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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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September 4, 2018

SHAWN HIRT, Complainant, v. GARY SERVAES ENTERPRISES, Respondent.	DISCRIMINATION PROCEEDING Docket No. CENT 2018-0065-DM RM-MD-2016-19 Mine: Atchison Quarry Mine ID: 14-01710

DECISION AND ORDER

This case is before me on a complaint of discrimination brought by Shawn Hirt against Gary Servaes Enterprises ("GSE") pursuant to Section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815(c)(3) ("Mine Act"). In a conference call with the judge, the parties agreed that there was no dispute of fact and the case could be decided on the written record without the need for an in-person hearing. Conf. Call 11, Aug. 1, 2018. GSE submitted a motion for summary decision. Hirt provided his argument orally during the conference call and submitted case law in support of his legal arguments. I have carefully considered the parties' motions, the attached exhibits, and the relevant case law. Because Hirt is unrepresented in this case, I have also considered the parties' statements during conference calls. Based on this record, I deny GSE's Motion for Summary Judgement and grant summary decision in favor of Hirt.

I. PROCEDURAL BACKGROUND

Hirt filed the instant Complaint of Discrimination with the Commission on December 8, 2017, after the conclusion of an investigation by the Mine Safety and Health Administration (MSHA). The Chief Administrative Law Judge acknowledged receipt of the complaint and notified Hirt of the requirement to provide proof of service within 30 days. Hirt submitted an envelope addressed to Gary Servaes Enterprises and an unsigned certified mail receipt on January 3, 2018. Respondent did not file an answer to the complaint. The Chief Judge then issued an Order to Show Cause on February 7, 2018, ordering GSE to file an answer to the complaint within 30 days or face a default judgment in favor of Hirt. The order was sent by certified mail to the address of record for GSE, but was returned to the Commission as unclaimed.[1]

[1] Counsel for GSE stated in a conference call that the address used by Hirt and the Commission was the home address of the business owner, Gary Servaes. If GSE is unable to accept service at that address, it will need to change its address of record with MSHA.

The case was assigned to me on March 13, 2018, and a Prehearing Order and Notice of Hearing were issued on March 22, 2018. Through phone conversations and emails with the parties, it became apparent that GSE had not received the complaint. The parties disagree about the circumstances involving the failed service of the complaint: Hirt believes that GSE refused to accept the certified mail containing the complaint, while GSE states that the complaint was sent to the home address of the business owner, Gary Servaes, who was not home to sign for it when it arrived. In either case, GSE was not served, and therefore the Order to Show Cause was erroneously issued.

As the complainant, Hirt bore the burden of establishing the validity of the service of process of his complaint. *See Fed. Deposit Ins. Corp. v. Oaklawn Apartments*, 959 F.2d 170, 174 (10th Cir.1992). It was within the authority of the Court to dismiss the case once it became clear that the respondent had not been served with the complaint. However, because of his pro se status, Hirt was given the opportunity to cure the defect in service. By Order on April 5, 2018, Hirt was directed to attempt service again. He provided proof of service on April 10, 2018. GSE filed an answer on April 16, 2018, and the case was set for hearing.

In several communications with the Court, Hirt has continued to argue that he is entitled to a default judgment based on the Chief Judge's February 7 Order to Respondent to Show Cause. Conf. Call Tr. 3, June 26, 2018. Hirt misunderstands the law on this issue. The Due Process Clause prevents a court from entering a default judgment without notice or service to the defendant. *Peralta v. Heights Med. Ctr., Inc.*, 485 U.S. 80, 80, 108 S. Ct. 896, 896 (1988); *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 657 (1950). A default judgment may not be issued in this case based on the failed service of Hirt's complaint to GSE, and therefore the case will be decided on the merits.

The parties have agreed that there is no dispute of fact and this case may be decided on the written record without the need for an in-person hearing. Conf. Call 11, Aug. 1, 2018. My findings of fact are based on the entire record in this case, including the Motion for Summary Decision submitted by Respondent, the attached exhibits, the submissions of Complainant, and the representations of the parties in recorded conference calls with the judge.

II. FINDINGS OF FACT

Hirt was employed as a blaster assistant at GSE's Atchison Quarry from November 2014 through April 9, 2015, when he was terminated from his employment. Resp. Ex. 3. Hirt filed a discrimination complaint with MSHA regarding his termination, and MSHA conducted an investigation. Following the investigation, Hirt filed a Section 105(c)(3) action against GSE before the Commission. A hearing was held on July 6, 2016, and a decision was entered in Hirt's favor. The present matter involves communications made between the parties during settlement negotiations in that case.

Prior to hearing in the 2015 discrimination case, the parties were directed to engage in settlement negotiations with the assistance of a Commission settlement attorney, Thomas Stock. GSE was represented by attorney Allen Ternent. In June 2016, Ternent sent an email to Stock with a copy to Hirt. The email stated in part:

> I would note that my client is unwilling at this time to support any outcome other than dismissal of the Complaint. He might be willing to agree to refrain from seeking the filing of criminal charges against Mr. Hirt (for the making of false documents) in return for a withdrawal of his Complaint, but that's about the best I expect.

Resp. Ex. 1. The email was sent in response to an email from Stock regarding scheduling a conference call. *Id.* Hirt alleges that the email constituted an unlawful threat. Compl.

An affidavit of Ternent submitted as an exhibit by GSE describes the context of the email at issue from the point of view of GSE. Resp. Ex. 6.[2] According to Ternent, Gary Servaes was frustrated with Hirt for filing the 2015 discrimination complaint because Hirt's allegations were false, and Servaes had in fact made an effort to keep Hirt employed at the mine for as long as possible. Resp. Ex. 6 ¶ 23. Servaes and Ternent believed that Hirt had made factual misrepresentations in his discrimination complaint and in an addendum to the complaint. Resp. Ex. 6 ¶¶ 15-18. They discussed what could be done to ensure that Hirt faced consequences for his misrepresentations. Resp. Ex. 6 ¶ 23. Ternent, a former prosecutor, advised Servaes that Hirt's actions likely violated Kansas law, and that once the discrimination matter was resolved, they could seek the filing of criminal charges against Hirt. Resp. Ex. 6 ¶ 23. Servaes indicated that he would like to do so. *Id.*

Sometime after this discussion, the parties were directed to work with a settlement attorney in an attempt to settle the case. FMSHRC Settlement Counsel Thomas Stock contacted Ternent to begin the mediation process. Resp. Ex. 6 ¶ 24. In a phone call between Ternent and Stock's office, Ternent explained that Servaes had indicated that he was not interested in participating in mediation. Resp. Ex. 6 ¶ 25. Ternent reiterated this point in a later call with Stock, and explained his opinion that Hirt had committed criminal wrongdoing. Resp. Ex. 6 ¶ 27. Stock asked Ternent to send his position regarding mediation in an email so that Stock could explain to the judge why the parties were abandoning settlement negotiations. Resp. Ex. 6 ¶ 28. After confirming with Servaes that he wished to proceed directly to hearing, Ternent sent the email above. Resp. Ex. 6 ¶ 29.

Ternent states that he did not intend to send the email to Hirt, but rather did so inadvertently because Hirt's email address was included in the email chain initiated by Stock.

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[2] Ternent also represented GSE in the instant case. He was advised that because he was a witness in this case, he should seek outside counsel prior to hearing. After a number of discussions, Ternent was granted permission to proceed in a limited capacity, because he had a difficult time finding an attorney and there were no disputes of fact or credibility issues to be decided.

Resp. Ex. 6 ¶ 30. Ternent states that he included the reference to seeking criminal charges against Hirt in the email in order to accurately reflect his conversation with Stock. Resp. Ex. 6 ¶ 31. He also believed that Hirt was probably unaware that "making false information" was a crime in Kansas, and felt it would be unfair for Hirt to participate in the mediation or hearing without being aware that a criminal investigation and prosecution could follow. Resp. Ex. 6 ¶ 31. In sending the email, he wished to leave that issue in the hands of the settlement counsel. Resp. Ex. 6 ¶ 31.

The representations made by Hirt that Ternent and Servaes believed to be false involved the dates and hours Hirt worked at the mine and the date of the filing of his complaint. Resp. Ex. 6 ¶¶ 15-18 (Ternent Affidavit). Hirt's discrimination complaint was filed with MSHA on July 6, 2015, but he signed the complaint with a date of April 2, 2015. Resp. Ex. 3 (Discrimination Complaint). Hirt also filed an addendum to his complaint on July 9, 2015, addressing the late filing of his complaint. Resp. Ex. 3 (Addendum to Discrimination Complaint). The addendum states that Hirt's last day of work was April 2, 2015. *Id.* However, the mine's payroll records indicate that Hirt's last day of work was April 9, 2015. Resp. Ex. 3 (Payroll Records). Hirt also stated in his discrimination complaint that he regularly worked 40 regular hours and eight overtime hours per week. Resp. Ex. 3 (Discrimination Complaint). The mine's payroll records indicate that he in fact worked an average of 28.67 regular hours per week and worked overtime only occasionally. Resp. Ex. 3 (Payroll Records); Resp. Ex. 6 ¶ 18 (Ternent Affidavit). Hirt denies making any false statements. Conf. Call 15, Aug. 1, 2018.

III. SUMMARY JUDGMENT STANDARD

Commission Rule 67 provides:

> A motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows:
>
> (1) That there is no genuine issue as to any material facts; and
>
> (2) That the moving party is entitled to summary decision as a matter of law.

29 C.F.R. § 2700.67(b).

In reviewing the record on summary decision, the judge must consider the record "in the light most favorable to . . . the party opposing the motion." *Hanson Aggregates N.Y., Inc*., 29 FMSHRC 4, 9 (Jan. 2007). Inferences drawn from the facts in the record must also be viewed in the light most favorable to the party opposing the motion. *Id*. (citing *United States v. Diebold, Inc*., 369 U.S. 654, 655 (1962)).

IV. DISCUSSION

Section 105(c) of the Mine Act provides in pertinent part that

> No person shall discharge or in any manner discriminate against . . . or otherwise interfere with the exercise of the statutory rights of any miner . . . because such miner . . . has filed or made a complaint under or related to this chapter, . . . or because such miner . . . has instituted or caused to be instituted any proceeding under or related to this chapter . . . or because of the exercise by such miner . . . of any statutory right afforded by this chapter.

30 U.S.C. § 815(c)(1). The Senate Committee Report indicates that Section 105(c) was intended to "protect miners against not only the common forms of discrimination, such as discharge, suspension, demotion . . . or changes in pay and hours of work, but also against the more subtle forms of interference, such as promises of benefits or threats of reprisal." S. Rep. No. 95-181, at 36 (1977). Accordingly, the Commission has recognized that "the Mine Act establishes a cause of action for unjustified interference with the exercise of protected rights which is separate from the more usual intentional discrimination claims evaluated under the *Pasula-Robinette* framework." *UMWA on behalf of Franks v. Emerald Coal Res., LP*, 36 FMSHRC 2088, 2103 n.22 (Aug. 2014) (Comm'rs Cohen & Young, separate op.), *vacated*, 620 Fed. Appx. 127 (3d Cir. 2015); *id.* at 2105-07 (Chairman Jordan & Comm'r Nakamura, separate op.); *see also Sec'y on behalf of Gray v. N. Star Mining, Inc.*, 27 FMSHRC 1, 7-8 (Jan. 2005) (implicitly recognizing cause of action for interference).

The Commission has split on the issue of the correct test for interference claims, however. Commissioners Cohen and Jordan have determined that an interference claim is established when:

> (1) a person's action can be reasonably viewed, from the perspective of members of the protected class and under the totality of the circumstances, as tending to interfere with the exercise of protected rights, and (2) the person fails to justify the action with a legitimate and substantial reason whose importance outweighs the harm caused to the exercise of protected rights.

Sec'y of Labor on behalf of Greathouse v. Monongalia Cty. Coal Co., 40 FMSHRC__, slip op. at 6 (June 2018) (Comm'rs Cohen & Jordan, separate op.) (quoting *Franks*, 36 FMSHRC at 2108 (Chairman Jordan & Comm'r Nakamura, separate op.)). The Commission has stated that this test is "consonant with Commission precedent." *Sec'y on behalf of McGary v. Marshall Cty. Coal Co.*, 38 FMSHRC 2006, 2012 (Aug. 2016). Commissioners Althen and Young would also require proof that the person's action was motivated at least in part by the miner's protected activity. *Greathouse,* slip op. at 25 (Acting Chairman Althen & Comm'r Young, separate op.).

Interference with Protected Activity

In interference cases, and in particular, in cases that involve a threat to an employee, the Commission has instructed its judges to "analyze[] the totality of the circumstances . . . to determine whether [the alleged statements or actions] were coercive and violative of section 105(c) of the Mine Act." *Sec'y of Labor on behalf of Gray v. N. Star Mining, Inc*., 27 FMSHRC 1, 10 (Jan. 2005); *see also McGary*, 38 FMSHRC at 2015-18. The essence of the inquiry is whether the conduct or statements "could logically result in a fear of reprisal and a reluctance to exercise the right in the future." *Moses v. Whitley Dev. Corp.*, 4 FMSHRC 1475, 1479 (Aug. 1982), *aff'd*, 770 F.2d 168 (6th Cir. 1985). Relevant factors include the setting of the interaction, the relationship between the parties to the interaction, whether the subject was raised repeatedly, the tone of the interaction, and who was present. *See Wilson v. Fed. Mine Safety & Health Review Comm'n*, 863 F.3d 876, 881-82 (D.C. Cir. 2017); *Multi-Ad Servs., Inc. v. NLRB*, 255 F.3d 363, 372 (7th Cir. 2001); *Gray*, 27 FMSHRC at 11. The standard is objective, and thus whether interference occurred "does not turn on the employer's motive or on whether the coercion succeeded or failed." *Gray*, 27 FMSHRC at 9 (quoting *American Freightways Co.*, 124 NLRB 146, 147 (1959)).

At issue in this case is an emailed statement from the operator's attorney Ternent to the Commission settlement counsel and Hirt.[3] Ternent states in the email that Gary Servaes "might be willing to agree to refrain from seeking the filing of criminal charges against Mr. Hirt (for the making of false documents) in return for a withdrawal of his Complaint, but that's about the best I expect." Resp. Ex. 1. The filing of a discrimination complaint is a protected right under the plain language of Section 105(c)(1). 30 U.S.C. § 815(c)(1) (prohibiting discrimination or interference because a miner has "instituted or caused to be instituted any proceeding under or related to this chapter").

Ternent's email threatens that Servaes will seek criminal charges against Hirt if he continues to pursue his complaint. GSE argues that Ternent's statement was not intended as a threat, but rather was simply speculation about GSE's position in mediation. Resp. Mot. at 11-12. GSE states that it "did not act with the intent to intimidate or interfere with claimant's rights to make a complaint or institute proceedings under the Act." Resp. Mot. at 11. However, Commission precedent is clear that in interference cases, statements are evaluated under an objective standard rather than according to the speaker's intent. *Gray*, 27 FMSHRC at 9; *see also Franks*, 36 FMSHRC at 2112 (Chairman Jordan and Comm'r Nakamura, separate op.).

In addition to the text of the email, the context of the interaction would lead a reasonable miner to interpret the statement as a threat. The Commission has determined that the nature of the relationship between the parties is a relevant factor in determining whether a statement was coercive. *Gray*, 27 FMSHRC at 10-11; *see also Wilson*, 863 F.3d at 882. Here, Hirt was an unrepresented party in a legal dispute, while Ternent was an attorney. Although Ternent had no direct authority over Hirt, Hirt's unfamiliarity with the legal process would have contributed to the intimidating nature of the email. GSE argues that the involvement of the neutral Commission

[3] While GSE notes that the email address for Hirt actually belonged to his mother, it is clear from the record that Hirt received the email.

settlement counsel in the interaction lessened the potential for it to be coercive. However, there was no evidence presented that Hirt was somehow reassured that he could continue to pursue his complaint without fear that doing so would lead to criminal charges being brought against him. *Cf. Franks*, 36 FMSHRC at 2113 (finding that the presence of a union representative during the interrogation of miners did not mitigate interference because he was representing the interests of different miners).

Even if the settlement counsel's presence did to some extent mitigate the coercive nature of the interaction, I see no basis for concluding that it completely neutralized Ternent's statement. The coercive effect of the statement is clear on its face, and there is nothing in the context of the conversation to suggest it should be interpreted differently. There is little doubt that a threat of this sort "could logically result in a fear of reprisal and a reluctance to exercise the right in the future." *Moses v. Whitley Dev. Corp.*, 4 FMSHRC 1475, 1479 (Aug. 1982), *aff'd*, 770 F.2d 168 (6th Cir.1985). Any reasonable miner would wish to avoid facing criminal charges, and thus could reasonably be dissuaded from pursuing his complaint with the Commission by such a comment. I find that no relevant facts are in dispute regarding this issue, and that as a matter of law, the email constituted interference with Hirt's protected right to file a discrimination complaint and participate in the ensuing litigation.

Discriminatory Motive

The Commission has split on the issue of whether discriminatory motive is a necessary element of an interference claim. Because there is no genuine dispute on the issue in this case, however, I find it unnecessary to decide whether proof is required.

The requirement of proving discriminatory motive in interference cases derives from the phrase "*because of* the exercise by such miner . . . of any statutory right afforded by this chapter." 30 U.S.C. § 815(c)(1) (emphasis added). In regular discrimination cases under Section 105(c), the Commission requires a showing that "the adverse action was motivated in any part by the protected activity." *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds*, 663 F.2d 1211 (3d Cir. 1981). Commissioners Althen and Young have determined that the same requirement should apply in interference cases. *Greathouse,* 40 FMSHRC __, slip op. at 25 (separate op.).

Here, there is no dispute that Ternent's email was sent in relation to a discrimination complaint filed by Hirt. Even if GSE believed that some statements made in the discrimination complaint were not accurate, it was a complaint nonetheless. The filing of the complaint was a protected activity under Section 105(c)(1). Thus, the email was sent at least in part because of Hirt's protected activity.

Legitimate and Substantial Reason

In some cases, conduct that interferes with the protected rights of miners may be justified by an operator's "legitimate and substantial reason." *Franks*, 36 FMSHRC at 2116 (Chairman Jordan & Comm'r Nakamura, separate op.). For the operator to prevail on this defense, its actions must be narrowly tailored to promote the purported justification, and the justification

must "outweigh[] the harm caused to the exercise of protected rights." *McGary*, 38 FMSHRC at 2019 (quoting *Franks*, 36 FMSHRC at 2108); *see also Moses,* 4 FMSHRC at 1479 n.8 (noting that in some cases a comment on protected rights could be necessary to address a safety or health problem).

Ternent offers two justifications for sending the email to Hirt. First, he states that he sent the email as a summary of a phone conversation between him and Stock. Resp. Ex. 6 ¶ 27 (Ternent Affidavit). During that conversation, Ternent informed Stock that he believed Hirt had committed criminal wrongdoing by making false statements in his filings with the Commission. *Id.* Ternent also conveyed GSE's position that it did not wish to attempt mediation. *Id.* At the end of the conversation, Stock requested that Ternent send him something in writing to explain to the judge why they were abandoning mediation. Resp. Ex. 6 ¶ 28. Ternent included the sentence about Hirt's criminal wrongdoing in the email because it had been part of his conversation with Stock. Resp. Ex 6 ¶¶ 29, 31.

Accepting these facts as true, the justification appears to be the need to make an accurate reflection of the conversation between Stock and Ternent, as well as the need to provide a reason to the judge for abandoning mediation. GSE has offered no explanation for why those reasons are important, and the information could have been provided by Ternent without resort to a threat. In contrast, the impact on the rights of the miner is substantial. A reasonable miner would be strongly dissuaded from pursuing his complaint with the Commission when faced with the threat of criminal charges. I do not find that the reasons offered by GSE outweigh that impact.

Ternent also states that he was motivated to include the reference to criminal charges in the email because he "felt it would be fundamentally unfair to Mr. Hirt to participate in mediation or a hearing without being aware that a criminal investigation and prosecution could follow." Resp. Ex. 6 ¶ 31. It is true that Hirt was unrepresented and may have needed the warning about criminal liability, although it is worth noting that this argument is inconsistent with Ternent's claim that the email was not intended for Hirt. However, Ternent presented the information about potential criminal charges as a threat conditioned on Hirt's continuing to pursue his complaint. The Act requires that an action that interferes with the protected rights of miners be narrowly tailored to the justification for the action. *Greathouse*, 40 FMSHRC __, slip op. at 17 (Comm'rs Cohen & Jordan, separate op.). Ternent's warning could easily have been conveyed in a way that did not interfere with Hirt's right to pursue his complaint. The choice to phrase the warning as a threat increased rather than minimized the impact on Hirt's protected activity.

I find that neither of GSE's proffered justifications outweighs the harm to protected rights in this case. There is no dispute of material fact, and Hirt is entitled to summary decision as a matter of law.

V. REMEDY

The authority of Commission judges to fashion relief for victims of discrimination is broad. *Sec'y of Labor on behalf of Rieke v. Akzo Nobel Salt Inc.*, 19 FMSHRC 1254, 1257 (July 1997). Section 105(c)(3) of the Act states that when a complainant's charges of discrimination

are sustained, the Commission shall "issue an order . . . granting such relief as it deems appropriate, including, but not limited to, an order requiring the rehiring or reinstatement of the miner of his former position with back pay and interest or such remedy as may be appropriate." 30 U.S.C. § 815(c)(3). The goal of a Commission judge in fashioning a remedy is "to restore discriminatees, as nearly as we can, to the enjoyment of the wages and benefits they lost as a result of their illegal terminations." *Sec'y of Labor on behalf of Dunmire v. N. Coal Co.*, 4 FMSHRC 126, 143 (Feb. 1982).

Hirt claims in his original complaint that he is entitled to $50,000.00 "for the hardship I have had to face for the last three years."[4] Compl. Hirt was given the opportunity to present further evidence regarding his damages but declined to do so. Conf. Call 5-7, Aug. 1, 2018. In the absence of any evidence of actual harm suffered by Hirt as a result of GSE's interference, I am unable to award him any damages in this case.

Hirt also argues that he is entitled to attorney's fees because he represented himself in this matter. Conf. Call 6, Aug. 1, 2018. Section 105(c)(3) provides that

> Whenever an order is issued sustaining the complainant's charges under this subsection, a sum equal to the aggregate amount of all costs and expenses (including attorney's fees) as determined by the Commission to have been reasonably incurred by the miner . . . shall be assessed against the person committing such violation.

30 U.S.C. § 815(c)(3). An award of attorney's fees is "a matter that lies within the sound discretion of the trial judge." *Sec'y on behalf of Ribel v. E. Assoc. Coal Corp*., 7 FMSHRC 2015, 2027 (Dec. 1985).

Hirt is not an "attorney" and did not retain an attorney to represent him in this matter. The Supreme Court considered the question of whether a pro se litigant could be awarded attorney's fees in an action under a different federal statute in *Kay v. Ehrler*, 499 U.S. 432, 111 S. Ct. 1435 (1991). The Court found that the primary purpose of the fee provision at issue was "ensuring the effective prosecution of meritorious claims." 499 U.S. at 437. The Court explained that

> A rule that authorizes awards of counsel fees to pro se litigants . . . would create a disincentive to employ counsel whenever such a plaintiff considered himself competent to litigate on his own behalf. The statutory policy of furthering the successful prosecution of meritorious claims is better served by a rule that creates an incentive to retain counsel in every such case.

Id. at 438. Discrimination complainants who are not represented by counsel frequently have difficulty navigating the procedural requirements of the Commission and presenting a successful

[4] Hirt also asks for a copy of his W-2, but that is not an issue for a FMSHRC proceeding and must be addressed between the parties in another setting.

case. Thus, it would be unwise to adopt an approach that encouraged complainants to proceed without counsel. Accordingly, I decline to award attorney's fees in this case.

VI. PENALTY

Because Hirt's discrimination complaint is sustained, the Secretary shall be notified of this decision and shall file a petition for assessment of civil penalty with the Commission within 45 days of receipt of the decision. *See* 29 C.F.R. § 2700.44(b).

Hirt has on several occasions raised the argument that because he is pursuing his complaint without the assistance of the Secretary, any penalty assessed should be paid to him rather than to the Secretary. Conf. Call Tr. 2-4, Aug. 1, 2018; Conf. Call Tr. 3-4, June 26, 2018. In support of this argument, he cites the case *Secretary of Labor on behalf of Bailey v. Arkansas-Carbona Co.*, 5 FMSHRC 2042 (Dec. 1983). *Bailey* states that in discrimination cases, the Commission should grant "all relief that is necessary to make the complaining party whole." 5 FMSHRC at 2049 (quoting S. Rep. No. 95-181, at 37 (1977)). The "make whole" principle is intended to "restore the [victim of illegal discrimination] to the situation he would have occupied but for the discrimination." *Bailey*, 5 FMSHRC at 2049 (quoting *Dunmire*, 4 FMSHRC at 142).

I am not persuaded by Hirt's argument. A penalty awarded to Hirt would not make him "whole," but rather would put him in a better position than he would have held but for the discrimination. This would exceed the remedial authority granted to the Commission by the Act.

VII. ORDER

Respondent's Motion for Summary Decision is hereby **DENIED** and Complainant's cross-motion is **GRANTED**. Gary Servaes Enterprises is hereby **ORDERED** to stop any action that threatens or tends to interfere with the rights of miners to file discrimination complaints as provided in the Mine Act, and to post a notice at the mine, in a conspicuous location, setting forth the rights of miners pursuant to Section 105(c) of the Act, along with a copy of this decision. This decision is referred to the Secretary of Labor for proposal of a civil penalty.

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

Distribution: (U.S. Certified First Class Mail)

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September 6, 2018

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. KNIGHT HAWK COAL, LLC, Respondent	CIVIL PENALTY PROCEEDINGS Docket No. LAKE 2016-0489 A.C. No. 11-03147-419437 Docket No. LAKE 2017-0024 A.C. No. 11-03147-421267 Mine: Prairie Eagle Underground

DECISION AND ORDER

Appearances: Travis W. Gosselin, Esq., U.S. Department of Labor, Two Pershing Square Building, 2300 Main Street, Suite 1020, Kansas City, Missouri, for the Petitioner

Mark E. Heath, Esq., Spilman Thomas & Battle, PLLC, 300 Kanawha Boulevard East, Post Office Box 273, Charleston, West Virginia, for the Respondent

Before: Judge Rae

I. STATEMENT OF THE CASE

These cases are before me upon two petitions for assessment of civil penalties filed by the Secretary of Labor ("the Secretary") pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, as amended, ("the Mine Act"), 30 U.S.C. § 815(d). At issue are two citations issued to mine operator Knight Hawk Coal, LLC ("Knight Hawk") under section 104(d)(1) and 104(a) of the Mine Act: Citation No. 9039437 in Docket No. LAKE 2016-0489 and Citation No. 9039438 in Docket No. LAKE 2017-0024.

A hearing was held in St. Louis, Missouri at which time testimony was taken and documentary evidence was submitted. The parties also filed post-hearing briefs. I have reviewed all of the evidence at length and have cited to the testimony, exhibits and arguments I found critical to my analysis and ruling herein without including a detailed summary of the testimony given by each witness. Based upon the entire record and my observations of the demeanor of the witnesses, I vacate both citations for the reasons set forth below.

II. JOINT STIPULATIONS

The parties have entered into the following stipulations:

1. Knight Hawk Coal LLC is an "operator" as defined in Section 3(d) of the Federal Mine Safety and Health Act of 1977, as amended (Mine Act), 30 U.S.C. 803(d), at the coal mine at which the citations at issue in these proceedings were issued.
2. Prairie Eagle Underground mine is operated by the Respondent in this case, Knight Hawk Coal LLC.
3. Respondent's Prairie Eagle Underground mine is located in Perry County, Illinois.
4. Prairie Eagle Underground mine is subject to the jurisdiction of the Mine Act.
5. These proceedings are subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judges pursuant to Sections 105 and 113 of the Mine Act.
6. The individual whose name appears in Block 22 of the citations at issue in these proceedings was acting in his official capacity and as an authorized representative of the Secretary of Labor when the citations were issued.
7. A duly authorized representative of the Secretary served the subject citations and terminations of the citations upon the agent of the Respondent at the dates and place stated therein as required by the Mine Act, and the citations and terminations may be admitted into evidence to establish their issuance.
8. The total proposed penalties for the citations at issue in these proceedings will not affect Respondent's ability to continue in business.
9. The citations contained in Exhibit A attached to the Petitions for Assessment of Penalty for these dockets are authentic copies of the citations at issue in these proceedings with all appropriate modifications and terminations, if any.

III. BACKGROUND

These proceedings arise out of a May 9, 2016, incident in which miner Jonathan Wink was injured while working as a continuous miner operator at Prairie Eagle Underground coal mine operated by Knight Hawk Coal in Perry County, Illinois. Tr. 25.

On May 9, 2016, at about 11:10 p.m. Jonathan Wink[1], a miner at Knight Hawk, was cutting a crosscut looking outby for a shuttle car travelling to pick up the next load of material. Tr. 255, 279. While facing outby, a rock fell from the roof, hit him from behind, and at least one

[1] Jonathan Wink began working in the coal industry in 2009 for Willow Lake roof bolting, shoveling, and "a little bit of everything." Tr. 253. He worked there for almost two years; then went to Prairie State for approximately two and a half years as a continuous miner operator and roof bolter. Tr. 253. He then worked at White Oak as a continuous miner operator for approximately a year. Tr. 254. In 2014, he began working for Knight Hawk in many roles including as a continuous miner operator, a roof bolter, and car operator. Tr. 254-55.

of Wink's legs was pinned under the rock. Tr. 256. It is unclear whether the rock bounced before hitting Wink. Tr. 40. The rock was triangular shaped and was 8.5' long, 4'1" wide at the larger end, and 16" wide at the narrow end of the rock. Ex. R-1, 6[2]. The rock was approximately 16" thick at the wide end and 9" thick at the narrow end. Ex. R-1. Wink was lying on his side when the smaller end of the rock fell on him and his leg became stuck under the rock from the knee down, and possibly up to the hip. Tr. 257-58.

Wink began yelling for help. Tr. 256-57. Kalin Rains, a car driver, heard Wink yell and came to try and free Wink from under the rock. Tr. 42-43. Rains was unable to lift the rock off Wink alone, so he called for help. Tr. 42-43. Miners Justin Raben, Dustin Bush, and Zack Guill arrived to help. Tr. 43, 247; R-1. Rains, Bush, and Raben then lifted the rock off Wink, while Guill pulled Wink out from beneath. Tr.43, R-1. Wink began complaining of right leg and hip pain, and his work belt was removed. Tr. 258.

Soon after the accident, Dave Stritzel[3], the section supervisor during that shift, saw Eric Heinz running past him for EMT supplies and was told about a rock falling on Wink. Tr. 204-05. Stritzel called the warehouse for an ambulance, and Darrel McCombs[4], the shift foreman, asked what happened. Tr. 206-07. Stritzel told McCombs that Wink was injured by a rock fall and that he would be packaged and sent out of the mine. Tr. 206-07. Stritzel then traveled to the accident site where Wink was already pulled out from under the rock. Tr. 205. Stritzel asked Wink how he was, and Wink told Stritzel about his leg and hip pain. Tr. 205. Stritzel observed that Wink was conscious and talking coherently. Tr. 206. Wink was then loaded onto a board, and packaged to be removed from the mine. Tr. 206-07.

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[2] Respondents exhibits will be cited to as Ex. R- followed by its corresponding number and the Secretary's exhibits will be cited to as Ex. S- followed by its corresponding number.

[3] Dave Stritzel was the section supervisor at Knight Hawk Coal. Tr. 202. He began working in the mining industry in 1991. Tr. 202. Stritzel had 27 years coal mining experience. Tr. 202. He worked as a surveyor for Zigler and Old Ben until 1997; then worked various positions at American Coal, including as an equipment operator. Tr. 202-03. In 2004, Stritzel became a supervisor and a shift manager from 2005-2008. Tr. 203. He began working at Knight Hawk in 2008 where he became the section supervisor. Tr. 203. He oversaw the safety and production of daily activities of the section. Tr. 204.

[4] Darrell McCombs was the shift foreman for Knight Hawk Coal. Tr. 270. He began working in coal mines in 1976. Tr. 270. McCombs worked at Freeman United Coal for 8 ½ years; then he worked for three years at Arch surface and underground mines. Tr. 271. Following that, McCombs took eight years off from mining, cumulatively working approximately 34 years in mining. Tr. 270. After returning to mining, McCombs worked as a leadman at Peabody Coal for two to three years. Tr. 271.

McCombs began working at Knight Hawk in Marcy 2009. Tr. 271. At Knight Hawk, he worked as a continuous miner, and then quickly became a shift manager. Tr. 272. As the shift manager, he ran the entire shift. Tr. 272. Approximately 80 people worked on a shift. Tr. 272. He was the responsible person on a shift. Tr. 273. McCombs was responsible for reporting 15-minut §50.10 accidents to MSHA. Tr. 274

On the way out of the mine, Jonathan Beckman, a miner and EMT-B,[5] met Wink in the dinner hole to assess Wink. Tr. 207. Beckman spoke with Wink and determined that Wink had a broken leg and found no signs of internal bleeding. Tr.228-29. Beckman cut off Wink's boot and his pant leg and performed an assessment of Wink's physical and mental status. He splinted the miner's leg and accompanied him out of the mine to the waiting ambulance. Tr. 228-31.

Once Wink was transported out of the mine, his care and transportation were taken over by the ambulance crew. Tr. 263. He was brought to a smaller hospital where he waited approximately one hour before being transferred to a larger hospital where a rod was surgically placed in his leg. Tr. 263. Wink was diagnosed with a broken fibula, tibia and three fractures in his hip. Tr. 153, 263. No treatment was given for Wink's pelvic fractures, and no internal bleeding was diagnosed. Tr. 263-65. After his leg surgery, Wink was transferred to another hospital for rehabilitation and began using his leg the following day. Tr. 264-65. He reported back to work in December 2016. Tr.265.

Management at Knight Hawk did not notify MSHA of Wink's accident until four days later when, on May 13, 2016, Corporate Safety Director Bill Jankousky submitted a 7000-1 Form to MSHA. Tr. 190-91; R-9. He also sent in forms he prepared describing a timeline of the accident and talking points for a conference with a CLR concerning the accident. Tr. 190-91; Ex. R-5, 9.

Jeffery Williams, an MSHA Roof Control Supervisor, was assigned to investigate the accident on Monday May 16, 2013. Tr. 16, 21. Williams interviewed the miners who came to Wink's rescue as well as mine supervisors. Williams took photographs of what he believed to be the accident site, where Stritzel painted a shadow of the area where the rock fell. Tr. 30. The rock, car, and Wink were no longer present by the time Williams investigated the accident scene. Tr. 30-31. The roof was bolted and the area was rock dusted at that time. Tr. 31; S-3. However, Williams was able to obtain photographs of the accident scene from Illinois Mines and Minerals accident investigation. Tr. 36. Williams interviewed Wink by telephone several days later and learned that that a rod was surgically put in his leg from knee to ankle and his pelvis had three fractures, which were left to heal on their own. Tr. 66-67.

Upon completion of his investigation, Williams issued two citations to Knight Hawk on May 31, 2016 which gave rise to this litigation. He issued Citation No. 9039437 for a violation of 30 C.F.R. § 50.10(b) by failing to notify MSHA of the accident within 15 minutes of the time management knew or should have known that Wink had sustained injuries having a reasonable potential to cause death. Citation No. 9039438 was issued for a violation of 30 C.F.R. § 50.12, altering the scene of an accident without permission granted by MSHA upon completion of its investigation.

[5] Jonathan Beckman was a repairman and an EMT at Knight Hawk. Tr. 220. Beckman began working for Knight Hawk in May 2005 on the surface, and then started working underground in 2008. Tr. 220. He worked as a roof bolter, ram car operator, and then became a repairman. Tr. 221. Beckman maintained face papers, mine examiners papers, mine managers papers, and electrical cards. Tr. 221.

IV. THE VIOLATION AND ADDITIONAL FINDINGS OF FACT

A. Citation No. 9039437 (Docket No. LAKE 2016-489) alleges:

> The mine operator failed to notify MSHA immediately at once without delay and within 15 minutes at the toll free number once the operator knew that an accident occurred involving an injury of an individual at the mine which had a reasonable potential to cause death. On May 9, 2016 at 2310 hrs. a serious accident occurred which resulted in injuries to a continuous miner operator that had a reasonable potential to cause death. The continuous miner operator was struck by a piece of roof material measuring 8.5 feet in length, up to 4 feet in width and as much as 20 inches thick and weighing in excess of 4,000 lbs. The continuous miner operator was entrapped between the large piece of rock and the mine floor from his waist to his feet. The injured miner was complaining of pain in his legs and pelvic area once extricated. The size and weight of the rock required 4 miners in order to extricate the injured miner. Mine management has engaged in aggravated conduct constituting more than ordinary negligence in that they knew the miner was seriously injured and knew the reporting requirement yet failed to notify MSHA for 4 days. This is an unwarrantable failure to comply with a mandatory standard. This violation is an unwarrantable failure to comply with a mandatory standard.

Ex. S-1.

The standard alleged to have been violation is 30 C.F.R. §50.10(b), which provides: "The operator shall immediately contact MSHA at once without delay and within 15 minutes at the toll-free number, 1-800-746-553, once the operator knows or should know that an accident has occurred involving… [a]n injury of an individual at the mine which has a reasonable potential to cause death."

B. The Nature of the Accident

Williams interviewed mine management at the start of his investigation on May 16, 2017. After speaking with mine management, Williams learned that Wink had sustained non-compound fractures to the tibia and fibula. Tr. 25-26. He then interviewed the miners who responded to the accident. Based upon his notes, Williams testified that Kalin Rains was closest to the accident and the first to respond. He heard Wink holler from the other side of the curtain and went to him. Tr. 28, Ex.S-2. Rains believed the rock hit the ground and then struck Wink. Reins tried to move the rock himself was not able to so he ran to the cross-section to signal the bolters for help. When Dustin Bush, Zack Gull and Justin Raben arrived they lifted the rock off of Wink and pulled him out. Wink was complaining of leg and hip pain. Rains stayed on the unit as Wink was carried away. According to Rains, there was no blood at the scene.

Williams made a sketch of the scene upon speaking with Rains which depicts Wink under the small pointed end of the rock. Ex. S-2 pg. 25. This comports with the drawing and notations made by McCombs and the testimony of Dave Stritzel who assisted the State investigators in taking measurements and photos of the scene. Ex. R-1 and 3, Tr. 210-11. The

photograph at R-3 clearly depicts the rock laying on top of the trailing cable outby the miner where Wink was located.

Dave Stritzel was the section foreman working at the time of the accident. Stritzel was informed by Eric Heinz that a rock had fallen on Wink and he was running to get EMT supplies. When Stritzel arrived on the scene, Wink had been removed from under the rock and was complaining of leg and hip pain. He was conscious and speaking. Stritzel went on to call McCombs to summons an ambulance. Tr. 204-206. Once loaded on a backboard, Wink was transported to the dinner hole where he was met by John Beckman, an EMT. Tr. 207. Stritzel then returned underground and took measurements of the rock and outlined in spray paint the area on the ceiling from which the rock fell. Tr. 210 -14, Ex. S-3. Stritzel provided the measurements to the Illinois Department of Natural Resources Office of Mines and Minerals for their investigation and taking of photographs of the scene, which were in turn, provided them to Williams. Tr. 85, 210-11. Ex. R-3 and 4.

There is some divergence in testimony as to exactly what part of Wink was pinned under the rock. Rains, the first responder, told Williams that the rock covered Wink from the knees down while others said it was from the waist down. Tr. 42, 92. It was established through witness testimony that Wink was lying on his side when the rock fell on him although it is not clear which side was to the ground. Stritzel told Williams that he was lying on his right side while Wink testified he wore his rescuer on his right side and did not fall with it underneath him because he was lying on his left side. Tr. 42, 258. In either case, it is clear that the small end of the rock landed on top of the trailing cable of the miner and Wink's lower extremities while he was positioned on his side, rather than lying flat with the full weight of the rock on top of him.

Taking the measurements given to him by McCombs and Stritzel, Williams calculated the weight of the rock and thereby determined that the injury was life threatening. He explained his calculations thusly:

> I used the average width, the average thickness, and the average – well, I didn't do average length, the length was what it was, so the width was 4 foot 1 inches is what they said, so I took 49 inches by 16, divided it in half, converted it to feet, took the thickness, it was 20 by 9, so I took, I think, it was 14 and a half, converted that to feet, multiplied the feet times the length and to the cubic feet. The specific gravity of, of shale is anywhere from 2 – well, gray shale is 2.4 – is 2.8, black shale is 2.7 to 2.8, and limestone is 2.3 to 2.7. I took the lowest of 2.4 specific gravity and converted that, that's in grams per cubic centimeter, I converted that to pounds per cubic centimeter. I converted that to per cubic foot multiplying 2.4 by 62.4, which is the conversion factor, and then multiplied that by the cubic feet, and it came out to just over 4000 pounds or two-ton.

Tr. 74-75.

Williams went on to say that his estimation of the thickness of the rock was "not necessarily completely accurate" as he used the photograph of the roof area from which the rock fell to make that determination. Tr. 39. He further testified that the operator did not contest his

calculations he wrote in the citation. However, he admitted on cross-examination that he wrote his citation at 3:30 am on May 31st in his office and did not bring it out to the mine on that date as indicated on the citation. Ex. S-1. It was presented to the operator at a later date by Inspector Burtis and Williams had no idea that the operator did complain to Burtis about the weight calculation. Tr. 101.

Williams also interviewed Dale Winter[6] and learned that McCombs had gathered the information regarding the accident and passed it along to him. Winter testified that he was familiar with the reporting requirements under section 50.10 for all types of injuries. Tr. 144-46. He stated that non-compound fractures – those that do not puncture the skin or bleed – are not 15 minute reportable injuries. Tr. 146. He confirmed that all Responsible Persons are trained on the requirements of the section. Tr. 150-51. They are also required to fill out a Patient Information Report whenever any medical assistance is given regardless of the level of injury. Tr. 144. After speaking with McCombs who informed him that Wink had broken his leg, was alert and conscious, had normal vital signs and was joking with other miners, Winter made the decision that it was not a reportable injury under section 50.10. Tr. 152. The following day, Winter received an update on Wink's condition and was informed that Wink had been diagnosed with fractures to his leg for which surgery was required, and hairline fractures to the pelvis which did not require medical attention. Again, he determined that Wink's injuries were not reportable as having a reasonable potential to cause death. Tr. 153-54.

Williams acknowledged that he is not a trained EMT and has no medical training. Tr. 99. He also acknowledged that he did not speak with EMT Beckman nor did he review Beckman's Patient Information Report to determine what information the operator had at the scene of the accident. In fact, Williams only learned that Beckman was an EMT and had treated Wink at the scene of the accident when he sat in on Beckman's deposition. Tr. 99, 126. He was also unaware that Beckman had communicated his medical findings to McCombs while Wink was being brought out of the mine. Tr. 128. Williams testified that, in fact, he felt Beckman's examination results were not "relevant" because the mine does not have a CT scan or x-ray underground. Tr. 123-24. Williams did acknowledge, however, that a non-compound broken leg is not an immediately reportable injury nor is a fractured pelvis that requires no medical treatment as this incident proved to be. Tr. 130. He also admitted that screaming in pain is not an indication of the severity of an injury. Tr. 133. Yet, Williams concluded from the size of the rock, the height from which it fell, that Wink was screaming in pain, and the fact that the rock "crushed his hip, crushed his mid-section area…and fractured both bones in his leg" that there "was a very distinct possibility that he had internal injuries." Tr. 72.

[6] Dale Winter received a bachelor's degree in Mine Engineering from the University of Missouri in 1984. Thereafter, he was employed in engineering positions until 2003 when he went to work for Knight Hawk Coal. He has been the Underground Mine Superintendent since 2006 responsible for overall operations underground, compliance with MSHA and State law, and long and short term planning, budgeting, acquisitions and personnel. Tr. 140-41.

C. The Totality of the Circumstances

John Beckman testified that he was certified by the State of Illinois Public Health Department as an EMT. Tr. 221. Certification required 120 hours of classroom instruction and 120 hours of home assignments. Tr. 222. The training included "clinicals," which were ten-hour observations that must be done in an emergency room or with an ambulance service, and EMT's were required to pass a state certified test. Tr. 222.

Beckman became an EMT in December 2009 and received his EMT card in January 2010. Tr. 223-24. He completes 50 hours of continuing education every five years. Tr. 224. His certification as an EMT-B (EMT-Basic) is the second level of certification and differs from EMT-I (Intermediate) and EMT-P (paramedics) in that he is not authorized to administer IVs or certain other medications but is authorized to perform all other functions. He is also qualified to work on an ambulance crew or with a fire department crew. Tr. 224-25.

On the night of the accident, Beckman was informed by the face boss that a miner had just been hurt and he was told to go to Unit 2. When he arrived at the dinner hole he saw the lights from the mine car approaching so he waited there for Wink to be brought to him where the lighting was better and first aid supplies were nearby. Tr. 227. Beckman began his examination by speaking with Wink and noting his mental status. Wink appeared to be alert, responded verbally to questions and stated that his leg was hurting. Tr. 227-28. Beckman called for supplies to splint and stabilize Wink's leg. He then cut Wink's boot and pant leg off and noted that his leg was broken but there was no bleeding at the wound site and no blood pooling under the skin indicating good capillary refill and good circulation. He further checked to make sure there were no arteries that were pinched and that he had good circulation in the broken leg. Tr. 229. He then examined Wink's hips for crepitus which would indicate a crushed pelvis. He found no unnatural movement only pain, indicating no crush injury. He then palpated the four abdominal quadrants by using a rolling motion with his hands ranging from soft to hard pressure to determine if there were any abnormalities in the abdominal area. There were none and there was no sign of pain caused by the examination. Tr. 230-31. Once his examination was completed, Beckman splinted Wink's leg with a SAM splint and rubber boot to stabilize the leg for transport. Tr. 231. He described Mr. Wink as talking and complaining about his new boot being cut off of him. Beckman stated that Wink was more concerned about his new boot being ruined than his injuries. Tr. 232. Beckman performed a mental status examination as well as a physical one and testified that Wink's pupils were of equal size and reacted appropriately to light. This indicated that there were no signs of a brain injury or shock. Tr. 238, 251. He was fully oriented to date, name and location. At no time did Beckman see any indication of internal bleeding. Tr. 233. He did administer oxygen as a precaution as it can treat shock but also has the "placebo" effect of calming the patient and is "just good practice." Tr. 233-34. Throughout the process of readying Wink for transport from the dinner hole until he was turned over to the ambulance crew, Beckman continued to monitor Wink's pulse, observe his skin color and appearance for approximately one hour. Tr. 250. Although his pulse was slightly elevated at 80 beats per minute, had there been internal bleeding, his pulse would be elevated to 100 to 120 beats per minute in an effort to supply blood to the extremities while the body was losing blood. Tr. 234. Wink's vital signs remained normal throughout; his skin remained normal in its color and was dry also indicating normal circulation, no shock and normal mental status. Tr. 235. At no time

did Beckman feel there was a potential for death from Wink's injuries. Tr. 235. His findings and observations were recorded on the Patient Information Report form he completes any time he administers any sort of care. Tr. 236, Ex. R-2. At the time Beckman met up with the ambulance crew, Wink was talking to others at the scene, joking and telling them about his new boot being cut off. Tr. 242-43. Beckman passed along his findings to McCombs about the accident upon bringing Wink out of the mine. Tr. 242. Mc Combs then passed along the information to Winter who determined that the injury was not life threatening. Tr. 152,242.

William Jankousky, Knight Hawk's Corporate Safety Director, is also a trained EMT. He testified that Knight Hawk encourages its employees to become EMTs. If a miner voices an interest in being certified, he will contact Eastern Illinois Community College to find an upcoming course. Once the miner passes the written test, the company will pay for the remainder of their training and pay an annual bonus of $3000. In a company with approximately 200 employees, 22 are trained EMTs. Tr. 174-75. Jankousky stated that there are posters entitled "One Call Does It All" instructing mine operators to immediately call the toll free number when any of the listed conditions are met which are the same as those enumerated in section 50.10. Ex. R-8, 180. He testified that the posters are located throughout the mine. Tr. 181. He considers injuries that have a reasonable potential to cause death those that involve an unconscious individual, uncontrollable bleeding, a severed limb, someone needing CPR, someone not breathing or without a heartbeat. A broken limb does not qualify as such an injury unless there is a compound fracture with uncontrollable bleeding. Tr. 182, 184. He also would consider a fractured pelvis to such an injury if it was a crush-type injury and the pelvis was not intact. Then it would be necessary to check for pooling of blood and capillary refill to check for internal bleeding. If there was proper profusion with all other signs being normal, then it is not an immediately reportable injury. Tr. 184. Any Responsible Person ("RP") can call in without first asking permission from he or Mr. Winters. Tr. 186. There are generally three or four RPs on each shift and a shift manager who is designated as the RP for that shift. Tr. 179.

Jankousky reported the accident to MSHA on May 13 th. Tr. 191, Ex. R-6. He also was present when Inspector Burtis presented Williams' citation on September 16th. Jankousky objected to the weight of the rock stated in the narrative but was not given any conferencing rights at that time. He also told Burtis that they did not agree with either of the citations issued. Burtis replied, "don't shoot the messenger." Tr. 195-96. Jankousky also requested a closeout conference to contest the citations on June 10, 2016. Tr. 191. Ex. R-9. When the conference took place in September, he told the conference officer that he had consulted with the EMT at the time of the accident and based upon his thorough assessment of Wink, no one thought the injury had a reasonable potential to cause death. Tr. 192, 195. Jankousky also explained that their EMTs are all trained, if there is any doubt in this regard, they are to call for a helicopter as well as an ambulance. If the helicopter EMTs do not think a life flight is needed, they will send the miner by ambulance and not charge the operator for calling for one. Tr. 193.

V. ANALYSIS

In the instant matter, the Secretary argues that the totality of the circumstances extends only to the nature of the accident – that is, the fall of a large heavy piece of rock from the roof that partially pinned a miner. Inspector Williams testified, "the size of the rock…the height that

it fell, knowing that it came to rest on top of Wink, and Mr. Wink was screaming in pain, that it crushed his hip, crushed his mid-section area where his pelvis was, fractured…his lower leg, just the mechanism of injury" would indicated that there was a "possibility" of internal injuries. Tr. 72.

Knight Hawk argues that the totality of the circumstances must include the medical evaluation of the miner done at the scene just shortly after the accident occurred which provided reliable indications that the injury actually sustained by Wink had no reasonable potential to cause death and was therefore not reportable under section 50.10(b). In this particular case, pertaining only to the facts here, I agree with Respondent.

I take issue with the Secretary's position on several points. First, the nature of the accident is not the controlling factor here in determining that this injury had the reasonable potential to cause death. The Secretary's reliance solely on the nature of the accident is not in accord with the law. Secondly, the nature of the injury as stated in the citation is not accurate. Finally, considering the totality of circumstances known to the operator at the time of the accident and immediately thereafter, there was additional information which would reasonably lead one to a different conclusion but was not properly taken into account by the Secretary.

In its most recent decision, the Commission has reiterated its holding that under this generally worded standard, the evidence is to be evaluated under the "reasonably prudent person" test. *Consolidation Pa. Coal Co.*, 40 FMSHRC ___, slip op. at # 5, No. PENN 2014-816 (August 22, 2018), citing *Ideal Cement Co*., 12 FMSHRC 2409, 2415 (Nov. 1990). In its current decision, the Commission again cites to the "totality of circumstances" first iterated in *Signal Peak Energy, LLC*, 37 FMSHRC 470 (Mar. 2015), as the appropriate principle to consider when determining when a violation of section 50.10(b) has occurred. In doing so, the circumstances to consider are not only the nature of the accident or mechanism causing the injury but also any observable indicators of trauma and signs and symptoms readily available at the time of the accident or immediately following. "The outcome determinative inquiry in [this] case is whether responsible…employees had information that would lead a reasonable person to conclude there was a reasonable potential for death based upon the nature of the injury **and the totality of the circumstances**." *Consolidation Coal Co.* at 8 (emphasis added).

Both the Secretary and the Respondent cite to the preamble to the final rule which acknowledges that there is always "an element of judgment" involved in assessing whether a certain injury has a reasonable potential to cause death. It goes on to set forth certain injuries that are known to fall into that category. They include concussions, cases requiring CPR, amputations, blunt force trauma to the upper body and cases of unconsciousness. Emergency Mine Evacuation, 71 Fed. Reg. 71, 433-34 (Dec. 8, 2006). While the list is not exhaustive, the examples are instructive in that they involve far more severe medical signs and symptoms than those here. It also underscores that fact that medical triage at the scene is relevant and important in exercising judgement in this area.

The Commission has confirmed that medical information is also relevant in evaluating violations of section 50.10 under the controlling principle of the totality of circumstances known to the operator at the time of the accident or immediately thereafter. *See Consoldation*

*PA Coal Co.,*at 6; *Signal Peak Energy* at 476. While the nature of the accident is highly relevant, medical information is also necessary to consider. Beckman, who is a highly qualified EMT, spent approximately one hour with Wink immediately after the accident. Throughout this period of time, he performed numerous tests and made careful observations of the injured miner, all of which, as he articulated in great detail, were designed to detect internal bleeding, crush-type injuries, shock and changes in circulation and mental status. Combined with being able to speak to Wink about the location and level of pain, his assessment led him to the conclusion that Wink had suffered a non-compound fracture to his leg with no instability in his pelvic area and no signs of internal injury or bleeding. While the focus of this violation is what is known to the operator within a short period of time after the injury has occurred, it is clear that shortly after arrival at the hospital, Beckman's assessment was found to be accurate. Wink was left in the ER without treatment and then transferred to St. Louis where he waited for 12 hours before his leg was surgically repaired. Tr. 262-63. This information was available to Williams during his investigation but he felt that neither Beckman's nor the ambulance crew's nor the hospitals' records were relevant and he did not collect them. He did not even recognize that there had been an EMT at the scene until he sat in on Beckman's deposition many months later. I find this is relevant in that it underscores the fact that Beckman was correct in his assessment as he performed an adequate examination to make such a determination and that the information was available before Williams wrote the citation. Had Williams at the very least spoken to Beckman to learn what information was available to the operator on the scene, it would make his evaluation somewhat more credible. Williams, without any medical training, essentially chose to make up his mind as to what sort of injuries Wink might have sustained while ignoring the medical signs and symptoms collected at the scene by a well-trained medic that indicated there was not a reasonable potential for death.

The Secretary relies on several cases in order to fortify his position that the nature of the injury in this case should have put a reasonable person on notice that there was a reasonable potential for death. He cites *Signal Peak*, in which a roof caved in causing a blast of air, which damaged approximately 78 stoppings, and threw a miner 50-80 feet. In that case the miner was in severe pain, had difficulty breathing and moving, had a significant lump on his back and said he was not okay. The medic on the scene was not able to do a full assessment but did note trouble breathing accompanied by back and chest pain, a head laceration, noticeably broken ribs and signs of shock. *Id.* Clearly, the types of injuries *Signal Peak* were similar, if not identical, to those listed in the preamble including blunt force trauma to the torso and head as well as broken bones that could easily puncture a lung or other vital organs. But again the Commission in *Signal Peak* confirmed that the operator is afforded a reasonable opportunity for investigation of the surrounding circumstances in making the determination whether the injury is life-threatening.

Also cited by the Secretary is *M-Class Mining LLC,* 39 FMSHRC 1013 (May 2017) in which I determined that an injury was immediately reportable. In that case what was significant to me was the fact that the miner had been injected with hydraulic fluid through his work clothes into his rectum at 4200 psi. He immediately lost control of his bowls, was in extreme pain and was bleeding profusely from his rectum. He told the first responder that he was not okay and he felt like his intestines were "hanging out" and that there was "something wrong inside." He was described as frantic to get out of the mine and was in shock. He was bleeding so

profusely that it pooled in the mine car and run down the side. *Id.* at 1021. As in *Signal Peak*, it was obvious that there were serious internal injuries, shock and blunt force trauma to the torso. In the Commission's latest decision, *Consolidation Pa. Coal Co. supra,* the miner was crushed between a rail car and a scoop bucket. While he was conscious at the scene, he had no feeling in his legs, was in extreme pain, his abdomen was swollen and distended, there was some blood at the scene and the miner said he felt like his guts were coming out of his penis and he bid his family goodbye. Due to the obvious severity of the injury, lift-flight was called for evacuation. All of the signs indicated spinal cord and internal injuries were very likely present. The Commission found, considering the totality of the circumstances, that any reasonable person in that situation "possessing the available information would have concluded there was a reasonable potential for death." *Id.* at 9.

I find the cases cited by the Secretary are readily distinguishable from this instance. All of them involve instances where the injuries very clearly presented as those similar to the ones listed in the preamble. That is, blunt force trauma to vital organs, head injuries, spinal cord injuries and the like which are known to cause internal injury, bleeding and death. The only indication that Wink was likely to have suffered such severe injuries is the Secretary's description of the accident. Williams testified that Wink sustained crushing injuries to his mid-section and pelvis. He further stated that rock that struck Wink weighed 4000 pounds. The preponderance of the evidence does not support either of these conclusions, however. Williams' calculation is beyond comprehension and completely unverifiable. The Secretary claims the operator did not question the calculation. However, I find there is credible evidence that the operator was not given the opportunity to challenge Williams when he wrote the citation. Williams wrote the citation in his office at 3:30 in the morning and gave it to another inspector to present to the operator days after the fact. When Inspector Buris presented the citation, Jankousky did challenge the calculations only to be told "don't shoot the messenger." TR195-96. They were not given an adequate opportunity thereafter to challenge the information and, in fact, Williams was not even aware that they had questioned it. Tr.101. I find this representation that the operator did not object is inaccurate and undermines the credibility of the Secretary's evidence.

Furthermore, the description of the nature of Wink's injuries would lead one to believe that the full weight of the rock landed on the miner crushing him flat underneath it which is inaccurate. Both Williams' sketch of the scene made from interviewing Kalin Rains and the operator's sketch depict Wink being under just the smaller tip of the triangular-shaped rock. Ex. S- 2 at 25; Ex. R –1. There is no evidence given as to the weight of the section of the rock that landed on Wink but it is clearly far less than the weight of the entire rock. Additionally, it was established by the respondent that Wink was not flat on his back or stomach but on his side so that the rock did not land on his mid-section. Tr. 42, 258. Based upon the statements by the miners who responded to Wink, he was pinned either from the hip or the knee to the lower legs. Tr. 42, 92. There were no signs of injury to his mid-section or internal organs and no irregular movement in his hips suggesting any injuries to internal organs or the spine. I find that the evidence best supports that the rock was triangle shaped, and the smallest triangular part of the rock is what pinned Wink to the ground. R-1, 3, 4. While one miner was unable to lift the rock and free Wink, three miners were able to do so without the help of any mechanism or machine. R-1, 3, 4. Furthermore, the location of the rock which landed primarily on Wink's leg, in

conjunction with his resulting pain and the EMT's evaluation indicate that an injury with the potential to cause death did not occur. R-1 and 2.

I find the operator made a timely and diligent effort to determine the nature and extent of Wink's injuries on the scene. Beckman's medical assessment included a physical examination which assessed the physical and mental status of the miner. He had the opportunity to monitor Wink for approximately one hour before the ambulance transported the miner to the hospital. Beckman's examination was neither cursory nor rushed. There were no signs of internal injury, no blood, no crush injuries and no changes in circulation, pallor, or alteration of mental status, complaints of severe pain or alarming feelings of internal organs coming out of the body or fear of dying. He had the opportunity to speak with Wink throughout the course of his rescue from the mine. Wink maintained consciousness and was alert throughout. He was joking with his fellow miners about having his new boots cut off of him and complained primarily of leg pain. Beckman determined that the injury was a non-compound fracture of the lower leg and a non-crush injury to the hip which Williams confirmed are not immediately reportable injuries likely to cause death. Tr.130. Jankousky, an experienced EMT confirmed that Beckman's assessment was properly done and evaluated. Had Williams asked whether there had been a medical evaluation at the scene, spoken to Beckman or obtained his medical assessment report, it would have presented a far more accurate picture of what had occurred and what information was known to the operator at the time of the accident. The investigation took place days after the accident, there was no urgency involved in collecting all relevant information and doing so would not have presented an impediment to completing a timely investigation. Yet, this was not done leading the Secretary to rely solely on the nature of the injury rather than the totality of circumstances as required by law.

For the reasons discussed above, I find that when examining the nature of the accident and the relevant totality of the circumstances, the Secretary has failed to meet its burden that an injury occurred involving an accident with the reasonable potential to cause death. Consequently, there was no 30 C.F.R. § 50.10(b) violation. Because the regulation has not been violated, the citation must be vacated.

VI. Citation No. 9039438 (Docket No. LAKE 2017-24)

Citation No. 9039438 was issued on May 31, 2016, by MSHA Roof Control Specialist Williams. S-1. This citation was issued due to Respondent's failure to preserve the accident site where Wink was injured in violation of 30 C.F.R. § 50.12, which requires:

> Unless granted permission by a MSHA District Manager, no operator may alter an accident site or an accident related area until completion of all investigations pertaining to the accident except to the extent necessary to rescue or recover an individual, prevent or eliminate an imminent danger, or prevent destruction of mining equipment.

Under this standard for a violation to have occurred it presupposes that a section 50.10 violation transpired. As the nature of the accident and injury in this case did not arise to a section 50.12 violation, it was not necessary for the area of the accident to be preserved. Accordingly, there could be no section 50.12 violation, and this citation must also be vacated.

ORDER

It is hereby **ORDERED** that Citation Nos. 9039437 and 9039438 are **VACATED**. Because no issues remain for adjudication, these proceedings are **DISMISSED**.

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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September 13, 2018

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. WEST 2017-0546 A.C. No. 04-01299-437883
v.	Docket No. WEST 2017-0685 A.C. No. 04-01299-445257 Docket No. WEST 2018-0100 A.C. No. 04-01299-450097
ORIGINAL SIXTEEN TO ONE MINE INC, Respondent	Docket No. WEST 2018-0224 A.C. No. 04-01299-456276 Mine: Sixteen to One Mine

Appearances: Isabella M. Finneman, Esq. Office of the Solicitor, U.S. Department of Labor, San Francisco, California for the Petitioner

Michael Miller, for the Respondent

Randy Cardwell, CLR, U.S. Department of Labor, MSHA, Vacaville, California

Before: Judge William Moran

DECISION AND ORDER

A hearing involving these dockets was heard on April 17 and 18, 2018 in Nevada City, California. The Sixteen to One Mine is an underground gold mine. Tr. 18. Eight citations were in issue. All testimony for the Respondent was from Mr. Michael Miller. Post-hearing briefs were submitted and the Court considered them fully. The citations are discussed in the order presented.

A Preliminary Matter of Concern

In Respondent's Post-Hearing Brief,[1] submitted on July 12, 2018, by Michael Miller, Respondent first makes a responsible and fair comment invoking Section 505 of the Mine Act[2] which provides

> The Secretary may, subject to the civil service laws, appoint such employees as he deems requisite for the administration of this Act and prescribe their duties. Persons appointed as authorized of the Secretary shall be qualified by practical experience in mining or by experience as a practical mining engineer or by education: Provided, however, that to the maximum extent feasible, in the selection of persons for appointment as mine inspectors, no person shall be so selected unless he has the basic qualifications of at least five years practical mining experience and in assigning mine inspectors to the inspection and investigation of individual mines. Due consideration shall be given to the extent possible to their previous experience in the particular type of mining operation where such inspections are to be made.

R's Br. at 2 (underscoring in Respondent's brief).

> AR Basich and AR Hulsey have limited work experience in a surface operation. AR Hooker never worked in any type of mine. To litigate that actual work experience in an underground mine as an underground miner is irrelevant as a qualification for an AR is nonsense. Objective observations of health and safety conditions at Sixteen to One without underground experience are nonsense. Punitive decisions towards Respondent and its miners is nonsense! Sixteen to One miners and management must receive deferential treatment towards safety if any is to be given. Background, hands on experience and actual on-site training are the intentions of Congress and demanded in An ACT.

Id.

Respondent then continues with his expression that an inspector is to conduct an inspection "consistent with specific conditions at a mine. AR Hooker has shown her inability to perform according to this procedure. No exceptions." *Id.* at 4.

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[1] The submission was titled as "BRIEF OF THE REPSONDENT, ORIGINAL SIXTEEN TO ONE MINE, INC., TO CIVIL PENATLY [sic] PROCEEDINGS HELD BEFORE ADMINISTRATIVE LAW JUDGE WILLIAM MORAN ON April 17, 2018 IN NEVADA CITY, CALIFORNIA."

[2] While the Court fully considered the entirety of the Respondent's Post Hearing Brief and its Rejoinder Brief, titled, "RESPONDENT REJOINS SECRETARY OF LABOR'S REPLY TO RESPONDENT'S POST-HEARING BRIEF," dated August 3, 2018, this portion of the Court's Decision only speaks to its Preliminary Matter of Concern.

Again, the Court considers this to be a fair comment, within the bounds of advocacy and, while it does not subscribe to the Respondent's claim that MSHA Inspector Hooker failed to conduct her inspection in a manner consistent with the mine's specific conditions, it is a contention which the Court took into account and considered for each of the citations issued by Inspector Hooker and litigated during the hearing.

However, the Court's serious concern with the Respondent's Brief is with the following remarks by Mr. Miller, to wit:

> An Act of 1977 originated in Congress is a young law, but well-vetted by experienced participants. It has served America and the industry well, but is now being abused by **law whores**. As a relatively young agency, Mine Safety Health Administration has moved beyond the Congressional language and purposes of this law. MSHA's present behavior with Respondent in the specific inspection, citing, and prosecuting phases under review in this hearing must cease.
>
> The harmful consequences to America citizenry, the natural resource industry, and the miner goes beyond the harm to Respondent. Your time to pass judgment has arrived. Shall An Act of 1977 be ignored? Congress passed a law that was "necessary and proper" for improving the nation. Now it is the Commission's turn to act. Vacate the citations issued by AR Julie Hooker and modify the citations from ARs Rautiola, AR Basich, and AR Hulsey.

R's Br. at 6 (bold text added).

This intemperate and vituperative language employed by the Respondent has no place in legal proceedings and the Secretary of Labor has rightly voiced his objection to it in its Reply Brief. ("Sec.'s Reply," submitted July 26, 2018). In particular[3] the Secretary requested this Court

> strike the first paragraph on page 6 of Respondent's Brief that contains the derogatory term "law whores." A reasonable person reading the Brief could interpret the term "law whores" as a derogatory comment directed to the Secretary's female counsel. Derogatory comments such as this have no place in Commission briefs as it is inappropriate, offensive and harassing to the Secretary's counsel. Besides filing the Brief with the Commission, Respondent has posted its Brief on its website (see Exhibit A -- a screenshot of Respondent's website as of July 25, 2018), which contains a link to Respondent's Post-Hearing Brief dated July 12, 2018 for the general public to read.
>
> Therefore, the Secretary respectfully requests that the Commission issue an Order striking paragraph 1 on page 6 of Respondent's Post-Hearing Brief from the record and to direct Respondent to remove said Brief from its website in perpetuity.

Sec. Br. at 3.

The Court has no authority to direct that paragraph 1 on page 6 of Respondent's Post-Hearing Brief be stricken from the record nor to direct Respondent to remove his brief from its website in perpetuity.[4] That said, the Court is greatly disappointed that Mr. Miller would insert that kind of language in his brief because, having presided in four hearings involving Mr. Miller,

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[3] The Secretary's Reply also contends that the Respondent should be "barred from introducing additional evidence identified as "Exhibit R-A." Respondent attached Exhibit R-A to its Brief, which was served on the Secretary via email on July 11, 2018. This exhibit appears to be the Post-Hearing Brief that Respondent submitted to the Court in connection with the adjudication of MSHA citations in Docket No. WEST 2017-0119. Respondent did not obtain the Court's permission to submit Exhibit R-A and, therefore, Respondent is barred from supplementing the record evidence with this exhibit. Furthermore, Respondent's Exhibit R-A should be excluded from the evidence in these proceedings because it has no relevance to the factual or legal issues in these proceedings. Exhibit R-A pertains to a now-closed docket of unrelated citations (WEST 2017-0119). Since the evidence presented in the prior proceeding has no bearing on the relevant issues in these proceedings, Respondent is barred from using the evidence and law contained in Exhibit R-A to further its argument(s) in these proceedings." *Id.* at 2-3. The Court rejects the attempt to include proposed Exhibit R-A on two distinct grounds. First, it was not presented as part of the required prehearing exchange, nor was it offered at the hearing for inclusion as an exhibit. Second, the now rejected exhibit is in large measure a rehash of Mr. Miller's complaint that Inspector Hooker is insufficiently experienced to be an inspector. That assertion has already been independently made by Mr. Miller in this proceeding and therefore it is cumulative.

[4] *See generally* 29 C.F.R. § 2700.55, Powers of Judges.

it is out of character for him to use such language. The Court would surmise that Mr. Miller had a moment when his feelings momentarily got the better of his judgment. As the language employed by him is inconsistent with the person the Court has come to know during litigation and hearings in the course of four years, Mr. Miller can request that this language be stricken by withdrawing it and resubmitting his brief without that language. Further, Mr. Miller can voluntarily remove that offensive version from his website, perhaps upon realizing that the language was improper.

Further, the Court finds that the use of that language is unwarranted factually. Though it would have been better if Inspector Hooker had at least some prior mining experience in her background, that is a separate issue from whether she is a qualified inspector. As the Secretary notes in its Reply,

> The record in these proceedings establishes that the four MSHA inspectors who were involved in or issued the subject citations – Nick Basich, Jerry Hulsey, Craig Rautiola and Julie Hooker – are qualified and authorized representatives of the Secretary. Regardless of their mining background, each of these mine safety and health inspectors underwent a rigorous 21-week course of training on subjects such as the Federal Mine Safety and Health Act of 1977, as amended ("Mine Act"), the Mine Act's implementing regulations and MSHA policies and procedures in order to obtain their AR (authorized representative) cards, and regularly participate in MSHA refresher training in order to remain up-to-date on the relevant law, policies and procedures. In addition, MSHA inspectors can receive on-the-job training by accompanying more senior inspectors on their inspections. (Tr. 16:19 to 17:2; 83:23 to 84:7; 129:15-20; 242:24 to 243:23) The record is clear that the four MSHA inspectors who testified at the hearing are qualified MSHA Metal/Nonmetal mine safety and health inspectors.

Id. at 2.

The Court agrees with the Secretary's observations and comments. It must also be said that, while there may be instances when practical prior mining experience assists a mine inspector in determining whether a condition is a violation, many conditions can be evaluated apart from such prior experience. As two examples from the matters addressed in this decision demonstrate, one does not need to have prior mining experience to determine if a ladder extends a distance of three feet above a landing or are provided with substantial handholds. Nor, as a second example, is such prior experience needed to determine if a compressor, or for that matter a self-rescuer, has been appropriately maintained. MSHA training and retraining are sufficient to inform inspectors of such issues.

Finally, the Court wishes to emphasize that, while it disagrees with Mr. Miller's claims and is disappointed that he utilized the inaccurate and combative language in his brief, those remarks *play absolutely no role* in the Court's evaluation of the evidence in these dockets. That is the nature of a court's role – to put aside uncalled-for remarks, and instead to decide the matters solely on the evidence presented at the hearing, and that is exactly what this Court did in these instances.

Penalty Determinations –Overview of penalty factors.

As each of the citations in this litigation are upheld, at least as to the fact of violation, the Court here outlines the penalty factors applied.

Section 110 of the Mine Act, codified as 30 U.S.C § 820, addresses civil penalties for violation of mandatory health or safety standards. Subsection (i) of that section, titled, "Authority to assess civil penalties," provides:

> The Commission shall have authority to assess all civil penalties provided in this chapter. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. In proposing civil penalties under this chapter, the Secretary may rely upon a summary review of the information available to him and shall not be required to make findings of fact concerning the above factors.

Federal Mine Safety & Health Act of 1977 § 110(i), 30 U.S.C. § 820(i) (2012).

Penalty Factors, as applied to this case

History of violations: The Respondent mine's history of violations is reflected in Ex. P-1.

Size of operator's business: The Respondent's mine is small. Tr. 130, 213.

Good faith in compliance after notification of a violation: In each of the eight citations involved in the dockets, as listed above, the Respondent demonstrated good faith.

Effect on the operator's ability to continue in business: As discussed below, the Court finds that the Respondent did not meet its affirmative obligation to establish that the proposed penalties would have a cognizable effect on the Respondent mine's ability to continue in business. As the penalties imposed in this decision are, in total, less than the amounts proposed, this conclusion is reinforced.

Negligence and **Gravity** are discussed separately for each alleged violation. Where a designation made for negligence and/or gravity in a given citation was unchallenged by the Respondent, the Court upon consideration of the evidence has adopted the designations made.

Regarding the concept of "negligence," the Court notes that a fellow administrative law judge has recently remarked that,

> Section 110(i) of the Mine Act also includes "negligence" as one of the six criteria the Commission is required to consider in assessing a penalty. The term is not defined in the Act, but over 30 years ago the Commission recognized that:

> "[e]ach mandatory standard … carries with it an accompanying duty of care to avoid violations of the standard, and an operator's failure to meet the appropriate duty can lead to a finding of negligence if a violation of the standard occurs." *A. H. Smith Stone Company*, 5 FMSHRC 13, 15 (Jan. 1983). The Commission has established that its judges may "evaluate negligence from the starting point of a traditional negligence analysis rather than based upon the Part 100 definitions. Under such an analysis, an operator is negligent if it fails to meet the requisite standard of care-a standard of care that is high under the Mine Act." *Brody Mining LLC*, 37 FMSHRC 1687, 1702 (Aug. 2015). This evaluation considers "what actions would have been taken under the same circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation." *Jim Walter Resources*, 36 FMSHRC 1972, 1975 (Aug. 2014). … The Commission and its judges are not bound to apply the 30 C.F.R. Part 100 regulations that govern the MSHA's determinations. *Newtown Energy, Inc*., 38 FMSHRC 2033, 2048 (Aug. 2016) citing *Brody* at 1701-03. Therefore, the Commission's judges are not limited to an evaluation of allegedly "mitigating circumstances" and instead may consider the "totality of the circumstances holistically." *Brody*, at 1702; Mach Mining, 809 F.3d 1259, 1264 (D.C. Cir 2016). For example, the Commission has stated the real gravamen of high negligence is that it "suggests an aggravated lack of care that is more than ordinary negligence." *Newtown*, at 2049, citing *Topper Coal Co*., 20 FMSHRC 344, 350 (Apr. 1998) citing *Eastern Associated Coal Corp*., 13 FMSHRC 178, 187 (Feb. 1991). High negligence may be found in spite of mitigating circumstances, or, for example, moderate negligence may be found without identifying mitigating circumstances. *Brody*, at 1702-03. The Commission has described ordinary negligence as "inadvertent," "thoughtless," or "inattentive" conduct. *Emery Mining Corp*., 9 FMSHRC 1997, 2001, 2004 (Dec. 1987)."

Consol Pennsylvania Coal, 40 FMSHRC 429, 432-433, March 2018, (ALJ Andrews).

Findings of Fact

Docket No. WEST 2017-0546

Citation No. 8785581

The first matter is associated with Docket No. WEST 2017-0546. MSHA Inspector Nicholas Basich testified about Citation No. 8785581. It involved a section 104(a) citation alleging a violation of 30 C.F.R. §57.15031(a). That standard, titled, "Location of self-rescue devices," provides,

> (a) Except as provided in paragraph (b) and (c) of this section, self-rescue devices meeting the requirements of standard 57.15030 shall be worn or carried by all persons underground. (b) Where the wearing or carrying of self-rescue devices meeting the requirements of standard 57.15030 is hazardous to a person, such self-rescue devices shall be located at a distance no greater than 25 feet from such

person. (c) Where a person works on or around mobile equipment, self-rescue devices may be placed in a readily accessible location on such equipment.

The citation alleged that,

[a] miner took off his mine belt, with his self rescuer on it, inside the mine and exited the mine without the belt. The miner traveled about 1500 feet, according to the operator, from the "848" station to the "800" portal without a self-rescuer. The practice of traveling in an underground mine without a self-rescuer exposes a miner to suffocation hazards in the event of a mine fire. Miners access the mine daily and have been trained on the policies and procedures regarding wearing a self rescuer in the mine. Serious, potentially fatal suffocation type injuries would be expected in the event of an accident.

Ex. P 3-1.

The citation gravity was marked as unlikely for the injury or illness, and not significant and substantial, but the expected injury or illness was marked as "fatal." The number of persons affected was listed as "one" and negligence as "low." *Id.* As for abatement terminating the citation, the citation reflects: "The miner was retrained on the policies and procedures regarding the use of a self rescuer, eliminating the hazard." *Id*.

Inspector Basich conducted his inspection at the mine pertaining to this matter on March 14, 2017. Tr. 19. This was part of a regular inspection. With him was Jerry Hulsey, another Mine Safety and Health inspector. Basich issued Citation Number 8785581 on March 15, 2017. The citation was issued upon the inspector observing a miner about to re-enter the mine without wearing his mine belt and self-rescuer. Upon questioning him, the inspector learned that the miner had removed his mine belt and self-rescuer near the 848 underground level and then exited to the surface without wearing the self-rescuer. Compounding that mistake, the miner wanted to correct the error by returning underground to retrieve his self-rescuer. Another miner, Reid Miller, equipped with a self-rescue device, then entered the mine and retrieved the other miner's device. The inspector required that the miner be retrained about the proper use of his self-rescue device, before being allowed to re-enter the mine. Tr. 20-21. In exiting the mine without his self-rescuer, the miner traveled about 1500 feet. Tr. 22. The purpose of the self-rescue device is to remove carbon monoxide from the atmosphere so that a miner can escape that poisonous air. *Id.*

Basich cited 30 C.F.R §57.15031 with its requirement that the self-rescuer device be worn or be carried by a miner at all times underground. The provision allows that if wearing the device creates a hazard, it may be located no more than 25 feet from the miner. Tr. 22-23. In this instance the miner was about 1500 feet away from his self-rescuer device. Tr. 24. As noted, the inspector marked the gravity as unlikely, but fatal. His reasoning was because "there's positive ventilation in the mine at the time, no history of mine fires or gas inundation, a straight exit path

out of the mine, and there were other miners present." *Id.* However, he marked it as fatal because,

> [a]n inundation of a mine by CO or carbon monoxide from either a fire or it could be a fire outside of the mine, that the mine has positive ventilation that CO could be brought into the mine, in any event breathing CO can be fatal. So any gas inundation of CO inside a mine could prove to be fatal and that's why MSHA mandates the wearing of self-rescuers.

Tr. 25.

For negligence, the inspector marked it as low, "because this was the inadvertent act of a relatively new miner. I believe he had been working at the mine less than a year. The mine had policies and procedures in place that required the use of a self-rescuer, and the miner was trained. So that's why I rated this as low." Tr. 26.

On cross-examination the inspector stated that there were three or four miners working at the site. Tr. 62. As to the miners' location, he stated that they were on the 49 winze, which the Respondent advised was the "800 station." *Id.* Asked what combustible material was present from the portal to the 800 station, the inspector stated that it was the timber support in the mine as well as the material being used to build the stairs. Tr. 63-64. Later, he added that abandoned workings in the mine left behind discarded timber supports. Tr. 70.

The inspector described the hazard as carbon monoxide caused by a fire. It was the Respondent's position that, if a fire were to occur, a miner could have simply walked out using the second exit. Tr. 66. As Mr. Miller is not an attorney, the Court attempted to refine the Respondent's question, asking if his point was that it would be "extremely unlikely that any fatality would occur because should there be some combustible material producing CO entering the mine the miner had multiple means to escape the mine besides the direction from which he originally entered, something like that." Mr. Miller agreed that was the point about which he was trying to question the inspector. *Id.*

The inspector responded that his rationale was that, as the miner was then at

> 1400 feet inside the mine … [t]he mine becomes inundated with smoke, can be disorienting, can be a lot of things. Putting on a self-rescuer is not the easiest thing, however that's what you do to save yourself. Picking which route to go at that point to exit the 2100, which is the secondary escape, which I inspected, that takes time probably 15 minutes, maybe 20, maybe somebody not as big as I could make it quicker, but it's -- it wasn't easily accessed and exited by me. So I think the reason for the regulation is so that a miner can don his self-rescuer and safely exit the mine.

Tr. 67.

The questions posed by the Respondent were intended to show that it was not reasonable to mark the citation as "fatal." Tr. 69. As Mr. Miller put it, "That is my only complaint with this citation." Tr. 69. His contention was that the events leading to an underground fire or explosion were quite remote. Tr. 69-70. Inspector Basich then added that in addition to the supporting timbers and the material used for stairways, "there are many abandoned workings in the Sixteen to One Mine, and as a consequence supports have been discarded, leaving a lot of unused timber in the mine." Tr. 70. However, the inspector could not state that any of the discarded timber was between the 800 station and the portal. *Id.* The inspector acknowledged that the miner who left his self-rescuer had been properly trained on it, prior to the citation. Tr. 71. He also agreed that he had never seen a similar violation at the mine, where a miner did not have his self-rescuer appropriately nearby. *Id.*

Upon re-direct, the inspector testified that when evaluating the expected injury, his evaluation is not limited to the cited mine, but rather takes into account such incidents generally, that is, the importance of self-rescuers in the event of a mine fire at all mines.[5] Nevertheless, he asserted that his view was not based upon his general concern about what that safety standard addresses, *but rather what he observed at the particular location*. Tr. 72. When asked about the direction smoke would travel in the event of a fire, the inspector stated that temperatures at the mine can impact whether smoke-filled air would travel in or out of the mine at any given time. Tr. 76.

Mr. Miller, testifying with regard to this self-rescuer citation, stated that the fatal designation was inaccurate. Tr. 93. Miller asserted that, while that may be true in some underground mines, it does not apply to the Sixteen to One. He expressed that, applying the site-specific test to the violation, suffocation hazards in the event of a fire would not exist. Tr. 93. He maintained that, in the event of combustion or a fire or smoke inhalation, the need to use a self-rescuer would be non-existent and no miner would opt for that at the mine. Tr. 94-95. Miller asserted that not even lost workdays could occur. Tr. 95.

Upon cross-examination, Miller did not dispute that it was 1500 feet from the 800 portal and that the miner did not have his self-rescuer with him at the surface. Tr. 106-107. However, Miller did not agree that inspectors should consider the overall general injury dangers presented by miners who do not have their self-rescuers present. Instead, it was his view that the inspectors should evaluate the danger based on the Sixteen to One mine. Tr. 109. Apart from that view, Miller did not agree with the inspector's distinction between the *type of injury* and the *likelihood that such an injury would occur*. Instead, he believed that, because the miner was in an area where there were two ways to exit the mine, neither designation was appropriate. Tr. 110-111. It was his argument that the miner's location was at a "V," and therefore he had two exits to the outside and one of two exit routes would not have any smoke. Tr. 111-112.

Jerry Dean Hulsey also testified for the Secretary. Mr. Hulsey retired in March 2018. He had about 22 years of mining experience, mostly at sand and gravel operations. Following that he

[5] The inspector added that he applied the same approach to the other citation he issued during this inspection, involving an outdated inspection certificate for an air compressor. That is, he considers the hazard associated with the violation as it pertains to mines in general, not solely the Respondent's mine.

was an MSHA inspector, working in that role for some 20 years. Tr. 82-83. As an inspector he has inspected the Sixteen to One Mine about ten times. Tr. 84. Hulsey was with Inspector Basich during the March 2017 inspection at issue here. Regarding the self-rescuer violation, Hulsey stated that, during lunch on the day of the inspection, he was chatting with a new miner when he learned that the miner had left his self-rescuer in the mine. Apparently unaware of the safety implications, the miner offered to go back into the mine to retrieve the self-rescuer device. Tr. 89.

In the Secretary's post-hearing brief, it was acknowledged that the violation was unlikely to cause injuries, that there was positive ventilation in the mine, that the mine has no history of mine fires and that there was a straight exit path out of the mine. Sec. Br. at 5. The Secretary also admits that the negligence was low.

The Court, upon consideration of the testimony, credits Mr. Miller's view that a fatality was not likely in the event of smoke from a fire. At most, given his testimony about escape routes in the event of the admittedly "unlikely" event of the injury or illness for this non-S&S matter even occurring, the injury that could reasonably be expected at this mine would be lost workdays or restricted duty.

A proposed penalty of $220.00 was assessed by the Secretary under Part 100. Exhibit A to Docket WEST 2017-0546. Upon consideration of each of the statutory penalty factors, as set forth generally and particularly, above, the Court's reevaluation of the expected injury **produces a penalty of $100.00**.

Citation No. 8785582

Citation No. 8785582, a section 104(a) citation, invoked 57.13015(a). In relevant part, that standard, titled, "Inspection of compressed-air receivers and other unfired pressure vessels[6]," provides,

> Compressed-air receivers and other unfired pressure vessels shall be inspected by inspectors holding a valid National Board Commission and in accordance with the applicable chapters of the National Board Inspection Code, a Manual for Boiler and Pressure Vessel Inspectors, 1979. This code is incorporated by reference and made a part of this standard.

The citation alleged,

> No documentation of a current inspection for the Speedair air compressor (ID # 3622-06), located in the lower shop at the mine, could be produced at the time of inspection. The air compressor is plugged in and the receiver tank is holding pressure. This condition exposes miners to tank explosion hazards if the air receiver tank is defective. Miners access the lower shop area of the mine several times a day at the beginning and end of the shift, and sometimes at lunch. Serious,

[6] A pressure vessel is a vessel that holds compressed air. Tr. 17.

potentially fatal blunt force trauma type injuries would be expected in the event of an accident.

Citation No. 8785582.

The citation gravity was marked as unlikely for the risk of injury or illness, and not significant and substantial, but the expected injury or illness marked as fatal. The number of persons affected was listed as one and the negligence as "moderate."

Inspector Basich testified about Citation No. 8785582, which was issued on March 15th. As noted, this involved a pressure vessel for an air compressor located in the lower shop of the mine. The inspector sought current permits for each of the mine's pressure vessels. Such permits were provided for all but one and therefore he issued a citation for that one vessel's lack of a current permit. Tr. 28. Three other vessels had permits and they all had the same permit date. *Id.* The inspector accepted the remark of one of the mine's employees (Ms. Rae Bell Arbogast) who informed Inspector Basich that the State of California pressure vessel inspector had simply missed one when performing his inspections of the vessels. Tr. 29.

The inspector also determined that the cited compressor was in use, as it was plugged in and holding pressure. Upon inspecting it, that is, apart from the issue of its lack of a current permit, the inspector determined that it was functioning properly. Tr. 31.

The standard cited by the inspector 30 C.F.R. §57.130015, requires that a pressure vessel have a current inspection by a person certified to conduct pressure vessel inspections. It also requires that the mine operator keep records of such inspections and provide them to the inspector when requested. Tr. 32.

On direct examination, when referred to Ex. P 6, the inspector identified it as excerpt pages from the 1979 National Board Inspection Code, Manual for Boiler and Pressure Vessel Inspectors. It establishes "rules of safety governing the design, fabrication and inspection during the construction of boilers and pressure vessels." Tr. 33. Its intention is to ensure continued safe use of these devices. *Id*. The manual aside, the violation asserted here was the failure to establish that there had been a current inspection. Tr. 35. The inspector agreed that he found nothing inadequate about the compressor; his issue was solely that there was an absence of documentation. Tr. 36. The inspector added that his examination of the compressor was not the equivalent of a full inspection, but again that his issue was confined to the lack of documentation. Tr. 37.

Referring to Ex. P 7, the California Code of Regulations provision referring to air tanks, the inspector noted that Title 8, Section 461 of that code requires a permit for such tanks operation. Per that provision, the permit for the tank in question expired on September 21, 2015 and therefore, at the time of his inspection, the permit was 18 months out of date. Tr.41.

As noted, for this citation the inspector marked the gravity as "unlikely" but "fatal," if an accident occurred. Tr. 41. The "unlikely" designation was based on his examination of the tank, incomplete as it was, because he found that "the tank the gauge was in good apparent condition,

the pressure relief valve was working, and the tank had not been altered or modified in any way." *Id.* The "fatal" designation was based on his view that in the "event of a pressure vessel explosion, shrapnel would be thrown in many directions. The air compressor is located in the lower shop. Miners work in the lower shop. … so there was exposure and [if there was] an air tank explosion [he]would expect fatal blunt force trauma type injuries." Tr. 42. The inspector agreed that, as long as there was exposure, he would *always* mark a citation such as this one as "fatal" for that reason. *Id.* As he noted, there was exposure here, as the tank was located in the lower shop and miners would be in close proximity to it. Tr. 43.

For negligence, the inspector marked that as "moderate," because the vessels are required to be maintained and currently inspected, all to protect miners from potential injury. Tr. 44. Further, the inspector noted that the operator was aware of the inspection requirement, "because [the mine] had all [of its] other air compressors inspected. This one somehow was missed." *Id.*

Given that all the other vessels had been inspected, the Court inquired why the inspector could not have marked the negligence as low. The inspector responded that, for him, low negligence requires considerable mitigating factors. To meet that, he would need a showing "that the operator had done everything he could possibly do to keep -- in this case keep this pressure vessel inspected." *Id.* In effect, the inspector used the fact that all the other vessels had been inspected, to show that the mine knew of the requirement and therefore that someone had "dropped the ball." *Id.*

In further explanation of his moderate negligence designation, he added that he "always" starts with "moderate" negligence and then adds his observations and any mitigation that may be presented. To be listed as low negligence, he will "take all that into account, and so if there are numerous mitigating factors that showed me that they have policies and procedures in place and they have done everything possible, [he] *might* have evaluated it as low." Tr. 45 (emphasis added). On the other side of the issue, the inspector stated that he applies the same high threshold in deciding whether to mark a violation as above moderate and list the negligence as "high." Tr. 46. Thus, he requires a "large amount of evidence" before he will mark the negligence as "high." *Id.*

Upon cross-examination, the inspector agreed that the fact all the other compressors had been inspected was a mitigating factor. Tr. 47. Asked if the mine's office representative had shown him "the phone record of the attempts [the mine] tried to get the inspectors to come up that predated even your date of inspection," the inspector responded that he was not shown that information, but had that occurred, he would have considered it as mitigation. *Id.* The inspector's notes for this citation reflect that he held a close-out conference with the mine office representative, Ms. Rae Bell Arbogast. Tr. 50. Those notes do not mention any comment from the mine representative about either of the cited matters. *Id.*

The Respondent questioned the inspector about the size of the cited tank but the Court ruled that the regulations do not exempt the inspection requirement based on the tank's size. The inspector did agree that his concern was the risk of an explosion, but he also admitted that he saw no indication that the compressor was altered or weakened and that the pressure relief gauge was operable and functioning as well. Tr.54. The inspector also noted that the tank was plugged in

and holding pressure, and regretted that he did not include that in his notes. *Id.* However, no tools which would be used with the compressor were connected to it and the inspector conceded that the compressor would only be used for the operation of small hand tools. Tr. 56.

On re-direct, the inspector affirmed that, in evaluating what it would take for the tank to explode, that he considered "all the things that [he] checked and there was nothing wrong with those particular things, like the pressure relief valve and whether it was holding pressure, et cetera," and that he considered those things in rating the likelihood of an explosion. Tr. 73. However, it was still his perspective that an uninspected pressure vessel "is a bomb." Tr. 74. In terms of assessing the expected injury if the event occurred, he explained that inspectors are trained to consider what would be the worst case result in the event of an accident. *Id.* Here, his fatal designation was based upon miners being within 20 feet of an operating pressure vessel holding pressure. *Id.* In general such vessels operate at between 90 and 150 psi and if it exploded shrapnel would be created with fatal results for anyone within the blast radius. Tr. 75.

The inspector did not consider the air tank issue to be merely a paperwork violation because an injury could be involved. Tr. 77. In contrast, he identified a failure to file a quarterly report, or filing such a report late and, as another example, training, which was done, but for which the documentation was not completed, as examples of pure paperwork violations. *Id.* Therefore, he resisted the Respondent's suggestion that the air tank was a paperwork only matter, because "in [his] mind an uninspected air pressure vessel is a bomb."[7] *Id.*

As noted, Jerry Dean Hulsey testified for the Secretary and his testimony included the compressor certification issue. Regarding the compressor violation, Hulsey stated that he double-checked and determined that the inspection certificate had in fact expired. Tr. 89. He also confirmed that the cited compressor was plugged in at the time of the inspection. *Id.*

Regarding the alleged compressor inspection violation, Mr. Miller admitted that the violation occurred, and then made a contention similar to the self-rescuer violation, asserting that there was zero possibility of an injury occurring regarding the compressor's lack of a current inspection certificate. Tr. 97. Admitting that the compressor was overlooked when the testing and re-certification was done for the other compressors, he noted that there was no incentive to have that omission occur, as it is an expensive proposition to have a California state inspector come to the mine, apart from the cost for each device inspected. Tr. 98. The Court agrees with Miller's comments on these points. Further, Miller maintained that significant efforts were made to have the state inspector come back to the mine to inspect the lone uncertified compressor. Tr. 99. With the expense of having the state inspector return to the mine at $600, the mine decided to remove the compressor from service. *Id.* Also, speaking to the likelihood issue, Miller asserted that the compressor was like new and relatively unused and therefore the likelihood of it turning into a bomb was farfetched. *Id.* Miller asserted, correctly, that under California law, permits to operate such equipment remain effective "during the time that a request for a permit remains

[7] The Court advised that it would discount the two analogous hypotheticals offered by the inspector. This determination was based on their limited probative value to this matter. However, the Court does agree that the lack of a current inspection permit is more than a pure paperwork violation. As the Court noted, it would instead rely upon the inspector's view, generally, about the risk that compressors present, which he analogized to a bomb. Tr. 78.

unacted upon." Tr. 101. However, Miller conceded that he had no proof that he requested another permit inspection. *Id.* Following a back and forth between the parties, the Court ruled that, as Mr. Miller had no documentation that he requested a state inspection of the subject compressor until *after* it was cited, that exception did not apply in this instance. Tr. 104-105.

The Court then directed that, apart from the documentation issue, Miller could still testify about his disagreement with the inspector marking the citation as fatal and the negligence as moderate. The Court also noted that the inspector conceded that the violation was not S&S and that it was unlikely that an injury could occur. Tr. 105.

Upon cross-examination regarding the compressor inspection violation, Miller admitted that it was possible that no one noticed, between October 2014 and March 2017, that the mine had one compressor with a permit issued four years earlier than the others. Tr. 114.

The Secretary assessed the citation under Part 100 at a proposed penalty of $492.00. The Secretary admits in its post-hearing brief that the compressor's gauge was in good apparent condition, that the pressure relief valve was working and that the tank had not been altered or modified in any way. Sec. Br. at 9. The Secretary contends that the $492.00 assessment for this violation "is appropriate based on the size of the Respondent's business and its MSHA violation history." *Id.* at 10. This argument by the Secretary appears for each citation and the Court finds that the Secretary is simply commenting upon those penalty determination factors and is not suggesting that the penalty sought is justified on those factors alone.

The Court does not take issue with the inspector's evaluation of the gravity – that it was unlikely to occur, that it was not significant and substantial, and that, unlikely as it was, if the compressor were to explode, a fatality was possible, albeit remotely. It was not disputed that the compressor was relatively new. However, based on all the testimony, the Court considers the negligence to be less than moderate. While the failure to inspect one of the compressors does not excuse the violation, this was clearly an oversight; one compressor was missed by the state inspector, with no design on the mine's part to avoid an inspection of that compressor, which was admittedly in good condition. Further, the Court has a different take than the Secretary's view that the penalty is appropriate based on the size of the Respondent's business and its MSHA violation history. The Court views those factors as lessening the assessed penalty for this violation. Accordingly, upon consideration of the totality of the circumstances and the penalty factors, **a penalty of $100.00 is imposed for this violation.**

Docket No. WEST 2017-0685

Citation No. 8879879

This citation, invoking 30 C.F.R. §57.15030, listed the condition or practice as follows: "A personal Mine W65 Self-Rescuer (unit EN8047) actively used at the underground operations was not maintained per manufacturers operating instructions. A self-rescuer may provide a miner 1-hour of survival and escape, in the event of a mine fire. It must be maintained (weighed) at least each 90-days to ensure readiness for intended use." Ex. P 10-1. The citation listed under

gravity that the injury or illness was "unlikely," not S&S, one person affected, and the expected injury as "fatal." *Id.*

The standard, titled, "Provision and maintenance of self-rescue devices," provides: "A [one]-hour self-rescue device approved by MSHA and NIOSH under 42 CFR part 84 shall be made available by the operator to all personnel underground. Each operator shall maintain self-rescue devices in good condition." 30 C.F.R. § 57.15030.

MSHA inspector Craig Rautiola, the issuing inspector, testified regarding this violation. It is accurate to state that Inspector Rautiola has extensive mining experience. Tr. 128-130. Also, he has inspected the Sixteen to One mine on three occasions, including June 2017. Tr. 131-132. On June 27 of that year he found only *one* violation and issued a citation for that, Citation No. 8879879. Tr. 134, Ex. P-10. The citation alleged that a self-rescuer was not being maintained as required. Tr. 133. The inspector explained that, as part of good maintenance, self-rescuers have to go through a visual inspection and a weighing at least every 90 days. Tr. 135. In this instance he found that one self-rescuer device, assigned to Michael Miller, and which device was put into service in November 2016, had not been weighed thereafter. Tr. 136-137. All the other self-rescuers had been weighed in December 2016 and again in March 2017. *Id.* Finding this failure, the inspector issued the citation, alleging a violation of 30 C.F.R. §57.15030. *Id.*

An MSHA program policy manual applicable to the cited standard amplifies the standard's requirements. It provides that,

> the operator needs to have an effective inspection program to ensure that each self-rescue device is maintained in good condition. This inspection includes a visual inspection and weighing. The visual inspection serves to identify surface defects and the weighing of each self-rescuer of 90 -- at least every 90 days has to be recorded and the record kept for inspection.

Tr. 138, Ex. P 11.

The operating manual for the cited self-rescue device contains the same inspection and weighing requirements. Tr. 139, Ex. 12. In the issued citation, the inspector marked the gravity as "unlikely," and "fatal." Tr. 139.

Explaining the basis for those designations, Rautiola stated,

> the unit visually looked good so I didn't see any surface blemishes, any dents, and then in addition to that fact the self-rescuer was just put into operation in November. So it had seven months on it. So it was relatively new and I didn't see any visual damage to the unit.

Tr. 140.

As for his determination that the injury and illness would reasonably be expected to be fatal, he explained, if it has to be used "…it means there is a fire in the mine. One of the off

gases of a combustion process is carbon monoxide and in very small quantities carbon monoxide is toxic to the human body," and as the Court notes, can be deadly. Tr. 140. Negligence was marked as "moderate," because, according to Rautiola, "self-rescuers have been in use for decades and therefore the maintenance requirements were well known." Supporting this conclusion, the mine was following the requirements *except for one device*. Given that isolated failure, the Court inquired why the inspector didn't consider the negligence to be "low." Tr. 141. The inspector responded that it was an obvious and required task. *Id.* The Court inquired if the inspector would ever mark such a violation as "low" negligence. To this, the inspector responded that he "might" mark it as low, if one unit was not so maintained if it was a spare, but if that spare unit was being regularly used, he would mark it as "moderate" negligence. Tr. 142.

Asked for his definition of "moderate negligence," the inspector replied, "an experienced underground miner would or should have known that his or her self-rescuer needed to be weighed every 90 days." Tr. 143. He agreed that in his view, "would or should have known," is the applicable test for moderate negligence. *Id.*[8]

While cross-examining Mr. Rautiola, Mr. Miller informed the Court that he was not challenging the lack of an inspection of the self-rescuer. Tr. 152. He seemed to assert that the device was not on his belt when he went underground, but was instead in the back of his truck, Miller then advised the Court that he simply did not recall the device's location at that time. Tr. 153. In a somewhat unclear exchange about the point he was trying to make, the Court noted that if Miller was asserting that in fact he had a second self-rescuer on his person when he went underground, if found to be true, such a fact would impact the "fatal" designation for this violation. Tr. 155. However, Miller never established the spare rescuer claim.

The inspector stated that he and Miller did not go into the mine together on June 20th. Instead, on that date, he discovered, while in the mine's office, the issue of the self-rescuer not being weighed. Tr. 156. The following day, the inspector raised the issue of the self-rescuer records. A citation was then issued, as Mr. Miller did not have a justification for the failure. Tr. 157.

Mr. Miller next testified regarding the self-rescuer, stating that he doesn't like wearing it on his belt because it weighs heavily on his hips. He then asserted that the mine has extra self-rescuers "down there." Tr. 162. *He repeated that his challenge was limited to the "fatal" designation*. *Id.* The Court noted on the record that it could view the negligence differently than the inspector, since all but one self-rescuer was properly maintained. Tr. 161.

[8] Potential Exhibit R-06 was not admitted except for two pages on the back of the exhibit. Those two pages were admitted as Ex. P-32. Tr. 147. The inspector identified those pages as a photocopy of the spreadsheet he would have examined at the time of his inspection. While he confirmed that those pages showed the unit in question and that it was assigned to Mr. Miller, the inspector stated that the lines through Miller's name were not present when he examined the self-rescuer. Tr. 146. Also, the handwritten information on the form below the line "V equals visual examination," was not present when he examined the document. Tr. 146-147. The Court finds the inspector's testimony credible on these points.

The violation was established for this citation and the Respondent does not contest this. Rather, as noted, Miller took issue with the assertion that the injury could reasonably be expected to be fatal. The Secretary admits that the inspector did not see any visual damage to the self-rescuer and that it was "relatively new," having been placed in service only seven months earlier. Sec. Br. at 12. This self-rescuer violation is distinguishable from the earlier-described citation, in that this one involved a failure to inspect and weigh a relatively new device, but there was no charge of failing to have the device present while underground. The unweighed device was in the mine office, which is at a different location from the mine. The Secretary contends that the negligence was appropriately designated as "moderate" because the Respondent, through Mr. Miller, was well aware of the need to inspect and weigh the device from Part 48 initial and refresher training, which address this requirement. The Secretary also ascribes the moderate negligence designation because "maintaining [the mine's] self-rescuers in ready condition is crucial to ensuring the safety of its underground miners in the event of a fire." *Id.* at 13.

The proposed penalty under Part 100 was $492.00. Docket No. WEST 2017-0685, and Ex. A for Docket No. WEST 2017-685. In support of the Secretary's view that the proposed penalty of $492.00 is appropriate, the Secretary again asserts "that this penalty is appropriate based on the size of Respondent's business and its MSHA violation history." *Id.* at 14. This analysis is based upon the Part 100 calculation. *Id.*

Given that only one self-rescuer was non-compliant, that the device was not then in use, that the device was, as the Secretary concedes, a relatively new self-rescuer, and that, as the inspector acknowledged, the unit visually looked good and had no surface blemishes or dents, the Court agrees that the "fatal" designation is too much when the evidence is considered in context and in its entirety. **The Court imposes a civil penalty of $100.00**, an amount which the Court considers to be sufficient, both upon taking into account the statutory criteria and the effect of deterring future violations of the cited standard.

Docket No. WEST 2018-0100

Citation Nos. 8879886, and 8879887

Testimony was received with regard to Citation Nos. 8879886, and 8879887, out of Docket No. WEST 2018-100. Both were issued on August 18, 2017 and each was assessed with a proposed penalty of $492.00. Tr. 166, Ex. P 14.

Citation No. 8879886

This citation alleged a violation of 30 C.F.R. § 57.6160(b)(3). That standard, titled, "Main facilities," provides at subsection (b)(3): "Main facilities used to store explosive material underground shall be - … (3) Kept clean, suitably dry, and orderly."

The Citation alleged that,

> [t]he Detonator Explosive Magazine, located underground at the 800-level beyond the Tightner Shaft (from the 800-Portal), was not suitably Dry for long-term

> storage of Dyno Nobel Nonel shock tube detonators nor Cobra Blasting Caps. Unpredictable degradation of these products can occur under damp storage, reducing the shelf life of the products, and/or negatively impacting the performance of the detonators. Hazard to the miner is inaccurate timing of the delay, dead-pressing of adjacent explosives, cutoffs and/or misfire. This hazard condition is very serious resulting in accidents up to fatal classification . The site Blaster's license expired September 16, 2016.

Ex. P 14-1.

In what is a familiar evaluation for the citations in these dockets, the inspector marked the gravity of the injury or illness as unlikely, not S&S, with one person affected and the injury or illness marked as fatal. Negligence was, as with the others, listed as moderate.

Regarding this Citation, the inspector stated that while underground, they "went down the 49 winze, came out the ballroom and ended up at an explosive magazine in a distant point in the mine. The explosive magazine was specifically for storage of detonators." Tr. 167. There he found a wooden wall with a locked wooden door. Once past the wooden door, the remainder of the structure was natural rock. Inside the structure, there was also a table, approximately 4 by 6. On that table were numerous boxes of detonators. [9] *Id.* Although things were neat and orderly inside, the inspector observed significant dampness in the magazine. He also found there was no air flow there but he determined through an air quality reading that there was no toxic gases. His concern was the dampness and his stated observation that the detonators were water soaked. They were also stained and wet to the touch. Tr. 168. When asked, Miller informed the inspector that no blasting was scheduled; the miners were only doing rehab work. This reassured the inspector that no one would be using those explosives. *Id.*

At his hotel that evening the inspector began some research about the detonators he observed in the magazine; a Cobra number 8 blasting cap; and a Nonel. Tr. 169, 176. His research, which continued over the next several days, disclosed that both types of these detonators "need to be stored in a dry, cool, well ventilated magazine. Tr. 170, Exhibits P 16 and P 17. Following that, the inspector then contacted the detonators' manufacturers. Tr. 173. They confirmed his concerns about the detonator storage. Ultimately, the inspector learned, regarding his concern over any dangers to miners from wet detonators, that number 8 blasting caps can never be exposed to water. Tr. 174. The manufacturer advised that, once wet, the number 8 caps were deemed defective and they could not recommend their use. As for the Dyno Nobel detonators, those devices are water resistant but not waterproof. Those devices have a three year shelf life when stored in a cool, dry, environment. Tr. 175. That shelf life is shorter when stored in wet conditions as that "can degrade the product within the detonator to an unpredictable timing." *Id.* This is not insignificant.

[9] There were a number of boxes in the magazine. "[O]ne box was for the number 8 blasting caps and then each one of these different delays on the Nonel had its own autonomous box. … There were eight boxes of Nonel and one box of the Cobra blasting number 8." Tr. 184. Every one of the boxes had the same saturation issue. *Id.*

The inspector explained,

> the danger to the miner in that case is, one, when you use the detonator for a design blast you can get a misfire or you can get what is called a dead press or you can get what is called a cut up. In any case, if any of these three event happen at the design blast the miner would have to go back into one of the most dangerous activities in mining is dealing with a misfire, okay. So in the case of a misfire you have to go back after a safe amount of time and you have to remove the defective detonator from the explosive or you need to find a way to detonate that explosive with other means, very dangerous activity.

Tr. 175-176.

Exhibits P 15-1 and 15-2 are photos taken by the inspector of the Cobra No. 8 blasting caps. According to the inspector, the photo shows delamination of the cardboard, showing that the box was very, very saturated. Tr. 177-179.

Upon inquiry from the Court, the inspector stated that everything in the magazine was neat and orderly and that the box with the detonators was closed. Tr. 179. He added that the "specific box had four layers of like a pressed Styrofoam in it and each layer had 27 detonators in it. So the box contained 108 detonators in layers of 27." Tr. 180.

Asked whether, when he looked inside the box, it looked dry, *the inspector could not state that he saw dampness on the detonators themselves*. Tr. 180. He stated that, as the box was fully saturated all the way through, it would have come in contact with the interior but then admitted that "because the detonator is a metallic, … [he] didn't see any visible moisture." Tr. 180. Clarifying the conditions he observed, the inspector affirmed that he "really [was] unable to determine if the Styrofoam shelves or the detonators themselves were actually damp. All you could tell was that the cardboard box certainly on the outside and you just said saturated through to the inside was damp." Tr. 181. However, the inspector did not concede that it was possible that the detonators themselves were still dry along with the dry Styrofoam shelves, because there was no hermetic seal between the shelves. Tr. 182. Nevertheless, he did not pick up the Styrofoam shelves to determine if there was moisture on them because the detonators are very sensitive. *Id*.

The inspector made it clear that his issue was directed at the wetness in the magazine itself. Therefore, if one assumed that the cardboard boxes were all dry, he still would have had an issue because the magazine itself was wet. Tr. 185. Because there could be some misunderstanding, when the inspector referred to the magazine, he made it clear that he was speaking to *the room itself* where the boxes were stored. Tr. 186.

Upon finding the conditions, the inspector cited 30 C.F.R. §57.6160(b)(3) and its provision that main facilities used to store explosive material on the ground shall be kept clean, suitably dry and orderly." Tr. 187. As he described the magazine, "the walls, the roof, the floor of the magazine were saturated, damp, wet. I took a humidity measurement of 87 to 90 just exterior to the magazine and further evidence was the saturated cardboard boxes within the

magazine." Tr. 187. Further, as mentioned, he evaluated the ventilation. As there was no airflow, his anemometer could not provide a reading. Therefore, while he found the air quality to be good, the air flow was not.

Assessing the gravity, the inspector found the injury to be unlikely. This was based on Mr. Miller's statement that "they hadn't blasted since 2016 and they had no blasting scheduled in 2017 because his crew was fully dedicated to a rehab project in the 49 winze." Tr. 188. However, he classified the expected injury as "fatal," a determination based upon his "own experience and then in addition to that from my confirming conversations with the manufacturers. The danger to the miner is a misfire for that detonator not to work as intended." Tr. 189.

For negligence, he rated that as "moderate" for several reasons: "the magazine was obviously damp. …The product specification sheets for both of these detonators clearly states that the detonators have to be stored in a clean, dry, well ventilated environment." Tr. 189. And, although "the mine had a licensed blaster, … that individual's license had expired in 2016. So they didn't have an active blaster with a license." *Id.* Of note, the inspector had examined the *same magazine only three months earlier* and noted that it was damp then, but not so damp as to be citable. *Id.* He informed Mr. Miller of this dampness at that time and was told that the magazine and its contents were planned to be moved to a location outside the mine. Tr. 190.

The Secretary seeks a civil penalty of $492.00 for this alleged violation.

Citation No. 8879887

Inspector Rautiola also testified with regard to Citation No. 8879887, issued by him on August 18, 2017. Tr. 190, Ex. P 19. The citation invoked § 57.6900, titled, Damaged or deteriorated explosive material," provides, "Damaged or deteriorated explosive material shall be disposed of in a safe manner in accordance with the instructions of the manufacturer."

This section 104(a) citation alleged:

> The detonator storage magazine, located underground on the 800-level beyond the Tightner Shaft (from the 800 portal), contained Dyno Nobel Nonel shock-tube detonators beyond their shelf life. One box of detonators had expired in 2014. The boxes containing these detonators were also very damp. The detonators must be stored in a suitable dry, well ventilated explosive magazine, per the Manufacturer. Unpredictable degradation of these products can occur impacting the performance of the detonators. Hazard to the miner is inaccurate timing of the delay, dead-pressing of adjacent explosives, cutoffs and/or misfire. This hazard condition is very serious resulting in accidents up to fatal classification. The site Blaster's license expired September 16, 2016.

Citation No. 8879887.

As with the related citation involving these same explosives, per Citation No. 8879886, the inspector marked the gravity of the injury or illness as unlikely, not S&S, with one person affected and the injury or illness marked as fatal. Negligence was listed as moderate.

The citation was issued at the same magazine regarding Citation No. 8879886. This one dealt with the manufacturing dates of those detonators. One box had a manufacturing date of 2011, and another had 2012. This was a problem because the manufacturer states that the shelf life is three years. Therefore, these detonators were beyond their shelf life. Tr. 191-192. The inspector then cited the Respondent for a violation of 30 C.F.R.§57.6900 and its provision that "damaged or deteriorated explosive material shall be disposed of in a safe manner in accordance with the instructions of the manufacturer of that product." Tr. 192. As with the other citation related to the magazine, the inspector marked the gravity as "unlikely," since the mine had no blasting on the schedule for the year. Tr. 193. Applying the same approach, with his concern about a misfire, he classified it as "a highly dangerous activity that could result in injuries up to fatal." *Id.* Negligence, too, was marked as "moderate," given the clear specification about the shelf life, the storage conditions, and that the mine no longer had a licensed blaster. *Id.* The latter factor, no licensed blaster, is significant because such a person would do a monthly inventory of the magazines, which inventory would have found the shelf life problem. Tr. 193-194.

Upon cross-examination regarding these twin citations for magazine and detonators issues, the inspector stated that he cited 57.6900 as applicable because he analogized it to an "out-of-date product as a deteriorated product, whether it's a jug of milk or an explosive." Tr. 195. The cited products had expired, a determination he reached based upon the product specification sheets and upon speaking with a representative from Dyno Nobel about the Nonel product. *Id.* The inspector agreed that the Nonels are very good in a wet hole, as it is water resistant. However, he distinguished use from storage. For storage, they are not to be stored in wet conditions, as they are water resistant, but not waterproof. This is relevant because the manufacturer's representative informed that the three year shelf life applies when stored in dry, well ventilated conditions.[10] Tr. 197-198.

In his direct testimony, Mr. Miller stated that the boxes could not have been as wet as the inspector described, asserting that the boxes could not have looked so good upon being transported to the surface had their condition been as claimed. Thus, Miller contended that the degree of wetness of the box was overstated. Tr. 210. Miller also stated that no one at his mine would use a defective blasting cap for the end of a fuse. Tr. 211. More to the point, Miller stated that the Styrofoam used to store the caps was layered and the caps are stored in a little hole within that material. This shows, he contended, that the caps were not defective because of the moisture on the cardboard box or the humidity in the room. *Id.*

As for the Nonels, which are very different from the blasting caps, Miller asserted that none were wet. *Id.* In addition, none of the Nonels were removed and there was no type of testing done on them. Tr. 212. Miller emphasized that while there was moisture on the boxes,

[10] It is noted that there were several pages of a "mine profile report" which the inspector used as a starting point for his inspection as it reflects the mine's past performance. Tr. 203. The Court advised that it considered the report to be without value to the issues involving these two blasting associated citations. Tr. 204.

they were not supersaturated. *Id.* In terms of negligence, Miller seemed to concede that there was moderate or low negligence, but he rejected the claim that a fatality could occur. In part, this contention stemmed from the small number of miners employed at the Sixteen to One Mine. That is, it was Miller's view that where a mine with hundreds or more employees might be unaware of such hazards associated with these blasting materials, by contrast, the small number of miners at his mine would be aware of the issue. Tr. 213. Miller also expressed some frustration, as he related that the Nonels were placed underground because an earlier MSHA inspection had issues with the surface magazine for them, and this led to the mine locating them underground, primarily for security reasons. *Id.* MSHA did not dispute this assertion. Miller also stated that the issue of out of date stock and wetness had not been raised by MSHA before this instance and MSHA did not dispute this either. *Id.*

Based on his own contact with Nonel personnel, Miller asserted that a five year shelf life is common, with three years being conservative. Tr. 214-215. Thus, Miller disputed the inspector's interpretation of the danger associated with the Nonels. Tr. 215. On cross-examination of Miller, he asserted that he *did* take issue with the claim that the magazine was not suitably dry. To be clear, he was asserting that it was suitably dry. Tr. 218. As to whether he disputed the inspector's claim that there was water dripping from the walls and ceiling, Miller stated that he did not recall water dripping from the ceiling. Tr. 218-219. Miller did not dispute that the relative humidity just outside the magazine was 87 to 90 percent in that area, although he added he recalled it being "in the 80's." Tr. 220.

As to the inspector's testimony that he advised Miller in June 2017 about the dampness in that magazine and that if the dampness increased a citation might be issued, Miller responded that the inspector "didn't quite say it that way." *Id.* Instead, Miller expressed that Inspector Rautiola told him "you might want to take those out of there because it seems to be a higher humidity [but that] [h]e had no reference of any standard or anything." *Id.* Thus, Miller characterized the inspector's remark as a suggestion, as opposed to a recommendation. Tr. 221. As no enforcement action was taken by MSHA then, the Court finds Miller's version to be more credible.

For this alleged violation, the Secretary also seeks a civil penalty of $492.00.

Discussion of Citation Nos. 8879886 and 8879887

As these two citations are related, they will be discussed together. The chief distinction between Citation Nos. 8879886 and 8879887 is that the focus of the latter addresses expired detonators, while the former involves alleged dampness in the magazine itself.

As for the magazine, the Secretary states that the detonators are subject to malfunction when exposed to wet conditions. Though conceding that the magazine conditions were unlikely to cause injury, the Secretary maintains that if an injury were to occur it would be expected to be fatal. Thus, the Court notes that there was no claim that the detonators could go off on their own while in the magazine. Instead, for the fatal claim to occur, the detonators, admitted to be past their shelf life, would have to be used for blasting. Yet, the inspector conceded accepting Miller's assertion that the mine had no plans for any blasting to occur.

There is also no claim to support the idea that the mine would have employed these detonators for some unplanned possible future blasting. The Court accepts Miller's claim that, although the detonators had been stored, indeed moved underground, at MSHA's suggestion, for storage security reasons, they would not employ the detonators. Further, the Court finds that, at least for the Cobra blasting caps, the box was not as damp as the inspector asserted. The photographs introduced by the government do not support that claim.

Given these findings, the injury reasonably to be expected would not be fatal, but rather, no lost workdays. The mine should have disposed of the blasting caps, but the relevant gravity issue for the damp magazine issue was not fatal, nor, based on the testimony of Mr. Miller, was "fatal" an appropriate designation for the related citation requiring that deteriorated explosive material shall be disposed of in a safe manner in accordance with the instructions of the manufacturer. Again, there was no testimony that these devices could self-ignite. At most, while not dismissing the issue, the mine should have taken steps to dispose of the blasting materials, but it is too much to conclude that the materials, outdated and for the sake of argument, damp, would have been used, not to mention that no blasting was planned at the mine for the foreseeable future. The Secretary admits that no blasting had occurred since 2016 and these violations were cited in August 2018. Sec. Br. at 17.

In sum, regarding the magazine dampness citation, while the violation was established, upon consideration of the testimony of the inspector and Mr. Miller and the photographs at Ex. P 15, 1 and 2, also listed on those photos as 2 and 3 of 4, the Court concludes that the inspector overstated the degree of wetness of the box of Cobra blasting caps. Thus, while the magazine was damp, the box itself was not as damp as described by the inspector. As to the deteriorated detonators, acknowledged by the inspector to be unlikely and non S&S, the Court cannot accept the fatal designation for that violation either.

The Secretary sought civil penalties in the amount of $492.00 for each citation. Accordingly, as to the damp magazine violation, **Citation No. 8879886**, upon consideration of all the statutory factors, the Court finds the negligence to be less than ordinary and **imposes a civil penalty of $50.00.** For the deteriorated material violation, **Citation No. 8879887**, the negligence is found to be ordinary and upon consideration of all the statutory factors, **a civil penalty of $100.00 is imposed for that violation**.

Docket No. WEST 2018-0224

Citation No. 9377049

MSHA Inspector Julie Hooker testified. Her only experience with mining has been through her employment with MSHA. She is now in her third year as an inspector. Tr. 244. The issue of Inspector Hooker's experience has been discussed above. In December 2017 she was conducting an E01 inspection at the Respondent's mine. Tr. 245. On December 6th of that year she issued Citation No. 9377049. She was then at the mine's 1300 level and at the 49 Winze. The winze, which is a vertical shaft, starts at the 800 level and it provides access to all the other levels at the mine, such as the 1300 and 1500 levels. Tr. 246. At that time, rehab work was being done at the 1500 level. Tr. 247, and Ex. P 24, a map of the mine.

Inspector Hooker issued Citation No. 9377049, citing 30 C.F.R. §57.11006. That standard, titled, "Fixed ladder landings," provides "Fixed ladders shall project at least 3 feet above landings, or substantial handholds shall be provided above the landings."

The inspector's section 104(a) citation listed the condition or practice as:

> The fixed ladders at the 1300 level and the 49 Winze level in the mine did not project at least 3 feet above their landings or (sic) were provided with substantial handholds above the landings. This condition exposed miners using the ladders to a potential fall hazard that could result in serious injuries to the miner. Miners had been utilizing the 49 Winze level ladder on a daily basis and had recently started utilizing the ladder at the 1300 level to gain access down to the 1500 level.

Citation No. 9377049.

The inspector marked the gravity of the injury or illness as reasonably likely, S&S, with one person affected and the injury or illness marked as permanently disabling. Negligence was listed as moderate. *Id.*

In her testimony, Inspector Hooker stated that "at the 1300 level of the 49 winze that goes to the 1300 level there was a fixed ladder. There is one in each area, and neither of those ladders extended above their landings at least three feet nor were there any substantial handholds that were observed." Tr. 248-49. She added that one of the ladders extended less than 5 inches above the opening to the landing while another was "probably even with the landing." Tr. 250. The hazard associated with this "is if you don't have something substantial to hold on, say like the ladder or a handhold, you can fall. You can fall back into that hole and, gosh, knows what can happen. A serious injury could happen, even a fatal." Tr. 251.

Handholds, the inspector agreed, are an alternative means of compliance under the cited standard. *Id.* A handhold can be anything substantial "so you can pull yourself up and so that you don't fall back down … but it has to be something there where as you're coming out of that ladder you can grab up there and pull yourself so you can safely maneuver away from that hole." Tr. 252. A rope, a chain, even a piece of lumber may suffice, if it can accomplish the cited purpose. *Id.* The inspector did not see any type of a handhold. *Id.* This hazard, the inspector stated, applies both when exiting and entering the ladder. Tr. 253. The violation was abated by adding handholds, consisting of a piece of lumber for one condition and a handle attached to a wooden structure for the other. The ladders themselves were not modified. Tr. 254. Later, upon cross-examination, Miller agreed that Inspector Hooker did not direct that he build the handhold, nor how to build it. Tr. 396.

The inspector informed that the miners told her they were bringing supplies such as tools and lumber and backpacks too, down these ladders. Tr. 255. This meant that, with not having both hands free, there could be times when the miners lacked three points of contact, a good practice for ladder safety. Tr. 255-56. While the Court thought at the time of the hearing that this was outside of the focus of the cited standard, it has reconsidered that view, since it underscores the importance of a handhold or a sufficient ladder extension above the opening.

The cited ladders were about 10 feet in length for one and 13 to 14 feet for the other. Tr. 257-258. As noted, the cited standard, 57.11006, provides that fixed ladders have to extend, or project at least three feet above their landings or be provided with substantial handholds above the landings. Tr. 258. Assessing the gravity, the inspector concluded that it was "[r]easonably likely that an injury could occur, and if an injury could or would occur that it would be permanently disabling." Tr. 259. She also marked it as significant and substantial. The conclusion that it was reasonably likely that an injury would occur as a result of the conditions she observed was because the miners told her they were accessing those levels at least twice a day. *Id.* In marking the injury as permanently disabling, MSHA alerts have advised that falls of 10 feet have been permanently disabling. *Id.* For negligence, the inspector marked that as "moderate," because "they just recently started working in this area and so they were in the process of trying to do rehab work." Tr. 260.

Cross-examination began with the inspector acknowledging that she has never had any mining employment. Tr. 293. In explaining what she meant by a "substantial" handhold the inspector stated that it "would be something that they could grab onto, right, so the standard says handhold, so there needs to be at least probably two, right, so something that is not loose, … that's probably within easy access, that they can grab onto to either help lower themselves onto the ladder or pull themselves off of that ladder so that they can keep balanced." Tr. 297.

The inspector noted that she went down the ladder for the 49 Winze to the 1300 level and ascended it too. Tr. 298. She did this prior to any installation of a substantial handhold. *Id.* Her recollection was that the condition was not corrected until the next day. Tr. 298-299. The inspector reaffirmed that there were two ladders in that area with the same deficiency. Tr. 299. In that citation, the inspector stated that it was a "tight area," and by that she meant the opening to descend was tight. Tr. 301.

Asked by Mr. Miller if she asked the miners whether they felt the condition was hazardous, she stated that she did not ask them about that issue. Tr. 301. However, the inspector affirmed that no miner asserted that the condition was *not* hazardous. Tr. 302. The Court noted that under section 57.2, "working place" is defined as "[a]ny place in or about a mine where work is being performed." Tr. 305. The Court then asked of the inspector whether she "determine[d] when [she] viewed the matters for all three of these citations that each of these involved a place in or about a mine where work was being performed." Tr. 305. The inspector affirmed she made that determination that it was a working place. The Court finds that, per the defined term, each area was a working place.

Continuing with his cross-examination of the inspector, Hooker affirmed that she did not see any handholds, substantial or otherwise. Tr. 305. Once handholds were installed, the inspector took photos of them, in connection with the termination of the citation. Tr. 306. Ex. P. 23-3 is such a photo. For that photo, the inspector was at the top of ladderway. Tr. 307. The handhold which was installed consisted of a piece of lumber and inspector circled the handhold on that photo. Tr. 307-308. On the same photo, the inspector also marked where the ladder was located, indicating that with an "L" and with a rectangle. Tr. 310.

Referencing the citation No. 9377049, the inspector was asked why she marked the citation as "S&S." She explained that her determination was "[b]ecause it was reasonably likely due to the fact that the miners were traveling down there at least twice daily that an accident would occur, and if an accident did occur, that it would result in a permanently disabling injury." Tr. 311. The inspector affirmed that the frequency of the ladder's use informed her S&S determination. Tr. 311-312. Even if the ladder use had been only once a day, the inspector would have marked the violation as S&S. The Court did remark that the photograph, Ex. P 23-1, was essentially useless and the same is true of Photo 23-2, because they provide no clear depiction. Tr. 314-315. An exchange with Mr. Miller revealed that his challenge with regard to these handhold citations was his assertion that handholds *were* present. Tr. 316.

Mr. Miller testified about Inspector Hooker's citations. He noted that at the time of these citations, the mine had only five active miners. Miller maintained that substantial handholds were present above the landings. Tr. 374. He identified it as the "handhold that anyone would use coming up this ladder, if in fact they needed one, would be the vertical -- there's three pieces of wood and some which is wired like fence material that's rolled up right there. If in fact they wanted to use that for any reason or anybody wanted to use that, that is a substantial handhold." Tr. 375. Miller also contended that the material installed to abate the alleged violation "actually restrict[ed] [the miners] more and is causing it not to be safer." *Id.* Miller also contended that the likelihood that one of the miners could trip or fall was "no likelihood." Tr. 376. This contention was based on his assertion that the miners had been using the ladder for over a year and their skill and ability refutes the inspector's claim that this was an S&S violation. *Id.* Miller added, in further challenging the S&S designation, that unlike Hooker, Inspector Craig, who is experienced, never cited this condition. *Id.* The Secretary did not challenge the claim that the condition had not been cited previously. Miller also contended that there was no negligence, as the miners operate the mines and MSHA should "[l]et the miners do their work." Tr. 377. Also, no miner told the inspector that if they fell, it would be a fatal event. *Id.* The Court noted that the inspector did not mark this as fatal. Tr. 377.

The Secretary seeks a civil penalty of $462.00 for this alleged violation. The Court finds that the credible evidence establishes the violation alleged in this citation. The Inspector's testimony also establishes the other findings she made regarding the gravity aspect addressing reasonable likelihood, the risk of a permanently disabling injury and that the operator was negligent. The Court adopts the Secretary's view of the negligence involved as well. See, Sec's Br. at 23, paragraph 3.

As set forth below, upon applying the test for determining whether a violation is significant and substantial, the "S&S" designation was established upon the credible testimony of Inspector Hooker. For a violation to be considered S&S, as fellow Administrative Law Judge Kenneth Andrews recently noted,

> Section 104(d)(1) of the Mine Act describes an S&S violation as being "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d) (1). The Commission has established that a violation is significant and substantial if, based on the particular facts surrounding the violation, there exists a reasonable

likelihood the hazard contributed to by the violation will result in an injury or illness of a reasonably serious nature. *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). The four-part test long applied to establish the S&S nature of a violation examines: "(1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard - that is, a measure of danger to safety - contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury will be of a reasonably serious nature." *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984); *accord Buck Creek Coal Co., Inc.*, 52 F.3d. 133, 135 (7th Cir. 1995); *Austin Power Co., Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria).

The *Mathies* test has been revised to focus on the interplay between the second and third steps. The second step addresses the contribution of the violation to a discrete safety hazard and is now primarily concerned with "the extent to which the violation increases the likelihood of occurrence of the particular hazard against which the mandatory standard is directed." *ICG Illinois*, at 2475, *citing Newtown Energy Inc.*, 38 FMSHRC 2033, 2037 (Aug. 2016) *citing Knox Creek*, at 162-63. At this step a two-part analysis is required. First, the particular hazard to which the violation contributes must be clearly described. The Commission defines "hazard" in terms of prospective danger, *i.e.*, the danger which the safety standard at issue is intended to prevent. The starting point for determining the hazard is the regulation cited by MSHA. Second, a determination is required of whether, based on the particular facts surrounding the violation, there exists a reasonable likelihood of the occurrence of the hazard against which the mandatory safety standard is directed. *ICG Illinois*, at 2475-76; *Newtown*, at 2038. The Commission has recognized that "reasonable likelihood" is not an exact standard capable of measurement in precise terms, but is a matter of the degree of risk of the occurrence of a hazard or a reasonably serious injury. *ICG Illinois*, at 2476; *Newtown*, at 2039.

At step three the focus shifts from the violation to the hazard and the analysis is concerned with gravity. The *Knox Creek* Circuit Court reasoned that at this stage of the analysis the existence of the hazard should be assumed. *Knox Creek*, at 164. The inquiry is whether, based on the particular facts surrounding the violation, the occurrence of that hazard would be reasonably likely to result in an injury. *ICG Illinois*, at 2476, *Newtown*, at 2037, *citing Cumberland Coal Res.*, at 2365. The Commission has not equated the reasonable likelihood standard with a probability greater than fifty percent; The Secretary is not required to prove an injury was "more probable than not". *U.S. Steel Mining Co.*, 18 FMSHRC 862, 865-66 (Jun. 1996). The step four gravity determination is essentially unchanged, whether any resultant injury would be reasonably likely to be of a reasonably serious nature. *Newtown*, at 2038.

*Consol Pennsylvania Coal***,** 40 FMSHRC 429, 432, March 14, 2018. The Court finds Inspector Hooker's testimony regarding the lack of handholds, the frequency of ladder use, and the length of the falls that could occur, sufficient to justify the S&S designation.

Upon consideration of all the statutory criteria, the Court imposes a civil penalty in the amount of **$462.00.**

Citation No. 9377050

Inspector Hooker also issued Citation No. 9377050, on December 6, 2017. Hooker cited 30 C.F.R. §57.11012, which is titled, "Protection for openings around travelways" and provides, "Openings above, below, or near travelways through which persons or materials may fall shall be protected by railings, barriers, or covers. Where it is impractical to install such protective devices, adequate warning signals shall be installed."

The section 104(a) citation described the condition as follows:

> An estimated 2 ½ feet by 4 feet open area at the top of the manway ladder to the 1500 level was not protected by a railing, barrier or cover to prevent miners from a fall when accessing this area. This condition exposes the miner to a fall hazard with an estimated fall height of about 13 feet to the level below and could result in serious injuries to the miner. Miners had recently begun accessing this area to begin rehabilitation and maintenance work.

Citation No. 9377050

The citation listed, under gravity, that the injury or illness was unlikely to occur, was not S&S, and would affect one person, but that the expected injury would be fatal. Negligence was listed as moderate. *Id.*

This alleged violation was in the same area as the ladder issues, just discussed, that is, at the 1300 to 1500 level. Tr. 261. At that location, that is, at the manway ladder to the 1500 level, Hooker found that there "was no cover on the manway as required." *Id.* Interestingly, there a cover to the left side of the opening but it was not in place. *Id.* Of course, the cover cannot be in place when using the opening; the problem was failing to put the cover back on, after such use. Tr. 262**.** As noted, the inspector cited 57.11012, which provides that where there are openings and a risk of falling, such areas are to be protected by a railing, barrier or cover or, alternatively, that there is a warning sign posted. Tr. 264. No sign was present. *Id.* Also, as noted above, the inspector marked the violation as unlikely that an injury would occur but that if it did occur the injury could be fatal. She listed it as "non-S&S. Tr. 265. For negligence, the inspector marked that as "moderate." To constitute moderate negligence, she stated, there must be a lot of mitigating circumstances. Tr. 266. How an inspector moves the negligence determination down to low negligence was less clear, as the inspector stated that one has "to have a lot of mitigating circumstances, I mean a lot…. [y]ou have to show above and beyond." Tr. 266. In terms of marking that it was unlikely that an injury would occur, the inspector stated that was "[b]ecause it was the same miners accessing this area and going down and they were all aware that it wasn't

covered." Tr. 268. Her designation of "fatal," as mentioned, stemmed from knowing of instances where fatalities have occurred in drops of less than 13 feet. Tr. 269. In speaking with the miners at the cited location, the inspector advised that they agreed the injury could be fatal. Tr. 270. Ex P 27 is a fatalgram, describing an instance where a miner fell through an opening, for a distance of about 60 feet. Tr. 271. Ex. P 28 is another fatalgram, involving a miner who fell 28 feet through a four by six foot opening. Tr. 272. The inspector restated that she marked the negligence as moderate "because [the miners] were recently accessing the area, so they hadn't been there for very long, and they had -- they had a cover. They had just forgotten to put it back on." Tr. 273.

Cross-examination pertaining to Citation No. 9377050 began with the agreement that a cover was present, and that the citation was issued because the cover was not in place over the opening. Tr. 317. The inspector affirmed, consistent with her earlier testimony, that no warning signal was present either. Tr. 319. The Court inquired if the inspector's view was that the cover must be in place at all times, as it seemed impractical to require that. The inspector responded, her "position would be that if it is an area where miners are passing through or maybe working, we want to get that cover over that opening so there's no fall hazard while they're there." *Id.* The Court remarked that if the cover were required all the time, it would impede use of the opening. To this, the inspector responded that her understanding of the standard is that the mine "should probably install that cover so they can open it and where it's not impeding it, so that's the purpose of it. It should be where you can open the cover so you can travel, you can bring your supplies down, but after you're done doing those things, you should close that, especially if there's people working around that area or traveling through that area." Tr. 320. In abating the violation, the inspector advised that the cover was replaced, and that in fact it was a new cover that was used. *Id.*

The inspector acknowledged that she noted, "[t]he same four miners work this area and they're all aware of the situation," and this was why she rated it as "unlikely." Tr. 322. Asked to explain the basis for S&S determinations for the ladders but not for the missing cover, Hooker expressed that the miners knew exactly where the opening was and therefore she concluded it was unlikely. In contrast, as for the ladders, she felt they were S&S because the area was dark and they could slip. Tr. 323.

Speaking to the absent "cover" violation, Miller remarked that the cover was there and that covers go on and off. If a miner were to leave an area, the cover would then be used. Tr. 378. Given the constant use of the winze, as the miners transport material down it, Miller contended that "[t]here is absolutely no requirement to close this when they're going back and forth, back and forth, bringing in supplies, handling things downwind from another." Tr. 379. Again, Miller maintained that if the miners left the area the cover would have been put in place. *Id.* Miller also asserted that under the circumstances, continuing to replace the cover would have been impractical. Tr. 380.

On a separate note, Miller maintained that the fatalgrams were "totally different" and accordingly distinguishable and therefore without probative value. Tr. 381-382.

The Secretary seeks a civil penalty of $208.00 for this alleged violation.

Upon review of the evidence, the Court concludes that the violation was established, but that the negligence was low and that, under the circumstances cited, it was very unlikely that the injury would occur. It is noted that a cover *was present* and with that there is the testimony from Mr. Miller that the practice is to replace that cover when the miners had completed work in that area. In the course of using the area it would be impractical to remove and then replace the cover each time the winze was being used. There was no evidence that the winze was not being used at the time of the citation's issuance. On the other side of the equation, the standard provides that where it is impractical to install such protective devices, adequate warning signals shall be installed. Further, the Secretary did not invoke the alternative means of compliance in its brief. The inspector also did not invoke that aspect of the standard in her citation, nor in her testimony. It is true that there have been fatalities where miners have fallen through uncovered openings and no protective device has been installed in lieu of a cover. **Given these evidentiary considerations, the Court imposes a civil penalty of $100.00.**

Citation No. 9377052

Testimony then turned to Citation No. 9377052, which Inspector Hooker also issued on December 6, 2017.

That section 104(a) citation invoked 30 C.F.R §57.4560(c). That section, titled, "Mine entrances," provides

> For at least 200 feet inside the mine portal or collar timber used for ground support in intake openings and in exhaust openings that are designated as escapeways shall be - (a) Provided with a fire suppression system, other than fire extinguishers and water hoses, capable of controlling a fire in its early stages; or (b) Covered with shotcrete, gunite, or other material with equivalent fire protection characteristics; or (c) Coated with fire-retardant paint or other material to reduce its flame spread rating to 25 or less and maintained in that condition.

As noted, the inspector cited subsection (c) from this standard.

The citation listed under the condition or practice section:

> Several pieces of timber *used for ground support* within 200 feet inside the 800 level portal entrance and within 200 feet of the portal entrance of the 21 Tunnel (designated second escapeway) was not coated with fire-retardant paint or other material to reduce its flame spread rating to 25 or less. The operator had installed some new pieces of treated wood inside the 800 level portal that had not been painted. At the 21 Tunnel area the fire retardant paint had peeled off some of the existing ground support timber exposing the wood. This condition creates a potential hazard of toxic smoke entering the mine in the event of a fire. Miners travel the 800 portal daily to enter and exit the mine and the 21 Tunnel at regular intervals for inspection or maintenance purposes.

Citation No. 9377052 (emphasis added).

The inspector marked the citation for gravity as unlikely for the injury or illness, not S&S, one person affected, but with the injury likely to be fatal. Negligence was listed as moderate. *Id.*

Inspector Hooker testified that at the entrance to the 800 portal and also the entrance to the 21 tunnel, which is the secondary escape way, she found several pieces of timber "that had recently been installed that were not painted, and inside the 800 portal there were several pieces of timber on the back, the roof that had been there for a while, but that were not painted." Tr. 274. In addition, "[a]t the 21 tunnel there were some pieces of timber in a stall, which [had been painted] … but it had deteriorated so it had not been maintained … with fire retardant paint or some other kind of material like gunite to reduce the flame spread to the rating of 25 or less." *Id*.

Ex. P 30-1 is a photo of some new pieces of lumber that had not been painted. Some pieces in the photo were painted. *Id.* Upon questioning by the Court, the inspector agreed that "*most* of this is correctly coated with fire retardant paint, [and that] *it's just a few areas* that [were] not." T. 275 (emphasis added). The inspector did not agree to the suggestion by the Court that it seemed a little unreasonable to cite when there are only a few spots needing paint. Tr. 275-276. The inspector also did not agree with the Court's perception that only a few spots were not painted, asserting "this is a whole piece of timber here. There is actually two pieces of timber, and I think in subsequent pictures there's a couple more pieces. So it's not just some spots. There are pieces of timber."[11] Tr. 276.

Ex. P 30, at page 2, is another photo taken by the inspector. She identified it as another piece of unpainted lumber. [12] Ex. P30, at page 3, is another photo of an unpainted piece of lumber. Tr. 278. The inspector acknowledged that this was "kind of hard to see, but there is a piece of lumber. That is within 200 feet of the entrance of the 800 portal and that piece of timber was not painted." *Id.* The Court remarked that her description that it was "kind of hard to see" was an understatement and the inspector acknowledged that in that photo she was referring to "a white dot in the bottom third of this photograph, right, and it's sort of a little off center." *Id.* Asked by the Court where the problematic lumber was located in relation to the white dot, the inspector responded that the "white dot" was actually light and that cited area there was lumber "in a diagonal kind of way." Tr. 279. The inspector maintained that the photo depicts just one piece of lumber but that the whole piece was unpainted. *Id.* All lumber within 200 feet of the portal is required to be painted. *Id.* The piece was on the roof to the right of the tunnel but she

[11] In response to a clarifying question from the Court, the inspector affirmed that she was referring to the areas that are sandwiched between the gray paint, above and below, a sandwiched area that run horizontal. Tr. 276.

[12] Again, the Court asked clarifying questions to better understand the location of the areas alleged to be unpainted. The inspector described the area as "[b]ehind the water bottle is another piece of lumber that they put there and that had not been painted." The inspector agreed with the Court's remark that cited piece "run[s] essentially horizontal and about midway through the height of the water bottle and towards the rock." Tr. 277. She also agreed that the cited area did not involve either of the big pieces that occupy 60 percent of this photograph and that are painted either gray or white, … but [that she was] talking about the piece of lumber that is at an angle to that gray or white wood that is not painted." *Id.*

couldn't state how long the piece was, as measuring it was difficult – the piece was "kind of far up the [roof]." Tr. 280.

Next, the inspector was asked about Ex. P 30 at page 4. She identified it as another photo she took on December 6th and that it shows "one of the pieces of timber used for ground support at the 21 tunnel that wasn't coated … [this appears] at the upper left." *Id.* Some of that lumber, she explained, had been painted but not maintained, as the paint was coming off. *Id*. Ex. P-30, at page 5, is another photograph taken in connection with this citation. This one was taken "outside … the 21 tunnel, a stall, and at the bottom of it due to the water around it and the weather conditions and the environmental conditions at the time [,which the inspector believed showed] the paint was peeling off." Tr. 281.

The inspector cited 57.4560(c) with its requirement, as noted above, "that timber that is used for ground support within 200 feet of the entrance and the secondary escape ways need to be coated with fire retardant paint or any other material to reduce the flame spread rating to 25 or less and it has to be maintained." Tr. 281-282. She added, when asked, that the standard does allow as an alternative means of compliance "a fire suppression system, other than fire extinguishers and water hoses, capable of controlling a fire in its early stages or covered with shotcrete, gunite or other material with equivalent fire protection characteristics." Tr. 283.

The inspector was also asked to read from an MSHA policy manual, which essentially reiterated the requirements for compliance with the cited standard and her testimony about that standard's requirements. Tr. 284. Regarding her evaluation of the gravity, the inspector marked it as unlikely but under the assumption that if it did occur, she marked it as "fatal," but not S&S. In marking the negligence as "moderate," the inspector stated that was based on her finding that Mr. Miller trains his people to spot the hazard. Therefore, she concluded they were trained but that the problem had not been reported. The miners informed her that they simply forgot to paint the areas. Tr. 285.

In marking that it was unlikely to occur, the inspector reached this view because there were "winter weather conditions. It's raining. It's wet … [and also because the miners] were wearing self-rescuers." Tr. 286. As for her "fatal" designation, she explained, "the wood that they were installing is treated wood and also with that paint. So if there was a fire, [ ] that smoke would be toxic, [ ] smoke. So it depends, of course, where they are at in the mine, but toxic smoke if … for some reason they don't have their self-rescuers it could be fatal, moderate negligence, not S and S." [13] *Id.*

During cross-examination involving the missing paint, Miller asked what it would take for the timber to become combustible. The inspector noted that first one needs an ignition source for the timber. A source, the inspector offered as an example, could come from a welding tool. Still, she considered the event as unlikely to occur and she also marked it as non-S&S. Tr. 325-326. The inspector acknowledged that she did not tape the distance from the portal to the timber location. Tr. 330.

[13] Regarding the use of a self-rescuer, the inspector, after stating that the device converts CO to CO2, did not know if it protects against toxic fumes. This question was asked in the context of whether the cited wood, if on fire, would give off toxic emissions. Tr. 346-347.

The Court inquired of the inspector whether any miner challenged her about her assertion of inadequate or, in some cases, missing paint on the cited timbers, and she responded, they did not. Tr. 331. Nor did anyone challenge the assertion that the wood was within 200 feet of the portal. That is, no one claimed that the lumber was beyond 200 feet. Tr. 331. Although no tape measure was used, the inspector informed that they walked the distance, and found that it was about 120 feet and the miners agreed with that estimate. Tr. 332. The other measurements were of a similar distance or less. For example, one cited location was right at the portal. *Id.*

Continuing with cross-examination, Miller asked if the miners suggested that the lumber behind the metal plate had no structural significance. The inspector replied that they informed one had been there for a long time and they were unsure if it provided any support or not. Tr. 333. However, the inspector acknowledged that the miners claimed that the timber, per Ex. P 30-3, was not being used for support. Tr. 333-334. The Court then inquired, in face of the challenge as to whether it was being used for support, how she concluded to the contrary. Tr. 335. The inspector replied that "well, there's a reason it had to be there. People don't just put stuff up there just so, and also, you had the mesh, you had mesh and you can kind of see it in the photo." *Id.* Thus, it was the inspector's conclusion that "there's mesh there as well, so the timber had to be put up there at one time to support something." *Id.*

An issue then arose about the interpretation of the standard. The Secretary noted that the standard provides "For at least 200 feet inside the mine portal, or collar timber used for ground support and intake openings and exhaust openings." Tr. 337. The Secretary interpreted this to mean that "it's either for 200 feet in, or collar timbers used for ground support. It doesn't say it has to be 200 feet in and a collar timber used for support."[14] *Id.* The Court agrees with the Secretary's reading of the standard. Though inartfully worded, the most practical reading of the standard is that it applies to two situations. First, it pertains to two areas: "at least 200 feet inside the mine portal," and second, it applies to "collar timber used for ground support in intake openings and in exhaust openings that are designated as escapeways."

In this instance, the citation was directed at alleged timber located within 200 feet of the mine portal and the failure to coat that timber with fire-retardant paint. The citation itself is directed only to this aspect and the Secretary's brief is similarly confined to that part of the standard. Sec. Br. at 26.

In any event, the inspector testified that she did not consult with Inspector VanWey in making her determination that the timber was used for ground support. Tr. 337-338. Her only exchange with him was the determination to walk off the distance to confirm the cited timber was within 200 feet, which distance was confirmed and found to be about 120 feet. Tr. 338.

Cross-examination then moved to photograph Ex. P 30-4. The inspector identified the material in that photo as lagging. Tr. 341. She did not know if such material is collar timber. Tr. 341. However, the inspector affirmed that the material, the lagging, is used for ground support in

[14] Subsequently, the inspector expressed that the word "collar" in the standard simply refers to a type of timber. Tr. 340. Collar timber, by her understanding, is timber support and it refers to "the name given to a section of that support." *Id.* Miller defined a collar as "a surrounding of material to hold back the sloughage from an excavation." Tr. 390.

that its purpose is to stop material from sloughing into the opening. Tr. 342. Further, the inspector stated that the lagging was at the 21 tunnel entrance. *Id.*

The inspector was then asked about Ex. P-30-5, a photo. She described the wood in that photo as "a round piece of wood. It was found supporting the rock above it and it was painted, but at the bottom you see there the paint had deteriorated due to what I assume to be the elements, the water and the rainy conditions at the time." Tr. 343. She agreed that the bottom of the wood was in water, but she stated that it looked substantial to her. Tr. 343-344. The matter was abated by removing all of the cited wood. Tr. 344. Miller, noting that the inspector marked the citation as fatal, asserted that as some timber was removed, it undercuts the claim that it was used for ground support. The Court considers this to be a fair comment.

The inspector agreed that Miller raised the issue of whether the cited wood was in fact used for support and that he informed the inspector that he would be removing the wood. Tr. 346. While not vitiating that the cited standard was violated, at least at some of the locations identified by the inspector, it is fair to note that Miller's point about the inspector's lack of any mining experience has resonance in that limited instance. However, even an inspector with mining experience might need to ask about whether a given piece of timber served a support function. Inspector Hooker should have asked about this.

Asked about Ex. P 30-2, a photo, the inspector was asked about a "white section," in the upper left hand quadrant of that photo. Tr. 354. She identified a piece of vertical timber in that area and confirmed that the opening in that area is the sky. Tr. 355. Regarding photo 7 of 8, associated with this citation, the inspector agreed the description states, "Termination photo, 21 tunnel portal, all wood removed from entrance."[15] *Id.*

The inspector then identified Photo 8 of 8, associated with Citation No. 9377052, which she described as "a termination photo at the 800 level portal. The wood that was installed on back of portal was removed and the new wood at entrance was painted with fire retardant paint. No photo was taken of that." Tr. 358. She agreed the wood looked wet. She added that a miner told her "this was the wood that was removed from the back which was within 120 feet of the opening." Tr. 359.

Miller spoke to what the Court called for shorthand, the "paint issue," asserting that "the piece that was under the rock bolt was greater than 200 feet from the portal," and that two of his miners taped the distance and told him it was beyond 200 feet. Tr. 383. However, Miller stated that he did not ask them what distance they came up with. *Id.* Asked to specify which location was greater than 200 feet, Miller identified it as Ex. P 30-3. Miller maintained that in 1984 or

[15] Although the Court sustained several questions posed by Mr. Miller, it commented, that it "underst[ood] [Mr. Miller's point] … that Inspector Hooker comes upon some timber, she says it violates this particular standard, namely 57.4560, sub category C, and the mine's response is to remove the timber, so what [the Respondent is] inferring is that therefore it was not support timber because the Inspector did not have an objection to the removal of the timber, and therefore if the timber is removed, it could not have been used for support. That's your point." Tr. 356- 357. Miller agreed that was his point. Tr. 357. The Court also noted that no timber was replaced for the removed timber. *Id.*

1985 a rock bolt and some wood had been installed, purely as a precautionary measure since at that time people were unsure of the quality of the ground at that time. It was installed to capture loose rock but not for ground support and the mine had not been cited for this in some 30 years. Tr. 384-385. Miller summed up that the material was beyond 200 feet, that it was so wet that it could not be combustible and it had never been painted. Tr. 385.

The Court cannot credit Miller's testimony regarding this location, as his claim that the distance was greater than 200 feet was not credible. One making such an assertion would have asked the employees what the distance was, but Miller did not. Further, Miller admitted that, precautionary or not, at least that piece was used for support.

Miller also contended that, regarding Ex. P 30-1, that wood was outside and not quite underground and that it was not used for ground support. Tr. 389. As for Ex. P 30-2, Miller asserted that supports his claim that the wood was not underground and that it was not ground support.[16]

Referring to Ex. P 30-4, Miller also expressed that it was not ground support. Instead, he described it as "a horizontal position that was holding back a little bit, or it wasn't even holding back, it was put in a long time ago to support or to prevent any material coming from the left because there's a left coming down into the 21 tunnel. It was something that was useless or had no value, it had been there a long time, and there was no reason to take it out except when it generated a citation. Tr. 393. The material was not painted; instead it was removed. *Id.*

Turning to Ex. P 30-5, Miller contended it was the same issue and for "this one even more. Tr. 393. He contended it was not ground support because of its size, and because water had deteriorated it. Instead, it was "just something that had been there and left there." Tr. 394. Given that it was not support, Miller asserted that to call it a fatality was "nonsensical." *Id.*

Regarding his claim that the timber was more than 200 feet from the portal, Miller was asked how he determined the distance. He responded that they ran a 100 foot tape. Tr. 397. However, he couldn't give a precise measurement; only that it was more than 200 feet. *Id.* Asked if standard 30 C.F.R. § 57.4560, related to Citation No. 9377052, had an exception to its requirement if the timber is wet, Miller conceded there is no wetness exception. Tr. 398.

Turning to Ex. P 30-2, still involving the paint issue, Miller was asked if that location is inward from the 800 level portal. Miller informed that the portal "begins where one moves from the outside to the underground," and that some portals can be 50 feet out from the entrance. Tr. 399. Clarifying his answer, he added, photo P 30-2 is "probably eight feet or so outside the portal." *Id.* Thus, Miller contended that the cited timber was outside of the portal. Tr. 400.

The Secretary seeks a civil penalty of $208.00 for this alleged violation. Also, as previously noted, the inspector marked the citation for gravity as unlikely for the injury or illness, not S&S, one person affected, but with the injury likely to be fatal. Negligence was listed as moderate.

[16] Miller's testimony was somewhat confusing as to whether he was actually referring to Ex. P 30-1 or Ex. P 30-2. Tr. 389-390.

The Court noted during the hearing that "there were multiple locations listed by the Inspector as being in violation of 57.4560(c), so if [the Court were to] find that any of these locations were deficient and that they fit -- otherwise fit the requirements of the standard in terms of distance or timber used for support, then a violation is established. Now, it was only assessed at $208.00 … , which is a relatively small amount by any sort of objective standard, but it may be that [the Court] can find subject to [its] review of the testimony, including that which [Mr. Miller] may testify about, regarding 57.4560(c) that [the Court] could find that the amount of wood that was subject to the violation was less than what the Inspector alleged and that could impact the penalty downward." Tr. 360-361. The Court, taking this into account, finds that some of the timber was not in fact used for support, at least at the time of the citation's issuance.

Accordingly, while the violation was established, there were several problems with this citation which bear upon the appropriate penalty. First, that some timber was removed for abatement supports the Respondent's assertion that it was not used for ground support. Second, the amount of material in need of painting was minimal. Given that, the degree of negligence, in the Court's estimation of the entirety of the evidence for this citation, is that it was less than ordinary. Upon consideration of these factors, **the Court imposes a civil penalty of $50.00 for this marginal violation.**

The effect on the operator's ability to continue in business upon imposition of these civil penalties.

Testimony was received on the Respondent's contention that the penalties sought by the Secretary would have an effect on the operator's ability to continue in business, per Section 110(i) of the Mine Act. If all eight citations were affirmed and assessed as proposed, the total civil penalty would be $3,066.00. Mr. Miller began by stating that the mine has no "proven reserves." Tr. 403. He defined that as "something that for economic reasons you have an ore body that you can delineate expenses and expected revenue." *Id.* In terms of exhibits to support the claim of ability to continue in business, Miller introduced R 1, the Sixteen to One Mine condensed balance sheet for December 31, 2017 and December 31, 2016. Tr. 406. This was the only exhibit offered by the Respondent on this issue.

Miller then testified that, while the mine's fixed expenses are predictable, its income is unpredictable. It has significant expenses of labor and supplies. Tr. 407. He added that he has deferred his income. Although he has been issued a check, it has not been cashed. The mine's cash flow is a "tremendous problem." *Id.* "[E]very penny that [the mine] get[s] is going into something to sustain the operation." Tr. 407-408. There are no dividend payments. Tr. 408. Miller asserted that the mine's 2016 report shows a book profit but that 2017 will show a $429,000 loss. *Id.* He added that "[o]ver the years [the mine has] been down to two employees, [although] recently [it's] been up to six, … which is still ridiculously small." Tr. 409. Miller also asserted that the mine has already spent over $3,066.00 terminating these citations. Tr. 411.

Upon cross-examination, Miller was directed to page 5 of Ex. R 1, and asked what the remark under inventory means where it states, "[j]ewelry is quoted at the market price for the gold content, plus labor cost." Tr. 412. Miller agreed that meant the gold was being valued at less

than the retail sale price would be, adding that was consistent with Generally Accepted Accounting Principles, or "GAAP." Tr. 413.

Next, the Secretary directed Miller to page 6 of Ex. R 1, which "states that 'Accounts payable and accrued expenses was $1,197,026 at December 31st, 2017,' and then it states, 'This balance includes $753,783 in accrued wages owed to Michael Miller.'" Tr. 413. The page goes on to state, "Mr. Miller's salary has been mostly accrued (not paid) for over ten years and is secured with real estate." Tr. 414. Asked to explain this, Miller stated, "It means that my base salary for the past ten years for being President of this company is $60,000 a year, and it was mostly accrued until the directors decided it would be better to put some type of a payment on record which is modest and secured with real estate. In order to protect my family, I have a first trust deed note on part of the mine which, in order to borrow $500,000 from some metal technology people, I assigned them that note, so I'm now in a second position to a company called Quartz View on that secured note." Tr. 414.

Miller agreed that he has uncashed checks on his desk, that he receives a net check every two weeks of about $980.00, after Social Security and IRS payments have been deducted. Tr. 414-415. He stated that he has cashed a couple of those checks but he has also advanced $40,000 from his savings account to keep the mine going. Tr. 415. Miller agreed that the $753,783 in accrued wages, when divided into $1,197,026 in accounts payable and accrued expenses, means that about 62% of the mine's accounts payable and accrued expenses is allocated to his accrued wages. *Id.*

Referring to the mine's website and within that to gold sales and jewelry, Miller was asked why the site advises customers to "call for price" on such items. Miller responded that he had never before viewed this category but that it means that one has to check for the price because the mine doesn't manufacture the jewelry and the price of gold varies. Tr. 416. Asked how much the mine derives from such jewelry sales, Miller advised there is no fixed percentage. The mine is a wholesaler. Tr. 418.

Examining gold specimens listed for sale on the site, with the Secretary inquiring about one particular item, listed as item 17 at $425.00, Miller acknowledged that it was for sale. He added that if a specimen price is listed at $105.00, the mine's balance might list it at $50.00, as it does not reflect the value added. Tr. 421. He asserted that the mine's inventory value will go up or down depending on the price fluctuations of gold. However, Miller admitted that if a particular gold specimen is listed on the site and sold, the mine will receive that amount along with the expense of shipping. Tr. 424.

Upon review of the evidence on this issue, Mr. Miller failed to establish that the penalties imposed in these collective dockets would have an effect on the mine's ability to continue in business. This is true even if the full amount sought by the Secretary, $3,066.00, was imposed, let alone the amount the Court is imposing for these matters, totaling **$1,062.00**.

Summary

Having found that the citations described above were violations, the civil penalties for these citations are summarized here as follows:

Docket No. WEST 2017-0546

- **Citation No. 8785581 $100.00**
- **Citation No. 8785582 $100.00**

Docket No. WEST 2017-0685

- **Citation No. 8879879 $100.00**

Docket No. WEST 2018-0100

- **Citation No. 8879886 $50.00**
- **Citation No. 8879887 $100.00**

Docket No. WEST 2018-0224

- **Citation No. 9377049 $462.00**
- **Citation No. 9377050 $100.00**
- **Citation No. 9377052 $50.00**

ORDER

It is hereby **ORDERED** that the above listed citations are affirmed as written and that the Respondent is **ORDERED** to pay civil penalties in the total amount of **$1,062.00 within 30 days of this decision**.[17]

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

[17] Payment is to be sent to: Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.

Distribution:

Isabella M. Finneman, Esq., Office of the Solicitor, Department of Labor, 90 Seventh Street, Suite 3-700, San Francisco, CA 94103

Michael Miller, President, Original Sixteen to One Mine, Inc., P.O. Box 909, Alleghany, CA 95910

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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September 17, 2018

HAROLD NOTAH Complainant, v. GCC RIO GRANDE INC., Respondent.	DISCRIMINATION PROCEEDINGS Docket No. CENT 2017-0146-DM Docket No. CENT 2017-0453-DM Mine: Tijeras Plant & Quarry Mine ID: 29-00013

INTERIM DECISION ON LIABILITY

Appearances: Harold Notah, Tohatchi, New Mexico, pro se;
Justin M. Winter, Esq., Jackson Lewis, P.C., Reston, Virginia, for Respondent.

Before: Judge Lesnick

This proceeding is before me on a two Complaints of Discrimination filed by Harold Notah against GCC Rio Grande, Incorporated ("GCC"), under section 105(c) of the Federal Mine Safety and Health Act of 1977 ("the Act"), 30 U.S.C. § 815(c). The complaints allege unlawful discipline and discharge from employment in retaliation for having made safety complaints to the Respondent and to the Mine Safety and Health Administration ("MSHA").

Notah filed two Discrimination Complaints with MSHA pursuant to section 105(c)(2) of the Act, 30 U.S.C. § 815(c)(2),[1] on November 12, 2016 and May 12, 2017. In letters to Notah dated December 2, 2016 and July 13, 2017, MSHA notified him that, based on its investigation of the allegations contained in the Complaints, it had concluded that there was not "sufficient evidence to establish, by a preponderance of the evidence[,] that a violation of Section 105(c) occurred." Notah initiated the instant proceedings on his own behalf, and without legal counsel, before the Commission on December 27, 2016 and August 4, 2017 under section 105(c)(3) of the Act, 30 U.S.C. § 815(c)(3).[2]

[1] Section 105(c)(2) provides, in pertinent part: "Any miner . . . who believes that he has been discharged, interfered with, or otherwise discriminated against . . . by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination."

[2] Section 105(c)(3) provides, in pertinent part: "If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission . . . ."

As a preliminary matter, in an email dated January 30, 2018, Notah stated that GCC had failed to cover medical expenses he incurred as the result of a workplace injury. The injury, which was to Notah's ankle, occurred during the first week of March 2017. According to Notah, he received a "harassing phone call" about the medical bill from a collection agency, and that he was informed that GCC was not responsible for the bill and would not pay it. Notah asserted that GCC's alleged refusal to pay the bill constituted a continuing act of discrimination against him. I construed Notah's email as a motion to amend his complaint.

On March 23, 2018, GCC moved for leave to file an opposition out of time to Notah's motion to amend his complaint, and an opposition pleading. Exhibit 1 to that pleading is an affidavit made by Jackie McGuire, GCC's Risk Management Director. McGuire attests that Notah's medical bill was paid in full on February 16, 2018. In a subsequent phone conference conducted by my counsel with the parties on March 12, 2018 to determine if further evidentiary proceedings were necessary, Notah claimed that he was continuing to receive phone calls from a collection agency, and that he had received such a call that morning. Counsel for GCC stated: "that this claim had not been paid initially was due to inadvertent error on the part of GCC, not based on any purposeful action. . . . The claim was actually paid on February 5th of 2018." A transcript of the call has been entered into the record. In four emails Notah filed with me after my counsel conducted the phone conference, Notah was not able to substantiate his claim of further contacts made by a collection agency regarding the bill. Attached to one of the emails is a letter dated January 25, 2018 from Concentra Medical Centers informing Notah that a claim he made for workers compensation had been denied, and that he owed Concentra $510.02. Attached to the three other emails are copies of insurance forms submitted for care he received at Concentra facilities. Notah did not provide any information as to any contacts made by a collection agency.

In light of the above facts, I find that when the outstanding bill for a workplace injury was brought to GCC's attention, payment of the bill was arranged by GCC, and that this payment was made by February 16, 2018. Accordingly, Notah's motion to amend his complaint is **DENIED.**

A hearing on Notah's complaints was held in Albuquerque, New Mexico. The parties presented testimony and documentary evidence, and filed post-hearing briefs. For the reasons set forth below, I conclude that Notah engaged in activity protected by the Act, that GCC retaliated against him, and that Notah's protected activity served as the basis for his termination by GCC.

I. Factual Background

GCC operates the Tijeras Plant and Quarry, a cement mine in Tijeras, New Mexico. The mine employs approximately 100 persons, including over 70 miners. GCC Br. at 2. Harold Notah was employed at the Tijeras Plant as an electrician. Notah had 23 years experience as an

electrician. Tr.-I 6.[3] At the time of his termination on March 16, 2017, Notah had worked at the Tijeras mine for approximately four years, eight months. Tr.-I 15. GCC had its electricians work flexible shifts most days of the week, and by pre-arrangement, could work on Saturdays and take a day off during the week. The electricians were also regularly placed on an "on-call" list, and could be called into the plant at any time when on the list. GCC Br. at 2.

On or around October 8, 2016, Notah observed a deficient splice in an electric cable. This cable was the responsibility of electricians working under the supervision of Jorge Ambriz. R. Ex. 1, Tr.-I 7, 60. By October 19, 2016, the splice had not been repaired. On that day, Notah called MSHA and complained to the agency regarding the potential hazard the deficient splice created. Tr.-I 10-11. Later that day, an MSHA inspector arrived at the plant, found that the splice was in fact deficient, and issued Citation Nos. 8968030 and 8968031. Tr.-I 10-11, R. Ex. 1.

On November 1, 2016, Notah received a three-day suspension for an incident that had occurred three weeks earlier on October 8, 2016. R. Exs. 3,17. Notah alleges his suspension is a retaliatory response to his phone call to MSHA notifying the agency of a workplace hazard. R. Ex. 2. Notah subsequently filed a discrimination complaint with MSHA, which found insufficient evidence to establish discrimination. R. Ex. 1, 3. On December 20, 2016, Notah filed a complaint with the Commission. R. Ex. 2. Thereafter, Notah received three more disciplinary actions, the final two resulting in his termination on March 16, 2017. R. Exs. 9, 10, 18. Notah subsequently filed another complaint alleging that his termination was a continuing act of discrimination against him. R. Ex. 20.

GCC supervisors document disciplinary actions taken against employees they deem to have performed unsatisfactorily through written reports. These reports are signed and dated and include, among other information, the names of the employee and supervisor, and the nature and date of the alleged poor performance. *See* R. Exs. 9-18. Three witnesses on the stand testified to Notah's poor work ethic. Tr.-I 53-4, 68-73, 83, 85. However, Notah received disciplinary actions only twice during a period of nearly two years. R. Exs. 15, 16. Thereafter, Notah received eight disciplinary actions in the ten months leading up to his termination, four of which occurred after his phone call to MSHA. Seven of these disciplinary actions were issued by the same supervisor, Alfonso Stokes. R. Exs. 9-18. Notably, Stokes did not appear at the hearing, nor did he offer any testimony in any fashion.

Disciplinary Action dated November 1, 2016

On October 8, 2016, Notah's usual supervisor, Stokes, was on vacation. Tr.-II 16. Notah was instead working under the supervision of Jorge Ambriz, who instructed Notah to gather and

[3] Citations to the transcript of the hearing in this matter refer to the two separately paginated volumes covering the first day of the hearing, cited as "Tr.-I", and the second day, cited as "Tr.-II". At the hearing, Notah testified that written statements by him titled "Discrimination Report" dated November 7, 2016 and May 8, 2017 were his fair and accurate representations of his recollections. In light of Notah's status as a pro se complainant, I have used these statements to supplement Notah's testimony. I also note that GCC had an opportunity to cross examine Notah at the hearing on his written recollections.

deliver materials necessary to install a new motor for a transport belt. R. Ex. 3. Notah subsequently told maintenance supervisor Andrew Montoya that his shortened shift that day made completing such an installation unlikely. *Id*. Montoya advised Notah to merely disconnect power to the motor instead. *Id*. Occupied with this and other repair-related preparations and safety procedures, Notah testified that he ran out of time to collect and deliver the requested materials as Ambriz instructed. *Id*. Montoya testified that he allowed Notah to leave his shift, unaware of Notah's failure to deliver materials for the motor installation. Tr.-I 56.

That night, Ambriz discovered the installation materials were not gathered or delivered as he had instructed Notah to do. Tr.-II 9-10. He and the next electrician on shift spent one hour gathering the materials. Tr.-II 10. Under Ambriz's periodic supervision, the electrician then installed the new motor with an improper splice. Tr.-I 60. Guillermo Manquera, a lead electrician, discovered the improper splice and shared his observations with Notah. Tr.-I 90-91. Manquera brought the splice to management's attention in a morning meeting soon thereafter. *Id*. As noted above, when the condition remained unremedied, Notah contacted MSHA on October 19, 2016. Tr.-I 10-11. Manquera suspected Notah had notified MSHA, but when Manquera questioned Notah, he remained silent. Tr.-I 87. When MSHA personnel arrival at the plant, Stokes told Notah that the MSHA inspectors wished to interview Notah in private. Tr.-II 40-41.

On November 1, 2016, Ambriz suspended Notah for his failure to deliver the motor installation materials as orderd. R. Ex. 1. This action occurred a full 24 days after the incident for which Notah was cited, and 12 days after Notah's call to MSHA. R. Ex. 1, Tr.-I 15. Ambriz testified that his decision was based on company policy for someone with previous disciplinary actions. Tr.-II 11-12. He also testified that he was not aware Notah had notified MSHA of the improper splice until the day of the hearing, testimony I found credible. Tr.-II 12. GCC maintenance manager Dylan Gilbert, who began working indirectly with Notah in January 2017, also testified that he was not aware that Notah notified MSHA of the improper splice until the hearing date. Tr.-II 28.

Disciplinary Action dated March 14, 2017

Notah testified that on Monday, March 6, 2017, Stokes granted Notah's request to work Saturday instead of Friday of that week. R. Ex. 20. On Tuesday, March 7, 2017, Notah sustained an ankle injury and was placed on restricted duty. *Id*. Because GCC policy does not allow those on restricted duty to work as the sole electricians on a Saturday shift, Notah was ineligible to work Saturday in lieu of Friday. R. Ex. 9, 20. Unaware of the policy, Notah did not arrive to work on Friday and incurred an unauthorized absence. *Id*.

On his return to work, Notah testified that Stokes agreed to consider Notah's unauthorized absence as paid time off. R. Ex. 20. Apparently, Stokes later denied the existence of any such agreement because he submitted a written disciplinary action against Notah for an unauthorized absence, which was signed and dated on Notah's termination date, March 16, 2017. R. Ex. 9. Notah's written statement and the signatures of Notah, Stokes, and the human resources staffer indicate that the disciplinary action was submitted on March 16, 2017, the date of Notah's termination. The date typed in the header of the disciplinary action report is Tuesday, March 14, 2017. The date Stokes signed the action is unclear. *Id*.

Disciplinary Action dated March 16, 2017

Notah testified that on Monday, March 13, 2017, Stokes verbally confirmed that another electrician was on-call that week. Tr.-I 40-41. Maintenance manager Dylan Gilbert testified that the on-call schedule listed Notah. Tr.-II 21, 27. When Notah received a call from the mine on Wednesday, March 15, 2017, he informed the control room operator that another electrician was on call, but that he (Notah) was available if needed. R. Ex. 20, Tr.-I 41. The operator declined and apologized for the confusion. *Id*. The next day, March 16, the day of Notah's termination, Stokes confronted Notah, denying the on-call schedule had changed. R. Ex. 18. Notah's discrimination report indicates Stokes grew heated and warned Notah of an impending disciplinary action. R. Ex. 20.

Two hours later, Stokes brought Notah to the plant's human resources office. There, Notah received the disciplinary action discussed above for an unauthorized absence on Friday, March 10, 2017. *Id*. This disciplinary action was delayed six days and signed on the date of termination; however, in every prior occurrence, Stokes reliably submitted disciplinary actions within 3 days of an incident. R. Ex. 9. The action warned Notah that further disciplinary action would result in discharge. *Id*.

When Notah protested the disciplinary action during his human resources meeting, he stated Stokes grew increasingly agitated. R. Ex. 20. During the afternoon of March 16, Stokes again summoned Notah to the human resources office and presented him with a final disciplinary action for falsely claiming during his conversation with the control room operator that the on-call schedule had changed. R. Ex. 18. Lying to management is an offense that can lead to termination. R. Ex. 8. Notah denies lying to the operator. Tr.-II 42. Gilbert, who was present during the meeting, testified that Notah's previous disciplinary actions contributed to Notah's termination. Tr.-II 23. Notah's employment with GCC was then terminated. R. Exs. 18, 20.

II. Findings of Fact and Conclusions of Law

Section 105(c)(1) of the Mine Act provides, in pertinent part, that a miner cannot be discharged, discriminated against or interfered with in the exercise of his statutory rights because he "has filed or made a complaint under or related to this Act, including a complaint . . . of an alleged danger or safety or health violation." 30 U.S.C. § 815(c)(1). A complainant alleging discrimination under section 105(c) of the Act, 30 U.S.C. § 815(c), establishes a *prima facie* case of prohibited discrimination by presenting evidence sufficient to support a conclusion that the individual engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. *See Secretary of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds*, 663 F.2d 1211 (3d Cir. 1981); *Secretary of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981).

In determining whether a mine operator's adverse action was motivated by the protected activity, the judge must bear in mind that "direct evidence of motivation is rarely encountered; more typically, the only available evidence is indirect." *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (November 1981), *rev'd on other grounds sub*

nom. Donovan v. Phelps Dodge Corp., 709 F.2d 86 (D.C. Cir. 1983). "Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence." *Id.* (citation omitted). In *Chacon*, the Commission listed some of the more common circumstantial indicia of discriminatory intent: (1) knowledge of the protected activity; (2) hostility or animus towards the protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the complainant. 3 FMSHRC at 2510-12; *see also Hicks v. Cobra Mining, Inc.*, 13 FMSHRC 523, 530 (April 1991). The Commission has also held that an "operator's knowledge of the miner's protected activity is probably the single most important aspect of a circumstantial case" and that "knowledge . . . can be proved by circumstantial evidence and reasonable inferences." *Secretary of Labor on behalf of Baier v. Durango Gravel*, 21 FMSHRC 953, 957 (September 1999) (citing *Chacon*). The operator may rebut a complainant's *prima facie* case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. *See Robinette*, 3 FMSHRC at 818 n.20.

Here, I find ample unrebutted evidence that Notah engaged in protected activity protected under the Mine Act when he brought safety concerns about what he characterized as an "illegal splice" to the attention of GCC management. Tr.-I 10-11. The splice was done on October 8, 2016 and discovered soon thereafter by Notah and a fellow electrician, Guillermo Maquera. Notah testified that at an electrical department meeting on or around October 17, 2016, Maquera "brought up the issue" of the hazardous splice: "He told our supervisor, Alphonso Stokes, saying that we need to get this fixed, it's a safety issue. And he didn't take us seriously; Mr. Stokes didn't take us seriously. So he didn't say [any]thing, he just brushed it aside, practically laughing about it." Tr.-I 10-11. When faced with management's lack of concern regarding the splice, Notah called MSHA's Albuquerque office and reported the hazardous splice. This occurred on October 19, 2016 during Notah's break time. Tr.-I 10-11.

That same day, two MSHA inspectors arrived at the mine and, at approximately 1:00 p.m., interviewed Notah. I find that GCC management, specifically his supervisor Alphonse Stokes, knew that Notah was talking to MSHA because, according to Notah, it was Stokes who told Notah during the October 19th MSHA inspection that the inspectors were at the mine, and it was Stokes who told Notah that the MSHA inspectors wanted to talk to Notah. This emerged in unrebutted testimony by Notah that I find credible. Tr.-II 40, 50 (" MR. NOTAH: Yes, when I was out in the field, Mr. Stokes told me to come to the shop. As I arrived at the electrical department, Mr. Stokes says, that 'MSHA is here to talk to you. Go see them at the front office in the basement.'") Reporting an unsafe working condition to MSHA, and discussing the condition with MSHA inspectors, are quintessentially protected activities under the Mine Act.

I also find that GCC took several adverse actions against Notah, starting with the suspension that is the basis of Notah's first complaint, and culminating in GCC terminating Notah's employment. What remains for me to determine is whether either of the adverse actions taken by GCC against Notah that serve as the bases for his complaints were motivated by Notah's protected activity.

The first adverse action Notah complained of is the suspension for failure to follow a work order. That occurred on October 8, 2016. But disciplinary action was not taken against

Notah for this incident until November 1, 2016, which was 24 days after the incident and 12 days after the MSHA inspection. However, the person supervising that work, and the person who took the disciplinary action against Notah, Jorge Ambriz, credibly testified that when he disciplined Notah, he was not aware of Notah's contacts with MSHA. Tr.-II 18. Ambriz also testified that the delay in taking the disciplinary action was on account of the absence of Notah's direct supervisor Stokes and a human resources staff person. Tr.-II 11.

It may strain credulity that Stokes said nothing to Ambriz about Notah's contacts with MSHA at the time Ambriz disciplined Notah. After all, Ambriz apparently delayed taking action until he could consult with Stokes. Although I find that the suspension given to Notah on November 1 may have been justified, that Ambriz had legitimate grounds for the action, and that the action was not motivated in any way by Notah's protected activity, I find that this adverse action was essentially eclipsed by the later disciplinary action taken against Notah by Stokes, i.e., his termination. I need not reach any conclusion as to Notah's first complaint because I find his second complaint supported by the testimony – and lack thereof.

The missing link in this case is Alfonso Stokes. Despite being given the opportunity to call Stokes to the witness stand to rebut Notah's testimony and to more fully explain Notah's termination, GCC chose not to do so. Nor did GCC offer to have him testify telephonically. Nor did GCC ask for a continuance to allow Stokes to testify at a later date. One question is whether Stokes knew that it was Notah who called MSHA. From all the circumstances of this case, including Stokes's subsequent behavior towards Notah, I am compelled to draw the negative inference that Stokes knew it was Notah who made the call to MSHA. As I noted above, although several of GCC's witnesses testified to Notah's less than satisfactory performance, only two disciplinary actions were taken against Notah over a nearly two year period, in May 2013 and June 2014. Tr.-I 32-33. Eight disciplinary actions were taken against Notah during the ten months leading up to his termination, seven of which were carried out by the same supervisor, Alfonso Stokes, and four of which were taken after Notah called MSHA. I find that this increase in adverse actions taken against Notah were motivated by the complaint Notah made to MSHA, of which I have already found Stokes (and thus GCC) was fully aware.

Lending credence to my conclusion that Notah's firing was motivated by his protected activity are the circumstances surrounding his firing. According to insurance claim forms proffered by Notah in support of his motion to amend his complaint, he injured his ankle at work on March 7, 2017, and went to an urgent care facility that same day. A doctor placed him on light duty work. Tr.-I 36, 38. He took a personal day off from work March 9 "to let the swelling go down." Tr.-I 36. By prior arrangement with Stokes, Notah took off from work on Friday, March 10, with the intention of working Saturday, March 11. Tr.-I 37. After seeing a doctor on the morning of Monday, March 13, 2016, Notah was released from light duty restrictions. Tr.-I 39. That same day, Stokes inexplicably disciplined Notah for missing work on the previous Friday (Tr.-I 39) – inexplicably because Stokes was not called to provide an explanation for apparently refusing to honor his prior arrangement with Notah to take that day off.

Notah also testified that Stokes told him on Monday, March 13, that Manquera was on call that week. Tr.-I 40. Stokes was responsible for keeping the on call list up to date, but apparently did not make this change to the list. Tr.-I 41-42. As a result of this oversight, more

problems arose later that week when, at approximately 1 a.m. on Wednesday, March 15, the control room operator called Notah and told him to report to the plant. Tr.-I 41. Notah testified that "I told him that . . . the schedule has changed, and [Stokes] told me Monday that [Manquera] was on call. . . . And then . . . he apologized to me and . . . I said I'm willing to come in, Brian. Do you want me to come in? He goes, no, wait. Wait, if I need to call you, I'll call you back." Tr.-I 41. The control room operator did not testify at the hearing. I credit Notah's testimony as to these circumstances, especially in light of the absence of any testimony from Stokes offered either in rebuttal or corroboration.

When Notah reported for work the next day, Thursday, March 16, he was terminated for "insubordination and lying to management on March 15." R. Ex. 18. In light of Notah's testimony as to his firing, I find that this action taken against Notah by Stokes to be transparently pretextual, and further find that it was motivated by Notah's protected activity.

In conclusion, I find that Mr. Notah engaged in clearly protected activity of which the operator was fully aware, and that GCC took adverse action against him in retaliation for his protected activity.[4]

ORDER

Accordingly, inasmuch as Notah has established, by a preponderance of the evidence, that he was discharged for engaging in activity protected under the Act, it is **ORDERED** that the Complaint of Discrimination under Docket No. CENT 2017-0453-DM of Harold Notah against GCC Rio Grande, Incorporated under section 105(c) of the Mine Act is **GRANTED.**

Within ten days of the date of this interim decision the parties **ARE ORDERED** to confer to determine the appropriate back pay and interest to be awarded Notah for the days he missed work as a result of his illegal termination, and any other relief required to make Notah whole, including reinstatement.[5] Within 20 days of the date of this interim decision, the parties

[4] If the operator cannot rebut a *prima facie* case under section 105 by proving that there was no protected activity, no adverse action, or no adverse action motivated by a miner's protected activity, it may nevertheless defend affirmatively by proving that it was also motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. *See Robinette*, 3 FMSHRC at 817-18; *Pasula*, 2 FMSHRC at 2799-800. However, I am limited to considering defenses raised by the operator, *U.S. Steel Mining Co.*, 23 FMSHRC 981, 989 (2001) (". . . the judge's inquiry is limited to an examination for the reasons given by the operator for the adverse action."), and here, GCC raised no such defense.

[5] Section 105(c)(3) of the Mine Act provides, in pertinent part: "The Commission shall afford an opportunity for a hearing . . . and thereafter shall issue an order . . . dismissing or sustaining the complainant's charges and, if the charges are sustained, granting such relief as it deems appropriate . . . Whenever an order is issued sustaining the complainant's charges under this subsection, a sum equal to the aggregate amount of all costs and expenses (including attorney's fees) as determined by the Commission to have been reasonably incurred by the miner . . . for, or in connection with, the institution and prosecution of such proceedings shall be assessed against the person committing such violation." 30 U.S.C. § 815(c)(3).

shall report the results of their discussions to me jointly in writing, and I will issue a final decision and order ruling on the agreed-upon relief. If the parties are unable to agree, they shall jointly advise me in writing within 20 days of the date of this decision, and I will issue an order regarding the issue of relief.

Also within 15 days of the date of this decision, the parties **ARE ORDERED** to separately address the civil penalty criteria set forth in section 110(i) of the Mine Act.[6] In addition, the parties are hereby notified that, pursuant to Commission Procedural Rule 44(b), 29 C.F.R. § 2700.44(b), upon issuance of this decision sustaining Harold Notah's discrimination complaint brought pursuant to section 105(c)(3), 30 U.S.C. § 815(c)(3), I shall notify the Secretary of such determination by service upon the Department of Labor's Office of the Solicitor. As stated in Rule 44(b), "The Secretary shall file with the Commission a petition for assessment of civil penalty within 45 days of such notice."

SO ORDERED.

/s/ Robert J. Lesnick
Robert J. Lesnick
Chief Administrative Law Judge

[6] Section 110(i) of the Act provides, in pertinent part: "The Commission shall have authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation." 30 U.S.C. § 820(i).

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September 17, 2018

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of JUSTIN HICKMAN, Complainant, v. HUBER CARBONATES, LLC, Respondent.	TEMPORARY REINSTATEMENT PROCEEDING Docket No. LAKE 2018-0343-DM MSHA Case No: NC-MD-18-06 Mine: Quincy Plant Mine ID: 11-02627

DECISION AND ORDER

Appearances: Jing Zhang, Esq., U.S. Department of Labor, Office of the Solicitor, Chicago, Illinois, for the Complainant;

Jason Nutzman, Esq., Dinsmore & Shohl LLP, Charleston, West Virginia, for the Respondent.

Before: Judge Rae

This matter, heard on September 11, 2018, in St. Louis, Missouri, is before me based on an application for temporary reinstatement filed by the Secretary of Labor (Secretary) on behalf of Justin Hickman, pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 (the Mine Act), 30 U.S.C. § 815(c)(2), against Huber Carbonates, LLC (Huber or Respondent). This statutory provision prohibits operators from discharging or otherwise discriminating against miners who have complained about alleged safety or health violations, or who have engaged in other safety-related protected activity. Section 105(c)(2) of the Mine Act authorizes the Secretary to apply to the Commission for the temporary reinstatement of a miner pending the full resolution of the merits of his discrimination complaint. The Secretary found that Hickman's discrimination complaint was not frivolously brought and filed his petition on behalf of Hickman.

For the reasons that follow, I grant the application and order Justin Hickman's temporary reinstatement.

I. PRINCIPLES OF LAW

Section 105(c) of the Mine Act prohibits discrimination against miners for exercising any protected right under the Mine Act. The purpose of the protection is to encourage miners "to play an active part in the enforcement of the [Mine] Act" recognizing that "if miners are to be encouraged to be active in matters of safety and health they must be protected against any possible discrimination which they might suffer as a result of their participation." S. Rep. No. 95-181, at 35 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 623 (1978).

A temporary reinstatement proceeding is analogous to a preliminary hearing. Unlike a trial on the merits of a discrimination complaint brought by the Secretary where the Secretary bears the burden of proof by the preponderance of the evidence, the scope of a temporary reinstatement proceeding is limited by statute. Section 105(c) of the Mine Act, as well as Commission Rule 45(d), 29 C.F.R. § 2700.45(d), limit the issue in an application for temporary reinstatement to whether the subject discrimination complaint has been "frivolously brought." Rule 45(d) provides:

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

29 C.F.R. § 2700.45(d).

Courts and the Commission have concluded that the "not frivolously brought" standard of section 105(c) is satisfied when there is a "reasonable cause to believe" that the discrimination complaint "appears to have merit." *Jim Walter Res., Inc. v. FMSHRC*, 920 F.2d 738, 747 (11th Cir. 1990); *Sec'y of Labor on behalf of Bussanich v. Centralia Mining Co.*, 22 FMSHRC 153, 157 (Feb. 2000) (citations omitted).

While the Secretary is not required to present a prima facie case of discrimination to prevail in a temporary reinstatement proceeding, it is helpful to review the elements of a discrimination claim to determine if the evidence at this stage satisfies the "not frivolously brought" standard. As a general proposition, to demonstrate a prima facie case of discrimination under section 105(c) of the Mine Act, the Secretary must establish that the complainant participated in safety-related activity protected by the Mine Act, and, that the adverse action complained of was motivated, in some part, by that protected activity. *See Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-800 (Oct. 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981);

Sec'y of Labor on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (Apr. 1981).

In demonstrating a motivational nexus between the protected activity and the adverse action, the Commission has recognized that direct evidence of motivation is rarely encountered; more typically, the only available evidence is indirect. *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983). The Commission has identified several circumstantial indicia of discriminatory intent: (1) hostility or animus toward the protected activity; (2) knowledge of the protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the miner. *Id.*

Finally, it is not the judge's duty to resolve conflicts in testimony or to entertain the operator's rebuttal or affirmative defenses at the preliminary stage of the proceedings. *Sec'y of Labor on behalf of Albu v. Chicopee Coal Co.*, 21 FMSHRC 717 (July 1999).

II. SUMMARY OF THE EVIDENCE

Hickman testified that he was fired from Huber Carbonates, a subsidiary of J.M. Huber Corporation, Tr. 21, after three years[1] of employment at the Quincy Plant. He worked as the Ball Mill Complex[2] (BMC) coordinator[3] responsible for anything from giving input on hiring or firing, issuing disciplinary measures, managing the schedule of the mills, and assigning[4] duties to the miners within the Ball Mills. Tr. 22. Hickman supervised 10 to 11 miners. Tr. 22, 92. As a supervisor, Hickman was a salaried employee working roughly 40–50 hours per week and making $70,029 as his base salary.[5] Tr. 22.

As the BMC coordinator, Hickman's performance for the first half of 2017 appeared excellent: he received a 4.70% raise for exceptional performance in early 2017; he was the recipient of a presidential award for exceptional work in early 2017; and he was offered the opportunity to go back to school to earn a bachelor's degree paid for by Huber. Tr. 24-25, 27. Additionally, on July 18, 2017, Huber offered Hickman a promotion to the ultrafine mill

[1] Hickman testified that he was first hired in "March of 2015." Tr. 23. However, it appears he misspoke as he then discussed moving to different positions over the course of eight or nine months and eventually becoming a night supervisor in "early 2015." Tr. 23.

[2] The Ball Mill Complex is responsible for grinding calcium carbonate to a specific micron size for additives in things like PVC and paints. Tr. 21-22.

[3] Hickman testified that prior to becoming the BMC coordinator he worked at Huber as a roller mill operator, a stock truck driver, and a temporary night supervisor. Tr. 23.

[4] Although the transcript says, "signing duties to the operators within the ball mills," Tr. 22, based on context and what I understood at hearing, I interpret this as "assigning duties."

[5] Hickman stated the number of hours he worked did not affect his pay. Tr. 23.

complex. Tr. 26. Hickman declined the offer, citing that there was no immediate salary raise that came with the promotion and he wanted to focus on what he was working on. Tr. 26-27.

On July 3, 2017, Austin Roberts, a miner Hickman supervised, was pressured multiple times by George Crane[6] into running a stock truck without the necessary site-specific training. Tr. 27-28, 30. On July 25, 2017, Hickman made a safety complaint about Crane's actions to Stacy Atteberry, the local HR representative, and eventually to Jackie Thompson, the regional manager for HR corporate. Tr. 28-29. Corporate eventually sent the issue back to the plant and local level, informing Kristi Taylor, the local HR manager, and Mike Morris, the local plant manager. Tr. 29. Hickman testified that Atteberry told him a few days later that people in the main office at the Quincy Plant were upset and knew that Hickman had circumvented the chain of command by taking the safety complaint straight to corporate. Tr. 29.

Crane was known for manipulating people, making threats, and insinuating things, so Hickman tried to stay out in front of any accusations. Tr. 30. Hickman raised concerns about Crane with Atteberry and Thompson multiple times and eventually had phone and email exchanges with Sharon Noble, the vice president of HR for J.M. Huber. Tr. 30. Hickman was told his complaint was investigated, but nobody ever followed up with him. Tr. 30-31.

Eventually, in August or September of 2017, Crane was removed from his position as Hickman's direct supervisor and was replaced with Robert Hogan. Tr. 79-80. After Hickman's complaint, management's attitude toward him changed. Hickman felt isolated from coworkers, shipping deadlines were not being met for the first time, and things that were never issues before were being cited as issues. Tr. 31-32.

Hickman testified on cross examination that the mine had a history of dust problems. Tr. 82. He recalled an incident in 2016 while they were installing mill 38. Tr. 82. Hickman and Tony Lahey, who was the environmental health and safety (EHS) manager at the time, were pushing to shut certain mills down after a pressure relief valve popped and created heavy dust within the building. Tr. 82-83. Morris and Crane's solution to the problem, however, was to only run those mills after 3:00 p.m., which exposed Ritchie Pressy, one of Hickman's miners, to dust all night long. Tr. 83. Hickman testified that a complaint was made to management about this, which Hickman believes was the reason Lahey was later fired. Tr. 83. Hickman testified that additional complaints about dust were raised by miners to him between August 2017 and into 2018. Tr. 83. Hickman took those complaints up to management. Tr. 83.

On January 16, 2018, Hogan interviewed Hickman and asked if he had ever been told to tell his crew to manipulate the MSHA air samples. Tr. 58. Hickman told Hogan that in 2015 he was instructed by Director of Operations Rick Zwingelberg and Maintenance Manager Sean Eisenbeiss to adjust his team's duties or not do certain work in order to ensure that MSHA's air sample readings were underexposed. Tr. 55-56, 58. Hickman also told Hogan that in 2017 work

[6] George Crane was Hickman's direct supervisor and the production manager at the plant at the time. Tr. 25.

activities were manipulated between the nutritional[7] group and industrial group, which helped reduce the air samples' dust exposure readings. Tr. 56, 58.

On January 17, 2018, Hogan sent an email instructing everybody that employees wearing dust pumps should carry on with their normal duties and ensure that the samples collected are an accurate representation of the working environment. Tr. 58; Ex. S–6. Despite the email from Hogan, Hickman testified that Lori Dowil, the EHS manager, coached people to not do activities that would show overexposure of dust when MSHA was around during the MSHA inspection that occurred in February 2018. Tr. 58-59.

On January 18, 2018, Inspector Steve Cody took instantaneous dust readings and found the BMC was extremely overexposed. Tr. 34. During his time with Inspector Cody, Hickman learned about the dangers of breathing in calcium carbonate rock dust and the importance of accurate dust readings so that miners were not being overexposed. Tr. 35, 59. The next day, January 19, Hickman sent an email to Dowil to see how many of the BMC employees were fit tested and to schedule appointments for those who had not been fit tested. Tr. 35-36; Ex. S–1. Hickman could not recall receiving a response from Dowil, but he pushed the issue in morning production meetings and eventually got his miners fit tested a week later. Tr. 36.

On January 30, 2018, Hickman sent an email to various management members, including Kevin Miller, the maintenance supervisor, with a 14-point list of problematic areas that needed to be fixed. Tr. 38-39; Ex. S–2. Hickman also CCed Ashley Anders, who was in charge of putting work orders into the system. Tr. 39-40. The leaks enumerated by Hickman were those that he could not have fixed himself and should have been addressed by the maintenance department. Tr. 40. Hickman said there were some attempts to fix these problems but, to his knowledge, some of the problems have not been fixed to date. Tr. 41.

On February 9, 2018, Hickman received and signed a Performance Improvement Plan (PIP). Tr. 41-42; Ex. S–3. Hogan and Atteberry gave Hickman the PIP, Tr. 42, which cited repeated delayed shipments, incomplete preventative maintenance on equipment, and multiple safety issues. Ex. S–3. The PIP was to last 60 days and required Hickman to hit performance benchmarks or face serious consequences. Tr. 43-44; Ex. S–3. In 2018, only two employees—Hickman and Kevin Ransom, the Roller Mill Complex Supervisor—were placed on a PIP. Tr. 44-45. According to Hickman, a PIP was a death knell: "nobody at Huber has ever survived a [PIP], to my knowledge." Tr. 51.

As part of the PIP, Hickman was supposed to have regular check-ins with his direct supervisor, Robert Hogan. Tr. 49; Ex. S–3. However, despite having the check-ins on the outlook calendar every Thursday, Hogan never showed up to the meetings. Tr. 49; Ex. S–3.

On February 27, 2018, Hickman sent an email to eight members of Huber management and HR who were assigned to review and assess his PIP and review. Tr. 50-51; Ex. S–4. In the email, Hickman listed 28 bullet points to rebut the three major accusations in the PIP. Tr. 49-51; Ex. S–4. At the end of his email, Hickman stated in clear terms, "I know I have upset some

[7] "Nutrition" is the name of another sector of the plant where they create food-grade calcium carbonate. Tr. 63.

people by reporting this. I have been threatened, intimidated, isolated and retaliated against for driving issues such as training, fugitive dusting, and environmental issues." Ex. S–4. In response, Sharon Noble told Hickman that retaliation was against the Huber Code of Ethics and the culture, and she wanted to know more about these allegations. Tr. 52.

Later that day, February 27, and in response to Noble's comments, Hickman sent Noble and regional HR manager Dave Daisy a seven-point list of actions taken by his superiors that he perceived as retaliation for his earlier safety complaints. Tr. 51, 53; Ex. S–5. Three of the seven points alleged that resources and personnel, which were needed, were being withheld from the BMC group. Ex. S–5. Hickman concluded the email by stating that he had previously seen coordinators in the past who had been "choked out of resources until they reach failure only to have those resources restored once they are terminated . . . ." Tr. 54; Ex. S–5. Hickman testified that he only sent this email to Noble and Daisy because certain individuals who received the earlier email (i.e., the 28-bullet-point rebuttal) were angry at him for what he was doing. Tr. 54.

On March 6, 2018, Hickman was called to Zwingelberg's office. Tr. 60. During that meeting, Hickman was told that Zwingelberg and Matt O'Brien, the VP and general manager, were prepared to make "necessary changes" in the BMC. Tr. 60. Hickman interpreted this as a threat that, unless he reassigned his team to conduct tasks that would underexpose the dust measures, he would be let go. Tr. 61. Despite this, Hickman told Zwingelberg that he would not reassign his miners to change their tasks for the MSHA sampling. Tr. 61. At some point after this conversation, sampling triggered 104(b) orders to withdraw the load outs and mill 26. Tr. 60. There was confusion between members of management on what to do with the 104(b) orders: Dowil and Morris instructed Hickman to run the mills; Hogan instructed Hickman to not restart any mills or processes until the modifications were in writing. Tr. 60; Ex. S–7.

On March 15, 2018, Hickman and three of his supervisees were called in by Zwingelberg who was frustrated with the 104(b) orders. Tr. 62-64. Hogan, Morris, and Dowil were also present as well. Tr. 64. Zwingelberg asked Hickman and his BMC team if they all wanted to be laid off like Nutrition, a sector of the plant that was laid off in early December 2017. Tr. 63. Hickman perceived this comment as a threat that they would be replaced with miners willing to work in illegally dusty conditions. Tr. 63. Zwingelberg stated that the mills had no problems for 20 years, to which Hickman responded that it was because they had been cheating the samples and that BMC was done cheating the samples. Tr. 63.

On March 24, 2018, Zwingelberg and Inspector Cody had walked around the respirator area taking samples, including time measurements. Tr. 67. By the time Hickman got to the plant, Inspector Cody was packing up to leave. Tr. 67. Hickman was not told what Inspector Cody had said about the area nor was Hickman directed to fix or address any issues in the respirator area. Tr. 67. Over the next week, however, Hickman spoke with Hogan, Eisenbeiss, and Morris about keeping the packers clean, putting shelving up, and installing hanging giant hooks on the wall. Tr. 68. Despite these conversations, Hickman never assumed responsibility nor was he directed

to be responsible for installing the hooks.[8] Tr. 68. Hickman testified that he did not know who was ultimately responsible for installing the hooks. Tr. 68.

On April 1, 2018, Hickman filled out a 105(c) discrimination complaint. Tr. 72, 74; Ex. S–8. He mailed it to MSHA via USPS on April 2, 2018. Tr. 72, 74-75; Ex. S–8. Hickman subsequently informed Hogan that he had sent the 105(c) discrimination complaint earlier that morning. Tr. 72.

On April 3, 2018, Inspector Cody returned and issued a 104(d) citation for failure to have a fully functional respirator protection program. Tr. 65. Specifically, the area was cited for not having disposable parts for the respirators. Tr. 66. Despite having had discussions with Hogan, Eisenbeiss, and Morris the week before, Hickman did not realize that Inspector Cody had previously requested they have the area fully functional. Tr. 66-67. After the 104(d) citation was issued, Huber installed the wall hooks like they planned. Tr. 70. Since the respirators were full-hooded heavy units, the fix required a stable setup. Tr. 70. The maintenance team installed two-by-fours, concrete anchors, and giant bandoleer hooks. Tr. 70. The project required drilling concrete and brick—work that was outside the expertise and scope of the BMC team. Tr. 70-71.

On April 4, 2018, Hickman was called to the office by Zwingelberg. Tr. 71. On his way up, Hogan told Hickman that management would try and blame Hickman for the 104(d) citation. Tr. 71. When Hickman got to the office, Zwingelberg chastised Hickman for not following instructions related to the respirator area. Tr. 71. Hickman denied at hearing ever being directed by Zwingelberg to install the wall hooks. Tr. 72.

On April 11, 2018, Hickman was terminated. Tr. 76. Although Hickman had two weeks left of the PIP's 60-day term, he was told it would not make a difference and that he failed his PIP goals. Tr. 47, 76. Hickman was not given the results of his PIP, Tr. 47, 77, and was never told by Hogan how he was doing while on the PIP. Tr. 49.

Counsel for Respondent called two witnesses: Kristi Taylor and Lori Dowil. Taylor is the current human resource manager at Huber responsible for employee benefits, hiring, terminations, and performance evaluations. Tr. 97. Dowil is the current EHS manager. Tr. 108.

Taylor testified that only two employees, Hickman and Kevin Ransom, were placed on the PIP in 2018. Tr. 99. Dowil testified that Hickman had received annual refresher training in 2016, 2017, and 2018. Tr. 112. Additionally, she testified that Huber began making changes to reduce dust overexposure after becoming aware of the dust issues in December 2017. Tr. 113-14. Taylor additionally testified that the Quincy Plant had 16 overexposures since the summer of 2017, and MSHA issued 14 enforcement actions for those overexposures during that period. Tr. 113.

[8] Hickman did state that he purchased some light-duty wall hanging hooks after Hogan requested that Hickman take care of small things in his area. Tr. 68-69. However, the small hooks Hickman purchased were not purchased for the respirators and, in any event, were much too small to properly hold the respirators. Tr. 69-70.

III. APPLICATION OF THE LAW

The Secretary argues Hickman engaged in multiple counts of protected activity and was the recipient of adverse action that was in part related to his protected activity. With regard to protected activity, the Secretary highlights four discrete instances. First, Hickman made a corporate complaint about his direct supervisor, George Crane, after Crane directed a miner, Austin Roberts, to operate a truck the miner was not authorized to operate—an action that Hickman deemed unsafe. Second, Hickman sent a series of emails to upper management and HR, which brought up issues about problematic dusty areas, leaking equipment, being short-staffed in the BMC, and requesting that the miners he supervised were fit tested for respirators. Hickman also alleged that he felt he was being retaliated against in multiple emails to management. Third, Hickman refused to direct workers under his supervision to tamper with MSHA air sampling. Finally, Hickman filed his 105(c) complaint with MSHA on April 2, 2018, and told his then-supervisor, Robert Hogan, about it later that morning.

In addition to Hickman's termination on April 11, 2018, the Secretary implies that his low performance evaluation and placement on the PIP after making a safety complaint constituted adverse action. The Secretary draws a nexus between the protected activities and adverse action by citing to the hostility Hickman received from upper management, proximity in time of the events, and upper management's knowledge of Hickman's various protected activities.

Respondent argues three points in its closing arguments. First, there was no protected activity with regard to the events that took place in July 2017 because Hickman was given a great midyear review and Huber dealt with Crane swiftly by demoting him. Second, Hickman's emails to management regarding dust issues did not constitute protected activity because management was already aware of the problems by the time Hickman raised them. Finally, a remedy does not exist for Hickman at the temporary reinstatement stage because the discrimination complaint was filed before Hickman suffered any adverse employment action and Huber was only made aware of Hickman's complaint after he was terminated.

In enacting the Mine Act, Congress indicated that the concept of protected activity in section 105(c) "be construed expansively to assure that miners will not be inhibited in any way in exercising any rights afforded by the legislation." S. Rep. No. 95-181, at 36 (1977), *reprinted in Mine Safety and Health Act of 1977*, at 624 (1978). Protected activity under the Act can include making a complaint to an operator or its agent about unsafe equipment, *e.g.*, *Sec'y of Labor on behalf of Knotts v. Tanglewood Energy, Inc.*, 19 FMSHRC 833, 837 (May 1997), or a complaint about an alleged danger or safety or health violation. *E.g.*, *Sec'y of Labor on behalf of Davis v. Smasal Aggregates & Asphalt, LLC*, 28 FMSHRC 172, 175 (Mar. 2006) (ALJ). I conclude the Secretary has presented sufficient evidence at this temporary reinstatement stage to establish that Hickman engaged in multiple counts of protected activity. Hickman's corporate complaint about Crane, the numerous safety complaints presented to upper management, his refusal to reassign his workers to manipulate dust exposure measurements, and even the 105(c) discrimination complaint itself all constitute protected activity under the Act.

It is also clear from the record that, at the very least, one adverse action was taken against Hickman when he was terminated on April 11, 2018.

Additionally, there is sufficient evidence at this stage to support a reasonable cause to believe there was a motivational nexus between Hickman's protected activities and the adverse action. While the other circumstantial indicia of discriminatory intent outlined in *Chacon*—coincidence in time, hostility toward the protected activity, and disparate treatment—are all present in varying degrees in this case, it is Huber's knowledge of Hickman's protected activities that is most striking. The Commission has held that an "'operator's knowledge of the miner's protected activity is probably the single most important aspect of a circumstantial case' and . . . 'can be proved by circumstantial evidence and reasonable inferences.'" *Sec'y of Labor on behalf of Baier v. Durango Gravel*, 21 FMSHRC 953, 957 (Sept. 1999), *citing Chacon*, 3 FMSHRC at 2510. Here, Hickman provided extensive and detailed emails he sent to numerous members of upper management. This strongly supports a reasonable inference that upper management was not only aware of Hickman's protected activities but also of the alleged retaliation, intimidation, and harassment Hickman endured.

I also find that the evidence of Hickman's alleged employment performance—an issue not directly articulated at hearing but suggested by Respondent's witness' testimony—is a matter left to a later proceeding on the merits of the discrimination complaint. In order to find that his past conduct was the sole role in the termination of Hickman, it would be necessary to make evidentiary findings on the affirmative defenses and to resolve conflicts in testimony between the Secretary's witness and the Respondent's witnesses. This is not the role of the Administrative Law Judge at this stage of the proceedings. Additionally, making such a finding here would be tantamount to deciding the discrimination case in chief which is not before me and would deprive the Secretary of the right to conduct discovery and present witnesses to rebut the defenses raised by this evidence.

In summary, all elements of the analytical framework discussed above are satisfied to the level required by the relevant statutes, rules, and case law precedent. The Secretary has carried his burden of presenting evidence to support a reasonable cause to believe that Hickman engaged in protected activity, and that there was a nexus between the protected activity and the adverse action of termination. I conclude that the complaint of discrimination is not frivolously brought.

IV. ORDER

For the reasons set forth above, Huber Carbonates, LLC is **ORDERED** to immediately reinstate Justin Hickman to the position he held on April 11, 2018, at his regular base salary of $70,029 a year with restoration of all benefits to which he was then entitled.

Mr. Hickman's reinstatement is not open-ended. It will end upon a final order on the underlying discrimination complaint case in chief. 30 U.S.C. § 815(c)(2). Therefore, the Secretary must promptly determine whether or not he will file a complaint with the Commission under section 105(c)(2) of the Act and so advise the Respondent. Otherwise, I shall entertain a motion to terminate this Order.

/s/ Priscilla M. Rae
Administrative Law Judge

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September 19, 2018

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. THE AMERICAN COAL COMPANY, Respondent	CIVIL PENALTY PROCEEDING Docket No. LAKE 2011-0013 A.C. No. 11-02752-232235 Mine: New Era Mine

DECISION UPON REMAND

This matter involves Section 110(k) under the Mine Act, 30 U.S.C. § 820(k), which is a unique provision in federal remedial legislation. In issue is the settlement motion seeking an across-the-board reduction of 30 (thirty) percent for each of the 32 citations in the docket. The Commission, per its decision in this matter, concluded that the Court erred by applying an incorrect legal standard, and it therefore vacated the Court's denial of the amended settlement motion and remanded the matter for further proceedings consistent with its decision. *Sec'y of Labor, Mine Safety & Health Admin. (MSHA) v. The American Coal Company and United Mine Workers of America and United Steel, Paper and Forestry, Rubber Mfg., Energy, Allied Industrial and Service Workers Int'l Union*, 40 FMSHRC ___, 2018 WL 3830145 (Aug. 2, 2018) (hereinafter *AmCoal*).

In relevant part, the section involved, titled "Compromise, mitigation, and settlement of penalty," provides "[n]o proposed penalty which has been contested before the Commission under section 815(a) of this title shall be compromised, mitigated, or settled except with the approval of the Commission." 30 U.S.C. § 820(k).

The provision came into being with the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. and it was left undisturbed when the Mine Act was revised in 1990 and, more recently, when revised again by the Mine Improvement and New Emergency Response Act of 2006 ("MINER Act"), 30 U.S.C. § 876(b)(2)(G), 120 Stat. 493, 495-96. As the Commission has observed, Congress explicitly explained the purpose behind Section 110(k), noting that

The Senate Report recognized, in particular, the importance of an Administrative Law Judge's review of a proposed settlement of a penalty:

> In addition to the delay in assessing and collecting penalties, another factor which reduces the effectiveness of the civil penalty as an enforcement tool under the Coal Act is the compromising of the amounts of penalties actually paid. In its investigation of the penalty collection system under the Coal Act, the Committee learned that to a great extent the compromising of assessed penalties does not

> come under public scrutiny…. Even after a Petition for Civil Penalty Assessment has been filed by the Solicitor with the Office of Hearings and Appeals, settlement efforts between the operator and the Solicitor are not on the record, and a settlement need not be approved by the Administrative Law Judge.

S. Rep. No. 95-181, at 44 (1977), reprinted in Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 632 (1978) ("Legis. Hist."). *See also Sec'y of Labor, Mine Safety & Health Admin. v. Black Beauty Coal Company*, 34 FMSHRC 1856, 1861 (Aug. 2012). (hereinafter *Black Beauty*).

Congress intended that the settlement of a penalty be open to scrutiny in order to better serve the purpose of civil penalties, that is, to encourage operators' compliance with mandatory standards. The Senate report provided:

> The Committee strongly feels that the purpose of civil penalties, convincing operators to comply with the Act's requirements, is best served when the process by which these penalties are assessed and collected is carried out in public, where miners and their representatives, as well as the Congress and other interested parties, can fully observe the process.

Id. at 633.

In order to ensure penalties serve as an effective enforcement tool, prevent abuse, and preserve the public interest, Congress authorized the Commission to approve the settlement of civil penalties. The Senate report explains:

> To remedy this situation, section 111(l) [later codified as section 110(k)] provides that a penalty once proposed and contested before the Commission may not be compromised except with the approval of the Commission…. By imposing these requirements, the Committee intends to assure that the abuses involved in the unwarranted lowering of penalties as a result of off-the-record negotiations are avoided. *It is intended that the Commission and the Courts will assure that the public interest is adequately protected before approval of any reduction in penalties.*

Id. (emphasis added).

The Commission stated in this regard that "[t]o carry out this responsibility, the Judge must have information sufficient to establish that the penalty reduction does, in fact, protect the public interest."

Black Beauty at 1862.

Thus, Congress identified the problem, the purpose behind its inclusion of the provision and what it wanted to achieve going forward.

The Commission's Decision in *AmCoal*

The Court, per the Commission's directive, takes into account the Commission's decision in *AmCoal*, remanding the matter. To begin, the Commission held that the criteria in section 110(i) of the Mine Act are not to be applied "in an overly rigid manner."[1] *AmCoal* at 6, 2018 WL at *5. Further, the Commission held that it is not true "that the facts supporting the settlement 'must be tied to the six statutory criteria in [s]ection 110(i).'" *Id.* In this regard, the Commission stated that although it "has previously explained that standards for factual support for a penalty reduction in settlement may be found in section 110(i)," it has also expressed "that 'parties may submit facts supporting a settlement that fall outside of the section 110(i) factors but that support settlement.'" *Id.* at 7, 2018 WL at *5.

The Commission has stated that "factual information, supporting the penalty agreed to through settlement[,] must be submitted."[2] *Id.* at 2-3, 2018 WL at *1. However, it has expounded that "there may be considerations beyond the six statutory criteria of section 110(i) that are relevant to whether a settlement proposal is fair, reasonable, appropriate under the facts, and protects the public interest."[3] *Id* at 8, 2018 WL at *5. citations omitted.

While the Commission noted that both it and the Commission's "Judges 'must have

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[1] **Approaching a perfect approval rate.** Underscoring that the penalty criteria in section 110(i) are not to be applied in an "overly rigid manner," the Commission noted that its settlement procedures "have resulted in a near perfect approval rate for motions to approve settlement. … [i]n fact ... from fiscal year 2015 through approximately seven months of fiscal year 2018, 99.8% of proposed settlements have been approved." *AmCoal* at 6, 2018 WL at *4. The Commission's decision therefore deals the .2% involving settlement denials, which impairs achieving the near perfect approval rate. In addition to dealing with those .2% of settlement denials, the Commission also commented that "[i]t appears that some Commission Judges have a practice of seeking additional information from parties when evaluating a proposed settlement, and that this procedure works effectively." *Id.* However, the Commission announced that even under this procedure of seeking additional information, "[i]f a party believes that a Judge has overstepped his or her authority or otherwise committed an abuse of discretion in requesting such facts, a party may appeal that matter to the Commission on an interlocutory basis." *Id*.

[2] In a footnote, one Commissioner supported the idea that the Secretary should be required "to provide some basic justification based on *substantive fact* … [to] make sure that [the Commission] ha[sn't] reverted to the state of affairs that existed prior to enactment of the current legislation in section 110(k)." *Id.* at 8 n.10, 2018 WL at *5 n.10 (emphasis added). The footnote must be read in context: that lone Commissioner did not dissent, nor define what constitutes a substantive fact, but rather joined in the unanimous decision remanding the matter "for further submissions and consideration consistent with [its] decision." *Id.* at 11, 2018 WL at *7.

[3] The phrase invoking that a settlement proposal be "fair, reasonable, appropriate under the facts, and protects the public interest," is obviously important to the Commission, as it is repeated 7 (seven) times in its decision. See *AmCoal* at pages, 2, 5 (twice), 6, 7, 9, and 10, 2018 WL *1, *3-7, in its eleven page decision.

sufficient information to carry out [the Congressionally delegated] responsibility'" under section 110(k), it expressed that this has been happening, as measured by the fact that the settlement procedures "have resulted in a near perfect approval rate for motions to approve settlement." *Id.* at 5-6, 2018 WL at *4 and n. 1 *supra*.

In its *AmCoal* decision, the Commission identified that such other considerations include "that the operator had agreed to accept all of the citations as written," endorsing the Secretary's statement that "the fact that the proposed settlement preserves all of the citations as written could assist the Secretary in future enforcement efforts against this operator by ensuring that the paper record reflects the Secretary's views regarding gravity and negligence stated in the citations." *Id.,* 2018 WL at *5. Thus, *AmCoal* instructs that it is proper to consider the "value of accepting the citations as written on future enforcement actions." *Id.*

Further, the Commission instructed that a judge is "to accord due consideration to the entirety of the proposed settlement package, including both its monetary and nonmonetary aspects." *Id.*, citation omitted.

In discussing what constitute "facts" for a settlement, the Commission stated "there is no requirement that facts supporting a proposed settlement must necessarily be submitted by the Secretary. *Facts* supporting a penalty reduction in a settlement motion may be provided by any party individually or by parties collectively." *Id.* at 8, 2018 WL at *6 (emphasis added). The only associated requirement with such "facts" is that "there is a certification by the filing party that any non-filing party has consented to the granting of the settlement motion."[4] *Id.*

Accordingly, the Commission rejected the view that a respondent's assertions of fact need to "present *legitimate* questions of fact," and further that the Secretary need not comment yea or nay to the facts asserted by a respondent. Instead, the Commission announced that "[f]acts alleged in a proposed settlement need not demonstrate a 'legitimate' disagreement that can only be resolved by a hearing. The Commission's Procedural Rules and standing precedent do not contain such a requirement." *Id.* at 9, 2018 WL at *6. Instead, the Commission will allow that the "parties may submit facts that reflect a mutual position *that the parties have agreed is acceptable to them*…." *Id*. (emphasis added).

As the Commission did not expressly set forth how one discerns that the submitted facts "reflect a mutual position that the parties have agreed is acceptable," the Court infers that the act of submitting the settlement reflects such a mutually acceptable position from the parties, else the submission could not be denominated a "settlement." That this is the case is reflected by the Commission's statement that it is "'[*i*]*nherent in the concept of settlement* [ ] that the parties find and agree upon a mutually acceptable position that resolves the dispute and obviates the need for further proceedings.'" *Id.*, citation omitted.

To meet Rule 31, it is enough, the Commission has stated, to "include a description of an issue on which the parties have agreed to disagree. The Commission does not require

[4] It would difficult to imagine a "settlement" motion where one party does not consent to the granting of the motion.

concessions from parties in settlement as long as the parties provide mutually acceptable facts that demonstrate the proposed penalty reduction is fair, reasonable, appropriate under the facts, and protects the public interest." *Id.*

In evaluating the propriety of settlements, the Commission also eschewed the idea that the Secretary is required "to provide an explanation for the specific numerical percentage reduction of each penalty." *Id.* In this regard the Commission stated that there may be non-monetary considerations that also support settlement that are not amenable to "explanation about why a particular numerical reduction is appropriate for a violation." *Id*. at 10, 2018 WL at *7.

The Commission has "recognized that, in reviewing information supporting a reduced penalty in settlement, a Judge 'need not make factual findings with respect to each of the section 110(i) factors as a Judge would in the assessment of a penalty after hearing.'" *Id.* at 9, 2018 WL at *6 (citation omitted).

Issued the same day as *AmCoal* was the Commission's decision in *Sec'y of Labor, Mine Safety & Health Admin. (MSHA), v. Rockwell Mining, LLC*, 40 FMSHRC ___, slip op., 2018 WL 3830146 (Aug. 2, 2018) (hereinafter *Rockwell*). There can be no doubt that the Commission required the two decisions to be read together, *in pari materia*, if you will,[5] as it stated in its remand in *Rockwell*, that the Court's reconsideration was to be considered together with its *AmCoal* decision as it directed the Court to conduct "reconsideration consistent with this opinion and [the Commission's] decision in *AmCoal* issued on this date."[6] *Rockwell*, slip op. at 4, 2018 WL at *3. Therefore the *Rockwell* decision must also be discussed to fully employ and adhere to the Commission's directives for review of settlement motions.

In its August 2, 2018 decision in *Rockwell*, remanding this matter for further proceedings, the Commission instructed the Court to conduct "reconsideration consistent with this opinion and [its] decision in *AmCoal* issued on this date." *Rockwell*, slip op. at 4, 2018 WL at *3. Therefore, as stated, it is necessary to discuss the Commission's decisions in both matters. The Commission noted that in "evaluat[ing] settlement motions, [it] consider[s] 'whether the settlement of a proposed penalty is fair, reasonable, appropriate under the facts, and protects the public interest. *The American Coal Co*., 38 FMSHRC 1972, 1976 (Aug. 2016)." *Rockwell*, slip op, at 3, 2018 WL at *2. It then acknowledged that to make that evaluation both the "Commission and its Judges 'must have information sufficient to carry out this responsibility.'" *Id*., citation omitted.

[5] While the term in *pari materia*, literally, "upon the same subject," is usually employed in the context of statutory interpretation, its use can be more liberally applied where apt, as here.

[6] In its four page decision in *Rockwell*, the Commission invoked its *AmCoal* decision at pages 1, 3, 2018 WL at *1-2.

To accomplish this, the Commission, citing Commission Procedural Rule 31, 29 C.F.R. §2700.31,[7] stated that "for each violation" a motion to approve penalty settlement must include three things:

1. the penalty proposed by the Secretary
2. the amount of the penalty agreed to in settlement
3. *facts* in support of the penalty agreed to by the parties

Rockwell, slip op. at 3, 2018 WL at *2.

The Commission determined that the Court erred in denying the settlement motion in two particulars. First, it noted as error that the Court "did not refer to or apply the [Rule 31] standard … that [the Commission] use[s] for evaluating penalty reductions in settlement[s].[8] *Id.*

Second, the Commission determined that the Court "erred in concluding that a motion to approve settlement must include an acknowledgement by the Secretary that the Respondent's assertions present legitimate questions of fact which are in dispute and can only be resolved through the hearing process. … facts alleged in a proposed settlement need not demonstrate a 'legitimate' disagreement that can only be resolved by a hearing." *Id.*, and citing its *AmCoal* decision issued the same day as *Rockwell*.

[7] In relevant part, 29 C.F.R. §2700.31 provides: "(b) Content of motion - (1)Factual support. A motion to approve a penalty settlement shall include for each violation the amount of the penalty proposed by the Secretary, the amount of the penalty agreed to in settlement, and facts in support of the penalty agreed to by the parties. Rather than setting forth such information in detail, the motion may incorporate by reference the information which has been included in the accompanying proposed order as required by paragraph (c)(1) of this section. (2) Certification. The party filing a motion must certify that the opposing party has authorized the filing party to represent that the opposing party consents to the granting of the motion and the entry of the proposed order approving settlement. (c) Content of proposed order - (1) Factual support. A proposed order approving a penalty settlement shall include for each violation the amount of the penalty proposed by the Secretary, the amount of the penalty agreed to in settlement, and facts in support of the penalty agreed to by the parties.

[8] In this decision upon remand, the Court hereby expressly refers to Commission Rule 31.

The Commission uses the term "facts" in a sense that the Court had not previously applied that term.[9] For the Commission, in settlements, "facts" may "reflect a mutual position that the parties have agreed is acceptable to them in lieu of the hearing process." *Id*. citation omitted. This occurs where "the parties find and agree upon a mutually agreeable position that resolves the dispute and obviates the need for further proceedings." *Id*., citation omitted. Expressed differently, the Commission has stated the Rule 31 facts "may include a description of an issue on which the parties have agreed to disagree." *Id.* Facts of this nature do "not require concessions from parties in settlement as long as the parties provide mutually acceptable facts that demonstrate the proposed penalty reduction is fair, reasonable, appropriate under the facts, and protects the public interest." *Id.* (emphasis added).

Accordingly, by virtue of the submission of a settlement motion, in all instances the parties have implicitly provided "mutually acceptable facts." And those "facts" may be composed entirely upon "a description of an issue on which the parties have agreed to disagree." *Id.* at 3, 2018 WL at *3.

The parties' submissions, per the Commission's decision remanding the matter.

The Commission directed the Court to "provide the parties with 30 days to submit facts supporting the proposed penalty reductions, which may be submitted individually or collectively pursuant to Commission Procedural Rule 31." *AmCoal*, slip op. at 10, 2018 WL at *7.

Respondent's, American Coal, Supplement in support of joint motion to approve settlement and dismiss proceeding ("R's Supplement" or "Supplement").

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[9] The Court was applying what it heretofore thought was meant by "facts," that is, "[a] thing that is known or proved to be true." Fact, *Oxford English Dictionary* (online ed.); something that has actual existence; a piece of information presented as having objective reality; the quality of being actual. Fact, *Merriam-Webster* (online ed.); "[a] fact is a statement that is consistent with reality or can be proven with evidence. The usual test for a statement of fact is verifiability." Fact, *Wikipedia*, Wikipedia (Sept. 17, 2018), https://en.wikipedia.org/wiki/Fact. Of course the Court understood that the parties may, in the context of a settlement motion, have a different view of what the facts are and that they need not necessarily agree on what they actually are. It was on the basis of that understanding that the Court sought a representation from the Secretary that the Respondent's assertions present legitimate questions of fact which are in dispute and can only be resolved through the hearing process. *The Commission has stated this is not required in settlements.* Instead, it has instructed that it is sufficient for *the parties to submit facts that reflect a mutual position that the parties have agreed is acceptable to them in lieu of the hearing process.* But that *mutual* position and the parties providing "mutually acceptable facts" does not require agreement as to the facts involving the alleged violation. Instead, submitted facts are sufficient where they "reflect a mutual position that the parties have agreed is acceptable to them." Obviously, the Court plays no role in that *mutual position of the parties*. Now the Court realizes that, in the context of a settlement, facts may be different from the findings of facts resulting from a hearing. Still, it seems to be a misnomer, in the context of a citation, to call one side's, or the other's, statements to be facts. Rather, they are assertions about the parties' view of the allegations and or conditions surrounding a citation or order.

The Respondent submitted its supplement pursuant to the Commission's decision and the Court's Order in compliance with that decision. Respondent states that its Supplement "contains citation-specific facts … in further support of the proposed settlement." Supplement at 1 (emphasis added). Citing to the Commission's decision in *AmCoal,* the Respondent notes that the Secretary has consented "to the proposed settlement as set forth in the Joint Motion and does not oppose the filing of [its] settlement." *Id.* at 2.

Certainly it would have to be said that in the Respondent's 18 page Supplement, it provides a host of "facts" for each of the 32 citations involved.[10] Indeed, in reading the *facts* asserted by the Respondent, among many other claims,[11] it asserted that 13 of the citations involved no or low negligence, with 8 others involving low negligence and at least 5 that should be vacated and 5 that were not significant and substantial. What is truly amazing about all these *facts*[12] is that the Respondent agreed to settle all of the citations for a mere 30% off and to accept each as written.

Given the lengthy defenses asserted for each and every citation, the Court was quite surprised to read that those presented *facts* "are not exhaustive of the facts that AmCoal could or would have presented at the evidentiary hearing of this matter." *Id.* In fact, despite the passing of more than five years, AmCoal informed that it "has not prepared for trial and likely would have presented *different and additional* facts, dependent in large part upon the facts necessary for rebuttal." *Id.* (emphasis added).

[10] Nevertheless, Respondent states that while providing citation specific *facts*, "it is in no way endorsing or proposing a citation-specific settlement. Instead, AmCoal strongly believes that the 30% uniform penalty reduction negotiated and agreed upon by the parties to globally settle all of the disparate violations in this docket is 'is fair, reasonable, appropriate under the *facts*, and protects the public interest.'" Supplement at 2, quoting the phrase invoked by the Commission seven times in its *AmCoal* decision. (emphasis added). It is noted that the Commission did not adopt the claim that this docket amounted to a "global settlement." Indeed, it was only *after* this Court noted that there had been no claim that this docket constituted a global settlement that the Respondent then asserted that it was.

[11] Among other claims in its defense to these citations, the Respondent's supplement also contends that, for some of the citations, the number of persons affected and the characterization of the extent of the injury should be reduced.

[12] An appreciation of *facts* in the settlement context may be analogous to one who cries fire in a crowded theatre. If, in truth, there was no fire, it would be still be *a fact* that the claim of a fire was uttered.

The Parties Joint Motion to Approve Settlement and Dismiss Proceeding

The Joint Motion represents the Secretary's submission post the Commission's Remand to the Court in this matter.[13] ("Secretary's Submission"). Given the Commission's directive to provide the parties with 30 days to submit *facts* supporting the proposed penalty reductions, the Court, endeavoring to comply with the Commission's Remand Decision, asked the parties to underscore all *new* facts in their submission. The Respondent replied that its submission contains "important facts not previously mentioned in prior motions seeking approval of the parties' settlement, in addition to the new citation-specific facts set forth in AmCoal's separately filed Supplement." Respondent's email to the Court dated September 16, 2018.

For the Secretary's part, he "relies on the averments in the parties' Joint Motion to Approve Settlement, filed on September 7, 2018, and not on any motion filed previously. The Secretary respectfully declines to file, through the Commission's e-CMS, an underscored settlement motion as requested by the judge." Secretary's email to the Court dated September 14, 2018.

The Court can appreciate the Secretary's declination. The Secretary's Submission notes that the parties have agreed to an across-the-board 30% penalty reduction, from the proposed penalty amounts.[14] The Secretary also notes that AmCoal accepts all citations as written. Neither of these are *new* facts of any stripe. In an assertion the Court does not fully understand, the Secretary then advises that "in explaining his reasons for settlement,[the Secretary] is mindful that, should the Secretary make concessions, he risks vacatur, or other downward adjustments, to the enforcement actions and weakens his case in the event the settlement is denied and the case goes to hearing."[15] *Id.* at 2.

Of note, and new, the Secretary informs that the mine ceased production as of September 2016, and that the Respondent's other mine has also ceased production. *Id.* Thus, the Secretary states that "the mine operator's current status further support[s] the penalty reductions because there is less reason to employ the penalty process as a way to deter its alleged noncompliance with the Act." *Id.* However, the Secretary admits that when it reached this settlement agreement the mine was still operating and the Secretary was not aware of any plans to close to mine and

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[13] It is, in the Court's estimation, the Secretary's submission, although the Respondent consented to the granting of it. See Certificate of Consent.

[14] As noted, the proposed penalty already included a 10% reduction for good faith.

[15] In this regard, the Secretary cites to *Co-op Mining*, 2 FMSHRC 3475 (Dec. 1980). However the cited case appears entirely inapposite. That case involved a settlement where the parties' *own stipulation* showed no violation occurred, and thus is hardly the case here. Thus, *Co-op* stands merely for the proposition that "[c]ompliance with the Act and its standards is not fostered by payment of a civil penalty *where the stipulated facts establish that no violation occurred*." *Id.* (emphasis added). Further, it is clear that offers of settlements and settlements themselves, if rejected, cannot be used at hearing against concessions made for the purpose of settlement. If that were otherwise, settlement offers would not occur.

therefore the Secretary's position then is the same as now – it would support the settlement even if the mine were operating at full tilt.

Like a ship rolling at sea, the Secretary's position sways from port to starboard, asserting that the "[t]he facts regarding the mine operator's current [shuttered] status further support the penalty reductions because there is less reason to employ the penalty process as a way to deter its alleged noncompliance with the Act," while simultaneously declaring that "the fact that the proposed settlement preserved all of the citations as written to be a significant advantage of the compromise. This fact would have assisted the Secretary in future enforcement efforts against this operator. " *Id.* at 3-4.[16] That is, of course, if the mine ever reopens and as the same entity.

Utilizing its predictive skills, the Secretary's submission informs that he has also considered "a worst-case outcome," while also asserting that he "does not believe [that it] would occur," but that the if it did occur, there would be an approximate 50% reduction from the proposed penalty amounts. Further, with a brightened outlook about the settlement terms reached, the Secretary declares that "[e]ven if [he] were to substantially prevail at trial, and to obtain a monetary recovery *similar to or even exceeding* the amount of the settlement, it would not necessarily be a better outcome from the enforcement perspective than the settlement, in which all the citations are admitted and can constitute *a basis for future enforcement actions*.[17] A resolution of this matter in which all violations are admitted is of significant value to the Secretary." *Id.* at 4. Again, the "significant value" would be activated only if operations resume for that entity.

No matter. That the Secretary's submission does not get into any particulars about any of the individual citations, leaving it solely to the mine operator, through its counsel, to make declarations about the gravity and negligence, is not problematic because, under the Commission's decisions in *AmCoal* and *Rockwell Mining*, there is no need to do so.[18]

Application of the Commission's decisions in *Rockwell Mining* and *AmCoal*

Although the Commission decision in *AmCoal* concludes with the directive that the Court shall "determin[e] whether the proposed settlement is fair, reasonable, appropriate under the

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[16] If the mine ever does reopen, and as AmCoal, the Secretary solemnly remarks that the settlement by "ensuring that the paper record reflects the Secretary's views regarding the gravity and negligence of the operator's conduct … can affect the proposed or assessed penalty in future proceedings, can affect whether future citations are classified as unwarrantable failures within the meaning of section 104(d) of the Act, and can bear on how the citations are counted for purposes of determining whether the operator has demonstrated a pattern of violations within the meaning of section 104(e) of the Act." *Id.* at 4.

[17] Again, assuming that AmCoal ever reopens as AmCoal.

[18] Though no longer required, the Secretary has, in *numerous* past settlement motions, stated that a respondent's averments presented legitimate questions of fact which could only be resolved by going to hearing, and each of those settlements motions was approved by the Court.

facts, and protects the public interest," it does not directly express how this is to be applied. That general phrase, no matter how many times it is repeated, is not self-defining. Instead, the Court must look to the factors which the Commission expressed are to be applied.

Accordingly, all per the Commission's decisions in *AmCoal* and *Rockwell Mining*, the Court has not applied the criteria in section 110(i) in an overly rigid manner; notes that the facts supporting the settlement need not be tied to the six statutory criteria in section 110(i); notes that, in this instance, the operator has agreed to accept all of the citations as written; that it has given due consideration to the entirety of the proposed settlement package, including both its monetary and nonmonetary aspects; that the facts may be submitted by only one side with the only limit on that being a certification by the filing party that any non-filing party has consented to the granting of the settlement motion; that there is no requirement that a respondent's assertions of fact need to "present legitimate questions of fact; only that the *facts* reflect a mutual position *that the parties have agreed is acceptable to them.*

Therefore, pursuant to the *entirety* of the Commission's decisions in *Rockwell Mining* and *AmCoal*, and in obeisance to those decisions, the Court finds that the settlement motion contains:

1. the penalty proposed by the Secretary
2. the amount of the penalty agreed to in settlement
3. "facts," as the Commission has employed that term, in support of the penalty agreed to by the parties

On those grounds, the Court finds that the settlement motion meets the Commission's expressed requirements for settlement approval, as expressed in *Rockwell Mining* and *AmCoal*, and on that basis it is approved.

The settlement amounts are as follows:

Citation	**Assessment**	**Settlement**
8418392	$2,282	$1,597
8418393	$243	$170
8418394	$334	$234
8424959	$540	$378
8418397	$540	$378
8418399	$585	$410
8418400	$5,503	$3,852
8423999	$1,304	$913
8424965	$460	$322
8424967	$2,678	$1,875
8424502	$1,944	$1,361
8424503	$425	$298
8424970	$2,678	$1,875
8424508	$263	$184

8424509	$946	$662
8424002	$1,944	$1,361
8424000	$1,995	$1,397
8424001	$1,795	$1,257
7579858	$1,944	$1,361
7579878	$3,405	$2,384
8424511	$425	$298
8159274	$1,203	$842
8159277	$100	$70
8424512	$425	$298
8424012	$1,203	$842
8424013	$585	$410
7579993	$150	$100
8424982	$807	$565
7579995	$585	$410
8427401	$2,282	$1,597
8424983	$807	$565
8427403	$3,996	$2,797
TOTAL:	**$44,376**	**$31,063**

Each party hereby agrees to bear its own fees and other expenses incurred by such party in connection with any stage of this proceeding to date.

Payment shall be made to:

U.S. Department of Labor/MSHA
P.O. Box 790390
St. Louis, MO 63179-0390.

WHEREFORE, the motion to approve settlement is **GRANTED.**

It is **ORDERED** that the respondent pay a civil penalty of $31,063.00. Upon receipt of timely payment, the captioned case is **DISMISSED**.

SO ORDERED.

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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September 20, 2018

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of GEORGE M. SCOLES, Complainant, v. HARRISON COUNTY COAL CO., Respondents	DISCRIMINATION PROCEEDING Docket No. WEVA 2016-274-D MSHA Case No.: MORG-CD-2016-13 Mine: Harrison County Mine ID: 46-01318

DECISION

Appearances: Brian P. Krier, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, PA, Representing the Secretary of Labor

Philip K. Kontul, Esq., Ogletree, Deakins, Nash, Smoak & Steward, Pittsburgh, PA, Representing the Respondent

Before: Judge Andrews

This case is before me upon a complaint of discrimination brought by George M. Scoles ("Complainant"), a miner, against Harrison County Coal Company, ("Respondent"), pursuant to § 105(c) of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 815(c).

The Secretary of Labor, on behalf of George M. Scoles, alleges that Scoles was discriminated against in violation of his statutory rights after engaging in protected activities. A hearing was held in Pittsburgh, PA, on February 28, 2017-March 01, 2017, at which the parties presented testimony and documentary evidence. After the hearing, the parties submitted Post Hearing Briefs, which have been fully considered.

STIPULATIONS

The parties submitted stipulations as a joint exhibit. The following joint stipulations represent those where there is agreement:

1. Respondent The Harrison County Coal Company is incorporated under the laws of the State of Delaware and it operates a portal located in Mannington, West Virginia.

2. Respondent The Harrison County Coal Company operates the Harrison County Mine.

3. Respondent is an "operator" as defined in Section 103(d) of the Federal Mine Health and Safety Act of 1977, as amended (hereinafter, "the Mine Act"), 30 U.S.C. § 802(d).

4. Respondent is a "person" subject to Section 105(c) of the Mine Act, 30 U.S.C. § 815(c).

5. The United Mine Workers of America Local No. 1501 represents hourly production and maintenance employees at the Harrison County Mine.

6. Complainant, George M. Scoles, is currently employed as a Longwall Utility by Respondent The Harrison County Coal Company at the Harrison County Mine.

7. Complainant is a "miner" as defined in Section 3(g) of the Act, 30 U.S.C. § 802(g).

8. Complainant previously filed three § 105(c) discrimination complaints against the Respondent at case numbers 2015-19, 2015-05, and 2014-09.

9. George McCauley was not disciplined for any conduct occurring on September 3, 2015.

10. Complainant was not disciplined for any conduct occurring on September 3, 2015.

JX-1.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

Background:

At the time of hearing, George M. Scoles worked at the Harrison County Coal Mine in Mannington, West Virginia. Tr. 17. Scoles had worked as a coal miner for 11 years, as a belt

man, a block mason, a general inside laborer, and a longwall outby utility man. Tr. 17-18. Scoles became certified in West Virginia as a coal miner in 2006. Tr. 17.[1]

At the time of hearing, Scoles had been working as a longwall outby utility worker for 7.5 years, responsible for supporting the longwall, reporting to the longwall outby foreman, Corey Raad. Tr. 18-19, 26. His duties included getting supplies to the longwall face for belt setups, power moves, running of the scoop, and other assorted daily tasks. Tr. 18. Scoles had also served as a miners' representative for approximately 7 or 8 years. Tr. 20. In this capacity, he accompanied federal and state mine inspectors approximately twice per week. Tr. 20. Scoles was a member of the United Mine Workers of America, Local 1501, located in Shinnston, West Virginia. Tr. 19.

Scoles had raised safety concerns to many members of mine management, including his shift foreman, Jim Coles, foreman, Mike Allman, longwall coordinator, George McCauley, assistant superintendent, Brad Hibbs, and the superintendent, Scott Martin. Tr. 22-23, 25-27. He had raised safety issues ranging from bad rollers to excessive float dust in places that needed additional rock dusting. Tr. 23. He testified that some in management have taken his concerns seriously, but with others, "it falls on deaf ears." Tr. 24. He further testified that based on some safety matters not being attended to after he reported them, he believed that some in management think that he is "blowing smoke." Tr. 24-25.

George McCauley was the longwall coordinator and a member of mine management.[2] Tr. 25. He had worked in this position off and on since December 2013.[3] Tr. 370-371. In this position, McCauley was in charge of the production and maintenance of the longwall.[4] Tr. 371. McCauley oversaw safety aspects of the longwall, planned longwall moves, ordered supplies, and was generally in charge of the entire longwall department. Tr. 371. The longwall accounts for approximately 98% of the mine's total production. Tr. 371. McCauley described the longwall as "the life blood of our coal mine." Tr. 385, 418. Other miner witnesses described McCauley as being more concerned with production than with safety, testifying that "he's just there for the tonnage, and that's all he is worried about," and stating that "he seems to get irritated if there's any sort of safety concern that may halt production." Tr. 302, 353.

McCauley supervised and directed approximately 50 hourly employees and 12 salary employees. Tr. 372. He had three people at the mine who were ranked above him: Mine Foreman, Mike Allman, Assistant Superintendent, Brad Hibbs, and Superintendent, Scott Martin. Tr. 372.

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[1] The transcript incorrectly states Virginia, rather than West Virginia. *See* Tr. 17.

[2] McCauley testified at hearing.

[3] Prior to working at Harrison County Mine, McCauley worked at the Robinson Run Mine since January 2006. Tr. 370.

[4] McCauley is authorized to discipline employees by giving them verbal or written warnings. Tr. 373.

Scoles worked under the authority of McCauley, and McCauley had the authority to issue orders to Scoles. Tr. 26. Scoles had known McCauley for approximately 7.5-8 years, and during that time Scoles had raised safety concerns and complaints to McCauley on at least 10 occasions. Tr. 25-27. Examples of such complaints include issues with the head gate, rock dust on the tail, walkways on the belt line, and issues with rollers. Tr. 27. Scoles testified that McCauley responded to his safety complaints by ignoring them and walking away from him. Tr. 27-28. Scoles did not believe that McCauley took his safety concerns seriously. Tr. 28. He testified about an example where there was a hot roller and a bad roller, and McCauley said on the radio, "if the roller is not on fire, don't turn the belt off." Tr. 28.

Eric Efaw had worked with McCauley for approximately six to eight months.[5] Tr. 296. During that time, he never personally raised safety concerns or complaints to McCauley, but he witnessed Scoles doing so on a number of occasions. Tr. 296-297. Efaw described Scoles as a "very safety conscious guy. He looks out for everybody." Tr. 297. At hearing, he described examples of this, such as making sure that the haulage where they drive their scoops were watered down, making sure that trash was picked up, making sure that rock dusting was performed, and the like. Tr. 297. Most of the time, McCauley responded by brushing off the concerns or saying that if Scoles wanted it done, he should do it. Tr. 297.

Efaw testified that he believed that McCauley needed to place a higher priority on safety. Tr. 300. He described how they went through a clay vein one time and the roof was falling, and McCauley ordered them to keep going and not worry about it. Tr. 300. The miners wanted to slow down and take their time, but McCauley ordered them to mine faster and go as fast as they could. Tr. 300. They were trying to keep the shields pulled in so the roof would not fall, but he told them not to worry and let it fall. Tr. 300-301. Efaw feared that the roof would fall and bounce off the shear and hit one of the miners or a hydraulic hose, but McCauley told them not to worry about it. Tr. 301.

The shear operators, Shawn Efaw and Ben Brummage, raised the safety concern to McCauley. Tr. 301. Efaw testified that he did not believe that McCauley took their concern seriously. Tr. 301. He testified that he believed that McCauley doesn't "look out for the miners. I feel that he's just there for the tonnage, and that's all he is worried about." Tr. 302.

In the five years that Tyler Hixenbaugh had worked with McCauley, he had raised numerous safety concerns.[6] Tr. 325. These included complaints about being told to run the

[5] At the time of hearing, Eric Efaw worked as a general inside laborer restricted at the Harrison County Coal Mine for two years and two months. Tr. 283-284, 302. Efaw is certified as a coal miner in West Virginia. Tr. 284. Efaw had worked for over 20 underground coal mines in his career. Tr. 284.

[6] Tyler Hixenbaugh testified at hearing. At the time of hearing, Tyler Hixenbaugh had worked as an underground coal miner for eight years, six of which were at the Harrison County Mine. Tr. 315. He worked as a longwall face helper for six months, and previous to that worked as a longwall shear operator, mechanic, and shield man. Tr. 316. Hixenbaugh was an hourly employee and a member of the UMWA Local 1301. Tr. 316-317.

longwall, when the work on the drum remained unfinished. Tr. 325-326. Hixenbaugh feared that the drum would fall off on him, and McCauley responded by guaranteeing that it would not fall off. Tr. 326. Because Hixenbaugh felt it was unsafe, he refused to do the work. Tr. 326. Hixenbaugh did not get disciplined for his work refusal. Tr. 332-333.

William Hall had worked with McCauley for approximately three years, and testified that when others raised safety complaints with him they were not received well.[7] Tr. 353. McCauley would get irritated if there were any safety concerns that might halt production. Tr. 353.

Scoles and McCauley do not have a good working relationship.[8] Tr. 28. Scoles attributed the poor relationship to McCauley not liking him because Scoles raised safety concerns. Tr. 28-29. Scoles testified that McCauley often talked to him in a demeaning manner and tried to belittle him. Tr. 29. Further, Scoles testified that McCauley tried to harass him by repeatedly making him do jobs like picking up garbage by hand. Tr. 29-30. Usually such "detrashing" jobs are performed as a group, but McCauley would make Scoles do it alone. Tr. 30. Scoles believed that McCauley singled him out for specific tasks, testifying that "it's like he'll come down and hunt for me to give me something to keep me away from the crew or the normal day process." Tr. 31. Scoles testified that such treatment interfered with his ability to perform his job. Tr. 31.

In reference to questions about whether McCauley singled out or picked on miners, Efaw described McCauley as a "headhunter" and a "bully." Tr. 297-298. He described McCauley as going after individuals and trying to get under their skin. Tr. 298. "Pretty much if you question his authority, he will pretty much single you out the rest of the day." Tr. 298. Efaw witnessed this conduct on several occasions, directed at Scoles, Efaw's brother, Shawn Efaw, and others. Tr. 298-299. Efaw had witnessed McCauley pick on Scoles. Tr. 299. He described how, on several occasions, McCauley would walk around and ask where Scoles was, go after Scoles, and then proceed to argue with him. Tr. 299. Efaw never witnessed Scoles seeking out McCauley in a similar manner. Tr. 299.

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[7] William Hall III testified at hearing. At the time of hearing, William Hall had worked at the Harrison County Mine for approximately eight years as a classified mechanic. Tr. 337. He has also been a member of the UMWA. Tr. 337. He was certified as a coal miner in 2004 or 2005 and became a certified electrician in 2011. Tr. 337-338. Hall previously worked as a contractor in several smaller mines. Tr. 337.

[8] It is common for miners to have nicknames, which they do not choose. Tr. 563. Scoles and other miners refer to McCauley as "Chicken George." Tr. 261-262, 478-479. There was a great deal of testimony about Scoles and other miners referring to McCauley as "Chicken George," much of which I find irrelevant to the issues at hand.

Outby foreman, Brian McKinney, testified at hearing concerning an alleged conversation he had with Scoles where Scoles allegedly said that he wanted to "fry the chicken." Tr. 488. I do not credit McKinney's hearsay testimony as it was vague, irrelevant, undeveloped, and uncorroborated.

Scoles has complained about McCauley's treatment of him to his shift foreman, the superintendent, and the HR supervisor. Tr. 33. Scoles testified that he did not believe that mine management took his concerns about McCauley seriously. Tr. 33-34.

In 2015, a short meeting was held with the union president, Chris Yanero, Scoles' mine committeeman, Matt Miller, HR representative, Chris Fazio, assistant superintendent, Brad Hibbs, and McCauley. Tr. 34. As a result of that meeting, Scoles was separated from working under McCauley for a short period, and he was removed from his position and assigned other duties throughout the mine. Tr. 34-35. Scoles was again separated from working under McCauley from January 2016 until the time of hearing. Tr. 35. At the time of hearing, Scoles was not working his bid job in longwall outby utility. Tr. 35.

Prior to bringing the discrimination complaint at issue in the instant case, Scoles had filed three other discrimination complaints against Harrison County Mine, several of which involved McCauley. Tr. 36-39, 120-123; JX-1. Ryan Besedich had worked with Scoles for approximately ten years, and knows of him raising safety concerns and complaints to numerous people in mine management, including the shift foreman, McCauley, and a lot of other foremen.[9] Tr. 246. Scoles had a reputation for being a miner who looked out for safety, and who brought it to management's attention. Tr. 246.

The Head-Butting Incident on September 3:

On September 3, 2015, Scoles worked the day shift from 8:00 a.m. to 4:00 p.m. on the 1E longwall section as the longwall outby utility man. Tr. 40. Corey Raad was his immediate foreman, Mike ("Ziggy") Zikafoose was the maintenance foreman, and Jason Tennant was the longwall face boss. Tr. 40.

For the first half of the shift on September 3, 2015, they followed their normal work schedules, which included belt setups, supplying the face, loading the duster, and other related activities. Tr. 41. Zikafoose did not issue any orders to Scoles before lunch.[10] Tr. 42. After lunch, Scoles took Raad on his fire boss run, and Raad told Scoles that when he returned he should help some other miners put the duster on the scoop. Tr. 42.

When Scoles returned there was another scoop which had a belt structure on it that had fallen off. Tr. 42. Scoles encountered Zikafoose at the center of the entry at the No. 2 heading, and Zikafoose asked Scoles to go to the No. 3 heading to get the bucket scoop. Tr. 42-43, 226. Other miners, including Flint Leichliter, Ryan Besedich, and Bill Hall were present with Zikafoose when he issued the order. Tr. Tr. 43. Scoles responded, "Okay, sir. I'll go get it." Tr. 43, 340.

[9] Ryan Besedich testified at the hearing. Besedich had worked at the Harrison County Coal Mine for 12 years. Tr. 223-224. In September 2015, and at the time of the hearing, he worked as an underground mechanic and electrician. Tr. 224.

[10] The miners refer to lunch as dinner. Tr. 42.

Scoles requested that Besedich help him by opening the doors so he could bring the scoop through.[11] Tr. 44, 227. Scoles and Besedich then proceeded to the No. 3 heading. Tr. 44. When they arrived at the scoop, it had gob in it. Tr. 45. Besedich stood at the No. 3 heading, while Scoles went down to the scoop to do his preoperational checks. Tr. 227-228. McCauley came up to Besedich and asked him about the charge of the scoop, and Besedich replied that McCauley would have to speak to Scoles who was at the scoop performing the preoperational checks. Tr. 228-229.

McCauley arrived a few seconds later, and asked what had happened. Tr. 340. Zikafoose replied that "some moron had him load the structure on a fork scoop," that it fell off, and that he had instructed Scoles to get a bucket scoop from the intake to help him load it. Tr. 340. McCauley appeared irritated, and then went through the double doors, and left Hall and Zikafoose standing at the scoop. Tr. 340, 343.

Soon thereafter, Scoles saw McCauley walking towards him, and Scoles asked whether it was okay to dump the gob from the scoop. Tr. 45, 229. McCauley began yelling at him and asking him why he was not shoveling the belt.[12] Tr. 45. Scoles responded by telling McCauley that no one had instructed him to work the belt line, and Zikafoose ordered him to come to the heading to get the bucket scoop. Tr. 46, 229. McCauley said that he would check to see if Scoles had been ordered to do so, and Scoles responded that he could check with whomever he wanted. Tr. 229.

McCauley continued to badger Scoles, telling him he needed to get a pick or shovel, and shovel the belt. Tr. 46. Scoles described McCauley's demeanor as "hostile," "mad," and "very demeaning." Tr. 46. Besedich described McCauley's demeanor as "aggressive," "mad," "upset," and "irritated." Tr. 230. Besedich had worked with McCauley for several years, and testified that McCauley's demeanor was different than usual. Tr. 231.

Scoles responded, "Sir, I have no problem shovel[ing] the belt, but those were not my orders." Tr. 46. As he continued up the No. 3 heading, McCauley continued to badger Scoles about why he was not shoveling the belt, and Scoles responded, "You're not going to talk to me in this manner, and I have no problem shoveling the belt. You're not going to intimidate me, and you're not going to harass me. I'll go shovel the belt like you asked." Tr. 47, 230, 341. Scoles testified that he did not raise his voice at McCauley during this exchange. Tr. 47-48.

Scoles was having this conversation as he was walking back to the air lock doors, with Besedich in front. Tr. 48, 231. Besedich opened the first set of air lock doors, and they all went

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[11] These were two sets of air lock doors that miners travel through from the No. 2 entry to No. 3, which are used to keep the air flowing. Tr. 44.

[12] Much of McCauley's testimony about this incident is discounted because I find it largely not credible. His descriptions of events were self-serving and wholly at odds with the other witnesses to the event.

through them.[13] Tr. 49. Scoles testified that McCauley's "badgering" of him continued in the air lock, and Scoles kept replying that McCauley wasn't going to harass or intimidate him. Tr. 49. Scoles judged McCauley's behavior as harassing and intimidating because of McCauley's tone of voice. Tr. 49-50.

Besedich opened the second set of air lock doors, and they were all approaching them.[14] Tr. 50. Scoles turned around, stopped, and said, "Sir, I have no problem going to shovel the belt line." Tr. 50-51. Scoles testified that at that point, McCauley "came towards me aggressively." Tr. 51. Scoles said, "Sir, you need to get out of my personal space." Tr. 51-52, 232, 341. McCauley stopped less than an arm's length from Scoles, took a step back, and then head-butted Scoles. Tr. 51-52, 233-234. McCauley made contact with the bill of Scoles' helmet and as a result, Scoles' helmet fell off his head. Tr. 51-52.

Scoles testified that the action was "a hostile and aggressive contact." Tr. 52. Besedich, who was standing approximately 15-20 feet away, testified that it was an "aggressive step motion forward, and their heads hit." Tr. 234. Besedich testified that it was not a light contact, and it did not appear to be accidental. Tr. 234. Besedich estimated that there were a couple feet of space to each side of Scoles, and that McCauley could have gone around him if he wanted. Tr. 235. Scoles described being "shocked" and "stunned" and felt that his "individual safety was jeopardized." Tr. 53. Though Scoles and McCauley had a long history of disagreement, this was the first time where there had been physical contact. Tr. 53-54.

Besedich testified that Scoles and McCauley were arguing when McCauley head-butted him, but there was no chance that McCauley accidentally head-butted Scoles from just being too close to him. Tr. 259. Besedich described the way that McCauley stepped forward as "an intimidation." Tr. 259. Scoles did not step towards McCauley. Tr. 279, 347.

Hall described the assault as Scoles, who was stopped at the time, told McCauley to get out of his personal space, and then "took one swift step forward and head-butt[ed] Mr. Scoles." Tr. 341, 346. Hall described it further as "one swift step, [and] a forward lunge leading with his head." Tr. 346-347. He described it as intentional, because it came from a full stop. Tr. 347. Scoles' head and shoulders went backwards from the contact. Tr. 348. Hall described being in shock from what he saw, because he had never before witnessed a physical altercation in the mines. Tr. 348-349. Besedich described being in shock because he had never seen anything like what he witnessed. Tr. 236. Besedich felt that McCauley's actions towards Scoles posed a safety issue. Tr. 236. He testified that if one had to work around someone who assaulted you, you could lose focus from your job. Tr. 236.

McCauley testified that there was no head-butt, but rather that his left arm merely touched Scoles' left arm. Tr. 391-393. McCauley testified that he then said, "don't touch me,

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[13] The two sets of air doors are approximately 50 feet apart from each other. Tr. 254.

[14] In the area around the air lock doors, the surface is uneven, with the center part towards the heading being higher. Tr. 158. Scoles and McCauley were standing in the cross-cut. Tr. 158.

man." Tr. 392. McCauley testified that at most the contact was "a light brush of the arms."[15] Tr. 395.

After McCauley made physical contact with Scoles, Scoles looked at McCauley and said, "I can't believe you did this. There's witnesses here," referring to Besedich and other members of the crew. Tr. 54, 235, 349. McCauley responded, "You need witnesses" or "I'm glad you have a witness." Tr. 54, 235-236, 349.

After the physical altercation, McCauley went to the four-way intersection and instructed Zikafoose to come over to him, and he gave Scoles the orders again to shovel the belt line. Tr. 237, 341. McCauley said, "Mr. Scoles, will you please come over here and shovel the belt." Tr. 55, 341. Scoles responded, "Well, sir, like I said, I have no problem shoveling that belt. If those are my orders, that's what I'll do." Tr. 55, 237. McCauley then told Scoles, "I'm going to give you this tape measure. I need 77 inches of clearance at 74 block on the belt line. You do know how to read this, don't you?" Tr. 341. Scoles replied, "I do." McCauley then said, "I need 77 inches of clearance, so I need you to get a pick and get a shovel and wherever you don't have 77 inches, you pick and you shovel. Get on your knees and shovel if you have to, but I want 77 inches of clearance, so get to picking and get to shoveling." Tr. 341-342. Scoles then proceeded to grab a shovel and pick, and shoveled the belt. Tr. 56.

Usually Scoles finished his shift at 4 pm, but on that day he did not finish his work until 6 pm. Tr. 57-58. When Scoles arrived at the surface, he looked around for a union representative or a supervisor, but everyone had already left for the evening. Tr. 58. Scoles did not immediately call the police because he thought they may not have jurisdiction in the mine.[16] Tr. 164-165.

That evening, Besedich and Hall went outside to fill out the permissibility books and McCauley came down and asked Besedich and Hall if they felt comfortable being there. Tr. 238, 342. Besedich answered that he was fine. Tr. 238, 342. McCauley responded, "because I don't want to be accused of badgering the witness." Tr. 238, 342-343. Bill Hall was with Besedich when McCauley said this. Tr. 238. Besedich described McCauley as having a smirk when he said it as if he thought it was funny. Tr. 239.

When Scoles arrived home, he contacted his union president, Chris Yanero, and reported that he was assaulted by McCauley. Tr. 58-59.

The following morning, on September 4, Scoles reported the incident to Harrison County Mine management. Tr. 59. Scoles first went to find his union representatives, Matt Miller and Perry Hefflin. Tr. 59. Scoles told Assistant Superintendent Hibbs that he wanted to report an incident from the day before, but Hibbs did not want to hear it, saying, "you all don't tell me

[15] I find much of McCauley's testimony to be not credible, contrary to reason, and contrary to all credible witnesses to the event.

[16] Criminal charges were filed in October. Tr. 402. The charges were eventually dismissed. Tr. 402.

when we're going to have a meeting. I instruct when we're going to have a meeting."[17] Tr. 60, 544. During this encounter, Yanero called Hibbs. Tr. 60. Scoles tried to return to work, but Hibbs grabbed him by the arm and, as soon as he got off the phone, told Scoles that he would "check this out." Tr. 60-61, 545. Scoles told Hibbs the entire account of the incident, and Hibbs responded that he would check it out. Tr. 61. Scoles felt that his complaint "fell upon deaf ears." Tr. 62.

McCauley testified that he first became aware of the allegation that he head-butted Scoles several days later when Hibbs told him about it. Tr. 398-399, 455. McCauley testified that he was in disbelief, and that he responded to Hibbs, "you got to be kidding, right?" Tr. 399-400. McCauley denied the allegations to Hibbs. Tr. 399. Hibbs replied that he "would be checking into it." Tr. 400. McCauley was not aware of whether Hibbs conducted an investigation into the matter. Tr. 400. McCauley was not asked to write a statement. Tr. 456.

Hibbs did not suspend McCauley pending an investigation. Tr. 522, 567. Hibbs conducted a cursory investigation that included a single 30-second conversation with McCauley, vague conversations with Besedich and Hall 7-10 days after the incident, and conversations with Scoles and Zikafoose. Tr. 239, 350-352, 455-456, 545, 565; RX-R. Scoles, Besedich, and Hall described the contact that McCauley made with Scoles as severe. RX-R. Hall compared the head-butt to "deer tickling antlers," which he described at hearing as "pretty aggressive," and "a whitetail male deer hitting another deer's antlers." Tr. 352-353; RX-R. Hibbs' investigation was so cursory that he never asked Hall to elaborate on what the phrase meant, but simply assumed that it meant that it referred to "light contact" that was not severe. Tr. 548-549, 573-574; RX-R. Hibbs concluded that the contact Scoles complained of was "an incidental contact based on the activity." Tr. 547. McCauley, in his 30-second conversation concerning the incident, was the only individual who described the contact as "incidental." RX-R. Hibbs concluded that McCauley should not receive any discipline. Tr. 549-550. Every witness told Hibbs that there was physical contact, and some said the physical contact was more severe than others. Tr. 565-566.

Hall testified at arbitration about the incident and testified that, as a result of his arbitration testimony, McCauley treated him differently. Tr. 354. Prior to the head-butting incident, McCauley and Hall would talk or joke daily about hunting or fishing or work. Tr. 354. However, following Hall's arbitration testimony, McCauley did not talk to Hall for approximately 8 months, including not giving him work orders. Tr. 354. Hall testified that he was concerned that his testimony at the instant discrimination hearing would affect his relationship with McCauley because he received the silent treatment from McCauley following the arbitration. Tr. 355. Hall has also heard that McCauley began denigrating Hall's abilities as a mechanic behind his back following the arbitration. Tr. 355.

[17] Brad Hibbs testified at hearing. At the time of hearing, Brad Hibbs had worked for Harrison County Mine for over 13 years. Tr. 542. He had worked as the assistant mine superintendent for over two years. Tr. 542. His job duties include overseeing operations and mine plans, as well as assisting the superintendent. Tr. 542.

McCauley testified that an act of violence or intimidation would be a safety issue at the mine. Tr. 435-436. He further stated that accusations of assault in the mine were very rare. Tr. 436. He testified that Harrison County Mine had a zero-tolerance policy for acts such as assault that doesn't distinguish between hourly employees and management. Tr. 436-437.

The Mantrip Incident on September 8:

Several days after the head-butting incident, on September 8, 2015, Scoles was working the day shift at the 1E longwall section at the Harrison County Mine. Tr. 62. Scoles and other miners would get from the surface to the 1E longwall section by taking an elevator to the bottom, and then walking to the track mantrips. Tr. 62-63. The mantrip was a 15-man personnel carrier that rode on tracks. Tr. 63. On this mantrip, there are two enclosed compartments, where five or more miners could sit, one on each end of the mantrip, and in the center was the driver's seat and jump-seat.[18] Tr. 63-64.

To enter the mantrip, one must first remove the safety chain before lowering oneself into the compartment by grabbing hold of a small handle on the ceiling. Tr. 65-66. The miners usually carry a good deal of equipment, including a PPE, a rescuer, a radio, a light, lunch buckets, and some detectors and a tool pouch. Tr. 66, 243.

Scoles was seated in the front of the mantrip, in the direction of travel, with his back toward the driver and the jump-seat. Tr. 64. There were five or six other miners seated in the compartment with Scoles. Tr. 66. The miners sitting in the compartment were staggered, with miners sitting across from Scoles, legs interlocked. Tr. 65. Tyler Hixenbaugh was seated directly across from Scoles, and had his legs interlocked with Scoles' legs. Tr. 65, 318. Besedich was sitting on the outby end of the mantrip, on the other end from Scoles. Tr. 242. The miners had their legs bent up, with little room for movement. Tr. 66. Besedich described it as "hard" to get out of a mantrip in the regular compartments, stating, "if there's a full crew of guys, it's tight." Tr. 243.

The jump-seat is laid out differently, so that a miner can step right into it. Tr. 67. The jump-seat and driver seat are easier to get out of because one's legs are not interlocked with another miner's legs, and because one does not have to step down into the seats. Tr. 68.

On September 8, 2015, the mantrip encountered a series of switches that had to be thrown or flipped over in order to change the travel of the track as the mantrip made its way to the 1E section. Tr. 69, 288-289. No one in particular is assigned to throw switches when riding the mantrip. Tr. 71.

[18] The seats in the mantrip are first-come-first-serve. Tr. 64.

Eric Efaw threw the first switch.[19] Tr. 289. Efaw testified that when they pulled up to the switch, he jumped out quickly and threw it because he was in a hurry to get to work that day. Tr. 289. At that time, Efaw did not know that McCauley was in the jump-seat, and only learned of the fact later. Tr. 289-290.

When the mantrip arrived at the second switch, they sat for a few seconds. Tr. 70. People began yelling from the back and front of the mantrip, "Get the switch. Get the switch." Tr. 70. Scoles recognized Jason Tennant's voice yelling, "Get the switch. Get the switch. Get the fucking switch."[20] Tr. 70. The yelling lasted for a couple of seconds, and Scoles described it as a game that everyone played in the morning.[21] Tr. 70-71.

Though it was not part of Scoles' official duties to throw the switch, Scoles voluntarily unhooked the chain, got out of the mantrip, and threw the second switch. Tr. 71, 290. When he did so, he saw that McCauley was sitting in the jump-seat. Tr. 72. This was the first time that Scoles saw McCauley at the 1E section. Tr. 73. Scoles thought it unusual that McCauley did not flip the switch, because it was "past practice and customary in the mines that the guy in the jump-seat throws the switch." Tr. 72. Scoles based this understanding on his ten plus years of experience at the mine at issue, as well has his experiences at five other mines that had track haulages. Tr. 72-73.

Besedich similarly testified that it was common practice at the mine that if there is someone in the jump-seat, that person throws the switches. Tr. 244. He testified that he had sat in the jump-seat on numerous occasions, and it is easier to get out of the jump-seat than from the compartment. Tr. 243-244. Hixenbaugh similarly testified that the person in the jump-seat typically throws the switches. Tr. 319. Besedich and Hixenbaugh each described it as an "unwritten rule" at Harrison County Mine and other mines they had worked at with track haulages. Tr. 244-245, 319-320, 323-324. Besedich testified that he has thrown the switch from the compartment when there is no one sitting in the jump-seat, but he has never done so when there is someone in the jump-seat and there is a full crew in the mantrip as there was on September 8. Tr. 268-269.

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[19] Efaw rode on the mantrip on September 8, 2015, with Scoles and McCauley. Tr. 284. At that time, he was working as a general outside laborer, restricted. Tr. 302. Efaw was seated in the back of the mantrip, facing inby, in the direction of travel. Tr. 285. His nickname in the mine was "Red." Tr. 405.

[20] Scoles used the word "f'ing" at hearing, but it was clear that the actual swear words were used. Tr. 70. Jason Tennant testified at hearing. At the time of hearing, Tennant worked as the assistant shift foreman on the midnight shift at Harrison County Mine. Tr. 589-590. His duties include lining up the shift, fire bossing, and visiting areas in the coal mine that are his responsibility. Tr. 590. Tennant has previously worked as the fill-in section foreman, outby compliance, and longwall face foreman on the day and midnight shifts. Tr. 590. On September 8, 2015, Tennant was working as the day shift face boss. Tr. 590. He was present during the derail incident. Tr. 590. Tennant was driving the mantrip on the day of the incident. Tr. 591.

[21] The mantrip had a diesel engine, which was fairly loud, so people had to yell. Tr. 75.

Hixenbaugh had worked with McCauley for approximately five years, and had traveled in the mantrip with McCauley approximately 30 times. Tr. 323. Hixenbaugh testified that when McCauley has sat in the jump-seat, he recalled McCauley throwing the d-rail switch. Tr. 323-325.

McCauley testified that the unwritten rule in the mine was that the "person closest and [with] easiest access would be the one that would get out and throw a switch or throw a d-rail." Tr. 462. He repeated that it would be a combination of closeness and easiest access, and not just closeness. Tr. 462.

The mantrip next arrived and stopped at the d-rail after it left the 1E switch.[22] Tr. 74, 290. When it stopped, everyone began yelling, "Get the d-rail. Get the d-rail." Tr. 74-75, 290-291. Tennant said, again, "Get the fucking d-rail" to no one in particular. Tr. 74-75, 241, 417, 604. Scoles testified that he believes that McCauley yelled, "Get the d-rail," to which Scoles responded that it was the responsibility of the person in the jump-seat to get the d-rail. Tr. 74-75.

Everyone continued to yell to get the d-rail, and Scoles repeated that the person in the jump-seat should get the d-rail. Tr. 75. Efaw grew tired of waiting, so he got out to get the switch. Tr. 290-291. When Efaw got to the jump-seat, McCauley leaned forward and put his hand on Efaw's chest and told him "I got it. Go sit back down." Tr. 291. So Efaw turned around and went back to his seat. Tr. 291. This was the first instance that Efaw saw that McCauley was sitting in the jump-seat.[23] Tr. 292. Efaw testified that there is "an unspoken rule of coal miners" that dictates that if there's somebody sitting in the jump-seat, that person throws switches. Tr. 292. This is because it is easiest for that person to get out of the ride. Tr. 292. Efaw based his understanding of this rule on his time at Harrison County Mine, as well as the twenty or so other mines that he has worked at. Tr. 293.

McCauley then exited the mantrip toward the direction of travel, shined his lights directly in Scoles' face, and said, "You need to throw the d-rail."[24] Tr. 77, 418. McCauley was standing right next to Hixenbaugh, facing opposite the direction of travel. Tr. 77. McCauley had his arm up on the mantrip, standing above Scoles, with his light was shining into Scoles' face.[25] Tr. 77-78. Scoles felt it was significant because in the mines, one is not supposed to shine one's light in

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[22] The d-rail or derail is a device that derails the mantrip if it gets out of control, rather than allowing it to proceed into the main haulage. Tr. 73-74. The d-rail has a handle that must be flipped over in order to proceed towards the section. Tr. 74.

[23] When Efaw previously threw the switch on that day, he did not know someone was sitting in the jump-seat. Tr. 292.

[24] After reviewing his deposition testimony, McCauley testified that Hixenbaugh was the closest to the d-rail. Tr. 467-470.

[25] McCauley testified that he did not purposefully shine the light from his helmet into Scoles' face. Tr. 418.

another miner's eyes because it blinds them. Tr. 78. Scoles did not have a lamp on that day. Tr. 78.

McCauley then said, "Scoles, get the d-rail." Tr. 75. Scoles responded, "Sir, the man in the jump-seat, that is his responsibility." Tr. 75. Scoles responded in this way because in his experience in the mines, it was always the responsibility of the man in the jump-seat to flip switches. Tr. 75-76. McCauley responded by again telling Scoles specifically to get the d-rail. Tr. 76. Scoles responded, "Sir, I feel like you're just singling me out and harassing me." Tr. 76. Scoles said this because of the September 3 head-butting incident, and because he felt that McCauley did not like him. Tr. 76. McCauley responded by saying again, "Get the d-rail." Tr. 76. Scoles again explained to McCauley that he felt McCauley was harassing him. Tr. 79, 419. Scoles testified that he felt intimidated because McCauley had physically assaulted him four days prior, and now was standing above him blinding him with a light in his eyes. Tr. 79.

McCauley called Tennant to come to the opening of the mantrip, saying "back me up." Tr. 79, 293. Tennant got out of the mantrip, and Efaw heard Tennant say, "somebody just get the damn d-rail." Tr. 293. McCauley once again ordered Scoles to get the d-rail, and said, "Do you understand what I'm telling you?" Tr. 79. Scoles responded, "Sir, you are harassing me and singling me out." Tr. 79. McCauley then ordered Scoles to exit the mantrip. Tr. 79. Scoles started exiting the mantrip, and said to McCauley, "Sir, I don't have a Solaris on me. Do you understand that?"[26] Tr. 80. McCauley responded, "Don't worry, somebody will be by here directly to pick you up." Tr. 80, 294.

McCauley then went to the front of the vehicle and threw the d-rail. Tr. 421. The mantrip proceeded through, McCauley threw the d-rail back, returned to his seat, and the mantrip continued toward the section. Tr. 421.

McCauley, Tennant, and Hixenbaugh were all closer to the d-rail than Scoles. Tr. 80. Efaw testified that it would take approximately 15-20 seconds to get out of the compartment of the mantrip, throw the d-rail, and get back in. Tr. 294. He estimated that it would take 10 seconds or less from the jump-seat. Tr. 295. He estimated that they were stopped at the d-rail that day for at least five minutes. Tr. 295.

McCauley did not take any measures at that time to ensure that Scoles was escorted out of the mine. Tr. 421. When they were halfway to the section, McCauley had Tennant stop the mantrip so McCauley could use the phone. Tr. 421. McCauley called Hibbs and told him that Scoles was being insubordinate by refusing to throw the d-rail. Tr. 422. He told Hibbs that he left Scoles along the tracks and that someone would be along to talk with him. Tr. 422.

After speaking with Hibbs, McCauley spoke with the day shift foreman, Jim Coles. Tr. 423. McCauley told Coles that he "had a situation" with Scoles, that Scoles refused to throw the

[26] A Solaris is a three-gas detector that detects CO, Oxygen, and Methane. Tr. 80. Scoles did not have a Solaris on him because he was working on a crew where the outby foreman had one. Tr. 81. Under federal and West Virginia law, a miner is required to have a three-gas detector if he is by himself. Tr. 81, 477.

d-rail and was being insubordinate, and that Hibbs wanted McCauley to contact Coles to bring Scoles outside. Tr. 423. Coles responded that he would get Scoles out of the mine. Tr. 423.

Scoles was left alone for an hour and a half to an hour and forty minutes without a multi-gas detector, after the mantrip went to the section without him. Tr. 82. Scoles' shift foreman, Jim Coles, eventually picked him up. Tr. 82. Scoles was sent home on September 8, and not permitted to return to work the following day. Tr. 86-87. He was suspended from work pending an investigation. Tr. 504.

Scoles did not believe that McCauley's order concerning the d-rail was valid because he felt that McCauley was harassing him and singling him out, as well as trying to cover up what McCauley did several days prior. Tr. 83.

During lunch that day, Efaw asked Bill Hall what happened with Scoles, and Hall replied that they took him outside and sent him home. Tr. 295.

Later in the evening, McCauley spoke with Hibbs again. Tr. 425. Hibbs met with Scoles and union president Chris Yanero later in the day. Tr. 550-551. Hibbs testified that Scoles admitted that the order he received was a direct and safe order, but that he didn't follow it "because it was dumb." Tr. 551.

Hibbs testified that insubordination was a serious offense because "it disrupts whatever activity is taking place. No matter what it is, it's a disruption, and it stops the flow of work, and in this case, travel." Tr. 554.

McCauley then spoke and with Chris Fazio in Human Resources the following day. Tr. 425. He spoke with Superintendent Scott Martin some time later. Tr. 425. McCauley testified that he did not have any role in deciding whether Scoles would be disciplined. Tr. 425. When Scoles was suspended pending investigation, Fazio was not aware that Scoles had accused McCauley of assaulting him days earlier. Tr. 522. However, Hibbs was investigating both the head-butting and mantrip incidents at around the same time. Tr. 570.

Brad Hibbs informed Fazio of the September 8, 2015 incident in the mantrip between Scoles and McCauley the day after it occurred.[27] Tr. 503-504. Hibbs told Fazio that Scoles was directed to throw the d-rail and refused to do so, and that Scoles admitted that it was a safe and

[27] Christopher Fazio testified at the hearing. Fazio was not sequestered during the hearing, and was present for other witness' testimonies. Tr. 496-498. Fazio had worked as the supervisor of human resources at the Harrison County Coal Mine since June 2010. Tr. 498. Prior to that, he was the supervisor at the Monongalia County Mine from November 2007 until June 2010. Tr. 498. He had a total of 11 years' experience, with 10 of those years being a human resource supervisor. Tr. 498.

Fazio's job duties consisted of handling compensation benefits, the collective bargaining agreement, disciplinary matters, investigations, policies, procedures, employee conduct rules, and the like. Tr. 499-500.

legal order. Tr. 504. Fazio proceeded to investigate the incident, interviewing both management and union employees. Tr. 296, 504-507. Hibbs interviewed several of the witnesses to the mantrip incident, and sent his notes to Fazio. Tr. 568-569. No one interviewed Hixenbaugh, even though Hixenbaugh was seated closest to Scoles. Tr. 569.

Fazio summarized his investigation by saying that "it was consistent that George Scoles was given a work order, and he refused to throw the d-rail. It was legal. It was safe." Tr. 506.

When Fazio completed his investigation, he took his finding to Superintendent Scott Martin.[28] Tr. 507. They went over the findings in general, and Martin ordered Fazio to put together a suspension with intent to discharge letter. Tr. 507-508, 532. Martin testified that he did not discuss the details with Fazio, but understood that Scoles was given a clear work order to throw a d-rail and he refused. Tr. 534. Martin testified that "after reviewing everything and stuff, I felt that insubordination was feasible for discharge." Tr. 534. The only materials he reviewed prior to making the decisions were the materials provided by Fazio. Tr. 537. He testified that similar to sleeping, drugs, and alcohol, insubordination was "a choice," which makes it especially egregious. Tr. 534. He testified that insubordination was a problem, because "if orders and stuff are not followed, you cannot effectively manage the mine." Tr. 535. Martin testified that there are no circumstances where insubordination would not result in suspension with intent to discharge, stating that there are never mitigating circumstances that would be considered. Tr. 538. Martin testified that in his view the alleged assault by McCauley and the insubordination issues were "separate issues." Tr. 539.

Fazio testified that the 11 Employee Conduct Rules are "the most serious rules in our industry…[and] at our coal mine." Tr. 500. Scoles was suspended with intent to discharge for a violation of Rule Number 4. Tr. 85; P-5. Fazio testified that there is a policy of "first time every time" when it comes to insubordination. Tr. 508. This means that there are no situations where there are mitigating circumstances such that someone would not be suspended with intent to discharge. Tr. 526.

Following the mantrip incident, there were a series of meetings—including the 24-48 meeting and the Step 3 meeting—and then Scoles was suspended with intent to discharge.[29] Tr.

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[28] Scott Martin testified at hearing. Martin worked as General Superintendent at the Harrison County Coal Company starting in January 2014. Tr. 531. His job duties included serving as the chief health and safety officer, as well as overseeing all expenditures, budgets, hiring, maintenance, production, and coordination. Tr. 531.

[29] According to the collective bargaining agreement, management must first meet with the employee prior to suspending with intent to discharge. Tr. 502. A mine committeeman may be present at the meeting. Tr. 502. During the meeting, management goes over the suspension letter with the employee. Tr. 502. The employee can then elect to have a 24-48 hour meeting with management and the union, which occurs after 24 hours of the suspension, but before 48 hours. Tr. 502. Martin was unable to attend the suspension with intent to discharge meeting, so Hibbs was present. Tr. 511. At the meeting, Fazio read the letter to Scoles and informed him of his right to a 24-48 meeting. Tr. 512.

84. On September 15, 2015, Scoles received a letter from Harrison County management that they were suspending him with intent to discharge. Tr. 84-85; P-5. The letter was written by Scott Martin, and stated that Scoles was being suspended with intent to discharge due to "violation of Employee Conduct Rule No. 4 Insubordination (refusal or failure to perform work assigned or to comply with supervisory direction…" Tr. 85; P-5. Scoles did not believe that he was insubordinate on September 8, 2015, because of the events leading up to that point. Tr. 85. Scoles testified that he believed that his suspension was due to his participation in safety activities, being an advocate for safety, and for reporting McCauley for the head-butting incident. Tr. 106.

At hearing, Fazio reviewed the Employee Conduct Rules, and noted that insubordination was listed as "a serious rule." Tr. 500; RX-M. He testified that this was because "if employees are insubordinate, it creates mass chaos in the operation. If employees are doing whatever they want to do, maybe not what they're assigned to do, it could be unsafe." Tr. 500. He testified that the mine could not function if work orders were not followed.[30] Tr. 501.

In the 13-plus years that Hibbs worked at the mine, he had never heard of anyone else being suspended with intent to terminate for insubordination. Tr. 571.

Scoles filed a grievance over his suspension with intent to discharge, and took the matter to arbitration. Tr. 87; P-5. Following an arbitration hearing, Scoles was reinstated and received a 40-day suspension. Tr. 87; P-6. He was out of work for a total of 61 days. Tr. 88. The Respondent told Scoles that the mine was idle for most of the 21 days difference. Tr. 88.

In September of 2015, Scoles was earning $28.64 per hour, and paid time and a half for overtime hours, at $42.96. Tr. 92, 94; P-1. Scoles estimated that he worked approximately 7.5 hours of overtime per week.[31] Tr. 95. Scoles calculated his lost income from his suspension at $16, 324.80. Tr. 99-102. In addition to lost pay, Scoles was also seeking expungement of his record, and a cessation of all harassment. Tr. 102.

CONTENTIONS OF THE PARTIES

Following the hearing, the Complainant and Respondent submitted briefs and reply briefs in support of their respective positions. The Secretary argues that this Court should admit and consider the arbitration decision, not for the arbitrator's factual or credibility findings, but rather for the following reasons:

> to show that Scoles appealed his suspension to arbitration, that an arbitrator heard testimony from live witnesses, that an arbitrator issued a decision based on this

[30] At hearing, Fazio named four employees that were discharged for insubordination. Tr. 517-518.

[31] This estimate depended on the season. Tr. 95.

evidence, that this decision reinstated Scoles to his job and his suspension was reduced to forty days, and the dates of the arbitration and award.

Sec. Brief, 14.

The Secretary further argues that Scoles engaged in protected activity when he reported McCauley's assault to assistant superintendent Brad Hibbs and when he made previous safety and discrimination complaints. Scoles then suffered an adverse employment action when he was suspended pending investigation and eventually discharged, which was subsequently changed to a 40-day suspension without pay. The Secretary argued that the circumstantial indicia surrounding the incident show that Respondent's adverse employment actions were motivated at least in part by Scoles' protected activities. Lastly, the Secretary argues that Respondent has failed to rebut the *prima facie* case by proving that it was in no way motivated by Scoles' protected activities. As remedy, the Secretary seeks back wages for Scoles' entire suspension without pay plus interest, which is equivalent to $16,324.00 plus pre-judgment interest. Further, the Secretary seeks a civil penalty in the amount of $30,000.

The Respondent argues first that the arbitrator's decision should not be admitted into evidence because it constitutes hearsay, the prejudicial value of the decision outweighs the probative value, and there is a danger that the arbitrator's judgement will substitute the fact-finder's judgment. It further argues that the statutory issue at stake in the instant matter was not at issue in the arbitration.

With regards to the discrimination claims at issue, the Respondent argues that the Secretary failed to prove a *prima facie* case of discrimination. The Respondent argues that Scoles' complaints of being assaulted by McCauley are not protected under the Mine Act. The Respondent characterizes the alleged assault as a "personal dispute…based upon nothing more than mutual animus," and argues that complaints surrounding such matters are not protected. Resp. Brief. At 17-18.

The Respondent further argues that the Secretary failed to prove the existence of a nexus between Scoles' purported protected activity and his suspension with intent to discharge. It argues that Martin, who made the final decision to suspend with intent to discharge, had no knowledge of the head-butting incident. It also argues that the dispute between Scoles and McCauley, and presumably any animus emanating from it, was personal and not directed towards any protected activities. It further argues that Harrison County Mine uniformly applies its policy regarding insubordination, and therefore there was no disparate treatment. The Respondent urges this Court to find that even if Scoles did engage in protected activities, it should still find his suspension permissible due to Scoles' alleged insubordination.

The Respondent argues that if the Court does find for Scoles, it should not award him the amount he is seeking. Rather, it maintains that the estimate provided in an attached affidavit of Fazio is more appropriate.

ANALYSIS

The Arbitration is Admitted Into Evidence

At hearing, the Secretary sought to admit into evidence the November 08, 2015 arbitrator's decision that reinstated Scoles and modified the discipline to a 40-day suspension. The Secretary did not seek to introduce any of the arbitrator's factual or credibility findings, but rather for the following reasons:

> to show that Scoles appealed his suspension to arbitration, that an arbitrator heard testimony from live witnesses, that an arbitrator issued a decision based on this evidence, that this decision reinstated Scoles to his job and his suspension was reduced to forty days, and the dates of the arbitration and award.

Sec. Brief, 14.

The Respondent does not object to the admission of these facts into the record, but maintains its objection to the admission of the arbitrator's decision in fear that it would constitute an "improper introduction of credibility and factual findings of that proceeding into this matter." Resp. Reply Brief, at 10-11.

The Commission has addressed the propriety of admitting an arbitrator's findings in a FMSHRC proceeding, stating:

> there are several factors that must be considered in determining the weight to be accorded to arbitral findings: the congruence of the statutory and contractual provisions; the degree of procedural fairness in the arbitral forum; the adequacy of the record; and the special competence of the particular arbitrator. Arbitral findings may be entitled to great weight if the arbitrator gave full consideration to the employee's statutory rights; the issue before the judge is solely one of fact; the issue was specifically addressed by the parties when the case was before the arbitrator; and the issue was decided by the arbitrator on the basis of an adequate record.

Secretary o/b/o Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2795 (October 1980).

In the instant case, there appears to be little actual difference between the parties' positions.[32] The Secretary's request for admission of the arbitrator's decision for the limited purposes stated above is appropriate. The Respondent's fear that this Court will accidentally consider the arbitrator's credibility and factual findings are misplaced. The arbitrator's decision is admitted as Exhibit P-6 for the limited reasons stated above.

[32] Indeed, the parties likely could have worked better together prior to hearing to introduce these facts as joint stipulations, and thereby avoided this unnecessary controversy.

1) Discrimination:

Section 105(c)(1) of the Mine Act provides that a miner cannot be discharged, discriminated against, or otherwise interfered with in the exercise of his statutory rights because he "has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine," or "because of the exercise by such miner…of any statutory right afforded by this Act." 30 U.S.C. 815(c)(1).

In order to establish a *prima facie* case of discrimination under Section 105(c)(1), the Secretary on behalf of a complaining miner must produce evidence sufficient to support a conclusion that (1) he engaged in protected activity, (2) he suffered an adverse action, and (3) the adverse action was motivated at least partially by that activity. *See Turner v. Nat* 7 *Cement Co. of California,* 33 FMSHRC 1059, 1064 (May 2011); *Sec'y of Labor on behalf of Pasula v. Consol Coal Co.,* 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds* 663 F.2d 1211 (3d Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.,* 3 FMSHRC 803, 817-18 (Apr. 1981).

The operator may rebut the *prima facie* case by showing either that no protected activity occurred or that the adverse action was in no part motivated by the protected activity. *Driessen v. Nev. Goldfields, Inc.,* 20 FMSHRC 324, 328-29 (Apr. 1998); *Robinette,* 3 FMSHRC at 818 n.20. The operator may also defend affirmatively by proving that the adverse action was in part motivated by unprotected activity of the miner, and that it would have taken the adverse action based on the unprotected activity alone. *Driessen,* 20 FMSHRC at 328-29 (citing *Robinette,* 3 FMSHRC at 817; *Pasula,* 2 FMSHRC at 2799-2800). The operator bears the burden of proof for the affirmative defense. *Pasula,* 2 FMSHRC at 2800.

A. Protected Activity:

George Scoles engaged in multiple activities protected under the Mine Act. Scoles' service as a miner's representative during federal inspections is a protected activity. *Consolidation Coal Co.*, 19 FMSHRC 1529, 1534-35 (Sept. 1997). The three discrimination complaints that Scoles filed with MSHA constitute protected activities. *See Savage Services Corp.*, 37 FMSHRC 936, 946 (April 2015) (ALJ). Furthermore, he had been an avid safety advocate, making numerous complaints to mine management about health and safety issues. Tr. 22-23, 25-27, 33. Such frequent safety complaints to a supervisor constitute protected activities. *Kingston Mining, Inc.*, 37 FMSHRC 2519, 2523 (Nov. 2015).

Scoles also engaged in protected activity on September 3, 2015, when he repeatedly complained to McCauley that he was harassing him and was in his personal space. McCauley was a member of mine management and was the longwall coordinator. Tr. 25. Complaints about being harassed and feeling unsafe to a supervisor are protected under the Mine Act.

On September 3, 2015, McCauley asked Scoles why he was not shoveling the belt, and Scoles replied that he had not been ordered do so, but that he would shovel the belt. Tr. 45-46. McCauley began badgering Scoles in a manner that Scoles and others described as demeaning,

hostile, and aggressive. Tr. 230. McCauley continued to badger Scoles about shoveling the belt, and Scoles complained to McCauley that he was trying to intimidate and harass him. Tr. 47, 230, 341. McCauley did not cease badgering Scoles and Scoles continued to complain to McCauley that he was harassing him and trying to intimidate him. Tr. 49-50. When McCauley approached Scoles in an aggressive fashion, Scoles told him to get out of his personal space. Tr. 51-52, 232, 341.

These complaints to McCauley of him acting in a harassing, intimidating, and aggressive manner, while he entered Scoles' personal space, constitute health and safety complaints protected by the Mine Act. Respondent attempts to argue that McCauley's actions towards Scoles were part of a "personal dispute," and "mutual animus," and seems to argue that actions arising out of such feelings somehow are not covered by the Mine Act. Resp. Brief, at 18. Whatever mutual animus that may have existed between Scoles and McCauley, harassment, intimidation, and aggressive behavior in the mine raises serious health and safety concerns. If a supervisor orders a miner to perform an unsafe action, it does not matter whether that order was borne of unilateral animus, mutual animus, or a desire to reach production goals. There is no safe harbor under the mine act for activities that compromise a miner's health or safety if they arise out of personal dislike for the miner. The effect of a miner's health and safety in the mine—an effect that that Mine Act seeks to mitigate—is the same.

It is especially odd that Respondent would make this argument, given that McCauley, its main witness who engaged in the assault, disagrees with Respondent's position. McCauley admitted in cross-examination that an act of violence or intimidation in the mine would constitute a safety issue. Tr. 435-436. He further testified that an accusation of an employee assaulting another employee at the mine should be treated as a safety issue and would be a serious allegation. Tr. 435-436.

In this instance, Scoles was right in being concerned about his safety, as McCauley soon showed that his aggressive and intimidating behavior was no hollow threat. Moments after Scoles made his complaints to McCauley, McCauley proceeded to physically assault him.[33]

Scoles' next protected activity was when, on the day after the assault, Scoles reported the incident to Assistant Superintendent, Brad Hibbs. Tr. 60, 544. Such a complaint is protected activity under the Mine Act. *See Cordero Mining, LLC,* 36 FMSHRC 963, fn. 5 (April 2014) (ALJ) (Reporting workplace violence or abuse that implicates concerns for safe performance of work tasks may rise to the level of protected activity under section 105(c) of the Mine Act.); *see also Kingston Mining, Inc.*, 37 FMSHRC 2519, fn. 3 (Nov. 2015) ("Raising safety concerns is...paradigmatic 'protected activity' within the meaning of section 105(c)"); *Durango Gravel*, 20 FMSHRC 59, 62 (Jan. 1998) (ALJ), *aff'd* 21 FMSHRC 953 (Sept. 1999) (a safety-related conversation was protected activity).

[33] I credit Scoles', Besedich's, and Hall's testimonies on what they witnessed concerning McCauley's actions. Each of these witnesses appeared forthright, honest, and displayed no evasion. Furthermore, each of their accounts significantly corroborates the others. On the other hand, I do not credit McCauley's testimony. Throughout the hearing, his account of events was self-serving, contrary to other witnesses, and not believable.

Following this report, Scoles engaged in protected activity on September 8, 2015, when in response to McCauley ordering Scoles to switch the d-rail, Scoles complained that McCauley was singling him out and harassing him and that he felt unsafe. Tr. 79. In that same interaction, when McCauley ordered Scoles out of the mantrip, Scoles complained that he was being left in the mine without a Solaris multi-gas detector, in violation of state and federal health and safety laws. Tr. 80. This complaint was similarly protected.

B. Adverse Action:

The Respondent does not contest that Scoles suffered an adverse employment action. On September 8, 2015, Scoles was suspended pending an investigation of the mantrip incident. Tr. 504. On September 15, 2015, Scoles received a letter that suspended him with intent to discharge. Tr. 84-85; P-5. Following an arbitration hearing, Scoles' discipline was modified to a 40-day suspension. Tr. 87; P-6. "Discharge is perhaps the clearest form of adverse action prohibited by the plain language of the Mine Act." *Nevada Goldfields, Inc.*, 20 FMSHRC 324, 329 (April 1998) (citing Section 105(c)(1) of the Mine Act; *Hecla-Day Mines Corp.*, 6 FMSHRC 1842, 1847-48 (Aug. 1984)).

C. Discriminatory Motive:

The Commission has acknowledged that it is often difficult to establish a motivational nexus between protected activity and the adverse action that is the subject of the complaint. *Sec'y of Labor on behalf of Baier v. Durango Gravel,* 21 FMSHRC 953, 957 (Sept.1999). To establish the nexus, the Commission has identified the following indicia of discriminatory intent: (1) hostility or animus toward the protected activity; (2) knowledge of the protected activity; and (3) coincidence in time between the protected activity and the adverse action. *Sec'y of Labor on behalf of Lige Williamson v. CAM Mining, LLC,* 31 FMSHRC 1085, 1089 (Oct. 2009). The Commission has further considered the disparate treatment of the miner in analyzing the nexus requirement. *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983). It is not necessary, however, to establish all four indications of discriminatory intent. For example, where there is knowledge of the protected activity and coincidence in time between the protected activity and the adverse action, a causal connection is supported. *Sec'y of Labor, on behalf of Yero Pack v. Cimbar Performance Minerals*, 2012 WL 7659706, *4 (ALJ)(Dec. 2012).

1. Animus Towards Protected Activity

"Hostility towards protected activity—sometimes referred to as 'animus'—is another circumstantial factor pointing to discriminatory motivation. The more such animus is specifically directed towards the alleged discriminatee's protected activity, the more probative weight it carries." *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corporation*, 2 FMSHRC 2508, 2511 (Nov. 1981)(citations omitted). In the instant case, there is ample evidence of hostility or animus towards the protected activity.

Following Scoles' multiple safety complaints to McCauley, McCauley responded by ignoring him and walking away. Tr. 27-28. When Scoles complained about the dangers of a hot

roller, McCauley responded, "if the roller is not on fire, don't turn the belt off." Tr. 28. These responses were consistent with how other miners described McCauley's approach to safety complaints. Eric Efaw testified that McCauley regularly disregarded his complaints about roof falls. Tr. 300-301. Similarly, Hixenbaugh and Hall testified that their safety complaints to McCauley were disregarded in order to increase production. Tr. 325-326, 333, 353.

Scoles further testified that in response to his advocacy for safety in the mine, McCauley talked to him in a demeaning manner and tried to belittle him. Tr. 29. McCauley would single Scoles out to do jobs such as picking up garbage by hand. Tr. 29-30. Efaw corroborated this and described how McCauley would walk around asking where Scoles was, and then proceed to argue with him. Tr. 299.

In one of the primary incidents at issue in this case, Scoles complained to McCauley that he felt McCauley was harassing him, trying to intimidate him, and entering his personal space in a manner that made Scoles feel unsafe. Tr. 46-49, 51-52, 230, 232, 341. McCauley responded by physically assaulting Scoles in a manner that was so extreme that every witness was shocked and surprised by his actions. Tr. 236, 348-349. From a complete stop, McCauley took a step back, and then head-butted Scoles. Tr. 51-52, 233. As a result of the severity of the contact, Scoles' helmet fell off his head. Tr. 51-52. Scoles described the action as "a hostile and aggressive contact," and felt that his "individual safety was jeopardized." Tr. 52-53. Besedich described McCauley's actions as "an intimidation," and made it clear that there was no chance that it was accidental. Tr. 259. He felt that it posed a safety issue in the mine. Tr. 236. Hall similarly testified that the assault was intentional and shocking. Tr. 347-349.

Following the assault, McCauley called Zikafoose over to serve as a witness as he demeaned Scoles. Tr. 237, 341. McCauley told Scoles to shovel the belt, and when Scoles agreed to do so, McCauley responded by saying, "I'm going to give you this tape measure. I need 77 inches of clearance at 74 block on the belt line. You do know how to read this, don't you?" Tr. 341. Scoles replied, "I do." McCauley then said, "I need 77 inches of clearance, so I need you to get a pick and get a shovel and wherever you don't have 77 inches, you pick and you shovel. Get on your knees and shovel if you have to, but I want 77 inches of clearance, so get to picking and get to shoveling." Tr. 341-342.

That evening, McCauley evinced animus towards Scoles' protected activity when he approached Besedich and Hall and asked them if they were comfortable being out of the mine filling out the books. Tr. 238, 342. When Hall replied that he was fine, McCauley responded, "because I don't want to be accused of badgering the witness." Tr. 238, 342-343. Besedich described McCauley as having a smirk when he said the statement as if he thought it was funny. Tr. 239. McCauley's open mocking of his recent assault of another miner, to the other miner witnesses, illustrates that he was not trying to hide the intent of his assault. Indeed, McCauley's conduct on the mantrip several days later indicates that McCauley felt free to single out and harass Scoles in front of other miners.

Upper management also showed animus towards Scoles' protected activity in the manner in which they responded to his complaint of an assault in the mine. When Scoles complained on September 4, to Assistant Superintendent Hibbs about McCauley assaulting him, that complaint

constituted a protected activity. Hibbs responded to Scoles' request for a meeting by saying, "you all don't tell me when we're going to have a meeting. I instruct when we're going to have a meeting."[34] Tr. 60, 544. This response shows that in the first instance, he did not regard this complaint of a violent assault as seriously. Hibbs eventually said that he would "check it out," but he neither suspended McCauley pending an investigation nor did he separate McCauley from Scoles pending an investigation. Tr. 522, 567.

The cursory and inattentive approach to the investigation also evinces animus towards Scoles' protected activity. Assault in the mine is a rare and serious event, and management should have taken proper and immediate steps to investigate and address the complaint. Instead, Hibbs waited 7-10 days to talk to the other two witnesses, Besedich and Hall, and conducted a 30-second conversation with McCauley. Tr. 239, 350-352, 455-456, 545, 565; RX-R. The investigative report stated that Scoles described being head-butted. RX-R. It further stated that Besedich described it as severe. RX-R. It reported that Hall described it as "two deer tickling antlers," which Hall explained at hearing as "pretty aggressive," and "a whitetail male deer hitting another deer's antlers." Tr. 352-353. Hibbs did not ask Hall to explain what he meant by the phrase, but simply concluded that it meant that the contact was not severe. Tr. 548-549, 573. That Hibbs simply assumed that the description of deer tickling antlers referred to "light contact" that was not severe is an indication of how cursory the investigation was. Tr. 548-549, 573.

Hibbs never followed up with Scoles or McCauley. Instead, after three of the witnesses to the assault told Hibbs that a severe assault took place, Hibbs concluded that the contact Scoles complained of was "an incidental contact based on the activity." Tr. 547. Hibbs concluded that McCauley should not receive any discipline. Tr. 549-550.

Hibbs' investigation following the assault stands in complete contrast to his investigation following the incident on the mantrip, which at worst was a minor act of insubordination. *See* RX-R; RX-Q. These investigations were conducted concurrently, and the difference between the two investigations shows the animus with which mine management held towards Scoles' complaints. As opposed to the almost complete lack of description of the actual assault of the September 3 incident, Hibbs described in great detail the alleged insubordination on September 8. See RX-R; RX-Q.

The next instance of animus occurred on September 8, 2015. Four days after Scoles complained about McCauley's assault, McCauley engaged in animus towards the protected activity by singling Scoles out with an arbitrary order that ran contrary to unwritten work rules in the mines.

There was a great deal of testimony in this case concerning the exact nature of the unwritten rule in the mine, as well as whose responsibility or duty it is to throw switches and d-rails. Importantly, no one denied that there was an unwritten rule or custom governing which

[34] Brad Hibbs testified at hearing. At the time of hearing, Brad Hibbs had worked for Harrison County Mine for over 13 years. Tr. 542. He had worked as the assistant mine superintendent for over two years. Tr. 542. His job duties include overseeing operations and mine plans, as well as assisting the superintendent. Tr. 542.

miner was required to throw switches. There was a consensus among all witnesses with knowledge of the issue that there were unwritten and established norms concerning whose responsibility it was to throw switches. Tr. 67-68, 72, 244, 319-320, 323-324, 462. Scoles, Hixenbaugh, and Besedich each testified that if someone was sitting in the jump-seat then that person was responsible for throwing switches and d-rails. Tr. 72, 244, 319-320, 323-324. This rule was based on the fact that the jump-seat was easier to get in and out of. Tr. 67, 68. McCauley testified that the "person closest and [with] easiest access would be the one that would get out and throw a switch or throw a d-rail." Tr. 462.

Though the weight of the evidence would lead to a finding that there is an unwritten rule in the mine that the person in the jump-seat is responsible for throwing switches and d-rails, I need not resolve the contradictory testimony here, because under either version of the rule, Scoles was not responsible for throwing the d-rail. If one accepts that it was the responsibility of the person in the jump-seat to throw the d-rail, then it was McCauley's responsibility, as he was seated in the jump-seat. If one accepts McCauley's formulation of the rule, that it is the responsibility of the person who is both closest and with easiest access, then that responsibility shifted at various times as the event unfolded, but it was never Scoles'.

When the mantrip arrived at the d-rail, Efaw jumped out to throw the d-rail. Tr. 290-291. At that point, Efaw was the person who had easiest access, as he was outside of the mantrip and was proceeding towards the d-rail. However, McCauley stopped Efaw and told him to sit back down. Tr. 291. Then, before McCauley verbalized any order to Scoles, McCauley got out of the mantrip and stood beside Scoles. Tr. 77, 418. At that moment, before any direct orders were given, McCauley was both closer and had easier access. McCauley's order, while perhaps safe, were unreasonable and were intended to harass and single out Scoles.[35] The order was akin to a supervisor purposefully dropping something on the floor and then ordering a miner to bend over to pick it up. No one would mistake such an order as being legitimately work related, rather than intended to demean and disrespect a subordinate in front of fellow miners.

Furthermore, McCauley's act of stopping Efaw from throwing the d-rail and ordering Scoles to do so, belies any argument that McCauley's primary concern was to get to the section quickly. Instead, it is in line with ample testimony in this case that McCauley's response to safety complaints was to single people out.

McCauley's response to Scoles' refusal to switch the d-rail further evinced animus. McCauley ordered Scoles to exit the mantrip and left him in the mine for over an hour and a half without a Solaris multigas detector. Tr. 80. Under federal and West Virginia law, a miner is required to have a three-gas detector if he is by himself. Tr. 81, 477. McCauley displayed indifference to placing Scoles in danger by leaving him without a Solaris. When Scoles mentioned that he did not have a Solaris on him, McCauley displayed indifference, stating, "Don't worry, somebody will be by here directly to pick you up. Tr. 80, 294.

[35] Coming only 5 days after McCauley's physical assault of Scoles, with McCauley shining a light in Scoles' eyes, it would be reasonable for Scoles to fear for his safety in exiting the mantrip with McCauley standing beside him. Therefore, it is indeed questionable whether McCauley's order can be described as safe.

Fazio's investigation of the mantrip incident and his subsequent actions further evince animus. The investigation report does not mention the allegations of assault against McCauley, even though they were highly relevant to the mantrip incident. RX-R. The report similarly omits the important fact that Efaw attempted to throw the d-rail, but was stopped by McCauley. RX-R. Fazio neglected to interview Hixenbaugh, who was seated beside Scoles. RX-R. Lastly, the suspension pending an investigation for a minor form of alleged insubordination displayed animus.

2. Knowledge

Respondent argues that Scott Martin, the individual who made the decision to suspend Scoles with intent to discharge, had no knowledge of Scoles' protected activities. Resp. Brief, at 18; Tr. 536-537. Similarly, Fazio claims that he did not know about the allegations of assault while he was investigating the mantrip incident. Tr. 522. These claims of ignorance concerning McCauley's assault of Scoles are at best not credible, and at worse, due to willful ignorance.

The Commission has held that "An operator may not escape responsibility by pleading ignorance due to the division of company personnel functions." *Metric Constructors, Inc.* 6 FMSHRC 226, 230 n.4 (Feb. 1984), *aff'd sub nom. Brock ex rel. Parker v. Metric Constructors, Inc.,* 766 F.2d 469 (11th Cir. 1985)*; see also Nat'l Cement Co. of Cal.*, 33 FMSHRC at 1068. In the instant case, Scoles reported the assault to Assistant Superintendent Hibbs on September 4. Tr. 60. McCauley told Hibbs about the mantrip incident shortly after it occurred. Tr. 422. Hibbs testified that he told Fazio about the mantrip incident on September 8, and Fazio began the formal investigation. Tr. 503-504. It defies logic that Hibbs would not have told Fazio about the allegations of assault that he was actively investigating and which involved the same two miners. If, somehow, Hibbs did not actually inform Fazio about the allegations of assault, such willful ignorance cannot provide a safe harbor for the operator. I find that mine management knew or should have known about the protected activity of Scoles' complaint of assault.

3. Coincidence in Time

With respect to coincidence in time between the protected activity and the adverse action, the Commission has noted, A[a] three week span can be sufficiently close in time@, especially when there is evidence of intervening hostility, animus or disparate treatment. *CAM Mining, LLC,* 31 FMSHRC at 1090. Likewise, in *All American Asphalt*, a 16-month gap existed between the miners= contact with MSHA and the operator=s failure to recall miners from a layoff; however, only one month separated MSHA=s issuance of a penalty resulting from the miners= notification of a violation and that recall failure. *Sec=y of Labor on behalf of Hyles v. All American Asphalt*, 21 FMSHRC 34 (Jan. 1999). Similarly, in *Pamela Bridge Pero v. Cyprus Plateau Mining Corp.*, the Commission found a five-month gap to constitute close temporal proximity between the protected activity and the adverse employment action. 22 FMSHRC 1361, 1365 (Dec. 2000). The Commission stated AWe >appl[y] no hard and fast criteria in determining coincidence in time between protected activity and subsequent adverse action when assessing an illegal motive. Surrounding factors and circumstances may influence the effect to be given to such coincidence in time.=@ *Sec=y of Labor on behalf of Hyles v. All American Asphalt*, 21 FMSHRC at 47 (quoting *Hicks v. Cobra Mining, Inc.*, 13 FMSHRC 523, 531 (Apr. 1991)).

In the instant case, Scoles was suspended pending an investigation within four days of Scoles' complaint about being assaulted by McCauley. He was then suspended with intent to discharge within 11 days of his complaint. As the courts have noted, the "fact that the Company's adverse action against [a miner] so closely followed the protected activity is itself evidence of an illicit motive." *Donovan v. Stafford Const. Co.*, 732 F.2d 954, 960 (D.C. Cir. 1984). I find that this proximity in time is strong evidence of discriminatory motive behind Scoles' discipline.

4. Disparate Treatment

There was little discussion in this case concerning disparate treatment. Without any development, Fazio testified that four employees had been discharged for insubordination. Tr. 517-518. He never described who these individuals were, what form of insubordination they engaged in, or when they were discharged. Hibbs testified that in the 13-plus years that he worked at the mine, he had never heard of anyone else being suspended with intent to terminate for insubordination. Tr. 571. Therefore, there is no credible evidence that any other miners have ever been legitimately discharged for insubordination.

This Court does not need to delve deep into the operator's disciplinary history to find that there was disparate treatment in this case. The Respondent has argued that it discharged Scoles for his insubordinate conduct on September 8, 2015 on the mantrip because he violated Employee Conduct Rule Number 4. RX-M; GX-5. Fazio testified that the 11 Employee Conduct Rules are "the most serious rules in our industry…[and] at our coal mine." Tr. 500. It has further described the rule as being enforced "first time every time." Tr. 508. However, in the facts of the instant case, there are two instances where another miner violated Rule Number 4, and was not subsequently disciplined in any fashion.

The full text of Employee Conduct Rule Number 4 states:

> Observance of work rules is a requirement for good labor-management relations. In order to minimize the occasions for discipline or discharge, each employee should avoid conduct which violates reasonable standards of an employer-employee relationship including: Insubordination (refusal or failure to perform work assigned or to comply with supervisory direction) or use of profane, obscene, abusive, or threatening language or conduct toward subordinates, fellow employees, or official of the company.

RX-M.

First, on September 3, 2015, McCauley violated Rule Number 4's prohibition against abusive or threatening conduct when he harassed and then assaulted Scoles. The Respondent's cursory investigation and lack of any disciplinary or follow-up action towards McCauley illustrates that the rule was not applied evenly.

Another instance that arose in this case involved someone else on the mantrip violating Employee Conduct Rule Number 4 on September 8, 2015, within minutes of Scoles doing so, and that miner receiving no discipline as a result. Everyone who witnessed the mantrip incident testified that Tennant repeatedly yelled the word "fucking" when demanding that someone throw

a switch or d-rail. Tr. 70, 74-75, 241, 417, 604. The word, "fucking," is undeniably an example of profane or obscene language. While this Court takes no position as to the propriety of using profanity in the mine, it is clearly forbidden under Rule Number 4.[36] Tennant was not disciplined in any manner following his use of profanity.

D. Affirmative Defense

Having found that the miner engaged in protected activities, suffered an adverse employment action, and that there was a nexus between the two, the operator may still avoid liability if it can show that it would have disciplined him for unprotected activity alone. *See MSHA obo Riordan v. Knox Creek Coal*, 38 FMSHRC 1914 (Aug. 2016). In the instant case, the Respondent argues that even if this Court finds discrimination, it was permitted to discipline Scoles due to the alleged insubordination. Resp. Brief, at 19. The Commission has explained:

> that an operator's business justification defense should not be "examined superficially or be approved automatically once offered." *Haro v. Magma Copper Co.*, 4 FMSHRC 1935, 1938 (Nov. 1982); *see Cumberland River Coal Co. v. FMSHRC,* 712 F.3d 311, 320 (6th Cir. 2013). In reviewing defenses, the Judge must "determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed." *Bradley v. Belva Coal Co.*, 4 FMSHRC 982, 993 (June 1982). The Commission has held that "pretext may be found … where the asserted justification is weak, implausible, or out of line with the operator's normal business practices." *Sec'y of Labor on behalf of Price v. Jim Walter Res., Inc.*, 12 FMSHRC 1521, 1534 (Aug. 1990) (citing *Haro*, 4 FMSHRC at 1937-38).

Id. at 1925.

In support of its argument, the Respondent cites *Kahn v. Sec'y of Labor*, 64 F.3d 271 (7th Cir. 1995) and *Sec'y of Labor obo Pollock v. Kennecot Barney's Mining Co.*, 22 FMSHRC 419 (2000)(ALJ) for the legal proposition that an operator may discharge a miner who engaged in protected activity if there is an allegation of insubordination. However, the Respondent's reliance on these cases is inapposite. In *Kahn*, the discharged employee had a long history of being abusive and engaging in improper contact with other employees. The employee in *Kahn* was discharged for these improper acts. In *Pollock*, the miner had made a threat, and the judge found that it constituted reason enough for the termination.

In the instant case, Scoles was the victim of abuse, harassment, and assault. He did refuse an order from McCauley on September 8 in the mantrip, but to describe his conduct as insubordination that warranted immediate suspension and eventual termination is not reasonable. One must consider the context of the situation—described in detail *supra*—when reviewing Scoles' refusal to get out of the mantrip to throw the d-rail. McCauley had a history of being

[36] Indeed, this Court is reminded of Judge Harner's important reminder concerning the propriety of using profanity in the mine: "this is a mine, not a nursery*." Sec'y of Labor obo Harrison v. Consolidation Coal Co*., 37 FMSHRC 1497, 1507 (ALJ)(July 2015).

abusive and singling out Scoles. Five days before the mantrip incident, McCauley had physically assaulted Scoles in front of other miners. McCauley had not been reprimanded or separated from Scoles; instead, McCauley continued to single him out for harassment. McCauley stood above Scoles, shining a light in his face, and gave him an arbitrary order that was against established norms in the mine. A supervisor absolutely has the authority to direct subordinates, but he does not have absolute authority to issue arbitrary and demeaning orders in an attempt to provoke insubordination and punishment. See eg. *Cordero Mining, LLC*, 33 FMSHRC 3029 (Dec. 2011) (ALJ) (citing *Vought Corp.,* 273 NLRB 1290, 1295 n.31 (1984), *enfd.* 788 F.2d 1378 (8th Cir. 1986); *Reading Anthracite Co.*, 22 FMSHRC 298, 306 (Mar. 2000)) ("Generally, an employer may not provoke an employee to a point where the employee commits an act of insubordination and then rely on that insubordination to discipline the employee."). McCauley's conduct described in detail in this case from September 3-8, was of a supervisor abusing his authority in multiple ways that directly and indirectly compromised the safety of miners, in a public attempt to put a safety advocate in his place.

Scoles' conduct was at best a minor act of insubordination stemming from a provocation of an abusive supervisor who singled out safety advocates. I find that the proffered reason for Scoles' termination was pretextual. The Respondent cannot point to McCauley's act of animus towards Scoles' protected activity and somehow argue that it was the basis for its affirmative defense.

Remedies and Penalties

A successful complainant is entitled to be made whole for the entire period of his unemployment, plus interest. *See Local Union 2274,District 28, UMWA v. Clinchfield Coal Co.*, 10 FMSHRC 1493 (Nov. 1988)(" *Local 2274")*. The Commission has recognized that certain events, such as a bona fide reduction in force, can toll a miner's right to back pay, the burden to show that work is no longer available for the complainant lies squarely with the employer. *KenAmerican Resources, Inc*., 31 FMSHRC 1050, 1054-55 (Oct. 2009) (citing *Kenta Energy, Inc*., 11 FMSHRC 1638 (Sept. 1989)). The operator must make this showing by a preponderance of the evidence. *Id.*; *C.R. Meyer and Sons Co.*, 35 FMSHRC 1183, 1188 (2013). In the absence of evidence identifying any basis for tolling or other restrictions on lost wages, Complainant is entitled to be made whole for the entire period of his unemployment, plus interest. *See Clinchfield Coal Co*., 10 FMSHRC 1493 (Nov. 1988).

Having found that Respondent discriminated against Scoles in violation of the Mine Act, the next issues are the proper remedies and civil penalties. With respect to remedies, the Secretary argues that Scoles should be awarded $16,324.80 in estimated back wages, plus pre-judgment interest. Sec'y Brief, at 29-30. In support of this estimate, the Secretary provides several exhibits and testimonial evidence that show that Scoles' regular rate of pay was $28.64/hour, his overtime rate of pay was $42.96/hour, and his Saturday rate of pay was $42.96/hour. Tr. 87-88, 90, 92-94; PX-1, PX-10. The Secretary argues that Scoles was not at work for 61 days due to the discrimination, but that since the mine was idled during a portion of that time, the estimate was reduced accordingly. Sec'y Brief, at 29-30. The evidence presented shows that Scoles worked 8 hours of regular time and two hours of overtime each weekday, as

well as every Saturday. An accompanying chart submitted by the Secretary breaks down the amounts by day. PX-10.

In addition to backpay, the Secretary requests that the Respondent be ordered to expunge any documentation, records or references to the September 3, 2015 and the September 8, 2015 incidents from Scoles' personnel file. Sec'y Brief, at 30.

The Respondent argues that the Complainant's estimates contain errors and that it cannot be the basis of any award. Resp. Brief, at 20-21. In support of its argument, it submits a signed affidavit by Christopher Fazio that stated that Scoles should only be paid for the 40-day suspension period, that the mine was idled on 10 days, and that the overtime hours would have been fewer than those submitted by the Secretary. Resp. Brief, Exhibit A. Neither the affidavit nor the brief provide an estimate of Scoles' backpay during the period that he was out of work.

The Secretary has credibly shown that Scoles is entitled to $16,324.80 in estimated back wages, plus pre-judgment interest. [37] Presumably, Fazio's affidavit was intended to serve as evidence in support of a tolling argument. However, it falls short. I found Fazio to be a less than credible witness at hearing, and his assertions in the affidavit do not make a sufficient showing that Scoles' backpay should be reduced due to days the mine may have been idled. It should be noted that if the mine was idled as Respondent claims, and if Scoles' backpay should have been reduced, the Respondent would have been the party in possession of ample evidence to prove such. Its submission of a short, inconclusive, affidavit by a less than credible witness does not meet the evidence requirements.

The Secretary further proposes a civil penalty of $30,000. The Respondent argues that its level of negligence and its following a standard investigative procedure should lead to a lower civil penalty.

The principles governing the authority of Commission Administrative Law Judges to assess civil penalties *de novo* for violations of the Mine Act are well established. Section 110(i) of the Mine Act delegates to the Commission and its judges "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(i). The duty of proposing penalties is delegated to the Secretary. 30 U.S.C. §§ 815(a), 820(a). Thus, when an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess the penalty. 29 C.F.R. § 2700.28. The court's assessment here is independent, and the Secretary's proposal "is not a baseline or starting point," that the court has used in its assessment. *Sec'y of Labor, MSHA v. The American Coal Co.*, LAKE 2011-701. The Act requires that in assessing civil monetary penalties, the judge must consider six statutory penalty criteria: the operator's history of violations; its size; whether the operator was negligent; the effect on the operator's ability to continue in business; the gravity of the violation; and whether the violation was abated in good faith. 30 U.S.C. § 820(i). In keeping with this statutory requirement, the Commission has held

[37] The interest should be calculated using the method described in *Secretary on Behalf of Bailey v. Arkansas Carbona Co.*, 5 FMSHRC 2042, 2052 (Dec. 1983), as modified by *Clinchfield Coal Co*., 10 FMSHRC 1493, 1505-06 (Nov. 1988), *aff'd*, 895 F.2d 773 (D.C. Cir. 1990).

that judges must make findings of fact on the statutory penalty criteria. *Sellersburg Stone Co.*, 5 FMSHRC 287, 292 (Mar. 1983), *aff'd*, 736 F.2d 1147, 1152 (7th Cir. 1984). Once these findings have been made, a judge's penalty assessment for a particular violation is an exercise of discretion "bounded by proper consideration of the statutory criteria and the deterrent purposes underlying the Act's penalty scheme." *Id.* at 294; *see also Cantera Green*, 22 FMSHRC 616, 620 (May 2000).

The instant case is an extremely egregious case that warrants a civil penalty of $40,000. At the time of the discrimination in this matter, the Mine had a history of three prior 105(c) violations, and its controller had a history of twelve prior 105(c) violations, justifying a more substantial penalty. Furthermore, the mine was in the largest category of mines, and the controlling entity in the largest category under MSHA's tables in Part 100.3. Complaint, Exhibit B. There is no evidence in the record that the penalty will affect the operator's ability to continue in business.

The gravity of the Respondent's conduct in this case was extremely severe. A miner made a safety complain to his supervisor and his supervisor proceeded to physically assault him in front of other miners. The operator then found a pretextual reason to fire the miner who suffered and complained about the assault.

The history of coal mining in this country is one marked by violence and tragedy. The Mine Act was passed by Congress to mitigate as much as possible the significant health and safety risks associated with the inherently dangerous activity of mining. Section 105(c) of the Mine Act, which protects miners in making health and safety complaints is central to the proper functioning of the Mine Act. Congress stated that:

> If our national mine safety and health program is to be truly effective, miners will have toplay an active part in the enforcement of the Act. The Committee is cognizant that if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation.

S. Rep. No. 95-181, at 35-36 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 623-24 (1978). Section 105(c) was intended to ensure that miners' rights to make complaints or refuse work were not chilled by any company action. Indeed, the Senate Committee stated that it "intends section 10[5](c) to be construed expansively to assure that miners will not be inhibited in any way in exercising any rights afforded by the legislation." *Id.* This Court can imagine few things that would chill a miner's ability to speak up over safety complaints more than a physical assault by a supervisor followed by a provocation followed by a termination.

The level of negligence in this case was also extremely high, bordering on reckless disregard. Scoles promptly brought the assault to mine management's attention, and the response was open contempt for the complaint, followed by a process that this court almost hesitates to label an investigation due to its slipshod approach and unreasonable conclusion. When Scoles initially brought his complaint of the assault to Assistant Superintendent Hibbs and asked for a

meeting, Hibbs responded, "you all don't tell me when we're going to have a meeting. I instruct when we're going to have a meeting." Tr. 60, 544. The Respondent then did not separate McCauley from Scoles, or suspend him pending an investigation. It interviewed a few people briefly, and reached a conclusion that is contrary to all the evidence presented. The investigation was so cursory that McCauley testified that he was never even aware that an investigation had been held. Tr. 400.

The Respondent's complete disregard for Scoles' safety can clearly be seen when comparing the Respondent's actions following the assault, where a miner's health and safety was actually put at risk, to their actions following what can at worst be described as a minor act of insubordination. Following the mantrip incident, Scoles was suspended pending an investigation, an investigation was quickly held, where almost every detail of the encounter was laid out,[38] and Scoles was promptly suspended with intent to discharge.

The Respondent made no effort to abate or address the health and safety issues complained of by Scoles. It has continued to cast the issue as stemming from two individuals not liking each other, without any regard for the power dynamic of the supervisor-subordinate relationship. The Respondent's attitude towards these matters of health and safety, as being permissible so long as they stem from a supervisor's dislike of a miner, is quite troubling. If a supervisor puts a miner's health or safety at risk, the company cannot ignore it simply because there is unilateral or mutual dislike between the individuals. I independently assess a civil penalty of $40,000.

CONCLUSION AND ORDER

Based on the foregoing, I find that Respondent violated §105(c) of the Act by discriminating against Scoles for engaging in protected activity.

Respondent is **ORDERED** to pay Scoles backpay in the amount of at $16,324.80, plus pre-judgment interest. Further, Respondent shall expunge all disciplinary and other records of the September 2, 2015 and September 8, 2015 incidents from his personnel file.

[38] It should be noted that one detail that was curiously absent was the assault that occurred several days prior.

It is **ORDERED** that Respondent post this decision at the Harrison County Mine in a conspicuous unobstructed place where notices to employees are customarily posted, for a period of 60 days. It is **ORDERED** that Harrison County Coal management personnel and supervisors undergo comprehensive specialized training by MSHA personnel in the statutory rights of miners under Section 105(c) of the Act.

It is **FURTHER ORDERED** that Respondent pay a civil penalty of $40,000.00 within 40 days of this decision to the Secretary of Labor.[39]

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

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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September 20, 2018

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. ROCKWELL MINING, LLC, Respondent.	CIVIL PENALTY PROCEEDING Docket No. WEVA 2017-0220 A.C. No. 46-06618-427999 Mine: Gateway Eagle Mine

DECISION UPON REMAND

Before: Judge Moran

In a Decision, issued August 2, 2018, the Commission, upon interlocutory review, concluded that this Court "applied an incorrect legal standard in denying the settlement motion and abused [its] discretion." *Sec'y of Labor, Mine Safety and Health Admin. (MSHA), v. Rockwell Mining, LLC*, 40 FMSHRC ___, slip op. at 1, 2018 WL 3830146 *1 (Aug. 2, 2018) (hereinafter *Rockwell*). It then vacated the Court's "order denying the settlement motion and remand[ed] for further proceedings." *Id.* Specifically, the Commission remanded the matter "for reconsideration consistent with [its] opinion *and* [its] decision in *AmCoal* issued on this date." *Id.* at 4, 2018 WL at *3 (emphasis added), citing *Sec'y of Labor, Mine Safety & Health Admin. (MSHA) v. The American Coal Company and United Mine Workers of America and United Steel, Paper and Forestry, Rubber Mfg., Energy, Allied Indus. and Service Workers International Union*, 40 FMSHRC ___, slip op., 2018 WL 3830145 (Aug. 2, 2018) (hereinafter *AmCoal*).

In its May 9, 2018 decision denying settlement, the Court recounted the information provided in the parties' motion:

Citation No. 9068232, which alleged a violation of 30 C.F.R. § 75.202(a), was proposed for a penalty reduction from $446.00 to $244.00. This citation alleged that,

> on the CO #2 section, 012/013 MMU, the rib area of the #3 entry, on the inby right rib corner across from the loading point, has not been supported or otherwise controlled to protect persons from hazards related to fall of the rib. When checked, the rib corner was found cracked and loose. When the rib was pulled, the corner fell in two pieces. When measured, one piece was approximately 18"x21"x10" and was rectangular in shape and the second piece was approximately 12"x21"x9" and was triangular in shape.

Citation No. 9068232 (formatting added).

The Secretary alleged that this violation was S&S, reasonably likely to result in lost workdays or restricted duties for one person, and the result of moderate negligence.

In support of the proposed penalty reduction for this citation, the motion stated,

> the Respondent argues that the evidence would establish that it was not negligent. The Respondent was taking steps to control the ribs by installing rib bolts throughout the section as needed. Furthermore, the cited conditions likely occurred since the most recent examination in the area. The Secretary notes that no rock dust was observed in the cracks in the ribs indicating that the cracks were fairly recent. Taking into account the Respondent's arguments, as well as the uncertainties of litigation, the Secretary has agreed to a reduced penalty.

Mot. at 3.

Citation No. 9070540, which alleged a violation of 30 C.F.R. § 75.380(d)(4), was proposed for a penalty reduction from $2,598.00 to $2,000.00. The citation alleged that,

> The operator failed to maintain 6 foot of clearance on the branch line leading from secondary escapeway lifeline to the section refuge chamber, on 1 Section (010 and 011 MMU), in that upon arrival to the section a 6 man Diesel mantrip was observed parked under the branch line leading from the secondary escapeway lifeline to the section refuge chamber.

Citation No. 9070540.

The Secretary alleged that this violation was S&S, reasonably likely to result in permanently disabling injuries for 10 persons, and the result of moderate negligence.

In support of the proposed penalty reduction for this citation, the Motion stated,

> the Respondent argues that the evidence would establish that it was not negligent because there is no evidence as to how long the referenced mantrip was parked beneath the branch line or that management was aware of its presence. Taking into account the Respondent's arguments, as well as the uncertainties of litigation, the Secretary has agreed to a reduced penalty.

Mot. at 3-4.

Citation No. 9070542, which alleged a violation of 30 C.F.R. § 75.604(b), was proposed for a penalty reduction from $666.00 to $443.00. The citation alleged that,

> The operator failed to effectively insulate and seal a permanent splice in the energized 995 volt trailing cable suppling [sic] power to the Co.# 251 continuous mining machine located on the right side of the 1 Section (010and 011MMU), in

> that an opening was observed in the permanent splice exposing the energized insulated inner conductors.

Citation No. 9070542.

The Secretary alleged that this violation was S&S, reasonably likely to result in permanently disabling injuries for one person, and the result of moderate negligence.

In support of the proposed penalty reduction for this citation, the Motion stated,

> the Respondent argues that the levels of gravity and negligence were overwritten. The Respondent would argue that the violation should not have been issued as S&S because there were no exposed inner leads in the splice. Respondent also argues that the cable is being moved on a continuous basis and the damage to the splice likely occurred sometime after the most recent weekly electrical examination. Taking into account the Respondent's arguments, as well as the uncertainties of litigation, the Secretary has agreed to a reduced penalty.

Mot. at 4, Decision Denying Settlement at 1-3.

The Court also summed up the motion, noting that, "[s]even citations are involved in this docket. The settlement motion proposed penalty reductions for three citations, and the Respondent agreed to pay the proposed penalties for three more, with no modifications." Decision Denying Settlement at 1.

The motion also informed the Court that the Secretary had decided to vacate Citation No. 9070543, which alleged a violation of 30 C.F.R. § 75.400-2. That citation, issued under section 104(a), initially alleged that "[t]he operator failed to follow the cleanup program on 1 Section (010 and 011 MMU), in that roadway coal spillage is present from the active pillar line to the section dump and from #1 entry to #8 entry. This creates slip, trip and fall hazards for mine personn[el] in the event of a rock fall trying to escape the rock fall." Citation No. 9070543, issued November 30, 2016. The cited standard, 30 C.F.R. § 75.400-2, titled, "Cleanup program," provides, in relevant part, that "[a] program for regular cleanup and removal of accumulations of coal and float coal dusts, loose coal, and other combustibles shall be established and maintained."

The condition or practice was then modified to state that the "[t]he operator's cleanup program on 1 Section (010 and 011 MMU) is deficient, in that rock, hydraulic oil cans, timber saw butts and metal are present across the section, presenting tripping hazards." Citation No. 9070543-01. Subsequently, because the operator had made "good efforts" to correct the cited conditions, more time was granted on December 5, 2016, to perform more cleaning. Finally, on December 11, 2016, the citation was terminated as "[t]he section has been cleaned and all combustible material [was] removed." Citation No. 9070543-03. The gravity for the injury was marked as "Reasonably Likely," and "Permanently Disabling," and designated as "Significant and Substantial," with the negligence listed as "Moderate." The proposed penalty for that now

vacated citation was $722.00, an amount, like each of the citations in this docket, that included a 10 (ten) percent reduction for "good faith."

Two of the reduced penalties, Citation Nos. 9070540 and 9070542, were in the same area 1 Section: 010 MMU and 011 MMU, as the vacated citation. The total proposed penalty amount was $6,977.00, with that amount representing the 10% across the board reduction for "good faith." The proposed settlement is for $5,232.00. This amounts to a 25% reduction from the total proposed penalty."[1] *Id.* at 1.

The Commission's Decisions in *Rockwell* and *AmCoal*

To comply with the remand order, the Court must first recount the Commission's holdings in those decisions.

In its August 2, 2018 decision in *Rockwell,* remanding this matter for further proceedings, the Commission instructed the Court to conduct "reconsideration consistent with this opinion and [its] decision in *AmCoal* issued on this date." *Rockwell,* slip op. at 4, 2018 WL at *3. Therefore, as stated, it is first necessary to discuss the Commission's decisions in those two matters. The Commission noted that in "evaluat[ing] settlement motions, [it] consider[s] 'whether the settlement of a proposed penalty is fair, reasonable, appropriate under the facts, and protects the public interest." *The American Coal Co*., 38 FMSHRC 1972, 1976 (Aug. 2016)." *Id*. at 3. It then acknowledged that to make that evaluation both the "Commission and its Judges 'must have information sufficient to carry out this responsibility.'" *Id., citation omitted.*

To accomplish this, the Commission, citing Commission Procedural Rule 31, 29 C.F.R. §2700.31, stated that "for each violation" a motion to approve penalty settlement must include three things:

(1) the penalty proposed by the Secretary;
(2) the amount of the penalty agreed to in settlement;
(3) "facts" in support of the penalty agreed to by the parties.

Id.

[1] As will be discussed more fully within, the Commission, concluding that the Court "applied an incorrect legal standard in denying the settlement motion and abused [its] discretion," rejected the Court's reliance in its denial that "that [while] the penalty reduction proposed here is relatively modest, … Commission approval under section 110(k) is not simply about dollars [and the Court's conclusion that for] … two of the three citations … discussed above, the Secretary provided no substantive or case-specific information following the Respondent's contentions. The repeated allusion to uncertainties of litigation does nothing to help the Court discern whether there is a legitimate dispute of fact or law at issue here." Court's Denial at 3.

The Commission determined that the Court erred in denying the settlement motion in two particulars. First, it noted as error that the Court "did not refer to or apply the [Rule 31] standard … that [the Commission] use[s] for evaluating penalty reductions in settlement[s].[2] *Id.*

Second, the Commission determined that the Court "erred in concluding that a motion to approve settlement must include an acknowledgement by the Secretary that the Respondent's assertions present legitimate questions of fact which are in dispute and can only be resolved through the hearing process. …[Instead,] facts alleged in a proposed settlement need not demonstrate a 'legitimate' disagreement that can only be resolved by a hearing." *Id.*, and citing its *AmCoal* decision issued the same day as *Rockwell.*

The Commission uses the term "facts" in a sense that the Court had not previously applied to that term. The Court was applying what it heretofore thought was meant by "facts," that is, "[a] thing that is known or proved to be true." Fact, *Oxford English Dictionary* (online ed.); something that has actual existence; a piece of information presented as having objective reality; the quality of being actual. Fact, *Merriam-Webster* (online ed.); "[a] fact is a statement that is consistent with reality or can be proven with evidence. The usual test for a statement of fact is verifiability." Fact, *Wikipedia*, Wikipedia (Sept. 17, 2018), https://en.wikipedia.org/wiki/Fact.

Of course, the Court understands that the parties may, in the context of a settlement motion, have a different view of what the facts are and that they need not necessarily agree on what they actually are. It was on the basis of that understanding that the Court sought a representation from the Secretary that the Respondent's assertions present *legitimate* questions of fact which are in dispute and can only be resolved through the hearing process. The Commission has stated this is not required in settlements. Instead, it has instructed that it is sufficient for the parties to submit facts that reflect a mutual position that the parties have agreed is acceptable to them in lieu of the hearing process. This means that such submitted "facts" are sufficient where they "reflect a mutual position that the parties have agreed is acceptable to them." *Rockwell*, slip op. at 3, 2018 WL at *3. Obviously, the Court plays no role in that mutual position of the parties. Now the Court realizes that, in the context of a settlement, facts may be different from the findings of facts resulting from a hearing. Still, it seems to be a misnomer, in the context of a citation, to call one side's, or the other's, statements to be facts. Rather, they are assertions about the parties' view of the allegations and or conditions surrounding a citation or order, with the key determinant being whether they have reached a mutual position that is acceptable to them. Acceptability to the Court then, apparently under the Commission's view of the Court's role in carrying out section 110(k), is to apply the three elements, as described above.

For the Commission, in settlements, "facts" may "reflect a mutual position that the parties have agreed is acceptable to them in lieu of the hearing process." *Id* (citation omitted). This occurs where "the parties find and agree upon a mutually agreeable position that resolves the dispute and obviates the need for further proceedings." *Id.* (citation omitted). Expressed differently, the Commission has stated the Rule 31 facts "may include a description of an issue on which the parties have agreed to disagree." *Id.* Facts of this nature do "not require concessions

[2] In this decision upon remand, the Court hereby expressly refers to Commission Rule 31.

from parties in settlement as long as the parties provide *mutually acceptable facts* that demonstrate the proposed penalty reduction is fair, reasonable, appropriate under the facts, and protects the public interest." *Id.* (emphasis added).

Accordingly, by virtue of the submission of a settlement motion, in all instances the parties have implicitly provided "mutually acceptable facts." And those "facts" may be composed entirely upon "a description of an issue on which the parties have agreed to disagree." *Id.* at 3, 2018 WL at *3.

As noted, the Commission's remand directed further proceedings for reconsideration consistent with its opinion in *Rockwell* and its decision in *AmCoal* issued on the same date. Therefore the Court now takes into account the Commission's decision in *AmCoal*. To begin, the Commission held that the criteria in section 110(i) of the Mine Act are not to be applied "in an overly rigid manner." *AmCoal*, slip op. at 6, 2018 WL at *5. Further, the Commission held that it is not true "that the facts supporting the settlement 'must be tied to the six statutory criteria in [s]ection l l0(i).'" *Id.* In this regard, the Commission stated that although it "has previously explained that standards for factual support for a penalty reduction in settlement may be found in section l l0(i)," it has also expressed "that 'parties may submit facts supporting a settlement that fall outside of the section 110(i) factors but that support settlement.'" *Id.* at 7, 2018 WL at *5.

Rather, the Commission has stated "there may be considerations beyond the six statutory criteria of section 110(i) that are relevant to whether a settlement proposal is fair, reasonable, appropriate under the facts, and protects the public interest." *Id.* citations omitted.

In its *AmCoal* decision, the Commission identified that such other considerations include "that the operator had agreed to accept all of the citations as written," endorsing the Secretary's statement that "the fact that the proposed settlement preserves all of the citations as written could assist the Secretary in future enforcement efforts against this operator by ensuring that the paper record reflects the Secretary's views regarding gravity and negligence stated in the citations." *Id.* Thus, *AmCoal* instructs that it is proper to consider the "value of accepting the citations as written on future enforcement actions." *Id.*

Further, the Commission instructed that a judge is "to accord due consideration to the entirety of the proposed settlement package, including both its monetary and nonmonetary aspects." *Id.*, citation omitted.

In discussing what constitute "facts" for a settlement, the Commission stated "there is no requirement that facts supporting a proposed settlement must necessarily be submitted by the Secretary. *Facts* supporting a penalty reduction in a settlement motion may be provided by any party individually or by parties collectively." *Id.* at 8 (emphasis added), 2018 WL at *6. The only associated requirement with such "facts" is that "there is a certification by the filing party that any non-filing party has consented to the granting of the settlement motion."[3] *Id.*

[3] It would difficult to imagine a "settlement" motion where one party does not consent to the granting of the motion.

Accordingly, the Commission rejected the view that a respondent's assertions of fact need to "present *legitimate* questions of fact," and further that the Secretary need not comment yea or nay to the facts asserted by a respondent. *Id.*

Instead, the Commission announced that "[f]acts alleged in a proposed settlement need not demonstrate a 'legitimate' disagreement that can only be resolved by a hearing. The Commission's Procedural Rules and standing precedent do not contain such a requirement." *Id.* at 9, 2018 WL at *6. Instead, the Commission will allow that the "parties may submit facts that reflect a mutual position that the parties have agreed is acceptable to them…." *Id*.

As the Commission did not expressly set forth how one discerns that the submitted facts "reflect a mutual position that the parties have agreed is acceptable," the Court infers that the act of submitting the settlement reflects such a mutually acceptable position from the parties, else the submission could not be denominated a "settlement." That this is the case is reflected by the Commission's statement that it is "'[*i*]*nherent in the concept of settlement* [ ] that the parties find and agree upon a mutually acceptable position that resolves the dispute and obviates the need for further proceedings.'" *Id.*, citation omitted.

To meet Rule 31, it is enough, the Commission has stated, to "include a description of an issue on which the parties have agreed to disagree. The Commission does not require concessions from parties in settlement as long as the parties provide mutually acceptable facts "that demonstrate the proposed penalty reduction is *fair, reasonable, appropriate under the facts, and protects the public interest.*" *Id.* (emphasis added). That phrase, repeated seven (7) times in *AmCoal*, is unadorned. Rather, in terms of any tangible guideposts as to its meaning, a court is directed to ascertain whether:

(1) there has been a penalty proposed by the Secretary;
(2) the settlement motion reflects the amount of the penalty agreed to in the settlement; and
(3) whether there are "facts" which reflect a mutual position that the parties have agreed is acceptable to them.

Thus, the Commission has held, per its decisions in *Rockwell* and *AmCoal*, that the presence of these three elements are consonant with Congress' inclusion of Section 110(k) of the Mine Act, addressing the subject of "Compromise, mitigation, and settlement of penalty," which provides in relevant part that "[n]o proposed penalty which has been contested before the Commission under section 815(a) of this title shall be compromised, mitigated, or settled except with the approval of the Commission."

30 U.S.C. § 820(k).

In evaluating the propriety of settlements, the Commission also eschewed the idea that the Secretary is required "to provide an explanation for the specific numerical percentage reduction of each penalty." *Id.* In this regard the Commission stated that there may be non-monetary considerations that also support settlement that are not amenable to "explanation about why a particular numerical reduction is appropriate for a violation." *Id*. at 10, 2018 WL at *7.

The Commission has "recognized that, in reviewing information supporting a reduced penalty in settlement, a Judge 'need not make factual findings with respect to each of the section 110(i) factors as a Judge would in the assessment of a penalty after hearing.'" *Id.* at 9, citation omitted. Last, the Commission also held that it was error for the Court to require that the Secretary need "provide an explanation for the specific numerical percentage reduction of each penalty." *Id.*

Application of the Commission's decisions in *Rockwell Mining* and *AmCoal*

Pursuant to the *entirety* of the Commission's decisions in *Rockwell Mining* and *AmCoal*, the settlement motion and in obeisance to those decisions, the Court finds that the motion contains:

(1) the penalty proposed by the Secretary;
(2) the amount of the penalty agreed to in settlement;
(3) "facts," as the Commission has employed that term, in support of the penalty agreed to by the parties.

The Court finds that the settlement motion meets the Commission's expressed requirements for settlement approval as expressed in *Rockwell Mining* and *AmCoal* and, on that basis, it is approved.

In sum the settlement amounts for the citations in issue are as follows:

Citation	**Assessment**	**Settlement**
4201556	$1,484	$1,484
9068232	$446	$244
9070540	$2598	$2,000
9070542	$666	$443
9070543	$722	$0 (Vacated by Secretary)
9065102	$446	$446
9065104	$615	$615
TOTAL:	**$6,977**	**$5,232**

Within 30 days of this Order approving this settlement, the Respondent shall send to MSHA a check in the amount of $5,232.00, made payable to "U.S. Department of Labor/MSHA", and mailed to the following address: P.O. Box 790390, St. Louis, MO 63179-0390.

WHEREFORE, the motion to approve settlement is **GRANTED.**

It is **ORDERED** that the respondent pay a civil penalty of $5,232.00. Upon receipt of timely payment, the captioned case is **DISMISSED**.

SO ORDERED.

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

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October 2, 2018

RIVER HILL COAL COMPANY, INC., Contestant, v. SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent.	CONTEST PROCEEDING Docket No. PENN 2014-0956-R Order No. 8012327; 09/02/2014 River Hill Tipple Mine ID 36-08683
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. RIVER HILL COAL COMPANY, INC., Respondent.	CIVIL PENALTY PROCEEDING Docket No. PENN 2015-0178 A.C. No. 36-08683-375386 Mine: River Hill Tipple

DECISION AND ORDER

Appearances: Ryan M. Kooi, Esq., U.S. Department of Labor, Office of the Solicitor, Philadelphia, PA, for the Secretary of Labor;

Joseph A. Yuhas, Esq., Northern Cambria, PA, for the Operator.

Before: Judge L. Zane Gill

These proceedings arose from a Petition for the Assessment of Civil Penalty filed by the Secretary of Labor ("Secretary") and a Notice of Contest filed by the operator, River Hill Coal Company, Inc. ("River Hill" or "Operator") pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 ("Mine Act" or "Act"), 30 U.S.C. § 815(d). These cases involve one section 104(d)(1) citation, one section 104(d)(1) order, and one section 104(b) order.

The Secretary seeks civil penalties of $2,000.00 for Citation No. 8012325 and $2,000.00 for Order No. 8012326, requesting that they be affirmed as issued. River Hill argues that the court should vacate the citations because it lacked fair notice of the violative nature of its conduct. Failing that, the operator argues the citations are neither significant and substantial ("S&S") nor unwarrantable failures.

Additionally, River Hill argues the section 104(b) order, Order No. 8012327, was improperly issued because the inspector did not provide a reasonable time for abatement.

For the reasons listed below, I find that the violations for which Citation No. 8012325 and Order No. 8012326 were issued are S&S and constitute unwarrantable failures to comply with a mandatory standard. I find that a total penalty of $4,000.00 is appropriate. Additionally, I find that Order No. 8012327 was properly issued.

I. STIPULATED FACTS

1. River Hill Coal Company, Inc. operated the River Hill Tipple (Mine No. 36-08683) at the time that the violations in this matter were issued.

2. Respondent was an "operator" as defined in § 3(d) of the Act, 30 U.S.C. § 802(d), at the Mine at which the citations in this matter was issued.

3. The operations of Respondent at the Mine at which the citations in these matters were issued are subject to the jurisdiction of the Act.

4. These proceedings are subject to the jurisdiction of the Federal Mine Safety and Health Review Commission, and its assigned Administrative Law Judges, pursuant to Sections 105 and 113 of the Act.

5. The citations in these matters were properly issued and served by a duly authorized representative of the Secretary of Labor upon an agent of Respondent at the date, time, and place stated therein as required by the Act.

6. True copies of the citations in these matters were served on Respondent and/or its agents as is required by the Act.

7. The violations contained in "Exhibit A" attached to the Secretary's petitions in these matters are authentic copies of the subject violations, with all the appropriate modifications or abatements, if any.

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

II. FACTUAL BACKGROUND

On June 26, 2013, River Hill idled the Old Processing Plant ("Old Plant") and the New Old Processing Plant (referred to here as the "Wash Plant")[1] at the River Hill Tipple, a coal preparation plant near Karthaus, Pennsylvania. (Tr.209:20-22; 225:11-16; Ex. S–5)

In either late June or early July, Keith Thompson, a contractor who supervised plant operations for the operator, consulted MSHA's Clearfield Office and explained River Hill's intention to idle the plants. (Tr.209:20-210:12; 226:22-227:1) Over the phone, Thompson informed Inspector John McMurray that while he intended to maintain electricity through both buildings, he no longer planned to use or run the plants. (Tr.210:17-21) He agreed to restrict power to the equipment and lighting and prevent access to both buildings. (Tr.211:4-13)

On August 7, 2014, McMurray[2] inspected the plants, accompanied by Thompson and Elwood King, the mine's electrician. (Tr.22:13-15; 46:12-14; 121:7-15) McMurray observed numerous structural hazards, (Tr.26:23-28:25; 50:1-7; 51:5-9), and decided to return with an expert to determine the extent of structural deterioration before issuing citations. (Tr.51:12-52:19; 139:12-140:18) McMurray received assurances from Thompson that the plants would remain locked and restricted from access. (Tr.54:25-55:7; 140:7-10; 217:23-218:10)

On August 25, 2014, McMurray returned with Terrance Taylor, an MSHA expert on structural engineering.[3] (Tr.156:6-20; 167:18-23; 170:8-11) Collectively, they observed the following:

A. Old Plant Conditions

Numerous support beams within the Old Plant were corroded or deteriorated. Corroded steel floor plates hung from an outdoor overhanging structure. (Tr.198:8-24; Ex. S–17) McMurray testified that miners walked under this overhanging structure. (Tr.42:20-43:7) Large delaminated metal sheets hung from the walls. (Tr.29:20-22; 30:22-23; 42:16-19; 193:11-14; Exs. S–1, 5, 15) These plates posed a danger to those standing below on the ground floor. (Tr.194:8-12; Ex. S–15) The garage door, the garage door opener, and a fresh water pump were located below these plates on the ground floor. (Tr.31:6-24; 33:12-34:2) McMurray testified all

[1] Both plants are referred to by a variety of names throughout the testimony. The Old Processing Plant is also known as the Old Plant, the Old Side, the Old Side Tipple, and the Screen building. (Tr.25:1-3; 136:16-20; 137:13-21) The New Old Processing Plant is also known as the New Old Plant, the New Old Building, the New Side Tipple, the New Side, the Fines Building, and the Wash Plant. (Tr.25:4-5; 87:2-6; 136:6-15; 137:9-12; 228:20-229:4) For the purpose of clarity, I refer to the New Old Processing Plant as the Wash Plant.

[2] At the time of the hearing, McMurray had been an MSHA employee for 32 years. (Tr.13:23-25; 121:6) As a surface mine inspector, McMurray conducted thousands of inspections on surface mines and served as a technical advisor to other inspectors. (Tr.14:1-15:23)

[3] At the time of the hearing, the Secretary's expert witness was a senior civil engineer and had worked in technical support for MSHA for 28 years. (Tr.158:5-12; 167:4-15)

three pieces of equipment required inspection or service, and that at least two employees accessed the area. (Tr.31:14-24; 32:18-33:4; *see* Ex. S–5)

McMurray and Taylor were unable to access the upper floors because the second floor walkway that led to the stairs was corroded. (Tr.35:4-15; 36:23-37:18; 194:24-195:8; 200:25-201:16; Exs. S–16, 18) This walkway had rust, holes, lacked support, and bent under applied pressure. (Tr.37:12-38:10; Ex. S–16) McMurray observed King cross this walkway. (Tr.38:1-16) The metal and the tread of an outside stairwell were deteriorated. (Tr.44:6-17) A pipe obstructed the bottom of the stairwell as a warning against access. (Tr.28:4-7) The pipe was moveable and lacked any cautionary signs.[4] (Tr.28:8-25; *see* Ex. S–5)

B. Wash Plant Conditions

The Wash Plant's main support columns were completely compromised with rust. (Tr.87:10-14; Ex. S–7) The diagonal bracings for numerous columns were corroded or detached.[5] (Tr.50:17-18; 176:24-178:25; Ex. S–8) Two columns had corrosion holes within their webbing. (Tr.174:14-176:2) Numerous horizontal support beams had delamination damage, corrosion holes, and pitting. (Tr.180:1-181:10) One sagging horizontal beam supported an elevated platform. (Tr.181:20-182:8; Ex. S–10) The stairwell's support posts were almost completely deteriorated from severe corrosion and pitting. (Tr.97:5-13; 188:17-189:21; Exs. S–13, 20) The stairway's inclined channel stringers also had corrosion holes. (Tr.187:2-8; Ex. S–12) The horizontal beam that supported the stair landing was weakened with corrosion holes. (Tr.87:22-25; 97:2-13) The plant had flooring that was totally corroded and bending down, causing a bow in the floor. (Tr.88:11-90:3; Ex. S–10) Three or four support posts for a sump bin were severely deteriorated. (Tr.183:11-184:22; Ex. S–11) There were severe corrosion notches in four of the vertical support posts for the plant's BC-1 conveyor belt. (Tr.190:12-191:24; Ex. S–14) Additionally, the Belt BC-1 had a large corrosion hole in the webbing of the channel. (Tr.190:15-17) At the time of the inspection, the Wash Plant lacked any barricade, lock, tape, or cautionary warning sign to discourage entry. (Tr.47:11-19; *see* Ex. S–5)

On inspection, Taylor determined that both buildings were not maintained in good repair. (Tr.171:12-13; 172:1-2; Ex. S–5) He testified that a significant number of areas in each building were unsafe. (Tr.204:18-205:16) In Taylor's expert opinion, neither the Old Plant nor the Wash Plant was maintained in good enough repair to prevent injuries and accidents to miners. (Tr.203:20-204:15)

[4] After the inspection, River Hill welded a bar across the entrance of the stairwell. (Tr.44:22-25)

[5] Diagonal braces provide lateral resistance to the structural frame and resist stress from mechanical vibrations that could weaken the structural integrity of the building. (Tr.177:1-20)

C. Plant Use and Employee Access

The plants were accessed and used in the eighteen months before the issuance of the citation. King, Operator's electrician, conducted monthly electrical examinations of both plants. (Tr.46:18-25; 57:19-61:1; 76:15-20; 213:22-214:11; Ex. S–21) The routine records from these examinations confirm King walked through the first floors and accessed the upper floors of the Old and Wash Plants.[6] (Tr.46:18-25; 149:18-150:1; 214:2-11; 239:13-23; Ex. S–21)

From May 24-27, 2014, the mine ran raw coal on conveyor belts through both plants. (Tr.61:23-62:4; 67:12-68:18; 231:5-233:5; 237:10-18; Ex. S–21, at 14) This activity does not necessitate employee presence within the plants. (Tr.69:1-22; 121:19-25) However, conveyor belts usually spill coal over the edges of the belts and produce coal dust that accumulates on all the structures. (Tr.70:8-16) Every active working area and active surface installation must be examined once each shift and cleaned of spilled coal and coal dust. (Tr.69:9-14; 122:1-16; 30 C.F.R. § 77.1713(a)) Thompson alleges the miners performed visual examinations by standing outside the plant and that coal did not spill in either building. (Tr.234:11-235:2; 237:19-238:1) Had maintenance been required, Thompson claims he would have shut down the plant and performed inspections to ensure safe travel within the plants. (Tr.238:22-239:2) The buildings must be hosed down from the top floor to the bottom floor to entirely remove coal dust. (Tr.75:9-18) McMurray testified that it was obvious the Wash Plant had been washed down because it was "remarkably clean" and without coal dust three months later.[7] (Tr.48:7-8; 70:17-71:3)

On August 28, 2014, McMurray issued Citation No. 8012325 and Order No. 8012326 to River Hill under 30 C.F.R. § 77.200 for a failure to maintain two buildings in good repair to prevent accidents and injuries to employees. (Tr.7:18-24; Exs. S–1, 2) At the time of the cited violations, the plants had been idled for over a year. (Tr.109:22) McMurray did not want to economically damage the operator by issuing numerous citations. (Tr.140:19-141:1) After discussion with the MSHA field office supervisor the next morning, McMurray issued a 104(d)(1) citation for the Old Plant and a 104(d)(1) order for the Wash Plant. (Tr.19:3-10; Exs. S–1, 2) McMurray gave River Hill until September 2, 2014—five days—to abate the violations. (Tr.107:3-8; Exs. S–1, 2) River Hill made some suggestions and considered how to restrict access to the buildings. (Tr.105:22-106:1)

On September 2, 2014, the abatement deadline, McMurray returned and discovered that while the entrances to the plants were locked, the key was readily accessible to the mine

[6] On July 31, 2013, King's records indicate he repaired an electrical ballast on the fifth floor of the New Side Tipple plant. (Tr.75:19-76:8; Ex. S–21, at 1) Thompson and McMurray disagree whether the New Side Tipple refers to the Wash Plant. (Tr.136:21-137:12; 228:7-229:11) The issue is not determinative. Thompson admitted that King accessed the upper levels of the Wash Plant during inspections. (Tr.214:2-11)

[7] As part of the procedure to initially close the buildings a year earlier, the operator hosed down the plants from the top to the bottom floors on August 29, 2013. (Tr.74:16-75:18; 225:21-226:6; Ex. S–21, at 3)

employees in the office. (Tr.107:11-17) He issued a 104(b) order for a failure to abate the conditions.[8] (Tr.106:19-22; Ex. S–3)

On September 16, 2014, McMurray terminated the 104(b) order when he observed that the buildings were completely barricaded, the power within the buildings was disconnected, and River Hill submitted a plan to the District Office to keep the Old Plant and the Wash Plant idle. (Ex. S–3)

III. ANALYSIS AND DISPOSITION

A. PENN 2015-0178

1. Notice

River Hill seeks to avoid liability by arguing that it lacked fair notice of the requirements of section 77.200. (Resp't Br. 9) River Hill argues MSHA's conduct on numerous occasions affirmed River Hill's compliance with the regulation. Thompson testified that when he consulted McMurray on the best practice to close both buildings, he indicated the intent to maintain electricity within the buildings. (Tr.210:17-21) River Hill argues that MSHA either approved of or failed to raise objections to the implied monthly electrical examinations necessary to maintain electricity in both buildings. (Resp't Br. 10) It cites MSHA's failure to issue citations during two inspections and the three week delay in the issuance of the citations after the third inspection as evidence of MSHA's belief of River Hill's compliance. (*Id.*) River Hill also highlights McMurray's "NVO" notation in the inspector's notes as evidence that no violations were observed during the final inspection. (*Id.*) Finally, River Hill highlights an instance where McMurray told King "that's fine for you" while crossing a dangerous walkway. (*Id.*, *citing* Tr.38:17-18) McMurray indicated that while the state of the walkway might satisfy King, it did not satisfy his own standards for safety. (Tr.38:18-25) River Hill, nevertheless, argues that McMurray's response ("that's fine for you") indicated approval of King's actions. Essentially, the operator argues that MSHA should be estopped from issuing the citations because MSHA did not raise objections to electrical examinations in the idle buildings and because of a lack of previous citations from prior inspections. (*See* Resp't Br. 9-11)

The operator's argument that it detrimentally relied on MSHA's implicit approval of electrical examinations within the buildings and the lack of previous citations fails. The Commission has declined to apply equitable estoppel against the government or its agents. *King Knob Coal Co.*, 3 FMSHRC 1417, 1421 (June 1981). Generally, "those who deal with the Government are expected to know the law and may not rely on the conduct of Government agents contrary to law." *Heckler v. Cmty. Health Servs.*, 467 U.S. 51, 63 (1981); *see also Emery Mining Corp. v. SOL*, 744 F.2d 1411, 1416 (10th Cir. 1984). The Commission has held that an inconsistent enforcement history by MSHA inspectors "does not prevent MSHA from

[8] Order No. 8012327 only applies to the Old Plant, as personnel were already required to be withdrawn from the Wash Plant pursuant to 104(d)(1) Order No. 8012326. Accordingly, Order No. 8012327 only refers to Citation No. 8012325 in the condition or practice narrative. (Ex. S–3)

proceeding under an application of the standard that it concludes is correct." *Maxxim Rebuild Co*., 38 FMSHRC 605, 610 (Apr. 2016) (citing *Mach Mining, LLC*, 34 FMSHRC 1769, 1774 (Aug. 2012)) (citing *Nolichuckey Sand Co.*, 22 FMSHRC 1057, 1063-64 (Sept. 2000)); *see also Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1131 (July 1992) ("prior instances of inconsistent action by MSHA do not constitute a viable defense to liability."). Rather, confusing MSHA actions may be a mitigating factor in determining an operator's negligence. *King Knob*, 3 FMSHRC at 1422. I find that a lack of prior citations and a conversation permitting the idling of the plants without MSHA's explicit approval of regular miner access within the buildings cannot be used to deny the electrician protections afforded to him by the statute.[9]

A mine operator is held strictly liable for violations that occur at its mine. *Asarco, Inc.*, 8 FMSHRC 1632, 1634-36 (Nov. 1986), *aff'd*, 868 F.2d 1195 (10th Cir. 1989). The operator may, however, avoid liability by showing that it was not properly on notice of the violative nature of its conduct. *See Hecla Ltd.*, 38 FMSHRC 2117, 2125 (Aug. 2016) ("To comport with due process, laws must 'give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.'") (citing *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972)). The Commission has held that where the language of a standard is clear and unambiguous, the standard provides operators with fair and adequate notice. *Dynamic Energy, Inc*., 32 FMSHRC 1168, 1172 (Sept. 2010) (citing *Bluestone Coal Corp*., 19 FMSHRC 1025, 1031 (June 1997)). Even in the absence of actual notice, the Secretary may properly charge the operator with a violation when a reasonably prudent person familiar with the mining industry and the protective purposes of the cited standard would have recognized a hazard warranting corrective action within the purview of the applicable regulations. *Hecla*, 38 FMSHRC at 2125; *Lafarge N. Am.*, 35 FMSHRC 3497, 3500-01 (Dec. 2013); *Ideal Cement Co*., 12 FMSHRC 2409, 2415-16 (Nov. 1990); *Ala. By-Products Corp*., 4 FMSHRC 2128, 2129 (Dec. 1982).

I reject the operator's fair notice defense as to these violations. The D.C. Circuit has held that the plain language of section 77.200 gives fair notice of what it requires and that the regulation is not unconstitutionally vague. *Freeman United Coal Mining Co. v. FMSHRC*, 108 F.3d 358, 362 (D.C. Cir. 1997). The plain meaning of the standard requires that structures be maintained in good repair so that they do not deteriorate to a condition that is hazardous. *Id*. The court found that any reasonably prudent person would recognize that allowing steel beams supporting a walkway to corrode and deteriorate to the point of collapse constitutes a failure to maintain a facility in good repair. *Id*. Similarly, I find the standard is clear on its face as it applies to the facts in this case. A reasonably prudent person familiar with the mining industry and the protective purposes of the standard would recognize that allowing a miner access to buildings with sagging support beams, deteriorated staircases, and corroded support columns and

[9] There is no evidence that the Secretary actually took inconsistent positions with respect to this particular application of the standard. Neither party testified that MSHA allowed a miner to enter the unmaintained buildings and expose himself to potentially serious injuries. It was only the operator's "understanding" of the discussion that led it to conclude that it was acceptable to provide the electrician regular access throughout both buildings despite the severity of structural decay. (Tr.211:13-22; 222:13-19) As for the lack of citations from previous inspections, the inspectors understood access to the idled plants was restricted and, consequently, performed only cursory inspections of the buildings. (Tr.216:22-217:7)

walkways constitutes a failure to maintain a structure in good repair to prevent accidents and injuries to that miner. The operator's impressions of MSHA's actions do not overcome the clear language of the statute or the standard of a reasonably prudent miner in similar conditions. Accordingly, I conclude that operator had adequate notice of the requirements of 30 C.F.R. § 77.200.

2. S&S

An S&S violation is a violation "of such nature as could significantly and substantially contribute to the cause and effect of a [. . .] mine safety or health hazard." 30 U.S.C. § 814(d). In order to establish the S&S nature of a violation, the Secretary must prove: "(1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard—that is, a measure of danger to safety—contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature." *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984); *accord. Buck Creek Coal, Inc.*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc.*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria). An experienced MSHA inspector's opinion that a violation is S&S is entitled to substantial weight. *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-79 (Dec. 1998).

The Commission has explained that the focus of the *Mathies* analysis "centers on the interplay between the second and third steps." *ICG Ill., LLC*, 38 FMSHRC 2473, 2475 (Oct. 2016) (citing *Newtown Energy Inc.*, 38 FMSHRC 2033, 2037 (Aug. 2016)). The second step requires the judge to adequately define the "particular hazard to which the violation allegedly contributes[,]" and then determine whether "there exists a reasonable likelihood of the occurrence of the hazard against which the mandatory safety standard is directed." *Newtown*, 38 FMSHRC at 2037-38. This determination must be made "based on the particular facts surrounding the violation[.]" *Id.* at 2038.

The third step requires the judge to assume the existence of a hazard and assess whether the hazard "would be reasonably likely to result in serious injury." *Id.* at 2037; *ICG*, 38 FMSHRC at 2476. The "reasonably likely" provision does not require the Secretary to prove that an injury was "more probable than not." *U.S. Steel Mining Co.*, 18 FMSHRC 862, 865 (June 1996). In addition, the "Secretary need not prove a reasonable likelihood that the violation itself will cause injury" but, rather, that the hazard contributed to by the violation is reasonably likely to cause an injury. *Cumberland Coal Res., LP*, 33 FMSHRC 2357, 2365 (Oct. 2011), *citing Musser Eng'g, Inc. & PBS Coals, Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010). When determining whether a hazard is reasonably likely to result in a serious injury, the Commission has held that the degree of danger increases when an operator ignores a chronic problem. *Arnold Stone, Inc.*, 39 FMSHRC 1719, 1723 (Sept. 2017).

I find that the violations were S&S. River Hill violated section 77.200 by failing to maintain the buildings in good repair to prevent injuries and accidents to miners. The hazard to which the violation allegedly contributes is that a person could be struck by falling debris or trip or fall on or from the many rusted stairs and walkways. (Tr.91:19-93:12) I find that these hazards were reasonably likely to occur given the severity and extensiveness of the deterioration, the

frequency with which King entered the plant, and his documented presence throughout the upper floors of both plants. I also find this hazard was reasonably likely to occur given that of the stairways King would have used, one was only accessible via a thoroughly corroded second-story walkway, and the other was supported by posts that were almost completely deteriorated. (Tr.92:1-7) I find that the mine undertook no corrective measures to improve the structural integrity of the buildings despite King's frequent exposure to the hazardous conditions. I find that the growing structural deterioration after the alleged closing of both plants increased the danger to King over time. I find it likely that a trip or a fall contributed to by rotted floors and stairways, particularly from the upper floors of either building, would be reasonably likely to result in an injury to a miner. A trip or a fall over corroded metal is reasonably likely to result in a serious cut, infection, or severed limb injury—all serious injuries. A fall from the second floor to the ground below is also reasonably likely to result in a serious injury. Accordingly, I find the violations were S&S.

3. Gravity

The gravity penalty criterion under section 110(i) of the Mine Act, 30 U.S.C. § 820(i), "is often viewed in terms of the seriousness of the violation." *Consolidation Coal Co*., 18 FMSHRC 1541, 1549 (Sept. 1996) (citing *Sellersburg Stone Co.*, 5 FMSHRC 287, 294-95 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 673, 681 (Apr. 1987)). The gravity analysis focuses on factors such as the likelihood of injury, the severity of an injury if it occurs, and the number of miners potentially affected.

I find that the gravity of this violation was moderately serious. Given the increasing decay, I find it reasonably likely that King would be injured during his inspections within the plants for the reasons discussed above. If an injury did occur, it could reasonably be expected to be serious, possibly resulting in a permanently disabling injury. Nevertheless, although I am not in full agreement with Inspector McMurray's evaluation after viewing the totality of the record, I will not alter his official severity rating of "Lost Workdays or Restricted Duty." Because the operator restricted access to the plants to King for his monthly inspections, I find that only one miner was potentially affected.

4. Negligence and Unwarrantable Failure

I find that the violation was a result of the operator's high negligence and unwarrantable failure to comply with the cited standard. The Commission has recognized that "[e]ach mandatory standard [. . .] carries with it an accompanying duty of care to avoid violations of the standard, and an operator's failure to meet the appropriate duty can lead to a finding of negligence if a violation of that standard occurs." *A.H. Smith Stone Co*., 5 FMSHRC 13, 15 (Jan. 1983). In determining whether an operator has met its duty of care, the Commission considers "what actions would have been taken under the same circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation." *Jim Walter Res. Inc*., 36 FMSHRC 1972, 1975 (Aug. 2014) (footnote omitted). The Commission has stated the real gravamen of high negligence is that it "suggests an aggravated lack of care that is more than ordinary negligence." *Newtown*, 38 FMSHRC at 2049 (citing *Topper Coal Co.*, 20 FMSHRC 344, 350 (Apr. 1998)).

The operator was highly negligent when it provided King regular access to the buildings and when it transferred coal through both plants as recently as three months prior to the structural inspection. The degree of danger increases when an operator ignores a chronic problem. *Arnold Stone*, 39 FMSHRC at 1723. Thompson acknowledged to the inspector that unmaintained buildings deteriorate quickly. (Tr.45:14-20) Despite knowing the increased risk to King, the operator had no intention to correct the conditions. Given the visible extent of the damage, as demonstrated by corrosion in the walls and floors, sagging horizontal support beams, large holes in the vertical support columns, and holes within the support posts of the stairways, I find that a reasonably prudent person familiar with the mining industry would know not to use the buildings, much less access its upper floors. I find that King's monthly access to such conditions for an extended period of time, during which the likelihood of a hazard developing continued to increase, demonstrates an aggravated lack of care that amounts to high negligence.[10] Because Thompson was the Tipple's main supervisor, his knowledge of King's regular access to both buildings is imputed to River Hill for purposes of finding that the operator was highly negligent and engaged in aggravated conduct.

Confusing MSHA actions may be a mitigating factor in determining an operator's negligence. *King Knob*, 3 FMSHRC 1422. When consulted regarding the proper protocol to idle the plants, McMurray failed to raise objection to the operator's implied monthly electrical examinations. This failure may have served as a mitigating factor to the operator's negligence when the plants lacked visible structural deterioration. However, the hazardous conditions of the plants at the time of the inspection were undeniable. Accordingly, I do not find MSHA's failure to raise initial objections to King's electrical examinations a mitigating factor in this case.

Section 104(d) of the Act, 30 U.S.C. § 814(d), describes unwarrantable failure as more serious conduct by an operator in connection with a violation. In *Emery Mining Corporation*, 9 FMSHRC 1997, 2001 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. Unwarrantable failure is characterized by conduct described as "reckless disregard," "willful intent," "indifference," or a "serious lack of reasonable care." *Id.* at 2002-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); *see also Buck Creek*, 52 F.3d at 136 (approving Commission's unwarrantable failure test). The Commission has explained that an "unwarrantable failure" determination is evaluated based on the facts and circumstances in each case, and in light of each of the following factors: (1) the length of time that the violation has existed; (2) the extent of the violative condition; (3) whether the operator has been placed on notice that greater efforts were necessary for compliance; (4) the operator's efforts in abating the violative condition; (5) whether the violation was obvious; (6) whether the condition posed a high degree of danger; and, (7) the operator's knowledge of the existence of the violation. *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000); *IO Coal Co.*, 31 FMSHRC 1346, 1362-63 (Dec. 2009). All of

[10] Thompson testified that, other than himself, King was the only employee allowed to enter the buildings. (Tr.242:24-243:1) In *Arnold Stone*, the operator's neglect was not diminished simply because only two miners were exposed to a known and obvious danger over a period of time. 39 FMSHRC at 1734. Similarly, the presence of only one employee within the plants does not diminish the level of negligence here.

the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether mitigating circumstances exist. *Consol*, 22 FMSHRC at 353.

I find that the violation was obvious, extensive, and existed for an extended period of time. As discussed above, I find the operator had been placed on notice that greater efforts were necessary for compliance. I find that the operator had no intention to correct the conditions and that, apart from one movable pipe warning against access to a rotted stairwell, no steps were taken to abate the condition prior to the issuance of the citations. For the same reasons provided in my S&S analysis, I find that the conditions presented a high degree of danger. While the Secretary presented little evidence that Thompson, as supervisor, had actual knowledge of the violations,[11] on balance, my findings on the factors establish that the operator engaged in aggravated conduct and unwarrantably failed to comply with the cited standard.

5. Penalty

Under section 110(i) of the Mine Act, 30 U.S.C. § 820(i), Judges must consider six criteria in assessing a penalty: (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. The Commission has held that Judges must make findings of fact based on these statutory penalty criteria. *Sellersburg Stone Co*., 5 FMSHRC 287, 292 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984). Once these findings have been made, a Judge's penalty assessment is an exercise of discretion "bounded by proper consideration of the statutory criteria and the deterrent purpose underlying the Act's penalty assessment scheme." *Id*. at 294; *see also Cantera Green*, 22 FMSHRC 616, 620 (May 2000); *Arnold Stone*, 39 FMSHRC at 1724.

I find that the proposed penalties of $2,000.00 are appropriate for both Citation No. 8012325 and Order No. 8012326. I assess this total penalty of $4,000.00 because the cited conditions created severe and obvious hazards and because River Hill was highly negligent.

B. PENN 2014-0956-R

River Hill contests the 104(b) order, No. 8012327, arguing the order was invalid. River Hill requests the 104(b) order be vacated by arguing the following: (1) the inspector abused his discretion because he had an improper understanding of the "full abatement" necessary to terminate a 104(b) order; (2) the abatement period to correct the conditions was unreasonable; and, (3) the inspector's refusal to extend the abatement period was unreasonable. (Resp't Br. 14-15)

The Secretary establishes a prima facie case that a section 104(b) order is valid by proving by a preponderance of the evidence that the violation described in the citation existed at

[11] Thompson accompanied an inspector through a previous inspection of the buildings, but the state of the deterioration at that time remains unclear. (Tr.215:10-217:7)

the time the section 104(b) withdrawal order was issued. *Mid-Continent Res., Inc*., 11 FMSHRC 505, 509 (Apr. 1989). The Commission has held that it is the Secretary, as the proponent of a section 104(b) order, who bears the burden of proving that the violation described in the underlying citation has not been abated within the time period originally fixed or as subsequently extended. *Id*. Here, the termination deadline for Citation No. 8012325 was set for September 2, 2014. (Tr.107:3-5; Ex. S–1) Within this five-day abatement period, the operator welded the railing that was across the steps, put "some clasps" on the garage door, put a lock on, put up some no trespassing signs, and locked the door. (Tr.107:11-15; 149:8-10) However, the operator hung the key in its office—a location accessible to the mine's employees. (Tr.107:15-17) Because of the accessibility to the key, access to the dangerous conditions existed on September 2, 2014. Accordingly, I find the violative condition existed at the time the 104(b) order was issued.

In contesting a section 104(b) order, an operator may challenge the reasonableness of the length of time set for abatement or the Secretary's failure to extend that time. *Clinchfield Coal Co*., 11 FMSHRC 2120, 2128 (Nov. 1989). The Commission has applied an "abuse of discretion" standard in reviewing an inspector's issuance of a failure to abate an order. *See Energy W. Mining Co*., 18 FMSHRC 565, 569 (Apr. 1996) (applying an abuse of discretion standard in reviewing Secretary's failure to extend abatement time). An abuse of discretion has been found when "there is no evidence to support the decision or if the decision is based on an improper understanding of the law." *Id*. (citations omitted).

In challenging the reasonableness of the abatement period, River Hill asserts that the inspector abused his discretion based on an improper understanding of the law when he allotted an abatement period of five days—only two of which were business days. (Resp't Br. 14) The inspector testified that the termination deadline does not require full abatement of a violation. (Tr.142:1-25; 147:20-148:16) River Hill asserts that the Commission requires full abatement by the deadline and the inspector's misunderstanding of the law led him to set an unreasonably short abatement period. (Resp't Br. 14-15) The Commission does require full abatement by the deadline. *Hibbing Taconite Co*., 38 FMSHRC 393, 399 (Mar. 2016). Accordingly, I find the inspector had an improper understanding of the law.

The analysis next turns to whether Inspector McMurray's improper understanding of the law subjected the operator to an unreasonable abatement deadline; in other words, whether achieving full abatement was reasonable within the abatement period.

The Mine Act does not indicate what satisfies full abatement. When the Mine Act is silent on an issue, the Secretary's interpretation, which reasonably effectuates the health and safety goals of the Act, is controlling. *Sec'y of Labor on behalf of Wamsley v. Mutual Mining, Inc.*, 80 F.3d 110, 115 (4th Cir. 1996). Deference is accorded to "an agency's interpretation of the statute it is charged with administering when that interpretation is reasonable." *Energy W. Mining Co*. *v*. *FMSHRC*, 40 F.3d 457, 460 (D.C. Cir. 1994) (citing *Chevron U.S.A., Inc*., *v*. *Nat. Res. Def. Council, Inc*., 467 U.S. 837, 844 (1984)).

I find that full abatement of the violations could be achieved by restricting all access to the buildings. My review is limited to whether the Secretary's interpretation of full abatement

reasonably effectuates the goals of the act. The cited regulation requires that mine structures be maintained in good repair to prevent accidents and inquiries to employees. I further find the purpose of the regulation is to prevent accidents and injuries to miners from unsafe structural conditions. McMurray testified that he considered the violations fully abated when access to the structurally unsound conditions was "totally eliminated," thus preventing accidents and injuries to mine employees.[12] (Tr.109:3-11) I find that the Secretary's interpretation of what constitutes full abatement of the citations reasonably effectuates the goals of the Act.

The abatement period was not unreasonable. Within the abatement period, the operator welded the railing that was across the steps, put "some clasps" on the garage door, put a lock on, put up no trespassing signs, and locked the door but hung the key in the office. (Tr.107:11-17; 149:8-10) I find that five days is a reasonable duration for an operator to install locks on the entrances of the buildings and prevent employee access to the conditions. I further find that the assigned abatement period was a reasonable amount of time to fully abate the citations by restricting access to the buildings. I conclude that the inspector's misunderstanding of the law did not subject the operator to an unreasonable abatement deadline.

River Hill's argument that the operator unreasonably refused to extend the abatement period also fails. The inspector must determine whether an extension in abatement time is warranted or whether he should issue a section 104(b) order. *Hibbing Taconite*, 38 FMSHRC at 399. In making that determination, the inspector may consider information such as whether the operator delayed beginning the abatement process and whether any delay was justified, giving priority to the safety of miners exposed to the unabated condition. *Id*. By installing some locks on the buildings, I find that the operator demonstrated that abatement of the conditions could reasonably be achieved in five days. By keeping the key to the buildings in an accessible location, however, the operator unjustifiably failed to prevent miner access to the buildings. I find that the inspector did not abuse his discretion when he determined that further extension of the abatement time was not warranted.

Finally, I note that River Hill's post-hearing argument that the termination deadline was unreasonable because it would have taken "months to correct the conditions" assumes full abatement required a structural overhaul and does not comport with the facts. While repairing and rebuilding the Old Plant, which would have taken months to accomplish at great cost, was but one way of terminating the citation, totally restricting access was another sufficient option. Respondent appears to have realized this as evidenced by its attempts at restricting access—putting locks on doors, installing no trespassing signs, putting up posters—in the five days between August 28, 2014, and September 2, 2014. Further, McMurray testified that King had commented that repairing and rebuilding the tipple was not a realistic option for Respondent, which is why both plants had been allowed to deteriorate the way they did. (Tr.82:3-83:3)

In any event, and despite Inspector McMurray's misunderstanding of the requirement to fully abate, River Hill should have been aware of the expectations placed on them. McMurray

[12] While the inspector did not inform the operator how to abate the citations, the operator considered and made suggestions on how to best prevent access to the buildings. (Tr.105:13-106:5)

testified that he gives operators short initial termination deadlines but liberally grants extensions. (Tr.142:8-21) Importantly, McMurray had utilized this process with River Hill in the past, so they knew or should have known that there was no realistic expectation to completely repair and rebuild the Old Plant in only five days.[13] (Tr.142:22-25)

The 104(b) order was validly issued. The record indicates the operator did not conduct sufficient repairs or sufficiently limit access to the Old Plant within the abatement period. I find the violative conditions existed at the time the 104(b) order was issued. While some locks were on the building, warning posters were put up, and a railing was welded across the steps, the key to the locks was accessible to mine employees by the abatement deadline. (Tr.107:11-17) Because of the access to the key, I find the employees had access to the conditions and were susceptible to the accidents and injuries caused by the violations. I find the 104(b) order was valid because the operator failed to abate the violation by the abatement deadline.

IV. ORDER

For the reasons set forth above, Citation No. 8012325 and Order No. 8012326 are **AFFIRMED**.

WHEREFORE, it is **ORDERED** that River Hill Coal Company, Inc. **PAY** a total penalty of $4,000.00 within forty (40) days of the date of this decision.[14]

/s/ L. Zane Gill
L. Zane Gill
Administrative Law Judge

[13] Application of the operator's definition of full abatement—i.e., repairing and rebuilding the tipple—would have them remain in violation of section 77.200. Fortunately for the operator, my review is limited to whether the Secretary's interpretation of full abatement is reasonable.

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

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October 17, 2018

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. NORTHSHORE MINING COMPANY, Respondent.	CIVIL PENALTY PROCEEDING Docket No. LAKE 2018-0177 A.C. No. 21-00831-458957 Mine: Northshore Mining Company

DECISION APPROVING SETTLEMENT

Before: Judge Miller

This case is before me upon a petition for assessment of a civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977. The Secretary has filed a motion to approve settlement and has set forth the factual basis for the proposed modifications. Respondent has agreed to the proposed changes. The originally assessed amount for the citations at issue was $17,856.00 and the proposed settlement amount is $3,706.00. The proposed settlement is as follows:

Citation No.	Originally Proposed Assessment	Settlement Amount	Modification
Docket No. LAKE 2018-0177			
9380347	$589.00	$118.00	Modify negligence from moderate to low. Modify severity of injury from fatal to lost workdays/restricted duty.
9380348	$311.00	$138.00	Modify negligence from moderate to low.
9380353	$429.00	$191.00	Modify negligence from moderate to low.
9380354	$811.00	$243.00	Modify severity of injury from fatal to lost workdays/restricted duty.
9380351	$1,421.00	$191.00	Modify negligence from moderate to low. Modify severity of injury from fatal to lost workdays/restricted duty.

Citation No.	Originally Proposed Assessment	Settlement Amount	Modification
9380366	$691.00	$208.00	Modify severity of injury from fatal to lost workdays/restricted duty.
9380374	$395.00	---	Vacate.
9380377	$8,947.00	$1,806.00	Modify likelihood of injury from reasonably likely to unlikely. Remove S&S designation.
8896277	$243.00	---	Vacate.
9380381	$4,019.00	$811.00	Modify likelihood of injury from reasonably likely to unlikely. Remove S&S designation.
TOTAL	**$17,856.00**	**$3,706.00**	

The Secretary filed the initial motion to approve settlement on July 24, 2018. The Secretary was at the time represented by a non-attorney conference and litigation representative (CLR), George F. Schorr. Upon my review of the motion, the parties were asked to provide additional facts to justify the significant reduction in penalty from $17,856 to a total of $3,706, a reduction of more than 80%. The case was then transferred from the CLR to an attorney from the Solicitor's Office, Dana L. Ferguson. Ferguson submitted an amended settlement motion on behalf of the Secretary on August 3, 2018, which also lacked sufficient information to determine if the large penalty reductions were appropriate. As a result, a conference call was held on August 13, 2018, and the parties were again directed to provide additional information in support of the settlement. The request was also made in an email sent to the parties after the call. The Secretary submitted a second amended motion to approve settlement on August 23, 2018. The motion did not include any additional facts or information from the Secretary but included a recitation of purported case law concerning settlements. It also included a statement, at paragraph 11, that the parties are resubmitting the proposed agreement with the same reductions but the "Respondent submits additional information for the three citations..." which were specifically discussed with the parties during the telephone conference. The representations from the Respondent were not joined by the Secretary. Based on my review of the additional information provided by Respondent, I conclude that the settlement is appropriate based upon the information submitted by the Respondent.

In evaluating proposed settlements, the Commission has directed its judges to consider "whether the settlement of a proposed penalty is fair, reasonable, appropriate under the facts, and protects the public interest." *Am. Coal Co.*, 38 FMSHRC 1972, 1976 (Aug. 2016). The ALJ must consider all of the relevant penalty criteria in determining if a settlement is appropriate. To enable judges to make this determination, Commission Rules require that a motion to approve a penalty settlement must include "facts in support of the penalty agreed to by the parties." 30 C.F.R. § 2700.31(b). The facts submitted may include "a description of an issue on which the parties have agreed to disagree. The Commission does not require concessions from parties in settlement as long as the parties provide mutually acceptable facts" that meet the standard. *Rockwell Mining, LLC*, No. WEVA 2017-220, 40 FMSHRC __, slip op. at 3 (Aug. 2, 2018).

The Secretary's initial motion to approve settlement included a summary of the modifications and proposed penalty reductions for each citation. Sec'y Mot. 3-9. The Secretary conveyed arguments made by the operator during settlement negotiations regarding the modified citations, but did not include sufficient fact to support the modification. For some of the citations, the Secretary set forth some conclusory statements and added that he had "determined that Respondent's arguments have merit." Sec'y Mot. 3-5. With respect to three of the citations, however, the Secretary declined to say whether the respondent's arguments had merit. *Id*. at 6-9. Instead the Secretary stated only that "the information presented by the Respondent could be viewed as mitigating," and that he agreed to the modifications "while not admitting the relevancy or significance of Northshore Mining Company's arguments, and the possibility that the Administrative Law Judge might find that the Respondent [sic] argument has merit." *Id.* The three citations, Nos. 9380381, 9380377, and 9380351, each involved penalty reductions of 80 percent or more and included few if any facts, to support such a proposed reduction. As stated above, the Commission does not require concessions from parties in settlement. *Rockwell*, slip op. at 3. Nevertheless, the parties are required to provide some basis from which the judge can conclude that the proposed settlement is "fair, reasonable, appropriate under the facts, and protects the public interest." *Am. Coal Co.*, 38 FMSHRC at 1976.

The Secretary's amended motion filed on August 3, 2018, provided additional mutually acceptable facts for a number of the citations. However, the added facts did not provide sufficient justification for all of the reductions. Specifically, Citation No. 9380377 concerned flooding in the old MCC room at the mine. The original citation alleged both slip-and-fall hazards and electrical hazards, and the citation was issued as S&S. In the amended settlement motion, the parties agreed that there were no energized transformers in the room, any electrical panels were more than three feet above the ground, and the electrical components were adequately grounded. Sec'y Am. Mot. 6. They concluded that injury was therefore unlikely to occur. However, the parties did not explain why those few facts would change the penalty so drastically. In addition, the motion did not address the likelihood of a slip-and-fall injury. The S&S designation may have been sustainable based on that hazard alone. *See Consol Pa. Coal Co.*, 39 FMSHRC 1893, 1900 (Oct. 2017) ("The Commission has long recognized that broken bones and other injuries likely to result from a trip-and-fall accident are sufficiently serious in nature to support an S&S designation."). The additional facts provided were insufficient to demonstrate that the proposed reduction in penalty from $8,947.00 to $1,806.00 was appropriate.

Similarly, Citation No. 9380351 alleged that there was a broken electrical conduit between an on/off switch box and an LB connector in a storage area at the mine. The inspector found that an injury caused by the condition could reasonably be expected to be fatal. The parties proposed a reduction in penalty from $1,421.00 to $191.00 based in part on a modification of the injury designation from "fatal" to "lost workdays or restricted duty." In the amended motion, the Secretary stated that the parties had agreed that even if the inner conductors were contacted, the resulting injury would not be fatal. Sec'y Am. Mot. 5. There was no information provided to support that conclusion, however. The Secretary also stated that the location of the conductors would prevent inadvertent contact, but that fact had already been addressed in the initial penalty proposal, which alleged that injury was unlikely to occur. Regarding negligence, the Secretary explained that the negligence designation should be modified from moderate to low because the operator had no knowledge of the condition. However, the essential inquiry in a negligence

analysis is whether the operator *should have* known about the violation. *See Brody Mining, LLC*, 37 FMSHRC 1687, 1704 (Aug. 2015) ("actual knowledge . . . is only part of the inquiry"). The Secretary did not address that issue. The facts provided by the Secretary did not adequately justify the significant reduction in penalty from $1,421.00 to $191.00.

The Secretary filed the most recent second amended motion to approve settlement on August 23, 2018. The Secretary makes a number of legal arguments for why the settlement should be approved on the basis of the two motions already filed. For one, the Secretary argues that the settlement is supported in part by the justification that the case "fits into his overall enforcement strategy." Sec'y 2d Am. Mot. 6 (quoting Sec'y Mot. 2-3). The Commission has recently observed that an operator's acceptance of citations as originally issued may be of value to the Secretary in future enforcement actions, and thus that the operator's acceptance of citations as written may provide support for approval of a settlement. *Am. Coal Co.*, No. LAKE 2011-13, 40 FMSHRC __, slip op. at 7 (Aug. 2, 2018). In this case, however, the operator agreed to accept the citations not as originally issued, but rather in modified form. The Secretary provides no explanation for his assertion that the modified citations would be valuable in future litigation, and accordingly I give little weight to the statement. *See id.* (Comm'r Cohen, separate note) ("The Secretary's boilerplate recitations of having evaluated the value of the compromise, the prospects of coming out better or worse after a trial, and 'maximizing his prosecutorial impact' add nothing."). I am not persuaded that the Secretary's statements regarding enforcement strategy demonstrate the appropriateness of the settlement in any significant way.

Additionally, the Secretary argues that a judge may not review the Secretary's decision to remove an S&S designation for a citation in settlement. The Secretary argues that "Section 110(k) provides the Commission with authority to review penalty reductions only, and … the Secretary possesses unreviewable discretion to withdraw an S&S designation." Sec'y 2d Am. Mot. 5. Citing the Commission decision *Mechanicsville Concrete, Inc.*, 18 FMSHRC 877, 879-80 (June 1996), the Secretary states that "ALJs may not designate a violation as S&S if MSHA has not already done so, because such an action falls within the Secretary's enforcement and prosecutorial discretion." *Id.* In *Mechanicsville*, the Commission determined that an ALJ could not designate a citation as S&S in a decision after hearing where the inspector had issued the citation as non-S&S and the Secretary had not requested a modification to the citation. 18 FMSHRC at 879-80. The Commission noted that the decision "to designate the citation as S&S in the first instance" was "an exercise of enforcement authority reserved for the Secretary." *Id.* In the instant matter, however, the citations at issue were designated as S&S "in the first instance" by the Secretary's authorized representative, the inspector. I am not persuaded that the reasoning in *Mechanicsville* is applicable to the settlement context where a citation was initially issued as S&S.

Aside from these legal arguments, the second amended motion provides factual assertions from the Respondent to support several of the penalty reductions. There is no explanation regarding the Secretary's position on these facts. For Citation No. 9380377, alleging flooding in the old MCC room, Respondent asserts that the operator did not discover the condition until the time of the inspection, and that the miner who entered the area at that time only did so in order to shut off a valve to stop the flow of water. Sec'y 2d Am. Mot. 16. The company asserts that injury was unlikely to occur because there was no reason for anyone else to enter the room. *Id.* For

Citation No. 9380351, Respondent asserts that the cited damaged components were located in an area of the mine that was no longer used, and even if someone were to enter the area, there would be no way for a person to contact live electrical components. *Id.* at 15. However, given the Secretary's unwillingness to provide further facts, the Respondent did provide an explanation for at least three of the citations that were drastically reduced. For example, for Citation No. 9380381, the proposed penalty was modified from $4,019.00 to $811.00. After two attempts, the Secretary's explanation was, "Respondent contends that the labels that were found on the electrical panels did provide sufficient information to persons working on electrical equipment, and that only authorized persons work on electrical equipment. The Secretary agrees that there is some labeling but that it is not adequate as it does not clearly identify which breaker energizes which circuit. Given the partial labeling and the credentials of miners accessing the area, the Secretary agrees to modify the likelihood of occurrence from Reasonable Likely to Unlikely, and to modify the violation form (sic) S&S to non S&S." The Secretary was asked, but did not provide the facts necessary to reach the conclusion that the violation was not S&S.

However, the Respondent added the following information: "The breakers were labeled. The manner of labeling had been accepted by MSHA in the past, including by the current field office supervisor. The Citation states that "no electrical schematics were available." This is not true. There were schematics available. During the inspection, the inspector asked a single electrician to provide the schematic. He was new and had difficulty retrieving it from the computer at the time of the inspection. However, the schematics were available and would have been retrieved and consulted prior to any work on the electrical panel. Only qualified personnel work on the panel. They know how to interpret the schematics and what breakers correspond with what labeling. This practice has been accepted by MSHA for decades."

As explained above, Commission case law requires that the parties provide mutually acceptable facts to demonstrate the appropriateness of a settlement. The facts asserted by Respondent were not "mutually acceptable" because the Secretary did not explain his position on them. Nevertheless, Respondent's assertions demonstrate that the parties had at least a dispute of fact on substantial issues with respect to several of the citations with significant penalty reductions. The Commission has found that a settlement may be justified based on "the description of an issue on which the parties have agreed to disagree." *Rockwell*, slip op. at 3. Further, Respondent's assertions advance the goal of transparency in the settlement process by forming a record of the factual basis for the settlement. *See Am. Coal*, slip op. at 5. Therefore, I find that the information provided in the second amended motion, and specifically the additional information provided by the mine operator, is adequate to show that the settlement is appropriate.

I accept the representations and modifications of the parties as set forth in the second amended motion to approve settlement, including the statements provided by Respondent. The reduced penalties correspond to the Secretary's scheme for assessing penalties under Part 100, and I find that they are appropriate to the violations as modified. I have considered the representations and documentation submitted, and conclude that the proposed settlement is appropriate under the criteria set forth by the Commission.

The motion to approve settlement is **GRANTED**, and Respondent is hereby **ORDERED** to pay the Secretary of Labor the sum of $3,706.00 within 30 days of the date of this decision.

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

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October 19, 2018

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. LEHIGH ANTHRACITE COAL, LLC, Respondent.	CIVIL PENALTY PROCEEDINGS Docket No. PENN 2014-0108 A.C. No. 36-01761-340312 Docket No. PENN 2014-0109 A.C. No. 36-01761-340312 Mine: Tamaqua Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. SHANE T. WETZEL, EMPLOYED BY LEHIGH ANTHRACITE COAL, LLC, Respondent.	CIVIL PENALTY PROCEEDING Docket No. PENN 2016-0135 A.C. No. 36-01761-402886A Mine: Tamaqua Mine

DECISION ON REMAND

Appearances: Jennifer L. Bluer, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner;

R. Henry Moore, Esq., Jessica M. Jurasko, Esq., Jackson Kelly PLLC, Pittsburgh, Pennsylvania, for Respondents.

Before: Judge L. Zane Gill

These cases are before me on remand from the Commission. 40 FMSHRC 273 (Apr. 2018). On November 22, 2016, I issued a decision and order for the two citations issued by the Secretary of Labor ("Secretary") to Respondent Lehigh Anthracite Coal, LLC ("Lehigh") pursuant to sections 104(a) and 104(d)(1) of the Federal Mine Safety and Health Act of 1977 ("Mine Act" or "Act"), 30 U.S.C. §§ 814(a), 814(d)(1), and a civil penalty issued to Respondent Shane T. Wetzel pursuant to section 110(c), 30 U.S.C. § 820(c). 38 FMSHRC 2782 (Nov. 2016)

(ALJ). On appeal, the Commission reversed my negligence determinations for Citation No. 8000958[1] and vacated and remanded the determination of penalties. 40 FMSHRC at 284-85.

I. PROCEDURAL BACKGROUND AND ISSUES ON REMAND

On July 3, 2013, MSHA issued Citation Nos. 8000958 and 8000959. On February 10, 2016, MSHA issued a civil penalty against Wetzel pursuant to section 110(c) of the Mine Act.

A hearing was held on April 12–13, 2016, in Allentown, Pennsylvania. In my November 22, 2016 decision, I found a violation in each instance and made various findings and determinations. Of central consequence, I concluded that although Lehigh and Wetzel had displayed highly negligent behavior, their negligence did not rise to the highest level of reckless disregard. On December 22, 2016, the Secretary filed his petition for discretionary review, which was granted by the Commission. On April 10, 2018, the Commission concluded that I erred in holding that Citation No. 8000958 was the result of high negligence, concluded the negligence was instead reckless disregard, and vacated and remanded the case with instructions to reassess the civil penalties against the respondents in accordance with its decision. 40 FMSHRC at 284-85. The commission accepted as undisturbed my factual findings and credibility determinations. *Id*. at 278.

Consequently, the sole issue before me on remand is the appropriate penalty for Lehigh and Wetzel in light of the reckless disregard determination by the Commission for Citation No. 8000958.[2]

II. PRINCIPLES OF LAW

Administrative Law Judges are accorded broad discretion in assessing civil penalties under the Mine Act. *Westmoreland Coal Co.*, 8 FMSHRC 491, 492 (Apr. 1986). When assessing a civil penalty, section 110(i) of the Mine Act requires that the Commission consider six criteria: (1) the operator's history of previous violations; (2) the appropriateness of the penalty relative to the size of the operator's business; (3) the operator's negligence; (4) the penalty's effect on the operator's ability to continue in business; (5) the violation's gravity; and, (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of a violation. 30 U.S.C. § 820(i).

These six criteria also apply, with appropriate revisions, to the assessment of penalties against individuals under section 110(c). *Mize Granite Quarries, Inc.*, 34 FMSHRC 1760, 1764

[1] The single citation in Docket No. PENN 2014-0109 was not before the Commission on appeal. According to MSHA's mine retrieval and data website, the $285.00 penalty for Citation No. 8000959 was paid and the citation was closed on January 2, 2017.

[2] The facts of this case have been discussed at length in both the original decision, *see* 38 FMSHRC at 2784-87, as well as the Commission's decision. *See* 40 FMSHRC at 274-76. Accordingly, I will not restate the factual findings in its entirety but will, at times, reference and highlight certain details nonetheless.

(Aug. 2012). Specifically, the commission has indicated that judges should consider the following criteria when assessing a penalty against an individual: (1) the individual's history of previous violations; (2) the appropriateness of the penalty to the individual's income and net worth; (3) the effect of the penalty on the individual's ability to meet his financial obligations; (4) whether the individual was negligent; (5) the gravity of the violation; and, (6) the demonstrated good faith in abatement of the violative condition. *Id.*; *Ambrosia Coal & Constr. Co.*, 19 FMSHRC 819, 823-24 (May 1997); *Sunny Ridge Mining Co.*, 19 FMSHRC 254, 271-72 (Feb. 1997).

In addition, deterrence is a relevant factor that judges may consider separately from the statutorily-prescribed criteria in assessing penalties. *See Black Beauty Coal Co.*, 34 FMSHRC 1856, 1864-69 (Aug. 2012).

The Commission has repeatedly held that substantial deviations from the Secretary's proposed assessments must be adequately explained using the section 110(i) criteria. *E.g.*, *Hubb Corp.*, 22 FMSHRC 606, 612 (May 2000); *Cantera Green*, 22 FMSHRC 616, 620-21 (May 2000); *Sellersburg Stone Co.*, 5 FMSHRC 287, 293 (Mar. 1983). A judge need not make exhaustive findings, but the judge must provide an adequate explanation of how the findings contributed to his or her penalty assessments. *Cantera Green*, 22 FMSHRC at 621.

Although all of the statutory penalty criteria must be considered, they need not be assigned equal weight. *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997). Generally speaking, the magnitude of the gravity of a violation and the degree of negligence are important factors, especially for more serious violations for which substantial penalties may be imposed. *Musser Eng'g, Inc.*, 32 FMSHRC 1257, 1289 (Oct. 2010) (judge justified in relying on utmost gravity and gross negligence in imposing substantial penalty); *Spartan Mining Co.*, 30 FMSHRC 699, 725 (Aug. 2008) (appropriate for judge to raise a penalty significantly based upon findings of extreme gravity and unwarrantable failure); *Lopke Quarries, Inc.*, 23 FMSHRC 705, 713 (July 2001) (judge did not abuse discretion by weighing the factors of negligence and gravity more heavily than the other four statutory criteria).

Finally, the Commission alone is responsible for assessing final penalties. *See Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151-52 (7th Cir. 1984) ("[N]either the ALJ nor the Commission is bound by the Secretary's proposed penalties [. . .] . [W]e find no basis upon which to conclude that [MSHA's Part 100 penalty regulations] also govern the Commission.").

III. PENALTY

The sole task before me is to reassess the civil penalties for Lehigh and Wetzel consistent with the Commission's instructions and the increased negligence designation of reckless disregard.

As intimated in my original decision, I considered Wetzel's conduct—and Lehigh's by extension—as having teetered on the narrow edge between involving high negligence and reckless disregard. Guided by MSHA's definition of reckless disregard as conduct that exhibits

the "absence of the slightest degree of care," 30 C.F.R. § 100.3(d), I ultimately found that Wetzel made efforts to demonstrate some degree of care to comply with the safety standard and concluded that, by definition, he did not act with reckless disregard. 38 FMSHRC at 2800. The penalties I originally assessed were issued with this close call in mind.

On appeal, the Commission stated that a literal application of MSHA's definition adapts poorly to the holistic consideration of negligence by Commission judges after a hearing. 40 FMSHRC at 280. The Commission explained that judges should instead be guided by broader and more general common-law standards more congruent with the Act's intent and purpose of prioritizing the health and safety of miners. *Id.* Specifically, the Commission determined that Wetzel's willingness to enter the pit himself and his genuine-but-objectively-unreasonable belief that the pit was safe were not factors that reduced the level of negligence. *Id.* at 281-82. Additionally, the Commission concluded Wetzel's various actions—meeting with the crew, discussing means of freeing the bucket, identifying a procedure to limit exposure by quickly attaching a chain to the crow's foot away from the highwall, examining the southern slope for indications of future movement and support strength, illuminating the area with the dragline, and providing the dragline operator with a horn to alert Erik Osenbach if conditions became hazardous—were "effectively meaningless" in terms of realistically reducing the hazards in the pit to Osenbach. *Id.* at 282.

Ultimately, the Commission concluded that the record on review "supports only the conclusion that the respondents recklessly disregarded the safety of a miner, and thus demonstrated the highest possible level of negligence for purposes of penalty assessment under section 110(i)." *Id.* at 284.

The Commission's determination that respondents acted with reckless disregard does not require that I assess radically higher penalties, nor does it require me to automatically adopt the penalties listed in Table XIV of 30 C.F.R. § 100.3(g). *See Sellersburg Stone Co.*, 736 F.2d at 1151-52. With this in mind, I will reassess the penalties for Lehigh and Wetzel below in turn.

a. <u>Civil Penalty for Lehigh</u>

Although not highlighted in my original decision, both the Commission's majority and dissent discussed Lehigh's exceptional response upon learning about the events that transpired between the night of June 19, 2013, and the morning of June 20, 2013. *See* 40 FMSHRC at 276, 284 n.14, 299.

On June 20, 2013, mine foreman Louis Mitchalk found the 2400 Lima Bucket buried in the pit while conducting his preshift inspection. (Tr.234:9-15; 248:8-12; Ex. S–19, at 2). He thereafter called safety director John Hadesty. (Tr.234:22-25; Ex. S–19, at 2).

Mitchalk and Hadesty immediately started an internal investigation, (Tr.235:5-8; 376:17-19), which included documenting the physical features of the incident area, taking nearly 50 digital photographs, recording relevant measurements, transcribing notes, and drawing sketches of the scene. (Tr.373:3-7; 375:22-376:16; Ex. S–20, at 8) Additionally, Mitchalk and Hadesty conducted a complete review of training records and examination records. (Ex. S–20, at 8)

Hadesty also conducted multiple interviews with the employees involved and with persons who had knowledge of the incident. (Tr.236:12-16; 373:18-20; 384:12-17; Ex. S–20, at 8)

Upon completing the internal investigation, Lehigh disciplined the four miners involved—Shane Wetzel, Larry McNeal, Erik Osenbach, and Rich Rudinsky—with written warnings, foregoing its ordinary first step of providing verbal warnings because the miners' conduct was so dangerous.[3] (Tr.73:15-21; 245:6-20; 350:6-14; Ex. S–19, at 3) The miners also received verbal counseling. (Tr.246:3-6)

On June 24, 2013, MSHA became involved after receiving an anonymous safety complaint. (Tr.22:20-23:3; 387:10-13) By all accounts, Lehigh was cooperative and helpful in MSHA's investigation: Hadesty offered his notes and photos from Lehigh's internal investigation to Inspector David Labenski (Tr.28:11-17; 49:3-9; 52:14-24; 111:16-19; 113:17-20; 390:6-15; 395:10-12); Hadesty gave Inspector Labenski a copy of Wetzel's email (Tr.122:14-16; *see* Ex. S–13); and Hadesty gave Inspector Labenski a copy of McNeal's handwritten note. (Tr.109:7-8; *see* Ex. S–10)

Indeed, Inspector Labenski's notes state that Lehigh had been "very cooperative and share[d] info freely when requested. Action was taken to correct the problem before anyone from MSHA knew about it and policies have been written to prevent further troubles. Company tries very hard to make jobs safe." (Ex. S–3, notes for 7-8-13, at 7) Inspector Tom Leshko similarly testified that Lehigh was fully cooperative with the 110(c) investigation. (Tr.283:3-10) Special Investigator John Stepanic also testified it was nice to see that the company took it upon itself to issue the written warnings. (Tr.303:24-25)

In addition, the operator formalized the procedure it had used to recover the buried bucket, sought and eventually received approval from MSHA for the procedure as an addendum to its ground control plan, and provided training on the new procedure to its miners. (Tr.124:1-4; 126:18-127:4; Ex. S–5, at 3; Ex. S–14; Ex. R–9) Notably, the addendum to the ground control plan was not required by MSHA (Tr.125:3-14; 126:14-17; 401:21-402:1); rather, it was independently developed and executed by Lehigh to ensure safer working conditions moving forward.[4] (Tr.124:18-24; 125:9-11; 211:21-22; 402:6-10) The citations were abated after the updated ground control plan was approved by MSHA and Lehigh had a safety talk with all of the employees. (Tr.126:18-22; 402:15-21)

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[3] In a footnote in my original decision, I stated that I would not take Lehigh's disciplinary actions of Wetzel, McNeal, Osenbach, and Rudinsky into consideration since they played no part in Inspector Labenski's decision making in the proceeding. 38 FMSHRC at 2787 n.4. On remand, however, I will consider this fact in assessing the civil penalty.

[4] This proactive safety measure is particularly commendable given the apparent rarity of bucket retrievals. Field Office Supervisor Tom Yencho testified that he only saw one other instance of a bucket retrieval in 15–20 years of experience and, to his knowledge, no other operator besides Lehigh has a provision in its ground control plan addressing how to recover a bucket. (Tr.218:10-21) Similarly, Mitchalk had only seen five bucket retrievals in 33 years (Tr.249:14-25), and Hadesty had never seen it in his 27 years of experience. (Tr.379:19-25)

Lehigh's proactive actions may be considered under section 110(i) as "demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation." *See Hidden Splendor Res. Inc.*, 36 FMSHRC 3099, 3109 (Dec. 2014) (Comm'r Cohen, concurring). The Commission articulated in its decision that it does not consider the statutory phrase "after notification of a violation" as "being limited to notification by MSHA or its inspectors. An operator which is ultimately charged with a violation may receive 'notification of a violation' where, as here, another foreman discovers the unsafe action and notifies the company's safety director." 40 FMSHRC at 284 n.14.

Moreover, a severe fine is not necessary to achieve future compliance in this case as Lehigh has already positively demonstrated safety consciousness by taking exemplary unilateral corrective action. Deterrence, as is abundantly evident here, is a relevant factor that Judges may consider separately from the statutorily-prescribed criteria in assessing penalties. *See Black Beauty Coal Co.*, 34 FMSHRC at 1864-69.

Lehigh took quick and decisive action in its investigation and acted aggressively to deter similar errors in the future prior to involvement by MSHA. When MSHA got involved, Lehigh cooperated fully and made efforts to improve safety beyond what MSHA required. Even in light of a negligence determination of "reckless disregard," I give special weight to the exceptional response by Lehigh as demonstrating good faith to achieve rapid compliance and its commitment to ensuring a safer work environment moving forward.

After reweighing the civil penalty factors,[5] I conclude a civil penalty of $10,000 is appropriate and will sufficiently further the purposes of the Mine Act.

b. <u>Civil Penalty for Wetzel</u>

As Special Investigator Stepanic explained at hearing, the 110(c) penalty is used as a deterrent—personal liability gets people in the mining community to talk. (Tr.305:19-306:3) The Commission has also opined on the role of deterrence in assessing a civil penalty: "The legislative history of the Mine Act makes exceedingly clear that Congress intended civil penalties assessed pursuant to the Mine Act to induce compliance with health and safety laws and regulations. Put another way, Congress undoubtedly recognized that such penalties should be used to deter operators from violating such mandates." *Black Beauty Coal Co.*, 34 FMSHRC at 1865.

Taking into account the entirety of Wetzel's actions, I determine that Wetzel's conduct constituted reckless disregard. Given this heightened level of negligence, and after rebalancing the 110(i) factors,[6] I find my original assessed penalty of $1,000 is inadequate. It is imperative

[5] Of the 110(i) criteria, the history of violations, appropriateness of the penalty to the size of the business, ability to pay, and gravity criteria remain undisturbed from my original decision.

[6] Of the 110(i) criteria for 110(c) liable respondents, four criteria—Wetzel's history of violations, the appropriateness of the penalty to Wetzel's income and net worth, Wetzel's ability to pay, and the gravity—remain undisturbed from my original decision.

that the penalty assessed be large enough to sufficiently deter Wetzel from future negligent conduct and to impress upon him the severity of his actions. With this in mind, I note that Wetzel was punished by Lehigh immediately after the incident and before MSHA's involvement. Lehigh forewent its standard first step of providing a verbal warning and instead gave Wetzel a written letter of reprimand. This was not insignificant. Such punishment serves as an additional deterrent against future negligent and dangerous conduct for Wetzel.

Accordingly, for the reasons stated above and in light of the deterrent-focused purposes of 110(c) liability, I conclude a civil penalty of $2,000 is appropriate and will sufficiently further the goals of the Act.

IV. ORDER

It is **ORDERED** that Citation No. 8000958 be **AFFIRMED** as written.

WHEREFORE, it is **ORDERED** that Lehigh Anthracite Coal, LLC **PAY** a penalty of $10,000.00 and that Shane Wetzel **PAY** a penalty of $2,000.00 within forty (40) days of the date of this Decision on Remand.[7]

/s/ L. Zane Gill
L. Zane Gill
Administrative Law Judge

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

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October 24, 2018

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) on behalf of JUSTIN HICKMAN, Complainant, v. HUBER CARBONATES, LLC, Respondent.	DISCRIMINATION PROCEEDING Docket No. LAKE 2018-0387-DM MSHA No. NC-MD-18-06 Mine: Quincy Plant Mine ID: 11-02627

ORDER GRANTING EXTENSION OF TIME TO RESPOND

Before: Judge Rae

This case is before me upon a petition for assessment of a civil penalty under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). This case was assigned to me on September 20, 2018.

On October 19, 2018, Respondent, Huber Carbonates, LLC, filed a Motion for Declaratory Judgment. In their motion, Respondent requested an order from the Commission requiring Complainant to return to Respondent an email dated August 8, 2018 and bar its use in this or any other proceeding under the Federal Mine Safety and Health Act of 1977. Respondent alleges the email is protected by attorney-client privilege and was inappropriately obtained by Complainant. Respondent alleges that the email was drafted by outside counsel and addressed to Respondent's in-house counsel and management. The email included language labeling it "ATTORNEY-CLIENT PRIVILEGED COMMUNICATION" and a footer reiterating this point and requesting its return should any party receive it in error. Respondent further alleges that one of its employees, included on subsequent responses to the original email, forwarded the email to another employee discussed in the email on August 16, 2018. That employee then forwarded the email to Eric Reno, an MSHA Special Investigator, who served as the lead investigator in the present discrimination proceeding. Subsequently, Respondent made unsuccessful attempts to request the return of the email from Complainant.

On September 11, 2018, a Temporary Reinstatement hearing was held in St. Louis, Missouri. In that hearing, this same issue was raised by Respondent. Hr'g Tr. 10-12, Sept. 11, 2018. At the hearing, Respondent noted that Mr. Reno received the email. Complainant explained the email was not reviewed by MSHA attorneys, nor used in preparation for the hearing, but instead was placed in a confidential file for the time being.

On October 19, 2018, Complainant filed a Motion for Extension of Time to Respond to Respondent's Motion for Declaratory Judgment, in which it requests additional time, until November 16, 2018, to respond to Respondent's motion. Complainant justifies this request by arguing Respondent has asked for extraordinary and unprecedented relief when they request a bar on the use of the email in any proceeding hereafter. In addition, Complainant argues that Respondent's motion raises novel issues related to the applicability and waiver of attorney-client privilege in the context of governmental privileges, specifically the government informant's privilege. Complaint has informed Respondent of their motion and reports that Respondent opposes the motion.

Complainant has possessed the email in question for a considerable period of time and has been aware of its potentially-privileged nature. Furthermore, Complainant has known of Respondent's objection to Complainant's continued possession of the email, as Respondent made these objections known during the Temporary Reinstatement hearing. This knowledge has provided Complainant ample time to formulate a response to the attorney-client privilege contest. However, due to time taken by the court to consider this motion, the Secretary's Motion is **GRANTED** in part. The Secretary is **ORDERED** to submit his Response to Respondent's Motion for Declaratory Judgment by November 5, 2018.

Due to the relevance of the email in consideration of Respondent's Motion for Declaratory Judgment, Respondent is **ORDERED** to provide the email document under seal for *in camera* review.

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

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