

**September 2020**

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Secretary of Labor v. KenAmerican Resources, Inc., Docket No. KENT 2013-0211 (Judge Miller, August 7, 2020)

# **COMMISSION ORDERS**



# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, D.C. 20004-1710

September 1, 2020

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

Docket No. LAKE 2019-0087-R

v.

KNIGHT HAWK COAL, LLC

BEFORE: Rajkovich, Chairman; Althen and Traynor, Commissioners

## ORDER

BY: Rajkovich, Chairman, and Althen, Commissioner

This proceeding comes before us on a Motion for Stay by the Secretary of Labor (“Secretary”). The Secretary seeks a stay of the Commission’s decision of July 23, 2020 affirming a decision of the Administrative Law Judge (“ALJ”) which vacated the Mine Safety and Health Administration’s (“MSHA”) revocation of a 12-year longstanding MSHA-approved ventilation plan of Knight Hawk Coal, LLC’s Prairie Eagle Underground Mine (“PEUM”).<sup>1</sup> We affirmed the vacation of that attempted revocation and that such vacation of the Secretary’s attempted revocation resulted in the reinstatement of that plan.

We review the Secretary’s motion under the familiar four factor formula set forth in *Secretary on behalf of Price and Vacha v. Jim Walter Resources, Inc.*, 9 FMSHRC 1312 (Aug. 1987); *UMWA ex rel. Franks & Hoy v. Emerald Coal Res., LP*, 35 FMSHRC 2373, 2374 (Aug. 2013) (noting that a “stay constitutes ‘extraordinary relief’”). These are (1) a likelihood that the party will prevail on the merits of its appeal; (2) irreparable harm to it if the stay is not granted; (3) adverse effects on other interested parties; and (4) the public interest. *See* 35 FMSHRC at 2374.

Based upon those factors, and the discussion set forth below, the Secretary’s motion for a stay is denied.

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<sup>1</sup> The Secretary filed an appeal of the Commission’s Decision with the United States Court of Appeals for the District of Columbia Circuit on August 7, 2020. Thereafter, the Commission committed, through conversation between counsel, that it would issue this order early in the week of August 31. Earlier today, September 1, the Secretary filed an Expedited Motion for Stay Pending Appeal with the court. The Commission is forwarding this order to the court to indicate that the Secretary has *now* exhausted his administrative remedies with respect to the stay.

## I.

### **BACKGROUND**

#### ***A. General***

Sufficient ventilation of underground coal mines is critical for miner health and safety. It is crucial that there be a sufficient quantity and flow of uncontaminated air to provide miners fully adequate oxygen and to avoid exposure to toxic levels of harmful contaminants. The ventilation system must also sweep away any liberated methane and any other noxious gases. To assure sufficient ventilation, the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) (“Mine Act”), and mandatory safety standards apply a two pronged approach. Mine Act sections 303(a) through (z) contain extensive statutory ventilation requirements. 30 U.S.C. § 863. Separately, from the enforcement agency perspective, the Mine Safety and Health Administration (“MSHA”) enforces extensive mandatory safety standards at 30 C.F.R. subpart D, sections 75.300 through 75.389, regulating underground coal mines’ ventilation to achieve safe and healthy mine atmospheres. Of course, MSHA inspectors frequently inspect mines in order to assure compliance.

Pursuant to section 303(o), 30 U.S.C. § 863(o), the operator must develop a ventilation system, methane, and dust control plan. Because the plan must be “suitable to the conditions and the mining system of the coal mine,” it is the operator’s duty to develop the plan. *Id.* In short, it is the operator’s plan. After the operator prepares its plan, it must submit the plan to MSHA for review for suitability before it is implemented.

#### ***B. Knight Hawk’s Ventilation Plan***

An important and unusual factor in this case is that it does *not* involve a request for approval of a newly-submitted plan. Instead, it arises from a decision by MSHA to revoke an *existing, approved* ventilation plan that had been in place for more than 12 years. That plan allowed Knight Hawk to utilize “perimeter mining,” which is a method wherein it was allowed to take 40 foot long cuts of coal from the perimeter of the area being mined as it “retreated” from a section that had been advance-mined. In perimeter mining, the operator mines coal in diagonals along the edges of the area from which it is leaving. See Attachment 1.

Knight Hawk received conditional approval for its ventilation plan 14 years ago in 2006. During the initial startup of the mine, the plan was subject to an initial evaluation that continued for 41 months. 41 FMSHRC 522, 524-25 (Aug. 2019) (ALJ). MSHA District 8 granted unconditional approval 4 years later in 2010, and again in 2015. *Id.* at 526.

Three years later, on January 9 and 10, 2018, MSHA performed an evaluation of the bleeder system which included areas where perimeter mining was being conducted at PEUM. After that evaluation, the parties engaged in conversations and correspondence regarding the suitability of the approved ventilation plan. Finally, 11 months later, on November 14, 2018, MSHA’s District Manager sent a letter to Knight Hawk revoking approval of the approved plan.

*Id.* at 526-27. Thus, Knight Hawk had been operating under the approved ventilation plan, reviewed by multiple MSHA District Managers, for 12 years until its revocation in 2018.

Thereafter, the parties followed the procedure for issuance of a technical citation and challenge.<sup>1</sup> The validity of MSHA's revocation of the approval of the plan was heard before the ALJ at a three day hearing on March 28-April 1, 2019.

## II.

### ALJ AND COMMISSION REVIEW

After the hearing, the ALJ made extensive findings of fact and reached legal conclusions. He vacated MSHA's revocation of the approved plan as arbitrary and capricious and reinstated the approved plan. After briefing and oral argument, the Commission affirmed the ALJ's decision 3 – 2. Rather than attaching the full ALJ Decision, summaries of findings of fact in the ALJ's Decision are set forth in Attachment 2.

## III.

### STANDARD OF REVIEW

We review the request for a stay according to the factors identified in *Virginia Petroleum Jobbers Association v. Federal Power Commission*, 259 F.2d 921 (D.C. Cir. 1958) and accepted by the Commission in *UMWA ex rel. Franks & Hoy v. Emerald Coal Res., LP*, 35 FMSHRC at 2374 (noting that a “stay constitutes ‘extraordinary relief’”). Again, the factors are (1) a likelihood that the party will prevail on the merits of its appeal; (2) irreparable harm to the movant if the stay is not granted; (3) any adverse effect on other interested parties; and (4) a showing that the stay is in the public interest.

With regard to ventilation plan disputes, the D.C. Circuit identified the standard of review for the Commission:

We review the legal determinations of the Commission and its ALJs *de novo* and factual findings for substantial evidentiary support. 30 U.S.C. § 816(a)(1); *Black Beauty Coal Co. v. Fed. Mine Safety & Health Review Comm'n*, 703 F.3d 553, 558 (D.C.Cir.2012); *Sec'y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096, 1099 (D.C.Cir.1998). We review evidentiary rulings for abuse of discretion, *Mach Mining*, 728 F.3d at 659; *cf. Veritas Health Servs., Inc. v. NLRB*, 671 F.3d 1267, 1273 (D.C.

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<sup>1</sup> This technical citation and challenge procedure is described in *Prairie State Generating Co. LLC v. Sec'y of Labor*, 792 F.3d 82, 87-88 (D.C. Cir. 2015). To abate the citation and continue operating, Knight Hawk was required to submit a ventilation plan that MSHA would approve, which it did. 41 FMSHRC at 527, 529.

Cir. 2012), and accord “great deference” to the ALJ’s credibility determinations, *Keystone Coal*, 151 F.3d at 1107.

*Prairie State Generating Co., LLC v. Sec’y of Labor*, 792 F.3d 82, 89 (D.C. Cir. 2015).<sup>2</sup> Accordingly, if MSHA denies plan approval, it must be able to articulate a reasonable basis for such denial, and not merely cite generalized dangers without any explanation of how the circumstances of a specific mine might result in the occurrence of a hazard. This means the Secretary must present a theory based on the actual evidence that an injury might occur. Of course, there need not be a “likelihood” of any injury, but there must be more than an unsupported theory. There must be supporting facts in the record. The explanation must be based on reasons grounded in the facts of the case as found by the ALJ. In short, the Commission applied the arbitrary and capricious standard in affirming the ALJ’s decision under the proper standard of review.<sup>3</sup> We further apply those standards, here, in considering the Secretary’s likelihood of success on appeal.<sup>4</sup>

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<sup>2</sup> The D. C. Circuit further explained that under the substantial evidence standard of review, which is “highly deferential,” the court “may not reject reasonable findings and conclusions, even if we would have weighed the evidence differently.” *Cumberland Coal Res., LP v. Fed. Mine Safety & Health Review Comm’n*, 717 F.3d 1020, 1028 (D.C. Cir. 2013) (citation omitted). Thus, the question is “whether a theoretical ‘reasonable factfinder’ could have reached the conclusions actually reached by the Commission and the ALJ.” *Id.* (citation omitted); *see also Biestek v. Berryhill*, U.S., 139 S.Ct. 1148, 1154 (2019).

<sup>3</sup> The term “plausible harm” as used in the decision is simply a means of expressing that if an operator submits a plan, a determination by MSHA finding the plan unsuitable must be explained by a rational and reasonable assessment of, and citation to, the facts of the plan’s operation. It is taken from Black’s Law Dictionary, which defines “plausible” as meaning “[c]onceivably true or successful; possibly correct or even likely . . . reasonably convincing and seemingly truthful, though possibly mendacious.” *Plausible*, Black’s Law Dictionary (11th ed. 2019). It is a means of explaining the arbitrary and capricious standard. If MSHA fails to reasonably identify ways in which the plan fails to be suitable, a finding that the plan is unsuitable is arbitrary. Obviously, the same standard applies with as much force when MSHA seeks to revoke a plan previously approved as suitable.

<sup>4</sup> It is thus incorrect that the Commission is requiring the Secretary to prove unsuitability. Mot. for Stay at 3. Rather, the Secretary has failed at the task of providing an argument that appears to be accurate based on the evidence. Put another way, the Secretary’s action in this case lacks a rational basis. *Mach Mining, LLC*, 34 FMSHRC 1784, 1790-91 (Aug. 2012) (internal citation omitted); *see also Prairie State*, 792 F.3d at 92 (the Secretary must show that the district manager “did not abuse his discretion . . . in making his suitability determination, for instance by failing to examine relevant facts and draw reasonable conclusions.”). The ALJ found no substantial evidentiary foundation for the decision to revoke the operator’s plan here.



## IV.

### DISPOSITION

#### ***A. Irreparable Harm to MSHA and/or Interested Persons***

Ordinarily, we would start by analyzing the likelihood that the Secretary would prevail on the merits. However, the Secretary's motion emphasizes the fear of a tragedy. A motion to stay anchored by a forecast of a possible mine explosion is of paramount concern to us. Therefore, we first consider the second and third factors described above.

Our primary focus must be on possible harm to miners. Our central consideration on review of the underlying issue was the possibility of irreparable harm that might arise from continued use of the long approved plan. In a most important and very basic way, therefore, the issue of irreparable injury runs throughout the Commission's decision. The Secretary has failed to make a showing of irreparable harm, absent a stay, for the same reason the revocation was vacated. The Secretary has failed to articulate a scenario under which a hazard arises from continued use of the long approved ventilation plan.

MSHA's observations and measurements during its review of perimeter mining in the survey did not find excessive methane in the perimeter areas or any other areas of the relevant mining sections.<sup>5</sup> In fact, every measurement of methane showed levels far below any measure of concern. The ALJ accepted testimony from a Knight Hawk expert that there were no ignition sources in the mine that might contribute to the dangers of methane buildup. The ALJ also accepted the Knight Hawk expert's testimony that in the unlikely event of a roof fall in a perimeter cut, given the composition of the roof, any methane would have been effectively diluted.<sup>6</sup> 41 FMSHRC at 546. The ALJ further found that the Secretary failed to rebut this testimony. Moreover, the Secretary did not provide any evidence of the presence of float coal

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<sup>5</sup> Section 103(i) of the Mine Act requires spot inspections for methane every 5 days, for mines that release more than one million cubic feet of methane during a 24-hour period. 30 U.S.C. § 813(i). Furthermore, such spot inspections are required every 10 or 15 days at mines that liberate five hundred thousand, or two hundred thousand cubic feet, respectively, of methane or other explosive gases during a 24-hour period. *Id.* The last U.S. mine explosion occurred in 2010 in a mine releasing more than a million cubic feet of methane in a 24 hour period. PEUM does not fall into any of the categories for release of excessive methane and is not on a spot inspection schedule.

<sup>6</sup> The perimeter cuts are areas into which no miner has ever entered and into which entry is thereafter explicitly prohibited and barred. Tr. 54, 105. Obviously, after the cut is made, no mining activity occurs that could create a spark. Even if one were to conjecture that loose roof material could fall to the floor creating some type of spark, we take judicial notice that methane is lighter than air. Thus, if any methane were to exist in a cut over time, it would rise toward the roof, unaffected by anything happening on the floor. Nevertheless, no evidence exists for such an incident. Likewise, the mine had never experienced a spontaneous combustion.

dust or other particles in the end of a perimeter cut that could propagate any ignition, even if a small ignition could have occurred.

The Secretary's fundamental argument for a stay is the claim that if Knight Hawk engages in perimeter mining during the appeals process, it will be operating without an MSHA approved ventilation plan.<sup>7</sup> That suggestion is unfounded.

After MSHA revoked the approval of the ventilation plan, Knight Hawk invoked its statutory right to a review by the Commission. A Commission Judge found that the Secretary's decision was arbitrary and capricious. Performing our statutory duties, we affirmed his decision vacating the revocation.

The review process has rendered the revocation null and void and, thus, returned the parties to the status quo ante. Consequently, Knight Hawk is bound by that previously approved plan, and subject to MSHA inspections for compliance with that plan.<sup>8</sup> While MSHA defends its revocation decision during this appeal, Knight Hawk will therefore be operating under an approved plan. For the Secretary to argue, contrary to the results of the review process, that Knight Hawk must now be mining without an approved plan is to assign ventilation decisions to an endless loop that may be ended only by capitulation by the operator to MSHA's ventilation plan.

As to the status quo ante, and as noted *supra*, Knight Hawk received conditional approval for its ventilation plan 14 years ago in 2006. Operations under that plan had thereafter occurred for 12 years. Consequently, we must take the continuation of that long approved plan into account in considering the likelihood of irreparable harm while Knight Hawk operates under that plan during the appeal. Continuing to operate under the previously approved plan does not preclude MSHA from continuing to inspect and review perimeter mining, generally, or specifically at the PEUM mine. Nothing in our decision prevents such continued enforcement.

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<sup>7</sup> We specifically note that the issue of operating without an approved ventilation plan, as a consequence, was never brought up to the Commission in its petition for discretionary review below, in accordance with section 113(d)(2)(A)(ii) of the Mine Act. 30 U.S.C. § 823(d)(2)(A)(ii). Nevertheless, we address that point for purposes of this Motion.

<sup>8</sup> Given the Secretary's stance, it is not clear how the Secretary would react if he does not prevail before the D.C. Circuit, since both the Commission and the Circuit Court act as appellate bodies with power to review decisions by MSHA. Under MSHA's apparently faulty reasoning, the operator would be caught in an endless loop in which its rights have been abused without remedy, and an appellate body has reversed MSHA in accord with Mine Act review principles without any effect whatsoever. The Secretary's position is tantamount to asserting that MSHA is beyond the review power of the Commission or the courts. It also directly contradicts the position the Secretary took before the court in defending the Commission's decision in *Mach Mining*, extolling the Commission's review role in plan disputes as "promot[ing] efficiency." S. Resp. Br. at 32-33, *Mach Mining, LLC v. MSHA*, 728 F.3d 643 (7th Cir. 2013) (No. 12-3598).

Importantly, it appears MSHA allowed Knight Hawk to continue to operate under that same plan until issuance of the technical citation eleven months after the two day inspection and survey in January 2018. After 12 years of operation without incident, and MSHA's permitted use of the plan for eleven months after the study, the Secretary must show that irreparable harm may result from use of that same plan for the months required for Circuit Court review. In other words, the essence of MSHA's argument is that the use of the plan presents a threat of irreparable harm *now* that was not present previously, even after MSHA had been aware, for nearly a year, of the conditions that supposedly rendered the plan unsuitable. There is no basis for this in the record.

In sum, the Secretary provided essentially no evidence of any set of circumstances that might result in a convergence of any type of ignition in a perimeter cut with explosive quantities of methane. Moreover, there is no evidence of any such incident occurring during the 12 years of operation under the plan. In fact, at no time, either before the Judge or during our review, has MSHA been able to provide a rational basis for its concerns, as required under the standard of review.

### ***B. Likelihood of Success on the Merits***

The failure to even meet the minimum requirement of providing a “satisfactory explanation” for its decision defeats MSHA's position on the other factors as well. The ALJ supported his findings of fact with appropriate citations to the record, and MSHA has not explained how those findings are defective or refuted by substantial evidence. The Judge also made crucial credibility determinations in support of his decision. The deference accorded the ALJ's credibility determinations is especially notable here. Unlike the Commission decisions in *Mach Mining*, 34 FMSHRC at 1784 and *Prairie State Generating Co., LLC*, 35 FMSHRC 1985 (July 2013), the ALJ rejected the MSHA witnesses' testimony in this case. *See, e.g.*, 41 FMSHRC at 531 n.10, 532, 541. He did not overturn an MSHA decision to reject a *new proffered* plan. He overturned MSHA's revocation of an *existing approved* plan.<sup>9</sup>

In making these findings, the ALJ relied upon and cited the stipulations of the parties and specific testimony of evidentiary and expert witnesses. His findings are based on substantial testimony as well as his analysis of the basis, reliability, and credibility of the testimony and evidence. Substantial evidence supports each of the findings. MSHA did not build a factual foundation supporting a reasonable basis for its rejection of the long-approved plan as suddenly unsuitable.

For example, the ALJ found that MSHA's tests were less accurate and its methods resulted in inconsistent and inconclusive readings. Testimony regarding the conditions supports his conclusion. MSHA's survey used chemical smoke tests from 44 feet away rather than more accurate gas-tracing tests. 41 FMSHRC at 534. The results of the chemical smoke tests were not always repeatable. *Id.* Those readings were brought further into question since members of the MSHA team were not always in agreement as to the results of the chemical smoke tests. *Id.* On

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<sup>9</sup> As noted before, this Decision effectively reinstated the operator's plan, and MSHA's argument on appeal that the operator would be mining without an approved plan—an argument not raised before the Commission—is meritless.

at least one instance, revisions were made in response to the reprimand of an inspector when she did not record observations to the satisfaction of the MSHA supervisor. *Id.* Regarding that supervisor, the ALJ did not find his testimony to be credible as an expert. In contrast, the ALJ found Knight Hawk's expert credible. *Id.*

MSHA's survey also found that air flowed through the section as required by the regulations. Methane readings throughout the section were substantially below the allowable limits for methane concentration, and the allowable limits of course are themselves far below an explosive concentration. *Id.* at 536. The concentrations of methane and oxygen established that the previously approved ventilation plan continuously diluted and moved methane-air mixtures and other gases, dusts, and fumes from the worked-out area. *Id.* at 546.

There also was no evidence of appreciable methane anywhere in the perimeter mining area, and MSHA only had evidence of meaningful methane in the mine from one sample bottle previously taken in the roof of an active area not subject to perimeter mining. Under the approved ventilation plan, any methane from the bleeder was being effectively diluted, in accordance with the plan, the Mine Act, and the standards governing ventilation. *Id.* at 536. At the time of the plan revocation, there was no evidence of any spontaneous combustion event of any kind at any place in the mine at any time over the years of its operations.<sup>10</sup> *Id.*

Accordingly, the ALJ's findings are based on substantial testimony as well as his analysis of the credibility of that testimony and evidence. MSHA simply failed to provide a reasonable basis for rejection of the long approved plan.

The ALJ's conclusion that MSHA's action was arbitrary corresponds directly to these well-found facts. Having made the findings set forth above, the ALJ correctly analyzed the controlling law and its application to the facts he had found. Citing Commission decisions and the decisions of the circuit courts in *Mach Mining*, 728 F.3d at 658 and *Prairie State*, 792 F.3d at 82, the ALJ reviewed MSHA's decision under the arbitrary and capricious standard, finding that the Secretary needed to establish only that MSHA's revocation of the mine's previously approved ventilation plan was not arbitrary, capricious, an abuse of discretion, or otherwise contrary to law.<sup>11</sup>

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<sup>10</sup> After the MSHA survey, one alleged spontaneous combustion event occurred underground at the mine. The ALJ, however, found that it could not be determined whether the event was spontaneous combustion. Furthermore, perimeter mining was not involved in the event. Therefore, the ALJ found the alleged event had little materiality for the case. 41 FMSHRC at 544.

<sup>11</sup> Notably, *Mach Mining* and *Prairie State* involved review of MSHA's review of *proffered new* ventilation plans. This case, again, involves revocation of an *existing* plan that MSHA had found suitable for eight years. Moreover, in his motion, the Secretary misstates the Commission's decision and incorrectly argues that the Commission did not apply an arbitrary and capricious standard. Apart from that misrepresentation, there can be no argument, however specious, that the ALJ applied and repeatedly invoked an arbitrary and capricious standard in reaching the decision under review.

Utilizing the guidance of *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983), as applied by the D. C. Circuit court in *Mach Mining*, the ALJ considered whether MSHA (1) relied on factors that were not intended to be considered; 2) failed to consider an important aspect of the problem; 3) offered an explanation for its decision that ran counter to the evidence before the agency; or 4) was so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

The ALJ found MSHA acted in an arbitrary and capricious manner under *Motor Vehicles Mfrs.*, 463 U.S. at 43, in that MSHA was applying tests to perimeter mining that were not applied to any other form of retreat mining. 41 FMSHRC at 549-50. Citing *Burlington Northern & Santa Fe R. Co. v. Surface Transp. Bd.*, 403 F.3d 771, 777 (D.C. Cir. 2005), the ALJ found that MSHA failed to explain this conduct with a reasoned explanation and, therefore, acted arbitrarily and capriciously by invoking such different standards without explanation. *Id.* He also found that MSHA entirely failed to consider important aspects of the revocation issue--the no-less-protection standard. 41 FMSHRC at 560.

The Commission agreed that, with no evidence to support a failure in any way of the approved plan to meet the standard of suitability, there was no rational basis for rejection. 42 FMSHRC \_\_\_\_, slip op. at 13, No. LAKE 2019-0087-R (July 23, 2020). Further, no evidence contradicted MSHA's earlier conclusion that the approved plan controlled methane and dust effectively and protected miners against the hazards of methane accumulations. In short, the plan was suitable for the purposes of ventilation and MSHA failed to articulate a reasonable basis for finding it unsuitable.<sup>12</sup>

The thoroughness of the ALJ's review, and our own review of the record, convinces us that substantial evidence supports the findings of fact. In turn, we affirmed the ALJ's finding based on the evidence that the Secretary did not support revocation of the approved mine plan by a reasoned explanation drawn from the record. Consequently, the ALJ correctly determined that the revocation of the approved mine plan was arbitrary and capricious.

Having found the findings of fact supported by substantial evidence, we agreed with the ALJ that MSHA had not supplied a reasoned explanation for revocation of the approved mine plan and, therefore, had acted with arbitrariness and caprice. Consequently, we applied the arbitrary and capricious standard set forth by the D.C. Circuit in *Prairie State*.

We find no support for the Secretary's reliance on *Pueblo of Sandia v. Babbitt*, 231 F.3d 878 (D.C. Cir. 2000). Mot. for Stay at 2 n.1. In *Pueblo*, the district court had remanded the Solicitor of the Interior's denial of a request for a corrected land survey. On appeal, the circuit court dismissed the appeal for lack of jurisdiction on the basis that the district court's remand order was not final. The circuit court noted that the decision below did not identify the true boundaries of the land grant or direct Interior to take action, it simply remanded the case for further

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<sup>12</sup> Even were one to consider the Secretary's charge that the Commission did not apply the correct standard, it remains clear that the Judge applied the arbitrary and capricious standard. Thus, the Judge's decision, standing on its own, would merit affirmation on any further review.

proceedings. *Id.* at 881. Conversely, in this matter neither the ALJ nor the Commission have ordered any further proceedings.

In contrast here, Knight Hawk exercised its right under the Mine Act to obtain Commission review of MSHA's final action of revoking a previously approved plan. In turn, the Commission, acting pursuant to its statutory obligation, vacated MSHA's decision which reinstated the plan that had been revoked by MSHA. 42 FMSHRC at \_\_\_, slip op at 2. There is nothing more for MSHA to consider with respect to its letter revoking the approval or its technical citation. While the parties may ultimately decide to enter talks to discuss a *new* plan approval process, the technical citation at issue is dismissed and finished and the originally revoked plan has been reinstated. Unlike the boundary dispute in *Pueblo*, there is no unfinished business regarding the current plan dispute.

Moreover, the court in *Pueblo* commented that the district court's decision to remand to the agency for further proceedings was consistent with precedent under the applicable judicial review provision for the agency's decision, section 706(2)(A) of the Administrative Procedures Act ("APA"), 5 U.S.C. § 706(2)(A), where the agency record in support of its decision was found wanting. *Id.* at 881. Section 706 of the APA, however, was expressly excluded as applicable to the Mine Act proceedings. *See* 30 U.S.C. § 956 ("Except as otherwise provided in this Act, the provisions of sections 551 to 559 and sections 701 to 706 of Title 5 [of the United States Code] shall not apply to the making of any order, notice, or decision made pursuant to this Act, or to any proceeding for the review thereof.").

There is no provision in the sections of the Mine Act governing Commission review of MSHA enforcement actions that incorporates section 706 of the APA. In contrast, the drafters of the Mine Act were quite cognizant of the APA, and did not hesitate to apply its provisions to MSHA actions in certain instances. *See* 30 U.S.C. § 811(a) (providing that section 553 of the APA would govern MSHA rulemaking proceedings). The Mine Act drafters did not do so with respect to section 303(o). Consequently, *Pueblo* is inapplicable, here.

The Secretary argues that the Commission seeks to shift responsibility for making technical policy and enforcement related decisions to the Commission. This is simply untrue. Congress determined that cases arising under the Mine Act, including the review of operational plans, must be subject to independent review. It is therefore fundamental that actions of MSHA and/or the Secretary, such as revocation of mining approvals, be reviewed to assure they are unbiased and principled—that is, that they are reasoned and rational, rather than arbitrary and capricious. That is the role of the Commission. *See* 30 U.S.C. § 823. The Secretary had the benefit of a full evidentiary hearing and review under the most forgiving standard in administrative law, and could not provide a plausible explanation grounded on substantial record evidence. Arguing that a decision must be accepted when challenged based solely on the credentials of the party making the argument is contrary to logic and the law. *Mach Mining and Prairie State* require the Secretary to provide a "satisfactory explanation" for his decision. 34 FMSHRC at 1790-91; 35 FMSHRC at 1983. He failed to do so.

In this case, the Commission has not abrogated or interfered with the legitimate functions of the Secretary. Rather, it reflects a permissible exercise of our authority under the Act to assure that agency actions are at least made on the basis of reason and facts rather than caprice and bias.

### ***C. Interest of Third Parties***

Neither the Secretary nor Knight Hawk presents any significant argument with respect to the impact upon the interest of third parties.<sup>13</sup> As noted above, each ventilation plan is specifically tailored to each mine. This approved Knight Hawk plan can only be used at PEUM. It is not dependent upon any other plan issued to any other operator at any other mine. Likewise, no plan issued to another operator for another mine is dependent upon the one issued to Knight Hawk.

The Secretary failed to note that it is uncontested that perimeter mining is safer than other forms of retreat mining.<sup>14</sup> It provides lower exposure to hazards that might occur during roof bolting or working around moving equipment. The Secretary's own hearing exhibit shows that perimeter mining also affords lower exposure to respirable dust and noise. Sec'y Ex. 2 at 3-6. That is clearly a benefit to the interest of PEUM's miners.

### ***D. The Public Interest***

Finally, perimeter mining does provide a positive public benefit in the protection of valuable surface farmland from subsurface subsidence, since the support pillars are left intact to support the surface. 41 FMSHRC at 530. Thus, it allows for the recovery of the energy resource while protecting farmers and the environment.

MSHA has failed to support its decision to revoke the operator's plan because it has been unable to express a reasonable basis for rejection of the approved plan. If there is no rational basis for believing harm may occur, there is, *a fortiori*, no threat to the public interest, either.

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<sup>13</sup> The Secretary misconstrues this element of the stay analysis. This factor is intended to function as a counterpoint to the question of irreparable harm. While the second factor asks whether the *moving party* will suffer irreparable harm if the stay is *not granted*, the third factor asks whether *other parties* will suffer adverse effects if the stay is *granted*, as a way to weigh potentially competing interests and determine whether a stay would be equitable. *Virginia Petroleum*, 259 F.2d at 925. However, rather than addressing whether the operator will face adverse effects in the event of a stay, the Secretary reiterates the alleged risk of an explosion or mine fire and argues that denying the stay will have adverse effects on miners and the community at large. Mot. for Stay at 5. Regardless, as discussed above, the record does not support a finding of such a risk.

<sup>14</sup> Roof bolting is generally eliminated during perimeter mining [the diagonal cuts of coal at the edge of the section being mined] because after the entry is mined and the continuous miner withdrawn, it is barricaded off. 41 FMSHRC at 524. This benefits operators and miners by more expeditious and safer retreat mining. *Id.* at 552.

In fact, the contrary is true. The Commission held that there is a public interest, expressed in the Mine Act, in ensuring that public agencies adhere to the law and make rational decisions respecting the matters delegated to them by Congress. Where Congress has insisted, as it has in the Mine Act, that due process requires independent review, the Secretary must defend his decision under the law. The public interest, therefore, does not support the stay of a decision made in conformance with the Mine Act and our precedents.

Accordingly, we find that the Secretary has not proven (1) a likelihood that he will prevail on the merits of its appeal; (2) irreparable harm if the stay is not granted; (3) adverse effects on other interested parties; or (4) the public interest. Accordingly, his motion is DENIED.

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

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



Commissioner Traynor, dissenting:

Absent a stay of my colleagues' decision that "the revocation of the operator's plan was arbitrary and capricious," it appears Knight Hawk intends to engage in extended-cut perimeter mining at the Prairie Eagle Underground mine without an MSHA-approved plan for at least the duration of the Secretary's appeal.<sup>1</sup> *Knight Hawk Coal, LLC*, 42 FMSHRC \_\_\_, slip op. at 18, No. LAKE 2019-0087-R (July 23, 2020) ("*Knight Hawk*"). The alternative, of course, is that Knight Hawk be prohibited from extended-cut perimeter mining unless and until it adopts a ventilation plan deemed acceptable by the Secretary for that purpose, at least through a final decision from the Circuit Court or other final resolution of this case.

The former approach is contrary to a Congressional mandate and implementing regulations requiring that all operators adopt an MSHA approved ventilation plan. *See* 30 U.S.C. § 863(o); 30 C.F.R. § 75.370(d) ("No proposed ventilation plan shall be implemented before it is approved by the district manager.").<sup>2</sup> And, it places miners at a corresponding increased risk of injury, illness and death. The latter approach, by contrast, encourages MSHA and the operator to continue during the pendency of the appeal to address the safety concerns uncovered by the Secretary's investigation. And it does not involve the Commission (or a reviewing court) making a decision that grants Knight Hawk what amounts to unprecedented permission to mine without an MSHA approved ventilation plan.<sup>3</sup>

The choice between these two alternatives, arrived at by balancing the equitable factors used to evaluate a stay request, is most saliently framed as follows: should this or any court make a decision that would, for the first time ever, allow a mine operator to operate a mine without a mine specific ventilation plan approved by the Secretary of Labor? My answer, especially in

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<sup>1</sup> Knight Hawk states in its briefing to the Commission, that it "has been hesitant to simply implement its previous plan because of the threats of severe and perhaps draconian sanctions by the Secretary" and therefore requests "that the Commission direct the Secretary to allow Knight Hawk to immediately conduct perimeter mining in a fashion consistent with the Commission's ruling." KH Resp. to Mot. at 9.

<sup>2</sup> Operators wishing to "create an opportunity to challenge the district manager's plan-suitability decisions" have in the past "momentarily operated the mine without [an] approved . . . ventilation plan[.]" which triggers a citation for violation of this regulation. *Prairie State Generating Co., LLC v. Sec'y of Labor*, 792 F.3d 82, 85 (D.C. Cir. 2015); slip op. at 3 n.2. The operator in this case has expressed an intention to extend the duration of its non-compliance beyond "momentary operation" necessary to trigger review. *See supra* note 1; KH Resp. to Mot. at 8. And my colleagues in the majority seem to oblige, stating in their order denying the Secretary's stay petition, that "[w]hile the parties may ultimately decide to enter talks to discuss a *new* plan approval process, the technical citation at issue is dismissed and finished and the originally revoked plan has been reinstated." Slip op. at 10.

<sup>3</sup> If the final decision of the Commission vacating the citation is stayed, the Secretary may continue during the pendency of the appeal to enforce compliance with section 75.370(d) with a system of progressive sanctions, up to and including the withdrawal of miners.

light of the very strong likelihood the Secretary will prevail on the merits of his appeal, is no. And so for reasons discussed more fully below, I dissent from my colleagues' decision to deny the Secretary's request for a stay of the Commission's decision.

The Commission held that a party seeking a stay must satisfy the factors set forth in *Virginia Petroleum Jobbers Ass'n v. Fed. Power Comm'n*, 259 F.2d 921 (D.C. Cir. 1958): (1) a likelihood that the party will prevail on the merits of its appeal; (2) irreparable harm to it if the stay is not granted; (3) no adverse effect on other interested parties; and (4) a showing that the stay is in the public interest. *UMWA ex rel. Franks & Hoy v. Emerald Coal Res., LP*, 35 FMSHRC 2373, 2374 (Aug. 2013). "Each of these requirements may, of course, be applied flexibly according to the unique circumstances of each case." *McSurely v. McClellan*, 697 F.2d 309, 317 (D.C. Cir. 1982).

The equitable factor weighing most heavily in favor of granting the Secretary's motion for stay is the high likelihood he will prevail on the merits of his appeal. The Commission's majority decision in *Knight Hawk* was wrongly decided. More specifically, the Commission decision fails to faithfully apply an arbitrary and capricious standard of review, and thus, it is inconsistent with Commission and Court of Appeals precedent. The majority, paying only lip service to controlling law, concocted and applied a novel legal standard to review the Secretary's decision to deny approval of a mine operator's proposed ventilation plan.

Section 303(o) of the Mine Act states that a ventilation plan "shall" contain "such other information as the Secretary may require," and thus accords the Secretary discretion in determining what is required in an operator's ventilation plan. 30 U.S.C. § 863(o); *Mach Mining, LLC*, 34 FMSHRC 1784, 1791 (Aug. 2012), *aff'd*, 728 F.3d 643 (7th Cir. 2013). Congress recognized that maintaining space for the exercise of this discretion is essential, stating that "[t]he unpredictability of accidents in mines and uncertainty as to the circumstances surrounding them requires that the Secretary . . . be permitted to exercise broad discretion in order to protect the life or to insure the safety of any person." S. Rep. No. 95-181, at 29 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 617 (1978).

If a dispute arises regarding the information that the Secretary requires, an operator may challenge the Secretary's determination at a hearing before a Commission Administrative Law Judge. The Secretary is required to demonstrate that the District Manager did not act in an arbitrary and capricious manner – that is, the manager must have considered the relevant data and provided a reasonable rationale based on the factors. *Mach Mining*, 34 FMSHRC at 1790-91; *Prairie State Generating Co.*, 35 FMSHRC 1985, 1989 (Jul 2013), *aff'd*, 792 F.3d 82 (D.C. Cir. 2015) ("The Secretary's burden is to persuade the Commission that the district manager did not abuse his discretion or act arbitrarily and capriciously in making his suitability determination, for instance by failing to examine relevant facts and draw reasonable conclusions."). The arbitrary and capricious standard of review focuses on the adequacy of the Secretary's decision-making. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

In *Knight Hawk*, the Commission majority held – for the first time ever – that the Secretary does not have the discretion to require information to be included in a ventilation plan unless the Secretary is able to connect that requirement to “some plausible harm to miners from methane, dust, noxious gases, or some other ventilation-related hazard.” *Knight Hawk*, slip op. at 11; *Knight Hawk*, slip op. at 12 (The Secretary must provide “a fact-based explanation for why the proposed plan could expose miners to unsafe or unhealthful conditions.”). The majority’s holding is flatly inconsistent with *Mach Mining, Prairie State* and other governing case law. *See also, e.g., Peabody Coal Co.*, 18 FMSHRC 686 690 (May 1996) (“[w]e reject Peabody’s proposal that the Secretary be required to prove the hazard addressed by a new plan provision either exists or is reasonably likely to occur.”); *see also Hopkins County Coal, LLC*, 557 Fed. Appx. 515, 520-21 (6th Cir. 2014), *aff’d* 35 FMSRHC 134 (Jan. 2013) (ALJ) (finding that the Judge’s determination that there was a rational connection between the facts and the requested revision does not depend on a precise finding of potential harm.).

My colleagues deny the Secretary’s motion for a stay holding, in part, that the Secretary has not demonstrated a likelihood of success on the merits of his appeal. Curiously, in analyzing the Secretary’s likelihood of success, my colleagues focus entirely on the ALJ decision.<sup>4</sup> The majority’s order makes no mention of the novel legal standard that they applied for the first time on review in *Knight Hawk*, i.e., whether the Secretary demonstrated some “plausible harm to miners from methane, dust, noxious gases, or some other ventilation related hazard.” *Knight Hawk*, slip op. at 11. Instead, the majority attempts to obscure their new standard from focus, inaccurately claiming that it simply applied the arbitrary and capricious standard set forth by the D.C. Circuit in *Prairie State*. Slip op. at 8. In doing so, the majority ignores the Secretary’s primary argument as to why a stay of the majority’s decision is warranted.

Accordingly, because the Commission majority decision is inconsistent with the Mine Act and Commission and Court of Appeals decisions, the Secretary has a very high likelihood of success on the merits of his appeal. This factor is nearly controlling in the circumstances of this case presenting the possibility that in the absence of a stay, for the first time since enactment of the Mine Act, an operator may send miners underground to mine pursuant to a ventilation plan the Secretary declined to approve.

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<sup>4</sup> For the reasons, articulated in my dissent in *Knight Hawk*, slip op. at 24-28, the Judge’s decision is infected with numerous errors and could not possibly be affirmed as written. Rather than wrestle with these errors, the majority elected to consider the evidence *de novo*.

I do find plausible the Secretary's contention that absent a stay he and the miners at the Prairie Eagle mine will suffer irreparable harm in the form of an increased risk of injury or death from disastrous fire or explosion. In other contexts, courts have accepted an increased risk that cannot be subsequently undone or remedied by damages as irreparable harm. *See, e.g., Barbecho v. Decker*, No. 20-CV-2821 (AJN), 2020 WL 1876328, at \*6 (S.D.N.Y. Apr. 15, 2020) (finding irreparable harm in the "significantly higher risk of contracting COVID-19" faced by immigration detainees). And proper ventilation is essential to safely mining coal underground.<sup>5</sup>

But the Secretary's motion did not provide much more than a conclusory statement that such harm is irreparable. The record contains compelling evidence that the deep cuts Knight Hawk proposed were not adequately ventilated and that the air was not controlled through the blocks.<sup>6</sup> *Knight Hawk*, slip op. at 22 (citing Tr. 78-79, 96-97). In addition, the record reflects MSHA's serious concern whether mine examiners could accurately assess the ventilation system. *Id.* at 23-24. When marshalled, the record facts bolster the Secretary's claim that if Knight Hawk is permitted to operate under the terms that were specifically rejected over concerns about air control, the Secretary and Knight Hawk miners face an unacceptable and irreparable increase in risk of accidents contributed to by inadequate air flow.

A stay of the Commission's decision pending appeal is plainly in the public interest. The decision to grant a stay preserves intact an unbroken history going back even to the predecessor of the 1977 Act of requiring underground mining only pursuant to an MSHA approved ventilation plan. No Commission majority or court has ever before allowed mining outside the terms of an approved plan and the public – to include Knight Hawk's competitor companies who were unable to secure approval of ventilation plans to perform perimeter mining – has an interest in this stay being granted to ensure the continued and consistent enforcement of the Act.

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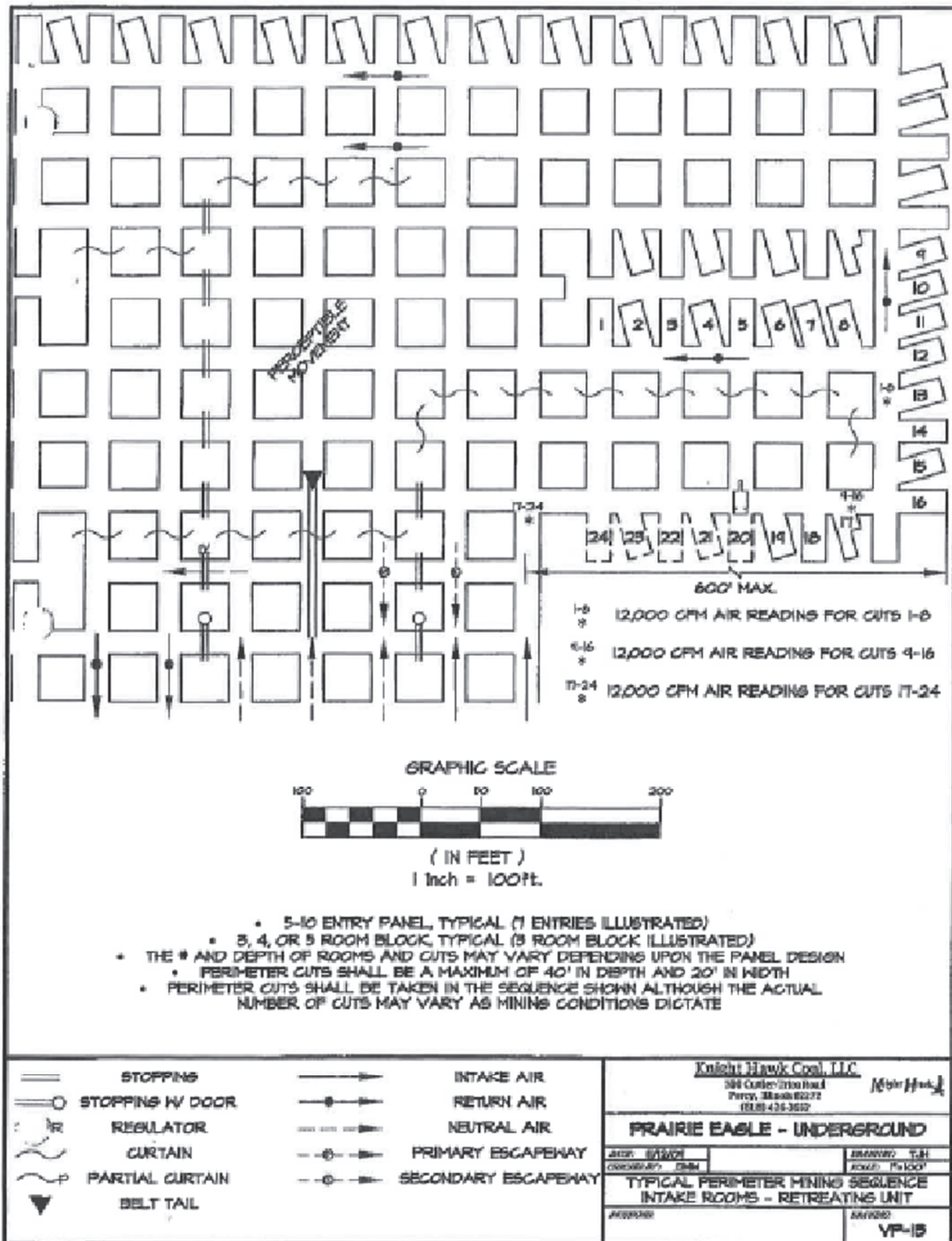
<sup>5</sup> "Congress recognized the hazards of improper ventilation and established a role for the government in addressing ventilation hazards. MSHA, with the cooperation of labor and industry, has met with a large measure of success in reducing the accidents, injuries and fatalities that have resulted from poor ventilation practices . . . . To a great extent, the framework for this success has been the implementation of effective ventilation standards." Safety Standards for Underground Coal Mine Ventilation, 61 Fed. Reg. 9,764, 9,764 (Mar. 11, 1996).

<sup>6</sup> The majority decries the absence of specific evidence of particular types of potential imminent harm – e.g., accumulations of methane. But the increased risk to miners that flows from an operator being allowed to mine without an MSHA approved ventilation plan – one that ensures to the agency's satisfaction that air flow is continuously controlled – is best understood as analogous to the increased risk to the teen driver whose parent stops policing their seatbelt use. We may not be able to pinpoint the time, place or nature of the threat posing a likelihood of harm that is increased by this decision, but there is obvious increased risk.

Viewed in light of the unique circumstance whereby denial of the Secretary's stay petition will permit the operator to mine without an approved ventilation plan and the Secretary's overwhelming likelihood of success on appeal, a stay to protect miners from unnecessary increased risk pending resolution of this appeal was the proper course of action.

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

# ATTACHMENT 1



1897

## ATTACHMENT 2

### The ALJ's Decision

#### 1. The ALJ's Additional Findings of Fact and Credibility Determinations

1. Mining began at the following date and the extended cut (40 foot) plan, including perimeter mining, was approved by the following District Manager on the following dates:
  - a. MMU 002 - June 2008, Acting DM Mary Jo Bishop (March 1, 2010)
  - b. MMU 003 - December 2011, DM Robert Simms (August 17, 2012)
  - c. MMU 004 - July 2013, DM Robert Simms (December 9, 2013)
  - d. MMU 005 - August 2017, DM Ronald Burns (September 27, 2017)

41 FMSHRC at 524 (Jt. Stip. 15).
2. On March 1, 2010, MSHA approved the ventilation plan. *Id.* at 526 (Jt. Stip. 17).
3. In performing tests, the MSHA employees used a long probe that would attempt to collect an air sample and a second tube that would release smoke in an attempt to observe the movement of the smoke from approximately 44 feet away in order to determine whether, and in what direction, there was air movement in the perimeter cut. *Id.* at 534.
4. Under the approved ventilation plan, the methane from the bleeder was effectively diluted to less dangerous levels. *Id.* at 536.
5. In making its evaluation, MSHA did not consider the experiential opinions and advice from District 8's own ventilation specialists and inspectors intimately familiar with the mine. *Id.* at 542.
6. District 8 ventilation specialist, Mike Pritchard, did not testify. However, there was testimony that he regularly performed ventilation plan reviews by walking "the air courses, walks intakes, returns, bleeders, and he . . . evaluates the bleeders." *Id.* The Judge cited testimony of a Knight Hawk witness that Pritchard said that he did not see anything wrong with the revoked system of ventilation for perimeter mining. *Id.* at 543.
7. The Judge found that the Secretary's expert was evasive and frequently avoided answering questions directly. Therefore, he was unreliable. *Id.* at 531 n.10.

#### 2. The ALJ's Legal Conclusions

From those factual findings, the ALJ recites in extensive detail that in revoking the approved plan MSHA relied on inappropriate factors, failed to consider important factors, and offered explanations counter to the evidence before it. In doing so, he went through the regulations cited by the Secretary and the reasons such citations did not apply to and/or did not warrant revocation of the plan approval. For purposes of responding to the present motion, we

need not go through the basis of the legal conclusions in anything approaching the detail with which he covered the points in 12 pages of text.

Citing *Burlington Northern & Santa Fe Ry. Co. v. Surface Transp. Bd.*, 403 F.3d 771, 777 (D.C. Cir. 2005), the ALJ found that MSHA failed to explain this conduct with a reasoned explanation and, therefore, acted arbitrarily and capriciously by invoking such different standards without explanation. 41 FMSHRC at 549-50.

Additionally, the ALJ found convincing evidence in the record that MSHA was seeking to undertake tests with a predetermined goal to eliminate perimeter mining. *Id.* at 550. As an example, the ALJ cited evidence that the MSHA expert admonished a line inspector on her method and recordings of smoke tests even though he was not present when the tests were run.

The ALJ further noted that MSHA's District Director persisted in stating he requires ventilation "throughout" the previously mined area even though the regulation required ventilation "through" such area, and MSHA conceded that ventilation under the approved plan, in fact, did move through the area as the regulation requires. *Id.* at 550, 556.

The ALJ found that the record showed the District Manager did not utilize or take into account the views of the District's own ventilation experts—that is, the MSHA ventilation personnel with the most knowledge of perimeter mining within the District. The ALJ opined that while "none of this evidence alone indicates a bias, taken together, the evidence--including the credited testimony, the use of inapplicable language, the use of the unreliable smoke tests, and the failure to consider the opinions of District 8's ventilation specialists intimately familiar with the ventilation plan at the mine--demonstrates a pattern of bias against perimeter mining that infected the decision-making process, leading to a predetermined, and thus arbitrary and capricious, decision." 41 FMSHRC at 551.

In terms of evidence ignored by MSHA, the ALJ found that, despite "substantial evidence that perimeter mining is a safe and likely safer form of mining with regard to recurring hazards," MSHA failed "to even consider, much less address, the comparative safety advantages of perimeter mining under the previously approved ventilation plan." *Id.* at 522.

Consequently, the ALJ found the evidence demonstrated that weekly examinations occurred and included travel of at least one entry of each set of bleeder entries to conduct the tests, thereby complying with the requirements of § 75.362(a)(2)(iii). *Id.* at 556-57. He reviewed and recited upon Knight Hawk's compliances with ventilation regulations and found MSHA offered no explanation as to why Knight Hawk's weekly examinations were inadequate under the regulation. *Id.*



# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 24, 2020

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

v.

NEVADA GOLD MINES, LLC

Docket No. WEST 2019-0512-M  
A.C. No. 26-02286-486626

Docket No. WEST 2019-0513-M  
A.C. No. 26-02286-490669

BEFORE: Rajkovich, Chairman; Althen and Traynor, Commissioners

## ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) (“Mine Act”). Previously, Nevada Gold filed motions to reopen two penalty assessments that had become final orders of the Commission in Docket Nos. WEST 2019-0512-M and WEST 2019-0513-M,<sup>1</sup> pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). Nevada Gold has now informed the Commission that it has decided not to pursue its motions to reopen. Accordingly, Nevada Gold moves to withdraw its motions to reopen.

Having considered Nevada Gold’s motions to withdraw, we hereby grant its requests. Accordingly, this matter is dismissed.

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

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

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

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<sup>1</sup> For the limited purpose of addressing these motions to reopen, we hereby consolidate docket numbers WEST 2019-0512-M and WEST 2019-0513-M, involving similar procedural issues. 29 C.F.R. § 2700.12.

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 30, 2020

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

v.

AGGREGATE SAND & GRAVEL, INC.

Docket No. CENT 2020-0055-M  
A.C. No. 14-01333-49975

BEFORE: Rajkovich, Chairman; Althen and Traynor, Commissioners

## ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) (“Mine Act”). On December 27, 2019, the Commission received from Aggregate Sand and Gravel, Inc. (“Aggregate”) a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor’s Mine Safety and Health Administration (“MSHA”) indicate that the proposed assessment was delivered on September 21, 2019, and became a final order of the Commission on October 21, 2019. Aggregate contends that it mistakenly mailed its notice of contest to the same address that it mailed payment of the penalties it chose not to contest. The Secretary does not oppose the request to reopen, but urges the operator to take steps to ensure that future penalty contests are timely filed. The Secretary

notes that the proposed penalty assessment clearly provides instructions to mail contest forms to an Arlington, Virginia address, and to mail payments to a St. Louis, Missouri address.

Having reviewed Aggregate's request and the Secretary's response, we find that Aggregate failed to timely contest penalties through inadvertence or mistake, and that such inadvertence or mistake constitutes good cause to reopen the penalty proceeding. In the interest of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

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

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

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

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 30, 2020

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

v.

TECK ALASKA, INC.

Docket No. WEST 2019-0446-M  
A.C. No. 50-01545-491155

BEFORE: Rajkovich, Chairman; Althen and Traynor, Commissioners

## ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) (“Mine Act”). On July 1, 2019, the Commission received from Teck Alaska, Inc. (“Teck”) a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor’s Mine Safety and Health Administration (“MSHA”) indicate that the proposed assessment was delivered on May 20, 2019, and became a final order of the Commission on June 19, 2019. Teck states that the proposed penalty assessment was received in its corporate office in Anchorage, Alaska on May 18, 2019. The person who typically opens the proposed assessments and e-mails them to the safety department was on leave that day. Instead, a summer intern placed the unopened envelope in a basket to be

shipped to the mine site via cargo services. Shipment was delayed by more than 30 days due to regional weather and limited delivery flights to the mine. The assessment was received by the mine on June 21, 2019, after it had become a final order of the Commission. The Secretary does not oppose the request to reopen, but urges the operator to take steps to ensure that future penalty contests are timely filed.

Having reviewed Teck's request and the Secretary's response, we find that Teck failed to timely contest the penalties through inadvertence or mistake, and that such inadvertence or mistake constitutes good cause to reopen the penalty proceeding. In the interest of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

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

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

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

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

September 30, 2020

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

v.

STONY CREEK QUARRY CORP.

Docket No. YORK 2019-0081-M  
A.C. No. 06-00005-4744423

BEFORE: Rajkovich, Chairman; Althen and Traynor, Commissioners

**ORDER**

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) (“Mine Act”). The Commission has received a motion from the operator seeking to reopen a penalty assessment which had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 813(a). The Secretary of Labor states that he does not oppose the motion.

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

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

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

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# **ADMINISTRATIVE LAW JUDGE DECISIONS**



# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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September 25, 2020

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

v.

NUGENT SAND COMPANY,  
Respondent

CIVIL PENALTY PROCEEDING

Docket No. KENT 2020-0039  
A.C. No. 15-18536-505478

Mine: Warsaw Plant

## DECISION AND ORDER

Before: Judge McCarthy

This case is before the undersigned upon a Petition for the Assessment of Civil Penalty under § 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). The Secretary of Labor's Conference and Litigation Representative ("CLR") filed a notice of limited appearance with the penalty petition. It is **ORDERED** that the CLR be accepted to represent the Secretary. *Cyprus Emerald Res. Corp.*, 16 FMSHRC 2359 (Nov. 1994).

The Secretary and the Respondent both filed Motions for Summary Judgment pursuant to 29 C.F.R. § 2700.67. This matter concerns a single citation, Citation No. 9424742, issued to Respondent on September 11, 2019, for failing to protect powerlines against lightning. 30 C.F.R. § 56.12065. ("Powerlines, including trolley wires, and telephone circuits shall be protected against short circuits and lightning.").

Based on an agreement between the parties to file cross-motions for summary judgment and the stipulated facts,<sup>1</sup> the undersigned finds that there are no genuine issues of material fact. For the reasons set forth below, the undersigned concludes that the Secretary is entitled to a summary decision as a matter of law, affirms the citation and assesses a penalty of \$121.00 against Nugent Sand Company.

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<sup>1</sup> In this Decision, "Sec'y Mem." refers to the Secretary's Memorandum of Points and Authorities in Support of his Motion for Summary Decision, "Resp't Mot. for Summ. J." refers to Respondent's Motion for Summary Judgment, and "JS" refers to the Joint Stipulations.

## I. STIPULATIONS

The parties submitted the following joint stipulations, which have been accepted into the record:

1. Warsaw Plant (Mine ID 15-18536) is a “mine” as defined in § 3(h) of the Federal Mine Safety and Health Act of 1977, as amended (hereinafter “the Mine Act”), 30 U.S.C. § 802(h).
2. Nugent Sand Company owns, operates, and controls Warsaw Plant. Nugent Sand Company is an “operator” as defined in § 3(d) of the Mine Act, 30 U.S.C. § 802(d).
3. At all times relevant to this case, the products of the Warsaw Plant 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. Operations of Nugent Sand Company at the Warsaw Plant are subject to the jurisdiction of the Mine Act.
5. This proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judge pursuant to Sections 105 and 113 of the Mine Act.
6. Warsaw Plant is a sand and gravel processing plant located in Gallatin County, Kentucky. As part of its mining process at Warsaw Plant, Nugent Sand Company utilizes several pieces of electrical equipment including conveyor belts, screens, sand screws, and cone crushers.
7. Electrical power is supplied to Warsaw Plant by three-phase 7200 volt powerlines. Each of these 7200 volt powerlines is protected against lightning by a lightning arrester. On each 7200 volt powerline, the lightning arrester is located immediately prior to the powerline’s connection to a transformer. No additional lightning protection is provided on the 7200 volt powerlines at the mine facility.
8. Each 7200 powerline connects to a transformer where the voltage is stepped down from 7200 to 480 volts.
9. From each transformer, 480 volt powerlines supply power to the plant’s electrical equipment. No additional lightning protection is provided on the 480 volt powerlines. Rather, the 480 volt powerlines are protected against lightning by the lightning arrestors on the 7200 powerlines.
10. The 7200 volt powerlines, lightning arrestors, transformers, and 480 volt powerlines are all located on mine property.
11. The 480 volt powerlines are owned by Nugent Sand Company. Nugent Sand Company contends, and the Secretary neither admits nor denies, that any maintenance performed on the 480 volt powerlines is done under the auspices of Owen Electric Cooperative, Inc.

12. The 7200 volt powerlines, lightning arrestors, and transformers are owned and maintained by Owen Electric Cooperative, Inc.

13. Owen Electric Cooperative, Inc. is a public utility. Nugent Sand Company contracts with Owen Electric Cooperative, Inc. to supply electricity to Warsaw Plant. Owen Electric Cooperative, Inc. has not authorized Nugent Sand Company to perform repairs on its 7200 volt powerlines, lightning arrestors, or transformers.

14. On September 11, 2019, the lightning arrestor on one of the three-phases of the 7200 volt powerlines was blown and therefore inoperable. As a result, that phase of the 7200 volt powerlines, the transformer it connected to, and the 480 volt powerline on the secondary of that transformer were not protected against lightning. The lightning arrestors on the other two phases of the 7200 volt powerlines were operable and therefore those two phases, the transformers that each of those phases connected to, and the two 480 volt powerlines secondary of those transformers were protected against lightning.

15. On September 11, 2019, Mine Safety and Health Administration Inspector Steaven Caudill (“Inspector Caudill”) issued Citation No. 9424742 for a violation of mandatory safety standard 30 C.F.R. § 56.12065. A copy of Citation No. 9424742 was served on an authorized agent of Nugent Sand Company. At all relevant times, Inspector Caudill was acting in an official capacity and as authorized representative of the Secretary of Labor.

16. On September 11, 2019, Nugent Sand Company informed Owen Electric Cooperative, Inc. of the blown lightning arrestor. Employees of Owen Electric Cooperative, Inc. replaced the blown lightning arrestor. After the blown lightning arrestor was replaced, on September 12, 2019, Inspector Caudill terminated Citation No. 9424742.

17. Nugent Sand Company contends that it is not liable for the violation. To the extent Nugent Sand Company is liable for the violation, the parties agree and stipulate:

- a. The violation was not significant and substantial.
- b. The violation was unlikely to result in an injury or illness.
- c. If an injury or illness were to occur as a result of the violation, the injury or illness could reasonably be expected to be permanently disabling.
- d. One person was affected by the cited hazard.
- e. Nugent Sand Company’s negligence was low.

18. Payment of the total proposed penalty of \$121.00 for Citation No. 9424742 will not affect Nugent Sand Company’s ability to continue in business.

19. The certified copy of the R-17 Assessed Violation History Report, attached as Exhibit 1, accurately reflects Nugent Sand Company’s violation history at Warsaw Plant for the time period of September 11, 2016 to September 11, 2019.

## II. Background

Nugent Sand Company (“Nugent Sand”) owns and operates the Warsaw Plant, a sand and gravel processing plant in Gallatin County, Kentucky. JS at ¶¶ 1-6. The Warsaw Plant is a “mine” as defined in § 3(h) of the Federal Mine Safety and Health Act of 1977, as amended (“Mine Act”). 30 U.S.C. § 802(h); JS at ¶ 1. As relevant here, the Warsaw Plant 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; JS at ¶ 3. Consequently, operations of Nugent Sand at the Warsaw Plant are subject to the jurisdiction of the Mine Act. JS at ¶ 5.

On the mine property, three-phase, 7200-volt powerlines supply electrical power to the Warsaw Plant. JS at ¶ 7. Each 7200-volt powerline connects to a transformer where the voltage is stepped down, and 480-volt powerlines run from the transformer to the plant’s electrical equipment. *Id.* at ¶ 7-8. Immediately prior to each 7200-volt powerline’s connection to a transformer, each powerline has a lightning arrester. *Id.* at ¶ 7. This is the only lightning protection on the 7200-volt powerlines, and there is no additional lightning protection on 480-volt powerlines from the transformer to the plant’s electrical equipment. *Id.* at ¶ 9.

Although the 480-volt powerlines from the transformer to the plant are owned by Nugent Sand, the 7200-volt powerlines, lightning arrestors, and transformer are all owned and maintained by Owen Electric Cooperative, Inc. (“Owen Electric”), a public utility that contracts with Nugent Sand. *Id.* at ¶¶ 12-13. Nugent Sand has no authority to perform repairs on the 7200-volt powerlines, lightning arrestors, or transformers. *Id.* at ¶ 13.

On September 11, 2019, the lightning arrester on one of the three phases of the 7200-volt powerlines was inoperable. Without an operable lightning arrester, that phase of the 7200-volt powerline as well as its transformer and a 480-volt powerline were not protected against lightning. *Id.* at ¶ 14. On that same date, MSHA Inspector Steaven Caudill issued Citation No. 9424742 for a violation of mandatory safety standard 30 C.F.R. § 56.12065. *Id.* at ¶ 15.

That same day, Nugent Sand notified Owen Electric of the inoperable lightning arrester. On September 12, 2019, Owen Electric replaced the inoperable lightning arrester; and Inspector Caudill terminated the Citation. *Id.* at ¶ 16.

The parties stipulate that the alleged violation was not significant and substantial and was unlikely to result in an injury or illness; that the expected injury or illness would be permanently disabling and would affect one person; and that Nugent Sand’s negligence was low. *Id.* at ¶ 17. The parties also stipulate that the total proposed penalty of \$121.00 would not affect Nugent Sand’s ability to continue in business. *Id.* at ¶ 18.

## III. Legal Principles and Analysis

Under Commission Rule 67(b), 29 C.F.R. § 2700.67(b), a motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, show 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. Based on the parties’ agreement to file cross-motions for summary judgment and the stipulated facts, the undersigned concludes that there are no genuine issues of material fact and that this



matter is ripe for summary judgment. The parties do not dispute the existence or the particulars of the violation itself.<sup>2</sup> Consequently, the Secretary and the Respondent agree that the sole issue is whether, as a matter of law, the Respondent is liable for the violation.

As an initial matter, the 7200-volt powerlines, the transformer, and the lightning arrestors are all on mine property, JS at 2, and subject to the regulations of the Mine Act. *Old Dominion Power Co.*, 6 FMSHRC 1886, 1890 (Aug. 1984) (*rev'd on other grounds* 772 F.2d 92 (4th Cir. 1985)).

However, despite the violation occurring on its mine, Nugent Sand contends that it is not liable for the violation. Nugent Sand argues that it is not liable for the violation because Owen Electric owned and exercised control over the 7200-volt powerlines and lightning arrestors.<sup>3</sup> Resp't Mot. for Summ. J. at 1 (“The transformers[] and the associated lightning arrestors[] are not the property of Nugent Sand” and they are “maintained and serviced by Owen Electric . . . and Owen [Electric] does not authorize Nugent Sand . . . or any contractors . . . to service, maintain, or check them.”). The Secretary argues, in part, that Nugent Sand is strictly liable for the violation occurring at the mine. Sec’y Mem. at 6-7 (citing cases).

Strictly speaking, this is a question of vicarious liability, and not strict liability. Strict liability operates to find liability even where the actions in question are not negligent, while vicarious liability operates to find liability even where the actions in question were done by another party. *See W. Fuels-Utah v. FMSHRC*, 870 F.2d 711, 713 (D.C. Cir. 1989) (“The general rule . . . is that a person is not liable for a harm done unless he caused it by his action (*actus reus*), and did so with a certain intent (*mens rea*). Strict liability alters this general rule by eliminating the requirement of *mens rea*; one may then be punished for acting in a forbidden way, even if one was without any particular intent, such as willfulness or negligence. . . Vicarious liability, on the other hand, alters the general rule by holding a person liable for the act of another—that is, by attenuating the requirement of an *actus reus*.”). Case law involving the Mine Act often elides the two concepts of strict liability and vicarious liability. *See, e.g., Allied Prods. Co. v. FMSHRC*, 666 F.2d 890, 894 (5th Cir. 1982) (discussing strict liability and stating that “[i]f the act or its regulations are violated, it is irrelevant whose act [precipitated] the violation”); *Cyprus Indus. Minerals Co. v. FMSHRC*, 664 F.2d 1116, 1120 (9th Cir. 1981) (“Mine owners are strictly liable for the actions of independent contractor violations under” the Mine Act.).

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<sup>2</sup> Nugent Sand Company included a letter from Owen Electric with its Motion for Summary Judgment. Nugent Sand Company presents this letter to address the gravity and level of negligence of the violation. However, the parties have stipulated as to the levels of gravity and negligence, and this letter does not contradict those stipulations. Consequently, this letter does not present any genuine dispute over material facts. *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986) (“Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted.”).

<sup>3</sup> Nugent Sand Company also argues that it has a grounding system that “provides protection to personnel,” but this argument goes to the negligence and gravity of the violation, not the question of liability. Resp't Mot. for Summ. J. at 2.

Therefore, the question is whether Nugent Sand is vicariously liable for a violation occurring under the control of Owen Electric while operating on the mine. This question must be answered in the affirmative. For although the case law often elides the concepts of strict and vicarious liability, the case law is clear as to the liability of mine operators for actions done by third parties on the mine. *W. Fuels-Utah*, 870 F.2d 711 at 713; *Allied Prods. Co. v. FMSHRC*, 666 F.2d at 894; *Cyprus Indus.*, 664 F.2d at 1120. Not only is a mine operator vicariously liable for the actions of an independent contractor, but also for the acts of unknown third parties. *Miller Mining Co., Inc. v. FMSHRC*, 713 F.2d 487, 491 (9th Cir. 1983) (“It is of no consequence that [the operator] may have been the innocent victim of an unrelated party’s desire, for whatever reason, to get the mine back in production. The Fifth Circuit recently recognized the inherent danger of mines, and held any failure to comply with a regulation under the Act would result in a citation to the operator. Imposing a kind of strict liability on employers to ensure worker safety, the court pointed out there are no exceptions for fault, only harsher penalties for willful violations.” (citations omitted)). In short, “when a violation of a mandatory safety standard occurs in a mine, the operator is automatically assessed a civil penalty. When a violation occurs, a penalty follows.” *Asarco, Inc.-Nw. Mining Dept. v. FMSHRC*, 868 F.2d 1195, 1197 (10th Cir. 1989); see also *Ames Constr., Inc. v. FMSHRC*, 676 F.3d 1109, 1112 (D.C. Cir. 2012) (“Where supervision or control of a distinct aspect of the mining activity is farmed out to a firm different from the principal production-operator, refusal to apply the act’s liability without fault provision would thwart the act’s purposes.”); *Sec’y of Labor v. Twentymile Coal Co.*, 456 F.3d 151, 155 (D.C. Cir. 2006) (*Twentymile Coal II*) (“[T]he owner of a mine is liable without regard to its own fault for violations committed or dangers created by its independent contractor .”), *rev’g* 27 FMSHRC 260 (Mar. 2006) (*Twentymile Coal I*).

The case law also speaks to the reasoning behind this vicarious liability. The Commission has stated as follows:

It bears emphasis that the miners of an independent contractor are invited upon the property of the mine owner to perform work promoting the interests of the owner. A mine owner cannot be allowed to exonerate itself from its statutory responsibility for the safety and health of miners merely by establishing a private contractual relationship in which miners are not its employees and the ability to control the safety of its workplace is restricted.

*Republic Steel Corp.*, 1 FMSHRC 5, 11 (Apr. 1979). Although there is no evidence that Nugent Sand maintains its contractual relationship with Owen Electric for the purposes of avoiding liability, this relationship nonetheless does not absolve Nugent Sand of its liability for actions occurring at the mine.<sup>4</sup>

Nugent Sand alleges that it cannot be held liable for the actions of Owen Electric because Nugent Sand did not exercise control over the transformers. Resp’t Mot. for Summ. J. at 1 (“Owen [Electric] does not authorize Nugent Sand . . . to service, maintain, or check” the

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<sup>4</sup> Moreover, the undersigned notes that Nugent Sand could have used this contractual relationship to indemnify itself. See, e.g., *Consolidation Coal Co.*, 26 FMSHRC 138, 139 (Mar. 2004); *W-P Coal Co.*, 16 FMSHRC 1407, 1408 (July 1994).

transformers.). On at least two occasions, the Commission has accepted such an argument; and on both occasions the Commission was reversed on appeal. *Twentymile Coal II*, 456 F.3d 151; *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533 (D.C. Cir. 1986) (*Cathedral Bluffs II*), *rev'g* 6 FMSHRC 1871 (Aug. 1984) (*Cathedral Bluffs I*).

In *Cathedral Bluffs*, the Commission held that the Secretary must satisfy the Secretary's own Enforcement Guidance in order to cite the owner-operator for violative actions by an independent contractor. *Cathedral Bluffs I*, 6 FMSHRC at 1873. Discussing control, the Commission held that, under the Guidance, an owner-operator can be found liable for the actions of an independent contractor if there is a level of control that creates a "functional nexus" beyond a mere contractual relationship. *Id.* at 1876. The Circuit Court for the District of Columbia reversed the Commission's decision. *Cathedral Bluffs II*, 796 F.2d at 539. Specifically, the D.C. Circuit ruled that the Guidance was a policy and not a binding regulation.<sup>5</sup> The D.C. Circuit further ruled that, because the Guidance was not binding, "the Secretary retained his discretion to cite production-operators as he saw fit." *Id.* at 538.

The Commission later applied the D.C. Circuit's decision in *Cathedral Bluffs II* in cases such as *Mingo Logan*. *Mingo Logan Coal Co.*, 19 FMSRHC 246 (Feb. 1997). In *Mingo Logan*, the Secretary cited both an independent contractor and the mine owner-operator for the failure of an employee of the independent contractor to have adequate training. In ruling that the owner-operator could be held liable for the inadequate training of an employee of an independent contractor, the Commission affirmed that "MSHA may hold Mingo Logan, because of its operator status, strictly liable for all violations of the Act that occur on the mine site, whether committed by one of its employees or an employee of one of its contractors." *Id.* at 249 (citing *Cyprus Indus. Minerals*, 664 F.2d at 1119 ("Mine owners are strictly liable for the actions of independent contractor violations."); *Bulk Transp. Servs., Inc.*, 13 FMSHRC 1354 (Sept. 1991) ("[T]he Act's scheme of liability . . . provides that an operator, although faultless itself, may be held liable for the violative acts of its employees, agents and contractors.")).

But *Cathedral Bluffs II* was not the last time the D.C. Circuit reversed the Commission on this issue. In *Twentymile Coal II*, the D.C. Circuit reviewed the Commission's determination that the Secretary had abused her discretion when she issued a citation for a mine owner-operator for the actions of an independent contractor. As relevant here, the Commission ruled that citing the owner-operator was an abuse of discretion because the independent operator was in the best position to prevent the violation, the owner-operator did not have "significant, continuing" involvement in the work that resulted in the violation, and the owner-operator did not contribute

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<sup>5</sup> Even were Nugent to rely on the Enforcement Guidance as a binding regulation, the Guidance permits the Secretary to cite an owner-operator for the actions of an independent contractor when the owner-operator's miners are exposed to the hazard. *Cathedral Bluffs II*, 796 F.2d at 245 (quoting 45 FR 44,497). Here, the parties have stipulated that one miner would be affected by the hazard, and the Citation indicates that the blown lightning arrestor "exposes employees around the plant to electrical shock hazards and potential flash injuries." Citation No. 9424742.

to the violation, either through action or significant omission. *Twentymile Coal II*, 456 F.3d at 154 (quoting *Twentymile Coal I*, 27 FMSHRC at 268-273).<sup>6</sup>

In rejecting these arguments, the D.C. Circuit made “relatively short work of the question of the Secretary’s authority to cite owner-operators for violations committed by their contractors.” *Id.* After reviewing case law, the D.C. Circuit affirmed that “liability under the Mine Act is without regard to fault” and “the argument that only an operator directly responsible for the violation . . . can be held liable . . . must be rejected.” *Id.* at 155 (quoting *Int’l Union, United Mine Workers of Am.*, 840 F.2d 77, 84 (D.C. Cir. 1988)).

For the same reasons in *Cathedral Bluffs II* and *Twentymile Coal II*, the undersigned rejects Nugent Sand’s argument that its lack of control insulated it from liability.

The parties agree there was a violation at the mine that Nugent Sand *owns, operates, and controls*. JS at ¶ 2. Consequently, Nugent Sand is liable for the violation as stated in the Citation.

#### IV. Penalty Assessment

It is well established that the Commission Administrative Law Judges assess civil penalties de novo for violations of the Act. Section 110(i) of the Act delegates to the Commission 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). When an operator contests the proposed penalty, the Secretary petitions the Commission to assess the proposed 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).

In keeping with this statutory requirement, the Commission has held that “findings of fact on the statutory penalty criteria must be made” by its judges. *Sellersburg Stone Co.*, 5 FMSHRC 287, 292 (Mar. 1983), *aff’d*, 736 F.2d 1147 (7th Cir. 1984). Once factual findings on the statutory penalty criteria have been made, a judge’s penalty assessment for a particular violation is an exercise of discretion, which is bounded by proper consideration of the statutory criteria and the deterrent purposes of the Act. *Id.* at 294; *Cantera Green*, 22 FMSHRC 616, 620 (May 2000). In exercising this discretion to determine the amount of a penalty, the Commission

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<sup>6</sup> It should also be noted that the administrative law judge found that the owner-operator “did not have direct control over the cited equipment.” *Twentymile Coal I*, 6 FMSHRC at 274 (quoting the ALJ decision).

has recognized that a judge is not bound by the penalty proposed by the Secretary. *Spartan Mining Co.*, 30 FMSHRC 699, 723 (Aug. 2008).

When determining a proper assessment for this violation, the undersigned considered the following stipulated facts: 1) the Respondent's history of violations of this standard in the 15 months prior to the accident (JS, Attach. 1 at 1); 2) the Respondent's size as an operator who worked only 17,678 hours at the mine in 2019 (MSHA, *Mine Data Retrieval System*, <https://www.msha.gov/mine-data-retrieval-system> (searchable by mine name)); 3) the Respondent's low level of negligence (JS at ¶ 17); 4) that the penalty will not have an effect on the Respondent's ability to continue in business (*id.* at ¶ 18); 5) that any injury or illness would be unlikely and would be expected to result in permanently disabling injuries affecting one person (*id.* at ¶ 17); and 6) the timely good-faith abatement (*id.* at ¶ 16 (showing the termination of the Citation the day following its issuance)).

Based upon the undersigned's consideration of the section 110(i) penalty criteria and the deterrent purposes of the Act, the undersigned assesses a penalty of \$121.00. This amount is the result of an independent determination by the undersigned of the statutory criteria and a penalty amount that would respond to the seriousness of the violation and would deter future violations. *American Coal Co. v. FMSHRC*, 933 F.3d 723, 728 (D.C. Cir. 2019).

### III. CONCLUSION

For the foregoing reasons, the Respondent's Motion for Summary Judgment is **DENIED**, the Secretary's Motion for Summary Judgment is **GRANTED**, and Citation No. 9424742 is **AFFIRMED**, as issued. It is further **ORDERED** that the Respondent pay a total penalty of \$121.00 within thirty days of this order.<sup>7</sup>

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

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<sup>7</sup> Payment should be sent to: Pay.gov, a service of the U.S. Department of the Treasury, at <https://www.pay.gov/public/form/start/67564508> or, alternately, Mine Safety & Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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September 29, 2020

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

v.

CONSOL PENNSYLVANIA COAL CO.,  
LLC,  
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. PENN 2019-0100  
A.C. No. 36-07230-490127

Mine: Bailey Mine

## DECISION AND ORDER

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

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

Before: Judge Lewis

## STATEMENT OF THE CASE

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

## LAW AND REGULATIONS

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

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

Section 75.1434 **Retirement Criteria** provides:

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

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

## **FINDINGS OF FACT AND CONCLUSION OF LAW**

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

## **JOINT STIPULATIONS**

1. The Bailey Mine ("Mine") is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977 ("Act").
2. The Mine is owned and operated by Respondent, Consol Pennsylvania Coal Company, LLC.
3. The presiding Administrative Law Judge has jurisdiction over the above-captioned proceedings pursuant to Section 105 of the Act.
4. The parties stipulate to the authenticity of their exhibits, but not to the relevance or truth of the matters asserted therein.



5. The subject citations and safeguards were served by a duly-authorized representative of the Secretary upon agents for Respondent on the dates and times and the places stated therein.
6. Respondent demonstrated good faith in abating the alleged conditions after the issuance of the safeguards and citations.
7. The penalties proposed on the Exhibit A attached to the Petition for Assessment for Citation Nos. 9076455 and 9076456 are incorrect. The Petitioner agreed to reduce the gravity of the citations to no likelihood, no lost workdays, non-S&S, and also the negligence to none at a pre-penalty settlement conference. The proposed penalties should have been \$135 for each citation. The mine tonnage, controller tonnage and number of violations represented in the Exhibit A attached to the Petition for Assessment are correct.
8. Payment of the total proposed penalty of \$270 in this matter will not affect Respondent's ability to continue in business.

T. 4-6<sup>1</sup>

## SUMMARY OF TESTIMONY

### WITNESSES

Joseph A. Vargo

At the time of hearing, Inspector Vargo had worked for MSHA for over 12 years. T. 13. He initially worked as a coal mine inspector and later in 2012 had been working as an electrical specialist. Prior to working for MSHA, Vargo had worked as a coal miner for approximately 30 years.<sup>2</sup> T. 14.

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

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

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<sup>1</sup> "T" refers to the hearing transcript. "P" refers to the Secretary's exhibits. "R" refers to Respondent's exhibits. "SB" refers to Secretary's post hearing brief and "RB" refers to Respondent's post hearing brief.

<sup>2</sup> *See* T. 13-15 for detailed description of Vargo's mining experience and specialized certifications.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### Michael Snyder

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

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

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

The hoist rope diameter measurements had been taken “at the worst spot” of 1.572, 1.571 and 1.572—1.571 being the smallest diameter reading. T. 110; *see also* P-6. By dividing 1.71 by 1.67, there was found to be a 5.93% diameter reduction.<sup>3</sup> T. 110. Any reduction exceeding 6% met the regulation retirement criteria. T. 110. While the diameter had not yet exceeded the regulation, “it was right at the edge.” T. 110.

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

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

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

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

In determining whether there is diameter reduction exceeding six percent of the baseline diameter measurement, pursuant to § 75.1434 (g), calipers could be used. T. 120-131. The hoist rope strength was “right at the limit” but “compliant” within the limits of § 75.1434 (h). T. 122. The hoist rope also did not meet the broken wires retirement criteria contained in § 75.1434 (a). T. 124. If a non-destructive test reveals more than a 10% loss of rope strength or a distortion of rope structure, the entire rope may not require changing out, but instead only require a retermination.<sup>4</sup> T. 125.

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

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<sup>3</sup> The Transcript erroneously states the diameter reduction as 1.71 in one instance, where it should read 1.571. T. 110

<sup>4</sup> A retermination was described as when one takes a portion of the rope and installs a new portion to the existing rope with zinc oxide. T. 125.

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

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

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

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

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

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

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

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

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

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

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

## Craig Elson

Craig Elson worked for Consol Energy at the Crabapple Portal and had done so for approximately 18 years. T. 152. At the time of hearing, he worked as assistant master mechanic, overseeing underground and surface maintenance. T. 152.<sup>5</sup>

A slope hoist is used to haul material in and out of a coal mine. T. 155. In case of an elevator malfunction, a hoist can also be used to transport individuals. T. 156. The slope hoist at the Crabapple Portal is operated by a hoistman. T. 156. Different types of cars are loaded with supplies. T. 156. They will then be hoisted through the track switch, taken off the hoist car and delivered to where needed throughout the coal mine. T. 156. The hoist rope is attached to a brakeman car; supply cars are coupled to the brakeman car.<sup>6</sup> T. 156.

The total length of rope at the Crabapple Portal is 3,000 feet. T. 157. From the pit mouth to slope bottom is approximately 1600 feet to 1800 feet.<sup>7</sup> T. 157. The slope rope is attached to a drum; the drum winds or unwinds causing the supplies to be dropped or raised.<sup>8</sup> T. 157-158. All the cars, including brakeman car and supply car, are on a track. T. 157.

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

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

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

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

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<sup>5</sup> See TT 152-155 for other mining positions held and certifications received.

<sup>6</sup> A brakeman car is used to hoist individuals. T. 156.

<sup>7</sup> Pit mouth “is the opening in the earth where you go from surface to underground in the beginning of the tunnel on your 22 degree decline into the coal mine.” T. 157.

<sup>8</sup> The drum is also called a “drum room.” Tr. 157-158.

The hoist rope, when examined on August 7, 2018, was not beyond the retirement criteria. T. 163. MSHA did not issue any citations on August 7, 2018. T. 163. After the August 7, 2018 inspection Consol took out 350-foot of the rope that was approaching retirement criteria.<sup>9</sup> T. 163. The rope was earlier changed on December 14, 2017, and March 29, 2018. T. 163-165; *see also* R-1.

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

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

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

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

During the examination of the slope car, "all the safeties" are checked. T. 172. The brakes are engaged to verify that they all set properly; batteries are checked for voltage; all lights and communications are checked. T. 172. The operator also checks for overspeed, mismatched speed, roll back.<sup>10</sup> T. 172; *see also* R-4.

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

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

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<sup>9</sup> Ketchum Construction, a subcontractor, actually performed the work. T. 163.

<sup>10</sup> For example, if the hoist rope would break, the car would go into overspeed. The brakes would be locked to the rail, avoiding a runaway car. T. 172-173.



Referring to Safeguard 9076448, wherein it was reported that the wear pad that the slope rope hoist rides on top of was worn down approximately 1 ¾", Elson noted that the wear pads at Bailey Mine were sometimes 2" thick and sometimes 2 ½" thick. T. 176. There are approximately 80 wear pads on the slope, which are designed to protect the rope. T. 176. Due to undulations in the mine floor, pads do not wear out at the same rate. T. 176-177. Rope tension also affected pad wear. T. 177. A fully loaded train with seven cars caused a higher tension on the rope than a brakeman car alone which could have sags in the rope. T. 177.

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

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

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

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

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

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

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

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

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

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

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

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

### Michael Tennant

Michael Tennant had worked for Respondent for approximately 20 years, being employed at Baily Mine for 18 years.<sup>11</sup> T. 194. Tennant had been working as a safety supervisor for Baily Mine in August 2018. T. 195.

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

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

Exhibit R-7 was a list of dates that Tennant reported to MSHA that Crabapple hoist had been down in 2016, 2017, and 2018. T. 200. Tennant had created the document to rebut the safeguard assertion that the Crabapple hoist had been taken down multiple times for wear on the

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<sup>11</sup> *See* TT 194-195 for full resume.

rope.<sup>12</sup> T. 200. On none of the dates reported in 2016 had the hoist been taken out of service for excessive wear. T. 201. On October 22, 2016, the operator did take the hoist out of service because it was “close enough to the non-destruct.” T. 201.

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

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

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

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

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

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

## **CONTENTIONS OF THE PARTIES**

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

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

As to Safeguard No. 9076448, Respondent contends that the alleged transportation hazards associated with the Crabapple hoist rope were already covered by mandatory safety

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<sup>12</sup> The full title of the document, which was partially obscured, read “reportable Crabapple Hoist Car.” T. 200. “Reportable” meant anytime the elevator was inoperable for more than 30 minutes in which case MSHA had to be notified. T. 200.

standards at 30 C.F.R. § 75.1430 through § 75.1438. As such, the safeguard was facially invalid because there was no actual mine specific transportation hazard not (already) covered by a mandatory safety standard. Respondent alternatively contends that, even if the safeguard was facially valid, there were no actual transportation hazards existent at any of the pertinent times within. The Respondent makes a similar argument with regards to Safeguard No. 9076449, arguing that it is invalid because there was no actual mine specific transportation hazard, and that the safeguard did not adequately articulate the hazard or the conduct required of the operator to remedy such hazard.

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

## ANALYSIS

- Issue I: Was Safeguard No. 9076448 facially invalid in that the contemplated transportation hazard—hoist slope rope failure due to excessive wear and tear—was already covered by existing mandatory safety standards at 30 C.F.R. §§ 75.1430 through 75.1438?
- Issue II: Assuming Safeguard No. 9076448 was not facially invalid, did the Secretary carry his burden of proving the existence of an actual transportation hazard?
- Issue III: Assuming the Secretary carried his burden of proof, did he properly articulate the conduct required of the operator to remedy the hazard?
- Issue IV: Was Safeguard No. 9076449 facially invalid in that the contemplated safety hazards associated with the slope hoist track were already covered by prior Safeguard No. 3670427?
- Issue V: Assuming Safeguard No. 9076449 was not facially invalid, did the Secretary carry his burden of proving the existence of any actual transportation hazard?
- Issue VI: Assuming the Secretary carried his burden of proof, did he properly articulate the conduct required of the operator to remedy the transportation hazard?
- I. Safeguard No. 9076448 was facially invalid in that the contemplated transportation hazard—hoist rope failure due to wear and tear—was already covered by mandatory safety standards found at 30 C.F.R. §§ 75.1430 through 75.1438.

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

an actual transportation hazard not covered by a mandatory standard and that a safeguard is necessary to correct the hazardous condition.”).

The Secretary did not dispute this proposition at hearing. Inspector Vargo responded affirmatively when asked at hearing, “would you also agree with me that to issue a safeguard, the actual hazard with respect to the transportation of men and materials you determined to have existed must also not be covered by a mandatory standard?” T. 48. Rather, the Secretary cited to the applicable sections of the Act and regulations establishing MSHA’s authority to issue mine-specific safeguards to minimize hazards with respect to the transportation of men and materials and Commission case law in support of such. *See, inter alia*, SB 4-5, *citing* § 314 (b) of the Act, 30 C.F.R. § 75.1403 of the regulations, and the Commission holding at *Pocahontas Coal Co. LLC*, 38 FMSHRC 157, at 157 (Feb. 2016).

However, the general authority of MSHA inspectors to issue transportation safeguards on a mine-to-mine basis is not at issue.<sup>13</sup> Rather, Respondent has challenged Coal Mine Inspector Vargo’s issuance of this particular safeguard on the basis that mandatory safety standards in Part 75 of 30 C.F.R. already address the alleged transportation hazard posed at Baily Mine.

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

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

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

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

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<sup>13</sup> Likewise, the question is not, as Secretary seems to imply, whether a safeguard is invalid because it addresses hazards that exist at other mines. *See* SB 5, *Citing Oak Groves Res., LLC*, 35 FMSHRC at 2013.

*Inter alia*, these sections specifically provide that “wire ropes...used to hoist” (§ 75.1430) shall be subject to “minimum rope strength” values (§ 75.1431), “initial measurement” (§ 75.1432), “examinations,” including biweekly visual examination and 6 month non-destructive testing (§ 75.1433), “retirement criteria,” including rope diameter reduction and rope strength loss percentages (§ 75.1434), “end attachment retermination,” (§ 75.1437) and “end attachment replacement” (§ 75.1438). These regulatory standards go to the heart of what constitutes excessive hoist rope wear and tear and render the within safeguard as duplicative and preemptive.

Considering, therefore, the record *in toto* and Respondent’s persuasive arguments on point, this Court finds Safeguard No. 9076448 to be facially invalid. The ALJ, however, recognizes that this a close question.<sup>14</sup> Accordingly this Court will further consider whether the Secretary carried his burden of proving that an actual transportation hazard existed when CMI Vargo issued the safeguard and whether MSHA had properly articulated the conduct required of the operator to remedy such hazard with specificity.

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

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

Vargo opined that an actual transportation hazard existed because the hoist rope was “right at the borderline.” T. 56. Similarly, Snyder testified the rope was “right at the limit.” T. 122. There is a speculative quality to these opinions which renders them problematic. According to Vargo’s and Snyder’s rationales, although the hoist rope was still compliant with all applicable wire rope regulations, a transportation hazard nonetheless presently existed because at some looming time the rope would become non-compliant and fail. Such reasoning implicates fundamental norms of due process. The reasoning also improperly imports the Commission’s assumption of continued mining operations in determining reasonable likelihood, to the analysis of whether a violation existed. *See Black Beauty Coal Co.*, 34 FMSHRC 1733, 1740 (Aug. 2012), *aff’d sub nom. Peabody Midwest Mining, LLC v. FMSHRC*, 762 F.3d 611 (7th Cir. 2014).<sup>15</sup>

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<sup>14</sup> Arguably, the MSHA inspector may have been properly exercising his statutory and regulatory authority under Section 314 (b) of the Act and Section 75.1403 of the regulations notwithstanding the Part 75 *Wire Ropes* standards discussed within. This is not an instance where the overreach of authority is manifested with refulgent clarity such as, for example, Martin Luther’s accusation of Pope Leo X’s usurpation of jurisdiction over Purgatory.

<sup>15</sup> The following analogy may not be on all fours. However, this Court wonders if the Secretary’s witnesses would accept—with equal equanimity—the finding of a Highway Patrol Officer that they were guilty of speeding because they were traveling at 64 miles per hour in a 65 MPH zone and would be presumably going over the speed limit shortly.

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

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

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

Inspector Vargo was also unable to determine how much—if any—contributory effect non-turning trough rollers would have on overall hoist rope erosion.<sup>16</sup> T. 72; P-2. He was unaware that Respondent had contracted wire rope specialists to perform work on the hoist rope days before he had issued the safeguard.

Inspector Snyder's mining engineering discipline did not involve any education in wire ropes. T. 141. Like Mr. Vargo, Michael Snyder had found no violations of the hoist rope on August 7, 2018. T. 51, 55, 110-120. He found the rope to be "right at the limit" but compliant. T. 122. He conceded that rope strength loss of 10% could be remedied by reterminating the affected section rather than changing out the entire rope. T. 125-126. He was unaware that the operator was also conducting daily examinations of the hoist rope. T. 127. He further agreed that, prior to the issuance of the safeguard, 350 feet of the hoist rope had been reterminated on August 7, 2018. T. 129-130. Snyder had not considered at the time the rope had been reterminated, whether it was safe to operate despite the worn wear pads.<sup>17</sup> T. 132.

On the other hand, Craig Elson, the operator's assistant master mechanic, had job experience with hoist operations. T. 157-158. He testified that the hoist rope had been reterminated on August 7, 2018, days prior to the August 15, 2018 issuance of the within

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<sup>16</sup> As noted *infra* Elson maintained that the two non-turning trough rollers would not be bearing the most pressure exerted by the hoist rope—rather the third roller, which was turning, would.

<sup>17</sup> Though finding Snyder to be an honest individual, this Court also found Snyder to be purposely unresponsive to some of Respondent's counsel's questions.

safeguard. T. 163, 165. Elson further gave un rebutted testimony that, as long as there were three remaining wraps on a drum [see also § 75.1436 (b)], portions of the rope could be cut out, still allowing it to remain compliant and not thereby requiring the entire hoist rope to be replaced. T. 125-126. He also noted that there were daily visual examinations of the hoist, as well as the 14-day examinations. T. 170; *see also* R-3. Elson noted that wear pads wore out at different rates due to undulations in the floor. T. 177. He further testified that the third trough roller (which was turning during Vargo's inspections) would be sustaining the most pressure or force—not the two inby static trough rollers described by Mr. Vargo in the safeguard. T. 180-181. Unlike Vargo, Elson knew the exact number of trough rollers located on the slope hoist. T. 181.

As to Vargo's assertion in Safeguard No. 9076448 that the slope rope had been removed from service multiple times for excessive wear, Mr. Elson testified that this was inaccurate. T. 182. The majority of times that the rope was removed was for kinks or distortions—not wear or tear.<sup>18</sup> *See* R-7.

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

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

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

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

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

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

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<sup>18</sup> Kinks may be found in even new wire ropes. T. 80, 139.



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

This Court was not enlightened by Secretary's hearing presentation as to how such conditions could be specifically remedied.<sup>19</sup>

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

CMI Vargo noted in his safeguard that "all wear pads that the hoist rope travels over be properly maintained." P-2. However, Vargo gave vague and inconsistent testimony as to what constituted "proper maintenance" T. 62-64, T. 91.<sup>20</sup> MSHA has not published any specific guidelines as to wear pad maintenance or replacement. T. 64, T. 132-133.

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

This Court does not have the authority or inclination to dictate what specific guidelines should have been placed in MSHA's safeguard regulating hoist ropes at Baily Mine. However this Court suggests that the remedies for repair or replacement of such items as wear pads or trough rollers should have some specificity. For example, a wear pad measuring 2 ½ inches in thickness should be replaced or rearranged when it is worn down to ¼ inch thickness.<sup>21</sup> Similarly, notice of specific criteria as to when the number and position of static rollers pose a transportation hazard should be afforded to the mine operator.<sup>22</sup> As to the condition of hoist rope removal from service "multiple times," the ALJ suggests that a specific number of times within a specific time period for a specific cause be clearly set forth in the safeguard.

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<sup>19</sup> *See also* Respondent's arguments on point at RB, pp. 15-16.

<sup>20</sup> In its brief the Respondent persuasively reviewed Vargo's contradictory testimony. RB, at pp. 15-17.

<sup>21</sup> At hearing Secretary's witness, Mr. Snyder, implied that a wear pad could serve its function until it was actually cut in half. T. 132-133.

<sup>22</sup> In his brief Respondent persuasively argues that neither the safeguard nor Mr. Vargo detailed what it meant for rollers to be "properly maintained" or to "turn freely" or how operator was to achieve the mandate. RB, p. 16.

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

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

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

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

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

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

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

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

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

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

At hearing, however, Mr. Vargo offered little evidence that the supplies and debris described in the safeguard were actually in contact with the slope track, brakes or slope cars, or slope hoist.<sup>23</sup> On cross-examination, Vargo admitted that he did not know whether any material was actually contacting the slope car. T. 87.

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

Similarly, as to whether material presented a slip and trip hazard, Vargo again failed to note such in the safeguard or his notes.<sup>24</sup> T. 88. This led to Vargo having to split hairs in his testimony. His explanation that he hadn't said "slipped" or "tripped", but only that he slipped was somewhat confusing. T. 89. This Court found it an open question as to whether Vargo and his escort had slipped because of the steepness of grade or because of material in the space between the track and supplies. Given that it is Secretary's burden to establish each operative fact, this Court specifically finds that the Secretary failed to carry such burden as to the existence of an actual slip and trip or slip and fall hazard.

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

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

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

The safeguard directs that the slope track be "kept free of these mine supplies and other supplies that are hoisted in and out of the mine." T. 93; P-4. Given that supplies are hoisted in and out of the mine, the safeguard provides insufficient direction as to how the slope track should be kept free of such. Considering Vargo's testimony that supplies or materials located in the slope which do not contact the slope car are not hazardous, the safeguard provides insufficient notice as to what remedies should be undertaken to avoid the contemplated transportation hazards.<sup>25</sup>

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<sup>23</sup> The issue of slope rope damage has already been discussed above.

<sup>24</sup> This Court also notes there may be an issue as to whether a slip and fall hazard constitutes a hazard with respect to transportation under § 75.1403.

<sup>25</sup> For example should there be a certain clearance distance maintained between the haulage track and any supplies, materials, debris along the track?

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

**ORDER**

It is the **ORDER** of this Court that Safeguard Nos. 9076448 and 9076449 are hereby **VACATED** and **DISMISSED**.

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

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