three requirements were met here. On January 8, 2013, a working place⁴ examination was done by a competent person, Davis,⁵ and a record was kept by Sunbelt.

In his response to Sunbelt's cross-motion for summary decision, the Secretary argues that Sunbelt did not perform an “adequate” examination of the 7th level, but does not contend or

⁴ “Working place” is defined as “any place in or about a mine where work is being performed.” 30 C.F.R. §§ 56.2, 57.2. “As used in the standard, the phrase applies to those locations at a mine site where persons work during a shift in the mining or milling process.” 61 Fed. Reg. 42788 (Aug. 19, 1996); MSHA Program Policy Manual at § 56.18002; see also Procedure Instruction Letter (PIL) No. P11-IV-01, entitled “Reissue of P10-IV-3: Examination of working places (30 C.F.R. §§ 56/57.18002),” effective February 17, 2011 through March 31, 2013.

⁵ A competent person is defined as “a person having abilities and experience that fully qualify him to perform the duties to which he was assigned.” 30 C.F.R. §§ 56.2, 57.2.

establish by opposition that the 7th level was a “working place.” Sec’y Resp. I at 2. In his untimely response to Roanoke’s and LVR’s cross-motions for summary decision, the Secretary argues that whether Sunbelt performed a workplace examination sufficient to satisfy the requirements of the standard is a material fact in dispute. Both arguments presume that the standard contains an “adequate” workplace examination requirement. It does not.

The plain language of Section 56.18002(a) does not include an adequacy requirement. No adequacy requirement is contained in MSHA’s program policy guidance regarding the requirements of Section 56.18002.⁶ As noted, no adequacy requirement is present in Commission case law interpreting the three requirements of section 56.18002(a).

In his untimely opposition to Roanoke’s and LVR’s cross-motions for summary decision, the Secretary also argues that Roanoke and LVR did not designate Davis to perform the workplace examination, but the Secretary errs when citing Synder’s affidavit as the purported source for said designation. Sec’y Resp. II at 3. Roanoke and LVR rely on Attachment C to Sunbelt’s Response, which is the “Pre-Shift Hazard Assessment” form by which Roanoke project manager Odell designated Sunbelt supervisor Davis to perform the workplace examination consistent with past practice. By that designation, Davis acted as examination agent for Roanoke, LVR, and Sunbelt on January 8, 2013. I reject any contrary argument that Section 56.18002 imposes a duty on multiple operators to perform multiple examinations of the same working place when the examination has already been done by a competent person.

Although the Secretary does not concede that Davis met the necessary requirements to be designated as a competent person, he offers no material facts, supported by affidavit or verified documents to show otherwise, apart from the fact that Davis missed the “latent” hazard during his examination. That is not enough under Commission precedent. *Cf.*, *FMC Wyoming Corp.*, 11 FMSHRC 1622, 1629 (Sept. 1989) (examiner Hastings lacked ability and experience fully qualifying him to examine the work place around the turbine for adverse safety and health conditions because he had not seen company memorandum regarding the presence of asbestos in turbine insulation, he was unaware of the presence of asbestos-containing material in the turbine, and he had no training in asbestos recognition).

By contrast, Respondents have established by affidavit and other documents that Roanoke project manager Odell designated supervisor Davis as a competent person to examine the work place around the pre-heat tower prior to erection of the scaffolding. The record establishes that Davis received all required MSHA training, including hazard recognition training associated with scaffold erection work. Sunbelt Mot. 3, and Davis Aff. at 2, para 5. More specifically, Davis was trained to observe potential hazards from falling objects during

⁶ See MSHA’s Program Policy Manual, Vol. IV, Subpart Q, Safety Programs, 56/57.18002, Examination of Working Places (Feb. 2003); MSHA’s “Final Policy on Examination of Working Places,” 61 Fed. Reg. No. 161, 42787-88 (Aug. 19, 1996); MSHA’s Program Policy Letter No. P11-IV-01 (Feb. 17, 2011).

scaffold erection. *Id.*; *see also* Sunbelt Mot. 4, and Davis Aff. at 4, para. 12, and Sunbelt Attach. C. Davis recorded his examination on a Pre-Shift Hazard Assessment form, which listed loose falling objects among potential hazards, and Davis reviewed potential hazards with his crew. Sunbelt Mot. 4, and Davis Aff. at 4, para. 12, and Sunbelt Attach. C. In these circumstances, I find that Davis was a competent person having abilities and experience that fully qualified him to perform the workplace examination duties to which he was assigned.

It is unfortunate that Davis, although legally competent, *may have* performed his examination duties in a negligent fashion by failing to peer through the small door on the 7th level to check for a falling material hazard. Nevertheless, absent any legal authority to imply an adequacy requirement in the standard, there was no violation here for failure to find what the Secretary concedes to be a “latent” hazard. Sec’y Mot. 2.⁷

Finally, I conclude in the alternative, that the Respondents did not have fair notice of the Secretary’s interpretation that the cited regulation included an adequacy requirement. As noted, the plain language of the regulation does not include an adequacy requirement, no adequacy requirement is contained in MSHA’s program policy guidance, and no adequacy requirement is present in Commission case law interpreting section 56.18002(a). In these circumstances, a reasonably prudent miner would read the standard, as written, to require that a competent person, designated by the operator, examine each working place at least once per shift for conditions which may adversely affect safety and health. That was done here.

Concededly, an adequacy requirement is consistent with the overarching purpose of the Mine Act to protect the safety and health of miners. If the Secretary, on behalf of MSHA, now feels that an adequacy requirement should be imposed under section 56.18002(a), the Secretary may revise the standard consistent with the extensive use of the word “adequate” throughout Title 30, Parts 1-100, to give the regulated industry notice. *See* Sunbelt Mot. 15, and Sunbelt App. A; *cf.*, *Northshore Mining Co. v. Sec’y of Labor*, 709 F.3d 706, 711 (8th Cir. 2013)(emphasizing MSHA’s failure to revise its regulation or update its policy guidance to reflect adverse interpretation).

⁷ This does not mean that an examiner can turn a blind eye toward numerous, obvious or egregious hazards, which may equate to failure to perform the requisite examination.

V. Order

The Secretary's motion for partial summary decision is **DENIED**. Respondents' cross-motions for summary decision are **GRANTED**. This matter is **DISMISSED**.

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

Distribution:

Willow E. Fort, Esq., Office of the Solicitor, U.S. Dept. Of Labor, 618 Church Street, Ste. 230, Nashville, TN 37219

Dinah L. Choi, Esq., Ogletree, Deakins, Nash, Smoak & Stewart, P.C., 1909 K. Street, NW, Ste. 1000, Washington, DC 20006

Matthew R. Korn, Esq., Fisher & Phillips, LLP, 1320 Main Street, Ste. 750, Columbia, SC 29211

Zachary J. Cohen, Esq., Lesavoy, Butz & Seitz, LLC, 7535 Windsor Drive, Ste. 200, Allentown, PA 18195

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

721 19th STREET, SUITE 443
DENVER, CO 80202-2536
303-844-5267/FAX 303-844-5268

September 26, 2013

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2010-365-M
Petitioner,	:	A.C. No. 04-05632-203553
	:	
v.	:	
	:	
NORTH COUNTY SAND &	:	Mine: Roadrunner No. 32
GRAVEL, INC.,	:	
Respondent	:	

DECISION

Appearances: Pamela Mucklow, Esq., & Timothy J. Turner, Esq., on brief, Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner; C. Gregory Ruffennach, Esq., Washington, D.C., 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 North County Sand & Gravel, Inc. pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the “Act” or “Mine Act”). The parties introduced testimony and documentary evidence at a hearing held in San Bernardino, California. The parties filed post-hearing briefs and Respondent filed a post-hearing reply brief.

North County operated the Roadrunner No. 32 mine in San Bernardino County, California. Citation No. 7980681 was adjudicated at the hearing. The Secretary proposed a total penalty of \$5,961.00 for the citation. For the reasons set forth below, the likelihood of an injury alleged in the citation is modified from highly likely to reasonably likely, the gravity is modified from fatal to permanently disabling, and the negligence is modified from reckless disregard to high. In all other respects, the citation is affirmed.

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

On April 16, 2009, MSHA Inspector Steven Soderburg issued Citation No. 7980681 under Section 104(d)(1) of the Mine Act, alleging a violation of Section 56.15005 of the Secretary’s safety standards. The citation states that the mine president and owner, Mike LaPaglia, did not wear fall protection when he was standing on top of the motor cover of a Roadrunner 450 portable track cone crusher. (Ex. G-9). The top of the motor cover was 58 inches above a travelway on the crusher, and 11 feet above the hard-packed ground. *Id.* Inspector Soderburg determined that an injury was highly likely to occur and that such an injury could reasonably be expected to be fatal. Further, he determined that the violation was

S&S,¹ the operator acted with reckless disregard, and one person was affected by the violation. Section 56.15005 of the Secretary's regulations requires, in pertinent part, that "[s]afety belts and lines shall be worn when persons work where there is danger of falling. . . ." 30 U.S.C. § 56.15005.

The Secretary originally proposed a penalty of \$35,500.00 for this citation under MSHA's special assessment regulation. *See* 30 C.F.R. § 100.5. Subsequent to that assessment and prior to the filing of post-hearing briefs, the Secretary amended the proposed penalty to \$5,961.00 in response to North County's motion to strike the specially assessed penalty. On July 30, 2013, I issued an order regarding Respondent's Motion to Strike and the Secretary's Motion to Amend the Penalty Proposal, which is incorporated herein by reference. *North County Sand & Gravel, Inc.*, 35 FMSHRC ____, 2013 WL 4648488 (July 30, 2013).

A. Summary of Evidence

Inspector Soderburg testified that as he drove his vehicle onto mine property he observed the president and owner of North County, Michael LaPaglia, standing on top of the engine cover of a portable cone crusher. (Tr. 27). The machine was running and vibrating, no handrails were installed, and LaPaglia was not wearing any fall protection. (Tr. 120-21). Upon seeing LaPaglia atop the machine, the inspector parked his van approximately 50 yards from the crusher, walked toward it about 25 yards, took a picture, and then walked about 15 yards closer to it. (Tr. 28; Ex. G-1). About 10 yards from the site, he took another picture. (Tr. 28; Ex. G-2). Inspector Soderburg stated that he did not yell at LaPaglia to step down because he was concerned that doing so would startle LaPaglia and that the noise of the machine would have prevented LaPaglia from hearing him. (Tr. 28).

Inspector Soderburg noted that LaPaglia appeared to use a remote control device to operate the machine while he was standing upon it. (Tr. 32). He did not know how long LaPaglia had been atop the crusher. *Id.* When the inspector was about 10 yards from the machine, after he took the second picture, he motioned for LaPaglia to get down from the machine. (Tr. 32-33). LaPaglia then immediately came down from the machine and turned it off. (Tr. 32-33, 50, 104). In order to get down from the machine, Inspector Soderburg testified that LaPaglia turned around, took a step back, stepped down onto a cover about two feet below,

¹ An S&S violation is a violation "of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard." 30 U.S.C. § 814(d) (2006). A violation is properly designated S&S, "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In order to establish the S&S nature of a violation, the Secretary must prove: "(1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard – that is, a measure of danger to safety – contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury will be of a reasonably serious nature." *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984); *accord Buck Creek Coal Co., Inc.*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power Co., Inc.*, 861 F. 2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria).

stepped down to a control panel platform, walked to the back of the machine, and climbed down a ladder attached to the machine. (Tr. 35). Inspector Soderburg presumed that LaPaglia got on top of the machine in the same way. (Tr. 35-36). He stated that the machine had a platform provided on the other side from which one could safely observe the size of the rock coming off of the return belt, without the need for a person to be where LaPaglia stood. (Tr. 43-44, 47).

Inspector Soderburg designated the citation as S&S. (Ex. G-9). He determined that an injury was highly likely to occur had he not instructed LaPaglia to come down from the top of the machine. (Tr. 58-59). He observed that the machine was running and vibrating, that LaPaglia was not wearing fall protection, that there were no handrails installed in the area of the machine upon which LaPaglia was standing, and that LaPaglia was 11 feet above the ground. (Tr. 59). In addition, LaPaglia was standing near the edge of the engine cover and it was windy that day. (Tr. 60). Had LaPaglia fallen from the engine cover, he could have fallen into the crusher, down in between the crusher and the front of the engine cover where there are moving machine parts, or 11 feet down to the ground below. (Tr. 54-55). Any of these falls could have resulted in fatal injuries. (Tr. 54-56).

The inspector designated the citation as an unwarrantable failure to comply with a mandatory safety standard.² (Tr. 62; Ex. G-9). He reached this conclusion because LaPaglia is the president and owner of the mine and is a competent trainer who instructs other miners in the use of fall protection. The inspector believed that it was obvious that a fall hazard was present, the condition posed a high degree of danger, and LaPaglia did nothing to abate the condition because he was the person who created it. (Tr. 63-64, 109-10). Inspector Soderburg also determined that the violation was the result of the operator's reckless disregard. (Tr. 64). He noted that LaPaglia is an experienced miner who was on top of the engine cover without fall protection in front of other miners. *Id.*

² The Commission has defined an unwarrantable failure as aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec. 1987). Unwarrantable failure is defined by such conduct as "reckless disregard," "intentional misconduct," "indifference" or a "serious lack of reasonable care." *Emery Mining Corp.*, 9 FMSHRC at 2003; *see also Buck Creek Coal, Inc.*, 52 F.3d at 136. Whether conduct is "aggravated" in the context of an unwarrantable failure analysis is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist, such as the length of time that the violation has existed, the extent of the violative condition, whether the operator was placed on notice that greater efforts are necessary for compliance, the operator's efforts in abating the violative condition, whether the violation is obvious or poses a high degree of danger, and the operator's knowledge of the existence of the violation. *See e.g. Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000). Repeated similar violations are relevant to an unwarrantable failure determination to the extent that they serve to put an operator on notice that greater efforts are necessary for compliance with a standard. *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992).

LaPaglia testified that he was atop the crusher in order to observe its functionality before deciding whether to purchase it.³ (Tr. 157, 174). The surface upon which he was standing was level, dry, free of loose materials, and had suitable traction. (Tr. 170). He testified that he has good balance and health and that he was not engaged in any lifting, bending, or other physical work while atop the machine. (Tr. 171-72). He only intended to be upon the machine for a short duration of time. (Tr. 174, 176). LaPaglia noted that the machine has since been outfitted with handrails around the area where he was standing when the citation was issued and that traction tape was added to the engine cover. (Tr. 158-59, 164; Exs. R-8, R-9).

LaPaglia testified that there are occasions when mine employees must work at heights, and the company had safety lines and belts available for use, including on the date of the inspection. (Tr. 148-49). In addition, the company trains its miners regarding its tie-off policy. (Tr. 149-50). However, there were no tie-off anchors or cables installed on the machine and he did not feel that fall protection was necessary. (Tr. 173-74).

B. Discussion and Analysis

The Secretary argues that section 56.15005 required LaPaglia to use fall protection at the location where he was standing because there was an inherent danger of falling. (Tr. 27, 120-21). Because LaPaglia was standing near the edge of the engine cover surface, the machine was running and vibrating, the surface was metal and slick, and there were no handrails, the Secretary contends that it was highly likely that a fall would result from the violation. (Tr. 58-60; Sec'y Br. 13, 15).

Respondent argues that no fall protection was required upon the machine and that the likelihood of LaPaglia falling was low. (Tr. 170-76; Resp. Br. 8-9). The condition of the machine – flat, dry, immobile, and free of loose materials – as well as LaPaglia's relatively still posture and good balance, suggest that there was no danger of falling at the cited location. (Tr. 170-72; Resp. Br. 10, 17). In addition, LaPaglia was only intended to be on the machine briefly. (Tr. 174, 176; Resp. Br. 9-10). Respondent argues that the duration of exposure to a fall hazard is relevant to determining whether a violation occurred and that the short duration here mitigates any violation of section 56.15005. (Resp. Br. 13-16).

I find that the Secretary established a violation of section 56.15005. LaPaglia was upon an elevated surface that lacked handrails or other restraints. I credit LaPaglia's testimony that he only intended to be upon the engine cover for a short duration of time, that the surface was flat, that his balance was stable, and that if he fell, it would likely be to an intermediate point between the engine cover and the ground. However, those arguments speak to the gravity of the

³ At the hearing, North County introduced evidence to show that it did not own the cone crusher and the Secretary introduced evidence to show that title had passed to North County before the citation was issued. I conclude that the question of ownership is irrelevant to the resolution of the issues in this case. Assuming North County did not own the crusher and could not therefore install handrails around the engine cover or anchors for attaching a lanyard, LaPaglia should have observed the operation of the crusher from a location that did not place him in danger of falling.

violation, discussed below, but do not absolve North County of liability for violating section 56.15005. The safety standard requires safety belts and lines “where there is a danger of falling” and I find that the Secretary established that such a danger existed. An informed, reasonably prudent person would have recognized that the danger of falling warranted the use of safety belts at that location given the lack of handrails. Indeed, a reasonably prudent person would not have stood at that location while operating the crusher due to the lack of handrails or any means to attach safety lines.

I also find that the Secretary established that the violation was S&S. The Secretary established the fact of violation and that inadequate fall protection creates a discrete safety hazard. The Secretary also proved that the cited conditions were at least reasonably likely to contribute to an injury. The parties agree that LaPaglia stood atop the engine cover without fall protection and the crusher did not have handrails where LaPaglia was standing. They also agree that the machine was running when Inspector Soderburg first saw LaPaglia. Respondent argues, and the Secretary does not dispute, that LaPaglia was operating a remote control while atop the crusher and was not performing physical labor or otherwise moving around. However, the parties presented conflicting evidence with respect to some of the facts. The Secretary argues that the machine was shaking, but LaPaglia testified that no rock crushing took place and the machine was relatively stable; the Secretary believes that wind gusts and silica dust made LaPaglia less stable on his feet, while Respondent denies that any such factors were present or relevant.

Respondent argues that if LaPaglia lost his balance, he would not have fallen to the ground but to an intermediate surface between the engine cover and the ground. (Resp. Br. 12; Resp. Reply Brief 3). Further, Respondent maintains that even if one were to fall into the crusher itself, there would not be a serious injury as the miner could escape without coming into contact with moving machine parts. (Tr. 207-08, Resp. Br. 18-19).

I find that it is reasonably likely that LaPaglia’s position atop the crusher would have contributed to a serious injury. Although he was only planning to be on the crusher for a brief period of time, his presence there contributed to the likelihood of injury. The Secretary, in his post-hearing brief, noted that “[e]ven a skilled employee may suffer a lapse of attentiveness, either from fatigue or environmental distractions, which could result in a fall.” (Sec’y Br. 11-12, citing *Cold Spring Granite Co.*, 26 FMSHRC 119, 123 (Feb. 2004), quoting *Great Western Electric Co.*, 5 FMSHRC 840, 842 (May 1983)). I credit LaPaglia’s testimony that LaPaglia was not engaged in any manual labor but I find that the violation was reasonably likely, although not highly likely, to contribute to an injury. I credit the testimony of Inspector Soderburg that LaPaglia was standing near the edge of the engine cover, the crusher was vibrating, and it was a relatively windy day.

I find that the most likely injury that would result from a fall was either a permanently disabling injury or an injury that would result in lost workdays or restricted duty. A fatal injury was certainly possible, but not as likely as a lesser injury. The likelihood of an injury and the

type of injury often depend upon the length of a potential fall.⁴ The Secretary argues that the surface on which LaPaglia stood was 11 feet from ground level and that a fall to the ground was most likely. I conclude that the evidence establishes that LaPaglia would likely have fallen to an intermediate surface a few feet below where he stood. Although fatal injuries are possible from such a height, less severe injuries are more likely. Additionally, the Secretary argues that if LaPaglia had fallen into the cone crusher, he would have received fatal injuries. Based upon the evidence presented at hearing, I find that it was unlikely that he would have fallen into the crusher. Accordingly, permanently disabling injuries or injuries resulting in lost work days or restricted duty would reasonably result from a fall from the top of the engine cover. Broken bones, sprains, or other more serious injuries were more likely than a fatal injury.

The Secretary argues that because LaPaglia was the president of North County and a certified trainer at the mine and he violated the standard in plain view of other miners, the violation was the result of reckless disregard and was an unwarrantable failure to comply with a mandatory safety standard. (Tr. 62-64, 109-10; Sec'y Br. 16-18). The Secretary believes that LaPaglia was aware of the requirements of the standard, but purposely chose to ignore them. (Sec'y Br. 17-18). North County argues that LaPaglia's conduct was neither negligent nor the result of an unwarrantable failure. It does not believe that a reasonably prudent person would have recognized a danger of falling. (Resp. Br. 10, 19-20). In addition, Respondent has fall protection available to its miners when it deems its use appropriate, the alleged violation was not extensive, the duration of exposure was brief, the mine had not been cited for this standard before, and even if there was a violation, LaPaglia was not aware of it. (Tr. 21-23). Respondent contends that all these factors together suggest that MSHA's designations of reckless disregard and unwarrantable failure are excessive.

I find that the Secretary did not establish that the violation was the result of North County's reckless disregard, but that it was an unwarrantable failure to comply with the safety standard. The determination of whether conduct is "aggravated" in the context of unwarrantable failure is made by considering all the facts and circumstances of a case. The violative condition existed for a short time, as LaPaglia testified that he was only going to be atop the crusher for several minutes and the Secretary did not introduce any evidence to the contrary. The unwarrantable failure analysis also looks at the extent of the violative condition. LaPaglia was the president and owner of the mine and is the primary person to whom other miners look for guidance and direction. While there is nothing to suggest that this violation was a regular occurrence, LaPaglia's status as a supervisor supports a finding of an unwarrantable failure determination. Because supervisors are held to a high standard of care, a supervisor's involvement in a violation is an important factor in an unwarrantable failure determination. The mine had not received any citations for a similar violation in the preceding 15 months and the operator was not put on notice that greater efforts were necessary for it to comply with the fall

⁴ See e.g. *Great Western Electric Co.*, 5 FMSHRC at 843 (a miner's "position twelve feet above the ground presented a substantial height from which to fall"); *Molton Co., LP*, 31 FMSHRC 427 (Mar. 2009) (ALJ) (finding an S&S violation where a miner was working without fall protection seven feet from the surface below); *Laramie Cnty. Road & Bridge*, 17 FMSHRC 902, 905-06 (June 1995) (ALJ) (finding an S&S violation where a miner was working without fall protection eight to twelve feet from the surface below).

protection standard. I find that the preponderance of the evidence establishes that when LaPaglia operated the cone crusher from atop the engine cover he demonstrated aggravated conduct that was greater than ordinary negligence. His actions were the result of a serious lack of reasonable care but were thoughtless rather than reckless. As the president and owner of North County, LaPaglia should have known better than to put himself in such a precarious position.

Whether LaPaglia realized that he violated the safety standard at the time, it is evident that he was on top of a raised surface without fall protection or handrails. The Secretary argues that LaPaglia knew about the violation and simply did not care. However, there is no evidence to support that position and I find it more likely that LaPaglia violated section 56.15005 without realizing it at the time. The inspector's unwarrantable failure determination is affirmed but I reduce the negligence attributable to the operator from "reckless disregard" to "high."

II. APPROPRIATE CIVIL PENALTY

Section 110(i) of the Mine Act sets forth the criteria to be considered in determining an appropriate civil penalty. North County's history of previous violations is set forth in Exhibit G-19. During the period between January 16, 2008 and April 15, 2009, North County had a history of three paid violations, none of which were designated S&S, and none of which alleged a violation of section 56.15005. Respondent was a small operator with only a few employees at the Roadrunner No. 32 Mine at the time of the violation. North County owns several other small sand and gravel operations in the area that employ a total of about 20 employees. (Resp. Br. 25). The instant violation was abated in good faith. There was no proof that the penalty assessed in this decision will have an adverse effect upon Respondent's ability to continue in business. The gravity and negligence findings are set forth above. Based upon the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), I assess a penalty of \$3,500.00 for this violation. I make special note of the operator's small size and history of previous violations.

III. ORDER

For the reasons set forth above, Citation No. 7980681 is **AFFIRMED** as a significant and substantial violation of section 56.15005 that was the result of North County's unwarrantable failure to comply with the safety standard. I have reduced the negligence and gravity of the violation as discussed above. North County Sand & Gravel, Inc. is **ORDERED TO PAY** the Secretary of Labor the sum of \$3,500.00 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.

Distribution:

Timothy J. Turner, Office of the Solicitor, U.S. Department of Labor, 1999 Broadway, Suite 800,
Denver, Colorado 80202 (Certified Mail)

C. Gregory Ruffennach, Esq., 1629 K Street, N.W., Suite 300, Washington, D.C. 20036
(Certified Mail)

ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 6, 2013

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2013-538-M
Petitioner,	:	A.C. No. 41-02670-323136
	:	
v.	:	
	:	
NEW NGC INCORPORATED,	:	Mine: Posey Pit
Respondent	:	

ORDER

Before: Judge Rae

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) (2000) ("the Mine Act" or "the Act").

On August 29, 2013, the Secretary filed a motion to amend Citation No. 8764751 to plead, in the alternative, that New NGC Incorporated (Respondent) violated 30 C.F.R. § 56.4104(b) in addition to the allegation in the citation that Respondent violated section 56.4104(a).¹ On September 5, 2013, Respondent filed a response in opposition to the Secretary's motion. For the reasons set forth below, the Secretary's motion is granted.

The Procedural Rules provide that the Commission's judges shall be guided by the Federal Rules of Civil Procedure "[o]n any procedural question not regulated by Act, these Procedural Rules, or the Administrative Procedure Act." 29 C.F.R. § 2700.1(b). Rule 15(a) of the Federal Rules of Civil Procedure provides that leave to amend a complaint shall be "freely given when justice so requires." Fed. R. Civ. P. 15(a); *Foman v. Davis*, 371 U.S. 178, 182 (1962). The Commission has taken a liberal view when it comes to amending complaints, "especially when... they do not prejudice a party in preparing its defenses." *Brannon v. Panther Mining, LLC*, 31 FMSHRC 1277, 1279 (2009) (ALJ); see also *Cyprus Empire Corp.*, 12 FMSHRC 911, 916 (1990); *El Paso Rock Quarries, Inc.*, 3 FMSHRC 35, 38 (January 1981); *Bak*

¹ The standard cited states waste materials shall not accumulate in quantities that create a fire hazard. 30 C.F.R. § 56.4104(a). The standard that the Secretary seeks to plead in the alternative requires such materials be placed in covered metal or other non-flammable containers prior to disposal. 30 C.F.R. § 56.4104(b).

Construction, 2006 WL 2927263 at *6 (ALJ). Among the permissible purposes of such amendments are changes in the nature of the plaintiff's claims or legal theories. E.g., Moore's, supra, Par. 15.08[3]. Delay alone, regardless of length, does not bar a proposed amendment if the other party is not prejudiced. Moore's, Par. 15.08[4]. The Commission has further stated that, in accordance with F.R.C.P. 15(b), even the conformance of pleadings to the evidence adduced at trial may be permissible. *Faith Coal Co.*, 19 FMSHRC 1357, 1361-62 (1997). Provided adequate notice is given and there is no prejudice to the opposing party, administrative pleadings are to be liberally construed and easily amended. *CDK Contracting Company*, 23 FMSHRC 783, 784 (2001) (ALJ); *Bak*, 2006 WL 2927263 *1, * 6 (Sept. 11, 2006) (ALJ). The grant or denial of a motion for leave to amend is within the sound discretion of the court and will be reversed only for an abuse of discretion. *Jim Walter Resources*, No. SE 2010-351, 2013 WL 3865345 *4 (June 12, 2013) (ALJ), citing *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330 (1971); *Foman*, 371 U.S. at 182.

The Secretary moves to amend the citation to add an allegation that Respondent violated section 56.4104(b) on the grounds that justice so requires it. He contends that Respondent will suffer no prejudice because formal discovery has not begun at this time, and the Secretary will rely mainly on facts stated in the body of the Citation and described in the Inspector's notes.

Respondent argues that the motion should be denied on three grounds. First, Respondent contends that the Secretary should not be allowed to allege the violation of multiple standards in a single citation. The issuing inspector was afforded the opportunity to inspect the site and, at the conclusion of the inspection, failed to identify any alleged violations of 30 C.F.R. §56.4101(b). Respondent asserts that the two standards impose distinct requirements on an operator and that the Secretary should not be permitted to argue the Respondent violated both standards. The inspector has been trained by MSHA to competently review the alleged hazards and determine the correct standard for issue, and failed to issue a citation for an alleged hazard under 30 C.F.R. §56.4104(b). Second, Respondent contends that it would be prejudiced if the motion is granted, as the Secretary requests the amendment as a change in litigation position after the parties have commenced litigation and negotiations. Citation No. 8764751 was issued five months ago on April 2, 2013. Respondent argues that the Secretary has had ample opportunity to correct an error by the inspector, with no action. Respondent claims that it invested miner and financial assets to abate a citation under 30 C.F.R. § 56.4101(a), and that granting the Secretary's motion could impose new and additional abatement requirements under 30 C.F.R. § 56.4104(b). Finally, Respondent argues that it was not provided fair notice that an alleged violation existed under 30 C.F.R. §56.4104(b) at the time of inspection. MSHA's failure to cite a condition during an inspection should not be permitted because the Secretary's representative did not view the alleged hazard and cannot verify that a hazard existed at the time of issuance.

I do not find Respondent's argument persuasive that the Secretary lacks authority to allege multiple violations in a citation. It is well settled that administrative pleadings are liberally construed and easily amended, as long as adequate notice is provided and there is no prejudice to the opposing party. Likewise, I am not persuaded by Respondent's argument that it was not provided fair notice because the inspector did not view the alleged hazard. Whether the inspector can verify the hazard goes to credibility, which is an issue for me to decide at hearing.

The only issue for the purposes of this Order is whether Respondent is prejudiced by the Secretary's amendment. *See CDK*, 23 FMSHRC at 783.

The Commission has stated "[m]ere allegations of potential prejudice or inherent prejudice should be rejected," and a Respondent must demonstrate more than a danger of prejudice to show actual prejudice. *Long Branch Energy*, 34 FMSHRC 1984, 1993 (2012); *PBS Coals*, 2013 WL 3152306 at *16 (May 2013). The Commission has given examples of actual prejudice, which include the inability of witnesses to appear at hearing or "lateness so great as to unduly delay a hearing." *Long Branch*, 34 FMSHRC at 1992. The majority of other examples of prejudice arise when motions are filed during or after hearing has occurred. *Cumberland Coal Resources*, 32 FMSHRC 442, 446-49 (May 2010) (denying Secretary's motion to amend her pleadings at oral argument); *Jim Walter Resources*, No. SE 2010-351, 2013 WL 3865345 *4 (June 12, 2013) (ALJ) (denying Secretary's motion to amend citation to align it with inspector's revised assessment of citation at hearing); *Consolidation Coal*, 33 FMSHRC 2632, 2633 (Oct. 2011) (ALJ) (denying Secretary's motion to amend as untimely when filed almost three months after hearing and days before briefs were due); *cf. Boart Longyear Co.*, No. WEST 2012-248-RM, 2013 WL 3947971 *2 (ALJ) (denying motion prior to hearing where the two safety standards at issue were not "virtually identical" and the evidence presented regarding both would not be "equally applicable."). Accordingly, the Commission and its Judges have generally been more willing to grant motions to amend prior to a hearing.²

Respondent's arguments that it would suffer prejudice are unpersuasive given the procedural posture of this case. It is not in litigation. It has not yet been scheduled for hearing and only informal exchanges of information have been made in an attempt to settle it and two other dockets pursuant to my pre-hearing order. While it is true the company may feel compelled to amend its answer and conduct additional discovery, the expenses "inherent in such activities are the necessary consequences of litigation, costs the company (and any litigant) must be prepared to bear." *Brannon*, 31 FMSHRC at 1279. The fact that the citation was written 5 months ago is not persuasive. This is a relatively new case, and most cases that come up for

² This interpretation is consistent with the language of Rule 15 of the Federal Rules of Civil Procedure. Fed. R. Civ. P. 15. Rule 15(a) allows amendments before trial to a party as a matter of course within "21 days" after serving its pleading or "if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier." In all other cases, a party may amend its pleading with the opposing party's written consent or the court's leave and the court should "freely give leave when justice so requires." For amendments made during and after trial, however, the rules are somewhat stricter. In such cases, the rule permit an amendment only when it aids in presenting the merits and the objecting party fails to satisfy the court that the evidence would prejudice that party's action or defense on the merits.

hearing are significantly older. Furthermore, there is no indication that MSHA is going to require Respondent to perform any other action to abate this citation so there is no additional expense involved in this instant case. Any suggestion otherwise at this point is pure speculation. Furthermore, there has been no evidence of bad faith or dilatory motive on the part of the Secretary. Accordingly, Respondent's arguments fail and I find that it will not be prejudiced by the addition of the allegation of the violation of 30 C.F.R. § 56.4104(b).

WHEREFORE, the Secretary's Motion to Amend is **GRANTED**.

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

Distribution:

William D. O'Dell, Conference Litigation Representative, South Central District, Metal/Non-Metal, U.S. Department of Labor/Mine Safety & Health Administration, 1100 Commerce Street, Room 462, Dallas, TX 75242

Nicholas W. Scala, Esq., Law Office of Adele L. Abrams, P.C., 4740 Corridor Place, Suite D, Beltsville, MD 20705

Justin M. Winter, Esq., Associate Attorney, Law Office of Adele L. Abrams P.C., 4740 Corridor Place, Suite D, Beltsville, MD 20705

/mjc

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 Pennsylvania Avenue, N.W. Suite 520 N

WASHINGTON, D.C. 20004-1710

Telephone No.: 202-434-9933

Telecopier No.: 202-434-9949

September 16, 2013

SECRETARY OF LABOR, MSHA, on	:	DISCRIMINATION PROCEEDING
behalf of HAROLD W. PYEATT,	:	
Complainant	:	Docket No. CENT 2012-219-DM
	:	SC-MD 11-19
v.	:	
	:	
	:	
LINDSEY CONTRACTORS, INC.	:	Naruna Quarry
AND ITS SUCCESSORS,	:	Mine ID 41-04468
Respondent	:	

ORDER DENYING REQUEST FOR SUBPOENA

Before the Court is Respondent's, Lindsey Contractors, Inc., request for issuance of a subpoena. Respondent's request is for a subpoena duces tecum directed to APAC-Texas, Inc., ("APAC") commanding that it produce certain documents. Respondent asserts that Complainant, subsequent to his termination by the Lindsey, obtained a similar position at APAC and that he was later terminated from APAC for reasons similar to his termination at Lindsey. Respondent maintains that "Complainant's job performance as a quarry manager in his immediate, post-Lindsey employment is directly relevant to Lindsey's claims and/or defenses in this matter that Complainant showed signs of poor job performance as a quarry manager." Request for Issuance of Subpoena, ("Request") at 3.

Respondent's Request also seeks "written and/or oral discovery on all Complainant's (post-Lindsey) employers from July 18, 2011 through the present" so that it may "determine what, if any, 'differential back pay and employment benefits' would be due Complainant if the Secretary (sic) were to find in his favor."¹ *Id.*

¹ If the Complainant prevails, it is *not* the Secretary, but rather the Court, in its role as an administrative law judge with the Federal Mine Safety and Health Review Commission hearing this matter, that makes the determination as to whether a discrimination complaint is upheld.

29 C.F.R. Part 2700, setting forth the Commission's procedural rules, provides at Section 2700.60(c) that "[t]he Commission or the Judge, as appropriate, shall revoke or modify the subpoena if it seeks information outside the proper scope of discovery as set forth in §2700.56(b) . . . or if for any other reason it is found to be invalid or unreasonable." *Dye v. Mineral Recovery Specialists*, 25 FMSHRC 170, (March 2003) (ALJ), *Secretary of Labor v. Martin Marietta Aggregates*, 20 FMSHRC 1239 (Oct. 1998) (ALJ).

Respondent's request is denied in both aspects. For the first ground, seeking information about the Complainant's post-Lindsey employment, the request is denied because it is immaterial to this proceeding. Complainant's post-employment experiences do not bear upon the issues regarding his employment interactions with Lindsey. That is, whatever those experiences may have been, they are not probative on the merits of Mr. Pyeatt's discrimination action here. This should be obvious but the point may be highlighted by noting that if the Complainant had an outstanding experience with some post-Lindsey employer, that would be equally immaterial to the present action and certainly could not be used by the Secretary to show that Lindsey must have discriminated against Mr. Pyeatt.²

As to the second aspect of the Request, in which the Respondent seeks "determine what, if any, 'differential back pay and employment benefits' would be due" should the Complainant prevail, this request is premature. The usual order is for a determination to first be made as to whether the Complainant's discrimination claim is upheld. Should that occur, the Court typically directs that the parties communicate and endeavor to reach an agreement as to damages and to then report back to the Court as to whether those terms could be amicably agreed-upon. It is only when those efforts are not fruitful, that the Court must become involved and consider appropriate discovery requests. *See, Dolan v. F & E Erection Co.*, 20 FMSHRC 847, (Aug. 1998) (ALJ).

For the reasons set forth above, Respondent's subpoena request is DENIED.

SO ORDERED.

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

² It is probably worth noting that the Court makes no finding or inference whatsoever regarding Mr. Pyeatt's post-Lindsey employment experiences, as there has only been an assertion by the Respondent regarding those experiences and because in any event, as noted above, they are not material.

Distribution:

Mia Franklin Terrell, Esq., U.S. Department of Labor, Office of the Solicitor, 525 S. Griffin Street, Suite 501, Dallas, Texas 75202

Ryan C. Johnson, Beard Kultgen Brophy Bostwick,, Dickson & Squires, LLP,
220 South Fourth Street, Waco, Texas 76701

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 23, 2013

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. SE 2013-68-M
Petitioner, : A.C. No. 01-01138-279202A
 :
v. :
 :
LEWIS JOHNSON, agent of ELMORE SAND :
& GRAVEL, INC., :
Respondent. : Mine: Scott Pit

ORDER DENYING MOTIONS TO DISMISS
ORDER GRANTING LEAVE TO FILE AND ACCEPTING PENALTY PETITION
ORDER TO FILE ANSWER

This matter arises under the Federal Mine Safety and Health Act of 1977 (“Mine Act”), 30 U.S.C. § 815, and this case is before me upon the Federal Mine Safety and Health Review Commission’s May 30, 2013, Order remanding this matter to Chief Administrative Law Judge Robert J. Lesnick for further proceedings under the Mine Act and the Commission’s Procedural Rules, 29 C.F.R. Part 2700.

This case’s path has been circuitous. On January 31, 2012, the Mine Safety and Health Administration (“MSHA”) mailed a proposed assessment to Lewis Johnson (“Johnson” or “Respondent”) at Elmore Sand & Gravel, Inc. (“Elmore”), but the proposed assessment was returned unclaimed. *Lewis Johnson*, 35 FMSHRC 1259, 1259 (May 2013) *available at* <http://www.fmshrc.gov/decisions/bluebook>. On May 17, 2012, MSHA mailed a delinquency notice. *Id.* In his November 2, 2012, motion to reopen his section 110(c) penalty assessment, Johnson asserted “that he left his employment with Elmore . . . on January 27, 2012, and has no recollection of receiving the assessment.” *Id.* The Commission concluded that the penalty assessment had not become a final order because Johnson never received it. *Id.* at 1260. After remanding the case to Chief Judge Lesnick, the Commission directed the Secretary of Labor (“Secretary”) “to file a petition for assessment of civil penalty within 45 days of [May 30, 2013.]” *Id.*

Then things get interesting. On August 6, 2013, Respondent’s counsel filed a Motion to Dismiss (“Mot. to Dismiss I”) this proceeding because the Secretary had not filed his penalty petition within the 45-day window the Commission provided. (Mot. to Dismiss I at 2.) Notably, Johnson’s August 6, 2013, Motion to Dismiss was not served on the Secretary. Then, on August 16, 2013, the Secretary filed Petitioner’s Motion for Leave to File Petition for Assessment of Civil Penalty Instantly (“Mot. for Leave”), as well as the Secretary of Labor’s Petition for the Assessment of Civil Penalty (“Petition”). Not to be outdone, on August 19 Johnson’s counsel filled substantially the same Motion to Dismiss (“Mot. to Dismiss II”) that he filed on August 6—this time serving the Secretary—and filed Respondent’s Opposition to Petitioner’s Motion

For Leave to File Petition Instanter (“Johnson Resp.”) on August 23, 2013. Chief Judge Lesnick assigned this case to me on August 26, 2013, and the Secretary filed his Response in Opposition to Respondent’s Motion to Dismiss (“Sec’y Resp.”) on August 29, 2013.

The parties’ gale of paperwork notwithstanding, these competing motions and responses each address essentially the same issue: whether the Secretary should be permitted to file his penalty petition despite missing the Commission’s 45-day deadline. The Commission recently clarified its burden-shifting framework for evaluating late-filed petitions.¹ *Long Branch Energy*, 34 FMSHRC 1984, 1989–1991 (Aug. 2012). The Secretary satisfies his burden of production with a “non-frivolous explanation for delay,” supported by “sufficient” evidence establishing the delay was not the result of mere caprice, willful delay, intentional conduct, or bad faith. *Id.* at 1991. Once the Secretary has satisfied his burden, an operator “must show at least some *actual* prejudice arising from the delay in order to secure a dismissal of a penalty proceeding due to a late-filed petition.” *Id.* (emphasis added). Moreover, “[m]ere allegations of potential prejudice or inherent prejudice should be rejected.” *Id.* Where both the Secretary and operator have satisfied their burdens of production, the Commission directs judges to “weigh the interests of fairness to the operator against the public interest in upholding the enforcement purpose inherent in section 105(d).” *Id.*

The Secretary admits that he did not file his petition by the Commission-ordered deadline, but contends that this delay “was not deliberate but rather the result of an administrative error by the Office of Assessment.” (Mot. for Leave at 2.) The Secretary also avers that it “is the practice of the Atlanta Solicitor’s Office to comply with all filing deadlines set out in the Commission Rules,” but “in this case, the Solicitor was unaware of the matter and need to file a Petition until the Office of Assessment notified the Solicitor on August 14, 2013.” (*Id.*) According to the Secretary, his request to file the penalty petition after the deadline is therefore based on adequate cause. (*Id.*) The Secretary also argues that Respondent is not prejudiced by the delay because Johnson “was notified of the penalty assessments as evidenced by his [November 2, 2012] Motion to Reopen, to which the Secretary did not object.” (*Id.*) Finally, the Secretary supports his motion with an attached declaration by Melanie Garris, Chief

¹ Under section 105 of the Mine Act and Commission Procedural Rule 28(a), the Secretary must file a penalty petition within 45 days of receiving an operator’s contest of a proposed penalty. 30 U.S.C. § 815(d); 29 C.F.R. § 2700.28(a). As Administrative Law Judge Zielinski has observed, “there are no comparable provisions directly governing the filing and processing of penalty cases against individual agents of operators pursuant to section 110(c) of the Act, [but] several Commission judges have determined that penalty cases against individuals must be processed expeditiously, and that delay in filing of a petition in a section 110(c) case should be analyzed using adequate cause and prejudice considerations similar to those addressed in *Long Branch*.” *Dyno-Nobel East-Central Region*, 35 FMSHRC 265, 266 (Jan. 2013) (ALJ) available at <http://www.fmsihrc.gov/decisions/bluebook>. The parties have each relied on the Commission’s decision in *Long Branch Energy*, 34 FMSHRC 1984 (Aug. 2012), in their filings. Moreover, I note that the Commission specifically referenced Commission Rule 28 in its order. *Lewis Johnson*, 35 FMSHRC at 1260. Accordingly, I will employ the *Long Branch* framework to analyze the parties’ claims.

of the MSHA Office of Assessments, Civil Penalty Compliance Office (“Garris declaration”), which outlines the clerical errors that occurred at the Office of Assessments.

Johnson, meanwhile, claims that the Secretary has not established an adequate cause for the delay in filing the penalty petition because his “clerical mistakes” demonstrate “obvious indifference” to the Commission’s deadline and the Respondent’s Motion to Dismiss “triggered” the “Secretary’s discovery of the clerical error.” (Johnson Resp. at 3.) In addition, Johnson claims he would be unfairly prejudiced by the delay because of unavailable witnesses and personnel transitions at Elmore Sand. (*Id.* at 3–4; Mot. to Dismiss II at 2.) According to Johnson “the Secretary’s initial failure to properly serve . . . Johnson, and the Secretary’s failure to subsequently timely file the petition” has prejudiced his “ability to prepare for this litigation.” (Johnson Resp. at 4.)

Commission Procedural Rules are not suggestions, and I take seriously the deadlines outlined in the Mine Act and the Commission’s procedural rules. Nevertheless, the Commission has recognized that dismissal on “mere procedural grounds . . . would frustrate section 105(d)’s overriding purpose of ensuring prompt and efficient enforcement.” *Long Branch*, 34 FMSHRC at 1990. Here, the Secretary’s explanation is non-frivolous, and the Garris declaration sufficiently establishes the delay did not result from caprice, willful delay, intentional conduct, or bad faith. I conclude, therefore, that the Secretary has satisfied his production burden showing adequate cause.

Conversely, Johnson has not established any actual prejudice from the Secretary’s month-long delay in filing the penalty petition. As I explained, the Commission has specifically rejected assertions of potential prejudice. Johnson, however, provides only unsubstantiated claims that Respondent will not have “ready access to the company’s records and personnel who would be of assistance in preparing his defense.” (Johnson Resp. at 4.) Specifically, he indicates that Elmore’s safety director at the time of the alleged violation left the operator in May 2013. (*Id.*) Conceptually, an inability to locate witnesses or access company records *might* have been the basis for claiming prejudice if they were substantiated or thoroughly explained. In this case, however, Johnson provides nothing beyond supposition to support his inability to track down witnesses or collect pertinent material. In fact, Johnson’s knowledge that Elmore Sand’s former safety director no longer works at Elmore suggests he has some knowledge about the safety director’s identity and whereabouts. I also note that the Commission’s procedural rules allow the parties liberal discovery and broad discretion to seek subpoenas. *See* 29 C.F.R. §§ 2700.56–.60 (providing discovery and subpoena rules). Based on the Respondent’s filings, it is unclear why Johnson cannot use discovery and subpoenas to gather the information he requires to for his defense. Accordingly, I conclude that Johnson has not satisfied his production burden showing actual prejudice.²

² Johnson seems to suggest that I should reach back to the Secretary’s service of the proposed penalty assessment in late-January 2012 to measure his prejudice rather than the month-long delay in filing the penalty petition. (Johnson Resp. at 4. (“Respondent’s ability to prepare for this litigation has been prejudiced by the Secretary’s initial failure to properly serve

(continued...)

WHEREFORE, it is **ORDERED** that Respondent's motions to dismiss are hereby **DENIED**. It is also **ORDERED** that the Secretary's motion for leave to file is hereby **GRANTED** and the Secretary's Petition for the Assessment of Civil Penalty is **ACCEPTED**.

Furthermore, Commission Procedural Rule 29 requires "a party against whom a petition for assessment is filed" to "file an answer within 30 days after service of the petition for assessment of penalty." 29 C.F.R § 2700.29. Accordingly, it is **ORDERED** that Johnson file an answer within 30 days of the date of this order.

/s/ Alan G. Paez

Alan G. Paez

Administrative Law Judge

Distribution: (Via Electronic Mail & U.S. Certified Mail – Return Receipt Requested)

Carmen L. Alexander, Esq., U.S. Department of Labor, Office of the Solicitor, 61 Forsyth Street, SW, Suite 7T10, Atlanta, GA 30303
(Alexander.Carmen@dol.gov)

Justin M. Winter, Esq., Law Office of Adele L. Abrams, PC, 4740 Corridor Place, Suite D, Beltsville, MD 20705
(jmwinter28@gmail.com)

/pjb

²(...continued)

Mr. Johnson . . ."). I am not convinced that service of the proposed penalty is the proper reference point for measuring Johnson's actual prejudice from the Secretary's late-filed *petition*. *Cf. Long Branch*, 34 FMSHRC at 1985 (discussing late-filed petitions). Yet it is unclear how Johnson would have a winning argument even if I were to accept his position that January 2012 is the proper measuring point. As Johnson acknowledges, he left Elmore on January 27, 2012, four days before MSHA issued its citation and proposed penalty to him. (Johnson Resp. at 2.) Had the Secretary served the citation to Johnson directly at the time, he would be in substantially the same position he is in now—relying on the Commission's liberal discovery and subpoena rules to collect the information he needs to mount a defense. Though more time has elapsed, Johnson *did* have knowledge of the charges against him when he filed his motion to reopen this case in November 2012. Mere passage of time does not, itself, establish actual prejudice. *Cf. Christopher Brinson*, 35 FMSHRC 1463, 1472 (May 2013) (ALJ) ("None of the Respondents here have alleged anything other than a hypothetical fading of memory, and I will not infer prejudice from the passage of time.") *available at* <http://www.fmsihrc.gov/decisions/bluebook>. Nevertheless, I do not need to address this issue because I conclude that Johnson has provided no indication of actual prejudice.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1331 Pennsylvania Avenue, N.W., Suite 520N
Washington, DC 20004-1710
Telephone No.: 202-434-9933

September 25, 2013

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. WEVA 2011-2185
Petitioner	:	A.C. No. 46-01968-258310-01
	:	
v.	:	
	:	
CONSOLIDATION COAL COMPANY,	:	Blacksville No. 2
Respondent	:	

**ORDER ON RESPONDENT’S MOTION TO COMPEL
PRODUCTION OF MSHA’S SPECIAL ASSESSMENT REVIEW FORM**

Before: Judge Moran

Respondent, Consolidation Coal Company, has filed a “ Motion to Compel Production of the Special Assessment Review Form.” The Motion notes that the Secretary is seeking Special Assessments in this case, but that MSHA has asserted that these documents are privileged. Respondent, acknowledging that the case law among administrative law judges is “mixed with regard to whether the SAR Forms must be disclosed,” contends that it “should be able to discover the basis for such [special assessment] requests in order to challenge this at the hearing.” Motion at 1. The Court has considered Respondent’s Motion and the Secretary’s Response in Opposition. Upon such consideration, Respondent’s Motion is DENIED.

Extended discussion of this matter is not, in the Court’s view, warranted. As the Secretary notes, its role involves proposing penalties, but that it is the Commission that assesses all civil penalties under the Mine Act. In that acknowledged role, the Commission’s determination, initially made by the presiding judge, “is an exercise of discretion, bounded by [the] proper consideration [of] the six statutory criteria under Section 110(i) of the Act, through relevant information developed in the course of the adjudicative proceeding.” Response at 2-3. To cut to the core, once a matter is before the Commission, no part of Part 100 or that subset

within it, special assessments under section 100.5, remains material. Although the Secretary has put forth other, substantial, reasons to deny the Respondent's Motion, the foregoing is sufficient, standing alone, to deny the motion. However, the Court adopts and incorporates the other well-stated points made by the Secretary in its Response. These appear as "Attachment A" to this Order.

SO ORDERED.

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

Distribution:

David J. Hardy, Esq.
Hardy Pence PLLC
500 Lee Street, East, Suite 701
25301
Post Office Box 2548
Charleston, WV 25329-2548

Rebecca L. Simon-Pearson, Esq.
U.S. Department of Labor
Office of the Solicitor
The Curtis Center, Suite 630 East
170 S. Independence Mall West
Philadelphia, PA 19106-3306

Attachment "A"

UNITED STATES OF AMERICA
FEDERAL MINE SAFETY HEALTH AND REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
UNITED STATES DEPARTMENT	:	
OF LABOR (MSHA),	:	Docket No. WEVA 2011-2185
Petitioner	:	A.C. No. 000258310
v.	:	Mine: Blacksville No. 2
	:	Mine I.D.: 4601968
CONSOLIDATION COAL COMPANY,	:	
Respondent	:	
	:	

**PETITIONER'S RESPONSE IN OPPOSITION TO MOTION TO COMPEL
DISCOVERY OF RESPONDENT, CONSOLIDATION COAL COMPANY**

I. INTRODUCTION

This matter involves five (5) specially assessed violations (two specially assessed 104(d)(2) orders; one regularly assessed 104(d)(2) order; and, two specially assessed 104(a) citations) totaling \$47,300.00 that were issued against Consolidation Coal Company's (hereinafter "Respondent") Blacksville No. 2 Mine during five (5) inspection days between the dates of June 22, 2010 and December 6, 2010.

Respondent did not specifically request the Special Assessment Review Forms (hereinafter "SAR Forms") in the Request for Production of Documents. ¹On or about August 23, 2013, Respondent informally requested the SAR Forms relating to the violations at issue in this matter.

For the following reasons, Petitioner respectfully requests that Respondent's Motion to Compel be denied.

II. ARGUMENT

A. The SAR Forms are not Discoverable

Two independent bases compel this Court to deny Respondent's request for the disclosure of the SAR Forms. First and foremost, the information contained therein is not reasonably calculated to lead to the discovery of admissible evidence insofar as the Court exercises de novo review of all

¹ Please note, formal discovery was propounded and answered by Rebecca Oblak, Esq. Jim McHugh, Esq. subsequently replaced Ms. Oblak as counsel.

penalty assessments. Secondly, even if the SAR Forms contain relevant information, it is protected from disclosure by the deliberative process privilege.

1. The Information Contained in the SAR Forms is not Reasonably Calculated to Lead to the Discovery of Admissible Evidence.

Pursuant to FMSHRC's Rule 56(b), 29 C.F.R. § 2700.56(b), and Rule 26(b)(1) of the Federal Rules of Civil Procedure, all relevant material that is not privileged is subject to discovery, including information that is reasonably calculated to lead to the discovery of admissible evidence. The SAR Forms, however, are not relevant or reasonably calculated to lead to the discovery of admissible evidence.

The special assessment of violations is simply a "process for determining an appropriate civil penalty without using the penalty tables in 30 C.F.R. 100.3." Respondent's Exhibit "4" (MSHA Program and Policy Manual, Volume III, § 100.5). While the Secretary is delegated with the duty of *proposing* penalties for violations of the Mine Act under 30 U.S.C. §§ 815(a) and 820(a), pursuant to Section 110(i) of the Federal Mine Safety and Health Act (hereinafter "the Act"), "[t]he Commission shall have authority to *assess* all civil penalties provided in this Act." (emphasis added). "The principles governing the Commission's authority to assess civil penalties *de novo* for violations of the Mine Act are well established." Douglas R. Rushford Trucking, 22 FMSHRC 598, 600 (Comm. 2000). As such, Commission judges are not bound by the Secretary's proposed civil penalties. See Claysville Quarry, 32 FMSHRC 242 (ALJ Feldman) (Jan. 2010). Rather, a judge's penalty assessment for a particular violation is an exercise of discretion, bounded by proper consideration for the six statutory criteria under Section 110(i) of the Act, through relevant information developed in the course of the adjudicative proceeding. See Sellersburg Stone Co., 5 FMSHRC 287, 291-92 (ALJ Backley) (Mar. 1983).

Recently, in Pocahontas Coal Co., 2012 WL 1564576 (ALJ Feldman) (Apr. 4, 2012), a copy of which is attached hereto as Exhibit "A," ALJ Feldman directly addressed the issue of whether SAR Forms are relevant. In denying Respondent's Motion to Compel the SAR Forms, ALJ Feldman held that "the Secretary's special assessment criteria . . . is not relevant given the *de novo* authority of the Commission to assess civil penalties . . ." *Id.* at *2; see also, Alcoa World Alumina, LLC, 23 FMSHRC 691, 692 (ALJ Hodgdon) (Jun. 2011) (granting Secretary's motion to quash deposition of "person or persons at MSHA's office of assessments who made the decision regarding the amount of penalty for this case" on the basis that "[s]ince the assessment of a penalty after a hearing is based solely on the information presented during the hearing on the penalty criteria set out in section 110(i), the reasons the Secretary may have relied on in proposing the penalty are not relevant"); Hidden Splendor Resources, Inc., 33 FMSHRC 2345, 2347 (ALJ Rae) (Sep. 2011) (holding that mental impressions contained in SAR Forms are not only privileged, but also irrelevant in the ALJ's *de novo* determination at hearing). In light of the fact that an ALJ makes his or her own determination as to the proper penalty, the SAR Forms do not have any "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401.

2. The SAR Forms are Protected from Disclosure by the Deliberative Process Privilege.

Respondent is not entitled to the SAR Forms because these documents are protected from disclosure by the deliberative process privilege. The deliberative process privilege, “attaches to interagency communications that are part of the deliberative process preceding the adoption and promulgation of an agency policy.” In re Contests of Respirable Dust Sample Alteration Cases, 14 FMSHRC 987, 990-93 (Comm. 1992) (hereinafter “Dust Cases”) (quoting Jordan v. U.S. Dept. of Justice, 591 F.2d 753, 772 (D.C. Cir. 1978)). “The privilege protects thoughts, ideas, reasoning, and analyses which lead to a decision of the agency.” Hidden Splendor Resources, Inc., 33 FMSHRC at 2347 (citing Kan. State Network, Inc. v. F.C.C., 720 F.2d 185, 191 (D.C. Cir. 1983)). In interpreting the privilege, the Supreme Court has stated that the privilege protects “‘the decision making process of government agencies,’ and focus[es] on documents ‘reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.’” N.L.R.B. v. Sears, Roebuck & Co., 421 U.S. 132, 150 (1975) (citations omitted). In order for a document to be privileged under the deliberative process privilege, it must: (a) be “pre-decisional;” (b) pertain to communications between subordinates and supervisors that are antecedent to the adoption of an agency policy; and (c) relate to “deliberative” communications – *i.e.*, the process by which policies are formulated. See Dust Cases, 14 FMSHRC at 992.

The Commission has explained that “purely factual information that does not expose an agency’s decision making process does not come within the ambit of the privilege.” Dust Cases, 14 FMSHRC at 992. In the event unprotected factual information is combined with protected information, the party opposing disclosure must show, “that the material is so inextricably intertwined with the deliberative material that its disclosure would compromise the confidentiality of the deliberative information that is entitled to protection.” Consolidation Coal, 19 FMSHRC 1239, 1246 (Comm. 1997) (internal citations and quotations omitted).

The Commission has yet to issue a ruling on whether, and to what extent, SAR Forms are discoverable. However, as Respondent points out, there is a split among Administrative Law Judges as to whether the deliberative process privilege applies to these types of documents. See Respondent’s Motion at ¶3. While ALJs Melick and Manning have held that the deliberative process privilege does not apply, ALJs Rae and Paez have held otherwise. Compare American Coal Company, 33 FMSRHC 2352, 2353 (ALJ Melick) (Sept. 2011) and CDK Contracting Co., 25 FMSHRC 289 (ALJ Manning) (May 2003) with Hidden Splendor Resources, Inc., 33 FMSHRC at 2347² and Humphreys Enterprises, Inc., 2010 WL 5619976 at *5 (ALJ Paez) (Dec. 23, 2010).

² ALJ Rae also independently denied Respondent’s Motion for the SAR Forms under the work product privilege, explaining:

The SAR is a document which contains the selected facts pertaining to a cited violation of a health or safety standard along with the mental impressions, conclusions and opinions of MSHA officials

(continued...)

It is the Secretary's position that ALJs Rae and Paez properly interpreted the application of the deliberative process privilege. In Humphreys Enterprises, Respondent filed a Motion to Compel the production of the "Possible Knowing/Willful Violation Review Form" (hereinafter "Review Form"), to which the Secretary objected on the basis of the deliberative process privilege. Id. at *1. In denying Respondent's Motion, ALJ Paez recognized that the Review Form typically gathers the inspector's conclusions as to whether a knowing or willful violation occurred, as well as the inspector's superiors' opinions of the inspector's analysis. See id. at *5. ALJ Paez held that "[a]ltogether, the content generated by these questions typically forms pre-decisional communications between the inspector and his superiors prior to the formulation of a conclusion as to whether a knowing or willful violation has occurred. These sections of the form are protected from disclosure under the deliberative process privilege." Id. ALJ Paez further held that, although the Review Form contains factual information, the entire Review Form is privileged because the factual information guides the Secretary's decision-making process as it relates to the determination of whether a knowing or willful violation occurred. Id. Although Humphreys Enterprises involved the deliberative process privilege as applied to the "Possible Knowing/Willful Violation Review Form" as opposed to the SAR Form, the forms are similar in that they both document the inspector's, and his supervisors', opinions as to whether a particular type of violation occurred.

In Coteau Properties Co., 22 FMSHRC 915 (ALJ Zielinski) (Jun. 2000), Respondent sought certain information gathered during an MSHA special investigation concerning a discrimination claim. The Secretary objected to the request pursuant to the deliberative process privilege. ALJ Zielinski expressly rejected Respondent's attempt to obtain the information, stating that, "the Secretary's decision making process, by which a determination is made whether or not to initiate a discrimination proceeding under the Act, is the type of governmental decision to which the deliberative process privileges applies." Id. Similarly, the determination whether or not to specially assess a citation is exactly the type of governmental decision to which the deliberative process privileges applies.

Here, the SAR Forms contain not only factual information about the violations at issue, but also the mental impressions, conclusions, and communications between the inspectors and their

(...continued)

used in the determination to categorize the violations as flagrant, and thus enhancing penalties assessed. While this deliberative process is engaged in at a time when litigation is not pending, it is readily foreseeable that should the special assessment be imposed, the operator is highly likely to contest the penalty. Furthermore, once the enhanced penalty is decided upon, the operator is served with a notice of the proposed penalty and is given 30 days to pay or contest the proposed penalty (citations omitted). **Therefore, this document is prepared in contemplation of litigation and is protected by the work product privilege.**

Hidden Splendor Resources, 33 FMSHRC at 2346 (emphasis added).

superiors regarding the appropriateness of the special assessments. The information contained in the SAR Forms consists of pre-decisional communications, as they were exchanged prior to the formulation of MSHA's decision to specially assess the violations. These communications are also deliberative in nature, as they constitute the thoughts, ideas, reasoning, and analyses used by the inspectors and their supervisors in reaching the decision to specially assess these violations. These are precisely the types of communications the deliberative process privilege was meant to protect. Moreover, the factual information contained in the forms is inextricably intertwined with the inspectors' decision-making process of whether the violations warranted special assessment; therefore, SAR Forms, as a whole, are privileged and are not subject to disclosure. See Consolidation Coal Co., 19 FMSHRC at 1246; Humphreys Enterprises, 2010 WL 5619976 at *5.

Lastly, the factual information that Respondent alleges it is seeking has either already been produced through discovery, or will be produced during the depositions of the inspectors. Petitioner has already provided Respondent with, among other things, the inspectors' notes, which set forth in detail the justification underlying the issuance of the citations/orders. In this regard, the production of the SAR Forms serves only to disclose MSHA's decision-making process in concluding that special assessments were warranted. Courts have applied the deliberative process privilege to disclosures of factual information when such disclosures "would expose an agency's decision-making process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions." Consolidation Coal, 19 FMSHRC at 1247 (quoting Quarles v. U.S. Dep't of the Navy, 893 F.2d 390, 392 (D.C. Cir. 1990)). If this Court orders the SAR Forms to be provided, inspectors and supervisors at MSHA would be discouraged from providing their candid analysis in the future for fear of disclosure.

1. The SAR Forms are not Essential to a Fair Determination of the Case.

The Commission has noted that, even if a claim of privilege is properly asserted, it is qualified and subject to a balancing test. See Humphrey's Enterprises, Inc., 2010 WL 5619976 at *4 (citing Bright Coal Co., 6 FMSHRC 1520, 2523 (1984)). If it is found that "disclosure is essential to the fair determination of a case, the privilege must yield." Id. In order to make that determination, the Court must consider such factors as: (a) whether the Secretary is in sole control of the information; (b) the nature of the violation; (c) possible defenses; and (d) the impact of the information. Id.

In this case, Petitioner has produced or identified the factual bases of the violations at issue. Specifically, Petitioner has produced copies of, inter alia, the citations and the inspectors' notes for the violations at issue. Furthermore, depositions being conducted presently the week of September 16, 2013, during which Respondent will have a full opportunity to explore the factual bases underlying the issuances of the citations. As ALJ Paez held in Humphrey's Enterprises, under these circumstances the factual information sought by Respondent is "reasonably accessible to it," and the information contained in the SAR Forms are not essential to a fair determination of the case. Humphrey's Enterprises, 2010 WL 5619976 at *5.

III. CONCLUSION

For the foregoing reasons, the Secretary requests that the Court deny Respondent's Motion to Compel Discovery.

Respectfully submitted,
Rebecca Simon-Pearson, Attorney
UNITED STATES DEPARTMENT OF LABOR

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 Pennsylvania Avenue, N.W., Suite 520N

Washington, DC 20004-1710

Telephone No.: 202-434-9933

Telecopier No.: 202-434-9949

September 27, 2013

FRED ESTRADA,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. CENT 2013-311-DM
v.	:	SE-MD 2013-06
	:	
	:	
	:	
FREEPORT McMoRan TYRONE, INC.,	:	
and/or RUNYAN CONSTRUCTION,	:	Tyrone Mine
Respondent	:	Mine ID 29-00159

**ORDER ON FREEPORT-McMORAN TYRONE's MOTION
FOR SUMMARY DECISION**

Respondent, Freeport McMoRan Tyrone, Inc. ("Freeport") filed, on September 13, 2013, a Motion for Summary Decision together with an accompanying memorandum of law in support of its motion. Respondent Runyan Construction, through Counsel, filed a response to the motion on September 25, 2013.¹ Runyan's Response, agrees with the six enumerated statements² in

¹ Runyan's Response bears the incorrect date of September 12, 2013 date on the first page but the certificate of service correctly lists that it was served on September 25th.

² Those statements were: 1. This motion concerns the improper inclusion of Freeport as a respondent to these proceedings even though it was not Complainant, Fred Estrada's ("Mr. Estrada") employer, nor in control of or responsible for the instrumentalities at issue; 2. Pursuant to 29 C.F.R. § 2700.67 of the Procedural Rules of the Federal Mine Safety and Health Review Commission, Freeport is entitled to summary decision in this action as a matter of law. Summary judgment "shall be granted" when it is shown that "[t]hat there is no genuine issue as to any material fact; and . . . [t]hat the moving party is entitled to summary decision as a matter of law." ... ; 3. Mr. Estrada specifically explained that the party responsible for the condition of the truck and later for his termination was Runyan Construction, Inc. and not Freeport. Freeport is an improper respondent in this proceeding and should be dismissed as a matter of law.; 4. . . . the undisputed facts demonstrate that Freeport cannot be held liable for the acts of its independent contractor, Runyan, because Freeport did not contribute by either act or omission to the occurrence of the alleged violation in the course of Runyan's work or operation; Freeport did not contribute by act or omission to the continued existence of the violation alleged by Mr. Estrada; Freeport's employees were never exposed to the alleged hazard complained of by Mr.

(continued...)

Freeport's Motion and concludes that Runyan "does not object to Freeport [McMoRan] Tyrone, Inc. [] being granted summary decision and dismissed from this proceeding." Runyan Response at 2. No response was made by the Complainant, Fred Estrada.³

There being no genuine issue as to any material fact, pursuant to 29 C.F.R. § 2700.67 of the Commission's procedural rules, the Motion is appropriate for summary decision on the issue of whether Freeport McMoRan is a proper named party in this litigation. For the reasons which follow, upon consideration of the Motion, the Memorandum in support thereof, the Response of Counsel for Runyan Construction, and the entire record at this point, the Court GRANTS Freeport's Motion and DISMISSES Freeport from this action.

The Court adopts the following undisputed material facts⁴ relating to Freeport's Motion: Runyan was an independent contractor working at the Freeport Tyrone Mine . Runyan Construction entered into a contract with Freeport to haze birds and manage wildlife at the Tyrone mine. Freeport and Runyan conduct their respective operations separately, and Freeport has no ownership interest in Runyan. Freeport and Runyan share no common management personnel. Freeport does not control or instruct Runyan in how to carry out its obligations under the contract as Runyan is responsible for the methods and means of performance of the services under the contract. Freeport has no control over the business or employment practices of Runyan. Freeport is not involved in the termination of employees of Runyan. Mr. Estrada worked for and was supervised by Runyan in October 2012, working as a bird hazer for Runyan at the Tyrone mine. Mr. Estrada was supervised by Runyan and not by any employee of Freeport. Mr. Hamilton was Mr. Estrada's supervisor. Hamilton was an employee of Runyan and was not employed by Freeport. Mr. Estrada's employment paperwork and training records were processed and retained by Runyan. Mr. Estrada did not fill out any employment paperwork with Freeport to work at the Tyrone Mine. Mr. Estrada's pay stubs were issued by Runyan.

²(...continued)

Estrada; and Freeport had no control over the condition of the truck that allegedly needed abatement.; 5. Freeport and Runyan are separate and distinct companies conducting distinct operations at the Tyrone mine. Runyan performed bird hazing activities at the Tyrone mine to protect migratory fowl from the leach ponds on the property and Mr. Estrada's sole job was to "haze" the migratory fowl by using Runyan's truck. Freeport is not a single-employer with Runyan.; 6. Freeport is entitled to summary decision as a matter of law because there is no issue of material fact, and it was included as a respondent improperly and not in accordance with the law.

³ The absence of a response was not unexpected as, on more than one occasion, Complainant Estrada has expressed that he agrees that Freeport is not a proper party to this proceeding. However, the Court has ruled that the determination of the proper parties is a factual and legal determination for it to make. Court's Order of July 30, 2013.

⁴ The motion was accompanied by supporting exhibits A through G. Citations to those exhibits are omitted from the Court's adopted supporting facts.

Freeport was not involved in the day-to-day business operations of Runyan, and Freeport took no part in the decision to terminate Mr. Estrada. Freeport has no ownership interest or operational control of the vehicles operated by Runyan. Runyan supplies its own trucks to fulfill its bird hazing obligations. The truck that was operated by Mr. Estrada was owned and maintained by Runyan, and Runyan was responsible for the servicing of its own trucks. Freeport has no maintenance obligations for the vehicles operated by Runyan. Freeport did not contribute, by any act or omission, to the alleged defective condition of the vehicle operated by Mr. Estrada. Freeport did not contribute to any violation alleged by Mr. Estrada. None of Freeport's employees were exposed to the alleged hazardous condition complained of by Mr. Estrada.

It is true that the Commission, in determining whether two or more entities can be deemed a single operator under the Mine Act, has looked to the standard employed “under similar statutory language [found in] the NLRA [National Labor Relations Act] and Title VII [of the Civil Rights Act of 1964].” Those factors are: the interrelation of operations; common management; centralized control of labor relations; and common ownership. *Berwind Natural Resources Corp., et al.*, 21 FMSHRC 1284, *1316. No one of the factors carries the day. Instead, the Commission examines the “totality of the circumstances to determine whether one corporate entity exercised such pervasive control over the other that the two entities should be treated as one.” *Id.* at *1317.

It is accurate to state that none of the factors above apply to the relationship between Freeport and Runyan. Runyan's task was limited to “haz[ing] birds and manag[ing] wildlife as needed at the Freeport Tyrone Mine.” Freeport, Exhibit D. Although, for the most part, Freeport's Exhibit G appears to be simply a standard form services agreement with boilerplate language and not specifically tailored to Runyan's specific contractual responsibilities with Freeport, the last attached page of that exhibit, identified as “Section 6: Scope of Services,” provides that Runyan is to “[m]onitor and haze migratory birds from Tyrone and Chino Mines,” with its additional responsibilities listed as “None.” Given the limited nature of Runyan's contract with Freeport, it is not surprising that the two entities conduct their operations separately, that they share no common management personnel and that Freeport does not have control over or direct the employment practices of Runyan. Indeed, Runyan has admitted to this during discovery. Freeport Exhibit B. Runyan has also agreed that it owned the vehicle that was operated by the Complainant, and that Freeport had no operational control, nor maintenance obligations, over that vehicle. Freeport Exhibit B.

Counsel for Respondent Freeport also addressed, in its Motion and its memorandum of law in support of that Motion, the issue of whether Freeport could be liable for the acts of Runyan, acting as its independent contractor. It noted that in *Bryant v. Dingess Mine Service, et al.*, 10 FMSHRC 1173, the Commission stated that resolution of liability of a principal for the acts of others working at a mine site depends upon the conduct of the parties and the “true nature of th[eir] relationship.” *Id.* at 1178. As Freeport has observed, the issue of whether it can “properly [be] included in these proceedings centers on what amount of control, if any, Freeport had over Runyan's operations and employees.” Freeport Memorandum at 9. The Court agrees with Freeport's statement that the answer to that inquiry is “none.” *Id.*

Accordingly, for the foregoing reasons, the Court DISMISSES Freeport McMoRan Tyrone, Inc. from this proceeding.

The Court is fully aware that in its earlier Motion to Dismiss, Freeport, through Counsel, provided strong arguments to support that motion. However, as Counsel for Freeport recognized, there is a process which must be followed and the Court's July 30, 2013 Order adhered to that process, for the reasons it articulated at that time. With Freeport's subsequent motion, as discussed above, along with its memorandum in support, and with the response from Runyan's Counsel, that process was carried out. The Court is appreciative of the high ethical standards presented by Counsel in Freeport's September 13th submission, which foursquarely addressed the applicable case law.

Having dismissed Freeport as a Respondent from this proceeding, future captions will not include Freeport-McMoRan Tyrone Inc. Only Runyan Construction will be listed as the sole remaining Respondent.

So Ordered.

/s/ William B. Moran
William B. Moran

Distribution:

Fred Estrada, P.O. Box 404, Tyrone, New Mexico 88064

David Estrada, 3861 East New Berry Ave. SE, Mesa, AZ 85206

Kristin R.B. White, Esq., Michelle Witter, Esq., Jackson Kelly, PLLC, 1099 18th Street, Suite 2150, Denver, CO 80202

Runyan Construction Inc., P. O. Box 2827 Silver City, NM 88062

Runyan Construction Inc., 12 Truck By Pass Rd, Silver City, New Mexico 88061

Nathan Gonzales, Esq., Gonzales Law, 925 N. Hudson, Silver City, New Mexico 88061
nathan@gonzaleslaw.us